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Making Trial Within a Reasonable Time a Right Once More

Steve Coughlan[*]

Jordan[1] got it right.

The use of presumptive ceilings to determine whether there has been a violation of a Charter right is a blunt instrument which eliminates most of the ability of judges to consider the individual circumstances of cases and to exercise discretion. It allows no role for what might seem to be an important consideration, the seriousness of the offence. Had this been the Court's first attempt at structuring the right, it would seem unsophisticated and simplistic.

But of course *Jordan* is not the first attempt at outlining the contours of the right to a trial within a reasonable time: it is more like the third or fourth. And as a response to the reality which confronted the Court — a reality of the Court's own making — *Jordan* made the right choice in eliminating as much discretion as possible.

I. The Problem Arises

Trial within a reasonable time case law is a fascinating study in how the underlying attitudes of judges can matter more than the legal rules themselves. I will argue here that the history of that right can be understood through the influence of two factors: the difference between individual and institutional delay; and the role and meaning of prejudice. The first is a distinction which the Court has still not sufficiently drawn, though *Jordan* has the effect of allowing for that distinction. The second is an issue about which members of the Court disagreed in principle through a series of cases 25 to 30 years ago, and where eventually the majority made what proved to be the wrong choice: *Jordan* reverses that error. When the history of the case law is analyzed through those two

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1 *R. v. Jordan*, [2016] S.C.J. No. 27, 2016 SCC 27 (S.C.C.) [hereinafter "*Jordan*"].

factors, we can see how we ended up where we were pre-*Jordan*, and therefore why the response in that case was the necessary and appropriate one.

1. Individual vs. Institutional Delay

The earliest trial within a reasonable time cases dealt with claims of what I term "individual delay". For example, in *Rahey* there was a motion for a directed verdict: the trial judge adjourned that decision 19 times over a period of 11 months.[2] In *Smith* a preliminary inquiry was put off three separate times, with the result that it was not scheduled to begin until 15 months after the charges were laid.[3] In both of those cases, there was a successful section 11(b) claim. The Court created a test outlining a number of factors to consider (the length of the delay, the reasons, waiver, and prejudice), but fundamentally it was not difficult to conclude that these cases took "too long". The Court was aware of how long it would normally take to decide a motion or schedule a preliminary inquiry in those jurisdictions, and these decisions took markedly longer than the norm.

Matters become more difficult when institutional delay is at stake. In those cases the problem is that the entire system is too slow. To make a section 11(b) claim based on institutional delay is to argue that the norm itself is too long, which is a harder claim to assess. In individual delay cases we have a norm against which to measure: in institutional delay cases we do not have that.

That was the issue which the Court first addressed in *Askov*, where the claim was based on the argument that cases in Brampton generally took longer to get to trial in Superior Court than they should.[4] It was also the issue in *Morin*, where the claim was that cases in Oshawa generally took longer to get to Provincial Court than they should.[5] *Morin* became the governing authority on trial within a reasonable time cases for the following quarter century.

We shall say more about these two cases later, but at the moment it is sufficient to note that, although institutional delay is quite a different problem from individual delay, the Court adopted essentially the same

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2 *R. v. Rahey*, [1987] S.C.J. No. 23, [1987] 1 S.C.R. 588 (S.C.C.) [hereinafter "*Rahey*"].
3 *R. v. Smith*, [1989] S.C.J. No. 119, [1989] 2 S.C.R. 1120 (S.C.C.) [hereinafter "*Smith*"].
4 *R. v. Askov*, [1990] S.C.J. No. 106, [1990] 2 S.C.R. 1199 (S.C.C.) [hereinafter "*Askov*"].
5 *R. v. Morin*, [1992] S.C.J. No. 25, [1992] 1 S.C.R. 771 (S.C.C.) [hereinafter "*Morin*"].

approach. The framework which was developed in *Rahey* and a few subsequent individual delay cases was applied in *Askov* and *Morin*, with little obvious change. That was unwise, because the problems are not at all the same: being able to schedule most preliminary inquiries in six months but having one fall through the cracks for 15 months is quite different from not being able to schedule *any* preliminary inquiries before 15 months. Different problems require different solutions, but the same analysis, now interpreted through the lens of institutional delay, was applied to all cases.

So that is the first factor that needs to be considered: the shift from analyzing cases of individual delay to analyzing cases of institutional delay, without noticing that it is a very different question. Let us look now at the second issue, the changing role of prejudice in the section 11(b) analysis.

2. The Role of Prejudice

It oversimplifies matters to speak generically of "prejudice": in fact three separate types of prejudice have been identified as potentially relevant in section 11(b) cases:

> Prejudice in this context is concerned with the three interests of the accused that s. 11(*b*) protects: liberty, as regards to pre-trial custody or bail conditions; security of the person, in the sense of being free from the stress and cloud of suspicion that accompanies a criminal charge; and the right to make full answer and defence, insofar as delay can prejudice the ability of the defendant to lead evidence, cross-examine witnesses, or otherwise to raise a defence.[6]

Those same three types of prejudice — security, liberty, and fair trial — have been acknowledged routinely since *Mills*, the Court's first section 11(b) decision.[7] However, for the first few years — that is, until *Askov* — there was disagreement about the significance of each type of prejudice. Justice Lamer, as he then was, espoused the view that prejudice to the security interest *by itself* was sufficient to make out a violation of section 11(b):

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[6] *R. v. Godin*, [2009] S.C.J. No. 26, 2009 SCC 26, at para. 30 (S.C.C.) [hereinafter "*Godin*"].

[7] *R. v. Mills*, [1986] S.C.J. No. 39, [1986] 1 S.C.R. 863 (S.C.C.) [hereinafter "*Mills*"]: see, for example, para. 150, referring to "the three interests which the speedy trial right was designed to protect: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defence will be impaired."

this was what he had in mind when he argued in *Rahey* that "prejudice underlies the right … actual prejudice need not be, indeed is not, relevant to establishing a violation of s. 11(b)."[8]

In Lamer J.'s view, other rights, such as section 7, were more suited to dealing with prejudice to liberty and fair trial interests.

Justice Wilson disagreed with this position. In her view

> ...[w]e cannot treat [rights] as a number of watertight compartments. They represent a series of rights which any person charged with an offence has, but there is nothing to say that they are mutually exclusive.[9]

The two judges continued exactly this disagreement from *Rahey* and *Mills* in a series of cases: *Kalanj*,[10] *Conway*,[11] *Smith*,[12] and *Askov*.[13] At first blush, Wilson J.'s position might seem the more reasonable — what is the harm in protecting an interest of the accused under more than one right? And, indeed in *Askov* a majority of the Court finally opted for her approach. It is important, however, to understand the danger Lamer J. was trying to guard against, since it is exactly the danger which materialized immediately after *Askov*.

His point was that prejudice to the security interest — which was inherent in every section 11(b) claim — is sufficient prejudice by itself:

> …prejudice is part of the rationale for the right and is assured by the very presence of s. 11(b) in the Charter. Consequently, there exists an irrebuttable presumption that, as of the moment of the charge, the accused suffers a prejudice the guarantee is aimed at limiting, and that the prejudice increases over time.[14]

That was why he argued that prejudice to the fair trial and liberty interests were irrelevant and that an accused ought not to be allowed to lead evidence relating to them. His logic was simple: if evidence of those sorts of prejudice was allowed to make some cases seem stronger, then cases without that sort of evidence would begin to seem weaker. But such claims were *not* weaker, because security interest prejudice *by itself* was sufficient. Therefore, to allow evidence of those other sorts of prejudice risked undermining the purpose of the right.

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8 *Rahey*, *supra*, note 2, at para. 35.
9 *Mills*, *supra*, note 7, at para. 285.
10 *R. v. Kalanj*, [1989] S.C.J. No. 71, [1989] 1 S.C.R. 1594 (S.C.C.).
11 *R. v. Conway*, [1989] S.C.J. No. 70, [1989] 1 S.C.R. 1659 (S.C.C.).
12 *Supra*, note 3.
13 *Supra*, note 4.
14 *Rahey*, *supra*, note 2, at para. 36.

Justice Lamer proved to be correct, and this is a problem which bedevilled section 11(b) case law for the next 25 years. Indeed, that became apparent in the very next case, *Morin*, where the Court dismissed the appellant's claim in large part based on the absence of any prejudice: what they meant by that was that she had not led evidence of prejudice to her fair trial or liberty interests. As Lamer J. pointed out in dissent, the Crown "has not even attempted to show that her security interests have not been affected".[15] More broadly, in the cases following *Morin*, for practical purposes an accused who could not show some infringement of her liberty or fair trial interests would almost certainly fail in a section 11(b) claim: security interest prejudice alone was not enough.

That is the first way in which the role of prejudice changed: by shifting from simply being about security of the person to including other concerns. However, *Morin* also implemented a more insidious change regarding prejudice.

Askov had sent a shock wave through the justice system by setting out guidelines for how long cases should take. Only a minuscule part of this was caused by judges granting section 11(b) applications: for the most part it was because Crown prosecutors seemed to go through their files with a weed-whacker, throwing out anything which did not comply: as the Court noted in *Morin*, post-*Askov* over 47,000 charges were stayed or withdrawn in Ontario alone.[16] Although this was not the fault of courts, it was the Supreme Court that got the blame, and that clearly affected the decision in the next case, *Morin*.

In some ways the decisions in *Askov* and *Morin* are extremely similar: both set out essentially the same framework, and both suggest time periods as guidelines to reach certain stages. The subtext to the two decisions, however, is exactly opposite: *Askov* had implied "be worried about delay" but *Morin* implied "*don't* be worried about delay". This is most apparent in its treatment of the issue of prejudice, and what it takes to be the typical accused's attitude towards it. They held, for example, that:

> An accused is often not interested in exercising the right bestowed on him by s. 11(b). His interest lies in having the right infringed by the prosecution so that he can escape a trial on the merits. … This right must be interpreted in a manner which recognizes the abuse which may be invoked by some accused.[17]

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15 *Morin*, *supra*, note 5, at para. 5.

16 *Id.*, at para. 7.

17 *Id.*, at para. 62, in part quoting a paper written by Doherty J.

Perhaps even more tellingly they held: "the prosecution may establish by evidence that the accused is in *the majority group* who do not want an early trial and that the delay *benefited rather than prejudiced* the accused."[18]

The attitude underlying these comments goes well beyond saying that prejudice to an accused's security interest is not sufficient; it is saying that security prejudice is not prejudice *at all*, but a benefit to the accused.

Two things are immediately noteworthy about his approach. First, it had the effect of making section 11(b) functionally limited to individual, as opposed to institutional, delay. *Most* accused aren't worried about delay, it says, only *some* accused. But in that case the interests protected by section 11(b) can be satisfied by finding the few squeaky wheels who are complaining and moving them to the front of the queue, and then letting the rest of the system chug along as slowly as it likes. There is no incentive to deal with institutional delay.

Second, this is a remarkably ironic result from the decision. The reason the Court downgraded the accused's interests in *Morin* was because it wanted to protect a *societal* interest in speedy trials. But society cannot make a section 11(b) application — only an individual accused can do that, and the Court had just said to treat such claims with suspicion: *Morin* says that the right response to an accused who says she wants a speedy trial is "yeah, suuuuure you do". With no one able to advance society's interest and claims by an accused generally ignored unless they dealt with a one-off problem, the net result was that the very societal interest in a speedy overall system that the Court wanted to protect had been sacrificed.

Looked at in this light, it can hardly be surprising that the Court found in *Jordan*, years later, that "a culture of complacency towards delay has emerged in the criminal justice system".[19] *Morin* all but flat-out said "be complacent about delay".

II. The Responses to the Problem

1. The Gentle Nudge: *R. v. Godin*

Looking solely at numbers of cases is an uncertain instrument, but is perhaps instructive in this context. In the five years immediately prior to

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[18] *Id.*, at para. 64 (emphasis added).

[19] *Jordan*, *supra*, note 1, at para. 40.

Morin (1987 to 1992) there were 320 decisions about trial within a reasonable time: in the five years after (1992 to 1997) there were only 173 such cases, a drop of almost half. A plausible interpretation is that it had been signalled to counsel that it was not worth bringing such a claim. In the five years after that (1997 to 2002), however, the number of claims rose to 231, in the next five years (2002 to 2007) rose further to 424, and in the five years after that (2007 to 2012) rose again to 475.[20] A further plausible interpretation — and one consistent with the culture of complacency — is that as time went on the system got slower and slower, precipitating a steady rise in the number of claims.

The pattern within decisions themselves at this time can generally be understood as "explaining away" delay so that, like a watch you have handed to a stage conjurer, it is suddenly not there any more. A typical example is the Ontario Court of Appeal decision in *Florence*, where the period between the accused's arrest and the scheduled start of trial was 30 months, roughly a year outside the guidelines.[21] The Court of Appeal reassessed the trial judge's analysis, concluding things such as that 255 days which the trial judge had called institutional delay should actually be considered to be 214 days of institutional delay, 31 days of neutral preparation time and 10 days of defence delay, and that a different 329 days which the trial judge had called institutional delay was actually only 238 days of institutional delay coupled with 91 days of neutral inherent time requirements and preparation time, and thereby — hey presto! — arrived at the result that the delay in the case was *actually* only 14 and a half months, and therefore within the *Morin* and *Askov* guidelines.[22] They did not reassess, but did implicitly rely upon, the trial judge's finding that there was no prejudice because there was no prejudice to fair trial or liberty interests.[23]

If you find that explanation from the appeal court less than clear, and less than convincing, you are not alone. Cases of that sort are what prompted the Supreme Court, with its 2009 decision in *Godin*, to try to nudge the system back onto the proper course. In *Godin*, the trial was not scheduled to begin until 30 months after charges were laid, well outside

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[20] These numbers are based on a search of "trial within a reasonable time" on Westlaw through the relevant time periods. There might be duplications, for example, by the same case appearing both at trial and on appeal, but that is as likely to happen throughout the period and should not affect the general pattern.

[21] *R. v. Florence*, [2014] O.J. No. 2702, 2014 ONCA 443 (Ont. C.A.).

[22] *Id.*, at paras. 71-72.

[23] The trial judge was quoted at para. 23, *id.*, as having held "the defence has demonstrated no prejudice, above and beyond the inferred [prejudice] flowing from the delay."

the limit, but the Ontario Court of Appeal found no section 11(b) violation. The Supreme Court of Canada overturned that result, prodding lower courts in two ways: that "...It is important … not to lose sight of the forest for the trees"[24] and to remember that "prejudice may be inferred from the length of the delay."[25]

"Not losing sight of the forest for the trees" was an admonition not to become preoccupied with parcelling out every single day into some category, and thereby explain away delay — justify it — rather than deal with it.

This point about prejudice was an attempt to restore the pre-*Morin* understanding that prejudice to the security interest mattered:

> ...Proof of actual prejudice to the right to make full answer and defence is not invariably required to establish a s. 11(*b*) violation. This is only one of three varieties of prejudice, all of which must be considered together with the length of the delay and the explanations for why it occurred.[26]

This did lead to lower courts talking about inferred prejudice, but frequently in the context of asking something like "was there inferred prejudice here". However, to think about the question in that way is to misunderstand the point that prejudice to the security interest underlies the right: to ask, "was there inferred prejudice" is equivalent to asking "was this unreasonable search unreasonable"?

Did the attempt in *Godin* work? Unfortunately, no. *Florence*, the example offered of the approach *Godin* tried to dislodge, post-dates *Godin* by five years. It nonetheless counts every leaf on every tree, and acknowledges the existence of "inferred prejudice" while ignoring its importance. The gentle nudge in *Godin* was not, it turned out, enough to set the juggernaut back on course.

2. The Firm Response – *R. v. Jordan*

The question in section 11(b) cases has always been "how long should it take", and as noted that question is relatively easy to answer in individual delay cases: "did this take markedly longer than it normally takes"? In institutional delay cases, though, *Morin* said the answer was "look at the length of the delay and whether there was waiver; then take

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[24] *Godin*, *supra*, note 6, at para. 18.
[25] *Id.*, at para. 31.
[26] *Id.*, at para. 38.

into account how long cases of this particular sort usually take; then look at how the defence and the Crown acted this time; think as well about whether it's just hard for your particular jurisdiction to give trials in a reasonable time; think as well about anything else that might be relevant; then compare that number to eight to 10 months, and if you still missed that time period, ask whether the accused has demonstrated any prejudice as a result." That method of answering gave judges discretion to explain away a great deal of delay, and *Morin* had instructed them that explaining away delay was the right orientation.

Faced with that self-created reality, *Jordan* said that the question "how long should it take" had a simpler answer: "18 months". As I said earlier, this is a blunt instrument that removes discretion from judges: however, given the 25 years of entrenched culture which had been initiated by *Morin*, coupled with *Godin*'s demonstration that a more nuanced approach was unlikely to change things, it was reasonable of the majority to conclude that only a blunt instrument would succeed.

Of course their analysis is more sophisticated than simply saying "18 months". That is a "presumptive" ceiling that applies to trials in inferior court, while trials in superior court face a presumptive ceiling of 30 months. That time period is measured by taking the time from the laying of the charge to the end of trial, and then subtracting any delay caused by the defence. Then,

> If the total delay from the charge to the actual or anticipated end of trial (minus defence delay) *exceeds* the ceiling, then the delay is presumptively unreasonable. To rebut this presumption, the Crown must establish the presence of exceptional circumstances. If it cannot, the delay is unreasonable and a stay will follow.[27]

Notably and deliberately absent from this analysis is any reference to whether the accused has or has not suffered prejudice. In addition the seriousness of the offence is not a relevant consideration.

Broadly then, the *Jordan* approach requires three steps: calculate the total time; deduct periods of defence-caused delay; and then if the time is over the presumptive ceiling see whether there are exceptional circumstances. There are some nuances after that — for example, claiming a section 11(b) violation below the ceiling, or most significantly the "transitional exception" — but these are the primary steps. We shall first look at defence delay and exceptional circumstances based on what

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[27] *Jordan*, *supra*, note 1, at para. 47.

Jordan said of them, and then turn to look at the case law which has developed in the short time afterward.

(a) Defence Delay

The majority in *Jordan* envisions only two possible causes of defence delay, and it is clear from the way they characterize them that they want to keep the lid on this consideration, to prevent it from eating up the right. One type of defence delay is time periods which are explicitly or implicitly waived. Waiver is a well-established concept, and *Jordan* sticks to the orthodoxy there: "...Waiver can be explicit or implicit, but in either case, it must be clear and unequivocal."[28]

The other category of defence delay is "delay caused solely by the conduct of the defence". This is a more amorphous standard, but the majority clearly signals that they do not intend that matters should routinely be explained away by this factor. They stress:

> To be clear, defence actions legitimately taken to respond to the charges fall outside the ambit of defence delay. For example, the defence must be allowed preparation time, even where the court and the Crown are ready to proceed. In addition, defence applications and requests that are not frivolous will also generally not count against the defence. We have already accounted for procedural requirements in setting the ceiling. And such a deduction would run contrary to the accused's right to make full answer and defence.[29]

The kinds of examples they offer of defence delay are "...[d]eliberate and calculated defence tactics aimed at causing delay, which include frivolous applications and requests"[30] or when "the court and the Crown are ready to proceed, but the defence is not."[31] The Court's message here is not to be too quick to categorize something as defence delay. The presumptive ceilings are already quite high, and were set on the assumption that the defence is likely to do many things — seek disclosure, make *McNeil* applications,[32] request *voir dires* — and that these are the sorts of ordinary procedures which contributed to setting

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28 *Id.*, at para. 61.
29 *Id.*, at para. 65.
30 *Id.*, at para. 63.
31 *Id.*, at para. 64.
32 *R. v. McNeil*, [2009] S.C.J. No. 3, 2009 SCC 3 (S.C.C.).

ceilings of 18 and 30 months, rather than the six-to-eight and eight-to-10-month guidelines of *Askov* and *Morin*.[33]

(b) Exceptional Circumstances

If delay exceeds the presumptive ceiling, the onus is on the Crown to justify the delay, but compared to the *Morin* approach *Jordan* significantly restricts the ability of the Crown to do so. It is only if the Crown can show that there were exceptional circumstances that there will not be a violation. In the long term there are only two types of exceptional circumstances, though in the short term the Court has recognized a "transitional" one.

The primary sort of exceptional circumstances — discrete events — must meet two criteria in order to justify some portion of the delay: they must "lie *outside the Crown's control* in the sense that (1) they are reasonably unforeseen *or* reasonably unavoidable, *and* (2) Crown counsel cannot reasonably remedy the delays emanating from those circumstances once they arise."[34]

These sorts of exceptional circumstances are meant to include things such as, medical emergencies, but that a problem has arisen is not by itself sufficient:

> It is not enough for the Crown, once the ceiling is breached, to point to a past difficulty. It must also show that it took reasonable available steps to avoid and address the problem *before* the delay exceeded the ceiling.[35]

Also important is that an exceptional circumstance of this sort does not necessarily mean that the right was not violated: it simply means that some discrete portion of time will be subtracted from the total. If the total still exceeds the presumptive ceiling, then there is still a section 11(b) violation.

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[33] See *Jordan*, *supra*, note 1, at para. 53:

> the presumptive ceiling also reflects additional time to account for the other factors that can reasonably contribute to the time it takes to prosecute a case. These factors include the inherent time requirements of the case and the increased complexity of criminal cases since *Morin*.

That allowing the time needed for these sorts of procedures to be a justification for exceeding the guidelines amounted to "double-counting" had been noted, pre-*Jordan*, in C. Ruby, "Trial Within a Reasonable Time Under Section 11(b): The Ontario Court of Appeal Disconnects from the Supreme Court" (2013) 2 C.R. (7th) 91.

[34] *Jordan*, *id.*, at para. 69 (emphasis in original).

[35] *Id.*, at para. 70 (emphasis in original).

The second type of exceptional circumstance is the particularly complex case. The Court left largely to the discretion of trial judges whether a case should be classed as particularly complex, though they did observe that a typical murder trial would not meet that definition.[36] When a case is particularly complex, however, and is delayed as a result "the delay is reasonable and no stay will issue."[37]

Consistent with the desire to limit discretion and give real teeth to section 11(b), the Court stressed that defence delay and exceptional circumstances are the only things which can cause a case which is initially above the presumptive ceiling not to be a violation:

> The seriousness or gravity of the offence cannot be relied on.… Nor can chronic institutional delay be relied upon.[38]

Those rules govern the situation where the delay in a case is above the presumptive ceiling. The Court also allows, however, for the possibility that a stay should be issued even if the delay is below the relevant ceiling. In such a case the onus shifts to the accused to show a section 11(b) violation, and to satisfy that onus "the defence must establish two things: (1) it took meaningful steps that demonstrate a sustained effort to expedite the proceedings; *and* (2) the case took markedly longer than it reasonably should have."[39]

Those are the primary features of the new system, subject to discussion below of the transitional exception. Before considering that, however, let us see how the *Jordan* approach responds to the two problems which had led to the culture of complacency: the role of prejudice; and the difference between individual and institutional delay.

(c) Jordan: The Role of Prejudice

Morin had effectively undermined the section 11(b) right by its attitude to prejudice: for practical purposes it required an accused to show fair trial or liberty prejudice if she were to succeed; and it assumed that generally delay was not "really" prejudicial to the accused at all. *Jordan* reverses that.

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[36] *Id.*, at para. 78.
[37] *Id.*, at para. 80.
[38] *Id.*, at para. 81.
[39] *Id.*, at para. 82.

Prejudice is not an explicit consideration in the *Jordan* analysis, but that is only so that courts cannot rely on the absence of proven fair trial or liberty prejudice as a way of dismissing a claim. The majority does not treat prejudice as irrelevant: quite the opposite,

> although prejudice will no longer play an explicit role in the s. 11 (*b*) analysis, it informs the setting of the presumptive ceiling. Once the ceiling is breached, we presume that accused persons will have suffered prejudice to their *Charter*-protected liberty, security of the person, and fair trial interests. …This is not, we stress, a rebuttable presumption: once the ceiling is breached, an absence of actual prejudice cannot convert an unreasonable delay into a reasonable one.[40]

In saying this, the majority has embraced the pre-*Askov* Lamer position that prejudice is inherent in the right itself, and therefore that there simply cannot *be* a lack of prejudice if a reasonable time has been exceeded:

> prejudice is part of the rationale for the right and is assured by the very presence of s. 11(b) in the Charter. Consequently, there exists an irrebuttable presumption that, as of the moment of the charge, the accused suffers a prejudice the guarantee is aimed at limiting, and that the prejudice increases over time.[41]

Indeed, *Jordan* presumes irrebuttable prejudice at some point to *all three* of the accused's interests, not just security. Further, to remove ambiguity, *Jordan* fixes the point at which that prejudice becomes irrebuttable: 18 or 30 months. As a result "the absence of prejudice can in no circumstances be used to justify delays after the ceiling is breached."[42]

This approach addresses head-on — and reverses — the approach which had been taken in *Morin* and which had undermined the right.

(d) Jordan: Individual vs. Institutional Delay

Jordan is particularly well-suited to dealing with the separate issues of individual and institutional delay. As noted above, it is easy to tell when a case took too long in an individual delay case, because it took markedly longer than the norm: the greater challenge is telling when the

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40 *Id.*, at para. 54.
41 *Rahey*, *supra*, note 2, at para. 36.
42 *Jordan*, *supra*, note 1, at para. 81.

norm itself is too long. *Jordan*'s presumptive ceilings are aimed at exactly that point: the norm is too long if it exceeds 18 or 30 months.

But it is not just that this aspect of the test will cover the institutional delay cases: it is that this part of the test is aimed at *remedying* institutional delay. Under the *Morin* approach

> ...Delay is condemned or rationalized at the back end. As a result, participants in the justice system — are not encouraged to take preventative measures to address inefficient practices and resourcing problems.[43]

In contrast, the *Jordan* approach is forward-looking, since the Crown will see the deadline of the presumptive ceiling approaching and have a need to act accordingly to *prevent* delay: "...Crown counsel will be motivated to act proactively throughout the proceedings to preserve its ability to justify a delay that exceeds the ceiling, should the need arise."[44]

It is not enough that an unexpected problem arose: the Crown "must also show that it took reasonable available steps to avoid and address the problem *before* the delay exceeded the ceiling."[45]

Consider what happened in *Godin*, for example, under the *Morin* framework. The accused's preliminary inquiry was scheduled for 16 months after his arrest, a period already well past the guideline. On the date set, other matters were also scheduled and heard first, with the result that Godin's preliminary inquiry did not take place that day and had to be adjourned. It seems to have crossed no one's mind that this was a case which was already well past an acceptable time and that efforts should have been made to ensure it took place as scheduled.[46] Further, no one seems to have thought that this case which was already well past the guideline and was now being postponed again should be given special treatment in scheduling, as opposed to simply put to the bottom of the list. To the extent that anyone

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43 *Id.*, at para. 41.

44 *Id.*, at para. 112.

45 *Id.*, at para. 70 (emphasis in original).

46 More accurately, it did not cross the mind of anyone in a position to *do* anything about it:

> [13] The defence was concerned about the delay. The charges had been laid in May of 2005. With the preliminary inquiry fixed for September of 2006, the appellant was facing a delay of 16 months for a one-day preliminary inquiry. In late February, a few days after the September 2006 hearing had been set, defence counsel wrote to the court and the Crown requesting an earlier date. Defence counsel proposed 31 alternative dates on which he would be available. He received no response to this request. The Crown has given no explanation for why this request to expedite the matter was ignored.

Godin, *supra*, note 6.

thought about delay, it was a matter that could be argued later. However, under the *Jordan* framework, it is now unimaginable that the need to expedite the matter would not be front and centre in everyone's mind.

So we no longer have an analytical framework which was designed with individual delay in mind but is being applied to institutional delay: the new framework consciously tackles institutional delay. No longer will it be sufficient to move the squeaky wheels to the front of the line — the line will need to be made to move faster. Indeed, the majority observes that the 18 and 30 months' ceilings have been set for now, but are "a long time to wait for justice" and might need to be revisited.[47]

In addition to directly addressing institutional delay, though, the *Jordan* framework also separately addresses individual delay. The rules provide potential remedies for cases which are lower than the presumptive ceilings. This will be based on two requirements: that the accused took meaningful steps to expedite the case; and that the case took markedly longer than it should. In this context, "should" will primarily be a reflection of how long such cases usually take, and so in effect a separate method of analysis is available for individual delay cases.

(e) Jordan: The Transitional Exception

Precisely because discretion not to find a violation had been limited so greatly, the Court recognized the danger of another *Askov*-like deluge of stays and withdrawals. To guard against that, they also created a third, short term, exceptional circumstance: a "transitional exception" for cases already within the system. In large part, this exception simply amounts to continuing to apply the *Morin* approach to cases where there has not yet been enough time for the practice in courts to adjust to the new *Jordan* reality. As the Court, said: "for most cases that are already in the system, the release of this decision should not automatically transform what would previously have been considered a reasonable delay into an unreasonable one."[48]

We have no clear indication as to how long this transitional period lasts, though it will be at least until charges laid after *Jordan* was decided (July 8, 2016) have come to trial, and perhaps somewhat longer than that: in any event we are still well within it. In the short term, it means that no case which would not have been stayed under *Morin* should be stayed under *Jordan*.

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47 *Jordan*, *supra*, note 1, at para. 57.

48 *Id.*, at para. 102.

III. THE IMPACT OF *JORDAN*

I suggested that *Jordan* got it right, for the reasons I have just offered: it responds to the two problems which had existed in the case law for a quarter century. But there is a broader sense in which *Jordan* got it right.

The sole remedy for a breach of section 11(b) is a stay of proceedings, and so that is the result of a successful application. As a society, however, we ought not to see "more stays" as a *success*. Rather, success should be understood as less *need* for stays of proceedings to be issued, because there are fewer violations of the right in the first place. A stay is the price we pay for not having been sufficiently diligent in preventing delay.

Jordan balances those individual and societal interests nicely. Because of the presumptive ceilings, the entire criminal justice system is now *worried* about delay and acting to reduce it.[49] But because of the transitional exception, the number of stays being granted has not greatly increased. That is, we are getting much more of the benefit without paying much more of a cost.

In the six months prior to *Jordan*, courts dealt with 69 section 11(b) applications: in the six months after, there were 101, nearly a 50 per cent increase.[50] That result is not surprising: *Jordan* was an invitation to take section 11(b) seriously again, and so counsel who likely would not have bothered pursuing a delay claim before were emboldened to do so. In fact the success rate for applications also increased, from 38 per cent beforehand to 50 per cent afterward. However, this increased success rate is not (at least directly) a result of the new framework: there has not yet been a single case where a judge granted a stay under *Jordan* that would not have been granted under *Morin*. Either the analysis reached the same conclusion under both the *Jordan* and *Morin* frameworks, or a stay that would have been granted under the *Jordan* framework was refused because of the transitional exception.[51]

In other words, there have been no successful delay applications that would not have succeeded before. At least that is true in principle: it is possible that some judges have absorbed the underlying message of

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[49] Various provinces have, for example, appointed new Crown prosecutors or have filled judicial vacancies.

[50] I am indebted to my research assistant, Jessica Patrick, for her sterling and assiduous work in finding and analyzing the nearly 200 cases on Westlaw over the one-year period which has the *Jordan* decision in its centre. Her own article setting out her findings in more detail can be found in the *Criminal Reports.*

[51] This was the case in 10 of the 50 cases where no stay was given.

Jordan — "be worried about delay again" — and, therefore, are more inclined to grant section 11(b) applications than they would have been before. If so, that is in itself a good thing, and in sheer numbers its impact — 24 more stays among the 160,000 or so cases heard across the country in a six-month period[52] — is extremely minimal. It remains possible that once we leave the transitional period there will suddenly be a catastrophe, but there is nothing to suggest that will be the case so far.[53]

It is interesting in its own right to consider the patterns in the first six months after *Jordan*, though the lessons which can be learned from them are not necessarily clear. There is of course significant variation because of individual judges. For example, *Jordan* could not make clearer that the old method of trying to parcel out each day is inappropriate:

> ...Trial judges should not parse each day or month, as has been the common practice since *Morin*, to determine whether each step was reasonably required. Instead, trial judges should step back from the minutiae and adopt a bird's-eye view of the case.[54]

Nonetheless some judges seem committed to applying pre-*Jordan* authorities and sticking to the old methods of calculating as much as possible,[55] while in contrast others have understood *Jordan* to require a departure from that approach.[56] Still, broad patterns can be reported.

For example, waiver has not been a significant factor to date: in fewer than 20 per cent of cases has any time been deducted from the total on that basis. It might be that the pre-*Jordan* cases were more willing to attribute particular time periods to waiver, and that a general greater "strictness" about delay has changed that. It seems likely, though, that waiver will become a more significant factor in future, because a practice of asking defence counsel to *expressly* waive particular periods is likely to develop.

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[52] Statistics Canada, "Table 2: Cases completed in adult criminal court, by province and territory, 2013/2014 and 2014/2015", <http://www.statcan.gc.ca/pub/85-002-x/2017001/article/14699/tbl/tbl02-eng.htm> shows 328,028 cases in the most recent one-year period.

[53] Pre- and post-*Jordan*, delay cases come disproportionately from Ontario. Ontario courts decide 38 per cent of all criminal cases (*id.*), but pre-*Jordan* 46 per cent of delay claims were in that province and post-*Jordan* it is 47 per cent.

[54] *Jordan*, *supra*, note 1, at para. 91.

[55] See, for example, *R. v. Gandhi*, [2016] O.J. No. 4638, 2016 ONSC 5612 (Ont. S.C.J.).

[56] See, for example, *R. v. Trinh*, [2016] S.J. No. 656, 2016 SKQB 376 (Sask. Q.B.):

> [22] While I have set out, with the assistance of counsel, a fairly detailed and extensive chronology, I do not propose to engage in the kind of 'micro-counting' disparaged in *Jordan*. The lesson I draw from the majority judgment is that it is preferable for reviewing judges simply to begin the analysis by measuring the size of the forest and then determine whether it is necessary to count the trees.

On the other hand, there was found to be defence-caused delay in about 60 per cent of cases, and only in 10 per cent of those cases where it was argued was there found to be none. That 10 per cent is a reflection of the *Jordan* approach: concluding that the defence was not acting frivolously in making requests to examine particular witnesses,[57] or in bringing particular Charter applications[58] and, therefore, that the application did not count as defence delay.

Where there was defence-caused delay, it often related to scheduling. This was argued in about 40 per cent of the cases, and succeeded in 30 per cent; that is, the argument that the defence caused scheduling-related delay succeeded three-quarters of the time it was made.

On the exceptional circumstance side, the Crown has had far more success arguing for discrete events than for particular complexity. The Crown argued for exceptional circumstances 50 per cent of the time, but among those cases 84 per cent claimed discrete events while only 49 per cent argued particular complexity. A discrete event claim also succeeded more often: 64 per cent of the time as opposed to 19 per cent. Reduced to actual totals, that means that there were only four cases where the Crown was able to persuade the judge that the case was particularly complex and therefore not bound by the presumptive ceiling. This suggests that judges have adopted a level of skepticism about excusing delay which is entirely consistent with the underlying message of *Jordan*.

Also seemingly consistent with that new approach is the initial reaction to claims under the presumptive ceiling. There was a danger that *Jordan* could have, in some instances, contributed to delay rather than reducing it. That is, by setting presumptive ceilings at 18 and 30 months, the case might have been seen as telling courts that those timelines were sufficient: that a court which was currently more efficient than that could relax! Happily, courts generally seem to be rejecting anything hinting of that suggestion.[59]

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[57] See, for example, *R. v. Zammit*, [2016] O.J. No. 4212, 2016 ONSC 5098 (Ont. S.C.J.) or *R. v. Brissett*, [2017] O.J. No. 298, 2017 ONSC 401 (Ont. S.C.J.).

[58] See, for example, *R. v. Penney*, [2016] N.J. No. 419, 135 W.C.B. (2d) 338 (Nfld. Prov. Ct.).

[59] See, for example, *R. v. Trocchia*, [2016] O.J. No. 4483, 2016 ONCJ 509 (Ont. C.J.); *R. v. Oyeniyi*, [2016] O.J. No. 5050, 2016 ONCJ 581 (Ont. C.J.); *R. v. Sedighi*, [2016] O.J. No. 6736, 2016 ONCJ 741 (Ont. C.J.); *R. v. Deonarine*, [2016] O.J. No. 6960, 2016 ONCJ 809 (Ont. C.J.); *R. v. Edan*, [2016] O.J. No. 4279, 2016 ONCJ 493 (Ont. C.J.); *R. v. Hart*, [2016] O.J. No. 6175, 2016 ONCJ 693 (Ont. C.J.); *R. v. DeSouza*, [2016] O.J. No. 5091, 2016 ONCJ 588 (Ont. C.J.); *R. v. Reynolds*, [2016] O.J. No. 5300, 2016 ONCJ 606 (Ont. C.J.) or *R. v. Santhanam*, [2016] O.J. No. 6691, 135 W.C.B. (2d) 450 (Ont. C.J.). For the contrary view, however, see *R. v. Hill*, [2016] O.J. No. 5482, 2016 ONCJ 623 (Ont. C.J.).

IV. Conclusion

Jordan is a controversial decision. It has focussed the attention of the media and the public on the judicial system, and the opinions expressed have not always been favourable. It is easy to see how those opposed can cast the decision as a way for those guilty of crimes to get off on a technicality, particularly as "seriousness of the offence" is no longer a factor.

But that is neither the purpose nor the effect of *Jordan*. No one aware of the facts could deny that there was significant delay in the justice system — delay which did at least as much harm to society's interests as it did to those of any individual accused. Further, no one aware of the facts could deny that, institutionally, the criminal justice system was content to let that reality linger.

Jordan has changed that. *Jordan* has put reducing delay in the entire system front and centre in the minds of those who can affect the result in individual cases, and who can affect how the system as a whole operates. It has created that necessary level of concern without increasing in any significant way the number of accused who actually succeed in a section 11(b) claim. It has started us on the road to attaining the benefits we want, and it has paid the tiniest of prices for doing so. That should be seen as a success, and therefore — *Jordan* got it right.