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The Hours are Long: Unreasonable Delay After *Jordan*

Palma Paciocco*

All I know is that the hours are long, under these conditions, and constrain us to beguile them with proceedings which – how shall I say – which may at first sight seem reasonable, until they become a habit.

– Samuel Beckett, *Waiting for Godot* (1954)

I. INTRODUCTION

In its most recent case on the section 11(b) Charter right to be tried within a reasonable time,¹ *R. v. Jordan*, the Supreme Court of Canada invoked “the familiar maxim: ‘Justice delayed is justice denied.’”² Marshall McLuhan once ventured a characteristically maverick rejoinder to that particular old chestnut: “Whereas convictions depend on speed-ups, justice requires delay.”³ In reality, both aphorisms hit upon important truths about our criminal justice system. Taken together, they underscore the importance of carefully calibrating the right to be tried within a reasonable time.

As criminal cases drag on, penological goals are undermined; presumptively innocent accused persons are left languishing in pre-trial

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¹ Section 11(b) of the Charter states: “Any person charged with an offence has the right ... to be tried within a reasonable time”: *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter “Charter”].

² [2016] S.C.J. No. 27, 2016 SCC 27, at para. 19 (S.C.C.) [hereinafter “*Jordan*”].

³ Marshallmcluhan.com, online: <<https://marshallmcluhan.com/mcluhanisms/>>.

detention or under restrictive bail conditions; victims and witnesses are further traumatized; evidence deteriorates; and the public loses faith in the criminal justice system.⁴ At the same time, excessive speed poses its own threat to the integrity of the criminal justice system: a rapid, “conveyor belt” approach to meting out justice hardly inspires public confidence, as illustrated by widespread antipathy towards rote plea-bargaining.⁵ Moreover, many of the rights of accused persons take considerable time to vindicate.⁶ In this light, finding the ideal balance between speed-up and delay is a challenging task. The task is all the more daunting when we factor in the decidedly non-ideal conditions that characterize our criminal justice system, most notably chronic resource limitations. Crowns, judges, and court staff are overtaxed.⁷ Habitual underfunding of legal aid programs results in a large number of self-represented litigants whose cases often take longer to process.⁸ Outmoded technologies and insufficient technical support in courtrooms further exacerbate the problem.⁹ If haste makes waste, dearth makes delay.

Jordan represents the Court’s most recent attempt to strike an ideal balance in decidedly non-ideal circumstances. The case was close and controversial. A bare majority overturned the existing law and introduced a new section 11(b) framework. That framework is both promising and problematic. It is the focus of the present article. Part II of this article

⁴ See, generally “Delaying Justice is Denying Justice”: Report of the Standing Senate Committee on Legal and Constitutional Affairs (August 2016), online: <https://sencanada.ca/content/sen/committee/421/LCJC/reports/CourtDelaysStudyInterimReport_e.pdf> [hereinafter “Delaying Justice is Denying Justice”].

⁵ S. Bibas, *The Machinery of Criminal Justice* (New York: Oxford University Press, 2012), at xvi.

⁶ Justice Cromwell makes precisely this point in his concurring reasons in *Jordan*, *supra*, note 2, at para. 150.

⁷ “Delaying Justice is Denying Justice”, *supra*, note 4, at 8. To some extent, Crowns’ excessive workloads are self-inflicted. Crown attorneys sometimes make the discretionary decision to move forward with prosecutions in minor cases where criminal sanctions are arguably not warranted, or where diversionary processes would be more productive. Some Crowns may, for example, abnegate their duty to make careful charging decisions because they over-rely on the recommendations of police officers when deciding which cases to pursue. The Honourable M. Rosenberg, “The Attorney General and the Administration of Criminal Justice” (2009), 34 Queen’s L.J. 813-862, at 829-30. For an argument that Crowns should be far more circumspect in pursuing prosecutions, see, *e.g.*, M.-E. Sylvestre, “Rethinking Criminal Responsibility for Poor Offenders: Choice, Monstrosity, and the Logic of Practice” (2010) 55 McGill L.J. 771-817, at 811 and 814.

⁸ Department of Justice Canada, “Legal Research Series: Court Site Study of Adult Unrepresented Accused in the Provincial Criminal Courts, Part 1: Overview Report” (2002) at 33, online: <http://www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr03_la2-rr03_aj2/rr03_la2.pdf>.

⁹ In *R. v. J.M.*, [2017] O.J. No. 256, 2017 ONCJ 4 (Ont. C.J.), for example, unreasonable delay was partly caused by technical failures in the courtroom [hereinafter “*J.M.*”]. See also “Delaying Justice is Denying Justice”, *supra*, note 4, at 13-14.

offers a brief overview of the case law preceding *Jordan*. Part III explains the *Jordan* framework. Part IV critically assesses the central feature of that framework: a presumptive ceiling on reasonable delay. Part V addresses a second key feature: the removal of prejudice as an explicit factor in the section 11(b) analysis. Part VI concludes.

II. THE ROAD TO *JORDAN*

To understand why the *Jordan* majority felt the need to reinvent section 11(b), it is helpful to survey some of the case law that came before. Between 1986 and 1989, the Supreme Court of Canada issued several section 11(b) decisions in which it established a flexible balancing test for section 11(b) claims¹⁰ but struggled to converge on a decisive list of factors to be weighed.¹¹ In 1989, in *R. v. Smith*, the Court issued its first unanimous section 11(b) decision and affirmed four factors: the length of the delay; the reason for the delay; defence waiver; and prejudice to the accused.¹² The Court acknowledged ongoing disagreement among its members as to how those factors should be interpreted and balanced, with particular disagreement about prejudice.

The following year, it addressed section 11(b) yet again in a decision that was to become notorious in Canadian jurisprudence: *R. v. Askov*.¹³ Prior to *Askov*, the Court's section 11(b) cases had all involved delays that were unusually long relative to the average timelines in their own jurisdictions. In *Askov*, by contrast, the complaint was that the delay was unjustified despite being in line with local practice.¹⁴ To adjudicate this claim, the majority compared the delays in Peel District, where *Askov* originated, to those in other jurisdictions. It did so on the basis of the evidence presented by the parties together with data collected on its own initiative after oral argument.¹⁵ This comparison led the majority to

¹⁰ *R. v. Mills*, [1986] S.C.J. No. 39, [1986] 1 S.C.R. 863 (S.C.C.) [hereinafter "*Mills*"]; *R. v. Rahey*, [1987] S.C.J. No. 23, [1987] 1 S.C.R. 588 (S.C.C.) and *R. v. Conway*, [1989] S.C.J. No. 70, [1989] 1 S.C.R. 1659 (S.C.C.) [hereinafter "*Conway*"].

¹¹ J.F.R. Levesque, "Trial Within a Reasonable Time" (1988) 31 *Crim. L.Q.* 55, 55; and see *Conway, id.*, at 1673.

¹² *R. v. Smith*, [1989] S.C.J. No. 119, [1989] 2 S.C.R. 1120 (S.C.C.).

¹³ *R. v. Askov*, [1990] S.C.J. No. 106, [1990] 2 S.C.R. 1199 (S.C.C.) [hereinafter "*Askov*"].

¹⁴ S.G. Coughlan, "*R. v. Askov* – A Bold Step Not Boldly Taken" (1991) 33 *Crim. L.Q.* 247 [hereinafter "*Coughlan*, 'A Bold Step'"].

¹⁵ C. Baar, "Court Delay as Social Science Evidence: The Supreme Court of Canada and 'Trial Within a Reasonable Time'" (1997) 19:2 *Justice System Journal* 123, at 133 [hereinafter "*Baar*, 'Court Delay'"].

conclude that the average delays in Peel were indeed unreasonable.¹⁶ The Court, wrote: “Making a very rough comparison and more than doubling the longest waiting period to make every allowance for the special circumstances in Peel would indicate that a period of delay in a range of some six to eight months between committal and trial might be deemed to be the outside limit of what is reasonable.”¹⁷

By now the fallout from *Askov* is legend. Numerous courts took very literally the admonishment that a six to eight-month delay may be unreasonable and immediately began to stay cases that surpassed that limit. In Ontario, where delay was especially bad, some 51,791 criminal charges were stayed, withdrawn, or dismissed in the 13 months following *Askov*.¹⁸ In a fascinating article, Professor Carl Baar, whose empirical work was relied on in *Askov*, explained that the Court did not foresee this result because it misinterpreted his data and because its supplementary research was flawed.¹⁹

The Court acted quickly to staunch the flow of cases hemorrhaging out of the system, scheduling oral arguments in two pending section 11(b) appeals.²⁰ The lead judgment, *Morin*, emphasized that the guideline for institutional delay articulated in *Askov* was to be applied flexibly and contextually and adjusted to account for “local conditions” and “changing circumstances”.²¹ The Court established a parallel, eight to 10-month guideline for provincial courts based on its findings that those courts have a heavier workload and take more time on average to dispose of cases.²² These findings were drawn from a voluminous record, but as reported by Baar, the Court once again misinterpreted the data.²³

¹⁶ *Askov*, *supra*, note 13, at 1240.

¹⁷ *Id.*

¹⁸ Baar, “Court Delay”, *supra*, note 15, at 130. Some post-*Askov* analyses report that over 47,000 charges were stayed or withdrawn in Ontario following the release of the judgment. That number is for the period from October 22, 1990 to September 6, 1991 and was reported in *R. v. Morin*, [1992] S.C.J. No. 25, [1992] 1 S.C.R. 771, at 779 (S.C.C.), *per* Lamer C.J.C., dissenting but not on this point [hereinafter “*Morin*”].

¹⁹ Baar, *id.*, at 133. Baar notes, *inter alia*, that the Court seems to have mistakenly relied on data from 1984 that was no longer current, and which had in fact been presented to the Court by way of contrasting the average timeline for cases in 1984 with the more protracted timeline that had come to exist by the time *Askov* was decided a few years later.

²⁰ Carl Baar, “Social Facts, Court Delay and the *Charter*” in F.L. Morton, ed., *Law, Politics, and the Judicial Process in Canada*, 3d ed. (Calgary: University of Calgary Press, 2002), at 375, 381.

²¹ *Morin*, *supra*, note 18, at 799-800.

²² *Id.*, at 799.

²³ Baar, “Court Delay”, *supra*, note 15, at 135. Baar notes, for example, that the Court based its guidelines for summary offence on information about indictable offences committed to trial following preliminary hearings, and that it conflated data on cases filed with data on cases pending, among other errors.

In practice, any empirical errors in *Morin* mattered far less than those in *Askov*, however, because *Morin*'s key implication was clear: "*Morin* sent a message – in what can only barely be described as subtext rather than text – that the right to a trial within a reasonable time did not matter."²⁴ This message was conveyed with particular force through the Court's comments on the prejudice factor. The Court affirmed that "prejudice to the accused can be inferred from prolonged delay", but in the very same paragraph opined that "many, perhaps most, accused are not anxious to have an early trial."²⁵ The effect, according to Steve Coughlan, "was a decade and a half in which successful section 11(b) claims were rare."²⁶

In 2009, in *R. v. Godin*, a unanimous Court "made an attempt to reverse that result" by underscoring that section 11(b) claims should not hinge on evidence of specific prejudice.²⁷ The Court also tried to discourage "micro-counting" — the process of assiduously parsing out every discrete source of delay that had come to characterize section 11(b) analyses — insisting on the importance of not "los[ing] sight of the forest for the trees".²⁸ Despite these clarifications, lower courts continued to engage in the painstaking process of taxonimizing and tallying every single source of delay; a process that the *Jordan* majority described as "the bane of every trial judge's existence."²⁹ Some courts also continued, rather absurdly, to seek evidence of inferred prejudice, and to dismiss cases for lack of prejudice.³⁰ These two trends were front-of-mind when the Court heard *Jordan*.

III. *R. v. JORDAN*

Barrett Richard Jordan, together with nine co-accused, was charged with a number of drug-related offences. His case took just under 50 months to wend its way through the system. During that time, he spent two months in custody and nearly four years under restrictive bail conditions. For 15 months during the latter period, he was under a conditional

²⁴ S. Coughlan, "*R. v. Jordan*: A Dramatically New Approach to Trial Within a Reasonable Time" (2016) 29 C.R. (7th) 311 [hereinafter "Coughlan, 'A Dramatically New Approach'"].

²⁵ *Morin*, *supra*, note 18, at 801.

²⁶ Coughlan, "A Dramatically New Approach", *supra*, note 24.

²⁷ *Id.*; *R. v. Godin*, [2009] S.C.J. No. 26, [2009] 2 S.C.R. 3, at paras. 30-31 and 38 (S.C.C.) [hereinafter "*Godin*"].

²⁸ *Godin*, *id.*, at para. 18. See Coughlan, "A Dramatically New Approach", *supra*, note 24.

²⁹ *Jordan*, *supra*, note 2, at para. 37.

³⁰ *Id.*, at para. 200 (*per* Cromwell J., concurring); Coughlan, "A Dramatically New Approach", *supra*, note 24.

sentencing order following a conviction for unrelated drug charges. Jordan brought a section 11(b) application for a stay of proceedings, which was dismissed. He was convicted of five drug-related charges.

In analyzing Jordan's section 11(b) claim, the trial judge found that his case took 49.5 months to complete, of which 32.5 months were attributable to institutional delay. The judge held that, while this period was well beyond the *Morin* guidelines, institutional delay should be given less weight than Crown delay in the balancing analysis. He held, further, that because much of the delay coincided with Jordan's 15-month conditional sentence, the prejudicial effect on Jordan's liberty and security interests was reduced. The Court of Appeal for British Columbia denied Jordan's appeal. Jordan appealed to the Supreme Court, where he objected to how the trial judge had weighed institutional delay and to the trial judge's treatment of prejudice.³¹ In response, a slim majority of the Supreme Court undertook a complete overhaul of the section 11(b) case law, establishing a new standard that relies less on distinctions among types of delay, and which dispenses with the prejudice factor altogether. It recently affirmed this new standard in *R. v. Cody*.³²

The central feature of the new framework is a ceiling on how much time can presumptively elapse between charging and the end of trial: 18 months for provincial court cases; and 30 months for cases in superior court or for those tried in provincial court following a preliminary inquiry. If a trial is not concluded (or is not expected to be concluded) within that period, then the delay is presumptively unreasonable. The charges must therefore be stayed unless the Crown can establish that the delay was justified. If a trial is concluded within that time period (or if it is expected to be), then the delay is presumptively reasonable. The onus then falls on the defence to prove otherwise.

As under the previous law, a court faced with a section 11(b) challenge must begin by calculating the total period of delay from charging through to the actual or anticipated end of trial. This period does not include "defence delay": delay that is unequivocally waived by the defence; or delay caused solely by defence conduct that is not "legitimately taken to respond to the charges".³³ Having identified the total period of delay and deducted any defence delay, the court can readily determine whether the complained-of delay falls above or below the ceiling.

³¹ Appellant's Factum, *Barrett Richard Jordan v. Her Majesty the Queen* (File No. 36068), at 20.

³² [2017] S.C.J. No. 31, 2017 SCC 31 (S.C.C.) [hereinafter "*Cody*"].

³³ *Jordan, supra*, note 2, at paras. 61, 191 and 65.

If the ceiling is breached, then the onus falls on the Crown to show the delay was reasonable by virtue of “exceptional circumstances”. Exceptional circumstances have two features: they are either reasonably unforeseen or reasonably unavoidable; and once they arise, the Crown cannot reasonably remedy the resultant delay. Exceptional circumstances need not be rare.³⁴ They generally fall into one of two categories.³⁵ The first, “discrete events”, are isolated incidents like medical emergencies or a complainant’s unexpected recantation. A period of delay that is attributed to a discrete event must be subtracted from the total delay. If the remaining delay still falls above the ceiling, then a stay must be entered; if it does not, then the onus shifts to the accused to show the delay was nevertheless unreasonable.³⁶ The second category of exceptional circumstances is “particularly complex cases”: cases in which the evidence or the issues demand an unusual amount of preparation or trial time. If the delay is justified by virtue of the case’s complexity, then *ipso facto* it is not unreasonable and no stay issues.³⁷ Exceptional circumstances are the only basis upon which the Crown can justify a presumptively unreasonable delay; it cannot rely on chronic institutional delay, the gravity of the offence, or the absence of prejudice.³⁸

If the ceiling is not breached, then it falls to the defence to demonstrate unreasonableness. To do so, the defence must show that “it took meaningful steps to demonstrate a sustained effort to expedite the proceedings” and that “the case took markedly longer than it reasonably should have.”³⁹ When considering whether a case took markedly longer than it reasonably should have, a court should “adopt a bird’s-eye view of the case” rather than engaging in “micro-counting”.⁴⁰ The majority voiced an expectation that “stays beneath the ceiling [are] to be rare, and limited to clear cases.”⁴¹

Finally, recognizing that institutional actors need time to remedy chronic institutional delay, and insisting that the justice system cannot afford a repeat of *Askov*, the majority introduced a transitional framework for cases already in the system when *Jordan* was released. *Jordan* applies to those cases, but with two caveats. First, where the

³⁴ *Id.*, at para. 69.

³⁵ *Id.*, at para. 71.

³⁶ *Id.*, at paras. 71-76.

³⁷ *Id.*, at paras. 77-80.

³⁸ *Id.*, at para. 81.

³⁹ *Id.*, at para. 82.

⁴⁰ *Id.*, at para. 91.

⁴¹ *Id.*, at para. 48.

ceiling is breached, the Crown may be able to justify the delay “based on the parties’ reasonable reliance on the law as it previously existed.”⁴² Second, where the delay falls below the ceiling, considerations of whether the defence took steps to move the case along, and of whether the case took markedly longer than was reasonably required, are to be applied contextually, again in recognition of the fact that the parties had been operating without notice of the *Jordan* standard.⁴³

IV. THE *JORDAN* CEILING

Writing on behalf of himself and three others, Cromwell J. (concurring) listed several objections to the new framework,⁴⁴ which he described as “wrong in principle and unwise in practice.”⁴⁵ He would have refined the existing law instead of overhauling it.

Justice Cromwell’s first objection was that “the ceilings substitute a right for ‘trial under the ceiling[s]’ ... for the constitutional right to be tried within a reasonable time.”⁴⁶ In response, the majority emphasized that the ceiling does not obviate a reasonableness analysis; rather, it allocates the burden of proof for purposes of that very analysis.⁴⁷ Even so, Cromwell J.’s objection has merit in light of the “anchoring effect”. By virtue of this well-known heuristic — “a ubiquitous phenomenon in human judgment”⁴⁸ — people presented with a number that is meant to serve as a reference point predictably fixate on the number and do not adjust up or down enough to rationally account for context-specific information.⁴⁹ The ceiling is likely to have precisely this effect: judges may come to equate “unreasonable delay” with delay surpassing 18 or 30 months, regardless of individual case factors. The effect may be especially strong in cases of delay falling below the ceiling, since the

⁴² *Id.*, at para. 96.

⁴³ *Id.* at para. 99.

⁴⁴ This article addresses three of these objections. The others are: that the ceilings may result in thousands of cases being stayed; that they do not actually simplify the law; and that an overhaul of the jurisprudence was unnecessary given that the Court unanimously agreed the appeal could readily be decided on the basis of the prior law. *Id.*, at para. 147.

⁴⁵ *Id.*, at para. 302.

⁴⁶ *Id.*, at para. 147 (citation omitted).

⁴⁷ *Id.*, at paras. 51 and 58.

⁴⁸ A. Furnham & H. Chu Boo, “A Literature Review of the Anchoring Effect” (2011) 40 *The Journal of Socio-Economics* 35, at 35.

⁴⁹ S. Bibas, “Plea Bargaining Outside the Shadow of Trial” 117 *Harv. L. Rev.* 2463 at 2515-17 (2004).

majority's insistence that such cases will only rarely be stayed should make judges especially wary of departing from the presumption.⁵⁰

Arguably, the ceiling actually *depends* upon the anchoring effect. Its purpose is to unsettle and recalibrate judges' valuations of unreasonable delay. For it to have this result, judges must take seriously the presumption that delay above the ceiling is unreasonable even if it is common in their localities. If they do not, then *Jordan* will turn out as *Morin* did.⁵¹ According to one *Jordan* intervener, the Criminal Lawyers' Association of Ontario ("the Association"), complacency about delay "can be traced to the *Morin* decision and the signal it sent that the right to a trial within a 'reasonable time' contemplates endless flexibility."⁵² A loose balancing test unmoored from a stable presumptive standard can lead judges to use their localized expectations as anchors. Like the proverbial slow-boiling frog, they can thereby come to normalize ever-increasing periods of delay.

Recognizing this phenomenon, the Association pushed for a presumptive ceiling, stating: "Boundless flexibility is incompatible with the concept of a *Charter* right".⁵³ As a general rule, this statement must be correct: a right is more valuable to the extent that it has specific, authoritative content; and a putative right with no stable content is illusory. Yet, while the idea of a clear *ex ante* standard for section 11(b) claims is appealing, it is hard to translate into practice. How can a court fix on a universal ceiling that will reduce delay across diverse cases without provoking a tidal wave of stays? This question brings us to Cromwell J.'s second and third objections: "creating these types of ceilings is a task better left to legislation"; and "the ceilings are not supported by the record or by [the majority's] analysis of the last 10 years of s. 11(b) jurisprudence and have not been the subject of adversarial debate."⁵⁴ I will take up each objection in turn.

The notion that establishing ceilings "is a task better left to legislation" is animated by the fact that trial management is a quintessentially polycentric issue.⁵⁵ In *Pushpanathan v. Canada (Minister of Citizenship*

⁵⁰ *Jordan*, *supra*, note 2, at para. 83.

⁵¹ *Morin*, *supra*, note 18.

⁵² *R. v. Jordan* (File No. 36068), Factum of Intervener, Criminal Lawyers' Association (Ontario) at paras. 8-10.

⁵³ *Id.*, at para. 12. The Association did not propose a particular number but merely endorsed the ceiling-based approach in principle.

⁵⁴ *Jordan*, *supra*, note 2, at para. 147.

⁵⁵ L.L. Fuller, "Adjudication and the Rule of Law" (1960) 54 *Proceedings of the American Society of International Law and Its Annual Meeting (1921-1969)* 1, citing M. Polanyi, *The Logic of Liberty* (Chicago: University of Chicago Press, 1951) [hereinafter "Fuller"].

and *Immigration*), Bastarache J. explained the concept of polycentricity as it relates to the division of labour between the judiciary and the other branches:

[T]he broad principle of ‘polycentricity’ [is] well known to academic commentators who suggest that it provides the best rationale for judicial deference to non-judicial agencies. A ‘polycentric issue is one which involves a large number of interlocking and interacting interests and considerations’ (P. Cane, *An Introduction to Administrative Law* (3rd ed. 1996), at p. 35). While judicial procedure is premised on a bipolar opposition of parties, interests, and factual discovery, some problems require the consideration of numerous interests simultaneously, and the promulgation of solutions which concurrently balance benefits and costs for many different parties. Where an administrative structure more closely resembles this model, courts will exercise restraint.⁵⁶

Lon L. Fuller, writing with Kenneth I. Winston, explains polycentricity using the image of a spider web: “each crossing of strands is a distinct center for distributing tensions” and “[a] pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole”.⁵⁷ Elsewhere, Fuller notes that polycentric problems can have rational solutions, but those solutions cannot be identified with reference to external or *a priori* principles; they must rather be located through a process of calibration whereby any one manoeuvre shifts the entire calculus.⁵⁸ Court delay is a polycentric issue: it involves numerous stakeholders and could be addressed through multiple, non-exclusive reforms, each of which would reverberate through a complex web of governance within and beyond the criminal justice system.

By establishing a presumptive ceiling on delay with the express purpose of incentivizing reform, the judiciary has effectively given marching orders to the other branches. Over two decades ago, writing about the *Askov* guidelines, Coughlan noted the objection that, “by requiring one jurisdiction to allocate the same level of resources as other jurisdictions, the court is stepping into the political arena. The decision amounts to saying that the Ontario Government is required to allocate fewer of its resources to health care and highways, and more to the justice system.”⁵⁹ The same could be said of *Jordan*. Indeed, the majority

⁵⁶ [1998] S.C.J. No. 46, [1998] 1 S.C.R. 982, at para. 36 (S.C.C.).

⁵⁷ L.L. Fuller & K.I. Winston, “The Forms and Limits of Adjudication” (1978) 92 Harv. L. Rev. 353 at 395.

⁵⁸ Fuller, *supra*, note 55, at 4.

⁵⁹ Coughlan, “A Bold Step, *supra*, note 14, at 250.

went so far as to suggest how various stakeholders could potentially go about reducing delay.⁶⁰ If implemented, their suggestions would invariably vibrate throughout the metaphorical policy web in precisely the manner suggested by Coughlan's analysis of *Askov*. The concern therefore arises: has the Court overstepped?

In my view, this concern has limited merit. From a separation of powers perspective, it may be unsatisfactory that the Court should effectively obligate some jurisdictions to divert more resources towards their criminal justice systems so that courthouses in, say, Calgary and Charlottetown operate at relatively similar speeds. But, from a Charter perspective, it is utterly unsatisfactory that an accused's section 11(b) right in Calgary should cash out as less valuable than her counterpart's in Charlottetown — which is precisely the result when the term “unreasonable delay” is given starkly different interpretations across the country. In this light, it is not the Court's decision to give concrete meaning to section 11(b) that constrains the other branches; it is section 11(b) itself. That is precisely the role of the Charter. Moreover, while executive and legislative choices are constrained by *Jordan*, they are by no means ordained. *Jordan* does not prescribe any specific policy response to delay, so much as make clear the consequence if none is forthcoming.

Still, there *is* reason to be concerned that setting the ceiling is not an appropriate task for the judiciary — not because the courts should be chary of identifying clear constitutional limitations on polycentric executive and legislative decision-making, but because establishing a time frame for criminal trials requires a great deal of empirical research and analysis. Courts may not be well placed to undertake this type of analysis, for several reasons. First, courts rely heavily on the parties to gather and interpret empirical evidence, and the parties may compile records that are more or less complete. Second, many judges lack the methodological training necessary to independently evaluate and apply empirical data, much less supplement it through independent research.⁶¹ Ideally, the court would be able to rely on clear expert evidence about the import and reliability of the data on offer;⁶² but here again, judges are largely at the mercy of the parties, who determine which expert evidence, if any, to present. Third, the lack of

⁶⁰ *Jordan*, *supra*, note 2, at para. 140.

⁶¹ J. Lazare, “When Disciplines Collide: Polygamy and the Social Sciences on Trial” (2015) 32 Windsor Y.B. Access to Just. 103, at 108 [hereinafter “Lazare”].

⁶² D. Paciocco, “Taking a ‘Gouge’ Out of Bluster and Blarney: An ‘Evidence-Based Approach’ to Expert Testimony” (2009) 13 Can. Crim. L. Rev. 135, at 149-50.

methodological expertise among many judges (and among many of the advocates charged with gathering and presenting empirical evidence, for that matter) may reflect essential divergences between “the objectives and values of the scientific enterprise and the legal culture” — including, most notably, the tension between the empiricist’s project of gathering evidence in order to reach a conclusion and the advocate’s project of gathering evidence in order to buttress a conclusion.⁶³ These related factors complicate the use of empirical evidence by the courts, even as such evidence helps them to resolve legal disputes.

All this brings us to Cromwell J.’s second objection: the ceiling is not sufficiently evidence-based.⁶⁴ To assess this objection, it is helpful to consider how the majority set the ceiling. The majority explained that it took the *Morin* guidelines as its starting point and adjusted them upwards “to account for other factors that can reasonably contribute to the time it takes to prosecute a case” including “the inherent time requirements of the case and the increased complexity of criminal cases since *Morin*.”⁶⁵ It also “conducted a qualitative review of nearly every reported s. 11(b) appellate decision from the past 10 years, and many decisions from trial courts.”⁶⁶ While this account is helpful, it is far from complete.⁶⁷ We can readily calculate that the majority increased the *Morin* guidelines by adding a further eight to 10 months for provincial court and 12 to 16 months for superior court, but it is not apparent how the majority generated *those* numbers. The scope and methodology of the majority’s “qualitative review” in particular is unclear.⁶⁸

Justice Cromwell observed that, in contrast, when the Court developed numerical guidelines in *Askov* and *Morin*, it did so on the basis of “extensive evidence including statistical information from comparable jurisdictions and expert opinion”.⁶⁹ Notably, Baar — whose contributions to the *Morin* record Cromwell J. expressly cited as evidence of that record’s sufficiency⁷⁰ — opined that the *Askov* Court went astray by trying to

⁶³ Lazare, *supra*, note 61, at 103, 110-11. See also C. Nowlin, “Should Any Court Accept the ‘Social Authority’ Paradigm?” (2001) 14 Can. J.L. & Juris. 55.

⁶⁴ *Jordan*, *supra*, note 2, at para. 147.

⁶⁵ *Id.*, at para. 53.

⁶⁶ *Id.*, at para. 106.

⁶⁷ M. Spratt, “Expect Delays: Right to a Speedy Trial”, *Michael Spratt Law Blog*, July 19, 2016, online: <<http://www.michaelspratt.com/law-blog/expect-delays-right-to-a-speedy-trial>>.

⁶⁸ According to Steve Coughlan, “The minority in *Jordan* notes correctly that the previous guidelines were based on extensive statistical and expert evidence: the presumptive ceilings seem to be best-guess ballpark figures.” Coughlan, “A Dramatically New Approach”, *supra*, note 24.

⁶⁹ *Jordan*, *supra*, note 2, at para. 281.

⁷⁰ *Id.*

supplement the inadequate record through its own data-collection, while the *Morin* Court misinterpreted the evidence before it.⁷¹ If the *Askov* record was inadequate and the *Morin* record was misinterpreted, the *Jordan* record may well have been both. With respect to its adequacy, Benjamin Perrin has noted that the Court was “limited to information about case duration from provincial court in Surrey, B.C.”; yet a recent study he co-authored with Richard Audas reveals “wide variability in average case length across the provinces and territories, ranging from 63 days to 271 days.”⁷² With respect to the Court’s analysis, it is significant that, according to Baar, courts should adopt a number of practices to help them interpret and apply social science data correctly despite the sorts of challenges outlined above. First among these suggestions is that courts should “make full use of the adversary process. Courts undermine their own processes when they collect and consider social facts after oral argument without providing an opportunity for those facts to be tested.”⁷³ The *Jordan* majority’s *sua sponte* post-hearing review disregards this advice.

At this juncture, it is still too early to know how the *Jordan* framework will play out in the long run. In practice, its effects are likely to vary across jurisdictions given the regional disparities reported by Perrin and Audas.⁷⁴ Much will depend upon how different criminal justice actors react. Their reactions will doubtless be informed by the incentive structures put into place by *Jordan*. Those structures are shaped

⁷¹ Baar, “Court Delay”, *supra*, note 15, at 134-35.

⁷² B. Perrin, “Victims of crime pay the real price for unreasonable delays” *The Globe and Mail* (February 20, 2017), online: <<http://www.theglobeandmail.com/opinion/victims-of-crime-pay-the-real-price-of-unreasonable-delay/article34077444/>>; B. Perrin & R. Audas, “Report Card on the Criminal Justice System: Evaluating Canada’s Justice Deficit”, Macdonald-Laurier Institute (September 2016), online: <http://www.macdonaldlaurier.ca/files/pdf/JusticeReportCard_F4.pdf> [hereinafter “Perrin & Audas”].

⁷³ Baar, “Court Delay”, *supra*, note 15, at 136. Baar goes on to suggest (despite his “first lesson” about “mak[ing] full use of the adversary process”) that courts should also “avoid dependence on the adversary process”, which, when it comes to the presentation and digestion of empirical evidence, is only as good as the advocates and expert witnesses involved. He further suggests strategies for maximizing the value of expert testimony; and he proposes that lawyers should “develop practices and guidelines” to help them sort through and effectively present voluminous social science data. Baar, “Court Delay”, *id.*, at 136-39. See also Judge R.J. Williams, “Grasping a Thorny Baton... A Trial Judge Looks at Judicial Notice and Courts’ Acquisition of Social Science” (1996) 14 Can. Fam. L.Q. 179 (arguing that “any trial process should conform to basic due process requirements that allow the parties the opportunity to *both* present evidence and make submissions with respect to material put before the court (whether that material is coming from the parties, represented or unrepresented, or the court).”) *Cf.* J. Monahan & L. Walker, “Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law”, 134 U. Penn. L. Rev. 477 at 497*ff.* (1986) (adopting a more sanguine and nuanced view of *sua sponte* research by judges).

⁷⁴ Perrin & Audas, *supra*, note 72, and accompanying text.

in part by the excision of prejudice as a factor in the section 11(b) analysis: the issue to which I now turn.

V. WITHOUT PREJUDICE?

One of Jordan's two contentions before the Supreme Court of Canada was that the trial judge had erred in his assessment of prejudice. Prejudice has long been a contentious and confusing aspect of the section 11(b) analysis. It is uncontroversial that unreasonable delay is prejudicial to accused persons. Delay impacts liberty interests by extending time spent in custody or under bail conditions. It implicates security of the person insofar as criminal charges entail stress and anxiety; disruptions to family, work, and social life; financial strain; loss of privacy; and stigma. Delay can also undermine an accused person's ability to make full answer and defence, since memories fade and evidence degrades over time.⁷⁵ These sources of prejudice are now settled in the jurisprudence.⁷⁶ The controversy is about how to incorporate them into the analysis so as to give due regard to the prejudice caused by trial delay without making section 11(b) claims conditional on the accused's ability to prove concrete harm.

In the first Supreme Court case on the issue, *Mills*, Lamer and Wilson JJ. espoused alternative views of prejudice that together helped shape the jurisprudence in this area. Justice Lamer (as he then was) would have excluded prejudice from the section 11(b) balancing analysis in favour of an "irrebuttable presumption that, as of the moment of the charge, the accused suffers a prejudice that the [section 11(b)] guarantee is aimed at limiting, and that the prejudice increases over time."⁷⁷ In his view, although "prejudice underlies the right", "actual prejudice" should not matter to the assessment because its absence cannot negate the claim.⁷⁸ In contrast, Wilson J. wrote:

if delay has had the effect of impairing the accused's ability to defend the charge, and he can establish the necessary causal connection, I cannot accede to the proposition that this is irrelevant in the assessment of reasonableness. It seems to me that it may provide an alternate basis of violation of the accused's s. 11(b) right.⁷⁹

⁷⁵ See, e.g., *Jordan*, *supra*, note 2, at para. 20.

⁷⁶ In *Mills*, *supra*, note 10, Lamer J. (as he then was) would have excluded the right to make full answer and defence from consideration on the grounds that it is protected by other Charter rights (at 921-23), but the law is now settled against his position.

⁷⁷ *Id.*, at 926.

⁷⁸ *Id.*

⁷⁹ *Id.*, at para. 969.

Over time, both views were incorporated into the law to some extent. In *Morin*, the Court affirmed that prejudice could be inferred from the length of delay and that actual prejudice could also be established. The Court specified, however, that while prejudice *could* be inferred, this presumption was neither automatic nor irrebuttable. The holding that prejudice could be inferred in some cases but not others led to the quixotic search for evidence of inferred prejudice.⁸⁰

To remedy this confusion and reignite our commitment to timely trials, the *Jordan* majority essentially adopted Lamer J.'s position in *Mills*. An irrebuttable presumption of prejudice is now baked into the section 11(b) framework. That presumption informs the setting of the presumptive ceiling. Once the ceiling is breached, we presume that accused persons have suffered prejudice to their Charter-protected liberty, security of the person, and fair trial interests.⁸¹

Thus, the accused no longer needs to demonstrate prejudice — and it appears the courts no longer have an avenue for considering it: prejudice “no longer play[s] an explicit role in the s. 11(b) analysis”.⁸²

There is much wisdom in establishing an irrebuttable presumption of prejudice following unreasonable delay. This presumption reflects an understanding that delay is not simply unreasonable to the extent that it harms the accused; rather, delay always harms the accused because the experience of being prosecuted is innately injurious. When the process drags on for too long, the accused is entitled to a remedy. This analysis is compelling, and it sidelines the cynical view that most accused persons favour delay. The inclusion of an irrebuttable presumption of prejudice within the *Jordan* framework is therefore welcome.

The exclusion of actual prejudice from the *Jordan* framework is less welcome. It raises a couple of significant questions that will need to be addressed in future cases.⁸³ First, under prior jurisprudence, prejudice was a key touchstone for assessing delay in cases of young offenders. It is well-settled that timely trials are especially important for young persons given

⁸⁰ See *supra*, note 30, and accompanying text.

⁸¹ *Jordan*, *supra*, note 2, at para. 54.

⁸² *Id.* Cf. Christopher Sherrin, observing that *Jordan* “does not specifically say whether the existence of prejudice can contribute to the conclusion that delay over a ceiling is *not* justified. One would assume that it could” but adding: “It is far from clear [...] that prejudice can be considered when a court assesses whether a case is sufficiently complex that the delay is justified.” C. Sherrin, “Understanding and Applying the New Approach to Charter Claims of Unreasonable Delay” (2017) 22 Can. Crim. L. Rev. 1, 22 [hereinafter “Sherrin”].

⁸³ *Jordan* leaves open a considerable number of questions, not all of which are addressed here, and many of which are helpfully canvassed in Sherrin, *id.*

their perceptions of time and their lesser ability to appreciate the connection between actions and consequences.⁸⁴ Under *Morin*, the section 11(b) test was identical for young persons and adults, but it was applied in light of the increased prejudice experienced by youth awaiting trial.⁸⁵ Now that prejudice is no longer a factor, it remains to be seen whether and how the *Jordan* framework will be adapted to account for the particularities of young offenders.⁸⁶

Likewise, the exclusion of prejudice from the analysis raises questions about corporate defendants. In *R. v. CIP Inc.*, the Court held that prejudice could not be presumed or inferred in the case of corporate defendants since the latter cannot logically claim their liberty or security of the person was harmed by delay.⁸⁷ (Corporate defendants were, however, permitted to demonstrate actual impairment to their ability to make full answer and defence.⁸⁸) The *Jordan* ceiling is calibrated to reflect presumed prejudice to liberty and security of person interests. As such, one could argue that the ceiling should be raised for corporate defendants who do not experience these harms. This possibility was neither addressed nor identified in *Jordan* and so remains open for contestation, although it seems the few courts that have considered it to date have applied the *Jordan* ceiling to corporations without modification.⁸⁹

More importantly, the removal of prejudice from the analysis creates perverse incentives for criminal justice actors, in particular Crowns. With that, we return to the question of how *Jordan* is likely to play out in practice. When exercising their discretion to decide whether and how to conduct prosecutions, Crowns are likely to be influenced by the fact that prejudice is no longer a factor in the section 11(b) analysis. If actual prejudice remained an explicit factor, then Crowns would be incentivized to prioritize cases where accused persons faced greater prejudice since those cases would be at heightened risk of being stayed. In particular, they would be incentivized to press ahead in cases where the accused was awaiting trial in custody or under especially restrictive bail conditions. The same goes for

⁸⁴ See esp. *R. v. M. (G.C.)*, [1991] O.J. No. 885, 3 O.R. (3d) 223 (Ont. C.A.).

⁸⁵ *J.M.*, *supra*, note 9, at paras. 113-124.

⁸⁶ See Judge W. Gorman, “*R. v. Jordan*: It’s Effects on Cases Already in the System” (2017) 64 C.L.Q. 240.

⁸⁷ [1992] S.C.J. No. 34, [1992] 1 S.C.R. 843, 860-61 (S.C.C.).

⁸⁸ *Id.*, at 863.

⁸⁹ See, e.g., *R. v. Live Nation Canada Inc.*, [2016] O.J. No. 6591, 2016 ONCJ 735, at paras. 5-13 (Ont. C.J.); *Ontario (Ministry of Labour) v. Sterling Crane Division of Procrane Inc.*, [2016] O.J. No. 6200, at para. 31, 2016 ONCJ 692, 369 C.R.R. (2d) 48, at 4, see 2[2] (Ont. C.J.); and *Mississauga (City) v. Uber Canada Inc.*, [2016] O.J. No. 6229, 2016 ONCJ 746, at paras. 84-89 (Ont. C.J.).

other institutional actors who have a hand in scheduling trials: they too would be incentivized to allocate earlier trial dates to accused persons on remand or under restrictive bail conditions. Further, Crowns would be motivated to think carefully about whether to oppose release or to request restrictive bail conditions in the first place, knowing that by doing so, they would effectively lessen the amount of time on the clock.

Inasmuch as actual prejudice is not an explicit factor under *Jordan*, Crowns and other officials are not working under these incentives. Instead, they are incentivized to move forward with older cases first, knowing that the ceiling is the same in all cases regardless of prejudice to the accused. Concretely, this means that if Axel is awaiting his provincial court trial and has already spent 10 months in a notoriously overcrowded jail, while Buster is awaiting his provincial court trial and has been out under minimally restrictive conditions for 15 months, then the Crown and court officials will be incentivized to move forward with Buster's trial ahead of Axel's. The Crown will also have less reason to accede to Axel's motion for pre-trial release. More generally, in regions where cases have been routinely wrapping up before the 18- or 30-month mark, Crowns could now pump the brakes, confident that section 11(b) applications are unlikely to succeed before the ceiling is reached.⁹⁰

These incentive structures work against the interests of justice. Although severe restrictions on liberty are by no means the only harm associated with trial delay, they are real and serious, and they are easy to predict and track. Conditions in pre-trial custody are notoriously awful: "an accused placed in remand is often subjected to the worst aspects of our correctional system by being detained in dilapidated overcrowded cells without access to recreational or educational programs."⁹¹ For people awaiting trial under these conditions, the hours are indeed long.⁹² Those held in pre-trial custody are more likely to plead guilty, to be convicted at trial, and to receive heavier sentences.⁹³ In light of the elevated prejudice that is consistently experienced by accused persons held on remand, it would have been better had the *Jordan* court either

⁹⁰ S. Coughlan, "Early Patterns in the New Section 11(b) Framework" (2016) 23 C.R. 386.

⁹¹ *R. v. Hall*, [2002] S.C.J. No. 65, [2002] 3 S.C.R. 309, at para. 118 (S.C.C.), *per* Iacobucci J., dissenting but not on this point. See also *R. v. Morant*, [2013] O.J. No. 2177, 2013 ONSC 1969 (Ont. S.C.J.). And, see N.M. Myers, "Eroding the Presumption of Innocence: Pre-trial Detention and the Use of Conditional Release on Bail" (2017) 57 *Brit. J. Criminol.* 664.

⁹² S. Beckett, *Waiting for Godot (A Tragicomedy in Two Acts)* (New York: Grove Press, 2011), at 91 [hereinafter, "Beckett"].

⁹³ G. Kellough & S. Wortley, "Remand for Plea: Bail Decisions and Plea Bargaining as Commensurate Decisions" (2002) 42 *Brit. J. Criminol.* 186.

retained actual prejudice as an explicit factor in the analysis or set a lower ceiling for accused persons awaiting trial in custody (and perhaps for those awaiting trial under highly restrictive bail conditions). While the latter approach would not account for all forms of prejudice, it would promote better incentives for Crowns and court officials while maintaining the relative simplicity and uniformity sought by *Jordan*.⁹⁴

A further proposal, which would import additional complexity into the framework but would promote even better incentive structures, would be to adopt a strong or even irrebuttable presumption that an accused person's section 11(b) right has been violated once she has spent more time in pre-trial custody than she could reasonably expect to spend in prison if ultimately convicted. Such a presumption would address the perverse fact that, for some accused persons, a guilty plea can actually result in a better outcome than an acquittal. One such accused, Tassandra Whyte, recently brought a successful application for bail review in which she argued that the amount of time she was predicted to spend in pre-trial custody would exceed the maximum sentence she would receive if convicted at trial.⁹⁵ By the time the bail review decision was released, she had already spent nearly two-and-a-half years in custody awaiting trial for a charge that carried an anticipated penalty of three years, and her trial was not scheduled to begin for at least another year. The Crown attorney in the case agreed that if she were to plead guilty immediately, Whyte would likely be released on the basis of time served.

It is easy to see why a person in Whyte's circumstances might take the plea, whether or not she was guilty. As one defence attorney noted,

⁹⁴ In his concurrence, Cromwell J. suggested something along these lines. In his view, actual prejudice, especially "being detained in custody or subject to very restrictive bail conditions pending trial" should be

taken into account in deciding what a reasonable time for trial would be. Prejudice of this nature during the period of reasonable delay need not be considered again in the final assessment of whether the delay is unreasonable.

Evidence of actual prejudice to the accused's fair trial rights and security of person would be considered at that final stage.

Jordan, *supra*, note 2, at paras. 203 and 205.

⁹⁵ *R. v. Whyte*, [2014] O.J. No. 1633, 2014 ONCA 268 (Ont. C.A.). The accused was charged with accessory after the fact to murder after she allegedly helped her then-boyfriend tamper with evidence. Her trial could not begin until his murder trial was completed. Similar circumstances are mentioned in *R. v. Vitrekwa*, [2011] Y.J. No. 76, 2011 YKTC 64, at para. 63, and in *R. v. Spence*, 2001 BCCA 521, at para. 10 (Y.T.T.C.).

...People don't want to sit in jail to get their day in court and be vindicated. They would rather have their freedom.⁹⁶

This perverse incentive structure undermines the criminal justice system's truth-seeking and justice-promoting functions. It should be eliminated. Were the *Jordan* ceiling uniformly lowered for accused persons held in custody, and were it applied in light of an additional presumption that delay is unreasonable if the accused spends more time in pre-trial detention than she could expect to serve post-conviction, then the incentives for institutional actors would improve.

In sum, the decision to remove prejudice from the section 11(b) framework opens up areas of dispute and contestation while foreclosing lines of argumentation that would have resulted in better incentives for Crowns and other institutional actors. While we must wait and see how *Jordan* plays out, particularly after the end of the transitional period, these incentives, together with concerns about how the ceiling was calibrated, suggest the results are likely to be mixed.

VI. CONCLUSION

Section 11(b) contemplates a delicate balance between speed-up and delay — one that allows for both thorough, satisfactory processes and timely case resolution. The appropriate balance would be hard to strike in a well-resourced system. In our chronically underfunded system, it seems unachievable. And yet, the Charter demands that we try. About a quarter-century after the *Askov* debacle, the Supreme Court has tried once again to create a workable section 11(b) test.

Despite its shortcomings, the *Jordan* decision should be applauded for unequivocally condemning the culture of delay and complacency that had settled on our criminal justice system like a thick layer of dust. Read together with the subsequent *Cody* decision,⁹⁷ *Jordan* sends a strong message that unreasonable delay is not to be tolerated and that all institutional actors share a responsibility for preventing it. As Coughlan observes, any new section 11(b) approach necessarily had to be “superimposed on a system which has spent a quarter-century being

⁹⁶ Human Rights Watch, “The Price of Freedom: Bail and Pretrial Detention of Low Income Nonfelony Defendants in New York City” (2010) at 32, online: <http://www.hrw.org/sites/default/files/reports/us1210webwcover_0.pdf>. The attorney, Leah Horowitz, was speaking in the American context, but her remarks apply equally to the Canadian experience.

⁹⁷ *Cody*, *supra*, note 32.

unsympathetic to delay claims. Given the reality into which the new rules must be introduced, one can have sympathy for the majority's view that nothing but grabbing the system by the scruff of the neck and shaking it is likely to work."⁹⁸ It remains to be seen whether *Jordan* will indeed prompt effective reform, but if it fails it will not be for lack of trying.

Ultimately, however *Jordan* plays out, section 11(b) will continue to vex us. The possibility that we will ever achieve the ideal balance between speed-up and delay is even more remote than the possibility that the criminal justice system will cease to face resource limitations. Yet, while the ideal balance may be unreachable, improvement is not. And if we are to improve, we must begin by repudiating the belief that lengthy delay is either inevitable or acceptable, and by affirming that it is intrinsically prejudicial. The *Jordan* majority has done that much at least.⁹⁹ In this respect, its reasons call to mind the first lines of *Waiting for Godot*; a play that, rather fittingly, is at least superficially about unreasonable delay.¹⁰⁰ One of the protagonists, Estragon, opens the play by declaring: "Nothing to be done." His interlocutor, Vladimir, replies: "I'm beginning to come round to that opinion. All my life I've tried to put it from me, saying Vladimir, be reasonable, you haven't yet tried everything. And I resumed the struggle."¹⁰¹

⁹⁸ Coughlan, "A Dramatically New Approach", *supra*, note 24.

⁹⁹ *Id.*

¹⁰⁰ Beckett, *supra*, note 92.

¹⁰¹ *Id.*, at 2.