Osgoode Hall Law Journal

Volume 57, Issue 3 (Fall 2020)
Special Issue: Law in the Time of COVID

Article 19

7-19-2020

Trial Delay Caused by Discrete Systemwide Events: The Post-Jordan Era Meets the Age of COVID-19

Palma Paciocco
Osgoode Hall Law School of York University, ppaciocco@osgoode.yorku.ca

Trial Delay Caused by Discrete Systemwide Events: The Post-Jordan Era Meets the Age of COVID-19

Abstract

[to be added]

Trial Delay Caused by Discrete Systemwide Events: The Post-*Jordan* Era Meets the Age of Covid-19

Palma Paciocco*

Abstract

Court closures necessitated by COVID-19 have resulted in extensive trial delay, with implications for the section 11(b) *Charter* right to be tried within a reasonable time. Although COVID-19 appears to be a straightforward example of an "exceptional circumstance" under the *Jordan* framework that governs section 11(b), careful analysis reveals that it falls within a category not contemplated by that framework—what this article calls "discrete systemwide events." Because COVID delay impacts cases across the system, the reasonable steps that can be taken to reduce it are themselves largely systemic in nature. Crucially, the exceptional circumstances analysis stipulated by *Jordan* focuses exclusively on the steps available in an individual case, while systemic delay is addressed indirectly through presumptive ceilings. Because the presumptive ceilings were not calibrated with COVID-19 in mind, they cannot account for COVID delay. Nor can systemic responses to COVID delay be assessed as part of the general exceptional circumstance analysis: Such an approach would require judges to adjudicate the reasonableness of myriad institutional policies, giving rise to problems ranging from a lack of data to separation of powers issues. This conundrum points towards one of two extremes: discount COVID delay without a full *Jordan* analysis, thereby partially relieving the Crown of its burden to justify presumptively unreasonable delay and leaving accused persons to bear the cost; or effectively prevent Crowns from justifying COVID delay as an exceptional circumstance, thereby risking thousands of stayed criminal charges flowing from the pandemic. This article suggests an alternative approach that navigates between these extremes: In some instances, delay caused by a discrete systemwide event like COVID-19 should be remedied by a sentencing reduction, authorized either by the *Charter* or by the sentencing process set out in the *Criminal Code*. This solution, while imperfect, achieves a more palatable result while adding minimal complexity to the section 11(b) analysis. If adopted, it could save accused persons from disproportionately bearing the costs of COVID delay, which would be the likely outcome were the *Jordan* framework applied straightforwardly.

In the summer of 2016, the Supreme Court of Canada radically revised the framework for assessing claims under section 11(b) of the *Charter*, which guarantees accused persons the right "to be tried within a reasonable time."[1] Decrying "the culture of delay and complacency" that had come to characterize our criminal justice system, the majority in *R v Jordan* established a new section 11(b) framework and urged all criminal justice system actors to recommit

* Assistant Professor, Osgoode Hall Law School, York University. I am grateful to the editors of the Osgoode Hall Law Journal and to Professor Dan Priel for the energy and thoughtfulness with which they conceptualized this special issue and brought it to fruition. I am also thankful to the editors for their perceptive comments on an earlier draft of this article and for their superb editorial support throughout its production, and to Shane Burton-Stoner and Alannah Marrazza-Radeschi for their able research assistance.

[1] *Canadian Charter of Rights and Freedoms*, s 11(b), Part I of *The Constitution Act*, being Schedule B to the *Canada Act 1982* (UK), 1982 [*Charter*].

themselves to delivering timely trials.[2] The doctrinal change was dramatic enough that courts and legal commentators soon began demarcating the "pre-*Jordan* era" and the "post-*Jordan* era."[3] Less than four years into the post-*Jordan* era, in March 2020, the World Health Organization declared COVID-19 to be a global pandemic, and courts across Canada closed to slow its spread. The imperative of ensuring timely trials yielded to the necessity of promoting public health. The post-*Jordan* era met the age of COVID-19.

As of this writing, criminal courts have begun to reopen but are not yet at full capacity. As courts reopen, they face dockets congested with older cases that were delayed by court closures, plus a backlog of newer cases initiated during or after the closure periods. Some of the accused persons squeezing through the resulting bottleneck have been languishing in pretrial detention at a time when jail conditions are more dangerous and desperate than usual.[4] Others have been released pending trial. For some of them, material conditions—such as curfews or home confinement—may actually have been relatively similar to those experienced by members of the general public under social distancing orders; but the emotional, social, and financial stresses associated with pending criminal charges, and the psychological and economic strain caused by COVID-19, are likely to be mutually exacerbating. Meanwhile, victims, witnesses, and the many family and community networks impacted by criminal prosecutions have been enduring an extended period of anticipation at a time when stress is already running high, and when access to support and fellowship is restricted. Furthermore, many of those who are disproportionately likely to be prosecuted for crimes, or to be victims of crime, are also likely to be among those hit hardest by COVID-19. This is so because people from equity-seeking groups—those who are economically marginalized, racialized, Indigenous, disabled, LGBTQ2S+, street-involved, engaged in sex work, and/or experiencing addiction or other forms of mental ill-health—tend to be disproportionately impacted by crime and the criminal justice

---

[2] *R v Jordan*, 2016 SCC 27 at para 29 [*Jordan*].
[3] See especially *R v Myers*, 2019 SCC 18 at para 58.
[4] Amanda Jerome, "Bail, sentencing impacted as jail could be 'death sentence' during pandemic, lawyer says," *The Lawyer's Daily* (15 May 2020), online: <www.thelawyersdaily.ca/articles/19059/bail-sentencing-impacted-as-jail-could-be-death-sentence-during-pandemic-lawyer-says> [perma.cc/7HH6-M7VE].

system[5] *and* by public health emergencies, including COVID-19.[6] In short, then, as they reopen, our criminal courts face a massive backlog, and the human stakes are extraordinarily high.

In this unprecedented situation, how should courts approach section 11(b) claims relating to trial delay caused by COVID-19? (In what follows, this type of delay is referred to by the shorthand "COVID delay.") The most obvious response is that COVID delay constitutes an "exceptional circumstance" under the *Jordan* framework, and as such should be subtracted from the total period of delay that is counted for section 11(b) purposes. Yet, a closer look at the section 11(b) jurisprudence reveals that this straightforward response is problematic. Under the *Jordan* framework, delay can only be deducted as an "exceptional circumstance" if the Crown can satisfy a two prong test: (1) it must show that the circumstance causing the delay was reasonably unforeseen or reasonably unavoidable; and (2) it must show that, once this circumstance arose, the Crown and the criminal justice system could not reasonably have remedied the resulting delay. Ordinarily, this second prong focuses on the particular actions that were taken, or ought to have been taken, in the case at hand; it does not involve a broader analysis of systemic efforts to limit trial delay. Systemic delay is addressed indirectly, through the application of numerical ceilings above which delay is presumptively unreasonable: Once

---

[5] See *e.g.* Robyn Maynard, *Policing Black Lives: State Violence in Canada from Slavery to the Present* (Fernwood Publishing, 2017); Jonathan Rudin, "Aboriginal Peoples and the Criminal Justice System" (2005) (Research Paper Commissioned by the Ipperwash Inquiry), online (pdf): *Ontario Ministry of the Attorney General* <www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/research/pdf/Rudin.pdf> [perma.cc/D4DY-MMWF]; Terry Skolnik, "Homelessness and Unconstitutional Discrimination" 15 JL & Equality 69 at 72-73, 79; Statistics Canada, *Violent victimization of lesbians, gays and bisexuals in Canada, 2014*, by Laura Simpson, Canadian Centre for Justice Statistics, Catalogue No 85-002-X (Ottawa: Statistics Canada, 31 May 2018), online: *Statistics Canada* <www150.statcan.gc.ca/n1/pub/85-002-x/2018001/article/54923-eng.htm> [perma.cc/SN5Q-NQP9]; Kyle Kirkup, *Relations Between Police and LGBTQ2S+ Communities* (Independent Civilian Review into Missing Persons Investigations, 2020), online (pdf): <8e5a70b5-92aa-40ae-a0bd-e885453ee64c.filesusr.com/ugd/681ae0_1d67158e1b824d21a1450dbcdebbc435.pdf> [perma.cc/P4FK-Z2ZD].

[6] See *e.g.* Kwame McKenzie, "Anti-racism legislation needed to ensure equitable public health response," *Toronto Star* (25 June 2020), online: <www.thestar.com/opinion/contributors/2020/06/25/anti-racism-legislation-needed-to-ensure-equitable-public-health-responses.html> [perma.cc/4D8D-ZZGR]; Kaitlin Curice & Esther Choo, "Indigenous populations: left behind in the COVID-19 response" (6-12 June 2020), online: *Elsevier Public Health Emergency Collection* <www.ncbi.nlm.nih.gov/pmc/articles/PMC7272170> [perma.cc/ABC3-FEAL]; Bridget M Kuehn, "Homeless Shelters Face High COVID-19 Risks," *JAMA Network* (9 June 2020), DOI: <10.1001/jama.2020.8854>; John P Salerno, Natasha D Williams & Karina A Gattamorta, "LGBTQ Populations: Psychologically Vulnerable Communities in the COVID-19 Pandemic" (2020) 12 Psychological Trauma: Theory, Research, Pract, Pol'y 239 (advance online publication), DOI: <dx.doi.org/10.1037/tra0000837>; Lucy Platt et al, "Sex workers must not be forgotten in the COVID-19 response" (2020) 396 Lancet 9, online: <www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)31033-3/fulltext> [perma.cc/A6UJ-WZYG]; The Agenda with Steve Paikin, "Demanding Disability Rights Amid COVID-19," (8 May 2020), online (video): *TVO* <www.tvo.org/video/demanding-disability-rights-amid-covid-19> [perma.cc/3R7P-W6MB].

other aspects of the *Jordan* analysis are factored in, the assessment of whether the ceiling was breached in a given case functions as a sort of proxy for evaluating systemic delay.

COVID delay is unique. It results from an exceptional circumstance, but a pervasive one that impacts cases across the system. Accordingly, the reasonable steps that can be taken to limit COVID delay must themselves be largely systemic in nature. They may include, for example, more strenuous charge screening protocols to reduce global caseloads, and procedural and technological innovations to enable remote proceedings. If the *Jordan* framework is to be respected in substance and not merely in form, then both prongs of the analysis must be meaningfully assessed whenever the Crown claims COVID delay is an exceptional circumstance. The analysis must include an assessment of whether the Crown and the criminal justice system took reasonable steps to mitigate the delay. Otherwise, Crowns would be informally relieved of their burden to show that presumptively unreasonable delay truly qualifies as an exceptional circumstance. Concretely, this would mean that, even if Crowns and other criminal justice actors collectively failed to take very obvious, important steps to move trials along, resulting in presumptively unreasonable delay, accused persons would be made to bear the resulting harms, contrary to the design and purpose of the *Jordan* framework and of the section 11(b) *Charter* right itself.

Yet, as I will explain, there are significant problems with attempting to evaluate the reasonableness of institutional responses to COVID delay. Quite simply, systemic mitigation efforts cannot be meaningfully assessed within the *Jordan* framework. There are overwhelming problems associated with asking judges to scrutinize institutional responses to COVID-19 when adjudicating individual section 11(b) claims, ranging from a lack of data to separation of powers considerations. Further, there is no mechanism for assessing these responses indirectly, since the presumptive ceilings that normally serve this function were not calibrated with an event like the COVID-19 pandemic in mind. Nor would it do to simply vary those ceilings: For reasons that are elaborated below, we could not establish a principled standard for assessing the COVID delay that accrued before the new ceilings were introduced. In short, the *Jordan* framework cannot work as intended without a direct or indirect analysis of systemic delay, and it cannot accommodate an analysis of systemic delay in the COVID context.

One could, of course, take the position that if the Crown cannot discharge its burden to justify presumptively unreasonable delay—for whatever reason—then the section 11(b) claim

must succeed. The trouble with this position is that it has been determined that section 11(b) violations can only be remedied by stays of proceedings, and the prospect of staying criminal charges across the country because of delay attributable to the pandemic is so anathema as to make this response nonviable.

What is required, then, is a creative, practical approach to redressing COVID delay; one that navigates between the extremes of requiring either too much or too little attention to institutional responses, and that is both consistent with the existing *Jordan* framework and sensitive to current material realities. My aim in this article is to propose such an approach. Concretely, I suggest that, in some instances, COVID delay should attract a different remedy—specifically, a sentencing reduction—as an alternative to either staying cases across the board or insisting that the delay is justified based on an anemic *Jordan* analysis. The proposed solution is a compromise, and as such is imperfect. It has the merit, however, of attaining a more nuanced result than the *Jordan* framework could achieve while adding relatively little complexity to the analysis. More importantly, if adopted, it could save accused persons from almost unilaterally bearing the costs of COVID delay, which would be the likely result were *Jordan* applied straightforwardly.

The remainder of the article unfolds as follows. Part I illustrates how COVID-19 is causing delay and introduces some of the institutional responses that have been adopted thus far. Part II sketches out the *Jordan* framework and explains why this framework cannot account for COVID delay. To that end, it proposes a refinement of the exceptional circumstances typology introduced in *Jordan*. The *Jordan* Court recognized that exceptional circumstances will normally apply in two types of cases: "particularly complex cases," which require more time because of their intrinsic complexity; and cases delayed by "discrete events," *i.e.*, by extrinsic occurrences. I propose that there are, in fact, two types of "discrete events": case-specific events, the impacts of which are confined to a single case (or to a very small number of cases); and systemwide events, which massively disrupt the criminal justice system and result in trial delay across large swaths of cases. When we consider the exceptional circumstances analysis in light of this distinction, we see that the "discrete events" category recognized by the *Jordan* Court is better characterized as "discrete case-specific events." The other category—"discrete systemwide events"—has yet to be recognized by the jurisprudence. The distinction matters because the discrete systemwide events category is not amenable to analysis under the usual *Jordan* framework, for reasons that

are detailed below. COVID delay falls within the "discrete systemwide events" category. As such, COVID delay cannot be satisfactorily addressed using the existing *Jordan* framework. It requires an alternative analysis. Part III proposes such an analysis, suggesting that delay attributable to "discrete systemwide events"—including COVID delay—should attract a sentencing reduction under some circumstances. Part III explains, further, that this sentencing reduction could potentially be authorized by section 24(1) of the *Charter* or, more feasibly, by the sentencing regime set out in the *Criminal Code*, as interpreted by the Court in *R v Nasogaluak*.[7] Part IV concludes.

I. Trial Delay Resulting from COVID-19

In early 2020, courts across Canada confronted the threat of COVID-19.[8] The following montage is far from exhaustive, but it is illustrative. In mid-March, the Provincial Court of Nova Scotia announced it was adjourning some criminal matters until June;[9] the New Brunswick Provincial Court postponed trials for out-of-custody accused;[10] and the Supreme Court of Newfoundland and Labrador limited operations and rescheduled court dates for non-urgent out-of-custody cases.[11] The Prince Edward Island Supreme Court likewise suspended regular operations. It

---

[7] *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*]; *R v Nasogaluak*, 2010 SCC 6 [*Nasogaluak*].
[8] Elizabeth Raymer, "Courts across Canada restrict access or suspend operations due to COVID-19," *Canadian Lawyer* (16 March 2020), online: <www.canadianlawyermag.com/news/general/courts-across-canada-restrict-access-or-suspend-operations-due-to-covid-19/327534> [perma.cc/9L24-7LRS].
[9] See Executive Office of the Nova Scotia Judiciary, "COVID-19: Measures Applicable to the Provincial Court of Nova Scotia" (16 March 2020), online (pdf): *The Courts of Nova Scotia* **Error! Hyperlink reference not valid.**<www.courts.ns.ca/News_of_Courts/documents/NSPC_Measures_03_16_20.pdf> [perma.cc/8624-L9GW]; Executive Office of the Nova Scotia Judiciary, "COVID-19: Further Restrictions in Provincial Courts" (18 March 2020), online (pdf): *The Courts of Nova Scotia* <www.courts.ns.ca/News_of_Courts/documents/COVID_Prov_Court_Update_03_18_20.pdf> [perma.cc/R64N-DXZ7].
[10] "Measures Applicable to the Provincial Court of New Brunswick: Notice to the Media, Justice Participants and the Public" (1 June 2020), online (pdf): *Law Society of New Brunswick* <www.lawsociety-barreau.nb.ca/files/Public/COVID-19%20-%20NOTICE%20EFFECTIVE%20JUNE%201ST%202020.pdf> [perma.cc/7QAE-JKF8].
[11] Provincial Court of Newfoundland and Labrador, "COVID-19 Court Scheduling for the Period March 16, 2020 to May 22, 2020, Inclusive" (17 March 2020), online (pdf): <court.nl.ca/provincial/COVID-19_Operational_Plan-Provincial_Court.pdf>.

started conducting case management conference calls again in May, and it resumed other pre-trial proceedings and criminal trials in mid-June.[12]

The Supreme Court of British Columbia suspended regular operations effective March 19, adjourning most criminal matters until June and cancelling jury selections until September.[13] The Alberta Provincial Court adjourned all non-urgent matters, except for in-custody criminal matters, from March 17 to May 22.[14] The Provincial Court of Manitoba suspended circuit court sittings and out-of-custody proceedings from mid-March until the end of May.[15] The Court of Queen's Bench for Saskatchewan postponed all jury trials set to commence between March 16 and May 30 and adjourned all trials for out-of-custody accused from March 20 to May 31.[16]

In the Northwest Territories, criminal proceedings scheduled for the period of March 16 to July 6 were adjourned for all accused persons outside of Yellowknife, and for out-of-custody accused in Yellowknife.[17] The Territorial Court of Yukon suspended circuit travel in mid-March and adjourned all out-of-custody circuit matters;[18] it resumed in-person hearings in Whitehorse

---

[12] "Prince Edward Island Courts–COVID-19 Impacts" (2 July 2020), online: *Government of Prince Edward Island* <www.princeedwardisland.ca/en/information/justice-and-public-safety/prince-edward-island-courts-covid-19-impacts> [perma.cc/6VK4-2EJL].

[13] Supreme Court of British Columbia, "Notice to the Profession, the Public and the Media Regarding Criminal Proceedings: COVID-19: Expansion of Court Operations" (7 July 2020), online (pdf): *The Courts of British Columbia* <www.bccourts.ca/supreme_court/documents/COVID-19_Notice_No.33_Expansion_of_Court_Operations_Criminal_Proceedings_July_7_2020.pdf> [perma.cc/ZLA7-7CLP].

[14] Provincial Court of Alberta, "COVID-19 Staged Resumption of Court Operations–Part 1" (19 May 2020), online: *Alberta Courts* <www.albertacourts.ca/docs/default-source/pc/covid-19-staged-resumption-of-court-operations---part-1.pdf?sfvrsn=42c9780_4> [perma.cc/A3AF-DE2V]; Provincial Court of Alberta, "COVID-19 Staged Resumption Party 2 – July 6" online: *Alberta Courts* <www.albertacourts.ca/pc/resources/covid> [perma.cc/U23T-T629].

[15] Provincial Court of Manitoba, "Notice Re: COVID-19 Suspension and Re-Opening of Some Courts" (15 May 2020), online (pdf): *Manitoba Courts* <www.manitobacourts.mb.ca/site/assets/files/1966/notice_-_provincial_court_-_covid-19_-_reopening_courts_may_15_2020_-_e.pdf> [perma.cc/9YJF-6PE8].

[16] Courts of Saskatchewan Communications Office, "Court of Queen's Bench for Saskatchewan Directive and Advisory" (19 March 2020), online (pdf): <sasklawcourts.ca/images/documents/Queens_Bench/COVID_Update_3_19.pdf> [perma.cc/7FUV-W9H4].

[17] Courts of the Northwest Territories, "Territorial Court Directive on COVID 19" (last modified 6 July 2020), online: *Northwest Territories Courts* <www.nwtcourts.ca/en/nwt-courts-response-to-covid-19> [perma.cc/N8DM-QVS3]

[18] Territorial Court of Yukon, "Announcement" (17 March 2020), online (pdf): *Yukon Courts* <yukoncourts.ca/sites/default/files/2020-06/covid_19_tc_announcement_mar_17_2020.pdf> [perma.cc/2W9D-HP5P].

on July 6.[19] The Nunavut Court of Justice suspended regular operations on March 16, later extending the closure until July 3.[20]

The Ontario Court of Justice adjourned all criminal court appearances involving out-of-custody accused from March 16 to July 3, and it subsequently extended the adjournment of criminal case management appearances until July 31.[21] The Cour du Québec suspended regular operations on March 13, with a gradual reopening beginning June 1.[22] The Chief Justice of the Superior Court of Québec, which likewise suspended operations, estimated that, in mid-May, his court "was losing 1,000 judge days per month (i.e., the number of days that judges are sitting on the bench)."[23] When we consider all the court closures and service reductions across Canada, only some of which are recounted here, the total loss of court days is staggering.

When court closures went into effect, various criminal justice actors took steps to move cases forward using virtual or telephone formats where possible, albeit with varying levels of attention and alacrity. Yet, while these technologies help to reduce trial delay, they cannot eliminate it. Virtual criminal trials and preliminary hearings pose special challenges, given the accused's statutory right to be present in court for all indictable matters where evidence is being taken,[24] and in light of the fact that our system privileges live witness testimony. Jury trials, in particular, are uniquely challenging.[25] Virtual proceedings of all kinds also pose accessibility

---

[19] Territorial Court of Yukon, "Notice to the Profession and the Public" (19 June 2020), online (pdf): *Yukon Courts* <yukoncourts.ca/sites/default/files/2020-06/covid_19_tc_notice_june_19_2020_0.pdf> [perma.cc/AAE5-GF5W].
[20] Emma Tranter, "Nunavut court will face backlog when they reopen, says deputy minister," *Nunatsiaq News* (11 May 2020), online: <nunatsiaq.com/stories/article/90376> [perma.cc/P84S-S6FH]; Nunavut Court of Justice, "Memo: Nunavut Court of Justice operations update in response to Coronavirus (COVID-19): Resumption of limited In-Person Court (IPC) criminal proceedings" (27 March 2020), online (pdf): *Nunavut Courts* <www.nunavutcourts.ca/images/phocadownload/Memo_to_Bar_Re_Resumption_of_In-person_Court_in_Iqaluit_NCJ_May_27_2020_Pub.pdf> [perma.cc/6FRF-CXLZ].
[21] Ontario Court of Justice, "COVID-19: Notice to Counsel and the Public re: Criminal Matters in the Ontario Court of Justice" (2 July 2020), online: *Ontario Courts* <www.ontariocourts.ca/ocj/covid-19/covid-19-criminal-matters> [perma.cc/8HZM-GXED].
[22] Cour du Québec, "Gradual Resumption of Court of Québec Services Beginning June 1, 2020, in light of the COVID-19 Health Crisis," online (pdf): *The Courts of Québec* <www.tribunaux.qc.ca/c-quebec/codiv19/Covid19_Resumption_Province_en.pdf> [perma.cc/C8E8-YPXR].
[23] Elizabeth Raymer, "Quebec Superior Court chief justice highlights court administration issues after COVID-19," *Canadian Lawyer* (16 June 2020), online: <www.canadianlawyermag.com/practice-areas/litigation/quebec-superior-court-chief-justice-highlights-court-administration-issues-after-covid-19/329888> [perma.cc/9YQJ-3TVK] [Raymer, "Quebec"]
[24] *Criminal Code*, *supra* note 7, s 650.
[25] For an analysis of the challenges and possibilities associated with virtual jury trials, see Ken Broda-Bahm, "Online Trials: Expect Both Challenges and Opportunities" (29 June 2020), online: *Lexology* <www.lexology.com/library/detail.aspx?g=359fbe3e-6e15-4100-88e9-d38bb913484c> [perma.cc/LC9S-MGJX].

issues. Among other things, not all participants can access the computer technology and high-speed internet necessary to engage in remote proceedings.[26] Accessibility is a particularly acute problem for accused persons held on remand, who may have no computer access.[27] There are also accessibility concerns for persons with disabilities, who may encounter barriers if technologies are not designed and utilized with due attention to inclusivity.[28] With these important caveats in mind, virtual criminal trials can work in appropriate circumstances.[29] But, again, they can only do so much to reduce delay.

Even the reopening of criminal courts has had a limited effect on trial delay. Courts cannot return to full capacity during the pandemic. As of this writing, staggered reopenings are being enabled by physical and procedural changes to promote health and safety, such as the erection of plexiglass barriers in courthouses.[30] These changes take time to implement, and some existing spaces may be too small to allow for physical distancing. Reopenings have therefore been partial. For example, the Provincial Court of British Columbia announced it was reopening a total of forty in-person trial courtrooms in June.[31] In Ontario, when trial courts reopened on July 6, 147 courtrooms were operational across forty-four locations (which was two short of the planned 149 courtrooms), and the stated goal was to have all Ontario courtrooms operational by November 1.[32]

Even if a case is now set to go forward in a reconfigured courtroom, there are new barriers. Some participants may not be able to travel for hearings due to the pandemic. Others

---

[26] See The Agenda with Steve Paikin, "Removing Barriers to Justice in Ontario" (26 May 2020), online (video): *TVO* <www.tvo.org/video/removing-barriers-to-justice-in-ontario> [perma.cc/DM7F-HAYZ]. Criminal defence attorney Annamaria Enenajor has observed that virtual court proceedings are "very dependent on privileged access to technology" and are therefore less accessible to people who are economically disadvantaged, a disproportionate percentage of whom are racialized (*ibid*).

[27] See *e.g. R v Vickerson*, 2020 ONCA 434.

[28] See *e.g.* Alaina Leary, "How to Make Your Virtual Meetings and Events Accessible to the Disabled Community" (12 April 2020), online (blog): *Rooted in Rights* <rootedinrights.org/how-to-make-your-virtual-meetings-and-events-accessible-to-the-disability-community> [perma.cc/2TE9-4NCY].

[29] See *e.g. In Re: Court File No. 19/578*, 2020 ONSC 3870.

[30] The Canadian Press, "Ontario courts to resume some in person proceedings today," *Law Times* (6 July 2020), online: <www.lawtimesnews.com/business-news/ontario-courts-to-resume-some-in-person-proceedings-today/331202> [perma.cc/DZ5T-2974] ["Ontario courts to resume"].

[31] "Message from the Chief Judge: How the BC Provincial Court has met the challenges of COVID-19" (12 June 2020), online: *Provincial Court of British Columbia* <www.provincialcourt.bc.ca/enews/enews-12-06-2020> [perma.cc/BUM7-MTY4].

[32] *Ibid.* See also "Ontario courts to resume," *supra* note 30.

may be unable to enter courthouses if they fail required COVID-19 screenings,[33] whether because they are genuinely experiencing symptoms, or because they are purporting to be symptomatic in a bid to avoid participating. The result is that some trials may need to be rescheduled if one or more participants is unable to attend. When section 11(b) claims arise in the context of such cases, courts will have to decide how to characterize that delay.

In sum, the implications of COVID-19 for section 11(b) rights across the country are as obvious as they are concerning. What is less obvious is how to respond. The starting point, of course, is the *Jordan* framework that governs section 11(b). I turn to that framework now.

II. The Challenge of Assessing COVID Delay Under the *Jordan* Framework

A. The *Jordan* Framework for Assessing Trial Delay

Section 11(b) of the *Charter* guarantees that, once a person has been charged with a crime, the state will act reasonably to ensure that person will not be made to endure an unreasonably long wait before the charge is resolved. This right to reasonable state action in avoiding excessive trial delay is understood to implicate the accused's liberty interests, since trial delay prolongs the period during which the accused is held in pre-trial custody or under release conditions; their security of the person, because trial delay exacerbates the stigma and anxiety associated with unresolved criminal charges; and their fair trial interests, since delay can make it harder to mount an effective defence as evidence deteriorates or is lost.[34] The *Jordan* majority made clear that unreasonable trial delay is irrebuttably prejudicial to accused persons. When it occurs, the remedy that issues through section 24(1) of the *Charter* is a stay of proceedings.[35]

Section 11(b) claims are now adjudicated using the framework set out in *Jordan*. First, the total period of delay is calculated. That period begins when the accused is charged, and it runs until the actual or projected end of trial, defined as the end of evidence and argument.[36] The total period excludes any delay that is unequivocally waived by the defence or caused solely by defence actions not "legitimately taken to respond to the charges."[37] Trial delay is presumptively

---

[33] See *e.g.* "Ontario courts to resume," *supra* note 30.
[34] *Jordan*, *supra* note 2 at para 20.
[35] *R v Rahey*, [1987] 1 SCR 588 [*Rahey*]. See also *Jordan*, *supra* note 2 at para 35.
[36] *R v KGK*, 2020 SCC 7 [*R v KGK*].
[37] *Jordan*, *supra* note 2 at para 65.

unreasonable if it surpasses eighteen months for cases tried before the provincial court, or thirty months for cases tried in superior court or in provincial court following a preliminary inquiry. The *Jordan* majority explained that, while prejudice to the accused is no longer expressly assessed under the section 11(b) framework as it was in the pre-*Jordan* era, "it informs the setting of the presumptive ceiling. Once the ceiling is breached, we presume that accused person's will have suffered prejudice to their *Charter*-protected liberty, security of the person, and fair trial interests."[38]

If the ceiling is breached, the Crown must rebut the presumption of unreasonableness by showing that the delay would have been below-ceiling but for "exceptional circumstances": circumstances that "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."[39] These two defining features operate as two prongs of the inquiry.[40] First, the Crown must demonstrate that the precipitating event was reasonably unforeseen or unavoidable; then, it must show that it "took reasonable steps in an attempt to avoid the delay."[41] Applying the second prong of the test in *R v KJM*, the Court first considered whether the Crown could have taken reasonable steps, then went on to consider whether "*the justice system*" could have done so.[42] Thus, when assessing whether presumptively unreasonable delay is justified by an exceptional circumstance, we should consider whether that delay could have been mitigated by reasonable steps available to the Crown *or* the criminal justice system; in other words, the state agents who administer the prosecution of offences. These agents are not held to a "standard of perfection," nor must the Crown show "that the steps it took were ultimately successful."[43]

Exceptional circumstances generally take one of two forms. The first is "discrete events" such as medical emergencies. Delay attributable to discrete events is subtracted from the total

---

[38] *Ibid* at para 54.
[39] *Ibid* at para 69 [emphasis in original].
[40] *R v Cody*, 2017 SCC 31 at paras 58-59.
[41] *Jordan*, *supra* note 2 at para 70.
[42] *R v KJM*, 2019 SCC 55 at paras 101-102 [emphasis in original] [*R v KJM*]. The dissenting justices endorsed this aspect of the analysis and would have applied it even more stringently by concluding, contra the majority, that some of the complained-of delay in that case was attributable to errors by criminal justice officials other than the Crown and should therefore have been included in the calculus of net delay.
[43] *Jordan*, *supra* note 2 at paras 90, 70.

period, which is then reassessed against the ceiling. The second form is particularly complex cases, *i.e.*, cases that properly require an inordinate amount of time to prepare and/or try, given the nature of the evidence or the issues. If a case is particularly complex, then the judge may find the total period of delay is reasonable on a qualitative standard, even if it is above the ceiling.

If the ceiling is not breached, then the delay is presumptively reasonable, and the onus falls on the defence to show otherwise. To do so, the defence must establish, first, that it "took meaningful steps that demonstrate a sustained effort to expedite the proceedings"; and second, that "the case took markedly longer than it reasonably should have" in light of such factors as the case's complexity, local considerations, and the Crown's efforts to expedite the proceedings.[44]

Finally, when it introduced this framework, the *Jordan* majority established standards for cases already in the system. It instructed courts to take a fair approach to assessing below-ceiling delay accrued in the pre-*Jordan* era, bearing in mind that the previous section 11(b) jurisprudence did not expressly require the defence to "demonstrate a sustained effort to expedite." For above-ceiling cases, "a transitional exceptional circumstance" could apply if the delay was justified based on the parties' reasonable reliance on pre-*Jordan* standards, or if it was attributable to institutional delay problems that would take time to remedy post-*Jordan*. The majority made it extremely clear, however, that it expected all stakeholders to take meaningful steps to reduce trial delay: Significant institutional delay problems could potentially justify lengthy delay for cases already in the system when *Jordan* was issued, but they could not go unaddressed for long.

The judgment stressed that chronic institutional delay is unacceptable, and that all criminal justice system participants must engage in sustained, cooperative efforts to promote timely trials.[45] This message continues to resonate in the post-*Jordan* era.[46]

B. Applying the Two-Prong Exceptional Circumstances Analysis to COVID Delay

How does COVID delay fit into the *Jordan* framework, if at all? The most obvious answer is that COVID-19 is an exceptional circumstance. Yet, while this answer may be obvious, it is not unproblematic. The problem becomes apparent when we consider how the two-prong

---

[44] *Ibid* at para 82.
[45] *Ibid* at paras 5, 81, 112-17.
[46] See *R v Thanabalasingham*, 2020 SCC 18 at para 9 [*Thanabalasingham*].

exceptional circumstances analysis would apply to COVID delay. Once again, the first prong addresses whether the circumstance giving rise to the delay was reasonably unforeseen or reasonably unavoidable, and the second prong asks whether the Crown and the criminal justice system took reasonable steps to avoid the delay.

1. The First Prong: The Delay Is Reasonably Unforeseen or Reasonably Unavoidable

The first prong of the analysis is relatively straightforward. COVID-19-related court closures were "reasonably unforeseen," at least at the outset. At a certain point, of course, they were planned and publicized, and hence not unforeseen; but even then, they remained "reasonably unavoidable." That having been said, COVID-19 differs from other circumstances that have been recognized as "reasonably unforeseen" or "reasonably unavoidable" to date, inasmuch as it is a systemwide occurrence. While this difference is not per se problematic for purposes of the first prong of the analysis, it is worth unpacking, since it enhances the conceptual clarity of the argument that follows with respect to the second prong.

As we have seen, exceptional circumstances generally fall under one of two categories—discrete events, and particularly complex cases—although the *Jordan* majority affirmed that "[t]he list is not closed."[47] The "particularly complex cases" category is of minimal relevance here. It applies to cases that take an unusually long time to try due to the complexity of the evidence or the issues before the court. These are the cases that would surpass the presumptive ceilings, even if the parties were to act with reasonable alacrity and the system were to run reasonably smoothly. In other words, these are the cases that *should* take longer. For particularly complex cases, the circumstance resulting in the delay is not unforeseen, but it is unavoidable since it is intrinsic to the case. There will, of course, be particularly complex cases that are impacted by COVID-19, but the category itself is not applicable to COVID delay: COVID-19 does not render cases more complex in substantive or evidentiary terms.

The "discrete events" category is more germane; but ultimately, it too is not readily applicable to COVID delay. Discrete events that have been recognized to date are one-off occurrences that stymy the progress of a specific case, and which are unforeseen and/or unavoidable. Examples include: late-breaking disclosure;[48] an unavoidable change of defence

---

[47] *Jordan*, *supra* note 2 at para 71.
[48] *R v Live Nation Canada Inc*, 2017 ONCJ 590 [*Live Nation*].

counsel; [49] a mistrial resulting from the elevation of the trial judge to a higher court; [50] a medical issue necessitating rescheduling;[51] an administrative error to do with a transcript request unrelated to the Crown; [52] a complainant's failure to appear; [53] and an unplanned power outage.[54] In each of these scenarios, the delay resulted from an isolated event, not a systemic one.[55] Indeed, these "discrete events" can be referred to with great precision as "discrete *case-specific* events"; *i.e.*, discrete events that occurred in the context of a particular case (or perhaps a very small subset of cases—picture, for example, a blackout that delays a number of cases in a single courthouse on a given day). They can be contrasted with "discrete *systemwide* events"; *i.e.*, extrinsic events that are systemwide in their scope and impact, such as COVID-19. Discrete systemwide events have not been taken up by the section 11(b) jurisprudence to date, and they present a special challenge. This is so because, while discrete systemwide events satisfy the first prong of the exceptional circumstances analysis, they pose a unique problem when it comes to applying the second prong.

2. The Second Prong: Reasonable Steps Taken to Avoid the Delay

To make the point concrete, consider the kinds of responses various criminal justice actors are taking, or could be taking, to reduce COVID delay. The most important strategy available to Crowns is robust charge screening. The conscientious, coordinated use of prosecutorial discretion to dispense with low-priority cases is a key strategy for reducing wait

---

[49] *R v Jackson*, 2017 ONSC 5925 [*Jackson*]. In some situations, delay arising out of a change of counsel may be deducted as "defence delay." See *Jordan*, *supra* note 2 at para 193.
[50] *Live Nation*, *supra* note 48.
[51] *R v Côté*, 2019 ONCJ 87; *Jackson*, *supra* note 49.
[52] *R v KJM*, *supra* note 42.
[53] *R v Francis*, 2019 ONCJ 173.
[54] *R v Herman*, 2019 SKPC 31.
[55] The category has also been applied to a delay caused by the accused's extradition to Canada. See *Jordan*, *supra* note 2 at paras 72, 81. Here, courts distinguish delay resulting from the Crown's failure to act expeditiously (which is not justified); delay resulting from the accused's attempts to avoid extradition (which constitutes defence delay); and delay genuinely required to achieve extradition (which is the only type counted as a discrete event). See *R v Prince*, 2018 ONSC 3033 at para 34. Inasmuch as delay associated with extradition proceedings flows directly from the nature of those proceedings, it is arguably more akin to "particularly complex cases" than to "discrete events" (*ibid* at para 15, citing *R v Coulter*, 2016 ONCA 704). It is nevertheless treated as a discrete event, presumably because it is plainly time-limited and easily measured, which means it is best accounted for through the quantitative analysis associated with the discrete events category, as opposed to the qualitative analysis used for particularly complex cases. Delay resulting from COVID-19 may likewise be quantifiable and time-limited. But, unlike delay associated with extradition, it does not flow directly and inevitably from the nature of the proceedings themselves; it is an extrinsic problem, to be reasonably managed.

times: By vigorously screening cases and dismissing minor and/or dubious charges outright, Crown attorneys can conserve limited time and resources for higher-priority cases.[56] For the balance of cases, Crowns can prefer diversion whenever possible; and they can encourage swift resolution where appropriate by staking out fair and transparent settlement positions, and by accepting defence-favourable positions whenever it is reasonable for them to do so.[57] Collaborative resolution discussions undertaken in a spirit of fairness, together with careful charge-screening, can do much to reduce delay. This is true in general, but it is particularly salient in the current context, when trial delay is an especially grave concern.

Turning to the justice system more broadly, delay can be reduced by creative, proactive investment in new technologies and procedures designed to enable remote case management, disclosure, and appearances. In a recent series of interviews, *Canadian Lawyer* magazine canvassed the chief justices of several trial courts to learn about local responses to COVID-19. Their comments are illustrative. Chief Judge Melissa Gillespie of the Provincial Court of British Columbia reported that her court used virtual conferencing technology to conduct pre-trial conferences for all matters that were set for trial in March to June 2020. She identified further initiatives that would be helpful if implemented, including e-filing, systems to facilitate the filing of exhibits and other documents during virtual hearings, greater access to technology for members of the public, and legislative revisions to reduce in-person requirements.[58]

Chief Judge Terrence Matchett of the Provincial Court of Alberta described a pilot project whereby various types of court appearances are conducted remotely through videoconferencing. He reported that his court has held a few criminal trials in this manner, and that it was moving towards hearing out-of-custody guilty pleas by videoconference or telephone. He identified the need for greater investment in technology as the court's biggest challenge,

---

[56] See *e.g.* Olivia Stefanovich, "Chief Justice Wagner denies crossing a line by suggesting Criminal Code changes," *CBC News* (18 June 2020), online: <www.cbc.ca/news/politics/stefanovich-criminal-defence-lawyers-concerns-post-pandemic-1.5615924> [perma.cc/JLU4-7PXX]. Stefanovich quotes Toronto-based criminal defence lawyer Adam Boni, stating: "The Crown attorney has tremendous power to relieve backlogs through judicious, reasonable, vigorous use of discretion" (*ibid*).

[57] It is essential that Crown attorneys engaged in settlement negotiations prioritize fairness over efficiency. They must be alive to the risk of coerced guilty pleas, particularly given that some accused may be tempted to plead guilty to avoid ongoing trial delay. See *R v Myers*, 2019 SCC 18 at para 22.

[58] Elizabeth Raymer, "B.C. Provincial Court's pre-trial conferences have resolved multiple matters before trial," *Canadian Lawyer* (16 June 2020), online: <www.canadianlawyermag.com/news/general/b.c.-provincial-courts-pre-trial-conferences-have-resolved-multiple-matters-before-trial/330581> [perma.cc/XVF6-PX53].

citing a need for more hardware, IT support, and Wi-Fi access.[59] Similarly, Chief Justice Jacques Fournier of the Superior Court of Québec described a rollout of virtual courtrooms in that province. He observed that the expansion of videoconferencing has taken time, and that the expanded use of efficiency-promoting technologies "should have been done before" the pandemic. He commented, further, on the need for lawyers to work together to resolve as many cases as possible.[60]

Recently, the Chief Justice of Canada (acting in his capacity as co-chair of the Action Committee on Court Operations in Response to COVID-19 alongside Justice Minister David Lametti) reported that that committee is considering various strategies as it works to develop national guidelines to promote safety and efficiency as courts reopen. Strategies reportedly under consideration include *Criminal Code* amendment to facilitate the adducing of evidence through video conferencing, and to allow judges to hear cases in different regional jurisdictions, among others.[61]

We can imagine other potential responses. It is foreseeable that some trials will be delayed when participants fail COVID-19 screenings and cannot enter courtrooms.[62] Under normal circumstances, a participant's illness is treated as a discrete event; but there is a marked difference between delay in a given case caused by an ordinary but unanticipated illness, and delay caused by a screening procedure that is adopted by the court and will foreseeably lead, on a regular basis, to some participants being denied entry to the courthouse—albeit for compelling public health reasons. It is likewise foreseeable that some trials may be delayed due to participants' pressing caregiving responsibilities. In both instances, justice system actors should

---

[59] Elizabeth Raymer, "Alberta's provincial court is planning expanded WebEx remote capability in most locations," *Canadian Lawyer* (5 June 2020), online: <www.canadianlawyermag.com/practice-areas/litigation/albertas-provincial-court-is-planning-expanded-webex-remote-capability-in-most-locations/330299> [perma.cc/TL8F-YRBQ].

[60] Raymer, "Quebec" *supra* note 23.

[61] Olivia Stefanovich, "Supreme Court chief justice suggests Criminal Code changes to cut into court backlogs," *CBC News* (13 June 2020), online: <www.cbc.ca/news/politics/stefanovich-chief-justice-reopening-proposals-1.5604773> [perma.cc/ST9A-MLXC]. See also "Terms of Reference, Action Committee on Court Operations in Response to COVID-19" (22 May 2020), online: *Department of Justice Canada* <www.justice.gc.ca/eng/csj-sjc/ccs-ajc/ac-ca/term.html> [perma.cc/4XT3-BF5U]; Department of Justice Canada, News Release, "Chief Justice of Canada and Minister of Justice Launch Action Committee on Court Operations in Response to COVID-19" (8 May 2020), online: *Government of Canada* <www.canada.ca/en/department-justice/news/2020/05/chief-justice-of-canada-and-minister-of-justice-launch-action-committee-on-court-operations-in-response-to-covid-19.html> [perma.cc/CVZ5-4VJX]. As of this writing, the recommendations have not been made public.

[62] See *supra* note 33.

be expected to foresee these delays and proactively address them. One approach may be for courts to facilitate last-minute virtual appearances when individuals are well enough to participate but cannot attend in-person. This method could be utilized on a consent basis, to account for the fact that some parties may reasonably prefer to accept delay rather than proceeding remotely. In addition to enabling participation from people who fail COVID-19 screenings, virtual hearings might be more manageable for some participants who are balancing caregiving responsibilities, particularly if those hearings are conducted with due flexibility and understanding—though for many, of course, more meaningful caregiving support is desperately needed.[63] The bottom-line is that a lot of the delay associated with COVID-19 is systemic in nature, even if it resembles case-specific delay: it is foreseeable on a general level, and it can be reduced in the aggregate through reasonable, proactive institutional responses.

At the same time, some of the types of COVID delay canvassed in Part I, above, could also be addressed by case-specific Crown responses, in addition to institutional responses. Thus, for example, where a trial date needs to be rescheduled because a participant fails a COVID-19 screening, the Crown can seek the earliest possible date. The Crown's office can likewise take steps to ensure that, if an individual Crown attorney anticipates being unable to attend court regularly due to extraordinary caregiving responsibilities, other colleagues take carriage of that Crown's files. Other case-specific steps available to Crowns that could reduce COVID delay include consenting if the accused seeks to re-elect trial by judge alone, per section 472(1) of the *Criminal Code*,[64] so as to avoid the additional delay associated with jury trials in the COVID context; developing and following concrete plans to minimize delay in cases impacted by COVID; and taking a proactive, collaborative approach at pretrial conferences.

With the foregoing in mind, let us return to the second prong of the exceptional circumstances inquiry, which queries whether the Crown and the criminal justice system took reasonable steps to avoid the complained-of delay. As we have just seen, some of the steps that

---

[63] Welcoming participants to the first virtual Supreme Court of Canada hearing, Chief Justice Wagner said, in part: "There will be hiccups and maybe even unexpected visits by children and pets. This is OK. There are things that are beyond our control." See Adrian Humphreys, "'Nothing is perfect the first time': Supreme Court's first hearing on Zoom a success despite glitches," *National Post* (9 June 2020), online: <nationalpost.com/news/supreme-courts-first-hearing-by-zoom-video-hits-early-glitch-after-deeply-human-opening-address-by-chief-justice> [perma.cc/RFD7-DC2U].

[64] *Criminal Code*, *supra* note 7.

may be helpful are case-specific and can therefore be assessed through the usual *Jordan* analysis. But, many of the steps available to Crowns and to other criminal justice system actors to reduce COVID delay are systemic in nature. Some of these are more ambitious, such as *Criminal Code* amendments. Others are more immediately attainable, like the implementation of more selective charge screening criteria. Some steps have already been taken, but with room for expansion. Many were urged years ago, including by the *Jordan* Court itself. Indeed, a Senate Committee Report published in 2017, which has been cited by the Supreme Court of Canada's section 11(b) jurisprudence, ventured multiple suggestions, many of which are now being repeated in the COVID context.[65] Among them: comprehensive *Criminal Code* review; improving case management; facilitating guilty pleas through fair practices, including the provision of transparent information about the Crown's sentencing position; standardizing e-disclosure; and expanding the use of technology.

In light of the foregoing, it would not be plausible for a Crown to assert, in any individual case, that COVID delay could not have been mitigated by reasonable steps. Put somewhat differently, it is far from self-evident that the second prong of the exceptional circumstances analysis will be satisfied in any given case, and hence it requires a focused assessment. The trouble is that the systemic steps that could reasonably limit COVID delay would be difficult, if not impossible, for trial judges to critically assess. This is so for myriad reasons, including the unavailability of data; the elusiveness of workable standards against which to measure institutional responses; the need to keep section 11(b) procedures relatively streamlined; and the separation of powers, which imposes limitations on the judicial scrutiny of legislative and executive decision making. It is one thing, for example, to assess "whether the Crown, having initiated what could reasonably be expected to be a complex prosecution, developed and followed a concrete plan to minimize the delay occasioned by such complexity" as mandated by *Jordan*;[66] but it is quite another to evaluate whether the Crown was guided by an appropriate charge-screening policy. Even if Crowns were willing and able to put officewide policies on the

---

[65] Canada, *Delaying Justice is Denying Justice: An Urgent Need to Address Lengthy Court Delays in Canada* (Ottawa: Standing Senate Committee on Legal and Constitutional Affairs, 2017), online (pdf): < sencanada.ca/content/sen/committee/421/LCJC/reports/Court_Delays_Final_Report_e.pdf> [perma.cc/YC2N-N9US] [Canada, *Delaying Justice is Denying Justice*]. The report was cited in *R v KGK*, *supra* note 36; *R v KJM*, *supra* note 42.

[66] *Jordan*, *supra* note 2 at para 79.

record—which is by no means a given—courts would not be able to evaluate their sufficiency without identifying appropriate standards and comparators, and without trenching on the prosecutorial discretion.[67] Further, any attempt to engage in this sort of analysis would complicate and extend section 11(b) proceedings at a time when it is particularly vital that those proceedings be conducted efficiently. In mid-August, the Ontario Superior Court of Justice amended its Provincial Practice Direction to, among other things, streamline section 11(b) applications, including by putting presumptive caps on the court time that can be dedicated to them.[68] In this practice context, any variations to the section 11(b) standard that would significantly increase its complexity are untenable.

C. Contrasting the Transitional Exceptional Circumstance with the COVID Context

To be sure, generalized policies and practices impact the timelines of *all* criminal trials, not just those affected by COVID-19. Yet, when applying the *Jordan* framework in the ordinary course, judges need not consider general policies. The analysis works, not because the framework disregards systemic conduct, but because it assesses that conduct indirectly, through the presumptive ceilings. The *Jordan* majority expressly intended the ceilings to motivate institutional reform: "A presumptive ceiling is required in order to give meaningful direction to the state on its constitutional obligations and to those who play an important role in ensuring that the trial concludes within a reasonable time … ."[69] The ceiling both spurs and guides criminal justice actors, serving as a metric by which their efforts can be evaluated. If a trial takes longer than eighteen or thirty months, as the case may be, and if the above-ceiling delay is not attributed to the defence and/or exceptional circumstances, then by process of elimination, it must be due to unreasonable Crown conduct, systemic delay, or both. As such, it cannot be justified. Thus, the

---

[67] The Court has made clear that trial judges should not interpolate themselves in exercises of prosecutorial discretion when applying section 11(b); but, "[w]hile the court plays no supervisory role for such decisions, Crown counsel must be alive to the fact that any delay resulting from their prosecutorial discretion must conform to the accused's s. 11(b) right" (*Jordan*, *supra* note 2 at para 79). See also *Thanabalasingham*, *supra* note 46 at para 5. Exercises of prosecutorial discretion are subject to very minimal judicial scrutiny, in light of concerns about the separation of powers. See *e.g. R v Anderson*, 2014 SCC 41.

[68] Ontario Superior Court of Justice, "Provincial Practice Direction/Amendment to the Criminal Proceedings Rules Regarding Criminal Proceedings" (12 August 2020), online: *Ontario Courts* <www.ontariocourts.ca/scj/practice/practice-directions/criminal#Part_II_s_11b_8211_Appearances_on_Indictments> [perma.cc/HB2H-WAXX].

[69] *Jordan*, *supra* note 2 at para 50.

Jordan framework does account for systemic efforts to promote trial efficiency, but it does not require judges to evaluate institutional policies and practices.

In the COVID context, the ceilings cannot serve as an indirect means of assessing systemic efforts to manage trial delay. This is so because, by their very nature, discrete systemwide events like COVID-19 upend the system, such that whatever policies and practices were in place to manage systemic delay prior to the discrete systemwide event are rendered inadequate or inapposite. Discrete systemwide events necessitate new, different approaches to managing systemic delay, which take time to implement.

When the *Jordan* majority established the ceilings, it did not expect criminal justice actors to get systemic delay in check instantly. It established the "transitional exceptional circumstance" so that cases already in the system when *Jordan* was decided would be assessed "contextually" in light of the pre-*Jordan* case law that guided the parties at the operative time, and with some forbearance for the systemic delay issues that characterized the pre-*Jordan* era. In effect, criminal justice actors were granted a time-limited period to improve institutional delay. Following the logic of the transitional exception, one could suggest that courts should recognize a new, higher ceiling to account for COVID delay that would apply temporarily and would account for the time required to implement institutional responses to COVID-19. There are, however, at least three problems with this suggestion. First, the Court has indicated a reticence to complicate the *Jordan* framework by introducing multiple ceilings.[70] Second, whereas the transitional exceptional circumstance was confined to a limited time period that was both unambiguous and non-arbitrary, it is not obvious how we could sensibly delineate a temporary exception for COVID-19: At what point do we expect institutional actors to have re-established equilibrium, particularly since the pandemic may ebb and flow in the foreseeable future? Third, the parties' conduct between the time when COVID delay became an issue, and the time the new ceiling would be announced, would have to be evaluated with reference to a retroactive standard. The transitional exception worked because the parties' conduct during the period to which it applied could be evaluated according to the standards that governed at that time. There is no analogous set of shared expectations that has been guiding criminal justice actors in the first months of the pandemic. The transitional exception is of modest assistance, since it provides

---

[70] *R v KJM*, *supra* note 42.

some authority for the proposition that as time passes, we can expect more effective institutional responses. Beyond that, it is of little help for present purposes.

At the end of the day, the *Jordan* framework assumes systemic efforts to reduce delay will be accounted for by the section 11(b) analysis, but it does not make space for such an assessment in the context of a discrete systemwide event like COVID-19. As a result, we are caught between two untenable positions: require Crowns to fully satisfy both prongs of the exceptional circumstances analysis, including by showing that reasonable efforts were made on a systemic level to reduce COVID delay, despite the fact that courts cannot realistically be expected to adjudicate this issue; or, effectively declaw the second prong of the analysis, even though doing so would informally relieve the Crown of much of its burden while allowing some accused persons to suffer avoidable, unreasonably protracted trial delay with no remedy. Neither position is acceptable. We need to navigate between them by developing a novel approach.

III. Responding to COVID Delay with Sentencing Reductions

The first step of developing a novel approach is identifying those cases to which it would apply. In below-ceiling cases marked by COVID delay, the standards are unchanged, since the exceptional circumstances analysis is not implicated.[71] For above-ceiling cases, we should begin, as usual, by calculating the total period of delay, excluding any defence delay. We should then subtract any delay that is attributable to exceptional circumstances *and is not COVID-19-related*; any COVID delay that occurred may or may not need to be specifically addressed, depending on

---

[71] COVID delay could potentially inform the below-ceiling analysis, but its role in that analysis is far less obvious than in the above-ceiling cases. The assessment for below-ceiling delay is somewhat more elastic and takes into account Crown conduct, among other factors, to decide whether the case took "markedly longer than it reasonably should have" (*Jordan*, *supra* note 2 at para 48). The defence bears the onus, and it must also show that it took "meaningful steps that demonstrate a sustained effort to expedite the proceedings" (*ibid*). In the COVID context, the defence could perhaps argue that the case took markedly longer than it should have due to institutional and individual failures to respond to COVID delay, but this argument would likely be a difficult one to mount, given the Court's admonishment that "stays beneath the ceiling [are expected] to be rare, and limited to clear cases" (*ibid*). The defence could also argue that the acute prejudice suffered by those jailed during the pandemic should be expressly accounted for in the below-ceiling analysis. This argument could be advanced on the basis of the Court's holding in *R v KJM* that "[i]n youth cases, the enhanced need for timeliness in youth matters should be included as another factor to be considered in determining the reasonable time requirements of a particular case" (*supra* note 42 at para 71). Arguably, like youth, accused persons held on remand during the pandemic are a readily identified group for whom trial delay is (or should be) recognized as especially prejudicial. See text accompanying notes 100-02.

how the rest of the analysis plays out, and so there is no need to take it up just yet. If the remaining total period of delay is below the ceiling, then the delay is presumptively reasonable, irrespective of how the COVID delay is treated; hence, the standards for below-ceiling delay can apply as usual, and there is no need to address whether the COVID delay ought to be deducted as an exceptional circumstance. If the remaining total period of delay is above the ceiling, then the next question is whether it would still be above the ceiling were the COVID delay subtracted as an exceptional circumstance. If the answer is yes, then once again, the COVID delay is not determinative: The total period of delay is presumptively unreasonable in any event, and since it cannot be justified using the exceptional circumstances analysis no matter how the COVID delay is treated, a stay should follow. If the answer is no, then the COVID delay may be determinative, and its status must be specifically addressed.

In cases where the COVID delay is determinative, the defence should be allowed to take the position that, even if the COVID delay were discounted entirely, such that the total period of delay would fall below the ceiling, that delay would *still* be unreasonable under the usual *Jordan* standard. If the defence can demonstrate that a section 11(b) violation occurred, irrespective of the COVID delay, then a stay is warranted. Where the defence does not take this position, it will be necessary to confront the COVID delay directly. At this juncture, it is appropriate to first consider whether the Crown took, or ought to have taken, reasonably available case-specific steps to manage COVID delay, examples of which were canvassed in Part II(B)(2), above. To the extent that the Crown failed to take reasonably available case-specific steps, the resultant delay cannot satisfy the exceptional circumstances test, and so it should attract a stay. This result follows from the standard *Jordan* framework and does not turn on how we address the problem of accounting for systemwide responses to COVID delay.

Once these analytic steps have been exhausted, we are left with those cases in which the COVID delay is determinative and could not reasonably have been avoided by case-specific steps. For these residual cases, the problem of accounting for systemwide responses to COVID delay cannot be avoided: The section 11(b) analysis should turn on the question of whether the delay would have breached the ceiling had the Crown and the criminal justice system taken reasonably available steps, on a systemwide level, to reduce trial delay. As we have seen, however, that question is resistant to analysis under the *Jordan* framework.

One could take the position that, in these cases, the section 11(b) challenge should succeed: The Crown cannot discharge its burden, and so the presumption of unreasonableness prevails. The problem is that, if this position were adopted, it could result in large numbers of charges being stayed because of the pandemic. The *Jordan* Court made it very clear that the system cannot countenance staying massive numbers of cases because of delay, and that this result would damage the repute of the administration of justice.[72] Justice Minister Lametti recently announced that Parliament would consider intervening to prevent it from occurring.[73] As such, an argument for staying cases whenever COVID delay is determinative departs from some of the commitments that animate *Jordan*, and in any event, it would almost certainly be rejected in practice. I have argued that the opposite extreme—simply eschewing a meaningful assessment and thereby denying section 11(b) claims when COVID delay is determinative—must likewise be rejected as both unjust and inconsistent with *Jordan*. That approach makes the accused whose *Charter* right is at issue bear the cost of the *Charter* framework's deficiency. In sum, then, insisting on a stay where the Crown cannot practicably discharge its burden is at best unrealistic, while denying a remedy when the Crown has not actually discharged its burden is unjust. What, then, is the solution?

We can avoid the two extremes by granting an alternative remedy, namely a sentencing reduction, in cases where COVID delay is determinative. Admittedly, this solution is imperfect. A sentencing reduction does nothing for accused persons who are acquitted after lengthy delays. It may be of limited value in cases involving mandatory minimum sentences. It arguably reduces the value of the accused's section 11(b) right. Yet, it achieves a more nuanced result than the alternatives, and it does so while remaining relatively straightforward to apply—an important consideration, given the ambitions of the *Jordan* Court to streamline the section 11(b) standard, and the particular need to avoid lengthy section 11(b) proceedings at a time when courts will predictably be overwhelmed.

Two doctrinal paths lead to this pragmatic solution. One cuts through the section 11(b) jurisprudence to establish sentencing reductions as a remedy for unreasonable trial delay

---

[72] *Jordan*, *supra* note 2 at para 94.
[73] Olivia Stefanovich, "Justice minister says he's ready to legislate if pandemic delays lead to charges being tossed," *CBC News* (15 July 2020), online: <www.cbc.ca/news/politics/stefanovich-jordan-decision-covid19-cases-delay-1.5638893> [perma.cc/T3BL-H9NQ].

authorized by section 24(1) of the *Charter*. The other takes a detour around the section 11(b) jurisprudence by making COVID delay a mitigating factor under the sentencing analysis mandated by the *Criminal Code*.[74] I will map both paths in turn.

A. Sentencing Reductions Under the *Charter*

The governing section 11(b) case law identifies a stay of proceedings as the only available remedy for unconstitutional trial delay. This is so despite the flexibility suggested by section 24(1) of the *Charter*, which authorizes remedies for *Charter* violations.[75] The holding that all section 11(b) violations automatically require a stay of proceedings was arrived at in 1987 in *R v Rahey*,[76] which reversed the Court's decision in *R v Mills*, issued the previous year.[77] *Rahey* was decided by a bench of eight justices, six of whom concurred that a stay is the only suitable remedy because, in effect, once an accused has been subjected to unreasonable trial delay, anything short of staying the proceedings will exacerbate the *Charter* violation. Four of the justices also stated that a stay of proceedings must follow because, when a section 11(b) breach occurs, the court loses its jurisdiction to proceed[78]—though this analysis did not ultimately gain much traction.[79]

The decision in *Rahey* to limit the section 11(b) remedy has long been controversial,[80] and the Court has signaled a willingness to reconsider it.[81] Christopher Sherrin has persuasively argued that *Rahey*'s core rationale—that continuing the trial will exacerbate the violation—has "superficial appeal but ultimately collapses on closer scrutiny. It incorrectly assumes that the

---

[74] *Criminal Code*, *supra* note 7, ss 718-718.2.
[75] See *Charter*, *supra* note 1, s 24(1). Section 24(1) states: "(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances" (*ibid*).
[76] *Rahey*, *supra* note 35.
[77] *R v Mills*, [1986] 1 SCR 863 at 965-66.
[78] *Ibid* at 889, Dickson CJ, Lamer J (Justice Estey and Justice Wilson concurring on this point).
[79] Christopher Sherrin, "Reconsidering the *Charter* Remedy for Unreasonable Delay in Criminal Cases" (2016) 20 CCLR 263 at 271 ("The claim did not truly amount to an additional justification for the chosen remedy of a stay. It was really nothing more than an assertion made in the course of articulating the argument [that a lesser remedy would exacerbate the *Charter* breach]. The claim also never attracted support from a majority of the Court," *ibid*, n 52) [Sherrin, "Unreasonable Delay"]. See also Andrew Pilla & Levi Vandersteen, "Re-Charting the Remedial Course for Section 11(b) Violations Post-Jordan" (2020) 56 Osgoode Hall LJ 436 at 450-51. But see *R v Hartling*, 2020 ONCA 243 at para 112 [*Hartling*].
[80] Sherrin, "Unreasonable Delay," *supra* note 79.
[81] *Jordan*, *supra* note 2 ("We were not invited to revisit the question of remedy. Accordingly, we refrain from doing so" at para 35, n 1).

problem is delay in and of itself, when the problem is actually the effects of delay on constitutionally protected interests."[82] Sherrin points out that if another remedy were adequate to address the harms associated with trial delay—namely, prejudice to liberty, security of the person, and/or trial fairness—then that other remedy would suffice. Other scholars agree that *Rahey* should be overturned, citing theoretical and pragmatic reasons, including a concern that the extreme remedy makes courts less likely to find a violation.[83] The aforementioned Senate Committee Report likewise recommended expanding the remedies for unreasonable trial delay.[84]

Others have argued for the status quo.[85] The Criminal Lawyers' Association (CLA) recently defended *Rahey* in an intervenor brief before the Court.[86] It made three points of note. First, it argued that the threat of a stay motivates criminal justice actors to promote trial efficiency. Second, it urged that introducing more remedies would "create precisely the litigation uncertainty that *Jordan* was trying to eliminate" while reintroducing the focus on individual prejudice that was disavowed in *Jordan*. Finally, it argued that the rest of the section 11(b) caselaw—which is "parsimonious in defining the contours of what constitutes a breach"—has been calibrated to the current remedy.[87]

For present purposes, I do not take a position on whether the section 11(b) remedy should be revised in general; my concern is limited to whether and how a lesser remedy could be applied in cases involving COVID delay. I agree with Sherrin that it is not intrinsically unjust or illogical to grant a lesser remedy for section 11(b), since the harm to be redressed is not the delay per se, but the prejudice irrebuttably associated with that delay. I recognize, however, that one could subscribe to this view while also accepting the CLA's arguments for limiting the section 11(b) remedy, at least so long as the *Jordan* framework governs. If one accepts, as I do, that

---

[82] Sherrin, "Unreasonable Delay," *supra* note 79 at 264.
[83] See Pilla & Vandersteen, *supra* note 79; Honourable Marc Rosenberg, "Twenty-Five Years Later: The Impact of the *Canadian Charter of Rights and Freedoms* on the Criminal Law" (2009) 45 SCLR (2d) 233; Colin Wood, "The Inflexible Stay of Proceedings: Alternative Remedies for *Charter* for Section 11(b) Breaches" (2016) 2 Windsor Rev Legal Soc Issues 80; Daved Muttart, "Section 11(b): A Case of the Trees Blocking LaForest" (2017) 64 Crim LQ 173; Kent Roach, *Constitutional Remedies in Canada*, 2nd ed (Thomsen Reuters, 2019) at 9.1050-9.1170; Justice Chris de Sa, "Understanding *R v Jordan*: A New Era for Section 11(b)" (2018) 66 Crim LQ 93.
[84] Canada, *Delaying Justice Is Denying Justice*, supra note 65 at 36-40.
[85] See *e.g.* Keara Lundrigan, "*R v Jordan*: A Ticking Time Bomb" (2018) 41 Man LJ 113.
[86] *KGK v Her Majesty the Queen*, 2020 SCC 7 (Factum of the Intervener, Criminal Lawyers' Association Ontario), online (pdf): <www.scc-csc.ca/WebDocuments-DocumentsWeb/38532/FM060_Intervener_Criminal-Lawyers'-Association-(Ontario).pdf> [perma.cc/DC69-996G] [CLA Factum] (The section 11(b) remedy was raised for the first time by the respondent on final appeal and was not taken up by the Court).
[87] *Ibid* at paras 19-21. The CLA also endorsed the rationale in *Rahey*. CLA Factum, *supra* note 86 at para 19.

there is no intrinsic problem with establishing sentencing reductions as a remedy for trial delay, then one could take the position that sentencing reductions are an appropriate section 11(b) remedy for cases where COVID delay is determinative.[88] This position would not be incompatible with the belief that, in all other cases where a more refined application of the *Jordan* framework is possible, the only available remedy should be a stay. Ultimately, the difficulty with the argument is that, while it finds some indirect support in recent Court of Appeal for Ontario jurisprudence, it is hard to square with *Rahey*.

In *R v Charley* and *R v Hartling*, the Court of Appeal for Ontario considered the appropriate remedy for unreasonable delay occurring at the sentencing phase.[89] The court did not find itself to be bound by *Rahey*, since a conviction is not tainted by a section 11(b) *Charter* breach occurring at the post-verdict stage, and so it is not necessary to stay that conviction.[90] In *Charley*, the court left the matter of remedy unsettled, having found no section 11(b) violation. In *Hartling*, it ultimately determined that staying a conviction because the sentencing process took too long "would bring the administration of justice into disrepute," yet a remedy was warranted, since the delay prejudiced the accused and undermined broader social interests. It concluded the delay should be addressed at sentencing and "should result in enhanced mitigation."[91]

Drawing on this analysis, one could argue that cases involving COVID delay require a similar balancing: On the one hand, it would bring the administration of justice into disrepute to stay those cases across the board, particularly if there were no meaningful opportunity for the Crown to show that the delay was justified; but on the other hand, COVID delay causes real harm that warrants a remedy. To be sure, the doctrinal analysis in *Charley* and *Hartling* does not apply directly to current circumstances, since that analysis hinged on the distinction between pre- and post-verdict delay, whereas the COVID delay cases will mostly be cases involving pre-verdict trial delay. The broader theme of *Charley* and *Hartling*, however, is that a principled

---

[88] There is no reason in principle why, if a section 11(b) violation at the trial phase could be remedied by a sentencing reduction, it could not also be remedied in other ways. Indeed, Sherrin has proposed a variety of remedies tailored to the particular harms to be addressed. Sherrin, "Unreasonable Delay," *supra* note 79. This more nuanced approach is, of course, more consistent with the critique of *Rahey*, which seeks to shift our focus on the discrete harms associated with trial delay. For present purposes, I have nevertheless embraced a blunter analysis, which is simpler to apply—an important consideration at a time when courts will be especially inundated.

[89] *R v Charley*, 2019 ONCA 726 [*Charley*]; *Hartling*, *supra* note 79.

[90] *Hartling*, *supra* note 79 at para 113; *Charley*, *supra* note 89 at paras 107-09. *Cf R v Croteau*, 2020 ONCJ 55.

[91] *Hartling*, *supra* note 79 at para 119.

analysis is required in cases where issuing a stay is untenable but declining to find a section 11(b) violation is unjust, and that analysis can ultimately support an alternative section 11(b) *Charter* remedy. Still, while this analysis is compelling on its own terms, as applied to the COVID context, it whistles past *Rahey.* It is therefore unlikely to be accepted unless *Rahey* is overturned or distinguished.

B. Sentencing Reductions under the *Criminal Code*

If sentencing reductions cannot be achieved through the *Charter*, they can nevertheless be afforded through the usual sentencing process, per the Court's unanimous reasons in *Nasogaluak*.[92] In that case, the Court recognized that extended trial delay can justify a lower sentence, whether or not it rises to the level of a *Charter* breach: [93]

> [T]he sentencing regime provides some scope for sentencing judges to consider not only the actions of the offender, but also those of state actors. Where the state misconduct in question relates to the circumstances of the offence or the offender, the sentencing judge may properly take the relevant facts into account in crafting a fit sentence, without having to resort to s. 24(1) of the *Charter*.

More particularly, state misconduct can factor into sentencing via the proportionality analysis mandated by section 718.1 of the *Criminal Code*. A proportionate sentence "expresses, to some extent, society's legitimate shared values and concerns"—including the values enshrined in the *Charter*.[94] If impugned state conduct relates to the offender and to the circumstances of the offence, then accounting for it at sentencing gives expression to *Charter* values and thereby advances the sentencing principle of proportionality.

The Court affirmed that "a sentence can be reduced in light of state misconduct even when the incidents complained of do not rise to the level of a *Charter* breach," and it cited several examples, including cases in which excessive trial delay falling below the section 11(b) threshold was treated as a mitigating factor.[95] In one of those cases, *R v Bosley*, Justice Doherty observed that "excessive delay which causes prolonged uncertainty for the appellant but does not

---

[92] *Nasogaluak*, *supra* note 7 at para 3.
[93] *Ibid* at para 2.
[94] *Ibid* at para 49.
[95] *Ibid* at para 53, citing *R v Bosley*, [1992] 18 CR (4th) 347 (Ont CA) [*Bosley*], *R v Leaver* (1996), 3 CR (5th) 138 (Ont CA) [*Leaver*], and *R v Panousis*, 2002 ABQB 1109 (reversed by 2004 ABCA 211).

reach constitutional limits can be taken into consideration as a factor in mitigation of sentence."[96] COVID delay will, in many cases, cause "prolonged uncertainty" and other manifest harms to the accused. Indeed, where the total period of delay surpasses the *Jordan* ceiling, harm can be presumed. Further, there is no issue as to the nexus between any state misconduct giving rise to extended delay and the circumstances of the offender. The less obvious point, for present purposes, is that COVID delay can be attributed to "state misconduct."

The term "misconduct" can suggest abuse or impropriety by one or more individual state actors, as was the case in *Nasogaluak* itself, where the accused was injured by excessive police force and then left without medical treatment. It can also apply to more impersonal, less dramatic encroachments on *Charter*-protected interests, however. The excessive delay cases cited by the *Nasogaluak* Court prove the point. In *Bosley*, for example, the excessive delay at issue was mostly characterized as "institutional delay" and mainly stemmed from the trial judge's inability to take sufficient time away from his other institutional duties to craft his reasons.[97] In another cited case, *R v Leaver*, the unacceptable delay was attributed to "unsatisfactory" court scheduling practices.[98] Thus, COVID delay could entitle an accused to a sentencing remedy under *Nasogaluak* to the extent that it reflects systemic delay. COVID delay does indeed reflect systemic delay. If nothing else, many of the strategies that could have meaningfully reduced COVID delay from the outset, such as greater technological investment, were touted long before the pandemic. They were pushed by various stakeholders and commentators, including the Senate Committee and the *Jordan* Court itself. In this light, it is not a stretch to say that, even if the failure to implement those strategies is not enough to ground a section 11(b) violation, it is sufficient to justify treating COVID delay as a mitigating factor at sentencing under *Nasogaluak*.

Quite apart from the fact that COVID delay can plausibly be attributed to "misconduct," the broader principle expressed in *Nasogaluak* is instructive. *Nasogaluak* recognizes that a proportionate sentence is one that balances and expresses the different values that animate our criminal justice system, and which relate to the experience of the individual offender. When crafting a proportionate sentence, judges are expected to account for the different ways in which the criminal justice process has subjected the accused to harshness and deprivation, in order to

---

[96] *Supra* note 95.
[97] *Ibid.*
[98] *Leaver*, *supra* note 95 at para 2.

ensure that the sum total of the accused's experience culminating in the actual sentence will not be disproportionately harsh. The sentencing assessment therefore accounts for such things as the hardship of pretrial detention, and the harms occasioned by collateral consequences arising out of the offence or the prosecution.[99] Even if COVID delay is not attributed to misconduct, it is nevertheless a hardship that relates directly to the offender's *Charter*-protected rights. It should be considered as a mitigating factor at sentencing.

C. Calculating the Sentencing Reduction

If a sentencing reduction is to apply—either as a remedy for a section 11(b) violation, or because COVID delay is a mitigating factor at sentencing—then it will of course be necessary to calculate that reduction. It is not possible to offer a general formula: "As with mitigating circumstances generally, there can be no automatic or formulaic calculation of the reduction in sentence. … The jurisprudence will—as always—develop with each case determined on its own particular facts, considering the offence, the offender, the length of the delay, the circumstances of the delay and any other relevant factors."[100] There are, however, a few general considerations that may be of assistance, beyond the basic principle that the specific circumstances of the case must of course inform how COVID delay should be weighted within the proportionality analysis.

First, as we have seen, the transitional exception suggests that, once the criminal justice system is on notice that institutional responses to trial delay are required, we can expect those responses to improve over time. By the same token, as more time passes, inadequate systemic responses are more deserving of censure. To the extent that the purpose of the sentencing reduction is to affirm *Charter* values, it therefore makes sense to afford a more generous reduction the further we get from March 2020, when the criminal justice system became fully aware of the need to manage COVID delay.

Second, since the sentencing reduction is meant to redress harms to the accused, it should also be informed by a high-level assessment of the harms that a particular accused experienced. The heightened prejudice associated with pretrial detention is especially relevant. It has long been understood that pretrial detention is prejudicial, but this is especially so in the current context. COVID-19 can spread rapidly in jails, where conditions make social distancing and

---

[99] *R v Safarzadeh-Markhali*, 2016 SCC 14 at para 8; *R v Suter*, 2018 SCC 34.
[100] *Hartling*, *supra* note 79 at para 122.

recommended hygiene practices virtually impossible to implement.[101] Efforts to prevent its spread have resulted in further restrictions on incarcerated persons, who may be confined to their cells for longer stretches to limit exposure.[102] The result is that jails are even harsher and more dangerous than usual. In suggesting that harms occasioned by delay should be factored into the analysis—including, but not limited to, the prejudice associated with pretrial detention—I am mindful of the fact that the *Jordan* majority sought to streamline matters by eliminating the assessment of individual prejudice. *Jordan* does not, however, purport to apply to criminal sentencing. That said, the imperative of keeping processes within a manageable scope operates in both contexts. The best approach, therefore, is likely one that accounts for prejudice in a pixilated fashion by looking at general indicators like whether the accused was held in pretrial detention during the pandemic. In addition, while evidence of specific prejudice may entitle the accused to a more significant sentencing reduction, it should not be regarded as a precondition to one, since any protracted trial delay is understood to be prejudicial.

Third, COVID-19 can warrant sentencing reductions for reasons other than trial delay. Accused persons may, for example, receive enhanced pretrial credit given the particular harshness of pretrial detention during the pandemic. Likewise, there is now some precedent for imposing quantitively lower criminal sentences during the pandemic, since COVID-19 makes custodial sentences qualitatively harsher.[103] Because these various sentencing reductions address different issues, they should be counted separately and cumulatively.

A final caveat. My argument for affording a lesser remedy for COVID delay responds to the particularities of discrete systemwide events; it is not an argument for reducing section 11(b) remedies across the board. In this connection, it is important to underscore that discrete systemwide events are vanishingly rare. We could perhaps imagine a scenario in which resources were diverted away from the criminal justice system to respond to some exigency, but where the pressure on the criminal justice system results solely from that budgetary decision. In other

---

[101] See *e.g.* Simon Lewsen, "Social Distancing Is Impossible in Prisons. Why Are They Still Full?" *The Walrus* (12 May 2020), online: <thewalrus.ca/social-distancing-is-impossible-in-prisons-why-are-they-still-full> [perma.cc/D39Y-NWDK].

[102] Valérie Ouellet & Joseph Loiero, "COVID-19 taking a toll in prisons, with high infection rates, CBC News analysis shows," *CBC* News (17 June 2020), online: <www.cbc.ca/news/canada/prisons-jails-inmates-covid-19-1.5652470> [perma.cc/AQ85-QJUJ].

[103] See *e.g. R v Stevens*, 2020 BCPC 104; *R v Studd*, 2020 ONSC 2810; *R v Hearns*, 2020 ONSC 2365; *cf R v Rich*, [2020] NJ No 90 (Prov Ct).

words, we can imagine an emergency situation having an *indirect* effect on trial delay. This scenario should *not* count as a discrete systemwide event. The core message of *Jordan* is that, if we are going to prosecute people, we must invest enough to do so in a *Charter*-compliant fashion. Nothing in the present analysis would support state officials diverting resources away from the criminal justice system, even for a compelling reason, and then arguing that the resulting trial delays should attract lesser remedies as a result of that choice to deprioritize criminal court operations.

In short, adopting the proposed solution for addressing COVID delay within the *Jordan* framework would not impact the majority of section 11(b) cases. There is no logical or practical impediment to implementing it while also maintaining that any case which is not impacted by a discrete systemwide event—that is, the overwhelming majority of criminal cases—should be decided under the received *Jordan* framework, and should only be remedied by a stay of proceedings if a section 11(b) violation is established. The notion that we should adopt an alternative remedy for excessive trial delay may look like a significant departure from our existing section 11(b) standards, but my suggestion is that we apply that remedy surgically, in response to a problem that is both sui generis and acute, and in a context wherein the only realistic alternative is to provide no remedy at all. Once we accept that the *Jordan* framework cannot account for delay caused by discrete systemwide events like COVID-19, we see that varying the framework in these cases is hardly a radical step—or in any event, it is a necessary one.

IV. Conclusion

In *Discipline and Punish*, Michel Foucault considers various measures of state control introduced in response to the plague in late seventeenth-century France. He contrasts what he calls the "whole literary fiction of the festival [that] grew up around the plague: suspended laws, lifted prohibitions, the frenzy of passing time, bodies mingling together without respect" with "a political dream of the plague, which was exactly the reverse: not the collective festival, but strict divisions; not laws transgressed, but the penetration of regulation."[104] Thus, according to

---

[104] Michel Foucault, *Discipline and Punish: The Birth of the Prison*, translated by Alan Sheridan (Vintage Books, 1975) at 197-98.

Foucault, a state of emergency caused by a deadly contagion was met by two contrasting visions. The first was of chaos and lawlessness. In the context of section 11(b), this vision is, in essence, the lurid image that invariably informs popular discourse about criminal charges being stayed due to trial delay: the image of criminals being set free in mockery of the law—as though to vindicate an individual's constitutional rights is not to enforce our most vital and foundational law. Foucault's second vision was of unyielding and proliferating state control. It is even more nefarious. It is the fiction that, by circumscribing individual rights and expanding state power, we can attain normalcy during an emergency. In the context of section 11(b), it tells us that, by the stroke of a pen and the invocation of "exceptional circumstances," courts can nullify the acute suffering that COVID delay is inflicting on accused persons, without requiring Crown attorneys to discharge their burden of justifying presumptively unreasonable delay. In truth, neither vision is accurate, and neither is desirable. We cannot realistically expect courts to simply stay thousands of criminal charges because of COVID-19; but neither should we accept that the harm caused to accused persons by COVID delay does not merit a remedy. We must navigate between these two extremes.

This article has proposed one possible route: Where COVID delay proves to be decisive, the accused should be entitled to a sentencing reduction, either as a *Charter* remedy or, more feasibly, through the statutory sentencing process. Admittedly, resort to a lesser remedy in the face of pervasive uncertainty about the merits and structure of a *Charter* claim is hardly ideal. But, when it comes to generating workable, real-time responses to a global pandemic, very little is.