

# *R v Jordan: A Ticking Time Bomb*

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## ABSTRACT

This article explores the progression of s. 11(b) *Charter* jurisprudence, the impact of trial delays, and the possibility of replacing the remedy of a stay of proceedings under s. 24(1) of the *Charter* with a system of costs. It further critiques the Senate of Canada's recommendations to reduce trial delays. The article argues that the Supreme Court of Canada's decision in *R v Jordan* fails to facilitate meaningful long-term change yet implementing a system of costs would further perpetuate trial delays. Ultimately, changes to the current structure and operation of the criminal justice system are required to immediately reduce trial delays beyond the current *Jordan* ceilings. All participants of the criminal justice system should strive towards the further reduction the ceilings for trial delay in Canada. Without these changes, the culture of complacency towards trial delay will continue to erode the s. 11(b) *Charter* rights of accused persons.

**Keywords:** *Jordan*; section 11(b); section 24(1); *Charter of Rights and Freedoms*; trial delay; reasonable time; ceilings; complacency; system of costs; damages; remedies; Senate of Canada; recommendations

## I. OVERVIEW

The Supreme Court of Canada (“the Court”) has nurtured a culture of complacency in the criminal justice system. Individual accused continue to wait considerable time for trial despite *Charter* protection. Section 11(b) of the *Charter of Rights and Freedoms*<sup>1</sup> (“the *Charter*”)

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<sup>1</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being

guarantees a right to trial within a reasonable time. The time it currently takes to complete a trial is vehemently unreasonable.

In the 27 years since the Supreme Court of Canada's decision in *R v Askov*<sup>2</sup> and its reiteration of the *Askov* principles in *R v Morin*,<sup>3</sup> the time it takes to complete a trial has increased dramatically, notwithstanding the decrease in the number of criminal charges laid annually. The median number of court appearances for a trial in 2013-14 was five and the elapsed time between charge and disposition was 123 days.<sup>4</sup> Forty per cent of cases in 2013-14 required 241 days or more to complete.<sup>5</sup>

The Court's most recent s. 11(b) decision, *R v Jordan*,<sup>6</sup> was introduced as a catalyst to combat the complacency the Court has facilitated. Moldaver, Karakatsanis and Brown JJ, writing for the majority in *Jordan*, developed a framework that included a presumptive ceiling to determine whether an accused's s. 11(b) rights are violated. This shift in jurisprudence, in many respects, falls short. While the new framework accounts for a transitional period before its application, it is outside the Court's jurisdiction to deal with systematic and budgetary issues surrounding the criminal justice system. Instead, a revamp is required. As a consequence of the *Jordan* framework, hundreds of charges are being stayed under s. 24(1) of the *Charter*, the minimal remedy considered appropriate by the Court for a breach of an individual's s. 11(b) rights.<sup>7</sup>

In reaction to *Jordan*, the Senate of Canada's Committee on Legal and Constitutional Affairs ("the Senate Committee") launched a study to investigate lengthy court delays in Canada. Deputy Chair of the Committee, Senator George Baker, indicated that in the second stage of the process the Committee will investigate introducing a system of costs into the criminal

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Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 11(b) [*Charter*].

<sup>2</sup> *R v Askov*, [1990] 2 SCR 1199, 74 DLR (4th) 355 [*Askov*].

<sup>3</sup> *R v Morin*, [1992] 3 SCR 286, 76 CCC (3d) 193 [*Morin* cited to SCR].

<sup>4</sup> Statistics Canada, "Completed Case Processing Times in Adult Criminal Courts," Presentation to the Senate Committee on Legal and Constitutional Affairs, by Yvan Clermont (Ottawa: Senate Standing Committee on Legal and Constitutional Affairs, 4 February 2016) [Statistics Canada, "Completed Case Processing Times"].

<sup>5</sup> *Ibid.*

<sup>6</sup> *R v Jordan*, 2016 SCC 27, [2016] 1 SCR 631 [*Jordan*].

<sup>7</sup> *Mills v the Queen*, [1986] 1 SCR 863 at 928, [1986] SCJ No 39 (QL) [*Mills* cited to SCR]; *Rahey v R*, [1987] 1 SCR 588 at 605, [1987] SCJ No 23 (QL) [*Rahey* cited to SCR].

justice system as a remedy to s. 11(b) *Charter* infringements.<sup>8</sup> Senator Baker suggested that this system of costs would replace an order of stay of proceedings under s. 24(1). A factually innocent accused would receive compensation once acquitted, while an accused who is convicted would receive a reduction in sentence below the statutory or mandatory minimum for the offence.

Although *Jordan* has woken the criminal justice system up from a deep slumber, it fails to facilitate meaningful change. A system of costs would further perpetuate existing delays: a stay of proceedings continues to be the only appropriate and just remedy to a breach of an accused's s. 11(b) rights. The federal government must take a proactive, preventative approach to reducing court delays as opposed to the reactionary approach of adding a system of costs to the criminal justice system.

This article will examine the evolution of s. 11(b) *Charter* jurisprudence to decipher the complacency in the criminal justice system that *Jordan* was designed to correct. It will then discuss the remedy of a stay of proceedings under s. 24(1) of the *Charter* and contrast it with the proposed remedy of costs in the criminal justice context. In doing so, it will incorporate and evaluate recommendations from the Senate Committee's recommendations from its August 2016 interim report<sup>9</sup> ("the Report") as well as recommendations from the witnesses who testified before the Committee. To conclude, this article will provide recommendations regarding the path forward in a post-*Jordan* criminal justice system.

## II. SECTION 11(b) JURISPRUDENCE

The Supreme Court of Canada's s. 11(b) jurisprudence from 1982 to 1990 echoes the reasoning of the Court in *Jordan*. However, the shift in jurisprudence in *Askov* in 1990 until *Jordan* in 2016 facilitated the justification of delay by the Crown and the courts to the detriment of the accused. The right to a trial within a reasonable time was characterized by the Court in *Morin* as a societal – as opposed to individual – interest: an

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<sup>8</sup> Senator George Baker, Address (Delivered at the University of New Brunswick Faculty of Law Speaker's Hour, 17 January 2017) [unpublished].

<sup>9</sup> Senate, Standing Committee on Legal and Constitutional Affairs, *Delaying Justice Is Denying Justice: An Urgent Need to Address Lengthy Court Delays in Canada* (August 2016) (Co-Chairs: Hon Bob Runciman, Hon George Baker) [*Delaying Justice*].

accused would rather a violation of his or her s. 11(b) rights and a remedy under s. 24(1) than to have a speedy disposition.<sup>10</sup> This rhetoric sent the message that the right to a trial within a reasonable time is irrelevant.

Accused have waited for years for trial to proceed with little to no recourse. Under the *Morin* framework, the accused had the burden of proving prejudice beyond the fact that the trial had taken longer than the recommended guidelines. Crown and institutional delay were protected: prejudice had to be proven to be granted a remedy. It allowed the criminal justice system to institutionalize lengthy trials as the norm, fostering complacency among all stakeholders. It was not until *Jordan*, when prejudice was removed as a prerequisite to a s. 11(b) violation, that the Court put pressure on stakeholders to decrease criminal trial delays. Section 11(b) has become once again a right with a remedy. But this new framework is not without its problems.

### A. Developing Section 11(b) Principles: Early Decisions

*Mills v the Queen*<sup>11</sup> was the first instance that the Supreme Court of Canada addressed a s. 11(b) *Charter* issue. Lamer J (as he then was) was the only Justice to address the merits of s. 11(b) in his dissent. He defined liberty and security of the person as s. 11(b) interests. He concluded that the purpose of s. 11(b) was to minimize pre-trial detention and other prejudices such as the “stigmatization of the accused, loss of privacy, stress and anxiety relating from a multitude of factors, including possible disruption of family, social life and work, legal costs, uncertainty as to the outcome and sanction.”<sup>12</sup> In doing so, he categorized pre-charge delay as immaterial to s. 11(b) but relevant to ss. 7 and 11(d) interests.<sup>13</sup> This definition of the purpose of s. 11(b) of the *Charter* has been adopted in all subsequent s. 11(b) jurisprudence.<sup>14</sup> It is Lamer J’s dissent in *Mills* that diverges from the American approach to trial within a reasonable time as set out in *Barker v Wingo*.<sup>15</sup> It was here that Lamer J first advocated to remove prejudice from

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<sup>10</sup> *Morin*, *supra* note 3 at 298; Steve Coughlan, “*R v Jordan*: A Dramatically New Approach to Trial Within a Reasonable Time” (2016) *Criminal Reports* (Westlaw).

<sup>11</sup> *Mills*, *supra* note 7.

<sup>12</sup> *Ibid* at 928.

<sup>13</sup> *Ibid* at 948.

<sup>14</sup> *Rahey*, *supra* note 7.

<sup>15</sup> *Barker v Wingo*, 407 US 514, 92 S Ct 2182 (1972).

the reasonableness analysis: an approach that would eventually be adopted by the Supreme Court of Canada 30 years later in *Jordan*.

*Rahey v R*<sup>16</sup> expanded on the concept of security of the person in a s. 11(b) context to include not only physical integrity but also “overlong subjection to the vexations and vicissitudes of a pending criminal accusation.”<sup>17</sup> Examples of these vexations included stigmatization of the accused, loss of privacy, stress and anxiety from a variety of factors in addition to those listed by Lamer J in *Mills*. The Court held that actual impairment or prejudice need not be proven by the accused for a violation of his or her s. 11(b) rights to be remedied.<sup>18</sup> Although the Court recognized that prejudice animated the right, actual prejudice was not relevant in establishing a s. 11(b) violation.<sup>19</sup>

The Court in *R v Conway*<sup>20</sup> added relevant factors to consider in determining whether an accused’s s. 11(b) Charter rights have been breached. These factors include: whether the accused waived or caused the delay; the time requirements given the nature of the case and any limitations on institutional resources; and the reasonableness of the overall lapse in time.<sup>21</sup> The Court held that once a person charged has satisfied the court that the total time is “*prima facie* unreasonable,” the onus shifts to the Crown to justify the delay<sup>22</sup> – a principle adopted by the Court in *Jordan*.

It is evident that the Court’s reasoning in *Mills*, *Rahey*, and *Conway* aligns with its reasoning in *Jordan*. The early s. 11(b) jurisprudence was in favour of prescribing a remedy: it was alive to the fact that a right without a remedy is an “empty promise”<sup>23</sup> and that proving actual prejudice was an insurmountable hurdle for many accused. The Court recognized the value of an accused’s s. 11(b) rights and were in favour of trial within a reasonable time. This jurisprudence led to relatively timely trials and did not breed a culture of complacency in the criminal justice system.

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<sup>16</sup> *Rahey*, *supra* note 7 at 605.

<sup>17</sup> *Ibid* at 599.

<sup>18</sup> *Ibid* at 603.

<sup>19</sup> *Ibid*.

<sup>20</sup> *R v Conway*, [1989] 1 SCR 1659, 49 CCC (3d) 289 [*Conway*].

<sup>21</sup> *Ibid* at 1670–1671.

<sup>22</sup> *Ibid* at 1672.

<sup>23</sup> Lawrence David, “Resource Allocation and Judicial Deference on Charter Review: The Price of Rights Protection According to the McLachlin Court” (2015) 73:1 UT Fac L Rev 35.

## B. Fostering Complacency: *R v Askov* and *R v Morin*

*R v Smith*<sup>24</sup> was the first indication of a jurisprudential shift – one which would enable the Crown and the courts to rationalize delays. *Smith* discussed the weighing of factors to be considered to determine whether an accused’s s. 11(b) rights have been breached. In addition to the factors outlined in *Conway*, the Court added that prejudice to the accused must be considered. However, the Court failed to acknowledge that prejudice is inherent in a s. 11(b) violation. It also put the onus on the accused to prove prejudice existing beyond the mere fact that the trial had gone on for an unreasonable amount of time.

This shift was cemented in *R v Askov*<sup>25</sup> when the Court developed the first test to determine whether there was an infringement of the accused’s s. 11(b) *Charter* rights.<sup>26</sup> *Askov* was the first time that a societal interest in trial within a reasonable time was considered within an accused’s s. 11(b) rights. It weighs heavily in favour of the Crown, who would simply justify delay by demonstrating that the accused deliberately caused the delay or that the accused suffered no prejudice due to the delay. While the Court acknowledged that over time the presumption that the accused suffered prejudice becomes irrebuttable, it was careful to prevent an accused’s s. 11(b) *Charter* right from becoming one which could be “transformed from a protective shield to an offensive weapon in the hands of the accused.”<sup>27</sup> Yet, with the guidelines offered for a trial within a reasonable time, it gave the accused a hard number to argue for any s. 11(b) *Charter* application, facilitating s. 11(b) applications.

The lower courts’ interpretation of *Askov* led to the message by the Court in *R v Morin*<sup>28</sup> that s. 11(b) rights are worthless. *Askov* was a public relations disaster for the Court: between October 22, 1990, and September 6, 1991, over 47,000 charges were stayed or withdrawn in Ontario alone due to violations of the accused’s s. 11(b) *Charter* rights.<sup>29</sup> Reacting to the fallout from *Askov*, the Court in *Morin* built in a period of eight to 10

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<sup>24</sup> *R v Smith*, [1989] 2 SCR 1120, 52 CCC (3d) 97.

<sup>25</sup> *Askov*, *supra* note 2.

<sup>26</sup> *Ibid* at 1238–1239.

<sup>27</sup> *Ibid* at 1227.

<sup>28</sup> *Morin*, *supra* note 3.

<sup>29</sup> *Ibid* at 773.

months for provincial court cases to the guidelines of six to eight months from committal to trial provided in *Askov*.<sup>30</sup> The Court warned that these guidelines required adjustments for different areas in the country based on local conditions.<sup>31</sup> This warning gave ammo to the Crown and the courts to justify the delays in their respective jurisdictions.

This hardline approach in *Morin* that gave greater weight to prejudice to the accused and allowed for flexibility in the time guidelines resulted in a higher threshold for the accused to establish a breach of his or her s. 11(b) *Charter* rights. The Court transformed s. 11(b) into a *Charter* right without a viable remedy. The result was a criminal justice system which no longer valued expediency; stakeholders were in cruise control throughout trial with no acceleration of the process. This laissez-faire attitude continued from 1992 until July 2016 with the redesigned s. 11(b) framework in *Jordan*.

### III. THE *JORDAN* FRAMEWORK: CATALYST FOR SPEEDY TRIALS?

The accused in *Jordan* was charged with nine co-accused on a fourteen-count information that included various drug trafficking offences. The accused was released on strict house arrest and bail conditions from December 2008 to the end of trial in February 2013. The majority in *Jordan* held that the delay of 49.5 months minus the 5.5 months of defence delay for a total of 44 months' delay attributable to the Crown or institutional delay was a violation of the accused s. 11(b) *Charter* rights and issued an order for a stay of proceedings under s. 24(1) of the *Charter*. *Jordan* developed the following test to determine whether an accused's s. 11(b) rights have been violated:<sup>32</sup>

There is a ceiling beyond which delay becomes presumptively unreasonable...[It] is 18 months for cases tried in provincial court and 30 months for cases in superior court or cases tried provincially after a preliminary inquiry. Defence delay does not count towards the presumptive ceiling...Total delay must be calculated and then defence delay deducted.<sup>33</sup>

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<sup>30</sup> *Ibid* at 799.

<sup>31</sup> *Ibid* at 797.

<sup>32</sup> *Jordan*, *supra* note 6 at paras 46-48, 66, 69-81, 82-91.

<sup>33</sup> *Ibid* at paras 66, 105.

Once the presumptive ceiling is exceeded, the burden shifts to the Crown to rebut the presumption of unreasonableness based on exceptional circumstances. Exceptional circumstances lie outside control of the Crown in that (a) they are reasonably unforeseen or reasonably unavoidable; and (b) they cannot be reasonably remedied. If the exceptional circumstance relates to a discrete event, the delay reasonably attributable to that event is subtracted. If the exceptional circumstance arises from the cases complexity, the delay is reasonable.

For cases below the presumptive ceiling, the defence may show that the delay is unreasonable. To do so, it must establish two things: (a) it took meaningful steps that demonstrate a sustained effort to expedite the proceedings; and (b) the case took markedly longer than it reasonably should have.

For cases currently in the system, the framework must be applied flexibly and contextually, with due sensitivity to the parties' reliance on the previous state of the law.

For delays that exceed the ceiling, a transitional exceptional circumstance may arise where the charges were brought prior to the release of this decision. The exception will take effect when the Crown satisfies the court that the time the case had taken is justified based on parties' reasonable reliance on the law as it previously existed – a contextual assessment. The judge should consider the time parties have had following release of this decision to correct their behaviour.

For cases below the ceiling, the two criteria in (iii) must also be applied contextually, sensitive to the parties' reliance on the previous state of the law. The defence need not demonstrate that it took initiative to expedite matters for the period of delay preceding this decision. A stay of proceedings will be even more difficult to obtain for cases currently in the system.

This framework restored the s. 11(b) jurisprudence to the position it was in 25 years ago, before the secondary interest of societal concerns took precedence. It eliminated the reliance on prejudice to the accused as a factor in the analysis and replaced flexible time guidelines that could be explained away with a presumptive ceiling that is triggered regardless of where in the country the accused was tried. It promotes simplicity and predictability in s. 11(b) applications.

The *Jordan* framework was applied to the facts in the companion case to *Jordan*, *R v Williamson*.<sup>34</sup> The accused was charged in 2009 with historical sexual offences against a minor. He was released on strict bail conditions from the time of his arrest in January 2009 to the time of his trial in December 2011. The Court accepted the trial judge's assessment of the delay of 35 months: eight months of inherent delay, one month delay attributable to the Crown, and 26 months of institutional delay. The total delay minus defence delay was 34 months; thus the accused's s. 11(b) rights were infringed and the Court of Appeal for Ontario's order for a stay of proceedings was upheld.

While the *Jordan* framework appeared to be more flexible in its application in *Williamson*, the framework is not without its faults. For example, it is less forgiving than the *Askov/Morin* framework.<sup>35</sup> Applying the *Jordan* framework to the facts of *Askov*, the delay would not have been presumptively unreasonable. In *Askov*, the Court found that while there was 30 months' delay, six months' delay was attributable to the defence: the total delay would only amount to 24 months. This would be below the 30-month ceiling imposed in *Jordan* and absent defence counsel's ability to demonstrate it took meaningful steps to expedite proceedings or that the case took markedly longer than it should have, no violation of the accused's s. 11(b) *Charter* rights would have been found. This delay occurred 27 years ago. The amount of delay required to trigger a breach of s. 11(b) *Charter* rights should have decreased in that time, not increased. Heightened trial complexity is no excuse for the increase in delays: new case management programs and technologies that could facilitate these complex trials have not been adopted or implemented in the criminal justice system.

Furthermore, the *Jordan* framework perpetuates a cynical approach to s. 11(b) claims: that accused want to have their trials delayed and benefit from the violation of their *Charter* rights. As stated by Michael A. Code, to suggest that a stay is a windfall for the accused is to "engage in an 'ex post facto analysis of rights violations' and confuses a constitutional remedy for the harm done by the state with a 'benefit.'"<sup>36</sup> It presumes the guilt of the

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<sup>34</sup> *R v Williamson*, 2016 SCC 28, [2016] SCR 741.

<sup>35</sup> Erin Dann, "R v Jordan: The Good the Bad and the Ugly in the New 11(b) Framework," *For the Defence – The Criminal Lawyers' Association Newsletter* 37:3 (9 Dec 2016) 6.

<sup>36</sup> Michael A Code, "Trial Within a Reasonable Time: A Short History of Recent Controversies Surrounding Speedy Trial Rights in Canada and the United States"

accused and neglects to consider the financial burden of a drawn-out charges that do not simply disappear with an order for a stay of proceedings.

By setting a ceiling in *Jordan* that is descriptive rather than prescriptive, the Court has facilitated the maintenance of the status quo. Had a prescriptive ceiling been set – one that tells the state how long a case should take – would, as Erin Dann argued, “foster constructive incentives” for reducing delay beyond the ceilings.<sup>37</sup> Instead, the Court opted for a descriptive ceiling that reflects how long it currently takes to complete a trial. It is open for the Court to alter its current ceilings to reflect an emerging reality in a post-*Jordan* world should another s. 11(b) case come before the Court. However, without an incentive to decrease delays below the ceilings set at the current reality, the ceilings may never be realistically reduced lower than their current levels.

Moreover, the 18-month and 30-month numbers arrived at for the presumptive ceilings were ‘invented’ by the Court.<sup>38</sup> No proposals or submissions were made by counsel in *Jordan* on a number for a presumptive ceiling at any level of court. The majority stated that they arrived at the ceilings by starting at the *Morin* guidelines followed by a qualitative review on appellate level decisions on delay. They reasoned that the ceilings accounted for other factors that can reasonably contribute to the time it takes to prosecute a case, such as the inherent time requirements and the increased complexity of criminal cases since *Morin*.<sup>39</sup> The ceilings also reflect prejudice, despite its absence from the framework: the majority picked a higher number than under *Askov/Morin* so that prejudice can automatically be inferred. Consequently, the *Jordan* presumptive ceilings are “best guess ballpark figures”<sup>40</sup> as opposed to the guidelines in *Askov/Morin* which were based on evidence.

This higher ceiling may allow for greater tolerance of inefficiencies. The current ceilings allow for a year and a half for delays in provincial court cases

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(Scarborough, Ont: Carswell, 1992) at iii.

<sup>37</sup> Dann, *supra* note 35.

<sup>38</sup> Jacques Gallant, “How an ‘Invented’ Supreme Court Ruling Has Rocked the Canadian Justice System,” *Toronto Star* (19 March 2017), online: <<https://www.thestar.com/news/gta/2017/03/19/how-an-invented-supreme-court-ruling-has-rocked-the-canadian-justice-system.html>>.

<sup>39</sup> *Jordan*, *supra* note 6 at paras 52–55.

<sup>40</sup> Coughlan, *supra* note 10.

– an amount of time that greatly exceeds the time it currently takes for most cases to proceed through the provincial court system. It can foster complacency in jurisdictions that currently have relatively efficient proceedings: the opposite of the Court’s intention in *Jordan*. A court can find a violation of an accused’s s. 11(b) *Charter* rights under the presumptive ceiling, but the Court has made it difficult as a positive obligation is placed on the accused and the defence counsel.

The new framework requires the accused to take initiative to expedite matters. Cromwell J, dissenting in *Jordan*, characterizes this requirement as a judicially-created diminishment of a constitutional right.<sup>41</sup> It requires the accused to actively attempt to prevent his or her *Charter* rights from being violated; blame is not solely placed on the lack of institutional or Crown resources. Toronto criminal defence lawyer Sean Robichaud voiced concerns over these duties: “[p]rotections that accused persons would otherwise enjoy are being sacrificed, or waived under coercive circumstances, to avoid a problem they often did not contribute towards.”<sup>42</sup> The accused should not have to actively fight against a violation of his rights to have a s. 11(b) violation found and remedy ordered.

Regardless of the limitations of the *Jordan* framework, one thing is clear: attitudes have shifted and all stakeholders are scrambling to reduce trial times. Since the release of the decision in July 2016 to March 2017, criminal defence lawyers have applied for 800 stays in criminal cases; this includes over three dozen murder, attempted murder and manslaughter cases. In Ontario, 6,500 cases in Provincial Court are currently past the 18-month mark.<sup>43</sup> The framework seems to have reached a balance between the 47,000 stays in the first year of the *Askov* framework and making s. 11(b) a right without a remedy, as under *Morin*.

The *Jordan* framework serves as a much-needed reboot of the s. 11(b) jurisprudence. The effect it has moving forward depends in part on the willingness of the stakeholders, including the federal government, to enact change in the system and aim for delays that fall far below the current presumptive ceilings. The Court also has an important role to play in the

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<sup>41</sup> *Jordan*, *supra* note 6 at para 263.

<sup>42</sup> Gallant, *supra* note 38.

<sup>43</sup> Sean Fine, “Courts Shaken by Search for Solutions to Delay,” *The Globe and Mail* (12 March 2017), online: <[www.theglobeandmail.com/news/national/courts-shaken-by-search-for-solutions-todelays/article34275019/](http://www.theglobeandmail.com/news/national/courts-shaken-by-search-for-solutions-todelays/article34275019/)>.

reduction of delay: it cannot shy away from re-evaluating the presumptive ceilings and further challenge the stakeholders to lessen the delay, as well as re-evaluating the framework to minimize the imperfections that currently exist. There is more work to be done.

#### IV. CURRENT REMEDIES FOR A SECTION 11(b) BREACH: SECTION 24(1)

Despite the failings of the s. 11(b) *Jordan* framework, lower courts must work within it and assign appropriate remedies. Remedies for a s. 11(b) *Charter* breach currently fall under s. 24(1) of the *Charter*, which allows for any remedy that is “appropriate and just in the circumstances” to be awarded by a court of competent jurisdiction.<sup>44</sup> This remedial section of the *Charter* grants the judiciary wide discretion in developing remedies for *Charter* breaches. Yet, the Supreme Court jurisprudence indicates that the “minimum remedy” to a s. 11(b) violation is an order for a stay of proceedings under s. 24(1), and this order cannot be granted by a preliminary inquiry judge: only a trial judge or a superior court judge can grant a remedy under s. 24(1).

##### A. Courts of Competent Jurisdiction

A remedy under s. 24(1) of the *Charter* can only be granted by a court of competent jurisdiction. *Mills* outlined the procedure for granting a s. 11(b) remedy under s. 24(1) of the *Charter*. The Court defined a “court of competent jurisdiction” as a court that has jurisdiction over the person and the subject matter, as well as jurisdiction to grant the remedy.<sup>45</sup>

As a general rule, the court of competent jurisdiction to grant a s. 24(1) remedy is the trial court. The superior criminal courts have constant complete and concurrent jurisdiction but should only exercise this jurisdiction in limited circumstances. A preliminary inquiry judge, on the other hand, is not a court of competent jurisdiction for the purposes of a s. 24(1) remedy. Once an accused is committed to trial, he or she must have access to a trial judge for the purposes of a s. 11(b) application. Superior courts should exercise their jurisdiction when no trial court is available to

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<sup>44</sup> *Charter*, *supra* note 1 at s 24(1).

<sup>45</sup> *Mills*, *supra* note 7.

the accused for a s. 11(b) application.<sup>46</sup> This ensures that there is always a court accessible to hear a s. 11(b) application and order the appropriate and just remedy. It also means that an accused cannot claim that his or her trial has exceeded a reasonable amount of time until the end of the preliminary inquiry, which can take months to complete.

## B. Appropriate & Just Remedies for a Section 11(b) Breach

Section 24(1) of the *Charter* is a broad remedial provision. It allows judges to be creative in proposing remedies for *Charter* breaches by providing an ambiguous ambit of any “appropriate and just” remedy. Such remedies must be appropriate and just to both the claimant and the state.<sup>47</sup> The most common s. 24(1) remedies are declaratory relief and an injunction but remedies such as damages, stays of proceeding, reduced sentences and costs are available.<sup>48</sup> Not all of these remedies are considered equal remedies for a s. 11(b) violation.

Lamer J noted in his dissent in *Mills* that after the passage of an unreasonable time, “no trial, not even the fairest possible trial,” is permissible and the minimum remedy to a breach of an accused’s s. 11(b) *Charter* right is a stay of proceedings.<sup>49</sup> While additional remedies, such as damages, may be appropriate in the circumstances, such remedies can only be added to a stay of proceedings when it is proven that there was malice or bad faith on behalf of the Crown that resulted in prejudice to the accused.<sup>50</sup> The majority in *Rahey v R* adopted Lamer J’s reasoning in *Mills* that a stay of proceedings is a minimum remedy to a s. 11(b).<sup>51</sup> Thus, the large ambit of remedies available under s. 24(1) becomes closed when remedying a s. 11(b) violation.

The appropriate remedy for a breach of a s. 11(b) right has not been challenged in the 30 years of Supreme Court of Canada s. 11(b) jurisprudence since *Rahey*: a stay of proceedings remains the remedy for a s.

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<sup>46</sup> *Ibid* at paras 82, 86, 87, 93, 100.

<sup>47</sup> David, *supra* note 23 at 15.

<sup>48</sup> Vinay Shandal, “Combining Remedies Under Section 24 of the *Charter* and Section 52 of the *Constitution Act, 1982*: A Discretionary Approach” (2003) 61:2 UT Fac L Rev 175.

<sup>49</sup> *Mills*, *supra* note 7 at 928.

<sup>50</sup> *Ibid*.

<sup>51</sup> *Rahey*, *supra* note 7 at 605.

11(b) violation. Consequently, the breadth of judicial discretion in s. 24(1) remedies for s. 11(b) violations remains stunted: additional remedies can only be added to a stay of proceedings in limited circumstances. This erodes the creativity of judges and the possibilities of alternative remedies to stays given the current state of the criminal justice system and the overwhelming amount of s. 11(b) applications since *Jordan*.

An example of the restrictions *Mills* and *Rahey* have placed on s. 24(1) remedies in cases of s. 11(b) violation is provided by *R v Court*.<sup>52</sup> Glithero J attempted to provide unconventional remedies in *Court*, a trial he stayed on the basis of delay: he included an order excluding police testimony about a taped statement of the accused because the tape was lost; an order requiring the Crown to pay the cost of an investigation into material not disclosed in a timely fashion; and put restrictions and obligations on the Crown in the conduct of the ensuing re-trial.<sup>53</sup> Yet, none of these additional remedies could be provided without first granting a stay of proceedings and thus were nothing more than symbolic as the trial did not proceed for evidence to be excluded or restrictions on Crown conduct on re-trial.

*Court* demonstrates the potential for creativity for s. 24(1) remedies. Perhaps in a post-*Jordan* world changes must also manifest in relation to the remedies available to justices under s. 24(1). Yet, the presumptive ceilings in *Jordan* show that any delay above 18 or 30 months is presumptively unreasonable and thus Lamer J's reasoning from *Mills* remains influential: any trial that has gone on for an unreasonably long time cannot continue. However, there is room for an expansion in s. 24(1) remedy where the delay is either below or above the presumptive ceiling but exceptional circumstances exist. It also is restrictive in terms of awarding costs or a reduction in sentence in lieu of a stay of proceedings, as in *Vancouver (City v Ward)*.<sup>54</sup>

### C. *Ward* Damages

The Court in *Ward* recognized *Charter* damages as a distinct public law remedy that can be ordered against the federal or provincial government as opposed to individual government officials for the purpose of

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<sup>52</sup> *R v Court* (1997), 36 OR (3d) 263, [1997] OJ No 3450 (QL) (Gen Div).

<sup>53</sup> Morris Manning, "Charter Remedies in Criminal Cases: A Cure for the Common Remedy" (2005) 16:1 NJCL 261.

<sup>54</sup> *Vancouver (City) v Ward*, 2010 SCC 27, [2010] 2 SCR 28 [*Ward*].

compensation, vindication, and/or deterrence.<sup>55</sup> Damages may be awarded under s. 24(1) of the *Charter* where appropriate and just but they must be sought in a civil court. Section 24(1) damages are a one-time award and not compensation of an indeterminate amount for an indeterminate time.<sup>56</sup> The majority in *Ward* developed a test to determine whether damages should be granted as a remedy under s. 24(1):<sup>57</sup>

Establish that a *Charter* right has been breached. The onus is on the plaintiff; Functional justification of damages: the plaintiff must show why damages are a just and appropriate remedy, having regard for whether they fulfill at least one of the functions of compensation, vindication, and/or deterrence;

Countervailing factors: the state can demonstrate countervailing factors that defeat the functional consideration that support a damage award and render damages inappropriate or unjust. For example, the Crown can show that alternative remedies adequately address the need for compensation, vindication and deterrence; or on the grounds of effective governance.

There is no rigid requirement for the plaintiff to establish a level of fault beyond the *Charter* breach but they must prove a functional need for damages.<sup>58</sup> For s. 11(b) this may mean the accused must prove negligence or bad faith on the part of the Crown in bringing his or her case to trial in order to obtain damages on top of an order for a stay of proceedings. There have been no civil cases claiming s. 24(1) *Charter* damages for a breach of an individual's s. 11(b) *Charter* right. Consequently, the success of a s. 24(1) damage claim for a s. 11(b) *Charter* breach remains unknown, nor is there any indication of what quantum of damages is appropriate for a violation of an accused's s. 11(b) *Charter* rights.

A claim for s. 24(1) damages in civil court comes at extra expense to the accused. As damages are only considered an additional remedy to a stay of proceedings, the risk in seeking damages will likely outweigh any potential damage award. In most situations, civil courts are not accessible to those accused criminally and damages remain elusive due to prohibitive costs. The Court in *Ward* awarded \$5,000 in damages for a breach of the plaintiff's s.

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<sup>55</sup> Kent Roach, "A Promising Late Spring for Charter Damages: *Ward v Vancouver*" (2011) 29:2 NJCL 135.

<sup>56</sup> David, *supra* note 23 at 15.

<sup>57</sup> *Ward*, *supra* note 54 at paras 4, 23, 27, 34, 42.

<sup>58</sup> *Ibid* at para 27; Roach, *supra* note 55 at 153.

s. 8 *Charter* right against unreasonable search and seizure. In doing so, the Court quantified the damage award as ‘moderate’ implying that higher and lower awards are in the range of what is appropriate and just.<sup>59</sup> Whether this amount is considered moderate for all *Charter* right violations or merely breaches of s. 8 is uncertain. The Court in *Ward* did allude to compensation for pecuniary or intangible interests such as loss of earnings caused by prolonged detention,<sup>60</sup> which also may apply to loss of earnings due to prolonged time to trial for s. 11(b) remedies.

The inaccessibility of civil courts to criminal accused coupled with the lack of precedent on s. 24(1) damages awarded for a violation of an accused’s s. 11(b) *Charter* rights will prevent or deter individuals from pursuing *Charter* damages under the *Ward* framework for s. 11(b) breaches. Despite civil law’s shortcomings surrounding *Charter* damages, the test from *Ward* could be informative in introducing a more accessible system of costs to the criminal law process.

## V. ADDING COSTS TO THE CRIMINAL JUSTICE SYSTEM: THE HOW

To limit the number of stays of proceedings post-*Jordan*, the Senate Committee is investigating introducing a system of costs to the criminal justice system to replace the remedy of stays of proceedings as the minimum remedy for a s. 11(b) violation. This system of costs would provide *Charter* damages for a s. 11(b) violation to factually innocent accused at the end of trial and would provide a reduction in sentence to accused convicted at trial. Criminal courts do not have the jurisdiction to award damages under s. 24(1) nor do they have power to reduce sentences below the statutory minimum without an amendment to the Criminal Code.

As demonstrated by *Ward*, the only recourse an accused has in terms of costs is to commence a civil action against the government. Thus, the only remedy available for a breach of an accused within the criminal justice system s. 11(b) rights is a stay of proceedings. The government would have to legislate costs as a minimum remedy to a s. 11(b) violation to override the Supreme Court of Canada’s precedent from *Mills* and *Rahey* that states a stay of proceedings is the minimum remedy. Given the Court’s strong stance

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<sup>59</sup> Roach, *supra* note 55 at 154.

<sup>60</sup> *Ibid.*

on the remedy, any legislation removing a stay as a minimum remedy may not withstand the Court's scrutiny and be found to be unconstitutional. Thus, the constitutionality of a system of costs as the prominent remedy to a s. 11(b) violation remains unknown. For the purposes of this section, the constitutionality of the system of costs will be assumed.

Options for forums to award s. 24(1) damages under the current constitutional framework include: superior criminal courts, provincial criminal courts sitting as trial courts, administrative tribunals, and small claims courts. Provincial criminal courts sitting as preliminary inquiry tribunals are precluded from awarding s. 24(1) damages.

## **A. Potential Forums Under the Current Constitutional Framework**

Under the current constitutional framework, the *Ward* test for determining whether *Charter* damages are merited can be applied by the three forums with jurisdiction to grant *Charter* costs. The test for sentence reduction or damages could rely on the presence of one of the three purposes identified in *Ward*: compensation, vindication, and deterrence. Providing a venue for accused to seek damages under s. 24(1) will protect innocent accused from *Charter* violations and will ensure a remedy is always available, even if it is a third party's rights that were violated.<sup>61</sup> Yet, these three forums still present the same accessibility issues as the current civil court venue, namely the extra cost to litigants relative to the small quantum potentially awarded.<sup>62</sup> Additionally, except with superior criminal courts and provincial criminal courts, there is no guarantee that the justice seized with the issue has training or experience in criminal law or *Charter* violations.

### ***1. Superior Criminal Courts and Provincial Criminal Courts***

*Mills*, *Rahey*, and *Ward* stand for the proposition that criminal courts have inherent jurisdiction to provide any s. 24(1) remedy (including damages) for a breach of an accused's s. 11(b) *Charter* rights. In rare

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<sup>61</sup> An example of when a third party's *Charter* rights were violated is *R v Edwards*, [1996] 1 SCR 128, 132 DLR (4th) 31, where the accused's girlfriend's apartment was searched without a warrant.

<sup>62</sup> Akash Toprani, "A Tale of Two Section Twenty-Fours: Towards a Comprehensive Approach for *Charter* Remedies" (2012) 70:2 UT Fac L Rev 14.

instances, criminal courts have exercised their jurisdiction to award costs in the past, but never for a violation of the accused's s. 11(b) rights.

Criminal courts are unlikely to exercise this jurisdiction on a regular basis as a remedy to s. 11(b) breaches. As argued by Kent Roach, criminal courts will not want to take on the additional task of considering a damage award at a criminal trial.<sup>63</sup> Although it may be beneficial to the accused to have a “one-stop shop”<sup>64</sup> for their trial and *Charter* damages, it burdens the court with additional work. This will also lead to increased trial length as courts must hear submissions on damages or a reduction in sentence either at the time of the s. 11(b) *Charter* application or at the time of sentence.

Additionally, the Court in *R v Nasogaluak*<sup>65</sup> held that s. 24(1) could not be used to lower a sentence below the statutory minimum. A violation of an accused's *Charter* rights can be reflected in the sentencing process and therefore there is no need to resort to the *Charter* to craft a remedy. The Court left the possibility of sentence reduction outside of statutory limits, but only where it is “the sole effective remedy for some particularly egregious form of misconduct by state agents.”<sup>66</sup> The *Criminal Code* would require amendments to expand on the remedial powers of criminal courts to include sentence reductions below the statutory minimum.

Criminal courts awarding s. 24(1) costs would create a “one-stop shop” or accused to be awarded a remedy for a breach of his or her s. 11(b) *Charter* rights. It would reduce the problem of accessibility currently present by adding time to the trial at the time of the s. 11(b) application or at the time of sentencing rather than have accused make a claim in an entirely new venue, making them wait longer for a remedy. It would create an equitable system whereby all accused would have access to remedies for breaches of their *Charter* rights: self-represented litigants would be accommodated within the system. The s. 24(1) damages would be awarded at the same moment in time that a stay of proceedings would currently be ordered. The judiciary would be well-versed in *Charter* issues and remedies to make an appropriate and just remedy in the circumstances: expertise would not be a problem.

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<sup>63</sup> Roach, *supra* note 55 at 142.

<sup>64</sup> Toprani, *supra* note 62 at 14.

<sup>65</sup> *R v Nasogaluak*, 2010 SCC 6, [2010] 1 SCR 206.

<sup>66</sup> *Ibid* at para 64.

While criminal courts remain the ideal solution, they are not the perfect solution. All accused, even self-represented litigants, would have access to s. 24(1) remedies, but they must be alive to the fact that a *Charter* breach occurred. By implementing a system of costs without providing legal representation to all litigants, the system of costs risks becoming two-tiered and accessible only to those who can afford counsel. This, of course, is a risk with any of the currently available solutions.

Additionally, if a remedy is to be granted at the time the application is heard, it may not be known whether the accused will be acquitted or convicted. Thus, while a remedy of costs is appropriate and just in the circumstances, exactly how long the trial will run or how the costs will be awarded will be unknown until the end of the trial. A judge could propose the quantum for damages should the accused be acquitted or the reduction in sentence prior to knowing the outcome or could defer his or her decision on the type of costs awarded until the end of trial. Either way, justice for the violation of the accused's s. 11(b) *Charter* rights is further delayed and—if a violation of an accused's *Charter* rights is found—the remedy does little to encourage an expeditious completion of the trial.

## 2. *Administrative Tribunals*

*R v Conway*<sup>67</sup> declared that an administrative tribunal can grant *Charter* remedies if it has jurisdiction, explicit or implicit, to decide questions of law. To determine this, we must look to the enabling statute: the *Charter* cannot enhance the powers of an administrative tribunal. The Court in *Conway* shifted from the *Mills* jurisprudence that required a court of competent jurisdictions to grant s. 24(1) remedies towards a contextual approach.<sup>68</sup> This approach accepted that administrative tribunals should play a primary role in *Charter* remedies.

The prospect of administrative tribunals awarding *Charter* damages for breaches of an accused's s. 11(b) rights has many benefits. It eliminates the added court resources needed under the superior and provincial criminal court model. It may also be less expensive to plaintiffs to make *Charter* claims as they will not face the prospect of an adverse cost award, as in civil

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<sup>67</sup> *Conway*, *supra* note 20.

<sup>68</sup> Christopher D Brecht & Ewa Kraiewska, "R v Conway: Simplifying the Test for Administrative Tribunal's Jurisdiction to Consider Charter Issues" (2011) 29:2 NJCL 189 at 196-197.

courts.<sup>69</sup> Administrative tribunals may also have the jurisdiction to order a broad range of alternative remedies to damages or reductions in sentencing. These remedies have the potential to be granted without submissions from the applicant.<sup>70</sup> Administrative tribunals present an efficient and equitable alternative to superior criminal courts.

Though efficient and equitable, administrative tribunals too have their flaws. Dealing with *Charter* damages through administrative tribunals eliminates the “one-stop shop” for accused under the superior and provincial court system. Administrative tribunals are not completely free: while no costs can be awarded for a failed claim, plaintiffs will likely have to hire counsel. The cost of counsel for an administrative hearing will likely be higher than for an additional submission during the criminal trial. It shifts the cost to the individual whose rights have been violated instead of placing the cost of remedying the violation on the state. Additionally, the remedies available through an administrative tribunal will ensure *Charter* compliance but they will not necessarily be designed to compensate individuals for past *Charter* violations: an expansion of the range of remedies that can be granted by administrative tribunals is required.

No administrative tribunal currently exists that has jurisdiction to decide questions of law and grant the remedy required for a s. 11(b) breach. Provincial human rights tribunals could take on the burden of granting s. 24(1) remedies.<sup>71</sup> This requires a change in the enabling statutes to ensure jurisdiction over the question of law and that the *Charter* is not excluded from its jurisdiction. Additionally, it would require that the remedies available to provincial human rights tribunal be expanded to include s. 24(1) damages. Knowledge possessed by human rights tribunals would be adequate for the purposes of awarding s. 24(1) *Charter* damages: human rights law is closely connected to constitutional law.

The limitation of human rights tribunals being reformatted to grant s. 24(1) remedies is the wait time for a hearing: it takes approximately one year to get a hearing depending on the province in which the accused is located.<sup>72</sup> Thus, an accused whose rights to trial within a reasonable time has been violated must wait an additional year after the conclusion of their criminal

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<sup>69</sup> Roach, *supra* note 55 at 141.

<sup>70</sup> Bredt & Kraiewska, *supra* note 68.

<sup>71</sup> Toprani, *supra* note 62 at 15.

<sup>72</sup> *Ibid.*

trial for damages. This may not be devastating for the factually innocent accused receiving financial compensation, but it may be a great hindrance for a convicted accused who is seeking a reduction in sentence: his or her sentence could be served by the time the application is heard. Financial damages could be awarded in lieu of a reduction in sentence, but will \$5,000 replace three months of freedom?<sup>73</sup> However, the administrative tribunal scheme allows claims to be settled prior to hearing and thus this additional delay may be relatively short.

Administrative tribunals, while attractive, perpetuate the delays for the accused. The accused must expend their own resources to claim a remedy for a violation of his or her s. 11(b) *Charter* rights and wait an additional period after the completion of trial for a remedy. No administrative tribunal is currently equipped with jurisdiction to grant a *Charter* damages remedy: changes to enabling statutes must occur. Most importantly, the legislature has power over the jurisdiction of administrative tribunals. If the legislature believes that administrative tribunal remedies for *Charter* breaches are too excessive or too plentiful, it can amend the enabling statute to prevent the tribunal from granting s. 24(1) remedies. It has the potential to once again make s. 11(b) a *Charter* right without an obtainable remedy.

### 3. *Small Claims Courts*

The resolution of s. 11(b) violations through s. 24(1) remedies in small claims court provides a venue for litigants to represent themselves. It also excludes the possibility of unsuccessful litigants being ordered to pay adverse costs.<sup>74</sup> Small claims court is thus more accessible to more litigants making *Charter* remedies available to more individuals. Like administrative tribunals, small claims court s. 24(1) remedies would allow third party non-accused to obtain a remedy for a breach of his or her *Charter* rights: it could open the possibility for the expansion of s. 11(b) rights to complainants.

Small claims courts' limit on quantum claimed has increased well above the \$5,000 awarded as *Charter* damages in *Ward*. For example, in 2016, the quantum limit for Ontario small claims court increased from \$10,000 to \$25,000.<sup>75</sup> This would provide the flexibility necessary to grant the

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<sup>73</sup> In *Ward*, \$5,000 was the amount of damages awarded for a breach of the accused's section 8 *Charter* rights.

<sup>74</sup> Roach, *supra* note 55 at 142.

<sup>75</sup> Ontario, Ministry of the Attorney General, "Small Claims Court - Increase in Monetary Limit from \$10,000 to \$25,000" (14 April 2016), online: <<https://www.attorney>

appropriate and just s. 24(1) remedy given the circumstances surrounding the s. 11(b) breach. However, as the Court in *Ward* stated that loss of earnings for a period of prolonged detention could be claimed under s. 24(1) damages, the \$25,000 cap may be insufficient to remedy a s. 11(b) breach. For example, if the accused in *Williamson* had been suspended from his job as a teacher *without pay* and the delay attributable to the Crown remained at 34 months, at the end of trial had Mr. Williamson been acquitted, part of his claim for damages would be for 34 months' lost earnings. This would greatly exceed the \$25,000 cap. Remedying s. 11(b) violations in small claims courts may prohibit claimants' from receiving an appropriate and just remedy.

Unlike superior and provincial criminal court judges or administrative tribunals, small claim courts judges have little experience in criminal or constitutional matters. Small claims courts are predominantly limited to a niche class of disputes.<sup>76</sup> In Ontario, for example, small claims court judges are 'deputy judges' – lawyers who sit on a *per diem* basis.<sup>77</sup> These deputy judges may not have the experience in deciding complex *Charter* issues, which could lead to divergent results. This, coupled with the fact that most small claim courts litigants are self-represented, may make the s. 24(1) process slow and unpredictable.

Granting s. 24(1) remedies in small claims courts eliminates the accessibility issue of criminal courts and administrative tribunals. It also protects the claimant from paying adverse costs if he or she is unsuccessful. Small claims courts are nonetheless limiting. Claimants cannot receive greater than a \$25,000 damage claim and it does not guarantee access to the expertise necessary for *Charter* issues. Small claims court, like superior criminal courts and administrative tribunals, remain an inappropriate forum to award appropriate and just remedies under s. 24(1) of the *Charter*.

## VI. CRIMINAL COSTS: A MOVE IN THE RIGHT DIRECTION?

There is a system in place that could award s. 24(1) damages for a s. 11(b) breach. These damages could be awarded by superior and provincial criminal courts, administrative tribunals or small claims courts. These

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[general.jus.gov.on.ca/english/courts/scc/scc\\_increase\\_limit.php](http://general.jus.gov.on.ca/english/courts/scc/scc_increase_limit.php)>.

<sup>76</sup> Toprani, *supra* note 62 at 14.

<sup>77</sup> *Ibid.*

forums could apply the *Ward* test to determine whether *Charter* damages are warranted. However, just because something can be done does not mean it should be done.

An examination of the Court's s. 11(b) jurisprudence indicates that s. 24(1) damages in the form of costs or a reduction in sentence will be insufficient for a breach of an accused's s. 11(b) rights. Lamer J's reasoning in *Mills* holds true: after the passage of an unreasonable time, "no trial, not even the fairest possible trial," is permissible and the minimum remedy to a breach of an accused's s. 11(b) *Charter* right is a stay of proceedings.<sup>78</sup> Once the presumptive ceiling is reached any further time it takes to adjudicate the case on its merits will continue to be an unreasonable amount of time regardless of how fast the rest of the trial may take. Arguments that sentence reduction provides the judiciary with a remedy to *Charter* infringements of the factually guilty "without throwing the baby out with the bathwater"<sup>79</sup> by granting the accused an "undeserved"<sup>80</sup> remedy fall short. No amount of money or reduction in sentence will make an unreasonable delay reasonable. Moreover, replacing the minimum remedy of a stay of proceedings for a s. 11(b) breach with a minimum remedy of damages may not withstand constitutional scrutiny.

A remedy for a s. 11(b) breach under s. 24(1) must be appropriate and just to both the accused and the government. With 800 stays of proceedings already applied for since July 2016 and 6,500 cases in Ontario provincial courts alone currently over the 18-month presumptive ceiling,<sup>81</sup> the amount of *Charter* damages awarded could be significant, especially if costs for lost earnings are included.<sup>82</sup> In trying to keep remedies appropriate and just to both parties, the accused may never recover the full amount for suffering. On top of this, the accused will continue to be tried, absorbing more legal costs.

No reduction in sentence or costs will compensation for a degradation of evidence due to delay. Witnesses' memories fade or they become unavailable over time. The cost to an accused of degradation of evidence cannot be measured. It is not tangible like the damages in *Ward* where a

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<sup>78</sup> *Mills*, *supra* note 7 at 928.

<sup>79</sup> Toprani, *supra* note 62 at 16.

<sup>80</sup> *Ibid.*

<sup>81</sup> These numbers reflect a period from July 2016 to March 2017.

<sup>82</sup> Fine, *supra* note 43.

strip search occurred on arrest, nor is it quantifiable in the way that unreasonable search and seizure can be, where what is at issue is a matter of whether a search, a partial strip search, a complete strip search, or no search at all occurred. There is no measure of how strong the memory of the witness would have been had the trial taken place within a reasonable time. You cannot tell how much an accused was stripped of his or her right to a fair trial, s. 11(d) of the *Charter*, by a breach of s. 11(b). Of course, jurisprudence would develop that would guide courts on the appropriate and just amount of damage, but there is no evidence to ground the jurisprudence in its development. A stay of proceedings requires less weighing of factors after a s. 11(b) breach has been found.

A system of costs puts the failure of the government back onto society: on the accused in terms of additional legal costs and society generally through taxpayers' money to pay damages. A counter-argument is that two-thirds of the accused tried in 2013-14 were convicted and thus no financial costs would be awarded but rather it would save taxpayers money by reducing the period of incarceration. This does not consider the extra money spent on the trial itself or the amount of costs paid to the one third accused acquitted.<sup>83</sup> A system of costs, while quasi-satisfying the societal purpose of s. 11(b) that an accused be brought to trial, ignores the primary purpose of s. 11(b): that an accused be brought to trial within a reasonable time. Instead, it perpetuates the delay.

Introducing a system of costs would increase the burden on the accused. The court could issue a declaration or an injunction under s. 24(1) to prevent the accused's s. 11(b) rights from continuing to be violated, but the only meaningful way to prevent s. 11(b) rights from being violated is a stay of proceedings. Permitting a trial to continue permits the delay to continue. There would be little use in making a s. 11(b) application until the end of trial or at the time of sentencing when the total amount of delay can be determined. As the Court did in *Morin*, a system of costs would make s. 11(b) a right without a viable remedy. There would be less urgency on the Crown to complete trial in a timely manner as there is no penalty to them directly: it would be the government who pays the cost and not the individual actor, per *Ward*. While pressure from superiors in Public Prosecutions, delay could continue to be explained away by individual

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<sup>83</sup> Statistics Canada, "Completed Case Processing Times," *supra* note 4.

Crown Prosecutors with no perceivable repercussions. Introducing a system of costs would be a step back from the progress made in *Jordan*.

Many Senate Committee witnesses referred to the impact trial delays have on the complainant involved. It also puts his or her life on hold for an indeterminate period. Complainants have no s. 11(b) *Charter* rights, but it is nonetheless an important consideration given the Senate's emphasis on the secondary societal purpose of s. 11(b). A system of costs would offer little reprieve to the stress and anxiety of the complainant caused by trial delay. Not only would they have to wait extra months to testify and for a verdict, but they would also see a convicted accused receive financial compensation or serve a lesser sentence for a crime against them due to Crown delay. Unlike the factually-innocent accused, the complainants receive no financial compensation for their lives being put on hold. A stay of proceedings would not be ideal for complainants but an efficient judicial system that prevents delay before it occurs would benefit them greatly.

## VII. RECOMMENDATIONS

Introducing a system of costs is a reactive solution to *Jordan*. The government needs to instead create proactive preventative solutions to reduce delays. The Senate Legal and Constitutional Affairs Committee has heard from 22 witnesses as of March 9, 2017: legal associations, police services, provincial legal and prosecutions services, and private individuals. Witnesses advocated for different interests in the criminal justice system – for the police, for the accused, for the complainant, and for society generally. Yet, based on witnesses' testimony, an incontrovertible theme of demanding investments in upgrades to the front lines of the criminal justice system is apparent. More importantly, not a single witness proposed introducing a system of costs to the criminal justice system. More practical recommendations were put forward that would reduce delays rather than perpetuating the complacency that currently exists.

### A. Senate Committee's Preliminary Findings

In its Interim Report published in August 2016, the Senate Committee studied the impact of delays on victims and witnesses, accused persons, and on the justice system. It also studied the issue of bail reform, case management, court resources, and alternative methods to traditional criminal justice. In doing so, the Committee arrived at the following four

recommendations that the Government of Canada should undertake immediately:<sup>84</sup>

1. Work with the provinces, territories and judiciary to examine and implement best practices in cases and case flow management to reduce the number of unnecessary appearances and adjournments and to ensure criminal proceedings are dealt with more expeditiously;
2. Take steps to ensure that the system is in place to make the necessary judicial appointments to provincial superior courts as expeditiously as possible;
3. Show leadership in working with provinces and territories to help share best practices concerning mega-trials, restorative justice programs, therapeutic courts, “shadow courts” and integrated service models for courthouses, and to help them implement these in appropriate circumstances; and
4. Take the lead and invest in greater resources in developing and deploying appropriate technological solutions to modernize criminal procedures.

The Committee found that delay impacts all areas of the criminal justice system. It fosters feelings of revictimization in complainants by inducing worry and anxiety with every additional adjournment.<sup>85</sup> The accused may be left uncompensated for lengthy periods of pre-trial detention and face ostracizing and stigmatization by their community if they are acquitted.<sup>86</sup> Delays erode the confidence of the public in the justice system, calling the efficiency and fairness of the system into question.<sup>87</sup> Delays are a benefit to no one. To combat delay, the Committee suggested providing case management training to all judges and additional resources, including electronic resources, to the judicial system and legal aid.<sup>88</sup> This would be an ideal starting point in reducing delays.

The recommendations made indicate that the Senate Committee is alive to the issues causing delay in the criminal justice system. The evidence is before them. To abandon this course of action in favour of a system of

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<sup>84</sup> *Delaying Justice*, *supra* note 9 at 4.

<sup>85</sup> *Ibid* at 5.

<sup>86</sup> *Ibid*.

<sup>87</sup> *Ibid* at 6.

<sup>88</sup> *Ibid* at 6, 8, 11-13.

costs would be wrong. It would take resources away from innovations and programs required by the criminal justice system to reduce trial delays. It would stymie and significantly hamper any progress made towards reducing delays.

## **B. Going Forward: Methods of Eliminating Delay**

Senate Committee witnesses provided various practical solutions to delay, all of which are proactive and would have immediate impact. No one solution will work alone: several solutions must be implemented to work in tandem to reduce delays. Federal government funding is required for each solution and thus the Senate should look to implement these solutions as opposed to sinking money into a system of costs. The recommendations can be divided into the following categories: case management techniques; judicial resources; police powers; bail reform; federal legislation revision; technological advancements; and the availability of programs. None of these solutions will be achieved without changing the legal culture.<sup>89</sup> A change in the idea that 18 months or 30 months is a reasonable amount of time to complete a trial must occur.

### *1. Case Management Techniques*

A triage system like that of the healthcare system is necessary to prioritize cases. This would make the criminal system more efficient.<sup>90</sup> It would allocate priority based on case complexity and diversion and early resolution options available for each case.<sup>91</sup> This would help reduce the number of cases that would proceed to trial in addition to making more programs available to individual accused based on their needs.

A scheduling practice that facilitates the expeditious disposition of routine cases would also be beneficial in reducing delays. A system that

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<sup>89</sup> This paper studies Witness Statements to the Senate Standing Committee on Legal and Constitutional Affairs on delay up to March 9, 2017.

<sup>90</sup> Nova Scotia, Attorney General, "Written Submission to Senate Standing Committee on Legal and Constitutional Affairs" on the issue of "a study on the issue of delays in criminal proceedings" (Ottawa: Senate Standing Committee on Legal and Constitutional Affairs, 23 February 2016) at 5.

<sup>91</sup> Canada, Department of Justice, *The Final Report on Early Case Consideration of the Steering Committee on Justice Efficiencies and Access to the Justice System* (Ottawa: Senate Standing Committee on Legal and Constitutional Affairs, 2016) at 4 [DO], *Early Case Consideration*].

would quickly identify cases likely to require more counsel and judicial attention so that effective use can be made of courtroom time and counsel preparation time would be necessary. One method is the introduction of case timetables that would be set by the judge in consultation with counsel to determine the length of time the case should take at the outset.<sup>92</sup> However, this would also take up judicial resources that could be better used elsewhere. An effective solution could be to appoint judges specifically for case timetables that would not be subsequently seized with the case. With the help of court administrative staff, all scheduling could be done in a manner similar to a pre-trial conference. The accused would have an expectation of the length of trial from the outset and could appropriately organize their lives around the trial.

Implementing case management teams in Crown offices is another solution. These teams would be in large local jurisdictions and where dedicated teams are not feasible, vertical file management procedures could be developed to promote Crown ownership and accountability over files.<sup>93</sup> The early assignment of cases to specific Crown prosecutors would ensure consistency and accountability. The current method of passing files over based on who is available on the day of the hearing does not put anyone in control of a file: there is no one person to take the blame for delay. The case management team would be responsible for bail hearings, pre-charge screenings including elections and appropriateness of diversion programs, first appearances, pre-trial conferences, further disclosure requests, set date court, and communications with the investigating police officer. This would make more Crown prosecutors available for trial, reducing delay due to unavailability or counsel preparation time. It would also reduce over-charging,<sup>94</sup> as all files would be subject to pre-charge screening prior to first appearance.

A third case management solution, closely related to the first two solutions, is maximizing first appearances. The Department of Justice Canada recommends that all non-bail first appearances take place within four weeks of arrest with shorter periods for specialized cases such as

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<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid* at 23.

<sup>94</sup> Legal Aid Ontario, "LAO Submission to the Standing Senate Committee on Legal and Constitutional Affairs to Inform the Senate Study on Delays in Canada's Criminal Justice System" (Ottawa: Senate Standing Committee on Legal and Constitutional Affairs, 2016) at 5.

domestic violence cases, cases involving young persons, or child abuse.<sup>95</sup> At the first appearance full disclosure should be made available to the accused even if no application for disclosure has been made. The Crown's position on early resolution should be communicated to the accused and the accused should be provided the opportunity to speak to duty counsel regarding the Crown's position on early resolution prior to the first appearance to attempt to resolve the matter without setting dates for trial. For example, Legal Aid Nova Scotia recommends that more information be provided to self-represented litigants at first appearance to help guide them through the court process.<sup>96</sup> This could be facilitated during the accused's meeting with duty counsel regarding plea bargains.

Essential to a successful system of case management is technological advancements. Implementing a program of electronic disclosure would dramatically decrease the number of adjournments required prior to election/plea and trial.<sup>97</sup> An electronic disclosure designed to categorize the documents contained in the disclosure would not only help get the disclosure to the accused or their counsel, but it would also help in reducing the time required for preparation for trial. One click would replace rifling through papers to find the document required. Technology would also be valuable in creating an efficient scheduling practice that prioritizes more complex cases. The system could fill dead time in court that was created by a resolution to cases prior to trial. Technological advancements could also include video-trials and pre-conferences where the available justice, the Crown, and the accused would not have to be in the same courtroom, or any courtroom at all.<sup>98</sup> It could be done from offices and conference rooms. Available judges could be seized of matters from neighbouring jurisdictions to help alleviate backlog.

These case management innovations would reduce unnecessarily scheduled trial dates that result in adjournment after adjournment for issues such as disclosure that could be resolved at first appearance. The 90 per cent of criminal cases that do not end with a trial will not be set down for trial

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<sup>95</sup> Canada, Department of Justice, *supra* note 91 at 28.

<sup>96</sup> Nova Scotia, Attorney General, *supra* note 90 at 4.

<sup>97</sup> Legal Aid Ontario, *supra* note 94 at 4.

<sup>98</sup> Saskatchewan, Ministry of Justice, "Saskatchewan Ministry of Justice Presentation – Standing Senate Committee on Legal and Constitutional Affairs" (Ottawa: Senate Standing Committee on Legal and Constitutional Affairs, 24 February 2016) at 3.

unnecessarily.<sup>99</sup> The innovations would create a system that prioritizes cases based on complexity and ensures that the appropriate amount of court time is scheduled for each trial without overscheduling, leaving much needed courtrooms empty while accused wait for trial. It is the first step required to fix the delays that currently occur in the criminal justice system.

## 2. *Judicial Resources*

Appointing experienced criminal lawyers from both sides of the aisle would facilitate speedy dispositions at trial. Along with filling all judicial vacancies, the federal and provincial governments must proportionally increase Crown prosecutor positions to ensure Crown availability for trial.<sup>100</sup> This also means an increase in legal aid funding to ensure defence counsel's availability. To increase judicial resources, the appointment process must be improved. Partisan patronage appointments must be eliminated. Superior Courts should be split into criminal and civil divisions so the appointments process can appoint judges with the appropriate experience to the appropriate division.<sup>101</sup> A streamlined process to appoint judges with the experience necessary to dispose of criminal matters efficiently is necessary to reduce delays in the future.

## 3. *Bail Reform/Police Powers*

The Criminal Lawyers' Association argued that denial of bail fundamentally hampers the justice systems ability to deliver justice: federal bail reform has failed, unjustly incarcerated marginalized groups such as the poor, the dispossessed, the disadvantaged, the mentally ill, and those new to our country and culture.<sup>102</sup> The wholesale denial of bail undermines efficiency in dealing with criminal matters as it is difficult to meet with clients to review disclosure and it lacks the rehabilitative programs that would benefit the accused.

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<sup>99</sup> Canadian Bar Association, "Study on Matters Pertaining to Delays in Canada's Criminal Justice System" (Ottawa: Senate Standing Committee on Legal and Constitutional Affairs, 17 February 2016) at 2.

<sup>100</sup> *Ibid* at 3.

<sup>101</sup> Ian Greene, "Delays in Criminal Proceedings" (Ottawa: Senate Standing Committee on Legal and Constitutional Affairs, 9 March 2016) at 6.

<sup>102</sup> Criminal Lawyers' Association, "Presentation on Delays in the Criminal Justice System" (Ottawa: Senate Standing Committee on Legal and Constitutional Affairs, 18 February 2016).

As of 2000-01, 60 per cent of all admissions to provincial correctional facilities are accused remanded until trial.<sup>103</sup> Failure to comply with a court order is the fourth most frequently occurring offence in Canada, representing nineteen percent of all cases in 2003-04.<sup>104</sup> The use of bail supervision and verification programmes to provide monitoring, referrals, and supervision beyond reporting conditions would reduce the amount of bail court appearances and re-appearances. It would provide community-based services to assist accused who are at risk of being denied bail on primary grounds: the risk of non-appearance. These programs could also provide counselling and treatment options while awaiting trial. Ontario has had success with these programs since 1979: in 2003-04 81 per cent of bail supervision programme clients attended all their court appearances.<sup>105</sup> These programs cost \$3 a day per client, compared to \$315 per day per inmate in custody.<sup>106</sup> Not only would these programs reduce delays but also would save the funds that could be put back into the program and other proactive delay-reduction mechanisms.

Disclosure should be provided by the Crown at the bail hearing.<sup>107</sup> The Crown should endeavour to provide as much information at the time of the bail hearing so the defence counsel can appropriately advise his or her client. Before the bail hearing, the police should provide the Crown with, at minimum, a synopsis and record of arrest, the criminal record of the accused, and a synopsis of any videotaped statements where a transcript has not yet been prepared.<sup>108</sup> This would give both Crown and defence counsel a better idea of the issues and whether release or remand will be consented to before proceeding with the bail hearing.

Technology could be useful to resolving bail reform issues. The use of an audio and video remand system would facilitate meetings between the accused and their counsel to discuss disclosure: it would be secure and convenient access to clients.<sup>109</sup> It would also reduce having accused transported to court when scheduling is at issue. If the court has time for a

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<sup>103</sup> DOJ, *Early Case Consideration*, *supra* note 91 at 2.

<sup>104</sup> *Ibid* at 3.

<sup>105</sup> *Ibid* at 16.

<sup>106</sup> *Ibid*.

<sup>107</sup> *Ibid* at 21.

<sup>108</sup> *Ibid*.

<sup>109</sup> *Ibid* at 19.

bail hearing when the accused is not present in the courtroom, it could proceed without the accused's physical attendance by video. This would fill gaps of dead time that currently exist when matters are adjourned for disclosure and thus reduce delays without requiring the extensive use of weekend and statutory holiday courts.

Police in Canada currently have the power under s. 498(1)(c) of the *Criminal Code* to release an accused with sureties or under s. 499 by signing an undertaking (Form 11.1).<sup>110</sup> More education on how and in what circumstances to release an accused would eliminate the number of bailing hearings required. An amendment to the *Criminal Code* to allow police to release without sureties would further relieve the justice system as an appearance to release on consent by Crown counsel would not be required.<sup>111</sup>

A more efficient bail system can be easily structured if the proper supervision programs and technology are available. Police powers can further reduce congestion in bail courts by exercising their power to release accused with sureties or on an undertaking. These small changes would have a sizable impact on reducing delays.

#### 4. *Federal Legislation Revision*

Providing court administrative staff with the power to schedule through legislative reform would be a step in reducing delay. It would eliminate the need to go before a justice to request or change a date. It could also grant the power for administrative staff to remove cases from the docket with consent of both the Crown and defence counsel and subsequently reschedule a different matter in the same timeslot. It would greatly reduce dead time that courts currently experience when a 1.5-day trial is adjourned or withdrawn.

Revising sentencing provisions may also reduce trial delay. Frequently recommended revisions include revisions to mandatory minimum sentences, Part XXIV of the *Criminal Code* in relation to dangerous and long-term offender designations, provisions dealing with the *Sexual Offender Information Registration Act* (SOIRA), and the provisions dealing with judicial interim release.<sup>112</sup> Changes to these provisions would grant the Crown

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<sup>110</sup> *Ibid* at 11.

<sup>111</sup> Greene, *supra* note 101 at 6.

<sup>112</sup> Nova Scotia, Attorney General, *supra* note 90 at 6.

greater flexibility in negotiating a plea bargain prior to trial. The current rigid mandatory minimums sentences, for example, do not allow a Crown attorney to give an offer below the minimum to an accused, putting the accused in an all-or-nothing situation where they have nothing to lose by going to trial. There is no incentive to plead guilty early in the process.

### 5. *Availability of Programs*

Rehabilitation should be a prominent goal in restructuring the criminal justice system to reduce delays. Various rehabilitative programs exist but no province offers all programs necessary to reduce delays. Sharing information between provinces on programs offered would help build a system that works for everyone. A critical requirement is increased access to legal aid funding to provide access to legal services to more accused, reducing the number of self-represented litigants in the process.<sup>113</sup> This will also make more accused aware of the range of programs available and give them the advice necessary to make use of the programs.

A range of adult diversion programs with clear operating principles and eligibility of community use must be made available.<sup>114</sup> Crown counsel should be encouraged to consider and promote the use of these diversion programs in all appropriate circumstances. These diversion programs can include mediation, sentencing circles, Aboriginal court worker programs, mental health services, drug therapy courts, and addictions counselling.<sup>115</sup> For example, Legal Aid Ontario has implemented an Aboriginal Justice Strategy that increases client access to *Gladue* report-writing services among other services for Aboriginal clients in addition to a Mental Health Strategy to better help clients with mental health issues.<sup>116</sup> The Saskatchewan Ministry of Justice has implemented an Aboriginal Courtworker Program that ensures Aboriginal accused receive fair treatment.<sup>117</sup> Incorporating

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<sup>113</sup> Canadian Bar Association, *supra* note 99 at 3.

<sup>114</sup> DOJ, *Early Case Consideration*, *supra* note 91 at 31.

<sup>115</sup> *Ibid*; Greene, *supra* note 101; Nova Scotia, Attorney General, *supra* note 90; Legal Aid Ontario, *supra* note 94; Saskatchewan, Ministry of Justice, *supra* note 98; Ottawa Police Services, "Presentation to Senate Standing Committee on Legal and Constitutional Affairs" (Ottawa: Senate Standing Committee on Legal and Constitutional Affairs, 14 April 2016); John Bradford, "Delays in Criminal Trials" (Ottawa: Senate Standing Committee on Legal and Constitutional Affairs, 20 April 2016).

<sup>116</sup> Legal Aid Ontario, *supra* note 94 at 6.

<sup>117</sup> Saskatchewan, Ministry of Justice, *supra* note 98 at 4.

diversion programs such as these in each province would provide viable options to accused to avoid trial.

Restorative justice is necessary in the criminal justice system. Without it, accused will proceed through the trial process with no resources to rehabilitate them. It offers no alternative to a criminal trial and sentence. These diversion programs will see accused treated fairly and allow them to get the help they need while simultaneously reduce trial delays. It considers the uniqueness in circumstance of every accused and the differing needs for rehabilitation. The federal government and the provinces must work together to build a range of programs to service all accused.

## VIII. CONCLUSION

*Jordan* once again made s. 11(b) of the *Charter* a right with a remedy. It has woken the criminal justice system up from its 25-year slumber to address trial delay. Yet, the presumptive ceilings do nothing to encourage reducing delays below their current levels. *Jordan* simply brings the s. 11(b) jurisprudence back to pre-*Askov/Morin* state: it does not address the current realities of the criminal justice system. In doing so, it creates a new form of complacency.

The minimum remedy to a breach of an accused's s. 11(b) rights is currently a stay of proceedings under s. 24(1) of the *Charter*: this should not be altered. While a system of costs can be introduced into the criminal justice system through amendments to the *Criminal Code*, this does not mean that a system of costs should be introduced. A system of costs, as proposed by the Senate Committee, is a reactive remedy to *Jordan* and will do nothing to reduce trial delays. Instead, it will perpetuate delay by allowing a trial to continue beyond a reasonable time.

Proactive remedies are required to combat trial delays. These remedies include, but are not limited to, case management techniques, greater judicial resources, bail reform, federal legislation revision, and increased availability of diversion programs. Not one solution will be successful in reducing delays: various solutions must be introduced simultaneously to work to reduce delays. A change in attitudes about the reasonable amount of time for trial is imperative for any remedy to be effective. Collaboration between the federal government, provincial and territorial governments, the judiciary and both Crown and defence counsel is necessary to reduce

criminal trial delays. It should not be on accused alone to fight the systematic abuse of their *Charter* rights.