

REMEDYING UNREASONABLE DELAY

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In R. v. Jordan, the Supreme Court of Canada adopted presumptive ceilings for determining whether the right to be tried within a reasonable time is violated. In so doing, the Supreme Court eschewed any balancing of individual and societal interests at the rights stage of analysis. Unfortunately, the Supreme Court did not simultaneously reconsider its prior determination that the only remedy for unreasonable delay is a stay of proceedings. As balancing individual and societal interests is fundamental to determining whether a stay is justified, the next logical step is to shift this balancing to the remedial stage of analysis. In so doing, the accused should typically be required to prove that the harm suffered irreparably undermines fair trial interests before proceedings are stayed in response to unreasonable delay. A stay of proceedings in these circumstances, however, ought not be restricted to “non-serious” crimes. Where the harm relates to the accused’s liberty or security interests, other remedies should be granted. The Senate’s recent proposal to grant monetary rewards is feasible if supplemented with other remedies that limit the continued impact of delay on an accused’s liberty and security interests. I nevertheless maintain that using financial compensation to remedy the impact of delay on these interests ought to be approached with caution as it could encourage complacency towards delay. To counteract this incentive, stays of proceedings should remain available if the Crown uses this narrower remedial structure as a means to “buy time” to conduct prosecutions.

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I. INTRODUCTION

In *R. v. Jordan*,¹ the Supreme Court of Canada overhauled the law relating to the right to be tried within a reasonable time protected under section 11(b) of the *Canadian Charter of Rights and Freedoms*.² Although the Supreme Court’s new presumptive ceilings for trial delay were quickly problematized,³ only a small literature has debated the sustainability of

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¹ 2016 SCC 27 [*Jordan*]. This framework was revisited and upheld one year later in *R v Cody*, 2017 SCC 31.

² Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

³ See e.g. *R v King*, 2018 NLCA 66 at para 33 (listing 28 questions that arise from *Jordan*, *supra* note 1); *R v Schenkels*, 2017 MBCA 62 at paras 43–50; *R v Nasery*, 2017 ABQB 564 (considering whether ceilings should be lowered if no preliminary inquiry takes place); *York (Regional Municipality) v Tomovski*, 2017 ONCJ 785 (whether provincial offences demand a lower ceiling); *R v JM*, 2017 ONCJ 4 (considering whether the ceilings should be lowered in youth matters); *R v TML*, 2019 ABCA 176 (asking when the clock starts running when multiple charges arose on the same indictment at different times); *R v KGK*, 2019 MBCA 9; *R v Warring*, 2017 ABCA 128; *R v Rhode*, 2019 SKCA 17 (asking whether the clock stops running when all evidence is admitted, after the judge’s verdict is rendered, or after sentencing); *R v Mouchayleh*, 2017 NSCA 51 (considering what counts as defence delay).

a separate holdover from the old law: an automatic stay of proceedings. The Supreme Court's decision in *Jordan* to eschew balancing the relevant individual and societal interests at the rights stage of analysis has opened the door to reconsider the appropriate remedy for unreasonable trial delay. Indeed, the Supreme Court was willing to address this issue in *Jordan*. As the majority observed in a footnote, it was "not invited to revisit the question of remedy" and it therefore "refrain[ed] from doing so."⁴

The proposed legal frameworks for remedying unreasonable delay after *Jordan* are divergent. Although the Senate's Standing Committee on Legal and Constitutional Affairs would permit courts to stay "non-serious" proceedings rendered unfair by trial delay, it would prefer to grant monetary compensation to innocent accused who received a fair trial but were subjected to unreasonable delay.⁵ Similarly, those found guilty after an unreasonably delayed but fair trial would only receive a sentence reduction.⁶ To the contrary, Keara Lundrigan contends that a stay of proceedings is the only appropriate response to unreasonable delay as other remedies inadequately respond to the "culture of complacency" the Supreme Court sought to discourage in *Jordan*.⁷ Alternatively, Christopher Sherrin advocates for a multi-remedy approach that tracks the relevant constitutional harm resulting from any unreasonable delay and awards a remedy accordingly.⁸ Andrew Pilla and Levi Vandersteen more recently made a similar recommendation.⁹

In my view, a stay of proceedings ought not be the only remedy for unreasonable delay. Although a stay is appropriate where delay renders a trial unfair, the automatic stay rule ignores the ability of other available remedies to deter Crown conduct and the need to ensure societal interests are given due weight when awarding a remedy.¹⁰ The Senate Committee's proposal to grant financial payouts and sentence reductions in cases where fair trial interests are not implicated nevertheless swings the pendulum too far in the other direction. Financial payouts may be used as a means for the state to "buy time" to prosecute a case which would undermine public confidence in the justice system. A reduction in sentence would also fail to deter Crown conduct because sentence reductions derive directly from the sentencing principles in the *Criminal Code* of Canada.¹¹ Any reduction in sentence is therefore tantamount to granting no remedy at all as the offender incurs the same degree of sanction as an offender who committed a similar crime but was tried in a reasonable time. They simply serve their sentences differently.

I nevertheless maintain that financial payouts may serve as a reasonable remedy when the relevant delay does not undermine the fairness of the trial. These circumstances will arise in the vast majority of cases as those who are subject to unreasonable delay will typically only

⁴ *Jordan*, *ibid* at para 35, n 1.

⁵ Standing Senate Committee on Legal and Constitutional Affairs, *Delaying Justice Is Denying Justice: An Urgent Need to Address Lengthy Court Delays in Canada (Final Report)* (Ottawa: June 2017) (Co-Chairs: Hon Bob Runciman & Hon George Baker) at 36–40 [Senate Committee].

⁶ *Ibid*.

⁷ Keara Lundrigan, "R v *Jordan*: A Ticking Time Bomb" (2018) 41:4 Man LJ 113 at 113, 115. See also *Jordan*, *supra* note 1 at paras 29, 40.

⁸ Christopher Sherrin, "Reconsidering the *Charter* Remedy for Unreasonable Delay in Criminal Cases" (2016) 20:3 Can Crim L Rev 263 at 264–65.

⁹ Andrew Pilla & Levi Vandersteen, "Re-Charting the Remedial Course for Section 11(b) Violations Post-*Jordan*" (2019) 56:2 Osgoode Hall LJ 436.

¹⁰ This framework will be discussed below.

¹¹ RSC 1985, c C-46.

have their liberty and security interests infringed. To address the potential for this remedial approach to undermine the integrity of the justice system, I maintain that courts ought to retain a residual discretion to stay proceedings in two circumstances where the constitutional harm suffered by the accused does not undermine trial fairness. The first scenario involves cases where the Crown fails to adequately expedite a trial after an initial finding that the trial has been unreasonably delayed. The second scenario arises if the accused can prove that the delay they incurred is part of a systemic practice of prioritizing trials based on their likelihood of engaging fair trial interests. As such an approach unjustly devalues some accused's *Charter* rights, it must be denounced in the strongest possible terms.

The article unfolds as follows. Part II provides a brief review of the Supreme Court's recent development of section 11(b) of the *Charter*. Part III then explains why the decision in *Jordan* to remove interest balancing from the rights stage of the analysis requires that these interests now be considered when determining the appropriate remedy. Where the constitutional harm relates primarily to the accused's security or liberty interests, I contend that remedies other than a stay of proceedings should typically be awarded. Part IV qualifies the latter conclusion by problematizing a plausible alternative remedial framework for unreasonable delay that engages an accused's liberty and security interests: financial payouts and sentence reductions. To combat any potential for the Crown to remain complacent with respect to trial delay, financial payouts should be granted in addition to any sentence reduction. More importantly, courts should retain a residual discretion to stay proceedings where the state's reliance on financial payouts threatens to undermine the integrity of the justice system.

II. SECTION 11(B) OF THE *CHARTER*

The Supreme Court solidified its initial test for finding a breach of section 11(b) of the *Charter* in *R. v. Morin*.¹² In determining whether trial delay was unreasonable, courts were required to balance several factors. The first factor concerned the length of the total delay in trying the accused.¹³ The trial judge would subtract any delay that was waived by the defence.¹⁴ Any other reasons for the delay offered by counsel were then taken into consideration. These reasons included "the inherent needs of the case, defence delay, Crown delay, institutional delay, and other reasons for delay."¹⁵ Institutional delay in particular was assessed with two guidelines allowing for eight to ten months of delay in the provincial court, and a further six to eight months in the superior court after the accused was committed for trial.¹⁶ Finally, courts considered whether the accused suffered any prejudice to their liberty, security, and fair trial interests.¹⁷ The liberty interest is engaged if delay unduly increases the time the accused is held in pre-trial custody or under bail conditions.¹⁸ The security interest is engaged when the accused's "stress, anxiety, and stigma" endured while awaiting trial is unreasonably prolonged.¹⁹ Finally, fair trial interests are implicated if the

¹² [1992] 1 SCR 771 [*Morin*].

¹³ *Jordan*, *supra* note 1 at para 30 (summarizing the framework from *Morin*, *ibid*).

¹⁴ *Jordan*, *ibid*.

¹⁵ *Ibid*.

¹⁶ *Ibid*.

¹⁷ *Ibid*.

¹⁸ *Ibid* at para 20.

¹⁹ *Ibid*.

delay results in the accused's case faltering "owing to faded memories, unavailability of witnesses, or lost or degraded evidence."²⁰

The Supreme Court in *Jordan* offered several reasons for abandoning the *Morin* framework. First, the flexibility of the *Morin* framework rendered it exceedingly difficult to determine when a rights violation occurred. This in turn led to a "proliferation of lengthy and often complex [delay] applications, thereby further burdening the system."²¹ Second, establishing prejudice at the rights stage of analysis was difficult to prove. Although the impact on the liberty interest will typically be clear,²² the Supreme Court found that proving delay affected the accused's security of the person or fair trial interests is highly subjective.²³ Third, the *Morin* framework resulted in counsel debating whether various individual delays ought to "count" when assessing the impact of the overall delay.²⁴ This analysis focused on addressing delay in retrospect as opposed to encouraging the parties to prospectively manage each case in a manner that is consistent with the right to be tried within a reasonable time. Finally, the Supreme Court concluded that the *Morin* framework was unnecessarily complex as "[e]ach day of the proceedings from charge to trial is argued about, accounted for, and explained away."²⁵ For the majority, "[t]his micro-counting is inefficient, relies on judicial 'guesstimations', and ... [results in] tolerance of ever-increasing delay."²⁶

As a result of these criticisms, the majority replaced the *Morin* framework with a presumptive ceiling within which accused must be tried: 18 months for cases in provincial court and 30 months for cases in a superior court.²⁷ If the total delay from the time of the charge to end of trial — minus defence delay²⁸ — exceeds the ceiling, then the delay is presumed unreasonable.²⁹ To rebut this presumption, the Crown must establish "exceptional circumstances."³⁰ Such circumstances "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."³¹ Exceptional circumstances will typically arise due to unforeseeable delays like an illness or unexpected development at trial or because the complexity of the charge requires that counsel spend an unusual amount of time preparing its case.³²

It is also possible to establish a breach of section 11(b) of the *Charter* if the delay falls below the relevant ceiling. To do so, the defence must meet two criteria. First, it must have

²⁰ *Ibid.*

²¹ *Ibid.* at para 32.

²² For instance, conditions of release provide objective criteria to measure the impact of any delay on the liberty interest.

²³ *Jordan*, *supra* note 1 at para 33.

²⁴ *Ibid.* at paras 35–36.

²⁵ *Ibid.* at para 37.

²⁶ *Ibid.*

²⁷ *Ibid.* at para 46 (notably, some provincial court cases may first go through a preliminary hearing in which case the 30-month ceiling applies at para 49).

²⁸ For a more detailed account of the meaning of "defence delay," see *ibid.* at paras 60–67.

²⁹ *Ibid.* at para 47.

³⁰ *Ibid.*

³¹ *Ibid.* at para 69 [emphasis omitted].

³² *Ibid.* at paras 71–81 (as the Supreme Court elaborated with respect to the complexity of the trial, "hallmarks of particularly complex cases include voluminous disclosure, a large number of witnesses, significant requirements for expert evidence, and charges covering a long period of time" at para 77).

taken “meaningful steps that demonstrate a sustained effort to expedite the proceedings.”³³ Token efforts, such as stating on the record that the defence wanted an earlier trial date, are insufficient. Instead, the defence must show that “it attempted to set the earliest possible hearing dates, was cooperative with and responsive to the Crown and the court, put the Crown on timely notice when delay was becoming a problem, and conducted all applications (including the [section] 11(b) application) reasonably and expeditiously.”³⁴ Second, the defence must establish that the case “took markedly longer than it reasonably should have.”³⁵ In making this determination, judges must consider the average length of such a trial given the case’s complexity and the available criminal justice resources in the relevant jurisdiction.³⁶ As the Supreme Court cautioned, however, stays of proceedings beneath the presumptive ceiling should “be rare, and limited to clear cases.”³⁷

Although the *Jordan* framework simplified the section 11(b) analysis, it remains controversial because it explicitly removed two factors for determining whether a stay of proceedings is an appropriate remedy for unreasonable delay. First, it no longer considers the extent to which delay impacted the accused’s liberty, security, or fair trial interests. Instead, prejudice is presumed to warrant a stay of proceedings once the delay exceeds the relevant ceilings for prosecuting an offence.³⁸ Second, the gravity of the offence has been removed from the analysis despite this consideration implicating society’s interests in conducting a trial on the merits.³⁹ As Pilla and Vandersteen maintain, “the presumption of prejudice and the removal of the seriousness of the offence as a factor in *Jordan* mean trial judges may no longer explicitly balance the accused’s interest in a stay against society’s interest in a trial.”⁴⁰

III. STAYING PROCEEDINGS

Section 24(1) of the *Charter* allows anyone whose rights have been infringed or denied to “apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.”⁴¹ As Justice McIntyre wrote in *R. v. Mills*,⁴² it is “difficult to imagine language which could give the court a wider and less fettered discretion.”⁴³ Section 24(1) therefore ought not be reduced “to some sort of binding formula for general application in all cases.”⁴⁴ Unfortunately, this is precisely what the Supreme Court’s decision in *Jordan* has accomplished. Upon establishing a certain duration of delay, the proceedings will be stayed regardless of the impact of the delay on the accused’s constitutional interests or societal interests more broadly.

³³ *Ibid* at para 82.

³⁴ *Ibid* at para 85.

³⁵ *Ibid* at para 82.

³⁶ *Ibid* at paras 88–89.

³⁷ *Ibid* at paras 48, 83.

³⁸ *Ibid* at para 81.

³⁹ *Ibid*. Although the Supreme Court acknowledges that more serious cases will typically be more complex and therefore considered at the “exceptional circumstances” stage of the analysis, serious cases need not always be more complex.

⁴⁰ Pilla & Vandersteen, *supra* note 9 at 440–41.

⁴¹ *Charter*, *supra* note 2, s 24(1).

⁴² [1986] 1 SCR 863 [*Mills*].

⁴³ *Ibid* at 965.

⁴⁴ *Ibid*.

The Supreme Court's explanation for the automatic stay rule derives from *R. v. Rahey*,⁴⁵ a case decided before the Supreme Court solidified its initial framework for determining whether trial delay is unreasonable in *Morin*. As Justice Wilson concluded, "what the court cannot do is find that [the accused's] right has been violated ... and still press him on to trial."⁴⁶ For Justice Wilson, such an approach would deprive the accused of their rights under "the pretext of granting him a remedy for its violation."⁴⁷ Similarly, Justice Lamer concluded that a stay of proceedings is the only reasonable remedy because "[t]o allow a trial to proceed after such a finding would be to participate in a further violation of the *Charter*."⁴⁸ Thus, the majority of the Supreme Court maintained that a stay is the only appropriate remedy because any other remedy would necessitate tolerance of a further violation of the right to be tried in a reasonable time.

This approach stands in stark contrast to determining whether a breach of other *Charter* rights ought to result in a stay of proceedings. Given the "drastic" nature of this remedy,⁴⁹ the Supreme Court has repeatedly concluded that a stay must only be awarded in the "clearest of cases."⁵⁰ Such cases fall into two categories. First, state conduct may undermine the accused's ability to receive a fair trial. Second, a stay may be ordered where state conduct undermines the integrity of the justice system. Regardless of which category the accused pleads, the test for staying proceedings is the same.⁵¹ First, the prejudice suffered by the accused must be "manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome."⁵² Second, the defendant must establish that no alternative remedy is capable of redressing the prejudice suffered. Finally, if uncertainty persists, the court must balance the need to denounce state misconduct against society's interest in having a trial on the merits.⁵³

The fact that *Rahey* was decided early on in the Supreme Court's jurisprudence likely accounts for the drastically different approach to staying proceedings in the section 11(b) context. This fact alone, however, cannot justify preserving the automatic stay rule. The problem with focusing only on the existence of unreasonable delay is that it fails to consider *why* excessive delay is problematic.⁵⁴ Those reasons were previously considered at the rights stage of analysis under the *Morin* framework. Only if the law unduly impacted the accused's liberty, security, and fair trial interests would a stay of proceedings be granted. If not, the Supreme Court refused to find a violation, thereby preventing the accused from receiving any remedy even if their interests were impacted by the Crown's delay in bringing a proceeding to trial.

The main benefit of the *Jordan* approach is that it does not allow courts to ignore the inevitable impact on the accused's liberty and security interests resulting from unreasonable trial delay. Regardless of the nature of the charge, unreasonable delay will result in

⁴⁵ [1987] 1 SCR 588 [*Rahey*].

⁴⁶ *Ibid* at 619.

⁴⁷ *Ibid*.

⁴⁸ *Ibid* at 614.

⁴⁹ *R v Regan*, 2002 SCC 12 at para 53 [*Regan*].

⁵⁰ *R v Babos*, 2014 SCC 16 at para 31 [*Babos*], citing *R v O'Connor*, [1995] 4 SCR 411 at para 68.

⁵¹ *Babos*, *ibid*.

⁵² *Ibid* at para 32, citing *Regan*, *supra* note 49 at para 54.

⁵³ *Babos*, *ibid*, citing *Regan*, *ibid* at para 57.

⁵⁴ Sherrin, *supra* note 8 at 264.

unnecessary pre-trial detention or (potentially onerous) bail conditions being imposed on many accused for unreasonably lengthy periods of time. The stigma the accused reasonably feels as a result of a pending criminal charge is also necessarily worsened when the accused must wait an unreasonable amount of time to be tried. These inherent effects on an accused subject to unreasonable delay are adequate to conclude that their rights have been infringed and, therefore, ought to result in a remedy. To conclude otherwise ignores two of the core purposes underlying why accused must be tried within a reasonable period of time.

It is nevertheless difficult to imagine a scenario where the impact on the liberty and security interests arising from unreasonable delay would alone warrant a stay of proceedings. Applying the general test for staying proceedings, it is necessary for the accused to prove that the administration of justice was undermined as a result of the impact of the delay on their liberty and security interests.⁵⁵ This is a high threshold to meet as cases of extreme state misconduct — such as using grossly excessive force during an arrest,⁵⁶ threatening an accused to plead guilty or face additional charges, and intentionally misleading the trial judge about the seizure of a valuable piece of evidence⁵⁷ — are inadequate to stay proceedings. Moreover, alternative remedies are often available to assuage these concerns. Where the accused’s liberty and security interests are infringed, Sherrin has provided a detailed review of how alternative remedies will often be better tailored to the infringement. These remedies include orders to “release the defendant from custody, relax their bail conditions, award costs, give enhanced credit for pre-trial custody, [and] declare that the defendant’s *Charter* rights have been violated.”⁵⁸

Any impact of unreasonable delay on the accused’s fair trial interests provides a better case for awarding a stay of proceedings. As the Supreme Court observes in *Jordan*, delay in the proceedings may undermine the ability of the accused to have a fair trial because of “faded memories, unavailability of witnesses, or lost or degraded evidence.”⁵⁹ If the state’s conduct directly and irremediably impairs the ability of the accused to receive a fair trial, it cannot legitimately complain when the proceeding is stayed. To conclude otherwise would encourage state actors to promote the same culture of complacency that the Supreme Court in *Jordan* sought to combat with its revised framework for determining the reasonableness of delay.

The Senate Committee nevertheless suggests that proceedings ought not to be stayed in instances of “serious” crimes regardless of whether a fair trial becomes impossible as a result of unreasonable trial delay.⁶⁰ As it observes, the perceived loss of public confidence in the justice system is most acute when courts stay charges involving crimes such as murder,⁶¹

⁵⁵ *Babos*, *supra* note 50 at para 31.

⁵⁶ *R v Nasogaluak*, 2010 SCC 6 [*Nasogaluak*]. This case will be discussed in more detail below.

⁵⁷ *Babos*, *supra* note 50.

⁵⁸ Pilla & Vandersteen, *supra* note 9 at 457, summarizing the work of Sherrin, *supra* note 8 at 279–91. The appropriateness of these alternative remedies will be discussed in more detail below.

⁵⁹ *Jordan*, *supra* note 1 at para 20.

⁶⁰ Senate Committee, *supra* note 5 at 39.

⁶¹ *Ibid.*, citing *R v Picard*, 2016 ONSC 7061, stay rev’d 2017 ONCA 692, leave to appeal to SCC refused 37802 (9 August 2018); *R c Thanabalasingham*, 2017 QCCS 1271, aff’d 2020 SCC 18; *R v Regan*, 2016 ABQB 561, stay rev’d 2018 ABCA 55, leave to appeal to SCC refused 38055 (25 October 2018).

manslaughter,⁶² and child sexual assaults.⁶³ The risk posed to confidence in the administration of justice in cases where delay rendered the trial unfair must nevertheless also be considered. Would not any conviction for these crimes *also* undermine the public's faith in the criminal justice system? Put differently, convicting and sentencing a person to life in prison as a result of a murder charge to which they were not afforded the opportunity to provide full answer and defence runs profoundly against basic principles of fairness. In my view, the negative impact on public faith in the justice system from staying proceedings in these circumstances is not proportionate to the significant possibility of a person being convicted of a serious crime without a fair trial. The principle of justice underlying William Blackstone's famous ratio supports this general intuition: "[I]t is better that ten guilty persons escape, than that one innocent suffer."⁶⁴

It would nevertheless be imprudent for courts to automatically stay proceedings in all cases where the accused's fair trial interests have been undermined. The second requirement for staying proceedings requires that no alternative remedy be capable of adequately mitigating the impact of delay on the accused's fair trial interests.⁶⁵ Courts and commentators have observed that admitting hearsay statements may provide an adequate response to faded memories or deceased witnesses.⁶⁶ Alternatively, the jury may be directed to consider the passage of time in assessing a defence witness' credibility.⁶⁷ Similarly, courts may exclude evidence in the Crown's possession that contradicts the evidence lost due to delay.⁶⁸ If such an alternative remedy is sufficient to render the trial fair, a stay of proceedings would not be an appropriate remedy.

Remedying the impact of delay on fair trial interests in this more flexible manner is also consistent with how the Supreme Court has addressed breaches of section 7 of the *Charter* resulting in lost or destroyed evidence.⁶⁹ Whether evidence is lost due to unreasonable delay, negligence, or deliberate state action, the accused in both the sections 7 and 11(b) contexts is deprived of evidence relevant to their defence due to no fault of their own. Yet, only pursuant to a breach of section 11(b) is a stay of proceedings automatic. As the Supreme Court explains in the section 7 context, such a remedy may only be granted in the "rarest of cases" where prejudice is "substantial, clear and irreparable, and only in circumstances where anything less will perpetuate or aggravate the prejudice."⁷⁰ The automatic stay rule in the

⁶² See e.g. *R v Manasseri*, 2016 ONCA 703, leave to SCC refused 37322 (13 April 2017).

⁶³ See e.g. *R v Williamson*, 2016 SCC 28.

⁶⁴ William Blackstone, *Commentaries on the Laws of England*, 4th ed (Oxford: Clarendon Press, 1770) vol 4 at 352 (the number of people included in the ratio is not a precise science, but the general principle that it is better to acquit multiple guilty people to avoid convicting even a single innocent person is meritorious).

⁶⁵ *Babos*, *supra* note 50 at para 32.

⁶⁶ See e.g. Sherrin, *supra* note 8 at 274–75, citing *Mills*, *supra* note 42 at 887:

[I]f for some reason the accused's right to a fair trial under s. 11(d) has been violated and the prejudice suffered is that the accused is precluded from adducing certain evidence due to a witness' disappearance, I see no reason why, under certain circumstances, the proper remedy could not be that the judge consider the facts the existence of which would have, to the satisfaction of the judge, been propounded by that witness, as averred.

⁶⁷ Sherrin, *ibid* at 275.

⁶⁸ *Ibid*.

⁶⁹ *Charter*, *supra* note 2, s 7. For a more detailed review of this argument, see Sherrin, *ibid* at 277–79.

⁷⁰ Sherrin, *ibid* at 277–78 [footnotes omitted], citing various sources, including *R v La*, [1997] 2 SCR 680 at paras 23–24, 27.

delay context therefore remains an anomaly and ought to be brought in line with the section 7 jurisprudence.⁷¹

It may nevertheless be countered that refusing to issue an automatic stay of proceedings is justified for a different reason unique to the delay context. As Lundrigan contends, any remedy short of a stay will only perpetuate the culture of complacency plaguing the criminal justice system.⁷² There are two reasons to reject this position. First, criminal justice actors cannot know beforehand whether a case will result in a stay of proceedings. This follows because factors relevant to determining whether a fair trial is possible — such as “faded memories, unavailability of witnesses, or lost or degraded evidence”⁷³ — cannot always be anticipated in advance. The Crown must therefore proceed knowing that there is still a *possibility* that the proceedings will be stayed if the delay becomes unreasonable. To increase this deterrent effect, I would be in favour of a presumptive stay of proceedings in response to the accused’s fair trial interests being undermined by unreasonable delay. Requiring the Crown to craft an adequate alternative remedy to avoid a stay would increase the pressure on the prosecution to speed the process along.

Second, and more importantly, the other available remedial responses for a finding of unreasonable delay are sufficiently punitive to deter Crown conduct. As explained earlier, it is possible in at least some cases to impact the ability of the Crown to secure a conviction by admitting otherwise inadmissible evidence, such as hearsay statements, to substitute for lost testimony. It may also often be possible to direct the jury to consider the passage of time in considering the credibility of testimony by a witness or exclude evidence valuable to the Crown’s case to level the playing field. In my view, any remedy that threatens the ability of the Crown to secure a conviction is a sufficient deterrent. To remedy delay impacting an accused’s liberty or security interests, commentators suggest that the accused may be monetarily compensated or have their sentence reduced.⁷⁴ Although a remedial framework employing monetary compensation has merit, I maintain below that such an approach requires several adjustments to ensure that the Crown does not use this remedy to undermine the integrity of the justice system.

IV. ALTERNATIVE REMEDIES

Allowing financial payouts to serve as a remedy for unreasonable trial delay would provide a meaningful remedy to those found innocent after trial. The Senate Committee’s failure to extend this remedy to guilty accused whose liberty and security interests are impacted by unreasonable trial delay is nevertheless misguided as its alternative sentence reduction remedy is tantamount to granting no remedy at all. To ensure delay is taken seriously, financial payouts should therefore be made to offenders *in addition* to any reduced sentence in cases of relatively minor harms resulting from unreasonable delay. When relying on monetary remedies, however, I maintain that courts should reserve a residual discretion to stay proceedings where financial payouts are used in a manner that undermines the integrity of the justice system.

⁷¹ Sherrin, *ibid* at 278.

⁷² Lundrigan, *supra* note 7 at 115, 146.

⁷³ Jordan, *supra* note 1 at para 20.

⁷⁴ *Supra* notes 5–9.

A. SENTENCE REDUCTIONS

In *Nasogaluak*, the Supreme Court concluded that a sentence reduction under section 24(1) of the *Charter* should not be used to remedy a violation of an offender's rights.⁷⁵ As Justice LeBel explained, resort to the *Charter* is unnecessary because rights infringements typically are encompassed by the principles used for determining the appropriate sentence.⁷⁶ Among those principles, section 718 of the *Criminal Code* describes the "fundamental purpose" of sentencing as being "respect for the law and the maintenance of a just, peaceful and safe society."⁷⁷ Given this broad language, state misconduct need only relate to the interests of the individual offender and the circumstances of the offence to qualify as a mitigating factor at sentencing.⁷⁸ While delay clearly impacts the individual's liberty and security interests, it is questionable whether delay relates to the "circumstances of the offence" as the infringement necessarily occurs after the offence was committed. The Supreme Court in *Nasogaluak* did not interpret this requirement so narrowly. Instead, it concluded that various types of state misconduct — including unreasonable delays — were adequately connected to the offence to warrant a reduction in sentence.⁷⁹

This conclusion is also consistent with the parity principle in sentencing found in section 718.2(b) of the *Criminal Code*.⁸⁰ The parity principle's requirement that like offenders be treated alike demands that those whose liberty and security interests are more seriously impacted by state conduct relating to a criminal charge not receive the same sentence as an otherwise identical offender. Trial delay clearly impacts these interests by not only keeping people in pre-trial detention or on bail conditions for unnecessarily lengthy periods but also by unduly perpetuating an accusation of criminal wrongdoing. To conclude that two otherwise identical offenders be granted the same sentence when one offender was subjected to more onerous pre-trial deprivations of liberty and security would clearly violate the parity principle.

The ability of the sentencing principles in the *Criminal Code* to account for unreasonable trial delay suggests that any sentence reduction remedy under section 24(1) of the *Charter* — with one potential exception discussed below — is entirely duplicative. This may not seem intuitively problematic. After all, remedies provided pursuant to non-constitutional instruments are capable of overlapping with *Charter* remedies. The most obvious example is the common law confessions rule constitutionalized as a principle of fundamental justice under section 7 of the *Charter*.⁸¹ Pursuant to the common law rule, an improperly obtained confession must be excluded from evidence. This result also inevitably flows under section 24(2) of the *Charter* given the seriousness of the state conduct, its severe impact on the

⁷⁵ *Nasogaluak*, *supra* note 56.

⁷⁶ *Ibid* at paras 48–49, 63–64.

⁷⁷ *Criminal Code*, *supra* note 11, s 718.

⁷⁸ *Nasogaluak*, *supra* note 56 at paras 49, 63.

⁷⁹ *Ibid* at paras 50–53 (this position was consistent with several lower courts, which held that even non-*Charter* infringing delay may be considered in sentencing). See e.g. *R v Bosley* (1992), 18 CR (4th) 347 (Ont CA); *R v Leaver*, [1996] OJ No 3931 (CA); *R v Purchase*, 2012 BCSC 208 at para 164; *R v Panousis*, 2002 ABQB 1109 at para 53; *R v Vroegop*, 2012 BCPC 484 at para 28; *R v KVE*, 2013 BCCA 521 at para 30.

⁸⁰ *Criminal Code*, *supra* note 11, s 718.2(b).

⁸¹ *R v Oickle*, 2000 SCC 38.

accused's *Charter*-protected interests, and the inherent unreliability of improperly obtained confessions.⁸²

It should nevertheless be noted that the remedy granted in response to a violation of the confessions rule under either the common law or the *Charter* is adequately serious to deter Crown conduct: exclusion of evidence. With other rights infringements, it is necessary to consider the impact of the remedial structure on Crown conduct. In the delay context, the Supreme Court has repeatedly identified a need to develop the law on delay in a manner that addresses the "culture of complacency" plaguing the criminal justice system.⁸³ If guilty offenders simply received a sentence that they were otherwise entitled to under the *Criminal Code*, it is difficult to comprehend how the Crown would be motivated to change its practices. For this reason, I maintain that a remedy, *in addition* to any reduction of sentence, must be granted to ensure the Crown's conduct is being deterred in a manner that is proportionate to the infringement of the accused's rights.

It may nevertheless be possible for a sentence reduction to serve as a meaningful remedy in limited cases where the accused is subject to a mandatory minimum punishment. Although the Supreme Court concluded that such a remedy is possible in *Nasogaluak*, it also severely restricted the scope of the remedy by requiring that the relevant breach be a "particularly egregious form of [state] misconduct."⁸⁴ The facts of *Nasogaluak* illustrate how strictly this factor has been interpreted. The accused was pulled over by police and refused to exit his vehicle.⁸⁵ As a result, he was physically removed and, during that process, punched in the head multiple times by police officers. When the accused later refused to put his hands behind his back, he was hit with enough force to break several of his ribs, one of which punctured a lung. The accused was later charged with fleeing police and impaired driving under the *Criminal Code*.⁸⁶

Although the trial judge in *Nasogaluak* refused to stay the proceedings, a reduction in the sentence below the mandatory minimum for impaired driving was granted.⁸⁷ The Supreme Court ultimately overturned the trial judge's remedy.⁸⁸ If the egregious state misconduct at issue in *Nasogaluak* does not justify a reduction below a mandatory minimum sentence, it is difficult to understand how the much less severe impact on an offender's liberty and security interests resulting from unreasonable trial delay could justify such a remedy. Unless the Supreme Court or Parliament significantly lessens the standard for departing from a minimum sentence, it is therefore highly unlikely that reduction of sentence will play any remedial role in the delay context. Even if a reduction below a mandatory minimum sentence were permitted, the fact that most accused are not subject to mandatory minimum sentences renders such a remedy redundant for the reasons expressed earlier. It is therefore necessary

⁸² For the legal test for excluding evidence under section 24(2) of the *Charter*, *supra* note 2, see *R v Grant*, 2009 SCC 32 at paras 72–86.

⁸³ *Jordan*, *supra* note 1 at paras 29, 40.

⁸⁴ *Nasogaluak*, *supra* note 56 at para 6.

⁸⁵ *Ibid* at paras 9–13.

⁸⁶ *Criminal Code*, *supra* note 11, ss 249.1, 253(1)(a) (as those provisions read when *Nasogaluak*, *ibid*, was decided).

⁸⁷ *R v Nasogaluak*, 2005 ABQB 994. At the time, the minimum sentence was a \$600 fine: *Criminal Code*, *ibid*, s 255(1)(a)(i) (as that provision read when *Nasogaluak*, *supra* note 56 was decided).

⁸⁸ *Nasogaluak*, *ibid* at para 65.

to explore other remedial options in response to the impact of unreasonable delay on an accused's liberty and security interests.

B. FINANCIAL PAYOUTS

As a matter of course, the constitutional harm in cases where delay impacts an accused's liberty and security interests will not warrant a stay of proceedings. Financial payouts are more appropriate remedies as they may be tailored towards compensating not only for the impact of unreasonable delay on the accused's liberty and security interests, but also any legal expenses incurred by the accused as a result of the Crown's delay. Importantly, financial remedies are also more proportionate to the relatively minor harm endured by accused whose liberty and security interests are impacted by unreasonable delay. To the contrary, staying proceedings in response to these harms serves as a windfall as those accused could still receive a fair trial despite enduring unreasonable delay.⁸⁹

Financial payouts may also become a more appropriate remedy when combined with other remedies that limit or mitigate the impact of delay on the accused's liberty and security interests. In cases where delay renders bail conditions unduly harsh, trial judges may grant a release from bail as a secondary remedy to limit any future effects of delay.⁹⁰ Similarly, an order expediting the proceedings would mitigate any further harms to an accused's security interests arising from the stigma of criminal accusation being unduly prolonged.⁹¹ In cases where delay impacts only liberty and security interests, these remedies should be granted as a matter of course to limit the impact of unreasonable delay on the accused.⁹² Given the availability of these secondary remedies, I see no reason why a financial payout as a primary remedy would be inadequate when trial delay engages only an accused's liberty and security interests.

Practical and legal barriers nevertheless exist for adopting financial payouts as a remedy for unreasonable delay.⁹³ An award of *Charter* damages, although permissible after *Vancouver (City) v. Ward*,⁹⁴ may only be sought in civil court. The need to navigate the civil justice system after undergoing a criminal trial in provincial court (where the vast majority of criminal offences are tried) will likely be financially prohibitive for many accused.⁹⁵ Although it is possible to provide provincial courts with jurisdiction to grant financial

⁸⁹ For a different view, see *Jordan*, *supra* note 1 (Factum of the Intervener, Criminal Lawyers' Association (Ontario)), any suggestion that a stay is a "windfall ... engage[s] in an 'ex post facto analysis of rights violations' and confuses a constitutional remedy for the harm done by state action with a 'benefit'" at para 28, citing Michael A Code, *Trial Within a Reasonable Time: A Short History of Recent Controversies Surrounding Speedy Trial Rights in Canada and the United States* (Scarborough: Carswell, 1992) at iii. Although this point is not without merit, it does not undermine my observation that a remedy ought to always be proportionate to the rights infringement which is the driving reason behind why a stay of proceedings cannot be the only remedy for a breach of section 11(b) of the *Charter*.

⁹⁰ Sherrin, *supra* note 8 at 279–91.

⁹¹ *Ibid.* See also *Mills*, *supra* note 42 at 973–74.

⁹² Release from pre-trial detention could also frequently serve as a remedy. I am hesitant to suggest that such a remedy ought to be awarded "as a matter of course" because of the increased public safety interests that may be implicated in circumstances where the accused seeks to be released from pre-trial custody.

⁹³ For a review, see Lundrigan, *supra* note 7 at 128–37.

⁹⁴ 2010 SCC 27 [*Ward*].

⁹⁵ Kent Roach, "A Promising Late Spring for Charter Damages: *Ward v Vancouver*" (2011) 29 NJCL 135 at 142.

remedies, Kent Roach observes that provincial court judges likely do not want this extra responsibility.⁹⁶ Tasking provincial court judges with such a duty would arguably exacerbate the already endemic delay in criminal courts, given the need to determine the appropriate damages to be awarded on a case-by-case basis.⁹⁷ Although this might initially prove to be a legitimate concern, the somewhat generic⁹⁸ nature of the infringement on liberty and security interests may eventually result in a more predictable remedy. Requiring criminal courts to grant such remedies therefore could prove highly efficient vis-à-vis reliance on the superior courts.

Alternatively, administrative agencies may be given jurisdiction to grant *Charter* remedies.⁹⁹ Creating such a forum for issuing monetary compensation has several benefits. As Lundrigan observes, an agency framework for determining monetary compensation “eliminates the added court resources needed under the superior and provincial criminal court model.”¹⁰⁰ Although these agencies themselves would add costs, they may be cheaper than relying on lawyers litigating an issue before a judge. Relying on agencies “may also be less expensive to plaintiffs ... as they will not face the prospect of an adverse cost award, as in civil courts.”¹⁰¹ Although not without their own problems, administrative tribunals could be designed in a way that provides “an efficient and equitable alternative to superior criminal courts.”¹⁰²

Small claims courts might also provide a preferable forum for litigating *Charter* damages claims. As Roach observes, the monetary amounts available in many small claims courts are now sufficient to allow adequate compensation for most rights violations.¹⁰³ More importantly, small claims courts do not require that accused be represented by counsel as self-representation is the norm in these courts. Utilizing small claims courts would therefore bring the cost of litigation down significantly.¹⁰⁴ Nor are costs orders possible against plaintiffs who bring a *Charter* damages application against the government. This would further serve to incentivize actions in these venues.¹⁰⁵ Although not all commentators view small claims courts as a positive venue for litigating *Charter* damages,¹⁰⁶ Roach’s review of the benefits of employing small claims courts in this capacity is worthy of further consideration.

Assuming financial payouts were adopted as a remedial possibility, the Senate Committee’s proposed implementation of this remedial response is nevertheless problematic for two reasons. First, the suggestion that financial payouts be restricted to only innocent

⁹⁶ *Ibid.*

⁹⁷ *Ward, supra* note 94 at paras 46–57. See also Lundrigan, *supra* note 7 at 130.

⁹⁸ Although the Supreme Court in *Jordan, supra* note 1 at para 32, concludes that the liberty interest is readily measurable by trial judges, it contends that the impact of delay on the security interest is less readily quantified. Although this may be true, courts would likely be able to determine how the security interests of the “reasonable person” would be impacted by delay and ascribe a monetary award based on how long the accused was subject to the stigma of criminal accusation.

⁹⁹ See e.g. *R v Conway*, [1989] 1 SCR 1659.

¹⁰⁰ Lundrigan, *supra* note 7 at 131.

¹⁰¹ *Ibid* at 131–32.

¹⁰² *Ibid* at 132.

¹⁰³ Roach, *supra* note 95 at 142.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ Lundrigan, *supra* note 7 at 133–34.

accused whose liberty or security interests are impacted by trial delay risks perpetuating the current culture of complacency towards trial delay. This follows because the Senate Committee's alternative remedy — sentence reduction — would fail to deter the Crown from being complacent with respect to trial delay.¹⁰⁷ A financial consequence would at least provide some motivation for the Crown to take trial delay endured by guilty accused seriously.

Second, the optics of paying an accused for violating their right to be tried within a reasonable time could reduce public confidence in the justice system. Given the relatively deep pockets of the Crown, a rule that effectively allowed it to pay for unreasonably delaying a trial could be viewed as permitting the Crown to “buy time” to prosecute accused who are likely to receive a fair trial despite enduring unreasonable trial delay. For instance, accused whose trials primarily involve police witnesses — as often occurs with impaired driving offences¹⁰⁸ — may be shuffled down the line as the Crown will have little reason to believe that the accused's right to a fair trial will be undermined by delaying the trial. The Crown might also more generally assess its cases to determine whether a charge is likely to be stayed due to delay given the vulnerabilities of the witnesses involved and prioritize those cases.

Although the Crown generally can be expected to prioritize cases based on a variety of legitimate factors,¹⁰⁹ allowing the Crown to deliberately *avoid* prosecuting cases because the law provides an “acceptable” remedy provides a perverse incentive to violate rights. This incentive would likely arise given the minimal remedies granted for violations of an individual's *Charter* rights. Although the Supreme Court in *Ward* confirmed that *Charter* damages are a permissible remedy, it upheld the trial judge's finding that the appropriate remedy for a strip search was \$5,000.¹¹⁰ As any constitutional harms deriving from unreasonable delay seem inherently much less harmful than those deriving from a strip search, it is likely that a much smaller sum would be granted to accused subjected to unreasonable delay.¹¹¹ From the Crown's perspective, it might therefore view such expenses as a prudent means for increasing the number of cases it is able to prosecute, even if it means delaying some cases for significantly lengthier times.¹¹²

The Crown might also avoid prosecuting particular charges because it knows civil penalties will continue in force while the accused awaits trial. For instance, section 148(5)

¹⁰⁷ Part IV.A, above.

¹⁰⁸ These offences are often litigated because of perceived *Charter* violations which will turn in large part on defence counsel's cross-examination of any investigating police officers.

¹⁰⁹ For instance, the Crown may prioritize cases based on their seriousness or evidentiary vulnerabilities.

¹¹⁰ *Ward*, *supra* note 94 at para 73. *Ward* was arrested and taken to a holding cell where he was told to strip. He initially complied but later refused to take off his underwear. His genitals were therefore not exposed and at no time did an officer touch *Ward*. Despite the search being minimally intrusive (as far as strip searches go), the search violated *Ward*'s right to be free from unreasonable search and seizure protected under section 8 of the *Charter*. As the Supreme Court previously concluded in *R v Golden*, 2001 SCC 83, police may only conduct a strip search incident to arrest if they have reasonable and probable grounds to believe that the accused possessed an illegal substance or weapon on their person. In *Ward*, the police had no grounds whatsoever to suspect *Ward* was in possession of such items.

¹¹¹ For discussion on creating a principled framework for determining the appropriate quantum of damages, see *Roach*, *supra* note 95 at 153–57.

¹¹² As one of the reviewers observed, it is possible that pressure by government actors could undermine prosecutorial independence. This issue is nevertheless outside of the scope of this article.

of *The Traffic Safety Act*¹¹³ prohibits motorists charged with impaired driving from operating a motor vehicle until the charges are resolved in a court of law. The *TSA* does, however, allow drivers to operate their vehicle if they “[pay] the prescribed licence reinstatement fee and the driver participates in a prescribed ignition interlock program.”¹¹⁴ If an accused cannot pay the fee or is otherwise incapable of meeting the requirements for the interlock program, the Crown would face no incentive to prosecute the accused as they would incur the main penalty for violating the impaired driving provisions: a driving prohibition.¹¹⁵

These Crown tactics could be disincentivized in two ways. First, the trial judge could entertain further delay hearings in cases where the Crown failed to adequately respond to the trial judge’s initial remedial decision. As alluded to earlier, any finding of unreasonable delay should invariably include an order to expedite proceedings. If the Crown fails to adequately respond to this order, a stay of proceedings should be reserved as a potential remedy depending on the Crown’s explanation for failing to expedite the trial. Second, the trial judge might issue a stay of proceedings at first instance if the accused proves that the Crown is systemically using financial payouts as a means to avoid prosecuting the categories of offenders canvassed earlier. By holding out this possibility, the Crown would be much more hesitant to schedule trials in a manner that unfairly sacrifices some people’s right to be tried in a reasonable time.

The Crown’s conduct in both of these scenarios meets the legal test for issuing a stay of proceedings. First, the failure to expedite a trial pursuant to a court order or a systematic delay of certain types of trials may fairly be said to undermine the integrity of the justice system.¹¹⁶ After a court finds that the accused’s trial was unreasonably delayed, anything other than the utmost attention to the accused’s charges would understandably undermine confidence in the administration of justice. This especially follows given the elongated and serious problem with delay highlighted by Canadian courts since the inception of the *Charter*.¹¹⁷ Similarly, the decision to dismiss a group of people’s rights to be tried within a reasonable time as a means to facilitate trials viewed as more pressing because of systemic delay shows a profound disregard for *Charter* rights and an unwillingness to respect those rights equally. The public would understandably lose faith in the justice system should the law of remedies be used as a means to rationalize infringements of some accused’s rights.

Second, less intrusive remedies will necessarily fail to deter Crown conduct in the two scenarios under consideration. In cases where the Crown failed to expedite a trial pursuant to a court order, it follows that the previously granted monetary rewards and other secondary remedies were incapable of preventing the Crown from unreasonably delaying a trial. In my view, a stay of proceedings is the only remaining remedy capable of deterring such Crown conduct. As for cases where delay is employed to the disadvantage of some accused, the systemic nature of the state conduct strongly implies that no remedy other than a stay of proceedings is reasonably capable of addressing the constitutional harm imposed on criminal accused more generally. In such circumstances, only the threat of staying (potentially

¹¹³ SS 2004, c T-18.1, s 148(5) [*TSA*].

¹¹⁴ *Ibid*, s 148(6).

¹¹⁵ *Criminal Code*, *supra* note 11, s 320.24.

¹¹⁶ *Babos*, *supra* note 50 at para 31.

¹¹⁷ For a general review, see *R v Askov*, [1990] 2 SCR 1199.

multiple) proceedings would prove capable of deterring the Crown from abusing the proposed remedial structure.

V. CONCLUSION

The Supreme Court's decision in *Jordan* to remove interest balancing from the rights stage of the analysis is sensible because it allows courts to find a *Charter* breach where delay unduly impacts any of the accused's constitutionally protected interests. In so doing, however, the Supreme Court must move interest balancing to where it belongs: the remedial stage. This is necessary because the most drastic remedy under section 24(1) of the *Charter* — a stay of proceedings — cannot reasonably be the sole remedy for trial delay. Not only is granting a stay of proceedings an anomalous remedy when compared to similar rights-infringing conduct, it is often unnecessary to deter Crown complacency towards trial delay. Stays of proceedings should instead be allowed only in two instances: (1) where delay rendered a trial irreparably unfair; or (2) if the Crown uses the proposed narrower remedial structure as a means to “buy time” to conduct prosecutions. In all other circumstances, a variety of alternative remedies will be sufficient to account for the impact of trial delay on the accused's constitutionally protected interests.