SCC File No. 39381

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF QUÉBEC)

B E T W E E N:

HER MAJESTY THE QUEEN

Appellant

- and -

MÉLANIE STE-MARIE; MICHEL STE-MARIE DAX STE-MARIE; RICHARD FELX

Respondent

- and -

CRIMINAL LAWYERS' ASSOCIATION (ONTARIO); ATTORNEY GENERAL OF ONTARIO; ASSOCIATION QUÉBÉCOISE DES AVOCATS ET AVOCATES DE LA DÉFENSE

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TABLE OF CONTENTS

PART I: OVERVIEW

1. In *Jordan*, having not been invited by the parties to do so, this Court refrained from revisiting the principle in *R. v. Rahey* that a stay of proceedings is the minimum possible remedy for a breach of s. 11(b) of the *Charter*.[1] Instead, the Court incorporated the standard existing remedial tool into its new s. 11(b) framework. The Court established generous presumptive limits for delay and articulated clear tests for a stay of proceedings in cases falling above and below those ceilings. The resulting analysis – which gives advance notice of the permissible scope of delay and the consequences for exceeding it – marked a dramatic shift from the reactive approach of *Morin*. It was intended to galvanize systemic and cultural change in the criminal justice system.

2. In the instant case, the intervener Attorney General for Ontario seeks to argue, absent a request or submissions from the parties, that this Court should overturn *Rahey* and, implicitly, *Jordan* itself. This proposal is not only unnecessary; it is counterproductive and would unravel the progress made in dismantling the culture of complacency towards excessive delay. The Criminal Lawyers' Association ("CLA") urges the Court not to retreat from the message conveyed in *Jordan* and the principles underlying it.

PART II: POSITION ON QUESTIONS IN ISSUE

3. If the Court decides that it is appropriate to consider the issue, the CLA submits that the Court should uphold the principle from *R. v. Rahey* that a stay of proceedings is the minimum remedy for a breach of s. 11(b) of the *Charter* for three reasons:

1) Abandoning the stay as the minimum remedy would halt the culture change that *Jordan* demands;

2) Given the nature of the right and the prejudice to the accused of a violation, a stay remains the only remedy capable of curing a s. 11(b) breach; and

3) Lesser remedies would disproportionately impact marginalized Canadians who are disproportionately represented in the criminal justice system.

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[1] *R. v. Jordan*, 2016 SCC 27 at footnote 1.

PART III: ARGUMENT

A. The Culture Change *Jordan* Demands Requires Mandatory Stays

4. The doctrinal power of the *Jordan* analysis rests on two pillars: (1) bright lines regarding the ambit of constitutionally tolerable delay; and (2) a clear consequence for crossing those lines. These twin pillars are essential to support the new approach to delay that this Court began building in *Jordan* atop the ruins of the *Morin* era's "culture of complacency."

5. Replacing the mandatory stay of proceedings with potential lesser remedies will undermine the clear message sent by the Court in *Jordan*, will unnecessarily remove the best incentive the parties have to combat the defeatist attitude toward delay that took root in the justice system before *Jordan*, and will re-introduce the doctrinal and practical concerns that plagued the pre-*Jordan* s. 11(b) analysis.

i) No Mixed Messages: Strict Enforcement of the Right to a Speedy Trial Matters

6. In *Jordan*, this Court sent a clear message to all justice system participants: pay attention to unreasonable delay. It is intrinsically prejudicial to the rights of defendants, does a disservice to witnesses, victims and society at large, and is neither acceptable nor inevitable. *Jordan* revitalized the right to a trial within a reasonable time by creating presumptive ceilings that prospectively warn the parties and the public – with as much certainty as possible in the absence of prejudgement – what delays are constitutionally tolerable, and what delays will result in a stay of proceedings.

7. Recognizing that the *Morin* regime had become "too unpredictable, too confusing, and too complex", the Court in *Jordan* sought to overcome the "culture of complacency" and excessive delay by replacing *Morin*'s "endless flexibility" with fixed ceilings.[2] Delays above the ceiling are presumptively unreasonable and will result in a stay unless the Crown can establish exceptional circumstances.[3] Delays below the ceiling are presumptively reasonable and the charges will not be stayed, except where the defence can show that it took meaningful steps to

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[2] *R. v. Jordan*, 2016 SCC 27 at paras. 4, 32, and 38.
[3] *R. v. Jordan*, 2016 SCC 27 at para. 47.

expedite the proceeding and that the trial nevertheless took markedly longer than it reasonably should have.[4]

8. The utility of a stay in combatting the culture of complacency is self-evident. There is no more powerful tool available to the justice system to change an established but constitutionally unacceptable practice. Broadening the range of remedies risks undermining the "the Jordan court's efforts to curb delay via bright-line rules."[5] Indeed, even with the stay in place as the minimum remedy, and despite the clear pronouncements in *Jordan* about eradicating the culture of complacency, this Court has had to reiterate its message more than once. In *R. v. Cody*,[6] *R. v. K.J.M.*,[7] *R. v. K.G.K.*,[8] and *R. v. Thanabalasingham*,[9] this Court resisted calls to water down the *Jordan* analysis and told all justice system participants: We meant what we said and we are not backing down. Permitting s. 11(b) remedies short of a stay of proceedings would send the opposite message, namely, the cost of delay is not really as high as this Court said it was.

ii) Revisiting Remedy is Unnecessary and Counterproductive

9. The clean break from *Morin* in *Jordan* was based on "cogent evidence" that systemic change was needed.[10] In contrast, here there is no evidence that the remedy of a stay contributes to the stubborn problem of systemic delay or that the *Jordan* framework has resulted in a drastic increase in successful stay applications.

10. Statistics bear out *Jordan*'s modest success in reducing delay where the threat of a stay is obvious. Above the ceiling, the proportion of cases at risk of exceeding the *Jordan* timelines fell from 9.5% in 2014/2015 to 6.4% in 2017/2018.[11] Below the ceiling, the statistics paint a less

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[4] *R. v. Jordan*, 2016 SCC 27 at para. 48.
[5] Mathew Asma and Matthew Gourlay, *Charter Remedies in Criminal Cases, A Practitioner's Handbook* (Emond: Toronto, 2019) at p. 103.
[6] *R. v. Cody*, 2017 SCC 31 at paras. 37-39.
[7] *R. v. K.J.M.*, 2019 SCC 55 at paras. 80-84.
[8] *R. v. K.G.K.*, 2020 SCC 7 at para. 37.
[9] *R. v. Thanabalasingham,* 2020 SCC 18 at para. 9.
[10] *R. v. K.G.K.*, 2020 SCC 7 at para. 37.
[11] Maisie Karam, Jennifer Lukassen, Zoran Miladinovic, and Marnie Wallace, "Measuring efficiency in the Canadian adult criminal court system: Criminal court workload and case processing indicators", Statistics Canada, (March 5, 2020) at p. 10, available at https://www150.statcan.gc.ca/n1/pub/85-002-x/2020001/article/00004-eng.htm

optimistic picture. Overall, criminal case processing times have gone up: the median number of days from first appearance to final decision has increased from 123 days in 2014/2015 to 141 days in 2019/2020.[12] With respect to under-ceiling delays that were routinely found unconstitutional under *Morin*, there is a concern that the 18-month ceiling has significantly diminished the threat of a stay, and along with it, the incentive for the Crown to take proactive steps to combat delay. As an experienced trial judge in Toronto's College Park courthouse noted:

> Ironically, in this jurisdiction the normal time from the setting of a trial date to the selected trial date has been around nine months for many years. Prior to *Jordan*, cases in the range of 13 to 15 months old were regularly stayed in this courthouse. The usual cause of *Charter*-infringing delay in this jurisdiction has always been deficiencies and delays in the disclosure process. **In this jurisdiction the *Jordan* presumptive ceiling of 18 months effectively gave the Crown a more generous licence in moving cases through to their conclusion.** Stays granted for 11(b) violations in this courthouse have become remarkably scarce since *Jordan*.[13] [Emphasis added]

11. The perception that the 18-month ceiling gave the Crown "a more generous licence" to comply with their obligation to ensure a speedy trial not only misunderstands *Jordan*,[14] but makes clear that, but for the threat of a stay, the culture of complacency will remain intact. In practical terms, decoupling a s. 11(b) breach from the attendant stay of proceedings will turn the high *Jordan* ceilings from "hard backstops"[15] to aspirational targets.

12. Nor does the obvious impact of the pandemic on the criminal justice system demand the course change proposed by the Attorney General for Ontario. Using the *Jordan* framework, trial courts have ably accounted for delay during the COVID-19 pandemic, recognizing this once-in-a-lifetime public health emergency and resulting backlog as a discrete exceptional event, [16]

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[12] See Statistics Canada, Table 35-10-0029-01 Adult criminal courts, cases by median elapsed time in days.
[13] *R. v. Pham*, 2018 ONCJ 754 at para. 37 per W.B. Horkins J.
[14] *Jordan* established ceilings not floors: *R. v. K.J.M.*, 2019 SCC 55 at para. 69.
[15] *R. v. K.J.M.*, 2019 SCC 55 at para. 75.
[16] See, *e.g.*, *R. v. Khattra*, 2020 ONSC 7894 at paras. 56-63.

without excusing delinquency in disclosure obligations or other unnecessary delay not caused by the pandemic.[17]

13. Furthermore, allowing for a panoply of remedies for s. 11(b) violations would create precisely the litigation uncertainty, complexity, and confusion that *Jordan* sought to eliminate. The culture of complacency was fostered by *Morin's* doctrinal and practical difficulties.[18] Allowing for discretionary remedies based on the purported gradation of the s. 11(b) violation would reintroduce the very same difficulties at a later stage of the analysis. Adducing evidence and litigating remedy in every s. 11(b) application would result in protracted litigation at the very point in time when swiftness and certainly ought to be most prized. This would exacerbate, rather than relieve, the burdens on the justice system. [19]

14. *Jordan* simplified the s. 11(b) analysis by building the concept of prejudice into the presumptive ceilings.[20] *Jordan* directed courts to infer that the accused has been prejudiced any time prosecutorial delay was so prolonged that it breached the generous presumptive ceilings.[21] Reintroducing prejudice as a separate analytical factor at the remedy stage would contradict the Court's explicit direction in *Jordan* that the presumption of prejudice above the ceiling is not rebuttable.[22]

15. While evidence of prejudice can be useful to determine whether under-ceiling delay is unreasonable,[23] prejudice that is proven either by evidence or inference at the breach stage cannot be disproven for the purpose of remedy. Bringing back the individualized prejudice assessment would revive one of *Morin*'s major doctrinal shortcomings: the fact that the treatment

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[17] See, *e.g.*, *R. v. Delaney*, 2021 ONCJ 467; *R. v. A.S.L.*, 2021 ONCJ 269; and *R. v. Bui*, 2021 ONCJ 379.
[18] *R. v. Cody*, 2017 SCC 31 at para. 1.
[19] *R. v. Jordan*, 2016 SCC 27 at para. 32.
[20] *R. v. K.J.M.*, 2019 SCC 55 at para. 46.
[21] *R. v. Jordan*, 2016 SCC 27 at para. 54. See also, *R. v. K.J.M.*, 2019 SCC 55 at para. 46.
[22] *R. v. Jordan*, 2016 SCC 27 at para. 54. See also, *R. v. K.J.M.*, 2019 SCC 55 at para. 46.
[23] See *R. v. K.J.M.*, 2019 SCC 55 at para. 65.

of prejudice is "confusing, hard to prove, and highly subjective."[24] In one stroke, it would restore the uncertainty that begot the complacency *Jordan* sought to end.

iii) A New Remedy Would Require a New Analytical Framework to Establish a Breach

16. The analytical framework articulated in *Jordan* rests on the foundation that breaches of the speedy trial right will result in a stay. Indeed, this Court has called the framework the "test for a stay".[25] A new remedial framework cannot be superimposed on an analysis specifically designed around this long-standing remedial regime. As the Attorney General for Ontario recognizes, the remedy dictates the right's scope and shape.[26] Permitting remedies short of a stay of proceedings would require a wholesale reimagining of how s. 11(b) operates and how courts will assess the reasonableness of delay. There is little doubt that in defining the contours of what constitutes a breach, the courts have kept the consequences of such a finding – the end of the proceedings – front of mind.[27] If the question of remedy is to be reopened, so too must be the contours of what constitutes a breach of the right to a timely trial, lest the culture of complacency return.

B. A Stay is the Minimum Remedy Capable of Curing a s. 11(b) Breach

17. For over 30 years, an unbroken line of jurisprudence has set a stay of proceedings as the remedial floor for curing a s. 11(b) breach. As Lamer J. explained in *Rahey*: after the passage of an unreasonable period of time, to allow any trial to proceed "would be to participate in a further violation of the *Charter*."[28] Wilson J. put it this way: "what the court cannot do is find that his right has been violated, i.e., that the reasonable time has already expired, and still press him on to trial. For to do so is to deprive him of his right under s. 11(b) in the pretext of granting him a remedy for its violation."[29]

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[24] *R. v. Jordan*, 2016 SCC 27 at para. 33.
[25] *R. v. K.J.M.*, 2019 SCC 55 at paras. 4, 5, 75, 77, 79, 83, and 104.
[26] Motion Record of the Proposed Intervener, The Attorney General for Ontario, Tab 2, Affidavit of Randy Schwartz sworn April 20, 2021, para. 20, p. 9.
[27] See, *e.g.*, *R. v. Rahey*, 1987 CanLII 52 (SCC), [1987] S.C.J. No. 23 at para. 58 per Le Dain J.
[28] *R. v. Rahey,* 1987 CanLII 52 (SCC), [1987] S.C.J. No. 23 at para. 48.
[29] *R. v. Rahey,* 1987 CanLII 52 (SCC), [1987] S.C.J. No. 23 at para. 61.

18. Remedies under s. 24(1) of the *Charter* must be full and effective. "[A] right, no matter how expansive in theory, is only as meaningful as the remedy provided for its breach."[30] Once a trial delay has become unreasonable, there is no constitutionally compliant way to continue the trial without further breaching the right. Accordingly, this Court has unanimously held that the interests of justice generally require trial judges to rule on s. 11(b) applications before the trial occurs, because "the trial court itself is implicated in a constitutional violation" where the right to a trial within a reasonable time is breached.[31]

19. Importantly, a stay of proceedings is the minimum remedy for a breach of s. 11(b), but it is not the maximum. A breach of s. 11(b) of the *Charter* is sufficiently serious that, in appropriate cases, costs against the Crown may be imposed in addition to a stay.[32] In the rare case where a court finds a breach of s. 11(b) but has already acquitted the accused in a contested trial, the imposition of costs may be of particular value in vindicating the speedy trial right.[33]

20. The CLA anticipates that the Attorney General for Ontario will suggest that lesser tools can remedy a s. 11(b) breach, such as sentence reductions, relaxing of bail conditions, and orders demanding the system prioritize and expedite the proceedings. Even if superficially attractive, such remedies can neither turn an unreasonable delay into a reasonable one, nor prevent the court from being implicated in an ongoing *Charter* breach.

21. Furthermore, these lesser remedial tools are *already* available. They are precisely the kind of proactive measures courts can, and in appropriate cases, should deploy to *prevent* a s. 11(b) violation and address delays that are excessive, but not unconstitutional, as part of eradicating the

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[30] *R. v. 974649 Ontario Inc.*, 2001 SCC 81 at paras. 19-20.
[31] *R. v. DeSousa*, 1992 CanLII 80 (SCC), [1992] 2 S.C.R. 944 at para. 17 per Sopinka J.
[32] See *R. v. Munoz*, 2008 ONCA 110 at para. 8. For cases where costs were imposed, see, *e.g.*, *R. v. Foster*, 2003 CanLII 26341 (ON SC) and *R. v. Lapointe*, 2003 ABPC 125 at paras. 18-30. See also, Jennifer A.Y. Trehearne, R. Craig Bottomley, and Joshua Frost, *Justice Delayed: A Practitioner's Guide to Section 11(b) of the Charter* (Toronto: Carswell, 2020) at pp. 67-69.
[33] See, *e.g.*, *R. v. Olarte*, [2005] O.J. No. 6048 (Ont. C.J.), which awarded costs for multiple breaches.

culture of complacency.[34] As this Court said in *K.J.M.*, "prosecutors cannot be content to wait until the 18-month mark is within eyesight before kicking into gear."[35] Neither can judges. Nothing prevents a court from ordering a trial be prioritized *before* a breach of s. 11(b) occurs. Indeed, this is exactly the type of case management power this Court has repeatedly urged trial courts to exercise.[36]

22. Courts have long recognized excessive but constitutional delay as a mitigating factor capable of reducing an offender's sentence.[37] More to the point, a sentence reduction is useless to those acquitted after an unreasonably delayed trial. For individuals on stringent bail conditions, a lengthy but constitutional delay may support relaxing their conditions on a bail review or even on consent. For those in pre-trial custody, sections 525 and 526 of the *Criminal Code* already establish a discretionary mechanism to prevent unreasonable delay and empower judges to expedite trials long before any breach of their s. 11(b) rights.[38] And where constitutionally compliant delay means an accused person in pre-trial custody has served the sentence they would receive if convicted, maintaining confidence in the administration of justice supports their release on bail.[39]

23. Excessive delay in the justice system is always undesirable, even when it doesn't violate the *Charter*. Presumptive ceilings are not aspirational targets.[40] Measures short of a stay of proceedings are appropriate and useful tools for reducing and mitigating lengthy delays that pass constitutional muster. To cast them as capable of remedying a s. 11(b) breach misunderstands both the scope of the *Charter* right and their curative force. This idea was considered and rightly rejected in *Rahey*. Despite the broad remedial power of s. 24(1), no *Charter* remedy can turn

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[34] See *R. v. Jordan*, 2016 SCC 27 at para. 108; *R. v. K.J.M.*, 2019 SCC 55 at para. 81; and *R. v. K.G.K.*, 2020 SCC 7 at paras. 43-44.
[35] *R. v. K.J.M.*, 2019 SCC 55 at para. 81.
[36] *R. v. Jordan*, 2016 SCC 27 at paras. 114 and 139; *R. v. Cody*, 2017 SCC 31 at para. 37; *R. v. Thanabalasingham*, 2020 SCC 18 at para. 9; and *R. v. Myers*, 2019 SCC 18 at paras. 57-60.
[37] *R. v. Nasogaluak*, 2010 SCC 6 at para. 53. See also, *R. v. Bosley* (1992), 1992 CanLII 2838 (ON CA).
[38] *R. v. Myers*, 2019 SCC 18 at paras. 4, 24, 28-33, and 54.
[39] *R. v. Myers*, 2019 SCC 18 at para. 51.
[40] *R. v. Jordan*, 2016 SCC 27 at para. 56.

back time. Once a trial delay has become unconstitutional, the time for remedies short of a stay is over.

C. Permitting lesser remedies will disproportionally impact marginalized Canadians

24. When the entire criminal justice system is slow, it has greatest impact on those disproportionately caught up in it: marginalized groups including racialized and indigenous individuals, those suffering from mental illness, and the poor.[41] An approach to s. 11(b) that reduces systemic delay advances substantive equality by diminishing the disproportionate burden on those most likely to be caught up in the system. The *Jordan* model, and specifically the mandatory stay for s. 11(b) breaches, benefits marginalized groups in two ways: 1) by incentivizing all justice system participants to take early, proactive steps to reduce delay *in all cases*, not just those where defence counsel effectively postures in set date court; and 2) by making any potential s. 11(b) breach easier to understand and act upon.

25. First, the *Jordan* framework is forward looking. It marks "a shift away from the retrospective, reactive approach" of *Morin*. Because the Crown and court know in advance the bounds of reasonableness – and the consequences for exceeding them – they are incentivized from day one to ensure *all* cases, move through the system promptly. [42] Removing the certainty of the consequence removes the incentive to *prevent* delay in every case.

26. Second, the presumptive stay of proceedings when the *Jordan* date is exceeded provides an analytical simplicity that offers certainty and predictability.[43] The more complicated it is to access a meaningful remedy for a s. 11(b) breach, the less likely it is that marginalized individuals across the criminal justice system will have their s. 11(b) rights respected. Not only does the *Jordan* model reinforce the burden on the state to move matters forward with dispatch, but it also streamlines s. 11(b) determinations, making them less costly and difficult for marginalized accused to advance.

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[41] Many cases speak to the overrepresentation of marginalized groups in the criminal justice system. See, *e.g.*, *R. v. Zora*, 2020 SCC 14 at para. 26; and *R. v. Chouhan*, 2021 SCC 26 at para. 186 per Abella J.

[42] See, for example, *R. v. K.J.M.*, 2019 SCC 55 at para. 117.

[43] *R. v. K.J.M.*, 2019 SCC 55 at para. 75.

27. Under *Jordan*, it is no longer sufficient "to move the squeaky wheels to the front of the [trial] line — the line will need to be made to move faster."[44] In the context of administrative court appearances, this has meant a shift from vague concerns about matters "getting long in the tooth" to pointed questions from bench about "the *Jordan* date" (i.e., 18 or 30 months after the laying of the information) and whether the matter is at risk of exceeding it. Informations themselves have been re-drafted to add to the *Jordan* date to the face of the charging document, focussing the parties' minds on delay before the first court appearance.

28. A switch to flexible discretionary remedies short of a stay represents a return to what we know (from decades of jurisprudence post-*Morin*) didn't work: responding to complaints about unconstitutional delay once it's already happened by individual accused persons with sufficient means to lodge timely and complicated s. 11(b) applications. While all justice system participants have a role to play in ensuring speedy trials, individual accused can only take steps to move their own case forward; they have no ability to affect how the system as a whole operates. The known risk of a stay of proceedings fosters constructive incentives for those in a position to do so, to make systemic changes.

29. The widespread fiscal, political, and structural issues that have contributed to the stubborn problem of delay in the criminal courts will not be cured with the "gentle nudge"[45] of relaxed bail conditions or simple declarations of a *Charter* breach. The presumptive ceilings were intended to provide assurance that s. 11(b) is not a "hollow promise."[46] If such comfort is to be delivered, this Court must not abandon the only meaningful remedy available where that promise is broken.

PART IV AND V: COSTS AND ORDER SOUGHT

30. The CLA takes no position on the disposition of this appeal. The CLA does not seek costs and asks that no costs be awarded against it.

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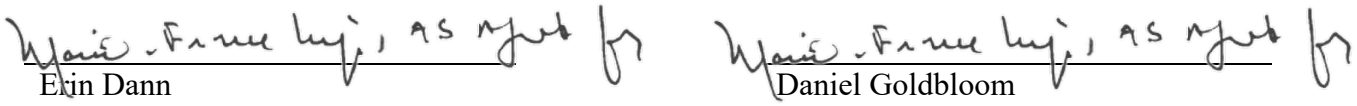
[44] Steve Coughlan, "Making Trial Within a Reasonable Time a Right Once More." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 81. (2019) at pp. 227 and 231. Available at https://digitalcommons.osgoode.yorku.ca/sclr/vol81/iss1/11

[45] Motion Record of the Proposed Intervener, The Attorney General for Ontario, Tab 2, Affidavit of Randy Schwartz sworn April 20, 2021, para. 29, pp. 12-13.

[46] *R. v. Jordan*, 2016 SCC 27 at para. 50.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Toronto, Ontario this 10th day of November, 2021.



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PART VI: TABLE OF AUTHORITIES AND LEGISLATIVE PROVISIONS

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Karam, Maisie; Lukassen Jennifer; Miladinovic, Zoran; and Wallace, Marnie. "Measuring efficiency in the Canadian adult criminal court system: Criminal court workload and case processing indicators". Statistics Canada, (March 5, 2020), available at https://www150.statcan.gc.ca/n1/pub/85-002-x/2020001/article/00004-eng.htm	10
R. v. 974649 Ontario Inc., 2001 SCC 81	18
R. v. A.S.L., 2021 ONCJ 269	12
R. v. Bosley (1992), 1992 CanLII 2838 (ON CA)	22
R. v. Bui, 2021 ONCJ 379	12
R. v. Chouhan, 2021 SCC 26	24
R. v. Cody, 2017 SCC 31	8, 13, 21
R. v. Delaney, 2021 ONCJ 467	12
R. v. DeSousa, 1992 CanLII 80 (SCC), [1992] 2 S.C.R. 944	18
R. v. Foster, 2003 CanLII 26341 (ON SC)	19
R. v. Jordan, 2016 SCC 27	1-16, 21, 23-27, 29
R. v. K.G.K., 2020 SCC 7	8, 9, 21
R. v. K.J.M., 2019 SCC 55	8, 11, 14-16, 21, 25, 26
R. v. Khattra, 2020 ONSC 7894	12