File Number: 41741

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

HIS MAJESTY THE KING IN RIGHT OF CANADA

APPELLANT
(Appellant)

and

ROBERT VRBANIC and SARAH JOSIPOVIC

RESPONDENTS
(Respondents)

FACTUM OF THE APPELLANT, HIS MAJESTY THE KING IN RIGHT OF CANADA

(Pursuant to Rule 35 of the Rules of the *Supreme Court of Canada*)

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PART I – STATEMENT OF FACTS

A. OVERVIEW

1. In *R v Jordan*, this Court sought to introduce certainty and predictability into the requirements inherent in the constitutional guarantee of a trial within a reasonable time. The aim was to define the bounds of reasonableness in advance so that justice system participants could take proactive measures to avoid unreasonable delay. The bitter pill of a certain stay of proceedings for cases that unjustifiably exceeded the presumptive thresholds was supposed to cure the "culture of complacency," thereby significantly reducing both unreasonable delay and the stays of proceedings that followed.

2. Almost a decade later, experience has shown that the framework does not always achieve this objective. Justice is not always mathematically quantifiable, and the lower courts' interpretation of the law does not always provide clear and practicable guidance as to what must be done to avoid unreasonable delay. *Jordan* was a call for collaboration by all justice system participants – but some of those participants have interests that are not fundamentally aligned. In the near decade since this decision, courts have struggled to effect just results within the rigid timeframes. This appeal is but one example of the myriad of cases that demonstrate that clarification from this Court is needed.

3. The respondents were charged with serious offences arising out of a major wiretap investigation that took place over the course of two years. The case generated 150 judicial authorizations, over 70 gigabytes of disclosure, and resulted in charges against 18 people whom the Crown subdivided into ten prosecution groups for the sake of efficiency. The application judge commended the conduct of the Crown as a "model for the *Jordan* principles" but stayed the proceedings for delay. Although he found in a related proceeding that the prosecution was complex, the application judge rejected that this piece of the case could fall under that umbrella. The majority in the Court below upheld the stay in a case that was only a mere four days past the post. A stay in such circumstances undermines public confidence in the administration of justice.

4. In order to remedy this situation, the appellant asks this Court to do two things.

5. First, the particularly complex case exceptional circumstance must be given a broad and purposive interpretation to fulfill its function. The exception must be interpreted and applied in a way that allows the parties to reasonably predict the circumstances in which it will govern. Trial courts likewise must be able to triage and manage their dockets based on a reasonable assessment of complexity. The inherent time requirements of increasingly complex cases, and the Crown's often limited ability to control all facets of the incurring delay, are both factors that ought to inform the Court's assessment of whether a case is particularly complex. A narrow interpretation of the exception creates uncertainty as to its availability and generates pressure to bring cases to trial within the *Jordan* thresholds, regardless of the appropriateness of the thresholds in relation to the nature and complexity of a given case. As this Court has repeatedly stated, the assessment of particular complexity must be made with respect to the case as a whole.

6. Second, where time is the primary measure of a case, justice may suffer. Where, as here, the Crown has moved with dispatch to get a large-scale project through the system efficiently, a stay of proceedings over four days of delay – an arbitrary four days in the context of this case – is not in the public interest. Nor is the public interest or trial fairness served when those charged with great decision-making responsibility to steer towards a just result are not given enough time to deliberate the course forward. Commensurate with the approach taken by this Court to delay that falls under the ceiling, trial judges must be given the same window of discretion to determine whether a stay is consistent with the public interest in cases that fall over the ceiling and where the mathematical accounting would otherwise require a stay. A mirroring of the test from *Jordan* for delay that falls on both sides of the presumptive line will provide a mechanism through which the court can assess what is in the best interests of the administration of justice.

B. THE FACTS

a) The Project OSkyfall investigation

7. Project OSkyfall was a joint-forces investigation by the Hamilton Police Service and the Royal Canadian Mounted Police.[1] The investigation spanned more than two years,[2] and involved 150 judicial authorizations, including two full-blown Part VI wiretap authorizations.[3]

8. Project OSkyfall generated a massive volume of disclosure. The first wave comprised 68 gigabytes of disclosure representing more than 99,000 files, including:

- more than 10,000 audio intercepts;
- more than 1,000 surveillance reports (including both mobile and static surveillance);
- more than 2,200 surveillance photos and videos combined;
- 85 Video Intercept Reports;
- officers' notes;
- the data generated by the tracking and transmission data recorder warrants; and
- copies of all the judicial authorizations, including a significant number of edited Informations to Obtain (ITOs).[4]

9. Later waves included the remaining ITOs, source documents related to early warrants and orders, and pole camera and probe videos.[5]

10. The respondents were arrested on August 27, 2021, but not charged until September 27, 2021. On the day they were arrested, August 27th, they were both found at a place that the police were searching pursuant to a search warrant. The respondent Vrbanic was located and arrested at

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[1] Transcript, January 12, 2022, p 11, ll 14-16 [Appellant's Record ("AR"), Vol II, Tab 16, p 36].
[2] Transcript, January 12, 2022, p 9, ll 23-29 [AR, Vol II, Tab 16, p 34].
[3] Transcript, January 12, 2022, p 8, ll 3-26 [AR, Vol II, Tab 16, p 33].
[4] Transcript, February 9, 2022, p 5, ll 6-18, 27-32 and p 6, ll 1-31 [AR, Vol II, Tab 17, pp 72, 73].
[5] Crown trial factum, at paras 43-46 [AR, Vol I, Tab 9, p 126]. (The Crown's trial factum set out certain background facts about the project and this prosecution, which appear to have been regarded as uncontentious and accepted by all parties: see *R v Ivarone*, 2023 ONCJ 69 at para 21.)

15 Regalview Drive in Hamilton. The respondent Josipovic was found at a condominium at 401-10 Concord Place in Grimsby. At that time, they were both released on undertakings. The subsequent search of those two locations culminated in the seizure of $400,000 at Regalview Drive, and of 2 kilograms of cocaine, 3 kilograms of methamphetamine, and 500 grams of psilocybin in the condominium storage locker at Concord Place.[6] On September 27, 2021, police laid an Information charging the respondents with possession of cocaine, fentanyl, psilocybin, and methamphetamine for the purpose of trafficking, as well as two counts of possession of proceeds of crime. Additional Project OSkyfall targets were arrested after August 27, with the last arrest on October 7, 2021.[7]

11. The warrants at Regalview Drive and Concord Place were executed the day after the respondent Vrbanic was allegedly observed attending a third address at 111 Brockley Drive, Hamilton, and taking a kilogram of cocaine from that location to the storage locker at 10 Concord Place.[8] As detailed below, Vrbanic was also charged and prosecuted with others (not Josipovic) in relation to the events at 111 Brockley Drive.

b) The case management process

12. The respondents made their first court appearance on October 6, 2021, with further brief appearances on November 17 and December 8.[9] On December 8, the Crown asked that matters go to January 12, 2022, for an appearance before the "case management judge"[10] for a judicial pre-trial and case management meeting. Leitch J. acted as case management judge for Project OSkyfall from the January 12 appearance onward. Among his other responsibilities in that capacity, Leitch J. heard the application giving rise to this appeal.

13. The respondents appeared on January 12, alongside 16 other accused also charged as part of Project OSkyfall. The project Crowns set out how they intended to group the 18 accused before

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[6] Information 21-2905 [AR, Vol I, Tab 1]; Crown trial factum, at paras 18-21 [AR, Vol I, Tab 9, pp 122-123]. The substance charged as fentanyl did not test as such: Crown submissions on 11(b) application, Transcript, February 6, 2023, p 24, ll 23-26 [AR, Vol II, Tab 19, p 167].

[7] Crown trial factum, at para 23 [AR, Vol I, Tab 9, p 123].

[8] Crown trial factum, at paras 16-21 [AR, Vol I, Tab 9, pp 121-123].

[9] Transcripts, October 6, November 17, and December 8, 2021 [AR, Vol II, Tabs 13, 14, 15].

[10] Transcript, December 8, 2021, p 3, l 22 [AR, Vol II, Tab 15, p 20].

the Court for prosecution. The Crown created ten prosecution groups, with some accused included in more than one group depending on their charges. The respondent Vrbanic was included in two prosecution groups, Group 5 and Group 8.[11] The charges giving rise to the present appeal, where the respondents were co-accused with each other, were prosecuted as Group 5. For the Group 8 charges, the respondent Vrbanic was prosecuted with four other individuals in relation to the allegations of trafficking at 111 Brockley Drive. Group 8 was also known as the "Brockley" Group.

14. The project Crowns indicated that as of this date, each accused had been provided with the principal disclosure relevant to their own charges, including disclosure of search warrant seizures giving rise to the charges and the relevant takedown warrants and ITOs. The Crown had applied to unseal the ITOs for 150 authorizations granted as part of the project and was prioritizing the takedown warrants for disclosure.[12]

15. At the next appearance, on February 9, the project Crowns confirmed that Wave 1 of disclosure had been provided on January 26. They had received the ITOs for all the judicial authorizations except the two Part VI authorizations, which were unsealed pursuant to a separate order in Superior Court. In total, there were 69 ITOs to be disclosed for the 150 authorizations. They indicated they expected to be able to provide all the outstanding ITOs in short order, and hoped to have resolution discussions with counsel for some accused once they had reviewed this disclosure.[13]

16. One of the issues addressed at the February 9 appearance was a proposed *Garofoli* application. At the previous appearance, counsel for a Group 1 accused, Daniel Reeve, suggested that challenging an early authorization could lead to excision that would invalidate the subsequent authorizations.[14] On February 9, counsel requested that a group judicial pre-trial be set to discuss

[11] Transcript, January 12, 2022, pp 4-6 [AR, Vol II, Tab 16, pp 29-31]. The numbering of the groups in this factum (and used by the Court below) is based solely on the order in which they were mentioned in the January 12 transcript.

[12] Transcript, January 12, 2022, pp 9-12 [AR, Vol II, Tab 16, pp 34-37].
[13] Transcript, February 9, 2022, pp 5-6 [AR, Vol II, Tab 17, pp 72-73].
[14] Transcript, January 12, 2022, p 10, ll 9-31 [AR, Vol II, Tab 16, p 35].

a "joint *Garofoli*." This judicial pre-trial was set for April 8. Additional judicial pre-trials for individual groups were set for March 24 and 25.[15]

17. The *Garofoli* issue was revisited on the record on April 8. Counsel for Mr. Reeve took the position that excision arising out of Reeve's *Garofoli* application would benefit other accused affected by subsequent authorizations. At this appearance, counsel for two other accused in Group 8 took the position it would have no effect on their clients' interests.[16] Other counsel made no comments on the record, including counsel for the respondents.

18. After an off-the-record Zoom meeting with the trial coordinator, dates for all matters were set on the record. Trial dates for three groups (Groups 2-4) were set between August and December 2022. Two separate *Garofoli* applications, later combined into a single application, were set to run between July 2022 and March 2023. The trial dates for the remaining groups (Groups 1 and 5-10) were all set for after the *Garofoli* was scheduled to be completed, with the earliest dates in May 2023 (Group 8). The respondents' trial was set for June 26-30, 2023.[17] Multiple trials (Groups 1, 4, 8, 9, and 10) were set for non-contiguous dates, in some cases with trial dates separated by multiple days. The last trial dates, for the Group 10 prosecution, were set for five days between August 29 and September 8, 2023.

Group	Accused	Dates set
1.	Ivarone, Reeve, Cote	11(b) motion June 14, 2022; *Garofoli* July 18-19 and August 15-19, 2022; 6-day trial set for August 15, 17, 18, 21, 22 and 24, 2023
2.	Nguyen	Motion October 20, 2022; 3-day trial set for November 7-9, 2022
3.	Heng and Khay	5-day trial set for August 8-12, 2022
4.	Chan and Tang	Motion November 4, 2022; 5-day trial set for December 5, 6, 9, 14, and 15, 2022
5.	**Vrbanic** and **Josipovic**	11(b) motion December 14, 2022; 5-day trial set June 26-30, 2023
6.	Apostolski and Apostolski	11(b) motion October 3, 2022; 3-day trial set for July 18-20, 2023

[15] Transcript, February 9, 2022, p 8, ll 22-30, and p 25 [AR, Vol II, Tab 17, pp 75, 92].
[16] Transcript, April 8, 2022, pp 6-15 [AR, Vol II, Tab 18, pp 105-114].
[17] Transcript, April 8, 2022, pp 20-31 [AR, Vol II, Tab 18, pp 119-130]. The two *Garofoli* applications were subsequently combined into a single proceeding: *R v Reeve*, 2023 ONCJ 70 at para 6.

7.	Vlahic	[No dates indicated]
8.	Vlahic, **Vrbanic**, Klisuric, Sihra, Sirha (Brockley Group)	Some *Garofoli* dates set on this date (October 3-5 and 7, March 27-30, 2023), additional dates confirmed by email on April 13. 15-day trial set for May 1-4, 8, 9, 11, 15, 16, 18, 19, 29-31 and June 1, 2023.
9.	Gallant	11(b) motion December 19, 2022; 3-day trial set June 19 (Monday), 20, and 23, 2023.
10.	Brooks and Ivarone	11(b) motion June 14, 2022; 5-day trial set for August 29 and 31, and September 1 and 7-8, 2023

19. In total, this process resulted in 84 days of court time – just under 17 weeks – allocated for proceedings arising out of Project OSkyfall.

20. The Group 8 Trial Scheduling Form completed on April 13 indicated that a *Garofoli* application was "being set separately" for the members of this group.[18] The trial coordinators' office prepared a Trial Scheduling Form for Group 5 that likewise indicated that a *Garofoli* application was "being set separately."[19] Unlike the Trial Scheduling Forms, the transcript record for the April 8 appearance does not show a *Garofoli* application being set for any groups other than Groups 1 and 8. However, in response to a defence comment that the dates set for Group 10 were the first that had been offered, the trial coordinator commented on the record that she understood that "the bulk of these have to be set after the March 15 day matter."[20]

21. The record of these case management meetings contains no comment from either respondent's trial counsel suggesting that the respondent Vrbanic intended to participate in the *Garofoli* application only for his Group 8 charges. Nor did either counsel seek earlier dates for the Group 5 trial.

c) The 11(b) application

22. The respondents' 11(b) application was heard on February 6, 2023. Originally seeking a stay of all his charges in his written materials, the respondent Vrbanic narrowed his application to the Group 5 charges only at the hearing. The primary issues on the application were quantification

[18] ONCJ Trial-Preliminary Inquiry Scheduling Form (Group 8) [AR, Vol I, Tab 6].
[19] ONCJ Trial-Preliminary Inquiry Scheduling Form (Group 5) [AR, Vol I, Tab 5].
[20] Transcript, April 8, 2022, p 21, ll 16-20 [AR, Vol II, Tab 18, p 120].

of Covid delay and the availability of the particularly complex case exceptional circumstance. The Crown's complexity argument relied on the size of the investigation, the volume of disclosure, and the multi-week *Garofoli* application. The Crown attributed the trial dates to the respondents' participation in the *Garofoli* application, and argued that but for their participation, the respondents' trial would have been prioritized over other matters (i.e., Groups 2 to 4) and set for dates in 2022.[21] In response to this last submission, the respondents denied ever having taken the position that the scheduling of their trial dates was dependent on the *Garofoli* application.

23. This factual question became the principal focus for both the Crown's and respondents' oral submissions. Crown counsel pointed to the Trial Scheduling Form which indicated that a *Garofoli* was being set separately, and indicated that he believed it was everyone's understanding that the result of the Group 8 *Garofoli* could impact the validity of the warrants that were the basis for the respondents' Group 5 charges.[22] Pressed on this point by the application judge, counsel for the respondent Vrbanic took the position that his client was not relying on the *Garofoli* application for these charges, but left it open that he might re-evaluate his reliance on the result of this application "if something changes."[23] Counsel for the respondent Josipovic characterized her client's case as a "possession case" but also suggested that she might somehow challenge the admissibility of her client's text messages.[24]

24. At the time he heard this application, the application judge had already heard and decided applications brought by two other Project OSkyfall accused, the reasons for which were both released on February 7, 2023. In *R v Ivarone*,[25] the application judge considered the complexity of Project OSkyfall with specific reference to the prosecution against Ivarone, an accused who had been included in prosecution groups 1 and 10.

25. In finding this prosecution to be particularly complex, the application judge considered the scale of the investigation, the volume of disclosure, the number of accused and prosecution groups,

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[21] Crown trial factum, at paras 70-72 [AR, Vol I, Tab 9, pp 134-135].
[22] Transcript, February 6, 2023, pp 24-26 [AR, Vol II, Tab 19, pp 167-169].
[23] Transcript, February 6, 2023, p 14, ll 12-17 [AR, Vol II, Tab 19, p 157].
[24] Transcript, February 6, 2023, p 17, ll 9-20 [AR, Vol II, Tab 19, p 160].
[25] *R v Ivarone*, 2023 ONCJ 69. The issues in *R v Reeve*, 2023 ONCJ 70, were unrelated to case complexity.

and the complex *Garofoli* application (involving Ivarone among others) which was already underway at the time his reasons were released. He considered the project Crowns' management of this large prosecution and held that they had "implemented a concrete plan with reasonable diligence."[26] Elsewhere in his reasons, the application judge praised the conduct of all parties in Project OSkyfall and described it as a "model for the *Jordan* principles."[27] Had it not already been fully justified as Covid delay, any delay over the threshold would have been justified by the particular complexity of the case. The application judge also commented that Crown counsel had done "all the right things" to bring the matter before him "and the other matters arising from project OSkyfall" to trial in a timely way.[28]

26. Despite these previous findings in *Ivarone*, on April 21, 2023, the application judge gave brief oral reasons allowing the respondents' application and staying the proceedings in this case. He substantially adopted the analysis of complexity and Covid delay from *Ivarone*. Following his analysis in *Ivarone*,[29] the application judge deducted 3 months for Covid delay, resulting in a net delay just over the 18-month presumptive threshold. Relying on an erroneous calculation by counsel at trial, the application judge calculated this delay as being one month. In fact, as the Court below accepted, on a proper calculation the remaining delay over the threshold was just four days.

27. The application judge found that there was insufficient evidence in the record to conclude that the respondents had intended to participate in the *Garofoli* application for these charges. While he had already held the Project OSkyfall prosecution to be particularly complex in *Ivarone*, he distinguished *Ivarone* on the basis that this finding of complexity was based on Ivarone's participation in the joint *Garofoli*. Without their participation in the *Garofoli* application for these charges (the respondent Vrbanic was participating in the *Garofoli* as part of his Group 8 charges), the prosecution against the respondents was no longer particularly complex. In the result, he stayed the respondents' Group 5 charges.

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[26] *R v Ivarone*, 2023 ONCJ 69 at paras 20-21, 24-28.
[27] *R v Ivarone*, 2023 ONCJ 69 at para 3.
[28] *R v Ivarone*, 2023 ONCJ 69 at para 2.
[29] *R v Ivarone*, 2023 ONCJ 69 at paras 15-20.

d) Court of Appeal: majority reasons and dissent

28. In the Court below, the Crown argued that the application judge had erred in allowing the question of the respondents' participation in the *Garofoli* application to be essentially determinative of complexity, thereby ignoring the complexity of the prosecution as a whole. Writing for the majority, Copeland J.A. rejected this argument. She noted that as the case management judge, the application judge was aware of the overall complexity of the case and held that his determination with respect to complexity was entitled to deference. She characterized the Crown's submissions on the reasonableness of the project Crowns' conduct as introducing new arguments on appeal.

29. Roberts J.A., in dissent, held that the application judge had erred by narrowly focusing on the *Garofoli* issue. She held that to the extent that the Crown's understanding of the respondents' position with respect to participation in the *Garofoli* was mistaken, this was itself a product of a very large and very complex prosecution with multiple moving parts and many counsel and parties. The application judge had erred in failing to take a "birds-eye" view of the case and in holding the Crown to a standard of perfection.

PART II – QUESTIONS IN ISSUE

30. This appeal raises the following issues:

I) Whether the application judge misapplied the governing principles on s. 11(b) *Charter* litigation by (a) miscalculating the net delay, and (b) failing to properly assess complexity.

The Court of Appeal was unanimous in accepting that the net delay in this case was miscalculated at trial to be one month but was, in fact, only four days.

The majority in the Court below was wrong to defer to the trial judge's view of complexity given that it was tainted by legal error, and wrong to preclude the Crown from arguing that it acted reasonably based on the factual record before the Court. As Roberts J.A. correctly held in dissent, the application judge misapplied the governing principles respecting exceptional circumstances and his conclusions on complexity and reasonableness were therefore not entitled to deference. The complex circumstances surrounding the scheduling process and the reasonableness of the Crown's understanding of that process were integral to an understanding of the delay in this case and the majority in the Court below was wrong to disregard them.

II) Whether the determination of complexity, for the purposes of an exceptional circumstance under the 11(b) framework, ought to be evaluated within the context of the case as a whole.

Roberts J.A. in dissent correctly held that the application judge erred in failing to consider both the complex circumstances surrounding the scheduling process and the reasonableness of the Crown's understanding of that process in all the circumstances. A proper approach to s. 11(b) is a holistic one – one that looks at the case as a whole and not just one small piece of the puzzle.

A proper holistic approach to s. 11(b) ought to incorporate some room in the *Jordan* framework to acknowledge the public interest and ensure a just result. A limited mirroring of the framework available for below-ceiling stays ought to apply above the ceiling to permit trial judges to consider the effects on the administration of justice before issuing a stay of proceedings in cases where the delay is otherwise reasonable.

PART III – STATEMENT OF ARGUMENT

A. THE COMPLEX CASE EXCEPTION MUST BE INTERPRETED PURPOSIVELY

31. The particularly complex case exceptional circumstance serves the crucial purpose of ensuring that the analysis of reasonable delay respects the inherent time requirements of some of the most important prosecutions that come before the courts. Complex prosecutions are not unto themselves "contrary to *Jordan*,"[30] nor do large-scale investigations make it "impossible … for people to have a trial within a reasonable time."[31] The public interest in the prosecution of serious crimes must inform the analysis of what constitutes reasonable delay in such prosecutions. The interpretation of the particularly complex exceptional circumstance must be done purposively, within the context of the prosecution as a whole.

a) Particular complexity is determined by time requirements

32. The presumptive ceilings adopted in *Jordan* took the *Morin* guidelines for institutional delay as their starting point and added an allowance for the inherent time requirements of a normally complex case.[32] Implicit in this approach is the recognition that particularly complex cases – cases with particularly significant inherent time requirements – cannot be expected to be completed within the presumptive ceilings. The defining characteristic of a particularly complex case is one whose evidence or issues cause it to "require an inordinate amount of trial or preparation time such that the delay is justified."[33]

33. Consequently, the particularly complex case exceptional circumstance operates independently of the presumptive ceilings. The assessment requires a qualitative assessment of the overall complexity of the case and the Crown's plan to mitigate the delay arising out of this complexity. Just as the delay due to complexity is not to be measured against the presumptive ceilings, the reasonableness of the Crown's plan is not to be assessed on the basis of how close it could have brought the case to the presumptive ceiling.[34]

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[30] Transcript, January 12, 2022, p 28, ll 9-18 [AR, Vol II, Tab 16, p 53].
[31] Transcript, February 9, 2022, p 15, ll 8-19 [AR, Vol II, Tab 17, p 82].
[32] *R v Jordan*, 2016 SCC 27 at paras 52-53, 106.
[33] *R v Jordan*, 2016 SCC 27 at para 77.
[34] *R v Jordan*, 2016 SCC 27 at paras 79-80; *Ontario (Ministry of Labour) v Nugent*, 2019 ONCA 999 at paras 31-35, leave to appeal ref'd [2020] 1 SCR xiv; *R v C.G.*, 2020 ONCA 357 at para 64.

34. Given the purpose of the exception, the issue relevant to particular complexity is not the complexity of the legal or factual issues taken in the abstract, but rather as it affects the overall time required by the case. In some cases, the preparation and court time required to litigate a very difficult legal issue may well be easily accommodated within the thresholds. By contrast, a long series of relatively straightforward pre-trial applications could significantly affect the overall time requirements of the case. The interpretation of particular complexity must bear these different realities in mind.

35. As this Court observed in *Jordan*, new offences, procedures, legal tests and obligations on the Crown and police have increased the complexity of pre-trial and trial processes in criminal proceedings.[35] This trend started before, and has continued since, *Jordan*. Nearly a decade before *Jordan*, Justices Lesage and Code authored a report that examined long and complex trial procedures and determined that cases were becoming increasingly complex primarily due to pre-trial applications resulting from changes in three areas: the development and interpretation of *Charter* rights, the addition of new and complicated sections to the *Criminal Code*, and common law developments around the law of evidence. [36]

36. Post *Jordan* this trend continues. By way of example, this Court has expanded standing to bring pre-trial applications under ss. 7 and 8 and other sections of the *Charter* in decisions such as *Marakah*, *Jones*, and *Brunelle*.[37] Parliament has likewise increased the complexity of sexual assault trials in enacting the records admissibility regime in ss. 278.92 to 278.94 of the *Code*.[38] While these provisions serve as an essential privacy protection for vulnerable sexual assault complainants, they

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[35] *R v Jordan*, 2016 SCC 27 at para 42.

[36] Patrick J. LeSage and Michael Code, *Report of the Review of Large and Complex Criminal Case Procedures*, Toronto: Ontario Ministry of the Attorney General, 2008, at pp 7-10.

[37] *R v Marakah*, 2017 SCC 59; *R v Jones*, 2017 SCC 60; *R v Brunelle*, 2024 SCC 3. See also *R v Bykovets*, 2024 SCC 6. As the landscape for determining standing has changed, the volume and complexity of *Charter* litigation has also changed. This is also true of increased requirements for judicial pre-authorization on police investigative practices – which also become an increased burden on the criminal justice system tasked with litigating those warrants at trial.

[38] Sections 278.92 to 278.94 of the *Criminal Code*. See also: *R v J.J.*, 2022 SCC 28.

also "run counter to a shift away from a culture of delay"[39] in the sense that they inherently take time. Recent decisions show that provincial courts are straining to accommodate prosecutions with such applications within the presumptive thresholds.[40]

37. All of these pre-trial proceedings take time – both in terms of actual court time to litigate them and also, as discussed further below, inherent decision-making time that is integral to a just process. All justice system participants – whether Crowns, defence counsel, police or judges – are charged with profound responsibilities that go to the very core of the criminal justice system. The deliberative processes through which these participants must make responsible decisions can sometimes take time and decisions ought not be made in haste – something this Court has recognized with respect to the deliberative time required by trial judges in *R v K.G.K.*[41] Nor should the accused be rushed to decision on who to call in their defence, or a complainant forced to waive the time-intensive privacy protections in the *Code* to increase the likelihood that a case will not be stayed for delay. These are difficult issues that take time to decide. Despite the difficulties associated with increased complexity created by new developments in the law, none of them come with an exemption from *Jordan.*

38. Complexity and inherent time requirements must be assessed in context. Necessarily, the 18-month threshold in provincial courts provides less room for time-consuming proceedings in a

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[39] See: *R v Larson*, 2024 SKPC 17 where Rybchuk J. states: "While well-intentioned, these legislative changes run counter to a shift away from a culture of delay. In my experience, these pretrial applications have only exacerbated delay and further drained precious, limited judicial resources as a result of requirements such as adjournments to accommodate scheduling conflicts, the appointment and retention of legal counsel for both self-represented accused persons and complainants, obligations on legal counsel to file voluminous materials and briefs of law and make oral submissions, obligations on presiding judges and justices to provide reasons for decisions under s. 278.94(4) of the *Criminal Code*, and so on."

[40] In addition to *Larson* in the previous note, see also *R v Flaumenbaum*, 2023 ONCJ 462; *R v J.P.*, 2020 ONCJ 27; *R v P.W.P.*, 2025 BCPC 51.

[41] *R v K.G.K.*, 2020 SCC 7.

busier criminal court.[42] This should be considered in assessing whether the time requirements of a prosecution rise to the level of particular complexity.[43]

39. Particular complexity must be assessed from the perspective of the prosecution as a whole – but does not need to arise equally from all stages of the prosecution. Voluminous disclosure, while "not automatically demonstrative of complexity,"[44] can arguably be sufficient to give rise to particular complexity in some circumstances. The digital realm has increased the volume and complexity of most criminal matters that now involve some form of inculpatory or exculpatory electronic evidence. Marshalling reams of video or phone evidence is no small task. In one case, forensic analysis of 99 digital devices seized at takedown was still ongoing some 17 months after takedown.[45] This factor would likely have rendered a trial within the 18-month threshold practically impossible.

40. As this prosecution demonstrates, it is common for major cases to become less complex at the trial stage than they were at the outset. Frequently by the time of trial, issues have been defined and concessions have been made, such that the trial itself is relatively compact. Complexity at the outset can nevertheless render such cases particularly complex.[46] At the extreme, the trial originally set may not occur for some or all of the accused, if these accused resolve their matters after the pre-trial motions. For instance, in *R v Bulhosen*, five of the seven accused opted not to proceed to trial

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[42] This Court in *Morin* previously recognized that the provincial court, at least in Ontario, deals with the majority of criminal matters: *R v Morin*, [1992] 1 SCR 771 at 806-807 per Sopinka J. In Quebec, the provincial court decides all non-jury criminal matters by virtue of s. 552 of the *Criminal Code*, which means that cases often subject to the higher ceiling in other provinces may be subjected to the lower ceiling in Quebec: *R c Costanzo-Peterson*, 2024 QCCA 1282 at paras 85-97, leave to appeal ref'd 2025 CanLII 33158 (SCC).

[43] *R v Anderson*, 2025 ONCA 172 at para 33, leave to appeal requested (SCC Number 41796).
[44] *R v Cody*, 2017 SCC 31 at para 64; *R v Picard*, 2017 ONCA 692 at paras 60-62, leave to appeal ref'd [2018] 2 SCR ix; *R v Lopez-Restrepo*, 2018 ONCA 887 at paras 33-40.
[45] *R v Bulhosen*, 2019 ONCA 600 at para 31, leave to appeal ref'd [2020] 1 SCR ix.
[46] *R v Picard*, 2017 ONCA 692 at paras 60-62, leave to appeal ref'd [2018] 2 SCR ix; *R v Lopez-Restrepo*, 2018 ONCA 887 at paras 33-40; *R v Baron*, 2017 ONCA 772 at paras 68-72.

at all, after unsuccessfully litigating an 11(b) application where the delay over the threshold was premised on the requirement of a six-month jury trial.[47]

41. As courts have recognized, complexity is not an all or nothing concept.[48] Recognizing a purposive approach to complexity does not require this Court to allow complexity to justify any and every delay whatsoever. As *Jordan* itself states, the question is whether the actual delay was justified by the complexity of the case.[49] This is a relative question that occurs on a continuum. The longer the delay, the greater must the complexity be to justify the delay in that instance.

b) The Crown's ability to manage complexity is frequently limited in practice

42. *Jordan* fairly requires that the Crown take proactive steps to mitigate delay. However, the reasonableness of these steps must take into account the uncertainties inherent in case managing complex prosecutions. Like trials themselves, large prosecutions are not "well-oiled machines."[50] The standard for the conduct of Crown counsel must be reasonableness, not perfection viewed with the benefit of hindsight.[51]

43. Case management for complex prosecutions often occurs in an adversarial context where not all parties may equally share a commitment to minimizing delay. While this Court in both *Jordan* and *Cody* encouraged "all participants in the criminal justice system to cooperate in achieving reasonably prompt justice" and called on defence to cooperate with the Crown to safeguard their clients' 11(b) rights, practically speaking there may be little incentive for the defence to do so.[52] Despite this Court's direction that all parties must collaborate to address cases more efficiently,[53] in practice such collaboration does not always occur because, fundamentally and understandably, defence counsel owe a duty to their clients – not the Crown – and a stay of proceedings is a big win. This Court recognized as much in *Jordan*: "Accused persons may seek

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[47] *R v Bulhosen*, 2019 ONCA 600 at paras 2, 31-40, 74-77, leave to appeal ref'd [2020] 1 SCR ix.
[48] E.g., *R v Shaporov*, 2025 ONCA 281 at para 52; *R v Anderson*, 2025 ONCA 172 at para 34, leave to appeal requested (SCC Number 41796).
[49] *R v Jordan*, 2016 SCC 27 at para 80.
[50] *R v Jordan*, 2016 SCC 27 at para 73.
[51] *R v Cody*, 2017 SCC 31 at para 58; *R v C.G.*, 2020 ONCA 357 at para 49; *Ontario (Ministry of Labour) v Nugent*, 2019 ONCA 999 at paras 43-45, leave to appeal ref'd [2020] 1 SCR xiv; *R v Lemioer*, 2019 SKCA 95 at paras 56, 62.
[52] *R v Jordan*, 2016 SCC 27 at paras 5, 138; *R v Cody*, 2017 SCC 31 at para 58.
[53] See *R v Jordan*, 2016 SCC 27 at para 139; *R v Cody*, 2017 SCC 31 at paras 33 and 37.

to avoid responsibility for their crimes by embracing delay, in the hope that the case against them will fall apart or they will obtain a stay of proceedings."[54] While this Court went on to say that this operates to the detriment of the justice system as a whole, and, quoting *Morin*, that "[s]ection 11(b) was not intended to be a sword to frustrate the ends of justice,"[55] the reality is that litigation of delay is a high-stakes adversarial endeavour that is inextricably tied to critical values like full answer and defence.

44. Assessment of the Crown's management of complex prosecutions must therefore take into account the accused's right to make full answer and defence and the attendant court time that that entails. This Court held in *Jordan* and reiterated in *Cody* that "defence actions legitimately taken to respond to the charges fall outside the ambit of defence delay."[56] This has been reinforced by this Court's recent holding in *Haevischer* that courts must hear all but "manifestly frivolous" applications on their merits, even if such applications appear to have little prospect of success.[57] In so doing, the Court rejected the earlier suggestion in *Cody* that trial judges could manage delay by using their case management powers to summarily dismiss applications based on the lower standard of "no reasonable prospect of success."[58] In prioritizing a robust interpretation of the right to make full answer and defence, the Court has also made it more difficult for the Crown to bring an early end to any motions that might be contributing to delay.

45. In *Cody*, the Court suggested that a court may deny an adjournment request on the basis that it would result in long delay, even where it would be deductible as defence delay.[59] However, subsequent cases demonstrate the danger of refusing such adjournments for complex cases involving serious charges. In such cases, the complexity of the case itself may require an adjournment to preserve the accused's right to full answer and defence.[60]

46. As this Court held in *Haevischer*, "[c]omplexity in criminal trials is sometimes unavoidable," and simplicity and speed cannot become ends in themselves.[61] The overriding

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[54] *R v Jordan*, 2016 SCC 27 at para 21.
[55] *R v Jordan*, 2016 SCC 27 at para 21, quoting from *R v Morin*, [1992] 1 SCR 771 at 801-802.
[56] *R v Jordan*, 2016 SCC 27 at para 65; *R v Cody*, 2017 SCC 31 at para 29.
[57] *R v Haevischer*, 2023 SCC 11 at paras 71-73.
[58] *R v Haevischer*, 2023 SCC 11 at paras 77-79, referencing *R v Cody*, 2017 SCC 31 at para 38.
[59] *R v Cody*, 2017 SCC 31 at para 37.
[60] *R v Hayter*, 2018 SKCA 65 at para 38, leave to appeal ref'd [2019] 1 SCR viii.
[61] *R v Haevischer*, 2023 SCC 11 at para 51.

consideration in criminal trials is that the outcome be just. These basic, incontrovertible principles must govern this Court's approach in analyzing delay throughout the 11(b) context. In evaluating the particular complexity of a given case, the volume, complexity and time necessitated by pre-trial applications brought by the defence (that do not constitute defence delay) must be part of the circumstances that are considered in the analysis.[62]

47. Finally, it goes without saying that the Crown's obligation to mitigate delay cannot require actions that are inconsistent with the Crown's broader role in protecting the public interest. Mitigating delay cannot require the Crown to abandon serious charges where there is a strong prospect of conviction, nor can it require the Crown to consent to defence requests that may put the prosecution at risk.[63]

c) The interpretation of the complexity exception should promote certainty

48. *Jordan* requires that the Crown take proactive steps to mitigate delay in complex prosecutions. However, litigation inevitably occurs after the fact, often long after the decisions affecting delay were made. The utility of the particularly complex case exceptional circumstance depends on the parties being able to reasonably predict whether and how this exceptional circumstance will be applied. Thus when assessing the conduct of the Crown, the Court must do so on the basis of the Crown's reasonable perception of the prosecution, and the choices affecting the prosecution, at the time these choices were made.[64]

49. It is entirely within the spirit of *Jordan* that delay in large wiretap investigations like Project OSkyfall should fall to be assessed under the particular complexity exceptional circumstance. As this Court observed more than 20 years ago, catching high-level drug traffickers "is never an easy task."[65] Both before and after *Jordan,* courts have repeatedly recognized the particular complexity and inherent time requirements of large wiretap prosecutions.[66] While Crown counsel must assess

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[62] See for example: *R v Merritt*, 2017 ONSC 6203 at paras 1-5; Patrick J. LeSage and Michael Code, *Report of the Review of Large and Complex Criminal Case Procedures*, Toronto: Ontario Ministry of the Attorney General, 2008, at pp 7-8 and note 7.
[63] *R v Saikaley*, 2017 ONCA 374 at paras 41-46, leave to appeal ref'd [2017] 2 SCR x.
[64] *R v Lemioer*, 2019 SKCA 95 at paras 56, 62; *R v Scher*, 2018 ABCA 365 at para 26.
[65] *R v Araujo*, 2000 SCC 65 at paras 41-43.
[66] *R v Morash*, 2021 ONCA 335 at paras 15-20; *R v Lopez-Restrepo*, 2018 ONCA 887 at paras 33-40; *R v Bulhosen*, 2019 ONCA 600 at para 79, leave to appeal ref'd [2020] 1 SCR ix; *R v Saikaley*,

every prosecution on its facts, it is both necessary and reasonable for Crown counsel prosecuting such large cases to operate on the basis that the particularly complex exceptional circumstance will normally apply.

50. As this case demonstrates, choices about the conduct of complex prosecutions are frequently made at early stages in the prosecution. Uncertainty as to the availability of the complex case exception at this point necessarily creates a risk-management incentive to try to bring a prosecution within the presumptive thresholds, whether or not this is practically possible. This creates a risk to other important values. Inappropriate pressure to move a matter forward can lead to pre-trials being held before Crown and defence have fully absorbed a complex case. It may result in the Crown proceeding on charges where the Crown should not have proceeded, and potentially, to wrongful convictions.[67] It risks creating additional delay with dates being set with insufficient understanding of what proceedings are actually necessary and what court time is actually required.[68]

51. Similarly, uncertainty creates incentives for courts to unnecessarily overbook court time to obtain dates within the thresholds. While "stacking" can be a necessary case management tool, other prosecutions should not be put in *Jordan* jeopardy by having their allocated court time pre-empted by a complex matter that could properly have been set for a later date.[69] As Doherty J.A. stated more than 25 years ago, "[n]o case is an island to be treated as if it were the only case with a legitimate demand on court resources."[70]

52. Pressure to set early dates creates the incentive to set trials for non-contiguous dates: the *Garofoli* application in Project OSkyfall was set for 20 days over the course of over six months.[71]

2017 ONCA 374 at paras 35-36, leave to appeal ref'd [2017] 2 SCR x; *R v Khan*, 2011 ONCA 173 at para 30, leave to appeal ref'd [2011] 2 SCR viii; *R v Nguyen*, 2013 ONCA 169 at para 61; *R v Edwards*, 2024 MBCA 27 at paras 29-30, leave to appeal ref'd 2024 CanLII 88335 (SCC).

[67] Devon Medeiros and Michelle I. Bertrand, "A Rush to Justice: The Institution of Presumptive Ceilings in *R v Jordan* and Their Potential Implications for Wrongful Convictions" (2024), 46 Man LJ 80.

[68] See, for instance, *R v C.G.*, 2020 ONCA 357 at para 46.

[69] See *R v S.A.*, 2024 ONCA 737 at paras 38-41, leave to appeal ref'd 2025 CanLII 33154 (SCC); *R v Liu*, 2024 ONSC 2022 at paras 26-27, 59.

[70] *R v Allen*, [1996] OJ No 3175 (CA) at para 27, aff'd in [1997] 3 SCR 700. See also *R v S.A.*, 2024 ONCA 737 at para 41, leave to appeal ref'd 2025 CanLII 33154 (SCC).

[71] ONCJ Trial-Preliminary Inquiry Scheduling Form (Group 8) [AR, Vol I, Tab 6, p 86].

This practice has a deleterious effect on the overall trial process and the accused's fair trial interests.[72] Simply put, the pressure to meet inappropriate deadlines at all costs operates to the prejudice of the proper administration of justice. A purposive interpretation of the particularly complex exceptional circumstance that takes into account the different ways that a case may be complex and provides markers for greater certainty of application will better serve the interests of justice.

B. THE APPLICATION JUDGE DID NOT APPLY THE COMPLEX CASE EXCEPTION CORRECTLY

53. The application judge's reasons in *Ivarone* demonstrate that he appreciated that Project OSkyfall was a complex case. Unfortunately, the very obvious complexity of the prosecution vis-à-vis Ivarone and other participants in the *Garofoli* application appears to have distorted the application judge's analysis of complexity for the respondents. In extracting Group 5 from Project OSkyfall for the purpose of analyzing complexity, the application judge erred in principle. The majority erred in deferring to this legally incorrect analysis.

a) The majority erred in its characterization of the trial judge's reasons

54. *Jordan* characterized determinations of particular complexity as falling "well within the trial judge's expertise."[73] Nevertheless, the determination of complexity is ultimately a question of law, as is the question of the overall reasonableness of the delay. Failing to consider complexity with a view to the prosecution as a whole, as the application judge failed to do here, is an error of law.[74]

55. The majority took the view that, contrary to the Crown's position on appeal, the application judge had considered the complexity of the case as a whole in finding that the Group 5 prosecution was not complex. However, the application judge's very brief oral reasons in this case provide no basis to conclude that he did so. His reasons reference just two factors as going to complexity: actual participation in the *Garofoli* application, and the volume of disclosure. He held that in combination they gave rise to particular complexity, but that standing alone the volume of

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[72] *R v Coates*, 2023 ONCA 856 at paras 60-64, leave to appeal ref'd 2024 CanLII 53389 (SCC).
[73] *R v Jordan*, 2016 SCC 27 at para 79; *R v Cody*, 2017 SCC 31 at para 64.
[74] *R v Cody*, 2017 SCC 31 at para 64; *R v Picard*, 2017 ONCA 692 at para 57, leave to appeal ref'd [2018] 2 SCR ix; *R v Zahor*, 2022 ONCA 449 at para 79.

disclosure did not.[75] He recognized no other factors as going to complexity. Moreover, the application judge framed the issues in the same way in his interactions with counsel during submissions.[76]

56. The application judge's comments at the April 8, 2022, appearance likewise suggest an erroneously restrictive conception of the particularly complex exceptional circumstance. At the end of March 2022, the application judge had conducted multiple judicial pre-trials for all the prosecution groups. On April 8, this was followed by a lengthy discussion about the complicated logistics of scheduling the common *Garofoli* application. It is surprising that immediately after this discussion, the trial judge would then go on to suggest that some counsel may want to bring 11(b) applications because some of the trial dates would likely be over the 18-month threshold.[77]

57. In fairness to the application judge, the erroneous approach that he ultimately took to this issue arose directly from a position taken by the respondents for the first time on the hearing date. In their application materials, both respondents had initially sought a stay of proceedings for all their charges. They drew no distinction between the Group 5 and Group 8 charges. They simply took the position that the voluminous disclosure was insufficient to generate particular complexity, and that the primary cause of the delay was insufficient judicial resources.[78] The Crown responded by pointing to the additional complexity arising out of the common *Garofoli* application, which the Crown understood to be relevant to the delay for both sets of charges.[79]

58. On the hearing date, the respondent Vrbanic abandoned his application in relation to the Group 8 charges and – for the first time – both applicants took the position that they had never intended to rely on the *Garofoli* in relation to their Group 5 charges. Responding to this submission for the first time on the hearing date, the Crown appropriately focused much of its argument on the submission that the defence position was contradicted by the record. The application judge ultimately found that the Crown had not met its burden on this question based on the record and held that the voluminous disclosure on its own was insufficient to ground particular complexity.

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[75] Ruling on 11(b) application, ONCJ, April 21, 2023, pp 3-4 [AR, Vol I, Tab 2, pp 11-12].
[76] Transcript, February 6, 2023, p 9, l 26–p 10, l 13; p 27, ll 18-23; p 34, ll 12-25 [AR, Vol II, Tab 19, pp 152–153, 170, 177].
[77] Transcript, April 8, 2022, p 7, l 25–p 9, l 30 [AR, Vol II, Tab 18, pp 106-108].
[78] Defence trial factum, at paras 35-38 [AR, Vol I, Tab 8, pp 109-110].
[79] Crown trial factum, at para 70 [AR, Vol I, Tab 9, p 134].

Then, without further analysis, the application judge concluded that the delay was unreasonable and stayed the Group 5 charges.

b) The application judge failed to consider complexity as a whole

59. The Crown did not concede that participation in the *Garofoli* application was determinative of complexity in this case. Hence the application judge was still required to consider the complexity of the prosecution as a whole in determining whether it was particularly complex. The respondents' sudden change of position on the *Garofoli* application may have unexpectedly changed the actual analysis that the application judge was required to undertake, but the fundamental issue remained the same: was the complexity of the case as a whole sufficient to engage the particularly complex exceptional circumstance, and if so, did the Crown properly manage complexity to mitigate delay?

60. The application judge was well equipped to perform this analysis on the basis of the record that was before him. In view of how the submissions on this application unfolded, there is no basis to doubt that the project Crowns genuinely believed that the respondents intended to participate in the common *Garofoli* for their Group 5 charges. The record was more than adequate to assess the reasonableness of this belief. Contrary to the majority's suggestion, seeking an adjournment to call further evidence of the Crown's management of the prosecution was neither necessary nor practicable. With its potential to create further delay, such an adjournment would also have been antithetical to *Jordan* principles.

61. The application judge's framing of the complexity issue altogether ignored a factor that gave rise to significant complexity in this prosecution: the need to set trial and application dates for 18 accused in a very large prosecution, all within a reasonable time. The application judge fairly assessed the individual trials in this prosecution as not particularly complex. However, this simplification was achieved by dividing the prosecution and its 18 co-accused into ten separate prosecution groups. Division into these prosecution groups did not change the size of the investigation, the volume of disclosure it produced, or – in broad terms – the total number of witnesses and trial time that would be required to prove the charges. Moreover, this division multiplied the number of proceedings that needed to be set, all of them within a reasonable time. The trial and application dates set for all prosecution groups spanned a period of over a year, from August 2022 to September 2023.

62. In combination with the tremendous volume of disclosure, the logistical challenges presented by the number of accused and prosecution groups in this case were more than sufficient to render Project OSkyfall a particularly complex case, both as a whole and in its component parts. The application judge found that the project Crowns had acted responsibly in managing this complex prosecution, a finding that is amply justified by the record.

63. The miscalculation of the overall delay may have presented the application judge with a misleading qualitative picture of the delay over the threshold in this case. However, even on this mistaken understanding of the overall delay, the modest delay over the threshold would have been amply justified by the complexity of the case.

64. Furthermore, as Roberts J.A. recognized, the complexity arising out of the need to set multiple trials and applications created significant potential for error and misunderstanding. The respondents' trial counsel made no attempt to clarify their position on the *Garofoli* application at the time the dates were set, notwithstanding that: (1) Vrbanic was participating in the application in relation to the closely related Group 8 charges, (2) the Trial Scheduling Form indicated that a *Garofoli* application was also being set separately for his Group 5 charges, and (3) it was evident at the April 8 appearance that earlier dates were being set for other groups where the accused were not relying on the results of the application. They never sought earlier dates at any point in the proceedings. This all occurred in a context where some counsel had argued that litigation of earlier authorizations may result in excision of grounds from later authorizations. In the absence of any indication to the contrary, it was reasonable for the project Crowns to believe that Vrbanic intended to participate in the joint *Garofoli* for all his charges.

65. Contrary to the majority's suggestion, the analysis that Roberts J.A. performed does not amount to considering a new argument made for the first time on appeal. It is precisely the analysis the application judge himself should have engaged in on the basis of his finding about the respondents' intentions with respect to the *Garofoli*. Roberts J.A. correctly took a "birds-eye view" in assessing the complexity of, and the Crown's conduct throughout, the prosecution. It was incumbent on the application judge to do the same. Instead, the application judge inappropriately extracted the Group 5 prosecution and isolated it from the prosecution as a whole in assessing its complexity.

c) The application judge's approach undermines reasonable reliance on particular complexity

66. From the outset, the application judge approached the particular complexity exception in a way that undermines reasonable reliance on its availability. It was eminently reasonable for the project Crowns to have approached Project OSkyfall on the basis that it was a particularly complex case, and that delay would likely fall to be analyzed on that basis. They reasonably approached the April 8, 2022, case management appearance as an appearance where dates would be set for this complex project as a whole.

67. The application judge's complexity analysis in relation to Group 5 ignores the practical reality of what was being done at the April 8 appearance. The Group 5 prosecution was part of Project OSkyfall. It was not a separate prosecution that had been hived off from the project as a whole. The project Crowns had no basis to suspect that a misunderstanding as to the respondents' intentions could remove the Group 5 prosecution from the complex case analysis altogether. Had the project Crowns foreseen that the defence position on the *Garofoli* application might result in Group 5 no longer being part of a complex prosecution, it is impossible that the record would have been anything but crystal clear as to the respondents' intentions about this application – especially since earlier dates for the Group 5 trial were in fact available.

68. The effect of the application judge's erroneous complexity analysis was to effectively remove Group 5 from the prosecution considered as a whole. Consequently, the application judge's findings about the project Crowns' management of the Project OSkyfall prosecution became irrelevant for evaluating the Group 5 delay, because Group 5 was effectively no longer a particularly complex case. This is a hindsight-based analysis that ignores what was reasonably in the minds of the project Crowns at the time the relevant decisions were made. Its effect was to inappropriately hold the project Crowns to a standard of perfection,[80] while fundamentally undermining the purpose of the particularly complex case exception.

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[80] *R v C.G.*, 2020 ONCA 357 at para 49; *Ontario (Ministry of Labour) v Nugent*, 2019 ONCA 999 at paras 43-45, leave to appeal ref'd [2020] 1 SCR xiv.

C. A PRINCIPLED APPROACH TO A JUST REMEDY REQUIRES A BALANCING OF INTERESTS

69. The Crown in this case did "all the right things" to bring the OSkyfall matters to trial in a timely way.[81] The Crown acted in a manner that was described by the application judge in a related proceeding as being "the antithesis of a culture of complacency."[82] The delay over the presumptive ceiling was four days. Yet the Court below upheld the application judge's stay of serious charges because there is no flexibility in the current framework to do otherwise.

70. After affirming that the correct determination of the delay in this case was four days, the majority in the Court below reiterated that "the presumptive ceiling 'is not an aspirational target'" and that if the Crown could not justify any excess delay over the ceiling then the application judge "was obliged to find a breach of the respondents' s. 11(b) *Charter* rights and stay the charges against them."[83] But this is arguably not in the best interests of the administration of justice. The four days over the threshold in this case does not reflect the inevitable consequence of the justice system's failure to hold trials within a reasonable time. Nor is it the foreseeable consequence of complacency on anyone's part. Even on the assumption that this prosecution failed to meet the threshold of being a particularly complex case, a stay of proceedings based on these four days would have been arbitrary and unprincipled.

71. Unlike the application judge's complexity assessment, his deduction of 3 months for Covid delay was reasonable, and consistent with his earlier decision in *Ivarone*.[84] However, in settling on 3 months as an appropriate deduction in *Ivarone*, the application judge could not have known that choosing this figure – as opposed to a marginally higher and functionally equivalent figure like 94 days – would have made the difference between reasonableness and unreasonable delay requiring a stay in the present case. There is no principled reason why the application judge could not have

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[81] *R v Ivarone*, 2023 ONCJ 69 at para 2.
[82] *R v Ivarone*, 2023 ONCJ 69 at para 3.
[83] *R v Vrbanic*, 2025 ONCA 151 at para 20 [AR, Vol I, Tab 3, pp 22-23].
[84] *R v Ivarone*, 2023 ONCJ 69 at paras 15-19.

used a slightly higher number had he thought it appropriate – if, for instance, he had been aware of the significance of the difference between these two figures to his decision on the application.[85]

72. A similar "close case" arose in *R v Long*, where a medical practitioner was ultimately convicted of sexual assault, sexual interference, and invitation to sexual touching in relation to two of his patients. Crown counsel attempted to proactively address issues arising out of the potential unavailability of a preliminary hearing, owing to the new amendments to the *Code*. Consequently, shortly before the Covid shutdown of the courts, the Crown had consented to a re-election in the Ontario Court of Justice and new trial dates were set. After a deduction of 29 days for defence delay, the trial dates set as a result of this re-election would have resulted in an overall delay of *one day* over the threshold. The Court of Appeal held that but for the loss of these trial dates due to the Covid shutdown, the Crown's consent to the accused's re-election without an 11(b) waiver would have resulted in these serious charges having been stayed.[86]

73. As this case and examples demonstrate, the unyielding *Jordan* thresholds can result in stays of proceedings in serious cases in the absence of conduct by any of the parties that would justify this drastic result. Even for cases that do not meet the particularly complex case threshold, case management frequently involves managing unexpected events with unpredictable consequences for delay. The call to action in *Jordan* was necessary to disrupt a culture of complacency but there is a pressing need for balance. Just as there remains a window of discretion for trial judges to order a stay for proceedings conducted under the ceiling, so too should there be a window of discretion for trial judges to not order a stay for proceedings conducted over the ceiling where that is in the best interests of the administration of justice.

a) Consideration of greater societal interest always integral to 11(b)

74. Since the advent of the *Charter* this Court has grappled with how to define the outer limits of what it means to have a trial within a reasonable time. As Sopinka J. wrote for the majority in

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[85] The application judge could not have been aware of this significance, not only because *Ivarone* was decided prior to this case but also because of the unfortunate miscalculation of the overall delay in this case by the project Crowns based on the discrepancy between the arrest and charge dates.

[86] *R v Long*, 2023 ONCA 679 at paras 50-52.

R v Morin,[87] "though beguiling in its simplicity," the language of "to be tried in a reasonable time," has "presented the Court with one of its most difficult challenges."[88] In a series of decisions spanning several years, this Court adopted a flexible and functional approach to assessing the reasonableness of the delay that involved a balancing of many factors, although there was some initial debate as to what those factors ought to be.[89] There was also debate about whether the test ought to consider both the explicit individual liberty interests of the accused, and the implicit collective interests of society. A majority of this Court settled that debate in *Askov*, holding conclusively that while the primary aim of s. 11(b) "is the protection of the individual's rights," there is, nonetheless, "a community or societal interest" that is implicit to s. 11(b).[90]

75. This societal interest demands two things: (1) that those who transgress the law are brought to trial and dealt with according to the law; and (2) that individuals on trial be treated fairly and justly. As Cory J. wrote for the majority in *Askov*, "[i]t is no exaggeration to say that a fair and balanced criminal justice system simply cannot exist without the support of the community. Continued community support for our system will not endure in the face of lengthy and unreasonable delays."[91] Nor will community support for the criminal justice system endure in the face of widespread and systemic stays. The community "will not and should not condone or accept a situation where those alleged to have committed serious crimes are never brought to trial solely as a result of unduly long delays."[92] As stated by Cory J., "it is a serious consequence with potentially dangerous overtones for the community" and it is "right and proper that there be criticism of the situation when it occurs."[93]

76. In *Morin*, this Court revisited its previous decision in *Askov* in the face of widespread and systemic stays resulting from its earlier decision. For the majority, Sopinka J. recognized that a flexible approach to s. 11(b) was key, and reiterated that the two forms of societal interest discussed

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[87] *R v Morin*, [1992] 1 SCR 771.
[88] *R v Morin*, [1992] 1 SCR 771 at 779-780, per Sopinka J.
[89] See for example: *Mills v The Queen*, [1986] 1 SCR 863; *R v Rahey*, [1987] 1 SCR 588; *R v Conway*, [1989] 1 SCR 1659; *R v Smith*, [1989] 2 SCR 1120; *R v Askov*, [1990] 2 SCR 1199.
[90] *R v Askov*, [1990] 2 SCR 1199 at 1219-1220, per Cory J.
[91] *R v Askov*, [1990] 2 SCR 1199 at 1221, per Cory J.
[92] *R v Askov*, [1990] 2 SCR 1199 at 1225-1226, per Cory J.
[93] *R v Askov*, [1990] 2 SCR 1199 at 1225-1226, per Cory J.

by Cory J. in *Askov* ought to inform the development of the test under s. 11(b).[94] Similarly, in her concurring reasons in *Morin*, McLachlin J. (as she then was), emphasized that in deciding whether proceedings against an accused ought to be stayed for unreasonable delay, the court must determine whether the interests of the accused and society in a prompt trial outweigh the interests of society in seeing that persons charged with offences are brought to trial.[95] The multi-factor balancing test ultimately adopted in *Askov* and *Morin* proved to be "too complex" and this Court ultimately eschewed that approach in favour of clearly defined ceilings in *Jordan*.[96] In looking at how lower courts have interpreted that framework over the past nine years, it is apparent that the long recognized societal interests remain but there is currently no room in the framework to consider them.

77. Some academic observers have commented that the removal of the seriousness of the offence from the 11(b) analysis, as an example, fails to give due weight to pressing societal interests, particularly where the public interest in a trial is compelling.[97] Unlike all other *Charter* rights which require some balancing of competing rights, there is no assessment of the seriousness of the breach (is it months or even years over the threshold or, like in this case, is it days over the threshold), the relative impact on the accused's *Charter* protected interests (which this Court has found ought to be presumed), nor any consideration of society's interest in the adjudication of the case on its merits.[98]

78. As noted above, the *Jordan* framework also does not distinguish between delays that go beyond the ceiling by one day versus delays that span weeks or more.[99] The result is the same: both cases are automatically stayed. Where, as here, the Crown's management of a complex case has been exemplary and the delay is but an arguably arbitrary four days over the ceiling, a stay does not appear to be in the interests of justice – but trial judges are beholden to the math. Professor

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[94] *R v Morin*, [1992] 1 SCR 771 at 786-787, per Sopinka J.
[95] *R v Morin*, [1992] 1 SCR 771 at 810, per McLachlin J.
[96] *R v Jordan*, 2016 SCC 27 at para 38; Colton Fehr, "Remedying Unreasonable Delay" (2023) 60-3 *Alberta Law Review* 739 at 742.
[97] Andrew Pilla and Levi Vandersteen, "Re-Charting the Remedial Course for Section 11(b) Violations Post-Jordan" (2019) 56:2 Osgoode Hall LJ 436, at pp 440-41.
[98] Colton Fehr, "Remedying Unreasonable Delay" (2023) 60-3 *Alberta Law Review* 739 at 743-744.
[99] Andrew Pilla and Levi Vandersteen, "Re-Charting the Remedial Course for Section 11(b) Violations Post-Jordan" (2019) 56:2 Osgoode Hall LJ 436, at p 441.

Palma Paciocco sagely observes that "while the idea of a clear *ex ante* standard for section 11(b) claims is appealing, it is hard to translate into practice. How can a court fix on a universal ceiling that will reduce delay across diverse cases without provoking a tidal wave of stays?"[100] She posits that trial management and consequently, court delay, is a polycentric issue as it involves numerous stakeholders.[101] The flipside of this analogy is that those very stakeholders – namely victims, and by extension the broader community – ought to be given some consideration in the s. 11(b) analysis.[102]

79. This Court, in *Jordan*, stated that "trial judges should be alive to the practical realities of trials" and suggested that where trials start close to the ceiling but do not finish due to unforeseeable or unavoidable delays, they will qualify as presenting exceptional circumstances.[103] Except this is not what is universally happening in practice. Sometimes cases begin, witnesses testify, and then cases are stayed. Or worse, sometimes cases proceed, witnesses testify, a verdict is rendered and then cases are stayed.

80. In *R v Toole*,[104] by way of example, the complainant in a sexual assault trial testified and was cross-examined, but then a mistrial was declared because of scheduling issues with both the trial judge and counsel for the accused. The matter was retried, the complainant testified and was cross-examined again, and the jury convicted the accused – but the trial judge subsequently stayed the proceedings. The total delay in the case was 36 months,[105] which included a constitutional challenge to the records regime in s. 278, a two-stage s. 278 application, and two trials, including one by jury that went to a verdict. The trial judge refused to deduct all of the time between the two trials as an exceptional circumstance (which would have brought the case below the ceiling) and instead deducted 3-4 months, bringing the net delay to 2-3 months over the ceiling. In staying the proceedings, the trial judge commented that even if she was wrong about the exceptional

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[100] Palma Paciocco, "The Hours are Long: Unreasonable Delay After Jordan" (2017), 81 SCLR (2d) 233 at 241.
[101] Palma Paciocco, "The Hours are Long: Unreasonable Delay After Jordan" (2017), 81 SCLR (2d) 233 at 241-242.
[102] Canada, 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, 2017 at pp 64-65.
[103] *R v Jordan*, 2016 SCC 27 at para 1.
[104] *R v Toole*, 2023 ONSC 7243, currently under appeal to the Ontario Court of Appeal.
[105] After deducting 3 months as admitted defence delay: *R v Toole*, 2023 ONSC 7243 at para 4.

circumstance and the case did fall below the ceiling, she would nonetheless have stayed it because of the emotional and financial hardship to the accused of having to endure a mistrial and subsequent wait for a new trial. The trial judge did not consider the emotional hardship to the victim of that same process, nor the public interest in upholding the conviction rendered by a jury. This reflects poorly on the repute of the administration of justice.

b) Ensuring that speed does not erode justice

81. While it is trite that timely justice "is one of the hallmarks of a free and democratic society"[106] and it is significant that many cases are getting through the system within the benchmark ceilings established in *Jordan*, it is also true that many cases are not. The public outcry when cases are stayed, sometimes involving murder or other serious offences, or after vulnerable witnesses have testified or people have been convicted, is eroding faith in the administration of justice.[107] While rampant stays of proceedings are of concern, the greatest concern for the administration of justice is that the pressure on all justice system participants to move matters forward with fervour can be antithetical to the fair trial rights that s. 11 of the *Charter* is meant to protect.

i) Public outcry over stays of proceedings

82. Recent media reports suggest that "long delays and collapsed cases are eroding faith in the justice system."[108] When cases are stayed due to delay, victims and their families feel that justice has not been served, with one victim's family referring to their day in court as "flipping the coin—whether you're going to get justice that day or not."[109] One media article reported that victims felt

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

[107] Canada, 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, 2017 at pp 1, 9; House of Commons, Standing Committee on the Status of Women, Evidence, 44-1, No 134 (November 27, 2024) at 1735 (Benjamin Roebuck, Federal Ombudsperson for Victims of Crime, Office of the Federal Ombudsperson for Victims of Crime). See also: Kristen Everson, "Long delays and collapsed cases are eroding faith in the justice system, lawyers warn", *CBC News*, (May 31, 2024); Canada, Office of the Federal Ombudsperson for Victims of Crime, Federal Ombudsperson launches systemic investigation into treatment of survivors of sexual assault in Canadian Justice System, March 11, 2024 [Report to be released in summer 2025].

[108] Kristen Everson, "Long delays and collapsed cases are eroding faith in the justice system, lawyers warn", *CBC News*, (May 31, 2024).

[109] Canada, 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)*,

that they were "not accounted for at all" by not being consulted or "cared about."[110] According to the media, since the beginning of 2023, more than 400 criminal cases nationwide have been dismissed, stayed or withdrawn as a result of *Jordan* challenges, which include all manner of charges from drug offences to fraud, sexual assault, and even murder.[111] Staffing shortages, increasing complexity and the sheer volume of evidence being presented have all been reported as contributing factors.[112]

83. Data from Statistics Canada supports the reporting. From between 2016 and 2023 data shows that, while the total number of criminal cases processed by the courts decreased significantly, the percentage of cases above the *Jordan* thresholds increased significantly, as did the proportion of those cases that terminated in stays or withdrawals.[113] Between the 2016-2017 and 2022-2023 fiscal years, the total number of cases in the system decreased from 355,951 to 215,038. During the same period, the percentage of over-the-threshold cases increased from 5.8%

Ottawa, 2017 at p 69. See also: Kristen Everson, "Long delays and collapsed cases are eroding faith in the justice system, lawyers warn", *CBC News*, (May 31, 2024).

[110] Jason Proctor, "Concerns that B.C. court delays are creating 'injustice system'" *CBC News*, (October 28, 2024).

[111] Darryl Greer, "Time limits for trials were meant to speed up justice. They've also halted hundreds of criminal cases", *CBC News*, (November 10, 2024); Kristen Everson, "Long delays and collapsed cases are eroding faith in the justice system, lawyers warn", *CBC News*, (May 31, 2024).

[112] Kristen Everson, "Long delays and collapsed cases are eroding faith in the justice system, lawyers warn", *CBC News*, (May 31, 2024).

[113] Statistics Canada, *Table 35-10-0173-01 – Key indicator results and absolute change for annual data, adult criminal court and youth court*, October 3, 2024, Data table for total cases & percentage of cases exceeding *Jordan*, 2016-2017 to 2022-2023. The category of stays and withdrawals includes all cases "stayed, withdrawn, dismissed or discharged at preliminary inquiry or referred to alternative or extrajudicial measures and restorative justice programs." (It does not include acquittals after trial.) Hence the trend in these numbers is more significant than the numbers themselves. However, generally speaking, over-the-threshold cases would not include preliminary hearing discharges, or stays and withdrawals entered at early stages in the prosecution as part of case management decisions (including decision-to-prosecute assessments).

to 10.8%, and the percentage of stays and withdrawals in such cases increased significantly from 27.8% to 46.8%.[114]

84. In the specific category of crimes against the person, the decrease in overall cases was less significant, from 86,510 to 71,049. However, the percentage of over-the-threshold cases more than doubled from 6.1% to 13.2%, and the percentage of stays or withdrawals in over-the-threshold cases increased from 29.3% to 49.8%.[115] Importantly, during the same period, Statistics Canada data show a modest overall increase both in the number of actual incidents of crime, and in the crime rate per 100,000 population.[116]

85. The problem with a stay of proceedings is that, whether it is justified or not, it can appear to be a windfall for an accused facing serious charges.[117] While the seriousness of the charges will never automatically render an unreasonable delay reasonable, it is important for public confidence in the administration of justice for these issues to be considered. There must be some discretion for trial judges to consider greater societal interests. This is of particular import where, as here, the case falls very closely and somewhat arbitrarily just over the line.

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[114] Statistics Canada, *Table 35-10-0173-01 – Key indicator results and absolute change for annual data, adult criminal court and youth court*, October 3, 2024, Data table for total cases & percentage of cases exceeding *Jordan*, 2016-2017 to 2022-2023. There is a significant decrease in overall cases, and also a significant increase in over-the-threshold stays and withdrawals, between 2019-2020 and 2020-2021. Hence Covid may be a factor in these statistics. However, the overall number of cases continued to decline in 2021-2022 and 2022-2023, and the percentage of over-the-threshold stays and withdrawals was higher in both years than in 2020-2021. The 2022-2023 fiscal year is the latest year for which complete data is available.

[115] Statistics Canada, *Table 35-10-0173-01 – Key indicator results and absolute change for annual data, adult criminal court and youth court*, October 3, 2024, Data table for percentage of total crimes against the person cases exceeding the *Jordan* limit.

[116] Statistics Canada, *Table 35-10-0177-01 – Incident-based crime statistics, by detailed violations, Canada, provinces, territories, Census Metropolitan Areas and Canadian Forces Military Police*. Between 2016 and 2023, actual incidents rose from 2,161,972 to 2,526,877; and the rate per 100,000 population rose from 5,986.93 to 6,301.79.

[117] Andrew Pilla and Levi Vandersteen, "Re-Charting the Remedial Course for Section 11(b) Violations Post-Jordan" (2019) 56:2 Osgoode Hall LJ 436, at p 445.

ii) Emphasizing fair trial rights

86. A stay of proceedings that is justified does not undermine justice, but rather, enhances it. The greater danger to justice is not the stay, but the risk that a system that privileges time as the primary marker of a case may compromise trial fairness for efficiency. As discussed above, all justice system participants are charged with profound responsibilities that go to the very core of the criminal justice system. They need time to deliberate the decisions that are integral to those responsibilities. In *K.G.K.*, this Court recognized the inherent time required for judges to contemplate the decisions before them. This makes good sense – these are decisions with monumental significance in people's lives. The import of decisions made by the prosecution and defence require similar treatment. Where decisions are made in haste, trial fairness may be compromised.

87. As some commentators have noted, the presumptive ceilings set out in *Jordan* heighten the pressures already faced by police and the Crown and have the potential to contribute to a "rush to judgment" mentality among justice system participants that could compromise trial fairness.[118] The pressure to adhere to a strict timeline could lead to cognitive bias and tunnel vision, which can ultimately result in wrongful convictions.[119] These pressures may arise from victims and their families, the public, colleagues, and supervisors, and can be particularly acute in high-profile cases.[120] These pressures can also include the rush to resolve cases early without the benefit of thorough review, due to the potential risk of exceeding the *Jordan* framework if a case were to

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[118] See Devon Medeiros and Michelle I. Bertrand, "A Rush to Justice: The Institution of Presumptive Ceilings in *R v Jordan* and Their Potential Implications for Wrongful Convictions" (2024), 46 Man LJ 80.

[119] Devon Medeiros and Michelle I. Bertrand, "A Rush to Justice: The Institution of Presumptive Ceilings in *R v Jordan* and Their Potential Implications for Wrongful Convictions" (2024), 46 Man LJ 80 at 28.

[120] Devon Medeiros and Michelle I. Bertrand, "A Rush to Justice: The Institution of Presumptive Ceilings in *R v Jordan* and Their Potential Implications for Wrongful Convictions" (2024), 46 Man LJ 80 at 20, 22. See also Peter Cory, "The Inquiry Regarding Thomas Sophonow" (2001) at 43-44, Winnipeg, Manitoba Justice, 2001 [online: perma.cc/BZF5-9QMY].

proceed to trial.[121] In these circumstances, strict adherence to timelines can dictate "efficiency over thoroughness" and undermine the administration of justice.

88. In a system in which cases are increasingly complex, and the inherent time requirements of those cases are that much more, the pressure on all justice system participants to move matters forward is sometimes irreconcilable with the procedural requirements of the case.

89. By way of example, and as mentioned above, in 2018 Parliament introduced a new regime governing the admissibility of all records that an accused may wish to have admitted in sexual assault proceedings.[122] The regime, which involves two stages and could include an oral hearing at both, is comprehensive and offers important constitutional protection for the privacy rights of complainants. However, it also takes time. In what is "becoming a public concern," trial courts are increasingly staying sexual assault cases for delay.[123] While sexual assaults and other sexual offences make up a relatively small number of cases before the courts (approximately 7,200 cases in 2022-2023), they are disproportionately among the cases that exceed the *Jordan* timelines. Between 2016 and 2023, the percentage of sexual assault cases that exceeded the *Jordan* thresholds increased from 15.1% to 30.4% (i.e., almost a third of sexual assault cases). The percentage of over-the-threshold sexual assault cases that ended by being stayed or withdrawn rose from 29.4% to 47.3%.[124]

90. The impact of the increasing complexity of trials is coming head-to-head with the important *Charter* value of those trials being conducted in a reasonable time. Stays "affect public confidence

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[121] Devon Medeiros and Michelle I. Bertrand, "A Rush to Justice: The Institution of Presumptive Ceilings in *R v Jordan* and Their Potential Implications for Wrongful Convictions" (2024), 46 Man LJ 80 at 1, 20-24.

[122] Bill C-51, *An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act*.

[123] Colton Fehr, "*R v JJ, Trial Delay and the Recent Trend of Staying Sexual Assault Charges*" (2024) 97 CR-ART 96.

[124] The figures are similar for the category of "other sexual offences": 26.3% exceeded the *Jordan* ceiling during the same period and of those 32.4% ended by being stayed or withdrawn. See Statistics Canada, *Table 35-10-0173-01 – Key indicator results and absolute change for annual data, adult criminal court and youth court*, October 3, 2024, Data table for percentage of total crimes against the person cases exceeding the *Jordan* limit.

in the criminal justice system" and can cause "unintended consequences" for public safety.[125] The cascading impact that judicial stays have on other justice system participants also cannot be understated. Victims of sexual assault, for example, feel that the system has "revictimized" them."[126] These trials are often much more complicated than the average trial, which means they can take longer to get through the system and are therefore more at risk of being stayed.[127] Where a complainant has to choose between exercising their statutory right to retain counsel and challenge the admissibility of records pursuant to the regime set out in the *Code* and risk the charges being stayed based on the concomitant delay, or surrendering those privacy rights to ensure the case gets to a verdict, justice is impaired.

91. *Jordan* recognizes that below-the-threshold delay can be unreasonable on a birds-eye-view of the case if it nevertheless took markedly longer than it should have. Where, as here, all parties have done everything within their power to get a case to trial in a reasonable amount of time but the case just misses the mark, justice demands a similar over-the-threshold birds-eye-view assessment.

92. By mirroring the discretion afforded to trial judges below the ceiling, this Court could allow some measure of discretion above the ceiling, to ensure that the outcome of the proceedings is consistent with the interests of justice. As part of this assessment, judges might consider:

1) the extent to which the unjustifiable delay is over the threshold.

   This consideration will no doubt apply on a continuum such that cases that fall over the threshold by one day ought to be easier to justify than those that fall over the threshold by longer. Just as the defence must show that the case has "markedly exceeded the

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[125] Canada, 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, 2017 at p 6; House of Commons, Standing Committee on the Status of Women, Evidence, 44-1, No 134 (November 27, 2024) at 1735 (Benjamin Roebuck, Federal Ombudsperson for Victims of Crime, Office of the Federal Ombudsperson for Victims of Crime).

[126] Canada, 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, 2017 at p 66.

[127] See for example: *R v Flaumenbaum*, 2023 ONCJ 462 at para 46-50, where a *Mills* application was brought mid-trial.

reasonable time requirements of the case" to be successful in its application under the ceiling, so too must the Crown demonstrate that the case has not markedly exceeded the reasonable time requirements of the case when it seeks to justify delay over the ceiling.[128]

2) the extent to which this delay was foreseeable and quantifiable at the time critical decisions about the case were made and how the Crown managed the delay.

   Where the Court looks to defence initiative to determine the reasonableness of the delay under the ceiling, so too should the Court look at Crown initiative in assessing reasonableness over the ceiling. To discharge its onus where delay falls above the ceiling and is not justified by exceptional circumstances, the Crown will have to demonstrate that which the defence must demonstrate below the ceiling, that "it took meaningful, sustained steps to expedite the proceedings."[129]

3) the effect on the administration of justice of a stay, taking into account all the circumstances including the conduct of the parties, the public interest in having serious charges tried on their merits and the impact on any victims.

93. In *Jordan*, this Court said that it expected that stays beneath the ceiling would only be granted in "clear cases." The same ought to be true for stays not imposed in prosecutions that are over the ceiling.

94. As this Court stated in *Jordan*, "substance matters, not form."[130] Substance over form is exactly what is missing from the lower courts' mathematical approach to the ceilings that fails to account for important societal interests. A modest recalibration that leaves the *Jordan* framework intact – providing presumptive ceilings against which delay must be measured but mirroring the discretion currently provided to trial judges in cases below the ceiling for cases above the ceiling – will prioritize a holistic approach to justice and avoid results that bring the administration of justice into disrepute.

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[128] *R v Jordan*, 2016 SCC 27 at para 87.
[129] *R v Jordan*, 2016 SCC 27 at para 84.
[130] *R v Jordan*, 2016 SCC 27 at para 84.

PART IV – COSTS

95. The appellant does not seek costs, and makes no submission in that regard.

PART V – ORDER SOUGHT

96. It is respectfully requested that the appeal be allowed, that the order of a stay be set aside, and that the matter be remitted back for trial.

PART VI – SUBMISSIONS ON CASE SENSITIVITY

97. There is no sealing or confidentiality order, publication ban, classification of information in the file that is confidential under legislation, or restriction on public access to information in this file that could have an impact on the Court's reasons in the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at the City of Ottawa, in the Province of Ontario, this 26th day of May 2025.

FOR

Jennifer Conroy
Counsel for the appellant,
His Majesty the King in Right of Canada

FOR

Ian Bell
Counsel for the appellant,
His Majesty the King in Right of Canada

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