

ROUNDTABLE ON CRIMINAL DELAYS

AT THE INTERSECTION OF CRIMINAL DELAYS AND PROFESSIONAL ETHICS

Report of the Canadian Institute for the Administration of Justice

By Christine Mainville, spring 2018

REPORT



ROUNDTABLE ON CRIMINAL DELAYS

At the Intersection of Criminal Delays and Professional Ethics

December 2, 2017, Vancouver, BC

(1 of 5)

CIAJ

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of Justice

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AGENDA

8:45–9:00 am: Introduction and Welcome Remarks

What Constitutes Professionalism in a Post-Jordan Era

- The Hon. Associate Chief Justice Austin F. Cullen, Supreme Court of British Columbia

9:00–9:45 am: Keynote– *Jordan’s Case; Ethical Issues; Delays in the Criminal System*

- The Hon. Thomas A. Cromwell, Chair, Action Committee on Access to Civil and Family Justice

9:45–10:45 am: *Introduction on Professional Ethics*

- Dean Lorne Sossin, Osgoode Hall Law School, York University

10:45–11:00 am – BREAK –

11:00 am–Noon: *The Fate of the Speedy Trial and Prospects for Systemic Reform*

- Mr. Matthew R. Gourlay, Partner, Henein Hutchison

Noon–12:45 – LUNCH –

12:45–2:00 pm: Panel discussion

Moderator: Prof. Micah B. Rankin, Thompson Rivers University Faculty of Law

Speakers: The Hon. Associate Chief Judge Melissa Gillespie, Provincial Court of British Columbia; Ms. Marilyn Sandford, Ritchie Sandford McGowan-Barristers; Mr. Peter Juk, QC, Assistant Deputy Attorney General, BC Prosecution Service

2:00–3:15 pm: Workshop

3:15–3:30 pm – BREAK –

3:30–4:15 pm: Plenary

Each group will report on their discussion

4:15–4:45 pm: Panel

Moderator: Prof. Micah B. Rankin, Thompson Rivers University Faculty of Law
Members of the panel will make final remarks on participants’ remarks

4:45–5:00 pm: Closing Remarks

- The Hon. Associate Chief Justice Austin F. Cullen, Supreme Court of British Columbia

Official Reporter: Ms. Christine Mainville, Lawyer, Henein Hutchison LLP

PLANNING COMMITTEE

- Mr. Mark Benton
- Mr. Jeff Campbell
- Associate Chief Justice Austin Cullen
- Mr. Todd C. Gerhart
- Associate Chief Judge Melissa Gillespie
- Mr. Peter Juk
- Ms. Marilyn Sandford
- Ms. Christine O’Doherty

BIOGRAPHIES

The Hon. Thomas A. Cromwell currently serves as the chair of the Action Committee on Access to Justice in Civil and Family Matters. He received law degrees from Queen’s and Oxford, practised law in Kingston and Toronto and taught at Dalhousie University. During his time at Dalhousie, he was active as a labour arbitrator and served as Vice-chair of the Nova Scotia Labour Relations Board. He served as Executive Legal Officer to the Chief Justice Canada from 1992–1995 and was appointed to the Nova Scotia Court of Appeal in 1997. He served there until his appointment to the Supreme Court of Canada in 2008 where he remained until his retirement on September 1, 2016. He is a past President and Honorary Director of CIAJ and received CIAJ’s Justice Medal in 2017.

Mr. Matthew R. Gourlay is a partner at Henein Hutchison LLP. He practises criminal and regulatory law, with a focus on appellate litigation and professional discipline. He appears regularly in the Ontario Court of Appeal and serves on the roster of pro bono duty counsel assisting unrepresented appellants in that court. He has argued a number of cases in the Supreme Court of Canada. His appellate work encompasses criminal, regulatory, and civil matters. He prosecutes and defends cases before a variety of professional disciplinary tribunals in Ontario. He is a legal editor of the Canadian Criminal Cases, a regular columnist on criminal justice issues for the Law Times, and a frequent speaker at continuing professional education events.

Ms. Christine Mainville represents Henein Hutchison LLP’s clients in criminal, extradition and regulatory proceedings, in both English and French. She has appeared at all level of courts in both Ontario and Quebec, as well as in the Supreme Court of Canada. She serves as pro bono duty counsel in the Court of Appeal, and has represented the Canadian Civil Liberties Association and the Criminal Lawyers’ Association in interventions before the Court of Appeal and the Supreme Court. She has experience in Customs Act offences; Elections Act offences; Extradition Act proceedings; search warrants and production orders. Ms. Mainville was also co-counsel on the Nova Scotia Parsons Independent Review.

Prof. Micah B. Rankin is one the founding members of Thompson Rivers University Faculty of Law, where he teaches in the areas of constitutional law, evidence and criminal law. He practiced civil litigation for several years at Hunter Litigation Chambers in Vancouver. His past research has focused on judicial independence, access to justice, the law of evidence and empirical trends in criminal sentencing. More recently, he has begun to conduct research in the area of regulatory law, heuristics in judicial decision-making, and legal ethics. He has published peer reviewed articles in numerous journals. In addition to his academic work, he regularly assists as counsel in public interest cases and on criminal appeals.

Dean Lorne Sossin became Dean of Osgoode Hall Law School at York University in 2010. Prior to this appointment, he was a Professor with the Faculty of Law at the University of Toronto. He is a former Associate Dean of the University of Toronto and served as the inaugural Director of the Centre for the Legal Profession. Dean Sossin served as Research Director for the Law Society of Upper Canada’s Task Force on the Independence of the Bar. He also serves on the Boards of the National Judicial Institute, the Law Commission of Ontario and is a Vice Chair of the Ontario Health Professions Appeal and Review Board and Member of the Health Services Appeal and Review Board. Dean Sossin is currently the Open Meeting Investigator for the City of Toronto.

REPORT | CIAJ ROUNDTABLE ON DELAYS IN CRIMINAL TRIALS: Professionalism and a “Culture of Complacency” Vancouver, December 2, 2017

By Christine Mainville
Henein Hutchison LLP

I. The Supreme Court’s call to end complacency in the face of delays: *Jordan/Cody* recap

II. Unconstructive measures and pitfalls to avoid

- A. Scrutinizing defence conduct for “illegitimacy”
 - i. Raising the specter of professional misconduct
Tensions between duty to client and duty to administration of justice
 - ii. Hindering a collaborative process and advancements in the law
- B. The hazards of overbroad trial and case management powers

III. Devising a productive approach: Positive actions to bring about change

- A. Enhanced mentoring and training
- B. Attenuating the informational asymmetry and enabling front-end work
- C. Avoiding trial continuations: Time estimates and time limits
- D. Capitalizing on the role of Crown counsel
- E. Engaging in evidence-based justice reform

IV. Conclusion

The Canadian Institute for the Administration of Justice (CIAJ) convened lawyers, judges, legal academics and key organization representatives to tackle the issue of delays in criminal proceedings in the aftermath of the Supreme Court of Canada’s ground-breaking decisions in *Jordan*¹ and *Cody*². The CIAJ’s purpose was for the legal community – including court administration and the judiciary – to take action in the face of the Court’s call for an end to the “culture of complacency” that it said characterized the criminal justice system and its participants’ approaches or attitudes towards delay.³ Using a similar roundtable format, CIAJ had previously considered how to better manage complex criminal trials.⁴ This time, therefore, the discussions held in Vancouver in December 2017 focused primarily on the role of ethics and professionalism to tackle delay issues in our system.

¹ *R. v. Jordan*, 2016 SCC 27

² *R. v. Cody*, 2017 SCC 31

³ See, for instance, *Jordan, supra*, at paras. 4-5, 29, 40-41, 112-14, 116, 137

⁴ The roundtable discussions on managing complex criminal trials were previously reported on at Mainville, C. *Report on the CIAJ’s Complex Criminal Trials Roundtable* (2015) 62 C.L.Q. 302

CIAJ sought concrete proposals for change based on best practices and professionalism. The exchange largely turned on how all actors in the criminal justice system can work more collaboratively to curb delays. To that end, both obstacles (some arguably emanating from the *Jordan/Cody* framework itself) and tentative solutions were considered by the attendees. The avenues for improvement targeted virtually every participant in the system, in particular defence counsel, Crown counsel, the judiciary, legal aid, and law societies across the country.

I. The Supreme Court's call to end complacency in the face of delays: *Jordan/Cody* recap

Called upon to revisit the question of delays in criminal trials and the right to a trial within a reasonable time, a majority of the Supreme Court led by Justice Moldaver clearly felt a need to give the system a bit of a jolt, lest delays continue to grow and plague the system. Discarding the previously established *Morin*⁵ framework, the *Jordan* majority created "presumptive ceilings" for the length of time a criminal matter should take from charge to resolution, and beyond which delay is presumptively unreasonable. Past an 18-month presumptive threshold in provincial courts, and a 30-month threshold in the superior courts, a rebuttable presumption of unreasonable delay for section 11(b) *Charter* purposes will apply. The burden will then shift to the Crown to establish exceptional circumstances that justify any delay in excess of the outer limit.⁶

Most significantly, in an apparent attempt to curb the practice of apportioning each step in the process as either "inherent", "institutional", "defence" or "Crown" delay, the Court stated that only delay waived by the defence – whether implicitly or explicitly – and delay "caused solely by the conduct of the defence", ought to be deducted from the overall time that has lapsed since the laying of charges.⁷ Defence-caused delay is said to comprise both "[d]eliberate and calculated defence tactics aimed at causing delay" – including "frivolous applications and requests", and "those situations where the accused's acts ... directly caused the delay", including where "the court and the Crown are ready to proceed, but the defence is not".⁸ Ordinary litigation time including for defence applications will otherwise form part of the delay period to be mapped on to the *Jordan* ceilings.

Specifically, in devising its new framework, the Court commented that "defence actions legitimately taken to respond to the charges fall outside the ambit of defence delay. ... [D]efence applications and requests that are not frivolous will also generally not count against the defence. ... While this is by no means an exact science, first instance judges are uniquely positioned to gauge the legitimacy of defence actions."⁹

⁵ *R. v. Morin*, [1992] 1 S.C.R. 771

⁶ *Jordan, supra*, at paras. 46-49

⁷ *Jordan, supra*, at paras. 30, 36-38, 49, 60-63

⁸ *Jordan, supra*, at paras. 63-64

⁹ *Jordan, supra*, at para. 65 (Emphasis added.)

Less than a year later, in *Cody*, the Court provided additional insight into what qualified as “legitimate” or “illegitimate” defence conduct. There, it explained that “[t]he only deductible defence delay [aside from defence waiver] is ... that which: (1) is solely or directly caused by the accused person; and (2) flows from defence action that is illegitimate inasmuch as it is not taken to respond to the charges.”¹⁰ It added:

Defence conduct encompasses both substance and procedure – the decision to take a step, *as well as the manner in which it is conducted*, may attract scrutiny. To determine whether defence action is legitimately taken to respond to the charges, the circumstances surrounding the action or conduct may therefore be considered. The overall number, strength, importance, proximity to the *Jordan* ceilings, compliance with any notice or filing requirements and timeliness of defence applications may be relevant considerations. Irrespective of its merit, a defence action may be deemed not legitimate in the context of a s. 11(b) application if it is designed to delay or if it exhibits marked inefficiency or marked indifference toward delay.¹¹

As in *Jordan*, the Court explicitly called on every actor in the justice system to proactively work toward curbing delays.¹² It also placed an onus on judges to find “ways to improve efficiency in the conduct of legitimate applications and motions, such as proceeding on a documentary record alone,” and to resort to their case management powers to summarily dismiss applications or requests in the absence of a reasonable prospect of success or “the moment it becomes apparent they are frivolous”.¹³ That discretionary screening function was originally framed by the Ontario Court of Appeal in *Kutynec*¹⁴ and subsequently by the British Columbia Court of Appeal in *Vukelich*¹⁵, and is thus not novel. However, the Supreme Court in *Cody* goes a step further to encourage both Crown and defence counsel, “as a best practice”, to “take appropriate opportunities to ask trial judges to exercise such discretion”.¹⁶

This is only one of the ways in which the Supreme Court now expects – indeed demands – a “change in courtroom culture.”¹⁷ New practice directions and rules of practice imposing deadlines and enhancing case management may support cultural change and help induce it, but it will not be sufficient to bring it about. CIAJ set out to consider what could.

As was perceptively said by the roundtable’s Chair, BC Supreme Court Associate Chief Justice Austin Cullen, if we lawyers and judges don’t accept that we have a larger responsibility to address this issue, it will fall on others to so. And what others might conceive of as well-founded solutions may well prove to be unwelcome by the legal community. In an attempt, therefore, to discharge

¹⁰ *Cody, supra*, at para. 30

¹¹ *Cody, supra*, at para. 32 (Emphasis added.)

¹² *Cody, supra*, at paras. 1, 36; *Jordan, supra*, at paras. 137-39

¹³ *Cody, supra*, at paras. 37-39. See also: *Jordan, supra*, at paras. 114 and 139

¹⁴ *R. v. Kutynec* (1992), 7 O.R. (3d) 277 (C.A.)

¹⁵ *R. v. Vukelich* (1996), 108 C.C.C. (3d) 193 (B.C.C.A.)

¹⁶ *Cody, supra*, at paras. 38

¹⁷ *Jordan, supra*, at para. 114

this responsibility, the roundtable participants devised recommendations not only in respect of potential solutions, but also in respect of what may be counter-productive or reveal certain pitfalls.

II. Unconstructive measures and pitfalls to avoid

With the potential exception of properly resourcing the criminal justice system, representatives of the legal community in attendance recognized that a professional and collaborative working relationship between Crown and defence counsel is likely the single most important factor in containing cases. Indeed, what is essential to counter delays and prevent cases from spiraling out of control is cooperation with a view to streamlining certain processes – albeit without sacrificing a full and firm defence of the client. Yet certain aspects of the *Jordan/Cody* framework seem to run counter to achieving the change in culture that the Court so desires. Despite proclaiming to want to incentivize collaboration, it may tend to hinder it by pitting the parties against each other.

A. Scrutinizing defence conduct for “illegitimacy”

There was at least one nearly unanimous view expressed at the roundtable: that the highly charged language used by the Supreme Court in *Jordan* and especially *Cody* was unfortunate. While some were of the view that the word may not have been used in its usual sense, invitees questioned the need to label the conduct of the defence as “illegitimate” in order to achieve a proper apportionment of delay. The exercise appears both unnecessary and counter-productive.

Under the *Morin* framework, attribution of delay to the Crown or defence was conducted in a non-judgmental way, akin to a causation analysis. It did involve apportioning each and every segment of time based on who prompted the delay, which was in turn based largely on what the court record revealed. This led to a tit-for-tat “blame game,” involving counsel comparing their schedules and taking up court time by placing boilerplate comments on the record. The Court has rightly made efforts to move away from this exercise by limiting the finger pointing to a much narrower set of circumstances. How the Court went about defining that narrow set of circumstances, however, has led to some controversy amongst the bar. The concern, in part, is that casting conduct as illegitimate may have brought back the “blame game” with a vengeance.

By introducing the notion of “illegitimate defence conduct”, both the *content* of a defence position and the *manner* in which defence counsel chooses to present it may be scrutinized as a routine part of the s. 11(b) analysis. While the Court in *Cody* stresses that illegitimacy does “not necessarily” amount to professional or ethical misconduct, it clearly does not rule it out.¹⁸ This might tend to suggest a misnomer: that a lawyer’s conduct could be characterized as illegitimate yet ethical seems difficult to reconcile.

At worst, *Jordan* and *Cody* hint at the creation of a new landscape of professional imperatives¹⁹ that is in tension with a lawyer’s other professional duties. At best, even if that is avoided, the

¹⁸ *Cody, supra*, at para. 35

¹⁹ See, for instance, *Jordan, supra*, at paras. 1, 5, 85, 112-13, 116 and 138; *Ibid*.

notion of illegitimacy may be problematic and have unintended consequences for collegiality and efficiency, which could have been entirely avoided.

i. Raising the specter of professional misconduct

Clearly, *Jordan* and *Cody* impose new expectations on criminal justice lawyers across the country. These expectations might go so far as suggesting a change to lawyers' professional obligations or to how they ought to be interpreted.

In its final report on court delays released after *Jordan* but initiated much before it, the Senate's Standing Committee on Legal and Constitutional Affairs ("the Senate Committee"), in pointing to the conduct of criminal justice participants and culture as being responsible for delay, directly referenced the possibility of resorting to lawyers' professional codes of conduct to sanction unethical conduct related to the creation of delay.²⁰ While the Committee came short of making it one of its recommendations, it stated:

There is no simple solution for changing the culture, though if all justice system participants work together and do what they can, reform is possible. The hard ceilings in the *Jordan* decision are clearly meant to force change. Other bodies are hoping that lawyers can be pushed towards change as well. For instance, Claudia Prémont mentioned that the Barreau du Québec is working to change the legal culture and she noted that **its professional code of conduct can be used to discipline lawyers for any abuse of process or any procedure improperly undertaken as these would constitute a breach of ethics.**²¹

Jordan and *Cody* did not go so far. As seen above, *Cody* was careful to distinguish "illegitimate" conduct from professional misconduct. Still, roundtable participants saw a need to caution against any rush to resort to or amend lawyers' ethical rules and professional obligations. First amongst the concerns raised was the tension between any ethical or professional obligation of counsel to ensure that cases proceed effectively, and defence counsel's duty to their client.

Tensions between duty to client and duty to administration of justice

Some participants raised concern that our current understanding of the role of defence counsel appears inconsistent with the role now envisioned by the Supreme Court. As the Law Society of Ontario's commentary to Rule 5.1-1 on "the lawyer as advocate" states:

In adversarial proceedings, the lawyer has a duty to the client to raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law. ... The lawyer's function as advocate is openly and necessarily partisan.

²⁰ Senate of Canada, *Delaying Justice is Denying Justice, An Urgent Need to Address Lengthy Court Delays in Canada: Final Report of the Standing Senate Committee on Legal and Constitutional Affairs*, June 2017, www.senate-senat.ca/lcjc.asp, at pp. 31-35 [Senate Report]

²¹ Senate Report, *supra*, at p. 35

Accordingly, the lawyer is not obliged (except as required by law or under these rules and subject to the duties of a prosecutor set out below) to assist an adversary or advance matters harmful to the client's case.²²

The Commentary is even clearer when specifically addressing defence counsel's role in a criminal proceeding:

When defending an accused person, a lawyer's duty is to protect the client as far as possible from being convicted, except by a tribunal of competent jurisdiction and upon legal evidence sufficient to support a conviction for the offence with which the client is charged. Accordingly, and notwithstanding the lawyer's private opinion on credibility or the merits, a lawyer may properly rely on any evidence or defences, including so-called technicalities, not known to be false or fraudulent.²³

Interestingly, the Commentary refers to defence counsel's conduct in relying on any argument "not known to be false or fraudulent" as being "proper". It is unclear whether the terminology relied on by the Supreme Court was intended to reflect a similar meaning.

In *Jordan* and *Cody*, the Court proposed a culture shift to a system where each participant has an equal responsibility to ensure that trials proceed effectively. The possibility that acting contrary to this duty could amount to professional misconduct is clearly in real tension with the above principles. The difficult position that defence counsel is placed in when juxtaposing its duty to the client with the proposed duty to facilitate the efficient administration of justice was an inevitable topic of discussion amongst attendees. The Court itself in *Cody* could not avoid recognizing this "potential tension between the right to make full answer and defence and the right to be tried within a reasonable time". It opined that there was a need to balance both, and that in their view "neither right is diminished by the deduction of delay caused by illegitimate defence conduct."²⁴

But the right to trial within a reasonable time is a constitutionally-protected right *of the accused*. As one of the guest speakers Matthew Gourlay pointed out, there is a dissonance in telling an accused that he cannot do something because it is inconsistent with a right he holds. Although section 11(b) is an individual right, *Jordan* and *Cody* are systemic rather than individual in their focus: the Court discusses the societal dimension of the right and makes a case for the *public's* right to a trial within reasonable time – something everyone is entitled to. But given its

²² Based on the House of Lords' decision in *Rondel v. Worsley*, [1969] 1 A.C. 191, [1967] 3 All E.R. 993.

²³ Emphasis added. In British Columbia, the lawyers' *Code of Professional Conduct* similarly states, at Rule 2.1-3 (e), that "A lawyer should endeavour by all fair and honourable means to obtain for a client the benefit of any and every remedy and defence that is authorized by law." At paragraph (f), it adds: "It is a lawyer's right to undertake the defence of a person accused of crime, regardless of the lawyer's own personal opinion as to the guilt of the accused. Having undertaken such defence, the lawyer is bound to present, by all fair and honourable means and in a manner consistent with the client's instructions, every defence that the law of the land permits, to the end that no person will be convicted except by due process of law." (Emphasis added.)

²⁴ *Cody*, *supra*, at para. 34

enshrinement in section 11(b) of the *Charter*, the focal point of the analysis must necessarily be the individual's right.²⁵

Our conception of criminal justice is process heavy: practicality and efficiency of outcome are often seen as being in tension with fairness and justice. The nature of defence counsel's enterprise is to challenge, and an accused is entitled to pursue a low-probability strategy. In light of a lawyer's duty to his or her client, a lawyer would no doubt find it preferable to run something in the face of a 10% chance of success, if the client wishes to at least give it a try.

Perhaps more to the point, consider the case of a client who instructs his counsel that what is most important to him is to put the matter off as long as possible. All sorts of interests are better served and more effectively tried with a delayed outcome, many of which can be most legitimate. Indeed having a speedy trial is only *one* of the client's interests at stake. Very often, it is not the most important one. One might be reminded of Justice Lamer's (as he then was) caution in *Mills*, that "care must be taken to ensure that justice is not sacrificed to speed, for the latter is not an end itself but simply one element of the former. Assembly-line justice is neither desirable nor required by s. 11(b); in fact it will often result in a breach of the accused's right to a fair trial guaranteed under ss. 7 and 11(d)."²⁶ Dean of Osgoode Hall Law School Lorne Sossin asked the roundtable attendees a fair question: we can get the trains to run on time, but what are we jettisoning in the process?

Participants did recognize that the discussion is not about efficiency as the enemy of justice. The Court in *Cody* specifically took care of stating that "[t]his understanding of illegitimate defence conduct should not be taken as diminishing an accused person's right to make full answer and defence. Defence counsel may still pursue all available substantive and procedural means to defend their clients."²⁷ The goal is to think about how they can work together in everyone's interest. While there may therefore be no need for panic, the prospect of defence counsel's conduct being characterized as illegitimate presents additional disadvantages which were addressed at the roundtable.

ii. **Hindering a collaborative process and advancements in the law**

First, even if a finding of illegitimacy for *Jordan* purposes does not entail a potential finding of professional misconduct, the new framework is detrimental to defence counsel's professional relationship with their Crown colleagues. Under this framework, only defence counsel needs to conduct themselves with this specter of illegitimacy over their heads. The accusatory tone that

²⁵ In fact in *Mills v. The Queen*, [1986] 1 S.C.R. 863, at para. 139, Lamer J. in dissent emphasized that the right is an individual one and has no collective rights dimension: "While society may well have an interest in the prompt and effective prosecution of criminal cases, that interest finds no expression in s. 11(b), though evidently, incidental satisfaction. The section is primarily concerned with ensuring respect for the interests of the individual."

²⁶ *Mills, supra*, at para. 215

²⁷ *Cody, supra*, at para. 34

submissions would, it seems, inevitably take, undermines the collegiality necessary to a more efficient process.

The risk is not hypothetical: participants spoke of at least one known instance where the Crown's allegations of illegitimate defence conduct led defence counsel to question whether her professionalism had been impugned. The occurrence did nothing to improve on relationships between Crown and defence. A senior BC Crown candidly acknowledged that Crowns are told to make clear that the defence is responsible for the delay, given the reality that Crowns are ultimately the ones who will feel the immense strain when serious charges are stayed. He also observed that while Crowns do want to spend more time working out admissions and focusing issues, that is difficult to do when all the while the clock is ticking against you.

Moreover, panelists and roundtable participants alike expressed concern that reference to whether a defence application or request is legitimate or not risks creating a chilling effect on novel or creative arguments, by inevitably bringing close scrutiny to whether the position is well-founded. Defence counsel will no doubt wish to avoid having their conduct labeled as illegitimate. That concern may inform their actions taken on behalf of a client.

There are obvious situations that do not cause concern: if counsel brings an application or raises an argument that is utterly unresponsive to the charge and is intended to delay, they can fairly be called out on it. But what of the application brought late simply because counsel initially failed to identify the issue? Will counsel think twice about bringing the application to steer clear of having their conduct impugned? It is difficult to judge in retrospect whether conduct exhibits "marked inefficiency or marked indifference toward delay" such that it should attract the illegitimacy label. Counsel should be free to conduct their case with reference to the well-established rules surrounding the powers of the court to manage the proceedings, without a new concept of "legitimacy" factoring in to their decisions.

Furthermore, should courts be in the business of policing "legitimacy" as opposed to managing the process and ruling on the merits? A not unimportant concern is with the process for determining illegitimacy. A judge making that assessment has the benefit of hindsight. She will know both how the evidence went in, and how the matter turned out for the defence. Illegitimate in hindsight may not mean illegitimate at the time. What, then, should inform defence counsel's conduct?

The legitimacy analysis is further rendered perilous by reason of the informational asymmetry between counsel and the judge, further discussed below. Participants queried whether defence counsel will now need to provide evidence on a *Jordan* application – to explain their motivations and reasoning process, and make clear why they conducted the case a certain way and not another way. This raises the prospect of counsel needing counsel – an eventuality that also entails additional costs (including legal aid costs) and delay. There is also a certain unseemliness to defence counsel having to defend themselves in the context of their own client's trial. At least one participant pointed out that unlike Crown counsel who can easily have someone come in and

speak in their defence, that is not the case for many defence counsel, in particular those who work on their own in smaller jurisdictions.

In truth, *Cody* did not intend to change the law of relevance or of *Charter* remedies. The Court took care to underscore that counsel should continue defending their clients to the fullest, and that all they are *not* permitted to do "is to engage in illegitimate conduct and then have it count towards the *Jordan* ceiling"²⁸. Most participants agreed that that is certainly the extent of what *Cody* should be interpreted to mean: that an accused cannot put forward an aggressive and unfocused challenge and then have it count toward s. 11(b) delay. But if that was the Court's only real intent, why was it necessary to connote counsel's conduct with impropriety? No doubt, the choice of language is poor. If the point of illegitimacy is simply to retrospectively say what periods of time the defence is prevented from complaining about because it brought it about itself and it wasn't a necessary part of the inherent time requirements of the case (which includes litigation time), why not call it "inefficient defence conduct"?

Perhaps the Court simply wanted to send a strong signal by raising the threshold for defence-caused delay to be relied on as a means of bringing the delay below the ceilings. Indeed the "illegitimate" criterion appears to be a consequence of the rigid ceiling and the inclusion of litigation time within it. In line with what may have been anticipated, the courts to date seem to have taken a somewhat reserved approach to attributing blame in the form of labeling defence conduct as illegitimate. Deference has been afforded to defence counsel's explanations. When conduct has been found to be illegitimate, such as in *St-Amand*,²⁹ there was a finding made that the application was frivolous and thus intended to delay.

It is also true that attribution will often be a non-issue. And counsel have become acquainted with Crown and defence attribution under *Morin*, such that a sudden chilling effect on defence counsel may be unlikely.

Still, given the drawbacks, it is hoped that in the future the Court will revise its terminology or clarify its intention and qualify the meaning of "illegitimate". It may acknowledge that it was intended as a term of art. If it does get adopted as such, the courts should give it a new gloss that differs from its usual meaning. This is important so that we don't replace a culture of complacency with a culture of recrimination and finger-pointing.

Associate Chief Justice Cullen reminded everyone that the implications of *Jordan*, *Cody* and the Senate Report have the potential to compound the problem if we don't approach the problem of delay sensibly and in good faith. In the interim, criminal justice participants would therefore be wise to resist the temptation to point fingers and rise above the terminology to find ways to work cooperatively.

²⁸ *Cody*, *supra*, at para. 34

²⁹ *R. v. St. Amand*, 2017 ONCA 913, at para. 71

B. The hazards of overbroad trial and case management powers

Arguably one way to lessen the need for any “illegitimate conduct” analysis is the exercise of trial and case management powers by the judiciary, to *prevent* illegitimate conduct (and resulting delay) before it happens. The Supreme Court in *Cody* encouraged both judges to *use* their trial management powers to reduce delay, and the parties to *request* that judges exercise these powers. In particular, it promoted judicial assessments of the reasonable prospect of success of applications before allowing them to proceed, as part of an overall cultural shift.

However these powers also have their limits, and their pitfalls. The fact that judges have these management powers is uncontroversial, having been established in cases such as *R. v. Felderhof*³⁰. These include the power to place reasonable limits on oral submissions, to direct that submissions be made in writing, to require an offer of proof before embarking on a lengthy *voir dire*, to defer rulings, and to direct the manner in which a *voir dire* is conducted and the order in which evidence is called.³¹ If *Cody* simply intends to remind us that these powers exist, it will not be contentious. But participants queried whether judges were expected to intervene even in the absence of any objection or motion from the opposing party. They observed that the Court did appear to be describing a judicial duty that would exist irrespective of the parties’ positions. Did *Cody* mean to change the law that precludes judges from descending into the arena?³² The constitutional requirements specific to our adversarial system would seem at odds with the notion of a judicial arbiter getting into the fray.

Some expressed concern about a potential clash between these case management powers and the accused’s right to full answer and defence. Certainly, judges should be wary of extending these powers to core areas of the defence, such as curtailing cross-examination of a Crown witness. There is a distinction to be made between laudable *Cody* trial management and improper interference with cross-examination. An enhanced vetting role for judges also raises the specter of incursions into the role of counsel. Given the informational asymmetry between the judge and counsel, counsel are best placed to say how a case should be litigated, and at what pace. While the participants were therefore comfortable with some level of weighing in and more robust case managing powers, they also cautioned against venturing too far in this direction and both usurping the role of counsel and compromising the judge’s independence.

In particular, a significant amount of concern was expressed about the ability to prevent an application from proceeding. Most opined that that should be a last resort. Where the application goes to guilt or innocence – such as a third-party suspect application, courts should be doubly concerned about not imposing restraints. Appropriate allowances also need to be made in respect of applications that are simply novel. Changes to the law happen incrementally. Often a novel

³⁰ *R. v. Felderhof*, [2003] O.J. No. 4819 (C.A.). See also certain rules of court, such as Rule 34.02 of the *Criminal Proceedings Rules for the Superior Court of Justice (Ontario)* (SI/2012-7) regarding the summary dismissal of applications with no reasonable prospect of success.

³¹ *Felderhof*, *supra*, at para. 57

³² For instance, pursuant to *R. v. Valley*, 1986 CanLII 110 (Ont. C.A.)

argument needs to be raised a number of times and be dismissed before it is eventually adopted. One can point to many past examples of such occurrences. This reality was in fact specifically recognized by the Supreme Court itself in *Bedford*³³. There, the Court took a relaxed approach to precedent in recognition of the fact that the law has to evolve with the times. It recognized that even a Supreme Court precedent can be revisited. The fact that a defence application runs counter to higher authority should therefore not be determinative. Nor should the fact of attempting to set a precedent that differs from one set in another province or jurisdiction. This is how the law develops and the new *Jordan* framework ought not undermine that.

Some suggested that judges should also be slow to disallow an application where a remedy under section 24 of the *Charter* appears unlikely. Should the result even matter? There is great benefit to allowing counsel to attempt to establish a new point of law, even where it will not lead to any obvious remedy. It would be an unfortunate reading of *Cody* to suggest that doing so is not an appropriate litigation objective. Some valid arguments that matter may otherwise never come to be adjudicated. And the law has occasionally evolved to find an appropriate remedy³⁴. In some situations, it may be that a sentence reduction at the end of the case will result. It is thus important to calibrate not only our idea of “reasonable prospect of success,” but also of what success represents, to not unduly stifle the development of the law.

A better way to conceive of trial management is to view it as engaging counsel into a more fulsome examination of the issues at the front end, without being autocratic. It can mean, simply, to assist the parties by probing, by getting a sense of what is being contemplated to make the parties articulate and turn their minds to the issues in an organized fashion, and to bring out what, from the perspective of the parties, lies at the heart of the matter. In other words, being a facilitator for cooperative action. This appeared to all to be the better approach, rather than an approach that sees judges making summary determinations about what can or cannot proceed.

Because of the more robust trial management that the Court expects judges to take at the front end, participants made two further recommendations: increased case management training for judges, and better recognition of judicial specializations. A judge needs to have a strong understanding of the criminal law and of criminal issues to be an efficient case management judge. Having experienced and specialized judges on the bench is critical to the success of an enhanced trial management approach. Judges also require education about their case management powers to ensure they are exercised more effectively, but also responsibly.

One final note of caution: case management in all cases that are proceeding to trial is not seen as an effective solution. In small non-complex cases, expending judicial resources on case management appears counter-productive. The level of management and oversight from the bench should be proportional to the complexity of a case or perhaps to the jeopardy of the accused. As in all instances, a proper allocation of resources is important.

³³ *Canada (A.G.) v. Bedford*, 2013 SCC 72

³⁴ See, for instance, *R. v. Pino*, 2016 ONCA 389, at paras. 48-78 in respect of the exclusion of evidence remedy pursuant to section 24(2) of the *Charter*

III. Devising a productive approach: Positive actions to bring about change

A. Enhanced mentoring and training

Several roundtable participants observed that one of the key contributors of delay is the increasing lack of mentoring in place for new lawyers. In other words, the problem is not illegitimacy, but judgment – something that takes experience and mentorship to learn. This is a particularly acute problem for defence counsel.

Defence counsel often work on their own and not in an office or chambers. They may be younger, and more poorly paid than before. Policy changes such as legal aid funding becoming unavailable for senior counsel to bring junior counsel along on cases has contributed to the problem. Over time, there has been a loss of camaraderie and mentorship in the profession. All in all, there are fewer opportunities for mentorship than there once were.

Not knowing any better, junior counsel who are over their heads in complex criminal matters may have the mindset of fighting every battle. As one participant emphasized, it takes courage to not bring an application. The decision to forego making an argument or application is a daunting one, and one that is not learned in law school. It is by going to court for years with more experienced counsel, working in an office surrounded by other counsel, exchanging with others in a coffee room or overhearing discussions that a lawyer learns what and when to fight, and how to convey to the client that being an aggressive advocate for the sake of being aggressive is often not effective and not a recipe for success.

Many believed that the concern may be less about a bad application being made, than about an application being made badly. It is often the manner in which the applications are framed that are problematic, not what underlies them. That skill set and the judgment that goes along with it can only be acquired by having the opportunity to work with other, more experienced, counsel.

Another aspect of the problem is how increasingly busy defence counsel are. They are often taking on more cases than they ought to in order to pay the overhead or law school loans, because legal aid tariffs are so low. In this context, legislators, courts and law societies can put in place all the rules they want, they are not of much use without mentorship and if counsel have no time to read them. Similarly, while junior members of the bar might benefit from increased training, they will legitimately be more preoccupied with paying their rent than with taking on additional continuing legal education programs.

With *Jordan* and *Cody* potentially forcing lawyers back into a positional battle, it is even more imperative that actors in the system fully comprehend the nature of their role, responsibilities and duties. They must also be given an opportunity to acquire the necessary skills to balance these roles with what *Jordan* and *Cody* now expect of them. This includes Crown counsel. It is not uncommon for inexperienced Crowns to be risk-averse and thus hesitant about making certain calls, or to resolve cases by looking at the broader picture and exercising judgment that takes time and experience to acquire. Every player in the system has newfound ethical responsibilities

to be more efficient, without compromising their role. That can only happen with mentoring, training, and education.

Thought should be given to funding this training where appropriate. To use a current example, while there has been much discussion about judges and certain Crowns receiving sexual assault training, defence counsel have been left out of the discussion despite a recognized need for all criminal justice system participants to better understand the phenomenon. Our system is an extraordinarily inter-dependent one. That should be kept in mind when devising training programs.

The Senate Committee also highlighted the need for an educational approach, recommending that the Minister of Justice develop a national education and awareness strategy for the judiciary, the legal profession and other key stakeholders concerning ways to address delays and other inefficiencies in the justice system.³⁵ This could provide an opportunity to address the issues referenced above.

For its part, at the conclusion of the roundtable, CIAJ indicated its intention to pursue opportunities to put on a recurring symposium for junior counsel, which would include a component regarding how to make judgment calls.

B. Attenuating the informational asymmetry and enabling front-end work

Participants observed that one of the causes of delay is the informational asymmetry between defence counsel on the one hand and the judge and Crown on the other. As previously alluded to, without a fair understanding of what a given application is about, judges cannot properly fulfill their case management powers, and Crowns are unable to raise an application's prospect of success, or prepare in a timely way. The dangers of summarily dismissing applications were canvassed above. But no doubt filling the knowledge deficit would go some way toward creating a more efficient process and reducing delays.

One proposed solution is to at least temper the informational asymmetry between the judge and counsel. Given the Supreme Court's call for increased case management by trial judges, defence counsel will no doubt increasingly be expected to lay out the foundation and structure of their argument and provide more factual context upfront. This can be done by filing a more detailed notice of application. Counsel may be expected to make an offer of proof, or provide an outline of evidence or a cogent explanation of what it hopes to establish, to demonstrate that their motion is well conceived. All parties would thereby be better prepared to respond in an efficient and timely manner. Judges would also be better positioned to guide the parties, encourage consensus, and in certain cases, make a preliminary assessment as to whether the motion or application should proceed at all. Counsel should assist judges by putting their best

³⁵ Senate Report, *supra*, at p. 35

foot forward. Motions are too frequently brought where it is difficult to discern what they are about at the outset.

A benefit for defence counsel who engages in this process is to protect the record against a later finding of illegitimacy, even if the motion turns out not to be well founded. If the application is permitted to proceed on the basis of a complete and detailed notice, one would be reluctant to hold any resulting delay against the defence.

There are, of course, practical obstacles to filling that informational asymmetry. As discussed above, counsel are hard-pressed to find the time to prepare detailed application notices. In many instances, additional legal aid funding at the outset of a case could go a long way not only in allowing counsel to devote time to that task, but also generally to do more front-end work which can lead to earlier resolutions, a narrowing of issues, or early identification of problems or obstacles.

Indeed, measures that enable front-end work generally would prove to be a most efficient solution to the delay problem. In fact, what is likely at the heart of the culture change desired by the Court in respect of all criminal justice participants is to stop waiting for things to happen before taking action. There ought to be a shift in the practice to invest more time and resources early on. In order to achieve this, the system must incentivize bringing an early focus to the central issues in a case and early planning of how trials will unfold.

Legal aid tariffs should therefore promote that ability by affording increased hours to review and prepare a case at the front end, in particular in more complex cases, rather than create a disincentive for counsel to engage in such work. It would also assist to have funding to engage junior counsel to assist with these tasks, which would simultaneously have the benefit of providing more mentorship opportunities to young counsel. In order to deal with the phenomenon of very busy senior counsel being unable to devote early attention to a case due to a heavy trial schedule, some spoke of the benefit of "bridge counsel": counsel who would get the file in order – including potentially putting together a trial plan for trial counsel, and handle a number of early applications. A change of culture will not occur unless counsel are able to accommodate that change and a framework is in place to incite it.

C. Avoiding trial continuations: Time estimates and time limits

Proper time estimates have long been a challenge. Inaccurate estimations of the length of a trial are a key contributor to delays. In the provincial courts, scheduling trial continuations at a later date are particularly problematic from a delay perspective, given that the anticipated end of the trial is what counts in the 11(b) calculus. Additionally, they are most inefficient for judge and counsel alike, as all need to re-familiarize themselves with the matter after having put it out of their heads.

It is therefore critical that everyone make efforts to be more realistic about the time that will be required. In order to do so, the parties need to understand what the case is about and what it looks like prior to dates being set. In the past, there has occasionally been pressure from judges to underestimate the time required (no doubt in part seen as justified given the number of matters that resolve or collapse on the eve of trial or mid-trial). It appears that the more favourable course may be to err on the side of more generous estimates, to avoid the scourge of continuations. Seeking out the assistance of senior counsel to determine estimates should be encouraged. Despite its disadvantages, there is seemingly a high degree of complacency regarding continuations. Changing that is part of the culture shift that is required.

In the event of poor trial estimates, trial management practices such as imposing time limits on arguments can have a positive impact. This is a no-cost measure that is by no means earth-shattering. In particular in cases where there are clear precedents, vigorous guidelines can be set and written arguments can be encouraged.

D. Capitalizing on the role of Crown counsel

What of the Crown's particular role? One participant opined that defence counsel are in fact a very small piece of the delay puzzle. Crown counsel certainly have a significant role to play in reining in delays, in particular given the role afforded to prosecutorial discretion in our system.

This can begin with the way the Crown structures charges and how they approach or structure a case. Too often, cases are fashioned in a way that is more complex than they need to be, or with little foresight of how they might be tried. Trimming down indictments and cases (such as the number of witnesses to be called) should form part the Crown's internal case management system. Like defence counsel, Crown counsel ought to be incentivized to address and foresee issues with a case at the front end – instead of waiting for issues to arise. As recognized by the Supreme Court, the prosecution must have a realistic plan for taking charges to trial, and conducting the trial within a reasonable time.³⁶ That is particularly so given that the defence is generally held captive to the prosecution's choices.

Charging too early, before a case is organized and ready to proceed, is also an issue that Crowns (and police) will now want to avoid to the extent possible. An onus to improve the state of preparedness before a charge is laid and to maintain a state of preparedness will rest on the Crown. Ideally, Crown synopses should also set out what witnesses are meant to address what issue.

In the course of a trial, Crowns should avoid the tendency to over-prove a point, or to call evidence in the face of an admission. Overall, Crowns should be expected to curb disorganization, diffuseness, and the fear of taking a position. They should exercise judgment in the face of defence requests, such as assessing whether it will take more time to argue or fight a request than to

³⁶ See *R. v. Auclair*, 2014 SCC 6, at paras. 2-3

acquiesce to it. For instance, Crowns must not fail to appreciate that tools such as *Vukelich/Kutyneć* and *Garofoli* are to be used with care, and that they have a responsibility to consider the appropriateness of any such application on a case-by-case basis.

The choices made by the Crown in respect of how to run the case ought to be considered on a *Jordan* application, in particular if the Crown relies on the exceptional complexity of the case to excuse part of the delay. The microscope should be on Crowns as much as on defence counsel in terms of their conduct of the case.

Furthermore, case management judges ought to try to address such inefficiencies and rein in the Crown on these issues. While some concern was expressed regarding judges becoming chief prosecutor and undermining the Crown's independence, most agreed that there was room for judicial intervention. Certainly in extreme cases, the Supreme Court has in fact held that judges *can* take on that role.³⁷ In other cases, judges can ask probing questions and request answers without interfering with the Crown's prosecutorial discretion. They should not be afraid to question unwieldy indictments and encourage paring down to make them more workable. And they should endeavour to manage these issues at the front end.

Like junior defence counsel, it appears that Crowns who are starting out in the profession also have fewer "junioring" and mentorship opportunities than they once did. An added layer of difficulty for Crowns in our new social media world is the immediate public exposure and lack of mercy for a mistaken or unpopular prosecutorial call. The public backlash can be most frightening. The result is increased risk aversion, which is not conducive to decisive and timely justice. The best way to temper this destructive instinct is increased confidence that is built through experience and mentorship. Additional training on the Crown's ethical responsibilities in these and other regards would also be welcome.

E. Engaging in evidence-based justice reform

A central area for systemic improvement is a more effective triage of cases entering the criminal justice system. On the one hand, this means having a robust charge approval system (for those provinces where Crowns lay the charges) and review system (for those where they don't), to get rid of unworthy cases entering the system before they clog it up. The Crown has a gate-keeping function that ought perhaps to be exercised with greater avidity. On the other hand, it means diverting entire categories of offences or offenders from the criminal justice system.

The Senate Committee in particular encouraged efforts to identify offences that could be diverted from the criminal system and addressed within a regulatory framework, or by way of extra-judicial measures.³⁸ The Committee specifically referenced the approach taken by British

³⁷ See *Auclair, supra*, at paras. 1-2

³⁸ Senate report, *supra*, at pp. 56-60, 138-141

Columbia in respect of impaired driving offences – where the vast majority of such cases are now dealt with administratively.

There is also a lot to be said for finding alternative ways of dealing with administration of justice offences such as breach of a probation order or failure to comply with conditions or to appear in court. Given the sheer volume of such charges, these take up a lot of court resources. More restraint should also be exercised when imposing conditions of release in the first place. Onerous, confusing or unnecessary conditions are easily breached, which leads to a revolving door of people re-entering the system for underlying conduct that is frequently victimless and non-criminal in nature.

A similar case could be made for some domestic violence³⁹ cases, which represent a very significant proportion of criminal charges laid. Many of these could benefit from alternative measure programs aimed at addressing the underlying problems. However, before that can be done, the facilities to address the risk those cases pose need to be made available. Admittedly, this issue presents a number of particular challenges that would require a roundtable of its own.

Finally, specialized courts⁴⁰ which address underlying problems of addiction or mental illness, or which promote restorative justice for Indigenous peoples, are increasingly being resorted to and warrant further implementation. Vancouver's lead in creating "Downtown Community Courts," which take a problem-solving approach by bringing together justice, health and social services in a single location, should also be explored in other jurisdictions. So many cases that enter the criminal justice system are a reflection of other social problems that need to be targeted, such as health, housing, education, poverty, and employment. Very often, the resources aren't there to address these underlying issues. Expanded use of diversion or alternative measure systems is also to be encouraged and promoted even further. The criminal justice system should not be used to address social ills that it is not meant to address. There have been worthwhile initiatives in recent years, and no doubt those should continue.

³⁹ Many provinces have established specialized courts to find alternatives ways of dealing with administration of justice offences. Examples of specialized courts :

<http://www.provincialcourt.bc.ca/about-the-court/specialized-courts>

⁴⁰On the British Columbia Provincial Court's website you could find information on the following courts: (<http://www.provincialcourt.bc.ca/about-the-court/specialized-courts>)

Aboriginal Family Healing Court Conferences

Drug Treatment Court of Vancouver

Downtown Community Court

Domestic Violence Courts

First Nations Court

Victoria Integrated Court

At least one attendee however raised a note of caution. The idea of prioritizing more serious offences might appear logical at first glance, but we must also be careful about “off-ramping” too many types of behaviour, simply to try to make justice timelier. Assigning quasi-criminal responsibility for certain types of conduct may be appropriate in many cases, but with continued expansion, we run the risk of offering less protection – less process, which is not without consequences. A more in-depth discussion certainly needs to be had to determine where we draw the line, and certainly before we close the courtroom doors to everything but serious criminal conduct.

More than a discussion, what the system requires to achieve efficiency and effectiveness is more detailed and comprehensive data. A constant obstacle in achieving better results is the lack of proper data regarding court operations that is essential to establishing sensible evidence-based policy. Too often, administration of justice policies are developed based on anecdotal evidence, assumptions and surmise. The fact that empirical data is lacking in the face of vast amounts of public funds being expended and considering the system’s impact on people’s lives, is to be lamented.

Consider, for instance, the ongoing debate regarding the impact of limiting recourse to preliminary inquiries. That debate has largely turned on anecdotal rather than empirical evidence. It is far from clear that, in fact, limiting the number of preliminary inquiries will have the desired impact of reducing delays. Many believe it to be an overly-simplistic solution that may have unintended consequences, but this belief is also difficult to ground in fact.

It can at least be said that in many instances, preliminary inquiries prove most useful and lead to a speedier resolution of matters, or otherwise contribute to focusing a case for trial. At least occasionally, if not frequently, they negate the need for a trial at all. Instead of considering their elimination in respect of all or some offences, it may be that the vehicle should be amended to improve its usefulness and efficiency. For instance, where committal is not in dispute, a discovery-like process can take place outside of a courtroom or in a courtroom but with no judge presiding.

Where a judge does preside, the option of having an “exit judicial pre-trial” whereby the judge will provide her input to the parties and can assist with resolution discussions or with identifying trial issues, at the end of the proceeding, can also be most effective and beneficial to the parties and ought to be encouraged. On occasion, the parties may agree to re-elect to proceed before the judge who heard the evidence for resolution purposes. One might also consider raising the threshold for committal, to give the preliminary inquiry’s screening function more teeth.

Whatever the case may be, to proceed with decisions that have tremendous impacts on people and resources, without the necessary data, is simply unacceptable. Data collection needs to take place in every jurisdiction, given the disparities between provinces when it comes to administering justice. Very often, what is occurring in one province may not correspond to the reality in another province, such that similar solutions may not resonate or prove effective. While it is true that there will remain many non-measurables in our system of justice – such as the *quality* of outcomes, there are no doubt great improvements to be made.

IV. Conclusion

Effecting change is an enormous challenge when there is no obvious or single cause to a problem. Crowns, judges, defence counsel, government and legislators each contribute to unnecessary delays. No single actor has a duty to redress it. Dean Sossin insightfully reminded attendees that a duty that is everyone's, is a duty that is no one's. The lack of direct accountability is certainly a big part of the challenge. Stays of proceedings are the main lever of accountability in the case of delays, but that may well continue to prove insufficient.

Retired Supreme Court Justice Thomas Cromwell – who, it should be recalled, did not join the majority in *Jordan* – invited the roundtable participants to reflect on why systemic or cultural change does not happen. Taking inspiration from Harvard Professor John Kotter's writings on the subject,⁴¹ he observed that the criminal justice system is an enormously complex system, and that it is illusory to speak of a single culture. Given a country as largely diffuse as Canada – where the administration of justice is the domain of the provinces, and a system of high levels of independence between the players, to say that there are many moving parts to this issue is to understate its complexity. In the face of such obstacles, what is needed to effect change? What will create the kind of professionalism that will support change? First, a belief that change is actually required. Second, a powerful guiding coalition – which is not a given in a system where no one person is in charge. And third, a shared sense of what the system should look like if we got there. If this roundtable can at least contribute to elucidating and distilling the latter, it will have done its part.

⁴¹ Kotter, J. P. *Leading Change*, Boston: Harvard Business School Press, 1996