ROUNDTABLE ON CRIMINAL DELAYS

REPORT

PRACTICAL RESPONSES TO JORDAN DELAYS

Report of the Canadian Institute for the Administration of Justice

By Maria Aylward, December 2018

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TABLE OF CONTENTS

ROUNDTABLE ON CRIMINAL DELAYS

Practical Responses to Jordan Delays
October 13, 2018, Edmonton, AB

(2 of 5) Previous Roundtable: Dec. 2, 2017, Vancouver, BC

AGENDA

9:00–9:05 am: Welcome and Introduction of keynote speaker
- The Hon. Justice R. Paul Belzil, Court of Queen's Bench of Alberta

9:05–9:45 am: Keynote – *Entrepreneurial Approaches to Post-Jordan Delay*
- The Hon. Chief Justice Mary T. Moreau, Court of Queen's Bench of Alberta

9:45–10:45 am: *Effecting Change in a Complex System: ACPS's Contribution to Reducing Delay*
- Mr. Eric Tolppanen, ADM, Alberta Crown Prosecution Services

10:45–11:00 am – BREAK –

11:00–12:00: *Forging a Pathway from Jordan Through Charter Values*
- Professor Lisa Silver, University of Calgary

12:00–1:00 pm – LUNCH –

1:00–2:00 pm: Panel discussion

Moderator: Professor Steven Penney, University of Alberta

Speakers: The Hon. Chief Justice Mary T. Moreau, Court of Queen's Bench of Alberta; The Hon. Chief Judge Terry Matchett, Provincial Court of Alberta; The Hon. Justice R. Paul Belzil, Court of Queen's Bench of Alberta; Mr. Kent J. Teskey, Q.C, Pringle Chivers Sparks Teskey; Ms. Shelley Bykewich, Crown Prosecutor's Office; Ms. Shelley Tkatch, Senior Counsel, Public Prosecution Service of Canada; Alberta Crown Attorneys' Association

2:00–3:15 pm: Workshop
Participants will provide their questions/input to the Planning Committee in advance
Moderators: Members of the Planning Committee

3:15–3:30 pm – BREAK –

3:30–4:45 pm: Plenary
Moderator: Professor Steven Penney, University of Alberta
Each group will report on their discussion

4:45–5:00 pm: Closing Remarks
- The Hon. Justice R. Paul Belzil, Court of Queen's Bench of Alberta

Official Reporter: Ms. Maria Aylward, Project coordinator, CIAJ

PLANNING COMMITTEE

- The Hon.Justice R. Paul Belzil
- Mr. Dan Chivers
- Ms. Shelley Bykewich
- Ms. Shaina Leonard
- Ms. Christine O'Doherty

BIOGRAPHIES

Justice R. Paul Belzil graduated with a Bachelor of Arts Degree (with distinction) at the University of Alberta in 1974. He then graduated with a Bachelor of Laws Degree from Osgoode Hall Law School of York University, 1977. He was called to the Bar of the Province of Alberta in July 1978 and to the Bar of the Northwest Territories in 1983. On December 1995, he was appointed to the Court of Queen's Bench of Alberta. He has been the Edmonton representative of the Executive Board of the Court of Queen's Bench of Alberta from 2012 to 2018. In 2014 to present, he was appointed Edmonton Co-Chair of the Criminal Steering Committee, Court of Queen's Bench of Alberta. He is currently the Chair of the Edmonton Criminal Duty Project.

Since her appointment to the bench in November 1994, **the Honourable Mary T. Moreau** has contributed her energy and wisdom to the Alberta Court of Queen's Bench of Alberta for over 20 years. She is the first woman appointed to the position of Chief Justice of the Alberta Court of Queen's Bench. Chief Justice Moreau has been actively involved in education, administration, and strategic planning. She regularly lectures at judicial education programs, and served as co-chair of the National Judicial Institute's annual spring National Criminal Law Conference for six years. A former president of the Canadian Superior Court Judges Association, Chief Justice Moreau received the Association's President's Award in 2013. Since 2014, she has been a member of the Advisory Committee on Judicial Ethics, which provides confidential advisory opinions on ethical issues to federally appointed judges across Canada.

Steven Penney (BA (Alberta), LLB (Alberta), LLM (Harvard)) is a Professor at the Faculty of Law, University of Alberta. Born and raised in Edmonton, he received a Bachelor of Arts and a Bachelor of Laws from the University of Alberta and a Master of Laws from Harvard Law School. He researches, teaches, and consults in the areas of criminal procedure, evidence, substantive criminal law, privacy, and law and technology. He is co-author of Criminal Procedure in Canada and co-editor of Evidence: A Canadian Casebook and is a member of the advisory boards of the Alberta Law Review and Canadian Journal of Law & Justice. Previously, he was Associate Dean (Graduate Studies & Research) at the Faculty of Law, University of Alberta; Visiting Professor at the Faculty of Law, University of Western Ontario; Associate Professor at the Faculty of Law, University of New Brunswick, and law clerk to Mr. Justice Gérard V. La Forest of the Supreme Court of Canada.

Lisa Silver is a proud Calgarian, lawyer, educator, and avid blogger. She holds a B.A. in Economics (UWO, 1984), LL.B. (Osgoode, 1987), and LL.M. (Calgary, 2001). She is a member of the Bars of Ontario (1989) and Alberta (1998). As a criminal lawyer, Lisa has appeared before all levels of Court, including the Supreme Court of Canada. Presently, Lisa is an Assistant Professor at the University of Calgary, Faculty of Law, where she teaches criminal law, evidence and is the course director for the 3L advocacy program. Lisa was awarded the Howard Tidswell Memorial Award for Teaching Excellence in 2016-2017. Her research and writing extends over a broad range of topic areas including judicial decision-making, confidential informants, expert and digital evidence. Lisa maintains her own law blog at www.ideablawg.ca and contributes to the Faculty's ABlawg website.

Eric Tolppanen graduated from Queen's University Law School in 1991. After graduation, he practiced with the Calgary law firm Burnet, Duckworth and Palmer before joining the Alberta Crown Prosecution Service, taking a position as a trial prosecutor in the Calgary Trial Office. He has been with Alberta Justice and Solicitor General for the bulk of the past 25 years. His previous roles with the Prosecution Service also include Appellate Counsel from 2001-2008 and Assistant Chief Crown Prosecutor in the Calgary Trial Office from 2008-2011. It was during this time that he worked towards a Master of Laws (Criminal Law) degree from Osgoode Hall Law School, graduating in 2009. In 2015, he was appointed Alberta's Chief Prosecutor and Assistant Deputy Minister of the Alberta Crown Prosecution Service. Eric regularly teaches at the University of Calgary and University of Alberta Law Schools, with CPLED and with LESA. Eric's other professional responsibilities include being Co-Chair of the National Committee on the Prevention of Wrongful Convictions; Chair of the Provincial Witness Protection Security Panel and co-chair of "Chiefs and Chiefs", a provincial committee of all Chiefs of Police and Chief Crown Prosecutors.

Introduction

CIAJ Roundtables

An integral part of CIAJ's mandate is to recognize and engage in issues of legal importance in Canada, and to encourage discussions which lead to recommendations and change. CIAJ is holding a set of roundtables in jurisdictions across Canada, composed of judges, defence lawyers, crown lawyers, and other important players in the criminal justice system. The goal of these individual roundtables is to discuss the pressing issue of lengthy criminal delays in a given jurisdiction, particularly after the influential decision of *R v Jordan*.[1] A national symposium may be held at the end of the process, to share ideas and perspectives from each roundtable, with the goal of presenting concrete recommendations in a report representing a national outlook on the issue of criminal delays in Canada.

The Second Roundtable

The group, purposefully capped at 30 participants to promote a robust discussion, included federal and provincial prosecutors, defence counsel, government representatives, provincial court judges and judges of the Court of Queen's Bench. Whereas CIAJ's British Columbia Roundtable on Delays in Criminal Trials held on December 2, 2017 focused on the role of ethics and professionalism to tackle delays, the Edmonton Roundtable took on a more practical approach.

Before engaging in a roundtable discussion and suggesting recommendations, CIAJ and the Edmonton Planning Committee hosted three speakers who set the stage for the roundtable dialogue. The keynote speaker, Chief Justice Mary T. Moreau of the Court of Queen's Bench, discussed entrepreneurial approaches to address post-*Jordan* delay. Mr. Eric Tolppanen, the ADM of Alberta Crown Prosecution Services ("ACPS"), contributed Alberta-specific statistics and approaches, which provided context for the day's criminal delays discussion. Both Chief Justice Moreau and Mr. Tolppanen shared information about current programs as well as pilot projects already underway in Alberta to ameliorate criminal trial timeframes in the post-*Jordan* era. Our last speaker, Professor Lisa Silver of the University of Calgary, Faculty of Law, highlighted the importance of *Charter* values when forging a pathway to create change. The dialogue throughout the day focused at times on creativity and entrepreneurship in the face of a wavering system, as well as practical solutions to be instituted quickly; all the while calling for education and collaboration among players in various legal roles.

[1] *R v Jordan*, 2016 SCC 27. The Supreme Court in *Jordan* discarded the previous framework for assessing the *Charter* section 11(b) right to a criminal trial within a reasonable time. While many consider the new framework to be simpler (it established presumptive ceilings beyond which the delay is presumed unreasonable, minus defence delays), it has caused both unpredictability and mobilization in the criminal law community, which will be further explored throughout this report.

A Culture of Complacency in the Criminal Justice System

Unfortunately, lengthy delays in criminal trials are not a new concern in the Canadian Criminal Justice System. Section 11(b) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") provides that:

> 11. Any person charged with an offence has the right [...]
> (b) to be tried within a reasonable time;[2]

With this seminal provision underlying its decisions, courts may find that an accused's constitutional rights are breached once these delays become unreasonably long. When this occurs, the sole judicial remedy available is a stay of proceedings, which halts any further legal proceedings for the case in question.

Repercussions to this occurrence are significant for the victim, the accused, the public, and our justice system as a whole. For the victim and their family, justice is not seen to be done, as the case will never be adjudicated on its merits. Such an event can devastate and even retraumatize victims of crime. For the accused, although they will have the charges against them dropped, they will never present their case, nor have the potential to clear their name. When stays of proceedings are ordered, particularly for heinous crimes such as murder or rape (particularly involving minors), the reputation of the Canadian justice system is shaken, and communities are shocked and left with a feeling that the system is unjust.

We cannot launch into a discussion of the *Jordan* case, without a mention of the 1990 decision of *R v Askov*[3], in which the defendants were ultimately charged with conspiracy to commit extortion. The trial took place almost three years after the original charges were laid. The Supreme Court ordered a stay of proceedings, finding the delay unreasonable. Because of this precedent, almost 50,000 other criminal charges in Ontario alone were dismissed because of "unreasonable delay." Notably, it is this magnitude of failure that our justice system must avoid in the post-*Jordan* era.

Until the Supreme Court of Canada landmark decision of *Jordan* on July 6, 2016 drastically changed the assessment of whether an accused's constitutional right to be tried within a reasonable time had been infringed, *R v Morin* remained the guiding case for assessing section 11(b) *Charter* issues for many years.[4] In *Morin*, the Supreme Court of Canada placed an emphasis on whether prejudice was present, thereby putting a greater onus on the accused to demonstrate that prejudice had occurred.[5]

The new analytical framework to evaluate delays in *Jordan* was presented with a goal to "cooperate in achieving reasonably prompt justice."[6] The Supreme Court established hard ceilings this time around,

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[2] *Canadian Charter of Rights and Freedoms*, s 11(b), Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[3] [1990] 2 S.C.R. 1199
[4] [1992] 1 SCR. 771.
[5] *Ibid*.
[6] *Jordan*, *supra* at para 5

putting forward that anyone charged with an offence has the right to have the case tried within a reasonable amount of time—18 months for provincial courts and 30 months for superior courts. Furthermore, transitional measures were put in place for cases already in the system.[7]

The *Jordan* decision has altered the status quo unlike any criminal decision in recent years. Justice Cromwell, writing for the minority in *Jordan*, admitted that we may be facing thousands of stays of proceedings in our criminal justice system.[8]

Less than a year after *Jordan*, the Supreme Court had the opportunity to review their new framework, in *Cody*[9], where they maintained their ground on unreasonable delay, this time with a focus on "illegitimate defence conduct." As the court in *Cody* explained:

> The determination of whether defence conduct is legitimate is highly discretionary, and appellate courts must show a correspondingly high level of deference thereto. 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. [...] Irrespective of its merit, a defence action may be deemed not legitimate if it is designed to delay or if it exhibits marked inefficiency or marked indifference toward delay.[10]

Charter Values are Paramount—Don't Lose the Forest for the Trees

During roundtables of this type, CIAJ gathers relevant professionals of the legal community to discuss practical recommendations and solutions to the *Jordan* issue. It is important, however, that we remember that the essence of this issue is a constitutional one. Section 11(b) of the *Charter* is often known as the right of the accused to a speedy trial, but the provision represents much more, as the *Jordan* decision highlights.

The Canadian justice system has a duty to protect the constitutional rights of the accused, by upholding their right to liberty, security of the person, and a fair trial. As explained by the majority in *Jordan*, liberty is engaged as an accused should spend as little time as possible in pre-trial custody or under release conditions before the merits of their case has been evaluated. Security is a factor since delay lengthens the period of anxiety and stigma thrust on an accused. Finally, a fair trial is paramount, and a long delay can affect many aspects of the case, such as the viability of evidence and the memories of witnesses.[11]

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[7] *Jordan*, *supra* at para 105
[8] *Jordan*, *supra* at paras 282–285
[9] *R. v. Cody*, [2017] 1 S.C.R. 659
[10] *Cody*, *supra* paras. 32-33
[11] *Jordan*, *supra* at para 20

The final speaker for the morning was Professor Lisa Silver who explained that the issue of unreasonable criminal delays is not just about s. 11(b) of the *Charter*, but about *Charter* values in general. Quoting a 1995 speech by Chief Justice Lamer where he spoke about the changing role of the court, he emphasized that by "concentrating on micro justice […] we lose sight of macro justice."

In the same vein, Professor Silver referred to the Quebec Court of Appeal case of *R v Rice*[12], in which the court cautioned not to get lost in the many potential micro-calculations in a *Jordan* case, and not to miss the forest for the trees.

Criminal Delays in Alberta

Chief Justice Moreau remarked that delay statistics are bleak in Alberta, as one third of the Alberta criminal cases are "*Jordan*-compromised." Additionally, Mr. Tolppanen relayed some comparative statistics regarding the backlog of cases in Alberta, allowing the participants to frame this issue in a quantitative context to highlight the current issues in Alberta.

The statistics presented from the Court of Queen's Bench (comparing 2018 and 2016) demonstrated two concerning trends. First, the average lead time (the average number of weeks a person can obtain a trial date when they are ready for trial) has increased by almost a month, and while clearance rates increased significantly, trial collapse rates are about the same. Secondly, the numbers show that there has been a significant increase in the number of cases over the *Jordan* threshold, including those that are considered serious and violent.

One jarring statistic put forward by Mr. Tolppanen came about in the representation of percent of the cases set for trial, and the outcome of those cases, using the 2016 and 2018 statistics, respectively. Only 16 and 18% of cases proceeded, while 21 and 24% ended before the trial date came about. Unfortunately, 60 and 61% of cases that were set for trial collapsed on the day of trial or were adjourned and then ended. While unexpected things may happen on the trial date, most obviously that the accused may change their mind and elect to plead guilty, Mr Tolppanen emphasized that a discussion needs to be had to drive these numbers way down.

Initiatives Already Underway in Alberta

While certainly not an exhaustive discussion of creative and entrepreneurial approaches underway in Alberta, it is a useful exercise to discuss some of the programs and pilot projects that may already be improving Alberta's criminal delays.

[12] *R v Rice*, 2018 QCCA 198

Chief Justice Moreau discussed some of the innovative programs that are already in place in Alberta to combat long delays. An example is their Pilot Criminal Project, which employs retired judges to conduct pre-trial conferences, in judge-alone trials.[13] Retired Justice Sandy Park is one such criminal pre-trial counsel. By scheduling pre-trial conferences from regional centres by audio or video hook-up with the new criminal pre-trial counsel, smaller centres, such as in the small community of Red Deer, can begin the trial process earlier than before.

The Criminal Law Steering Committee ("CLSC"), co-chaired by Justice Paul Belzil and Justice David Gates, both of whom attended the roundtable, advises the Executive Board on aspects of criminal law governance in the Court.[14] Strategic initiatives identified by the CLSC are meant to reduce delays and introduce more criminal case management. The CLSC has worked with the Alberta Justice Summit to address systemic delay challenges on a higher level.

An aggressive approach underway in Alberta is the triple booking of civil trials to clear up space for criminal trials to go ahead. The idea is that most of these cases will settle, clearing space for judges to pick up criminal trials that are proceeding. Under Chief Justice Moreau's direction, some supernumerary judges have volunteered to take two weeks from their half-time calendar where they keep their schedules clear. During this time, they may get deployed across the province to sit for trials if necessary, in what is affectionately known as a "have gavel will travel" approach.

Alternatively, the Alberta system has also begun scheduling some judge-only criminal trials in provincial court rooms. Another creative idea, not yet off the ground, is setting up modular courthouses, as an interim measure while waiting for funding, or as a more permanent solution in smaller communities.

From the Crown perspective, one important tactic to ensure timely trials is the "triage approach," based on three factors: serious and violent cases are prioritized, resources are to be used in proportion to the seriousness of the offence, and early assessment should occur where necessary and possible. The protocol, which came into effect February 2017, provides a standardized method for prosecutors to assess and review files, and is meant to ensure a principled and proportionate approach to criminal cases.

Case viability is another vital approach, which ensures that Alberta Crown Prosecution Services does not expend too many resources on a "lost cause" case. Their enhanced diversion protocol refers to the evaluation of files to determine whether alternative avenues exist for their processing. Often for cases

[13] (s. 625.1[1] Criminal Code) More information available at: https://albertacourts.ca/qb/resources/announcements/pilot-criminal-pre-trial-counsel-project

[14] The role of the Criminal Law Steering Committee is to advise the Executive Board on aspects of criminal law governance in the Court. The CLSC also promotes the Court's relationship with Court Services, the Justice Ministry and members of the Bar with respect to criminal law administration and practice.

less serious in nature, diversion can provide an array of benefits and alternatives in comparison to the standard criminal process.[15]

A particularly practical program has been the appointment of "Jordan Coordinators" in Alberta. Their role is to assist prosecutors in evaluating their more serious files, while ensuring that ACPS takes a consistent approach throughout Alberta. Mr. Tolppanen referred to the four coordinators in the province and the mentoring they undertake, particularly involving the transitional measures for Jordan cases already in the system.

As above, the judiciary and the crown in Alberta are already taking steps to curb criminal delays from their respective platforms within the system.

Productive Problem-Solving to Create Change — The Roundtable Discussion

After reviewing the ramifications of the *Jordan* decision and certain projects already in place to comply with the directions of the Supreme Court, the attendees were ready to take advantage of the roundtable forum. While the attendees discussed various aspects of criminal practice, certain topics were identified, which, if improved, could help reduce delays.

Early and Effective Pre-trial Conferences

Pre-trial conferences, and their importance in addressing the longer than needed criminal delays in Canada, was the most discussed issue of the day. A new rule in the *Court of Queen's Bench of Alberta Criminal Procedure Rules* provides that pre-trial conferences must be scheduled within 120 days after the filing of an indictment or the order committing the accused to stand trial, whichever occurs first.[16]

When used effectively, there is no doubt that pre-trial conferences can reduce delays from the front end of the trial process. Pre-trial conferences can help identify cases that require further case management, improve trial time estimates and identify *Jordan*-threatened cases. Pre-trial conferences are also an opportunity for the defence to re-elect from a judge and jury trial to a judge alone (the former which is generally understood to last at least 1.5 times longer, as reported by one participant).

Chief Justice Moreau mentioned the court's insistence for the Crown to complete the CC-7 form, used in the Court of Queen's Bench for pre-trial conferences, well in advance. Pre-trial conference judges can

[15] Mr. Tolppanen addressed several (current and future) programs meant to provide off-ramps from the standard route; the Alternative Measures Program (AMP) protocol, the Mental Health Diversion protocol, the Intimate Partner Violence (IPV) program and the Restorative Justice Protocol.

[16] Court of Queen's Bench of Alberta Criminal Procedure Rules (SI/2017-76), Part 3, Div. 1

better evaluate the case with help of this form. Jordan history must now be provided on the CC-7, which allows judges to determine, in advance whether the case is *Jordan*-threatened.

Pre-trial conferences can also vet certain situations. The value of an effective pre-trial conference cannot be underestimated when counsel is communicating effectively, and parties are participating successfully. Effective pre-trial conferences can avoid 11th hour decisions which unnecessarily use valuable trial time.

A general consensus among the attendees was that pre-trial conferences are not as effective as they *could* be. Many participants felt that oftentimes counsel come to pre-trial conferences underprepared, and not knowing their bottom line related to their case and client. Furthermore, counsel should be encouraged to speak to one another, engage with one another, and be prepared to move things forward when they arrive at pre-trial conferences.

Several attendees noted that the term "pre-trial conference" does not accurately describe the purpose or intent of the event. Suggestions included that the term "pre-trial conference" be changed to "pre-trial resolution conference" or "judicial management conference", or something similar that conveys the importance of moving towards a resolution at this point in the process.

Implementation of a "Common Form" for Alberta Courts

From a practical perspective, participants debated the usefulness of certain criminal forms, such as the CC-7 form. A suggestion which quickly gained traction was the implementation of a "common form", shared by both Alberta courts. One proposal was that the form be implemented at the lower court and would follow the case through the life of the file. The form would be as simple and straightforward as possible.

From the perspective of the Crown's office, the implementation of this form would be useful to create prosecution plans and committal reports to Queen's Bench as well as facilitating a continuous dialogue as the file moves through the system.

Suggestions were also made that the "resolution discussion" should be front and centre on this form, instead of one of the last issues addressed. Should there be a mandatory requirement to state your bottom-line resolution position? Such a change may help shift counsels" outlook as to why the parties are meeting and would place an importance on resolution.

Maintaining Awareness of Jordan Timeline and Changing Our Perspective

Some of the judges present mentioned that they will not even schedule matters outside of the *Jordan* timeframe, unless certain factors are present, as in for example a very clear waiver. Justice Colleen Suche, who joined the roundtable from the Manitoba Court of Queen's Bench, indicated that she always notes the "*Jordan* date" on the front of the indictment. Furthermore, in the Court of Queen's Bench, defence counsel is encouraged to declare themselves first, and if the matter is *Jordan*-threatened, the court counts on the Crown as an institution to accommodate. Crown reassignment will sometimes occur to ensure that the matter proceeds.

The number of serious and violent cases pending in the system (over 30 months) is increasing in Alberta. When addressing the participants, Chief Justice Moreau advocated an entrepreneurial approach, involving creativity across disciplines, to right the wrongs of complacency which contribute to delay in the criminal justice system.

An awareness of these new timelines is the first step in establishing an "early resolution" culture. The current cap (of 18 months and 30 months) cannot be the sole consideration, as the Supreme Court of Canada may continue to decrease the timelines in the future. The issue of delay should not be considered in a stagnant way.

As Mr. Tolppanen stressed, these timelines should not be seen as "targets", and the goal should continue to be the earliest possible resolution for these important cases. It is the systemic acceptance of delay, and the "culture of complacency" that the Supreme Court has challenged us to change.[17]

Direct Indictments

Since the report Injecting a Sense of Urgency: A New Approach to Delivering Justice in Serious and Violent Criminal Cases[18] the use of direct indictments has increased in Alberta. A direct indictment removes the need for a preliminary inquiry[19] and allows a case to proceed directly to trial in the Court of Queen's Bench. In the wake of *Jordan*, Alberta Justice Minister Kathleen Ganley said recommendations made in the report called for an increase in direct indictments, or cases that go directly to trial, instead of preliminary inquiries in "all but the most serious cases." Ganley said the push for more direct indictments could reduce the time it takes for cases to go to trial when there are concerns for "a really vulnerable victim" or to "avoid running up against the Jordan timeline."[20]

In Alberta, direct indictments are signed by the Deputy Attorney General after receiving a recommendation from the Alberta Crown Prosecution Service. On March 25, 2013, the ACPS released a

[17] *Jordan*, *supra*.
[18] This report was produced by the Alberta Crown Prosecution Service in three phases, in 2013–2014.
[19] Refers to section 577 of the Criminal Code
[20] As cited in https://calgaryherald.com/news/local-news/twelve-cases-in-alberta-dismissed-since-jordan-decision

Practice Protocol on Direct Indictments to encourage greater use of this process given the expeditious case processing.

It is thought that Alberta already uses direct indictments more than other provinces. They are not without controversy, however, as one participant opined that direct indictments are still an extreme measure to be used sparingly, even if they will reduce court time.

A Call for Education and Healthier Communication Between Counsel

There is no substitute for experience, and the legal professionals present mentioned that part of the backlog might be due to indecision by younger, less-experienced lawyers. While not a hard rule, it is generally understood that there is a correlation between counsel's level of experience, and their ability to prepare for a trial and advocate effectively.

Participants at the roundtable explained that young Crown lawyers are likely to "run" every file, not having the confidence to use their discretion to let some files go. It is possible that the profession has created in them a "culture of fear" that they are not doing their jobs. An ability to discern which files can be discarded is paramount, however, as there are not enough resources to "baby" every file.

Leadership, support and education may improve delays from the ground floor. The bigger picture is hard to see for young prosecutors, but resources are limited, and prioritization is key. Several parties were mentioned as potential collaborators who might help educate the members of the criminal justice system, including the Law Society of Alberta, the Legal Education Society of Alberta (LESA) and CIAJ. Mentorship between experienced counsel and young lawyers would go a long way, as well.

The group at the roundtable also discussed setting up a "town hall", during which experienced counsel, Crown and judges could spend the day educating younger lawyers. The participants decided that a great first step would be a town hall focusing on pre-trial conferences, which would include a package of useful resources.

Chief Judge Matchett of the Provincial Court of Alberta mentioned that while there has been a 30 to 40% increase in criminal work over the last few years, there was no correlative increase in prosecutors. Acquiring new Crown prosecutors means just that—inexperienced lawyers who will need training and practice to become competent. Increased complexity of cases further encumbers professionals. While a triage process is the right idea, it can only be successful if professionals are properly trained to make the best and most appropriate decision. This inexperience may contribute to the high number of stays of proceedings.

In general, participants felt that recent law graduates were ill-prepared for the practical challenges of criminal practice. Professor Silver believes such preparation must be built into our legal education

system. As she requires of her students, practical knowledge such as learning how to fill out a CC-7 form and becoming acquainted with the intricacies of the pre-trial conference, will prove invaluable when the situation arises. Thus, participants also noted that another valuable forum for legal education begins with provincial law societies and the Federation of Law Societies in Canada.

Part of the problem here may be the established culture among defence and Crown counsel. Attendees recognized the importance of a productive relationship between advocates. As one attendee stated, "it's not a poker game". The sharing of one's position and bottom line can serve to speed up the process overall, even though some withholding is inherent to the adversarial system.

However, establishing such a relationship may have become more difficult in light of the *Jordan* and *Cody* decisions. Despite claiming to encourage collaboration, the ways in which these cases have changed the law may not be conducive to a better working relationship between Crown and defence counsel. The reference to "illegitimate defence conduct" as well as the increased burden on the Crown in *Cody* is not helping to close the gap between counsels. Participants were hopeful that an increased emphasis on case management and effective pre-trial conferences might help shift the culture to "cooperate in achieving reasonably prompt justice."[21]

Freeing Up Resources — A Look at the British Columbia Impaired Driving Model

Much of the roundtable was spent in a discussion of identifying the processes that are clogging up the criminal justice system, and ways in which we can we free up resources to alleviate the burden. The idea is to implement proportionality. While all criminal matters find importance in our justice system, it is imperative that time and space remain available for grievous matters, such as murder and sexual assault.

One option to look towards is the new British Columbia model for impaired drivers which was put in place in part to clear up space in provincial court. Drivers who fail a breathalyzer test can receive a 90-day license suspension, pay a fine, have their vehicle impounded immediately, and may be required to take a course to regain the right to drive a vehicle.[22] This regulatory scheme has lessened the number of cases going through provincial court, freeing up space for other hearings.

One participant noted that the elimination of conditional sentence orders in Alberta, particularly for drug files, has resulted in drug charges appearing in Queen's Bench more frequently than ever before. Can we implement a new model for offences that are minor or regulatory in nature, in order to free up resources for offences that are more complex and grievous?

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[21] *Jordan*,*supra* para 5.
[22] Report of the Standing Senate Committee: Delaying Justice is Denying Justice, August 2016, p. 13

While the BC model is not without its critics — one participant challenged the appropriateness of receiving a measly ticket for drunk driving — there is merit is considering such alternatives to reduce the stress on our justice system. Such a shift would necessarily engage parliament and other stakeholders but must begin with such a recommendation.

Shining a Light on Delay in the Canadian Criminal Justice System

The consensus among panelists and attendees is that collaboration among stakeholders is pivotal in order to move away from the "culture of complacency" so denigrated in *Jordan*. As McLachlin J (as she was then) asserted in *O'Connor*, "what constitutes a fair trial takes into account not only the perspective of the accused, but the practical limits of the system of justice and the lawful interests of others involved in the process […] What the law demands is not perfect justice, but fundamentally fair justice."[23]

Above all, there was an acknowledgment that all stakeholders must take some responsibility for the cracks in the criminal justice system. The CIAJ roundtable discussions are about more than recognition and recommendations—they are about taking action. Chief Justice Moreau advocated such in her portrayal of the entrepreneurial and creative approaches already underway in Alberta. With new recommendations in place from the productive discussion, she closed with an apt quote from entrepreneur Nolan Bushell:

> A lot of people have ideas, but there are few who decide to do something about them now. Not tomorrow. Not next week. But today. The true entrepreneur is a doer, not a dreamer.

[23]1995, SCC at para 193.