

ROUNDTABLE ON CRIMINAL DELAYS

ETHICS AND RESPONSIBILITIES IN THE POST-JORDAN ERA

Report of the Canadian Institute for the
Administration of Justice

By Maria Aylward, April 2019

REPORT



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Introduction

CIAJ Roundtables

An integral part of CIAJ's (Canadian Institute for the Administration of Justice) mandate is to recognize and engage in issues of legal importance in Canada, and to encourage discussions which lead to recommendations and the promotion of 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 since the leading 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 that captures a national outlook on the issue of criminal delays in Canada.²

"The Third Roundtable" – Nova Scotia

Delay issues and strategies undertaken to remedy them have been analyzed through various lenses in roundtables around the country. 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. The Nova Scotia Roundtable at the centre of this report is titled Ethics and Responsibilities in the Post-Jordan Era. Justice Patrick Duncan of the Supreme Court of Nova Scotia suggested that another suitable title might have been An Example of Change in Criminal Case Management.

¹ *R v Jordan*, 2016 SCC 27. [2016 1 SCR 63]. [*Jordan*] 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.

² There are notable Canadian research and recommendations that have been referenced in the preparation of this report, such as the June 2017 Standing Senate Committee on Legal and Constitutional Affairs Report, Delaying Justice is Denying Justice: An Urgent Need to Address Lengthy Court Delays in Canada, which made 50 recommendations, including 13 that it identified as priorities, to reduce delays in the Canadian justice system. [The Senate Report]

ROUNDTABLE ON CRIMINAL DELAYS

Ethics and Responsibilities in the Post-Jordan Era
December 1, 2018, Halifax, NS

(3 of 5) Previous Roundtables:
Dec. 2, 2017, Vancouver, BC; Oct. 13, 2018, Edmonton, AB

CIAJ

Canadian Institute
for the Administration
of Justice

Listening. Learning. Leading.

AGENDA

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

- The Hon. Chief Judge Pamela S. Williams, Courts of Nova Scotia

9:00–9:45 am: *Tackling Delay*

- The Hon. Thomas A. Cromwell

9:45–10:45 am: *Side Effects of Jordan*

- Ms. Lori Anne Thomas, Thomas Defence

10:45–11:00 am – HEALTH BREAK –

11:00–Noon: *Nova Scotia's Court Response to Jordan*

- The Hon. Justice Patrick Duncan, Supreme Court of Nova Scotia, Halifax
- The Hon. Chief Judge Pamela S. Williams, Courts of Nova Scotia

Noon–1:00 pm – LUNCH –

1:00–2:00 pm: Panel discussion

Moderator: The Hon. Michael J. Wood, Supreme Court of Nova Scotia

Speakers: Mr. Mark Scott QC, Public Prosecution Service of Canada; Mr. David Schermbrucker, Public Prosecution Service of Canada; Mr. Trevor McGuigan, MacEwen, McGuigan Giacomantonio Trial Lawyers; The Hon. Judge Paul B. Scovil, Courts of Nova Scotia

2:00–3:15 pm: Workshop

Moderators: Members of the Planning Committee

3:15–3:30 pm – BREAK –

3:30–4:45 pm: Plenary

Moderator: The Hon. Michael J. Wood, Supreme Court of Nova Scotia
Each group will report on their discussion

4:45–5:00 pm: *What Constitutes Professionalism in a Post-Jordan Era; Closing Remarks*

- The Hon. Justice Patrick Duncan, Supreme Court of Nova Scotia, Halifax

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

PLANNING COMMITTEE

- The Hon. Chief Judge Pam Williams, Courts of Nova Scotia
- The Hon. Justice Patrick Duncan, Supreme Court of Nova Scotia, Halifax
- Mr. Shaun O’Leary Chief Federal Prosecutor from the Federal Crown
- Ms. Denise Smith, QC Deputy Director for the Provincial Crown
- Mr. Luke Merrimen, president of the NS Criminal Lawyers’ Association
- Ms. Meagan Mahoney, Manager, Policy and Planning, Department of Justice, Halifax
- Ms. Megan Longley, Executive Director, Nova Scotia Legal Aid
- Ms. Christine O’Doherty, Executive Director, CIAJ

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.

The Hon. Justice Patrick Duncan of the Nova Scotia Supreme Court (2007) was appointed after 28 years as a criminal defence attorney in Halifax. He is a past President of the Nova Scotia Criminal Lawyers’ Association and was selected in 2006, and again in 2007, for inclusion in “The Best Lawyers in Canada” in the areas of Criminal Law and Legal Malpractice Law. Justice Duncan has lectured in advocacy, criminal law and regulated professions including at programs sponsored by the National Judicial Institute, the Canadian Bar Association, and the Nova Scotia Barristers Society. He has regularly participated on committees tasked with addressing criminal justice and court administration issues in Nova Scotia. Justice Duncan is currently overseeing the revision of the Nova Scotia Supreme Court’s criminal case management structure in response to the decision of the Supreme Court of Canada in *Jordan v. R.* 2016 SCC 27.

Prior to opening up her own firm Thomas Defence, **Lori Anne Thomas** worked for over seven years with a prominent criminal defence Lafontaine & Associates. Ms. Thomas has appeared at every level of court, defending clients at trial and on appeals. Her practice is mainly trial work and she has worked on cases ranging from assault to complex fraud. In addition to her practice, she is an elected Executive Member on the Criminal Lawyers’ Association (CLA) Board and is Board Member for the Canadian Association of Black Lawyers. She also manages the *pro bono* Summary Conviction Program. She is the CLA’s representative on the planning and operations of the planned new amalgamated Toronto Courthouse and the current downtown Toronto Courthouse.

The Hon. Chief Judge Pamela S. Williams has been Associate Chief Judge of the Provincial Court since April of 2011. Most recently, she has been presiding in Dartmouth in the Mental Health Court in addition to her regular Provincial and Family Court duties and her duties as Associate Chief. She was first appointed as a Judge of the two Courts in September of 2003 after working for 18 years as a staff lawyer and then a managing lawyer with Nova Scotia Legal Aid. She earned her bachelor’s degree at Saint Mary’s University, and then her law degree from Dalhousie University Law School in 1984. She was called to the Nova Scotia Bar in 1985.

The issues that floated to the top of the different roundtables were also varied. For example, the attendees at the Edmonton Roundtable spent considerable time on stand-out topics such as encouraging healthier communication between defence and Crown counsel. While still addressing the changing role of counsel, the Nova Scotia Roundtable's participants reflected on the shift in obligations on counsel in the post-*Jordan* era. One consistent thread across the country has been a willingness to work together to produce change, efficiency and certainty as professionals adapt to the new normal post-*Jordan*.

Jordan, Cody and King – A New Era of Criminal Delays in Canada

The Supreme Court of Canada in *Jordan* explained that “a significant change was required in the analytical framework” that assesses the section 11(b) requirement of a trial within a reasonable time. The Court followed through by significantly overhauling the old *Morin* framework.³

Firstly, the majority held that there is a time-ceiling beyond which delays are *presumptively* unreasonable. For cases proceeding at provincial court the ceiling is 18 months. For cases proceeding at superior courts or tried after a preliminary inquiry in provincial court, the ceiling is 30 months in total.⁴

To determine whether the delay present in a given case has breached the presumptive ceiling, the court must first consider the total delay. The calculation of delay begins when the charges are first laid to the actual or anticipated end of the trial.⁵ From this number, the delays attributable to the defence are subtracted. The resulting delay from the above calculation (total delay minus the delay attributed to the defence) is the number used to determine whether the case's delay has passed the presumptive ceiling.⁶ The court in *R v Cody* called this final calculation of delays the “net delay.”⁷

There are two types of delays attributable to the defence: (1) delays waived by the defence and (2) delays caused solely or directly by the defence's conduct.⁸ Defence actions legitimately taken to respond to the charges do not constitute defence delay.⁹

³ *Jordan*, *supra* note 1.

⁴ *Ibid* note 1 at para 107.

⁵ *R v Cody*, [2017] 1 SCR 670, 2017 SCC [*Cody*]

⁶ *Ibid* at para 22. *Jordan* at paras 60, 67.

⁷ *Supra* note 5 at para 22.

⁸ *Supra* note 1 at paras 61-64.

⁹ *Ibid* at para 65.

If the “net delay” from the charge to the actual or anticipated end of trial (minus the defence delay) exceeds the presumptive ceiling, then the “net delay” is presumptively unreasonable.¹⁰ To rebut this presumption the Crown must establish the presence of exceptional circumstances.¹¹ If the Crown cannot rebut the presumption, a stay must be granted.

If the total delay falls below the presumptive ceiling, the defence can still argue that the delay is unreasonable. To do so the defence must show two things: (1) that it took meaningful steps that demonstrate a sustained effort to expedite the proceedings; and (2) that the case took markedly longer than it reasonably should have.¹² If the defence discharges its burden, a stay will follow.¹³

R v Cody (which has come to be known as *Jordan*’s sister case in the realm of criminal delays) was rendered on June 16th, 2017 when a quorum of seven judges at the Supreme Court of Canada set aside a stay of proceedings and remitted the matter back for trial but stated that “the crown, defence and the system had contributed to the delay”.¹⁴ The case reiterated that all participants in the criminal justice system share responsibility to adopt a proactive approach to prevent unnecessary delay by targeting its root causes.

The Supreme Court in *Cody* also encouraged 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 use their case management powers, where appropriate, to summarily dismiss applications or requests “the moment it becomes apparent they are frivolous”.¹⁵ The Court 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

As discussed by Chief Justice Pamela Williams of the Nova Scotia Provincial Court during the roundtable, a recent case from the Court of Appeal of Newfoundland and Labrador, *R v King*¹⁷ has given us some further things to consider:

¹⁰ *Jordan supra* note 1 at para 47, See also *Cody* at para 24.

¹¹ *Ibid.* The majority in *Jordan* qualified that there are two categories of exceptional circumstances: (1) discrete events and (2) a case’s overall complexity. If the exceptional circumstance relates to a discrete event, the delay reasonably attributable to that event is subtracted. If the exceptional circumstance arises from the case’s complexity, the “net delay” is presumed to be reasonable. Exceptional circumstances lie outside the Crown’s control in that they are (1) reasonably unforeseen or reasonably unavoidable, and (2) they cannot reasonably be remedied.

¹²¹² *Supra* note 1 at paras 87-91.

¹³ *Ibid.* at para. 6.

¹⁴ *Cody, supra* note 5, at paras. 1, 36; *Jordan, supra*, at paras. 137-39.

¹⁵ *Ibid.* at paras. 37-39. See also: *Jordan, supra*, at paras. 114 and 139.

¹⁶ *Cody, supra* note 5, at para. 38.

¹⁷ 2018 NLCA 66.

- What is legitimate defence action or inaction (and not delay)?
- Will defence counsel need to provide evidence to explain their actions and reasons?
- How does a court determine whether defence action or inaction is “designed to delay”?
- When should a Trial Judge, if ever, intervene to prevent a frivolous application?
- Does *Cody* encourage judges to get into the fray? Place limits on oral submissions? Require written submissions? Direct that the matter is one in which a *voir dire* should be conducted?
- What about the time it takes a judge to render a reserved decision: how is this classified in this new era?
- How do courts best promote the necessary collegiality and efficiency while recognizing that counsel have ethical considerations to follow?¹⁸

Jordan and *Cody* are still considered recent case law and it is no secret that legal professionals across Canada are struggling with their interpretations. Indeed, CIAJ roundtables on criminal delays are one such vehicle attempting to find common ground in their interpretation.

Don't Sell the Skin before You've Caught the Bear – The Dangers of Declaring Victory Too Soon

Rarely does a discussion of the *Jordan* case occur without a mention of the 1990 decision of *R v Askov*¹⁹, 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.

The roundtable’s keynote speaker the Honourable Thomas Cromwell referenced a favorite author of his, John Kotter, who has established an 8-step model for change.²⁰ While Kotter’s guide was originally meant to be implemented in a

¹⁸ *Ibid*, at para. 33.

¹⁹ *R. v. Askov*, [1990] 2 SCR 1199, 1990 CanLII 45 (SCC) [*Askov*] ,at 228-29. See also *Morin* at para 790-79.

²⁰ Kotter, J. P. *Leading Change*, Boston: Harvard Business School Press, 1996.

corporate, management context, the Honourable Thomas Cromwell explained how the model has a useful application to our criminal justice system as well. One of Kotter's recommendations is to avoid declaring victory too soon. Some legal historians would say that post-*Jordan* we are in a similar situation to *Askov* once again.

To undertake a significant systemic change, effort must be ongoing. Knowing when to persevere and when to stop is complicated. The Honourable Thomas Cromwell posed the question: How do we know when we have made a difference? Who is monitoring this feedback loop?

Changing Ethical Considerations on Counsel in the "Post-Jordan Era"

Chief Justice Pamela Williams of the Nova Scotia Provincial Court began the day with a useful overview of the ethical considerations facing counsel. She noted that the new framework is intended to prevent defence counsel from benefitting from their own potential dilatory actions or inactions, and at the same time requiring that they balance their obligations to ensure that they act with due diligence and protect their client's right to full answer and defence.

Crown counsel must face their own framework of ethical decision-making. For example, Crown counsel must determine under which circumstances to proceed with a given case. In a situation where some forensic evidence is not yet available, for example, should the Crown go ahead with a case of questionable strength? Or should they request an adjournment because of exceptional circumstances?

Ontario defence lawyer Lori-Anne Thomas, who contributed an outside perspective in terms of tools that have been implemented in Ontario, acknowledged the changing roles of police, crown counsel, defence counsel and the judiciary in the post-*Jordan* era. For lawyers, she mentioned that the new presumptive ceilings should not be "treated as aspirational". Ms. Thomas admitted that she has seen too many instances of resolutions occurring on the last day "before the ceiling", which is markedly contrary to the precedent that the Supreme Court of Canada intended to establish in *Jordan*.

While *Jordan* has been interpreted by many as increasing the extent to which ethical obligations are imposed on counsel, it may also serve as a simple reminder for all participants in the justice system of their long-standing obligations. Judge Paul B. Scovil of the Nova Scotia Provincial Court, in emphasizing the importance of counsels' preparedness for court, reiterated that "small delays can lead to large

delays”. Simply being able to proceed promptly when the case is scheduled is a first step in fulfilling one’s ethical obligation to the Court, the client and the public.

Defence lawyer Trevor McGuigan echoed the same idea from a defence perspective. Mr. McGuigan jested that hopefully, before the “ethical overhaul” imposed by the *Jordan* case, defence lawyers were already making timely disclosure requests and not being obstructionist without good reason. A lawyer’s duty of candour to the court in making reasonable admissions at trial existed well before the *Jordan* case. Have things changed, or is there just a spotlight on existing cracks in the criminal justice system in the wake of *Jordan*?

A consensus among participants of the roundtable was that, regardless of whether ethical obligations have become more stringent, pressures on counsel have certainly increased. Indeed, since *Jordan*, the focus on accountability and proactivity has become paramount for all stakeholders in the criminal justice system.

Leading up to Jordan: Criminal Delays in Nova Scotia

As per the Canadian Centre for Justice Statistics, in 2014-2015, 99% of all criminal charges heard in Nova Scotia had a median time for completion from first appearance of 109 days for Provincial Court, and 309 days for Supreme Court. Concerning the new presumptive ceilings, 7% of all Provincial Court charges were over the 18-month threshold, while in Supreme Court, 5% took longer than 30 months. In general, Nova Scotia was the fourth highest in Canada in terms of charges exceeding the presumptive ceiling, which was of course problematic.²¹

Aside from these bleak statistics, Justice Patrick Duncan explained that the Nova Scotia Supreme Court had an outdated approach to the management of the criminal docket. As is still the case, when a matter arrived in Crownside²², a pretrial conference was required prior to the assignment of a trial date. Fridays were the only days available for pretrial conferences, which sometimes meant lengthy delays before the matter could be set down for trial. It was not uncommon for four to eight weeks to pass from the arraignment in Crownside until the return to court to set dates.

²¹ These statistics were delivered by Chief Justice Pamela Williams of the Nova Scotia Provincial Court during the roundtable.

²² The use of the term “Crownside” in Halifax refers to the Criminal law version of Chambers, that is, a scheduled appearance where shorter matters are heard. Previously, it referred to a single court day, now it refers to a permanent position in the Court’s schedule.

The Crownside judges were only available to sit on Thursdays, and only for matters like arraignments, bail reviews and sentencings. The judge sitting in Crownside changed weekly and judges could be brought in on short notice from anywhere in the province. During the summer, Crownside was only held every other week.

With no continuity from week to week, returning matters were not being monitored or managed in a systemic way. Scheduling of pretrial conferences was implemented from an “available judge” list. Since there was no dedicated judge, matters were not heard in an efficient matter. For example, a self-represented accused person would come before the Court more than once, with excuses as to why they did not have a lawyer and wanting repeated adjournments. The presiding judge was often hearing the same excuse that had been provided in previous appearances.

Once cases were set down for trial, often the trial judge would not see the file until a few weeks before the trial was meant to begin. In the interim, the court was largely dependent upon counsel to bring forward case management concerns. If counsel were not being proactive, then delays often resulted. For example, if pretrial motions were required, especially in the case of a jury trial, it was exceptionally challenging to schedule and render decisions in the time available between the trial judge viewing the file and the commencement of the trial. Basically, trials had to be adjourned to accommodate the pretrial motion schedule.

The lack of an aggressive case management system, combined with busy counsels who did not always give their full attention to the file at an early stage, often resulted in last minute negotiations to resolve the issue. Unfortunately, this usually occurred too late to book another case into the timeslot, resulting in lost court time.

Justice Duncan further explained how a significant percentage of Supreme Court trials are multi-day cases, and the judges’ schedules are not dedicated to a single courtroom or even a single courthouse. Once seized with a case that does not finish in the scheduled time, it can be challenging for that judge to continue the trial. For example, that judge may be scheduled to go to a rural location such as Yarmouth for a divorce on the day after the expected finish date of the criminal trial. Therefore, double or triple booking, as is done at Provincial Court was not always feasible to the same degree.

Over and above the issues with the pre-*Jordan* set-up at the Supreme Court, there was no database or efficient system in place to monitor the criminal docket. In summary, delay was built into the system at almost every stage from the committal

until the commencement of the trial. *Jordan* required a serious rethinking of how the court managed its criminal dockets.

Mobilizing Stakeholders to Change the System: Nova Scotia Responses to Jordan

When the legal landscape shifts in a given area, players in the system must communicate and work together to decide which new approaches might help those involved adapt to the new status quo. Observing and learning from other jurisdictions is a smart tactic in evaluating what works. Pilot projects in Nova Scotia and across Canada reflect the willingness of criminal justice participants to use trial and error to test new projects, with a goal of improving overall efficiency and fairness within the system. Ontario defence lawyer Lori-Anne Thomas informed the roundtable that one such project in Toronto is the placement of Crowns in police stations, where police can rely on Crowns to help focus a case or draft search warrants, for example. Similarly, criminal law professionals in Nova Scotia have also helped launch groups and pilot projects based on the needs specific to the province in the wake of *Jordan*.

Strategic Groups to Set Change in Motion

The Criminal Justice Transformation Group, a coalition of high-level decision-makers in various roles within the criminal justice system in Nova Scotia, decided in July of 2016 to make *Jordan* issues its number one priority. The common goal was to work together to modernize the criminal justice system in the province.

Assembling at quarterly in-person meetings and monthly teleconferences, the group prioritized strategies to address delay. Data collection was used to identify areas and processes in need of improvement, as well as to track and evaluate changes to see which strategies were making a difference. As Chief Justice Williams emphasized to the attendees of the roundtable: “You can’t manage what you can’t measure!”

The group also began to look at relevant policies and procedures after *Jordan*. For example, a “ticker system” was quickly incorporated into case management to help identify the age of a case. A *Jordan* sub-group committee was also established to create a system for identifying cases in the *Jordan* “danger-zone” and subsequently managing and triaging from that point forward.

The Earlier the Better – Tackling Front-End Delay

Early Resolution Initiative

In some provinces, including Nova Scotia, the preferred strategy is to prioritize cases so that they can be dealt with efficiently by proactively negotiating plea bargains early in the process in exchange for reduced sentences. With the support of the Criminal Justice Transformation Group, prosecutors in Halifax and Dartmouth launched an ‘early resolution initiative’ in February 2017 with the expectation of freeing up time for the Provincial Court to hear more complex and serious matters. The initiative offers the accused the option to plead guilty before a date chosen by the Crown. If the accused pleads guilty, the form shows what the Crown would recommend as a sentence.²³ Will Mathers of the Dartmouth Crown Attorneys’ Office developed an Initial Sentencing Position “ISP” form. The form was intended to be used for relatively straightforward matters amenable to early resolution, such as breach of court order offences, first offence breathalyzer or refusal matters, and low-level assaults. The form is not intended for use in matters such as sexual assault, sexual offences against children, significant property loss, or where significant violence has been used.²⁴

According to the Public Prosecution Service of Nova Scotia, through the ongoing pilot project, offers made are time-sensitive and will not normally be repeated or revisited later in the proceedings, except where circumstances provide a rational basis for doing so. Ultimately, it is up to the accused and their lawyer to determine if this resolution at the initial stage is acceptable.

“The Dartmouth Pilot Project”

A four-person intake team (which presently has grown to five) was established and began operating in the Dartmouth Provincial Court. The “Dartmouth Pilot Project”,

²³ CBC Article, [N.S. prosecutors encouraged to offer plea bargains for minor crimes as cases pile up](#), February 18 2017

²⁴ Nova Scotia Barristers Society, <https://nsbs.org/early-resolution-initiative-criminal-justice-transformation-group>

as it was referred to during the roundtable, is having a positive impact with cases being resolved by way of a guilty plea at an earlier stage, and earlier identification of those cases requiring additional police investigation, thereby improving the quality of prosecution files.²⁵

The purpose of this pilot project is to determine if a shift in the timing of Crown work on files can increase early resolution of files, identify and address files with “Realistic Prospect of Conviction” issues, improve the quality of files being set for trial and lower the number of court appearances on the routine criminal files.²⁶

Judge Frank Hoskins, a Provincial Court and Family Court judge in Dartmouth, noted that the Dartmouth Pilot Project had resolved over 900 cases in a short period of time. Certain cases were off-ramped to restorative justice initiatives while others with no likelihood of success were set aside. Judge Hoskins also believes the project, among other changes in attitude and culture, have helped shift counsels’ outlook from reactive to proactive. Citing as an example the action of writing a letter to ensure disclosure is prioritized in a given case, when all parties are pushing for early resolution, the system works.

“Gaming the System” – Efficiently Using the Time Before the Jordan Clock Starts Running

David Schermbrucker from the Public Prosecution Service of Canada explained that Nova Scotia professionals have begun using the pre-charge period for various delay-reducing tactics. Some examples include effectively advising the police on what is required, making sure disclosure is in order and assessing who exactly needs to be charged and prosecuted – all of this before the *Jordan* clock starts running.

Some participants voiced that the practice of “gaming the system” may be viewed as inappropriate, perhaps due to a perceived “blurring” of the distinct roles of police and Crown, however it was described during the roundtable as a logical way to attempt to deal with *Jordan* delay. For example, Mr. Schermbrucker emphasized that if some of the advisory work is shifted to the pre-charge environment, benefits can be reaped along the life of the case. He explained that an unexpected benefit has been establishing a better working relationship with the police; when the police understand the case and their responsibilities, a collaborative working relationship benefits everyone.

²⁵ Public Prosecution Services, Nova Scotia, Budget 2018–19: Business Plan March 2018 ISBN: 978-1-55457-821-4

²⁶ *Ibid*, p. 4.

Generally, when professionals are being more proactive in post-charge case management (instead of, for example, a late response to a defence charter claim that should have been anticipated), problems are solved before they arise, reducing the time the case takes from start to finish. This practice has resulted in less adjournments prompted by disclosure requests as they are being addressed preemptively.

Mr. Martin Herschorn, Director of the Public Prosecution Service of Nova Scotia, explained that when there is early Crown involvement, the system often benefits as the scope of an investigation may be more appropriately focused. Most prosecution services, and studies on the topic, support early Crown involvement, particularly in major criminal investigations.

Case Management – Revamping the System in the Wake of Jordan

The Supreme Court in *Cody* encouraged judges to use their trial management powers to help reduce delay, and the parties to request that judges exercise these powers. Furthermore, the Senate Report identified the lack of robust case management among the judiciary as one of the major factors contributing to delay in Canada.²⁷ Training in “best practices for achieving reasonably prompt justice” was recommended for the Judiciary.²⁸

The Nova Scotia Supreme Court implemented a criminal case management spreadsheet²⁹ that lists all outstanding criminal cases in the Supreme Court in Halifax to be populated with key facts about the cases. The initial recorded data includes the date of the information, the 30-month date, the date committed, the time from the date of information to the date of committal to Supreme Court, the election and whether the accused is in custody. Other fields become populated as the case progressed such as trial dates, total number of scheduled trial days, and the number of months from the date of the information to the scheduled finish date of the trial. Colour-coding and tabbing help identify when files become time-sensitive. Timelines are updated as the matter ages, so information is current at the time of viewing.

²⁷ The Senate Report, *supra* note 2, at 2,4.

²⁸ *Ibid*, at 2,4.

²⁹ At the time of the Roundtable, this tool was only being used in Halifax. There are plans however that it be adopted by all seven judicial districts in Nova Scotia.

Justice Duncan, the Criminal Scheduler and the Crownside judge share responsibility to identify files that are *Jordan*-threatened. When a file is identified as being problematic, counsel is actively engaged to expedite the matter.

Crownside Judges

In conjunction with the new case management system, the Crownside judge is now scheduled for four consecutive weeks, and they are “on duty” 24/7. The Crownside judge presses for a very quick pretrial conference and returns to court for the setting of dates. The four weeks can only be booked by the Crownside judges and only for a specified list of actions such as monitoring the progress of files pending in Crownside, presiding at Crownside on Thursdays, scheduling and hearing bail hearings and bail reviews, resolution conferences (unless counsel have requested a different judge), summary conviction appeals, pretrial conferences, bail forfeiture hearings and sentencings.³⁰

Pretrial Conferences

In dedicating an open schedule for the Crownside judge, they are more readily available to counsel for matters like pretrial conferences. Judges conducting pretrial conferences are requested to press counsel on scheduling issues. If counsel is “considering filing a motion” then they are required to give a reasonable date by which that will be done. Judges are also encouraged to investigate whether there is a chance of resolution, and if so to offer a conference for that purpose as soon as the parties schedules can accommodate such.

Prompt Identification of the Trial Judge

At the setting of the trial date, the trial judge is immediately specified, and counsel are to contact the judge about any matters that may arise on the file. The file is promptly routed to the trial judge who is responsible for effectively case managing that file through to its conclusion. The assigned trial judge is expected to be proactive in getting counsel to commit to the time requirements for the trial and for early scheduling of pretrial motions, especially where there is potential that matter resolve, thus freeing trial time during which a new matter may be scheduled. The goals in this case are to achieve early resolution where possible, and to limit days lost by using court time effectively.

³⁰Crownside judges may also have “desk work” to do such as reviewing applications for wiretap authorizations; Part XV orders such as search warrants; reviewing Emergency Protection Orders; Issuing Orders for Transportation of Prisoners, and release of exhibits, etc.

Self-Represented Accused

The Court's practice gives self-represented litigants a couple of opportunities in a short timeframe to retain counsel. If the litigant is not diligent in doing so, he is given a written package of instructions for a self-represented litigant. The Court will inform the litigant that a trial date will be set and that he should be prepared to act for himself should he not retain a lawyer before trial. Anecdotally, this has reduced the amount of time wasted by those self-represented litigants who are not, for whatever reason, diligently pursuing legal representation.

Where a waiver of delay is not forthcoming and there is a *Jordan* deadline impending, then the Court will set the trial down to be heard within 30 months and promptly assign a judge, even if it means bumping another trial to do so. Justice Duncan emphasized that the Court is resolute that delay will not be attributable to delay specific to the scheduling of trials in the Supreme Court of Nova Scotia.

“Are You Waiving Delay?”- Are we Popping the Question too Early and too Often?

The first component of defence delay that is subtracted from the total delays is “delay waived” by the defence. “Delay waived” refers to instances where the accused has explicitly or implicitly decided to forgo their ability to consider a given period of time for a s.11(b) analysis to determine whether the case's attendant delays were reasonable.³¹ L'Heureux-Dubé J clarifies this in *R. v. Conway*, 1989 CanLII 66 (SCC), [1989] 1 S.C.R. 1659, saying:

“[i]n considering the issue of ‘waiver’ in the context of s. 11(b), it must be remembered that it is not the right itself which is being waived, but merely the inclusion of specific periods in the overall assessment of reasonableness.”³²

The defence can waive a delay explicitly or implicitly, but only if the waiver is clear and unequivocal.³³ The defence's conduct must demonstrate that the defence has understood that they possess the s.11(b) guarantee, the effect that the waiver will have on the s.11(b) right and that the right has indeed been waived for the time period in question.³⁴ The Court in *Morin* provides that in most cases agreement by

³¹ *R. v Morin*, [1992] 1 SCR 771 at 790 -791, 1992 CanLII 89 (SCC) [*Morin*].

³² *R. v Conway*, [1989] 1 S.C.R. 1659, per L'Heureux-Dubé J., at p. 1686, 1989

³³ *Jordan supra* note 1 at para 61.

³⁴ *Askov, supra* note 19.

the defence to setting of trials dates and setting of a future trial date will give rise to “an inference that the accused waives his right to subsequently allege that an unreasonable delay has occurred.”³⁵ If the Crown is relying on actions of the accused to prove a waiver, the Crown has the burden of arguing that a specific waiver can be inferred.³⁶

Defence lawyer Trever McGuigan explained that defence counsel are being asked to waive delay (or whether they intend to waive delay) early in proceedings. The question is arising even where disclosure is not yet complete or has just been finalized. At times, the issues surrounding this question can turn into a “mini-hearing” on who owns the delay. Are these reasonable discussions at such an early stage of a case?

Some attendees also voiced concern with having the question “*are you waiving delay?*” being posed too early. One repercussion may be the pressure felt by young, inexperienced defence counsel to agree to waive delay, if they believe that this is standard protocol. Others mentioned that the question has become a “security blanket” to be asked by Crown counsel regardless of circumstance.

The Court in *Jordan* reiterates that deductible delay does *not* include legitimate actions, taken diligently, to respond to an allegation.³⁷ Thus, it makes sense that the frequency and timing of the waiver question brings about concerns for defence lawyers. The accepted practice for waiver discussions in a jurisdiction must not deter defence counsel from advancing viable applications, nor inhibit creativity in making novel arguments that may serve as the basis for new conceptual frameworks.

Provincial Court Judge Paul Scovil weighed in on the waiver question from a judicial perspective. He echoed the experience of having it come up quite early, and a “mini-hearing” on waiver ensuing as a result. On occasion, it will not be the trial judge proceeding over this question, and in those cases, it makes no sense for waiver to be adjudicated on the spot. Judge Scovil emphasized however that it is the prerogative of counsel to liberally feed the record and the docket regarding the waiver question. In cases where there is a legitimate question of waiver, the record can be referenced later. Justice Duncan echoed the necessity of judges to require clear statements on the record as to the reasons for any delay and to obtain waivers from counsel where appropriate, which may include a recorded conversation of the

³⁵ *Supra* note 19 at pp. 1228-29.

³⁶ *Ibid*, at pp. 1228-29.

³⁷ *Jordan*, *supra* note 1 at para. 65

dates offered by the court and the position of counsel if they do not accept dates offered.

Ontario Defence lawyer Ms. Lori-Anne Thomas reminded the group that the waiving of delay cannot be assessed without considering client instructions. Perhaps the proper question is “*Do you have instructions to waive delay for this period?*” In posing the question with your client’s rights and instructions in mind, you should be left with an ethical response. Counsel must resist improper pressure to sacrifice a client's right to be tried within a reasonable time when making full answer and defence.

Direct Indictments

Under Section 577 of the Criminal Code, the Attorney General has the authority to prefer an indictment sending a matter directly to trial, despite the discharge of an accused person at a Preliminary Inquiry, or without the convening of a Preliminary Inquiry.

In a directive issued by the Nova Scotia Public Prosecution Service, it is shown that in Nova Scotia, the Attorney General, the Director of Public Prosecutions (DPP) and the Deputy Director of Public Prosecutions have the exclusive authority to consent to the preferring of a direct indictment in public prosecutions. In keeping with the provisions of the Public Prosecutions Act, the responsibility for determining whether written consent will be granted to the preferring of the indictment will be that of the DPP.

David Schermbrucker of the Public Prosecution Service of Canada explained that direct indictments are being used by the province more often in the post-*Jordan* era, and that delay has become a specifically identified reason for such.

Lori-Anne Thomas echoed that direct indictments have become less rare in Ontario as well, especially after the 2016 Ontario Court of Appeal case of *R v. Manasseri*.³⁸ Justice David Watt explained that:

“after *Jordan*, with full disclosure as required by *Stinchcombe*, the Crown should give very serious consideration to preferring direct indictments to

³⁸ 2016 ONCA 703. In this case, the court expanded on central concepts from *Jordan* and *Cody* that are used to determine whether s.11(b) is infringed in a given set of circumstances, such as whether the Crown has established that presumptively unreasonable delays are actually reasonable due to “exceptional circumstances,” and what amounts to a “transitional exceptional circumstance” enabling parties to rely on the pre-*Jordan* state of the law.

fulfil its mandate under s. 11(b) and to ensure, to the extent reasonably possible, that criminal trial proceedings do not exceed the presumptive ceilings set by Jordan.”³⁹

Education Needed Across the Board

Several attendees of the roundtable observed that a key contributor to delay is the lack of education and mentorship in place for new lawyers. The problem is not necessarily incompetence, but judgment – something that takes time and experience to acquire. To reach a level of specialization and sound judgment, especially when it comes to complex criminal matters, further education is needed. The Honourable Thomas Cromwell recommends further specialized education for the Judiciary as well.

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.⁴⁰ Furthermore, since 2016, the Public Prosecution Service of Nova Scotia has included the topic of *Court Delay Avoidance* at each of their Annual Education Conferences for all Crown lawyers.

Conclusion

Managing Delays – A Balancing Act?

Canada’s criminal justice system is an enormously complex system containing many interrelated factors. When a jurisdiction’s time to trial decreases, we have an objective measurement for success. But what if the cost of improving the time to trial affects another important aspect of the process, such as delaying charges being laid? Importantly, all stakeholders must be aware that improving one aspect of a system can denigrate another. What then if the cost of surveillance of dangerous people soared because of the delay in laying charges?

The Nova Scotia roundtable revealed its own examples of the system being thrown out of equilibrium. For example, success is not just a numbers game. Lori-Anne Thomas put forward that in her experience in Ontario, *Jordan* and *Cody* have placed palpable pressure on counsel, which can come at the sacrifice of counsel’s own

³⁹ *Ibid* at para. 379.

⁴⁰ The Senate Report, *supra* note 2, at p. 35.

mental health and well-being. Justice Duncan was also quick to share that the Court is aware that the stringency of the new case management system can be burdensome for counsel. While correlation is not always causation, it seems obvious that these increased demands can affect the well-being of legal professionals. Indeed, these occupations are stressful ones at their base, but with cases becoming more complex and disclosure more voluminous, the legal profession must ensure the health of its professionals.

Who is in Charge Here? The Need for Collaboration and Shared Responsibility Among Stakeholders

Overall, the response to *Jordan* in the Nova Scotia criminal system appears to be one of success. For example, since the *Jordan* decision there have been no successful section 11(b) applications in the Nova Scotia Supreme Court in which delays were attributable to the court being unable to accommodate the trial of the matter in a reasonable time. During the roundtable, it was also noted that the Provincial Court and the Crown (where they have proactively preferred indictments in cases that were dragging) are to be congratulated for their proficiency in moving cases along to the Nova Scotia Supreme Court.⁴¹

While it was clear that one of the reasons for success is due to the small population (relatively speaking) and manageable numbers, quantity and length of trials in Nova Scotia continue to increase.⁴² If this trend continues, resources may need to be reassessed and reallocated to meet the needs of the system in the province. As Justice Michael J. Wood of the Supreme Court of Nova Scotia agreed, each stakeholder in the justice system aspires to a different set of principles; for Judges, judicial independence; for Crown counsel, prosecutorial discretion; and for defence lawyers, a duty to their client. But we must also maintain our loftier legal principles, and our duty to one another, or risk having the system crumble around us.

⁴¹ Of those post *Jordan* files, 84 % of them were committed to the NSSC in less than 12 months from the date of the Information; 15% were committed to the NSSC between 12 and 18 months from the Date of Information.

⁴² In terms of quantity, Justice Duncan of the Nova Scotia Supreme Court reported that as of December 1st, 2018, the number of criminal cases pending trial in the NSSC was 39% higher than a year prior, and 58% higher than two years prior. In terms of length, 64% of the pending trials at the NSSC are scheduled for more than five days (included in that statistic are 12 trials currently pending that are scheduled to take between 20 and 31 sitting days.) These numbers do not include days required for pretrial motions. Particularly noteworthy is that a high percentage of the days scheduled for trial sittings are in fact used.

In Canada's criminal justice system, authority is diffuse and spread over many bodies such as justice ministries, legal aid authorities, the judiciary, social services, the bar, etc. One of the reasons why change fails to occur may be due to the inability of an organization to create a united coalition.⁴³ To what extent is a united coalition possible in a complex, adversarial system? How much should the public be involved and included? The Honourable Thomas Cromwell reminded us of a seminal quote from Marshall and McLuhan: "*There are no passengers on spaceship earth, we are all crew.*" All stakeholders must cooperate to bring about change, for it must not be "us and them" if we aspire to make true headway in combatting delay in Canada's criminal justice system.

⁴³As discussed by Justice Cromwell during the roundtable, another one of John Kotter's steps towards effective change is establishing a strong leadership, which includes assembling a strong enough coalition to lead a successful change effort.