
CANADA / JUDGMENT

R. v. Vrbanic

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SUPREME COURT OF CANADA

Citation: R. v. Vrbanic, 2026 SCC 19

Appeal Heard and Judgment Rendered: December 4, 2025

Reasons for Judgment: May 29, 2026

Docket: 41741

Between:

His Majesty The King in Right of Canada

Appellant

and

Robert Vrbanic and

Sarah Josipovic

Respondents

- and -

Attorney General of Ontario,

Attorney General of Quebec,

Attorney General of Manitoba,

Attorney General of British Columbia,

Director of Criminal and Penal Prosecutions,

Battered Women's Support Services Association,

Canadian Association of Chiefs of Police and

Criminal Lawyers' Association (Ontario)

Interveners

Coram: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.

Reasons for Judgment:

(paras. 1 to 101)

Wagner C.J. (Karakatsanis, Côté, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ. concurring)

Concurring Reasons :

(paras. 102 to 142)

Rowe J.

Note: This document is subject to editorial revision before its reproduction in final form in the Canada Supreme Court Reports .

His Majesty The King in Right of Canada Appellant

v.

Robert Vrbanic and

Sarah Josipovic Respondents

and

Attorney General of Ontario,

Attorney General of Quebec,

Attorney General of Manitoba,

Attorney General of British Columbia,

Director of Criminal and Penal Prosecutions,

Battered Women's Support Services Association,

Canadian Association of Chiefs of Police and

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Present: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.

on appeal from the court of appeal for ontario

Constitutional law — Charter of Rights — Right to be tried within reasonable time — Exceptional circumstances — Case complexity — Two co-accused applying for stay of proceedings on basis that right to be tried within reasonable time violated — Application judge granting stay after finding presumptively unreasonable delay not justified by exceptional circumstance of case complexity — Whether application judge misapplied governing principles on right to be tried within reasonable time by failing to properly assess case complexity — Canadian Charter of Rights and Freedoms, s. 11(b).

Eighteen individuals, including the two co-accused, V and J, were charged in connection with a drug trafficking operation as part of a project prosecution arising out of a major investigative project that generated significant disclosure. The Crown sought case management and divided the charges laid against the individuals into 10 prosecution groups, with some individuals in more than one group. V was part of groups 5 and 8, while J was V's co-accused in group 5 on joint charges. The individuals in group 8, including V, intended to participate in a group Garofoli application. The Crown provided the individuals who were not participating in the Garofoli application with trial dates below the Jordan ceiling of 18 months for trials in provincial court. In the mistaken belief that the co-accused intended to participate in the Garofoli application with respect to the group 5 charges, the Crown provided them with trial dates past the 18-month ceiling. Their counsel did not raise concerns and indicated on the record that they had accepted the earliest dates offered.

V and J applied for a stay of proceedings under s. 11(b) of the Charter and the application judge entered a stay on their group 5 charges. He held that the net delay, which was over the ceiling, was not justified by the case complexity exception under Jordan . Unlike in a related s. 11(b) proceeding arising from the same project prosecution where he had recognized that the case was particularly complex, he found that there was no evidence that the group 5 co-accused intended to rely on the Garofoli application and therefore that there was no interconnection of pre-trial applications that would make this case particularly complex. A majority of the Court of Appeal dismissed the Crown's appeal, holding that the application judge's case complexity assessment was free from error. The dissenting judge would have allowed the appeal, concluding that the Crown's scheduling mistake was reasonable given the size and complexity of the prosecution and that the delay was therefore reasonable.

Held: The appeal should be allowed, the stay of proceedings set aside and the matter remitted back for trial.

Per Wagner C.J. and Karakatsanis, Côté, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.: A proper application of Jordan's case complexity exception to the facts of the instant case demonstrates that the co-accused's right to trial within a reasonable time was not violated. The significant complexity of the case justified the net delay of 18 months and four days. This is not an appropriate case in which to consider more fundamental changes to the Jordan ceilings or to revisit the remedy for a breach of s. 11(b) of the Charter.

The Jordan framework is straightforward. Delay will be presumptively unreasonable where the time between the laying of the charge and the actual or anticipated end of the trial exceeds the 18- or 30-month ceilings for trials in provincial or superior court respectively, after any defence delay has been identified and subtracted. The burden then shifts to the Crown to demonstrate exceptional circumstances justifying net delay above the ceiling. One category of exceptional circumstances is case complexity. This exception recognizes that certain cases cannot reasonably be completed within the presumptive ceilings because the nature of the evidence or issues requires an inordinate amount of preparation or trial time. The case complexity exception is sufficiently flexible to account for changes in the average complexity of criminal trials caused by jurisprudential, legislative, and technological developments in the 10 years since Jordan.

The case complexity analysis comprises two stages. At the threshold stage, the Crown must prove two elements: (1) that the case is particularly complex such that delay beyond the ceiling is *prima facie* justifiable; and (2) that the Crown took reasonable steps to proactively mitigate the delay occasioned by the case's particular complexity. The analysis under the first element is focused on the case as a whole. Judges should consider if several, non-exhaustive hallmarks of complexity such as voluminous disclosure; a large number of charges, pre-trial applications, or motions; or joint proceedings against multiple co-accused are present. These hallmarks can indicate particular complexity only where they increase the amount of time required to bring a case to trial.

Where the first element is satisfied, a court must then ask whether the Crown took steps to proactively mitigate delay, such as by assigning sufficient resources to the prosecution, devoting adequate time to disclosure management, promptly resorting to case management to streamline the proceedings, and, where appropriate, organizing the co-accused into tailored prosecution groups. A court must consider all relevant circumstances, including the reasonableness of the defence's conduct in cooperating to advance the case in a reasonable time, as the Jordan framework relies on cooperation from the various actors in the criminal justice system to ensure that the shared goal of timely justice is achieved. Where the Crown's implementation of its plan to mitigate delay has failed, an application judge must inquire as to why. Where defence action or inaction has frustrated the Crown's efforts, the Crown may be capable of establishing the element of proactive mitigation notwithstanding its failure to successfully implement its plan.

If the threshold stage is met, the application judge proceeds to the justification stage and considers whether the net delay is justified in light of the complexity of the case by focusing on the specific amount of delay and the degree of complexity. Judges should avoid unduly emphasizing the actual amount of net delay over the ceiling as a case could be complex enough

to justify some delay over the ceiling but not the actual net delay where it is particularly long. Where the complexity of a case, wherever it has proceeded, justifies the amount of time it took from start to finish, delay over the Jordan ceiling is not unreasonable and s. 11(b) is not breached. This approach ensures that the case complexity analysis remains logically consonant with the rationale for the discrete ceilings in provincial and superior courts and remains responsive to developments in the law since Jordan .

The clarified test for case complexity under the Jordan framework is flexible enough to address the troubling number of criminal proceedings resulting in stays without incorporating into it a residual discretion for judges to decline to find a s. 11(b) breach even where net delay exceeds the ceiling. Such a discretion is inconsistent with Jordan , as it would restore a flexible interest-balancing test that would undo Jordan 's bright-line approach. It is also unnecessary, given the considerable latitude that judges already have to expedite proceedings using their case management powers.

In the instant case, the application judge made two errors justifying appellate intervention. He made an extricable error in principle in assessing the second element of the threshold stage, because he failed to engage with the reasonableness of the Crown's conduct in all the circumstances. This error was compounded by a calculation error he made in determining the amount of net delay. Considered afresh, the net delay was justified by the complexity of the case. First, the co-accused's prosecution was particularly complex. The voluminous disclosure, multiplicity of pre-trial proceedings, and joint nature of the prosecution are all hallmarks of complexity that can satisfy the first element of the threshold stage of the analysis. Second, the Crown took reasonable steps to proactively mitigate delay: it sought case management, and split the accused into prosecution groups, aiming to proceed as quickly as possible with cases that did not depend on the outcome of the group Garofoli application. Although the Crown's implemented plan failed to provide the co-accused with trial dates within the Jordan ceiling, this was at least partially attributable to defence counsel's failure to cooperate reasonably with Crown efforts to mitigate delay. Therefore, the Crown's mistake did not undermine the reasonableness of its efforts and the threshold is met. At the justification stage, the degree of complexity clearly reasonably justified the amount of net delay of 18 months and four days.

Per Rowe J.: There is agreement with the majority's disposition and its clarification of the framework for the application of the particularly complex case exception. However, in light of shortcomings now evident in the Jordan framework, it should be developed to provide judges with a residual discretion to determine whether, in all circumstances, the delay is unreasonable. Affording judges this discretion would address the disconnect between the promise of s. 11(b) of the Charter — that criminal charges will be tried on their merits within a reasonable time — and the proliferation of stays that has taken place since Jordan was decided.

Jordan has not kept up with the contemporary realities of criminal prosecutions: a significant proportion of serious charges are now being stayed. Legislative and jurisprudential developments in criminal procedure and evidence law have resulted in longer and more complex trials that are not fully captured by the exception in Jordan for complex cases. Trials take longer

because Parliament and the courts have caused them to take longer. While all parties bear responsibility for ensuring cases proceed in a reasonable time, courts must also be realistic about the conduct of criminal litigation. There is an inevitable tension between defence counsel's duty to their client and the expectation that the defence will facilitate bringing the prosecution to trial. To ensure that Jordan remains responsive to the realities of criminal prosecution, its framework should be modified to recognize a residual discretion for judges to consider whether delay is unreasonable in all the circumstances. Including a residual discretion that is exercised with proper regard to all of the interests underlying s. 11(b), namely those of the accused persons, victims and the broader public, would restore a necessary balance to the analysis and reinforce public confidence in the system.

A judge's residual discretion to determine whether delay is unreasonable in all the circumstances should include three considerations: (1) the seriousness of the charges, (2) the quantifiability and predictability of the delay when key decisions were made by the Crown and defence, and (3) the extent of the delay over the presumptive ceiling. The first consideration has a role to play because the public gives significant weight to the seriousness of charges when it assesses the effectiveness of the criminal justice system; experience has shown that such charges often do not satisfy the threshold for case complexity; and judges should be permitted to consider this factor when a case in which the Crown has conducted itself reasonably nonetheless risks being stayed. Regarding the second consideration, judges should take account of what was known to the parties when key decisions were made and the extent to which they could have predicted the delay resulting from those choices. Public confidence in the system depends on the belief that it functions fairly to all parties and that it does not reward those who seek to game the system. Finally, the extent of the delay over the presumptive ceiling should be weighed against the seriousness of the charges and the conduct of the parties. Cases involving serious charges where the parties have conducted themselves appropriately and could not have reasonably anticipated the extent to which their decisions would contribute to delay may not be held to be unreasonably delayed if the time over the ceiling is relatively short. This residual discretion would not be absolute. These considerations must always be balanced against the accused's primary interest in trial within a reasonable time. Their effect is cumulative — no single consideration can overwhelm the analysis to justify presumptively unreasonable delay.

Cases Cited

By Wagner C.J.

Applied: *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631; considered: *R. v. Ivarone*, 2023 ONCJ 69, 523 C.R.R. (2d) 262; referred to: *R. v. Garofoli*, [1990] 2 S.C.R. 1421; *R. v. Morin*, [1992] 1 S.C.R. 771; *R. v. K.G.K.*, 2020 SCC 7, [2020] 1 S.C.R. 364; *R. v. Varennes*, 2025 SCC 22; *R. v. Jacques-Taylor*, 2026 SCC 20; *R. v. Cody*, 2017 SCC 31, [2017] 1 S.C.R. 659; *R. v. Marakah*, 2017 SCC 59, [2017] 2 S.C.R. 608; *R. v. Bykovets*, 2024 SCC 6; *R. v. Kinamore*, 2025 SCC 19; *R. v. Lopez-Restrepo*, 2018 ONCA 887, 369 C.C.C. (3d) 56; *R. v. Picard*, 2017 ONCA 692, 354 C.C.C. (3d) 212; *R. v. Chan*, 2019 ABCA 82, 82 Alta. L.R. (6th) 1; *R. v. Wookey*, 2021 ONCA 68, 154 O.R. (3d) 145; *R. v. Manasseri*, 2016 ONCA 703, 132 O.R. (3d) 401; *Groia v. Law Society of Upper Canada*, 2018 SCC

27, [2018] 1 S.C.R. 772; R. v. Fraser , 2022 ONCJ 580; Lapointe v. R. , 2019 QCCQ 3099; R. v. Martell , 2022 QCCQ 9333; R. v. Oakes , [1986] 1 S.C.R. 103; R. v. Grant , 2009 SCC 32, [2009] 2 S.C.R. 353; R. v. Haevischer , 2023 SCC 11, [2023] 1 S.C.R. 416; R. v. J.J. , 2022 SCC 28 , [2022] 2 S.C.R. 3 ; R. v. Rahey , [1987] 1 S.C.R. 588; Auer v. Auer , 2024 SCC 36; R. v. Pauls , 2020 ONCA 220, 453 D.L.R. (4th) 193 , aff'd R. v. Yusuf , 2021 SCC 2, [2021] 1 S.C.R. 5; Housen v. Nikolaisen , 2002 SCC 33, [2002] 2 S.C.R. 235.

By Rowe J.

Considered: R. v. Jordan , 2016 SCC 27, [2016] 1 S.C.R. 631; referred to: R. v. Morin , [1992] 1 S.C.R. 771; R. v. Askov , [1990] 2 S.C.R. 1199; R. v. Agpoon , 2023 ONCA 449, 167 O.R. (3d) 721; R. v. Kovacs , 2025 ONCA 49, 175 O.R. (3d) 401; R. v. LeRoy , 2024 NSCA 30, 555 C.R.R. (2d) 1; R. v. Loiacono , 2023 ABCA 157; R. v. D'Souza , 2024 ABCA 77, 554 C.R.R. (2d) 201; R. v. Gardener , 2023 SKCA 12 ; R. v. Swanson , 2017 ONSC 710; R. v. Stelwagen , 2023 ONSC 1938, 525 C.R.R. (2d) 344, rev'd 2024 ONCA 794, 443 C.C.C. (3d) 439; R. v. Middleton , 2017 BCPC 67; Mills v. The Queen , [1986] 1 S.C.R. 863; R. v. Rahey , [1987] 1 S.C.R. 588; R. v. Conway , [1989] 1 S.C.R. 1659; R. v. Smith , [1989] 2 S.C.R. 1120; R. v. Godin , 2009 SCC 26, [2009] 2 S.C.R. 3 ; R. v. Kirkpatrick , 2022 SCC 33, [2022] 2 S.C.R. 480; Reference re Same-Sex Marriage , 2004 SCC 79, [2004] 3 S.C.R. 698; Reference re Employment Insurance Act (Can.), ss. 22 and 23 , 2005 SCC 56, [2005] 2 S.C.R. 669; R. v. Comeau , 2018 SCC 15, [2018] 1 S.C.R. 342; Reference re Code of Civil Procedure (Que.), art. 35 , 2021 SCC 27, [2021] 2 S.C.R. 291 ; R. v. Jones , 2017 SCC 60, [2017] 2 S.C.R. 696; R. v. Labelle , 2019 ONCA 557, 379 C.C.C. (3d) 270; R. v. Marakah , 2017 SCC 59, [2017] 2 S.C.R. 608; R. v. Reeves , 2018 SCC 56, [2018] 3 S.C.R. 531; R. v. Bykovets , 2024 SCC 6; R. v. Brunelle , 2024 SCC 3; R. v. D . (K.) , 2025 ONCA 639, 178 O.R. (3d) 721; R. v. Vallotton , 2024 ONCA 492; R. v. Bowden-Wright , 2024 ONSC 293, 545 C.R.R. (2d) 237; R. v. C.A. , 2024 ONSC 1603, 553 C.R.R. (2d) 78; R. v. Oliver , 2025 ONSC 5026; R. v. Neil , 2002 SCC 70, [2002] 3 S.C.R. 631; Boucher v. The Queen , [1955] S.C.R. 16.

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APPEAL from a judgment of the Ontario Court of Appeal (Roberts, Copeland and Dawe JJ.A.), 2025 ONCA 151 , 445 C.C.C. (3d) 430, 573 C.R.R. (2d) 197, [2025] O.J. No. 853 (Lexis), 2025 CarswellOnt 2406 (WL), affirming the stay of proceedings entered by Leitch J. Appeal allowed.

Jennifer Conroy and Ian Bell , for the appellant.

Jeff Marshman , Daniel Goldbloom and Alexa Klein , for the respondents.

Jeremy Tatum , Akshay Aurora and Philippe Cowle , for the intervener Attorney General of Ontario.

Sylvain Leboeuf and François Hénault , for the intervener Attorney General of Quebec.

Joel N. Myskiw and Michael Bodner , for the intervener Attorney General of Manitoba.

Lesley Ruzicka , K.C. , and Mark Sheardown , for the intervener Attorney General of British Columbia.

Xavier Lyonnais and Daphné Godin-Garito , for intervener the Director of Criminal and Penal Prosecutions.

Caitlin Ohama-Darcus and Abbey Fortin , for the intervener Battered Women’s Support Services Association.

Elaine Ahn , for the intervener Canadian Association of Chiefs of Police.

Frank Addario and Nikolas De Stefano , for the intervener Criminal Lawyers’ Association (Ontario).

The reasons for judgment of Wagner C.J. and Karakatsanis, Côté, Martin, Kasirer, Jamal, O’Bonsawin and Moreau JJ. were delivered by

The Chief Justice —

I. Introduction

[1] In the decade since this Court rendered its decision in *R. v. Jordan* , 2016 SCC 27, [2016] 1 S.C.R. 631, the principles it expounded have not diminished in salience. Timely justice continues to be a hallmark of a free and democratic society. An efficient criminal justice system remains of the utmost importance. And the public and private interests engaged by the state’s ability to bring accused persons to trial within a reasonable time are no less significant.

[2] Before this Court, the Crown notes, with great concern, the number of proceedings that have been stayed under the Jordan framework. In particular, the Crown points to the stay of proceedings ordered in this case, where the net delay exceeded the Jordan ceiling by just four days. The Crown urges us to change the law by equipping judges with a residual discretion in order to avoid finding a violation of s. 11(b) of the Canadian Charter of Rights and Freedoms in such close cases.

[3] In my view, the Jordan framework already provides the flexibility necessary to address the Crown's concerns. To the extent that jurisprudential and legislative developments in the past decade have increased the complexity of criminal trials, the Jordan framework can comfortably respond.

[4] This is not an appropriate case in which to consider more fundamental changes to the Jordan ceilings or to revisit the remedy for a breach of s. 11(b) of the Charter . Instead, this appeal offers this Court an opportunity to clarify how the exceptional circumstance of particular complexity can justify delay in excess of a Jordan ceiling. A proper application of Jordan 's case complexity exception to the facts of this case demonstrates that the respondents' right to trial within a reasonable time was not violated. This is why, at the hearing of this matter, we unanimously allowed the Crown's appeal, set aside the stay, and remitted the matter back for trial, with reasons to follow.

[5] These are those reasons.

II. Background

[6] The co-accused respondents, Robert Vrbanic and Sarah Josipovic, were charged with several offences in relation to a drug trafficking operation. Eighteen individuals were ultimately charged in connection with this operation, as part of a "project prosecution". The prosecution arose out of a major investigative project that lasted more than two years. The project generated around 68 gigabytes of electronic disclosure, including more than 10,000 audio intercepts, 1,000 surveillance reports, and 2,200 surveillance photos and videos, along with other materials.

[7] The respondents were arrested on August 27, 2021, and the information was sworn on September 27, 2021. At the outset of the prosecution, the Crown sought case management. The application judge in the respondents' case was the case management judge for all of the cases arising from the project prosecution.

[8] The Crown divided the charges laid against 18 individuals into 10 prosecution groups, with some individuals included in more than one group. Mr. Vrbanic was part of two of these groups, group 5 and group 8, while Ms. Josipovic was part of group 5. The individuals in group 8, including Mr. Vrbanic, intended to participate in a group Garofoli application (R. v. Garofoli , [1990] 2 S.C.R. 1421). However, neither of the respondents intended to participate in the application with respect to the group 5 charges.

[9] Between January 12 and April 8, 2022, the application judge held several pre-trial case management conferences. The discussions at the April 8 conference centred around the scheduling of the group Garofoli application. At the conference, counsel for several of the co-accused indicated that they did not intend to participate in or rely on the application. The respondents' counsel gave no indication as to whether their clients intended to participate in the group Garofoli application for the purposes of the group 5 charges.

[10] The Crown provided the individuals participating in the Garofoli application with trial dates that were past the 18-month Jordan ceiling for trials in provincial court. The individuals who were not participating in the Garofoli application were given trial dates below the ceiling.

[11] In the mistaken belief that the respondents intended to participate in the Garofoli application with respect to the group 5 charges, the Crown provided them with trial dates past the 18-month ceiling. The respondents' counsel did not raise concerns about the assignment of the later trial dates and simply indicated on the record that they had accepted the earliest dates offered.

[12] The respondents applied for a stay of proceedings on the basis that the delay violated their right to be tried within a reasonable time under s. 11(b) of the Charter .

III. Judgments Below

A. Ontario Court of Justice (Leitch J.)

[13] The application judge concluded that the respondents' s. 11(b) Charter rights had been violated and entered a stay of proceedings on their charges as part of the group 5 prosecution. The application judge calculated 22 months of total delay. The parties agree that this number resulted from a miscalculation by trial Crown counsel. The correct total delay was 21 months and four days. The application judge then reduced the delay by three months to account for the COVID-19 pandemic as a discrete exceptional circumstance.

[14] The application judge next turned to the question of case complexity. He distinguished the respondents' case from *R. v. Ivarone* , 2023 ONCJ 69, 523 C.R.R. (2d) 262, which concerned a s. 11(b) application brought by an individual in group 1 of the same project prosecution. In *Ivarone* , the same application judge concluded that the case was "particularly complex" because it arose from a large-scale investigation that had generated significant disclosure and involved numerous individuals bringing interrelated and complicated pre-trial applications. Notably, Mr. Ivarone intended to rely on the outcome of the group Garofoli application.

[15] In the respondents' case, the application judge held that there was no evidence that the respondents intended to rely on the group Garofoli application. Without the interconnection of the pre-trial applications that existed in *Ivarone* , the application judge stated that he could not find that the respondents' case was particularly complex. Because the Crown had not met its burden of demonstrating exceptional circumstances, the application judge held that the delay was not justified.

B. Court of Appeal for Ontario, 2025 ONCA 151, 445 C.C.C. (3d) 430 (Roberts, Copeland and Dawe JJ.A.)

[16] The Crown appealed and argued that the application judge had erred by failing to consider the complexity of the project prosecution as a whole and focusing instead on the respondents' non-participation in the Garofoli application as dispositive of the s. 11(b) application. In the Crown's view, when considered as a whole, the project prosecution was of considerable complexity, and the Crown had appropriately managed the prosecution to mitigate delay. Moreover, to the extent that Crown counsel were mistaken in their belief that the scheduling of the respondents' trial was dependent upon the group Garofoli application, this mistake was reasonable and should have been viewed as an isolated misstep.

(1) Majority Reasons (Copeland and Dawe JJ.A.)

[17] A majority of the Court of Appeal dismissed the Crown's appeal. First, the majority found that the application judge's assessment of whether the case was particularly complex was free from error and entitled to deference. In the majority's view, the application judge did not fail to consider the case as a whole. The majority also rejected the Crown's submission that the application judge erred in not considering whether the Crown's mistake about the scheduling of the respondents' trial could justify the delay, because this argument had not been raised before the application judge.

[18] Finally, the majority held that the application judge's error in calculating the total delay, by counting from the date of arrest rather than the date the information was sworn, did not affect the outcome of the s. 11(b) application. On a correct calculation, the net delay was only four days over the 18-month ceiling. However, because the application judge held that the respondents' case was not "particularly complex", his calculation error did not affect his conclusion that the delay was unreasonable.

(2) Dissenting Reasons (Roberts J.A.)

[19] Justice Roberts would have allowed the appeal, set aside the stay of proceedings, and remitted the matter back for trial. In her view, the application judge's failure to account for the continued interrelationship between the Garofoli application and the respondents' trial amounted to an error. Further, Roberts J.A. held that the application judge erred in failing to inquire as to the reason for the Crown's mistake in the scheduling of the respondents' trial. In her view, the application judge was required to make this inquiry regardless of whether this argument was put to him specifically. Justice Roberts held that the Crown's mistaken belief that the Garofoli application affected the scheduling of the respondents' trial was reasonable given the size and complexity of the prosecution. In her view, the four-day delay arising out of the complexity of the case was reasonable.

IV. Issue on Appeal

[20] This appeal raises one main issue: Did the application judge misapply the governing principles on s. 11(b) of the Charter by failing to properly assess case complexity?

V. Analysis

A. Principles Underlying the Jordan Framework

[21] This Court's decision in *Jordan* responded to the "culture of complacency" toward delay within the criminal justice system (para. 4). For decades, courts had been applying a multifactorial balancing test to address s. 11(b) claims, as synthesized in *R. v. Morin*, [1992] 1 S.C.R. 771. That balancing test was not working. It was "highly unpredictable", because it permitted "endless flexibility" that made it "difficult to determine whether a breach ha[d] occurred" (*Jordan*, at para. 32). It had "turned s. 11(b) into something of a dice roll" and "led to the proliferation of lengthy and often complex s. 11(b) applications, thereby further burdening the system" (para. 32).

[22] And because *Morin* analyzed delay only after it occurred, that framework was "designed not to prevent delay, but only to redress (or not redress) it" (*Jordan*, at para. 35). That retrospective orientation encouraged parties "to quibble over rationalizations for vast periods of pre-trial delay", and those competing explanations licensed "potentially limitless variations in permissible delay" (para. 36). The *Morin* framework was also unduly complex, requiring careful accounting that *Jordan* described as "the bane of every trial judge's existence" (para. 37). It fostered a "culture of complacency" toward delay, inviting parties to condemn or rationalize it at the back end (paras. 40-41). In short, because of its complexity and unpredictability, the *Morin* framework had, itself, become an obstacle to timely justice (para. 3).

[23] *Jordan* aimed to create structural incentives for all actors within the justice system to ensure that trials were held within a reasonable time. The presumptive ceilings put in place in *Jordan* were intended to enhance the "clarity and predictability" of the s. 11(b) analysis, encourage proactive efforts to mitigate delay from all actors within the criminal justice system, and ensure transparency and accountability to the public (para. 108).

[24] As *Jordan* made clear, these ceilings were never meant to be aspirational targets (para. 56). They are hard limits on the reasonable length of trials. Where the time between the laying of the charge and the actual or anticipated end of the trial exceeds the ceiling set out in *Jordan*, the burden falls on the Crown to justify the delay. Presumptively, such delay is unreasonable and unconstitutional.

[25] The ceilings are high. The 30 months allowed for trials in superior court is the better part of three years. That represents nearly three years of uncertainty for the accused, who is presumed innocent, waiting for the conclusion of the trial process while potentially in detention or under onerous bail conditions. It also represents nearly three years for the victim and their loved ones, during which time they are often unable to move forward with their lives. Even the 18-month

ceiling applying to trials in provincial court represents a long time to wait for justice. The ceilings include neither verdict deliberation time nor the sentencing process, both of which are subject to their own s. 11(b) analyses (Jordan , at para. 47; see also R. v. K.G.K. , 2020 SCC 7, [2020] 1 S.C.R. 364).

[26] Ultimately, the onus rests on actors within the system who have access to the levers of structural power to make the changes necessary to combat systemic delay. This Court, and the courts in general, have an important role to play in avoiding unconstitutional delay and the staying of potentially meritorious criminal proceedings (Jordan , at paras. 114-15; see also R. v. Varennes , 2025 SCC 22, at paras. 82 and 143). Parliament and the provincial legislatures, too, have their part to play in ensuring that Crown offices and courts are adequately funded to provide the human and material resources needed to advance criminal trials in a timely fashion.

[27] Jordan was clear that timely justice is a shared responsibility. The Charter protects the accused's right to be tried within a reasonable time. It does not entitle the accused to a stay of proceedings. The goal for defence counsel, as for all other actors within the criminal justice system, must be to seek the timely resolution of criminal proceedings in a just manner. Like the courts, the legislatures, and the Crown, the criminal defence bar has a responsibility to combat the culture of complacency and collaborate in good faith with a view to the shared goal of securing justice within a reasonable time.

[28] In a world of finite resources, the Jordan framework constitutes a compromise. It reflects the unavoidable reality that criminal trials take longer in practice than everyone might wish. It balances the public's interest in seeing criminal trials brought to their proper conclusion on the merits against the constitutional right of accused persons to be tried within a reasonable time.

[29] To achieve this balance, the Jordan ceilings account for two interrelated factors: institutional delay and the inherent time requirements for bringing a case to trial (paras. 52-53). The Jordan ceilings are hard limits on the amount of institutional delay that can be tolerated under the Charter (para. 56). This is why institutional delay cannot justify delay beyond the ceilings (para. 81). Only exceptional circumstances outside the control of the Crown and the state that go to the inherent time requirements for bringing a matter to trial can justify delay beyond the ceilings.

B. The Jordan Framework

[30] The Jordan framework is straightforward. Delay will be presumptively unreasonable where the time between the laying of the charge and the actual or anticipated end of the trial exceeds 18 months for trials in provincial court or 30 months for trials in superior court (or trials in provincial court following a preliminary inquiry) (Jordan , at para. 49).

[31] The accused's s. 11(b) right is held against the state; where the defence has caused or condoned delay, the right is not engaged. As a result, Jordan requires that delay caused or waived by the defence be subtracted from the total (paras. 60-67). As Jordan makes clear, defence delay does not include time taken up by legitimate defence actions. This kind of delay is already accounted for by the Jordan ceilings and must not be "double counted" by subtracting it as defence delay (see para. 65).

[32] Once defence delay has been identified and subtracted, any net delay in excess of the relevant ceiling will be presumptively unreasonable and so engage the accused's s. 11(b) right. At this point, the justificatory burden shifts to the Crown. Only exceptional circumstances can justify net delay above the ceiling, because the Jordan framework already makes maximum allowance for chronic institutional delay and for the amount of time it reasonably takes to conduct the ordinary criminal trial.

[33] Jordan makes it clear that the seriousness of the offence cannot justify delay beyond the ceiling; nor can any lack of prejudice to the accused (para. 81). Unless the delay is reasonable in light of case-specific exceptional circumstances, there will be a breach of the accused's s. 11(b) right every time net delay exceeds the Jordan ceiling.

[34] Jordan did not set out a comprehensive or exhaustive account of exceptional circumstances (para. 71). The justification for net delay over the relevant ceiling is a matter to be assessed on the facts of each particular case, and judges seized of s. 11(b) applications are uniquely positioned and qualified to assess whether delay in a given set of circumstances is reasonable. However, this Court in Jordan described two broad categories of exceptional circumstances that will generally encompass the kinds of considerations capable of justifying net delay over the ceiling. A detailed discussion of the first category, discrete exceptional circumstances, can be found in this Court's decision in *R. v. Jacques-Taylor*, 2026 SCC 20, released contemporaneously with these reasons. The second category of exceptional circumstances is case complexity.

[35] Before moving on to review case complexity — the principal issue in this appeal — it is important to note that the Jordan framework does not foreclose a finding that s. 11(b) has been breached even where the net delay, once all justifiable subtractions have been made, does not exceed the ceiling. However, this will be possible only where the defence can establish a clear case of unreasonable delay (see Jordan, at paras. 82-91).

C. Case Complexity Under Jordan

[36] The case complexity exception recognizes that certain cases, because of their inherent time requirements, cannot reasonably be completed within the presumptive ceilings. The exception applies to cases that are "particularly complex" because the nature of the evidence or issues requires an inordinate amount of preparation or trial time (Jordan, at para. 77). However, the exception will not apply where the Crown has failed to develop and follow a concrete plan to minimize delay associated with a case's complexity (para. 79).

[37] Case complexity involves a qualitative rather than a quantitative assessment; it does not result in the deduction of any specific period of delay (R. v. Cody , 2017 SCC 31, [2017] 1 S.C.R. 659, at para. 64). Where net delay exceeds the relevant presumptive ceiling after defence delay and any discrete exceptional circumstances have been accounted for, a case's particular complexity may justify the time it has taken.

[38] The case complexity exception is sufficiently flexible to account for changes in the average complexity of criminal trials. In *Jordan* , this Court referenced the “[n]ew offences, procedures, obligations on the Crown and police, and legal tests” that had emerged since *Morin* , remarking that these developments required additional court time and resources (para. 42). The same point can be made about the jurisprudential, legislative, and technological developments, canvassed below, that have occurred in the 10 years since this Court decided *Jordan* . Given the impact of these developments, it is worth clarifying the case complexity exception. These clarifications will elaborate the structure of the analysis and refine our guidance about the types of cases that will meet the “particularly complex” threshold.

[39] The case complexity analysis comprises two stages. At the threshold stage , a court considers whether the Crown is entitled to rely on complexity as a justification for delay in excess of the ceiling. At this stage, a court determines whether a case is particularly complex, such that delay beyond the ceiling is *prima facie* justifiable, and whether the Crown has taken reasonable steps to mitigate delay. Only where both questions are answered in the affirmative will the analysis proceed to the second stage. At the justification stage , a court considers whether the net delay is justified in light of the complexity of the case.

(1) Threshold Stage: Is There Particular Complexity, and Has It Been Reasonably Managed by the Crown?

[40] The Crown must prove two elements at the threshold stage: (1) that the case is particularly complex; and (2) that the Crown has taken reasonable steps to proactively mitigate the delay occasioned by the case's particular complexity (*Jordan* , at paras. 77 and 79). Recall that case complexity is an exceptional circumstance that must lie outside of the Crown's control. *Jordan* makes it clear that cases of ordinary complexity are not exceptional and thus cannot justify delay over the relevant ceiling. Similarly, where the Crown has not reasonably and proactively mitigated delay, complexity is no excuse for exceeding the *Jordan* ceiling (para. 79).

(a) Is the Case Particularly Complex?

[41] Only a case of “inordinate” or “exceptional” complexity can justify exceeding the ceiling. This is because the *Jordan* framework accounts for the inherent time requirements of the ordinary criminal trial. For this reason, a particularly complex case is one that, because of the nature of the evidence or the issues, required or can reasonably be expected to require an inordinate or exceptional amount of preparation or trial time (see *Jordan* , at para. 77).

[42] Such particularly complex cases will not necessarily be rare (Jordan , at para. 69). Since Jordan was decided in 2016, criminal trials and pre-trial procedures have increased in complexity as a result of jurisprudential and legislative developments. For example, the recognition that an accused may have a reasonable expectation of privacy in their text messages and IP address has resulted in a greater need for judicial authorizations and in additional applications under s. 8 of the Charter (see R. v. Marakah , 2017 SCC 59, [2017] 2 S.C.R. 608; R. v. Bykovets , 2024 SCC 6). Similarly, this Court has recently recognized the increasing complexity of sexual offence trials (R. v. Kinamore , 2025 SCC 19, at para. 1). The Crown and several interveners also point to mounting reliance on electronic evidence in criminal proceedings, which increases the time required to prepare disclosure and can raise complex questions of admissibility either before or during trial.

[43] Legislative developments have also led to greater complexity. These include the 2018 amendments to the Criminal Code , R.S.C. 1985, c. C-46, that created additional procedures and criteria governing the admission of a complainant's records (An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act , S.C. 2018, c. 29). Applications concerning such proceedings are increasingly frequent and contribute to the complexity of many otherwise ordinary sexual offence prosecutions.

[44] In light of these developments, more cases may be capable of engaging the case complexity exception.

[45] Jordan instructs application judges to consider the nature of the evidence and the issues involved when assessing whether a case is particularly complex (para. 77). Judges should consider several, non-exhaustive hallmarks of complexity at this stage of the analysis:

- voluminous disclosure;
- large number of witnesses;
- significant requirements for expert evidence;
- charges covering a long period of time;
- large number of charges;
- large number of pre-trial applications or motions requiring separate court dates and/or judicial reasons;
- novel or complex legal issues;
- large number of significant issues in dispute;
- joint proceedings against multiple co-accused.

[46] This is not a closed list. Application judges are well placed to recognize other features of a case that may render it particularly complex. Further, the features listed above can indicate particular complexity, but will not reach the threshold every time one or more are present in a

particular case. Importantly, these features indicate complexity only where they increased or can be expected to increase the amount of time required to bring a case to trial. Without a demonstrable connection to the inherent time requirements of a case, these hallmarks of complexity cannot render a case particularly complex.

[47] These hallmarks of complexity must be considered in the context of the case as a whole, from the initial laying of charges to the actual or anticipated end of the trial (*R. v. Lopez-Restrepo* , 2018 ONCA 887, 369 C.C.C. (3d) 56, at para. 37). A case may not be factually or legally complicated but may still meet the “particularly complex” threshold where it involves a multiplicity of pre-trial proceedings or numerous co-accused.

[48] Similarly, complexity can arise from any stage of a prosecution — whether it be the process of marshalling disclosure, preparing for and conducting pre-trial motions and applications, or the trial itself, which may involve voir dres or other subsidiary proceedings. Equally true, complexity need not arise from all stages of the prosecution. Indeed, it is common for major cases to decrease in complexity by the time they reach trial, as disclosure is completed and issues are narrowed or resolved. As the Ontario Court of Appeal observed in *R. v. Picard* , 2017 ONCA 692, 354 C.C.C. (3d) 212:

A case can be complex in the earlier stages and require extensive disclosure, the compiling of expert evidence and numerous witness statements, only to be made simpler and more straightforward when it comes time for trial. . . . These kinds of complexity in the early stages may result in inevitable delays due to extensive disclosure, a lengthy preliminary inquiry and so on, although the case is simple by the time of trial. [para. 62]

In this sense, complexity at the outset of a prosecution may be sufficient to render a case particularly complex, even where the case becomes more streamlined as it approaches trial (*R. v. Chan* , 2019 ABCA 82, 82 Alta. L.R. (6th) 1, at para. 29).

[49] In *Jordan* , this Court explained that a “typical murder trial” will generally not meet the “particularly complex” threshold (para. 78). This recognizes two important points: first, the *Jordan* ceilings account for the time it takes to bring an “ordinary” case to trial; and, second, the seriousness of the offence cannot in itself establish case complexity (para. 81). For example, many sexual assault trials involve applications under s. 276 or s. 278.92 of the Criminal Code . The fact that a trial involves such applications will not ordinarily render the case particularly complex. However, where the nature of the evidence or the issues involved in the application requires an inordinate amount of preparation or hearing time, an application under the s. 276 or s. 278.92 regimes might meet the threshold of particular complexity. Similarly, a case raising new or expanded privacy issues under s. 8 of the Charter that require several pre-trial applications (like *Garofoli* applications) or voir dres may, though will not always, meet the threshold of particular complexity.

[50] Of particular relevance to the facts of this case, complexity is frequently invoked where the Crown initiates a project prosecution following an expansive investigation, involving considerable disclosure and numerous co-accused. Given the “sheer size” of many of these cases,

and the increased time they take to organize and advance, a case that forms part of a project prosecution may be capable of meeting the threshold of particular complexity even where other features of the case, considered in isolation, would not meet the threshold (C. de Sa, “Understanding R. v. Jordan : A New Era for s. 11(b)” (2018), 66 Crim. L.Q. 92, at p. 97).

[51] Ultimately, as this Court observed in *Jordan* , the question of whether a case is particularly complex is one falling within an application judge’s expertise (para. 79). In light of their experience, application judges are well suited to evaluate whether the features of a case render it “inordinately” or “particularly” complex, in line with the guidance provided above. As I have explained, the hallmarks of complexity are not checkboxes that, once ticked, automatically indicate particular complexity. Case complexity is never presumed; like any exceptional circumstance, the Crown must establish complexity in each individual case (*Jordan* , at para. 68).

[52] In summary, the Crown must demonstrate that a case is particularly complex to satisfy the first element of the threshold stage . The analysis is focused on the case as a whole and looks at whether any of the aforementioned hallmarks of complexity are present. Where a court is not satisfied that a case is particularly complex, the analysis ends there. Conversely, where a court is satisfied that a case is particularly complex, it must then ask whether the Crown has taken reasonable steps to proactively mitigate delay.

(b) Has the Crown Proactively Mitigated the Delay Occasioned by Complexity?

[53] The second element of the threshold analysis will be satisfied where the Crown has taken reasonable steps to proactively mitigate delay. As this Court explained in *Jordan* , an application judge will need to

consider whether the Crown, having initiated what could reasonably be expected to be a complex prosecution, developed and followed a concrete plan to minimize the delay occasioned by such complexity (*R. v. Auclair* , 2014 SCC 6, [2014] 1 S.C.R. 83, at para. 2). Where it has failed to do so, the Crown will not be able to show exceptional circumstances, because it will not be able to show that the circumstances were outside its control. [para. 79]

(See also *Cody* , at paras. 63-64.)

Reactive steps to minimize delay will not, on their own, suffice (*R. v. Wookey* , 2021 ONCA 68, 154 O.R. (3d) 145, at para. 98).

[54] The Crown is held to a standard of reasonableness, not perfection. However, upon initiating what could reasonably be expected to be a complex prosecution, the Crown must ensure, for example, that it has assigned sufficient resources to the prosecution, devoted adequate time to disclosure management, promptly resorted to case management processes to streamline the proceedings, and, where appropriate, organized the co-accused into tailored prosecution groups (*R. v. Manasseri* , 2016 ONCA 703, 132 O.R. (3d) 401, at para. 308).

[55] Ultimately, an application judge must consider all relevant circumstances when assessing whether the Crown has met its obligation to take reasonable steps to proactively mitigate delay. These circumstances include not only the Crown's conduct in taking steps to proactively mitigate delay, but also the reasonableness of the defence's conduct in cooperating to advance the case in a reasonable time.

[56] The Jordan framework relies on cooperation from the various actors in the criminal justice system to ensure that the shared goal of timely justice is achieved (paras. 5, 41, 45, 116 and 137). The accused is entitled to trial within a reasonable time; the goal of all justice system participants, including defence counsel, must be to facilitate the vindication of this right. As Jordan makes clear, s. 11(b) of the Charter is not "intended to be a sword to frustrate the ends of justice" (para. 21, citing Morin , at pp. 801-2). The defence is well within its rights to avail itself of all legitimate strategic advantages available at law (Jordan , at para. 65). Defence counsel must zealously advocate for their client's interests while holding the Crown to its burden of proof (Groia v. Law Society of Upper Canada , 2018 SCC 27, [2018] 1 S.C.R. 772). At the same time, defence counsel are officers of the courts and are expected to cooperate with good faith efforts by the Crown and the courts to proceed expeditiously to trial on the merits. In some cases, defence action or inaction that frustrates the Crown's efforts to proactively minimize the delay occasioned by complexity may warrant counting ensuing delay as defence delay. But even where defence action or inaction does not rise to this level, it nevertheless bears on the reasonableness of the Crown's efforts to mitigate delay.

[57] Where the Crown's implementation of its plan to mitigate delay has failed, an application judge must inquire as to why and determine whether the failure stems from unreasonableness on the part of the Crown or from other causes, including a failure by defence counsel to reasonably facilitate the Crown's efforts. Where defence action or inaction has frustrated the Crown's reasonable efforts, the Crown may be capable of establishing the element of proactive mitigation notwithstanding its failure to successfully implement its plan.

(2) Justification Stage: Does the Case's Complexity Justify the Delay?

[58] If the threshold stage is met — that is, if the case is particularly complex and the Crown has taken reasonable proactive measures to mitigate delay — the analysis proceeds to the second stage. At this stage, the application judge considers whether the net delay is justified in light of the complexity of the case. While the threshold stage is binary — the case either is or is not particularly complex and either has or has not been reasonably managed by Crown — this stage of the analysis focuses on the specific amount of delay and the degree of complexity. A case could be complex enough to justify some delay over the ceiling but insufficiently complex to justify the actual net delay where it is particularly long.

[59] This is a reasonableness analysis well within the experience of an application judge. Judges should avoid unduly emphasizing the actual amount of net delay over the ceiling. Even one day of net delay over the Jordan ceiling must be justified by the case's exceptional complexity, and even where the threshold stage is met, s. 11(b) may still be breached if the complexity is insufficient to justify the actual delay. To find otherwise would be contrary to the rationale for the Jordan ceilings.

[60] Another consideration for judges is the lower ceiling in provincial court. In Jordan , this Court followed Morin in setting a lower presumptive ceiling for proceedings in provincial court than for those in superior court. Implicitly, this choice rests on the premise that cases proceeding in superior court are more likely to be complex and involve greater institutional delay. It was accordingly reasonable to expect that they would take longer.

[61] Developments in the law since Jordan have undermined this rationale to some extent. As noted by some of the interveners, 2019 amendments to the Criminal Code eliminated preliminary inquiries for certain offences (An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts , S.C. 2019, c. 25).

[62] Lower courts have raised concerns that cases that might previously have been decided in superior court, or in provincial court following a preliminary inquiry (and thus under the 30-month Jordan ceiling), are now being decided in provincial court under the 18-month ceiling. For example, the Ontario Court of Justice suggested in R. v. Fraser , 2022 ONCJ 580, that some accused persons might strategically elect to proceed in provincial court to benefit from the lower Jordan ceiling (paras. 28-31). Similar comments were made in Lapointe v. R. , 2019 QCCQ 3099:

[translation] The concept of a “particularly complex case” cannot be the same under an 18-month ceiling in provincial court as it is under a 30-month ceiling either in provincial court with a preliminary inquiry or in superior court. Without some modulation of this concept, a case that would not be particularly complex under a 30-month ceiling would not be so under an 18-month ceiling either. The qualitative review done by the Supreme Court in Jordan that led to the distinction between these two ceilings would then not make sense. [para. 30]

The observation in Lapointe was taken up in R. v. Martell , 2022 QCCQ 9333, where the court agreed that the standard for complexity must be “modulated according to the applicable ceiling” in order to make sense of Jordan (para. 204).

[63] I share these concerns. Ultimately, the question at the justification stage of the case complexity analysis is not whether the case's particular complexity justifies the amount of net delay over the ceiling . Rather, it is whether the complexity of the case justifies the total amount of net delay, thereby rendering it reasonable (Jordan , at para. 80).

[64] As I have explained, the Jordan framework accounts for two considerations: the time it reasonably takes to bring a matter of ordinary complexity to trial and the maximum tolerable amount of chronic institutional delay. While the 18- and 30-month ceilings define the starting points for when delay becomes presumptively unreasonable, once the threshold stage for case complexity is met, the analysis is holistic.

[65] For example, a case proceeding in provincial court may be sufficiently complex, having regard to its particular complexity and the Crown's reasonable efforts to proactively mitigate delay, to justify a total of 20 months between the laying of the charge and the end of the trial. The same case proceeding in superior court would not offend the Jordan ceiling. If the case's inherent complexity can justify those 20 months, there is no principled reason why it should be stayed in provincial court when it would not be stayed in superior court.

[66] The point, then, is not that application judges ought to "modulate" the degree of complexity required to justify delay under the two different ceilings. Rather, where the complexity of a case, wherever it has proceeded, justifies the amount of time it took from start to finish, delay over the Jordan ceiling is not unreasonable and s. 11(b) is not breached. This approach ensures that the complexity analysis remains logically consonant with the rationale for the discrete ceilings in provincial and superior courts and remains responsive to developments in the law since Jordan .

[67] Approaching the analysis in this manner should also reduce the incentive for accused persons to strategically elect to proceed in provincial court so as to benefit from the lower Jordan ceiling. This trend is detrimental to the administration of justice, risking the inefficient allocation of scarce judicial resources by increasing the burden on provincial courts while underutilizing superior courts. While accused persons are entitled to make whatever election is open to them, courts must be alert to any improper strategic incentives that undermine the shared goal of timely justice. Again, the purpose of s. 11(b) is to ensure that trials are conducted within a reasonable time; this purpose is not furthered when accused persons flock to provincial courts in the hope of securing stays under the lower Jordan ceiling.

[68] Finally, I want to emphasize that the justification analysis under the case complexity exception is not an exercise in balancing net delay over the ceiling against the reasonableness of Crown attempts to mitigate delay. The intervener the Attorney General of Ontario submits that "if the state has acted reasonably, there should be no finding of unreasonable delay" (I.F., at paras. 2 and 19). In my view, this submission improperly conflates the obligation of Crown counsel to act reasonably with the obligation of the state more broadly to minimize chronic institutional delay.

[69] The Attorney General of Ontario's submission would reduce s. 11(b) to a right to have the Crown make all reasonable efforts to proceed to trial quickly. This is inconsistent with the language of the Charter . Reasonable Crown efforts to proactively mitigate delay occasioned by complexity are necessary to justify net delay in excess of the Jordan ceiling: absent such efforts, the second element of the threshold stage is not satisfied and delay over the ceiling cannot be justified. But the right to trial within a reasonable time is more than a right to the Crown's best efforts. If the Crown cannot, by making reasonable efforts, bring cases to trial within a

reasonable time, then the state must step in and increase funding to the justice system. In effect, even where the Crown makes all reasonable efforts to proactively mitigate the delay occasioned by a particularly complex case, the presence of significant institutional delay will still result in a breach of s. 11(b). If the amount of net delay cannot be justified by the complexity of the case, it is irrelevant how many mitigating measures the Crown may have implemented to proactively address delay.

[70] Ultimately, the Charter prevents laying the burdens of underfunded courts and Crown offices at the feet of the accused. Where the amount of net delay exceeds what can reasonably be justified by the case's complexity, there will be a s. 11(b) breach and the proceedings will be stayed.

D. The Crown's Proposed Residual Discretion

[71] Before I apply the clarified test for case complexity to the facts of this case, it is necessary to address the question of "residual discretion" raised by the Crown. The Crown submits that it is "arguably not in the best interests of the administration of justice" to order a stay of proceedings every time net delay exceeds the Jordan ceiling and cannot be justified by exceptional circumstances (A.F., at para. 70). The Crown submits that, just as there is discretion for a judge to consider whether to stay a proceeding where delay does not exceed the Jordan ceiling, there should be a residual discretion for a judge to decline to find a breach of s. 11(b) even where net delay exceeds the Jordan ceiling and is not justified by exceptional circumstances.

[72] In cases where delay exceeds the ceiling, the Crown argues, courts should have a parallel discretion to refuse to find a breach of s. 11(b), based on several factors. These include the extent to which the delay exceeds the threshold, the extent to which that delay was foreseeable or quantifiable when critical case management decisions were made, the way in which the Crown managed the delay, and the effect of a stay on the administration of justice, "taking into account all the circumstances" (A.F., at para. 92). These circumstances include the parties' conduct, the public's interest in having serious charges tried on their merits, and the impact of a stay on any victims.

[73] To justify this change to the Jordan framework, the Crown points to data from Statistics Canada — which was not raised before the lower courts — indicating that between 2016, the year Jordan was decided, and 2023, the proportion of cases exceeding the Jordan ceilings increased significantly, even as the total number of criminal cases in the system decreased (A.F., at para. 83, citing Statistics Canada, Table 35-10-0173-01: Key indicator results and absolute change for annual data, adult criminal court and youth court (2024) (online)). The Crown attributes this increase to Jordan, but this attribution is unsupported by any other evidence. Indeed, upon closer examination of the data from Statistics Canada, it is evident that the proportion of cases over the Jordan ceilings decreased in each full year of reporting after Jordan was released — until 2020-21, when it spiked to previously unseen levels during the height of the COVID-19 pandemic. The most recent data available from Statistics Canada for 2023-24 actually shows a decrease in the proportion of cases exceeding the ceilings — a trend one might expect if the pandemic were

largely responsible for the 2021-23 spike (Table 35-10-0173-01: Key indicator results and absolute change for annual data, adult criminal court and youth court (2025) (online)). With that said, there can be no doubt that, as the Crown submits and as judges, journalists, and politicians across the country have noted with concern, the number of criminal proceedings resulting in stays is troubling. Section 11(b) of the Charter exists to ensure timely justice: even one stay of proceedings is one too many.

[74] But the Jordan framework, as clarified by these reasons, is flexible enough to address these troubling trends without incorporating the Crown's proposed residual discretion. As I will explain, the Crown's proposal is inconsistent with Jordan and replicates the flawed Morin approach rejected in Jordan . It is also unnecessary, given the considerable latitude that trial judges already have to expedite proceedings using their case management powers.

[75] The proposed residual discretion is inconsistent with Jordan . This Court could not have been clearer in Jordan : the sole basis on which the Crown may justify delay exceeding the ceiling is that exceptional circumstances — generally either discrete circumstances or case complexity — justify the delay and render it reasonable (paras. 71 and 81). There is no room within the Jordan breach analysis for a final, discretionary balancing of societal interests against the accused's s. 11(b) right. The Crown's proposal would reintroduce Morin 's "dice roll" (Jordan , at para. 32). Like the treatment of prejudice under the Morin framework, an inquiry into the effects of a stay on the administration of justice is likely to produce inconsistent results (see Jordan , at para. 33). And, again like the analysis required by Morin , the Crown's suggested approach is designed to excuse delay, not prevent it, and therefore "encourages parties to quibble over rationalizations" for lost periods of time (Jordan , at para. 36).

[76] In sum, the Crown's proposed change contradicts the very structure of the Jordan framework. Jordan 's bright-line approach simplified litigation in this area. Restoring a flexible, interest-balancing test would undo that. It would remove one of the key systemic incentives to curb delay and would prompt lengthy and unpredictable litigation about whether an accused's s. 11(b) right has been violated when delay has breached Jordan 's presumptive ceiling. Just as the Morin framework had "itself become a burden on already over-burdened trial courts" (Jordan , at para. 38), the Crown's approach would create more, not less, delay.

[77] There is a clear reason why the kinds of societal considerations the Crown would import into the Jordan framework have no place in the analysis of whether delay has breached the accused's s. 11(b) right. Considerations of public interest go to the questions of justification and remedy for a Charter breach, not to the question of whether the Charter right has been breached at all. These categories of questions should be kept analytically distinct (R. v. Oakes , [1986] 1 S.C.R. 103, at p. 134; R. v. Grant , 2009 SCC 32, [2009] 2 S.C.R. 353, at para. 200, per Deschamps J., concurring in part). Under Jordan , delay is unreasonable, and the accused's s. 11(b) right has therefore been breached, where net delay exceeding the ceiling cannot be justified by the exceptional circumstances of the particular case. Once delay has been found to be unreasonable, the Charter right is breached.

[78] The Crown's proposed residual discretion is also unnecessary. Trial judges have at their disposal broad case management powers that, when applied proactively and creatively, can avoid delay that can rise to the level of a s. 11(b) breach. Case management powers can and should be used to avoid unnecessary delay before it occurs and are powerful tools for that purpose (Cody , at para. 38; R. v. Haevischer , 2023 SCC 11, [2023] 1 S.C.R. 416, at para. 76). Where the courts, the Crown, and defence counsel collaborate, as Jordan demands, to prevent delay from arising, there are many strategies that can concretely reduce the time it will take to adjudicate a charge on its merits. For example:

- If the delay is because there are not enough judges available in the jurisdiction, the court could order a change of venue to a region with more judges available;
- If the delay is because the accused is self-represented, the court could appoint an amicus curiae ;
- If the delay is because Crown disclosure is being delayed unreasonably, the court could order immediate or expedited full disclosure;
- If the delay is because defence counsel has limited ability to consult with the accused at a detention facility, the court could order that the accused be moved to another facility or could make orders to facilitate communication with counsel;
- If the delay is because of a complex proceeding under s. 276 or s. 278.92 of the Criminal Code , the court could order that the procedures be simplified, such as by conducting the stage 1 proceeding in writing, or that the stage 1 and stage 2 proceedings be scheduled together (see, generally, R. v. J.J. , 2022 SCC 28, [2022] 2 S.C.R. 3);
- If the delay is because the Crown is proceeding with a lengthy charge sheet, the court can work with the Crown to divide the charges into multiple shorter trials or reduce the charges to those that are essential to the proper administration of justice.

[79] In short, the Jordan framework and the inherent powers of trial judges already provide a great deal of flexibility to prevent and address delay before it reaches the level of a Charter breach. Thus, a residual discretion to avoid finding a breach of s. 11(b) is both unnecessary and inconsistent with Jordan .

[80] The residual discretion the Crown proposes can be reconciled with Jordan only if it is understood to be a consideration going to the remedy for a s. 11(b) breach. Any change to the law on remedies available following a breach of s. 11(b) would have to be reconciled with R. v. Rahey , [1987] 1 S.C.R. 588, in which this Court ruled that once a s. 11(b) breach is established, the minimum remedy is a stay of proceedings.

[81] It may be that the time is near at hand when Rahey should be revisited. Its assumptions have not been tested against the jurisprudential, legislative, and societal developments of the past four decades. It may be necessary to consider whether this precedent remains workable or whether its foundations have been eroded by significant societal or legal change (Auer v. Auer , 2024 SCC 36, at para. 32).

[82] However, this is not the case in which to revisit Rahey , for two reasons. First, the issue is not properly before us, was not addressed in the lower courts, and has not been fully argued. Second, on a proper application of the analysis for case complexity, the issues that animate the Crown's concerns about unfairness and arbitrariness in this case can be addressed within the existing scope of the Jordan framework.

E. Application

(1) Standard of Review

[83] The ultimate determination of whether delay is unreasonable and the accused's s. 11(b) right has been breached is a question of law reviewable for correctness (R. v. Pauls , 2020 ONCA 220 , 453 D.L.R. (4th) 193 , at para. 40, aff'd R. v. Yusuf , 2021 SCC 2 , [2021] 1 S.C.R. 5 , at para. 2). An application judge's factual findings, and their application of the law to the facts, attracts review on the deferential standard of palpable and overriding error (Housen v. Nikolaisen , 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 10 and 28).

[84] The assessment of case complexity, including the determination of whether the Crown made reasonable efforts to mitigate delay, is a question of mixed fact and law "well within the trial judge's expertise" and is accordingly entitled to deference (Jordan , at para. 79). Where an application judge's analysis is affected by an extricable legal error, no deference is owed to the judge's conclusions (Housen , at para. 37).

(2) The Application Judge Erred in Assessing Complexity

[85] In this case, the application judge made two errors that justify appellate intervention. First, the application judge erred in assessing the second element of the threshold stage. In considering whether the Crown had taken reasonable measures to proactively mitigate delay, the application judge found that the Crown had mistakenly treated the respondents as though they intended to rely on the group Garofoli application. He did not, however, consider whether this mistake was reasonable in light of both the complexity of the overall proceedings and the failure by defence counsel to speak up when the opportunity presented itself to clarify the respondents' situation.

[86] The majority of the Court of Appeal below held that the application judge could not be faulted for failing to consider whether the Crown's mistake was reasonable, because that argument was not made before him (para. 57). However, as I have explained above, where the Crown fails to successfully implement proactive measures to mitigate delay, an application judge must inquire as to whether this failure stems from unreasonableness on the part of the Crown. I agree with Roberts J.A., dissenting below, that the application judge's failure to do so was an error justifying appellate intervention.

[87] Second, as all parties agree, the application judge made a palpable and overriding error in calculating the actual amount of delay . He relied on an inadvertent misstatement by trial Crown counsel in concluding that the anticipated length of time between the charge and the end of the trial was 22 months. In fact, it was 21 months and four days. On this correct calculation and once the three months were deducted to account for the COVID-19 pandemic as a discrete exceptional circumstance, the net delay over the Jordan ceiling was four days.

[88] As the majority of the Court of Appeal below correctly noted, a net delay four days over the Jordan ceiling is still over the Jordan ceiling (para. 6). There is no *de minimis* standard for the constitutional rights of an accused. As I have reiterated throughout these reasons, the Jordan ceilings already account for the maximum justifiable institutional delay. If the Crown cannot justify even four days of net delay over the ceiling on the basis of exceptional circumstances, then the accused's s. 11(b) right has been violated.

[89] However, this conceded calculation error is relevant to assessing the application judge's analysis of case complexity. At the justification stage, an application judge must consider whether the amount of net delay is justified in light of the complexity of the case. Such an analysis can only be done on a proper consideration of both the degree of complexity of the case and the amount of net delay; if the application judge is wrong about either, then the conclusion reached at the justification stage of the analysis is not entitled to deference.

[90] In summary, the application judge in this case made an extricable error in principle at the threshold stage, because he failed to engage with the reasonableness of the Crown's conduct in all the circumstances. This error is sufficient to displace the deference otherwise owed to his conclusion, and it was compounded by the conceded calculation error made in determining the amount of net delay. In light of these errors, it is appropriate for this Court to reconsider whether the complexity of this case justified the net delay.

(3) Considered Afresh, the Net Delay Was Justified by the Complexity of the Case

(a) Threshold Stage: The Case Was Particularly Complex, and the Crown Reasonably Managed the Corresponding Delay

(i) The Case Was Particularly Complex

[91] The respondents' case arose in the context of a complex project prosecution involving voluminous disclosure, multiple connected proceedings, and numerous pre-trial applications. Eighteen individuals were charged with offences arising from the same drug trafficking operation the investigation of which generated significant disclosure, including more than 10,000 audio intercepts. The Crown divided the charges against the 18 individuals into 10 overlapping prosecution groups; some of these groups intended to rely on the outcome of the group Garofoli application, while some did not. Considerable complexity arose from the scheduling of the pre-trial and trial proceedings in respect of these groups.

[92] The voluminous disclosure, multiplicity of pre-trial proceedings, and joint nature of the prosecution are all hallmarks of complexity that can satisfy the first element of the threshold stage of the analysis . Indeed, in a related s. 11(b) proceeding arising from the same project prosecution, the application judge recognized that the case was particularly complex (Ivarone , at paras. 25-27). In my view, these observations applied equally to the respondents' proceedings, regardless of the fact that they did not intend to rely on the outcome of the group Garofoli application. As I noted above, particular complexity is assessed having regard to any related proceedings and to the complexity and scale of the prosecution as a whole.

[93] I have no hesitation in concluding that the respondents' prosecution was particularly complex.

(ii) The Crown Took Reasonable Steps to Proactively Mitigate the Delay Occasioned by Complexity

[94] Further, the record makes it clear that the Crown took proactive steps in this case to mitigate the delay occasioned by this complexity. Shortly after bringing the charges, the Crown sought case management and split the accused into 10 tailored prosecution groups, aiming to proceed as quickly as possible with those accused whose cases did not depend on the outcome of the group Garofoli application. The Crown's proactive efforts to mitigate delay were commendable and exemplify the approach to ensuring timely justice that the Jordan framework seeks to incentivize.

[95] In the respondents' case, the Crown's implementation of this plan failed. The Crown erroneously scheduled the respondents' trial dates as though they intended to rely on the outcome of the group Garofoli application, when in fact they did not. The reason for the Crown's mistake can be readily discerned from the record before the application judge. Given the complexity of scheduling multiple trials and proceedings for 18 individuals, the Crown reasonably relied on the cooperation of defence counsel to assist in coordinating measures aimed at mitigating delay.

[96] During the case conference discussion on April 8, 2022, counsel for other accused in circumstances similar to those of the respondents clarified, without prompting, that their clients did not intend to rely on the outcome of the Garofoli application. These accused were given trial dates well within the Jordan limits. Defence counsel who spoke up to clarify their clients' situations acted appropriately and in accordance with their shared responsibility to ensure timely justice. By contrast, the respondents' counsel stayed silent, making no attempt to correct the Crown's mistake even after it became evident from the trial dates they received. The conduct of the respondents' counsel did not meet the standard of reasonable collaboration that the Crown was entitled to expect from the defence.

[97] To summarize, then, the Crown made reasonable proactive efforts to mitigate delay given the complexity of the project prosecution. While these efforts failed in fact to provide the respondents with trial dates within the Jordan ceiling, this is at least partially attributable to defence counsel's failure to cooperate reasonably with Crown efforts to mitigate delay. Under these circumstances, the Crown's mistake did not undermine the reasonableness of its efforts. The threshold is therefore met.

(b) Justification Stage: The Degree of Complexity Reasonably Justified the Amount of Net Delay

[98] The justification analysis will always depend on the facts of the particular case. Even one day of net delay over the ceiling will constitute a breach of s. 11(b) of the Charter if there are no exceptional circumstances capable of justifying exceeding the Jordan ceiling. However, once the threshold stage of the case complexity analysis is met — that is, once the Crown has established that the case is particularly complex and that it has taken reasonable proactive measures to mitigate the delay occasioned by that complexity — the amount of delay is relevant to its reasonableness. It will obviously be easier for the Crown to justify a net delay just a few days or weeks over the ceiling than to justify a net delay of months over the ceiling.

[99] In this case, on a proper calculation, the net delay was 18 months and four days. In my view, it is clear that the significant complexity of the case easily justifies this amount of net delay. The respondents' s. 11(b) rights were accordingly not breached.

VI. Conclusion

[100] In summary, the case complexity analysis under Jordan proceeds in two stages. At the threshold stage, the Crown must prove that the case is particularly complex in light of the nature of the issues, evidence, and proceedings and also that it has taken reasonable proactive steps to mitigate delay. If the threshold stage is met, at the justification stage, the Crown must then prove that the overall complexity of the case justifies the amount of net delay. Here, the significant complexity of the case justified the net delay of 18 months and four days.

[101] For these reasons, we allowed the appeal at the oral hearing of this matter, set aside the stay of proceedings, and remitted the matter back for trial.

The following are the reasons delivered by

Rowe J. —

[102] I concur with the disposition of the appeal and with the Chief Justice's reasons insofar as they address the particularly complex case exception and clarify the framework for its application. However, with respect, I am persuaded by the submissions of the appellant Crown and intervening Attorneys General that more needs to be done to correct the shortcomings now evident in the framework set out in *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631. In my view, the Jordan framework should be developed to provide judges with a residual discretion to determine whether, in all the circumstances, the delay is unreasonable.

I. Jordan Should Be Revisited in Light of Experience

[103] Jordan was a recalibration of the approach to the right of the accused to trial within a reasonable time under s. 11(b) of the Canadian Charter of Rights and Freedoms , as described by the Chief Justice (paras. 21-29). But, the approach set out in Jordan is not the s. 11(b) right itself. Rather, like R. v. Morin , [1992] 1 S.C.R. 771, and R. v. Askov , [1990] 2 S.C.R. 1199 , before it, Jordan is a means to give practical effect to s. 11(b). What, then, has been the practical effect of Jordan ?

[104] Ten years on, the Crown and intervening Attorneys General point to a widespread problem of serious charges being stayed rather than disposed of on their merits, even where the Crown has “done everything right” . They submit that the approach in Jordan needs adjustment.

[105] The Crown cites to a Statistics Canada table reporting that from 2016 to 2023 , the percentage of cases over the Jordan ceilings increased from 5.8 percent to 10.9 percent and the percentage of stays and withdrawals in such cases increased from 27.8 percent to 46.6 percent. This occurred while the total number of cases decreased from 355,951 to 219,154 (A.F., at para. 83, citing Statistics Canada, Table 35-10-0173-01: Key indicator results and absolute change for annual data, adult criminal court and youth court (2024) (online)). The Chief Justice takes note of these statistics, but views the increase in stays as largely attributable to the COVID-19 pandemic (para. 73).

[106] The pandemic may explain the increase in the proportion of cases that exceed the presumptive ceiling, but it does not fully explain the increase in the proportion of stays. While the COVID-19 pandemic had an impact on the operation of the justice system, delay arising from the pandemic was treated as a discrete exceptional circumstance to be subtracted from net delay under the Jordan framework (see, e.g., R. v. Agpoon , 2023 ONCA 449, 167 O.R. (3d) 721, at para. 33; R. v. Kovacs , 2025 ONCA 49, 175 O.R. (3d) 401; R. v. LeRoy , 2024 NSCA 30, 555 C.R.R. (2d) 1; R. v. Loiacono , 2023 ABCA 157; R. v. D’Souza , 2024 ABCA 77, 554 C.R.R. (2d) 201; R. v. Gardener , 2023 SKCA 12).

[107] That the proportion of cases exceeding the Jordan limit decreased from 2016 to 2020 is only half the picture, as the proportion of these cases that were stayed increased from 27.8 percent to 32.5 percent before the pandemic. That the proportion of stayed cases decreased slightly from 2022 to 2024 provides no assurance of a longer-term trend. In short, there is a serious problem and there is no reason to believe that it will fix itself.

[108] The Crown submits, and I agree, that these statistics demonstrate that too many persons charged with serious offences are simply allowed to walk out the courtroom door without a trial. Of course, some accused would have been acquitted. But a considerable portion of those who walk out the courtroom door likely did commit the offence of which they were charged and would have been convicted had they been tried. In some instances, a charge is stayed after a verdict of guilt has been entered (see, e.g., R. v. Swanson , 2017 ONSC 710 ; R. v. Stelwagen , 2023 ONSC 1938, 525 C.R.R. (2d) 344, rev’d 2024 ONCA 794, 443 C.C.C. (3d) 439; R. v. Middleton , 2017 BCPC 67). The Crown and intervening Attorneys General argue that public confidence in the

administration of justice is being undermined as many serious charges that should be adjudicated on their merits are instead stayed.

A. The Jordan Framework Needs to Be Developed to Address Contemporary Circumstances

[109] I am persuaded by the Crown that the Jordan framework needs to be developed to ensure that the law adapts to what experience has demonstrated. This Court has continuously developed the s. 11(b) jurisprudence in light of experience (see *Mills v. The Queen* , [1986] 1 S.C.R. 863; *R. v. Rahey* , [1987] 1 S.C.R. 588; *R. v. Conway* , [1989] 1 S.C.R. 1659; *R. v. Smith* , [1989] 2 S.C.R. 1120; *Askov* ; *Morin* ; *R. v. Godin* , 2009 SCC 26, [2009] 2 S.C.R. 3).

[110] In his reasons, the Chief Justice does this, to a degree, by clarifying the Jordan framework in light of “jurisprudential, legislative, and technological developments . . . in the 10 years since . . . Jordan ” (para. 38). I am persuaded that more is warranted. As Justice Sopinka observed in *Morin* : “Embarking as we did on uncharted waters it is not surprising that the course we steered has required, and may require in the future, some alteration in its direction to accord with experience” (p. 784).

[111] What the Crown and intervening Attorneys General propose, and what I accept, is the inclusion of residual discretion in the s. 11(b) framework. Adding this discretion accords with the approach of developing the s. 11(b) framework. This does not require overturning or fundamentally revisiting Jordan . However, even under the principles of horizontal stare decisis , there is justification for modifying the Jordan framework.

[112] First, Jordan is proving unworkable in a manner similar to *Morin* before it. A precedent will be unworkable if it can be shown that it is applied in a doctrinally incoherent manner (*R. v. Kirkpatrick* , 2022 SCC 33, [2022] 2 S.C.R. 480 , at paras. 217-18). For example, in *Jordan* , the *Morin* framework was revised, in part, on the basis of submissions demonstrating that, in numerous decisions, relief under s. 11(b) had been denied even in the face of delay far beyond what was contemplated in *Morin* (*Kirkpatrick* , at para. 218, citing I.F., *British Columbia Civil Liberties Association in Jordan* , at para. 18, fn. 35). Today, the high number of stays of serious charges, even where there is minimal delay over the presumptive ceiling, as in this case, is inconsistent with the purpose of Jordan : to encourage “all participants in the justice system [to] work in concert to achieve speedier trials” to “delive[r] justice in a timely manner” (paras. 116 and 141 (emphasis added)). While endemic delay would undermine the goal of speediness, stays where the delay is not unreasonable having proper regard to the circumstances undermines the goal of achieving justice by the disposition of charges following a trial on the merits.

[113] Second, as discussed below, the assumptions on which Jordan was predicated have proven to be out of touch with the realities of criminal prosecutions. A precedent may also be revisited where its foundation has been eroded so as to “undermine the rationale of the precedent” (*Kirkpatrick* , at para. 219) .

[114] Constitutional precedents, like common law precedents, may be revisited in light of legal or societal changes. The meaning of a constitutional provision is capable of growth and constitutional precedents must remain “responsive to the realities of contemporary society” (para. 265, citing *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698, at paras. 22 and 30; *Reference re Employment Insurance Act (Can.)*, ss. 22 and 23, 2005 SCC 56, [2005] 2 S.C.R. 669, at paras. 9-10; *R. v. Comeau*, 2018 SCC 15, [2018] 1 S.C.R. 342, at paras. 33 and 52; *Reference re Code of Civil Procedure (Que.)*, art. 35, 2021 SCC 27, [2021] 2 S.C.R. 291, at paras. 53-54).

[115] As I outline below, jurisprudential and legislative changes have resulted in longer and more complex trials that are not fully captured by the exception in *Jordan* for complex cases on which the Chief Justice relies. Similarly, encouraging participants in the system to be part of the solution is out of step with the incentives built into the criminal justice system.

B. Jordan Has Not Kept Up With the Contemporary Realities of Criminal Prosecutions

[116] As the Crown notes, a significant proportion of serious charges are now being stayed. Government underfunding is not the only reason for this, though it remains a contributing factor. Nor, as discussed above, is the COVID-19 pandemic. I agree with the Attorneys General that legislative and jurisprudential developments in criminal procedure and evidence law have contributed to the increasing length and complexity of even “routine” cases. In addition, *Jordan* was founded on idealized assumptions about the conduct of the parties.

(1) Legislative and Jurisprudential Developments Have Resulted in Longer and More Complex Trials

[117] Developments in case law, notably relating to ss. 7 to 14 of the Charter have caused proceedings to take longer. In effect, it is the courts themselves who have generated delay, often at the urging of criminal defence and public interest groups.

[118] Similarly, legislative changes have created new and increasingly involved proceedings for the adjudication of issues not directly related to the determination of guilt or innocence, but rather relating to the introduction and use of evidence. The Chief Justice acknowledges this in his reasons (paras. 3 and 38). However, with respect, I would attribute greater significance to the consequences of these on trial delay than does he.

[119] The following are examples of this:

- (a) The development of the framework under ss. 278.92 to 278.94 of the Criminal Code, R.S.C. 1985, c. C-46, for the admission of certain records related to complainants in sexual assault cases which, due to its complexity, inevitably adds delay to the trial process (see C. Fehr, “*R. v. J.J. , Trial Delay, and the Recent Trend of Staying Sexual Assault Charges*” (2024), 97 C.R. (7th) 96).

- (b) This Court's relaxation of the test for s. 8 standing on voir dices in *R. v. Jones*, 2017 SCC 60, [2017] 2 S.C.R. 696, which now permits an accused to rely on the Crown's theory to provide the evidentiary basis for a Charter voir dire (see also *R. v. Labelle*, 2019 ONCA 557, 379 C.C.C. (3d) 270). The result is that an accused may more readily bring a s. 8 challenge where previously their standing to do so may have been in question.
- (c) The jurisprudential expansion of the types of information that attract a reasonable expectation of privacy under s. 8 (see *R. v. Marakah*, 2017 SCC 59, [2017] 2 S.C.R. 608; *R. v. Reeves*, 2018 SCC 56, [2018] 3 S.C.R. 531; *R. v. Bykovets*, 2024 SCC 6).
- (d) The expansion of the abuse of process doctrine to encompass the conduct of third parties (*R. v. Brunelle*, 2024 SCC 3).

[120] It bears noting that while additional pre-trial proceedings, like third-party records applications and Charter challenges, may add complexity to a case, this does not necessarily lead to a case being treated as "particularly complex" within the meaning of Jordan framework; this is so even with the worthwhile clarifications of the framework set out by the Chief Justice. The result is that cases in which the Crown has "done everything right" may nonetheless be stayed as unreasonably delayed (see, e.g., *R. v. D. (K.)*, 2025 ONCA 639, 178 O.R. (3d) 721; *R. v. Vallotton*, 2024 ONCA 492; *R. v. Bowden-Wright*, 2024 ONSC 293, 545 C.R.R. (2d) 237; *R. v. C.A.*, 2024 ONSC 1603, 553 C.R.R. (2d) 78; *R. v. Oliver*, 2025 ONSC 5026). Results such as these follow, in part, from legislative and jurisprudential innovations since Jordan was decided.

[121] The intervener Attorney General of Manitoba notes that when Jordan was decided, preliminary inquiries were available for more offences, so that the prosecution of these offences was subject to the 30-month ceiling in a superior court. Amendments to the Criminal Code have resulted in more cases being tried in provincial courts subject to the 18-month ceiling. Yet, aside from the preliminary inquiry, the same steps (notably pre-trial proceedings) are now supposed to be completed in 18 months, rather than 30 months.

[122] Trials take longer because Parliament and the courts have caused them to take longer in the 10 years since Jordan was decided. The proliferation of stays, as referred to above, runs contrary to the interests protected by s. 11(b), which extend beyond those of accused persons to include victims and the broader public (*Jordan*, at paras. 19-22; *Askov*, at pp. 1219-20).

(2) Courts Must Be Realistic About the Conduct of Criminal Litigation

[123] The Chief Justice emphasizes that all parties bear responsibility for ensuring that cases proceed through the system in a reasonable time. However, this view must be tempered with realism about the competing interests at play in a criminal prosecution. Defence counsel have a duty of loyalty to their clients, one of "zealous representation" (*R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 63 1, at para. 19). It is understood that this duty does not justify unethical or unlawful conduct (*D. Layton and M. Proulx, Ethics and Criminal Law* (2nd ed. 2015), at pp. 26-27). I do not suggest that such conduct contributed to the current situation. However, defence counsel, operating in a fully ethical manner will always try to achieve a result in which their client walks

free.

[124] Thus, there is an inevitable tension between defence counsel's duty to their client and the expectation that the defence will facilitate bringing the prosecution to trial. For many accused persons the legal difference between an acquittal after a trial and a stay of proceedings is immaterial if the latter has them out the courthouse door sooner.

II. The Jordan Framework Should Be Modified to Include a Discretionary Balancing to Determine Whether Delay Is Unreasonable

[125] The Court in *Jordan* held that the presumptive ceilings "reflec[t] the realities we currently face" in the criminal justice system, and so accepted that either the ceilings themselves or the considerations that inform them would need to be revisited in the future (para. 57). In light of this, I do not propose to adjust the ceilings themselves. Rather, I am persuaded by the Crown and Attorneys General that, to ensure that *Jordan* remains responsive to the realities of criminal prosecution, the Court should recognize a residual discretion for judges to consider whether delay is unreasonable in all the circumstances.

A. Section 11(b) Recognizes Broad Interests in the Administration of Justice

[126] This Court has recognized that s. 11(b) has the primary purpose of protecting the rights of the accused, and the secondary purpose of protecting society's interest in "ensuring that those who transgress the law are brought to trial and dealt with according to the law" (*Askov* , at pp. 1219-20). As McLachlin J., as she then was, phrased it in *Morin* , a remedy under s. 11(b) should only issue where "the interest of the accused and society in a prompt trial outweighs the interest of society in bringing the accused to trial" (p. 810). In this inquiry, "[t]he interest of society in bringing those charged with criminal offences to trial is of constant importance" (p. 811).

[127] This balancing is reflected in the fact that s. 11(b) is not expressed in absolute terms. Rather, the language of "reasonableness" assumes that "[s]ome measure of impairment of the protected interests may validly result from the prosecution of persons charged. This in effect accommodates the important community interest of preventing crime through the conviction of persons guilty of a criminal offence" (*Conway* , at p. 1672).

B. Courts Should Consider the Effect of Delay on the Public's Confidence in the Administration of Justice

[128] The Chief Justice rejects the proposal of the Crown and intervening Attorneys General on the basis that residual discretion is inconsistent with *Jordan* and, more fundamentally, that it does not fit within the analysis of whether delay has breached an accused's s. 11(b) right (para. 77). In the Chief Justice's view, considerations of public interest factors are more appropriate at the remedy stage, and these two inquiries should remain analytically distinct.

[129] I respectfully disagree. What is reasonable within the meaning of s. 11(b) must be determined by reference not only to the interests of the accused but also those of the community in seeing those accused of offences tried and, if found guilty, sentenced according to the law.

[130] Jordan sought to build this balancing into a structured framework. But the experience of 10 years has shown that the framework is not proving fit for purpose, unless it is adjusted. While I agree that the answer does not lie in reverting back to the Morin approach, this is not, as the Chief Justice suggests, what the Attorneys General propose. Including a residual discretion that is exercised with proper regard to all of the interests underlying s. 11(b) would restore a necessary balance to the analysis and reinforce public confidence in the system.

C. Judges Should Be Given a Residual Discretion to Determine Whether Delay Is Unreasonable in all the Circumstances

[131] The Crown proposes that judges should be given residual discretion to determine whether delay is unreasonable in all the circumstances. This should include consideration of (1) the seriousness of the charges, (2) the quantifiability and predictability of the delay when key decisions were made by the Crown and defence, and (3) the extent of the delay over the presumptive ceiling. I agree with this proposal and address each factor in turn. Before doing so, however, I pause to note that this list of factors is not exhaustive, and, in keeping with the approach taken by this Court to the development of the s. 11(b) framework, experience may demonstrate that new factors warrant consideration in the exercise of residual discretion.

(1) Seriousness of the Charges

[132] As the Court noted in Morin , society's demand that an accused be brought to trial increases with the seriousness of the offence. While Jordan rejected the use of this factor as a sole or predominant basis for justifying presumptively unreasonable delay, this consideration does have a role to play. I say this for three reasons.

[133] First, the public understandably gives significant weight to the seriousness of charges when it assesses the effectiveness of our criminal justice system.

[134] Jordan was a response to the widespread tolerance of delay that predated it. In this context, the seriousness of the charges and prejudice to the accused were frequently used to justify excessive delay. But, unlike prejudice, which is now assumed within the Jordan framework, there is no accounting for the nature of the offences (see Jordan , at para. 81). This is divorced from the public's reasonable expectations regarding the administration of justice.

[135] Second, Jordan rejected consideration of the seriousness of the charges partly on the basis that serious charges would often have the hallmarks of complexity that would justify otherwise unreasonable delay. Experience has shown that this is not necessarily true. As the Attorney General of British Columbia points out in its factum, even serious charges that by their nature cry out for determination in a criminal court often do not satisfy the threshold for complexity.

[136] Finally, Jordan further assumed that if judges were permitted to consider the seriousness of the charges under s. 11(b), they would continue to deploy this factor to justify excessive delay. But it is not an all or nothing proposition. Anchored to the structure of Jordan , judges can and should be permitted to consider the seriousness of the charges when a case in which the Crown has conducted itself reasonably nonetheless risks being stayed.

(2) The Quantifiability and Predictability of the Delay When Key Decisions Were Made by the Crown and Defence

[137] When judges exercise residual discretion, they should take account of what was known to the parties when key decisions were made and the extent to which they could have predicted the delay that would result from those choices. This needs to be addressed bearing in mind that while all participants have an interest in the proper functioning of the system, only the Crown prosecutor occupies the role of a minister of justice (Boucher v. The Queen , [1955] S.C.R. 16) while defence counsel are “zealous advocates” for their clients.

[138] Public confidence in the system depends on the belief that it functions fairly to all parties and that it does not reward those who seek to “game the system”.

(3) The Extent of the Delay Over the Relevant Presumptive Ceiling

[139] Finally, the extent of the delay over the presumptive ceiling should be weighed against the seriousness of the charges and the conduct of the parties . Cases involving serious charges where the parties have conducted themselves appropriately and could not have reasonably anticipated the extent to which their decisions would contribute to delay may not be held to be unreasonably delayed if the time over the ceiling is relatively short.

[140] This residual discretion would not be absolute — no discretion is. These factors must always be balanced against the accused’s primary interest in trial within a reasonable time. And their effect is cumulative — no single consideration can overwhelm the analysis to justify presumptively unreasonable delay.

[141] As the Chief Justice points out, judges have a set of tools, their case managements powers, that can be used to prevent a s. 11(b) violation (see para. 78). He states that the existence of these tools renders residual discretion unnecessary. But these tools exist already and have existed since Jordan was decided. Emphasizing yet again the existence of case management powers is not a solution.

III. Conclusion

[142] Affording judges residual discretion to determine whether delay is unreasonable in all the circumstances addresses the disconnect between the promise of s. 11(b) — that criminal charges will be tried on their merits within a reasonable time — and the proliferation of stays that has taken place since *Jordan* was decided. It would balance the interests protected by s. 11(b), including those of the accused, of the victims of criminal offences, and of the broader public in seeing criminal charges properly adjudicated.

Appeal allowed.

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Solicitor for the intervener Attorney General of Ontario: Attorney General of Ontario, Crown Law Office — Criminal, Toronto.

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