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Re-Charting the Remedial Course for Section 11(b) Violations Post-Jordan

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Abstract

In *R v Jordan*, the Supreme Court of Canada adopted a new framework for establishing violations of the right to be tried within a reasonable time under section 11(b) of the *Charter*. It did not, however, adopt a new approach to the remedy applicable thereafter. Since the 1987 decision *R v Rahey*, the only remedy for unreasonable delay has been a stay of proceedings. This article contends that this "automatic stay rule" must be revisited post-*Jordan*. It does so by conceptualizing *Jordan* as a shift from an "interest balancing" framework—where individual and societal interests are weighed against one another—to a calculus largely devoid of interest balancing. The first section of this article contends that, while this shift promises a host of practical benefits, the dearth of any interest balancing under either *Jordan* or *Rahey* results in a reductive section 11(b) regime, which ignores case-by-case variations in factors that are plainly relevant to whether a given prosecution ought to be stayed. The second section of this article surveys existing interest balancing remedial frameworks under the *Charter,* arguing that the interests removed in *Jordan* are otherwise considered to be, and ought to be re-introduced as, remedial factors. The third section addresses the practical effects of the automatic stay rule on Canadian society, accused persons, and section 11(b) jurisprudence itself. The fourth proposes that the rationale for the automatic stay rule is both problematic and obsolete, necessitating the adoption of a "corrective justice" approach to section 11(b) violations. The paper concludes by outlining how the ideal remedial framework would function.

Keywords

Speedy trial; Remedies (Law); Stay of proceedings (Criminal procedure); Canada. Canadian Charter of Rights and Freedoms; Canada

Re-Charting the Remedial Course for Section 11(b) Violations Post-*Jordan*

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In *R v Jordan*, the Supreme Court of Canada adopted a new framework for establishing violations of the right to be tried within a reasonable time under section 11(b) of the *Charter*. It did not, however, adopt a new approach to the remedy applicable thereafter. Since the 1987 decision *R v Rahey*, the only remedy for unreasonable delay has been a stay of proceedings. This article contends that this "automatic stay rule" must be revisited post-*Jordan*. It does so by conceptualizing *Jordan* as a shift from an "interest balancing" framework—where individual and societal interests are weighed against one another—to a calculus largely devoid of interest balancing. The first section of this article contends that, while this shift promises a host of practical benefits, the dearth of any interest balancing under either *Jordan*

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or *Rahey* results in a reductive section 11(b) regime, which ignores case-by-case variations in factors that are plainly relevant to whether a given prosecution ought to be stayed. The second section of this article surveys existing interest balancing remedial frameworks under the *Charter*, arguing that the interests removed in *Jordan* are otherwise considered to be, and ought to be re-introduced as, remedial factors. The third section addresses the practical effects of the automatic stay rule on Canadian society, accused persons, and section 11(b) jurisprudence itself. The fourth proposes that the rationale for the automatic stay rule is both problematic and obsolete, necessitating the adoption of a "corrective justice" approach to section 11(b) violations. The paper concludes by outlining how the ideal remedial framework would function.

IN *R V JORDAN*, the Supreme Court of Canada "embark[ed] … on uncharted waters" for the second time in twenty-five years by crafting a new framework for establishing unreasonable delay in criminal proceedings under section 11(b) of the *Canadian Charter of Rights and Freedoms*.[1] The majority ruled that "the system ha[d] lost its way" under the preceding *R v Morin* framework, perpetuating a pervasive "culture of complacency towards delay" in the administration of justice.[2] In an intrepid effort to correct the section 11(b) course, the majority changed tack from the flexible *Morin* framework to one predicated on a simplified calculus.[3] The majority suggestively noted, however, that it had not been invited to rethink the Court's approach to remedy, which it charted in the 1987 decision *Rahey v R*, where three concurring decisions held that the only remedy for a violation of section 11(b) is a stay of proceedings under section 24(1) of the *Charter* (the "automatic stay rule").[4] This article proposes that *Jordan* is merely the first step in correcting the section 11(b) course. Canadian courts must now revisit the automatic stay rule.

Part I of this article introduces the concept of "interest balancing," where individual and societal interests are weighed against one another in the

1. Justice Cromwell cites Justice Sopinka in *R v Morin*: "Embarking as we did on unchartered 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." [1992] 1 SCR 771 at 784 [*Morin*] cited in *R v Jordan*, 2016 SCC 27 at para 145 [*Jordan*]. See also *R v Askov*, [1990] 2 SCR 1199 [*Askov*].
2. *Jordan*, *supra* note 1 at paras 29, 40.
3. *Ibid* at paras 38, 45-46, 77-81, 92-104.
4. *Ibid* at para 35. See also *R v Rahey*, [1987] 1 SCR 588 [*Rahey*]. See especially *R v Mills*, in which the majority of the Court appears to have ruled that alternative remedies were available. [1986] 1 SCR 863 [*Mills*]. To date, the Court has declined to re-open the issue of remedy. See *Morin*, *supra* note 1 809.

determination of an appropriate remedy.[5] By largely removing interest balancing from the section 11(b) analysis, the simplified *Jordan* framework presents a real promise of faster trials more frequently; however, the paucity of interest balancing under either *Jordan* or *Rahey* results in a reductive section 11(b) regime. Part II surveys existing interest balancing remedial frameworks, demonstrating that the factors excised from the section 11(b) analysis in *Jordan* are frequently considered relevant to the determination of an appropriate remedy for violations of the *Charter*'s other legal rights. Part III addresses the practical effects of the automatic stay rule on Canadian society, accused persons, and section 11(b) jurisprudence itself. Part IV proposes that the rationale for the automatic stay rule is both problematic and obsolete, necessitating the adoption of a "corrective justice" approach to section 11(b) violations. Part V outlines how such a remedial framework should function and briefly discusses the ancillary benefits of this proposed regime.

I. THE COURSE PARTIALLY CORRECTED: THE REMOVAL OF INTEREST BALANCING CONSIDERATIONS IN JORDAN

In the *Jordan* majority's view, the transition from the flexible *Morin* framework to one predicated on a simplified calculus was pragmatically necessary to remedy the "doctrinal and practical difficulties plaguing the analytical framework."[6] Under *Morin*, trial judges balanced several factors in the determination of whether the delay in a given case was reasonable: "the length of the delay," "waiver of any time periods," "the reasons for the delay," and "any prejudice to the accused."[7] While temporal "guidelines" developed, they were more complicated to calculate and compliance was merely one factor in a sweeping balancing analysis. Owing in part to this over-inclusion of conceptually distinct factors, the *Jordan* majority found that the *Morin* framework was "unpredictable," "highly subjective,"

5. The term "interest balancing" was conceived of by Paul Gerwitz:

> Under the approach I shall call 'Interest Balancing,' remedial effectiveness for victims is only one of the factors in choosing a remedy; other social interests are also relevant and may justify some sacrifice of achievable remedial effectiveness. In evaluating a remedy, courts in some sense 'balance' its net remedial benefits to victims against the net costs it imposes on a broader range of social interests.

Paul Gerwitz, "Remedies and Resistance" (1983) 92 Yale LJ 585 at 591. See also Sonja B Starr, "Rethinking 'Effective Remedies': Remedial Deterrence in International Courts" (2008) 83 NYU L Rev 693. An interest balancing approach "permit[s] courts to justify remedial shortfall based on other interests beyond those of the plaintiffs" (*ibid* at 753).

6. *R v Cody*, 2017 SCC 31 at para 1 [*Cody*].
7. *Supra* note 1 at para 31.

"unduly complex," and ultimately failed to "achieve future compliance with consistent standards."[8]

By addressing these doctrinal and practical difficulties, the *Jordan* framework presents a real promise of faster trials more frequently. Implementing a simplified and definitive calculus allowed the majority to set concrete deadlines for the administration of justice and instil a degree of objectivity lacking under *Morin*—developments which the majority believed will increase "confidence in the administration of justice."[9] The ability to foresee whether a section 11(b) issue is likely to arise at the pretrial phase through reference to the applicable *Jordan* ceiling has enabled justice system participants to streamline scheduling procedures and target problem cases. The presumption of (un)reasonableness that hinges upon compliance with those ceilings allowed the majority to implement "constructive incentives" designed to ensure proactivity on the part of both the Crown and defence.[10] In *R v Cody*, the Supreme Court unanimously emphasized the "important role trial judges play" post-*Jordan* "in curtailing unnecessary delay and changing courtroom culture," encouraging them to manage cases actively and summarily dismiss frivolous applications.[11] Finally, the *Jordan* decision itself led to increased public and governmental attention to existing delay issues, contributing to an increase in resources for the administration of justice.[12] Cumulatively, these developments appear to have begun the difficult work of combatting the culture of complacency towards delay condemned by the majority.

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8. *Jordan*, *supra* note 1 at paras 31-45. Even the dissent, which would have upheld the *Morin* framework, agreed "that the way in which *Morin* ha[d] come to be applied is unduly complicated" (*ibid* at para 158).
9. *Jordan*, *supra* note 1 at para 55.
10. *Ibid* at para 51. There are three incentives. First, when the presumptive ceiling has been exceeded and the Crown seeks to rely on discrete events, it bears the onus of demonstrating that it took "reasonable available steps to avoid and address the problem before the delay exceeded the ceiling." *Ibid* at para 70; *Cody*, *supra* note 6 at paras 48-62. Second, under the "particularly complex case" exception, the Crown must demonstrate that it "developed and followed a concrete plan to minimize the delay occasioned by such complexity." *Jordan*, *supra* note 1 at para 79; *R v Saikaley*, 2017 ONCA 374 at paras 41-48. Third, to discharge its onus where the remaining delay falls below the presumptive ceiling, the defence must show that it took "meaningful, sustained steps to expedite the proceedings," but the case nevertheless took "markedly longer than it reasonably should have." *Jordan*, *supra* note 1 at para 84.
11. *Supra* note 6 at paras 36-39. For an example of this process working as intended, see *R v Papasotiriou-Lanteigne*, 2017 ONSC 5337.
12. A point to which we return later in this article. For example, the province of Ontario hiring new Crowns and judges in 2016. Sean Fine, "Ontario to hire more judges, prosecutors to tackle trial delays," *The Globe and Mail* (1 December 2016), online: <www.theglobeandmail.com/news/national/ontario-expands-criminal-justice-system-to-meet-supreme-court-trial-deadlines/article33120097> [perma.cc/2SYB-H8UH].

The dissent in *Jordan*, however, held that the majority's framework "reduces reasonableness to two numerical ceilings."[13] While itself an over-simplification, this concern has merit.[14] In their warranted bid for simplicity, the *Jordan* majority incorporated two *Morin* factors into the *Jordan* ceilings such that they are no longer considered on a case-by-case basis: (1) the amount of demonstrable prejudice suffered to the accused's liberty, security of the person, and fair trial interests; and (2) the gravity of the offence charged. Under *Jordan,* prejudice is presumed once the "remaining delay"[15] exceeds the relevant ceiling. Similarly, the seriousness of the charge "cannot be relied upon," and is relevant only insofar as it affects the Crown's election and therefore the applicable ceiling.[16] This approach sits in stark contrast to the *Morin* framework, where case-by-case variations in prejudice and the seriousness of the offence often "played a decisive role in whether delay was unreasonable."[17]

This development is analytically important because prejudice is a measure of the personal cost exacted on a given defendant by the alleged *Charter* infringement, while the seriousness of the charge which the defendant seeks to have stayed is a measure of the potential cost exacted on society by the proposed remedy.[18] Cumulatively, the presumption of prejudice and the removal of the

13. *Supra* note 1 at para 254.
14. See *Cody*, *supra* note 6 (intervening provincial Attorneys General requested that the Supreme Court modify the *Jordan* framework to allow for more flexibility when deducting delay—a request which was declined by the unanimous Court).
15. We use "remaining delay" here and throughout the article as a term of art, meaning the final operative delay after defence delay and delay owing to exception circumstances have been deducted. See *Jordan*, *supra* note 1 at para 75; *R v Coulter*, 2016 ONCA 704 at para 38. This treatment of prejudice is actually a return to Lamer J's view in *Rahey*. See *Rahey*, *supra* note 4 at para 36. Interestingly, just one year prior in *Mills*, Justice Lamer was of the view that actual prejudice was a remedial concern. However, in *Rahey*, Justice Lamer saw prejudice as relevant to the determination of whether a remedy "additional to a stay" should follow. See *Rahey*, *supra* note 4 at para 38. *Jordan*, *supra* note 1 at para 54.
16. *Jordan*, *supra* note 1 at para 81. Under *Jordan*, "once the ceiling is breached, an absence of actual prejudice cannot convert an unreasonable delay into a reasonable one" (*ibid* at para 54). In *Jordan*'s companion case, *R v Williamson*, the majority stated that the right to be tried within a reasonable time "does not admit gradients or reasonableness where the charges are serious." *R v Williamson*, 2016 SCC 28 at para 35.
17. *Jordan*, *supra* note 1 at para 96.
18. As discussed below, a stay deprives society of a trial on its merits. Where there is sufficient evidence to prove an offence beyond a reasonable doubt, society is deprived of its interests in the objectives of sentencing, both retributivist and utilitarian. We recognize that there is also a societal interest, as recognized in *Jordan*, in having accused person brought to trial in a timely manner. We address this point below. The salient point at this stage of the article is that the balance between the relevant interests fluctuates. Surely society's interest is not always in favour of a stay, and the primary factor that cuts against a stay is a serious charge. *Jordan*, *supra* note 1 at paras 2, 21-27, 156, 210-12.

seriousness of the offence as a factor in *Jordan* mean trial judges may no longer explicitly balance the accused's interest in a stay against society's interest in a trial.

The *Jordan* framework is also inherently unconcerned with how much the "remaining delay" exceeds the relevant ceiling, as well as the cause(s) of that excess (with the sole exception where that excess is caused by the complexity of the case).[19] As long as the delay is operative (*i.e.*, not waived, caused by the defence, or caused by exceptional circumstances), the *Jordan* calculus does not distinguish in kind between more troubling forms of delay—such as delay caused by abusive state conduct or endemic institutional under-resourcing—and less troubling delay caused by the inherent time requirements of a criminal investigation and prosecution. This approach also differs from that of the *Morin* framework, where periods of delay that were considered inherent to criminal prosecution were subtracted.[20] The *Jordan* framework also does not distinguish in result between cases with thirty months and one day of remaining delay and cases with substantially more. Both are equally and automatically stayed. This third factor could be called the seriousness of the *Charter* infringement.

In stark contrast to the *Morin* framework, the *Jordan* framework is therefore indifferent to case-by-case variations in: (1) the effects of the delay on the accused; (2) the effects of a potential stay on society; and (3) the actual seriousness of the section 11(b) infringement itself. Consequently, *Jordan* reconfigures the section 11(b) analysis from an "interest balancing" framework—where individual and societal interests are weighed diametrically against one another—to an absolutist one, where the length of the "remaining delay" is dispositive of the analysis subject to a few exceptions.[21] Because *Jordan* does not permit this interest balancing under section 11(b), and the automatic stay rule necessarily precludes any remedial interest balancing, variations in these three factors no longer play any part in our section 11(b) regime at all.

II. CLEARED DECKS: INTEREST BALANCING AND OTHER CHARTER VIOLATIONS

A survey of remedial jurisprudence for violations of *Charter* rights other than section 11(b) demonstrates that analogous factors are frequently considered relevant

19. *Jordan*, *supra* note 1 at paras 76-81. Again, we use "remaining delay" here as a term of art (*ibid* at para 75). See also *Coulter*, *supra* note 15 at para 38.
20. For example, intake periods at the Provincial and Superior Courts, the time required for pre-trials, and preparation time for trial. *R v Nguyen*, 2013 ONCA 169 at paras 54, 59; *R v Tran*, 2012 ONCA 18 at paras 32, 38-40.
21. Gerwitz, *supra* note 5; Starr, *supra* note 5. The *Morin* framework was a "balancing" framework. See *Morin*, *supra* note 1 at 787.

to the determination of an appropriate remedy. This process generally follows the same two-stage paradigm, where the court makes a binary determination whether a *Charter* breach has occurred before balancing the relevant individual and societal interests at the remedial stage. The removal of these factors from the section 11(b) analysis in *Jordan* may, therefore, herald their subsequent use in crafting an interest balancing remedial framework for unreasonable delay under section 24(1) of the *Charter*.[22]

Both the *R v Grant* test to exclude evidence under section 24(2) of the *Charter* and the *R v Babos* test to stay charges for abuse of process under section 24(1) weigh individual and societal interests against one another in the determination of an appropriate remedy and are therefore interest balancing remedial frameworks.[23] The following table demonstrates that the *Grant* and *Babos* frameworks are constructed from factors directly analogous to those which the Court either presumed in, or excised from, the section 11(b) framework in *Jordan*.

TABLE 1: SURVEY OF REMEDIAL JURISPRUDENCE

Remedial Concern (plain language)	**Section 11(b) Terminology (*Morin*, *Jordan*)**	**Section 24(2) Terminology (*Grant*)**	**Section 24(1) Terminology (*Babos*)**
1) How serious is the *Charter* infringement?	By how much was the *Jordan* ceiling exceeded? What caused the excess delay?	The "seriousness of the *Charter*-infringing state conduct"[24]	The "isolated or systemic and ongoing nature of the conduct"[25]
2) How did the *Charter* infringement affect the defendant?	Demonstrable prejudice to the defendant's liberty, security of the person, and/or fair trial interests[26]	The "impact on the *Charter*-protected interests of the accused"[27]	"Prejudice to the accused's right to a fair trial"[28] "The circumstances of the accused"[29]

22. Justice Lamer identified demonstrable prejudice as a remedial concern. Justice Lamer stated, "[A]ctual prejudice is therefore irrelevant when deter mining unreasonable delay. Actual prejudice will, however, be relevant to a determination of appropriate relief." *Mills*, *supra* note 4 at para 221.
23. *R v Grant*, 2009 SCC 32 [*Grant*]; *R v Paterson*, 2017 SCC 15 [*Paterson*]; *R v McGuffie*, 2016 ONCA 365 at paras 59-64 [*McGuffie*]; *R v Riley*, 2018 ONCA 998 at paras 42-43; *R v Babos*, 2014 SCC 16 [*Babos*]; *R v Conway*, [1989] 1 SCR 1659.
24. *Grant*, *supra* note 23 at paras 72-75.
25. Babos, *supra* note 23 at para 41.
26. *Jordan*, *supra* note 1 at paras 153-55; Morin, *supra* note 1 at 802-03.
27. *Grant*, *supra* note 23 at paras 76-78.
28. *R* v Gowdy, 2016 ONCA 989 at para 59 [*Gowdy*].
29. *Ibid* at para 62.

TABLE 1: SURVEY OF REMEDIAL JURISPRUDENCE

3) How will the proposed remedy affect society?	The gravity of the offence(s) charged[30] Society's interest in deterring delay causing state conduct[31]	"Society's interest in an adjudication on the merits"[32]	The "charges faced by the accused"[33] The "interests of society in having the charges determined on their merits"[34] "Prejudice to … the justice system that will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome"[35]

The framework for the exclusion of evidence under section 24(1) (as opposed to section 24(2)) also balances similar factors and largely mirrors the *Babos* framework.[36] In these other *Charter* contexts, the court first determines whether a *Charter* infringement has occurred—a binary inquiry in which the *Charter* right is ideally defined clearly and objectively—and then balances competing interests

30. *Jordan*, *supra* note 1 at para 81. Prior to *Jordan*, the s 11(b) jurisprudence had long recognized that "more serious offences will carry commensurately stronger societal demands that the accused be brought to trial" (*ibid* at para 212). See also *Askov, supra* note 1 at 1226.
31. Whether and how societal interests would weigh in favour of a stay under an interest balancing remedial framework is an issue discussed further below. Such an approach would echo the recognition in *Jordan* that the public "interest is served by promptly bringing those charged with criminal offences to trial," as well as the early *Charter* debate that ultimately foreclosed any collective rights dimension to s 11(b). Jordan, *supra* note 1 at para 2. See also *Mills*, *supra* note 4 at para 189.
32. *Grant*, *supra* note 23 at paras 79-86. This factor under s 24(2) relies upon s 11(b) jurisprudence; namely, the recognition in *R v Askov* that society has a "collective interest in ensuring that those who transgress the law are brought to trial and dealt with according to the law" (*ibid* at para 79) citing *Askov*, *supra* note 1 at 1219-20. In *Grant*, the majority found that the seriousness of the offence "has the potential to cut both ways" (*ibid* at para 84).
33. *Babos*, *supra* note 23 at para 41; *Gowdy*, *supra* note 28 at para 62.
34. *Gowdy*, *supra* note 28 at para 62.
35. *Babos*, *supra* note 23 at para 32. This factor—as well as the recognition in *Grant* that the seriousness of the offence "has the potential to cut both ways"—recognizes that societal interests do not always militate against a drastic remedy. *Supra* note 23 at para 84. See also, *McGuffie*, *supra* note 23 at para 60.
36. *R v Bjelland*, 2009 SCC 38 at paras 18-27 [*Bjelland*].

to ensure the ultimate disposition is equitable, responsive, and a function of judicial discretion.[37]

The right to counsel under section 10(b) of the *Charter*—which the majority likened to section 11(b) in *Jordan*—provides a useful case in point because, like section 11(b), it concerns a temporal limit on how long a state actor has to implement a defendant's *Charter* right.[38] In *R v Suberu*, the Court defined the informational component of section 10(b) clearly and objectively, holding that the right to be informed of one's right to counsel "without delay" means "*immediately* upon detention."[39] Similarly, in *Jordan,* the Court defined the right to be tried "within a reasonable time" clearly and objectively by establishing eighteen-month and thirty-month ceilings. Unlike the *Jordan* ceilings, however, the absolutism of the "immediately upon detention" rule is subsequently tempered by the remedial *Grant* framework, which confers upon the trial judge discretion not to exclude the evidence at issue when a nuanced balancing of the relevant interests militates against doing so. The result is a clear, objective, and purposive interpretation of the section 10(b) right that does not under-represent individual or societal interests because those interests are properly considered remedial.[40] This example demonstrates the congruity with which this two-stage paradigm could be adopted for the section 11(b) regime.

III. MUDDIED WATERS: THE PRACTICAL EFFECTS OF THE AUTOMATIC STAY RULE

The practical effects arising from the current dearth of interest balancing under *Jordan* and *Rahey* range from plainly obvious to subtly and incrementally problematic. One effect that rarely fails to escape public consciousness when serious charges are stayed for unreasonable delay is that the accused may receive a windfall. The judicial stay has been called "the ultimate remedy" by the Court.[41]

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37. Vanessa MacDonnell, "*R v Sinclair*: Balancing Individual Rights and Societal Interests Outside of Section 1 of the Charter" (2012) 38 Queen's LJ 137 (arguing against muddying the Charter's Legal Rights with internal interest balancing).
38. *Supra* note 1 at para 86.
39. 2009 SCC 33 at paras 37-42 [emphasis added].
40. This point takes on new significance when one considers that the rule in *Suberu* is further qualified by another interest balancing framework: the s 1 *Oakes* test. See *R v Oakes*, [1986] 1 SCR 103. See also *R v Orbanski*, 2005 SCC 37 at para 54. The Supreme Court found that society's interest in "reducing the carnage caused by impaired driving" justifies the suspension of the 'immediately upon detention' rule during roadside stops.
41. *Canada (Minister of Citizenship and Immigration) v Tobiass*, [1997] 3 SCR 391 at para 86.

It is the most drastic remedy available for any *Charter* violation that is not "prescribed by law" such that the law itself may be declared of no force or effect under section 52(1).[42] As a result, a stay is normally reserved for the "clearest of cases" and the Court has found it to be unavailable in cases of serious, even "reprehensible" state conduct—such as *R v Tobiass*, where the Crown withheld "substantial evidence" that supported a murder suspect's alibi and cast doubt on the credibility of Crown witnesses, and *Babos*, where two officers colluded about firearm evidence and the Crown threatened to lay additional charges if the accused did not plead guilty.[43] In light of this high bar, it is difficult not to conclude that a hypothetical defendant has received a windfall when their case is stayed, without any further inquiry, because it took thirty months and one day of operative delay to complete their trial.[44]

Just as society may be deprived of justice for the guilty, presumptively innocent accused persons may also be deprived of an acquittal on the merits of the evidence. In the words of Akhil Amar on its American counterpart, the automatic stay rule "giv[es] the guilty a windfall and the innocent a brushoff."[45] These more obvious effects were recognized by the Standing Senate Committee on Legal and Constitutional Affairs, which described in its post-*Jordan* report how a stay both "has the potential to let a murderer walk away from their crime unpunished" and to "den[y] a chance of public vindication to the victim, the accused and to Canadian society more broadly."[46]

Subtler, more incremental effects flow from the inevitable creep of interest balancing concerns into the substantive section 11(b) analysis itself. The point is best demonstrated with an example. A hypothetical defendant is charged with murder. They are arrested the day of the offence on the basis of acute public safety concerns, even though the investigation is at a nascent stage. Their phone is seized upon arrest but locked. They are released on reasonable bail. During the course of the prosecution, the defendant, a YouTube sensation,

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42. A process which triggers the cardinal interest balancing framework under the *Charter*: The s 1 *R v Oakes* test. Upon finding that a *Charter* infringement that has been "prescribed by law," the effects of that violation are weighed against that law's efficacy and the importance of its societal goal. See *Oakes*, *supra* note 40. See also MacDonnell, *supra* note 37.
43. *R v Taillefer*; *R v Duguay*, 2003 SCC 70; *Babos*, *supra* note 23 at paras 53-74.
44. The hypothetical defendant's case is not "particularly complex" within the meaning of *Jordan.* See *Jordan*, *supra* note 1 at paras 77-81.
45. Akhil Reed Amar, "Foreword: Sixth Amendment First Principles" (1996) 84 Geo LJ 641 at 652.
46. Senate, *Delaying Justice is Denying Justice: An Urgent Need to Address Lengthy Court Delays in Canada: Report of the Standing Senate Committee on Legal and Constitutional Affairs* (June 2017) (Chair: Bob Runciman) at 37 [*Senate Report*].

tweets consistently about how their arrest and pending charges have enhanced their rebellious image and resulted in their financial gain.[47] The original trial is scheduled to begin twenty-four months after the defendant's arrest. Due to a confluence of neglect, inadvertence, and technological advancement, the police do not successfully crack the defendant's phone until the eve of trial. The phone results in reams of new evidence that renders the Crown's case overwhelming (but not "particularly complex"). On that basis, the defence successfully seeks an adjournment. The second trial dates are scheduled to conclude mere weeks after the thirty-month mark.

Though the delay in this hypothetical may be unreasonable, all three interest balancing factors militate against a stay. There is little, if any, demonstrable prejudice to the defendant's liberty, security of the person, or fair trial interests. Society's interest in a trial on its merits is high due to the gravity of the charge and the overwhelming strength of the Crown's case. The remaining delay only marginally exceeds the relevant thirty-month ceiling and the trial would have concluded under the *Jordan* ceiling but for the final six months of delay caused by state conduct that, while certainly problematic, is not the result of systemic issues or bad faith. Nevertheless, *Jordan* and *Rahey* require the trial judge to stay the charge entirely. Despite the majority's optimism that *Jordan* will increase public confidence in the administration of justice, Canadians would likely be unsatisfied with this outcome.[48]

While entering a stay in this hypothetical would under-represent society's interest in a trial on its merits, declining to find a violation may perniciously undermine the section 11(b) rights of the defendant, as well as future defendants.

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47. While relatively few accused persons purport to benefit from their criminal charges, Canadian courts have long recognized that some accused persons 'welcome' delay and there exist "persons who are in fact guilty of their charges [and] content to see their trials delayed for as long as possible." *Morin*, *supra* note 1 at 811. *Jordan*, *supra* note 1 at para 21. See also *Askov*, *supra* note 1 at para 48.

48. For a real-life example of Canadians dissatisfied because a serious charge was stayed without considering the gravity of the offence, see *R v Picard*, 2016 ONSC 7061; "Ottawa judge stays 1st-degree murder charge over trial delay" *CBC* (15 November 2016), online: <www.cbc.ca/news/canada/ottawa/trial-delay-judge-stays-1st-degree-murder-1.3852486> [perma.cc/3YV5-8QWZ]; "Parents of Fouad Nayel join protest outside Ottawa courthouse after murder trial halted" *CBC* (17 November 2016), online: <www.cbc.ca/news/canada/ottawa/ottawa-courthouse-protest-nov-17-1.3855094> [perma.cc/C7VH-GWZL]; Kathleen Harris, "'Dire situation': Senators seek guidance for top court ruling on trial deadlines" *CBC* (1 December 2016), online: <www.cbc.ca/news/politics/senate-legal-jordan-trial-delays-1.3877101> [perma.cc/Q5F3-XD2R]. *Picard* was overturned on appeal in part because the trial judge underemphasized the weight to be attributed to the seriousness of the offence under the transitional exception. See *R v Picard*, 2017 ONCA 692.

The hypothetical trial judge is faced with a dilemma: Either stay a case with a compelling public interest in a trial on its merits or strain the boundaries of the *Jordan* framework to manufacture a few weeks of subtractable delay—likely in this case by excusing and therefore normalizing the negligent police conduct that caused the final delay.[49]

This phenomenon, referred to as "remedial deterrence," occurs when the gravity of a given remedy is pitted against the finding of a rights violation.[50] Because the most drastic remedy available in the Canadian criminal justice system flows inexorably from the finding of a section 11(b) violation, the Court, academics, and the aforementioned Standing Senate Committee have all acknowledged that remedial deterrence inevitably, and perhaps understandably, dissuades trial judges from properly identifying unreasonable delay.[51] The *Jordan* framework, by virtue of its more restrictive approach to internal balancing, is more vulnerable to this tacit creep of interest balancing as trial judges inevitably struggle for the

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49. In this case, the trial judge would likely feel pressure to find that cracking the phone constituted an exceptional circumstance.

50. "We should expect that raising the 'price' of a constitutional violation by enhancing the remedy will, all things being equal, result in fewer violations." See Daryl J Levinson, "Rights Essentialism and Remedial Equilibration" (1999) 99 Colum L Rev 857 at 889; Starr, *supra* note 5 at 695. See also Richard H Fallon, Jr, "The Linkage between Justiciability and Remedies and their Connections to Substantive Rights" (2006) 92 Va L Rev 633.

51. For acknowledgement from the Court, see *Jordan*, *supra* note 1 at para 35:

> This after-the-fact review of past delay is understandably frustrating for trial judges, who have only one remedial tool at their disposal—a stay of proceedings. It is therefore unsurprising that courts have occasionally strained in applying the *Morin* framework to avoid a stay.

In the words of Justice La Forest, predicting this eventuality, see *Mills*, *supra* note 4 at para 331. Justice La Forest comments, "the adoption of [a stay] as the sole remedy would in my view have the effect of making the courts seriously hesitate before adopting it in any given case." For acknowledgement from academics, see Christopher Sherrin, "Reconsidering the Charter Remedy for Unreasonable Delay in Criminal Cases" (2016) 20 Can Crim L Rev 263. Sherrin comments, "[w]e sometimes dismiss serious charges unnecessarily and more often dismiss applications for *Charter* relief even though the accused has experienced lengthy delay and suffered prejudice" (*ibid* at 264). See also, Justice Casey Hill & Jeremy Tatum, "Re-Chartering an Old Course Rather than Staying Anew in Remedying Unreasonable Delay under the Charter" (2012), online: <www.crowndefence.ca/wp-content/uploads/2011/05/Justice-Casey-Hill_Remedying-Unreasonable-Delay1.pdf> at 52-58. Justice Hill and Tatum note:

> The effect of the remedial deterrence influence is that delay though recognized to be unjustifiable or excessive or lamentable, and accompanied by prejudice to an accused's liberty and security of the person's interests, too often results in a finding that the section 11(b) Charter right has not been violated.

means to grapple with variations in the facially relevant interests at play. Indeed, the question must be asked whether a trial judge can—or should—ever disregard the fact that she is being asked to stay an overwhelming first-degree murder case as opposed to a lesser charge.[52]

In a prospective sense, the real pernicious effects of this interest balancing creep occur when jurists rely on our hypothetical trial judge's precedent, normalizing *Charter*-infringing state conduct in future cases. That societal interests come to compromise accused persons' *Charter* rights themselves rather than merely countervailing their interest in a particular remedy is but one resulting problem. Another is that, because trial judges conduct this balancing implicitly, they do so without any guiding principle or structure, and are left to address facially relevant interest balancing factors on an ad hoc, implicit, and therefore inevitably more arbitrary manner.[53] Finally, it is questionable whether balancing societal

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Ibid at 51. The Senate Committee indicated that the severity of the mandatory remedy may dissuade some judges from finding that there has been a s 11(b) violation. *Senate Report*, *supra* note 46 at 37.

52. Indeed, it has been suggested that legal rights cannot properly be conceived without taking measure of the remedy that follows from the finding of the violation of that right. See Levinson, *supra* note 50. David Rudovsky comments on Levinson:

> For Levinson, the notion of a "pure right" is fiction, as remedies ultimately control the value of any constitutional right. Under this view, when the Court articulates the scope of a constitutional right, it does so against the backdrop of the remedial field, and the constitutional definition is directly affected by the range of possible remedies.

David Rudovsky, "Running in Place: The Paradox of Expanding Rights and Restricted Remedies" [2005] U Ill L Rev 1199 at 1203.

Justice Paciocco has argued that it is "legitimate, predictable and inevitable" that judges "seek out and use available legal tools" to avoid unfairness resulting from the lack of judicial discretion resulting from mandatory minimums. David Paciocco, "The Law of Minimum Sentences: Judicial Responses and Responsibility" (2015) 19 Can Crim L Rev 173 at 173. Remedial deterrence raises the obverse query: whether it is desirable for judges to exercise the same creativity in avoiding outcomes that are unfair to society when constrained by a lack of remedial flexibility.

53. MacDonnell has written about interest balancing under s 10(b) in *R v Sinclair*. MacDonnell, *supra* note 37 at 161. "There is no indication that any principle—not proportionality or anything else—governs the balancing of interests in any meaningful way. One might infer that 'balancing' means some variant of proportionality, but the case law simply does not bear this out." Take, for example, the nebulous way in which Justice Le Dain accepted that interest balancing would affect the s 11(b) analysis in *Rahey*, *supra* note 4 at para 58:

> There is no doubt, as suggested by La Forest J. and the critics of the American jurisprudence, that this drastic outcome [a stay] must inevitably influence the determination whether there has been an infringement of the right to be tried within a reasonable time. This may well ensure that there are compelling reasons for such a determination, which in my opinion is a good thing, but it need not, as the result in the present appeal indicates, and must not deter a court from applying the guarantee of s. 11(b) in a clear case.

interests is the proper function of the judiciary under legal rights analyses at all. As Professor Vanessa MacDonnell has compellingly argued, "the *Charter*'s substantive guarantees were simply not designed to protect societal interests, and there are compelling reasons why courts should not disregard the structure of the *Charter* by imposing internal limits on those guarantees."[54]

In sum, our current regime's paucity of interest balancing results in a fundamental tension caused by a lack of judicial discretion and nuance. This tension will persist and propagate until such time as the Court re-introduces interest balancing factors in a remedial framework for section 11(b) violations. In effect, the remedy is in the remedy.

IV. THE COURSE DIVERGENT: THE RATIONALE IN *RAHEY* AND CORRECTIVE JUSTICE UNDER SECTION 24(1)

With several compelling reasons why an interest balancing remedial framework ought to exist for section 11(b) violations, it is worth asking why Canadian courts have yet to fashion one. A historical perspective suggests the rudder has been locked on a singular course in this regard since 1987. Although appellate courts have occasionally recognized the "conceptual attractive[ness]" of alternative remedies (before ultimately concluding they are unavailable), the remedial issue has not been addressed by the Court since *Rahey*.[55] Indeed, the Court elected not to address the issue in *Morin*, despite being invited to do so by the Attorney General of Canada.[56] Therefore, the rationale for the automatic stay rule remains, at least explicitly, that which Justices Lamer, Wilson and Le Dain articulated in three concurring decisions in *Rahey*. It is important for this discussion to note exactly what the rationale in that decision was—and perhaps more important to note what it was not.

Put simply, the automatic stay rule in *Rahey* was premised on the presumption that the corollary to the right to be tried within a reasonable time is "the right not

54. *Ibid* at 140.
55. The alternative remedy argument is "conceptually attractive and ostensibly supported by recent developments in *Charter* jurisprudence more generally," but it is "precluded by the current state of the law." *R v Pidskalny*, 2013 SKCA 74 at para 48; *R v CD*, 2014 ABCA 333 at paras 41-45.
56. *Morin*, *supra* note 1 at 809. The majority states that "[i]n view of the result at which I have arrived, it is unnecessary to consider the argument of the Attorney General of Canada that a stay is not the only remedy available for an infringement of the right protected by section 11(b)."

to be tried beyond that time."[57] In effect, the majority held that a trial beyond a reasonable time would serve only to exacerbate the violation.[58] In a telling piece of *obiter dicta*, four of the six justices who held this view also believed that a section 11(b) infringement resulted in a loss of jurisdiction, a view which has never found majority favour.[59] In settling on the automatic stay rule, the Court relied heavily on the American decision, *Barker v Wingo*, but was entirely silent on European Court of Human Rights jurisprudence that had already rejected that approach.[60] The Court's reliance on *Wingo* has since been criticized on a number of grounds.[61] Most significantly for the purposes of this article, the United States Constitution does not contain a remedial provision, let alone one with the flexibility prescribed by section 24(1) of the *Charter*, which affords a court of competent jurisdiction the discretion to grant "such remedy as the court considers appropriate and just in the circumstances." We will return to this point momentarily, but it is useful first to address two points which, while some may argue they have implicitly come to form part of the rationale for the automatic stay rule, have not been articulated as such.

First, the automatic stay rule was not founded on the premise that only the gravity of a stay would motivate societal actors to care about delay. The threat of numerous stays, such a rationale would posit, is necessary for the judiciary to ensure sufficient resources are allocated to the criminal justice system and catalyze societal and administrative reform. Notionally at least, by wielding this

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57. *Rahey*, *supra* note 4 at para 61, Lamer J, Dickson CJC concurring. Per Justice Wilson and Justice Etsey concurring:

> [I]n my view, what the court cannot do is find that his right has been violated, *i.e.*, that the reasonable time has already expired, and still press him on to trial, for to do so is to deprive him of his right under section 11(b) in the pretext of granting him a remedy for its violation (*ibid* at para 56).

For his criticism of this rationale, see Sherrin, *supra* note 52 at 264.

58. Sherrin, *supra* note 51 at 271.
59. *Rahey*, *supra* note 4 at paras 48-65. Justice Le Dain, with Justice Beets concurring, advanced what would ultimately become the position of the Court: "I do not find it necessary, in support of this conclusion, to characterize such an infringement as going to the jurisdiction to try an accused, although such a characterization may well be justified for other purposes."
60. 407 US 514 (1972). Hill & Tatum, *supra* note 51 at 60, citing *Eckle v Germany*, [1982] ECHR 4 (Germany) [*Eckle*]. Hill and Tatum consider demonstrable prejudice as relevant not to whether the delay was unreasonable, but whether a sentence reduction was appropriate. Hill and Tatum also consider *Corigliano v Italy*, finding a declaration of a breach and costs the appropriate remedy. [1982] ECHR 10.
61. Hill & Tatum, *supra* note 51 at 35.

mobilizing power, Canadian courts are able to safeguard not only the rights of accused persons but also society's collective interest in trying criminal matters expeditiously—whether society likes it at the time or not. This dual conception of society's interest as simultaneously militating in favour of and against a stay would echo the Court's ruling in *Grant* that society may have a greater interest in excluding evidence where the charges are serious.[62] It would also accord with the *Jordan* majority's increased focus on the collective interests triggered by section 11(b).[63] The concurring decisions in *Rahey*, however, were predicated on an individual rather than collective rights conception of section 11(b).[64] Therefore, if the automatic stay rule has developed a collective rights dimension, it has done so implicitly.

Recognizing as much, however, may be problematic for a number of other reasons. First, those who often presume to speak most vociferously on behalf of Canadian society when it comes to issues of criminal justice may very well disagree that society's interest in motivating expeditious justice in a prospective sense outweighs its interest in trying a given case on its merits, particularly when the allegations are shocking. Such candour may, therefore, prove invidious.[65]

A related issue is that recognizing a collective rights dimension to the automatic stay rule may call into question the propriety of the judiciary, as opposed to Parliament, as the head of power to impose a blanket rule on

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62. See G*rant*, *supra* note 24 at para 84. See also, *McGuffie*, *supra* note 24 at para 60.
63. *Supra* note 1 at paras 19-28.
64. Justice Lamer was silent on the issue in *Rahey* but was explicit in his reliance on his reasons in *Mills*, with which the two concurring decisions ostensibly agreed on this point. See *Mills*, *supra* note 4 at para 20. Justice Lamer explicitly rejected the proposition that s 11(b) had a collective rights dimension:

    > Section 11(b) enunciates an individual right … this right is, in its nature, an individual right and has no collective rights dimension. While society may well have an interest in the prompt and effective prosecution of criminal cases, that interest finds no expression in section 11(b), though evidently, incidental satisfaction … the societal benefit … though of great importance, is a by-product of the section; it is not its object (*ibid* at para 140).

    Rahey precedes the Court's recognition that society has a "collective interest in ensuring that those who transgress the law are brought to trial and dealt with according to the law." See *Askov*, *supra* note 1 at para 76.
65. For a discussion as to whether judges should moderate their decisions to avoid publicly contentious decisions, see Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 2nd ed (New Haven: Yale University Press, 1986); Cass R Sunstein, "If People Would be Outraged by Their Rulings, Should Judges Care?" (2007) 60 Stan L Rev 155; Andrew B Coan, "Well, Should They? A Response to *If People Would Be Outraged by Their Rulings, Should Judges Care?*" (2007) 60 Stan L Rev 213.

behalf of Canadians' collective interests. To date, the automatic stay rule has been premised on the judiciary's traditional role as the guardian of individual *Charter* rights. Purporting to speak on behalf of societal interests in all cases is quite another claim. While it is common for Canadian courts to weigh societal interests against those of the individual, that determination usually occurs as outlined above: Explicitly, on a case-by-case basis, and pursuant to a predetermined framework. By foregoing a remedial analysis in favour of the automatic stay rule, there is necessarily no mechanism for jurists to determine whether society's interest in motivating expeditious justice actually outweighs its interest in a trial on the merits in any given case—a task which they are no doubt properly situated to undertake. What remains is something akin to a judicial statute of limitations. Indeed, subsequent to the Supreme Court of the United States' decision in *Wingo*, Congress enacted the *Speedy Trial Act*, which largely subsumed the sixth amendment analogue to section 11(b) as it pertains to federal prosecutions.[66] By and large, the individual states followed suit.[67]

The rationale for the automatic stay rule in *Rahey* also was not predicated on a determination that a stay is the only remedy capable of correcting the prejudice suffered by the accused. In fact, the concurring majority decisions – consumed with American precedent, the jurisdictional question, and rudimentary questions including whether real prejudice ought to inform the analysis at all, the concurring majority decisions largely failed to ask what remedies were capable of correcting prejudice to the individual interests it recognized as being protected by section 11(b)—adopting instead the rationale that a trial after unreasonable delay will simply cause more unreasonable delay. The problem with this simplistic rationale, as Professor Christopher Sherrin has succinctly put it, is that it "incorrectly assumes that the problem is delay in and of itself when the problem is actually the effects of delay on constitutionally protected interests."[68] In the words of Akhil Amar, "each legal interest has a unique size and shape, and its own uniquely apt remedy package. Remedies should fit rights, and if rights (or "legal interests") do not come in a one-size-fits-all package, neither should remedies."[69] As discussed

66. 18 USC § 3161 (1974).
67. For a compendium of such legislation in place shortly thereafter, in 1978, see *e.g.* Burke O'Hara Fort et al, *Speedy Trial: A Selected Bibliography and Comparative Analysis of State Speedy Trial Provisions* (Washington, DC: Midwest Research Institute for National Institute of Law Enforcement and Criminal Justice & Law Enforcement Assistance Administration & United States Department of Justice, 1978).
68. Sherrin, *supra* note 51 at 264.
69. Amar, *supra* note 45 at 650.

below, there exists a plethora of alternative remedies capable of substantially correcting or mitigating the effects of delay in any given case.[70]

Arguably, this "corrective justice" approach, which, in the Legal Rights context, aims to "make-whole" the victim of constitutional violation by returning him or her to the position he or she occupied before the violation—should underpin all section 24(1) remedies.[71] Interestingly, the Court initially adopted a burgeoning corrective justice approach to section 11(b) violations before reversing course in *Rahey*. In *R v Mills,* the Court held that a stay was not the only available remedy for unreasonable delay:

> No court may say, for example, that a stay of proceedings will always be appropriate in a given type of case. Although there will be cases where a trial judge may well conclude that a stay would be the appropriate remedy, the circumstances will be infinitely variable from case to case and the remedy will vary with the circumstances.[72]

The concurring decisions in *Rahey* did not comment on this reversal. On its face, however, the ruling in *Mills* is more congruent with the plainly capacious language of section 24(1), to "obtain such remedy as the court considers appropriate and just in the circumstances."

Over the past thirty years, the Court has shown a clear preference—in all facets of section 24(1) jurisprudence other than its application following section 11(b)—for the flexible corrective approach prescribed in *Mills* over the narrow remedial view of *Rahey*.[73] Examples abound. In *R v Bellusci*, the Court held that an effective remedy under section 24(1) should "vindicate the rights of the claimant, be fair to the party against whom it is ordered, and consider all other

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70. Sherrin, *supra* note 51. See also Anthony Amsterdam, "Speedy Criminal Trial: Rights and Remedies" (1975) 27 Stan L Rev 525 at 534-35.
71. Kent Roach, "The Limits of Corrective Justice and the Potential of Equity in Constitutional Remedies" (1991) 33 Ariz L Rev 859 at 867-69.
72. *Supra* note 4 at para 23. Justice McIntyre wrote for three of seven justices. Justice La Forest concurred on this point.
73. See *e.g. R v Donnelly*, 2016 ONCA 988 at para 146 (stating that "[i]t is difficult to imagine language which could equip a court with a wider and less fettered discretion"); *Doucet-Boudreau v Nova Scotia (Minister of Education),* 2003 SCC 62 at paras 41, 52-56 (holding that remedies under s 24(1) of the *Charter* are flexible and contextual); *Bjelland*, *supra* note 36 at para 18 (holding that s 24(1) remedies "address the most varied situations. Different considerations may come into play in the search for a proper balance between competing interests."). See also *Quebec v Jodoin,* 2017 SCC 26 at para 25 [*Jodoin*]; *Paterson*, *supra* note 23 at para 98. Justice Moldaver suggested in dissent that s 24(1) could provide an alternative remedy—a sentence reduction—even in exclusion of evidence cases.

relevant circumstances."[74] Similarly, in *R v 974649 Ontario Inc*, the Court held that section 24(1) "appears to confer the widest possible discretion on a court to craft remedies for violations of *Charter* rights" and "[t]his broad remedial mandate for section 24(1) should not be frustrated by a '[n]arrow and technical' reading of the provision."[75] It is difficult to square these pronouncements with the narrow interpretation of section 24(1) as it pertains to unreasonable delay in *Rahey*.

One possible explanation is that the proverbial tail more or less wagged the dog during the evolution of the section 11(b) jurisprudence. It is worth remembering that the automatic stay rule predates the *Morin* framework itself. By the time the Court decided *Morin*, it had clearly recognized the need for an interest balancing approach to unreasonable delay; however, having precluded any such balancing under a remedial framework five years earlier in *Rahey,* the Court was unprepared to revisit the automatic stay rule.[76] Instead, the Court chose to adopt the American approach and balance individual and societal interests under the section 11(b) framework itself—a decision which appears to have bifurcated the evolution of our section 11(b) regime from that of the other "Legal Rights."[77] Although *Jordan* has now properly overturned the inclusion of remedial factors under section 11(b) in *Morin*, the automatic stay rule persists as an unfortunate vestigial remnant of this bifurcation.

Interestingly, Justice La Forest correctly predicted this evolution in his dissent in *Rahey*, holding that the automatic stay rule would "give the right in section 11(b) a pre-eminence over other *Charter* rights."[78] While Canadian courts have developed nuanced remedial frameworks for other *Charter* rights in the interim, the automatic stay rule has now persisted for thirty years, despite

74. *R v Bellusci*, 2012 SCC 44 at para 18, citing *Bjelland*, *supra* note 36 at para 42; Hill & Tatum, *supra* note 51 at 52-58.
75. *R v 974649 Ontario Inc*, 2001 SCC 81 at para 18, recently cited with approval in *Jodoin*, *supra* note 74.
76. *Morin*, *supra* note 1 at 808. For how the Court decided *Rahey* before a s 11(b) framework existed and "before the [trial within a reasonable time] issue became a controversial one, see Janine Benedet et al, "30th Anniversary of the *Canadian Charter of Rights and Freedoms*: The Impact on Criminal Justice" (2012) 91 CR (6th) 71. See also Hill, *supra* note 51 at 42-46. For pre-*Rahey* criticism of the American equivalent of the automatic stay rule, see Anthony Amsterdam, "Speedy Criminal Trial: Rights and Remedies" (1975) 27 Stan L Rev 525.
77. "Legal Rights" are the heading for sections 7 to 14 of the *Charter*. Hill, *supra* note 51.
78. *Mills*, *supra* note 4 at 973 cited in *Rahey*, *supra* note 4 at para 109.

federal opposition, academic and juristic criticism, and international rejection.[79] In this regard, the Court's decisions in *Rahey* and *Morin* are inextricable and, by overturning *Morin*, the majority decision in *Jordan* suggests *Rahey* may be obsolete. If this is the case, a return to the corrective principles in *Mills* is the next logical step.

In this regard, although the Court did not address the remedial question in *Jordan*, the majority decision augurs well for the possibility of remedial reform. The Court's recognition that trial judges are "understandably frustrat[ed]" addressing delay retroactively with "only one remedial tool" is significant.[80] In the wake of this *obiter dicta*, the Standing Senate Committee has recommended that the Attorney General of Canada refer the constitutionality of two alternative remedies—sentence reductions and cost orders—to the Court.[81] Beyond these portents, however, this article has hopefully demonstrated that the particular construction of the *Jordan* framework itself is conducive to the development of a remedial framework, differentiating the approach advocated in this article from its predecessors.

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79. For federal opposition, see *Morin*, *supra* note 1 at 809. For academic criticism, see Sherrin, *supra* note 51. Sherrin argues:

> The reason why the Supreme Court decided that a stay of proceedings had to follow a finding of unreasonable delay was the belief that anything less would only exacerbate the problem by permitting even more delay. This argument has superficial appeal but ultimately collapses on closer scrutiny. It incorrectly assumes that the problem is delay in and of itself, when the problem is actually the effects of delay on constitutionally protected interests. If it is possible to eliminate or sufficiently reduce those effects, as well as adequately compensate for them, then additional delay does not make a bad situation worse (*ibid* at 264).

For Juristic, see *Rahey*, *supra* 4 at paras 59-75. For international opposition, see *Senate Report*, *supra* note 46 at 39.

80. *Jordan*, *supra* note 1 at para 35.

81. *Senate Report*, *supra* note 46 at 40. Despite having the benefit of the testimony of Professor Christopher Sherrin, the Standing Senate Committee only suggested sentencing and costs as potential remedies for unreasonable delay.

TABLE 2: DISCURSIVELY SITUATING THIS PAPER

	Non-interest balancing s 11(b) framework (adopted in *Jordan*, *supra* note 1)	**Interest balancing s 11(b) framework** (adopted in *Morin*, *supra* note 1)
No remedial framework (the automatic stay rule)	Our current regime	Our former regime
Alternative remedial framework	The approach recommended by this paper	Pre-*Jordan* alternative remedy proposals (Hill & Tatum, *supra* note 51; Sherrin, *supra* note 51)

V. THE COURSE CORRECTED: CONSTRUCTING A REMEDIAL FRAMEWORK FOR UNREASONABLE DELAY

Adopting this corrective approach, the appropriate remedy in a given case would be a function of the specific form of prejudice suffered. Section 11(b) violations that cause demonstrable but reparable prejudice to the accused's fair trial interest may, for example, be remedied with evidentiary rulings at trial.[82] If a defence witness has become unavailable, the prejudice could be repaired or mitigated by adducing an out of court statement for the truth of its contents.[83] In the wake of *Jordan*, a Standing Senate Committee has also suggested that costs might be awarded to compensate the accused for additional expenses in establishing evidence that has been lost due to unreasonable delay.[84] If a Crown expert report has been prepared after the *Jordan* ceiling has been exceeded, it could be excluded. These evidentiary remedies are far more practicable post-*Jordan* because it is now clear precisely when a section 11(b) infringement crystalized.[85] Such a regime may have been unworkable under *Morin* when the point in time at which the delay became unreasonable was paradoxically affected by demonstrable prejudice caused by that delay.

82. Sherrin, *supra* note 51 at 273-79.
83. *Ibid* at 275.
84. *Senate Report*, *supra* note 46 at 38.
85. While inferred prejudice is included in the *Jordan* ceilings, actual prejudice would only be relevant to the determination of an appropriate remedy. *Jordan*, *supra* note 1 at para 54. The European Court of Human Rights adopted the latter approach. See *Eckle*, *supra* note 61. This approach would also accord with much of the pre-*Morin* jurisprudence. See *Mills*, *supra* note 4 at paras 166-68; Hill, *supra* note 51 at 38; *Askov, supra* note 1 at para 68.

In cases where unreasonable delay infringes the Applicant's liberty and security of the person interests to a degree short of that warranting a stay, the trial judge could release the defendant from custody, relax their bail conditions, award costs, give enhanced credit for pre-trial custody, declare that the defendant's *Charter* rights have been violated, and/or reduce the defendant's sentence.[86] The most tangible remedy for a defendant who is ultimately convicted would likely be a sentence reduction or enhanced pre-trial credit.[87] One or both of these regimes would have to be squared with any revised remedial scheme given the legislative restrictions on enhanced credit for pre-trial custody and recent jurisprudence on the unavailability of sentence reductions below a mandatory minimum.[88]

Fewer remedies would be available to those who are ultimately acquitted. However, Professor Sherrin has suggested that costs, pre-trial orders, the declaration of a *Charter* violation, the peace of mind inherent in knowing in advance of trial that a sentence reduction will follow any finding of guilt, and ("perversely") the possibility of an acquittal provide significant redress for those who are ultimately acquitted.[89] Another potential remedy—put forward by the Standing Senate Committee and proposed by the dissenting justices in *Mills* and *Rahey* as the "most obvious remedy for delay"—is an order expediting the proceedings.[90] In order to comply with such an order, the Crown could be

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86. Sherrin, *supra* note 51 at 279-91. The Supreme Court of Canada has found that sentencing judges could reduce an offender's sentence in compensation for a *Charter* breach if that breach related to the circumstances of the offence or the offender. See *R v Nasogaluak*, 2010 SCC 6 [*Nasogaluak*]. Interestingly, some courts, particularly in British Columbia, have granted sentence reductions for delay short of a section 11(b) violation pre-*Jordan*. See: *R v Purchase*, 2012 BCSC 208 at paras 164-66; *R v Panousis*, 2002 ABQB 1109 at para 53; *R v Vroegop*, 2012 BCPC 484 at para 28; *R v E (KV)*, 2013 BCCA 521 at para 30.

87. See also Sonja B Starr, "Sentence Reduction as a Remedy for Prosecutorial Misconduct" (2009) 97 Geo LJ 1509.

88. *Truth in Sentencing Act*, SC 2009, c 29; *R v Summers*, 2014 SCC 26. See *Nasogaluak*, *supra* note 89 at paras 63-64: "The judge must impose sentences respecting statutory minimums and other provisions which prohibit certain forms of sentence in the case of specific offences." However, "I do not foreclose, but do not need to address in this case, the possibility that, in some exceptional cases, sentence reduction outside statutory limits, under s 24(1) of the *Charter,* may be the sole effective remedy for some particularly egregious form of misconduct by state agents in relation to the offence and to the offender." See also *R v Donnelly*, *supra* note 74 at para 160, in which Justice Watt found "the trial judge erred in invoking s 24(1) of the *Charter* to impose a sentence outside statutory limits for the offence of which Donnelly was convicted." *R v Ferguson*, 2008 SCC 6 forecloses the use of constitutional exemptions. See also Hill & Tatum, *supra* note 51 at 57.

89. *Sherrin*, *supra* note 51 at 279-91.

90. *Mills*, *supra* note 4 at para 298; *Senate Report*, *supra* note 46 at 38.

required to re-prioritize cases, curtail witness lists, or proceed on only some of the charges on a given indictment.

In terms of structure, the best remedial framework for section 11(b) violations would function as follows. The court would determine whether the delay in a given case is reasonable under the *Jordan* framework. If the delay is unreasonable, the court would then determine whether a stay ought to be entered with reference to three factors: (1) the seriousness of the violation; (2) demonstrable prejudice to the defendant's liberty, security of the person, and fair trial interests; and (3) society's interest in a trial on its merits.

Borrowing from existing section 24(1) jurisprudence, a stay would be appropriate where a fair trial is no longer possible or, having weighed the seriousness and impact of the violation against society's interest in a trial on its merits, the trial judge finds it "would be harmful to the integrity of the justice system" to proceed to trial.[91] Whether any alternative remedies are capable of redressing the specific prejudice suffered by the defendant would be crucial to both determinations.[92] Stays would likely be less frequent than they are currently, but more common than under the abuse of process regime due to the long history of assiduously guarding defendants' section 11(b) rights and the fact that prejudice arising from unreasonable delay is irremediable by simply ordering a new trial.[93] In cases where a stay is not entered, the court would redress to the fullest extent possible the specific prejudice to each of the defendant's three *Charter*-protected interests through the remedies outlined above. Some remedies would be implemented before or at trial, such as evidentiary rulings and release

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91. The first branch would be analogous to the "main category" of the abuse of process regime: *Babos*, *supra* note 23 at para 31; *Gowdy*, *supra* note 29 at para 57. While the abuse of process doctrine may be informative when structuring a remedial framework for s 11(b) violations, Justice Lamer was careful to distinguish the two in *Mills*:

> The section is concerned not with abuse of process but with abusive process. The Crown's motives, whatever they may be, do not render a reasonable delay unreasonable nor can they transform an unreasonable delay into a reasonable lapse of time. Thus, whether the delay is the result of malice, negligence or inadvertence is of little import, the remedy being in all cases at least a stay, except, of course, when considering additional remedies, such as damages.

Supra note 4 at para 189. The second branch would be analogous to the "residual category" of the abuse of process regime: *Babos*, *supra* note 23 at para 35.

92. *Gowdy*, *supra* note 29 at para 61.

93. *Babos*, *supra* note 23 at paras 46-47. Given the strong language in *Jordan*, s 11(b) is likely a right that "strikes at the very heart of the criminal justice system" and would likely be afforded strong protection. *Supra* note 1 at paras 1-3.

orders, while others would be implemented after trial, such as sentence reductions and cost awards.

What emerges is an interest balancing remedial framework that allows for alternative remedies. This regime would yield a host of ancillary benefits. For example, as occurs in exclusion of evidence cases, the Crown would actually concede some section 11(b) violations and confine the application to a determination of the appropriate remedy. This would further enhance *Jordan*'s stated goals of clarity and simplicity and mitigate the toll on judicial resources inherent in implementing a remedial framework.

Such a regime would also enhance public confidence in the administration of justice. As the *Jordan* majority noted, "the Canadian public expects their criminal justice system to bring accused persons to trial expeditiously."[94] However, in the current absence of any consideration of prejudice, the seriousness of the violation, or the gravity of the offence, Canadians may justifiably feel concerned that our current regime is purposefully ignorant of factors that are intuitively relevant to, if not dispositive of, the issue of delay.[95] If the Court is prepared to speak on behalf of the Canadian public's expectations, then it should recognize that Canadians likely do not expect the reductive outcomes foreseeably flowing from the confluence of its decisions in *Jordan* and *Rahey*.[96] Indeed, the analogous *Grant* test is specifically crafted to safeguard public confidence in the administration of justice by virtue of the wording of section 24(2).

An interest balancing remedial framework that allows for alternative remedies would also allow trial judges to address local and societal issues by amplifying society's interest in either a trial on its merits or in disassociating the administration of justice from abusive or systemic delay-causing conduct. For example, trial judges would be given the discretion to attach more weight to systemic institutional delay in their jurisdiction or, as suggested by the dissent in *Jordan*, attach less weight to "institutional delay that is attributable to exceptional and temporary conditions in the justice system" where the state has

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94. *Jordan*, *ibid* at para 2.
95. Public and political outrage followed news that a first-degree murder charge had been stayed in *Picard*. At least in the eyes of the deceased's family, the Court of Appeal's decision to overturn the trial decision restored some faith in the justice system, though they remain disillusioned. See Sean Fine, "Couple's faith in Canadian justice system lost, despite conviction in son's murder," *The Globe and Mail* (16 October 2018), online: <www.theglobeandmail.com/canada/article-couples-faith-in-canadian-justice-system-lost-despite-conviction-in> [perma.cc/T9GQ-36QE].
96. *Jordan*, *supra* note 1 at para 2.

made reasonable efforts to alleviate those conditions.[97] Trial judges could give effect to society's interest in a trial on its merits not only because the offence charged is grave, but because it represents a persistent or pressing societal ill, such as firearms offences, sexual offences involving children, and racially motivated violence.[98] In this way, section 11(b) could be refined from a blunt instrument to a surgical tool for denouncing and remedying the existing culture of complacency towards delay without compromising the bright-line definition of reasonableness conferred in *Jordan*.

VI. CONCLUSION

In *Jordan*, the Court demonstrated that it will not shy away from jurisprudential reform in its effort to correct the section 11(b) course. This intrepid spirit should persist with a re-evaluation of the automatic stay rule. While the automatic stay rule has arguably always been misguided, in conjunction with the *Jordan* framework, it precludes consideration of individual and societal interests that are clearly relevant to the issue of delay and requires trial judges to ignore the actual seriousness of a given infringement. As a result, it stands to undermine confidence in the administration of justice, the rights of accused persons, and the *Jordan* framework itself.

Simultaneously, however, *Jordan* represents an opportunity. By removing remedial concerns from the section 11(b) analysis, the Court has laid the foundation for an interest balancing remedial framework. By recognizing trial judges' frustration with the automatic stay rule, it has foreshadowed a return to the corrective principles of section 24(1). Once *Jordan* has exacted its sea change on the administration of justice, both of these developments should be embraced, and nuance and flexibility should be re-introduced into our section 11(b) regime. The Court has only partially corrected the section 11(b) course; it is time to untether the wheel and re-chart our approach to remedy as well.

A significant period of time elapsed from when this paper was first submitted until its publication. During that time several decisions were released which would have merited discussion. Perhaps most important was R v Charley *by the Ontario Court*

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97. *Ibid* at para 209.
98. See *Senate Report*, *supra* note 46 at 39. The gravity of sexual offences involving children were specifically stressed by the Standing Senate Committee as crucial to maintaining confidence in the administration of justice.

of Appeal.[99] *Paragraphs 106-14 may be seen as pertinent, especially paragraph 107 wherein the court noted, "[i]t is settled law, at least in respect of s. 11(b) breaches that occur prior to verdict, that a stay of proceedings is the only available remedy… . In his factum, Crown counsel suggests that Rahey and the subsequent line of authority from the Supreme Court of Canada has been heavily criticized and is ripe for reconsideration after Jordan."* [100] *At paragraph 27 of* Charley *it was noted, "[t]he [trial] Crown did not argue that there were any other remedies available under s. 24(1) of the Charter for a breach of s. 11(b)."* [101]

99. [2019] OJ No 4693.
100. *Ibid* at para 107.
101. *Ibid* at para 27.