



SUPREME COURT OF CANADA

CITATION: R. v. K.J.M., 2019 SCC 55

APPEAL HEARD: February 19, 2019

JUDGMENT RENDERED: November 15, 2019

DOCKET: 38292

BETWEEN:

K.J.M.
Appellant

and

Her Majesty The Queen
Respondent

- and -

**Attorney General of Ontario,
Director of Criminal and Penal Prosecutions,
Criminal Lawyers' Association (Ontario),
Legal Aid Society of Alberta and
Justice for Children and Youth**
Interveners

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

REASONS FOR JUDGMENT:
(paras. 1 to 120)

Moldaver J. (Wagner C.J. and Gascon, Côté and Rowe JJ. concurring)

JOINT DISSENTING REASONS:
(paras. 121 to 202)

Abella and Brown JJ. (Martin J. concurring)

DISSENTING REASONS:
(paras. 203 to 235)

Karakatsanis J.

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

R. v. K.J.M.

K.J.M.

Appellant

v.

Her Majesty The Queen

Respondent

and

**Attorney General of Ontario,
Director of Criminal and Penal Prosecutions,
Criminal Lawyers' Association (Ontario),
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Interveners

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2019 SCC 55

File No.: 38292.

2019: February 19; 2019: November 15.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Constitutional law — Charter of Rights — Right to be tried within reasonable time — Young persons — Delay of almost 19 months between charges and end of youth accused's trial — Whether presumptive ceilings established in Jordan apply to youth justice court proceedings — Whether youth accused's right to be tried within reasonable time under s. 11(b) of Canadian Charter of Rights and Freedoms infringed.

M, a “young person” under the *Youth Criminal Justice Act* (“YCJA”), was charged with various offences arising out of a fight in which he stabbed another youth. Almost 19 months after charges were laid, he was found guilty of aggravated assault and possession of a weapon for a dangerous purpose. Shortly before his convictions, he applied unsuccessfully for a stay of proceedings on the basis that the delay violated his right to be tried within a reasonable time under s. 11(b) of the *Charter*. The trial judge found that the total delay exceeded the 18-month ceiling set out in *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631, and was therefore presumptively unreasonable. The trial judge, however, dismissed the s. 11(b) *Charter* application and refused to enter a stay, reasoning that it was not the clearest of cases where a stay should be granted. The Court of Appeal dismissed the appeal, with one justice dissenting. The three justices wrote separate reasons, each taking a distinct approach as to whether the presumptive ceilings set out in *Jordan* apply to youth matters.

Held (Abella, Karakatsanis, Brown and Martin JJ. dissenting): The appeal should be dismissed.

Per Wagner C.J. and **Moldaver**, Gascon, Côté and Rowe JJ.: While *Jordan* did not explicitly answer the question of whether the 18- and 30-month presumptive ceilings apply to youth justice court proceedings, the existing *Jordan* framework is capable of accommodating the enhanced need for timeliness in youth cases. This need is well established in the jurisprudence and codified in the *YCJA*. It can and should be considered in applying the test for a stay below the ceiling, which requires the defence to establish that (1) it took meaningful steps that demonstrate a sustained effort to expedite the proceedings, and (2) the case took markedly longer than it reasonably should have. An accused's youthfulness should be considered in assessing the second branch of the test. But unless and until it can be shown that *Jordan* is failing to adequately serve Canada's youth and society's broader interest in seeing youth matters tried expeditiously, there is no need to consider, much less implement, a lower constitutional ceiling for youth matters.

Canada's youth criminal justice system stands separate from the adult criminal justice system. While every person charged with an offence has the right to be tried within a reasonable time under s. 11(b) of the *Charter*, this right has special significance for young persons, for at least five reasons. First, because young persons have a different perception of time and less well-developed memories than adults, their ability to appreciate the connection between actions and consequences is

impaired. Whereas prolonged delays can obscure this connection and dilute the effectiveness of any disposition, timely intervention reinforces it. Second, delay may have a greater psychological impact on a young person. Third, the increased rapidity with which a young person's memory fades may make it more difficult for him or her to recall past events, which may in turn impair his or her ability to make full answer and defence, a right which is protected by s. 7 of the *Charter*. Fourth, adolescence is a time of rapid brain, cognitive, and psychosocial development. Where a prolonged delay separates the offending conduct from the corresponding punishment, the young person may experience a sense of unfairness, as his or her thoughts and behaviours may well have changed considerably since the offending conduct took place. Fifth, society has an interest in seeing young persons rehabilitated and reintegrated into society as swiftly as possible. For all these reasons, youth matters should proceed expeditiously and in a timely manner.

The foregoing notwithstanding, there is no need to introduce a lower presumptive ceiling for youth matters. It has not been shown that there is a problem regarding delay in the youth criminal justice system, let alone one that warrants the imposition of a new constitutional standard. There is no evidence that young persons who proactively request an expedited trial are not being accommodated in the post-*Jordan* world, nor that actors within the youth criminal justice system are not taking *Jordan* to heart. Further, *Jordan* established a uniform set of ceilings that apply irrespective of the varying degrees of prejudice experienced by different groups and individuals. Setting new ceilings based on the notion that certain groups — such

as young persons — experience heightened prejudice as a result of delay would undermine this uniformity and lead to a multiplicity of ceilings, each varying with the unique level of prejudice experienced by the particular category or subcategory of persons in question. This would quickly become impracticable. The mere fact that Parliament decided to create and maintain a separate youth criminal justice system does not by itself provide a sound rationale for establishing a separate ceiling for youth matters.

The decision not to alter the *Jordan* ceilings to apply differently to youth justice court proceedings does not mean that an accused's youthfulness has no role to play under the *Jordan* framework. The enhanced need for timeliness in youth matters can and should be taken into account when determining whether delay falling below the presumptive ceiling is unreasonable. Like the other factors identified in *Jordan*, the enhanced need for timeliness in youth matters is simply one case-specific factor to consider when determining whether a case took (or is expected to take) markedly longer than it reasonably should have. This approach recognizes that while the presumptive ceiling remains the same whether the accused is a youth or an adult, the tolerance for delay differs. While the presumptive ceiling provides a hard backstop that offers certainty, predictability, and simplicity, the test for a stay below the ceiling affords the necessary flexibility to ensure case-specific features — such as the age of the accused — are not lost in the analysis. At the same time, *Jordan* will not deliver on its promise — whether for young persons or for adults — unless all participants in the criminal justice system work together and take a proactive approach from day

one. Prosecutors have a strong incentive to be proactive because the failure to do so will be a factor in determining whether a case has taken markedly longer than it reasonably should have. Equally, the defence has a duty to be proactive, as well as an interest in doing so. If the defence hopes to satisfy the “meaningful steps” test set out in *Jordan*, it must engage in proactive conduct throughout and show that the accused is committed to having the case tried as quickly as possible. Resigned acquiescence will not do.

There is every reason to expect that young persons will enjoy stronger protection against prolonged delay than they did in the pre-*Jordan* era. While the test for a stay for delay below the ceiling places the onus on the defence to establish that the delay was unreasonable, this does not disadvantage young persons vis-à-vis adults or place them in a less advantageous position than they were in pre-*Jordan*. *Jordan* affords all accused persons, including youth, the benefit of a strong presumption of unreasonableness once the delay exceeds the presumptive ceiling. Given that both young persons and adults benefit from this strong presumption, they both must bear the onus of justifying a stay when the delay is below the ceiling. While the Court stated in *Jordan* that stays for delay below the ceiling will be rare and limited to clear cases, this statement must be read in light of the fact that the *Jordan* framework applies to all criminal proceedings, not just youth matters. While stays for delay below the ceiling may be rare when considered against the entire body of applications for a stay for delay under the ceiling, they may be less rare when considered against the smaller body of youth applications for a stay for delay under the ceiling. Thus,

when *Jordan* is taken to heart and the test for a stay below the ceiling is properly applied to youth court proceedings, the *Jordan* framework affords young persons robust protection against unreasonable delay.

Any delay resulting from failed attempts at extrajudicial sanctions should be treated on a case-by-case basis. However, without foreclosing the theoretical possibility that such delay might in some rare instances be included in the *Jordan* calculation, it can reasonably be expected that it will be deducted as defence delay. Removing this type of delay from the *Jordan* calculation minimizes the risk that authorities will refrain from using extrajudicial sanctions in the first place out of a fear that they may be increasing the likelihood of a stay in the event such measures fail. Removing disincentives against extrajudicial sanctions is an important policy objective given the central role played by such measures in the youth criminal justice system. Furthermore, this approach makes sense at a conceptual level. When an attempt at extrajudicial sanctions is made, that effectively removes the matter from the court system and places it on a different track. It therefore makes good sense to stop the clock and to restart the clock only if and when the matter is placed back into the court system.

The delay in this case fell below the 18-month presumptive ceiling. The total delay was 18 months and 28 days. In line with *Jordan*, any delay caused by the defence must be subtracted from total delay. For example, the defence will have directly caused the delay if the court and the Crown are ready to proceed, but the

defence is not. Here, on one occasion, the court and Crown were ready at the scheduled start time, but M did not show up on time. This created a need to reschedule the hearing, and the earliest available date was five months later. While it is difficult to quantify with precision the extent of the delay caused by the defence, attributing a delay of two to three months to the defence is both fair and reasonable. In addition, delay caused by discrete exceptional events that are reasonably unforeseeable or reasonably unavoidable must also be deducted to the extent such delay could not reasonably have been mitigated by the Crown or the justice system. Such an event occurred when an administrative error in the transcript ordering process resulted in approximately one month of delay. This leaves a net delay of 15 to 16 months, falling below the applicable ceiling.

Although this case is close to the line, it does not meet the test for a stay below the ceiling. In a transitional case such as this one, both requirements — that the defence took meaningful and sustained steps, and that the case took markedly longer than it reasonably should have — must be applied contextually, sensitive to the parties' reliance on the previous state of the law. As to the first requirement, while the defence acted responsibly throughout the proceeding, it did not engage in the necessary proactive conduct. Its approach was more one of resigned acquiescence. However, given that about 80 percent of the trial took place before *Jordan* was released, the defence should have the benefit of the doubt and the first requirement has been met. As to the second requirement, although some factors suggest that this case should reasonably have completed in less time, the issue is whether it took

markedly longer than it reasonably should have. The vast majority of this trial took place at a time when the tolerance for institutional delay — the primary cause of delay in this case — was high across the country. It is clear from the record that overbooking and systemic delay in the jurisdiction in question were endemic. Further, the seriousness of the offences and the absence of any demonstrated prejudice are relevant in that they help to explain why the Crown had good reason to believe the delay in this case would not have been found to be unreasonable. The persistent systemic delay discussed above also constrained the Crown's ability to move this case through the system in a timely manner. While the delay here was excessive, a contextual approach leads to the conclusion that the case did not take markedly longer than it reasonably should have. Therefore, a stay is not warranted.

Per Abella, Brown and Martin JJ. (dissenting): Section 11(b) of the *Charter* requires a distinct and lower presumptive ceiling for proceedings brought under the *YCJA*, reflecting the distinct character of young accused and the recognized distinct prejudice they suffer from delay in the youth justice system. Doing so gives effect to Parliament's intention in enacting a separate youth criminal justice system, to Canada's international commitments, to the recognition in pre-*Jordan* case law that youth proceedings must be expeditious, and to the consideration that led to setting the presumptive ceilings for adults in *Jordan*. Just as the Court in *Jordan* determined the appropriate ceiling for adult proceedings, a separate analysis is required for youth proceedings. That analysis leads to a presumptive ceiling of 15 months for youth proceedings in the provincial court.

When Parliament created a separate youth criminal justice system over a century ago, it sought to achieve two fundamental objectives: to provide young persons with enhanced procedural protections throughout the criminal process in recognition of their youth, and to create less formal and more expeditious proceedings. Such enhanced procedural protections which recognize that youth proceedings must proceed more expeditiously than proceedings against adults are codified in s. 3(1)(b)(iv) and s. 3(1)(b)(v) of the *YCJA*, which crystallized the prior state of the common law. Since the enactment of the *YCJA*, courts have consistently maintained that criminal proceedings against youth should be resolved more quickly than adult proceedings and that reasonable delay in the adult criminal justice system may not be reasonable in youth proceedings. Given the heightened vulnerability of young persons in the justice system and their diminished moral blameworthiness, enhanced — and robust — procedural protections have been built into this separate system.

The role of prejudice in connection with young persons was not considered by the Court in setting the *Jordan* ceilings because *Jordan* did not fix ceilings for youth justice court proceedings. Therefore, the unique prejudice that young persons suffer as a result of delay was not accounted for in *Jordan*. The only outcome that is consistent with the reasoning in *Jordan* is to recognize that, in light of the separate court system created by Parliament and the greater prejudice that has been acknowledged in the case of young persons, there should be a lower presumptive ceiling for youth proceedings. Lowering the presumptive ceiling for

youth does not confer enhanced *Charter* protections on them. Rather, it acknowledges the more profound impact of delay on young persons, and sets a ceiling that aims to confer on them the same protections that adults receive. When it comes to prejudice arising from delayed criminal proceedings, equal protection as between young persons and adults requires differential treatment. This is not a departure from *Jordan*; indeed, it is the very application of *Jordan*'s principles to the youth criminal justice system. Refusing to create a separate ceiling would result in the principles underlying *Jordan* to furnish less protection for young people than they had before *Jordan*.

To rely on the absence of any reference to the youth justice system in *Jordan* as the basis for inferring that the *Jordan* framework applies to it, obliterates the historic distinction between the adult and youth criminal justice systems, to the prejudice of young persons. A framework for adjudicating a constitutional right that is directed to the criminal justice system for adults should not be inferentially taken as having been also directed to be considered in the context of the separate criminal justice system for young persons, particularly when inferring that young persons are captured by the adult framework will lead to less protection than they have received and are constitutionally entitled to. Furthermore, tacking young people onto the adult framework set by *Jordan* changes *Jordan* itself, and erodes the clarity it created. Following *Jordan*, prejudice is no longer an independent consideration and is instead a factor in the setting of the ceilings, and a stay will be granted in response to delay below the ceiling only in rare and clear cases. By changing *Jordan* so that stays will

theoretically be more readily available where necessary to account for the prejudice experienced by young persons, the clarity of *Jordan*'s instruction that a stay will be granted below the ceiling only in rare and clear cases is undermined and the predictability of the presumption that delay below the ceiling is reasonable dissipates. This results in the worst of both worlds: the rigidity of ceilings that offer youth less protection than they previously received and were entitled to, coupled with a lack of clarity and predictability about if and when a stay will be granted when the delay is below the ceiling. The "below the ceiling test" set out in *Jordan* is not capable of recognizing young persons' differential tolerance for delay. To ask youth accused to prove special circumstances to show that delay below the ceiling is unreasonable imposes a disproportionately high burden on them.

The total delay in this case from the time M was charged to the end of his trial was 18 months and 28 days, above the 15-month presumptive ceiling. It is inappropriate to deduct two to three months as defence delay arising from the fact that M was 2 ½ hours late to one of his numerous court appearances. The transcript error was the result of an administrative oversight that the justice system could reasonably have mitigated. None of the delay in M's case should be characterized as defence delay or delay due to a discrete exceptional circumstance. Further, the delay in M's case is not justified by the transitional exception and the Crown has not demonstrated that the delay in this case was reasonable. Therefore, M's constitutional right to stand trial within a reasonable time was infringed, and a stay of proceedings should be granted.

Per Karakatsanis J. (dissenting): There is agreement with the majority that a separate presumptive ceiling in the *YCJA* context is neither warranted nor necessary to accommodate the distinct characteristics of young accused and the youth criminal justice system. Rather, the presumptive ceilings set out in *Jordan* apply in the context of the youth criminal justice system and adopting a more robust approach to examining the reasonableness of delays falling below the presumptive ceiling provides protection for the rights of young accused pursuant to s. 11(b) of the *Charter*. However, as no part of the total delay in this case can be characterized as defence delay or delay resulting from discrete exceptional circumstances, the delay suffered by M breaches the 18-month presumptive ceiling. The delay cannot be justified under the transitional exception as the Crown has failed to demonstrate on the evidence that the delay in this case was reasonable based on a reliance on the previous state of the law and therefore, a stay should be granted.

There is no evidence that the youth criminal justice system suffers from endemic delays that would justify taking the exceptional judicial step of setting a new presumptive ceiling. A failure to lower the ceiling does not put young accused at a disadvantage compared to their adult counterparts and deprive them of the benefits that *Jordan* extended through the implementation of presumptive ceilings for delay. Young accused benefit from the presumptive 18-month ceiling set out in *Jordan* for cases going to trial in provincial courts and it is reasonable to presume that the entire criminal justice system, including the youth system, will ultimately benefit from positive initiatives generated in response to the presumptive ceilings established in

Jordan. Further, a lower presumptive ceiling is not required to account for the unique prejudice that young persons suffer as a result of delay as the increased prejudice and the special considerations for young persons codified in the *YCJA* are both best accounted for through the below-ceiling test in *Jordan*.

Adapting *Jordan* in the context of the youth criminal justice system by way of the below-ceiling test gives effect to the s. 11(b) rights of young accused in two ways. First, it gives them the benefit of a presumptive ceiling and second, the below-ceiling test is sufficiently flexible to incorporate general considerations concerning the unique impact of delay on young accused and the greater need for timeliness in the youth criminal justice system. The greater need for timeliness, including the unique prejudicial impact of delays on youth, are not simply case-specific factors — such as the personal attributes, characteristics or circumstances of a specific young accused — used to determine whether the delay in a given case was markedly longer than it reasonably should have been. Rather, these considerations play a larger role: they must suffuse and inform the entire analysis in order to give effect to the statutory mandates in the *YCJA*. Thus, both steps of the below-ceiling test must take into account, and be adapted to incorporate, the increased need for timeliness in the youth criminal justice system.

Jordan was referring to the criminal justice system as a whole when the Court explained that it expects stays beneath the ceiling to be rare, and limited to clear cases. Given the legislatively mandated and greater need for timeliness in the

youth criminal justice system, it necessarily follows that delay in a proceeding against a young accused will become markedly longer than it reasonably should have been sooner, perhaps significantly so, than it will in a proceeding against an adult. Therefore, stays below the ceiling in the youth context will not be rare or limited to clear cases.

It is particularly important that the conduct of the defence be examined liberally and generously in the youth context. While more than resigned acquiescence is required, the defence is not required to engage in proactive conduct throughout and show that the accused is committed to having the case tried as quickly as possible. This requires too much from the defence and thereby risks undermining the state's general s. 11(b) obligation to try all accused without undue delay. *Jordan* imposed no requirement on the defence to engage in proactive conduct or to take steps to have the case tried as quickly as possible. Rather, the defence is required to act reasonably and expeditiously throughout the proceedings and take meaningful, sustained steps to expedite the proceedings. Further, the defence initiative required at the first step of the test will necessarily be less in the youth context than in the adult context.

Nothing in the jurisprudence before or after *Jordan* suggests that delays caused by failed attempts at extrajudicial sanction programs should be attributed to the defence. It is wrong to attribute these delays to the accused. It would have the practical effect of extending the presumptive ceiling for young accused beyond the 18-month ceiling that was set in *Jordan*. It would also undermine the emphasis on

timeliness that must be accommodated in the below-ceiling test for matters in the youth criminal justice system.

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By Moldaver J.

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66, 369 C.C.C. (3d) 1; *R. v. K.G.K.*, 2019 MBCA 9, 373 C.C.C. (3d) 1; *R. v. Vader*, 2009 ABCA 191; *R. v. Vassell*, 2016 SCC 26, [2016] 1 S.C.R. 625.

By Abella and Brown JJ. (dissenting)

R. v. Jordan, 2016 SCC 27, [2016] 1 S.C.R. 631; *R. v. Cody*, 2017 SCC 31, [2017] 1 S.C.R. 659; *R. v. Morin*, [1992] 1 S.C.R. 771; *R. v. S.J.L.*, 2009 SCC 14, [2009] 1 S.C.R. 426; *R. v. D.B.*, 2008 SCC 25, [2008] 2 S.C.R. 3; *R. v. R.C.*, 2005 SCC 61, [2005] 3 S.C.R. 99; *R. v. L.T.H.*, 2008 SCC 49, [2008] 2 S.C.R. 739; *R. v. M. (G.C.)* (1991), 3 O.R. (3d) 223; *R. v. D. (S.)*, [1992] 2 S.C.R. 161; *R. v. J. (M.A.)*, [1992] 2 S.C.R. 166; *R. v. R. (T.)* (2005), 75 O.R. (3d) 645; *R. v. H.R.*, 2006 BCCA 211, 225 B.C.A.C. 127; *R. v. R.R.*, 2011 NSCA 86, 307 N.S.R. (2d) 319; *R. v. L.B.*, 2014 ONCA 748, 325 O.A.C. 371; *R. v. Askov*, [1990] 2 S.C.R. 1199; *R. v. J.O.B.*, 2005 ABCA 296; *R. v. M.A.B.*, 2011 ABPC 87; *R. v. S.M.*, 2003 SKPC 39, 230 Sask. R. 25; *R. v. J. (S.)*, 2009 ONCJ 217, 192 C.R.R. (2d) 266; *R. v. H. (M.)*, 2008 ONCJ 643; *R. v. F. (T.)*, 2005 ONCJ 413; *R. v. L.S.*, 2005 ONCJ 113, 130 C.R.R. (2d) 81; *R. v. C. (Q.Q.)*, 2005 BCPC 89, 129 C.R.R. (2d) 179; *R. v. M. (J.)*, 2017 ONCJ 4, 373 C.R.R. (2d) 194; *R. v. Godin*, 2009 SCC 26, [2009] 2 S.C.R. 3.

By Karakatsanis J. (dissenting)

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APPEAL from a judgment of the Alberta Court of Appeal (O’Ferrall, Veldhuis and Wakeling JJ.A.), 2018 ABCA 278, 74 Alta. L.R. (6th) 217, [2018] 10 W.W.R. 415, 364 C.C.C. (3d) 313, 417 C.R.R. (2d) 243, [2018] A.J. No. 1021 (QL), 2018 CarswellAlta 1767 (WL Can.), affirming the convictions of the accused for aggravated assault and possession of a weapon for a dangerous purpose. Appeal dismissed, Abella, Karakatsanis, Brown and Martin JJ. dissenting.

Graham Johnson and Tania Shapka, for the appellant.

Robert A. Fata, for the respondent.

Eric Siebenmorgen and *Joanne Stuart*, for the intervener the Attorney General of Ontario.

Justin Tremblay and *Marie Vaclair*, for the intervener the Director of Criminal and Penal Prosecutions.

Howard L. Krongold and *Meaghan McMahon*, for the intervener the Criminal Lawyers' Association (Ontario).

Dane Bullerwell and *Susan Haas*, for the intervener the Legal Aid Society of Alberta.

Jane Stewart, *Samira Ahmed* and *Mary Birdsell*, for the intervener Justice for Children and Youth.

The judgment of Wagner C.J. and Moldaver, Gascon, Côté and Rowe JJ. was delivered by

MOLDAVER J. —

I. Overview

[1] On April 12, 2015, the appellant, a “young person” under the *Youth Criminal Justice Act*, S.C. 2002, c. 1 (“YCJA”), was charged with various offences arising out of a fight in which he stabbed another youth in the face and the back of the head with a box cutter. He maintained his innocence, claiming self-defence. On November 9, 2016, almost 19 months after charges were laid, he was found guilty of aggravated assault contrary to s. 268 of the *Criminal Code*, R.S.C. 1985, c. C-46, and possession of a weapon for a dangerous purpose contrary to s. 88(1) of the *Criminal Code*. This followed not long after he had applied unsuccessfully for a stay of proceedings on the basis that the delay violated his right to be tried within a reasonable time under s. 11(b) of the *Canadian Charter of Rights and Freedoms*.

[2] In *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631, which was released nearly 15 months after the appellant was charged, this Court introduced a new s. 11(b) framework, replacing the one established in *R. v. Askov*, [1990] 2 S.C.R. 1199, and *R. v. Morin*, [1992] 1 S.C.R. 771. This new framework sought to address a “culture of complacency towards delay” that had emerged in the criminal justice system (para. 40). At its heart are two presumptive ceilings beyond which delay is presumed to be unreasonable: (1) an 18-month ceiling for single-stage provincial court proceedings; and (2) a 30-month ceiling for proceedings conducted in the superior court (para. 49).

[3] This appeal raises two main issues. First, do these presumptive ceilings apply to youth justice court proceedings? Second, was the delay in the appellant's case unreasonable?

[4] I would answer the first issue in the affirmative. While the enhanced need for timeliness in youth matters is well established in the jurisprudence and codified in s. 3(1)(b)(iv) and (v) of the *YCJA*, this factor is accounted for within the existing *Jordan* framework. In particular, it can and should be considered in applying the test for a stay *below* the ceiling, which requires the defence to establish that “(1) it took meaningful steps that demonstrate a sustained effort to expedite the proceedings, *and* (2) the case took markedly longer than it reasonably should have” (*Jordan*, at para. 48 (emphasis in original)). An accused's youthfulness should be considered in assessing the second branch of the test, assuming the first branch has been met. But unless and until it can be shown that *Jordan* is failing to adequately serve Canada's youth and society's broader interest in seeing youth matters tried expeditiously, there is in my view no need to consider, much less implement, a lower constitutional ceiling for youth matters.

[5] On the second issue, I am not persuaded that a stay is warranted in this case. After deducting two to three months of defence delay and about one month of delay resulting from an administrative error leading to the unavailability of a hearing transcript — a “discrete exceptional circumstance” (*Jordan*, at para. 75) — the delay in this case fell below the 18-month presumptive ceiling. Considering the test for a

stay below the ceiling — which, in a transitional case such as this, must be applied in a manner that is “sensitive to the parties’ reliance on the previous state of the law” (*ibid.*, at para. 99) — I am not persuaded that this case took markedly longer than it reasonably should have. Accordingly, I would dismiss the appeal.

II. Background

[6] On April 11, 2015, the appellant, then 15 years old, got in a fight with the complainant, then 16 years old, at a house party. During the fight, the appellant stabbed the complainant in the face and the back of the head with a box cutter, causing serious injuries. The appellant would later claim he acted in self-defence.

[7] On April 12, 2015, the appellant was arrested and charged with a number of offences, including aggravated assault contrary to s. 268 of the *Criminal Code*, and possession of a weapon for a dangerous purpose contrary to s. 88(1) of the *Criminal Code*. Bail was initially denied, but on April 21, 2015, the Crown consented to the appellant’s release on his own undertaking, with minimal conditions.¹

[8] On May 19, 2015, the appellant pleaded not guilty to all charges. Defence counsel hoped to schedule the trial for June 29, 2015, but this was not a sitting day due to judicial vacations. Instead, the trial was scheduled to be heard in Provincial Court in Fort McMurray on September 16, 2015.

¹ The appellant undertook to keep the peace and be of good behaviour, have no contact with the complainant, not possess any weapons, report in person as directed, not attend liquor establishments, and advise his bail supervisor of any changes in residence.

[9] On September 16, 2015, the Crown advised that it would be seeking to tender a statement made by the appellant to the police, reversing its previous position on the matter. This necessitated a *voir dire* to determine the admissibility of the statement under s. 146 of the *YCJA*. However, there was insufficient time to complete the *voir dire* that day, so it was put over to March 2, 2016, the earliest date available. Defence counsel indicated that there was no s. 11(b) waiver.

[10] On the morning of March 2, 2016, while the Crown and its witnesses were ready to proceed at the scheduled start time, the appellant did not show up on time. In the interim, the Crown dealt with other matters, and the *voir dire* did not commence until the afternoon. The court sat for about 2½ hours that afternoon. However, as the Crown predicted earlier that morning, more time was needed to complete the *voir dire*. A continuation date was set for July 28, 2016 (the earliest date available) for five hours. Defence counsel reiterated that there was no s. 11(b) waiver, and the trial judge indicated that any s. 11(b) application should be brought before the July 28 continuation date.

[11] On July 8, 2016, nearly 15 months after the appellant was charged, this Court's decision in *Jordan* was released.

[12] On July 28, 2016, the *voir dire* concluded and the trial judge asked the court clerk to order a transcript of the proceedings. The Crown was not involved in ordering the transcript and did not request a copy. The matter was then adjourned to

September 6, 2016, for a ruling on the admissibility of the appellant's statement to the police.

[13] On September 6, 2016, the trial judge advised the parties that the transcript had appeared in her box that morning; she acknowledged, however, that it may have arrived in the office the week before while she was away on vacation. Unfortunately, it was incomplete. Accordingly, she adjourned the matter to October 4, 2016, so that she could re-order and review the full transcript before issuing a ruling.

[14] On October 4, 2016, the trial judge ruled that the appellant's statement to the police was inadmissible. In addition, defence counsel advised of his intention to file a s. 11(b) *Charter* application, which he did the next day. The next court date was eventually scheduled for October 19, 2016.

[15] On October 19, 2016, the appellant testified and the defence closed its case. The matter was then set over to October 24, 2016 for argument on the s. 11(b) application.

[16] On October 24, 2016, approximately 18½ months post-charge, the trial judge heard argument on the appellant's s. 11(b) application and dismissed it.

[17] On November 2, 2016, final submissions concluded and the trial judge reserved judgment.

[18] On November 9, 2016, the trial judge issued her decision rejecting the appellant's claim of self-defence and convicting him of aggravated assault and possession of a weapon for a dangerous purpose. The remaining charges were dismissed.

[19] On February 1, 2017, the appellant was sentenced to 160 days in custody on the aggravated assault charge and 20 days on the weapon possession charge, less time spent in custody before and after conviction, followed by community supervision and probation. He has since served his sentence.

III. Decisions Below

A. *Section 11(b) Ruling — Provincial Court of Alberta (No. 15042886041)(Cleary Prov. Ct. J.) (Unreported)*

[20] In her s. 11(b) ruling, the trial judge found that the total delay was somewhat uncertain, as the trial had yet to complete. She estimated that it fell somewhere between 18 and 19 months. She did not attribute any delay to either the Crown or the defence, and she found that the approximate one-month delay caused by the unavailability of the *voir dire* transcript was not a discrete exceptional circumstance.

[21] The trial judge reasoned that because the delay exceeded the 18-month *Jordan* ceiling, it was presumptively unreasonable. However, she refused to enter a

stay, reasoning that “it is just not the clearest of cases where I should stay it” (A.R., at p. 3). In the result, she dismissed the s. 11(b) application.

B. *Court of Appeal of Alberta (O’Ferrall, Veldhuis [Dissenting] and Wakeling J.J.A.)* ([2018 ABCA 278, 74 Alta. L.R. \(6th\) 217](#))

[22] The appellant appealed the trial judge’s s. 11(b) ruling, raising for the first time the argument that the 18-month presumptive ceiling established in *Jordan* should be lowered in youth cases. The Alberta Court of Appeal dismissed the appeal, Veldhuis J.A. dissenting. The three justices wrote separate reasons, each taking a distinct approach.

(1) Wakeling J.A.

[23] Justice Wakeling held that the *Jordan* ceilings apply equally to youth matters. He added that even if *Jordan* left the door open to a lower ceiling for youth matters, the record did not allow the court to rationally determine what that ceiling should be.

[24] Applying the *Jordan* framework, Wakeling J.A. observed that the total delay was just under 19 months. He concluded that the approximate one-month delay arising from the unavailability of the *voir dire* transcript was not caused by the Crown and was clearly outside the Crown’s control. On this basis, he characterized this delay

as an exceptional circumstance and deducted it accordingly. This brought the delay just below the 18-month ceiling.

[25] Having concluded that the delay fell below the 18-month ceiling, Wakeling J.A. noted that a stay could be ordered only if the appellant could show that (1) he made a sustained effort to expedite the proceedings and (2) the case took markedly longer than it should have. Justice Wakeling found no evidence to this effect. He therefore concluded that the appellant had been tried within a reasonable time.

[26] Alternatively, Wakeling J.A. stated that if the delay *did* exceed the 18-month ceiling, then it was justified under the transitional exception. Considering the pre-*Jordan* jurisprudence, he noted that the offences were serious, the victim suffered severe and permanent facial scars, and “[t]he Crown undoubtedly and reasonably assumed that the seriousness of the offences weighed heavily against a stay being granted” (para. 45). He further noted that while prejudice was an important consideration under the *Morin* framework, the appellant was in custody for only nine days, and his release conditions were not onerous — there was “no evidence of actual prejudice and no inference of prejudice aris[ing] from the delay itself” (para. 46). He therefore concluded that the appellant was tried within a reasonable time under the *Morin* framework as well.

(2) O’Ferrall J.A. (Concurring)

[27] Justice O’Ferrall rejected the notion that any presumptive ceiling should be applied in youth justice court proceedings, stating that “given the arbitrariness and the relative inflexibility of any presumptive ceiling, it would be wrong in law to apply presumptive ceilings to young persons” (para. 71). He added that *Jordan* could not have been intended to apply to youth matters because “delay which may be reasonable in the adult criminal justice system may be unreasonable in the youth court” (para. 76). He also suggested that the converse is true: “delay which may be unreasonable in the adult criminal justice system may be perfectly reasonable in youth court if, for example, the reason for the delay is to attempt to rehabilitate and integrate the young person by postponing prosecution of charges pending the taking of extrajudicial measures or the imposition of extrajudicial sanctions” (*ibid.*).

[28] Turning to the appellant’s case, O’Ferrall J.A. stressed that ordering a stay “would do nothing to promote the [*YCJA*] principles of holding young persons accountable or of promoting their rehabilitation and reintegration” (para. 65). He therefore concluded that the appeal should be dismissed.

(3) Veldhuis J.A. (Dissenting)

[29] Writing in dissent, Veldhuis J.A. acknowledged that *Jordan* was meant to apply broadly to create a uniform s. 11(b) approach and that new categories of persons entitled to different presumptive ceilings cannot be created lightly. However, she was satisfied that creating a new presumptive ceiling for young persons facing single-stage proceedings in provincial court was consistent with both the reasoning in

Jordan and the pre-*Jordan* case law recognizing “the additional prejudice faced by young person[s] experiencing long pre-trial delays” (para. 81). Relying on *R. v. M. (J.)*, 2017 ONCJ 4, 344 C.C.C. (3d) 217, she set this ceiling at 15 months.

[30] Turning to the appellant’s case, Veldhuis J.A. agreed with the trial judge that the approximate one-month delay caused by the unavailability of the *voir dire* transcript was not an exceptional circumstance. She therefore found that the delay remained at 18½ months, surpassing the 15-month ceiling.

[31] Considering the transitional exception, Veldhuis J.A. concluded that the trial judge erred by applying a “clearest of cases” test. Rather, she said, the onus rested on the Crown to establish that the delay was justified based on the parties’ reasonable reliance on the pre-*Jordan* jurisprudence, which required that the court consider: (1) the complexity of the case; (2) the delay relative to the *Morin* guidelines; (3) the parties’ response to the delay; and (4) the prejudice to the accused. Applying this framework, Veldhuis J.A. reached the following conclusions:

(1) Complexity — The lack of complexity of the case weighed in favour of a stay.

(2) Delay relative to the *Morin* guidelines — The 12¾ months of institutional and Crown delay exceeded the 5-6 month range for youth matters suggested in *R. v. M. (G.C.)* (1991), 3 O.R. (3d) 223 (C.A.), as well as the 8-10 month range identified in *Morin*. This weighed in favour of a stay.

(3) Parties' response to the delay — The appellant demonstrated his commitment to getting the matter resolved as quickly as possible, while the Crown showed little motivation to move the matter through the system quickly and made prosecutorial decisions that caused delay.

(4) Prejudice — While the appellant led no evidence of prejudice, significant prejudice could be inferred given his age.

[32] Ultimately, Veldhuis J.A. concluded that the transitional exception was not engaged, as a proper application of the *Morin* framework would have resulted in a stay. Accordingly, she would have allowed the appeal and entered a stay.

IV. Issues

[33] This appeal raises two main issues:

(1) Do the presumptive ceilings established in *Jordan* apply to youth justice court proceedings?

(2) Was the delay in the appellant's case unreasonable?

V. Analysis

A. *Requirement for Leave to Appeal to this Court in Youth Cases*

[34] Before turning to the issues on appeal, I wish to briefly clarify a preliminary matter regarding leave to appeal to this Court in youth cases.

[35] The appellant filed a notice of appeal on the basis that s. 691(1)(a) of the *Criminal Code* permits him to appeal to this Court as of right based on Veldhuis J.A.'s dissent. That section allows a person who is convicted of an indictable offence, and whose conviction is affirmed by a court of appeal, to appeal to this Court as of right on any question of law on which a judge of the court of appeal dissents. However, as this Court observed in *R. v. C. (T.L.)*, [1994] 2 S.C.R. 1012, young persons tried for an indictable offence under what is now the *YCJA* do not enjoy a right of appeal to this Court (see p. 1017). Rather, leave is required under s. 37(10) of the *YCJA*.

[36] Having invited submissions on this jurisdictional issue prior to the hearing, this Court granted an extension of time to apply for leave to appeal and granted that application at the beginning of the hearing. The Crown did not oppose the granting of leave.

[37] Having settled this preliminary matter, I turn to the primary issue on appeal: whether the *Jordan* ceilings apply to youth justice court proceedings.

B. *Do the Presumptive Ceilings Established in Jordan Apply to Youth Justice Court Proceedings?*

(1) Section 11(b) — The Right to Be Tried Within a Reasonable Time

[38] Section 11(b) of the *Charter* provides that “[a]ny person charged with an offence has the right . . . to be tried within a reasonable time”. This right serves both individual and societal interests (see *Jordan*, at paras. 19-28). At the individual level, it protects the accused’s “liberty, as regards to pre-trial custody or bail conditions; security of the person, in the sense of being free from the stress and cloud of suspicion that accompanies a criminal charge; and the right to make full answer and defence, insofar as delay can prejudice the ability of the defendant to lead evidence, cross-examine witnesses, or otherwise to raise a defence” (*R. v. Godin*, 2009 SCC 26, [2009] 2 S.C.R. 3, at para. 30, see also *Morin*, at pp. 801-3; and *Jordan*, at para. 20). At the societal level, “[t]imely trials allow victims and witnesses to make the best possible contribution to the trial, and minimize the ‘worry and frustration [they experience] until they have given their testimony’”, and permit them to move on with their lives (see *Jordan*, at paras. 23-24, citing *Askov*, at p. 1220). Society also has an interest in seeing that citizens accused of crimes are treated humanely and fairly (see *Morin*, at p. 786), and timely trials help maintain the public’s confidence in the administration of justice, which is “essential to the survival of the system itself” (*Jordan*, at paras. 25-26). “In short, timely trials further the interests of justice” (*ibid.*, at para. 28).

[39] The s. 11(b) framework has gone through two iterations over the past three decades: the *Morin* framework and the *Jordan* framework.

(a) *The Morin Framework*

[40] Under the *Morin* framework, courts were required to balance four factors in determining whether delay had become unreasonable: “(1) the length of the delay; (2) defence waiver; (3) the reasons for the delay, including the inherent needs of the case, defence delay, Crown delay, institutional delay, and other reasons for delay; and (4) prejudice to the accused’s interests in liberty, security of the person, and a fair trial” (*Jordan*, at para. 30; see also *Godin*, at para. 18). Fundamentally, this inquiry required “a judicial determination balancing the interests which [s. 11(b)] is designed to protect against factors which either inevitably lead to delay or are otherwise the cause of delay” (*Morin*, at p. 787).

[41] Institutional delay, which ran from when the parties were ready for trial to when the system could accommodate the proceeding (see *Morin*, at pp. 794-95), was assessed against a set of administrative guidelines developed in *Morin*: “eight to ten months in the provincial court and a further six to eight months after committal for trial in the superior court” (*Jordan*, at para. 30). Institutional delay within or close to the guidelines was generally considered reasonable (see *ibid.*).

[42] Prejudice was an “important if not determinative factor” under the *Morin* framework (*ibid.*, at para. 34). Such prejudice could be either actual or inferred — “even in the absence of specific evidence of prejudice, ‘prejudice may be inferred from the length of the delay. The longer the delay the more likely that such an inference will be drawn’” (*Godin*, at para. 31, citing *Morin*, at p. 801).

(b) *The Jordan Framework*

[43] In *Jordan*, this Court determined that the *Morin* framework suffered from a number of doctrinal shortcomings that made it “too unpredictable, too confusing, and too complex” for courts to apply (see paras. 32-38). Even more troubling, the *Morin* framework failed to address the “culture of complacency towards delay” that had emerged in the criminal justice system due to inefficient practices, inadequate institutional resources, the increased complexity of pre-trial and trial processes since *Morin*, and other factors (see paras. 40-41).

[44] “[T]o focus the s. 11(b) analysis on the issues that matter and encourage all participants in the criminal justice system to cooperate in achieving reasonably prompt justice” (para. 5), *Jordan* introduced a new s. 11(b) framework. At the heart of this new framework are two presumptive ceilings beyond which delay is presumed to be unreasonable: (1) an 18-month ceiling for single-stage provincial court proceedings; and (2) a 30-month ceiling for proceedings conducted in the superior court (para. 49).

[45] In setting these ceilings, this Court took into account a number of factors, including the administrative guidelines for institutional delay set out in *Morin*, the increased complexity of criminal cases since *Morin*, the concept of prejudice, and the need to ensure public confidence in the administration of justice (see paras. 52-55).

[46] By building the concept of prejudice into the presumptive ceilings, *Jordan* eliminated prejudice as “an express analytical factor” to be considered (see paras. 54, 109-10). Thus, prejudice is now irrebuttably presumed once the ceiling is breached, meaning that “an absence of actual prejudice cannot convert an unreasonable delay into a reasonable one” (para. 54). Prejudice also has a strong relationship with the concept of defence initiative, as it can be expected that accused persons who experience heightened prejudice as a result of delay will be more proactive in moving the matter along (see para. 109). In sum, “the concept of prejudice underpins the entire framework” (para. 109).

[47] This Court summarized the new s. 11(b) framework as follows:

If the total delay from the charge to the actual or anticipated end of trial (minus defence delay) *exceeds* the ceiling, then the delay is presumptively unreasonable. To rebut this presumption, the Crown must establish the presence of exceptional circumstances. If it cannot, the delay is unreasonable and a stay will follow.

If the total delay from the charge to the actual or anticipated end of trial (minus defence delay or a period of delay attributable to exceptional circumstances) falls *below* the presumptive ceiling, then the onus is on the defence to show that the delay is unreasonable. To do so, the defence must establish that (1) it took meaningful steps that demonstrate a sustained effort to expedite the proceedings, *and* (2) the case took markedly longer than it reasonably should have. We expect stays beneath the ceiling to be rare, and limited to clear cases. [Emphasis in original; paras. 47 and 48.]

[48] But *Jordan* did not explicitly answer the question of whether the 18- and 30-month presumptive ceilings apply to youth justice court proceedings. Before

answering that question, it will first be useful to explore the enhanced need for timeliness in youth cases.

(2) The Enhanced Need for Timeliness in Youth Cases

[49] Canada's youth criminal justice system stands separate from the adult criminal justice system (see *R. v. R.C.*, 2005 SCC 61, [2005] 3 S.C.R. 99, at para. 41; *R. v. D.B.*, 2008 SCC 25, [2008] 2 S.C.R. 3, at para. 40; *R. v. S.J.L.*, 2009 SCC 14, [2009] 1 S.C.R. 426, at para. 56; *YCJA*, s. 3(1)(b)). The legislation governing this separate system is the *YCJA*, which covers “young person[s]” as defined under s. 2(1). This definition includes all persons between the ages of 12 and 17, as well as persons charged with having committed an offence while they were a young person. Such persons are tried before a “youth justice court”, which may be either a provincial or a superior court depending on the circumstances (see s. 13).

[50] While every person charged with an offence has the right to be tried within a reasonable time under s. 11(b) of the *Charter*, this right has “special significance” for young persons (N. Bala and S. Anand, *Youth Criminal Justice Law* (3rd ed. 2012), at p. 439). This is so for at least five reasons.

[51] **Reinforcing the connection between actions and consequences.** First, because young persons have “a different perception of time and less well-developed memories than adults” (Bala and Anand, at p. 144), their ability to appreciate the connection between actions and consequences is impaired. Whereas prolonged delays

can obscure this connection and “[dilute] the effectiveness of any disposition”, timely intervention reinforces it (P. Harris et al., “Working ‘in the Trenches’ with the YCJA” (2004), 46 *CJCCJ* 367, at p. 369). This better enables the young person to learn from the experience, which in turn promotes his or her rehabilitation and overall social development. Thus, it has been said that “[t]he effectiveness of the juvenile justice process depends at least in part on its timeliness” (J. A. Butts, G. R. Cusick and B. Adams, *Delays in Youth Justice* (2009), at p. 8).

[52] **Reducing psychological impact.** Second, bearing in mind that any time spent awaiting trial occupies a greater proportion of a young person’s life than an adult’s, and that young persons perceive time differently than adults do, delay may have a greater psychological impact on a young person. As this Court stated in *Catholic Children’s Aid Society of Metropolitan Toronto v. M. (C.)*, [1994] 2 S.C.R. 165, “[a] few months in the life of a child, as compared to that of adults, may acquire great significance” (p. 206). Thus, the same period of delay may weigh more heavily on a young person than on an adult, which may in turn increase the overall feelings of stress, anxiety, and (where applicable) loss of liberty associated with that delay. To minimize this impact, youth matters should, as a general rule, proceed expeditiously.

[53] **Preserving the right to make full answer and defence.** Third, memories tend to fade faster for young persons than for adults (see N. Bala, “Youth as Victims and Offenders in the Criminal Justice System: A Charter Analysis — Recognizing Vulnerability” (2008), 40 *S.C.L.R.* (2d) 595, at p. 616, citing C.J.

Brainerd, “Children’s Forgetting with Implication for Memory Suggestibility” in *Memory for Everyday and Emotional Event*, N.L. Stein et al., eds. (1997), at pp. 213-17). The increased rapidity with which a young person’s memory fades may make it more difficult for him or her to recall past events, which may in turn impair his or her ability to make full answer and defence, a right which is protected by s. 7 of the *Charter* (see *Dersch v. Canada (Attorney General)*, [1990] 2 S.C.R. 1505, at p. 1514; *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787, at para. 47; *R. v. Bjelland*, 2009 SCC 38, [2009] 2 S.C.R. 651, at para. 20). Furthermore, it has been suggested that because “[a]dolescents have less ability to take long-term consequences into consideration and a greater propensity for shortsighted decision-making”, they may be less able to assist in their defence as delay accumulates, as “[t]heir primary motivation may be for court proceedings to end, regardless of outcome” (Butts, Cusick and Adams, at p. 10). Therefore, to preserve the right to make full answer and defence as fully as possible, it is essential that young persons be tried in a timely manner.

[54] **Avoiding potential unfairness.** Fourth, adolescence is a time of rapid brain, cognitive, and psychosocial development (see L. Steinberg, “Adolescent Development and Juvenile Justice” (2009), 5 *Annu. Rev. Clin. Psychol.* 459, at pp. 465-71; T. Grisso, “Adolescents’ Decision Making: A Developmental Perspective on Constitutional Provisions in Delinquency Cases” (2006), 32 *New Eng. J. on Crim. & Civ. Confinement* 3, at pp. 7-9; M. Levick et al. “The Eighth Amendment Evolves: Defining Cruel and Unusual Punishment through the Lens of Childhood and

Adolescence” (2012), 15 *U. Pa. J.L. & Soc. Change* 285, at pp. 293-99). Where a prolonged delay separates the offending conduct from the corresponding punishment, the young person may experience a sense of unfairness, as his or her thoughts and behaviours may well have changed considerably since the offending conduct took place. Therefore, to avoid punishing young persons for “who they used to be”, delay should be minimized.

[55] **Advancing societal interests.** Fifth, trying young persons in a timely manner advances societal interests. Society has an interest in seeing young persons rehabilitated and reintegrated into society as swiftly as possible. When that happens, we all benefit, as our society becomes richer. Moreover, some studies suggest that prompt intervention in youth matters may reduce the likelihood of recidivism, which advances society’s interest in the prevention of crime (see Butts, Cusick and Adams, at p. 9). And given that youth have been described as “the most vulnerable members of our community” (*R. v. Alicandro*, 2009 ONCA 133, 95 O.R. (3d) 173, at para. 36, citing G. J. Fitch, Q.C., “Child Luring” in *Substantive Criminal Law, Advocacy and the Administration of Justice*, vol. 1, presented to the National Criminal Law Program (2007)), it seems axiomatic that society has a particularly strong interest in ensuring young persons do not suffer prolonged delays.

[56] The enhanced need for timeliness in youth cases is reflected in the jurisprudence. In *M. (G.C.)*, Osborne J.A. stressed that there is a “particular need to conclude youth court proceedings without unreasonable delay” (p. 230). He added

that although young persons do not enjoy a “special constitutional guarantee to [be tried] within a reasonable time” that “differs in substance from that available to adults”, they nonetheless should be tried more quickly than adults “as a general proposition” (*ibid.*). Thus, “[d]elay, which may be reasonable in the adult criminal justice system, may not be reasonable in the youth court” (*ibid.*). These sentiments have been reiterated by other Canadian appellate courts (see, e.g., *R. v. H.R.*, 2006 BCCA 211, 225 B.C.A.C. 127, at para. 21; *R. v. R.R.*, 2011 NSCA 86, 307 N.S.R. (2d) 319, at para. 8; *R. v. P.R.*, 2018 SKCA 27, 365 C.C.C. (3d) 120, at para. 85). Justice Osborne also proposed some “general guidelines” for delay in youth cases: youth matters should generally “be brought to trial within five to six months, after the neutral period required to retain and instruct counsel, obtain disclosure”, and so on (p. 236; see also *R. v. R. (T.)* (2005), 75 O.R. (3d) 645 (C.A.), at para. 40).

[57] Shortly after *M. (G.C.)*, this Court affirmed in *R. v. D. (S.)*, [1992] 2 S.C.R. 161, that while the societal interest recognized in *Askov* and affirmed in *Morin* “requires that account be taken of the fact that charges against young offenders be proceeded with promptly, it is merely one of the factors to be balanced with others” (p. 162). In doing so, the Court stopped short of creating separate guidelines or constitutional thresholds for delay in youth matters. In particular, it made no comment one way or the other on the five- to six-month administrative guideline for youth matters proposed in *M. (G.C.)*.

[58] More recently, the Ontario Court of Appeal reiterated that “youth court matters are expected to proceed with greater dispatch than adult criminal proceedings” (*R. v. L.B.*, 2014 ONCA 748, 325 O.A.C. 371, at para. 14, citing *M. (G.C.)*, at p. 230).

[59] The enhanced need for timeliness in youth cases also finds expression in statute. Section 3(1) of the *YCJA* contains a declaration of principles underlying Canada’s youth criminal justice system. Of particular relevance is s. 3(1)(b), which provides:

(b) the criminal justice system for young persons must be separate from that of adults, must be based on the principle of diminished moral blameworthiness or culpability and must emphasize the following:

(i) rehabilitation and reintegration,

(ii) fair and proportionate accountability that is consistent with the greater dependency of young persons and their reduced level of maturity,

(iii) enhanced procedural protection to ensure that young persons are treated fairly and that their rights, including their right to privacy, are protected,

(iv) timely intervention that reinforces the link between the offending behaviour and its consequences, and

(v) the promptness and speed with which persons responsible for enforcing this Act must act, given young persons’ perception of time;

[60] These principles are largely a codification of the jurisprudence under the former *Young Offenders Act*, R.S.C. 1985, c. Y-1 (see *R. (T.)*, at paras. 29 and 34;

H.R., at paras. 31-32; *R.R.*, at para. 14; *R. v. M. (K.)*, 2017 ONCJ 8, 373 C.R.R. (2d) 234, at para. 38). Section 3(1)(b)(iv) and (v) in particular “are intended to remind court administrators, judges, lawyers, and others of the need to give priority to the expeditious resolution of youth court cases” (Bala and Anand, at p. 145).

[61] Against this backdrop, I turn to the main issue on appeal: whether the *Jordan* ceilings apply to youth justice court proceedings.

(3) The *Jordan* Ceilings Apply to Youth Justice Court Proceedings

[62] The appellant maintains that the *Jordan* ceilings do not apply to youth justice court proceedings. He urges this Court to adopt a 12-month presumptive ceiling for young persons facing single-stage proceedings in provincial court (sitting as a youth justice court). My colleagues Abella and Brown JJ. accept the appellant’s argument that a lower ceiling should be applied in youth cases, but they would set the ceiling at 15 months. Respectfully, for reasons that follow, I would not introduce a lower ceiling for youth matters.

[63] First and foremost, it has not been shown that there is a problem regarding delay in the youth criminal justice system, let alone one that warrants the imposition of a new constitutional standard. It bears emphasis that constitutionalizing a lower presumptive ceiling would be no small step. While ordinary statutory requirements come and go, constitutional requirements are meant to be more lasting. At this time, and on the record before us, it has not been demonstrated that the *Jordan*

framework needs to be revisited in its application to youth cases. We have no evidence that young persons who proactively request an expedited trial are not being accommodated in the post-*Jordan* world, nor that actors within the youth criminal justice system are not taking *Jordan* to heart. Nor, despite Abella and Brown JJ.'s insistence, is there any evidence that young persons are worse off under *Jordan* than they were pre-*Jordan*. In fact, as I will develop later in these reasons, the reality is the opposite.

[64] Put simply, in my respectful view, Abella and Brown JJ.'s are responding to a supposed problem in the youth criminal justice system that has not been shown to exist; nor is it likely to arise, because as I will explain, the existing *Jordan* framework is capable of accommodating the enhanced need for timeliness in youth cases. It follows, in my view, that unless and until it can be shown that *Jordan* is failing to adequately serve Canada's youth and society's broader interest in seeing youth matters tried expeditiously, there is no need to consider, much less implement, a lower constitutional ceiling for youth matters.

[65] Second, *Jordan* established a uniform set of ceilings that apply irrespective of the varying degrees of prejudice experienced by different groups and individuals. Setting new ceilings based on the notion that certain groups — such as young persons — experience heightened prejudice as a result of delay would undermine this uniformity and lead to a multiplicity of ceilings, each varying with the unique level of prejudice experienced by the particular category or subcategory of

persons in question. Young persons in custody, young persons out of custody, adults in custody, adults out of custody, persons whose custody status changes, persons with strict bail conditions, persons with minimal bail conditions, persons who experience heightened memory loss, and others could all lay claim to their own distinct ceiling. Even within the category of young persons, this could lead to separate ceilings being established for different age groups: one for 17-year-olds, one for 14-year-olds, and so on. This would quickly become impracticable. Moreover, the result would be incompatible with the uniform-ceiling approach adopted in *Jordan* and would undermine its objective of simplifying and streamlining the s. 11(b) framework.

[66] Nor, in my view, can a separate ceiling for youth matters be justified on the basis that Parliament has established a separate youth criminal justice system under the *YCJA*. Constitutional standards exist independent of Parliament's statutory design. Therefore, the mere fact that Parliament decided to create and maintain a separate youth criminal justice system does not by itself provide a sound rationale for establishing a separate ceiling for youth matters. Otherwise, Parliament would have the ability to alter constitutional standards through ordinary statutory amendment, such as by merging the adult and youth justice systems. Such a result would be incompatible with the concept of a constitutional standard.

[67] Reinforcing these points is a practical difficulty that would accompany the introduction of a lower presumptive ceiling for youth matters: the need to fashion a transitional scheme capable of fairly discerning which cases falling above the new

ceiling, but below the *Jordan* ceiling, should be stayed. While this practical concern obviously does not preclude the introduction of a lower ceiling, it is yet another reason to question the advisability of doing so.

[68] For these reasons, I would not alter the *Jordan* ceilings to apply differently to youth justice court proceedings. But that does not mean an accused's youthfulness has no role to play under the *Jordan* framework. In particular, as I will develop, the enhanced need for timeliness in youth matters can and should be taken into account when determining whether delay falling *below* the presumptive ceiling is unreasonable. In this way, the existing *Jordan* framework is capable of accommodating the enhanced need for timeliness in youth cases.

(4) Considering the Enhanced Need for Timeliness in Youth Matters in the Test for a Stay Below the Ceiling

[69] While the presumptive ceilings are a significant chapter in *Jordan*, they are not the full story. *Jordan* established *ceilings*, not *floors*. While the ceilings offer a bright-line approach, they are supplemented by a more flexible, case-specific approach to delay *below* the ceiling. In this way, *Jordan* marries uniformity with flexibility.

[70] The *Jordan* framework recognizes that delay falling below the presumptive ceiling will be unreasonable where the defence establishes that "(1) it

took meaningful steps that demonstrate a sustained effort to expedite the proceedings, *and* (2) the case took markedly longer than it reasonably should have” (para. 48).

[71] Focusing on the second requirement, this Court stated in *Jordan* that “[t]he reasonable time requirements of a case derive from a variety of factors, including the complexity of the case, local considerations, and whether the Crown took reasonable steps to expedite the proceedings” (para. 87 (emphasis added)). The use of the word “including” indicates that the list of factors is not closed. In youth cases, the enhanced need for timeliness in youth matters should be included as another factor to be considered in determining the reasonable time requirements of a particular case. This factor should be considered not merely because the legislature has codified it under s. 3(1)(b)(iv) and (v) of the *YCJA*, but because of the rationales identified at paras. 51-55 of these reasons, which would remain valid even if Parliament were to eliminate s. 3(1)(b)(iv) and (v) of the *YCJA*.

[72] The enhanced need for timeliness in youth cases cannot, in my view, be reduced to a set “youth discount”, and its weight will vary depending on the circumstances. Nonetheless, it requires as a general rule that youth matters should proceed in a timely manner, and the Crown and the justice system must do their part to ensure this objective is met. This general rule, and the corresponding obligation on the Crown and the justice system to do their part, is already reflected in practice, as youth cases are typically given priority and completed more quickly than adult cases. Thus, recognizing the enhanced need for timeliness in youth matters as a factor to be

considered in determining the reasonable time requirements of a case simply gives effect to what is already happening on the ground.

[73] In line with this case-specific approach, where a young person, in taking meaningful and sustained steps to expedite the proceedings, brings special concerns about delay to the attention of the Crown and the court, those concerns, and the extent to which the Crown and the justice system respond to them, should also be considered. For example, if an accused can show that he or she is struggling in school due to anxiety over the outstanding charges, and the Crown and the justice system fail to take reasonable steps to expedite the matter to respond to this concern, that may be a significant factor in determining whether the case took markedly longer than it reasonably should have. Conversely, if the Crown and the justice system take reasonable steps to respond to this concern and do their part to ensure that the matter proceeds expeditiously, then “it is unlikely that the reasonable time requirements of the case will have been markedly exceeded” (*Jordan*, at para. 90).

[74] Ultimately, like the other factors identified in *Jordan*, the enhanced need for timeliness in youth matters is simply one “case-specific factor” to consider when determining whether a case took (or is expected to take) markedly longer than it reasonably should have.

[75] This approach recognizes that while the presumptive ceiling remains the same whether the accused is a youth or an adult, the tolerance for delay differs. What may be reasonable in the case of a 45-year-old may not be reasonable in the case of a

17-year-old — and for that matter, what may be reasonable in the case of a 17-year-old may not be reasonable in the case of a 12-year-old. By permitting a flexible, case-specific inquiry for cases falling below the ceiling, the *Jordan* framework recognizes that simply treating everyone alike is no solution. Context matters. While the presumptive ceiling provides a hard backstop that offers certainty, predictability, and simplicity, the test for a stay below the ceiling affords the necessary flexibility to ensure case-specific features — such as the age of the accused — are not lost in the analysis. Indeed, *Jordan* was not insensitive to the need for context-sensitivity. This Court emphasized that “‘the judge must look at the circumstances of the particular case at hand’ in assessing the reasonableness of a delay” (para. 58, citing *Jordan*, at para. 301, per Cromwell J. (concurring in the result)). It also stated the following:

While the presumptive ceiling will enhance analytical simplicity and foster constructive incentives, it is not the end of the exercise: . . . compelling case-specific factors remain relevant to assessing the reasonableness of a period of delay both above and below the ceiling. Obviously, reasonableness cannot be captured by a number alone, which is why the new framework is not solely a function of time. [para. 51]

[76] Despite Abella and Brown JJ.’s suggestion to the contrary, the *Jordan* framework, when properly applied, provides no less protection to young persons than its predecessor, which proved to be unpredictable, confusing, and complex (see *Jordan*, at para. 38). In fact, there is every reason to expect that young persons will enjoy stronger protection against prolonged delay than they did in the pre-*Jordan* era. To this end, I wish to address two main concerns that have been raised about taking a “below-the-ceiling approach” in youth cases.

[77] First, while the test for a stay below the ceiling places the onus on the defence to establish that the delay was unreasonable, this does not, in my view, disadvantage young persons vis-à-vis adults or place them in a less advantageous position than they were in pre-*Jordan*. *Jordan* affords all accused persons, including youth, the benefit of a presumption of unreasonableness once the delay exceeds the presumptive ceiling. This presumption is an advantage that accused persons did not enjoy under the pre-*Jordan* framework, which always placed the onus on the accused to demonstrate that the delay was unreasonable, no matter its length (see *Morin*, at pp. 788-89). Moreover, as stated in *Jordan*, “[s]ince the defence benefits from a strong presumption in favour of a stay once the ceiling is exceeded”, it is appropriate to place the onus on the defence to justify a stay below the ceiling (paras. 85-86). In fairness, given that both young persons and adults benefit from this strong presumption, they both must bear the onus of justifying a stay below the ceiling.

[78] Second, while this Court stated at para. 48 of *Jordan* that stays below the ceiling will be “rare” and “limited to clear cases”, this statement must be read in light of the fact that the *Jordan* framework applies to *all* criminal proceedings, not just youth matters. While stays below the ceiling may be “rare” when considered against the entire body of applications for a stay under the ceiling, they may be less “rare” when considered against the smaller body of *youth* applications for a stay under the ceiling. The restriction to “clear cases” was simply meant to ensure that borderline cases are not stayed, given the significant public interest in seeing a criminal matter resolved on the merits.

[79] Thus, while Abella and Brown JJ. maintain that the approach adopted in these reasons will afford young persons less protection than they enjoyed pre-*Jordan* and will turn *Jordan* into a “hollow promise” for youth (para. 166), this is simply not so. When *Jordan* is taken to heart and the test for a stay below the ceiling is properly applied to youth court proceedings, the *Jordan* framework affords young persons robust protection against unreasonable delay.

[80] Having said this, *Jordan* will not deliver on its promise — whether for young persons or for adults — unless *all* participants in the criminal justice system work together and take a proactive approach from day one (see *Jordan*, at paras. 5, 108, 112, and 117; *R. v. Cody*, 2017 SCC 31, [2017] 1 S.C.R. 659, at para. 36). As I will explain, this applies to both the Crown and the defence, among others.

[81] Prosecutors cannot be content to wait until the 18-month mark is within eyesight before kicking into gear. That is precisely the sort of normalized indifference towards delay that prompted *Jordan*. Rather, they should take active steps from the outset to ensure the matter is dealt with promptly, even if the presumptive ceiling is still far on the horizon. Failing to take reasonable steps to expedite the proceeding is one indicator that the case may have taken markedly longer than it reasonably should have (see *Jordan*, at para. 87). This is particularly so in the youth context, since the tolerance for delay in this context has always been — and will continue to be — lower than in the adult context.

[82] In embracing this proactive approach, prosecutors should bear in mind that the presumptive ceiling “is not an aspirational target”, 18 or 30 months is still “a long time to wait for justice”, and most cases “can and should” be completed in less time (*Jordan*, at paras. 56-57). This is particularly so for young persons, for reasons already explained. It is also worth reiterating that prosecutors have a strong incentive to be proactive: where the delay in a case falls below the ceiling, “a diligent, proactive Crown will be a strong indication that the case did not take markedly longer than reasonably necessary” (*ibid.*, at para. 112). Conversely, where the Crown fails to take a proactive approach — particularly in the context of youth proceedings — this will be a factor in determining whether a case has taken markedly longer than it reasonably should have.

[83] Equally, the defence has a duty to be proactive, as well as an interest in doing so. In the case of an accused who wishes to proceed as quickly as possible, the defence must, to meet the test for a stay below the ceiling, take “meaningful steps that demonstrate a sustained effort to expedite the proceedings” (*Jordan*, at para. 48). Simply sitting back and watching the delay pile up will clearly not suffice. Nor will mere “token efforts” such as simply putting on the record that the defence wanted an earlier trial date (see *ibid.*, at para. 85). Rather, the defence must take “meaningful and sustained steps” — attempting to set the earliest possible hearing dates, cooperating with and responding to the Crown and the court, putting the Crown on timely notice when delay is becoming a problem, conducting all applications reasonably and expeditiously, and so on (see *ibid.*). In short, if the defence hopes to

satisfy the “meaningful steps” test set out in *Jordan*, it must engage in proactive conduct throughout and show that the accused is committed to having the case tried as quickly as possible. Resigned acquiescence will not do.

[84] Stated succinctly, if we are to make the culture of complacency towards delay identified in *Jordan* a thing of the past, *all* criminal justice system participants must take a proactive and cooperative approach with a view to fulfilling s. 11(b)’s important objectives (see *Jordan*, at para. 5). While this principle certainly applies in adult cases, it applies with even greater force in youth cases.

[85] Finally, before considering whether the delay in the appellant’s case was unreasonable, a brief clarification regarding the treatment of delay resulting from failed attempts at extrajudicial sanctions is warranted. I offer this clarification solely for future guidance, as no attempt to impose extrajudicial sanctions was made in this case.

(5) The Treatment of Delay Resulting from Failed Attempts at Extrajudicial Sanctions

[86] The *YCJA* encourages the use of “extrajudicial measures”, which seek to respond to youth offending in “a less intrusive, more informal, and more expeditious fashion” than can be achieved through the courts (Bala and Anand, at p. 340). They are defined in s. 2(1) of the *YCJA* as “measures other than judicial proceedings under this Act used to deal with a young person alleged to have committed an offence and

includes extrajudicial sanctions”. Such measures include simple warnings or cautions; referrals to programs or agencies in the community; and, if those measures would prove inadequate, “extrajudicial sanctions” (see *YCJA*, ss. 6 to 8 and 10; B. Jones, E. Rhodes and M. Birdsell, *Prosecuting and Defending Youth Criminal Justice Cases: A Practitioner’s Handbook*, in *Criminal Law Series*, B. H. Greenspan and V. Rondinelli, eds. (2016), at p. 128). These are all forms of “diversion” — attempts to deal with youth offending outside the formal court system (see Bala and Anand, at pp. 340 and 350). Among other things, they help minimize delays within the youth court system, and within the court system more generally, by reducing the number of young persons proceeding through the courts (see Senate, Standing Senate Committee on Legal and Constitutional Affairs, *Delaying Justice is Denying Justice: An Urgent Need to Address Lengthy Court Delays in Canada* (June 2017) (online), at p. 169).

[87] The *YCJA* treats extrajudicial measures as an essential tool in the youth justice toolbox. It recognizes in its Preamble that the youth criminal justice system should “reserv[e] its most serious intervention for the most serious crimes” and reduce its “over-reliance on incarceration for non-violent young persons”. The central role of extrajudicial measures in the youth criminal justice system is recognized in s. 4(a) and (b) of the *YCJA*, which declare that “extrajudicial measures are often the most appropriate and effective way to address youth crime” and that “extrajudicial measures allow for effective and timely interventions focused on correcting offending behaviour”. Moreover, s. 4(c) creates a presumption that extrajudicial measures are “adequate to hold a young person accountable for his or her offending behaviour if

the young person has committed a non-violent offence and has not previously been found guilty of an offence”, while s. 6(1) requires police to consider extrajudicial measures before starting judicial proceedings. As a consequence of this emphasis on extrajudicial measures, the *YCJA* has “resulted in a significant drop in the number of youth charged and an increase in the use of various methods of diversion” (Bala and Anand, at p. 387).

[88] Extrajudicial sanctions, a particular species of extrajudicial measures, are “non-court measures that are used to dispose of a criminal offence and hold a young person accountable for his or her criminal conduct but without the need for a formal finding of guilt” (Jones, Rhodes and Birdsell, at p. 128; see also Bala and Anand, at pp. 371-81). They are always post-charge programs (Jones, Rhodes and Birdsell, at p. 128). The use of such programs does not necessarily bar later judicial proceedings, provided the young person failed to fully comply with the terms and conditions of the program and, in a case of partial compliance, it would not be unfair to prosecute the matter in court (see *YCJA*, s. 10(5)). Where an attempt at extrajudicial sanctions fails and prosecutors then decide to pursue court proceedings, some time will have passed since the laying of the charges, which is the point at which the *Jordan* clock starts ticking (see *Jordan*, at para. 49). The question, then, is how such periods should be treated in the calculation of delay under the *Jordan* framework.

[89] In my view, any delay resulting from failed attempts at extrajudicial sanctions should be treated on a case-by-case basis. That said, without foreclosing the

theoretical possibility that such delay might in some rare instances be included in the *Jordan* calculation, it can reasonably be expected that it will be deducted as defence delay. There are sound policy reasons for this. Removing this type of delay from the *Jordan* calculation minimizes the risk that authorities will refrain from using extrajudicial sanctions in the first place out of a fear that they may be increasing the likelihood of a stay in the event such measures fail. Removing disincentives against extrajudicial sanctions is an important policy objective given the central role played by such measures in the youth criminal justice system. Furthermore, this approach makes sense at a conceptual level. When an attempt at extrajudicial sanctions is made, that effectively removes the matter from the court system and places it on a different track. It therefore makes good sense to “stop the clock” and to restart that clock only if and when the matter is placed back into the court system.

[90] I will now consider whether the delay in the appellant’s case was unreasonable.

C. *Was the Delay in the Appellant’s Case Unreasonable?*

(1) Applicability of the *Jordan* Framework

[91] As a general rule, the *Jordan* framework’s scope of application extends to “transitional cases”, which were already in the system when *Jordan* was decided on July 8, 2016 (see *Jordan*, at para. 95; *Cody*, at para. 25). As the appellant’s case had

already been in the system for nearly 15 months by that time, it qualifies as a transitional case.

(2) Total Delay

[92] The first step under the *Jordan* framework is to calculate total delay, which runs from the date the accused was charged to the actual or anticipated end of trial (*Jordan*, at paras. 49 and 60). In this case, the parties have proceeded on the basis that the total delay extends from when the appellant was charged on April 12, 2015 to when he was convicted on November 9, 2016 — a total delay of 18 months and 28 days (excluding the final day).²

(3) Defence Delay

[93] In line with *Jordan*, any delay caused by the defence must be subtracted from total delay (para. 60). This is because “[t]he defence should not be allowed to benefit from its own delay-causing conduct” (para. 60). Thus, for example, “the defence will have directly caused the delay if the court and the Crown are ready to proceed, but the defence is not” (para. 64).

² The Crown did not argue that time taken to issue a reserve judgment or to render a decision on a mid-trial application (i.e., “decision delay”) should not be counted in the calculation of delay. The issue has been considered in several cases (see, e.g., *R. v. Ashraf*, 2016 ONCJ 584, 367 C.R.R. (2d) 30; *R. v. Zilney*, 2017 ONCJ 610, 390 C.R.R. (2d) 209; *R. v. Lavoie*, 2017 ABQB 66; *R. v. Mamouni*, 2017 ABCA 347, 58 Alta. L.R. (6th) 283; *R. v. King*, 2018 NLCA 66, 369 C.C.C. (3d) 1; *R. v. K.G.K.*, 2019 MBCA 9, 373 C.C.C. (3d) 1 (appeal heard on September 25, 2019, judgment reserved); *R. v. Vader*, 2019 ABCA 191). Given the absence of submissions on this issue, I would leave it for another day.

[94] Here, on the morning of March 2, 2016, while the court and the Crown were ready to proceed at the scheduled start time, the appellant did not show up on time. In the interim, the Crown dealt with other matters, and the *voir dire* did not commence until the afternoon. Ultimately, the *voir dire* did not conclude, and a continuation date was set for July 28, 2016 (the earliest date available) for five hours.

[95] Even if it was inevitable that the hearing would not conclude on March 2, it remains the case that if the appellant had shown up on time, more of the trial could have been completed on March 2 — approximately 2½ hours more. Had this occurred, it is reasonable to think that a date for continuation earlier than July 28 would have been found, as a 2½-hour time slot is easier to find than a five-hour time slot. This is not, contrary to Abella and Brown JJ.’s contention, mere “conjecture” (para. 175). Rather, it simply recognizes the undeniable reality of scheduling cases in a busy provincial court like the one in Fort McMurray: the longer the time requirement, the longer the wait.

[96] Ultimately, it was the appellant’s late appearance that created a need to find a date that would accommodate a five-hour, rather than 2½-hour, trial. Accordingly, there is good reason to treat at least some of the delay between March 2, 2016 and July 28, 2016 (almost five months) as defence delay, even if a continuation was inevitable. Without assigning blame, just as the delay occasioned by the Crown’s change of mind in seeking to introduce the appellant’s statement is attributable to the Crown, so too should the delay caused by the appellant’s failure to attend court on

time be attributable to the defence. It is, of course, difficult to quantify with precision the extent of the delay caused by the defence, and I would not attribute the full five months to it. However, attributing a delay of two to three months to the defence is in my view both fair and reasonable. This results in a net delay of 16 to 17 months.

[97] In attributing a delay of two to three months to the defence resulting from the appellant's failure on March 2 to attend court on time, I recognize that this delay was not accounted for by the trial judge or the Court of Appeal. With respect, for the reasons I have outlined, it should have been.

(4) Discrete Exceptional Events

[98] Delay caused by “discrete exceptional events” that are reasonably unforeseeable or reasonably unavoidable must also be deducted to the extent such delay could not reasonably have been mitigated by the Crown or the justice system (see *Cody*, at para. 48, citing *Jordan*, at paras. 73 and 75). The event need not be “rare or entirely uncommon” to qualify as a discrete exceptional event (*Jordan*, at para. 69). Examples would include “an illness, extradition proceeding, or unexpected event at trial” (*ibid.*, at para. 81). “[O]nly circumstances that are genuinely outside the Crown’s control and ability to remedy” may qualify (*ibid.*).

[99] In this instance, the Crown maintains that the 28-day delay between September 6, 2016, and October 4, 2016, resulting from an administrative error leading to the unavailability of the *voir dire* transcript qualifies as a discrete

exceptional event that must be subtracted from the total delay, and the trial judge erred in concluding otherwise. For reasons that follow, I agree.

[100] As for the first requirement, the administrative error in the transcript ordering process was neither reasonably foreseeable nor reasonably avoidable. As stated in *Jordan*, “[t]rials are not well-oiled machines” (para. 73). Similarly, as noted in *Cody*, “[m]istakes happen. Indeed, they are an inevitable reality of a human criminal justice system” (para. 58). The administrative error in this case was simply one of those unforeseeable and unavoidable hiccups that sometimes occur in the life of a trial.

[101] Turning to the second requirement, it is axiomatic that the Crown could not reasonably have mitigated this delay. It neither requested nor received a copy of the transcript, which was ordered by trial judge for her own benefit, and it plays no role in monitoring or correcting matters between court administrators and the court reporter’s office in which it has no involvement. Put simply, the error here had nothing to do with the Crown, and by the time the trial judge advised the parties of the issue, there was nothing it could have done to avoid the need to adjourn the matter and thereby mitigate the delay caused by the error.

[102] The question, then, is whether *the justice system* could reasonably have mitigated this delay. It is true that, had the trial judge been in her office when the incomplete transcript arrived, she likely would have noticed the error and been able to mitigate its effect, perhaps by listening to the audio recording of the hearing or by

rush ordering a complete transcript. But when assessing whether a particular period of delay could reasonably have been mitigated by the Crown or the justice system, we must take into account certain “practical realities” (*Jordan*, at para. 74). One of those practical realities is that judges sometimes take vacations. They are not chained to their desks. While the error could have been caught and remedied had the trial judge taken no vacation and instead monitored her inbox, in my view this is not a reasonable expectation. Accordingly, this was a period of delay that could not reasonably have been mitigated by the justice system.

[103] Therefore, the approximate one-month delay resulting from this administrative error must be subtracted from the total delay. This leaves a net delay of 15 to 16 months, falling below the 18-month presumptive ceiling.

(5) Test for a Stay Below the Ceiling

[104] This case is the first in which this Court has had occasion to apply the test for a stay below the ceiling. As indicated, delay falling below the ceiling will be found unreasonable where the defence establishes that “(1) it took meaningful steps that demonstrate a sustained effort to expedite the proceedings, *and* (2) the case took markedly longer than it reasonably should have”. In a transitional case such as this one, these requirements must “be applied contextually, sensitive to the parties’ reliance on the previous state of the law” (*Jordan*, at para. 99).

(a) *Defence Initiative — Meaningful and Sustained Steps*

[105] The defence acted responsibly throughout the proceeding. It entered pleas promptly, attempted to book trial dates as early as possible, and took reasonable positions. On the other hand, it did not go beyond simply putting on the record that there was no s. 11(b) waiver when a pattern of delay began to emerge, nor did it show that the appellant was committed to having the case tried as quickly as possible. Rather, the approach it adopted was more one of resigned acquiescence. Moreover, the appellant's failure to show up to court on time on March 2, 2016 caused delay.

[106] That said, the defence is required to act "reasonably, not perfectly" (*Jordan*, at para. 85), and given that we are dealing with a transitional case, the approach taken by the defence must be viewed flexibly. As this stated in *Jordan*, "the defence need not demonstrate having taken initiative to expedite matters for the period of delay preceding [*Jordan*]" (para. 99). Given that about 80 percent of the trial took place before *Jordan* was released, I am prepared to give the defence the benefit of the doubt and conclude that the first requirement has been met.

(b) *Reasonable Time Requirements of the Case — Time Markedly Exceeded*

[107] To be clear, under this branch of the test, the issue is not whether the case should reasonably have been completed in less time. Rather, it is whether the case took *markedly* longer than it reasonably should have. Here, three factors suggest that this case should reasonably have been completed in less time.

[108] First, this case was straightforward. While a number of witnesses testified and a *voir dire* on the admissibility of the appellant's statement to the police took place, the central issue was simple: In cutting the victim with a box cutter, did the appellant act in self-defence? It is not unreasonable to expect that a straightforward case like this could have been completed within a year.

[109] Second, in line with the principles of timely intervention and prompt and speedy enforcement in youth matters recognized in the case law and codified in s. 3(1)(b)(iv) and (v) of the *YCJA*, there was an enhanced need to try the appellant expeditiously. For reasons already explained, the right to be tried within a reasonable time under s. 11(b) of the *Charter* has special significance for young persons, and this requires that they be tried with greater dispatch.

[110] Third, despite the fact that this was a youth case, the Crown did not take steps to expedite the proceeding, and its late decision to reverse its position and attempt to seek admission of the appellant's statement to the police caused 5½ months of delay. While it was of course the Crown's prerogative to reverse its position, it must remain vigilant that its prosecutorial decisions do not compromise the s. 11(b) rights of accused persons (see *R. v. Vassell*, 2016 SCC 26, [2016] 1 S.C.R. 625, at para. 5; see also *Jordan*, at para. 79).

[111] But that is not the end of the story. As indicated, the test is not whether the case should reasonably have been completed in less time, but whether it took *markedly* longer than it reasonably should have. In a transitional case such as this, this

inquiry must be approached contextually, in a manner that is sensitive to the parties' reliance on the previous state of the law (see *Jordan*, at para. 99). In particular, it must take into account how much of the delay pre-dated *Jordan*, as well as how that delay would have been treated under the pre-*Jordan* jurisprudence. These considerations shape what can reasonably be expected in terms of timeliness in a transitional case. In short, today's standards should not be rigidly applied to yesterday's events.

[112] The vast majority of this trial took place at a time when the tolerance for institutional delay — the primary cause of delay in this case — was high across the country. In a transitional case such as this, this high tolerance for institutional delay is a component of the reasonable time requirements of the case (see *Jordan*, at paras. 100-1). In view of this, the Court in *Jordan* emphasized that “given the level of institutional delay tolerated under the previous approach, a stay of proceedings below the ceiling will be even more difficult to obtain for cases currently in the system” (para. 101).

[113] Turning to the particular jurisdiction in question, while we lack sufficient data to draw general conclusions about how long similar youth cases in Fort McMurray were taking to complete in the pre-*Jordan* era, it is clear from the record that overbooking and systemic delay were endemic. While the various causes of these symptoms may be debated, they undoubtedly include the culture of complacency discussed in *Jordan* and the practical reality that many small centres like Fort

McMurray face a caseload that outstrips their operational capacity. While *Jordan* set out to counteract the courtroom malaise and lack of institutional resources that produce patterns of systemic delay like that seen in this case, “[c]hange takes time” (*Jordan*, at para. 102). Change will not happen overnight. In sum, the systemic delays afflicting Fort McMurray — a “local consideratio[n]” under the *Jordan* framework — play a key role in assessing what can reasonably be expected in terms of timeliness.

[114] It is true that the combined institutional and Crown delay in this case — between 9¾ and 10¾ months³ — exceeded the administrative guideline for youth matters proposed in *M. (G.C.)* (five to six months) and was at the high end of or above the more general administrative guideline proposed in *Morin* (eight to ten months). However, administrative guidelines were never intended to be “limitation period[s]” or “fixed ceiling[s]” on delay (*Morin*, at p. 795). Rather, they were intended to be applied flexibly, in the knowledge that they must “yield to other factors” when appropriate (*ibid.*, at p. 797). In this case, those “other factors” include: (1) the seriousness of the offences; and (2) the absence of any demonstrated prejudice to the appellant.

³ This figure includes the following periods of delay:

- June 30, 2015 to September 16, 2015 (the date the parties were ready for trial to the first available trial date) (2½ months of institutional delay);
- September 17, 2015 to March 2, 2016 (the first trial date to the commencement of the *voir dire* necessitated by the Crown’s late decision to seek admission of the appellant’s statement to the police) (5½ months of Crown delay); and
- March 3, 2016 to July 28, 2016 (less 2-3 months of defence delay) (the commencement of the *voir dire* to the continuation date on which it concluded) (1¾ to 2¾ months of institutional delay).

[115] The seriousness of the offence played an important role under the pre-*Jordan* framework (see *Cody*, at para. 70). As the seriousness of a matter increases, so too does society's interest in seeing the matter proceed to trial (see *Morin*, at p. 787). In this case, the charges were undoubtedly serious. Aggravated assault under s. 268 of the *Criminal Code* is an indictable offence that qualifies as a "violent offence" under s. 2(1) of the *YCJA*, and when an adult sentence is sought it carries a maximum punishment of 14 years' imprisonment (s. 268(2)). Possession of a weapon for a dangerous purpose contrary to s. 88(1) of the *Criminal Code* is also a serious offence. When an adult sentence is sought, it carries a maximum punishment of ten years' imprisonment when prosecuted by indictment (see s. 88(2)(a)). And the specific incident in question was itself serious: the victim, another young person, suffered "devastating injuries" as a result of the stabbing.

[116] Prejudice was an "important if not determinative factor" under the pre-*Jordan* framework (*Jordan*, at para. 34). In this case, there was no evidence of any actual prejudice to the appellant, and the fact that he was kept in pre-trial detention for only nine days before being released on minimal conditions does not provide a strong basis for inferring prejudice. While some prejudice might be inferred from both the length of the delay itself (see *Morin*, at p. 807) and the appellant's young age, inferring prejudice can be a fraught exercise (see *Jordan*, at para. 33).

[117] Here, the seriousness of the offences and the absence of any demonstrated prejudice are relevant in that they help to explain why, in this transitional case, the

Crown had good reason to believe the delay in this case would not have been found to be unreasonable. Had the law been different — had *Jordan* been decided before this trial commenced — the Crown no doubt would have acted differently and made greater efforts to move the case through the system quickly. But it would be unfair to put today's head on yesterday's shoulders. Just as the standard for defence initiative in a transitional case must be adapted to account for the pre-*Jordan* jurisprudence, so too must the standard for what can reasonably be expected of the Crown in a transitional case.

[118] I would add that the persistent systemic delay discussed above constrained the Crown's ability to move this case through the system in a timely manner (see *Jordan*, at para. 97). In fairness, the Crown cannot be faulted for the systemic constraints which existed at the time and which, post-*Jordan*, require time and resources to remediate.

[119] In the final analysis, this case is close to the line. The delay here was excessive, particularly given the enhanced need for timeliness in youth cases. Had 80 percent of the trial taken place *after Jordan*, rather than *before* it, I would have been inclined to grant a stay. However, taking a contextual approach that is sensitive to the parties' reliance on the prior state of the law, I am not persuaded that the case took *markedly* longer than it reasonably should have.

VI. Conclusion

[120] In the result, I would dismiss the appeal.

The reasons of Abella, Brown and Martin JJ. were delivered by

ABELLA AND BROWN JJ. —

[121] Section 11(*b*) of the *Canadian Charter of Rights and Freedoms* guarantees persons charged with an offence the right to be tried within a reasonable time. In *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631, this Court established a new framework for determining when an accused's s. 11(*b*) right has been infringed by establishing ceilings of 30 months (in superior courts) and 18 months (in provincial courts), beyond which trial delay would be presumptively unreasonable. But in *Jordan* the Court did not consider the youth justice system, nor did any of the parties or interveners in that case raise the issue. The question in this appeal is, therefore, whether, in light of the traditional distinctions made between young persons and adults in the criminal justice system, the ceilings set in *Jordan* should be different for youth court proceedings.

[122] In our view, while the principles underlying the *Jordan* framework apply equally to youth court proceedings, their application leads to the inescapable conclusion that there should be a distinct and lower ceiling reflecting the distinct character of young accused and of the recognized distinct prejudice they suffer from delay in the youth justice system.

[123] Doing so gives effect to Parliament’s intention in enacting a separate youth criminal justice system, to Canada’s international commitments, to the recognition in pre-*Jordan* case law that youth proceedings must be expeditious, and to the considerations that led to setting the presumptive ceilings for adults in *Jordan*.

[124] The youth justice court is a defining feature of the youth criminal justice system — a system that was created, and has always been recognized, as separate and distinct from the adult criminal justice system. Parliament established a separate criminal justice system with enhanced procedural protections for young persons because of the unique nature of their interactions with the criminal justice system. This long-standing separation between the adult and youth criminal justice systems drives our analysis. As we shall explain, cramming youth criminal justice proceedings into *Jordan* simultaneously changes how the system treats young persons, and changes *Jordan* itself. To provide meaningful protection under s. 11(b) of the *Charter*, to preserve the integrity of *Jordan* itself, and to maintain consistency with this Court’s jurisprudence, the *Jordan* framework should be applied in a manner that respects the distinction Parliament has drawn between the adult and youth criminal justice systems.

The Principles Underlying the Framework in *Jordan*

[125] In *Jordan*, and then again in *R. v. Cody*, 2017 SCC 31, [2017] 1 S.C.R. 659, this Court identified a “culture of complacency within the [criminal justice] system towards delay” fostered by “doctrinal and practical difficulties plaguing the

current analytical framework governing s. 11(b)” of the *Charter* (*Jordan*, at para. 4). The prior framework for assessing s. 11(b) claims, set out in *R. v. Morin*, [1992] 1 S.C.R. 771, was unpredictable and complex. As this Court explained in *Jordan*, the result was that “everyone suffers . . . [a]ccused persons remain in a state of uncertainty . . . [v]ictims and their families . . . cannot move forward with their lives . . . [a]nd the public, whose interest is served by promptly bringing those charged with criminal offences to trial, is justifiably frustrated by watching years pass before a trial occurs” (para. 2).

[126] What was needed, the Court held, was “[e]nhanced clarity and predictability [that] befits a *Charter* right of such fundamental importance to our criminal justice system” (para. 108).

[127] Consequently, the Court decided on “[a] change of direction” (para. 5) — a new framework for s. 11(b) based upon presumptive ceilings representing the maximum amount of time it should take to bring an accused person to trial: 18 months for cases going to trial in the provincial court, and 30 months for cases going to trial in a superior court. These ceilings, the Court explained, signify the point at which the burden shifts under s. 11(b) from the defence (to prove that the delay is unreasonable) to the Crown (to justify the length of time the case has taken). While the ceilings were intended to “enhance analytical simplicity and foster constructive incentives”, they were also meant to allow for flexibility in considering “compelling

case-specific factors” to determine the reasonableness of delay above and below the ceiling (*Jordan*, at para. 51).

[128] Four rationales were offered in *Jordan* for setting presumptive ceilings. First, presumptive ceilings are “*required* in order to give meaningful direction to the state on its constitutional obligations and to those who play an important role in ensuring that the trial concludes within a reasonable time”, such as court administration, the police, Crown prosecutors, accused, defence counsel, and judges (emphasis added). Secondly, presumptive ceilings provide assurance that s. 11(*b*) is not “a hollow promise”. Thirdly, ceilings “encourage conduct and the allocation of resources that promote timely trials”. Finally, ceilings provide a degree of certainty, as they allow participants in the criminal justice system to know in advance “the bounds of reasonableness so proactive measures can be taken to remedy any delay”.

[129] At stake in this appeal is simply this: how should the benefits sought to be achieved by setting presumptive ceilings be applied to young persons, given the separate criminal justice system created by Parliament, and the increased prejudicial impact of delay on young persons that has been long recognized by Parliament and in this Court’s jurisprudence?

[130] In our view, the rationales set out in *Jordan* for setting presumptive ceilings for the adult criminal justice system are equally relevant to youth proceedings, but the separation between the adult and youth criminal justice systems *must* inform how those rationales apply to youth proceedings. We therefore find that

s. 11(b) of the *Charter* requires a distinct presumptive ceiling for proceedings brought under the *Youth Criminal Justice Act*, S.C. 2002, c. 1 (“*YCJA*”), reflecting the separate justice system created by Parliament based on the unique considerations applicable to young persons. Just as this Court in *Jordan* determined the appropriate ceilings for adult proceedings, therefore, a separate analysis is required for youth justice proceedings. That analysis leads to a presumptive ceiling of 15 months for youth proceedings in the provincial court.

[131] Since the delay of almost 19 months in this current appeal exceeds the 15-month ceiling, and since the Crown has not satisfied us that the transitional exception applies to justify the delay, it is unreasonable. We would, therefore, allow the appeal and enter a stay of proceedings.

The Separate Youth Criminal Justice System

[132] Over a century ago, Parliament created a separate youth criminal justice system in the *Juvenile Delinquents Act, 1908*, S.C. 1908, c. 40. Distinct treatment for young persons accused of criminal offences continued in the *Young Offenders Act*, R.S.C. 1985, c. Y-1 (“*YOA*”), and again when the *YCJA* was enacted in 2002. Significantly, s. 3(1)(b) of the *YCJA* requires that “the criminal justice system for young persons must be *separate* from that of adults”. To give effect to this separation, s. 13 of the *YCJA* provides that criminal proceedings against young persons be heard by the youth justice court. While the youth justice court is a distinct institution from the provincial and superior courts, the *YCJA* deems the superior court to be a youth

justice court for certain proceedings (s. 13(2) and (3)) while provincial legislation designates provincial courts as youth justice courts (see for example: *Provincial Court Act*, R.S.A. 2000, c. P-31, ss. 11-12; *Provincial Court Act*, R.S.B.C. 1996, c. 379, s. 2(5); *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 38(3)).

[133] This Court's decisions interpreting and applying the *YCJA* elucidate the rationales underlying Parliament's decision to enact a separate system for young persons. In holding that a young person cannot be tried jointly with an adult in *R. v. S.J.L.*, 2009 SCC 14, [2009] 1 S.C.R. 426, the Court described the separation between the adult and youth criminal justice systems as one of the "governing principle[s] of the *YCJA*" (para 56). The Court explained the "reason for the creation, more than 100 years ago now, of a justice system dedicated to young persons" (para. 62) in the following terms:

Since the enactment of the *Juvenile Delinquents Act* in 1908 (S.C. 1908, c. 40 . . .), young persons have, unless they were transferred to adult court, benefited from a separate criminal justice system that has its own principles. *The creation of this system was based on recognition of the presumption of diminished moral blameworthiness of young persons and on their heightened vulnerability in dealing with the justice system* (*D.B.*, at paras. 41 et 127; *R. v. L.T.H.*, 2008 SCC 49, [2008] 2 S.C.R. 739, at paras. 3 and 93; *R. v. R.C.*, 2005 SCC 61, [2005] 3 S.C.R. 99, at para. 41; *R. v. Z. (D.A.)*, [1992] 2 S.C.R. 1025; P. J. Harris and M. H. Bloomenfeld, *Youth Criminal Justice Act Manual* (2003), vol. 2, Part Ten: Adult Sentence Hearing Cases, at p. 10-6.1; "Historically, transfer was predicated on the existence of a justice system for youth that was wholly separate and distinct from that applicable to adults": P. Platt, *Young Offenders Law in Canada* (2nd ed. 1995), at p. 235). [Emphasis added; para. 64.]

[134] The connection between the separate youth criminal justice system and young persons' diminished moral blameworthiness and culpability was central to the Court's holding in *S.J.L.* for good reason. One year prior to the release of *S.J.L.*, this Court affirmed in *R. v. D.B.*, 2008 SCC 25, [2008] 2 S.C.R. 3, that the presumption of young persons' diminished moral blameworthiness is a principle of fundamental justice under s. 7 of the *Charter* (see, e.g., B. Jones, E. Rhodes and M. Birdsell, *Prosecuting and Defending Youth Criminal Justice Cases*, in *Criminal Law Series*, B. H. Greenspan and V. Rondinelli, eds. (2016), at p. 8).

[135] In 2012, Parliament amended s. 3(1)(b) of the *YCJA* to codify the jurisprudence and emphasize that the separate youth criminal justice system “must be based on the principle of diminished moral blameworthiness or culpability”.

[136] By creating in the *YCJA* a separate youth criminal justice system with its own procedures, Parliament sought to achieve two fundamental objectives:

- To provide young persons with enhanced procedural protections throughout the criminal process in recognition of their youth; and
- To create less formal and more expeditious proceedings.

(see S. Davis-Barron, *Canadian Youth & the Criminal Law: One Hundred Years of Youth Justice Legislation in Canada* (2009), at p. 179).

[137] The necessity of providing enhanced procedural protections for young persons can also be traced to Canada's international commitments. The Preamble to the *YCJA* makes explicit reference to the United Nations *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3 (adopted by the United Nations General Assembly, November 20, 1989, ratified by Canada on December 13, 1991):

WHEREAS Canada is a party to the United Nations Convention on the Rights of the Child and recognizes that young persons have rights and freedoms, including those stated in the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights*, and have special guarantees of their rights and freedoms;

[138] The *Convention* recognizes that "the child, by reason of his physical and mental immaturity needs special safeguards and care, including appropriate legal protection" (Preamble). The *Convention* articulates some of the enhanced procedural protections that should inure to the benefit of young persons charged with criminal offences. Paragraph 1 of Article 40 sets out the overarching principle that young persons must be treated in a manner consistent with the promotion of the young person's sense of dignity and worth, cognizant of the young person's age. Paragraph 2(b) of Article 40 sets out specific procedural guarantees to which young persons are entitled, including: the presumption of innocence; the right to be promptly and directly informed of any charges against them; the right not to be compelled to give testimony or confess guilt; the right to have the matter determined without delay by a competent, independent and impartial authority; and the right to appellate review.

[139] The *Convention* is not the sole international guideline affirming the need for enhanced procedural protections in youth criminal justice systems. The *Convention*, in its Preamble, builds upon the foundation established in the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, A/RES/40/33 (November 29, 1985) (“Beijing Rules”). The Beijing Rules call for similar procedural protections for young persons in “juvenile justice systems” in United Nations members states, including Canada.

[140] The *YCJA* was enacted against this international backdrop. Section 3 of the *YCJA* (“Declaration of Principle: Policy for Canada with respect to young persons”) echoes the international instruments referred to above. Section 3(1)(b) enshrines enhanced procedural protections for young persons as one of the core principles of the *YCJA*:

3 (1) The following principles apply in this Act:

...

(b) the criminal justice system for young persons must be separate from that of adults, must be based on the principle of diminished moral blameworthiness or culpability and must emphasize the following:

(i) rehabilitation and reintegration,

(ii) fair and proportionate accountability that is consistent with the greater dependency of young persons and their reduced level of maturity,

(iii) enhanced procedural protection to ensure that young persons are treated fairly and that their rights, including their right to privacy, are protected,

(iv) timely intervention that reinforces the link between the offending behaviour and its consequences, and

(v) the promptness and speed with which persons responsible for enforcing this Act must act, given young persons' perception of time;

[141] This Court has repeatedly recognized the relevance of these international instruments in interpreting the scope of the *YCJA* and the enhanced protections for young persons charged with criminal offences. In *R. v. R.C.*, 2005 SCC 61, [2005] 3 S.C.R. 99, Fish J. noted that “[i]n keeping with its international obligations, Parliament has sought to extend to young offenders enhanced procedural protections” (para. 41), citing the *Convention*. In *D.B.*, Abella J. referred to both the Beijing Rules and

s. 3(1)(b)(iii) of the *YCJA* in holding that the Crown always bears the onus of establishing that a publication ban on a young person's identity should be lifted (paras. 84-87).

[142] As Fish J. also noted in *R. v. L.T.H.*, 2008 SCC 49, [2008] 2 S.C.R. 739, “Parliament has considered it right and necessary to afford young persons rights and procedural safeguards which they alone enjoy” (para. 46). Such enhanced procedural rights in the *YCJA* include: extrajudicial measures (ss. 4 to 12); notice to parents (s. 26); the possibility of compelling parents to attend court (s. 27); an enhanced right to counsel (ss. 10(2)(d), 25 and 32); specific obligations for youth justice court judges to ensure that young persons are treated fairly (s. 32); reducing the possibility of bail (s. 29); creating the option of releasing young persons who would otherwise be

denied bail (s. 31); *de novo* bail reviews (s. 33); the right of young persons to be separated from adults in temporary detention (s. 30); enhanced procedural safeguards surrounding the admissibility of statements made by young persons to authorities (s. 146); and a distinct sentencing regime (ss. 38 to 82).

[143] In short, a long trail of parliamentary direction, international obligations and jurisprudence recognizes the need for a separate and distinct regime for trying young persons charged with criminal offences. Given the heightened vulnerability of young persons in the justice system and their diminished moral blameworthiness, enhanced — and robust — procedural protections have been built into this separate system.

The Need for Timeliness in Proceedings Under the YCJA

[144] One aspect of these enhanced procedural protections — and the critical one for the purposes of this appeal — is the general recognition that proceedings under the *YCJA* must proceed more expeditiously than proceedings against adults. Sections 3(1)(b)(iv) and 3(1)(b)(v) codify expediency and promptness as governing principles of the *YCJA*. These provisions are in keeping with both the *Convention* and the Beijing Rules. Article 40(2)(b)(iii) of the *Convention* guarantees the right of young persons to have their criminal proceedings determined without delay, while Rule 20.1 of the Beijing Rules states that “[e]ach case shall from the outset be handled expeditiously, without any unnecessary delay”.

[145] In order to fully understand the longstanding recognition of the need for the timely resolution of youth criminal justice matters, however, it is necessary to turn the clock back to pre-*YCJA* jurisprudence, which, even then, emphasized the importance of expeditious proceedings.

[146] In *R. v. M. (G.C.)* (1991), 3 O.R. (3d) 223 (C.A.), Osborne J.A. stressed the need to conclude youth court proceedings without unreasonable delay, observing the close connection between the reasonableness of delay and the youth justice court:

. . . it seems to me that, *as a general proposition, youth court proceedings should proceed to a conclusion more quickly than those in the adult criminal justice system.* Delay, which may be reasonable in the adult criminal justice system, may not be reasonable in the youth court. There are sound reasons for this. They include the well established fact that the ability of a young person to appreciate the connection between behaviour and its consequences is less developed than an adult's. For young persons, the effect of time may be distorted. If treatment is required and is to be made part of the *Young Offenders Act* disposition process, it is best begun with as little delay as is possible. [Emphasis added; p. 230.]

Notably, Osborne J.A. did not treat delay in the youth criminal justice context as “a special constitutional guarantee” (p. 230) for young persons. Rather, he found that what is reasonable delay in the adult criminal justice system may not be reasonable for young persons. While the s. 11(b) “constitutional right remains constant . . . [i]t differs in its application to young persons because there is a particular element of prejudice which may result if the trial of a young person is unduly delayed” (*M. (G.C.)*, at p. 231).

[147] Similarly, in *R. v. D. (S.)*, [1992] 2 S.C.R. 161, at p. 162, and *R. v. J. (M.A.)*, [1992] 2 S.C.R. 166, at p. 167, this Court recognized the “societal interest” in proceeding expeditiously with charges against young persons. Sopinka J. concluded that, in the s. 11(b) context, “account [should] be taken of the fact that charges against young offenders be proceeded with promptly”.

[148] The pre-*YCJA* jurisprudence demonstrates that while the *YCJA* added additional procedural protections to youth court proceedings, the need for timely resolution of youth proceedings *predated* the *YCJA*. With the enactment of s. 3(1)(b) of the *YCJA* in 2002, which states that “the criminal justice system for young persons must . . . emphasize . . . *timely intervention* that reinforces the link between the offending behaviour and its consequences, and . . . *the promptness and speed* with which persons responsible for enforcing this Act must act, given young persons’ perception of time”, Parliament was merely codifying the pre-*YCJA* jurisprudence. As the Court of Appeal for Ontario noted in *R. v. R. (T.)* (2005), 75 O.R. (3d) 645, the *YCJA* crystalized the prior state of the common law, and in particular, *M. (G.C.)*, “the leading decision of this court on the issue of unreasonable delay” (p. 650) in youth offender proceedings.

[149] The British Columbia Court of Appeal agreed, observing that “much of s. 3 of the *YCJA* is a codification of earlier jurisprudence . . . a pronounced judicial focus on ensuring the prompt resolution of youth justice proceedings was a prominent component of the interpretation of the *YOA* and on this issue the *YCJA* does not

introduce a change” (*R. v. H.R.*, 2006 BCCA 211, 225 B.C.A.C. 127, at para. 32; see also *R. v. R.R.*, 2011 NSCA 86, 307 N.S.R. (2d) 319, at para. 14). By enacting s. 3(1)(b) of the *YCJA*, therefore, Parliament recognized that a core tenet of the separate youth criminal justice system is the need for enhanced timeliness for proceedings against young persons.

[150] Since the enactment of the *YCJA*, courts have consistently maintained that criminal proceedings against youth should be resolved more quickly than adult proceedings and that reasonable delay in the adult criminal justice system may not be reasonable in youth proceedings. In *R. v. L.B.*, 2014 ONCA 748, 325 O.A.C. 371, for example, the Court of Appeal for Ontario noted that “youth court matters are expected to proceed with greater dispatch than adult criminal proceedings” (para. 14). And in *R.R.*, the Nova Scotia Court of Appeal concluded that “the appropriate way to take into account the special circumstances of young persons is to acknowledge the potential for a heightened degree of prejudice to their liberty and security interests that may flow from delay” (para. 13).

[151] While the need for prompt resolution is clearly connected to the general prejudice suffered by young persons in their interactions with the criminal justice system, there are particular reasons why *timeliness* as a procedural safeguard takes on heightened significance for young persons charged with criminal offences. Veldhuis J.A. at the Court of Appeal of Alberta, identified three characteristics of young

persons which may lead them to experience a heightened degree of prejudice (relative to that suffered by adults) from long pre-trial delay (at paras. 104-6):

First, the ability of young persons to appreciate the connection between behaviour and consequences is less developed than it is for adults: *M. (G.C.)* at para 23. Long delays which further separate the connection between behaviour and consequence may inhibit a young person's ability to learn and be effectively rehabilitated from the incident.

Second, a young person's perception of time may be distorted: *M. (G.C.)* at para 23; *YCJA*, at s. 3(1)(b)(v). Delays may feel longer to a young person because the length of the delay takes up a greater proportion of their life relative to that of an adult. This may increase their experienced prejudice through a greater feeling of loss of liberty with respect to any pre-trial custody or bail conditions, which may seem to last longer than it would to an adult. It may also increase their experienced prejudice through a prolonged sense of the general stress felt by anyone under a cloud of suspicion.

Third, memories of young people tend to fade more quickly than those of adults: Nicholas Bala, "Youth as Victims and Offenders in the Criminal Justice System: A Charter Analysis — Recognizing Vulnerability" (2008) 40:19 *SCLR* 595 at 616. This characteristic may inhibit a young person from making full answer and defence when critical details of the incident become difficult to recall. [Emphasis added.]

To this list, we would add the two additional factors raised by the majority — avoiding potential unfairness and advancing societal interests.

[152] *Jordan* did not address the fact that delay uniquely affects young persons and, as the majority recognizes, it did not explicitly answer the question of whether its presumptive ceilings apply to youth justice court proceedings. We do not, with respect, share the view that the ceilings established in *Jordan* were intended to apply to proceedings under the *YCJA*.

[153] Nowhere in *Jordan* are young persons or the youth criminal justice system referred to. Nor does *Jordan* remotely suggest that the unique considerations that apply to young people were accounted for. This is unsurprising: no one raised it, no one argued it, and no one considered it. To conclude that the *Jordan* framework applies to *all* criminal proceedings, however, relies on the *absence* of any reference to the youth justice system in *Jordan* as the basis for *inferring* its inclusion. This obliterates the historic distinction between the adult and youth criminal justice systems, to the prejudice of young persons. If a framework for adjudicating a constitutional right that is directed to the criminal justice system for adults is now to be taken as having been also directed to be considered in the context of the separate criminal justice system for young persons, it should be done explicitly and not inferentially, particularly when inferring that young persons are captured by the adult framework will lead to less protection than they have received and are constitutionally entitled to.

[154] But this is not just a matter of eliminating protections for young people. Tacking young people onto the adult framework set by *Jordan* changes *Jordan* itself, and erodes the clarity it created. In effect, the majority's approach overrules the "below the ceiling" test. In *Jordan*, this Court could not have been clearer: prejudice is no longer an independent consideration, and is instead a factor in the setting of the ceilings; and a stay will be granted in response to delay below the ceiling *only* in "rare" and "clear cases". But no more. By changing *Jordan* so that stays will theoretically be more readily available where necessary to account for *the prejudice*

experienced by young persons, the clarity of *Jordan*'s instruction that a stay will be granted below the ceiling only in "rare" and "clear cases" is undermined and the predictability of the presumption that delay below the ceiling is reasonable dissipates.

[155] Under the majority's revised "below the ceiling" test, moreover, it is unclear how and when the need for timeliness in youth proceedings will be relevant to the reasonableness of the delay in any given case. This results in the worst of both worlds: the rigidity of ceilings that offer youth less protection than they previously received and were entitled to, coupled with a lack of clarity and predictability about if and when a stay will be granted when the delay is below the ceiling.

[156] We disagree, therefore, that the "below the ceiling" test set out in *Jordan* is capable of recognizing young persons' differential "tolerance for delay" (*Jordan*, at para. 42). To ask a youth to prove special circumstances to show that delay below the ceiling is unreasonable imposes a disproportionately high burden on those persons whom the majority recognizes are vulnerable. We see no reason to try to align the unalignable. Rather, we would apply the principles underlying *Jordan* to determine the appropriate presumptive ceiling for youth justice proceedings, accounting for the system's unique considerations.

The Presumptive Ceiling for Proceedings Under the YCJA Should Be Lowered

[157] The foregoing leads us to agree with Veldhuis J.A. at the Court of Appeal that a separate and distinct presumptive ceiling should be set for the separate and distinct regime that Parliament has created under the *YCJA*.

[158] What, then, should that presumptive ceiling be, taking into account the need for timely resolution of youth proceedings as affirmed in the jurisprudence, Parliament's statement of the principles governing the *YCJA* and Canada's international commitments respecting youth criminal justice?

[159] In *Jordan*, the "starting point[s]" for determining the presumptive ceilings were the *Morin* guidelines. In *Morin*, eight to ten months was set as a guide for institutional delay in the provincial court, and an additional six to eight months in the superior court.

[160] The Ontario Court of Appeal in *M. (G.C.)* set out as an "administrative guidelin[e]" that "youth court cases should be brought to trial within *five to six months*" (p. 236 (emphasis added)). Therefore, using this same "starting point" for proceedings under the *YCJA*, it is clear on this basis alone that the same ceilings as for adult proceedings cannot apply.

[161] The *M. (G.C.)* guideline reflected the pre-*Jordan* judicial practice of considering the necessity for promptness in youth proceedings within an analysis of prejudice arising from pre-trial delay. In *Jordan*, however, this Court removed any consideration of individual prejudice from the s. 11(b) analysis, as it was "confusing,

hard to prove, and highly subjective” (para. 33). In setting the presumptive ceilings at 18 and 30 months for proceedings in provincial and superior courts respectively, this Court in *Jordan* said that where the ceiling is breached, prejudice is irrebuttably presumed. As the majority correctly notes, *Jordan* folded the consideration of prejudice into the presumptive ceilings.

[162] The role of prejudice in connection with *young persons*, however, was not considered by the Court in setting the *Jordan* ceilings because *Jordan* did not fix ceilings for youth justice court proceedings. Again, in the face of a body of jurisprudence which recognizes the increased prejudice to youth caused by delay, it seems to us that *Jordan* would have referred to this heightened prejudice if it intended to capture it.

[163] We therefore do not agree that accounting for the specific prejudice experienced by youth would constitute some form of “double-counting”. The unique prejudice that young persons suffer as a result of delay was *not* accounted for in *Jordan*. In setting a new presumptive ceiling for youth proceedings, the heightened prejudiced suffered by young persons would be folded in for the first time.

[164] And, as to that folding, it seems to us that the *only* outcome that is consistent with this Court’s reasoning in *Jordan* is to recognize that, in light of the separate court system created by Parliament and the greater prejudice that has been acknowledged in the case of young persons, there should be a *lower* presumptive ceiling for youth proceedings. As Veldhuis J.A. observed, “[s]ince the ceiling [in

Jordan] was set based on the inferred prejudice faced by adults, it follows that the enhanced prejudicial effects on young persons require the court to set a lower ceiling, above which delay is presumptively unreasonable” (para. 107).

[165] Lowering the presumptive ceiling for youth does not confer enhanced *Charter* protections on them. Rather, it acknowledges the more profound impact of delay on young persons, and sets a ceiling that aims to confer on them *the same* protections that adults receive. There may be a difference in number, but not in substance. When it comes to prejudice arising from delayed criminal proceedings, *equal protection* as between young persons and adults requires *differential treatment*. This is not a departure from *Jordan*; indeed, it is the very application of *Jordan*’s principles to the youth criminal justice system — a system designed to accommodate the unique circumstances, and heightened prejudice, experienced by young persons. The failure to acknowledge this uniqueness deprives young persons of the very substantive benefits in s. 11(b) that *Jordan* extended to adults.

[166] It is this simple. What is a reasonable time for adults is not the same as for young people. Refusing to create a separate ceiling denies this, while paradoxically leading to the result that the principles underlying *Jordan* furnish less protection for young people than they had before *Jordan*. It turns the *Jordan* principles — so far as young people are concerned — into a hollow promise.

[167] As the case law decided under *R. v. Askov*, [1990] 2 S.C.R. 1199, and *Morin* demonstrates, delay was usually determined to be *unreasonable* in youth

proceedings well before 18 months. Courts regularly applied s. 11(b) to ensure prompt trials for youth in ways that resulted in cases against them being stayed *before* reaching what is now the *Jordan* ceiling of 18 months for adult trials in provincial court (see for example: *R. v. J.O.B.*, 2005 ABCA 296; *R. v. M.A.B.*, 2011 ABPC 87; *R. v. S.M.*, 2003 SKPC 39, 230 Sask. R. 25; *R. v. J. (S.)*, 2009 ONCJ 217, 192 C.R.R. (2d) 266; *R. v. H. (M.)*, 2008 ONCJ 643; *R. v. F. (T.)*, 2005 ONCJ 413; *R. v. L.S.*, 2005 ONCJ 113, 130 C.R.R. (2d) 81; and *R. v. C. (Q.Q.)*, 2005 BCPC 89, 129 C.R.R. (2d) 179). Applying the adult *Jordan* ceilings to young persons erodes this standard, and contradicts this long-standing understanding and practice. And it — bizarrely — leaves young persons *worse off* than they were, since the adult *Jordan* ceilings potentially allow for *more* pre-trial delay for young persons than the system previously tolerated. This defeats entirely the very purpose of *Jordan*, namely, to deter the “culture of complacency within the system towards delay” (para. 4).

[168] The majority’s primary reason for declining to set a distinct presumptive ceiling for youth matters is that “it has not been shown that there is a problem regarding delay in the youth criminal justice system” (para. 63). But the presence or absence of evidence of delay does not dictate or delimit the content of a young person’s right to a trial within a reasonable time. Rather, if one accepts — as we do — that the goals *Jordan* sought to achieve are equally applicable in the youth justice context, those principles must be applied in light of the uniqueness of youth

proceedings. In short, the existence of a problem is not a precondition for guaranteeing or defining the content of constitutional rights.

[169] Further, we observe that no such empirical evidence of delay across jurisdictions was before this Court when it decided *Jordan*. Nevertheless, the Court effectively took judicial notice of a culture of complacency in the adult criminal justice system. The majority offers no compelling reason for failing to do so with respect to the youth criminal justice system. Consistent with the insight and methodology of this Court's judgment in *Jordan*, we would do so.

[170] We also reject the suggestion that setting a separate presumptive ceiling for youth court proceedings would lead to a multiplicity of ceilings. Parliament has chosen to treat young persons ranging from 12 to 17 years of age as a group for the purposes of the *YCJA*. By setting a separate presumptive ceiling for *all* young persons, we are merely reflecting Parliament's direction, that those in that age range must be treated separately and differently from adults. The majority does not explain how recognizing a new ceiling for youth court proceedings would lead to a proliferation of ceilings either under the *YCJA* or generally. For example, the majority does not account for *Jordan* having itself recognized *two* distinct ceilings — one for provincial court proceedings and one for superior court proceedings.

[171] Further, and contrary to the majority's contention, Parliament's creation of a separate youth criminal justice system is not the sole basis on which we would establish a separate ceiling for youth matters under the *YCJA*. In our view, the

longstanding presence of a distinct legislative regime is an implicit acknowledgement of the distinct interests of youth in a timely trial. That youth have a separate criminal justice system, with its own court and unique procedures, simply directs us to determine the appropriate ceiling for *this* system. Were it any other way, *Jordan* would be guilty of the same transgression of setting “system-specific” timelines, since it set distinct ceilings for proceedings in superior and provincial courts. There was no question in *Jordan* of the propriety of recognizing that proceedings in the provincial court system should have a lower ceiling than proceedings in the superior court system. Therefore, just as *Jordan* set distinct ceilings for the *provincial court system* and the *superior court system* — the propriety of which was not questioned — we now set a distinct ceiling for the *youth court system*.

[172] We do not share the concern that setting a new presumptive ceiling for youth justice court proceedings will lead to “practical difficulties”, such as creating a new transitional scheme. Even if practical difficulties could or should determine the bounds of a constitutional right, they do not arise here. The presumptive ceiling that we set here for youth proceedings would apply to cases currently in the system, with the same transitional qualifications that *Jordan* afforded to those cases in the system at the time of its release.

[173] There remains the question of where to fix the presumptive ceiling for proceedings under the *YCJA*. In *R. v. M. (J.)*, 2017 ONCJ 4, 373 C.R.R. (2d) 194, Paciocco J. noted that there is “objective support for a 12 month presumptive

ceiling”, but that “[a] credible case can also be made for a 15 month presumptive ceiling” (paras. 137-38). He ultimately concluded: “What is clear is that nothing higher than 15 months could reasonably serve as an appropriate presumptive ceiling” (para. 144). In dissent at the Court of Appeal of Alberta, Veldhuis J.A. concluded that a 15-month presumptive ceiling should be set for proceedings under the *YCJA*. K.J.M., however, submits that nothing higher than a 12-month ceiling can fulfil the “*Jordan* promise combined with the principles of the *YCJA*”. Although not strictly necessary for the purposes of this appeal, since the delay experienced by K.J.M. exceeded 15 months, we would set the presumptive ceiling for proceedings in the provincial court under the *YCJA* at 15 months.

Calculation of Delay

[174] The first step, whether in an adult case or in a youth case, is to calculate the total delay from the time the accused was charged until the actual or anticipated conclusion of the trial. From this total are subtracted defence delay and delay caused by discrete exceptional events. Here, the total delay from the time K.J.M. was charged to the end of his trial was 18 months and 28 days. While there is no need for us to re-characterize this delay in any great detail — even on the majority’s calculation, the total delay in this case was above the 15-month presumptive ceiling — we offer a few comments on the majority’s calculation.

[175] First, K.J.M.’s late arrival to court and the resulting delay. In our view, it is inappropriate to characterize two to three *months* as defence delay arising from the

fact that K.J.M. was 2½ *hours* late to one of his numerous court appearances on March 2, 2016. Neither the trial judge nor the Court of Appeal characterized any delay as defence delay. Conjecture about whether “it is reasonable to think that a date for continuation earlier than July 28 would have been found” (majority reasons, at para. 95) but for K.J.M.’s late arrival, is unwarranted.

[176] We turn to the delay that the majority says was caused by a discrete exceptional event — the mistake surrounding the *voir dire* transcript. In our view, the transcript error was the result of an administrative oversight that the justice system “could reasonably have mitigated” (*Jordan*, at para. 75). As this Court recognized in *Jordan*, “court administration, the police, Crown prosecutors, accused persons and their counsel, and judges” all “play an important role in ensuring that [trials] conclud[e] within a reasonable time” (para. 50).

[177] In this case, the trial judge explained that “an agent of the state made an error” in ordering the transcript. As is clear from the trial judge’s description, the transcript error was the result of an oversight at the level of court administration. Compounding this error, the trial judge acknowledged that she may have noticed and corrected the transcript mistake if she had been in her office. Although we agree with the majority that judges “are not chained to their desks” (para. 102) and are entitled to take vacations, delay caused by these vacations should not be subtracted as an exceptional circumstance to the detriment of the accused.

[178] In any event, the Court in *Jordan* said that “the determination of whether circumstances are ‘exceptional’ will depend on the trial judge’s good sense and experience” (para. 71). In this case, the trial judge concluded that the missing transcript was not a discrete exceptional event. We would defer to the trial judge’s “good sense and experience” in making this determination.

[179] We would, therefore, not characterize any of the delay in K.J.M.’s case as defence delay or delay due to a discrete exceptional circumstance. Without these deductions, we calculate the total delay in this case as 18 months and 28 days.

[180] Our reasons would represent the first occasion on which a presumptive ceiling has been set for youth criminal justice proceedings. We therefore rely on and apply *Jordan*’s comments on transitional cases.

[181] As explained above, even on the majority’s calculation of delay, the delay in this case was above the presumptive 15-month ceiling. Above the ceiling, the transitional exception will apply where “the Crown satisfies the court that the time the case has taken is justified based on the parties’ reasonable reliance on the law as it previously existed” (*Jordan*, at para. 96). As the Court said in *Jordan*, “[t]his requires a contextual assessment, sensitive to the manner in which the previous framework was applied . . . [f]or example, prejudice and the seriousness of the offence often played a decisive role” (*ibid.*). Additional relevant factors include the complexity of the case, the actual amount of delay, the presence of “significant” and “notorious” institutional delay and the parties’ response to the delay (*Jordan*, at paras. 96-98;

Cody, at paras. 68-70). The “bottom line is that all of these factors should be taken into consideration as appropriate in the circumstances” (*Cody*, at para. 70).

[182] Here, the trial judge found that although the delay exceeded 18 months, it was justified under the transitional exception. In considering the transitional exception, the trial judge concluded that on “taking a bird’s eye view of this case, it is just not the clearest of cases where I should stay it”. Both parties agree that this was not the correct legal test for the transitional exception. The “clear cases” test is relevant only when determining if a stay should be granted for delay that is *below* the presumptive ceiling. Because of this legal error, we will conduct a fresh analysis of whether the delay is justified under the transitional exception.

[183] As we are largely in agreement with Veldhuis J.A.’s transitional exception analysis, our approach mirrors the structure of her reasons.

[184] First, the complexity of the case. As Veldhuis J.A. noted, this was a relatively straightforward case. The facts were not overly complex, and the core issue was whether K.J.M. acted in self-defence. Complexity, in this case, did not lead to “inevitable delay”. This factor militates in favour of granting a stay.

[185] Next, it is necessary to consider the delay in relation to four factors which are to be balanced in order to determine whether the delay was unreasonable. These factors are: “(1) the length of the delay; (2) defence waiver; (3) the reasons for the delay, including the inherent needs of the case, defence delay, Crown delay,

institutional delay, and other reasons for delay; and (4) prejudice to the accused's interests in liberty, security of the person, and a fair trial" (*Jordan*, at para. 30).

[186] Here, delay — the time running from the date K.J.M. was charged to the actual or anticipated end of trial — extends from April 12, 2015 to November 9, 2016, for a total of 18 months and 28 days. There was no defence waiver.

[187] Turning to the reasons for the delay, the prior law set out categories of delay. Inherent time requirements, which include the time to retain counsel, attend bail hearings, provide disclosure and complete police and administrative documentation, are a neutral factor. Institutional delay is, on the other hand, "the period that starts to run when the parties are ready for trial but the system cannot accommodate them" (*Morin*, at pp. 794-95). Delay caused by the accused will not contribute to a finding that the delay was unreasonable. Conversely, delay caused by the Crown *will* contribute to a finding that the delay was unreasonable. It is necessary, therefore, to characterize the delay periods.

[188] *April 12, 2015 — June 29, 2015 (2½ months)*: During this period, K.J.M. retained counsel, a bail hearing was conducted and the parties were ready to set a trial date. This period of time is inherent delay.

[189] *June 30, 2015 — September 16, 2015 (2½ months)*: While defence counsel had hoped to set the trial for June 29, 2015, the court in Fort McMurray was

not sitting due to judicial vacations. The trial was set for September 16, 2015. This period of time is institutional delay.

[190] *September 17, 2015 — March 2, 2016 (5½ months)*: The trial was set for 9:30 am on September 16, 2015. It was, however, set over to the afternoon as the Crown only planned to call a single witness and was not seeking to tender K.J.M.'s police statement. This plan changed over the lunch hour, and the Crown decided that it would attempt to tender the police statement. This decision necessitated a *voir dire*. Because there was no time for a *voir dire* on September 16, 2015, the judge adjourned the trial to March 2, 2016. While the Crown has the prosecutorial discretion to change its strategy, the manner in which it exercised its discretion led to a lengthy adjournment. The period of time between September 17, 2015 and March 2, 2016 is Crown delay.

[191] *March 3, 2016 — July 28, 2016 (4¾ months)*: A number of factors were in flux over this period of time. Some of the delay was caused by K.J.M. arriving late to court. There were, however, other reasons for the delay during this period. The Crown decided to proceed with another matter instead of waiting for K.J.M. to arrive, a forensics report was disclosed late, the time for the *voir dire* was under-estimated, and there were scheduling restrictions at the courthouse. Like Veldhuis J.A., we are of the view that this delay was partly caused by both parties and partly caused by institutional delay. We endorse her allocation of the delay: it is appropriate to

attribute one month to neutral delay and the remaining 3¾ months to institutional delay.

[192] *July 29, 2016 — September 6, 2016 (1¼ months)*: The trial continued on July 28, 2016, the *voir dire* was concluded, and the Crown closed its case. The matter was adjourned until September 6, 2016, for a decision on the *voir dire*. This time period is inherent delay.

[193] *September 7, 2016 — October 4, 2016 (1 month)*: This is the time period discussed above in relation to the missing transcript. We agree with Veldhuis J.A. that this period is institutional delay.

[194] *October 5, 2016 — November 2, 2016 (1 month)*: The judge ruled that K.J.M.'s statement was inadmissible on October 4, 2016. On October 19, 2016, K.J.M. testified, and the defence closed its case. The matter was adjourned to October 24, 2016, to hear the s. 11(b) application, which was dismissed. The matter was again adjourned, this time to November 2, 2016, for argument on the merits. Arguments were heard on November 2, 2016, and judgment was reserved until November 9, 2016. We are of the view that the time between October 5, 2016 and November 2, 2016 is inherent delay.

[195] We would therefore, in accordance with the prior state of the law, allocate 4¾ months to inherent delay, 7¼ months to institutional delay, no time to defence delay, 5½ months to Crown delay, 1 month to neutral delay. Under *Morin*, 8 to 10

months of institutional and Crown delay was considered reasonable in proceedings against adults in provincial court. As we have already discussed, however, timeliness has always had a heightened significance in youth proceedings, and the jurisprudence on delay in youth proceedings adapted these timeframes accordingly. In *M. (G.C.)*, Osborne J.A. suggested that only 5 to 6 months of institutional and Crown delay would be reasonable for youth justice court proceedings (p. 236). In this case, the total institutional and Crown delay was 12¾ months. As this calculation more than doubles the *M. (G.C.)* guidelines for youth proceedings and even exceeds the *Morin* guidelines for adults, this factor militates strongly in favour of granting a stay.

[196] Turning next to the parties' response to the delay, the majority acknowledges the defence acted responsibly throughout the proceedings, but faults defence counsel for failing to "show that the appellant was committed to having the case tried as quickly as possible" (para. 105). With respect, we disagree with the majority's underlying logic and its characterization of the defence's attitude towards delay. Defence counsel should not have to beg for timely proceedings in order to receive a trial within a reasonable time in accordance with s. 11(b) of the *Charter*. We share Veldhuis J.A.'s view, moreover, that the defence was motivated to bring this matter to an expeditious conclusion from the beginning. K.J.M. entered an early plea, his counsel repeatedly noted his concerns about delay, and indicated that K.J.M. was not waiving his s. 11(b) rights. Even in the face of the late disclosure of a forensics report, the defence agreed to proceed with the trial. The defence clearly made every effort to get the matter resolved in a timely manner. The same motivation cannot be

attributed to the Crown, whose prosecutorial decisions significantly lengthened the proceedings. Taken together, the parties' response to the delay, in our view, weighs in favour of granting a stay.

[197] Finally, prejudice. Under the prior law, the degree of prejudice suffered by the accused was an important factor in determining how much institutional delay would be tolerated. In *R. v. Godin*, 2009 SCC 26, [2009] 2 S.C.R. 3, at para. 30, the Court noted the three interests protected by s. 11(b):

. . . liberty, as regards to pre-trial custody or bail conditions; security of the person, in the sense of being free from the stress and cloud of suspicion that accompanies a criminal charge; and the right to make full answer and defence, insofar as delay can prejudice the ability of the defendant to lead evidence, cross-examine witnesses, or otherwise to raise a defence.

[198] While it may be true that K.J.M. did not lead evidence of actual prejudice, it can certainly be presumed based on the uniquely prejudicial impact delay has on young persons. As Veldhuis J.A. noted (at para. 150):

[S]ignificant prejudice can be inferred simply given the appellant's age. As a young person, his ability to appreciate the connection between his behaviour and its consequences is less developed than it is for adults. The long delay in this case may have lessened the appellant's ability to learn from and be effectively rehabilitated following the incident. Further, the proceedings continued for a relatively significant portion of his life, likely exacerbating the impact of the stress and cloud of suspicion he lived under, as well as the impact of the period he was subject to bail conditions. Finally, the appellant's ability to make full answer and defence may have been prejudiced given the tendency for young persons' memories to fade relatively quickly when compared with adults.

[199] The final step for transitional cases is to weigh all the relevant factors so as to decide whether a stay should be granted. As Veldhuis J.A. noted, the seriousness of the matter was an important consideration under the prior law — the more serious the incident, the greater society’s interest in seeing the case proceed to trial. This was a serious incident, one which left the victim with significant injuries and permanent facial scars.

[200] Against the seriousness of the offence, we weigh the factors militating the favour of granting a stay. These include K.J.M.’s young age — 15 years old at the time of the charge, and nearly 17 years old when convicted. This represents a substantial portion of his life, and we would infer significant prejudice from the delay here. The case itself was not unduly complex. In light of the foregoing, particularly the parties’ response to delay, K.J.M.’s age and the length of the proceedings in their entirety, the 12¾ months of institutional and Crown delay is unreasonable. This unreasonable delay outweighs the seriousness of the offence.

[201] In the result, we would find that the delay in K.J.M.’s case is not justified by the transitional exception. Even relying on the prior law, the Crown has not demonstrated that the delay in this case was reasonable.

Conclusion

[202] We would allow the appeal. K.J.M.’s constitutional right to a trial within a reasonable time was infringed, and we would therefore grant a stay of proceedings.

The following are the reasons delivered by

KARAKATSANIS J. —

[203] Section 11(*b*) of the *Canadian Charter of Rights and Freedoms* protects the right of an accused to be tried within a reasonable time. When this Court decided *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631, it did so to address the widespread culture of complacency towards delay throughout the criminal justice system. This Court set out a new framework for s. 11(*b*) applications, acknowledging its “role to play in changing courtroom culture and facilitating a more efficient criminal justice system, thereby protecting the right to trial within a reasonable time” (para. 45).

[204] At the heart of the *Jordan* framework is a ceiling beyond which a delay is deemed presumptively unreasonable: 18 months for cases going to trial in provincial courts, and 30 months for cases in superior courts. For cases in which the total delay falls *below* the presumptive ceiling, the onus is on the defence to show that the delay is unreasonable.

[205] In the instant case, we must apply this framework to the appellant, K.J.M., a “young person” charged under the *Youth Criminal Justice Act*, S.C. 2002, c. 1 (*YCJA*). The appellant was found guilty of aggravated assault contrary to s. 268 and possession of a weapon for dangerous purposes contrary to s. 88(1) of the *Criminal Code*, R.S.C. 1985, c. C-46. In total, 18 months and 28 days elapsed from the date

charges were filed against him to the date of the verdict. K.J.M.’s motion to stay proceedings under s. 11(b) of the *Charter* was denied.

[206] The legal issue at the core of this appeal is whether the *Jordan* framework can adequately accommodate the increased need for timeliness mandated by the *YCJA* in cases involving accused who are “young persons”,⁴ or whether a separate presumptive ceiling is required to give effect to their s. 11(b) rights.

I. The Appropriate Approach to Unreasonable Delays in the Youth Criminal Justice System

[207] The application of *Jordan* in this context must be premised on the distinct and separate nature of the youth criminal justice system. Parliament has mandated that “the criminal justice system for young persons must be separate from that of adults” (*YCJA*, s. 3(1)(b)). As Abella and Brown JJ. explain, Parliament’s intentions, Canada’s international obligations, and our jurisprudence suggest that, “[g]iven the heightened vulnerability of young persons . . . and their diminished moral blameworthiness, enhanced — and robust — procedural protections” are required for young people; there is, therefore, a “need for a separate and distinct regime for trying young persons charged with criminal offences” (para. 143).

⁴ Section 2(1) of the *YCJA* defines the term “young person” as generally meaning “a person who is or, in the absence of evidence to the contrary, appears to be twelve years old or older, but less than eighteen years old”. The statutory definition also extends to “any person who is charged under [the *YCJA*] with having committed an offence while he or she was a young person”.

[208] This separate criminal justice system recognizes the greater prejudicial impact of delay on young persons and, consequently, mandates greater efforts to ensure timeliness in cases involving young accused. This is codified in the *YCJA*, which provides that the youth criminal justice system must emphasize two factors: “timely intervention” to “reinforc[e] the link between the offending behaviour and its consequences” (s. 3(1)(b)(iv)); and “promptness and speed”, given a young person’s accelerated perception of time (s. 3(1)(b)(v)). The greater need for timeliness in cases involving young accused was recognized by this Court in jurisprudence predating the *YCJA* (*R. v. D. (S.)*, [1992] 2 S.C.R. 161, at p. 162). Therefore, I also agree with Abella and Brown JJ. that “a core tenet of the separate youth criminal justice system is the need for enhanced timeliness for proceedings against young persons” (para. 149) and that this must guide the way the *Jordan* framework should be applied to the youth criminal justice system.

[209] However, despite these shared foundations, I part company with Abella and Brown JJ. when they conclude that the framework in *Jordan* requires the adoption of a separate presumptive ceiling in the *YCJA* context. In my view, a separate ceiling is neither warranted nor necessary to accommodate the distinct characteristics of young accused and the youth criminal justice system. Rather, I agree with the conclusion reached by Moldaver J. that the presumptive ceilings set out in *Jordan* also apply in the context of the youth criminal justice system. Adopting a more robust approach to examining the reasonableness of delays falling below the

presumptive ceiling provides protection for the s. 11(b) rights of young accused. I reach this conclusion for several reasons.

[210] First, creating a lower presumptive ceiling for young accused does not align with this Court's reasons in *Jordan*. In *Jordan*, this Court recognized that prior judicial attempts to give meaning to the right to be tried without undue delay had ultimately proved unsuccessful. Despite this Court's decisions in *R. v. Askov*, [1990] 2 S.C.R. 1199, and *R. v. Morin*, [1992] 1 S.C.R. 771, the "culture of complacency towards delay" was systemic (*Jordan*, at para. 40). It was beyond dispute in *Jordan* that *extraordinary* measures were required in order to give effect to the s. 11(b) *Charter* right.

[211] Setting a presumptive ceiling was not a step lightly taken. Indeed, the Court specifically noted that a "presumptive ceiling is required in order to give meaningful direction to the state on its constitutional obligations and to those who play an important role in ensuring that the trial concludes within a reasonable time" (*Jordan*, at para. 50 (emphasis added)). In this case, there is no evidence before the Court that the youth criminal justice system itself suffers from endemic delays that would justify the Court to take the exceptional judicial step of setting a new presumptive ceiling. The creation of a separate ceiling in the youth context would be unwarranted on the record before the Court.

[212] Further, I do not accept that a failure to lower the ceiling puts young accused at a disadvantage compared to their adult counterparts and deprives them of

the benefits that *Jordan* extended through the implementation of presumptive ceilings for delay. Young accused benefit from the presumptive 18-month ceiling set out in *Jordan* for cases going to trial in provincial courts under which youth justice courts generally fall.⁵ In addition, it is reasonable to presume that the entire criminal justice system, including the youth system, will ultimately benefit from positive initiatives generated in response to the presumptive ceilings established in *Jordan*.

[213] I also reject the argument that a lower presumptive ceiling is required to account for the unique prejudice that young persons suffer as a result of delay. In my view, the increased prejudice and the special considerations for young persons codified in the *YCJA* are both best accounted for through the below-ceiling test in *Jordan*. Indeed, although *Jordan* stressed the importance of the presumptive ceilings, this was not the “end of the exercise” and “compelling case-specific factors remain relevant to assessing the reasonableness of a period of delay both above and below the ceiling” (para. 51).

II. Adapting the “Below-Ceiling” Test

[214] The below-ceiling test was set out as follows in *Jordan*:

If the total delay from the charge to the actual or anticipated end of trial (minus defence delay or a period of delay attributable to exceptional circumstances) falls *below* the presumptive ceiling, then the onus is on the

⁵ Sections 13(2) and 13(3) of the *YCJA* provide that a superior court of criminal jurisdiction is deemed to be a youth justice court where the accused either elects or is deemed to have elected trial by judge and jury or by judge alone.

defence to show that the delay is unreasonable. To do so, the defence must establish that (1) it took meaningful steps that demonstrate a sustained effort to expedite the proceedings, *and* (2) the case took markedly longer than it reasonably should have”. [Emphasis in original; para. 48.]

[215] Adapting *Jordan* in the context of the youth criminal justice system by way of the below-ceiling test gives effect to the s. 11(*b*) rights of young accused in two ways. First, it gives them the benefit of a presumptive ceiling as mandated in *Jordan*. As well, the below-ceiling test is sufficiently flexible to incorporate general considerations concerning the unique impact of delay on young accused and the greater need for timeliness in the youth criminal justice system.

[216] In order to do this, the application of the below-ceiling test must recognize the fundamental principle that the youth criminal justice system is distinct from the general criminal justice system. The Preamble of the *YCJA* mandates that “Canadian society should have a youth criminal justice system that . . . fosters responsibility and ensures accountability through meaningful consequences and effective rehabilitation and reintegration”. Timeliness is integral to this statutory mandate, as detailed in s. 3(1)(b)(iv) and (v) of the *YCJA*.

[217] The greater need for timeliness, including the unique prejudicial impact of delay on youth, are not simply “case-specific factors” — such as the personal attributes, characteristics or circumstances of a specific young accused — used to determine whether the delay in a given case was “markedly longer” than it reasonably should have been. Rather, these considerations play a larger role: they must suffuse

and inform the entire analysis in order to give effect to the statutory mandates in the *YCJA*. Thus, *both* steps of the below-ceiling test must take into account, and be adapted to incorporate, the increased need for timeliness in the youth criminal justice system.

[218] As a result, I would add the following. *Jordan* was referring to the criminal justice system as a whole when this Court explained that it expects “stays beneath the ceiling to be rare, and limited to clear cases” (para. 48). This statement does not hold true for the youth criminal justice system. Most young persons accused of an offence will assert their rights under s. 11(*b*) of the *Charter* before their case reaches the 18 month presumptive ceiling (see, for example, *R. v. M. (G.C.)* (1991), 3 O.R. (3d) 223 (C.A.), at p. 236: “in general, youth court cases should be brought to trial within five to six months”; see also *R. v. L.B.*, 2014 ONCA 748, 325 O.A.C. 371, at para. 14). Indeed, given the legislatively mandated and greater need for timeliness in the youth criminal justice system, it necessarily follows that delay in a proceeding against a young accused will become “markedly longer than it reasonably should have [been]” sooner, perhaps significantly so, than it will in a proceeding against an adult.

[219] Therefore, stays below the ceiling in the youth context will not be “rare” or limited to “clear cases”. The incorporation of such language would effectively render any accommodations made for youth in the below-ceiling test ineffective. To

the contrary, many cases involving young accused will, and should be, resolved before their case approaches the 18-month presumptive ceiling.

A. *Step 1: The Defence Took Meaningful Steps That Demonstrate a Sustained Effort to Expedite the Proceedings*

[220] It is particularly important that the conduct of the defence be examined liberally and generously in the youth context. Instead, Moldaver J. heightens the standard for defence initiative above even that which was set out in *Jordan*. While I agree that more than “[r]esigned acquiescence” is required, I disagree that the defence is required to “engage in proactive conduct throughout and show that the accused is committed to having the case tried as quickly as possible” (para. 83). In my view, this requires too much from the defence and thereby risks undermining the state’s general s. 11(b) obligation to try all accused without undue delay. *Jordan* imposed no requirement on the defence to engage in “proactive conduct” or to take steps to have the case tried “as quickly as possible”. Rather, the defence is required to act “reasonably and expeditiously” throughout the proceedings and take “meaningful, sustained steps to expedite the proceedings” (*Jordan*, at paras. 84-85).

[221] The *YCJA* effectively imposes responsibility on the state to expedite proceedings in the youth criminal justice system (s. 3(1)(b)(iv) and (v)). This necessarily affects what “meaningful steps” should be taken by the defence to expedite the proceedings. Therefore, in my view, the defence initiative required at the

first step of the test will necessarily be less in the youth context than in the adult context. It will not normally present a high hurdle to granting a below-ceiling stay.

B. *Step 2: The Defence Must Establish That the Case Took Markedly Longer Than it Reasonably Should Have*

[222] Whether the time a case has taken *markedly exceeds* what is reasonable is determined by considering a “variety of factors, including the complexity of the case, local considerations, and whether the Crown took reasonable steps to expedite the proceedings” (*Jordan*, at para. 87 (emphasis added)). The list of factors is not closed.

[223] The second prong of the below-ceiling test can therefore, in many circumstances, be used to effectively account for the increased prejudice suffered by an accused from delays. For example, the assessment of whether a delay of a given duration “took markedly longer than it reasonably should have” would likely be different for an accused in custody, or awaiting trial on strict bail conditions compared to an accused who is subjected to relatively minimal restrictions on their liberty while awaiting trial. Obviously, the specific circumstances and individual characteristics of a young person, including his or her age, will impact this analysis.

[224] However, for young persons in the youth criminal justice system, the below-ceiling test also allows the court to take into account the reasonableness of delay based on the unique statutorily-mandated considerations codified in the *YCJA*. The fact that young accused fall under a separate criminal justice system, one in

which the heightened prejudicial impact of delay and the resulting greater need for timeliness are recognized by legislation (s. 3(1)(b)(iv) and (v)), means that the length of time it should take to try a young accused will necessarily be shorter. The incorporation of these considerations thereby justifies a different and nuanced assessment of whether a given delay was “markedly longer” than it should have been in the youth context.

III. Note on Attribution of Delay Caused By Failed Extrajudicial Sanctions Programs

[225] Finally, I address the issue of diversion or extrajudicial sanctions (EJS) programs. In my view, it is neither necessary nor prudent to consider this issue in the instant case. There is no reference to EJS programs in the factual matrix, the submissions of the parties or, indeed, anywhere except for the submissions of a single intervener who asked that the Court consider this issue. In my view, this Court should exercise judicial restraint and, in the absence of full submissions and a factual context in which to properly analyze this issue, should not address it here.

[226] However, I express strong disagreement with my colleague’s assertion that “it can reasonably be expected that [delay caused by failed attempts at EJS programs] will be deducted as defence delay” (Moldaver J.’s reasons, at para. 89). Nothing in the jurisprudence before or after *Jordan* suggests that such delays should be attributed to the defence.

[227] Moldaver J. suggests that his reasoning is based on “sound policy reasons”, including the minimization of “the risk that authorities will refrain from using extrajudicial sanctions in the first place out of a fear that they may be increasing the likelihood of a stay in the event such measures fail” (para. 89). In my view, this reasoning is based upon a premise for which there is no support. Indeed, in cases where potential delays caused by an EJS program would risk breaching the presumptive 18-month ceiling, the Crown may choose to ask for a waiver of any delay that would result from the young accused failing to complete that program.

[228] I add that, in my view, it is wrong to count delays caused by failed attempts at EJS programs against the accused. Because these programs have been strongly promoted by Parliament in s. 4 of the *YCJA*, their use in the youth criminal justice system is extremely common. Attributing delays from failed attempts at EJS programs to the accused therefore has the practical effect of extending the presumptive ceiling for young accused beyond the 18-month ceiling that was set in *Jordan*. This would undermine the emphasis on timeliness that must be accommodated in the below-ceiling test for matters in the youth criminal justice system.

[229] Furthermore, it is unfair to attribute the delay from failed attempts at EJS programs to the accused. Diversion programs “allow for effective and timely interventions” and “are presumed to be adequate to hold a young person accountable for his or her offending behaviour” (*YCJA*, s. 4(b) and (c)). Participating in an EJS

program is not a passive exercise and likely does little to alleviate the stress and uncertainty of being in the criminal justice system. Since these programs are endorsed by the state, prejudice from delay caused by these programs is no different from any other delay caused by state actors. In the same vein, it is unfair to attribute that delay solely to the defence when it might in fact be a constellation of factors that results in the inefficacy and ultimate failure of an EJS program. These factors may well include inefficiencies within the justice system itself.

IV. Application

[230] I agree with Abella and Brown JJ. on their calculation of the net total delay in this case as 18 months and 28 days.

[231] I also agree there is no evidence that the appellant's late arrival on one of his court appearances caused the two to three months of delay Moldaver J. attributes to the defence. While some delay may have been attributable to the appellant's lateness, it is unclear to what extent this *actually* impacted the delay in finding a date to complete the trial. I am concerned that simply applying a ratio of months of delay to hours of court time is arbitrary and may set a dangerous precedent, with the potential to lead to disproportionate results. Furthermore, as acknowledged by Moldaver J., the contribution of institutional factors to this delay is a reflection of systemic delay in the overall criminal justice system and should not be attributed *entirely* to the defence.

[232] In light of the difficulty in quantifying the amount of delay caused by the appellant's lateness, I would agree with Abella and Brown JJ. that there is insufficient evidence to attribute any period of delay to the appellant on this basis. Similarly, I agree with my colleagues that the transcript error "was the result of an administrative oversight that the justice system 'could reasonably have mitigated'" (Abella and Brown JJ.'s reasons, at para. 176) given that it was directly tied to court administration.

[233] I would therefore not characterize any of the total delay of 18 months and 28 days as either defence delay or delay resulting from discrete exceptional circumstances. The delay suffered by the appellant in this case thus breaches the 18-month presumptive ceiling for delay established by *Jordan*.

[234] However, as 80 percent of the proceedings took place before *Jordan* was decided, the transitional exception applies: it is therefore necessary to determine whether "the time the case has taken [to be tried] is justified based on the parties' reasonable reliance on the law as it previously existed" (*Jordan*, at para. 96). Like Abella and Brown JJ., I cannot accept that this delay can be justified under the transitional exception. I agree with their analysis that the Crown has failed to demonstrate on the evidence that the delay in this case was reasonable based on a reliance on the previous state of the law.

[235] Therefore, despite the difference in our approaches, I reach the same conclusion as Abella and Brown JJ. The delay suffered by the appellant in this case was unreasonable and a stay should be granted. I would allow the appeal.

Appeal dismissed, ABELLA, KARAKATSANIS, BROWN and MARTIN JJ. dissenting.

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