# The COVID-19 pandemic and the right to a trial within a reasonable time

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The COVID-19 pandemic continues to have far-reaching effects on the lives of Canadians. As some provinces tentatively ease restrictions, Canadian court processes have not been immune and have developed substantial jurisprudence that address pandemic related delays.

Calculating delays with a view to upholding an accused's right to trial within a reasonable time must be a flexible and contextual approach that depends on jurisdiction, factors that lead to a delay, and mitigating circumstances addressed by the parties.

The right to a trial within a reasonable time is enshrined in provision 11(b) of the *Charter* and forms an important foundation that is central to Canada's justice system.[1] The Supreme Court of Canada's landmark decision *R v Jordan* (2016 SCC 27) addresses 11(b) rights and associated trial delays. *Jordan* recognizes that "trials within a reasonable time are an essential part of our criminal justice system's commitment to treating presumptively innocent accused persons in a manner that protects their interests in liberty, security of the person, and a fair trial."[2]

Section 11(b) of the *Charter* reads:

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

*Jordan* clarified the framework for interpreting what length of time is reasonable and created deadlines for matters to be set for trial. Squaring these deadline alongside the extensive effects of the pandemic has not been a universal exercise for Canadian courts.

In this article, we address the differential impact of the pandemic across Canadian jurisdictions with a view to exploring Alberta case law specifically.

## 1. Framework

To determine whether an accused's s. 11(b) rights have been violated, *Jordan* developed the following general framework:

> There is a ceiling beyond which delay becomes presumptively unreasonable. The presumptive ceiling is 18 months for cases tried in provincial court, and 30 months for cases in superior court or cases tried provincially after a preliminary inquiry. Defence delay does not count towards the presumptive ceiling...Total delay must be calculated and then defence delay deducted.[3]

Once this ceiling has been exceeded and the delay is unreasonable, the Crown bears the onus to rebut this presumption of unreasonableness. The Crown may overcome the limits imposed by *Jordan* where circumstances lie outside of the Crown's control and include (i) particularly complex cases;[4] and (ii) discrete events or circumstances.[5]

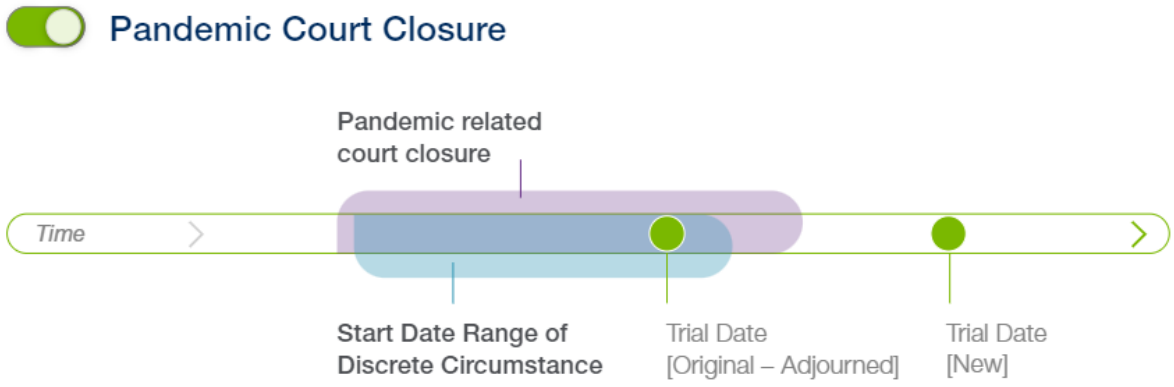
The effects of the pandemic are a "discrete exceptional circumstance" under the *Jordan* framework.

In other words, effects related to the pandemic are not included when calculating the *Jordan* limits. This calculation is not a simple exercise and the question of when this time period begins and ends requires a factual and contextual approach that will be different for each case.

## 2. Calculating Delays

### a. Start Date

Generally, a discrete exceptional circumstance must be causally related to a delay in bringing a matter to trial. To determine the start date for a pandemic related delay, the date when a court matter was previously scheduled (and subsequently adjourned as caused by the pandemic) is an appropriate starting point for analysis.[6] This includes clear instances where a trial or booking is not available due to court time being unavailable.




The starting point for such discrete circumstances appears determinable at first glance though Canadian courts have not taken a universal approach. Throughout the pandemic, each Province's respective courts issued notices of closures thereby establishing defined dates as to when court closures occurred and which matters had to be adjourned.

For Alberta, the earliest starting point available for this discrete exceptional circumstance at the Court of Queen's Bench could be said to fall on the date of court bookings affected by various Orders of Chief Justice M.T. Moreau, the earliest being March 15, 2020.[7]

Different starting points have been recognized in Alberta case law including the date on which a delayed trial would have ended (*R v Fischer*, 2021 ABQB 345 at para 17), the date of the first scheduled hearing subsequently adjourned by a bench order (*R v Harker*, 2020 ABQB 603), or simply the date of the first bench order as referenced above (*R v Moeketsi*, 2021 ABPC 99 at paras 52-62).

The early and dominant approach to determining a start time for calculation appears to be *R v Simmonds* (2020 ONSC 7209) which found that the original (adjourned) trial start date as the time when a pandemic related discrete circumstance begins to run.[8]

**b. End Date**

Calculating the end date for pandemic related discrete circumstances is also subject to significant variability across all Canadian courts. Specific end dates have included dates as early as the date when courts resumed operations (See, *R v Drummond*, 2020 ONSC 5495) or as late as the last date of a rescheduled trial (See, *R v GR*, 2020 ONCJ 578 at paras 59-67).


This variability will require both Crown and Defence counsel to be up to date on their province's nuanced case law and prepared to distinguish this evolving case law on the facts of their case.

In determining an end point to pandemic related delays, courts have been reluctant to recognize court re-opening dates as stopping the delay timer. Jurisprudence recognizes that courts had to develop a whole new way of doing business and that "The Court system is not a tap that can be turned off, then turned on and pick up where everything left off."[9]

The most common and current dominant approach in Alberta is calculating the end point as the end of the rescheduled trial. *R v Boyko* summarizes Alberta's approach as follows:

In Alberta, courts have tended to calculate delay from the original trial date (re-scheduled due to COVID-19) to the anticipated end of the re-scheduled trial date (*R v KGY*, 2020 ABPC 171; *R v Harker*, 2020 ABQB 603; *R v Parent*, 2021 ABQB 66).[10]

This calculation of a delay until the *end* of the rescheduled trial date in Alberta is a departure from the *R v Simmons* case and the common approach in Ontario which typically calculates the end date as the *first* day of the rescheduled trial.

## 3. Mitigation

Discrete exceptional events such as the pandemic must be subtracted from the total period of delay when calculating the time limits imposed by *Jordan*. Imbedded in this calculation includes the efforts to mitigate delays. The responsibility to mitigate delays is borne by the justice system, the Crown, and defence counsel.

Within reason, the Crown and the justice system should be capable of prioritizing cases that have faltered due to unforeseen events (see *R. v. Vassell*, 2016 SCC 26, [2016] 1 SCR 625).

Thus, any portion of the delay that the Crown and the system could reasonably have mitigated may not be subtracted (i.e. it may not be appropriate to subtract the entire period of delay occasioned by discrete exceptional events).[11]

Mitigation efforts are considered in light of the context and circumstances surrounding each case and generally asks whether the parties made efforts to expedite their matter and remain proactive with scheduling. *R v Ghraizi* (2022 ABCA 96) addresses pandemic related mitigation factors and specifically speaks to the sense of defeatism to be avoided when faced with exceptional circumstances such as Covid-19. Justice Inglis found that the Crown did not attempt to shorten the trial or resolve the matter while court bookings were unavailable stating:

The Crown also suggests on appeal that so long as the *initial* trial date is within the *Jordan* ceiling, the Crown need do nothing further. Such an approach is incongruous with the overarching message in *Jordan* and the jurisprudence following. The fact of the matter is that unforeseen circumstances *do* happen. Counsel illness or witness unavailability or trial over-runs are simply part of the vagaries of running a trial. There is an obligation on all parties to work toward a sufficient resolution of trials. As succinctly stated in *Jordan*, at para 56: the presumptive ceiling "is not an aspirational target. Rather, it is the point at which delay becomes presumptively unreasonable. The public should expect that most cases can and should be resolved before reaching the ceiling".[12]

Genuine efforts must be made from all parties. This can include proposing remote or modified procedures, accommodating unique circumstances of the case, streamlining issues, and making candid requests for speedy resolution of matters.

To deduct all of the time, from the adjournment to the rescheduled trial, it is implicit that the Crown must be able to demonstrate that it could not have reasonably mitigated the resulting delay. Courts will be unwilling to characterize this entire time, from start date to end date, as an exceptional circumstance, where the Crown has not taken an active role in bringing the matter to trial.

## 4. Conclusion

Charters rights, especially 11(b) rights, must be applied contextually and include circumstances related to the pandemic. Calculating appropriate start and end times in conjunction with mitigating factors cannot fit into a "one-size-fits-all" approach.

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