REMEDIES FOR BREACH OF THE RIGHT TO BE TRIED

WITHOUT UNDUE DELAY:

TO STAY OR NOT TO STAY?

by

Zannah Johnston

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University of Toronto

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Abstract

Remedies for Breach of the Right to be Tried Within a Reasonable Time: To Stay or Not to Stay?  LL.M. 2009, Zannah Ruth Johnston, Faculty of Law, University of Toronto.

This paper considers what the consequences should be when the right to be “tried without undue delay” is breached. The current New Zealand approach is that a stay of proceedings is a required remedy only in limited cases, and breaches can often be remedied by sentence reductions or monetary damages. This is contrasted with the Canadian Courts’ requirement that a stay of proceedings must be ordered in any case of breach. This paper explains why a stay of proceedings is not the minimum remedy, and shows how the New Zealand courts’ approval of alternative remedies aligns with the purposes and principles of constitutional remedies. It also shows that there can be both benefits and pitfalls to New Zealand courts referring to foreign judgments, and illustrates the need for the New Zealand courts to engage with theoretical principles of constitutional remedies.
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All errors remain my own.
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Part 1: Introduction

A. Overview

The right to be tried “without undue delay”, or “within a reasonable time”, is contained in many rights instruments around the world. It presents courts with two difficult tasks: first, to determine ‘how long is too long’, and second, to determine what the consequences should be when the right is breached. This paper considers the proper approach to the second question in New Zealand. The contemporary approach in New Zealand is that breaches of the right can be remedied with sentence reductions (where the victim of the rights violation is convicted), or monetary damages (where the victim is acquitted), and a stay of proceedings will seldom be appropriate. This is contrasted with the prevailing approach of the Supreme Court of Canada, where a stay of proceedings is the minimum remedy for any breach of the speedy trial right.

Through an examination of these contrasting approaches, this paper argues that the right can be better understood when it is acknowledged that it protects more than just the defendants’1 interests in a fair trial, liberty and security, but also protects the integrity of the justice system. Understanding of the speedy trial right is also enhanced when it is viewed in the context of a participative criminal justice system where the defendant is called to answer the allegations that have been made. The value of, and public interest in, a court verdict is undermined when the temporal connection between the charges and

1 The term “defendant” is used in this paper as a generic term where either “defendant” or “accused” might be appropriate depending on the circumstance.
their resolution is lost through a long delay. The protection the speedy trial right gives against this eventuality plays an important role in protecting the integrity of this system and the condemnatory value of verdicts. The focus on only the fair trial, liberty and security interests has lead the Supreme Court of Canada into the flawed understanding that a stay of proceedings is the necessary remedy.

It is easier to understand why a stay is not a required remedy when it is recognised that the harm in the breach of the right is in large part expressive, and this can be remedied through the application of expressive theories of law. Sentence reductions and damages can effectively remedy the expressive harm caused by delay in many cases, and stays of proceedings are only required as an expressive remedy in extreme cases. The use of alternative remedies also avoids the over-use of stays, which harm the public interest in verdicts on the merits.

Once it is accepted that a stay is not a necessary result of a breach of the right to be tried without undue delay, another difficult question arises: which alternative remedies are appropriate, and in what circumstances? The New Zealand Supreme Court was right to endorse the use of sentence reductions and monetary damages, however it did so without an examination of the arguments for and against their use, and with little analysis of the principles behind the grant of remedies. This is problematic because it is only when it is understood why sentence reductions are appropriate that courts can make principled decisions about when to grant them as a remedy.
Before examining the right to be tried without undue delay in more detail, it is necessary first to introduce the instrument in which the right is embodied – the *New Zealand Bill of Rights Act 1990* – and its relationship to Canada. Following this introduction, Parts 2 and 3 shall outline the New Zealand right to be tried without undue delay, and the New Zealand courts’ change in approach to remedies for its breach. Parts 4 and 5 contain the two core arguments of this thesis: first that a stay should not be the minimum mandatory remedy for breach of the right, and second how and why sentence reductions can be a particularly appropriate remedy in this context.

### B. New Zealand Bill of Rights Act 1990

#### The role of the BORA

The *New Zealand Bill of Rights Act 1990* (hereafter ‘BORA’) is somewhat unusual among bills of rights internationally. First, it is an ordinary unentrenched enactment, so the rights contained in it can be altered by a simple Parliamentary majority.² Second, it is not supreme law and cannot be used to invalidate other enactments.³ In fact, it has something of a ‘subordinate’ position to other enactments, as s.4 explicitly provides that

> no court shall, in relation to any enactment … (a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or (b) Decline to

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² In this sense it can be described as a “statutory” bill of rights, as opposed to a “constitutional” one, see Paul Rishworth “The Inevitability of Judicial Review under ‘Interpretive’ Bills of Rights: Canada’s Legacy to New Zealand and Commonwealth Constitutionalism” in Grant Huscroft and Ian Brodie (eds) *Constitutionalism in the Charter Era* (Markham, Ont: LexisNexis Butterworths, 2004) 233 at 235 [‘Rishworth, The Inevitability of Judicial Review’].

³ Although any bill introduced into Parliament that appears to be inconsistent with the rights and freedoms in the BORA should be subject to a report from the Attorney General bringing that fact to Parliament’s attention, see s.7 BORA.
apply any provision of the enactment—by reason only that the provision is inconsistent with any provision of this Bill of Rights.4

A third unusual feature of the BORA, of particular note in this paper, is that it has no specific remedies provision.5

Despite these apparently weak features, the BORA is by no means powerless. By virtue of s.6 it has a strong interpretive role: “Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.” Section 5 requires that (“subject to section 4”) the rights may only be subject to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”.6

One of the areas in which the BORA has played a very strong role is in the development of rights in the criminal procedure system. Prior to the enactment of the BORA, police investigations and the conduct of the criminal justice system were controlled by a number

4 This feature of the BORA was unique when it was first enacted, as most bills of rights at the time were supreme law, (the Canadian Charter of Rights and Freedoms takes a middle ground with the “notwithstanding” clause) and instruments have followed this model since (for example the United Kingdom Human Rights Act 1998, the ACT Human Rights Act and the Irish European Convention on Human Rights Act 2003) see Andrew Butler and Petra Butler, The New Zealand Bill of Rights Act: A Commentary (Wellington: LexisNexis, 2005) at 5-6.
5 Discussed infra at 21 et seq.
6 The relationship between the BORA and other statutes and the way in which ss4, 5 and 6 operate and interrelate is complex, and has been subject to much debate, and an examination of which is beyond the scope of this paper. In Moonen v. Film and Literature Board of Review [2000] 2 N.Z.L.R. 9 the Court of Appeal reviewed the proper approach to the interpretation of statutes consistently with the BORA, and a five-step approach was set out at [17]-[19]. In Moonen v. Film and Literature Board of Review (No 2) [2002] 2 N.Z.L.R. 754 the Court of Appeal clarified that the five-step approach was a guide, and other approaches are open. See also the recent discussion by the Supreme Court in R v. Hansen [2007] 3 N.Z.L.R. 1. For commentary see Butler and Butler supra note 4 Chapter 7 “Interaction with Other Enactments” and Paul Rishworth et al., The New Zealand Bill of Rights (Victoria, Australia: Oxford University Press, 2003) Chapter 4: “Interpreting Enactments: Sections 4, 5 and 6”.
of specific statutory provisions and common law doctrines such as the discretion to exclude unfairly obtained evidence, and the discretion to stay proceedings as an abuse of process. BORA rights now dominate the criminal procedure landscape.

The “Canadian Connection”

The Canadian experience has been influential in the development of BORA jurisprudence since the statute’s enactment. The subordination of the BORA is said to have been inspired by a desire not to follow the experience of the Canadian Bill of Rights 1960, which could be used to ‘disapply’ other enactments. Further, the BORA “justified limitations” clause (s.5) was based on s.1 of the Canadian Charter of Rights and Freedoms (hereafter ‘the Canadian Charter’ or ‘the Charter’), and the subordination clause (s.4) is said to have been introduced in response to Canadian cases that had held that human rights statutes enjoy a special status. Many of the BORA rights are expressed in similar (if not identical) terms to those in the Charter. Both share a common goal to give effect to rights contained in the International Covenant on Civil and Political Rights.

7 See Butler and Butler supra note 4 at 57.
8 Butler and Butler ibid. at 5. The Canadian Bill of Rights 1960 has been described as an “anti precedent” for New Zealand, see Rishworth, The Inevitability of Judicial Review supra note 4.
10 Enacted as Schedule B to the Canada Act 1982, (U.K.) 1982, c. 11, which came into force on April 17, 1982.
11 Rishworth, The Inevitability of Judicial Review supra note 4 at 256-258
12 See the long title to BORA (“An Act— (a) To affirm, protect, and promote human rights and fundamental freedoms in New Zealand; and (b) To affirm New Zealand's commitment to the International Covenant on Civil and Political Rights”). In Canada the influence of the Covenant is less clear, Justice Tarnopolsky argues that while much of the debate surrounding the Charter concerned Canada’s obligations
There are a number of key differences between these two rights instruments. Most notable are the fact that the Canadian Charter is supreme law, it can be used to strike down inconsistent legislation, and is entrenched. The Charter also makes specific provision for remedies. Section 24(1) is a general remedies provision:

(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Section 24(2) provides specifically for the exclusion of evidence:

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Despite these differences, Canadian cases have been of assistance to New Zealand Courts in interpreting the substantive content of rights in a number of cases. As the Canadian Charter was introduced 8 years prior to the BORA, and because Canada is a much larger jurisdiction than New Zealand, there is Canadian precedent for many of the issues that have arisen in the New Zealand context. Recent research has shown that decisions of

under the Covenant, the impetus of the Charter was not the Covenant: see Walter S. Tarnopolsky “A comparison between the Canadian Charter of Rights and Freedoms and the International Covenant on Civil and Political Rights” (1983) 8 Queens L.J. 211 at 212-213.

13 Constitution Act 1982: s.52 “The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect”.

14 See Constitution Act 1982 s.52(3).

15 For example, in R. v. Harmer (CA 324/02, 26 June 2003), a case concerning the destruction of evidence by police (argued to be a breach of the right to adequate time and facilities to prepare a defence, s.24(d)) the Court of Appeal adopted the approach of L’Heureux-Dubé J. in the Supreme Court of Canada in R. v. La [1997] 2 S.C.R. 680 (S.C.C.).
the Canadian courts are cited by New Zealand judges far more than those of any other jurisdiction.\textsuperscript{16}

Up until recently, the speedy trial right has been a prime example of New Zealand being influenced by the Canadian approach. The s.25(b) BORA “right to be tried without undue delay” is equivalent to the Canadian right “to be tried within a reasonable time” in s.11(b) of the \textit{Charter}.\textsuperscript{17} The New Zealand Court of Appeal\textsuperscript{18} adopted the Canadian approach to the right in its first major decision on the right (\textit{Martin v Tauranga District Court}\textsuperscript{19}), and this approach has been repeatedly affirmed.

Concerns have been expressed by some academics about New Zealand courts’ use of overseas authorities.\textsuperscript{20} Allan \textit{et al.} argue that New Zealand courts tend to cite overseas authority in an unprincipled and unsystematic way (which they describe as “ad hocery”). The authors argue that “it is not obvious why the decisions of Canadian courts should be considered unusually helpful, or to what end, as the interpretation of

\begin{itemize}
\item[\textsuperscript{16}] Allan \textit{et al.} supra note 9 at 437. The authors analysed reported New Zealand cases on BORA issues where overseas authorities were cited, and found that Canadian cases were cited in 98 judgments; the next most commonly cited jurisdiction is the United States, cited in 54 cases.
\item[\textsuperscript{17}] It has never been suggested that the rights differ materially. For the purpose of brevity, this right is at times shortened to “the speedy trial right” in this paper.
\item[\textsuperscript{18}] The Court of Appeal is the primary appellate court for decisions made in both the trial jurisdictions in New Zealand (the District Court and the High Court). The bulk of BORA jurisprudence is contained in decisions of the Court of Appeal. New Zealand’s court of final appeal was the Judicial Committee of the Privy Council until 2004, when it was replaced by the Supreme Court, see the Supreme Court Act 2003. Appeals from the District Court’s summary jurisdiction are usually (although not exclusively) made to the High Court (see Summary Proceedings Act 1957 and the District Courts Act 1947). Note also that the High Court was known as the Supreme Court prior to 1980.
\item[\textsuperscript{20}] Allan \textit{et al.} supra note 9
\end{itemize}
bills of rights is not a generic sort of skill that transcends political and cultural differences”.21

It is valuable and commendable that the New Zealand courts are developing an autochthonous approach to rights. However, given the size of the jurisdiction, and the wealth of overseas jurisprudence on analogous rights, it is likely that New Zealand will continue to seek guidance elsewhere. The consideration of remedies for breach of the speedy trial right in this paper, and a recent Supreme Court decision on this topic (R v Williams22) illustrates the valuable assistance that can be gained from overseas authorities. However, it might also be said to be an example of the ‘ad hoc’ use of overseas authorities23 as although the Court gained assistance from Privy Council cases, it did not thoroughly examine them, and the Court did not confront strong arguments made in Canada against the approach taken. The Supreme Court was right to reject the Canadian approach in this context, and an evaluation of the reasons why assists with a better understanding of both right and remedy.

21 Allan et al. ibid. at 445
23 As criticized by Allan et al. supra note 9.
Part 2: The right to be tried without undue delay

A. New Zealand approach to the right

The right to a speedy trial has long been acknowledged in general terms in the common law, can be dated back to the Magna Carta, and is recognised in art. 14.3(c) of the International Covenant on Civil and Political Rights 1966. Section 25(b) was the first express provision in New Zealand requiring a defendant to be tried within a particular time. There are however other mechanisms that protect speedy trial interests. The right also overlaps with the more general right to a fair trial affirmed in s.25(a) of

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24 This section is not intended as a thorough exposition of the substance of the right in New Zealand, as the main focus of this paper is on the issue of remedies. See Butler and Butler supra note 4, Chapter 23.3 and Rishworth et al. supra note 6 Chapter 25.

25 See e.g. Bell v. Director of Public Prosecutions for Jamaica [1985] A.C. 937, and discussion in Rishworth et al. ibid. at 719-720

26 “We will sell to no man, we will not deny or defer to any man either justice or right”: Magna Carta (1225), Ch29 (Ch40 of King John’s Charter of 1215), quoted in Rishworth et al. supra note 6 at 719; see also Butler and Butler supra note 4 at 810, citing Re. Arnold [1977] 1 N.Z.L.R. 327, 334, which referred to the Magna Carta, and the Habeas Corpus Act 1679 (Eng.).

27 This guarantees the right of a person facing a criminal charge “to be tried without undue delay”. The long title to the BORA states that one of its purposes is “To affirm New Zealand's commitment to the International Covenant on Civil and Political Rights”.

28 Rishworth et al. supra note 6 at 719.

29 It can be described as a “third source of power” to stay proceedings for undue delay (the other two sources being the abuse of process discretion and s347): Rishworth et al. supra note 6 at 720, citing Holland v. District Court at Auckland (HC Auckland, M1107/00, 20 September 2000, Randerson J.), R. v. P. (HC Auckland, T2/95, 20 October 1995, Fisher J), and Justice Bruce Robertson, Adams on Criminal Law, looseleaf (Wellington, Thomson Brookers, 2009), last updated 26 May 2009 [‘Adams on Criminal Law’]. The other two sources are the common law power to stay proceedings as an abuse of process, and the discretionary power to discharge an accused under s.347 Crimes Act 1961. Section 347 gives a trial judge the discretionary power to “direct that no indictment shall be filed, or, if an indictment has been filed, direct that the accused shall not be arraigned thereon; and in either case direct that the accused be discharged.” As to the operation of s.347, see Adams on Criminal Law at CA347.01 et seq.. Section 347 has been used to discharge an accused where delays have reached the point that a fair trial is no longer possible, or the delay has caused an abuse of process: R. v. P. (HC Auckland, T2/95, 30 October 1995, Fisher J.) and discussion in Adams on Criminal Law at Ch10.16.02(1). A potential fourth source of power is under the general right to natural justice (BORA s.27(1)), see discussion in Adams on Criminal Law at Ch10.21.04(10). There are also a number of statutory provisions directed at ensuring the timely hearing of charges in New Zealand, though these are primarily directed at the laying of summary charges within a specified period after the time of the alleged offence: Section 14 of the Summary Proceedings Act 1957 provides for a general limitation period of 6 months where defendants are proceeded against summarily.
BORA,\(^{30}\) and the liberty protections in s.24(b) (the right to release on bail\(^{31}\)) and s.23(1)(c) (the right to habeas corpus\(^{32}\)).

There was little commentary or explanation regarding this right in the White Paper proposal for the Bill of Rights,\(^{33}\) other than the observation that the existing law already protected the unfairness that could be brought about by the failure to try an accused within a reasonable time.\(^{34}\) The comparable experience in Canada was also referred to during the debates surrounding the enactment of the BORA.\(^{35}\)

The formative decision on the application of the s.25(b) right was \textit{Martin v Tauranga District Court}.\(^{36}\) In that case, a five-judge bench of the Court of Appeal found that the right had been breached after a 17-month delay (resulting in part from the unjustified actions of the prosecutor), even though there was no evidence of impact on the accused’s ability to have a fair trial. Although s.25(b) overlapped with the s.25(a) fair trial right,

\(^{30}\) Section 25 provides that “Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights: (a) The right to a fair and public hearing by an independent and impartial court. …”.

\(^{31}\) Supplemented by s.8(2) of the Bail Act 2000, which provides that “In considering whether there is just cause for continued detention under subsection (1), the court may take into account the following: (c) the seriousness of the punishment to which the defendant is liable, and the severity of the punishment that is likely to be imposed: …(f) the likely length of time before the matter comes to hearing or trial:”

\(^{32}\) See also the Habeas Corpus Act 2001.

\(^{33}\) In 1985 Minister of Justice Geoffrey Palmer presented a discussion document to the House of Representatives entitled “A Bill of Rights for New Zealand: a White Paper”, that contained a draft Bill of Rights (proposed at this stage to be supreme entrenched law), and discussion: White Paper supra note 9. The White Paper was tabled in the House of Representatives in 1985, and the Justice and Law Reform Select Committee reported on it in 1987 and 1988. A statutory Bill of Rights Bill was introduced in 1989 that contained much of the content of the draft White Paper Bill of Rights. After further Select Committee consideration the New Zealand Bill of Rights Act 1990 received Royal Assent in August 1990, and came into force in September 1990. For discussion of the history and background to the BORA see Butler and Butler supra note 4 Chapter 2 and Rishworth \textit{et al.} supra note 6 Chapter 1.

\(^{34}\) Butler and Butler \textit{ibid.} at 809

\(^{35}\) \textit{Ibid} at 809-810, citing White Paper note 9 paras 10.131-10.133.

\(^{36}\) Supra note 19
the rights were not identical. The Court found prejudice to the accused’s liberty interest (having been on restrictive bail conditions awaiting trial), and the charges were stayed.

Overseas authorities were extensively referred to in the judgment, with Cooke P. concluding as follows:

In the end I think that the judgment of Sopinka J, concurred in by the majority of his colleagues in the Supreme Court of Canada in *R v Morin* (1992) 71 CCC (3d) 1 contains an exposition of principles which covers clearly, concisely, yet sufficiently fully, most of the main points that tend to arise in Bill of Rights delay cases. … In my opinion it should be treated, in the interests of clarity and simplicity, as an authoritative statement of the general principles applying in New Zealand also.

The Court expressed the view that the actual guidelines set out in *Morin* (i.e. the number of months said to be reasonable) were not applicable in the New Zealand context, but embraced the factors to be taken into account in determining whether there was a breach. These are: (1) the length of the delay; (2) waiver of time periods; (3) the reasons for the delay, including (a) inherent time requirements of the case; (b) actions of the accused; (c) actions of the Crown; (d) limits on institutional resources, and (e) other reasons for delay, and (4) prejudice to the accused.

Concern was expressed in *Martin* that the requirement to consider prejudice could be problematic, as “there will be a natural tendency for the Court to accept this as the dominating factor, thereby deflecting the purpose behind the section of ensuring the

37 *Martin* supra note 19 at 421 per Cooke P.
38 *Martin* supra note 19 per Cooke P. at 422
39 *Martin* supra note 19 per Cooke P. at 422; and Richardson J. at 426-27: “I consider we will need to have far more factual information before the Court -- particularly as to case flows here in New Zealand and Australia, with which we share similar values -- before we could indicate the period or periods which would trigger inquiry as to the reasonableness of the delay.”
40 See *Martin* supra note 19 at 424, citing *Morin* supra note 19 at 13.
speedy disposal of charges.” This prediction has come true to some extent, as courts have generally insisted on defendants being able to point to specific prejudice suffered through delay. However, in cases of lengthy delay, prejudice is “inferred”. The tendency to treat prejudice as a requirement has been much criticised, and is discussed further below.

The Court of Appeal’s decision in Martin remained the leading authority in New Zealand until the Supreme Court considered the issue in 2009. R v Williams was the first decision on this right made by New Zealand’s highest appellate court (there having been no decisions of substance from the Privy Council).

The Williams decision did not introduce significant changes to the mandated approach to the right itself. The Court confirmed that “[w]hether there has been undue delay in a particular case is a function of time, cause and circumstance”.

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41 Martin ibid. at 430 per Casey J.
42 See Butler and Butler supra note 4 at 818, citing R. v. Grant (CA 471/95, 29 May 1996) and R. v. Lim (CA 173/04, 8 October 2004).
43 See for example R. v. The Queen [1996] 2 N.Z.L.R. 111 (“where the period of delay is long it can be legitimate for the Court to infer prejudice without proof of specific prejudice”).
44 Professor Code points out that it is unusual to define constitutional rights in terms of the prejudice caused by their violation. For similar reasons Schneider argues that it is inappropriate to require proof of actual prejudice (no other procedural safeguard designed to secure the reliability of evidence, other than the due process clause, requires the defendant to show actual prejudice): Michael Code, Trial Within a Reasonable Time: a short history of recent controversies surrounding speedy trial rights in Canada and the United States (Scarborough, Ont: Carswell Thomson, 1992) at 26. Schneider argues that the best approach would be to require a “reasonable possibility of prejudice”: Alan L. Schneider, “The Right to a Speedy Trial” (1968) 20 Stan. L. Rev. 476 at 493-501.
45 Supra note 22
46 There were no decisions of substance on delay by the Judicial Committee of the Privy Council.
48 Williams supra note 22 at [12]
defendant is not required to assert the right,\(^49\) that the right applies to appellate delay,\(^50\) and confirmed that the defendant is not required to show prejudice in defending the charges to found a breach of the right.\(^51\) The remarkable aspect of the \textit{Williams} decision was the Court’s endorsement of a new approach to remedies for breach of the right.

\textbf{B. Remedies for breach of the speedy trial right}

In \textit{Martin}, the Crown had conceded that if the right to trial without undue delay was breached, the appropriate remedy was a stay. As such, a stay was accordingly granted by the Court of Appeal. Cooke P. was of the view that a stay should be the “standard remedy”,\(^52\) and \textit{Martin} has subsequently been treated as authority for this.\(^53\) However, the Court of Appeal was by no means unanimous on this point. Hardie Boys J. agreed that a stay was appropriate on the facts of \textit{Martin}, but was “far from persuaded that it should be the usual remedy for undue delay”.\(^54\) His Honour also noted that the grant of

\begin{itemize}
\item \textit{Williams} supra note 22 at [12]: “[n]otwithstanding the suggestions to the contrary of Hardie Boys and McKay JJ. in \textit{Martin}, supra note 19 [At pp 432 and 433 respectively] there is no obligation on any accused to progress matters towards trial, or to protest about delay; the obligation is on the prosecution to ensure trial without undue delay.”
\item \textit{Williams} supra note 22 at [10], citing the judgment of the Privy Council in \textit{Darmalingum v. The State} [2000] 1 W.L.R 2303 (PC) at p 2309 and the dictum of Cooke P. in \textit{Martin} (supra note 19) at p 420. Although note that this point is obiter, as the case did not itself concern appellate delay. As to the application of s.25(b) to appellate delay see Rishworth \textit{et al.} supra note 6 at 740-741, and Butler and Butler supra note 4 at 812 and cases cited therein. It is notable that the Supreme Court did not consider the fact that the contrary approach is taken in Canada (\textit{R. v. Potvin} [1993] 2 S.C.R. 880 (S.C.C.)), and the fact that the Privy Council in \textit{Darmalingum} declined to follow the Canadian approach on the basis that it was restricted to the way in which the right is expressed in Canada, which differs from the expression of the relevant right in Mauritius. This is lamentable as s.25(b) is expressed in terms much more similar to Canada than Mauritius. See Birdling & Johnston supra note 47 at 256.
\item \textit{Williams} supra note 22 at [9]
\item \textit{Martin} supra note 19 at 424
\item See for example \textit{Tunstall v Police} (2002) 7 H.R.N.Z. 205 (H.C.), discussed in Butler and Butler supra note 4 at 824-825.
\item \textit{Martin} supra note 19 at 432
\end{itemize}
bail or an order for an early trial might be appropriate remedies.\textsuperscript{55} Casey J. agreed that a stay was the appropriate remedy for \textit{Martin}, but stated that in some cases an expedition of the trial might be more suitable.\textsuperscript{56} McKay J. simply noted that whether a stay is the appropriate remedy would depend on what one regards as “undue”.\textsuperscript{57} Richardson J. commented that it was not suggested in argument that a remedy other than a stay was appropriate, and noted that where delay has not affected the trial fairness “it is arguable that the vindication of the appellant's rights does not require the abandonment of the trial processes”. Richardson J. further suggested that “the trial should be expedited rather than aborted and the breach of s.25(b) should be met by an award of monetary compensation”.\textsuperscript{58}

Subsequent to \textit{Martin}, there were calls for the recognition of alternative remedies. The strongest argument was made by Winkelmann J. in the High Court in \textit{Du v Auckland District Court}.\textsuperscript{59} Her Honour gave four reasons to support the conclusion that “the time has come for New Zealand Courts to be more flexible as to remedy wherever a breach of s25(b) is made out.”\textsuperscript{60} First, a more flexible remedial approach to s.25(b) would mean that this right would be able to be given recognition as a separate right from the fair trial right, without the need for the courts to be concerned with prejudice. Second it was consistent with the view that a stay should only be granted in extreme circumstances.

\textsuperscript{55} \textit{Ibid.}
\textsuperscript{56} \textit{Ibid.} at 430
\textsuperscript{57} \textit{Ibid.} at 433
\textsuperscript{58} \textit{Ibid.} at 426
\textsuperscript{59} \textit{Du v. Auckland District Court} [2005] N.Z.A.R. 341
\textsuperscript{60} \textit{Du v. Auckland District Court \textit{ibid.} at para [74]. However, a stay was found to be the appropriate remedy in that case.}
Third, it would accord with a flexible and proportional approach to remedies; and fourth, remedies should be allowed to develop.

Winkelmann J. did not go into detail about which alternative remedies would be appropriate, or in what circumstances a particular alternative should be ordered, but did note that a “declaration may have little coercive effect but it goes some way to giving the right explicit recognition.” In the end, a stay was the appropriate remedy in Du’s case, but “if prejudice was not made out in this case I would have been inclined to declare a breach of s.25(b) and order that the trial be heard by a certain date in the very near future.”

There have been a number of examples of New Zealand courts considering, and ordering, remedies alternative to stays of proceedings, such as orders for expedited hearings, and there is one instance of a court granting a stay without prejudice. Sentences have also

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62 Du supra note 59 at [74]
63 Ibid. at [74], citing Rishworth et al. supra note 6 at 833
64 Ibid. at [76] Her Honour went on to note that “of course, bearing in mind that such an order would take 8 weeks to implement”.
65 The Courts have occasionally used s.25(b) in an anticipatory manner, for example, in B. v. Police (No 2) [2000] 1 N.Z.L.R. 31 the Court of Appeal dismissed an appeal against refusal to grant bail, but noted that the length of time it was predicted the case to get to trial was “both unacceptable and avoidable”, and commented that “[h]aving opposed bail, it is incumbent on the prosecution to proceed the more speedily.” (at 36). See also R. v. Grant (Court of Appeal, CA471/95, 29 May 1996), cited in Butler and Butler supra note 4 at 1056. As such an order is made prior to a breach being established, these orders cannot properly be regarded as “remedies”. An order for an expedited hearing does little to compensate for prejudice caused by a breach in the past.
66 In R. v. Biddick (DC Rotorua, CRI-2006-077-001563, 30 September 2008, McGuire D.C.J.) there had been 21 months of systemic delay between arrest and trial date, this was found to not be egregious enough to lead to an inference of prejudice (at [30]). However, the time awaiting trial had impacted on the accused’s liberty interest, and he had a mental breakdown that was “directly attributable to the time it has taken to bring the charges he faces on for trial” (at [36]). The District Court adopted the approach in Du (supra note 59) but held that a declaration, relaxation of bail conditions or a stay were inappropriate, and
been reduced to reflect delay in a number of instances, albeit with very limited discussion of the theoretical implications and relevant principles,\textsuperscript{67} and there are indications in \textit{obiter} from the High Court that sentence reductions should be available as a response to at least post-trial delays.\textsuperscript{68}

Despite the fact that sentence reductions have been used as a remedy in the delay context, the Court of Appeal has expressed uneasiness with their use. In the leading case on remedies where evidence is obtained in breach of the BORA, \textit{R. v. Shaheed}\textsuperscript{69}, the Court of Appeal had expressed the view that remedies alternative to the exclusion of evidence would be “unlikely to be found satisfactory to provide vindication of the right in a criminal case involving a serious breach of a right whereby the police have obtained important evidence against the accused”.\textsuperscript{70} The majority also noted that the award of monetary damages for the use of improperly obtained evidence “might look strange”, and “[s]o too, perhaps, would the imposition of a reduced sentence.”\textsuperscript{71} Any benefit to that approach “would be outweighed by the general public perception that the police could

\footnotesize{the “appropriate response” was “a stay without prejudice”, and “[i]n the event of a changed set of circumstances, for example, further offending or new evidence coming to light, then the Crown may again proceed to trial on this matter.” (at [37]).

\textsuperscript{67} In \textit{Szwajwa v. Police} (HC Wellington, AP 130/95, 5 October 1995, Heron J.) the High Court halved a sentence of periodic detention (a sentence akin to probation and community service in Canada) in acknowledgement of trial delays. In \textit{Dalton v. Police} (1999) 5 H.R.N.Z. 415 there were significant delays in the prosecution of a breath/blood alcohol charge. The Court found a breach of the defendant’s right to be tried without undue delay, and chose to remit the monetary penalty. On appeal, the High Court concluded that the appropriate response was a discharge without conviction.

\textsuperscript{68} In \textit{R v. Trifilo} [2006] D.C.R. 796 (HC) the relevant delay was after the defended hearing had occurred, but a breach of the right was not found. Simon France J. commented (at para [50]) that “[t]he overall delay was not so excessive as to merit quashing the conviction absent actual prejudice to a fair trial. I would instead have invited counsel to further address me on the issue of sentence reduction.”

\textsuperscript{69} Supra note 61

\textsuperscript{70} \textit{Ibid.} at para [153], Richardson P., Blanchard and Tipping J.J. (judgment delivered by Blanchard J.)

\textsuperscript{71} \textit{Ibid.} at [154]
now breach the rules and still secure such a result.”72 Similarly, Elias C.J. noted her agreement that “monetary compensation and sentence reduction are inappropriate responses [to breach of the search and seizure right].”73 However, as commentators have pointed out, the Court of Appeal in this case did not consider the issue of sentence reductions in depth, and no cases were cited on this point in Shaheed.74

Subsequent to Shaheed the Court of Appeal has commented on sentence reductions twice. In R. v. Harmer,75 the Court of Appeal referred to the fact that the Privy Council had approved a reduction in sentence to reflect the (appellate) delay in Mills v. HM Advocate.76 However, no breach of s.25(b) was found in Harmer, and the Court left the issue of sentence reductions open for future consideration.77 The issue arose again in the Court of Appeal in R. v. Manawatu78, where the appellant asked for a sentence reduction to reflect undue appellate delay, and the Crown accepted that this might be an appropriate course of action for breach of the BORA. The Court of Appeal did comment that sentence reductions should only be available where there was some type of prejudice to the appellant,79 but the Court of Appeal again did not finally rule on the issue.80

72 Ibid. at [154]
73 Shaheed ibid. at [24] (Elias C.J. dissented in the decision to overturn the prima facie exclusion rule.)
74 Butler and Butler supra note 4 at 1066-1067
75 (CA324/02, 26 June 2003), at para 135, (cited by Butler and Butler ibid. at 824)
76 [2002] 3 W.L.R. 1597 (on appeal from Scotland) where there were two types of prejudice: anxiety from the prolonged proceedings and life changing efforts making it a greater hardship to return to prison
77 (at para [135]) Note that the issue in Harmer was pre-trial delay (19 months between charge and trial, 13 of which had elapsed after the preliminary hearing), rather than appellate delay.
78 R. v. Manawatu (CA 111/05, 10 November 2006)
79 Ibid. and see discussion in Adams on Criminal Law supra note 29 at Ch10.16.01(1)(a).
80 Ibid at para [28]: “A reduction in sentence may be an appropriate remedy for a breach of the Bill of Rights in some circumstances, but we do not need to determine the point in the present case because we are satisfied that there is no proper basis for the granting of such a remedy to [M]. We therefore leave it open.”
The accused in *Williams* had applied to the trial court for a stay of proceedings prior to a fourth trial attempt.\(^81\) Asher J., the trial court judge, held that the delay was unacceptably long, and warranted a remedy. However, that remedy differed depending on the level of involvement of each accused in the drug manufacturing operation. The lower and middle-level players were granted stays, but the lead players were left to pursue alternative remedies. In the end, the lead players had their sentences reduced by 18 months in recognition of the delay.\(^82\)

The lead players appealed, and the issue made its way to the Supreme Court,\(^83\) which, in a unanimous decision, wholeheartedly rejected the idea that a stay was the only remedy for breach of this right and encouraged courts to consider alternative remedies.\(^84\) The Supreme Court held that if, as in *Williams*, an accused was convicted after being on bail pending trial, “a reduction in the term of imprisonment [would] likely … be the appropriate remedy”, and that if this time was spent in custody, “that time w[ould] count

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\(^{81}\) The case concerned a complex drugs manufacturing trial that suffered a number of delays in reaching its conclusion. There was an initial 21 month delay in bringing the charges to trial, followed by three aborted trials that caused a further year of delay, a further 14 month delay while awaiting the decision of the Court of Appeal on an admissibility issue, (see *R. v. Williams* [2007] 3 N.Z.L.R. 207 (C.A.), now the leading N.Z. decision on search and seizure, and search warrant requirements) followed by a further delay before the fourth trial attempt.

\(^{82}\) See *R. v. Williams* (HC Auckland CRI 2007-404-0006 and CRI 2007-404-0007, 10 August 2007) declining stay applications) and *R. v. Williams* (HC Auckland CRI 2007-404-6, 6 December 2007, Asher J). The Supreme Court expressed some doubt as to whether this aspect of the decision was appropriate, noting that “The seriousness of the offending will usually not be relevant to the nature of the remedy.” (at [18]), and “Mr Williams’ alleged co-offenders who were granted a stay, particularly those who were said to have provided the greatest assistance to the principal offenders, should also regard themselves as fortunate in avoiding trial and the consequent risk of conviction and sentence” (at [22]).

\(^{83}\) The Court of Appeal declined to deliver a “leading judgment” on the issue of delay, given the manner in which the case had come before them, (the Court of Appeal was sitting as a Divisional Court), and “in any event, the arguments were not presented to us in a way that was conducive to such an attempt” at [12]. The Court of Appeal upheld Asher J’s decision on delay, and endorsed the use of sentence reductions in this circumstance: *R. v. Williams* [2008] N.Z.C.A. 296 at [30]

\(^{84}\) *Williams* supra note 22 at [18]
towards service of the term of imprisonment." If an accused is acquitted after undue delay, monetary damages could be ordered.

The Supreme Court gave limited guidance as to when a stay will be appropriate, but it appears clear that a stay is only likely to be appropriate where the breach seriously undermines the defendant’s fair trial right, or is required on deterrence grounds. Where undue delay is established prior to trial (when the argument most commonly arises), this means that the question of remedies will be postponed until the trial verdict is known.

In the first High Court decision to apply *Williams*, the High Court gave some indication of the practical effect of this new approach to remedies. Ronald Young J. criticised the District Court for effectively jump[ing] from a finding that there was undue delay to the remedy of stay and dismissal without properly considering whether a fair trial was still possible and without considering other potential remedies for the breach of s 25(b).

Given the “modest delay” in that case, and lack of evidence that a fair trial was no longer possible, a stay was not the appropriate remedy. The appropriate course of action would have been:

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85 *Ibid.*. Interestingly, the second point (time spent in custody) in effect states the effect of the operation of the Parole Act ss.90-91. As the deduction of time spent in pre-sentence detention would occur (for parole eligibility purposes) by operation of this statute in any event, it is difficult to see how this could constitute a remedy for the breach of a right, see Birdling & Johnston supra note 47. Something additional is required in order to vindicate the breach of the right.
86 *Ibid.*.
88 *Fincham v. District Court at Lower Hutt* (HC Wellington, CIV 2009-485-676, 9 July 2009, Ronald Young J)
89 *Ibid.* at [27]. (It should be noted that the District Court decision must have been issued prior to the Supreme Court’s decision in *Williams*.)
90 *Ibid.* at [34]
… to make a declaration of undue delay (assuming that was the conclusion). In my view no further remedy was then required. It was open to the Judge to then say that further delay in the resolution of the case beyond a relatively short period to arrange a fixture and hear and resolve the case would likely then have resulted in a stay.

Further, if the case was heard during that brief further interval and the defendant convicted, then the sentencing Judge could have taken into account the declaration of undue delay in any sentence.

This approach may tempt courts into declining to deal with difficult delay arguments pre-trial, even where a stay may be appropriate, so that the decision is made once the verdict is known. This has the potential to undermine the strength of the right.92

In the absence of evidence of prejudice, it is therefore likely that courts will now be invited, post trial, to consider reducing sentences (or granting monetary damages93) in cases where the speedy trial right has been breached. Future courts may however have difficulties in applying this decision as it reveals little of the principles that should guide the use of sentence reductions,94 and it does not confront key objections that are made to this approach.

Part 3 of this paper outlines the principles that guide the grant of BORA remedies in New Zealand generally, before addressing the key objection that can be made to the use of

91 Ibid. at [38]-[39]
92 This is problematic because if the court comes to the conclusion that a stay was appropriate in the end, a trial will have occurred that should not have. See Birdling & Johnston supra note 47 at 255.
93 The focus of this paper is on sentence reductions rather than monetary damages as it is the more controversial remedy, as (even though this should not be the case) there is likely to be less resistance to providing a remedy to an acquitted person. Though, there are likely to be difficulties with assessing the quantum of monetary damages where a person is acquitted, as the measure of damages would need to reflect the impact of the delay rather than the impact of the decision to charge the defendant.
94 “Key to determining whether a reduction in sentence can be an effective remedy in cases of delay is identifying what role the reduction in sentence plays. Is it intended as a judicial statement that the state is not justified in imposing the level of punishment otherwise deserved by the offender because of its culpable delay in seeking to do so? Or is it rather a recognition that the period spent awaiting trial…is a form of punishment in and of itself?”. Birdling & Johnston supra note 47 at 256.
remedies alternative to a stay (Part 4), and the sentence reduction remedy in particular (Part 5).

**Part 3: Remedies for breach of the BORA**

**A. Introduction**

Despite the fact that there is no explicit remedial provision in the BORA, the New Zealand Courts have not been held back from developing and applying remedies for its breach. In the seminal case that established that monetary damages are available for a breach of a BORA right ("Baigent’s case") McKay J. in the Court of Appeal stated that:96

> [i]t is impossible to interpret [the BORA] as simply making a pious declaration of so-called rights which could be infringed with impunity and would confer no remedy for their breach. The omission of art 25 of the White Paper draft does not show an intention that there should be no remedy, but rather that Parliament was content to leave it to the Courts to provide the remedy.

However, the New Zealand approach to BORA remedies remains, for the most part, “strong on rhetoric, weak on theory”, and decisions have generally centered on whether a particular remedy is appropriate, without engaging in “the larger remedial enterprise envisaged by BORA”.97 The *Williams* decision is a prime example of this: although the decision harkens a fundamental shift in the approach to remedies for breach of this right, there is virtually no consideration of the remedial principles or theories at play. The next

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95 *Simpson v Attorney-General (Baigent’s case)* [1994] 3 N.Z.L.R. 667 [‘Baigent’s case’]
96 McKay J. in *Baigent’s case*, ibid. at 717-718, see also discussion in Butler and Butler supra note 4 at 968-969.
97 Butler and Butler *ibid.* at 970. The one exception given by the authors is *Baigent’s case, ibid.*.
section reviews the general remedial themes that can be drawn from BORA jurisprudence generally (and thus those that should guide the grant of remedies for breach of the speedy trial right), and argues that the principle of “vindication” is better able to be effective if it is understood as remedying expressive harm.

**B. The strands of theories in the BORA**

The rhetoric of BORA remedies in New Zealand centres around the need for “rights vindication”, as well as ensuring that remedies are “appropriate”, “effective”, and “proportionate”. These concepts are generally not been examined in any detail, or with any eye to theory or principle. The most recent and thorough discussion of remedies for BORA breaches in the Supreme Court decision of *Taunoa v. Attorney-General*. This case concerned the grant of monetary damages for a BORA breach, but the principles discussed in the decision are of more general relevance. The remedial purposes that can be drawn from that decision are regulatory justice (or ‘deterrence’), corrective justice (or ‘compensation’) and the need for “rights vindication”. These three strands guide the New Zealand approach, and the overall requirement of proportionality (as between the violation and remedy) has become increasingly dominant in recent years. Each strand is now introduced.

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98 Butler and Butler supra note 4 at 970-972
Regulatory justice

The concept of ‘regulatory justice’, or the ‘deterrence rationale’ in the BORA context embodies the position that remedies should aim to ensure that the police (and other public officials) will be deterred from breaching rights. It is premised on the idea that officials will be deterred from wrongdoing most effectively if they are not able to use the profits of their wrongdoing.\(^{100}\) Deterrence is a dominant rationale in U.S. criminal procedure,\(^{101}\) but has gained little currency in criminal procedure in Canada\(^{102}\) and New Zealand (until recently).

The New Zealand Courts have in the past expressly rejected the view that BORA remedies are aimed at deterring police action,\(^{103}\) but it appears that the courts are becoming more welcoming of the use of deterrence. In Taunoa Elias C.J. noted that the issue was “controversial”,\(^{104}\) but held that BORA damages should deter future breaches


\(^{103}\) Hardie Boys J in \textit{R. v. Te Kira} [1993] 3 N.Z.L.R. 257 at 276 that the duty of the Court is vindication of rights “fundamental to all citizens, and not simply as punishment of the officer for breach or as compensation to the person affected, who may be unworthy of much consideration”. It is said that the focus is on the rights and their underlying value rather than the violator and punishing breach, see Butler and Butler supra note 4 at 970.

\(^{104}\) \textit{Taunoa} supra note 99, footnote 187, at para [109], citing \textit{Baigent's case} (supra note 95) per Hardie Boys J., and Cooke P. at 678.
“where appropriate”.105 Blanchard J. held that bringing conduct to an end and providing a disincentive to government officials to repeat that conduct (i.e. deterrence) was more important than making amends with the victim.106 McGrath J. took a similar approach, endorsing the need to “secu[re] future respect of the state for the right concerned”,107 and “ensure future compliance by public officials”.108 Tipping J. also endorsed the potential relevance of “deterrence and punishment”,109 but was more cautious in doing so, noting that it was “doubtful how effective any such monetary impos[ition] w[ould] be in deterring the individuals actually involved in the breach”.110

Despite the fact that deterrence was disavowed as a remedial purpose in the delay context in Martin,111 the use of deterrence was implicitly endorsed in the more recent case of Williams:112

\[
\text{staying the proceedings is likely to be the correct remedy only if the delay has been egregious, or there has been prosecutorial misconduct or a sanction is required against a prosecutor who does not proceed promptly to trial after being directed by a Court to do so.}
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The extent to which the deterrence rationale is effective in influencing criminal behaviour is controversial, and it is doubtful that sentence length has any impact on criminal

106 Taunoa supra note 99 at [258]-[259]
107 Ibid. at [366]
108 Ibid. at [369]
109 Ibid. at [319]
110 Tipping J. would not go so far as the Supreme Court of Sri Lanka as to state that the idea of deterrence of the state was “hopelessly futile”: Taunoa, ibid. at [320], citing Supreme Court of Sri Lanka in Saman v. Leeladasa [1989] 1 Sri. L.R. 1 at 44. Henry J. again expressed general agreement with Tipping J. and Blanchard J., without any specific comment on this issue.
111 “[T]he objective is to vindicate human rights, not to punish or discipline those responsible for the breach”, Martin supra note 19 at 428, per Richardson J.
112 Supra note 22 at [18]
There may be more scope to argue that deterrence can be an effective rationale as against public officials or the court system. Deterrence can be a useful guiding principle when it operates alongside other principles, particularly as many remedies have an inevitable deterrent effect (even if they are not intended to) that should be acknowledged.

Corrective justice

The principle of corrective justice is that remedies should place the victim of the rights violation back in a position as close as possible to the position he was in prior to the breach, and thus ‘correct’ the breach, or ‘compensate’ the victim of the violation. Its goal is focussed on repairing the harm caused by the government’s violation of rights, and disavows any wider and more ambitious goals – these should be left to legislative and administrative branches. This is concerned only with the relationship between the individual and the state, so does not take into account the possible effects on third parties and wider society.

The importance of compensation was affirmed by each of the members of the Supreme Court in Taunoa. However different views were expressed about its relative importance

115 For instance the R. v. Askov [1990] 2 S.C.R. 1199 decision in Canada had a significant deterrent effect, see infra at note 145 and surrounding text.
117 Ibid.
compared to vindication (discussed below). Some expressed the view that compensation was of equal importance to the goal of vindication, but others were of the view that vindication should be paramount. Even among those who stated that each was of equal importance, there were strong indications that the Supreme Court regards compensation as a component of vindication, or something that helps the courts reach the goal of vindication.

Rights vindication

“Vindication” is the word most often used to describe the purpose of BORA remedies in New Zealand. Vindication of rights has long been understood as the primary rationale for the exclusion of evidence obtained in breach of the BORA, and Taunoa shows that it is a central theme of BORA remedies more generally. It is concomitant with a “rights-centred” approach, as BORA rights “carry the expectation that they will be observed irrespective of the fact that any violation may not prejudice the accused or affect his or

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118 Tipping J. found that compensation and vindication should both “have an equal claim for attention in providing an effective remedy for a Bill of Rights breach”. Elias C.J. recognised the importance of both (see [109], [112], [115]): Taunoa supra note 99.
119 Blanchard J. acknowledged the importance of both, but gave primacy to vindication: “the award of public law damages is normally more to mark society’s disapproval of official conduct than it is to compensate for hurt to personal feelings.” at [259] (footnote omitted). Similarly, McGrath J was of the view that the principal objective “must be to vindicate the right in the sense of upholding it in the face of the state’s infringement”: Taunoa, ibid..
120 Tipping J. noted that compensation contributes to the need for vindication, but given the public nature of the wrong may not suffice of itself (at [314]-[315]). Elias C.J. appeared to view compensation as an aspect of proper vindication as “[w]ithout adequate compensation, the breach of right is not vindicated” (at [109]). McGrath J. also expressed the view that compensation is complementary to vindicate the right (at [366]). Henry J. expressed general agreement with both Tipping J. and Blanchard J. as to the proper approach to the award of damages for BORA breach, without making any specific comment on the relative importance of vindication and compensation (see paras [382] and [385]): Taunoa, ibid..
121 Butler and Butler supra note 4 at 971
her ability to obtain a fair trial”. Beyond this general understanding, the courts do not tend to examine what it actually means to vindicate a right. BORA jurisprudence would benefit from the application of the ‘expressive theory’ of law. Rights vindication can be understood as an exercise of remedying the expressive harm caused by a rights violation.

Expressive theories of law recognise that harms are not only instrumental and measurable, but can also have more subtle and intrinsic manifestations. They acknowledge that “the meaning of conduct may be different from, but as significant as, the ends that an actor seeks to achieve through her actions”. Expressive harm occurs where someone is “treated according to principles that express negative or inappropriate attitudes toward her”, or “send ‘demeaning messages about human worth’. For example, if the wind blows garbage from my neighbour’s lawn onto mine, I suffer the ugliness and inconvenience of having to remove the garbage, but I do not suffer an expressive harm. If however, the neighbour were to throw the garbage onto my lawn, there is an expressive harm in “the neighbours’ rudeness, in the casual disregard for [my] interests expressed in their actions”. The value of remedying expressive harm can be seen in the way in which wealthy landowners are more accepting of redistribution of land where they are given compensation – even where the compensation is ‘token’ only.

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124 Lawrence Friedman, “Reactive and Incompletely Theorized State Constitutional Decision-Making” (2007) 77 Miss.L.J. 265 at 283
126 Starr supra note 114 at 1535, and Andrew E. Taslitz “The Expressive Fourth Amendment” (2006) 76 Miss. L.J. 483, 564
127 Anderson and Pildes supra note 125 at 1528
128 Ibid. at 1529, footnote 51, citing empirical research studies.
There is an expressive harm in a breach of the speedy trial right, because forcing a defendant to spend a long time in the uncertain position of facing unresolved charges expresses disrespect for that defendant as a moral agent, and denies that he or she has sufficient worth as a person to have the charges resolved efficiently. Expressive remedies are required to “affirm the level of respect the government should accord every individual’s interest”\textsuperscript{129}.

As social relationships are “constituted by a shared acknowledgement of the attitudes…that govern the interactions of the parties to that relationship”\textsuperscript{130}, expressive harm must be remedied in order to ensure that the relevant relationships “remain constituted according to the principles previously thought to govern them”\textsuperscript{131}. In order to maintain the relationships between individuals and the justice system, the courts must ensure that criminal charges are resolved within a reasonable time, so that there is a relevant temporal link between the allegations and their resolution, and thus so individuals maintain respect for the system. It is important to remedy these harm, not only because of the effect on the individual defendant, but also because of the effect on the justice system as a whole.

Expressive theory looks beyond the binary relationship between the defendant and the Court, and recognises the effect that lengthy delays can have on other individuals and the

\textsuperscript{129} Friedman supra note 124 at 289  
\textsuperscript{130} Anderson and Pildes supra note 125 at 1529  
\textsuperscript{131} Ibid.,
system as a whole. Complainants and witnesses, and the wider community, has an interest in the speedy resolution of criminal charges.

While not explicitly engaging with notions of expressive harm, the courts do apply its theory in practice. One example of this is the practice of awarding nominal damages for violations of constitutional rights. There is also evidence of expressive notions of justice permeating remedial decision making, such as in the comment made by Tipping J. in *Taunoa* that the public nature of the case at bar meant that compensation in itself may not suffice. It can also be seen to guide decisions with respect to the exclusion of evidence obtained in breach of constitutional rights. For instance, where the state has conducted an unreasonable search or seizure:

> their actions express disrespect for the search victim’s privacy interest; the unconstitutional search conveys the message that, notwithstanding the constitutional commitment to protection of that interest, the government simply can disregard the established rules.

In this context “the exclusionary rule serves to *vindicate* publicly the search victim’s privacy interest: it represents the means by which the community, speaking through the judiciary, answers the government’s incorrect valuation of privacy”.

The need for rights vindication is often cited, but seldom examined. It can be better understood as the need to remedy expressive harm. This theory enables the court to look beyond the narrow defendant-state focus of corrective theory and the instrumental goals of regulatory theory, and gives substance to the stated desire for vindication. Expressive

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132 *Ibid.* at 1529, citing U.S. caselaw
133 *Taunoa* supra note 99 per Tipping J. at [314]-[315].
134 Friedman supra note 124 at 285-286
135 *Ibid.* at 286, emphasis added
theory assists the courts in recognising the public and intrinsic nature of the harms caused by a BORA breach, and it can operate alongside corrective and deterrence goals. As will be seen, this aids in the appreciation of the harm that remedies should be responding to.

Proportionality

The above three purposes of BORA remedies are increasingly subject to the “proportionality” principle, or the notion that the BORA should “attempt to strike the right note in marking the seriousness of a particular breach”. Proportionality has become an increasingly important principle in recent years, and is best illustrated by the shift in approach to remedies for improperly obtained evidence. In the early days of the BORA the Court of Appeal established the “prima facie exclusion rule” for dealing with evidence obtained in breach of the BORA. This was the prevailing approach for the next decade, but increasing concern that the prima facie rule had become a “nearly automatic rule of exclusion” and had too much of an “all or nothing” effect, lead the Court of Appeal to reconsider the approach. In R. v. Shaheed Blanchard J for the majority described the concerns with the ‘prima facie’ rule as follows:

A system of justice will not command the respect of the community if each and every substantial breach of an accused’s rights leads almost inevitably to the exclusion of crucial evidence which is reliable and probative of a serious crime. The vindication will properly be seen as unbalanced and disproportionate to the circumstances of the breach. Nor does a presumptive rule seem entirely consistent with the concept of a specific tailoring of remedies

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136 Butler and Butler supra note 4 at 970
138 Butler and Butler supra note 4 at 1029.
139 The effect of the prima facie rule was summarized by Blanchard J for the majority in Shaheed (supra note 61) as follows (at [140]): “…in practice the exclusion of evidence has followed almost automatically once it has been established that there has been a breach which is more than trivial and that there is a sufficient connection between that breach and the availability of the challenged evidence.”
140 Blanchard J in Shaheed ibid. at [143]
Shaheed replaced the prima facie exclusion rule with a “balancing approach”. Under this approach, where a court concludes that evidence has been obtained as a result of a BORA breach, it is required to decide, by balancing listed relevant factors, whether exclusion “is a response which is proportionate to the character of such a breach of the right in question.”\(^{141}\) A similar shift in the approach to remedies for the speedy trial right is heralded by Williams, where it is said that the remedy must “provide a reasonable and proportionate response to [the] delay”, and thus “[a] stay is not a mandatory, or even a usual remedy”.\(^{142}\) The contemporary Canadian approach to remedies under s.24(2) of the Charter also involves a more explicit balancing between the seriousness of the breach and society’s interest in the resolution of the case.\(^{143}\)

\(^{141}\) Blanchard J in Shaheed supra note 61 at [156]. This “balancing approach” has now been codified in the new Evidence Act 2006. Section 30 of that Act requires that where evidence is shown to have been “improperly obtained” (defined in s.30(5)(a) as including evidence obtained in consequence of a breach of the BORA) the court must “determine whether or not the exclusion of the evidence is proportionate to the impropriety by means of a balancing process that gives appropriate weight to the impropriety but also takes proper account of the need for an effective and credible system of justice” (s.30(2)(b)). In undertaking this “balancing process”, the Court may take into account listed factors: s.30(3): “For the purposes of subsection (2), the court may, among any other matters, have regard to the following:
(a) the importance of any right breached by the impropriety and the seriousness of the intrusion on it:
(b) the nature of the impropriety, in particular, whether it was deliberate, reckless, or done in bad faith:
(c) the nature and quality of the improperly obtained evidence:
(d) the seriousness of the offence with which the defendant is charged:
(e) whether there were any other investigatory techniques not involving any breach of the rights that were known to be available but were not used:
(f) whether there are alternative remedies to exclusion of the evidence which can adequately provide redress to the defendant:
(g) whether the impropriety was necessary to avoid apprehended physical danger to the Police or others:
(h) whether there was any urgency in obtaining the improperly obtained evidence.
These factors in large part reflect those espoused in Shaheed.

\(^{142}\) Williams supra note 22 at [18]

\(^{143}\) See R. v. Grant (SCC) supra note 102
As a principle, proportionality can be difficult to apply in practical terms, as the relative weight assigned to each factor is unknown.\(^{144}\) It may however be a more useful principle in the context of rights (such as the speedy trial right), that are expressed by reference to a flexible concept (‘undue’ or ‘unreasonable’ delay), because it enables the remedy to be tailored to the nature of the breach.

**Summary**

There is no explicitly articulated theoretical approach to BORA remedies in New Zealand, but it can be said that the three purpose of correction, deterrence and vindication (best understood as remedying expressive harm) each operate together depending on the circumstances. The principle that any remedy should be proportional to the relevant breach is overarching, and is becoming increasingly dominant. Remedies for breach of the undue speedy trial right should be assessed in light of these principles. As will be seen in Part 5, these principles support the use of sentence reductions as a remedy for undue delay. However, there is a preliminary argument that must first be dealt with: that to hold a trial after undue delay is a breach (or a ‘continuing breach’) of itself, and thus that a stay of proceedings is required after a breach of the right.

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Part 4: Can a trial be held after undue delay?

The primary barrier to the use of alternative remedies in Canada is the view that to hold a trial after breach of the speedy trial right would be to breach the defendant’s rights. Thus, a stay of proceedings is a necessary remedy, otherwise the court would be allowing a further breach. It is implicit from the Williams decision that the Supreme Court rejected that approach. Given New Zealand’s historical connection to the Canadian approach, it is surprising that New Zealand’s Supreme Court did not address this fundamental objection. The Canadian approach is certainly flawed, but an examination of the arguments on either side of this debate reveals the importance of understanding of the interests protected by the right, and this in turn informs decisions about how best to remedy breaches of it.

A. The Canadian approach

Right

The Charter s.11(b) right “to be tried within a reasonable time” became the subject of much attention in Canada after the Supreme Court in R. v. Askov\(^{145}\) held that a breach of the right could arise from institutional delays. The charges were stayed in that case following a delay of almost two years (after the preliminary hearing), and the Court expressed the view that “a period of delay in a range of some six to eight months between

committal and trial might be deemed to be the outside limit of what is reasonable.”

This limit was interpreted as a standard to be met by all courts, and in the 18 months following the decision approximately 50,000 charges were stayed or withdrawn in Ontario. After this initial upheaval, the courts appear to have stepped back from Askov, and in general the time period required to found a breach has increased to reflect the drastic nature of the stay remedy.

As in New Zealand, Canadian Courts have tended to treat prejudice as a necessary (although not sufficient) factor in determining whether a breach has occurred. Canadian courts also recognise a breach in a case of extreme delay, but “infer prejudice”, in a similar manner to the New Zealand Courts.

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146 Askov ibid. at 1240
147 Code supra note 44 at 114-116. These charges were estimated to involve more than 27,000 cases, and included more than 13,000 impaired driving charges, and more than 300 sexual assault charges, see Carl Baar, “Court Delay as Social Science Evidence: The Supreme Court of Canada and ‘Trial Within a Reasonable Time’” (1997) 19 Just. Sys. J. 123
148 In Morin Sopinka J. emphasized that the 6-8 limit described in Askov was meant as a “guideline”, with a degree of flexibility. In Morin, the guideline was also modified for the Provincial Court, to an 8-10 month figure. See discussion in Code supra note 44 Chapter 4, Roach, Constitutional Remedies supra note 102 at 9.400, and Kent Roach, Due Process and Victims’ Rights: The New Law and Politics of Criminal Justice (Toronto: University of Toronto Press, 1999) at 94-95 ['Roach, Due Process and Victims’ Rights']
149 "The Supreme Court of Canada’s adoption of the stay of proceedings as the minimum remedy for a violation of s.11(b) has had obvious effects on the interpretation of that right”: Roach, Constitutional Remedies supra note 102 at 9.400.
150 Rishworth et al. supra note 6 at 735, citing Stuart, Charter Justice at 330. See also the dissent of Lamer C.J. in Askov at 6. In the N.Z. context see discussion supra n12 and surrounding text.
151 See Morin at 801, and Godin (infra) the Supreme Court was prepared to infer prejudice from the simple length of the delay - At [34] Cromwell J stated “It was reasonable, in my view, to infer as the trial judge did that the prolonged exposure to criminal proceedings resulting from the delay gave rise to some prejudice.” See also [37]. However, as there was evidence in Godin of risk of prejudice to the accused’s defence owing to that delay, it cannot be known what weight would have been put on prejudice to the other interests alone.
In the recent case of *R. v. Godin*, the Supreme Court confirmed that prejudice to the defendant’s right to make full answer and defence is not required to found a breach of s.11(b), as “[t]his is only one of three varieties of prejudice, all of which must be considered together with the length of the delay and the explanations for why it occurred.” The Court has therefore confirmed that the speedy trial right is more than a fair trial right, echoing the comments of the New Zealand Supreme Court.

In *Godin* itself there was evidence of actual fair trial prejudice (there was a risk of prejudice to the accused’s defence because of the delay – as the case turned on issues of credibility, and the effectiveness of cross examination would diminish over time). The Supreme Court also inferred prejudice from the length of the delay.

In summary, the right in Canada is understood to protect similar interests to the right in New Zealand, and courts in both countries apply the same set of factors to determine whether there has been a breach, and make it clear that evidence of prejudice to fair trial rights is not necessary. In both countries, some type of prejudice (to the defendant’s liberty, security or fair trial interests) is effectively a requirement, but where there is no evidence of prejudice, a lengthy period of delay can result in prejudice being inferred. However, where the two jurisdictions diverge is on the issue of remedies: the Canadian courts take a vastly different position to that endorsed in *Williams*.

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153 Ibid. at para 38
154 I.e. that prejudice to a fair trial is not required to found a breach, see *Williams* supra note 22 at [9]-[11]
155 “The majority of the Court Appeal acknowledged that these charges had been hanging over the appellant's head for a long time. It was reasonable, in my view, to infer as the trial judge did that the prolonged exposure to criminal proceedings resulting from the delay gave rise to some prejudice”: *Godin* supra note 152 at para 34, per Cromwell J.
Remedy

The Canadian approach to remedies for breach of the speedy trial right is exemplified by the following statement of Lamer J. in *R. v. Rahey*:\(^{156}\)

> If an accused has the constitutional right to be tried within a reasonable time, he has the right not to be tried beyond that point in time, and no court has jurisdiction to try him or order that he be tried in violation of that right. After the passage of an unreasonable period of time, no trial, not even the fairest possible trial, is permissible. To allow a trial to proceed after such a finding would be to participate in a further violation of the Charter.

The key to Lamer J.’s judgment in *Rahey* is that a stay of proceedings is the minimum remedy because after a breach the court will be without *jurisdiction*.\(^{157}\) Two other justices agreed that a finding of a s.11(b) breach went to jurisdiction, and “what the court cannot do is find that his right has been violated, i.e., that the reasonable time has already expired, and still press him on to trial. For to do so is to deprive him of his right under s. 11(b) in the pretext of granting him a remedy for its violation.”\(^{158}\) Two further justices agreed that a stay of proceedings was appropriate and just, but expressed doubt about whether the issue necessarily went to jurisdiction.\(^{159}\)

La Forest J. delivered a strong dissent on behalf of himself and McIntyre J., arguing for a more flexible approach to remedies:\(^{160}\)

> Reasonableness is a flexible concept, and a delay may be more or less unreasonable having regard to all the circumstances. So the remedy must be adjusted accordingly. I cannot accept

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\(^{156}\) [1987] S.C.J. No. 23; [1987] 1 S.C.R. 588; 39 D.L.R. (4th) 481; at para 48. Lamer J. was joined by Dickson CJ. This approach was firmly established by a majority of the Supreme Court in *R. v. Mills* [1986] 1 S.C.R. 863 (S.C.C.), followed by *Rahey*. No subsequent Supreme Court decisions citing *Rahey* reconsider the issue of remedies. Note that this finding does not however mean that a stay is the only remedy, if there was malice on the part of the Crown, and prejudice, then an additional remedy may be justified, such as damages: at para 51 per Lamer J..

\(^{157}\) Arguably a stay in this circumstance is not a “remedy” so much as a finding of loss of jurisdiction.

\(^{158}\) Estey and Wilson JJ. at para 61

\(^{159}\) Beetz and Le Dain JJ.

\(^{160}\) *Rahey* supra note 156 at para 109
that delays may be adjudged to be wholly reasonable one day, so as to deprive an accused of any remedy under the Charter, and wholly unreasonable the next, so that the trial must be aborted.

La Forest J. was critical of the effect that regarding a stay as the only possible remedy would have on the way in which the right would be interpreted in the future. Pointing to the U.S. experience, La Forest J. pointed out that by viewing a stay as the only remedy the courts “necessarily allowed its perception of the appropriate remedy to shape its views of the nature of the right, and more or less ensured that the lower courts would take a hostile approach to it.” In contrast, other justices were of the view that this was in fact “a good thing”, and should not deter the Court in a clear case from applying the s.11(b) guarantee.

Responding to the argument that a court loses jurisdiction to after a reasonable time has passed, La Forest J. quoted from the comments of McIntyre J. in the earlier decision of Mills:

Section 24(1) of the Charter … has not specified a remedy and has not excluded the court from further participation in the matter. It has authorized the giving of an appropriate remedy by the court. This is not language from which one can infer that whenever a right is infringed in a prosecution the result must be a loss of jurisdiction by the trial court. Rather, it is language vesting the court with power to correct the situation. If one accepts this jurisdictional argument, it would be to mandate a particular result in every case and to prevent the exercise of the discretion given in s. 24(1) to give the appropriate remedy. In my view, the fact that a Charter right has been infringed does not of itself give rise to jurisdictional error, and I see no basis for the characterization of some Charter violations as jurisdictional while others are not.

La Forest J also cited his own comments in Mills to the effect that s.24(1) is discretionary, and that to hold that a stay is the only remedy would be to rewrite s.24(1),

161 Supra note 156 at para 105
162 Supra note 156 at para 58 per Le Dain J (joined by Beetz J)
163 McIntyre J. in Mills (supra note 156) at 964-65, cited in Rahey (supra note 156) La Forest J. at para 109
and give s.11(b) precedence over other Charter rights.\textsuperscript{164} La Forest J. did not go into any
detail as to what remedies would be appropriate instead of a stay, other than noting that
“[o]ften the most obvious remedy is to expedite the proceedings”.\textsuperscript{165}

Despite the pragmatic arguments raised by La Forest J., the concern remains that to hold
a trial after breach of the speedy trial right would be to hold a trial after a reasonable
time, which – taking the literal approach of Lamer J. – is a breach of the defendant’s
rights.

In the New Zealand context, it is surprising that the argument of the majority in \textit{Rahey}
was not addressed in \textit{Williams}, given that it had garnered some support in New
Zealand.\textsuperscript{166} For instance, Cooke P. in \textit{Martin} had referred to the arguments in \textit{Rahey} and
stated:\textsuperscript{167}

…if a balancing of the factors leads to the conclusion that there has in truth been undue delay,
it would normally be unsatisfactory (to say the least) for the state to insist on trial thereafter. A
trial would then ipso facto be in breach of the right of the person charged to be tried without
undue delay.

Further,\textsuperscript{168}

…I would be inclined to see some incongruity in any suggestion that, although undue delay
has been found, the state should continue with a prosecution and, even if it results in
conviction and imprisonment, accompany it with an award of compensation. A stay seems the
more natural remedy.

\textsuperscript{164} \textit{Rahey} (supra note 156) at para 109, citing \textit{Mills} (supra note 156) at 973
\textsuperscript{165} \textit{Rahey ibid.} at para 125. Although La Forest J. did consider sentence reductions in the earlier decision of
\textit{Mills ibid.} at 567-91
\textsuperscript{166} It appears that this argument may not have been argued in the Supreme Court, see the transcript of oral
argument “Courts of New Zealand: Supreme Court Transcripts 2009”, online, available at
\url{http://www.courtsofnz.govt.nz/from/transcripts/supreme-court-transcripts-2009/SC-61-2008-Shane-
Edward-Williamsv-The-Queen.pdf}
\textsuperscript{167} \textit{Martin} supra note 19 at 425
\textsuperscript{168} \textit{Ibid.} at 425
Hardie Boys J. expressed a different view, noting the argument of Lamer and Wilson JJ. in *Rahey* and commenting:169

> With respect, I doubt the logic. The right is to trial without undue delay; it is not a right not to be tried after undue delay. Further, to set at large a person who may be, perhaps patently is, guilty of a serious crime, is no light matter. It should only be done where the vindication of the personal right can be achieved in no other satisfactory way. An alternative remedy may be an award of damages. That has conceptual problems. It would of necessity be after trial, and the notion of an award of damages to a person who has been found guilty presents some difficulty. If found not guilty of course there is no difficulty. But the right has been infringed whether the person is guilty or innocent. Any differentiation could only be in quantum.

Commentators have also noted the “conceptual difficulty with any remedy for a concluded violation of s.25(b) that permits a trial to take place”.170 The argument was also touched upon in *Du*.171

Neither *Martin* nor *Du* can properly be said to have decided this issue in the New Zealand context. Given the usual respect of the New Zealand courts to the Canadian approach, and the fact that the approach of the majority in *Rahey* was endorsed by Cooke P. in *Martin*, it is surprising that the argument failed to receive any consideration in *Williams*. The Supreme Court was right to reject the argument, but it would have been helpful if they had explained why.

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169 *Ibid.* at 432. McKay J was also not persuaded that the issue goes to jurisdiction, and found that whether a stay is the appropriate remedy would depend on what one regards as “undue”, at 433.

170 Rishworth *et al.* supra note 6 at 739

171, Winkelmann J. noted the contrast in approach between Canada and the United States on the one hand, and the United Kingdom on the other. Her Honour endorsed the reasoning of Lord Bingham in *Attorney General’s Reference (No 2 of 2001)* [2004] 2 AC 72 at 89 (discussed infra at 43 et seq.) that “the prosecutor and the Court do not further breach the right in continuing to prosecute or entertain proceedings after a breach since the breach consists in the delay which has accrued and not in the prospective hearing.”, see *Du* (supra note 59) at [72].
Non-remedies?

This examination (albeit a brief one) of the Canadian approach to remedies cannot be left without noting the way in which the Canadian approach is not as “all or nothing” as it appears. While the only remedy for delay that breaches the Charter is a stay of proceedings, where there has been excessive delay that does not breach the Charter, the courts do sometimes recognise that delay in sentencing. In *R. v. Bosley*, Doherty J.A. in the Ontario Court of Appeal made a finding of excessive delay, that was “close to the line between unwarranted delay and constitutionally unreasonable delay”, but did not breach the accused’s constitutional rights. Doherty JA concluded:

> Before leaving this issue, I would add that excessive delay which causes prolonged uncertainty for the appellant but does not reach constitutional limits can be taken into consideration as a factor in mitigation of sentence: *R. v. Cooper* (No. 2) (1977), 35 C.C.C. (2d) 35, 4 C.R. (3d) S-10 (Ont. C.A.). The trial judge expressly held that the delay occasioned in this case served as a mitigating factor in his determination of the appropriate sentence. The sentence he imposed reflected that mitigation.

It is notable that *Cooper* concerned appellate delay (which could not constitute a breach of the Charter in any event). There are a number of other examples of appellate delay being recognised as a factor in mitigation of sentence, as well as other delays that

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173 7 month delay between the completion of the evidence and the sentencing of the offender
176 7 ½ years of appellate delay was held to be relevant to mitigation of sentence for one offender in *R. v. Grande* [2008] O.J. No. 399; 76 W.C.B. (2d) 404, (see also appeal on related issue *R. v. Flis*, [2006] O.J. No. 442; 207 O.A.C. 228; 205 C.C.C. (3d) 384; 68 W.C.B. (2d) 553 (Ontario Court of Appeal), Leave to appeal refused [2006] S.C.C.A. No. 120). See more recently *R. v. Williams* [2009] O.J. No. 1692, 2009 ONCA 342, Docket: C42937 (Ontario Court of Appeal) where delay in prosecuting the appeal was found not to breach the Charter (ss7 or 11(b)), but “does have a bearing on sentence” (at para 30).
could not constitute a s11(b) breach, such as pre-charge delay (where a stay was declined). 177

There are also other instances where judges have declined stay applications made on the grounds of trial delay, but subsequently mitigated the sentence to reflect that delay. 178

Sentences have also been mitigated to reflect delay in other cases (i.e. where there has been no previous stay application), both pre-conviction 179 and for delays at the sentencing stage. 180 There are indications of approval of this approach from the Supreme Court: in holding that the speedy trial right in Canada extends to delay awaiting sentencing, McLachlin J. stated 181

> Delay in sentencing extends the time during which these constraints on an individual’s liberty are imposed. While the sentencing judge may take them into account, there is no certainty that this will occur. It follows that delay in sentencing may prejudice the accused’s liberty interest.

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177 R. v. Cleary [2002] N.W.T.J. No. 44; 2002 N.W.T.S.C. 30 (Northwest Territories Supreme Court) “Although the delay in charging her did not entitle her to a stay, it is a circumstance that I do take into account in mitigation of sentence because it means that she has had the uncertainty of this matter hanging over her for over four years.” (at para 25)

178 For example in R. v. Schroeder [2004] O.J. No. 6231; 2004 CarswellOnt 8823 (Ontario Superior Court of Justice) the sentencing judge noted that “though I ruled against the offender’s 11(b) Charter application, the delay in this case has in fact caused prolonged uncertainty for Mr. Schroeder, which is a factor in mitigation of sentence, as stated in R. v. Bosley” (at para 20), and “[i]n recognition of the lengthy delay since your arrest and what at times were unusually harsh conditions endured as a remand prisoner, you shall receive 2.5 to 1 credit for your pre-trial custody.” (at para 32).

179 In R. v. Kalenuik [2005] O.J. No. 4670 (Ontario Court of Justice) the sentencing judge (at para 61) took into account in mitigation “the substantial time which has past since her arrest, including the time when the stay was in effect and the effect that this passage of time has had on Ms. Kalenuik” as one mitigating factor that contributed to the court’s decision to impose a sentence at the lower end of the range.


The practice has been limited in some respects. Doherty J.A. has subsequently held that where the defendant’s bail conditions are unrestrictive, and time is needed to complete the proceedings, a mitigation in sentence will not be warranted.\(^{182}\) In *R. v. G.W.R.*\(^{183}\) the sentencing court reduced a sentence (based on *Cooper* and *Bosley*) to take into account anxiety caused by charges being laid five years previously (they had been partly heard, stayed and re-laid). However, the court was “not thoroughly convinced that the delay in this case warrants consideration as a mitigating factor”.\(^{184}\) The Alberta Court of Appeal has indicted that it should be restricted to more extreme cases. In *R. v. Keegstra*\(^{185}\) the Alberta Court of Appeal commented on sentencing and delay caused by successive appeals to the Supreme Court of Canada, and stated that:\(^{186}\)

> We do not consider mere delay in sentencing to be a mitigating factor in a case where the delay is not the fault of the Crown. ...But a long history between the commencement and the end of a criminal prosecution and a long record of unusual litigation steps even if not the fault of the Crown, can be viewed as a mitigating factor for sentence because of the added expense for the Accused and the extended anxiety for him and his family.

In sum, the Canadian approach requires that any breach of the speedy trial right be met with a stay of proceedings. However, where that delay is not serious enough to justify that extreme remedy, the courts will make allowance for it at the sentencing stage (albeit without recognising it as a remedy). This could be characterised as what has been described elsewhere as the courts being “forced to provide sentence reductions because of


\(^{184}\) The Court declined to mitigate a sentence to take account anxiety caused by pre-charge delay.


\(^{186}\) Ibid. at [20]. As a result of these and other mitigating factors, Keegstra's sentence was reduced from one year in prison to a suspended sentence and 200 hours of community service work.
shortcomings in legal doctrine”. This practice is also significant as it shows that the courts are prepared to accept that the sentencing court is a proper forum to recognise delay.

**B. Why the Canadian approach is flawed**

The argument that to hold a trial after breach of the speedy trial right is a ‘continuing breach’ is contingent on the view that holding the trial would affect the interests protected by the right. Where the delay has seriously impacted on the defendant’s ability to defend herself during the trial, to hold a trial will further aggravate the impact on that interest. In such a case, a stay is required to prevent a breach of the fair trial right, which may or may not have been caused by delay. However, in other cases where the right is breached without an impact on the defendant’s right to a fair trial, the interests that are affected may or may not be affected by holding a trial. In those cases, simply holding a trial after delay does not necessarily breach the speedy trial right. For instance, in a case where the right is breached because of a lengthy period of stress and anxiety awaiting trial, holding a trial will bring this to an end, rather than further breaches it. The remedy should depend on the nature of the breach. This conception is well illustrated by a series of decisions of the House of Lords and Privy Council that reveal an understanding of the interests protected by the right that is more nuanced than that which prevails in Canada.

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188 There will be cases where the fair trial right is breached, but a stay is not necessary – because the impact on the fair trial rights can be remedied by trial orders, and a trial can be held that does not breach the defendant’s rights.
In the Scottish Privy Council decision of *HM Advocate v. R.*\(^{189}\) the Crown had conceded that an unreasonable time period had passed, the only question was the effect of that breach. The alleged breach was of art. 6 of the European Convention on Human Rights.\(^{190}\) Also at issue in was a provision in the Scottish law that specifically prevents the Lord Advocate (prosecutor) from doing any act incompatible with the European Convention.\(^{191}\) The argument that a trial cannot be held after breach could therefore be said to be stronger in Scotland, because acts incompatible with rights are specifically prohibited. However, in my view the real issue is whether holding a trial after breach of the right affects the right itself, and this argument is the same whether or not an incompatible act is specifically prohibited.

The majority of the Privy Council in *HM Advocate* took a position similar to the Canadian approach and concluded that once it was determined that a reasonable time for trial had passed, to hold a trial would be a “continuing infringement”.\(^{192}\) “Once that threshold has been crossed…the position is irretrievable”.\(^{193}\) In contrast, the minority argued that there was no continuing breach, and referenced the comments of Hardie Boys J. in *Martin* that the right was a right to be tried without undue delay, not a right not to be tried after undue delay.\(^{194}\) Lord Steyn emphasised that art. 6 supports three separate and independent guarantees ((i) a right to a fair and public hearing, (ii) a right to a hearing by

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\(^{190}\) "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

\(^{191}\) section 57(2) of the Scotland Act 1998

\(^{192}\) Lord Hope of Craighead, Lord Clyde and Lord Rodger of Earlsferry, *HM Advocate* supra note 189, per Lord Rodger at para 150

\(^{193}\) *HM Advocate* *ibid.* at [76] per Lord Hope of Craighead

\(^{194}\) *Ibid.* per Lord Steyn (at [14]-[20]) and per Lord Walker of Gestingthorpe (at [160]-[164]).
an independent and impartial tribunal and (iii) a right to a hearing within a reasonable time), and while it is clear that a breach of the first and second guarantees required a quashing of the conviction, but the third guarantee is of a wider scope and prejudice to a fair trial is not required to found a breach. The question of remedy is therefore different for the speedy trial right, and there is no automatic consequence upon breach. A stay should be an exceptional result where there are no fair trial concerns. Lord Steyn’s conclusion was also influenced by public policy concerns about the effect of draconian stays of proceedings on the functioning of the criminal justice system, and His Lordship quoted the Supreme Court of Canada (somewhat ironically given the position taken):

It is important to recognise that the Charter has now put into judges' hands a scalpel instead of an axe - a tool that may fashion, more carefully than ever, solutions taking into account the sometimes complementary and sometimes opposing concerns of fairness to the individual, societal interests, and the integrity of the judicial system.

Shortly after *HM Advocate*, the issue arose in the House of Lords in *Attorney-General’s Reference (No 2 of 2001).* Seven of the nine judges in that case declined to follow the approach of the majority *HM Advocate v R*. A breach of the speedy trial right required a remedy, but did not make further proceedings unlawful under United Kingdom law. A stay is therefore not the required remedy unless there could no longer be a fair hearing, or it would be otherwise unfair to try the defendant.

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196 *Ibid.* at [9]. Contrast the position at common law, where this aspect of the right was only breached where there was a prejudice to fair trial rights.
198 *R. v. O’Connor* [1995] 4 SCR 411 per L’Heureux-Dubé J at 461, quoted in *HM Advocate v. R.* supra note 189 at [18]
200 S.6(1) of the Human Rights Act 1998
Lords Hope and Rodger disagreed with this approach, and held that any trial after breach of the right to be tried within a reasonable time was unlawful under the UK Human Rights Act, but this did not have the same consequences as under the Scottish provision.

The issue again came before the Privy Council in *Spiers v. Ruddy.*\(^{201}\) As this was also an appeal from Scotland, the issue was whether it would be “incompatible” with the right to trial within a reasonable time to continue to prosecute the defendant\(^{202}\)

> following the lapse of a reasonable time, in circumstances where a fair trial remains possible and there is no other compelling reason why it would be unfair to try [the defendant], and whether the Lord Advocate has power to do so.

The Judicial Committee recognised the conflict between its previous decision (in *HM Advocate*) and the approach of the House of Lords (in *Attorney-General’s Reference (No 2 of 2001)*), but there was “a body of Strasbourg authority” that “eases our choice”.\(^{203}\) On the basis of those Strasbourg cases the Privy Council reversed its previous decision: the fact of a breach of the speedy trial right cause a continuing breach, but gives rise to “a breach which can be cured, even where it cannot be prevented, by expedition, reduction of sentence or compensation, provided always that the breach, where it occurs, is publicly acknowledged and addressed”.\(^{204}\)


\(^{204}\) *Ibid.* at [16] per Lord Bingham of Cornhill
The turn-about by the Privy Council was justified in a relatively short judgment (compared to *HM Advocate v R* and *Attorney-General’s Reference*). The main reason cited for the change was the Strasbourg cases, but interestingly those cases did not directly consider the issue of whether holding a trial after a reasonable time would be a continuing breach, but were cases where it was “never suggested” that to continue to prosecute would be a continuation of the breach. The Strasbourg cases simply held that remedies would be “effective” if they prevented an alleged violation “or its continuation”. The Privy Council concluded that this shows that expediting proceedings can indeed prevent the "continuation" of any violation. That is inconsistent with the view that the prosecutor is, inevitably, in continuing breach of article 6(1) once he has delayed unduly, so that the situation can only get worse.

The reference to Strasbourg authorities assisted the Judicial Committee to reach the right conclusion, but these cases did not materially improve the analysis. A stronger analysis is brought about by an evaluation of the interests underlying the right, and thus the nature of the breach (as was discussed by the minority in *AGs Reference*). Where the breach affects the defendant’s fair trial rights, it is logical to see the continuation of proceedings as a breach in itself, because holding an unfair trial would be a breach. However, in a case where the fair trial right is not invoked, the breach is manifest in the length of the

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205 See commentary to *Spiers v Ruddy* 2008 S.C.C.R. 131 at para 1 and a case note: James Chalmers “Delay, Expediency and Judicial Disputes: *Spiers v Ruddy*” (2008) 12 Edinburgh L. Rev. 312. Chalmers notes: “There were a total of 168 paragraphs in R and 179 in *Attorney-General’s Reference: in Spiers v Ruddy*, there are 29. Lord Hope, whose speeches in those two cases were 62 and 66 paragraphs long respectively, takes five paragraphs to depart from his previously expressed views. Lord Rodger takes just four to depart from arguments that previously required 51 and 39 paragraphs.” (at 313)

206 See discussion of cases by Lord Bingham of Cornhill *Spiers v Ruddy* supra note 201 at [10]-[14]

207 The issue of remedies is primarily a matter for domestic courts under the European Convention on Human Rights, the Strasbourg Court only having jurisdiction to consider whether the domestic remedy is “effective”. Art 13 states “Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

208 *Spiers v Ruddy* supra note 201 at [26] per Lord Rodger of Earlsferry
time waiting for trial, rather than the holding of the trial after the delay.\textsuperscript{209} The impact on the defendant’s liberty and security interests, for example, are no further impacted by going to trial. In this case, the continuing breach argument falls away.

The real reason for the change in approach in the Privy Council was a clear recognition of the nature of the breach. The Privy Council had initially regarded the right as adhering to the trial itself, but in \textit{Spiers} recognised that sometimes interests are at play that do not affect the trial itself – so are not ‘continuing’ by holding a trial.

The choice between whether a stay of proceedings is required, or whether an alternative remedy is available should be made based on whether holding a trial will impact on the interests protected by the right. In cases where holding a trial will impact on the defendant’s right to a fair trial, it will breach her fair trial right, but in other cases, holding a trial does not constitute delay, and is therefore not necessarily a breach. It is necessary to further examine those interests, because, as will be shown, the traditional understanding of those interests is incomplete.

\textbf{C. The interests protected by the right}

An understanding of the right to be tried without undue delay as protecting the interests in a fair trial, liberty and security helps to provide understanding of the right in many cases. However, the way in which those interests are protected by other mechanisms, and

the fact that courts follow the practice of ‘inferring prejudice’ in the absence of evidence of an impact on those interests, suggests that this is not the complete picture.

**Fair trial**

The most well understood component of the speedy trial right is its role in shielding the ability of the defendant to “make full answer and defence”. Long periods of delay can affect a defendant’s right to a fair trial as over time evidence may be lost, witnesses may die or their memories may fade, and it can become more difficult for the defendant to respond to allegations or cross examine witnesses. An example of a case being stayed for delay that prejudiced fair trial interests in New Zealand is *R. v. F.* 210 In that case, charges alleging historic sex offending were stayed on the grounds of post-charge delay of 52 months. In the time that had elapsed between charge and trial a key prosecution witness had become unwell and was unable to give evidence. The High Court concluded that there was at least a risk of trial prejudice as a result of this, and the charges were stayed. 211

The recent Supreme Court decisions in both Canada 212 and New Zealand 213 make it clear that a breach of the fair trial component is not *required* to found a breach of the speedy trial right. The New Zealand Supreme Court has gone so far as to say that the fair trial

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211 *Ibid.* at [35]

212 The Supreme Court of Canada in *Godin* (supra note 152) made it clear that prejudice to the fair trial right is not a requirement in order to found a breach of s.11(b) as “[t]his is only one of three varieties of prejudice, all of which must be considered together with the length of the delay and the explanations for why it occurred.” at [38].

213 *R. v. Williams* supra note 22 at [9]-[11].
right is “separate and independent”. The same could be said about the Canadian Charter: although there is no direct equivalent of the New Zealand s.25(a) right to a fair trial, the s.7 right to “life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice” is of similar effect. Section 7 has been interpreted as including the general right to make “full answer and defence” to a criminal hearing. However, the New Zealand Supreme Court’s explicit recognition of the separate nature of the fair trial right likely assists it in seeing that there will be cases where a stay is not required.

It must be noted that where there is impact on a defendant’s fair trial rights this is usually not caused by the delay itself, but rather by the consequences of delay. Those consequences are not necessarily related to the length of the delay, instead the length of the delay provides the opportunity for them to occur. The key witness in R. v. F. may have become unwell a very short time after the charges were laid. In this respect, this aspect of decisions like R. v. F. should more properly be regarded breaching the fair trial (s.25(a)) right rather than the speedy trial right (s.25(b)). This distinction is preferable because the “failure to accord independent constitutional significance to the speedy-trial guarantee creates the danger of analytical confusion in the courts”.

214 R. v. Williams supra note 22 at [9]
215 Rishworth et al. supra note 6 at 666
217 “Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights: (a) The right to a fair and public hearing by an independent and impartial court.”
218 Butler and Butler supra note 4 argue that the fair trial aspects of unreasonable delay should be dealt with under the fair trial guarantee, entirely separately from the speedy trial right.
219 Schneider supra note 44 at 497
separation of fair trial issues from other delay concerns helps to avoid the fair trial considerations inhibiting the development of speedy trial right jurisprudence, and potentially skewing the proper approach to remedies. The recognition that there is overlap between the fair trial and speedy trial rights also brings to light the fact that the speedy trial right protects more than just fair trial interests, and a different remedy may be appropriate where the fair trial interest is not implicated.

**Liberty & security**

The other two frequently cited interests protected by the right are the defendant’s liberty and security. There is a liberty interest at stake as a defendant awaits trial: he is likely to be subject to either pre-trial custody or bail conditions, and may suffer “other personal disadvantage”. Related to the liberty interest is the security interest, which protects against the less-tangible effects on a defendant awaiting trial. It is designed to protect the defendant from “the stress and cloud of suspicion that accompanies a criminal charge” and to minimize “anxiety for someone who is entitled to be presumed innocent until guilt is established.” In sum, the defendant is protected from:

…overlong subjection to the vexations and vicissitudes of a pending criminal accusation: anxiety, heightened vulnerability to the displeasure of public officials and private blackmailers, restrictions upon freedom of movement, upon employment and educational opportunities, upon “associations and participation in unpopular causes.”

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220 Butler and Butler supra note 4 at 811
221 Wilson J. in Williams supra note 22 at [8], quoting from the Court of Appeal in R. v. Harmer at [130]
222 Godin supra note 152 at [30]
223 Williams supra note 22 per Wilson J at [8], quoting from the Court of Appeal in R. v. Harmer at [130]
These interests were also at play in the case of *R. v. F.* discussed above. The accused had the charges “hanging over him” for four years, and there was evidence of tangible effects on his liberty and security (such as effects on his health, early retirement, on a residency application in Australia, and there was publicity about the charges on the internet, despite the fact that his name was suppressed).\(^225\)

It must also be recognized that liberty and security interests are protected by means other than the speedy trial right protection. For example, there is a right of persons charged to be “released on reasonable terms and conditions unless there is just cause for continued detention”.\(^226\) The defendant can also use the *habeas corpus* process to challenge detention.\(^227\) Time in which the defendant is held in custody prior to trial is credited against her sentence if she is convicted,\(^228\) and sentencing courts will mitigate sentences where a defendant has been subject to onerous bail conditions.\(^229\) The courts can make orders to minimize the effect on a defendant’s security interest, such as orders for suppression (of names or details) pending trial.\(^230\)

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\(^{225}\) *R. v. F.* supra note 210, see [36]-[38].

\(^{226}\) BORA s.24(b) This is supported by the Bail Act 2000 that ensures that defendants’ liberty is not unduly interfered with, and recognises the relevance of the length of time to trial in determining whether an accused should be remanded in custody. See supra note 31 and surrounding text.

\(^{227}\) In New Zealand see the Habeas Corpus Act 2001 which provides the procedure whereby applications to challenge the legality of a person’s detention can be made by writ of habeas corpus. Section 23(1)(c) of the BORA affirms the “right to have the validity of the arrest or detention determined without delay by way of habeas corpus and to be released if the arrest or detention is not lawful.”

\(^{228}\) As is the operation of the Parole Act 2002, ss.90-91 in New Zealand, and in the practice of giving “2 for 1” credit in Canada.

\(^{229}\) In New Zealand offenders can be given some sentencing credit for time spent awaiting trial while subject to stringent bail conditions, including electronically monitored bail, see Geoffrey Hall, *Hall’s Sentencing*, looseleaf (Wellington: LexisNexis, 1993) at I.7.5 [*“Halls’ Sentencing”*].

\(^{230}\) See the NZ Criminal Justice Act 1985, ss.138 & 140
The cause of the impact on these interests must also be carefully examined. To a large extent consequences on liberty and security interests are caused by the fact that the defendant has been charged, and are “felt by those who are brought to trial within a reasonable period as well as those who are not”. A defendant has his liberty restricted, and suffers anxiety because of the fact that he faces a charge. For interference with these interests to found a breach of the speedy trial right, something more is required, interference with liberty and security interests of themselves cannot be enough. The speedy trial right should only be invoked where the extent of the interferences crosses the line into that which is ‘undue’.

**Integrity of the justice system**

The three interests reviewed above are the ones that are usually cited as the foundations for the speedy trial right, and they account for the purpose of the right in many cases. However, the relationship between delay and interference with these three interests is not direct. A fair trial may be affected regardless of whether or not there has been excessive delay in bringing it to trial, but it is more likely that it will be affected after a long delay. The defendant is subject to the “vexations and viscidities” of awaiting trial no matter how long the process takes. A delay simply extends these consequences. The impact on these three interests can be remedied in by means other than by using the speedy trial right. Parliament must have intended that the speedy trial right would give protection above and beyond the protections it gives elsewhere; otherwise the inclusion of this right in the

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231 Richard G. Fox, “Criminal Delay as Abuse of Process” (1990) 16 Monash U. L. Rev. 64 at 86
BORA would be superfluous. The right is best understood as preventing the adverse effects of delay on these three interests continuing beyond a reasonable time, and importantly also protecting the effect on the integrity and legitimacy of the justice system.

The right to a fair trial is usually regarded as protecting against the danger of an innocent person being convicted (or ensuring a “fair trial”), and this is usually the focus of the fair trial protection in the BORA generally, and in the fair trial component of delay cases. However, there is another component of the fair trial right: ensuring that the proceedings do not compromise the moral integrity of the criminal justice process (or ensuring that it is “fair to try” the defendant). This aspect of the fair trial right requires more emphasis, as it is not commonly recognised, and is of equal importance to the truth-protection aspect. Arguably given that the truth-protection aspect of the fair trial is recognised as separately protected under s.25(a)BORA, more emphasis should be paid to the second (‘integrity’) limb in delay jurisprudence.

The first limb of the right focuses very much on the truth-seeking aims of the criminal justice process, and the protection of the accuracy of the system, whereas the “fair to try”

232 S.25(a), see Butler and Butler supra note 4 at 900-904
233 See Andrew L.-T. Choo, Abuse of Process and Judicial Stays of Proceedings, 2nd edn (Oxford: Oxford University Press, 2008) at 188 who argues that this fair trial/fair to try terminology should be disbanded, and both limbs should be protected as part of an overall fair trial conception, as both aspects are needed to protect the legitimacy of the justice system as a whole.
234 “…the courts’ commitment to protecting judicial integrity and the reputation of the entire administration of justice should be as strong and unwavering as their commitment to ensure the fairness of trials.” Kent Roach, “The Evolving Test for Stays of Proceedings” (1998) 40 C.L.Q. 400 at 404 ['Roach, The Evolving Test'].
235 Arguably the integrity limb of the fair trial right could be protected under s.25(a) also, however it does not appear to have been applied in this way to date– see Butler and Butler supra note 4 at 900-904.
or integrity limb recognises that there is more to the criminal trial. The conception of Duff et al.\textsuperscript{236} is informative: the purpose of the criminal trial is not solely to find the truth, but “the trial is a process of calling the defendant to answer a charge and, if he is criminally responsible, to account for his conduct.”\textsuperscript{237} In this sense, the trial is a communicative and participative system. There is an intrinsic value to the verdict of the court:\textsuperscript{238}

> the verdict is not just the assertion of a proposition, but a performative that condemns the defendant as a criminal wrongdoer. Its meaning lies not only in the proposition that the defendant committed the crime charged, but also in what is done by this formal declaration of guilt – the condemnation of his commission of that crime.

The authors argue that what is critical on a communicative view is the ability of a public trial “to ensure that convictions have the appropriate standing as expressions of public condemnation”.\textsuperscript{239} This ties in with the expressive theory of law introduced earlier: the expressive value of verdicts must be protected by remedying expressive harm. As such, trials both show respect for the accused, and have an educative role. The trial can communicate to the public the norms according to which citizens should be tried, at the same time as publically condemning wrongdoing.\textsuperscript{240} In summary:

> … we should see [the value of holding trials in public] in terms of the rights of citizens either to affirm verdicts or to distance themselves from them, rights that are grounded in the critical independence that liberal democracies ought to afford their citizens. In terms of the popular formulation, it is not just that justice should be seen to be done – which suggests a purely contingent relationship between justice and the public – but that a trial in which justice is not seen to be done cannot properly be said to be just.

\textsuperscript{236} Duff et al. supra note 100  
\textsuperscript{237} Ibid. at 236  
\textsuperscript{238} Ibid. at 83  
\textsuperscript{239} Duff et al. supra note 100 at 269  
\textsuperscript{240} Duff et al. supra note 100 at 269-270
The importance of the integrity of the justice system is recognised by the jurisprudence of other rights, such as the presumption of innocence, the right of a criminal defendant to the assistance of an interpreter, and the right to a public hearing. The relevance of both aspects of the fair trial right was recently affirmed by the Supreme Court of Canada in a case dealing with remedies for breach of the Crown disclosure obligation. In the context of abuse of process in Canada the protection of the integrity of the justice system is recognised as a “residual category” for the grant of stays.

Duff et al. illustrate the effect of this participative and communicative conception of the criminal trial through an evaluation of the right to a public hearing. This right can be seen to have instrumental benefits, such as discouraging witnesses from lying and encouraging other witnesses to come forward, as well as ensuring that criminal justice standards are scrutinized. However, these benefits are difficult to evaluate.

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241 The presumption of innocence “is essential in a society committed to fairness and social justice. The presumption of innocence confirms our faith in humankind; it reflects our belief that individuals are decent and law abiding members of the community until proven otherwise.” R. v. Oakes (1986) 26 D.L.R. (4th) 200, 212-213, cited by Butler and Butler supra note 4 at 827.

242 S.24(g) BORA. can be regarded as protecting the ability of the defendant to present a defence, but also to prevent the trial becoming a “charade” and it “reinforces the importance of the appearance of fairness and integrity in the criminal trial process, as a process”. Butler and Butler supra note 4 at 801, emphasis original.

243 Section 25(a) BORA is in part directed at instrumental aims of facilitating discovery of evidence and the deterrence of improper conduct (see discussion of purposes of the right, Butler and Butler ibid. at 882), but also plays an important role in ensuring that justice is “seen to be done”.

244 R. v. Bjelland [2009] S.C.C. 38 (30 July 2009) “the appropriate focus in most cases of late or insufficient disclosure under s. 24(1) is the remediation of prejudice to the accused, but that safeguarding of the integrity of the justice system will also be a relevant concern.” (at [26] per Rothstein J., joined by McLachlin C.J. and LeBel, Deschamps JJ.)

245 In R. v. Tobias the Canadian Supreme Court held that stays of proceedings are most often granted where there is a concern about unfairness to an individual, but there is also a residual category that protects the integrity of the justice system. discussed in Roach, The Evolving Test supra note 234.

246 See Duff et al. supra note 100, Chapter 9

247 Ibid. at 264-265

248 Ibid. at 265-267
empirically, and they could be met through other means such as by having public observers to ensure appropriate scrutiny. Having public trials may also subject a trial to illegitimate public pressure. More importantly, the right to a public hearing “required in order to ensure that convictions have the appropriate standing as expressions of public condemnation”.

It can also be said that a trial must occur within a reasonable time in order for it to be an appropriate expression of public condemnation. Duff et al. note that the effect of individuals “increasingly being deprived of their liberty for extended periods without a trial or a conviction” may “subvert the requirement for a proper calling to account”.

Dealing with the speedy trial right more generally (whether or not the defendant is detained), Jackson and Johnstone postulate that “there may come a point in time when it is no longer fair to hold them to account in view of the passage that has elapsed since the events surrounding the allegations.” The authors acknowledge that this would be a rare occurrence, but in the case of young persons it is much more likely to occur. It can also be said that after a lengthy period of time a verdict will not end controversy, nor

249 Ibid. at 267-268.
250 Ibid. at 265-267
251 Ibid.
252 Ibid. at 269
253 Duff et al. ibid. at 289. The context referred to here is excessive detention in situations where there are national security concerns surrounding the detained person. The authors clearly had the issue of prolonged detention in mind at this point, but similar concerns prevail with the fact of a delayed trial (whether or not the defendant is detained pending trial).
254 Jackson and Johnstone supra note 209 at 20
255 “It may be rare for the circumstances to be so extreme as to break this link between the past and the present” (ibid. at 20).
256 Because between the time of the alleged offence and trial young people have “evolved into very different persons in terms of growth and development from the persons they were at the time of the offence” (ibid.).
will it bring about effective closure for those involved.\textsuperscript{257} A verdict that has been reached a significant amount of time after the offence may be controversial and undermine public confidence in the integrity of the justice system.\textsuperscript{258}

The need to protect the integrity of the justice system by ensuring that expressive harm to the communicative system is remedied is not explicitly acknowledged in New Zealand or Canada. However, the courts do recognise it. The artificial way in which courts in both countries “infer” prejudice has been referred to above. What the courts are in effect doing in cases where prejudice is inferred is recognising that the delay is so long that a remedy is required even without any indication of prejudice to the three interests usually cited. The reason the courts are driven to provide a remedy is because of the impact of the lengthy delay on the integrity of the system – in other words, the courts recognise the prejudice to the system itself. In these cases, the proper remedial question is whether the delay is so extreme that pressing on to trial will negatively affect the integrity of the system in a fundamental way, or whether a lesser, alternative, remedy would suffice to remedy the expressive harm to the defendant and the system.

\textit{D. Conclusion}

This part has considered the argument, most strongly made in Canada, but also considered in New Zealand, the House of Lords, and the Privy Council, that a stay is a

\textsuperscript{257} Jackson and Johnstone \textit{ibid.} at 18

mandatory remedy for breach of the speedy trial right. This argument reflects an understanding of the right as protecting the fair trial interest alone, as to hold an unfair trial would undoubtedly be a breach. This effectively means that the right is treated “as though it were a single, indivisible right: a right that either is or is not violated, for all purposes”.\textsuperscript{259} When considering whether the right has been breached, the courts in both Canada and New Zealand recognise that the issue is wider than just fair trial interests and that the right can be violated in the absence of prejudice to the accused’s ability to have a fair trial. The Canadian position of requiring a stay in every case where the speedy trial right is inconsistent with this conception of the right, as this approach only makes sense if the speedy trial right is interpreted narrowly so that it is only infringed in cases where a fair trial is no longer possible. If the trial will not further impact on any interest protected by the right, a stay will only be necessary in extreme cases. The next question is how to direct remedies where holding a trial does not breach rights of itself, and how alternative remedies can fulfil other purposes of the speedy trial right.

**Part 5: The sentence reduction remedy**

The most effective alternative remedies, and those endorsed by Williams, are sentence reductions and monetary damages. This section explains why sentence reductions are an appropriate remedy in two parts: first by reviewing the key objections that are made to the use of sentence reductions, and second by outlining how sentence reductions meet the goals of BORA remedies. Reducing a sentence to reflect delay in bringing charges to

\textsuperscript{259} Amsterdam supra note 224 at 537
trial can be an appropriate and effective means of vindicating the breach of the speedy trial right and remedying the expressive harm that breach has caused to the defendant and the justice system.

**A. Objections to sentence reductions as a remedy**

The use of sentence reductions as a remedy for Charter breaches generally has been a controversial issue in Canada. There has been debate among the Canadian courts as to the availability and appropriateness of sentence reductions, and the position is by no means settled. A similar debate has been outlined by Professor Starr in the U.S., who argues that sentence reductions should be used as a remedy for prosecutorial misconduct (including breach of the speedy trial right, where a stay is presently regarded as the mandatory remedy).

This debate reveals five main arguments that are made against the use of sentence reductions: the problems of “commodification”, “incommensurability”, and “mixed messages”, and the objections based on the need for proportionality, and the proper role of the sentencing court. Each of these arguments appears to be strong, but can be shown to be misleadingly so. A consideration of these issues gives a stronger understanding of how and when sentence reductions should be used.

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260 See the review of the issue by Oren Bick “Remedial Sentence Reduction: A Restrictive Rule for an Effective Charter Remedy” (2005-2006) 51 C. L. Q. 199
The commodification problem

The “commodification” problem is concerned that sentence reduction “send[s] the message that prosecutors can go ahead and violate defendants’ rights, so long as they are willing to pay a price.” A similar objection can be made against the use of monetary damages, as it would allow the Crown to “buy” a BORA breach. In other words, these remedies treat the defendant’s rights as commodities that can be traded in for a reduction in sentence.

While it is concerning if rights are treated as commodities, this argument overstates the problem. If rights breaches are to be remedied, some level of commodification is inevitable. This argument suggests that the only options in the delay context would be a very strong remedy (staying proceedings in any and every case where rights are breached), or no remedy at all (giving no remedy for the breach of rights, to prevent assigning a ‘value’ to it). As Starr points out, our legal system “embraces money damages as a compensatory remedy for non-monetary injuries”, and there is no reason why the position should be different for breach of the speedy trial right. The better lesson to be taken from the commodification concern is that the remedy of sentence reduction (and equally monetary damages) should only be granted in cases where it is an

262 Starr supra note 114 at 1539
263 Rishworth et al. supra note 6 at 739
264 In some circumstances an appropriate remedy would be a specific order regarding the conduct of the trial. For example, in the situation of a breach of the right to natural justice, monetary compensation is not usually an appropriate remedy, rather, the decision should be quashed and an order made for a rehearing or reconsideration. Rishworth et al. ibid. at 817
265 Starr supra note 114 at 1540
appropriate and proportional response to the breach, and should not be used to avoid a stronger remedy, where that stronger remedy is appropriate.

In any event, it is unlikely that the use of sentence reductions or monetary damages would lead to a commodification of rights in New Zealand. Decisions regarding when a particular file goes to trial is not made by one actor or agency, who could be seen to ‘trade’ in rights. The courts (and the Ministry of Justice) determine the number of trials that can proceed at any given time (through the number of courts that are resourced etc.), and the Crown assists with determining which trials occur when. Neither agency could be seen to be weighing the timing of a particular trial against the loss of a benefit, because the level of sentence cannot be seen as a benefit to either the Crown or the Court. Given this philosophy, it is unlikely that New Zealand prosecutors would be lead to ‘trade’ the likely sentence in a case for more time to prepare for trial. Even if the Crown were solely responsible for making decisions that determine the length of time it took for cases to reach trial, the risk that New Zealand prosecutors would be lead into making decisions that commodify defendants’ rights is low. Unlike the US jurisdictions considered by Starr, the Crown in New Zealand has no ‘interest’ in the ultimate sentence, and prosecutors performance is not measured on the level of sentences imposed in their files.\(^\text{266}\) The New Zealand courts have repeatedly emphasised that it is not the role of Crown Prosecutors to strive for a result, or to act in an adversarial manner.\(^\text{267}\)

\(\text{\textsuperscript{266}}\) Compare Starr supra note 114 at 1526-1527 expressing the view that prosecutors seek to “maximize sentence years”, win high sentences, and gain career advancement through sentence length (as “sentence length” is said to be a “core performance measure” for prosecutors). The New Zealand Solicitor-General’s Prosecution Guidelines (1992) state that: “Counsel for the prosecution should not press for a particular term or level of sentence. It is the Crown’s duty to assist the sentencing Court to avoid errors of principle or
In addition, the expressive value of a sentence reduction (discussed in more detail below), is likely to act as a strong deterrent to both prosecutors and the courts to treat the defendant’s rights as a commodity.

**The incommensurability problem**

This argument points out the difficulties inherent in quantifying the harm of undue delay into units of sentence reduction. However, this problem is not unfamiliar to the court system, and when dealing with damages for any kind of breach (whether civil or constitutional), the courts are asked to translate harm into monetary units. Each day criminal sentencing courts translate units of harm to a victim and units of culpability of an offender into years of sentence. The fact that this is a difficult task for which there is no mathematical formula should not prevent the courts from granting a remedy.

In effect, “liberty is the currency of the criminal law”, and so the incommensurability problem should not prevent the use of sentence reductions. It might be argued that breach of the speedy trial right is actually more commensurable with sentencing than most breaches, because both deal with units of liberty. However, as is argued above, the speedy trial right does more than protect the liberty interest, and a direct equation of time.

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268 Starr supra note 114 at 1541
awaiting trial with a sentence reduction must be guarded against. First, because it would only recognise the effect on the liberty interest, and would not take account of the potential effect on individual security, the integrity of the justice system, and fair trial rights (where appropriate). This reveals a risk of under-correction. Second, in cases where the offender has been in pre-sentence detention, this time is deducted from the total time served in any event through the operation of the Parole Act 2002. This circumstance reveals a risk of over-correction.

At most, the incommensurability concern shows that it is not an easy exercise for a court to set the appropriate level of remedy, and that any remedy will be imperfectly corrective. This is nothing new to the justice system, and this of itself is not a reason to deny the use of this remedy. Again, the real message to be taken from this problem is that when they use sentence reductions as a remedy, courts must ensure that they are using them in an appropriate way, and in a way that is as proportional to the rights breach as possible.

**The mixed messages problem**

Another concern with the use of sentence reductions that has been expressed in Canada is the “potential for mixed messages in the real world in which courts must operate.” It is said that “[i]t is too much to expect judges, at the same time, to sentence a guilty offender to the punishment and treatment most appropriate to his or her character, and

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also to reduce the sentence because the accused, as an abstractly considered rights bearer, has suffered a *Charter* violation.”

This “mixed messages” objection reveals a simplistic conception of the sentencing process. As Starr points out, “Court decisions routinely encompass more than one message, and there is no reason the messages need get mixed”.

The way in which sentencing courts balance messages may be more evident in New Zealand than it is in Canada, and this may explain New Zealand’s comparative readiness to adopt sentence reductions. In New Zealand the sentencing practice usually requires a specifically articulated starting point for the circumstances relating to the *offending*, followed by a specified adjustment for circumstances particular to the individual *offender*. In following this practice, the court postulates a level of sentence appropriate to the offending (thus sending a message about the seriousness of this particular offending), and then can reduce it to take account of such factors as a guilty plea (sending a message about the value of remorse, accountability and saving court resources), or the court can increase a sentence to take account of the need for deterrence (thus sending a message about reoffending to this offender, and about offending to the wider community).

By contrast, in Canada the sentencing practice is less explicit. Sentencing is more often conducted on the basis of a ‘joint submission’ between the Crown and the defence, and

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270 Roach, Strategy and Structure supra note 187 at 262-63
271 Starr supra note 114 at 1543
273 Sometimes a sentence can increase to reflect the circumstances of the offender, for instance if he or she has previous relevant convictions.
even where the level of sentence is contested, the explicit starting point approach is not followed. Nevertheless, more than one message is clearly being balanced – it is just not articulated in as much detail as it is in New Zealand.

Once it is accepted that a sentencing court is able to balance competing demands, the “mixed messages” problem should not be a barrier to the use of sentence reductions as a remedy. The substantive concern should not be whether messages will get mixed, but whether there is a problematic effect on the need for the end sentence to be proportionate to the offending.

**Proportionality**

The crux of the proportionality concern is that a final sentence is not proportionate to culpability this may “compromise the public’s interest in having the offender sentenced on the basis of his or her culpability” and this in turn may impact on “the complainant’s claims to equal protection of the law and security of the person”.

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274 A “starting-point approach” to sentencing has been followed in some provinces in Canada (see e.g. *R. v. Sandercock* (1985), 22 C.C.C. (3d.) 79, 48 C.R. (3d) 154 (Alta. C.A.): “This, then, is the starting-point approach: first, a categorization of a crime into ”typical cases”; second, a starting sentence for each typical case; third, the refinement of the sentence to the very specific circumstances of the actual case.” (at para 7), and contrast *R. v. Glassford* (1988), 42 C.C.C. (3d) 259 (Ont. C.A.) “each case must be decided on its own facts”), but its use is controversial (see *R. v. McDonnell* (1997), 6 C.R. (5th) 231 (S.C.C.) and Manson *et al.* supra note 181 at 76-96), and it is not equivalent to the New Zealand approach.

275 Roach, *Constitutional Remedies* supra note 102 at 9.990

In *R. v. Carpenter* the defendant had experienced a breach of the right to counsel and was also searched in breach of the *Charter*. The British Columbia Court of Appeal rejected the sentencing reduction remedy because of its potential effect on proportionality:

[n]o mention is made [in the Criminal Code] of providing a remedy for illegal or tortuous conduct by law enforcement authorities or providing reparations for Charter breaches. Further, s. 718.1 states that a sentence "must" be proportionate to the gravity of the offence and the degree of responsibility of the offender. Section 718.2 states that in imposing a sentence, a court must take into consideration inter alia, the principles (a) that "a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender"; and (b) that "a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances". It is difficult to determine how a court could grant a reduction in sentence to "signify" its disapproval of, for example, police conduct occurring after the commission of the offence, and at the same time remain faithful to these principles.

This concern about the impact of sentence reductions on the need for proportionality has lead some Canadian jurisdictions to restrict the use of sentence reductions for Charter breaches to circumstances where the breach has caused some punishment or hardship to the offender. In that circumstance, the interests of proportionality are not affected, as the hardship the defendant has been subjected to by the Charter breach lessens the level of additional punishment required in order for the overall punishment to be proportional to her culpability. In the delay context it can be said that lengthy delay can “mitigate” the


278 *Carpenter* supra note 269 at para 26

279 Sentence reductions are generally only regarded as a permissible remedy for Charter breaches where the breach “mitigates the seriousness of the offence, or imposes some form of punishment on the individual that should be factored in calculating the sentence”: *R. v. Nasogaluak* [2007] A.J. No. 1217, 2007 ABCA 339, 53 C.R. (6th) 115, 95 C.R.R. (2d) 158, 54 W.C.B. (2d) 293 (British Columbia Court of Appeal) at para 38, following Ontario Court of Appeal in *R. v. Glykis* [1995] O.J. No. 2212, 100 C.C.C. (3d) 97 (Ontario Court of Appeal). Leave granted to the Supreme Court of Canada, appeal heard and reserved 20 May 2009: *R. v. Nasogaluak* [2008] S.C.C.A. No. 13. The punishment or hardship reasoning is strongly argued for by Bick supra note 260 as the “most theoretically sound iteration of the law” that accords best with the requirements of the corrective purpose of the Charter, and the proportionality requirements of the Criminal Code (at 202). He argues that restricting sentence reductions to cases where the breach imposes punishment or hardship best meets the needs of “qualitative proportionality”, as there is then “some connection between the deleterious effect of the breach and the ameliorative effect of the remedy” (at 219-220).
need for punishment of the offender, as “a deliberate or unnecessary expansion of the period during which [the burdens, stress and loss of liberty] operate is akin to added punishment”. However, given the Rahey precedent, sentence reductions are not an accepted remedy for delay in Canada, even though this would accord with the approach to Charter breach sentence reductions more generally.

Delay, regardless of its cause, could be said to be a mitigating factor in sentencing. The relevance of delay as a mitigating factor where it does not constitute a Charter breach has been accepted by a number of Canadian courts. This can be said to be akin to the way in which collateral consequences of offending (such as a long term injury or loss of employment) are sometimes regarded as mitigating.

This approach however requires that sentence reductions should only be used where the rights breach causes punishment or hardship, and therefore significantly narrows the circumstances in which it could be used as a remedy. This approach would limit the use of sentence reductions to cases where there is actual prejudice to the defendant by the rights breach, and would prevent its use in cases where a remedy is required to respond to harm caused to the integrity of the justice system.

280 Manson et al. supra note 181 at 127
281 In Canada, s.718.2 permits for adjustments for “aggravating and mitigating circumstances relating to the offence or the offender”. In New Zealand, s.9 of the Sentencing Act 2002 lists aggravating and mitigating factors that the court must take into account “to the extent that they are applicable in the case”.
282 Discussed supra at 40 et seq.
283 In Canada see Manson et al. supra note 181 at 123-124, and in New Zealand see Halls’ Sentencing supra note 229 at I.6.9.
The use of sentence reductions need not be restricted in this manner, at least not in New Zealand. The need for proportionality is not absolute, and it is arguably less so in New Zealand than in Canada. The Canadian Criminal Code provides that sentences “must” be proportionate to the gravity of the offence and the degree of responsibility of the offender (s.718.1). By contrast, in New Zealand although proportionality is a key consideration – the sentencing court “must take into account the gravity of the offending in the particular case, including the degree of culpability of the offender” – there is no requirement that the end sentence be exactly proportionate to the offending.

In any event, even in Canada, to reduce a sentence as a remedy for a rights breach does not fundamentally differ from established sentencing practice. Proportionality is never an exact science, and nor can it be (given the incommensurability of offending to sentence). Sentencing courts in both New Zealand and Canada allow for mitigating and aggravating circumstances that adjust the end sentence, for reasons not directly tied to the offender’s culpability. A common example is the reduction of sentences where an offender has pleaded guilty – a practice that is justified on notions of the importance of remorse, accountability and savings to public resources, and not on any effect on the offender’s actual culpability. Sentences are also routinely reduced to recognise an offender’s

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284 This was the provision that affected the result in R. v. Carpenter (supra note 269). A provision of this type is a strong barrier in Canada as Canadian courts are careful not to exceed their role when granting constitutional remedies: “[r]egard for the limits of the judicial role and the appropriate roles of legislatures is an important social interest that is often considered when devising remedies”. See Roach, Constitutional Remedies supra note 102 at 3.790. The issue of whether sentence reductions “can be reconciled with existing sentencing legislation … has been the main source of controversy surrounding the permissibility of the remedy in Canada” Starr supra note 114 at 52-3. It is likely that this argument will receive some consideration by the Canadian Supreme Court in its forthcoming judgment in Nasogaluak, supra note 279.

285 Sentencing Act 2002, s8(a)

unrelated assistance to the authorities. 287 Another example is the aggravation of a sentence to reflect the need for general deterrence, 288 which by definition occurs independently of the offender’s culpability. In sum, it is not uncommon for an offender’s end sentence not to be exactly proportionate to the offender’s culpability. 289

The real value of the proportionality principle is in its operation as an important fetter, or moderator, of alterations to sentences. It restrains the court from aggravating or mitigating a sentence so much that it loses its connection to culpability. It ensures that overly harsh sentences are not imposed in the name of general deterrence, 290 and that overly large discounts are not given for mitigating factors such as guilty pleas. It does not follow from the proportionality principle (at least in New Zealand) that proportionality to culpability is the only measure of the appropriateness of a sentence, or that an interference with proportionality should be fatal to the use of sentence reductions as a remedy.

288 i.e. deterrence of potential future offenders.
289 As was pointed out in a dissenting judgment in the Newfoundland Supreme Court: In R. v. Collins [1999] N.J. No. 44, 172 Nfld. & P.E.I.R. 1, 133 C.C.C. (3d) 8, 22 C.R. (5th) 269, 41 W.C.B. (2d) 356 (Newfoundland Supreme Court) at para 167. rejected the idea that the exclusion of evidence under s24(2) of the Charter was an exclusive remedy for a Charter breach, and pointed out that “[w]hereas the severity of the sentence is often governed by the degree of culpability, the imposition of a lesser sentence does not in itself indicate a lessened culpability”.
The role of the sentencing court

The real question raised by the proportionality debate is whether the sentencing court is an appropriate venue in which to recognise breaches of the defendant’s rights. One of themes expressed in some of the Canadian decisions is the view that “it is inappropriate to view sentencing proceedings as an avenue for sending a message to the law enforcement agencies.”²⁹¹ In fact, as will be seen, the message being sent to by a sentence reduction is not solely being sent to officials, but it is an expressive message sent to society as a whole. In any event, the idea behind this argument is that sentencing is a bilateral relationship between the defendant and the state, and thus breaches of the defendant’s right by others along the way are not relevant in this forum. It is argued that the issue of rights breaches is better left out of the criminal justice process, and can be dealt with in the civil courts.²⁹² This type of argument has also been described as the “separation thesis” – the view that the violation of rights is a separate matter from the criminal trial.²⁹³

The “separation thesis” takes a very narrow view of the purpose of a sentencing court as concerned only with the offender’s culpability, and as a one-way process focussed solely on calling the defendant to account. It does not acknowledge the criminal justice process as a whole. However, the sentencing court has long been used as a vehicle to communicate a range of messages. The fact that sentences are altered for other purposes,

²⁹¹ R. v. Glykis supra note 279 at para 21
²⁹² I am indebted to the members of the Constitutional Branch of the Ontario Ministry of the Attorney-General’s Office for their discussion of these issues with me in a seminar in their offices in Toronto on 12 May 2009.
²⁹³ Ashworth, Exploring the Integrity Principle supra note 144 at 112-115
as has been outlined, is not an improper use of the sentencing discretion. In fact, as
discussed above, Canadian courts do reduce sentences to take account of delay. At
common law, courts reduced sentences to show disapproval of police impropriety,\textsuperscript{294} and
there is no reason in principle why this should not be extended to constitutional
violations.\textsuperscript{295} As Professor Manson argues, “[t]he accused’s blameworthiness usually
occupies the sentencing judge’s message but this is only part of the larger message about
community norms and values.”\textsuperscript{296}

If a defendant’s sentence can be increased as part of a larger message about community
values (through the deterrence principle), it is incongruous that there should not be the
capacity to decrease the sentence to express a message about community values (through
the recognition of a \textit{Charter} or BORA breach). The criminal trial should be regarded as
“not simply a sealed compartment, not one of a row of separate boxes that go to make up
the criminal process”.\textsuperscript{297} Rather, the trial is “centrepiece” of the criminal trial\textsuperscript{298} and the
process of calling the accused to account “is properly a two-way process: if we are to call
you to account for your conduct, we must also be ready to answer to you for relevant
aspects of our conduct.”\textsuperscript{299}

\begin{footnotesize}
\begin{enumerate}
\item Ruby \textit{ibid.} at 271
\item Manson \textit{et al.} supra note 181
\item Ashworth Exploring the Integrity Principle supra note 144 at 113
\item \textit{Ibid.}
\item Duff \textit{et al.} supra note 100 at 96
\end{enumerate}
\end{footnotesize}
If the integrity of the system is to be protected, and the condemnatory value of verdicts are to be maintained, then the process of calling the defendant to answer, and calling to account (if found guilty), must be done in a manner that accords with the integrity of that system and the rights espoused by it. Thus, the conduct of the prosecution (and other state officials) must be relevant throughout the trial process. This understanding more appropriately validates the integrity of the justice system as a moral and legitimate process, worthy of respect, and worthy of obedience.

The five objections to sentence reductions reviewed in this part can now be put to one side as none of them are persuasive objections. The next step is to consider the way in which sentence reductions are an appropriate remedy because they further BORA remedial goals.

**B. Sentence reductions and BORA remedial goals**

As noted above, the New Zealand courts have shied away from substantive engagement with the theories and principles of BORA remedies. This paper does not espouse a comprehensive BORA remedial theory, but what it does do is examine the use of sentence reductions mandated by *Williams* in light of the remedial goals that are evident from other decisions. This analysis shows that the use of sentence reductions as an alternative to stays of proceedings better accords with these goals than the Canadian approach.

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300 *Ibid.* at 97
Sentence reductions better vindicate the right

One of the primary criticisms of the Canadian approach to delay remedies is the effect that this approach to remedies has had on the content of the right itself.\(^{301}\) In his dissent in Mills and Rahey La Forest J. expressed the concern that the courts would take a “hostile approach” to the right if the delay was the only remedy.\(^{302}\) The Canadian experience since then tends to support that conclusion, as the content of the right appears to have been diluted.\(^{303}\) The effect in New Zealand has been similar; as the stay remedy is “so powerful and dramatic that the perception that this is the only properly available remedy has skewed the analysis of the substantive rights that s.25(b) confers”.\(^{304}\) This is also similar to what has occurred in the U.S..\(^{305}\) This experience is part of a broader phenomenon of courts avoiding undesirable remedies, which as been described as “remedial deterrence”.\(^{306}\)

The ‘remedial deterrence’ phenomenon is also problematic because it skews the analysis of the right by allowing factors to influence the decision of whether a right is breached that are more properly considered at the remedies stage.\(^{307}\) However, it may be inevitable that there is some overlap between right and remedy considerations,

\(^{301}\) “The Supreme Court of Canada’s adoption of the stay of proceedings as the minimum remedy for a violation of s.11(b) has had obvious effects on the interpretation of that right”: Roach, Constitutional Remedies supra note 102 at 9.400.

\(^{302}\) See discussion above at Roach, Constitutional Remedies supra note 102 at 9.400

\(^{303}\) Butler and Butler supra note 4 at 825

\(^{304}\) Starr supra note 114 at 1515, referring to effect of the extreme nature of the stay remedy on the speedy trial right under the U.S. Constitution.

\(^{305}\) Starr supra note 114 at 1515-1516 citing, inter alia, Daryl J. Levinson, “Rights Essentialism and Remedial Equilibriation” (1999) 99 Colum. L.Rev. 857

\(^{307}\) Thus it “collapses the distinction between right and remedy”: Butler and Butler supra note 4 at 819, 1057.
particularly where a right is defined in a flexible way (by reference to a standard such as “undue” or “reasonable”). The Canadian and New Zealand approaches are in many ways more similar than they appear. For instance, in a case where the defendant’s fair trial rights are fundamentally affected, or where the delay is extreme, a stay of proceedings will be granted, and where the delay is less serious, the end sentence will be reduced to reflect that. The Canadian mitigation approach (Bosley described above), means that a sentence reduction is effectively granted, but a fiction is maintained that the right has not been violated, so as to avoid the automatic stay mandated by Rahey. The New Zealand approach is preferable because it is more intellectually honest, and recognises the breach of a right, thus it is a better remedy in expressive terms because the right is reaffirmed as important in society. The Canadian approach puts the right in a subordinate position, and only permits recognition in some cases. The New Zealand approach will recognise the impact that delay can have on the integrity of the justice system, but the Canadian approach will not: it will only mitigate a sentence where the delay has prejudiced the defendant. If a system is to truly recognise the speedy trial right as a right, then when the interests underlying it are interfered with, the courts should recognise this as a breach of a right that requires a remedy. This is preferable to only recognising a factor that may be taken into account as part of a discretionary sentencing exercise in limited circumstances. Finally, and importantly, the Canadian approach leaves little room for vindication of the right in a case where the defendant is acquitted after a speedy trial right.308

308 As the defendant will only receive a remedy if the delay causes actual prejudice, or is extreme enough that prejudice is ‘inferred’.
Sentence reductions are an ideal remedy for expressive harm, because they are announced by the court in a public manner,\textsuperscript{309} and because they are not merely declaratory, there is also some force (and practical effect) behind the condemnation. This is necessary because “expressive remedies are …usually ineffective if they are merely expressive”.\textsuperscript{310} Like minimal compensation to landowners who have their land confiscated, even a small sentence reduction can be effective to remedy expressive harm. It ensures that the condemnation is taken seriously, and is not mere rhetoric. Importantly, this expressive harm can be remedied without compromising the goals of proportionality, and corrective and regulatory justice.

**Sentence reductions are a proportionate remedy**

In some circumstances the drastic nature of a stay is appropriate: “Stays remain the best and most decisive means by which a court can wash its hands of an abuse and send a loud and clear message that it will not condone or be tainted by such unacceptable behaviour”.\textsuperscript{311} However, depending on the nature and extent of the breach, such a loud and clear message may not be the proportional response.

One of the key values of sentence reductions that they are “less of a blunt instrument”\textsuperscript{312} than stays of proceedings, and also because “the court could tailor the reduction's

\textsuperscript{309} The sentencing of an offender must be in open Court and no part of the process can take place in Chambers: \textit{R. v. X. (an accused)} \[1987\] 2 N.Z.L.R. 240; \(1987\) 2 C.R.N.Z. 520 (C.A.); \textit{Lewis v. Wilson & Horton Ltd.} \[2000\] 3 N.Z.L.R. 546; \(2000\) 18 C.R.N.Z. 55; 6 H.R.N.Z. 1 (C.A.), at 566; 76; 23.

\textsuperscript{310} Starr supra note 114 at 1536 (emphasis original)

\textsuperscript{311} Roach, \textit{The Evolving Test} supra note 234 at 435

\textsuperscript{312} Starr supra note 114 at 1539
magnitude to the seriousness of the misconduct, the remedy need not be perceived as a disproportionate judicial response”.  

Sentence reductions can thus be a more proportional remedy, and more appropriately corrective.

**Sentence reductions further corrective goals**

Stays of proceedings sometimes reflect corrective remedial philosophies, but whether they are effective in this regard this will depend on the nature of the breach. If the relevant breach is directly associated with bringing the defendant to trial, such as rights breaches in the course of extraditing a defendant, then a stay can properly be regarded as corrective. Where a breach of the speedy trial right impacts on a defendant’s ability to defend herself, a stay can also be corrective. However, where the breach is of a different nature, or does not impact on the conduct of the trial itself, a stay of proceedings can “over-correct” (or provide the defendant with a “windfall”), as it would put the defendant in a better position than she was in prior to the impropriety. This approach also has a tendency to lead to “under-correction” because cases of lesser interference with the

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313 Starr supra note 114 at 1521
314 As argued by Roach, *Constitutional Remedies* supra note 102 at 3.460.
315 See for example *R. v. Hartley* [1978] 2 N.Z.L.R. 199 (C.A.) where charges were stayed as against a defendant who had been placed on a flight from Australia to New Zealand to face charges, rather than following proper extradition procedures. See discussion in Choo supra note 233 at 113-123
316 “These corrective and expressive objectives risk being undermined by excessive remedies (windfalls), not just by insufficient ones. Strong remedies like reversal, mistrial, or dismissal may thus sometimes be counterproductive responses. …The harm of windfalls is easy to understand in corrective terms: they overcorrect and thus restore the defendant not to his rightful position, but to a superior position. If restoration of the status quo ante is the moral ideal, overcorrection is as problematic as undercorrection.”: Starr supra note 114 1537.
relevant interests will receive no remedy. Both under-correction and overcorrection are problematic under corrective justice,\textsuperscript{317} and proportionality is again compromised.

Sentence reductions as an expressive remedy help meet corrective remedial goals, because they avoid the problem of “all or nothing” stays over- or under-correcting. Further, the level of reduction can be tailored to the harm caused to the defendant through the breach. Because corrective theory is bi-polar in orientation (as between the defendant and the state), it does not take into account the effect of delay on the integrity of the justice system. This is a further reason why the expressive element of the remedy is so valuable: it recognises the wider effects of breach of the right.

**Sentence reductions further deterrent goals**

The deterrence rationale can be used to justify stays of proceedings. Even if they are not intended to, stays have a strongly disciplinary effect on the system. The court system will seek to provide the resources to hear cases in an expedient manner if there is a risk that “guilty people will walk free” because of delay. In this sense, stays can be “a form of discipline for the justice system which cause discomfort in the short term but brings achievement in the long term”.\textsuperscript{318} For example, even though it was not intended to, the Canadian *Askov* decision had a strongly disciplinary effect on the system. In the wake of *Askov*, $39 million was spent by the provincial government on further court and

\textsuperscript{317} Ibid.
\textsuperscript{318} Code supra note 44 at 133-134
prosecution resources,\textsuperscript{319} and $C314 million was committed to building court facilities.\textsuperscript{320} This may be said to be effective as after Askov, the number of charges disposed of in Ontario courts actually increased.\textsuperscript{321}

Stays of proceedings can also have a tendency to over- and under-deter. A stay will over-deter where the value of the deterrence generated is outweighed by reasons in favour of prosecution\textsuperscript{322} (such as where they are ordered in cases where there is no official or system that is at fault for causing the delay). Because stays are granted only in ‘extreme’ cases, their rarity can undermine the effect of the deterrence, and so stays can also under-deter.\textsuperscript{323} This approach “does not do justice to the importance of the right and hardly encourages public authorities to take the expeditious processing of cases prior to trial seriously”.\textsuperscript{324}

Empirical studies on deterrence show that the probability of a sanction being imposed is a more effective deterrent than the severity of the sanction when it is imposed.\textsuperscript{325} By taking a middle ground, and being available in more cases, sentence reductions are more likely to be an effective deterrent.\textsuperscript{326}

\begin{footnotesize}
\textsuperscript{319} Code \textit{ibid}. at 114-116.
\textsuperscript{320} Roach \textit{Due Process and Victims’ Rights} supra note 148 at 93
\textsuperscript{321} \textit{Ibid}.
\textsuperscript{322} Duff \textit{et al}. supra note 100 at 229
\textsuperscript{323} If the only remedy granted for breach of this right is a stay of proceedings in very rare cases, then “this does not do justice to the importance of the right and hardly encourages public authorities to take the expeditious processing of cases prior to trial seriously”: Jackson and Johnstone supra note 209 at 23.
\textsuperscript{324} Jackson and Johnstone \textit{ibid}. at 23
\textsuperscript{325} See Starr supra note 114 at 1522
\textsuperscript{326} “A better approach is to allow courts the option of sentence reduction … in cases in which a fair trial is still possible, notwithstanding the delay. Because courts would be more willing to invoke it, sentence reduction would be a more effective deterrent.”: Starr supra note 114 at 1549.
\end{footnotesize}
Starr argues that sentence reductions can deter prosecutors from misconduct instrumentally (because it represents a loss to them that they will seek to avoid), and also more subtly through the “professional embarrassment” and dismay caused when a sentence is reduced.\(^{327}\) In the context of delay in New Zealand, this is likely to be of limited effect, both because a sentence reduction would not properly constitute a ‘loss’ to a prosecutor (as prosecutors have no interest in the sentence, as argued above), and also because prosecutors (particularly individual prosecutors) can seldom materially influence the speed with which a case is heard. It would not be effective or appropriate to aim to visit “professional embarrassment” on an individual prosecutor who could not have prevented the delay that had been caused.

The best place for deterrence in the delay context is exactly where the Supreme Court places it: where a “sanction is required against a prosecutor who does not proceed promptly to trial after being directed by a Court to do so.”\(^{328}\) The reasons why the prosecutor failed to proceed promptly to trial would need to be carefully examined, but there is certainly utility in exercising the deterrent rationale in cases of bad faith.

**Conclusion: Meeting the goals of BORA remedies**

By allowing for sentence reductions as an alternative, intermediate remedy, the courts enable a remedies practice that better fits with the corrective, regulatory and vindicatory

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\(^{327}\) Starr *ibid.* at 1532

\(^{328}\) Williams *supra* note 22 at [18], despite the fact that the comment of Richardson J in Martin, that a stay should not be used to punish: Martin *supra* note 19 at 426.
purposes of BORA remedies. Thus, the New Zealand Supreme Court was right to endorse sentence reductions as a remedy for breach of the speedy trial right. For this conclusion to be better understood, and effectively applied in future cases, the key is to relate the appropriate remedy to the various interests served by the right and to recognize the overriding importance of the proportionality principle in crafting the appropriate remedy.

Part 6: Conclusion

The New Zealand courts have embraced the Supreme Court of Canada’s approach to the speedy trial right, and continue to rely on the Morin factors to guide its decision making. However, when it comes to the question of remedies, the New Zealand approach of allowing for alternative remedies such as sentence reductions is directly in conflict with that in Canada, where a stay is the minimum remedy.

Three key conclusions can be drawn from the remedial debate considered in this paper. First, this paper has shown that a stay is not the minimum remedy, and thus why the New Zealand approach is correct. The “continuing breach” argument in Canada is maintained by an insufficient examination of the interests the right protects. The right does protect the truth-seeking goals of the criminal justice system and against the instrumental effects on defendants’ liberty and security. A stay will be appropriate where a fair trial is not possible, because the trial would breach the fair trial right, rather than because it causes

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329 See Fincham supra note 88.
delay of itself. A stay is unlikely to be required for interference with liberty or security interests, as in most cases these issues can be dealt with by other means. The courts in both countries instinctively recognise that there is something more at play as they will ‘infer’ prejudice in some cases of lengthy delay. A better analysis is that what the courts recognise in these cases is that the speedy trial right also protects the integrity of the justice system as a communicative and participative process. In a case of extreme delay, it would be contrary to the integrity of the justice system to hold a trial, but in many other cases the expressive harm can be remedied through a lesser remedy, such as a sentence reduction.

The second conclusion is that there can be pitfalls of New Zealand courts failing to consider arguments of other jurisdictions, and also problems with too readily accepting the approach of other jurisdictions. By relying on dicta from the Privy Council, and not confronting the arguments made to the contrary in Canada, the New Zealand Supreme Court missed the opportunity to thoroughly explain why a stay is not a required remedy for breach of the speedy trial right. While it might be thought unnecessary for the New Zealand Supreme Court to consider these arguments, as it reached the right conclusion, the fact that the arguments were not considered means that the interests protected by the right were not thoroughly examined, so the actual decision gives limited guidance to future courts applying it. The failure to consider the arguments that have been made against the use of sentence reductions in the U.S. and Canada similarly undermines the principled application of sentence reductions in the future.
The third conclusion that can be made is that the New Zealand approach to BORA remedies remains “strong on rhetoric, weak on theory”.\textsuperscript{330} The \textit{Williams} case presented the first opportunity for an appellate court to decide the issue of whether a stay is a minimum remedy for breach of the speedy trial right, and the first opportunity to consider the issues surrounding the use of sentence reductions for breach of BORA rights. The Supreme Court reached its decision with little consideration of either the objections that may be made to the approach, or discussion of the principles involved. The Court has missed out on the opportunity to provide guidance to courts about how the various remedies can serve the various purposes of the right and relate to the proportionality principle. This paper has identified the key principles that guide the grant of constitutional remedies in New Zealand, and illustrates how the use of sentence reductions as a remedy for breach of the speedy trial right can further each of these aims. It has also suggested that the strong remedy of a stay should generally be reserved for speedy trial violations that cause irreparable prejudice to the defendant’s interest in a fair trial,

\textsuperscript{330} Butler and Butler supra note 4 at 970
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