Waiting for justice: R v Jordan and the new framework for delay

This article is written by a law student for the general public.

What does it mean to be tried in a reasonable time? In *R v Jordan,* a majority of the Supreme Court of Canada answered this question with a new framework for deciding which delays to trial are reasonable and which are not.

Jordan was a case involving a man charged with 14 drug offences who waited over four years for his trial.[1] The Supreme Court unanimously agreed that Mr. Jordan's charges should be dismissed, with the majority introducing new timelines for determining what is unreasonable delay.

The new framework introduces time limits by which criminal trials should be complete or have an expected date of completion: 18 months for trials in provincial court or 30 months for trials in superior courts.[2]

Why do we need limits on delay?

The need for a speedy trial stems from section 11(b) of the *Canadian Charter of Rights and Freedoms*, which protects the right of a person charged with an offence to be tried within a reasonable time.[3] Although some delay is inevitable in the trial process, lengthy delays can offend an accused's section 11(b) *Charter* right and have effects on more than just the accused

What effects do long delays have on society?

Unreasonable delay affects justice for the accused, victims and their families, and the general public.[4] For the accused, waiting a long time for a trial causes stress, and can lead to feelings of contempt and frustration with the justice system, especially if the person is incarcerated while waiting for his or her trial.[5] Victims and their families are affected by delay because of aggravated suffering, which can prevent them from moving on with their lives.[6] Delayed trials also force victims and witnesses to interrupt their lives repeatedly to attend court dates and to lengthen their period of worry and frustration before giving their testimony.[7]

The *Jordan* decision is a significant change to assessing delay

The Supreme Court previously decided how to assess "reasonable" delay in their *Askov* and *Morin* decisions,[8] which offered a contextual approach to assessing whether the delay to trial was too long. This contextual approach assessed several factors including time of delay

and prejudice or negative effects on the accused because of the delay.

The shift in the 2016 *Jordan* decision seeks to address the "culture of complacency" that has characterized the criminal justice system in Canada.[9] This "culture" refers to the unnecessary trial procedures, inefficient practices, and lack of institutional resources (such as low numbers of prosecutors, judges, and court clerks) which are accepted as normal.[10] These factors not only contribute to delay, but they also cause harm to the public's confidence in the justice system.[11]

In the majority's view, the previous court decisions did not address this culture because the assessment of delay only happened after the fact, resulting in "finger-pointing" instead of problem solving.[12]

The new approach stresses that the onus to avoid delay is on *all* parties: the courts, the prosecutors, and the defence lawyers.[13] Extensive delays are a reason why change is necessary – the Court explains in *R v Cody* that waiting five *years* for a five-*day* trial is a result of the Crown, the defence, and the system all contributing to an unreasonable amount of delay.[14]

What is the remedy for unreasonable delay?

If the court finds the delay is unreasonable, the remedy is a judicial stay of proceedings. A stay means that the accused faces no further prosecution or any outcomes resulting from the charges. The practical effect of a stay is similar to that of an acquittal because the charge does not appear on the accused's criminal record.[15] A stay is currently the only remedy for a finding of unreasonable delay.

The new timelines for delay

The "clock" for calculating delays starts when the accused is charged with a criminal offence. From that point, the trial must be complete within the set time limits: 18 or 30 months, depending on the level of court in which the trial is being held.

Three types of delay count towards the total length:

1. Crown delays (for example, delays with providing disclosure to the defence)[16];
2. Institutional delay (i.e. the time the court needs to be ready to hear the case[17] – usually 8 to 10 months at provincial court or 6 to 8 months at superior court following the accused's committal for trial.[18]); and,
3. The inherent time needed for trial (i.e. the necessary length of time needed to run the type of trial. For example, a double-murder trial will take longer than a simple drug possession trial).

How trial time is estimated varies by jurisdiction, but the time needed is usually agreed upon by Crown and defence. Any delays the defence caused or agreed to are not counted in the total delay-- meaning the defence cannot cause the delay and then rely on that length of delay to strategically surpass the *Jordan* timelines.[19]

What happens to delays over the time limit?

Typically, delays over the time limit will result in the charges being stayed. With delays over the time limit (over 18 or 30 months), the court will assume that the delay is unreasonable.[20] However, the Crown can still try to establish that the delay is reasonable because of exceptional circumstances or unexpected complexity.[21]

Exceptional circumstances must arise from a specific event that is unforeseen or unavoidable. For example, a medical illness or family emergency of the accused, an important witness, the trial judge, or counsel would delay a trial.[22]

The Crown may be able to establish that the case in question is unexpectedly complex and needs more time than previously thought.[23] This can include cases that involve several pre-trial applications, multiple charges, requirements for expert evidence, or the coordination of many witnesses.[24] In *R v Cody*, the Court confirmed that a large amount of disclosure alone is not sufficient to qualify for unexpected complexity.[25]

What happens to delays *under* the time limit?

Even if the time it takes to get to trial is less than the prescribed time limit (under 18 or 30 months), the defence can still argue that there was unreasonable delay.[26] If the delay is found unreasonable, the charges are stayed. The Court confirmed that this will not happen very often; only in obvious or clear cases.[27]

In order to establish unreasonable delay that is under the time limits, the defence must show two things: 1) that they made a continuous effort to try and speed up the court process; and 2) that the case took longer than it reasonably should have.[28] In such circumstances, the delay must exceed the time estimated for the case by Crown and defence.

A modified framework is used for trials already in the system when *Jordan* was released

For trials or charges that were already in the justice system when *Jordan* was released, the new framework is applied in a flexible way. This flexibility combines the previous contextual approach with the new timelines.[29]

For example, the *Jordan* framework was applied in Alberta in *R v Lam,* where the charges against an accused drug dealer were stayed in October 26.[30] The time between Mr. Lam's

charge in February 2013 to the expected completion of his trial in September 2017 would have been 55 months.[31] In the decision, Justice Pentelechuk notes that these levels of delay will be a "familiar and recurring event" if Canada and the province do not provide adequate court resources and staffing.[32]

In *Cody*, the Supreme Court confirmed that, in order to qualify for a transitional exceptional circumstance, delay must have seemed reasonable under the previous *Morin* framework.[33] As well, when applying the transitional framework, delay that occurred before the *Jordan* decision is assessed using the previous framework, whereas delay occurring afterwards is assessed under the new framework.[34]

The *Cody* decision, almost one year post-*Jordan*, confirms and clarifies the new framework set out in *Jordan:* "…*Jordan* was released a year ago. Like any of this Court's precedents, it must be followed and it cannot be lightly discarded or overruled."[35]

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[1] *R v Jordan*, [2016] 1 SCR 631 at paras 11-12 .

[2] *Ibid* at para 49.

[3] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 11(b) .

[4] *Jordan, supra* note 1 at paras 45, 107.

[5] *R v Askov*, [1990] 2 SCR 1199 at 1200 .

[6] *Ibid* at para 23.

[7] *Ibid* at para 24.

[8] *Askov, supra* note 5; *R v Morin,* [1992] 1 SCR 771.

[9] *Jordan, supra* note 1 at para 40.

[10] *Ibid* at para 40.

[11] *Ibid.*

[12] *Ibid* at paras 45, 107.

[13] *Ibid* at paras 112-115.

[14] *R v Cody*, 2017 SCC 31 at para 1.

[15] *Jordan, supra* note 1 at para 46; *R v Jewitt*, [1985] 2 SCR 128 at paras 49-50.

[16] *Jordan, ibid* at para 178.

[17] *Ibid* at paras 52, 83.

[18] *Ibid*. These numbers are based on the previous *Morin* guidelines for institutional delay.

[19] *Ibid* at paras 60-63.

[20] *Ibid* at para 47.

[21] *Ibid* at paras 47, 69.

[22] *Ibid* at paras 72, 195.

[23] *Ibid* at para 69-73, 77.

[24] *Ibid* at para 77-78.

[25] *Cody, supra* note 14 at para 65.

[26] *Jordan, supra* note 1 at para 82.

[27] *Ibid* at 48.

[28] *Ibid*.

[29] *Ibid* at paras 92-95.

[30] *R v Lam*, 2016 ABQB 489.

[31] *Ibid* at para 1.

[32] *Ibid* at paras 115-116.

[33] *Cody, supra* note 14 at para 68.

[34] *Ibid* at para 71.

[35] *Ibid* at para 3.