One Year Post-Jordan: Was it really a game changer?

One year ago, the majority of the Supreme Court of Canada in *R v Jordan* set new timelines for completing criminal trials, giving new life to an accused person's right to be tried within a reasonable time.[1] The Court stated that complacency in the justice system needed to be addressed and it hoped that the new time limits would lead to significant changes.[2] Controversially, the decision has resulted in cases as serious as murder and major sexual assaults being dismissed. The risk of losing public confidence in criminal justice is forcing the entire system to scramble to find solutions to combat trial delays.[3] One year has passed since the decision. Was it *really* a game changer?

Jordan changes the test for assessing unreasonable delay

The majority of the Supreme Court in *Jordan* introduced new timelines by which criminal trials should be completed before the delay is assumed to be unreasonable: 18 months for provincial court cases and 30 months for superior court cases.[4] Unreasonable delays violate the constitutionally protected right of a person charged with an offence to be tried within a reasonable time (section 11(b) of the *Canadian Charter of Rights and Freedoms*). If a court finds that the delay for completing a trial is unreasonable, the remedy is a judicial stay of proceedings - meaning that the case gets dismissed. This is regardless of the seriousness of the offence.[5]

Cases dismissed since *Jordan*

Since the release of the *Jordan* decision, there have been over 1000 stay applications by defence lawyers across the country. However, only a small percentage of applications have resulted in a stay being granted:

- Quebec: 889 applications as of May 18, 2017. Stays granted: 61.[6]
- Ontario: 296 applications from July 26, 2016 - March 15, 2017. Stays granted: 68.[7]
- Alberta: 107 applications from October 25, 2016 – June 22, 2017. Seven stays have been granted.[8]
- Manitoba: Over 60 applications. Two stays have been granted.[9]
- Saskatchewan: Nine applications. Four stays have been granted.[10]

A study by a law professor and law student at Dalhousie University showed only a 12% increase in successful stay applications since the *Jordan* decision.[11] The study compared all of the reported decisions found on legal databases that involved section 11(b) stay applications six months before and after the *Jordan* decision.[12] The authors note that all of the successful applications would have also succeeded under the previous legal test for

unreasonable delay.[13]

According to law professor Stephen Coughlan, despite the limited increase in successful applications, defence lawyers now perceive stay applications as being worthwhile again.[14] In other words, *Jordan* has made the right to be tried within a reasonable time meaningful again.

Governments respond to *Jordan*

Likely the largest impact of the *Jordan* decision is that it has forced governments across Canada to turn their attention to combatting trial delays. In response to the decision, various provinces are increasing funding for the court system:

- The Quebec government announced that it will invest $175.2 million over the next four years to recruit more judges, prosecutors, and support staff as well as to add new courtrooms.[15]
- Ontario plans to invest $25 million to hire 13 judges, 32 Crown attorneys, and 16 legal aid lawyers, and 26 court staff.[16]
- Alberta announced that it will invest $14.5 million to hire 50 Crown prosecutors and 30 support staff.[17]

Since the *Jordan* decision, the federal government has announced 80 new judicial appointments across Canada.[18] They also made changes to the 2017 federal budget to include additional funding for the appointment of 28 judges across the country: $55 million over five years, and $15.5 million per year afterwards.[19]

In April 2017, the federal Justice Minister had an "emergency meeting" with a number of her provincial and territorial counterparts to discuss ways to deal with delays.[20]

The Justice Ministers identified certain areas as priorities for reform, such as the bail system and mandatory minimum penalties.[21] While bail itself does not cause delays to trial, conducting bail hearings and managing the increasing number of people held in pre-trial detention requires a significant number of resources that are already limited.[22] Mandatory minimum penalties contribute to delays because they affect the ability of Crown prosecutors to offer lighter sentence recommendations to an accused person for pleading guilty and often lead to pointless "nothing-to-lose" trials.[23]

The Justice Ministers are meeting again in early September to consider what changes can be made to existing laws or what new laws can be introduced to address the problems they identified.

Unique provincial approaches to deal with delays

Several provinces have developed unique approaches for responding to delays in the trial process. The approaches signal a recognition that there are a host of problems in the criminal justice system that contribute to trial delay.

As an example of unique provincial approaches, part of **Ontario's** plan to speed up the resolution of criminal cases is to improve the bail system by making it faster and more effective.[24] One initiative is providing greater access to duty counsel - defence lawyers who provide legal information and assistance to accused persons who do not have a lawyer.[25] In addition, Ontario plans to modernize the bail policies and procedures of Crown prosecutors, as well as to hire Crown attorneys to take on active roles in the bail process.[26] Ontario is also providing programs for greater bail supervision and support for low-risk vulnerable groups such as the mentally ill, homeless, and Indigenous people so that they can be safely released into the community.[27]

In the prairies, **Alberta** has implemented a triage protocol - named after the medical practice of prioritizing patient treatment based on the severity of their condition.[28] Applied to criminal law, the triage approach provides Crown prosecutors with a standardized method for assessing files to determine which files will be prosecuted and how.[29] The goal is to prioritize resources for the most serious and violent crimes.

The resources dedicated to each case are determined by factors such as the seriousness of the crime and the likelihood of conviction.[30] Cases that are unlikely to result in a conviction are dropped. The protocol also offers the Crown prosecutors guidelines on how to efficiently manage cases and how to encourage early resolution of cases.[31]

Meanwhile, in **Nova Scotia**, a working group of lawyers and judges developed a simple one-page form for Crown prosecutors to use for less complicated offences such as minor property offences to encourage early case resolution.[32] The form allows the Crown prosecutor to clearly outline what they recommend as a sentence. The lighter sentence outlined in the form has an expiry date, which provides an incentive for accused persons to plead guilty early on.[33] This approach is currently being tested in Halifax and Dartmouth, Nova Scotia.[34]

The future of *Jordan*

If there was ever any doubt about the Supreme Court of Canada's resolve to protect the right to be tried within a reasonable time, it was dispelled when it unanimously reaffirmed the *Jordan* framework in *R v Cody* on June 16, 2017.[35] The Court was clear that the *Jordan* framework must be followed and that it will not be "lightly discarded or overruled."[36]

The *Jordan* decision made it apparent that the criminal justice system requires major reform. Undeniably, the decision has made an impact. It has forced the criminal justice system to address delays that had become pervasive and unacceptable for all parties involved.

One year after the decision, all signs seem to say that *Jordan* decision is indeed a game-changer. Going forward, the question remains whether all actors within the justice system will continue to work proactively to combat trial delays after the issue fades away from the public spotlight.

For more information:

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

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[1] *R v Jordan*, 2016 SCC 27 .

[2] *Ibid* at paras 4-5.

[3] Sean Fine, "Courts shaken by search for solutions to delays", *The Globe and Mail* (08 June 2017), online: <www.theglobeandmail.com/news/courts-shaken-by-search-for-solutions-todelays/article34275019/>.

[4] *Jordan*, *supra* note 1 at para 5.

[5] *Ibid* at para 81.

[6] "Man accused of killing Montrealer with a machete has charges stayed due to Jordan ruling", *CBC News* (19 May 2017), online: <www.cbc.ca/news/canada/montreal/man-accused-of-killing-montrealer-with-a-machete-has-charges-stayed-due-to-jordan-ruling-1.4124735>.

[7] Andrew Duffy, "Ontario has had 68 criminal cases stayed since Jordan: ministry", *Ottawa Citizen* (03 May 2017), online: <ottawacitizen.com/news/local-news/ontario-has-had-68-criminal-cases-stayed-since-jordan-ministry>.

[8] Alberta Justice and Solicitor General, "Jordan Applications", online: <justice.alberta.ca/programs_services/criminal_pros/Pages/Jordan_Applications.aspx>.

[9] Katie May, "Supreme Court doubles down on court delays", *Winnipeg Free Press* (16 June 2017), online: <www.winnipegfreepress.com/local/supreme-court-doubles-down-on-court-delays-429010303.html>.

[10] Andrea Hill, "Four cases dismissed due to delays following Supreme Court decision", *Saskatoon Star Phoenix* (23 June 2017), online: <thestarphoenix.com/news/local-news/four-cases-dismissed-due-to-delays-following-supreme-court-decision>.

[11] Cristin Schmitz, "Supreme Court 'got it right' on speedy trial right, law professor says", *The Lawyer's Daily* (21 April 2017), online: <www.thelawyersdaily.ca/articles/2962/supreme-court-got-it-right-on-speedy-trial-right-law-professor-says>.

[12] *Ibid*.

[13] *Ibid*.

[14] Tonda MacCharles, "Fears of widespread trial dismissals not borne out, says law professor", *The Star* (10 April 2017), online: <www.thestar.com/news/canada/2017/04/10/fears-of-widespread-trial-dismissals-not-borne-out-says-law-professor.html>.

[15] Luis Millan, "Quebec boosts spending on justice system", *The Lawyer's Daily* (12 January 2017), online: <www.thelawyersdaily.ca/articles/3497/quebec-boosts-spending-on-justice-system>.

[16] Jacques Gallant, "Ontario to tackle court delays by hiring more judges, prosecutors", *The Star* (01 December 2016), online: <www.thestar.com/news/queenspark/2016/12/01/ontario-to-tackle-court-delays-by-hiring-more-judges-prosecutors.html>.

[17] Michelle Bellefontaine, "Alberta hiring 50 new Crown prosecutors, 30 support staff to deal with court backlogs", *CBC News* (09 March 2017), online: <www.cbc.ca/news/canada/edmonton/kathleen-ganley-new-court-staff-budget-1.4017382>.

[18] Department of Justice Canada, "Judicial Appointments", online: <www.justice.gc.ca/eng/news-nouv/ja-nj.asp?action=tdetail&tid=4&year=2017>.

[19] Government of Canada, *Building a Stronger Middle Class*, 22 March 2017, at 190.

[20] Cristin Schmitz, "Justice ministers agree on post-Jordan action plan to combat trial delays", *The Lawyer's Daily*, online: <www.thelawyersdaily.ca/articles/3060/justice-ministers-agree-on-post-jordan-action-plan-to-combat-trial-delays>.

[21] Department of Justice Canada, "Minister Wilson-Raybould Issues Statement on the Cody Decision" (16 June 2017), online: <www.canada.ca/en/department-justice/news/2017/06/minister_wilson-rayboulddissuesstatementonthecodydecision.html>.

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[23] *Delaying Justice, ibid* at 53.

[24] Ministry of the Attorney General, "About Ontario's Plan for Faster, Fairer Criminal Justice" (01 December 2016), online: <news.ontario.ca/mag/en/2016/12/about-ontarios-plan-for-faster-fairer-criminal-justice.html>.

[25] *Ibid*.

[26] *Ibid*.

[27] *Ibid*.

[28] Alberta Justice and Solicitor General, "Triage" (2017), online: <justice.alberta.ca/programs_services/criminal_pros/Documents/TriageProtocol.pdf>.

[29] *Ibid*.

[30] *Ibid* at 2-4.

[31] *Ibid* at 4-6.

[32] The Criminal Justice Transformation Group, "Early Resolution Initiative of the Criminal Justice Transformation Group" (07 Feb 2017), online: <nsbs.org/early-resolution-initiative-criminal-justice-transformation-group>.

[33] Shaina Luck, "N.S. prosecutors encouraged to offer plea bargains for minor crimes as cases pile up", *CBC News* (18 February 2017), online: <www.cbc.ca/news/canada/nova-scotia/n-s-prosecutors-encouraged-to-offer-plea-bargains-for-minor-crimes-as-cases-pile-up-1.3989246>.

[34] *Ibid*.

[35] *R v Cody*, 2017 SCC 31.

[36] *Ibid* at para 3.