Justice in Troubled Times: Pandemic Disrupts the Right to be Tried Within a Reasonable Time

INTRODUCTION

On March 11, 2020, the World Health Organization declared SARS-CoV-2 (COVID-19) a pandemic. The world, and the administration of justice in Canada, changed dramatically within days.

As pertinent examples of the effects on the administration of justice: circuit courts closed; the public were excluded from court rooms; criminal and civil court matters were summarily adjourned far into the future, sometimes with warrants "held," although the accused were precluded from attending; trials were adjourned.

This list is not intended to be exhaustive but highlights the events that may cause breaches of section 11(b) of the *Charter of Rights and Freedoms*, which protects the rights of individuals to be tried within a reasonable time.

At the time of writing, this author knows of no case brought alleging delay caused in any part by the pandemic. This paper discusses the potential for such a case, and what courts and counsel may do to mitigate potential breaches of section 11(b).

PRESENT LEGAL FRAMEWORK

The administration of justice is still groaning from changes made to section 11(b) law with the release of the Supreme Court's decision in *R v Jordan*[1] and from further changes made by the same court in *R v KJM*,*[2]* and, to a lesser extent, *R v Cody*.[3]

Those keen on the administration of justice noted the fundamental shift of fault from the prior *Sharma*/*Morin* or *Morin*/*Askov* framework.[4] Formerly, any period of delay which was not caused by defence counsel, or waived by defence, was a period that worked in favour of an application that there had been a breach of section 11(b). Now, essentially, the only periods of delay which work in favour of the 11(b) application are those periods of time caused by the Crown.[5]

Perhaps fortuitously, the *Jordan* framework has a precise mechanism to deal with the pandemic as a cause of delay. Exceptional circumstances, a new concept to 11(b) law, and already applied generously in favour of State actors to the detriment of 11(b) complainants,[6] cannot be found to have caused a period of delay — provided the Crown has acted reasonably to mitigate. The majority in *Jordan* defined "exceptional circumstances" broadly and not exhaustively:

> Exceptional circumstances lie *outside the Crown's control* in the sense that (1) they are unforeseen *or* reasonably unavoidable, *and* (2) Crown counsel cannot reasonably remedy the delays emanating from those circumstances once they arise. So long as they meet this definition, they will be considered exceptional. They need not meet a further hurdle of being rare or entirely uncommon. …
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> …It is obviously impossible to identify in advance all circumstances that may qualify as "exceptional" for the purposes of adjudicating a s. 11(b) application. Ultimately, the determination of whether circumstances are "exceptional" will depend on the trial judge's good sense and experience. The list is not closed. However, in general, exceptional circumstances fall under two categories: discrete events and particularly complex cases.
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> Commencing with the former, by way of illustration, it is to be expected that medical or family emergencies (whether on the part of the accused, important witnesses, counsel or the trial judge) would generally qualify. Cases with an international dimension, such as cases requiring the extradition of an accused from a foreign jurisdiction, may also meet the definition.[7]

It may be therefore possible for someone whose section 11(b) rights have been aggrieved in the context of the pandemic to argue that some period of the pandemic delay weighs in favour of the application where: 1) the pandemic was foreseeable; 2) the Crown did not reasonably mitigate the period of delay; 3) the Court and/or Crown failed to give appropriate priority to disposition of the particular charges.

IS A PANDEMIC A FORESEEABLE EVENT?

An exceptional circumstance is one that is either "reasonably unforeseen or reasonably unavoidable." While there is, in the circumstances of pandemic, room to argue that it should have been foreseen by authorities earlier than it was, it is highly unlikely that a court would find that a Crown, in and of itself, could have reasonably avoided a pandemic. I expect that, if challenged, an exceptional circumstance need only meet one of the conditions of "reasonably unforeseen or reasonably unavoidable."

However, at the time of writing, arguments abound concerning the degree of responsibility of State actors for acting negligently or carelessly. It is impossible to predict how that public dialogue will end and whether remedy will be warranted for particular citizens, most notably prisoners or section 11(b) complainants.

REASONABLE MITIGATION

The scope and nature of duties of counsel and Crown to advance a delayed proceeding are outside the purpose of this paper. Consider, however, what is the role of the Crown? Suffice to say for the moment, from the above passage, that the Crown must mitigate delay from pandemic.

What may be the role of defence counsel? *Jordan*, as further elaborated by *KJM*, appears to

place positive obligations on defence counsel where prior law, not over-ruled, did not.[8] From *R v Coulter*:

> Defence-caused delay is comprised of situations where the acts of the defence either directly [and solely] caused the delay or are shown to be a deliberate and calculated tactic employed to delay the trial. Frivolous applications and requests are the most straightforward examples of defence delay. … [Subject to a court's assessment of the legitimacy of a defence position], [w]here the court and the Crown are ready to proceed but the defence is not, the defence will have directly caused the delay.[9]

On a hotly contested point in *KJM*, the majority further directed in *obiter* that defence counsel need also act "proactively."[10]

So the Crown must mitigate. How?

This writer is aware that courts have, without submissions of counsel, summarily adjourned docket and trial matters due to the pandemic. Where the courtrooms were closed and the court parties appeared via electronic means, bench warrants may have been issued but held until a return date far in the future.

On the last point, where accused persons fail to attend court on the date far-fixed, will there be jurisdiction to release the warrant, or jurisdiction to order for a warrant held? Should the Crowns be directing service of fresh compelling documents in advance of the return date? Getting the cattle back in the gates after they have been left to pasture all summer could be a cumbersome — and delay causing — task.

Summary adjournments will create problems. *Jordan* still applies during pandemics in Canada. This means that the Crown, on every file at every appearance, has a standing duty to mitigate. Was there anything substantial that may have been done on an adjourned file? Some courts are sentencing by video and over phone, for examples.

With respect to trials, they should not be adjourned summarily. The circumstances of every trial needs be examined to determine whether the trial should, and could, be held in accordance with published health guidelines. This approach was taken in Québec recently, where the court[11] firmly set out that trials of prisoners are to be expedited and the Crown burden to continue the prosecution was there not excused. Citing section 11(b) of the *Charter*, *inter alia*, the trial was ordered to continue, *albeit* with an Order for appropriate health and safety measures.

> FOR THESE REASONS, THE COURT:
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> DISMISSES the request [by the Prosecution] to postpone the prosecution.
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> DECLARES that this is an urgent matter.
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> DECLARES that the trial will take place in Chibougamau with videoconference in Roberval (presence of the judge in the courtroom) and in a detention facility preferably

> in Roberval if transportation from Quebec City is possible given the health emergency context.
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> DECLARES that various preventive health measures will be taken at trial.[12]

Note the presumption that the trial would proceed. The onus was on the Crown, if it believed otherwise, to persuade the Court that it should be adjourned. The procedure in this case should be held out as the standard approach to considering the merit of proceeding with or adjourning a scheduled trial. This position accords with the requirement set out in *Jordan* that the Crown has a duty to mitigate delay.

PRIORITIES POST-PANDEMIC

KJM was the Supreme Court's opportunity to clarify whether youth matters deserve special consideration in the *Jordan* framework.[13] In so doing, the Supreme Court accepted that "certain groups" of persons experience "heightened prejudice"[14] and therefore demand priority in the administration of justice:

> Second, [in response to the urging of the Supreme Court to set a different "presumptive ceiling for youth], *Jordan* established a uniform set of ceilings that apply irrespective of the varying degrees of prejudice experienced by different groups and individuals. Setting new ceilings based on the notion that certain groups - such as young persons - experience heightened prejudice as a result of delay would undermine this uniformity and lead to a multiplicity of ceilings, each varying with the unique level of prejudice experienced by the particular category or subcategory of persons in question. Young persons in custody, young persons out of custody, adults in custody, adults out of custody, persons whose custody status changes, persons with strict bail conditions, persons with minimal bail conditions, persons who experience heightened memory loss, and others could all lay claim to their own distinct ceiling….
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> For these reasons, I would not alter the *Jordan* ceilings to apply differently to youth justice court proceedings. But that does not mean an accused's youthfulness has no role to play under the *Jordan* framework. …the enhanced need for timeliness in youth matters can and should be taken into account when determining whether delay falling *below* the presumptive ceiling is unreasonable…[15]
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> …Jordan established *ceilings*, not *floors*…

"No" to different presumptive ceilings for different accuseds (or groups of accuseds). "Yes" to different non-presumptive floors; depending on the "circumstances" or "special concerns" of a prejudicial nature[16] that are brought timely by defence to the court. That is *KJM* in the simplest terms.

It is submitted that defence counsel need to identify clients with "heightened prejudice" and promote the interests of those clients in accordance with *KJM*.[17] Resistance from the court or Crown to prioritization of a special case should be made a matter of record because, although the majority in *Jordan* predicted that the new framework would cause

less litigation over fault for adjournment, matters of record are important facts of every *Jordan* application. And any matter could potentially bump up against *Jordan*…

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[1] 2016 SCC 27 , to be read in conjunction with *R v Williamson*, 2016 SCC 28

[2] 2019 SCC 55 .

[3] 2017 SCC 31.

[4] *R v Sharma*, [1992] 1 SCR 814, 134 NR 368; *R v Morin*, [1992] 1 SCR 771, 134 NR 321; *R v Askov*, [1990] 2 SCR 1199, 74 DLR (4th) 355 .

[5] From *Jordan*, *supra* note 1 at para 90, if the Crown and the justice system take reasonable steps to respond to this concern of particular prejudice and do their part to ensure that the matter proceeds expeditiously, then "it is unlikely that the reasonable time requirements of the case will have been markedly exceeded." These words have significant implication about the process, as do similar words from same decision that "a diligent, proactive Crown will be a strong indication that the case did not take markedly longer than reasonably necessary" (*ibid* at para 112). There is an argument to be made that application of *Jordan* in this way has deleterious effects on section 7 of the *Charter*, where there has not been careful examination of the scope of changes emanating from *Jordan*, see Owen Griffiths, "Jordan: A Policy Statement Concerning the Administration of Justice" [forthcoming].

[6] *KJM*, *supra* note 2 at paras 99–102; *Jordan*, *supra* note 1 at paras 81ff.

[7] *Jordan*, *supra* note 1 at paras 69–72 [emphasis in original].

[8] The Crown, more broadly defined as the State, is responsible for bringing accused persons to trial and for the provision of facilities and staff to see that accused persons are tried in a reasonable time, see *Askov*, *supra* note 4 at 1225, Cory J. The Nova Scotia Court of Appeal in *R v MacIntosh*, 2011 NSCA 111, stated that the burden is on the Crown to exercise diligence in bringing someone to trial, and that "inaction" by an accused is never relevant to examining the reasons for delay (*ibid* at para 69). This is due to the principle that there is no duty on the accused to bring himself to trial (*ibid* at paras 47–50). This law has not been expressly overruled.

[9] *R v Coulter*, 2016 ONCA 704 at para 44, referencing *Jordan*, *supra* note 1 at paras 63–64 [parenthetical statements added].

[10] See *KJM*, *supra* note 2 at para 220.

[11] *R c Raphaël-Fontaine*, 2020 QCCQ 1232 relying upon *R* c *Myers*, 2019 SCC 18 , para. 4 and *R* v *Hall*, [2002] 3 SCR 309, 2002 SCC 64 para. 47 to emphasize the cost of liberty and the need for expedited trials of prisoners.

[12] *Ibid* at paras 24–28 [translated by author]. These reasons fully coincide with *KJM*, discussed below.

[13] Particularly whether for youth the 'threshold ceiling', where delay is deemed unreasonable, ought to be lower.

[14] There again is much to be said about a reference to "groups," where individuals are the 11(b) right holders, as well as the reference to "prejudice," a concept which *Jordan* tried to put to bed. Such discussion is beyond the scope of this paper.

[15] *KJM*, *supra* note 2 at para 65. Justice Karakatsanis added to the reasons of the small majority on this point (*ibid* at paras 217, 218): "…Indeed, given the legislatively mandated and greater need for timeliness in the youth criminal justice system, it necessarily follows that delay in a proceeding against a young accused will become "markedly longer than it reasonably should have [been]" sooner, perhaps significantly so, than it will in a proceeding against an adult. … Therefore, stays below the ceiling in the youth context will not be "rare" or limited to "clear cases". …

[16] *KJM*, *supra* note 2 at para 73. Note that the flavour of the special concern, from the example provided, is of "actual prejudice" - to use the pre-Jordan language.

[17] The ethics of promoting an earlier trial date of one client over another is a flagged topic of interest.