To be Tried Within a Reasonable Time: Affirming the Jordan Ceilings

In October 2014, police charged a B.C. man with sexual assault against his daughter.[1] Two years later a B.C. judge issued a stay of proceedings, dismissing the case against the man because the prosecution took too long, in the judge's words: "the delay was excessive".[2] The result is that a man accused of a serious crime now walks free without a trial. This was an ordinary case, reflective of a shift in Canadian law brought about by the Supreme Court of Canada's 2016 decision in the *Jordan* case. Since then, Canada's judiciary takes the timeliness of trials more seriously than ever before. *Jordan* created presumptive ceilings – 18 months for provincial court trials and 30 months for superior court trials.[3] If a trial takes longer than the ceiling, courts presume it is unreasonable.

Long delays in criminal trials harm everyone, not just the accused. The *Canadian Charter of Rights and Freedoms* recognizes the importance of timely trials and protects everyone's right "to be tried within a reasonable time".[4] The Supreme Court emphasised these harms in *Jordan* and created a new, stricter, framework to ensure trials proceed more quickly. Since then, the Court has had opportunities to clarify and modify their approach. While they have made minor changes, they have generally stuck to the *Jordan* framework. As a result, courts dismiss criminal trials that take too long. Some people are frustrated by this – it means that those charged with serious offences may walk free without a trial.[5] As the above example illustrates, judges will dismiss even very serious charges for unreasonable delay. The Supreme Court is making a clear statement: the right to be tried in a reasonable time is essential.

The Right to be Tried within a Reasonable Time

At its core, the right to be tried in a reasonable time reflects the idea that "[t]imely justice is one of the hallmarks of a free and democratic society".[6] It applies to the time between when police charge someone with an offence and the date their trial occurs.[7] This is an important time because the accused often has their freedom impaired while awaiting trial, despite the prosecution having not proven the accused's guilt. This can include being held in jail or being subject to restrictive bail conditions like curfews.

Long delays in this time harm everyone. Delay harms the accused because they may have their freedoms restricted while awaiting trial. This delay is painful even if they are ultimately found guilty of the offence. They stress over the uncertainty of their future and may come to feel contempt toward the justice system.[8] If they are eventually found innocent, these delays seem even worse: innocent people may be stuck in jail awaiting trial for a crime they did not commit. Unreasonable delays also harm victims and their families. They lack the finality that comes with a trial and may be unable to move on with their

lives.[9] Delay also harms society at large. The public has an interest in seeing justice administered quickly. The longer a trial's delay, the less confidence the public may have in the justice system.[10]

The *Jordan* Ceilings

To address these harms, the Supreme Court introduced a new method for determining when delays are unreasonable in the *Jordan* case. The RCMP arrested Mr. Jordan in late 2008 and charged him with drug possession and trafficking offences.[11] He spent two months in custody, before being released under house arrest and other restrictive bail conditions.[12] Proceedings slowed, and Mr. Jordan's trial did not conclude under February 2013. From the date the RCMP charged him, Mr. Jordan waited 49.5 months for his trial to conclude.[13] Mr. Jordan then argued that this delay violated his *Charter* right to be tried within a reasonable time. The Court agreed, and dismissed his charges.

The Court took this opportunity to scold the criminal justice system for its "culture of complacency" about delay.[14] They felt that the system was not working hard enough to alleviate delays. To solve this, they introduced a new framework based on presumptive ceilings.[15] If a trial takes longer than the ceiling, courts presume it is unreasonable. For trials held in provincial courts, the ceiling is 18 months. For trials in superior courts, it is 30 months.[16] Unreasonable delays violate the accused's right to be tried within a reasonable time and will be dismissed.[17]

If a case goes above the ceiling, the prosecution can attempt to rebut the presumption of unreasonableness by showing that the circumstances were somehow exceptional.[18] Exceptional circumstances include things outside of the prosecution's control like medical or family emergencies.[19] Likewise, the accused and their defence can try to show that a delay was unreasonable even if it is under the ceiling. To show this, the defence must have taken meaningful steps to speed the proceedings up and show that the case took longer than it reasonably should have.[20]

When a court finds a delay to be unreasonable, they will issue a stay of proceedings: the prosecution ends and the accused is free to go. Practically, this is like the court finding them innocent. The accused receives no punishment and nothing appears on their criminal record. This makes sense: since the accused is innocent until proven guilty, and has not been proven guilty, it is as if nothing happened.[21]

After the Supreme Court's decision in *Jordan*, some expected the Court to modify the ceilings to allow for greater delays.[22] The *Jordan* ceilings meant that even very serious offences would be stayed because of delays. Instead, the Court doubled down, reaffirming the importance of timeliness in criminal trials. Still, questions about the *Jordan* ceilings remained. Recently, the Supreme Court addressed two of these questions: do the *Jordan* ceilings include the time it takes judges to reach a decision, and do the *Jordan* ceilings apply to youth criminal justice proceedings?

***KGK*: The *Jordan* Ceilings Do Not Include Judicial Deliberation Time**

Since *Jordan*, the Supreme Court has heard several cases dealing with the presumptive ceilings. In *KGK*, a Supreme Court case from 2020, the Court clarified that the presumptive ceilings from *Jordan* do not include the time it takes judges to reason and write their decision after the trial.[23] K.G.K. was charged in April 2013 for sexual offences against his minor stepdaughter.[24] The evidence and argument portion of his trial ended in January 2016. In October 2016, 43 months after being charged, K.G.K. applied to have his charges stayed because of the delay.[25] While this delay exceeds the *Jordan* ceiling, much of this time was spent by the judge reasoning after the trial – thinking about how to decide the case and writing their reasons.

The Supreme Court gave two main reasons why the *Jordan* ceilings do not include the time it takes judges to reach decisions. First, including this time in the ceilings would present practical difficulties. For an accused to argue that a trial has taken too long, they would need to guess at how long a judge's reasoning would take.[26] Because they don't know how long this time takes, applications for stays owing to delay could not really occur before the judge actually took the time to reason. Second, the *Jordan* ceilings were a solution tailor-made to address the "culture of complacency" about delay in the criminal justice system.[27] The time it takes a judge to reach their decision was not a major contributor to this complacency.

While the *Jordan* ceilings do not include judicial deliberation time, section 11(b), the right to be tried within a reasonable time, does. If deliberation takes "markedly longer than it reasonably should have," it violates the accused's section 11(b) right.[28] This will only happen very rarely because courts recognize that judges have a hard job. They must assess evidence, research the law, and write their reasons carefully.[29] Also, we can presume that they normally operate with integrity, not taking longer than they must.[30]

KJM: The *Jordan* Ceilings Apply Equally to Youth

In *KJM*, another post-*Jordan* case dealing with presumptive ceilings, the Supreme Court held that the *Jordan* ceilings also apply to youth criminal justice proceedings.[31] The *Youth Criminal Justice Act* governs the criminal justice process for those aged 12-18 in Canada.[32] The Court held that for reasons of consistency, the same ceilings should apply to youth criminal justice proceedings as to adult proceedings.

M, a youth, was charged with several offences in April 2015. These charges relate to a fight between M and another youth in which M stabbed the other youth in the face and back of the head with a boxcutter.[33] A trial judge found M guilty of aggravated assault and a weapons offence just over 18 months later.

In refusing to grant M a stay, the Court identified two reasons why the same *Jordan* ceilings should apply to youth. First, there is not a special delay problem in the youth criminal justice system that requires a more stringent solution.[34] Delays in the youth criminal justice system were caused by the same issues as those in the adult system, and they were not especially egregious. Second, creating a separate ceiling for youth would undermine the simplifying objective of *Jordan*.[35] Part of the Supreme Court's goal in implementing

presumptive ceilings was to simplify the process of identifying unreasonable delays. The Court worried that implementing new ceilings for youth might lead to further calls to implement different ceilings for other groups.

While the ceilings apply to youth in the same way as they do to adults, the Court recognized that timeliness is especially important for youth. Making sure youth trials occur quickly is important to:

- reinforce the connection between actions and their consequences;
- reduce unnecessary psychological suffering;
- preserve the right to make a full defence;
- avoid potential unfairness; and to
- advance societal interests, such as reintegrating youth offenders.[36]

The *Jordan* ceilings already account for these reasons.[37] Still, the increased need for timeliness in youth cases will impact how judges assess delays above or below the ceiling.[38]

Conclusion

Since the *Jordan* ceilings have been implemented, some have worried that too many cases are stayed. A 2019 report found that nearly 800 criminal cases had been stayed since *Jordan* was decided in 2016.[39] Despite the sometimes-distasteful outcome, the Supreme Court has held firm: the right to be tried within a reasonable time is a key right in our country. We all – accused, victim, and society alike – have an interest in ensuring that those accused of crimes are tried within a reasonable time. The Supreme Court made a bold move by imposing presumptive ceilings, but the result has been less complacency in the criminal justice system. That is something we all can benefit from.

[1] See *R v MNT*, 2016 BCPC 338 at para 6 .

[2] *Ibid* at paras 24-30.

[3] *R v Jordan*, 2016 SCC 27 at para 49 .

[4] *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) .

[5] See Andrew Russell, "'It's a travesty': Nearly 800 criminal cases thrown out over delays since 2016 Jordan decision" *Global News* (10 June 2019), online: <www.globalnews.ca/news/5351012/criminal-cases-thrown-out-r-v-jordan-decision/>.

[6] *Jordan*, *supra* note 3 at para 1.

[7] See *R v Kalanj*, 1989 CanLII 63 (SCC) at para 16.

[8] See *R v Askov*, 1990 CanLII 45 (SCC) at para 43.

[9] *Ibid* at para 46.

[10] See *R v KGK*, 2020 SCC 7 at para 25 .

[11] *Jordan*, *supra* note 3 at para 7.

[12] *Ibid*.

[13] *Ibid* at para 12.

[14] *Ibid* at para 4.

[15] *Ibid* at paras 5, 46.

[16] *Ibid* at para 49.

[17] *Ibid* at para 46.

[18] *Ibid* at para 47.

[19] *Ibid* at para 69-71.

[20] *Ibid* at para 48.

[21] *Charter*, *supra* note 4 s 11(d).

[22] See Tonda MacCharles, "Supreme Court of Canada to revisit trial delays in upcoming session" *The Star* (3 April 2017), online: <www.thestar.com/news/canada/2017/04/03/supreme-court-of-canada-to-revisit-trial-delays-ruling-in-upcoming-session.html>.

[23] *KGK*, *supra* note 10 at para 24.

[24] *Ibid* at para 6.

[25] *Ibid* at para 15.

[26] *Ibid* at para 44.

[27] *Ibid* at para 34.

[28] *Ibid* at para 31.

[29] *Ibid* at para 60.

[30] *Ibid* at para 55.

[31] See *R v KJM*, 2019 SCC 55 at para 4 .

[32] See *Youth Criminal Justice Act*, SC 2002, c 1 .

[33] *KJM*, *supra* note 31 at para 1.

[34] *Ibid* at para 63.

[35] *Ibid* at para 65.

[36] *Ibid* at paras 51-55; *YCJA*, *supra* note 32 s 3(1)(b)(iv-v).

[37] *KJM*, *supra* note 31 at para 4.

[38] *Ibid* at paras 71-72.

[39] Russell, *supra* note 5.