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Justice In a Timely Manner:
The New Framework for Trial Within a Reasonable Time

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Cases Commented On: *R v Jordan*, 2016 SCC 27 (CanLII); *R v Williamson*, 2016 SCC 28 (CanLII)

I recently posted a comment on a Supreme Court of Canada decision, *R v Vassell*, 2016 SCC 26 (CanLII), involving section 11(b) of the *Charter*, which guarantees the right of any person charged with an offence to be tried within a reasonable time. On July 8, 2016, the Supreme Court of Canada decided two more appeals on section 11(b) of the *Charter*. In a five-four split in *R v Jordan*, 2016 SCC 27 (CanLII), the majority overturned the framework for calculating unreasonable delay that was established in *R v Morin*, [1992] 1 SCR 771 (CanLII). The new framework is simpler, and establishes presumptive ceilings for unreasonable delay (minus defence delays) between charges being laid and the end of trial. The new ceilings are 18 months for charges going to trial in provincial court, and 30 months for charges going to superior court. (*Jordan*, at para 49) This is a significant change to section 11(b) jurisprudence, and both the majority and concurring judgments acknowledge it as such (*Jordan*, majority at paras 134-137, concurring at para 302). Moreover, the concurring justices only concur as to the outcome of *Jordan* – they propose a less radical departure from *Morin* and fundamentally disagree regarding the proper framework to be applied. This post explores the reasons provided by the majority for this change, as well as the application of the majority and alternative frameworks in *Jordan* and the companion case of *R v Williamson*, 2016 SCC 28 (CanLII)..

The New Framework

The majority decision (Justices Moldaver, Karakatsanis, and Brown writing) includes a summary of the new framework (at para 105). The first step is to determine the length of delays caused by the defence and subtract those delays from consideration. Then whether or not the ceiling has been passed determines who has the burden of proof. When the accused has waited for trial less than the prescribed ceiling (18 months for provincial court, 30 months for superior court), the burden is on the defence to show the delay was unreasonable. The defence must lead evidence that they took steps to speed the proceedings, and that the case took markedly longer than it should have. Once the ceiling has been passed, the burden shifts to the Crown, and the Crown must show that exceptional circumstances beyond its control caused the otherwise unreasonable delay in order to avoid a section 11(b) violation. A flexible approach must be taken for cases already in the system. (at para 105)

The majority justifies its new framework by describing the problems with the old framework. First, it was highly unpredictable and flexible, leading to a proliferation of section 11(b) applications. (at para 32) Second, the role of prejudice to the accused was unclear and subjective. (at para 33) Third, it could only be applied retrospectively, and did not effectively encourage parties to avoid delay. (at paras 34-35) Finally, the framework was unduly complex, inefficient,

and increasingly tolerant of delays. (at para 37) The majority remarks that this old framework - developed to discourage delay - has instead become a source of delay and a burden on the already over-burdened judicial system. (at paras 38-39)

The concurring justices (Justice Cromwell writing) recognize that section 11(b) jurisprudence is troubled, but would have made only modest adjustments to the section 11 (b) framework. (at para 145) The concurring justices give extensive reasons for their opposition to the change. They believe the new framework groundlessly attaches a particular number of months to the determination of a reasonable time (at para 225-266) in a manner that oversteps the function of the Court (at para 267-273), without evidence on the record to have selected the particular ceilings for delay that were chosen by the majority (at para 274-281), and at significant risk of causing a large number of judicial stays for cases already in the system (at paras 282-284). The concurring justices describe the transitional approach suggested by the majority as creating a *Charter* amnesty' (at para 287) for the Crown – unfairly denying those currently in the system from equal protection of their section 11 (b) rights.

The Approach of the Concurring Justices

I do not intend to discuss at length the modifications to the old framework suggested by the concurring justices, but as a quick review this is the procedure they suggest for analyzing a section 11 (b) issue (summarized from paras 159 – 212):

(A) Is an unreasonable delay inquiry justified?
(B) What is a reasonable time for the disposition of a case like this one?
    (1) Institutional delay
    (2) The inherent time requirements of the case
    (3) Conclusion on objectively reasonable time requirements
(C) How much of the delay that actually occurred counts against the state?
    (1) Delay attributable to the accused
    (2) Extraordinary and unavoidable delays that should not count against the state
(D) Was the delay that counts against the state unreasonable?
    (1) Can the delay beyond what would have been reasonable be justified?
    (2) The role of prejudice in the analysis
    (3) Extraordinary reasons for the delay
    (4) Are there especially strong societal interests in the prosecution on the merits of the case?

One serious difficulty in previous cases has been steps (B1) & (B2). The concurring justices say this about that portion of the analysis:

> The reasonable inherent time requirements are concerned with identifying a reasonable period to get a case similar in nature to the one before the court ready for trial and to complete the trial. The inherent time requirements are not determined, for instance, with reference to the actual availability of particular counsel and court, but rather they are determined by an objective estimation. The other element, the acceptable period of institutional delay, is the amount of time reasonably required for the court to be ready to hear the case once the parties are ready to proceed… (at para 183)

As trial dates need to be obtained months in advance, most counsel obtain a trial date and then work at a pace that have them prepared by that trial date. In that situation the inherent and

institutional delay periods consistent largely of the same actual time periods. Finding the appropriate length for inherent delay requires a court to determine how much delay is inherent to the nature of the case absent any institutional delay – a bizarre what-if situation. Trying to decide what is inherent delay and what is an institutional delay (either at the Crown's office, or at the courts) is a gordian knot–and the concurring decision makes a note of this problem.

> On occasion, the elements of institutional and inherent requirements have been intermingled in the application of the s. 11(*b*) framework such as in considering periods of time during which both counsel and the court are unavailable: see e.g. C. Ruby, "Trial Within a Reasonable Time Under Section 11(b): The Ontario Court of Appeal Disconnects from the Supreme Court" (2013), 2 C.R. 7th 91, at p. 94, citing *Morin*, at p. 793. The short answer to this question of overlap, however, is that, on the objective determination of how much time the case should reasonably take, the two periods are distinct. (at para 182)

This clarification, in my opinion, does not remove the difficulty in the analysis. The knowledge that the two time periods are conceptually distinct does not help to distinguish them in practice.

The concurring justices claim "This straightforward framework does not attempt to gloss over the inherent complexity of determining what delays are unreasonable". (at para 216) While this analysis might not gloss over complexity, it seems a little odd to spend 53 paragraphs attempting to clarify a 30-year-old analysis and conclude by calling it straightforward. Whatever virtues or failings the new approach will turn out to have, it appears to provide a much clearer framework and a faster analysis.

The Application of the Frameworks

In *Jordan* the appellant was charged with drug trafficking offences and the total time from charges being laid to the conclusion of his trial (at which he was convicted) was 49.5 months (at paras 7-12). Both the BC Supreme Court and the BC Court of Appeal found the accused's section 11(b) rights were not infringed. The majority of the Supreme Court applies the new framework and the concurring justices apply their revised version of the old framework, but both hold that the Court of Appeal erred primarily in giving less weight to institutional delay than to delay caused by the Crown (at para 132, 246-247).

In the second decision, *R v Williamson*, 2016 SCC 28 (CanLII), the Court arrives at different conclusions. The appellant was charged with historical sexual offences against a minor (at para 3) and waited 35 months for trial (at para 12). The Ontario Supreme Court found no infringement of section 11(b) primarily because there was not significant prejudice to the appellant during the delay, and proceeded to convict the appellant (at paras 13-14). The Ontario Court of Appeal decided that the prejudice to the appellant was serious, the defence had been diligent in moving the case forward, and the delay was unreasonably long. The Court of Appeal entered a stay of the proceedings (at para 17).

The majority of the Supreme Court in *Williamson* (made up of the same five Justices who formed the majority in *Jordan*: Justices Abella, Moldaver, Karakatsanis, Côté, and Brown) apply the new framework developed in *Jordan* and, rejecting the conviction or the seriousness of the offence as considerations under section 11(b), the majority agrees with the Ontario Court of Appeal and upholds the stay of proceedings for unreasonable delay (at paras 31-39). Chief Justice McLachlin applies the revised old framework set out by the concurring justices in *Jordan*

and concludes the Court of Appeal did not err, concurring with the majority in the result. The remaining Justices (Cromwell, Wagner, and Gascon, with Cromwell writing) also apply the revised old framework, but determine that the delay was not clearly unreasonable enough to overcome the public interest in a decision on the merits. The dissent concludes that it would bring more disrepute to the administration of justice to stay the charges, and would have restored the conviction. (at paras 80-86)

Why Does the Court Change Direction?

What is perhaps most interesting in these two decisions is how assertive the majority is in overturning precedent by replacing the *Morin* framework. This is an example of the living tree of constitutional interpretation not just growing, but responding to a concern with the judicial system –specifically the culture of delay that seems to be consuming the Canadian legal system. Recognizing that the old approach was not effectively dealing with the *Charter* right to trial within a reasonable time, the majority departs from their earlier precedents. (at para 45)

The majority recognizes concerns about the old framework and the culture of delay it contributed to, and determines that there are compelling reasons to depart from precedent here. (at para 45, citing *R v Henry*, 2005 SCC 76 (CanLII)) The Supreme Court has made similar explicit changes to frameworks in the past, notably when revising the framework for the standard of review in administrative law in *Dunsmuir v New Brunswick*, 2008 SCC 9 (CanLII), and for the *Charter* section 13 right against self-crimination in *R v Henry*, 2005 SCC 76 (CanLII). What is noteworthy is that the change in frameworks was largely motivated by the majority's dissatisfaction with the *Morin* framework's inability to address that a "culture of complacency towards delay has emerged in the criminal justice system…"(at para 40) As the majority states:

> [44] The intervener Attorney General of Alberta submits that a change in courtroom culture is needed. This submission echoes former Chief Justice Lamer's two decades-old call for participants in the justice system to "find ways to retain a fair process . . . that can achieve practical results in a reasonable time and at reasonable expense" ("The Role of Judges", remarks to the Empire Club of Canada, 1995 (online)).
>
> [45] We agree. And, along with other participants in the justice system, this Court has a role to play in changing courtroom culture and facilitating a more efficient criminal justice system, thereby protecting the right to trial within a reasonable time. We accept Mr. Jordan's invitation — which was echoed by the Criminal Lawyers' Association (Ontario), the British Columbia Civil Liberties Association, and Mr. Williamson in the companion appeal of *R. v. Williamson*, 2016 SCC 28 (CanLII) — to revise the s. 11(b) analysis. While departing from a precedent of this Court "is a step not to be lightly undertaken" (*Ontario (Attorney General) v. Fraser*, 2011 SCC 20 (CanLII), [2011] 2 S.C.R. 3, at para. 56), as we have explained, "there are compelling reasons to do so" (*R. v. Henry*, 2005 SCC 76 (CanLII), [2005] 3 S.C.R. 609, at para. 44).

It is not the legal tests for *Charter* rights that define those rights, as it was put in *R v Big M Drug Mart Ltd.*, [1985] 1 SCR 295, 1985 CanLII 69 at para 116 "The meaning of a right or freedom guaranteed by the *Charter* [i]s to be ascertained by an analysis of the purpose of such a guarantee; it [i]s to be understood, in other words, in the light of the interests it [i]s meant to protect." When the legal tests fail to effectively protect those interests, the Court reserves the power to restructure the test in a manner that will. Time will tell how effectively the new

framework for section 11(b) will protect the right to trial within a reasonable time, but it is reassuring to see that the Supreme Court of Canada has not become complacent or formalistic in its defence of the *Charter* rights of Canadians.

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