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An Update on The Right to Trial Within a Reasonable Time

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Cases Commented On: *R v Lam*, 2016 ABQB 489 (CanLII); *R v Regan*, 2016 ABQB 561 (CanLII); *R v Lavoie*, 2017 ABQB 66 (CanLII)

It has been about 8 months since the Supreme Court released *R v Jordan,* 2016 SCC 27 (CanLII) and overhauled how courts deal with applications under section 11(b) of the *Charter*, the right "to be tried within a reasonable time". I described the new framework in an earlier post. In short, *Jordan* established presumptive ceilings for unreasonable delay (minus defence delays and exceptional circumstances) between charges being laid and the end of trial. The ceilings are 18 months for charges going to trial in provincial court and 30 months for charges going to superior court, subject to a flexible transitional approach for cases that were already in the system when *Jordan* was decided. Since the release of *Jordan* there have been 11 reported decisions in Alberta posted to CanLII for applications for stays under the new framework. This post discusses three of those decisions that addressed interesting aspects of the new framework.

R v Lam, 2016 ABQB 489 (CanLII)

Mr. Lam was charged with offences relating to drug possession and trafficking. From the time Mr. Lam was charged to the anticipated end of trial was 55 months. Mr. Lam's trial was initially scheduled for "28 months from the time he was charged" (at para 35). A considerable part of the delay was caused by applications for disclosure of police disciplinary records, as there were reports that the officers involved in the case were facing charges for trafficking steroids. These reports turned out to be true (at paras 41-42), and the Crown took several months to provide sufficient disclosure on this topic. The Crown argued that up to 13 months delay could possibly be attributed to the defence, but that still would have left the delay over 41 months, well above the presumptive 30 month ceiling established by *Jordan*. (at para 60). Justice Pentelechuk found the Crown's complacency in making disclosure troubling (at para 102), found a breach of the section 11(b) right, and stayed the charges.

The interesting aspect of *Lam* is how it shows the impact of *Jordan* on the police service; Justice Pentelechuk criticizes the Edmonton Police Service for their role in the delay (referring to *R v McNeil,* 2009 SCC 3 (CanLII), a case establishing the disclosure requirements for police disciplinary records):

> Unlike other jurisdictions in this country, the Edmonton Police have failed to adopt a comprehensive *McNeil* protocol that has it turn over possibly relevant documents to the Crown for its review. Instead, the Edmonton Police Service appears entrenched in a culture that closely guards the documents in its possession and fails to respond to the Crown in a timely way.
>
> The lack of communication between the Crown and the Edmonton Police Service in this regard is concerning. The process for disclosure of police disciplinary records must be transparent. It is the prerogative of the Crown, not the Edmonton Police, to decide what *McNeil* information should or should not be disclosed to defence counsel.

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> These are all examples of the "culture of complacency" that can no longer be countenanced. This is not an exceptional circumstance, but rather a self-inflicted injury where Crown and EPS procedures led to an unnecessary and foreseeable delay. This is an example of where appropriate procedures and policies would have significantly controlled this potential disclosure issue and the resulting delay. Therefore, this is not an exceptional circumstance: *Jordan* at paras 69-70. (*Lam* at paras 85-87)

Justice Pentelechuk also finds that a stay would have been entered under the old *R v Morin,* 1992 CanLII 89 (SCC) framework for unreasonable delays of proceedings (at para103). *Lam* concludes with a discussion of the serious lack of judicial resources in Alberta (at paras 111-116), a situation that has since received some attention, and can be expected to be improving.

***R v Regan*, 2016 ABQB 561 (CanLII)**

Mr. Regan was charged with the first degree murder of another prisoner at the Edmonton Institution. The time from the initial charge to the end of trial was expected to be 62.5 months. The defence was found to be responsible for 24 months of the delay (at para 83), for bringing a late application for third party disclosure late (at para 79), and for changing counsel three weeks before trial, requiring rescheduling (at paras 70-71). The defence argued that they would have been prepared for trial sooner than the 11.5 months that they had to wait for a new trial date, but Justice Hillier found that even if the defence had not required that much time to prepare for trial, there would not be any delay without the late change of counsel, and that "the defence should not be allowed to benefit from its own delay-causing conduct." (at para 72)

Justice Hillier's reasoning makes sense, but the result of that line of thinking is worth considering. If the defence requires an adjournment for any reason, they become responsible for the total delay caused. If the defence requires an adjournment of just a couple of days, but the next available trial date is years away, the defence would become responsible for the entire delay. If the Crown were blamed for that institutional delay, it would risk pushing far more cases above the *Jordan* delay ceilings. *Regan* suggests that when either the Crown or the defence requires an adjournment they must take responsibility for the entire delay that results, although most of it will in reality be caused by the scarcity of trial dates. This strange situation might be an unavoidable consequence of the lack of judicial resources in Alberta.

Justice Hillier considers whether a transitional provision as allowed by *Jordan* might apply. (at paras 97-110) He finds that he is not able to make a large exception to the presumptive ceiling merely because of the seriousness of the offence, and could at most excuse a couple of months delay beyond the presumptive ceiling (at paras 106-108) There is a temptation to diminish the importance of *Charter* rights for those accused of serious offences, and it is a comfort to see that temptation resisted by Justice Hillier. *Charter* rights do not have to be earned, and a person does not need to come to court as a sympathetic figure to see their rights protected. The 38.5 months delay was well past the presumptive ceiling, was not excusable and the charges were stayed (at paras 103, 112).

***R v Lavoie*, 2017 ABQB 66 (CanLII)**

Lavoie involved three accused "charged with multiple offences, including aggravated assault and armed robbery" (at para 2). At most the delays would have amounted to 33 months, and Justice Belzil found "applying the new framework contextually and sensibly" he would have dismissed

the application for a stay even if none of the 33 months could be subtracted from consideration (at para 58-59). While not explicit, this appears to be a use of the transitional exceptions provided for in *Jordan.*

The interesting aspect of *Lavoie* was the determination that in an application for a stay, "delays occasioned by judges reserving decisions are discrete events which constitute exceptional circumstances" (at para 38), which is to say that they do not count towards the delay for the presumptive ceilings. In *Lavoie,* two applications (a *voir dire*, and a dispute over the correct mode of trial) led to a total of 7 months delay while judges reserved their decisions. (at para 34) I want to focus on two things Justice Belzil considers about delays caused by judges reserving decisions.

First, the defence brought the procedural applications, not the Crown (at para 40). This raises the same issue *Regan* did. A party, once they have caused a delay, has no ability to control how long it will last. Will it deter applications on evidentiary disputes if the parties know they might become responsible for many months of delay?

Second, the Crown does not control the length of the delay in delivering reasons, the judge does (*Lavoie* at para 39). This issue raises a question about the responsibility of a judge to move an action forward. The courts were not hesitant to include police as part of the system responsible to move the action forward to trial in cases such as *Lam*. A judge is impartial in the context of criminal proceedings, but a judge is certainly part of the criminal justice system that is not within the control of the accused. Why should the delays that judges cause be excluded from the presumptive ceiling for delays? The majority said in *Jordan* that "Real change will require the efforts and coordination of all participants in the criminal justice system." (*Jordan,* at para 137) Furthermore:

> For the courts, this means implementing more efficient procedures, including scheduling practices. Trial courts may wish to review their case management regimes to ensure that they provide the tools for parties to collaborate and conduct cases efficiently. Trial judges should make reasonable efforts to control and manage the conduct of trials. Appellate courts must support these efforts by affording deference to case management choices made by courts below. All courts, including this Court, must be mindful of the impact of their decisions on the conduct of trials. (*Jordan*, at para 139)

Because this finding regarding the exclusion of delays caused by reserved reasons did not change the outcome in *Lavoie*, I doubt it will be appealed. However, it is not at all obvious that delays brought on by judges should be excluded from the period of delays to be considered. This issue is likely to be the subject of future litigation, when a case arises where it makes the difference between a successful and unsuccessful section 11(b) *Charter* application.

In my original post on *Jordan*, I mentioned that only time will tell how effectively the new framework protects the right to trial within a reasonable time. So far, the framework appears to have brought greater clarity to the area, but not without raising some unforeseen issues.

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