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Missing Ceilings for Trial Within a Reasonable Time in the Youth Justice Context

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Case Commented On: *R v KJM*, 2018 ABCA 278

R v KJM is yet another case addressing the changes to the *Charter* section 11 right to trial within a reasonable time set out in *R v Jordan*, 2016 SCC 27. The question in *KJM* is how the *Jordan* framework applies in the youth justice context. The Court of Appeal was split three ways. Justices Wakeling and O'Ferrall concurred that KJM's right to trial within a reasonable time was not violated, and that charges should not be stayed, but their reasons for why are fairly different. Justice Veldhuis found that the delay did violate KJM's Charter right to trial within a reasonable time and would have stayed the charges.

Facts

KJM was convicted of aggravated assault and possession of a weapon for a purpose dangerous to the public peace. He was 15 at the time of the incident, charges were laid the day after the incident, and he was ultimately convicted 18 and a half months later (at paras 78 and 84). The Supreme Court of Canada released their decision in *Jordan* four months before the end of trial, and KJM brought an application for a stay of proceedings on the ground that he was not "tried within a reasonable time" as required by section 11(b) of the *Charter*. The provincial court dismissed the application and KJM appealed (at para 1).

Decision of Justice Wakeling

Justice Wakeling noted that the *Youth Criminal Justice Act*, SC 2002, c 1 includes:

> 3(1) The following principles apply in this Act:
>
> …
>
> (b) the criminal justice system for young persons must be separate from that of adults … and … emphasize the following
>
> …
>
> (iv) timely intervention that reinforces the link between the offending behaviour and its consequences, and
>
> (v) the promptness and speed with which persons responsible for enforcing this Act must act, given young persons' perception of time ...

Justice Wakeling summarized the history of the right to trial within a reasonable time (at para 24-29), and quoted from *Jordan*:

> At the heart of the new framework is a ceiling beyond which delay is presumptively unreasonable. The presumptive ceiling is set at 18 months for cases going to trial in the provincial court, and at 30 months for cases going to trial in the superior court (or cases going to trial in the provincial court after a preliminary inquiry).
>
> If the total delay from the charge to the actual or anticipated end of trial (minus defence delay) exceeds the ceiling, then the delay is presumptively unreasonable. To rebut this presumption, the Crown must establish the presence of exceptional circumstances. If it cannot, the delay is unreasonable and a stay will follow.
>
> If the total delay … falls below the presumptive ceiling, then the onus is on the defence to show that the delay is unreasonable. (*Jordan* at paras 46-48)

Justice Wakeling determined that a young person tried in a youth justice court has the constitutional protection of the right to trial within a reasonable time (at paras 52-57). All three justices appear to agree with that conclusion.

Justice Wakeling noted that the "Supreme Court of Canada said nothing in *Jordan* that remotely suggests the presumptive ceilings it fashioned do not apply to young persons tried in youth justice courts … or any other identifiable group" (at para 33). He finds the Court was provided insufficient evidence of the rehabilitative benefits of more rapid trials for youths, and what kind of timelines are necessary and beneficial. He left the problem of setting a shorter delay ceiling for youths to Parliament:

> Parliament is in the best position to determine whether a unique presumptive ceiling or other methodology should be adopted for young persons charged with an offence. It has the institutional ability to hear from a wide range of experts and decide if a different standard is desirable, whether or not there is a scientific foundation for it. (at para 62)

Justice Wakeling applied the normal delay ceilings from *Jordan*. He found that one month of the delay was caused by a court administration error: a transcript required by the trial judge to determine the admissibility of a statement made by the appellant never appeared, and had to be reordered (at para 35). He determined this was an "exceptional circumstance" totally outside the Crown's control, and therefore not something that counted towards the *Jordan* ceiling (at para 37). With that one month of delay excluded, the total delay was just under the 18-month ceiling set by *Jordan* (at para 39). Alternatively, if transitional considerations applied, he found the delay was also acceptable under the previous *Morin* framework (at paras 42-48).

Justice Wakeling noted many U.S. jurisdictions have enacted strict statutory timelines for youth sentencing (see footnotes 37 and 38) and dismissed the appeal (at para 64).

Concurring Reasons of Justice O'Ferrall

Justice O'Ferrall started by saying he would dismiss the appeal, as:

> to stay the charges on the basis that the state did not get the appellant to trial soon enough would do nothing to promote the *Youth Criminal Justice Act*, SC 2002, c 1 principles of holding young persons accountable or of promoting their rehabilitation and reintegration. (at para 65)

Justice O'Ferrall agreed with Justice Veldhuis that the delay was unreasonable under the *Morin* test that is still considered for those transitional cases already in the system when *Jordan* was decided (at para 69). But Justice O'Ferrall noted that

> the *Youth Criminal Justice Act* makes it clear that the criminal justice system for young offenders must be separate from that of adults. Timely intervention reinforcing the link between behaviour and its consequences is called for (s. 3(1)(b)(iv)). Persons responsible for enforcing the Act must act promptly, given young persons' perceptions of time: s. 3(1)(b)(v). (at para 72)

Justice O'Ferrall ruled that "[w]hat is a reasonable length of time between charges and trial in the case of young persons will be dependent on a myriad of factors" (at para 75). He concluded that "given the arbitrariness and the relative inflexibility of any presumptive ceiling, it would be wrong in law to apply presumptive ceilings to young persons" (at para 71) and rejects the use of presumptive ceilings in youth court matters, as the conclusion of a trial may be extended by attempts at rehabilitation and reintegration of the young person, so that even longer periods of time between charges being laid and the end of trial may be reasonable in some youth court scenarios (at para 76).

Dissenting Reasons of The Honourable Madam Justice Veldhuis

Justice Veldhuis found the presumptive ceiling in this situation should have been 15 months (at para 81).

Justice Veldhuis found that the question of "whether lower presumptive ceilings apply to young persons" was a new legal issue raised as a consequence of the *Jordan* decision, and that she was required to conduct her own legal analysis (at paras 94-95). She rejected the approach taken by Justice Wakeling of leaving the decision to Parliament:

> The majority suggests that the courts ought to leave it to Parliament to assess whether a unique presumptive ceiling or other methodology ought to be adopted for young persons. I disagree. The Supreme Court has recognized that the Court, along with other participants in the justice system, have 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: *Jordan* at para 45. To effect real change, a proactive approach is required that prevents unnecessary delay by targeting its root causes and all participants in the criminal justice system share this responsibility: *R v Cody*, 2017 SCC 31 (CanLII) at para 36, [2017] 1 SCR 659.

> …
> As a result, it falls to this Court, which appears to be the first appellate court in Canada to consider the issue, to account for both the *Jordan* framework and the law as it was prior to *Jordan* to determine the appropriate presumptive ceiling for young persons facing single stage criminal proceedings in provincial court. (at paras 96 and 98)

Justice Veldhuis noted that the law prior to *Jordan* recognized the greater prejudice youths feel from pre-trial delays (at paras 104-107). Justice Veldhuis concluded that since the *Jordan* "ceiling was set based on the inferred prejudice faced by adults, it follows that the enhanced prejudicial effects on young persons require the court to set a lower ceiling, above which delay is presumptively unreasonable" (at para 107). Justice Veldhuis followed the reasoning of Justice David M. Paciocco in *R v JM*, 2017 ONCJ 4, and after reviewing section 11(b) case law from cases involving young persons, she concluded that a 15 month ceiling roughly aligns with the law on section 11 as it was prior to *Jordan* (at paras 108-112).

Justice Veldhuis also explained how the different ceiling for youth is consistent with Charter protections protecting all people equally:

> On the surface, a lower ceiling for youth proceedings may seem like a special constitutional guarantee for young persons; however, a lower ceiling is required to guarantee young persons the same level of *Charter* protection as adults. A lower ceiling is required to properly give effect to the s. 11(b) rights of young persons. Failing to differentiate between adults and young persons in this way would ignore the heightened prejudicial effect of delay experienced by young persons and would have the inadvertent effect of treating young persons more harshly than adults. This is analogous to s. 15 *Charter* jurisprudence which recognizes that equality "does not necessarily mean identical treatment": *R v Kapp*, 2008 SCC 41 (CanLII) at para 15, [2008] 2 SCR 483. The focus must be on substantive rather than formal equality: *Kapp* at para 15. (at para 113)

Justice Veldhuis considered the transitional provision (allowing for the analysis from *Morin*) for cases already in the system when *Jordan* was decided, and concluded the delay was also unacceptably long under the *Morin* analysis (at paras 148 and 152). Justice Veldhuis concluded that the charges should have been stayed (at para 154).

Commentary

In my opinion, none of these opinions quite live up to the bold promise of *Jordan*. *Jordan* was meant to set tighter timelines for the Crown to bring the accused to trial in order to attack the systemic delays in the justice system. Justice Wakeling's reasons make the *Charter* section 11 right for youths weaker than it was pre-*Jordan* , Justice O'Ferrall's reasons reject the setting of presumptive ceilings that was at the heart of the approach to section 11 in *Jordan*, and Justice Veldhuis's reasons maintain the situation roughly as it was for youths pre-*Jordan*.

Justice Wakeling correctly notes that Parliament is better suited to acquiring the expert psychological evidence needed to determine what timelines are suitable for youth. While I am sympathetic with his reluctance to set a timeline with potentially massive effects on the justice

system in the absence of a proper evidentiary record, KJM and his constitutional right was already before the court, and a decision needed to be made as to whether he had been tried within a reasonable time.

Justice O'Ferrall's reasons are inconsistent with the majority decision in *Jordan*, which rejected complex, flexible, and retrospective approaches (*Jordan*, at paras 31-38). Justice O'Ferrall's decision focuses on concerns about the difficulty of reducing "a reasonable time" to a precise number in the form of a presumptive ceiling in the youth justice context. This reflects a concern Justice Cromwell described in the concurring reasons in *Jordan*:

> One of the themes that appears throughout the Court's jurisprudence on the right to be tried within a reasonable time is that reasonableness cannot be judicially defined with precision or captured by a number. The proposed ceilings are deeply inconsistent with this constant in our jurisprudence. (*Jordan*, at para 225)

Justice O'Ferrall's judgement argues the key changes from *Jordan* should not apply in the youth context, rather than attempting to apply them.

Justice Veldhuis's dissenting opinion seems best to match the reasoning of the majority decision in *Jordan* by setting a presumptive time ceiling for moving charges through the system. She would have established a predictable, prospective, and simple approach for the right to trial within a reasonable time in the youth context. However, since Justice Veldhuis sets the ceiling based on the average timeline deemed unacceptable pre-*Jordan* (at para 108-112), her reasoning would not compel prosecutors to act faster than during the pre-*Jordan* era. A 15-month ceiling would do less than *Jordan* did to attack the "culture of complacency towards delay" (*Jordan*, at para 40), and will not provide the "discipline for the justice system" (*Jordan*, at para 134) that the majority decision in *Jordan* prescribed. To fulfill the purpose of *Jordan* in the youth context, the ceiling should be something less than 15 months.

Because of the three-way split in the Court, *R v KJM* leaves the application of *Jordan* in the youth justice context unresolved. Justice Wakeling said that Parliament would be best suited to step in to resolve the issue. This shows more confidence in the diligence and speed of Parliament than I have, and I consider it more likely that clarity will come to this area when this case, or another like it, takes the issue up to the Supreme Court.

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