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Trial Within A Reasonable Time: A Farewell to the Transitional Period

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Case Commented On: *R v Scher*, 2018 ABCA 365; *R v Carter*, 2018 ABQB 657; *R v Tetreault*, 2018 ABCA 397

The Supreme Court rendered judgment in *R v Jordan*, 2016 SCC 27 on July 8, 2016. This post is a review of three recent Alberta decisions addressing *Jordan*, and a farewell to the transitional provisions, as it has been almost thirty months since *Jordan* was released. The transitional provisions apply only to time between when charges were laid and when *Jordan* was released. Few cases left in the system (though some decisions are likely still pending) will involve relevant argument on the application of the transitional provisions. The post ends with a caution about where the law might be headed.

The three cases are *R v Scher*, *R v Carter*, and *R v Tetreault*. *Scher* deals with the transitional provisions, and gives an idea of how complicated they were to work with. *Carter* and *Tetrault* have a common theme: the responsibility of the defence to act with sufficient organization and focus to avoid delay in order to obtain a section 11 remedy. *Carter* addresses a section 11 application where the presumptively unreasonable time ceiling has not been reached, and *Tetreault* addresses a section 11 application where the delay is credited to a disorganized approach by the defence.

This is the sixth ABlawg I have written relating to *Jordan* and the Section 11(b) *Charter* right to trial within a reasonable time. (For the benefit of anyone retrospectively interested in the impacts of *Jordan*: One – on the SCC decision on the issue just before *Jordan*; two – on *Jordan* and its companion decision; three – on some early cases applying *Jordan* in Alberta; four – on the Supreme Court's decision in *R v Cody*, 2017 SCC 31, which tightened the Crown's obligations a little further; five – on *R v KJM*, 2018 ABCA 278, where the Alberta Court of Appeal considered the issue in the youth justice context.)

Jordan established presumptive ceilings for unreasonable delay (minus defence delay and with consideration for 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. Above the ceiling, there is a presumption the delay has breached the accused's section 11 rights, and below the ceiling there is a presumption that the delay has not breached the accused's section 11 rights. The change was subject to a flexible transitional approach that allowed for the previous law to apply for delay that occurred before *Jordan*'s release.

R v Scher: *Morin* and the Transitional Provisions

A unanimous panel at the Court of Appeal decided *Scher*. The accused, along with two others, was charged with four drug-related and conspiracy offences, and the Crown appealed a stay of proceedings granted following a finding of a section 11 breach. The trial judge applied the transitional provisions twice, once before the release of *R v Cody*, in which he found the transitional provisions made the delay justifiable, and again after *Cody*, in which he found the delay could not be justified. The difference was in what amount of delay could be attributed to the inherent time requirements for disclosure. The trial judge had found 28 months of relevant delay the first time (counting 9 months as inherent delay), and found 35 months of relevant delay the second time (counting only 2 months as inherent delay) (at paras 7-9). The Court of Appeal noted that it was appropriate for the trial judge to reconsider the section 11 Charter application post-*Cody*, as it was a recent Supreme Court decision on the very issue in question (at para 14-15).

The crown's argument at the appeal rested entirely on the ground that the transitional provisions were misapplied (at paras 10-12). The transitional provisions require the crown to have followed the law as it was pre-*Jordan*, when the leading case was *R v Morin*, [1992] 1 SCR 771. In effect, the *Jordan* analysis applies from the day *Jordan* was released, and *Morin* continues to apply for delay occurring before the day *Jordan* was released.

The Court of Appeal found errors in the trial judge's approach: he considered the complexity of the case only under the 'exceptional circumstances' provisions of *Jordan*, and then re-used his conclusion that the case had no 'exceptional circumstances' to conclude the case was not sufficiently complex to receive special consideration in the application of the previous *Morin* framework (at para 22). The case was complex for the purposes of the *Morin* framework because of the complexity of the investigation and disclosure, although the final trial was comparatively straightforward (at para 23). The trial judge also erred in relying on hindsight to conclude aspects of the trial were simple that would have been complex at the start of the prosecution (at paras 24-27), and made errors in classifying inherent and institutional delay (at para 33).

The Court of Appeal re-calculated the delay and found 23.5 months of institutional delay, five months over the applicable *Jordan* ceiling (at para 41). *Jordan* was released 11 months before the end of the trial. The trial judge found the crown had an obligation to attempt to reduce the delay in those 11 months (at para 43). The Court of appeal disagreed, finding that since neither party put forward any reasonable suggestions on how to speed trial, the crown cannot be faulted for failing to speed the process at that point (at paras 44-45).

The Court of Appeal applied the balancing provisions from *Morin.* They concluded the prejudice caused by the delay on the accused and their rights to make a full answer and defence was less than society's interest in the accused being brought to trial, and concludes that the delay was justified (at para 48-50). The Court of Appeal set aside the stays, and ordered the trial judge to continue the trial to its conclusion (at paras 51-53).

Scher shows some of the difficulties with the transitional provisions: because they preserved the *Morin* analysis, they made the section 11 analysis lengthy and intricate, and made the ultimate result heavily dependant on an unpredictable and opaque balancing of interests. The transitional

provisions operated like a suspended declaration, delaying the full impact of the change to the law. While the transitional provisions were necessary to avoid an avalanche of stays, the section 11 analysis will be much simpler without them. Because the transitional provisions preserved *Morin,* they preserved its problems of being "too unpredictable, too confusing, and too complex" (*Jordan,* at para 38). The justice system is now exiting the 'short run' where "most cases that were reasonable under *Morin* will be protected by the transitional provisions," hopefully the long run benefits of "less delay but not more stays" are on the horizon (*R v Cody*, 2016 NLCA 57 at para 74).

R v Carter: A Section 11 Application below the Presumptive Ceiling

Mr. Carter was charged along with two other accused on a joint indictment, primarily for criminal harassment. *Jordan* was released between the first and second appearances in Criminal Appearance Court. The parties agreed that the total delay was 28 months, under the usual 30-month ceiling for a case going to superior court (at para 20). Defence counsel argued that since this was a one-step trial with no appearances at provincial court, the 18-month ceiling should apply. Justice Poelman rejected this approach, as it had no basis in *Jordan* or *Cody*. There is no presumption of a *Charter* breach under the 30-month ceiling for superior court and adding one would needlessly complicate the *Jordan* test (at paras 14-19). It is still possible to obtain a *Charter* remedy, but the defense has the onus of showing a breach.

Justice Poelman applies the test from *Jordan* for showing a breach under the 30-month ceiling:

> To do so, the defence must establish two things: (1) it took meaningful steps that demonstrate a sustained effort to expedite the proceedings; *and* (2) the case took markedly longer than it reasonably should have. Absent these two factors, the s. 11(b) application must fail. (at para 20, citing *Jordan* at para 82)

The defence attempted to have Mr. Carter's case severed from the joint trial, hoping this would speed the case. The application was denied, as Justice Tilleman found that the interests of justice required a joint trial. The "request to be tried separately cannot be considered unreasonable, nor can the Crown's refusal to accede to the request" (at paras 22-24). The defence made comments about severance potentially allowing for a faster trial, but Justice Poelman concluded that this is not enough to find there was a sustained effort to expedite the proceedings: "it is important that an accused raise concerns about unreasonable delay in a meaningful way very early in the proceedings. The message of *Jordan* and *Cody* is that all participants in the justice system must take steps to avoid delay in proceeding" (at paras 25-27, citing *Cody* at para 36; *Jordan*, at paras 35 and 36).

Although Justice Poelman accepted that the Crown showed a "lack of initiative," and the "delay was almost entirely institutional," decided Mr. Carter was unable to show the time taken "markedly exceeds the reasonable time requirements of the case" (at paras 33-35). He concluded with a brief summary before dismissing the application:

> In brief, I have concluded that the applicable presumptive ceiling is thirty months. The trial is scheduled to conclude well before that ceiling is reached. Mr. Carter has failed to

> discharge his onus, where the time to trial falls under the presumptive ceiling, of showing that the delay is unreasonable. This is not one of those "clear cases" contemplated in *Jordan* where a stay beneath the ceiling should be granted. (at para 36)

The decision in *Carter* shows the *Jordan* test applied where the delay is under the presumptive ceiling for unreasonable delay. Below the ceiling, when the delay has been presumptively reasonable, defence counsel must have significant evidence of their attempts to speed trial. Counsel must do more than not be responsible for the delay: they must have objected to it clearly, from early in the process, and made legitimate attempts to speed trial.

***R v Tetreault*: Defence Waiver by Disorganized Approach**

Mr. Tetreault appealed from four convictions for charges involving firearms, drug-related offences and other breaches. The core of the dispute on the section 11 analysis is the one-year period from when the trial dates were set in the arraignment court to the dates set for trial (at paras 5-6). The Court of Appeal again decided unanimously.

The Court of Appeal agreed with the Crown: "the appellant's cavalier and disorganized approach to the advancement of his *Charter* arguments resulted in the trial not finishing within the 30-month *Jordan* threshold even if he did not waive the specific period of delay that underpins the appellant's arguments" (at para 13). Since the defence, through legitimate (but inefficiently organized tactics) pushed the trial past the ceiling, the defence should be responsible for the delay.

Further, the Court of Appeal agreed that although "waiver cannot be inferred from silence or inaction: *R v Klassen*, 2018 ABCA 258 (CanLII) at paras 78-81" (at para 17), the Court of Appeal found that:

> The trial judge's reasons clearly reflect that he found appellant counsel had "acted" by taking the lead and offering trial dates when the parties appeared in court to set those dates. … Given his finding that counsel did not express concern about delay or indicate that the dates provided were the earliest dates that all counsel were available and given that the promise of earlier dates for a preliminary inquiry was not pursued on an earlier occasion, there was an evidentiary basis for the trial judge's finding that was not refuted. (at para 18)

The Court considered arguments based on *Scher*, and decided it does not change the outcome:

> *Scher* involves a dispute over categorization of periods of delay to institutional or inherent delay and the impact of that characterization on the Morin analysis. *Scher* did not, as here, involve any issue concerning defence waiver of any of the delay. Moreover, if anything, *Scher* also reinforces that the defence shares a positive obligation to take all necessary steps to expedite a prosecution: *Scher* at para 44. (at para 28)

The court also considered and rejected a different ground of appeal about the trial judge's conclusion on 'knowledge and control,' and dismissed the appeal (at paras 30-38),

The conclusions in *Carter* and *Tetreault* seem reasonable enough. However, portions of both decisions point to a troubling shift to allow the justice system to soften the impact of *Jordan*: shift as much of the burden for speeding trials onto the defence. The Supreme Court did say in *Cody* that "every actor in the justice system has a responsibility to ensure that criminal proceedings are carried out in a manner that is consistent with an accused person's right to a trial within a reasonable time" (at para 1). While it is evident that the defence should not benefit from their own delays, shifting too much responsibility onto the accused and defense counsel to prevent delays might set a bar few accused will be able to meet. The Supreme Court's comments on the legitimacy of defence tactics in *Cody* (at paras 30-35) contain the seeds for future disputes about the application of the *Jordan* framework:

> We stress that illegitimacy in this context does not necessarily amount to professional or ethical misconduct on the part of defence counsel. A finding of illegitimate defence conduct need not be tantamount to a finding of professional misconduct. Instead, legitimacy takes its meaning from the culture change demanded in *Jordan*. *All* justice system participants — defence counsel included — must now accept that many practices which were formerly commonplace or merely tolerated are no longer compatible with the right guaranteed by s. 11(*b*) of the *Charter*. (*Jordan*, at para 35)

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