

***R v Cody*: The Supreme Court Stands Their Ground on Unreasonable Delay**

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Case Commented On: *R v Cody*, [2017 SCC 31 \(CanLII\)](#)

Just a little under a year after the Supreme Court released *R v Jordan*, [2016 SCC 27 \(CanLII\)](#) and established a new framework for the *Charter* section 11(b) right to a criminal trial within a reasonable time, the Court has released a new decision on the issue. (For my earlier post on *Jordan*, see [here](#), and for a post discussing interpretation of *Jordan* by some Alberta courts see [here](#).) *R v Cody*, [2017 SCC 31 \(CanLII\)](#) clarifies the *Jordan* framework, but more importantly it affirms the Supreme Court's commitment to ending the "culture of complacency towards delay in the criminal justice system" (at para 1) despite the pressure *Jordan* has placed on Crown prosecutors.

The Facts

Mr. Cody was arrested January 10th, 2010 and charged with offences related to drug possession and weapon possession. A number of issues slowed down the progress of the case. There was a *Charter* application to exclude evidence, a dispute over disclosure, Mr. Cody chose to change counsel once, his second lawyer was appointed to the bench causing him to change counsel again, and Mr. Cody's counsel brought an unsuccessful recusal application alleging reasonable apprehension of bias (at paras 5-14). Mr. Cody's trial date was set for January 26th, 2015, but his *Charter* application to have the charges stayed under section 11(b) was heard and granted in late 2014 (at para 14).

The Lower Court Decisions

The Supreme Court of Newfoundland and Labrador trial division decision was made under the old framework from *R v Morin*, [1992] 1 SCR 771, [1992 CanLII 89](#), and thus included an analysis of inherent time requirements and prejudice to the accused (at paras 15-16), no longer used under the *Jordan* framework. The trial judge, even operating under the more forgiving timelines of the *Morin* framework, found the delay unreasonable and stayed the charges.

Jordan was released prior to the appeal being heard by the Newfoundland and Labrador Court of Appeal. Applying *Jordan*, a majority at the Court of Appeal found "a number of exceptional circumstances" (at para 18) that allowed time to be deducted from the total time from arrest to trial. They concluded the total remaining delay of 16 months was reasonable and directed the case to trial (at para 18).

The dissenting Justice at the Court of Appeal found that the majority had incorrectly deducted several periods of delay, and that the total remaining delay was 39 months, well above the 30-

month ceiling established by *Jordan*. The dissenting Justice stated that *Jordan* was not intended to allow even longer periods of delays:

What would a successful implementation of *Jordan* look like? In the short run, most cases that were reasonable under *Morin* will be protected by the transitional provisions. In the medium run, the ceilings in *Jordan* will be challenging, especially for complex cases, but the framework will give both Crown and defence incentives to act promptly and efficiently. Stays will increase temporarily and then recede. A virtuous cycle of promptness will set in. In the long run *Jordan* will mean less delay but not more stays. (*R v Cody*, [2016 NLCA 57 \(CanLII\)](#) at para 74)

The Supreme Court Decision

The Supreme Court reviewed the framework they set out in *Jordan* (at paras 20-39), with a focus on illegitimate defence conduct. Illegitimate defence conduct “encompasses both substance and procedure — the decision to take a step, *as well as the manner in which it is conducted*” (at para 32). The defence can cause delays that do not count towards the ceiling by inaction or omission (at para 33), but the Court was clear that this cannot be used to deter the accused from taking advantage of their right to a fair trial:

[I]llegitimate defence conduct should not be taken as diminishing an accused person’s right to make full answer and defence. Defence counsel may still pursue all available substantive and procedural means to defend their clients. What defence counsel are not permitted to do is to engage in illegitimate conduct and then have it count towards the *Jordan* ceiling. (at para 34)

The Court reiterated that *Jordan* places duties on trial judges to immediately dismiss frivolous applications (at para 38).

In applying the *Jordan* framework, they found that the defense’s issue with disclosure undertakings was reasonable and that the Crown failed to resolve the issue at a reasonable speed, so that no time was to be deducted (at paras 51-52). Two months were deducted for the discrete event of *McNeil* applications (applications relating to evidence of misconduct by a police officer involved in the case, see *R v McNeil*, [2009 SCC 3 \(CanLII\)](#)), and one month was deducted because it was caused by defence counsel’s unavailability (at paras 53-55). In the result, the total delay was 36.5 months (at para 62). The Court dismissed “voluminous disclosure” alone as being sufficient to make a case “particularly complex” and justifying lengthier delay (at paras 63-65).

The Supreme Court reviewed *Jordan*’s transitional provisions for cases already in the system at the time *Jordan* was released (at paras 67-74), but their key finding was that the *Jordan* framework sets tighter timelines for the Crown:

Where a balancing of the factors under the *Morin* analysis, such as seriousness of the offence and prejudice, would have weighed in favour of a stay, we expect that the Crown will rarely, if ever, be successful in justifying the delay as a transitional exceptional circumstance under the *Jordan* framework. (at para 74)

The Supreme Court restored the order of the trial judge and entered a stay (at para 74).

Commentary

R v Cody answers a specific question about how the *Jordan* framework is to be applied that had come up at the Alberta Court of Queen’s Bench in *R v Regan*, [2016 ABQB 561 \(CanLII\)](#). Who takes responsibility for periods of delay that are occasioned by the defence, but then prolonged by a lack of institutional resources? The court in *Regan* had decided responsibility for such periods of delay must fall on the defence, to ensure the defence does not “benefit from its own delay-causing conduct” (at para 72).

But the Supreme Court in *Cody* decided in the other direction. In relation to the *McNeil* applications, the Supreme Court found that after the Crown and defence were prepared to proceed in late June, “the court was unable to accommodate them until September— that portion of delay was therefore a product of systemic limitations in the court system and not of the discrete event (*Jordan*, at para 81) and therefore those months should not be deducted” (*Cody* at para 55). Institutional delay that follows from defence action remains institutional delay, and cannot be deducted.

The most interesting aspect of *Cody* is only briefly mentioned in the Supreme Court’s judgment. The Attorney Generals of five provinces acted as interveners in the case, and “[a] number of the provincial Attorneys General who intervened in this matter asked this Court to modify the *Jordan* framework to provide for more flexibility in deducting and justifying delay” (at para 3). There were expectations that *Jordan* was being revisited so soon in order for the Supreme Court to “[course correct](#)”, “[explain, or dial-back, their widely criticized Jordan decision](#).” That did not happen. Justices Côté and Brown, who dissented in *Jordan*, even participated in the unanimous seven-justice decision written by “The Court” in *Cody* (the other two dissenting justices in *Jordan*, Justice Cromwell and Chief Justice McLachlin, did not hear *Cody*). If anything, the clarifications in *Cody* make the *Jordan* framework even stricter on Crown prosecutors. *Jordan* was a bold attack on the ‘culture of complacency’ in Canada’s criminal justice system, and *Cody* gives no sign that the Supreme Court’s resolve has weakened.

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