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Material and Cultural Causes of Delay

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Case Commented On: *R v King*, 2019 ABQB 467

This is the seventh instalment in my long-running series of blog posts covering Alberta decisions dealing with the fallout of *R v Jordan*, 2016 SCC 27, released almost three years ago. This post starts with a discussion of the recent *R v King*, 2019 ABQB 467, which covers one of the two live issues about *Jordan* that will be going up before the SCC: whether or not the time between when an application or case is heard and when it is decided (often called 'judicial delay'; I will refer to it as 'judicial decision-making time') is excluded from the delay calculation. This issue will be before the Supreme Court as part of *R v KGK*, 2019 MBCA 9, on September 25, 2019. (The second issue is how the timelines apply to minors, an issue in the appeal of *R v KJM*, 2018 ABCA 278, which the SCC heard in February 2019). The second part of the blog post discusses some longer-term impacts of *Jordan*, and some of the limitations of the decision.

If you require a quick refresher on *Jordan*: the case established presumptive ceilings for unreasonable delay between charges being laid and the end of trial for the purposes of the *Charter* section 11(b) right to trial within a reasonable time. The ceilings are 18 months for charges going to provincial court and 30 months for charges going to superior court. Above the ceiling, there is a presumption that 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.

R v King and Reserved Decisions

R v King was a criminal trial of three individuals facing various charges in relation to a conspiracy to traffic cocaine into Canada (at para 113). The charges were laid after *Jordan* was released (so there were no transitional period considerations), and the time from the charge to the end of the trial was 40 months (at para 2). The case considered whether any of a 12.25-month period was attributable to the defence and concluded it was not (at paras 14-15). Among the factors slowing the process down were a 17-month delay to provide disclosure and decisions not to sever the trials of any of the accused out of the joint trial. The prosecutors "alleged that the defence caused the 7.25-month delay to create a viable ***Jordan*** application" (at para 50), but Justice Gillian D. Marriott concluded that the actions of defence counsel had been legitimate (at paras 57-60).

The Provincial Court Judge took almost nine months to render her decision on the committal of two of the accused (at para 67). The central question was whether this amounts to a discrete event causing an exceptional circumstance such that the nine months should not count towards

the ceiling. Justice Marriott noted that courts have been split on the issue so far (at paras 84-97). The Alberta Courts had previously excluded judicial decision-making time from the *Jordan* ceiling calculation in *R v Lavoie*, 2017 ABQB 66 (a decision discussed in one of my earlier posts), but in *R v Mamouni*, 2017 ABCA 347 Justice Jack Watson stated judicial decision-making time would normally count towards the *Jordan* ceilings, but exceptional delays could be considered an exceptional circumstance (at para 90, referring to *Mamouni* at para 54-55). Justice Marriott noted that the majority of the Supreme Court in *Jordan* had accounted for preliminary inquiries in selecting the 18 and 30 month ceilings, so they must have considered judicial decision-making time on a committal to count towards the ceilings (at paras 97-100). Justice Marriott concludes that the judicial decision-making time in this case is not an exceptional circumstance and must count towards the ceilings (at para 105).

Justice Marriott found the case was not sufficiently complex to justify the delay (at para 115). The prosecutors attempted to argue both that defence counsel caused delay by intentionally overestimating the complexity of the trial, which prosecutors said was actually simple, and that the case was complex enough that the long judicial decision-making time was justified by the complexity of the case. Although it is proper for counsel to argue different positions in the alternative, it is strategically challenging to take two positions that conflict directly with each other. Justice Marriott did not find the approach compelling:

> The Crown's position on exceptional circumstances arising from the case's complexity contradicts their position on the 7.25-month alleged defence delay. Specifically, in their written submissions, the Crown asserted that the defence over-estimated the length of the trial because the prosecution consists of "the Applicants' own words, caught on videotape, coupled with a single drug seizure in the United States." (at para 115)

Justice Marriott found that prosecutors had not taken appropriate steps to mitigate the delay (at paras 125-128), and gave some examples of actions that could have been taken:

> "For example, the Crown could have filed an Originating Notice for an Order in the nature of Mandamus, requiring the Provincial Court Judge to render the decision on committal. Crown counsel undertook this action in *Rahey*: at para 6. Further, the Crown could have sent a letter to the Chief Judge expressing concern about the delay. Crown counsel undertook this action in *KGK*: at para 34." (at para 121)

Justice Marriott found that prosecutors also could have severed one of the accused from the trial, or severed some of the charges in order to proceed more expeditiously (at para 123). Justice Marriott found the section 11(b) rights of the accused had been violated and granted the stays (at para 131).

Commentary on *King*

I agree with Justice Marriot's interpretation of the majority of the Supreme Court's reasons in *Jordan* finding that the that judicial decision-making time ought to count towards the *Jordan* ceilings. That conclusion also seems doctrinally necessary: the duty to try an accused within a reasonable time is owed by the Canadian government, not merely the prosecutors assigned to the

case. (This is an instance where the term 'Crown' as shorthand for 'crown prosecutor' can be misleading, because 'Crown' is also shorthand for the Canadian government as a whole.)

If I have any disagreement with the decision, it is the way in which the responsibility to mitigate delay appears to be placed on the prosecutors alone. Most mitigation measures prosecutors could take for delay are not systemic improvements: one case would be sped through at the cost of delaying the other cases in the system. As has long been noted, if a prosecution is severed to speed one charge or accused through the system, it will often increase the total amount of total time the entire prosecution takes because procedures must be duplicated (consider *R v Koruz*, 1992 ABCA 144 at para 83, and *R v Basha*, 2017 ONSC 337). If the prosecutions of the three accused in *King* had been severed and heard independently, the total amount of court and prosecutor time required would likely have been greater than having them all heard together. For the prosecutor to have taken action to compel the provincial court judge to release the committal decision faster would have taken extra prosecutor and court time, and presumably only re-ordered judges' priorities and slowed down their other responsibilities.

Material and Cultural Impacts of *Jordan*

The majority of the Supreme Court who decided *Jordan* wanted the decision to change the culture of complacency and delay that existed in the Canadian criminal justice system. *Jordan* has, from what I understand (I do not practice criminal law), changed the 'culture' of criminal law, though whether it has actually improved it is less clear.

In an unfortunate way, *Jordan* may have caused defence counsel and prosecutors to use more court time and resources instead of less. There are, of course, more section 11(b) applications and the associated time for argument and judicial decision writing. But beyond that, some applications to adjourn court dates and appearances that would have taken moments pre-*Jordan* now often include argument about who is responsible for the delay and whether the defence has waived the delay.

The heart of the problem might be that the focus on courtroom culture rather than the funding of the justice system is misguided – courtroom culture is heavily determined by the material conditions in which courtrooms operate. The indirect result of *Charter* sections 7 and 11(b) is that if the government does not fund the justice system enough for trials that meet the principles of fundamental justice to be completed within a reasonable time, the criminal justice system will be unable to operate. This is an admirable principle: a justice system that is interminably slow or fails to accord with fundamental justice is dangerous to a free and democratic society. What most people would hope would happen is that the government will sufficiently fund the justice system – but instead it has been allowed to fray at the edges.

The impacts of *Jordan* are unevenly and unjustly distributed: accused persons who are ultimately found not guilty receive no direct benefit (or at least, I am not aware of any reported decisions where they have sought any) and those who are found guilty outside the *Jordan* timelines receive an outsized benefit in the form of a post-conviction stay of charges.

I still believe the Supreme Court was right to put their foot down on delay in the criminal justice system in *Jordan*. However, the focus on 'courtroom culture' has been excessive and misleading. Strategic approaches by prosecutors can partially control the problems, but the stays following *Jordan* can most likely be ended only by substantial government investments into the justice system (or programs that keep people out of the justice system). In *Jordan*, the majority of the Supreme Court did mention that "Government will also need to consider whether the criminal justice system (and any initiatives aimed at reducing delay) is adequately resourced" (at para 140). The judiciary is wary of interfering in budgeting questions that should be handled by the legislature, but the point can be made more clearly: government had inadequately resourced the criminal justice system in most provinces, and the 'culture of complacency' was primarily the acceptance by judges and lawyers that the Canadian justice system was going to be indefinitely underfunded.

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