

***R v Jordan* – An unreasonable new ceiling for reasonable delay?**

By Geneviève Ryan¹

Introduction:

On July 8, 2016, the Supreme Court overruled *R v Morin*² with their 5-4 decision in *R v Jordan*³, which introduced new presumptive ceilings for unreasonable delay: 18 months for cases being heard before provincial courts, or 30 months for cases that are either before the superior court or before the provincial court following a preliminary inquiry. Where delays exceed the ceilings, the Crown must demonstrate that they are attributable to exceptional circumstances outside its control. To prove that delays below the ceiling are unreasonable, the defence must demonstrate that the case took ‘markedly’ longer than it should have, and that they made a sustained and meaningful effort to expedite proceedings.

Applying the new framework to the facts in *Jordan* and to its companion case, *R v Williamson*⁴, the Court found that the delays in both cases exceeded the new ceilings and that the Crown had failed to demonstrate exceptional circumstances that would justify the delay. The new framework raises important new questions about the nature of the right to be tried within a reasonable time, the prevalence of lengthy delays in the Canadian justice system, and the appropriate role of the judiciary in addressing them.

Background to the Case

The appellant in *Jordan* was arrested in December 2008 following a police investigation into a “dial-a-dope” drug operation in British Columbia, and was charged with various possession and trafficking offences. He was detained until February 2009, when he was released under strict house arrest and bail conditions, which applied throughout the 49.5 months from when charges were laid to the end of his trial in February 2013. The delays were attributable to a variety of factors, including delays in Crown preparation of evidence for preliminary inquiries, courtroom availability and an adjournment following the dismissal of Mr. Jordan’s application for a stay of proceedings based on the alleged breach of his s.11(b) *Charter* right to be tried within a reasonable time. The trial judge found that the delay was not unreasonable, with substantial weight given to the fact that while the delay was in excess of the *Morin* guidelines, it did not

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² [1992] 1 SCR 771 (*Morin*).

³ 2016 SCC 27 (*Jordan*).

⁴ 2016 SCC 28 (*Williamson*).

cause Mr. Jordan to suffer significant prejudice. The British Columbia Court of Appeal denied Mr. Jordan's appeal, affirming the trial judge's reasoning.

The new framework explained

The majority judgment delivered by Moldaver, Karakatsanis and Brown JJ., introduced the presumptive ceilings along with the new framework for rebutting the presumption of unreasonableness for excessive delays. Above the ceiling, the burden is on the Crown to prove exceptional circumstances beyond its control. Exceptional circumstances are defined as being circumstances which are reasonably unforeseeable or reasonably unavoidable, and which Crown counsel cannot reasonably remedy once they have arisen. While the majority held that qualifying circumstances cannot be decided in advance, they indicated that they will generally belong to one of two categories: discrete events (such as medical or family emergencies) or particularly complex cases which, because of the nature of the evidence or issues, require an inordinate amount of trial or preparation time.

Accused wishing to challenge delays that fall below the ceiling will have the burden of demonstrating that the delay is unreasonable, requiring them to demonstrate both that the defence made a meaningful and sustained effort to expedite proceedings and that the case took "markedly" longer than it should have.

The justification for these new ceilings and their accompanying framework rests on a number of flaws with both the *Morin* framework and the justice system itself. With regard to the *Morin* framework, the majority stated that it was both unduly complex, requiring a "minute accounting...[which] might fairly be considered the bane of every trial judge's existence", and so unpredictable as to make it difficult to establish whether a breach has occurred. The majority further took issue with the often determinative role of prejudice in a *Morin* analysis, despite that the reasonableness of a delay is not necessarily determined by the amount of suffering it causes the accused.

These flaws within the *Morin* framework were found to generate a "culture of complacency" within the justice system, generating a permissive atmosphere around delays and incentivizing parties to rationalize rather than remedy them. In light of this, the majority decided it was necessary to replace the retrospective inquiry established by *Morin* with a preventative framework aimed at encouraging future compliance over retroactive justification.

The data underlying the *Jordan* ceilings

The majority gave a number of justifications for setting the ceilings at 18 and 30 months. The *Morin* guidelines of 14-18 months institutional delay formed the baseline, to which were added

factors such as inherent time requirements of a case and the increased complexity of criminal proceedings since *Morin* was decided.

The majority also conducted a qualitative review of appellate s.11(b) decisions from the past decade, in addition to many trial-level decisions. This review aided the setting of the ceilings and the defining of exceptional circumstances, as the Court considered how the new framework might have influenced those past decisions. The majority especially noted that in leading cases such as *R v Askov*⁵ and *R v Godin*⁶ the unreasonable delay was within the 30-month range.

Cromwell J., writing for the minority, was extremely skeptical of this qualitative review. He pointed out that 20% of cases in that review held delays at or below the ceilings to be unreasonable. Under the *Jordan* framework, those cases would have been presumed reasonable absent proof of defence efforts to expedite proceedings.

Cromwell J. also questioned the appropriateness of the ceilings in light of the review. The average net delay in reviewed cases before the superior court was 44 months and the median was 37 months – well above the 30-month ceiling. A similar discrepancy arose with provincial court cases: 27 average and 24.5 month median net delays well exceeded the 18-month ceiling.

Finally, Cromwell J. voiced concerns over ceilings developed without the assistance of evidence presented by counsel. He contrasted this fact with the multiple volumes of evidence from several expert witnesses on the issue of institutional delay across Canada, in addition to evidence from witnesses familiar with the region at issue and international jurisdictions that led to the administrative guidelines set out in *Morin*.

In light of the apparent discrepancies and potential evidentiary flaws, Cromwell J. remarked that “the proposed approach in effect substitutes a right to be “tried under the ceiling” for a right to be tried within a reasonable time.”

The minority’s alternative framework

Instead of new presumptive ceilings, the minority judgment recommended revising the *Morin* guidelines. Their framework would have regrouped the *Morin* factors into four main steps as a guide to judges confronted with a s.11(b) claim:

- 1) Is an inquiry into unreasonable delay justified in this case?
- 2) What is a reasonable amount of time for the disposition of a case like the one at bar?
- 3) How much of the delay that occurred actually counts against the state?

⁵ [1990] 2 SCR 1199.

⁶ 2009 SCC 26.

4) Was the delay that counts against the state unreasonable?

Cromwell J. argued this framework addressed issues of prejudice by accounting for it under the heading of the normal amount of time a given case requires, and emphasized that in any case prejudice is unnecessary to establish a s.11(b) breach. With regards to the problem of predictability under the *Morin* framework, Cromwell J. argued that the revised guidelines would improve it and that in any case unpredictability alone was an insufficient reason to overrule *Morin*.

As for the retrospective nature of the *Morin* framework and the 'culture of complacency', Cromwell J. opined that it is better left to Parliament to legislate a remedy, as the legislature is better placed to enact a solution comprehensively addressing the root of the problem.

R v Williamson – the first application of the ceilings

The *Jordan* majority applied the new framework in *Williamson*, a case involving sexual offences against a minor. Charges were laid in 2009, and various delays – for example, the last minute unavailability of judges for preliminary inquiries and limited courtroom availability – prevented the trial from taking place before December 2011. The total time elapsed from charges to trial was 35.5 months, of which the majority attributed 1.5 months to the defence. As 34 months was still in excess of the ceiling, the delay was presumptively unreasonable.

The majority found no exceptional circumstances in *Williamson*, and then considered the 'transitional exceptional circumstance' that the parties had been relying on *Morin*. The fact that the delay exceeded the *Morin* guidelines and that the Crown had not undertaken sufficient efforts to expedite the process – here the majority particularly noted the lack of efforts to find an alternate courtroom – led to a finding that the 'transitional exceptional circumstance' was inapplicable. McLachlin CJ would have found the delay unreasonable under the revised framework proposed by Cromwell J. in *Jordan*.

Cromwell J., writing for the minority, applied the revised *Morin* framework. While he agreed that 35.5 months exceeded the reasonable time required for disposition of a case of this nature (which he set at 25 months) he held that only five months of the excess could be fairly counted against the state. With a total excess of only 5.5 months, he found it was a close case that warranted consideration of societal interests in having the case tried on its merits. Given the gravity of the offence, he found that the balance lay with the societal interests in having the case proceed to trial, and would have allowed the appeal.

Comments

The division within the Court on the issue of whether an entirely new framework is either reasonable or necessary is not likely to improve the confusion that may follow the introduction of the new ceilings. A particular issue is likely to be the application of the *Jordan* decision itself as a ‘transitional exceptional circumstance’ and whether or not parties reasonably relied on the *Morin* framework in cases where pretrial delays exceed the ceilings.

The consideration by the majority in *Williamson* that the Crown did not attempt to mitigate the delays in accessing a courtroom casts significant doubt on the potential clarity and effectiveness of the transitional regime. As pointed out by the minority, that particular issue had not been raised as an issue at trial or on appeal. The manner in which the majority introduced it in their analysis arguably disregards the reasonable reliance on *Morin* by nonetheless introducing a new factor into the analysis. This kind of analysis risks nullifying the ostensible benefit of introducing transitional considerations in the first place – which would have been to avoid the disruption of thousands of cases, as occurred following *Askov*.

We should also be concerned about the fact that *Williamson* was a close case, and the level of disagreement over how much time could be counted against the defence or the state. This disagreement suggests that the *Jordan* framework may not actually reduce the amount of argument and rationalization over elapsed time in the courtroom.

Finally, all three opinions in *Williamson* demonstrate that the delay would have been unreasonable under the *Morin* framework – both in its original form and in the revised framework proposed by Cromwell J. This reinforces the question of whether the introduction of ceilings to determine the reasonableness of a delay is necessary. What is the added value of a hard ceiling if in the most cases the revised *Morin* guidelines would have achieved the same result? The fact that *Williamson* was a close case is illustrative of the potential result in any case where delays fall within a month or two of the ceiling.

For example, a case involving 29.5 months total delay and identical facts to *Williamson* would have been presumptively reasonable. Yet this is still in excess of what the minority deemed to be the inherent time requirements of that kind of case. Even if the defence had made reasonable efforts to expedite the process, the defence still must prove that the case took ‘markedly’ longer than it should have – and it is not clear whether four or five months is ‘marked’. If four or five months is not ‘markedly longer’ than a case ought to take, it is not obvious why, two weeks later when the elapsed time crosses the 30 month ceiling, it should become presumptively unreasonable.