

Each year at OJEN's Toronto Summer Law Institute, former Ontario Court of Appeal judge Stephen Goudge presents his selection of the top five cases from the previous year that are of significance in an educational setting. This case summary and related questions, based on his comments and observations, is appropriate for discussion and debate in the classroom.

R v JORDAN, 2016 SCC 27, [2016] 1 SCR 631

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<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/16057/index.do>

Facts

Mr. Jordan was involved in a “dial-a-dope” operation and was arrested and charged with a number of drug-related offences in December 2008. Not only was he operating a phone line on which orders for cocaine and heroin were placed, he also oversaw the sale of these drugs through other persons.

After his arrest, Mr. Jordan remained in jail for two months while awaiting his trial. Then, he was released on house arrest with very strict conditions. His case worked its way through the justice system for over 49 months and he was convicted of the offences in February 2013.

Procedural History

In 2012, Mr. Jordan asked the trial judge to stay (not proceed with) all his charges, based on his claim that his s. 11(b) *Charter* right “to be tried within a reasonable time” had been violated. The process for evaluating whether a delay in the trial process infringes this right had been set out in an earlier case, *R v Morin*, in 1992. The trial judge dismissed Mr. Jordan’s application after applying the *Morin* framework.

The Court of Appeal for British Columbia dismissed Mr. Jordan’s appeal from this conviction, stating that the trial judge had applied a proper analysis of the s.11(b) rights using the applicable case law. Jordan appealed this decision to the Supreme Court of Canada (SCC).

Issues

1. Had the accused’s right under s.11(b) of the *Charter* been violated?
2. What is the appropriate analysis to decide a s. 11(b) *Charter* application?
3. If the accused’s right has been violated, what are the appropriate remedies?

Canadian Charter of Rights and Freedoms

11. Any person charged with an offence has the right (b) to be tried within a reasonable time.

Decision

The SCC allowed the appeal on the basis that Jordan's right to a trial within a reasonable time had been violated, set the convictions aside, and granted a stay of proceedings.

Ratio

The *Morin* framework to establish whether criminal proceedings have taken an unreasonable amount of time to reach their conclusion after trial should no longer be used. Instead, an objective timeline should be applied, with different guidelines for matters tried in provincial and superior courts. The new framework for deciding s. 11(b) issues will better address the real problems of delay in criminal courts. To avoid chaos and multiple reevaluations of cases that are already in the criminal justice system (as a result of this decision), the new framework will be applied contextually, to prevent negative effects on people charged under the old framework and to provide transitional flexibility.

Reasons

In a 5-4 decision, the majority addressed the issue by looking at the problems with previous considerations of s. 11(b). The s. 11(b) analysis structure had been determined in *R v Morin*, [1992] 1 SCR 771, and had been the law for more than 20 years. The essence of that framework is still very important. It weighed four factors which the Court uses to identify a s. 11(b) violation:

- 1. Length of Delay** – Time between the charge and trial;
- 2. Waiver of Time Periods** – Whether any amount of the length of delay was due to actions taken on the defence side of the case;

3. Reasons for Delay – These may include inherent time restrictions presented by the case, how much of the delay was due to egregious conduct by either the accused or the Crown, and if resource limitations were a factor; and

4. Prejudice to the Accused – During the time of delay, what were the consequences for the defendant and the ability to have a fair trial (e.g. a witness dying in that time span of delay and fairness affected by that witness's absence)?

The majority of the Court in *Jordan* determined that this *Morin* framework is insufficient from a practical standpoint: it is too complex and does not promote diligence by justice system participants to point out improper conduct or resourcing issues that may lead to time delays. Instead, the SCC created a new framework for analyzing s. 11(b), one that has an objective timeline with a "presumptive ceiling" – a set period of time after which further delay is automatically presumed to be unreasonable.

Under the new framework any delay is presumed to be unreasonable if it is longer than 18 months for cases tried in provincial courts or 30 months in superior courts. Any delay that is due to or waived by the defence does not count towards the 18 or 30-month limit. If the presumptive ceiling is exceeded, the Crown must show that the delay was due to "exceptional circumstances" outside of its control that were reasonably unforeseen or unavoidable, and cannot be reasonably remedied. The "exceptional" circumstances are not a closed list; however, in general, they will fall into one of two categories – discrete events or particularly complex cases. If the exceptional circumstance is discrete, the time attributable to it will be deducted from the total time. If the case is

extremely complex, the delay is reasonable and no further analysis is required. If the presumptive ceiling is not exceeded, the defence has the burden to demonstrate that it took continuous and purposeful steps to achieve prompt justice, and that the case took an unreasonable amount of time as a whole.

The majority gave guidance on how to measure the reasonableness of delay for cases that were already in the system at the time of this decision, under a set of transitional rules.

Dissent

The SCC was sharply divided in this decision. In dissent, four judges said that the *Morin* framework should be revised, rather than replaced with a new, more fixed approach. A revised *Morin* framework was preferred because courts would continue to balance the many possible competing factors. The new framework would restrict a court's ability to assess all the factors that could define an unreasonable delay. The minority opinion also expressed the view that setting hard time limits might exceed the court's authority, since it makes a rule that is more appropriately made by democratically-elected legislators.

Both the majority and the dissenting judges agreed that, applying any framework, the delay experienced by Mr. Jordan was unreasonable and that proceedings against him should be stayed.

Additional Note: The Impact

This decision had immediate consequences. A number of serious charges, including murder charges were stayed as many persons who were facing trial had already experienced delays exceeding the "presumptive ceiling" – in spite of the decision's "transitional provisions". It has also had a dramatic impact on the administration of justice.

The Attorneys General of Ontario and Canada appointed additional judges to the courts under their respective jurisdictions, and Ontario hired new Crown prosecutors. Administrative procedures in the court system were amended to shorten waiting times for hearings, in particular because of high numbers of matters needing to be heard before their time limit expires and of accused persons who are seeking court hearings to determine whether their trial delays have been reasonable under the newly adopted framework.

DISCUSSION

1. Is it important to the justice system that persons accused of crimes should be tried within a reasonable time after being charged? Why?
2. Which is easier to understand: the *Morin* framework or the one established in this case?
3. In what ways might long wait times between charge and trial be problematic for both accused persons and for the administration of justice?
4. Why do you think the presumptive ceiling is different for crimes tried in the provincial courts than for those tried in superior courts?
5. Try to think of one benefit and one challenge for both defendants and prosecutors that might come as a result of this decision.