

## **R. v. Cody: Trial within a reasonable time and enhancing efficiency**

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The Supreme Court decision in *Jordan*<sup>1</sup> was a watershed decision that changed the balancing required in considering whether a trial has occurred in a reasonable time. The Court has affirmed the importance of this case in the 2017 decision in *R. v. Cody*.<sup>2</sup>

In considering whether a stay of charges should be granted in the context of trial within a reasonable time, the seriousness of the offence will not override the rights in issue. The result is that very serious charges, including murder, have been stayed. This has resulted in considerable media criticism and understandably victims of serious crimes have been left feeling that the justice system has failed them.<sup>3</sup> The *Jordan* and the *Cody* decisions require that all of the actors in the criminal justice system must engage in a risk balancing of priorities much earlier in the process.

The Court set presumptive time limits in *Jordan*:<sup>4</sup>

The new framework for s. 11(b) can be summarized as follows:

- There is a ceiling beyond which delay becomes presumptively unreasonable. The presumptive ceiling is 18 months for cases tried in the provincial court, and 30 months for cases in the superior court (or cases tried in the provincial court after a preliminary inquiry). Defence delay does not count towards the presumptive ceiling.
- *Once the presumptive ceiling is exceeded*, the burden shifts to the Crown to rebut the presumption of unreasonableness on the basis of exceptional circumstances. Exceptional circumstances lie outside the Crown's control in that (1) they are reasonably unforeseen or reasonably unavoidable, and (2) they cannot reasonably be remedied. If the exceptional circumstance relates to a discrete event, the delay reasonably attributable to that event is subtracted. If the exceptional circumstance arises from the case's complexity, the delay is reasonable.
- *Below the presumptive ceiling*, in clear cases, the defence may show that the delay is unreasonable. 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.

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<sup>1</sup> *R. v. Jordan*, 2016 SCC 27, 2016 CSC 27.

<sup>2</sup> *R. v. Cody*, 2017 SCC 31.

<sup>3</sup> <https://www.theglobeandmail.com/news/national/ontario-murder-case-tests-courts-time-limit-dismissals/article34648763/>; <https://www.theglobeandmail.com/news/national/murder-charge-dismissal-leaves-fouad-nayels-parents-waiting-for-justice/article35281939/>

<sup>4</sup> *R. v. Jordan* 2016 SCC 27, 2016 CSC 27 at paragraph 105.

- For cases currently in the system, the framework must be applied flexibly and contextually, with due sensitivity to the parties' reliance on the previous state of the law.

In *Cody*, the Supreme Court of Canada delivered a unanimous decision with strong language underscoring the importance of *Charter* rights and precedent in the Court:<sup>5</sup>

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. But *Jordan* was released a year ago. Like any of this Court's precedents, it must be followed and it cannot be lightly discarded or overruled (*Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 38; *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, at para. 44). The *Jordan* framework now governs the s. 11(b) analysis and, properly applied, already provides sufficient flexibility and accounts for the transitional period of time that is required for the criminal justice system to adapt.

The facts in *Cody* set the context. On January 12, 2010, Mr. Cody was arrested as a part of "Operation Razorback", a drug trafficking investigation. A search of Mr. Cody's vehicle uncovered half a kilogram of marijuana, a kilogram of cocaine and a stun gun.

In the ensuing months, there were skirmishes over the format of disclosure, changes of counsel, motions to exclude evidence, further disclosure concerning misconduct allegations that had been made against one of the police officers involved in Operation Razorback, an application for a stay of proceedings or a mistrial, and a recusal application alleging reasonable apprehension of bias.

The Court in *Cody* applies the *Jordan* framework in a staged manner. The first step under this framework entails "calculating the total delay from the charge to the **actual or anticipated end of trial**" [emphasis added]. Pausing here for a moment, it is worth noting that the parameter of the actual or anticipated end of trial is a major change from prior jurisprudence in the trial within a reasonable time jurisprudence. One of the logistical dynamics that this creates is that the trial Judge's own conduct of the case in terms of efficient trial management may be in issue.

In the *Cody* case an information was sworn against Mr. Cody on January 12, 2010, and his trial was scheduled to conclude on January 30, 2015. This makes the total delay approximately 60.5 months.

After the total delay is calculated, "delay attributable to the defence must be subtracted". Defence delay is divided into two components: (1) "delay waived by the defence"; and (2) "delay that is caused solely by the conduct of the defence".

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<sup>5</sup> *R. v. Cody*, 2017 SCC 31 at paragraph 3.

In the *Cody* case, it was undisputed that Mr. Cody expressly waived 13 months of delay. Accounting for this reduces the net delay to approximately 47.5 months.

In assessing the second component, the Supreme Court observes that the only deductible defence delay under this component is, therefore, that which: (1) is solely or directly caused by the accused person; and (2) flows from defence action that is illegitimate inasmuch as it is not taken to respond to the charges. As the said in *Jordan*, the most straightforward example is “[d]eliberate and calculated defence tactics aimed at causing delay, which include frivolous applications and requests”. Similarly, where the court and Crown are ready to proceed, but the defence is not, the resulting delay should also be deducted.

The Court sets the bar for illegitimate action as less than professional misconduct but also respectful of the right to make full answer and defence:

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.<sup>6</sup>

To effect real change, the Court endorses a proactive approach that prevents unnecessary delay by targeting its root causes. The following are some highlights of this approach:

- Before permitting an application to proceed, a trial judge should consider whether it has a reasonable prospect of success. This may entail asking defence counsel to summarize the evidence it anticipates eliciting in the *voir dire* and, where that summary reveals no basis upon which the application could succeed, dismissing the application summarily.
- Trial judges should also be active in suggesting ways to improve efficiency in the conduct of legitimate applications and motions, such as proceeding on a documentary record alone. This responsibility is shared with counsel.

On the facts in *Cody*, the Court deducted two periods of time as defence delay. First, it was undisputed throughout the proceedings that the delay resulting from Mr. Cody’s first change of counsel should be deducted as defence delay. The second period arose from Mr. Cody’s recusal application alleging reasonable apprehension of bias, which was meritless, frivolous or illegitimate.

After accounting for these two deductions, the net delay is approximately 44 months. Because the net delay of approximately 44 months exceeds the 30-month ceiling, it was presumptively unreasonable, and it fell to the Crown to demonstrate exceptional circumstances.

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<sup>6</sup> *Cody* at paragraph 35.

Exceptional circumstances lie outside the Crown's control in the sense that (1) they are reasonably unforeseen or reasonably unavoidable, and (2) Crown counsel cannot reasonably remedy the delays emanating from those circumstances once they arise.

In *Cody* the Court divided exceptional circumstances generally into three categories: discrete events; particularly complex cases; and transitional cases already in the system.

(i) Discrete events

"The delay caused by discrete exceptional events or circumstances that are reasonably unforeseeable or unavoidable is deducted to the extent it could *not be reasonably mitigated by the Crown* and the justice system" (emphasis added). For example, Mr. Cody conceded that his former counsel's appointment to the bench qualifies as an unavoidable discrete event, and that the 4.5 months of resultant delay should be deducted. By contrast, "it was the Crown's refusal to release the disclosure that pushed the delay beyond what might otherwise be viewed as reasonable".

(ii) Particularly Complex Cases

A particularly complex case is one that "because of the nature of the evidence or the nature of the issues, require[s] an inordinate amount of trial or preparation time". This calculation is qualitative and is not a simplistic analysis only of things such as volume of disclosure, as illustrated in the following paragraph:

In this case, the Crown argues that four months of delay should be deducted as an exceptional circumstance based on the complexity as demonstrated by the voluminous disclosure. The majority of the Court of Appeal agreed. This approach, however, is inconsistent with a qualitative assessment of case complexity. The delay caused by a single isolated step that has features of complexity should not have been deducted. While voluminous disclosure is a hallmark of particularly complex cases, its presence is not automatically demonstrative of complexity. The question is whether the case is sufficiently complex "such that the delay is justified" (*Jordan*, at para. 77). Here, there was extensive disclosure. However, the balance of the proceedings appear to have been relatively straightforward. In our view, even after accounting for the voluminous disclosure, this does not qualify as a particularly complex case.<sup>7</sup>

(iii) The Transitional Exceptional Circumstance

The Crown may show that it cannot be faulted for failing to take further steps, because it would have understood the delay to be reasonable given its expectations prior to *Jordan*. Under this category however, the seriousness of the offence and prejudice play an important role under the transitional exceptional circumstance.<sup>8</sup> For aspects of the case that pre-dated *Jordan*, the focus should be on reliance on factors that were relevant under the *Morin* framework, including the seriousness of the offence and prejudice. For delay that accrues after

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<sup>7</sup> *Cody* at paragraph 65.

<sup>8</sup> *Cody* at paragraph 70.

*Jordan* was released, the focus should instead be on the extent to which the parties and the courts had sufficient time to adapt.

As noted above, seriousness of the offence is not a relevant factor in post *Jordan* cases, which brings this analysis into line with the same reasoning by the Court in the exclusion of evidence context.

On the facts in *Cody*, the Court found that the charges were serious, but this consideration was overcome by the trial judge's findings of "real and substantial actual prejudice". The ultimate conclusion of the Supreme Court of Canada was that the delay in this case was unreasonable.

In assessing the complexity of a trial, an important factor will be the necessity of expert evidence. Expert evidence must pass the gatekeeper threshold of admissibility. Expert opinion evidence can be a key element in the search for truth, but it may also pose special dangers. To guard against them, the Court over the last 20 years or so has progressively tightened the rules of admissibility and enhanced the trial judge's gatekeeping role. These developments seek to ensure that expert opinion evidence meets certain basic standards before it is admitted.<sup>9</sup>

Trial Judges play a gatekeeper function. Expert evidence is not admissible unless it meets strict criteria, as articulated by Justice Cromwell of the Supreme Court of Canada:

Finding that expert evidence meets the basic threshold does not end the inquiry. Consistent with the structure of the analysis developed following *Mohan* which I have discussed earlier, the judge must still take concerns about the expert's independence and impartiality into account in weighing the evidence at the gatekeeping stage. At this point, relevance, necessity, reliability and absence of bias can helpfully be seen as part of a sliding scale where a basic level must first be achieved in order to meet the admissibility threshold and thereafter continue to play a role in weighing the overall competing considerations in admitting the evidence. At the end of the day, the judge must be satisfied that the potential helpfulness of the evidence is not outweighed by the risk of the dangers materializing that are associated with expert evidence.<sup>10</sup>

The role of expert evidence will have particular relevance to white collar financial charges and/or regulatory charges. To the extent that there is a ruling at the gatekeeper stage about the necessity of this evidence, this will assist with the determination of complexity on the issue of trial within a reasonable time.

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<sup>9</sup> *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 [2015] 2 SCR 18

<sup>10</sup> *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 [2015] 2 SCR 18 at paragraph 54.