The Alberta Government's Response to *Jordan*

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LAW ON DELAY – BEFORE AND AFTER *R. V. JORDON*

Previous Framework: *R. v. Askov* and *R. v. Morin*

Section 11(b) of the Canadian *Charter of Rights and Freedoms* (the *Charter*) provides that any person charged with an offence has the right to be tried within a reasonable time.

In 1990, the Supreme Court of Canada (SCC) in *R. v. Askov [1990] 2 S.C.R. 1199* directed that four factors must be considered in determining whether a period of time amounts to unreasonable delay:

- Length of the delay (a more complex case may justify a more lengthy delay);
- Explanation for the delay (delays owing to inadequate institutional resources weigh against the Crown);
- Waiver of delay (when defence acknowledges responsibility for a delay); and
- Prejudice to the accused.

In 1992, in *R. v. Morin [1992] 1 S.C.R. 771* the SCC revisited the test for unreasonable delay set out in *R. v. Askov*, putting an increased emphasis on the presence or absence of prejudice, and putting a greater onus on the accused to prove that prejudice has occurred.

For the next 24 years, this was the framework within which the right to a trial within a reasonable time was assessed. During this timeframe, cases were certainly stayed due to unreasonable delay, but in Alberta this was a relatively infrequent occurrence and was nearly unheard of in serious cases.

New Framework: *R. v. Jordan*, 2016 SCC 27

In 2015, the SCC heard two appeals involving the right to a trial within a reasonable time: one case originating in British Columbia and the other in Ontario. Recognizing that the outcome of these cases had the potential to impact prosecutions in Alberta, and given the Attorney General of Alberta's experience in addressing pre-trial delay, the ACPS intervened. The SCC decisions in these two cases were released on July 8, 2016. The decisions are lengthy and complex, and they have significant implications for the criminal justice system.

In the two judgments, the SCC departed from the previous jurisprudence on the question of trial within a reasonable time. It has now imposed "ceilings" for bringing criminal charges to trial. After subtracting delay waived or frivolously caused by the defence, these ceilings are:

- 18 months for trial in the Provincial Court of Alberta, and
- 30 months for preliminary inquiry and trial in the Court of Queen's Bench.

If these time periods are exceeded, the Crown bears the burden of justifying the delay based on "exceptional circumstances;" that is, circumstances that the Crown could not reasonably foresee or remedy. In addition, the SCC held that:

- Particularly complex cases may create exceptional circumstances;
- Where the Crown commences a particularly complex prosecution, it will be expected to have a plan for proceeding expeditiously; and
- Throughout, the burden is on the Crown to show proactive steps to combat delay.

Notwithstanding the language of the SCC regarding flexibility and context for cases currently "in the system," in the companion case of *R. v. Williamson, 2016 SCC 28*, the SCC overturned convictions for historical sexual assaults after a jury trial that fell just four months outside of the new ceiling (a ceiling that obviously did not exist at the time of Williamson's trial). This certainly indicates that the ceilings are meant to the strictly enforced.

Since then, *R. v. Cody, 2017 SCC 31* has further clarified that the only deductible defence delay is that which is solely or directly caused by the accused and flows from defence action that is illegitimate as non-responsive to the charges, or is markedly inefficient or indifferent. The SCC reinforced the message that the judiciary is equipped with procedural tools to address potential delay. A court may, for instance, deny an adjournment that would otherwise be deductible as defence delay on the basis that it would result in an unacceptably long delay. In addition, before a pre-trial application is permitted to proceed, judges should consider whether the application has a reasonable prospect of success.

The new framework encourages (indeed, demands) a shift in culture by creating incentives for both the Crown and defence to proactively address and prevent delay.

SOME PRACTICAL REALITIES

A constellation of factors have – and continue to – pressure Crown prosecutors and the criminal justice system as a whole. The ACPS has been under increasing caseloads in recent years due to