

Unreasonable Delay and Environmental Prosecutions

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Companies and individuals who may be charged with environmental offence, often ask how long the legal proceedings may last. In the event the defendant and Crown are unable to reach an agreement to resolve the charge(s), how long will it take for the matter to proceed to trial? The right to be tried within a reasonable time is a constitutionally protected right under the Canadian Charter of Rights and Freedoms. The Supreme Court of Canada recently set an upper limit of 18 months as the presumed ceiling for a reasonable time to trial.

Summary

On July 8, 2016, the Supreme Court of Canada (the SCC) released its decision in *R v Jordan*.¹ The decision overhauls the legal framework for determining whether a trial is unreasonably delayed.

Jordan introduces ceilings, beyond which a delay is presumed to be unreasonable. The ceilings are:

- ♦ 18 months for cases tried in the Provincial Court without a preliminary inquiry, and
- ♦ 30 months for cases tried in the Superior Court or cases tried in the Provincial Court after a preliminary inquiry.²

If a case does not reach trial within the ceilings listed above, the Crown has the burden of proving that the delay was reasonable. If the Crown cannot discharge its burden, the charge(s) will be stayed.³

Previous Law: The *Morin* Framework

The SCC's decision in *Jordan* marks a notable change in the Court's approach to evaluating unreasonable delay. For the past 24 years, Courts have relied on the framework established by the SCC in *R v Morin*.⁴ Under the *Morin* framework, the courts balanced a number of factors to determine whether a trial delay was unreasonable.

In a frank criticism of the *Morin* framework, the SCC found it to be an unpredictable retrospective rationalization of delays which does nothing to encourage participants to prevent delay.⁵ The Court found that the *Morin* framework contributed to a "culture of delay" within the judicial system.⁶

¹ *R v Jordan*, 2016 SCC 27 [*Jordan*].

² *Ibid* at para 5.

³ *Ibid* at para 47.

⁴ *R v Morin*, [1992] SCR 771, aff'g (1990), 55 CCC (3d) 209 [*Morin*].

⁵ *Jordan*, *supra* note 1 at paras 33, 35-37

⁶ *Ibid* at para 1.

New Framework: Ceilings for Delay

In contrast, the new framework in *Jordan* establishes the following ceilings for delays:

- ◆ 18 months for cases tried in the Provincial Court without a preliminary inquiry, and
- ◆ 30 months for cases tried in the Superior Court or cases tried in the Provincial Court after a preliminary inquiry.⁷

Delays are calculated from the date the charge was laid to the actual or expected end of the trial. Any delays caused by the defence are deducted from the total.⁸ Once the ceiling period is exceeded, the trial delay is presumed to be unreasonable. The burden then falls on the Crown to justify the delay.⁹

The Crown can only justify a delay if an “exceptional” circumstance caused the delay. Exceptional circumstances must be reasonably unforeseeable or unavoidable and cannot reasonably be remedied.¹⁰ If the Crown cannot prove exceptional circumstances exist, the proceedings will be stayed.¹¹

On the other hand, the defence may argue that a delay is unreasonable before the ceiling period has elapsed.¹² However, the burden rests with the defence to show that the delay is unreasonable by establishing that:

1. the defence took “meaningful steps that demonstrate sustained effort to expedite the proceedings”,¹³ and
2. the case took markedly longer than it reasonably should have.¹⁴

Implications for Environmental Cases

How will the recent decision of *Jordan* affect future environmental prosecutions? We are already seeing a greater push during preliminary hearings to resolve matters or proceed to trial. We can also anticipate that:

- ◆ The numerical ceiling may provide to be more predictable than the previous standard of “reasonableness” under *Morin*.
- ◆ The Crown may wait longer to lay charges to prevent running into the ceiling. The Crown will have to balance the wait to lay charges against statutory limitation periods.
- ◆ Defendants will have to be more deliberate about taking “meaningful steps that demonstrate sustained effort to expedite the proceedings” if they wish to argue unreasonable delay before the ceiling period elapses.

⁷ *Ibid* at para 5.

⁸ *Ibid* at para 66.

⁹ *Ibid* at para 30.

¹⁰ *Ibid* at para 69.

¹¹ *Ibid* at para 81.

¹² *Ibid* at para 82.

¹³ *Ibid* at paras 82, 84, 85.

¹⁴ *Ibid* at paras 82, 87.

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