Time Keeps Ticking: Implications of the New Undue Delay Framework on Regulatory Prosecutions

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"Timely justice is one of the hallmarks of a free and democratic society."[1] To this end, section 11(b) of the *Canadian Charter of Rights and Freedoms* grants an accused person, including a corporation[2], the right "to be tried within a reasonable time" and section 24(1) of the *Charter* permits a court to stay proceedings against an accused whose section 11(b) *Charter* right has been infringed due to unreasonable delay.

In its 2016 decision in *R. v. Jordan*, 2016 SCC 27 ("*Jordan*"), the Supreme Court of Canada directed Canadian courts to apply a new analytical framework when determining whether a delay warrants a stay of proceedings under section 24(1) of the *Charter.* Although *Jordan* involved a criminal prosecution, the applicability of the new analytical framework to "quasi-criminal" or regulatory prosecutions may be of interest to persons operating in the regulatory environment.

The Pre-*Jordan* Framework

Prior to *Jordan*, Canadian courts weighed and considered a number of factors (i.e. the length of the delay, waiver of time periods, reasons for the delay, and prejudice to the accused) when determining whether a delay warranted a stay of proceedings under section 24(1) of the *Charter*.[3] Unfortunately, however, this analytical framework led to unpredictable results and did not encourage participants in the justice system to take preventative measures to address inefficient practices and resourcing problems. Furthermore, under the pre-*Jordan* framework, a corporate accused could only obtain a stay of proceedings under section 24(1) of the *Charter* if it could prove that its fair trial interest had been "irremediably prejudiced" by a delay.[4] Practically, this meant that a corporate accused could only obtain a stay of proceedings if it could establish that the delay impaired its ability to make full answer and defence.[5]

The *Jordan* Framework

In *Jordan*, the Supreme Court of Canada established the following three-part analytical framework for determining whether a delay warrants a stay of proceedings under section 24(1) of the *Charter*:

Part 1 — There is a time ceiling beyond which delay becomes presumptively unreasonable and warrants a stay of proceedings. The presumptive time ceiling is 18 months from the laying of charges to the end of trial for cases tried in a provincial court, and 30 months from the laying of charges to the end of trial for cases tried in a superior court (or cases tried in a provincial court after a preliminary inquiry). Delay that is attributable to, or waived by, the defence does not count towards the time ceiling. However, institutional delay that is not the fault of the Crown does count toward the time ceiling.

Part 2 — When the presumptive time ceiling is exceeded, it is automatically presumed that the delay is unreasonable and warrants a stay of proceedings. The Crown may only rebut this presumption by establishing one of the following exceptional circumstances:

1. A discrete event occurred that was reasonably unforeseen and reasonably unavoidable (such as an illness or unexpected event at trial). The delay attributable to such an event is subtracted from the total delay.
2. The case was particularly complex in that the nature of the evidence or the nature of the issues required an inordinate amount of trial time or preparation time.

Where the Crown cannot rebut the presumption of unreasonableness, the proceedings against the accused must be stayed.

Part 3 — When the presumptive time ceiling has not been exceeded, an accused may establish that the delay is unreasonable and warrants a stay of proceedings by showing that:

1. the defence took meaningful steps that demonstrate a sustained effort to expedite the proceedings; and
2. the case took markedly longer than it reasonably should have.

Where charges were laid pre-*Jordan*, the application of the framework set out above must take into account whether the parties justifiably relied on the pre-*Jordan* state of the law.

The Implications of *Jordan*

In the time that has elapsed since *Jordan* was released in 2016, Canadian courts have confirmed that the *Jordan* framework applies to determining whether a delay in a "quasi-criminal" or regulatory prosecution warrants a stay of proceedings under section 24(1) of the *Charter.*[6] They have also confirmed that the *Jordan* framework applies equally to an individual accused and a corporate accused and that a corporate accused no longer has to prove "irremediable prejudice" to obtain a stay of proceedings.[7] The practical implications of this are three-fold.

First, if the presumptive time ceiling has been breached, it will likely be easier for an individual or a corporation charged with a regulatory offence to obtain a stay of proceedings under section 24(1) of the *Charter*. Conversely, if the presumptive time ceiling has not been breached, it will likely be more difficult for an individual or a corporation charged with a regulatory offence to obtain a stay of proceedings under section 24(1) of the *Charter.*

Second, the existence of presumptive time ceilings may cause all regulatory cases to regress towards this level of delay. Crown prosecutors will likely be forced to direct their resources towards ensuring that more complex regulatory proceedings are heard within the 18 or 30 month time limit. This in turn could result in fewer resources being available for more straightforward regulatory proceedings.

Third, the existence of presumptive time ceilings may force the Crown to organize disclosure in advance of the service of a summons, move matters more quickly toward pre-trial conferences, and set early trial dates.

As a final matter, it is important to note that the rights guaranteed by s.11(b) of the *Charter* will only be available to persons “charged” with paying administrative monetary penalties ("AMPs") if the amount of the AMPs is so large that the AMPs appear to be imposed for the purpose of redressing a wrong done to society at large rather than for the purpose of deterring non-compliance within a limited sphere of regulated activity. In this regard, anyone who has been charged with a regulatory offence, or who has received notice of AMPs, would be well advised to seek legal advice at the earliest opportunity.

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

[2]*R. v. CIP Inc*., [1992] 1 SCR 843.

[3]*R. v. Morin* [1992] 1 SCR 771

[4]*R. v. CIP Inc*., [1992] 1 SCR 843.

[5]*R. v. Pioneer Construction Inc.,* [2006] O.J. No. 1874. An individual accused was not required to satisfy any such evidentiary burden.

[6]See *Mississauga (City) v. Uber Canada Inc*., 2016 ONCJ 746 at paras. 82-83; *Martin v. Director of Criminal and Penal Prosecutions*, 2016 QCCQ 12830 at para. 9; *Les Industries Garanties limitée v. R*., 2017 QCCS 1504; and *R. v. Stephensons Rental Services*, 2017 ONCJ 466 at para. 31.

[7]See *Mississauga (City) v. Uber Canada Inc*., 2016 ONCJ 746 at paras. 84-89 and *R. v. Stephensons Rental Services*, 2017 ONCJ 466 at para. 32.

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