

More Judges Needed

Delay: Jordan's big effect on civil litigation

By Brian Sunohara



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(October 10, 2019, 8:40 AM EDT) -- The Supreme Court of Canada's decision in *R. v. Jordan* 2016 1 SCC 27 has had a big impact, not only in the context of criminal law, but also in civil actions.

The Supreme Court stated that the culture of delay and complacency in criminal matters must come to an end.

For criminal cases tried in Superior Court, there is a 30-month ceiling from the time a charge is laid to the actual or anticipated end of trial. Any delay beyond this is considered presumptively unreasonable and a breach of an accused's Charter right to be tried within a reasonable time. Delay attributable to the defence is subtracted from the ceiling.

In the civil context, the *Jordan* decision has caused criminal cases to be given far greater priority. In many jurisdictions, court dates in civil actions are being booked well into the future. Trials in civil actions are being bumped so that criminal cases can be heard.

In September, the Supreme Court heard a case that may cause further strain on the judiciary and additional backlog in civil cases.

In *R. v. K.G.K.* [2019] S.C.C.A. No. 19 (SCC Court File No. 38532), the issue was whether judicial delay in rendering a decision should count toward the calculation of total delay.

Put another way, is the "end of trial," as referred to in *Jordan*, the point at which the case is left in the hands of the trier and out of the litigants' control (that is, the end of closing arguments in a non-jury trial or the conclusion of the judge's charge in a jury trial), or is it when a decision or verdict is rendered? Further, does the end of trial include the decision on sentencing?

The trial judge released his decision around nine months after the conclusion of the trial, convicting the accused of sexual interference and invitation to sexual touching arising from complaints made by his stepdaughter.

A day prior to the release of the decision, the accused brought a motion to stay the proceedings based on purported delay by the trial judge in releasing the decision.

The motion was dismissed. The motion judge, referring to an earlier Supreme Court decision, stated that judicial delay must be "shocking, inordinate and unconscionable" in order to infringe on an accused's Charter rights.

A majority of the Manitoba Court of Appeal dismissed the appeal. The majority stated that judicial decision-making time is relevant to an accused's right to be tried within a reasonable time, but it forms part of a separate analysis and is not included in the calculation of total delay in the *Jordan* context.

The dissenting justice stated that judicial decision-making time should fall within the calculation of total delay.

The Supreme Court reserved its decision in *R. v. K.G.K.* During oral argument, some of the justices raised an issue that there is no evidence of a serious systemic problem of trial judges taking too long to render decisions.

Another issue is that rushing judges is problematic because time is required to thoughtfully consider the evidence and write fair and well-reasoned decisions.

Moreover, absurdities could result. For example, if closing arguments conclude one day prior to the *Jordan* ceiling, it would be absurd to require the trial judge to write a decision in one day.

Further, there can sometimes be exceptional circumstances which may cause a delay in releasing a decision, such as the illness of a judge or the complexity of a case. The court, somewhat rhetorically, queried whether a judge should be expected to swear an affidavit and be cross-examined in those circumstances.

The outcome of this case could have a significant impact on both criminal and civil matters.

In this author's view, the Supreme Court will not likely include judicial decision-making time in calculating total delay under the *Jordan* timelines. However, the court may provide guidance on the timeframe in which judges should render decisions. This timeframe may be six months, which is articulated by the Canadian Judicial Council as a best practice.

Regardless, depending on the court's reasons, in many jurisdictions judges may need to be given more time to write decisions and additional judges may need to be appointed.

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