Delay, Environmental Offences and Private Prosecutions

Author : Jason Unger

A case comment on the impact of *Jordan* in two recent environmental cases: *R. v. The Lake Louise Ski Area Ltd*., 2017 ABPC 262 and *R. v. HMTQ, Executive Flight Centre et al*. BCPC File No: 25268

The Supreme Court of Canada's decision in *R. v Jordan* provides guidance, as a matter of *Charter* rights, on unreasonable delay in bringing an accused to trial. Two recent provincial court decisions (one in Alberta and one in BC) expand the judicial consideration of how to apply *Charter* arguments regarding unreasonable delay (set out in *R v. Jordan*) in the context of environmental regulatory prosecutions. Neither of these decisions has passed the timeline to appeal and, as such, there may be more to follow.

Unreasonable Delay & *Jordan*

By setting out a framework of unreasonable delay in bringing an accused to trial, the Supreme Court of Canada's (5:4) decision in *R v.* Jordan has had significant impact resulting in numerous stays of prosecutions due to unreasonable delay. . This stems from section 11(b) of the *Canadian Charter of Rights and Freedoms* which states that "any person charged with an offence has the right …to be tried in a reasonable time". The majority in *Jordan* set out a framework of a "presumptive ceiling on the time it should take to bring an accused person to trial: 18 months for cases going to trial in the provincial court, and 30 months for cases going to trial in the superior court" (at para 5). The minority decision countered that "the promised simplicity of the ceilings is likely illusory". The majority of the court noted that "given the contextual nature of reasonableness, the framework accounts for case-specific factors both above and below the presumptive ceiling" and the framework analysis focuses on encouraging "all participants in the criminal justice system to cooperate in achieving reasonably prompt justice". (at para 5)

In determining the duration of "unreasonable" delay under the *Charter* one looks at the time between the date a charge is brought and the actual or anticipated end of trial. Delays attributable to the defence are subtracted from the time. The Crown may rebut the presumptive time ceiling by establishing the "presence of exceptional circumstances". The court noted:

> 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. So long as they meet this definition, they will be considered exceptional (para 69).

Further the court noted, “exceptional circumstances fall under two categories: discrete events and particularly complex cases” (at para 71). Delay from exceptional circumstances are also to be subtracted from the calculation of delay. There is an expectation that the Crown will take steps to mitigate delay resulting from these circumstances.

Recent Environmental Prosecutions applying the *Jordan* Framework

In *R. v. The Lake Louise Ski Area Ltd*. (October 30, 2017), *Lake Louise* sought a stay of proceedings based on delay for bringing charges to trial in relation to allegations that it cut down whitebark pine (an endangered species under the federal *Species at Risk Act*), and damaged and destroyed flora without a permit contrary to the *National Parks Act*. In finding that there was not unreasonable delay, the court made various findings of note but the focus was on how much delay should be attributed to the accused.

The information was sworn on September 4, 2015 and the trial set to proceed on December 4-22, 2017. The Crown had disclosed information related to the charge on December 10, 2015, including an expert opinion as to the identity of the species of tree cut. The defence subsequently requested “technical and expert data (DNA)” regarding the species identity. There was some delay in relation to the Crown disclosing that DNA evidence which the defence argued contributed to the unreasonable delay. The Court observed that “DNA analysis was not of such a substantive nature as to prohibit entry of a not guilty plea and setting trial dates. Defence had access to the Crown’s expert opinion on the species of the trees cut. This first package of disclosure containing expert opinion on the species of trees cut was sufficient to allow the Defence to enter a plea and set trial dates.” (at para 7)

Further the court noted that:

> There is an important issue to address in this application with respect to the obligation of the Crown and Defence to communicate to develop a litigation plan in complex regulatory statute prosecutions which includes consideration of bringing an application before the Assistant Chief Judge to move a lengthy trial from a regional court location to the Calgary Courts Centre. (para 8).

…

> The case clearly has an element of exceptional complexity in relation to the DNA testing that leaves the Court to conclude that it would offend the principles of the proper administration of justice to grant Charter relief to the Defence based on the timing of disclosure of DNA analysis. (at para 11)

In contrast, the British Columbia Provincial Court in *R. v. HMTQ, Executive Flight Centre et al.* BCPC File No: 25268 (also decided October 30, 2017) held that there was unreasonable delay in bringing the accused to trial. Some of the delay was attributable to a start date that ran from the staying of a private prosecution.

Executive Flight Centre Fuel Services Ltd. was one of 3 co-defendants charged with "unlawfully depositing or permitting waste or a deleterious substance to be deposited into Lemon Creek contrary to various sections of the *Fisheries Act*… and the *Environmental Management Act*." The spill of 30,000 gallons of aviation fuel into Lemon Creek occurred on July 26, 2013 and a private prosecutor laid an information on September 29th, 2014. The private prosecution was stayed on January 25, 2016 and new Crown charges were sworn July 22, 2016, which reflected a six-month delay after the private prosecution and 22 months after the initial charges.

A central part of this decision was how section 11(b) of the *Charter* may integrate (or exclude) delay when a private prosecutor has initiated the laying of an information. The Court noted that a "private prosecutor has a role parallel to that of the Attorney General" and that the relevant question to be answered in relation to whether the *Charter* applies "is whether there is a sufficient element of government action present regardless of whether the private actor is or is not an agent of the state" (at para 48). In so doing, the Court distinguished this case from the decision in *Podolsky v. Cadillac Fairview* [2012] O.J. No. 4027, where a private prosecutor was not found to be carrying out a government function (in the context of an issue of claim of unreasonable search and seizure).

The Court concluded that it was "satisfied that the time period for the calculation of time from charge to trial should include the six-month period from the date the Crown stayed the private prosecution to the date of it re-laying charges against Executive, among others. This gives a period of 24 months." (at para 60) The Court found that the Crown did not make efforts to mitigate the delay and the Crown conceded that the case was not complex. (see paras 72 and 81)

As a side-note, both of these cases transpired at the time the *Jordan* case was decided and therefore both dealt with the "transitional" issues as well if that is of particular interest.

Importance of these Cases

Several important principles can be gleaned from these two cases:

1. **For private prosecutors**. Those contemplating private prosecutions should consider the impact of laying an information on the Crown pursuit and management of a prosecution

where a stay is likely (although this appears to be an issue that may be ripe for appeal).

2. **For the Crown**. Clearly the *Jordan* decision and unreasonable delay will continue to play an important role in environmental regulatory prosecutions. This requires that the Crown ensure timely gathering of evidence, timely disclosure, and to proactive seeking efficiencies by pursuing case management options and early resolution of preliminary issues (i.e. establish that it is mitigating delay). Where there is a private prosecution involved, the Crown should clearly consider the timing of stays and other interactions with the court system when a private information has been laid. The risk of a private prosecution undermining Crown discretion is an important new area of consideration.

3. **For the defendant**. The objective of a "reasonably timely justice system" is not only the role of the Crown. Arguments regarding deferring pleas for further disclosure and setting of trial may be relevant in some circumstances but other procedural decisions which result in delays will likely be scrutinized by the court. This point is further picked up by the Supreme Court of Canada in R. v. Cody: "*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* " and that "Defence conduct encompasses both substance and procedure — the decision to take a step, *as well as the manner in which it is conducted*, may attract scrutiny".

4. **For the Courts**. The issue around regulatory and environmental offences and *Jordan* delay is often related to the complexity of gathering and proving evidence as part of environmental offences. Much like the *Lake Louise* case, the nuances and potential complexity of investigation that typically accompany environmental enforcement should attract scrutiny as an exception to the Jordan framework.

Conclusion

The issue around delay in environmental prosecutions once again raises the question of whether it is appropriate to treat criminal and regulatory offences with the same *Charter* scrutiny. On several fronts *Charter* application to environmental offences has been distinguished: for example, the reverse onus nature of due diligence defences (see R. v. Wholesale Travel Group Inc., [1991] 3 SCR 154(SCC)) and the purposive approach to *Charter* claims that environmental protections are

overbroad or vague and contrary to s.7 (see Ontario v. Canadian Pacific Ltd., [1995] 2 SCR 1031 (SCC)).

As noted in *Jordan*, the reasons to bring accused to trial in a reasonable time are grounded in the presumption of innocence, the protection of liberty and security of the person, and the provision of a fair trial.

> Liberty is engaged because a timely trial means an accused person will spend as little time as possible held in pre-trial custody or living in the community under release conditions. Security of the person is impacted because a long-delayed trial means prolonging the stress, anxiety, and stigma an accused may suffer. Fair trial interests are affected because the longer a trial is delayed, the more likely it is that some accused will be prejudiced in mounting a defence, owing to faded memories, unavailability of witnesses, or lost or degraded evidence. (at para 20)

Further the court notes that timely trials are important to the victims of crime as delay "aggravates victims' suffering, preventing them from moving on with their lives." (at para 23).The court in *Jordan* concludes:

> Last but certainly not least, timely trials are important to maintaining overall public confidence in the administration of justice. As McLachlin J. (as she then was) put it in *Morin*, "delays are of consequence not only to the accused, but may affect the public interest in the prompt and fair administration of justice" (p. 810). Crime is of serious concern to all members of the community. Unreasonable delay leaves the innocent in limbo and the guilty unpunished, thereby offending the community's sense of justice (see *Askov*, at p. 1220). Failure "to deal fairly, quickly and efficiently with criminal trials inevitably leads to the community's frustration with the judicial system and eventually to a feeling of contempt for court procedures" (at para 25)

However, environmental offences are distinct from true criminal offences in important ways:

- pre-trial custody is basically non-existent as are conditional releases;
- stress and stigma of the accused should not be assumed, particularly for corporate accused;
- unlike criminal matters, the victim (i.e. the environment) is not impacted by delay; and
- a communities' "sense of justice" in relation an environmental prosecution is neither so uniform nor so linked to perceptions of our justice system.

One can argue that for environmental prosecutions, the notion of an 18 months ceiling to bring a matter trial is particularly illusory (to borrow the minority's phrasing from *Jordan*). The

circumstances that apply in many environmental prosecutions are clearly distinct from other criminal prosecutions (from the gathering of evidence to the use of scientific experts), as are the objectives of the justice system, being more remedial and deterrent focused.

Share this: