Impact of the decision in *R.* v. *Jordan* on public law

November 4, 2016

The procedural delays in criminal, penal, civil, administrative and disciplinary matters have drawn a lot of criticism and contributed to undermining public confidence in the administration of justice. This concern was at the heart of an important decision by the Supreme Court of Canada rendered last July 8. In this majority judgment, the Court adopted a new framework for applying section 11(b) of the *Canadian Charter of Rights and Freedoms*,[1] which guarantees the right to be tried in a reasonable time. While this decision resolves issues raised in the criminal and penal domains, this case is likely to spark reflection that could very well have ramifications for administrative and disciplinary law.

Since 1992, in order to determine whether there has been an infringement of the right to be tried within a reasonable time in a given case, the Canadian courts have applied the test developed by the Supreme Court in *R.* v. *Morin*.[2] In applying that test, the courts assessed the alleged infringements by balancing the following four factors:

length of the delay
waiver by the defence of part of the delay
reasons for the delay
prejudice to the accused's interests in liberty, security of the person, and a fair trial

The decision rendered by the Supreme Court in *R.* v. *Jordan*[3] marks a significant change as compared to the prior law. Indeed, in this decision (numbering 303 paragraphs), the majority judges discarded the framework established in *Morin*, noting the unforeseeability of its application, the inconsistencies in the treatment of the concept of prejudice in the case law and the difficulty of proving it, the problems caused by the retrospective application of the test and, finally, its great complexity.

To address these problems, the majority judges introduced a new framework based on a "presumptive ceiling". The Court set the ceiling at 18 months for cases heard in the provincial courts and 30 months for those heard in the superior courts.[4] Once the time period between the laying of the charges and the end of the trial exceeds this ceiling, it is presumed to be unreasonable. The onus is then on the Crown to rebut this presumption, which can only be done by invoking exceptional circumstances. If the Crown cannot do so, a stay of proceedings is ordered. On the other hand, where the "presumptive ceiling" is not reached, the burden of proving the delay is unreasonable lies on the defence. In such circumstances, a stay of proceedings will only be ordered in clear cases.

The role of "prejudice"

The issue of prejudice seems to have played a decisive role in the reflection of the majority judges and, ultimately, in their decision to reject the test laid down in *Morin*. As noted above, the difficulty in proving prejudice, the highly subjective nature of the analysis thereof, and the confused treatment it has received in the case law, are among the main reasons that persuaded the Court to reform the applicable framework:

> [33] Second, as the parties and interveners point out, the treatment of prejudice has become one of the most fraught areas in the s. 11(b) jurisprudence: it is confusing, hard to prove, and highly subjective. As to the confusion prejudice has caused, courts have struggled to distinguish between "actual" and "inferred" prejudice. And attempts to draw this distinction have led to apparent inconsistencies, such as that prejudice might be inferred even when the evidence shows that the accused suffered no actual prejudice. Further, actual prejudice can be quite difficult to establish, particularly prejudice to security of the person or fair trial interests. Courts have also found that "it may not always be easy" to distinguish between prejudice stemming from the delay versus the charge itself (*R.* v. *Pidskalny*, 2013 SKCA 74 (CanLII), 299 C.C.C. (3d) 396, at para. 43). And even if sufficient evidence is adduced, the interpretation of that evidence is a highly subjective enterprise.
>
> [34] Despite this confusion, prejudice has, as this case demonstrates, become an important if not determinative factor. Long delays are considered "reasonable" if the accused is unable to demonstrate significant actual prejudice to his or her protected interests. This is a problem because the accused's and the public's interests in a trial within a reasonable time does not necessarily turn on how much suffering an accused has endured. Delayed trials may also cause prejudice to the administration of justice.[5]

In light of the above, the majority judges excluded prejudice from the factors that are explicitly considered as part of the new approach they propose. However, prejudice still plays a role, as it was considered by the Court in determining the parameters of the presumptive ceiling:

> [109] Second, the new framework resolves the difficulties surrounding the concept of prejudice. Instead of being an express analytical factor, the concept of prejudice underpins the entire framework. Prejudice is accounted for in the creation of the ceiling. It also has a strong relationship with defence initiative, in that we can expect accused persons who are truly prejudiced to be proactive in moving the matter along.
>
> [110] Prejudice has been one of the most fraught areas of s. 11(b) jurisprudence for over two decades. Understanding prejudice as informing the setting of the ceiling, rather than treating prejudice as an express analytical factor, also better recognizes that, as we have said, prolonged delays cause prejudice to not just specific accused persons, but also victims, witnesses, and the system of justice as a whole.[6]

Once the presumptive ceiling is reached, it will not be possible under any circumstances to argue absence of prejudice in order to justify the delay. Indeed, the Supreme Court has instituted a form of irrebuttable presumption of prejudice once the ceiling is breached:

> [54] Third, although prejudice will no longer play an explicit role in the s. 11(b) analysis, it informs the setting of the presumptive ceiling. Once the ceiling is breached, we presume that accused persons will have suffered prejudice to their *Charter*-protected liberty, security of the person, and fair trial interests. As this Court wrote in *Morin*, "prejudice to the accused can be inferred from prolonged delay" (p. 801; see also *Godin*, at para. 37). This is not, we stress, a rebuttable presumption: once the ceiling is breached, an absence of actual prejudice cannot convert an unreasonable delay into a reasonable one.[7]

Beyond the presumptive ceiling, absence of prejudice will therefore no longer have any effect in determining whether or not a delay is reasonable.

Impacts on administrative and disciplinary law

Firstly, it bears repeating that section 11(b) of the Canadian Charter applies to “any person charged with an offence”, and therefore only in criminal matters. In the administrative law context, unreasonable delays can still be sanctioned either under section 7 of the same Charter or simply by applying the principles of administrative law, as noted by the Supreme Court in the *Blencoe* case.[8] These principles also apply to disciplinary matters, as appears from the decision rendered by the Court of Appeal in *Huot* v. *Pigeon*.[9].

However, whether the delay is considered under section 7 of the Canadian Charter or under the principles of administrative law, prejudice will play an important role in assessing whether such delay can give rise to a stay of proceedings. Indeed, for there to be an infringement of the right to security protected by section 7 of the Canadian Charter, it must be shown that there has been interference with a person’s bodily or psychological integrity. When the interference is psychological in nature, it must also be serious:

> First, the psychological harm must be state imposed, meaning that the harm must result from the actions of the state. Second, the psychological prejudice must be serious. Not all forms of psychological prejudice caused by government will lead to automatic s. 7 violations.[10]

The same is true of the principles of administrative law:

> In my view, there are appropriate remedies available in the administrative law context to deal with state-caused delay in human rights proceedings. However, delay, without more, will not warrant a stay of proceedings as an abuse of process at common law. Staying proceedings for the mere passage of time would be tantamount to imposing a judicially created limitation period (see: *R.* v. *L. (W.K.)*, 1991 CanLII 54 (SCC), [1991] 1 S.C.R. 1091, at p. 1100; *Akthar* v. *Canada (Minister of Employment and Immigration)*, [1991] 3 F.C. 32 (C.A.). In the administrative law context, there must be proof of significant prejudice which results from an unacceptable delay.[11]

These principles continue to apply, of course, notwithstanding the Supreme Court’s decision in *Jordan*. However, in light of this case, it is reasonable to expect a similar reform of administrative and disciplinary law will be in the works in the not too distant future. Indeed, the difficulty of proving prejudice where caused by long delays and the confusion in the case law over the treatment of prejudice, are also issues faced in administrative and disciplinary, and not just criminal matters. Furthermore, extended delays cause prejudice to all the parties, the witnesses and the system of justice, whether it be administrative or judicial. Finally, administrative tribunals and disciplinary bodies also have the same implicit duty as the courts, in our view, to preserve the confidence of the public in the administration of justice as a whole.

---

1. *Canadian Charter of Rights and Freedoms*, part I of the *Constitution Act 1982*, [Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11] (hereinafter the “*Canadian Charter*”).
2. *R.* v. *Morin*, [1992] 1 S.C.R. 771 (hereinafter “*Morin*”).
3. *R.* v. *Jordan*, 2016 SCC 27 (hereinafter “*Jordan*”).
4. Delay attributable to the defence does not count in calculating the ceiling.
5. *Supra*, note 3.
6. *Supra*, note 3.
7. *Ibid.*
8. *Blencoe* v. *British Columbia (Human Rights Commission)*, 2000 SCC 44.
9. *Huot* c. *Pigeon*, 2006 QCCA 164.
10. *Supra*, note 8, para. 57.
11. *Ibid*, para. 101.