

MLT AIKINS WESTERN CANADA'S LAW FIRM

R V JORDAN: LEGAL AND PRACTICAL IMPLICATIONS

Adryan J.W. Toth

11/28/2017 MLT AIKINS LLP • MLT AIKINS.COM 1

MLT AIKINS WESTERN CANADA'S LAW FIRM

PRESENTATION OUTLINE

- Overview of the *Morin* framework
- Overview of the *Jordan* framework
- Review of some cases applying the *Jordan* framework
- Discussion of some practice issues and some doctrinal issues moving forward

11/28/2017 MLT AIKINS LLP • MLT AIKINS.COM 2

OVERVIEW OF THE TRADITIONAL FRAMEWORK

11/28/2017 MLT AIKINS LLP • MLT AIKINS.COM 3

MLT AIKINS WESTERN CANADA'S LAW FIRM

THE TRADITIONAL FRAMEWORK

- Derived from *R v Morin*, [1992] 1 SCR 771 ["*Morin*"]
- Required courts to balance 4 factors to determine whether a breach of s 11(b) occurred:
 1. The length of the delay;
 2. Defence waiver;
 3. The reasons for the delay (including the inherent needs of the case, defence delay, Crown delay, institutional delay, and other reasons for delay); and
 4. Prejudice to the accused.

11/28/2017 MLT AIKINS LLP • MLT AIKINS.COM 4

MLT AIKINS WESTERN CANADA'S LAW FIRM

PROBLEMS WITH THE TRADITIONAL FRAMEWORK IDENTIFIED IN *JORDAN*

- The framework has given rise to both doctrinal and practical problems, "contributing to a culture of delay and complacency towards it": *Jordan* at para 29
- Some of the main doctrinal shortcomings:
 1. Unpredictable application
 - *interpreted endlessly flexible, making it difficult to establish if a breach has occurred* (at para 32)
 2. The treatment of prejudice was confusing and fraught with difficulties
 - *it is confusing, hard to prove, and highly subjective* (at para 33)

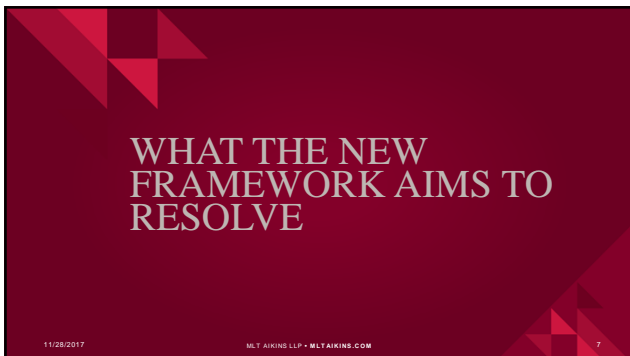
11/28/2017 MLT AIKINS LLP • MLT AIKINS.COM 5

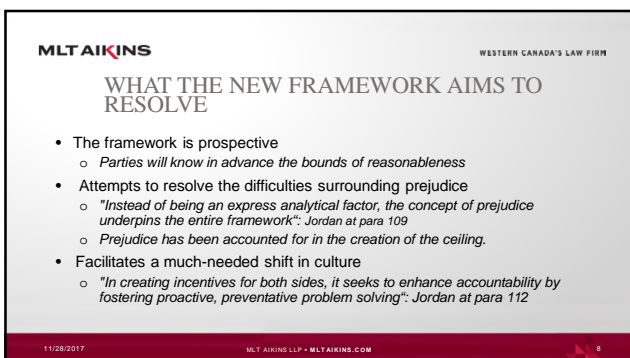
MLT AIKINS WESTERN CANADA'S LAW FIRM

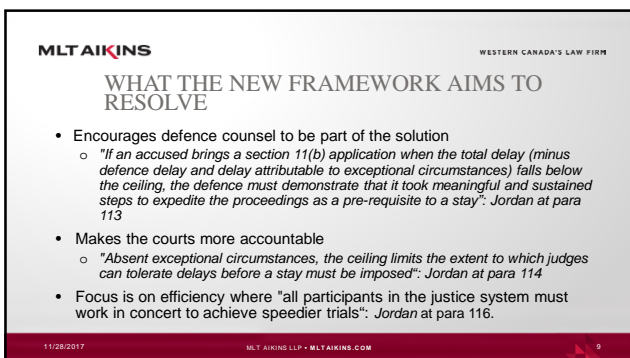
PROBLEMS WITH THE TRADITIONAL FRAMEWORK IDENTIFIED IN *JORDAN*

- (continued) Some of the main doctrinal shortcomings are as follows:
 3. The framework is retrospective as opposed to prospective
 - "Competing after-the-fact explanations allow for potentially limitless variations in permissible delay": *Jordan* at para 36
 4. The framework is unduly complex
 - "Each day of the proceedings from charge to trial is argued about, accounted for, and explained away": *Jordan* at para 37

11/28/2017 MLT AIKINS LLP • MLT AIKINS.COM 6







11/28/2017 MLT AIKINS LLP • MLT AIKINS.COM 10

11/28/2017 MLT AIKINS LLP • MLT AIKINS.COM 11

11/28/2017 MLT AIKINS LLP • MLT AIKINS.COM 12

MLT AIKINS WESTERN CANADA'S LAW FIRM

THE NEW FRAMEWORK: STRUCTURE

4. Subtract delay caused by discrete events from the Net Delay (leaving the "Remaining Delay")
5. If the Remaining Delay exceeds the presumptive ceiling, the court must consider whether the case was particularly complex such that the time the case has taken is justified and the delay is reasonable
6. If the **Remaining Delay falls below the presumptive ceiling**, the onus is on the defence to show that the delay is unreasonable
7. The new framework, including the presumptive ceiling, applies to cases already in the system when Jordan was released (the "Transitional Cases")

11/28/2017 MLT AIKINS LLP • MLT AIKINS.COM 13

MLT AIKINS WESTERN CANADA'S LAW FIRM

TRANSITIONAL PERIOD / EXCEPTION

- For cases currently in the system, the *Jordan* "framework must be applied flexibly and contextually, with due sensitivity to the parties' reliance on the previous state of the law": *Jordan* at para 105
- The new framework applies to cases currently in the system, subject to two qualifications:
 1. *This transitional exceptional circumstance will apply when the Crown satisfies the court that the time the case has taken is justified based on the parties' reasonable reliance on the law as it previously existed.* (para 96)
 2. *The second qualification applies to cases currently in the system in which the total delay (minus defence delay) falls below the ceiling. Since defence initiative was not expressly required by the Morin framework, it would be unfair to require it for the period of time before the release of this decision.* (para 99)

11/28/2017 MLT AIKINS LLP • MLT AIKINS.COM 14



APPLICATIONS OF JORDAN

11/28/2017 MLT AIKINS LLP • MLT AIKINS.COM 15

MLTAIKINS WESTERN CANADA'S LAW FIRM

KEY CASES: SUPREME COURT

❖ **R v Cody, 2017 SCC 31**

- Supreme Court of Canada unanimously reaffirms the *Jordan* framework. After applying the framework, the Court found there to be 36.5 months of delay, which was above the presumptive ceiling, and entered a stay.
- Court clarifies, *inter alia*, the transitional exceptional circumstance. Seriousness of the offence and prejudice can be considered in the analysis, but these factors must relate to how the parties decided to move the case through the system in reliance on the previous state of the law. (at paras 69-70)

11/28/2017 MLT AIKINS LLP • MLTAIKINS.COM 16

MLTAIKINS WESTERN CANADA'S LAW FIRM

❖ **R v Cody, 2017 SCC 31**

- Vital for Crown to bring forward actual evidence of how it took immediate steps to remedy delay caused by a discrete event if it wishes to establish and exceptional circumstance.
- Court again stresses the need for all participants in our criminal justice system to get serious about delay. In particular, the Court urges front line judges to be more interventionist (at paras 37-39)

11/28/2017 MLT AIKINS LLP • MLTAIKINS.COM 17

MLTAIKINS WESTERN CANADA'S LAW FIRM

KEY CASES: SASKATCHEWAN

❖ **R v Smythe, 2017 SKQB 86**

- Crown difficulty in getting witnesses to show up for a trial is not unforeseeable or exceptional. Demonstrates need for the Crown to bring forward actual evidence if it wishes to establish and exceptional circumstance.
- Crown adjourned two trials, one due to new disclosure arising and the other due to inability to serve key witness with a subpoena. Defence counsel objected to both adjournments.
- Net delay = 38 mo; no exceptional circumstances; stay of proceedings

11/28/2017 MLT AIKINS LLP • MLTAIKINS.COM 18

MLTAIKINS WESTERN CANADA'S LAW FIRM

KEY CASES: SASKATCHEWAN

❖ *R v McCullough*, 2017 SKQB 113

- Information laid 10 years prior to arrest. Court holds that clock starts ticking re delay at the time of arrest, not the time the Information is laid
 - See also *R v Moosomin*, 2017 SKQB 182 at para 49)
- However, there are a number of other decisions saying the clock starts ticking at the time the Information is laid. Some deal with inability of the police to locate accused over lengthy periods of time under the discrete events exceptional circumstance (see e.g. *R v Nurse*, 2017 ONCJ 648 and the cases cited therein)

11/28/2017 MLT AIKINS LLP • MLT AIKINS.COM 19

MLTAIKINS WESTERN CANADA'S LAW FIRM

KEY CASES: SASKATCHEWAN

❖ *R v Mullen*, 2017 SKQB 237

- Agreed by parties that delay exceeded 30 months
- Accused had already pleaded guilty at the time *Jordan* was released. At sentencing hearing, *Jordan* was raised.
- Despite the presumptive ceiling being breached, Court found no breach of section 11(b) because there was not a proper foundation to consider the transitional exceptional circumstance. The Court faulted the accused for the lack of details in this regard.
- See also *R v Bialski*, 2017 SKQB 17. *Jordan* issues raised for the first time on appeal. Court refuses to consider as no evidentiary foundation.

11/28/2017 MLT AIKINS LLP • MLT AIKINS.COM 20

MLTAIKINS WESTERN CANADA'S LAW FIRM

KEY CASES: SASKATCHEWAN

❖ *R v Pastuch*, 2017 SKQB 211

- Case complexity renders presumptively unreasonable delay reasonable
- 34 months of net delay
- Hallmarks of complexity present including
 - 36 complainants;
 - 1 expert witness;
 - Voluminous / enormous disclosure
 - 9 week prelim (scheduled, but ultimately not held)
 - 3 month scheduled trial

11/28/2017 MLT AIKINS LLP • MLT AIKINS.COM 21

MLT AIKINS WESTERN CANADA'S LAW FIRM

KEY CASES: SASKATCHEWAN

❖ *R v Keller*, 2016 SKQB 319

- Example of a case where delay below the presumptive ceiling was still found unreasonable
- 17.5 months of net delay. At trial, *Morin* framework was applied and delay was found to be unreasonable.
- On appeal, *Jordan* was handed down and appeal court applied *Jordan*
- Case was straightforward, requiring only 1 day hearing, and took markedly longer than what was reasonable in the circumstances

11/28/2017 MLT AIKINS LLP • MLT AIKINS.COM 22

MLT AIKINS WESTERN CANADA'S LAW FIRM

KEY CASES: SASKATCHEWAN

❖ *R v Boehmer*, 2017 SKQB 328

- Net delay was 35.5 months and above the presumptive ceiling
- However, accused went through 4 different legal counsel leading to various periods of delay, including the adjournment of two trials dates
- Court held that the successive lawyer situation amounted to an exceptional circumstance. Application dismissed.

(Compare *R v Park*, 2016 SKPC 137 where delay in retaining counsel not counted as defence delay as no intention by accused to cause delay)

11/28/2017 MLT AIKINS LLP • MLT AIKINS.COM 23

**ADDITIONAL
IMPLICATIONS TO
CONSIDER**

11/28/2017 MLT AIKINS LLP • MLT AIKINS.COM 24

MLT AIKINS WESTERN CANADA'S LAW FIRM

NOTABLE PRACTICE CHANGES

- Judges are more interventionist, asking questions of counsel and showing pause to adjournment requests
- Regina Provincial Court implemented a file flagging system that informs judges when filed are becoming dated. On such files, judges dig deeper into reasons for adjournment requests and seek waivers of delay.
- Waivers of delay typically requested by the Crown and judges for adjournments longer than 2 or 3 weeks.

11/28/2017 MLT AIKINS LLP • MLT AIKINS.COM 25

MLT AIKINS WESTERN CANADA'S LAW FIRM

NOTABLE PRACTICE CHANGES

- Crown may now issue Crown Caution Letters designed as a stern warning to an accused. Stay of proceedings will follow.
- Some judges have expressed concern that counsel use adjournment dates as a diary system, when they should be working on files through the adjournment period. Concern is that this is a holdover from the culture of delay days.

11/28/2017 MLT AIKINS LLP • MLT AIKINS.COM 26

MLT AIKINS WESTERN CANADA'S LAW FIRM

HOW TO TREAT NEW TRIAL DELAY?

- When a matter is appealed and a new trial is ordered, how should the new trial delay be treated under the *Jordan* framework?
- *Jordan* is silent, but case law under the *Morin* framework suggested that new trial delay be tacked onto the initial trial delay (see e.g. *R v Barros*, 2014 ABCA 367, 584 AR 362)
- Emerging case law from lower courts stating that new trial delay is not contemplated within the presumptive ceilings (see e.g. *R v Ferstle*, 2017 ABPC 266)

11/28/2017 MLT AIKINS LLP • MLT AIKINS.COM 27

MLTAIKINS WESTERN CANADA'S LAW FIRM

SHOULD THERE BE ALTERNATIVE REMEDIES TO A STAY OF PROCEEDINGS?

- Current theory is that when there is unreasonable delay, the court loses jurisdiction and therefore a stay of proceedings is mandatory (*R v Pidskalny*, 2013 SKCA 74 at paras 49-50, 417 Sask R 124 and the cases cited therein)
- Majority in *Jordan* may have hinted in a footnote to a willingness to reconsider the issue and theory of remedy. (*Jordan* at para 35, n 1)
- However, SCC in *Cody* imposed a stay of proceedings without further comment.

11/28/2017 MLT AIKINS LLP • MLT AIKINS.COM 28

MLTAIKINS WESTERN CANADA'S LAW FIRM

DEFENCE WAIVED DELAY – RELEASE VALVE OR INSTRUMENT OF UNREASONABLE DELAY

- Defence waiving delay may be seen as a release valve for the pressures imposed by the *Jordan* framework. Judges and counsel suggest waiving delay when pressure mounts or to obtain adjournments.
- Waiving delay does not address the underlying problems with delay itself. Arguably, from a point of principle, if we are to be serious about remedying delay, we should not let waiver of delay be our saving grace.
- However, practically, waiver of delay may be a necessity.

11/28/2017 MLT AIKINS LLP • MLT AIKINS.COM 29

MLTAIKINS WESTERN CANADA'S LAW FIRM

Q&A

11/28/2017 MLT AIKINS LLP • MLT AIKINS.COM 30

