

OHS Prosecution: How Long Is Too Long for a Trial Delay?



THE PROBLEM

The wheels of justice turn notoriously slowly with delays between OHS charges and trial commonly lasting months, if not years.

THE QUESTION

At what point does a prosecution delay violate an OHS defendant's Charter right to a speedy trial?

THE ANSWER

In a 2016 case called [*R v. Jordan*](#), the Canadian Supreme Court set out to shake up the justice system's 'culture of complacency' and draw some lines on trial delays:

The Jordan Rules

1. 18 months or less is presumed to be a reasonable delay;
2. The defendant can rebut the presumption that a shorter is reasonable by showing that:
 - a. It took meaningful steps and exerted a sustained effort to speed up the proceedings; and
 - b. The case took markedly longer than it reasonably should have;
3. Delays longer than 18 months are presumed to be unreasonable and grounds for staying the prosecution, i.e., dismissing the charges;
4. The Crown can rebut the presumption of unreasonableness by showing show that:
 - a. The delay was caused by the complexity of the case and/or discrete, unforeseen events beyond its control; and
 - b. It implemented a reasonable plan to minimize the resulting delay.

The following cases illustrate how the *Jordan* rules have played out in actual OHS prosecutions decided since the case.

CASE 1: 23-MONTH DELAY IS UNREASONABLE

Situation: In May 2016, the Crown charges 3 mining supervisors with OHS violations after a millwright dies of cyanide poisoning. Parallel OHS and C-45 charges are also laid against the mining company. A series of procedural delays later, the criminal charges are finally resolved in August 2017 and the Crown is ready to bring the OHS case against the supervisors. Trial is slated for November 2017. The supervisors ask the trial court to toss the charges noting that the total delay between charge and start of trial is 23 months, over the 18-month *Jordan* ceiling. The trial court agrees. The Crown appeals.

Ruling: The Ontario Superior Court upholds the trial court's decision to dismiss for unreasonable delay.

Reasoning: While acknowledging that the 23-month delay was presumably unreasonable, the Crown tried to rebut the presumption by arguing that the case was incredibly complex. It sure was, the court acknowledged. The problem, though, is that to rebut the presumption, the Crown had to show not only that the case was complex but also that it implemented a plan to minimize the delay. The Crown didn't do that. In fact, the court criticized the way the prosecution managed the case and dragged its feet on securing a trial date, compiling witness lists and practically ignoring defence requests to pick up the pace.

1. [*v. Nugent, Guillemette and Buckingham*](#), 2018 ONSC 3546 (CanLII), June 8, 2018

CASE 2: 44-MONTH DELAY IS REASONABLE

Situation: On June 6, 2013, OHS charges are laid against an events planner and other defendants in connection with the death of a drum technician in a stage collapse before a Radio Head concert in Toronto. Trial begins but is continually delayed and dragged out and isn't expected to end until Jan. 27, 2017. Total delay: 44 months, more than twice the *Jordan* cap. So, the defendants ask the court to dismiss the charges.

Ruling: The Ontario Court of Justice rules that the long delay was reasonable and refuses to toss the case.

Reasoning: First, the court clarified that the *Jordan* rules for trial delays apply to corporations as well as individuals. But having determined that the 18-month cap was in play, the court went on to find that the Crown in this case rebutted the presumption and showed that the delay 'though long' was reasonable, citing the following factors:

- The complexity of the case;
- The intervention of discrete, unforeseeable events, including complications with defence counsel that resulted in having to press the reset button 3 weeks into the trial; and
- The reasonable efforts the Crown made to manage the case and minimize the delay.

[R.v. Live Nation Canada Inc.](#), [2016] ONCJ 735 (CanLII), Dec. 5, 2016