A Review of Decisions Rendered by the Supreme Court of Canada in Criminal Matters:

January 1 to November 30, 2017

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This column will review those decisions rendered by the Supreme Court of Canada, between January 1 and November 30, 2017, that involved criminal causes or matters. In 2017, the Supreme Court of Canada considered a multitude of issues involving criminal law, including defences, evidence, and sentencing. The Court also considered the application of the Canadian Charter of Rights and Freedoms, Constitution Act, 1982, to various criminal-law provisions and procedures.

Let us start with the Supreme Court's consideration in 2017 of criminal offences.

(1) OFFENCES:

(A) BREATHALYZER DEMANDS:

Section 253 of the Criminal Code makes it an offence to operate a motor vehicle in Canada with a blood-alcohol level that exceeds 80 milligrams of alcohol per every 100 milliliters of blood. The Criminal Code allows the Crown to establish a person's blood-alcohol level through the introduction of a certificate prepared by a police officer who conducted a breathalyzer test upon the accused. Section 258 of the Criminal Code creates a presumption that the certificate is accurate if the samples were taken within a prescribed time period.

In *R. v. Alex*, 2017 SCC 37, a vehicle being operated by the accused was stopped by the police. The accused provided samples of his breath that registered blood-alcohol levels above the legal limit. He was charged with driving "over 80," contrary to section 253 of the Criminal Code. The Supreme Court noted that, to rely upon the section 258 presumptions, the Crown must prove that the breath samples were "taken within a prescribed period of time following the alleged offence; the samples have to be provided directly into an approved container or instrument; and the instrument has to be operated by a properly qualified technician" (at paragraph 4).

At his trial, the trial judge found that the police officer did not have lawful grounds to have made the breathalyzer demand, but concluded that it was not necessary for the Crown to prove that a lawful demand had been made to rely on the evidentiary presumption contained within section 258 of the Criminal Code.

On appeal to the Supreme Court of Canada, the following issue was raised (at paragraph 5): "The issue in this appeal is whether, in addition to the three preconditions just mentioned, the Crown must also establish that the demand for the breath sample made by the police was a 'lawful' demand before it can take advantage of the evidentiary shortcuts."

The Supreme Court concluded, at paragraph 11, that the Crown did not have to

> prove that the demand was lawful in order to take advantage of the shortcuts. If the taking of the samples is subjected to *Charter* scrutiny, and the evidence of the breath test results is found to be inadmissible by virtue of ss. 8 and 24(2) of the *Charter*, that will end the matter. Resort to the evidentiary shortcuts will be a non-issue. On the other hand, if the taking of the samples is subjected to s. 8 *Charter* scrutiny, and the breath test results are found to be admissible in evidence — either because no s. 8 breach occurred or because the evidence survived s. 24(2) *Charter* scrutiny — the shortcuts should remain available to the Crown.[1]

(2) DEFENCES:

(A) MISTAKE OF AGE:

Section 150.1(4) of the Criminal Code allows an accused person charged with certain sexual offences, involving children less than sixteen years of age, to raise the defence of mistake of age. The section requires the accused to have taken all reasonable steps to have ascertained the age of the complainant before the defence can be applicable.

Footnotes

1. Sections 8 and 24(2) of the Charter state as follows:

> 8. Everyone has the right to be secure against unreasonable search or seizure.
>
> 24(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

In *R. v. George*, 2017 SCC 38, the accused was charged with the offence of sexual interference. The trial judge acquitted the accused based on having a reasonable doubt about whether the Crown had proven that the accused had failed to take all reasonable steps to determine the complainant's age. A majority of the Court of Appeal allowed an appeal, quashed the acquittals, and ordered a new trial. The accused appealed to the Supreme Court of Canada. The appeal was allowed and the acquittals restored.

The Supreme Court noted, at paragraph 8, that to

> convict an accused person who demonstrates an "air of reality" to the mistake of age defence, the Crown must prove, beyond a reasonable doubt, either that the accused person (1) did not honestly believe the complainant was at least 16 (the subjective element); or (2) did not take "all reasonable steps" to ascertain the complainant's age (the objective element).

The Supreme Court concluded that, in this case, a "review of the trial judge's reasons reveals no legal errors. As a result, the Court of Appeal lacked jurisdiction to interfere with the trial judgment" (at paragraph 15).

(B) OFFICIALLY INDUCED ERROR

In *R. v. Bédard*, 2017 SCC 4, the Supreme Court considered the defence of officially induced error, though in a brief oral judgment. The Court summarized the elements of the offence in the following manner (at paragraph one):

> The defence of officially induced error of law is intended to protect a diligent person who first questions a government authority about the interpretation of legislation so as to be sure to comply with it and then is prosecuted by the same government for acting in accordance with the interpretation the authority gave him or her.

(3) EVIDENCE:

(A) INFORMER PRIVILEGE

In *R. v. Durham Regional Crime Stoppers Inc.*, 2017 SCC 45, the police received a Crime Stoppers tip concerning a fatal shooting. A few days later Keenan Corner was charged with the offence of second-degree murder.

The Supreme Court of Canada noted, at paragraph 6, that at the trial

> [t]he Crown brought a pre-trial application seeking to introduce evidence of the anonymous tip made to Crime Stoppers. Prior to any rulings being made by the application judge, the Crown disclosed to the defence the anonymous tip and all relevant information about it in its possession. The Crown maintained that the call was made by Keenan Corner to divert attention away from himself in the police investigation. It sought to use the call at trial as evidence relevant to Keenan Corner's general credibility . . . Keenan Corner denied making the call. In addition, he and Crime Stoppers submitted that the call was covered by informer privilege.

In response, the Crown asserted that informer privilege did not apply to the tip.

The application judge (at paragraph 7):

> found that Keenan Corner had made the call and that he had done so with the intention of diverting attention away from himself in the police investigation. [The trial judge held] that informer privilege did not apply to the tip because its application would, in the circumstances, undermine the objectives which underlie the privilege.

"[S]hielding this person's identity behind the near absolute protection of informer privilege would compromise, if not negate, the privilege's objectives."

An appeal was taken to the Supreme Court of Canada. The Supreme Court indicated, at paragraph 2, that the primary issue raised by this appeal was

> whether informer privilege exists where a caller makes an anonymous tip to Crime Stoppers with the intention of interfering with the administration of justice. A secondary issue concerns the procedure to be followed when the Crown challenges a claim of informer privilege over an anonymous tip made to Crime Stoppers.

The appeal was dismissed. The Supreme Court held that informer privilege "does not exist where a person has contacted Crime Stoppers with the intention of furthering criminal activity or interfering with the administration of justice" (at paragraphs 9 and 10):

> As regards the primary issue, the application judge excluded the tip from the scope of informer privilege on the basis that Keenan Corner made the call to Crime Stoppers in order to divert attention away from himself in a police investigation. In my view, he did not err in doing so. Informer privilege does not exist where a person has contacted Crime Stoppers with the intention of furthering criminal activity or interfering with the administration of justice. In such circumstances, shielding this person's identity behind the near absolute protection of informer privilege would compromise, if not negate, the privilege's objectives.
>
> With respect to the secondary issue, I am satisfied that the procedure followed by the application judge was reasonable. That said, this case provides the Court with an opportunity to clarify the procedure that should be followed and the safeguards that can be put in place when the Crown challenges the applicability of informer privilege over an anonymous tip made to Crime Stoppers.

The Court held that "[o]nly serious misconduct can justify such a sanction against a lawyer. . . . [C]ourts must be cautious . . . in light of the duties owed by lawyers to their clients . . . ."

What Is the Procedure to Be Followed by a Court When the Crown Challenges a Claim of Privilege Over an Anonymous Tip?

The Supreme Court held that when the Crown challenges a claim of privilege over an anonymous tip, "the court must consider whether privilege in fact exists at an *in camera* hearing" (at paragraph 35). The Court also held, at paragraph 36, that the "*in camera* hearing will likely require an *ex parte* proceeding—in which the accused and defence counsel are excluded—to determine whether informer privilege applies to the tip." Finally, the Court concluded that "the application judge may review the record of the anonymous tip" (at paragraphs 38-39).

(4) TRIALS:

(A) THE ORDERING OF COSTS AGAINST COUNSEL:

In *Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin*, 2017 SCC 26, an application judge awarded costs personally against defence counsel after dismissing counsel's applications for recusal of two trial judges on the basis of purported apprehensions of bias. On appeal, the Quebec Court of Appeal set aside the award of costs against counsel. The Crown appealed to the Supreme Court of Canada.

The Supreme Court of Canada restored the order of costs made against defence counsel. The Court indicated that "[t]he courts have the power to maintain respect for their authority. This includes the power to manage and control the proceedings conducted before them . . . A court therefore has an inherent power to control abuse in this regard . . . ." (at paragraph 16). The Supreme Court also held that "[t]his power of the courts to award costs against a lawyer personally is not limited to civil proceedings, but can also be exercised in criminal cases . . . . This means that it may sometimes be exercised against defence lawyers in criminal proceedings, although such situations are rare . . . ." (at paragraph 19).

THE CRITERIA:

The Supreme Court indicated that "the threshold for exercising" the power to award costs against defence counsel personally "is a high one" (at paragraph 25). The Court held that "[o]nly serious misconduct can justify such a sanction against a lawyer. Moreover, the courts must be cautious in imposing it in light of the duties owed by lawyers to their clients . . . ." (at paragraph 25). The Supreme Court held that an award of costs personally against counsel can only be ordered in "exceptional" circumstances (at paragraph 29).

THE PROCEDURE:

The Supreme Court indicated, at paragraph 36, that when a court is considering issuing an order of costs personally against counsel, the lawyer involved

> should be given prior notice of the allegations against him or her and the possible consequences. The notice should contain sufficient information about the alleged facts and the nature of the evidence in support of those facts. The notice should be sent far enough in advance to enable the lawyer to prepare adequately. The lawyer should, of course, have an opportunity to make separate submissions on costs and to adduce any relevant evidence in this regard. Ideally, the issue of awarding costs against the lawyer personally should be argued only after the proceeding has been resolved on its merits.

The Court also indicated that the Crown "must confine itself to its role as prosecutor of the accused. It must not also become the prosecutor of the defence lawyer" (at paragraph 38).

APPLICATION TO THIS CASE:

In applying these principles to this case, the Supreme Court described the conduct of counsel in this case as being "particularly reprehensible" (at paragraph 42). It indicated, at paragraph 42, that the purpose of the applications were

> unrelated to the motions he brought. The respondent was motivated by a desire to have the hearing postponed rather than by a sincere belief that the judges targeted by his motions were hostile. . . . The respondent thus used the extraordinary remedies for a purely dilatory purpose with the sole objective of obstructing the orderly conduct of the judicial process in a calculated manner. It was therefore reasonable for the judge to conclude that the respondent had acted in bad faith and in a way that amounted to abuse of process, thereby seriously interfering with the administration of justice.

(B) TRIALS: DIFFERENT LEVELS OF SCRUTINY OF THE EVIDENCE:

In *R. v. Awer*, 2017 SCC 2, the accused was convicted of the offence of sexual assault. On appeal to the Supreme Court of Canada the accused argued that the trial judge subjected a defence expert to a higher level of scrutiny than the Crown's expert.

The Supreme Court allowed the appeal, set aside the conviction, and ordered a new trial. In a brief judgment, the Court concluded that (at paragraphs 5-6):

> [T]he materially different levels of scrutiny to which the evidence of the two experts was subjected—none for the Crown expert and intense for the defence expert—was unwarranted, and it tended to shift the burden of proof onto the appellant. . . . In these circumstances, we feel obliged to quash the conviction and order a new trial.

(C) TRIALS: JOINDER OF PROVINCIAL AND FEDERAL OFFENCES:

In *R. v. Sciascia*, 2017 SCC 57, the accused was charged with offences contrary to a provincial Highway Traffic Act and the

Criminal Code on separate informations (the Criminal Code offence was proceeded with by way of summary conviction). With the accused's consent the two informations were tried together in a single trial. The accused was convicted of a provincial offence and a Criminal Code offence. He appealed arguing that the trial judge lacked jurisdiction to conduct a joint trial on the criminal and provincial charges and that his trial was therefore a nullity.

The appeal was dismissed. The Supreme Court of Canada held that a Provincial Court judge has jurisdiction to conduct a joint trial of a provincial charges and summary conviction Criminal Code offence. The Supreme Court indicated that "conducting a joint trial is both permissible and desirable where the provincial charges and the summary conviction criminal charges share a sufficient factual nexus and it is in the interests of justice to try them together" (at paragraph one).

(D) JUDICIAL INTERIM RELEASE PENDING APPEAL:

In *R. v. Oland*, 2017 SCC 17, the accused was convicted of second-degree murder. Section 679 of the Criminal Code allows for a convicted person to seek judicial interim release by a single judge of the province's Court of Appeal. An unsuccessful application can be reviewed by a panel of the Court of Appeal.

In this case, a Judge of the New Brunswick Court of Appeal denied the accused's application for release. A review by a panel of three judges of the Court of Appeal upheld the denial of bail. On appeal to the Supreme Court, the Court held that the accused should have been released by the Court of Appeal Judge and that the panel of the Court of Appeal erred in affirming the denial of bail. In the course of the ruling, the Supreme Court considered sections 515(10)(c) [the public confidence test for release consideration by trial judges]; 679(3)(c) [the public confidence test for release by a single Judge of the Court of Appeal pending an appeal]; and 680(1) [review of a section 679 decision by a panel of three judges of the Court of Appeal] of the Criminal Code.

SECTION 679(3)(C):

The Supreme Court noted that in section 679(3)(c) of the Criminal Code, "Parliament has not provided appellate judges with any direction as to how a release pending appeal order is likely to affect public confidence in the administration of justice" (at paragraph 31). However, "it has done so" under section 515(10)(c) of the Criminal Code (at paragraph 31). The Court held that the four factors listed in section 515(10)(c), "with appropriate modifications to reflect the post-conviction context—should be accounted for in considering how, if at all, a release pending appeal order is likely to affect public confidence in the administration of justice" (at paragraph 32).

The Supreme Court pointed out that in assessing public confidence concerns pursuant to section 515(10)(c), "the seriousness of the crime plays an important role. The more serious the crime, the greater the risk that public-confidence in the administration of justice will be undermined if the accused is released on bail pending trial" (at paragraph 37). The Supreme Court concluded that in considering the public confidence component under section 679(3)(c), "the seriousness of the crime for which a person has been convicted should . . . play an equal role in assessing the enforceability interest" (at paragraph 37).

"[A]dmitting a statement by an accused for the purpose of assessing the constitutionality of state action . . . does not engage the rationale for the confessions rule."

SECTION 680(1):

The Supreme Court held that a panel reviewing a decision of a single judge under s. 680(1) should be guided by the following three principles (at paragraph 61):

> First, absent palpable and overriding error, the review panel must show deference to the judge's findings of fact. Second, the review panel may intervene and substitute its decision for that of the judge where it is satisfied that the judge erred in law or in principle, and the error was material to the outcome. Third, in the absence of legal error, the review panel may intervene and substitute its decision for that of the judge where it concludes that the decision was clearly unwarranted.

The Supreme Court, at paragraph 69, concluded that that the appeal court judge

> did not apply the correct test in assessing the strength of Mr. Oland's appeal and the implications flowing from it. Much as he was satisfied that Mr. Oland had raised "clearly arguable" grounds of appeal, this was not enough. . . . [H]is reasons show[] he required more, something in the nature of unique circumstances that would have virtually assured a new trial or an acquittal[.]

(5) EVIDENCE:

(A) THE APPLICABILITY OF THE COMMON-LAW CONFESSIONS RULE TO STATEMENTS TENDERED IN A VOIR DIRE UNDER THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS:

In *R. v. Paterson*, 2017 SCC 15, the Crown sought to establish the reasonableness of a warrantless search by presenting evidence on a *Charter voir dire* of things said to the police by the accused before they entered his residence. An appeal to the Supreme Court of Canada raised the following issue: "the applicability of the common law confessions rule to statements tendered in a *voir dire* under the *Canadian Charter of Rights and Freedoms*" (at paragraph 1).

The accused argued that the Crown was required to prove beyond a reasonable doubt that any statements made by the accused and upon which it relied to support the police entry into the apartment, were voluntarily made (i.e., the "confessions rule"). The Supreme Court rejected this proposition. It held, at paragraph 18, that "the confessions rule should not be expanded as proposed by the appellant. More particularly . . . the confessions rule should not apply to statements tendered in the context of a *voir dire* under the *Charter*." The Supreme

It held that a drug-recognition expert's expertise had been conclusively and irrebuttably established by Parliament . . . .

Court held that (at paragraph 21):

> [A]dmitting a statement by an accused for the purpose of assessing the constitutionality of state action, as opposed to the purpose of determining the accused's guilt, does not engage the rationale for the confessions rule. To apply the rule to evidence presented at a *Charter voir dire* would distort both the rule and its rationale.

(B) HEARSAY:

In *R. v. Bradshaw*, 2017 SCC 35, a witness (Thielen) provided a videotaped reenactment of two murders in which he implicated the accused. Thielen refused to testify at the accused's trial. The Crown sought to admit into evidence his reenactment. The trial judge admitted the reenactment and the accused was convicted. On appeal to the Supreme Court of Canada, the following issue was raised (at paragraph 18): "When can a trial judge rely on corroborative evidence to conclude that the threshold reliability of a hearsay statement is established?"

The Supreme Court held that (at paragraph 4):

> [C]orroborative evidence may be used to assess threshold reliability if it overcomes the specific hearsay dangers presented by the statement. These dangers may be overcome on the basis of corroborative evidence if it shows, when considered as a whole and in the circumstances of the case, that the only likely explanation for the hearsay statement is the declarant's truthfulness about, or the accuracy of, the material aspects of the statement. The material aspects are those relied on by the moving party for the truth of their contents.

However, the Court noted that (at paragraph 6):

> [T]he evidence he relied on did not, when considered in the circumstances of the case, show that the only likely explanation was that Thielen was truthful about Bradshaw's involvement in the murders. It did not substantially negate the possibility that Thielen lied about Bradshaw's participation in the murders. While this corroborative evidence may increase the probative value of the re-enactment statement if admitted, it is of no assistance in assessing the statement's threshold reliability. The trial judge therefore erred in relying on this corroborative evidence.

(C) DRUG RECOGNITION EXPERT EVIDENCE:

Section 254(3.1) of the Criminal Code allows designated police officers (referred to as "drug recognition experts") to demand that the operator of a motor vehicle submit to a drug evaluation (a series of physical tests designed to determine if the person's ability to operate a motor vehicle is impaired by a drug).

In *R. v. Bingley*, 2017 SCC 12, the accused was involved in a motor vehicle collision. A police officer, who was designated as a drug recognition expert, conducted a "field sobriety test" which led to the accused being charged with the offence of operating a motor vehicle while impaired by a drug.

On appeal to the Supreme Court of Canada the following issue was raised (at paragraph 1): "Can a drug recognition expert ('DRE') testify about his or her determination under s. 254(3.1) of the *Criminal Code*, R.S.C. 1985, c. C-46, without a *voir dire* to determine the DRE's expertise?"

The Supreme Court held that a *voir dire* was not required. The Court indicated that while a trial judge would normally determine whether an expert has special expertise at a *voir dire*, section 254(3.1) of the Criminal Code conclusively answered the question. It held that a drug recognition expert's expertise had been conclusively and irrebuttably established by Parliament (at paragraph 20):

> The DRE, literally, is a "drug recognition expert", certified as such for the purposes of the scheme. It is undisputed that the DRE receives special training in how to administer the 12-step drug recognition evaluation and in what inferences may be drawn from the factual data he or she notes. It is for this limited purpose that a DRE can assist the court by offering expert opinion evidence.

(6) CHARTER:

(A) SECTION 8: SEARCH AND SEIZURE-EXIGENT CIRCUMSTANCES:

In *Paterson*, the police entered an apartment to seize several marihuana roaches. The police told the accused they would treat this as a "no case" seizure, meaning that they intended to seize the roaches without charging him. Once inside, the police observed a bulletproof vest, a firearm, and drugs. They arrested the accused, obtained a warrant to search his apartment, and executed the warrant. This led to the discovery of other firearms and drugs.

The accused was charged with various drug and firearm offences. He was convicted at trial. On appeal, the Court of Appeal of British Columbia upheld the convictions.

The accused appealed to the Supreme Court of Canada. The Supreme Court described one of the issues raised by the appeal as being (at paragraph 1): "[W]hether, on the facts of this case, exigent circumstances, within the meaning of s. 11(7) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 ("*CDSA*"), made it impracticable to obtain a warrant before entering and searching the appellant's residence[.]"

The Supreme Court allowed the appeal, set aside the convictions, and entered acquittals. The Supreme Court of Canada held that the police entry into the appellant's residence "was not justified by exigent circumstances making it impracticable to obtain a warrant" (at paragraph 4). The Court excluded the evidence located by the search, pursuant to section 24(2) of the Charter and the accused was acquitted.

The Supreme Court held that (at paragraphs 33-34):

> "[E]xigent circumstances" in s. 11(7) denotes not merely convenience, propitiousness or economy, but rather *urgency*, arising from circumstances calling for immediate police action to preserve evidence, officer safety or public safety. . . . Even where exigent circumstances are present, however, they are not, on their own, sufficient to justify a warrantless search of a residence under s. 11(7). Those circumstances must render it "impracticable" to obtain a warrant.

The Court held, at paragraph 34, that the "impracticability of obtaining a warrant does not support a finding of exigent circumstances."

The Court also held, at paragraphs 36-37, that the word

> "impracticable" within the meaning of s. 11(7) contemplates that the exigent nature of the circumstances are such that taking time to obtain a warrant would seriously undermine the objective of police action—whether it be preserving evidence, officer safety or public safety. . . . In sum, I conclude that, in order for a warrantless entry to satisfy s. 11(7), the Crown must show that the entry was compelled by urgency, calling for immediate police action to preserve evidence, officer safety or public safety. Further, this urgency must be shown to have been such that taking the time to obtain a warrant would pose serious risk to those imperatives.

In the circumstances of this case, the Supreme Court concluded that (at paragraph 39):

> [T]he police had a practicable option: to arrest the appellant and obtain a warrant to enter the residence and seize the roaches. If, as the Crown says, the situation was not serious enough to arrest and apply for a warrant, then it cannot have been serious enough to intrude into a private residence without a warrant.

The Supreme Court concluded, at paragraph 41, that "the warrantless entry by the police into the appellant's residence was not authorized by s. 11(7) of the *CDSA*, and infringed his right under s. 8 of the *Charter* to be secure against unreasonable search."

(B) EXCLUSION OF EVIDENCE UNDER SECTION 24(2):

Section 24(2) of the Charter allows a Canadian trial judge to exclude evidence that "was obtained in a manner that infringed" any of the provisions of the Charter if the admission of the evidence "would bring the administration of justice into disrepute."

In *Paterson*, the Supreme Court held that the evidence obtained by the police was obtained in violation of section 8 of the Charter should be excluded despite the seriousness of the offences (at paragraphs 56-57):

> It is therefore important not to allow the third *Grant 2009* factor of society's interest in adjudicating a case on its merits to trump all other considerations, particularly where (as here) the impugned conduct was serious and worked a substantial impact on the appellant's *Charter* right. In this case, I find that the importance of ensuring that such conduct is not condoned by the court favours exclusion. As Doherty J.A. also said in *McGuffie*, at para. 83, "[t]he court can only adequately disassociate the justice system from the police misconduct and reinforce the community's commitment to individual rights protected by the *Charter* by excluding the evidence. . . . This unpalatable result is the direct product of the manner in which the police chose to conduct themselves."

"If . . . the situation was not serious enough to arrest and apply for a warrant, then it cannot have been serious enough to intrude into a private residence without a warrant."

> Having considered these factors separately and together, I am of the view that the evidence obtained as a result of the entry and search of the appellant's residence should be excluded, as its admission would bring the administration of justice into disrepute.

(C) SECTION 11(B): TRIAL WITHIN A REASONABLE PERIOD OF TIME:

Section 11(b) of the Charter protects the right of an accused person to be tried within a reasonable period of time. It states as follows:

> Any person charged with an offence has the right
> . . . .
> (b) to be tried within a reasonable time[.]

In *R. v. Jordan*, 2016 SCC 27, the Supreme Court issued its landmark decision in relation to section 11(b) of the Charter. In that decision the Court created presumptive time frames (18 months for summary conviction offences and 30 months for indictable offences), the breach of which will result in the staying of charges for unreasonable delay. In *R. v. Cody*, 2017 SCC 31, the Court had the opportunity to revisit *Jordan*, particularly in relation to cases in which the charges had been laid prior to *Jordan* being issued (referred to as "transitional cases").

The Supreme Court held in *Cody* that the "new framework in *Jordan* applies to cases already in the system. . . . However, in some cases, the transitional exceptional circumstance may justify a presumptively unreasonable delay where the charges were brought prior to the release of *Jordan*" (at paragraph 67). The Court indicated that (at paragraph 68):

> [T]he transitional exceptional circumstance assessment involves a qualitative exercise. . . . The Crown may rely on the transitional exceptional circumstance if it can show that "the time the case has taken is justified based on the parties' reasonable reliance on the law as it previously existed" . . . Put another way, the Crown may show

"In light of these findings, the Crown cannot show that the 36.5 months of net delay in this case was justified . . . ."

that it cannot be faulted for failing to take further steps, because it would have understood the delay to be reasonable given its expectations prior to *Jordan* and the way delay and the other factors such as the seriousness of the offence and prejudice would have been assessed under *Morin*.

The Supreme Court concluded that a stay of proceedings was appropriate because the Crown was unable to establish that the delay "was justified based on its reliance on the previous state of the law" (at paragraphs 73-74):

> The charges in this case were serious. In our view, however, this consideration is overcome by the trial judge's findings of "real and substantial actual prejudice" . . . The trial judge also made an express finding that Mr. Cody's conduct was not "inconsistent with the desire for a timely trial" . . . .
>
> In light of these findings, the Crown cannot show that the 36.5 months of net delay in this case was justified based on its reliance on the previous state of the law. To the contrary, the trial judge's findings under the previous law strengthen the case for a stay of proceedings. Where a balancing of the factors under the Morin analysis, such as seriousness of the offence and prejudice, would have weighed in favour of a stay, we expect that the Crown will rarely, if ever, be successful in justifying the delay as a transitional exceptional circumstance under the *Jordan* framework. We therefore find that the delay in this case was unreasonable.[2]

(D) SECTION 11(F): THE RIGHT TO A TRIAL BY JURY

Section 11(f) of the Charter guarantees the right to trial by jury. It states as follows:

> Any person charged with an offence has the right
> . . . .
> (f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment[.]

In *R. v. Peers*, 2015 ABCA 407 (Can. Alta.), the accused was charged with an offence, contrary to section 194 of the Securities Act, R.S.A. 2000, c. S-4 (Can. Alta.). The maximum penalty for a conviction under this provision was a period of imprisonment of five years less a day, a fine of up to $5 million, or both. The Alberta Court of Appeal held that the phrase "imprisonment for five years or a more severe punishment" found in section 11(f) of the Charter primarily engaged the deprivation of liberty inherent in the maximum sentence of imprisonment imposed by the statute. The Court of Appeal concluded that a maximum penalty of "five years less a day" did not become a more severe penalty just because some collateral negative consequences were added to it.

On appeal to the Supreme Court of Canada, the Court in *R. v. Peers*, 2017 SCC 13, stated in a brief oral judgment (at paragraph 1): "The appeal is dismissed. We conclude that the appellant was not entitled to a trial by jury, substantially for the reasons of the majority of the Court of Appeal, 2015 ABCA 407, 609 A.R. 352."

(7) SENTENCING:

(A) CONDITIONAL SENTENCES:

Section 742.1 of the Criminal Code allows a judge to order that a period of imprisonment of less than two years be served in the community under certain conditions (normally including "house arrest"). These sentences are referred to as "conditional sentences."

In *Tran v. Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50, the Supreme Court of Canada considered the nature of conditional sentences in the following context (at paragraph 2):

> This appeal concerns the obligation of permanent residents to avoid "serious criminality", as set out in s. 36(1)(a) of the *IRPA* [*Immigration and Refugee Protection Act*, S.C. 2001, c. 27.]. This obligation is breached when a permanent resident is convicted of a federal offence punishable by a maximum term of imprisonment of at least 10 years, or of a federal offence for which a term of imprisonment of more than 6 months has been imposed.

The Supreme Court made the following comments concerning the nature and purpose of conditional sentences (at paragraphs 28, 32, 33):

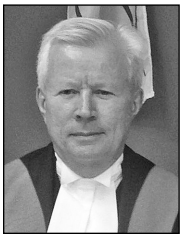
> [C]onditional sentences generally indicate less "serious criminality" than jail terms. As Lamer C.J. said, a "conditional sentence is a meaningful alternative to incarceration for less serious and non-dangerous offenders" . . . Thus, more serious crimes may be punished by jail sentences that are *shorter* than conditional sentences imposed for less serious crimes—shorter because they are served in jail rather than in the community. . . . Conditional sentences are designed as an alternative to incarceration in order to encourage rehabilitation, reduce the rate of incarceration, and improve the effectiveness of sentencing . . . .

2. For a review of *Cody*, see Matthew R. Gourlay, *After* Jordan*: The Fate of the Speedy Trial and Prospects for Systemic Reform*, 36:2 ADVOC. J. 22-27 (2017).

CONCLUSION

As we have seen, the Supreme Court of Canada considered a number of issues in 2017 related to criminal law and procedure. This included the defences of mistake of age (*R. v. George*) and officially induced error (*R. v. Bédard*). In addition, the Supreme Court commented upon conditional sentences (*Tran v. Canada*), clarified the law of bail at the appellate level (*R. v. Oland*), and considered the nature and extent of informer privilege (*R. v. Durham Regional Crime Stoppers Inc.*). In the constitutional context, the Court considered exigent circumstances in the law of search and seizure and when evidence obtained in violation of the Charter should be excluded (*R. v. Paterson*).

Finally, it is difficult to predict over the course of a year which decision rendered by the Supreme Court will have the most significant long-term effect. For the Supreme Court of Canada in 2017, I would choose the Court's decision in *Cody*. In *Cody* the Court affirmed its groundbreaking and controversial decision in *Jordan*. *Cody* provided the Supreme Court with the opportunity to step back from *Jordan* or to affirm its remarkable transformation of the right to be tried within a reasonable period of time in Canada. It chose the latter.



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