

Did the SCC set an unreachable bar for accused to argue delay during verdict deliberation time?

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On March 20, 2020, the Supreme Court of Canada (SCC) rendered judgment in *R. v. K.G.K. (K.G.K.)*, in which it addressed how to determine whether an accused person's right to be tried within a reasonable time was infringed in the specific context of the verdict deliberation time. The period of verdict deliberation starts after the end of the evidence and arguments and extends until the release of the decision.

This decision comes in the aftermath of the landmark *Jordan* decision, in which the SCC created a new framework to determine whether an accused person has faced an unreasonable delay in being tried under s. 11(b) of the *Canadian Charter of Rights and Freedoms* (the *Charter*). This framework established numerical ceilings (18 months for provincial court trials and 30 months for superior court trials), beyond which a delay becomes presumptively unreasonable.

R. v. K.G.K.: Summary

Although the SCC confirmed that s. 11(b) of the *Charter* applies to verdict deliberation time, it notably clarified that the presumptive ceilings established in *Jordan* do not apply to this period. Rather, the *Jordan* ceilings apply only from the date of the charge until the actual or anticipated end of the evidence and argument.

In assessing whether an accused person's right to be tried within a reasonable time was infringed by a delay during the verdict deliberation period, the test to be applied is whether the deliberation time took "markedly longer than it reasonably should have in all the circumstances." To determine whether this test was met, reviewing courts are to examine, among other things, the following considerations: how close to the relevant *Jordan* ceiling the case was before the trial judge reserved judgment, the complexity of the case, anything on the record from the judge or the court, and the length of time taken in cases of a similar nature in similar circumstances.

Importantly, the test operates in the context of the presumption of judicial integrity, which presumes that trial judges have balanced the need for timeliness and trial fairness in rendering a just verdict. The presumption recognizes that judges carry out their sworn duties of office to the best of their ability. The accused has the burden to rebut this presumption, which the SCC acknowledged to be a high threshold, given the considerable weight that this presumption carries.

Comment

The manner in which courts will apply the “markedly longer” test remains to be seen. For one, *K.G.K.* took place in a unique context, in the sense that the trial judge’s verdict deliberation time had taken place before the *Jordan* decision was rendered. The SCC noted that it would have decided the issue differently had the case been heard entirely post-*Jordan*.

Moreover, the presumption of judicial integrity means that accused persons may face a difficult burden in proving that there was an unreasonable delay during the verdict deliberation time. It is unclear at this point what type of evidence is required for an accused person to overcome this presumption. Of note, Justice Abella, in a concurring opinion, commented that such a presumption elevates the burden to an “impossible” threshold for the accused. Although s. 11(b) of the *Charter* still ostensibly applies to verdict deliberation time, requiring an accused person to demonstrate that the trial judge did not act with integrity appears to be a challenge, to say the least.