Yes – Corporations DO Have Rights: Part II

By: Jeremy D. Schwartz

On December 13, 2016, we published an update concerning the recent case of **R. v. Live Nation** (since reported: **here**) in which the Ontario Court of Justice found that the new test for unconstitutional delay (the "**Jordan Test**") applied equally to corporate defendants in regulatory prosecutions. That new test was the result of last summer's Supreme Court ruling in **R. v. Jordan**. Despite the favourable ruling for all employers, the application of the new test did not result in a stay of proceedings in **R. v. Live Nation**.

On January 13, 2017, Justice DeBartolo of the Ontario Court of Justice ruled in **R. v Fitness One et. al.** (unreported) that the **Jordan Test** applied to the corporate defendants, and stayed the proceedings against the individual and all ten corporate defendants as well.

To our knowledge, this is the first time a court has applied the Jordan Test to stay charges against a corporate defendant in a regulatory prosecution, anywhere in the country.[i]

Jordan Test

We have written before on the groundbreaking decision of the Supreme Court of Canada in **R v Jordan** (see our previous blog post on that case here). In **Jordan**, the Supreme Court of Canada set hard caps on the time it takes to process a prosecution through trial. The time limit under the cap is determined by the court procedure elected by the Crown in prosecuting the offence.

Hearings before the Superior Court must be completed in 30 months and those before provincial courts, which include regulatory prosecutions (under the *Occupational Health and Safety Act*, *Employment Standards Act*, *etc.*) must be completed in 18 months.

If the actual time to the end of trial exceeds the cap, then absent certain defined circumstances the right of the accused to be tried within a reasonable time under section 11(b) of the **Canadian Charter of Rights and Freedoms** is considered to have been breached. This invariably results in a stay of proceedings, which has the effect of dismissing the charges and preventing the Crown from laying them again.

R. v. Fitness One et. al.

The case involved almost 200 orders to pay against 10 corporate defendants and one individual director, for allegedly failing to pay certain Ministry of Labour orders to pay wages issued by an Employment Standards Officer. As the name of the corporation suggests, the business was essentially a management company and eight fitness clubs. The businesses ceased operations and Ministry of Labour investigations concluded that roughly 70 individuals were due a total of about

$140,000 in wages. Approximately $30,000 was collected via garnishment, leaving roughly $110,000 outstanding.

The charges against all defendants were laid in February 2015 and the first court appearance occurred in late April 2015. The individual defendant (the director) represented himself and the corporate defendants until our firm was retained in October 2016. By this time, there had been two preliminary appearances and three judicial pre-trials.

The first two trial dates, November 25 and December 1, 2016, were used to argue a disclosure motion and this motion concerning delay. As a result of limited court availability, the case was not scheduled to conclude the hearing on the merits until May 2017.

As a regulatory prosecution in a provincial court, the **Jordan Test** (if applicable) prescribed that the hearing must conclude within 18 months. The time from the laying of charges to December 1, 2016 was roughly 22.5 months.

Highlights of the Decision on Delay

1. Justice DeBartolo followed **Live Nation**, finding that the new Jordan Test applied equally to corporate defendants, including in regulatory prosecutions, something the Crown resisted strongly.

2. The Court found that, unlike in **Live Nation**, there was nothing complex about the prosecution - despite the fact that there were almost 200 charges against eleven defendants. Indeed, the Crown had advised the Court at an earlier appearance that it was mostly a "paper case" for the Crown, which could be put in with or without a witness, via certificate evidence, in about two days including argument.

3. Somewhat surprisingly, the Court charged as defence delay the roughly two months between the first appearance in April 2015 (when the defendants received a bankers box of disclosure) and the second appearance in July 2015. That adjournment was provided so the defendants could review the significant disclosure. The Supreme Court in **Jordan** said this sort of ordinary defence preparation time should not be charged against the time through trial (when calculating whether the 18 cap was breached), and said such things delays were accounted for in the (18 month) deadline. In any event, that took the delay from at least 22.5 months down to roughly 20.5, and so it remained over the 18-month ceiling.

4. A significant issue argued on the motion was the failure by the court and Crown, at various appearances, to apprise the unrepresented accused of their Charter rights. As such, the Court rejected the Crown's argument that the accused's tacit acceptance of dates offered, which in every case were the first available, constituted tacit condonation. The Crown had argued, echoing the sort of arguments heard pre-**Jordan**, that defendants cannot be passive but instead must be actively complaining and enforcing their rights. The Court rejected this submission. This is not surprising, as it was precisely that sort of submission from which the Supreme Court sought to depart with **Jordan**.

5. The Crown had argued that, as a transitional case which commenced pre-**Jordan** and would conclude post-**Jordan**, the reasonableness of the steps taken (and not taken) had to be judged based on what would have been acceptable under the old framework. Effectively the Crown asked the Court to determine whether the actions of the parties would, under the old system, have given rise to a stay of proceedings, and then to use that to determine whether the parties would have had reason to be concerned at various points in the pre-**Jordan** process. The Crown argued that the transitional exception ought to apply, and so a stay not entered, if it would not have been reasonably anticipated/understood by the parties under the old framework that there was a problem.

   The Court rejected this argument, finding that when the case had reached its second judicial pre-trial, some 11 months after the charges were laid, the matter should have been set down for trial. Instead, and despite the fact that the defendants explicitly told the Crown its position on joint resolution would never be acceptable and said "let's go to trial", the Justice of the Peace, on his own initiative, pressed the parties to schedule a third judicial pre-trial to allow the parties to continue discussions. This caused a further five-month delay because of a lack of court availability.

   The Crown had argued that the defendants' failure to complain about the time the case was taking, distinguished the case from R. v Williamson. The Supreme Court released **R. v Williamson** on the heels of **Jordan**, and the case provided a helpful example and discussion of how to apply the "transitional exception" in transitional cases. The Court rejected this argument finding that, as unrepresented defendants, the Court had a duty to help them to understand their rights. The court had neither explained their rights to them along the way, nor offered them an opportunity expressly to reject the multiple proposed dates set. In each case the Crown and presiding Justice of the Peace had simply discussed the next step, the Court Clerk offered the first available dates, and then the defendants were merely consulted for their availability.

6. Finally, to the extent prejudice remains something to consider in transitional cases, the Court found that the cloud of a prosecution involving more than $100,000 in outstanding orders to pay, plus fines, plus a Crown pressing for jail time for the individual director accused, was significant "actual" prejudice. The Court found that this prejudice made the court's failure to assist the defendants to understand their rights, and failure to set the matter down for trial at month 11, all the more unreasonable.

What Employers Need to Know

The Crown has 30 days from the decision to appeal to the Provincial Court of Justice, so this may not be the last word in this matter.

However, if courts continue to heed the call in **Live Nation** for an unfiltered application of **Jordan** to corporate defendants in regulatory matters, this case adds to the chorus and amplifies the din.

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[i] Our firm was counsel to the defendants in this matter. Cases in regulatory matters are often unreported and so may not be readily known or searchable. We are aware of no reported or unreported decisions in which a corporate accused successfully had regulatory charges stayed applying the Jordan Test.