CSIS officials, counsel learning to share information with courts

The Globe and Mail
Colin Freeze
April 17, 2017,

Faced with what is being called an "urgent need" to win back the trust of judges, federal-government spies and their lawyers are trying to learn how to be more forthcoming in court. [Do any of them, notably the lawyers, have any chances of learning anything other than how to lie better so as to not get caught and embarrass Canada, her lying (Charter violating) spies and courts?

Intelligence officials have commissioned expert reports and are taking courses on warrant-writing as part of actions to mitigate the fallout from a scathing Federal Court ruling. In that decision released last fall, a group of judges publicly complained that Canadian Security Intelligence Service (CSIS) officials and their Department of Justice counsel have not included enough information in their warrant applications.

In October, the Federal Court ruled that CSIS had used its warranted authorities to unlawfully warehouse communications data. The information related to people who were not targets themselves, but whose data were captured during surveillance operations on other people. The information was put into a CSIS data-analytics unit the judges said they were never told about.

"We took the court's criticisms seriously," said Christian Girouard, a spokesman for the Justice Department. "We wanted someone to come in from the outside with expertise who could review our practices and tell us how to do it better."

The CSIS controversy at Federal Court was revealed just as Public Safety Minister Ralph Goodale had launched a public consultation on the surveillance powers of federal agents. It complicated already complex political debates, including how the Liberals should make good on their campaign promises to rein in some spy-agency powers and heighten Parliamentary scrutiny of intelligence operations.

At issue in the Federal Court are the closed-courtroom hearings in which officers from the domestic spy agency ask judges for permission to launch surveillance operations against individuals or groups in Canada, such as suspected terrorists, networks of foreign spies or the people around them.

Details about what is said, done and authorized are almost never disclosed publicly for security reasons

CSIS and its Justice counsel are supposed to tell warrant judges everything they might want to know in the hearings. In 2013, a Federal Court judge complained in a written ruling of "strategic" omissions. Last year, 14 specially designated Federal Court judges ruled that CSIS and Justice had verged on contempt-of-court by failing – for a decade – to tell the court the spy

agency had launched the data-analytics centre, where it was indefinitely storing telecommunications information drawn from wiretaps.

“Both [agencies] understand the urgent need to restore the confidence of the Federal Court in them, and have resolved to make every effort to repair this vital relationship,” reads one of two expert reports recently commissioned by the federal government. “… In each case, the Court expressed its disapproval in very strong language.”

The reports are on the Justice Department website. One of them was written in December by Murray Segal, a former chief prosecutor of Ontario, and it makes 21 recommendations for better policies and scrutiny around CSIS warrant applications. Mr. Segal urged ongoing training, and with an RCMP sergeant and several Crown lawyers, conducted a two-day course in January for 50 spy-agency and legal officials on best practices from the criminal justice system’s approach to obtaining wiretaps.

Speaking to The Globe and Mail, Mr. Segal suggested it is getting harder for spy-agency officials to tell judges everything they need to know. CSIS and its lawyers “are well-intentioned and extremely hard-working people who do … high-pressure work,” he said. The recent shortcomings, he added, were not about falsehoods so much as “not always being comprehensive in terms of bringing to the table all the issues a judge issuing an order might want to have.”

His report points out that Parliamentary law allows relatively intrusive spy-agency measures, but because CSIS lacks powers of arrest or to lay charges, no defence lawyers get to challenge the surveillance at trial.

“Indeed, even though a CSIS warrant can authorize profound intrusions into a person’s privacy, the target is never notified that he or she was ever a target. The adversarial challenge mechanism that elsewhere helps keep state power in check is generally absent,” Mr. Segal’s report said.

This, he added, “places a heavy responsibility on the service, on counsel and on the court to get it right.”

A follow up report by John Sims, a former Justice deputy minister, gives specific guidance on how to implement the proposed changes. One of his points is that complex surveillance technologies and methods are blurring the lines on when CSIS needs warrants.

Mr. Sims suggests Federal Court judges may have several blind spots that CSIS and Justice must resolve soon. “An inventory of all programs and activities (including technical developments) related to CSIS operations that could potentially trigger a duty-to-disclose to the Court needs to be put together,” he wrote.

In addition to all this, CSIS and the Justice Department have lately signed on to a “full, frank and fair disclosure” courtroom policy that explicitly obliges CSIS officials to tell judges about any “new intrusive technique” being considered.

The Canadian government reaction to intelligence-warrant practices stands in contrast to similar debates in the United States and Britain, where leaks about modern spy programs have brought information about intelligence agencies' activities out into the open. In both of those jurisdictions, spy agencies were found to be using judicial warrants or ministerial orders to collect records relating to citizens generally – and not just spy-agency targets. Telephone-call logs, for example, were among several bulk data sets these agencies amassed in hopes it could be data-mined for potential leads.

The Canadian government has never had to weather such disclosure, but cryptic criticisms have been raised lately by CSIS's watchdog agencies.

The Security Intelligence Review Committee said last year that CSIS had been collecting some data in bulk quantities without warrants, and urged judicial oversight for this.

Separately, the Privacy Commissioner of Canada has sounded the alarm about federal agents gravitating toward new technologies that "allow for personal information to be analyzed algorithmically to spot trends, predict behaviour and potentially profile ordinary Canadians with a view to identifying security threats among them."

Federal government to test name-blind hiring for public service

The Canadian Press
April 20, 2017

TORONTO - A new project announced today will test whether hiding the names of job applicants would improve hiring practices in the federal government.

The Public Service Commission of Canada project, unveiled at Toronto's Ryerson University, will compare the results of traditional screening methods with name-blind recruitment.

The experiment will involve six federal departments, including National Defence, Global Affairs and Immigration, Refugees and Citizenship.

A report on the findings is expected in October.

The government says the project is meant to strengthen diversity and inclusion in the public service, but says there is no indication that current recruitment practices are biased.

It says name-blind recruitment has already been adopted in several European organizations, such as the British civil service.

Federal government to test name-blind hiring for public service

The Globe and Mail
Paola Loriggio
April 20th, 2017

The federal government will be testing whether hiding the names of job applicants would improve its hiring practices, in what it calls an effort to strengthen diversity and inclusion in the public service.

The Public Service Commission of Canada project, unveiled Thursday at Toronto's Ryerson University, will compare the results of traditional screening methods with name-blind recruitment.

The practice consists of removing names and other identifying information such as email addresses and country of origin from job application forms in order to combat bias against people of diverse ethnic and cultural backgrounds.

"We believe that the public service should reflect the idea that our diversity is our strength and should be a model of inclusion for employers across Canada and around the world," said Scott Brison, president of the Treasury Board.

The experiment will involve some externally advertised jobs in six federal departments, including National Defence, Global Affairs and Immigration, Refugees and Citizenship. A report on the findings is expected in October.

Brison said the pilot project is meant to identify best practices before rolling out the technique throughout the public service, which he said the government aims to do before the end of its mandate.

He said name-blind recruitment has already been adopted in some universities as well as several European organizations, such as the British civil service.

Many orchestras made the switch to blind auditions, in which musicians play hidden by a screen, in the 1970s and 1980s, which led to a dramatic increase in the number of women hired, studies have shown.

A 2012 study by University of Toronto researchers found job applicants with English-sounding names were 35 per cent more likely to receive a call back than those with Indian or Chinese names, which they said suggested an unconscious bias.

Philip Oreopoulos, one of the study's authors, said it benefits employers to remove any barriers that could prevent them from hiring the best people.

Oreopoulos, a professor of economics and public policy at the University of Toronto, said there is "general interest" in moving towards name-blind hiring and the government project may give it a boost.

"I do think there may be some momentum here and the fact that the public sector is going to try this out is promising and may attract interest in employers to see how that goes," he said.

Other studies have found that name discrimination was more prevalent at smaller organizations, the professor said, adding companies that can afford to have a large human resources department may be in a better position to curb that kind of behaviour.

The federal government said there is no evidence of bias in its current hiring practices.

Judge grills government on how long is too long in immigration detention

Justice Ian Nordheimer asked government lawyers whether they believed immigration authorities should have the right to detain someone "literally for the rest of their natural life."
Toronto Star
Brendan Kennedy
April 20, 2017

How long is too long?

That was the question with which Superior Court Justice Ian Nordheimer grilled government lawyers on Thursday regarding Kashif Ali, an immigration detainee who has been locked up in maximum-security jail for more than seven years because Canada has been unable to deport him.

"It seems to me the fundamental question," said Nordheimer, one of the province's most respected judges, who wanted to know whether Canada believes it should have the right to hold someone in immigration detention indefinitely.

Nordheimer said it "seems to be the government's position" that if an immigration detainee is being unco-operative they could hold them "literally for the rest of their natural life." He asked if that was their position.

Government lawyer Daniel Engel would not answer the question directly.

Engel said Ali's situation had not reached that point yet — the government still believed it could deport him — and he pointed to previous court decisions that found an immigration detainee should not be rewarded for lack of co-operation.

Ali disputes the allegation that he has been unco-operative. He has said repeatedly that he wants to be deported and has given the government all the information he has.

Nordheimer said even if he agreed Ali was not co-operating, the question remains: How long can he be detained?

Engel spoke but again did not answer directly.

So Nordheimer interrupted him. He said there are only two positions the government can logically take: Either it believes it's entitled to hold immigration detainees like Ali forever, or there is a point at which it's no longer "constitutionally permissible."

"If the answer is the former that's very crystal clear," Nordheimer said, adding that the courts could then decide if that is justifiable. "If the position is the second, then the question becomes, well, what's the time frame?"

Canada detains thousands of people every year for immigration purposes. Most are deported relatively easily — the average length of detention is about three weeks — but some cases drag on for months or years. Although neither charged nor convicted of a crime, many of the long-term detainees end up in maximum-security provincial jails, where they are treated the same as inmates awaiting trial or serving a criminal sentence.

Unlike some countries, Canada has not set a maximum length of time a person can be kept in immigration detention. In Europe, the absolute upper limit is 18 months, while more than a dozen countries have shorter time frames. The U.S. and the U.K. do not technically have prescribed limits for immigration detention, but their courts have ruled that if deportation is not reasonably foreseeable after six months the detainee should be released.

Ali, who was profiled last month as part of a Star investigation into immigration detention, says he was born in Ghana to a Ghanaian father and Nigerian mother. The 51-year-old, who has been in Canada for more than 30 years, believes he is a citizen of both Ghana and Nigeria and is willing to be deported to either country, but neither will take him back because he can't prove his citizenship.

The former taxi driver has a lengthy criminal record — mostly drug-related offences — but the total time he has now spent in immigration detention is more than twice as long as all of his 28 criminal sentences combined.

Ali's lawyers say his detention is arbitrary and indefinite, and therefore a violation of the Charter of Rights and Freedoms. They have argued that there has never been a reasonable prospect of his removal from Canada, and his detention is "cruel and unusual."

The government says Ali is "intentionally thwarting" his removal by withholding information. Ali says he just wants to get out of jail and has told them everything he can.

But Nordheimer seemed most interested in the question of what point the government believed detention would no longer be reasonable. He continued to press Engel on whether the government believed they should be able to detain someone potentially forever.

"It sounds like you're taking position number one," Nordheimer said at one point, almost playfully.

"I don't think so," Engel said. "The position that we're taking is we haven't reached that point yet."

"That would immediately prompt the question," Nordheimer said. "If it's not seven (years), is it 15? 20?"

Engel said he didn't think there was a "magic number."

Nordheimer's decision is scheduled for April 28.

Unions short millions in Phoenix mess

The Canadian Press
April 21, 2017

OTTAWA — The federal government says it's trying to figure out how much its troubled electronic pay system has short-changed the unions representing thousands of civil servants facing pay problems.

But officials aren't saying whether the unions will be granted emergency payments like those being offered to workers who've been improperly paid through the Phoenix pay system.

One union, the Professional Institute of the Public Service of Canada (PIPSC), says it's owed nearly $2 million in unpaid dues from its members that have been collected by the government but not handed over, or not collected at all.

PIPSC president Debi Daviau says her union's focus has been on ensuring members are paid properly.

But she says the cash shortfall is creating serious problems in maintaining the resources needed to help civil servants sort through their pay issues.

PIPSC represents more than 50,000 federal employees, making it the second-largest federal civil service union.

The Public Service Alliance of Canada, which speaks on behalf of a majority of federal workers, won't say publicly how much it's owed, saying it will sort through the dues mess once it is satisfied the government has fixed the Phoenix problems for good.

The pay system has caused financial turmoil for up to 82,000 federal civil servants since it was launched more than a year ago. In some cases, government employees went without pay for months.

Supreme Court dismisses Quebec lawyers' appeal

Lawyer's Daily
Cristin Schmitz
April 20, 2017

Unionized Quebec government litigators, who unsuccessfully argued that their constitutional right to strike was gutted when they were nevertheless ordered to show up to represent their employer in court, have lost their appeal to the Supreme Court of Canada.

Justice Clément Gascon, ruling from the bench April 20 after nine judges heard the appeal in Pierre-Michel Lajeunesse, et al. v., said his colleagues unanimously held that the appeal was moot.

On that point, the judges accepted the submission of amicus curiae Sébastien Grammond, a University of Ottawa law professor who argued that the case was moot because the Quebec government passed legislation requiring its lawyers and notaries to go back to work last month.

The appellants urged that the court should decide the case anyway, because the matter may well arise again in future. The appeal required the court to balance the appellants' constitutional rights to strike and to freedom of association with other considerations, such as access to justice and the proper administration of justice.

Justice Gascon specified that the court's dismissal of the appeal was not an endorsement of the process or result below.

The Supreme Court's decision is the latest setback for Les avocats et notaires de l'État québécois (LANEQ) in a bitter labour dispute that culminated March 1 in back-to-work legislation, following a lengthy conflict that paralyzed the administrative justice system and the government's efforts to enact pass legislation and regulations.

Lacking a collective agreement since March 2015, 1,100 government lawyers and notaries went on strike last October after more than 18 bargaining sessions and five meetings with a mediator ended in an impasse. The union has said it is challenging the legislation and suing the government.

At the Supreme Court, the appellants attacked an interlocutory order by a Quebec Court of Appeal judge, who denied their request — made a month in advance of a scheduled court date — to postpone the hearing of an appeal on which the appellants were to appear as counsel for the government.

At issue as well was a decision by the Administrative Labour Tribunal (Essential Services Division) determining which essential services LANEQ's members had to maintain during their strike. The services determined to be essential included applications for postponement, i.e. [TRANSLATION] "A lawyer who is responsible for a case scheduled for a strike day must apply for a postponement and must conduct the hearing should the court dismiss the application for postponement." LANEQ filed an application for judicial review of the ALT's decision on the ground, among others, that the ALT had [TRANSLATION] "failed to analyze the requested essential services in relation to the decision of the Supreme Court" in Saskatchewan Federation of Labour v. Saskatchewan 2015 SCC 4.

In its intervention in the case, Ontario argued that labour disputes should not be permitted to interfere with the administration of justice, and that courts need not consider the labour relations of the lawyers before them, including the constitutional right to strike. That issue remains to be determined another day.

Supreme Court 'got it right' on speedy trial right, law professor says

Lawyer's Daily
Cristin Schmitz
April 21, 2017

The Supreme Court "got it right" with its robust new approach to the Charter's speedy trial right as the positive impact so far outweighs any perceived negatives, says Dalhousie University law professor Steve Coughlan, who has studied the aftermath of R. v. Jordan.

The top court will hear arguments April 25 in R. v. Cody — its first opportunity to elaborate on the new framework a 5-4 majority created last July for analyzing the s. 11(b) Charter right to be tried within a reasonable time: R. v. Jordan 2016 SCC 27.

Seven governments are urging the judges, in various ways, to be more flexible or lenient with the Crown's obligations — and/or to expand the duties of defence counsel — under Jordan's stricter, and less discretionary, analytical framework that imposes presumptive time limits from charge to the end of trial of 18 months in provincial court and 30 months in superior court.

But as the intervener Criminal Lawyers' Association (CLA) points out in its factum, there has been only a "modest" increase in the number of successful s. 11(b) stay applications post-Jordan, as revealed by the research of Coughlan, and Jessica Patrick of the Schulich School of Law who comparatively analyzed all the reported decisions on s. 11(b) stay applications in the six months before and after Jordan was handed down.

Their analysis shows that the tougher approach to trial delays mandated by Jordan has not so far triggered a deluge of stay applications or resulted in a flood of cases being thrown out for unreasonable trial delay. Indeed, there have been no successful stay applications that would not have succeeded under the more discretionary and lenient approach that prevailed for 25 years under the R. v. Morin [1992] 1 S.C.R. 771, framework for analyzing s. 11(b) claims (which was supplanted by Jordan).

The Supreme Court's majority "got it right" in Jordan, in Coughlan's opinion. "I think it would be a shame if after such a short period of time the court were to have second thoughts about the new framework itself," he told The Lawyer's Daily. "It seems to be doing precisely the thing that the Supreme Court had wanted it to do, so I think it makes sense to just stay the course. ... We're still in the transitional period, so that's hardly a time to change your mind about things."

Patrick's statistical analysis found that courts across Canada decided 69 s. 11(b) stay applications in the six months before Jordan was handed down — of which only 26 claims (38 per cent) succeeded. That compared with 101 court decisions on s. 11(b) stay applications in the six months following Jordan, of which 51 (50 per cent) resulted in stays — only a 12 per cent higher success rate than pre-Jordan.

In the six months post-Jordan there were only 32 more decisions across Canada on stay applications (a 46 per cent increase from the six months before Jordan) and 25 additional stays. Considering there are about 160,000 criminal cases heard across the country in a six-month period the small uptick in s. 11(b) stays is "extremely minimal," notes Coughlan in his paper "Making Trial With a Reasonable Time a Right Once More."

Jordan's biggest and best impact so far is "that it's got everybody thinking what we can do to speed up the system as a whole — not [just] individual cases — but the system as a whole," said Coughlan.

As a result of Jordan, governments are devoting more resources to criminal justice by hiring more Crowns and judges, but as importantly the Supreme Court successfully smashed "the

culture of complacency" around delay that grew up under the court's previous approach, said Coughlan.

Jordan has triggered a massive rethink of criminal justice, including sparking debate, and many new proposals and initiatives to streamline and speed up the criminal justice system. "It has created that necessary level of concern without increasing in any significant way the number of accused who actually succeed in a s. 11(b) claim," argues Coughlan in his paper. "It has started us on the road to attaining the benefits we want, and it has paid the tiniest of prices for doing so.

That should be seen as a success, and therefore — Jordan got it right," he concludes. Coughlan acknowledges that Jordan remains controversial, and that there was public outcry after three murder charges were thrown out for unreasonable trial delay. But in at least two of the cases, "there is no obvious basis on which those decisions are wrong — the judges [in the cases] are saying 'even if Jordan had never been handed down, I would still be staying these charges,'" he said.

Coughlan said Jordan has likely also moved the Crown in some jurisdictions to purge many stale criminal cases by withdrawing charges or accepting pleas (how many is not known). "But I think we're entitled to presume that Crown prosecutors are exercising responsibility in doing that," he suggested.

The only potential downside Coughlan sees with respect to Jordan is the possibility that many cases will be thrown out once the "transitional period" for charges that were already in the system when Jordan was handed down has ended, and the presumptive time limits are strictly applied to charges laid post-Jordan. "I don't want to say it's foreseeable that we will, [but] we certainly couldn't foreclose the possibility of that happening either," he said.

He explained, "it seems pretty clear that so far Jordan has worked the way the majority intended ... because of the 'transitional exception,' and the notion of the transitional exception was to give courts enough time to solve these problems and bring the system as a whole up to speed. But exactly when does the transitional period end? What's the date? We don't know that, and we don't know whether courts will adequately solve these problems by then."

Coughlan suggested the reality that only some four dozen cases — rather than hundreds — were thrown out for unreasonable trial delay by courts in the six months post-Jordan should give comfort to Jordan's four-judge minority (one dissenter, Thomas Cromwell, has since retired). "Indeed, if anything, it's the dissenting judges who ought to have second thoughts because one of their major fears was 'We're going to create a new post-Askov catastrophe,' and so seeing that hasn't happened they might become more comfortable with thinking: 'All right, we'll stick with [Jordan]," opined Coughlan.

(The s. 11(b) landmark R. v. Askov [1990] 2 S.C.R. 1199, led to more than 52,000 criminal cases in Ontario alone being flushed out of the backlogged justice system, but it was supplanted

17 months later by Morin which saw the top court enfeeble the speedy trial right by modifying or reversing key elements of Askov.)

One of the broad patterns that Coughlan and Patrick identify in the post-Jordan s. 11(b) case law is that defence waiver of delay has not been a significant factor — i.e. time has been deducted for defence waiver in fewer than 20 per cent of the cases. Coughlan predicts the issue of waiver will arise more often in the future, however, because of a developing practice of asking defence counsel to expressly waive particular periods of time.

Defence-caused delay was found in about 60 per cent of the s. 11(b) decisions in the six months after Jordan, and defence delay was found to be absent in only 10 per cent of the cases in which it was argued by the Crown. When there was defence-caused delay, it often related to scheduling. The argument that the defence caused scheduling delays succeeded three-quarters of the time it was made (i.e. it was argued in about 40 per cent of post-Jordan s. 11(b) cases, and succeeded in 30 per cent).

In about half the s. 11(b) cases decided after Jordan, the Crown argued the presumptive 18- or 30-month ceilings on trial delay should be relaxed, on the basis of the "exceptional circumstances" exception created by the Supreme Court. In that regard, the Crown had far more success relying on "discrete events" that were outside its control and irremediable, than it did in contending that the cases in question were particularly complex. (The Crown was able to persuade the presiding judge in only four cases that the case was particularly complex and therefore should not be held to the presumptive limit on trial delay).

"This suggests that judges have adopted a level of skepticism about excusing delay which is entirely consistent with the underlying message of Jordan," wrote Coughlan in his paper.

Nor have courts been buying into the notion that delays below the presumptive ceilings are thereby precluded from successful s. 11(b) claims.

Coughlan noted that s. 11(b) claims — both pre- and post-Jordan — are made disproportionately in Ontario: courts in that province decide 38 per cent of all criminal cases in the country, but about 47 per cent of the decided s. 11(b) cases were from Ontario.

Supreme Court drug case prompts appeal for tolerance of judicial delays

The Globe and Mail
Sean Fine
April 23, 2017

Less than a year after it set new time limits for criminal trials, the Supreme Court of Canada is being asked by federal prosecutors and several provinces to soften a ruling that has resulted in four charges of murder being thrown out for unreasonable delays.

At a hearing Tuesday in the case of James Cody, an accused drug trafficker from Newfoundland and Labrador, the court will hear a plea from the federal prosecution service for tolerance of slow-moving cases that entered the system before the ruling last July – in a case known as R v. Jordan – created the new limits.

Five provinces are intervening in the case in support of a more permissive view of delay. Three of them – Ontario, Alberta and Quebec – have seen judges throw out murder charges over delay, including a first-degree murder charge against a Montreal man dismissed on Friday, and a second-degree murder charge against another Montreal man whose wife died when her throat was slit. Manitoba and British Columbia are the other two provinces intervening.

Read more: Courts shaken by search for solutions to delays

The Cody case was scheduled, after multiple delays, to take five years to come to trial. The Supreme Court's new time limit is exactly half that – 30 months, from charge to completion, for trials in Superior Court. But the court also said it would be unfair to apply the new rules to cases that were already well under way; it provided for a blend of new and old rules.

Two months before Mr. Cody's trial was to begin, he applied to the judge for a stay, saying his right to a timely trial had been violated. The trial judge agreed and dismissed the charges. But the Newfoundland and Labrador Court of Appeal, in a 2-1 decision, said the delay was reasonable and ordered a new trial. Mr. Cody appealed to the Supreme Court to restore the trial judge's ruling.

The federal prosecution service argues that five years was reasonable in Mr. Cody's case, under the old rules.

"If the Crown had known that the law was going to be changed, it might have acted differently; it cannot now go back and change behaviour that was reasonable under the former law," federal prosecutors, who handle drug cases, said in a legal filing to the Supreme Court.

The hearing in the Cody case comes as the federal and provincial justice ministers prepare for an emergency meeting on Friday to look for solutions to clogged courts and dismissed cases. It is unlikely that a ruling will be made in time to influence discussions in that meeting, though the court occasionally rules on the same day as the hearing.

For the court, the Cody case is a test of its resolve to transform the justice system. In Jordan, the court's majority in the 5-4 ruling was scathing about a "culture of complacency and delay" in the

justice system, and said judges, defence lawyers, prosecutors and government all bore responsibility.

“Unless you admit a case has been in the system too long, you will never get past the ‘culture of complacency,’” said Ottawa lawyer Michael Crystal, who is representing Mr. Cody before the Supreme Court. “It’s only when you say too long is too long – five years is too long – that you will be uncomfortable. It’s only when you have a target of 30 months that you become uncomfortable and you have to become more efficient.”

Mr. Cody was charged in January, 2010, one of 13 people accused of being part of an alleged drug-trafficking ring between British Columbia and Newfoundland and Labrador. Complications arose during proceedings. His initial lawyer was named to the bench. An agreed statement of facts contained errors, and so did a judge’s pretrial ruling. Based on those errors, Mr. Cody’s defence counsel fought an extended battle to have the charges thrown out.

The case shows the difficulty judges are having in interpreting the Supreme Court’s rules for cases in the system before Jordan. Two appeal court judges said the actual delay had been just 16 months, after subtracting for delay that was permitted under the old rules, and delay caused by the defence. By contrast, a dissenting judge found there were 39 months of delay. (The trial judge ruled before Jordan. The appeal court ruled after Jordan, and called the defence and Crown lawyers in to make arguments about how to apply Jordan.)

The Jordan ruling sparked an uproar. In Alberta, prosecutors dropped 200 cases – including drunk driving and assaulting-police charges – saying that they did not have enough prosecutors to handle them all, and had to save their resources for serious cases. In Quebec, where the government is spending an extra $175-million over four years to hire more judges, prosecutors and court workers, Justice Minister Stéphanie Vallée told The Globe and Mail that by the time prosecutors can set trial dates in superior court, the cases are already beyond the 30-month time limits. Ontario and Manitoba are trying to persuade Ottawa to drop most or all preliminary inquiries.

The situation in the Cody case echoes that of the Supreme Court’s last major attempt to crack down on court delay. In 1990, it set time guidelines in R v. Askov, resulting in nearly 50,000 criminal charges being thrown out in Ontario alone; then in R v. Morin, 18 months later, the court eased off, allowing for more flexibility. And the court was clear in Jordan that it did not wish to see a repeat of the chaos caused by Askov, which is why it allowed for the old rules still to be in force to some extent.

But the Criminal Lawyers’ Association is urging the Supreme Court to stay the course, saying that governments and the media have exaggerated the fallout from Jordan, and that what is happening is stimulating the change sought by the court.

“The ‘problem’ underlying government calls for flexibility does not exist,” the group says in a legal filing. “The early evidence is that Jordan is working the way it was supposed to – as a vehicle for measured change. It started a conversation about delay without drastic results.”