

# Opinion: The Jordan ruling and Charter rights in Canada



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Judges do not grant charter motions lightly, notes Montreal criminal lawyer Ralph Mastromonaco. *FOTOLIA*

A recent judgement granting a stay of proceedings in a second-degree murder trial has prompted calls for the Quebec government to invoke the notwithstanding clause to override the “Jordan judgement” of the Supreme Court of Canada. But such calls reflect a shallow understanding of charter rights in general and the specific challenges facing courts tasked with ensuring the right of an accused to a trial within a reasonable delay.

If the stay of proceedings ordered by the court in [the Sivaloganathan Thanabalasingham case](http://montrealgazette.com/news/local-news/crown-files-appeal-of-judges-decision-to-stay-murder-charge-against-thanabalasingham) (<http://montrealgazette.com/news/local-news/crown-files-appeal-of-judges-decision-to-stay-murder-charge-against-thanabalasingham>) is so objectionable, why not opt out of all charter rights that can potentially lead to “accused criminals going free,” to paraphrase a recent populist sound bite?

The howls of indignation generated by the Thanabalasingham case will largely be ignored because the Quebec public is not an angry mob. We respect the rule of law and individual rights.

In addition to the right to be tried within a reasonable delay, since 1982 the Canadian Charter of Human Rights and Freedoms guarantees persons the presumption of innocence, the right to remain silent, to be secure from unreasonable search and seizures, to not be arbitrarily detained or arrested, to immediately consult a lawyer upon detention or arrest, to full and timely disclosure of all prosecution evidence.

To ensure that constitutional rights are more than just high minded words on paper, Section 24 of the Charter mandates our courts to issue appropriate orders, including a stay of proceedings, acquittals and the

exclusion of evidence in the event of charter violations.

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Everyone believes in the idea of respecting human rights but that belief falters for some when our courts do what they are legally obliged to do — enforce the Charter.

These same persons would, of course, expect a defence attorney to vigorously defend them if they were ever accused of a crime — including presenting charter motions.

Judges do not grant charter motions lightly. When a judge comes to the conclusion that a person's charter rights have been violated, he or she is obliged to order the appropriate remedy.

The Charter motion has loomed large in our criminal justice landscape for decades. In that time our courts have excluded evidence, stayed proceedings or ordered acquittals in cases ranging from shoplifting to murder. These judgments are rendered with little fan fare and hardly ever garner press coverage.

The Supreme Court has rightly decided that the law on what constitutes a reasonable delay required reform. Going forward an accused is entitled to have a trial completed in 18 months for a summary conviction offence or

30 months for cases in which a preliminary inquiry is held.

This reform concomitantly assures persons alleging to be victims of crime to be heard in a timely manner. Our courts have begun the work of applying the new framework generating jurisprudence helpful to defence attorneys and prosecutors.

The ominous tone taken at news conferences about the hundreds of motions being filed with our courts is disingenuous. Complaining about too many people filing charter motions is as valid as complaining that too many people are going to our hospitals.

Defence lawyers file Jordan motions because they are duty bound to do so. Some politicians may consider the Jordan motion a nuisance or worse, but judges think otherwise.

There is no media coverage of or political interest in the many Jordan motions that have been dismissed by our courts or that have resulted in mutually acceptable plea bargains.

The Jordan ruling requires us to examine how we are using the resources already dedicated to the criminal justice system. More judges, prosecutors and support staff may be needed. This is a public policy debate no different than re-evaluating whether we need more doctors and hospitals to respond to the health needs of our population.

But overriding the Charter of Rights and Freedoms?

Please.

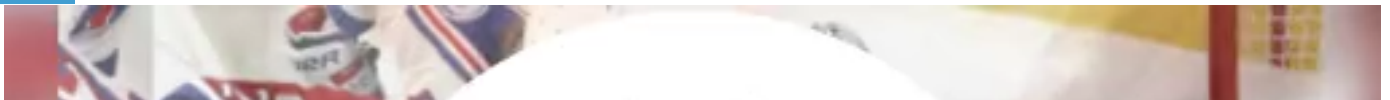
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