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$5.00 • Vol. 28, No.16 COVERING ONTARIO'S LEGAL SCENE • WWW.LAWTIMESNEWS.COM May 8, 2017

Measures similar to process at airports: lawyers

New security screening at federal courts

BY ALEX ROBINSON
Law Times

The federal government has tightened security at federal courts in an effort to improve safety.

Lawyers at federal courts in Toronto and Ottawa now will be required to go through metal detectors when entering, and they will have their belongings screened.

The new screening process is being implemented in the Federal Court, Federal Court of Appeal, Tax Court of Canada and the Court Martial Appeal Court of Canada.

While some lawyers do not view the new screening as particularly onerous, another has voiced concerns that lawyers are being subjected to searches.

Peter Aprile, of Counter Tax Lawyers, says that while there is a concern that the new process could leave files with sensitive information open to scrutiny, he is confident that lawyers can work with court staff to appropriately balance privilege with security concerns.

"What the release seems to say and what the court seems to support is that we can make arrangements with the courts' officers in advance if there are any issues," he says.

"My position was if I had some grave concern about that, then, obviously, we would avail ourselves to speaking with the court registry office . . . and make sure any sensitive information was protected."

The new security measures were announced at the end of March along with a list of prohibited items.

The new screening measures are similar to the process when going through security at an airport, lawyers say.

However, it is unlike Ontario's provincial courts, where lawyers are exempt from security screening.

Lawyers, and others who enter the courts, will have their belongings screened using an X-ray machine and possibly physically searched if necessary "to resolve an alarm" or if there is no machine available.

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Peter Aprile says that while there is a concern that the new process could leave files with sensitive information open to scrutiny, he is confident that lawyers can work with court staff to appropriately balance privilege with security concerns. *Photo: Robin Kuniski*

Ruling impacts defence scheduling post-Jordan

Megan Savard says scheduling delays, especially in cases where there is more than one accused, have not been settled in the trial courts in Ontario in the aftermath of *Jordan*.

BY SHANNON KARI
For Law Times

The unavailability of a defence lawyer because of scheduling issues will not necessarily count against an accused in assessing whether the right to a trial in a reasonable time has been breached, a Superior Court judge in Cornwall has ruled.

Defining what is defence-caused delay is one of the issues that trial courts have been grappling with since the Supreme Court of Canada decision in *R v. Jordan* last summer.

"Counsel are not expected to devote their time to one case," wrote Justice Rick Leroy in staying human trafficking charges against three defendants for a violation of their Charter rights in a case that took nearly 40 months to be brought to trial.

The main cause of the delay was a lack of Superior Court resources, noted Leroy in his ruling in *R v. Albinowski et al*, released on April 20.

"A symptom of the poor health of the criminal justice system in this jurisdiction is that we were unable to assign priority status to a serious case with serious consequences for the accused if convicted because the pipeline was/is full," wrote Leroy.

Scheduling delays, especially in cases where there is more than one accused, says Toronto defence lawyer Megan Savard, has not been settled in the trial courts in Ontario when it comes to how to interpret that aspect of *Jordan*.

"There is a vigorous debate. I think there is a divide in the Superior Court," says Savard, a partner at Addario Law Group LLP, who represented the Criminal Lawyers' Association last month as an intervener at the Supreme Court in *R v. Cody*, which is also about unreasonable delay (the decision is on reserve).

In *Cody*, the criminal lawyers group argued there should be a high bar for attributing delay to

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Equipment being installed across the country

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They will also have to walk through a metal detector.

Security guards may use an additional hand-held metal detector if it's deemed necessary and can also conduct a physical search.

Privacy lawyer Gil Zvulony says he does not think lawyers should be subjected to security screening as it will be an undue inconvenience.

"[It's] much like airport employees, [who] don't have to go through rigorous screening when they go to work. Similarly, the judges aren't going to go through screening. So, I don't think lawyers should," he says.

He questioned whether court resources should be used to screen lawyers who are officers of the court and have met professional requirements.

"Screening is to weed out the people we don't know, bringing in bad things," he says.

Yves Leclair, a spokesman for Courts Administration Service, said that briefcases and document boxes will be screened using equipment that does not reveal the content of documents.

"Security officers will not be reviewing solicitor-client privilege documents. If the X-ray screening equipment identifies item(s) that could be potentiality prohibited, the lawyer will be asked to help resolve the matter by showing only the item(s) in question to the screening officer," said Leclair in an e-mail statement.

"This may include asking the lawyer to move aside anything in the belonging that is obstructing the officer's view of the questionable item(s)."

He added that the screening procedures were developed to be the least intrusive possible.

Leclair said further inspection will only be conducted "if there is no other way to confirm there are no prohibited items present" and with the lawyer's prior consent.

He added it was decided that lawyers would not be exempt from the screenings after examining the practices of other jurisdictions.

"As a national security program whose main objective is to minimize risks to the safety and security of members of the courts, lawyers, parties, witnesses, employees and the public, it is particularly important that the Courts Administration Service ensures consistency and uniformity in the security measures applied throughout Canada," he said.

CAS is encouraging lawyers who intend to submit items to the court as potential exhibits that are not documents to consult the registry ahead of time to see if special arrangements are available to avoid delays.

Aprile says his firm's general practice is to clearly mark all files that are subject to solicitor-client privilege and that it would rarely bring such materials to court.

"Frankly, security isn't terribly interested in our submissions," he says.

The courts have told lawyers to let their clients know about the requirements and encouraged them to arrive at least 30 minutes before their proceeding is set to begin.

In Ontario Superior Court, lawyers simply have to show their identification from the Law Society of Upper Canada and they can avoid having to go through security screening. Lawyers say that when they visit courts in other provinces, they can usually show their LSUC identification and walk through.

The government also plans to invest $19 million over five years in both physical and IT security at federal courthouses, which will include installing new cameras, additional security personnel and screening tools.

The equipment necessary for the screenings is being installed at 11 federal courts across the country and should be operational at all of them within the next few months. LT

Main cause of delay lack of court resources

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the defence.

It cited a Supreme Court decision in 2009, which stated that defence lawyers cannot be expected to be in a perpetual state of availability in terms of scheduling.

The stay issued by Leroy is one of a handful of Superior Court rulings in Ontario since *Jordan* to examine whether unavailability for a specific time window in court should be classified as defence delay.

Bob Miller, a defence lawyer based in Cornwall, Ont. who acts for one of the accused in *Albinowski*, says the court did not accept the federal Crown's position that the rules on this issue have changed since *Jordan*. "I think the interpretation that the Crown wanted Justice Leroy to make was that because we declined a date we were not ready. There is a difference between being available and being ready," says Miller.

The defence should always make efforts "to keep the show moving along," says John Sheard, a Toronto-based lawyer who represents Albinowski.

At the same time, if there is only one scheduling option offered or else a proceeding is delayed for several months, it should not necessarily be attributed to the defence, says Sheard.

"You can't just tick a box and say the rest of the delay is defence delay," he states.

Leroy notes in his ruling that all of the parties were ready to proceed, but two of the defence counsel could not change their schedules to have the case tried earlier in 2016 when court time "opened up *ad hoc* exceptionally" for reasons unrelated to any of the lawyers in the case.

"Defence counsel are bound to the solicitor-client paradigm. They do not have the option of compromising one client's interests for another," wrote Leroy.

Donald Johnson, a Cornwall defence lawyer who represents the other accused in the Albinowski case, says that delay issues will continue in the region without additional resources.

"With more judges and more courtrooms, we can work something out," says Johnson.

The Public Prosecution Service of Canada has 30 days to decide whether to file an appeal of the ruling by Leroy, says spokeswoman Nathalie Houle.

She also points to a specific section of *Jordan* where the Supreme Court stated that if the court and Crown are ready to proceed and the defence is not, then delay from that unavailability will be attributed to the defence.

Savard suggests, though, that Leroy correctly found a distinction between readiness and availability.

"There should not be [defence] deductions of a week here and a week there just because the court had a spot available," she says.

"It is the Crown's job to get the case to trial," she adds.

In the Albinowski case, the accused were not seeking to be tried separately and the judge concluded there were no exceptional circumstances that justified the delay.

Two other recent Ontario Superior Court decisions, with slightly different factual circumstances, have come to different conclusions on the best approach in assessing delay in cases with more than one accused.

In her decision in *R v. Ny and Phan*, Justice Michal Fairburn stayed charges against two defendants in a marijuana-trafficking case that took four years to come to trial.

Much of the delay was caused by other accused in the proceeding and Fairburn rejected the Crown's argument that this should count against all of the defendants.

In dismissing an unreasonable delay application in January in a Toronto drug-trafficking case with three accused, Justice Michael Code urged caution in adopting the approach taken by Fairburn if delay is attributable to one of the defendants.

"I am concerned that, post-*Jordan*, treating delay caused by one co-accused as personal to that accused in cases where a joint trial remains reasonable and justified, will lead to arbitrary results," wrote Code in *R v. Brissett*.

"It rewards one co-accused with a windfall that flows solely from the calendar and availability of another accused's counsel," he stated. LT