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Superior Court of Justice
Small Claims Court

Suite 127, 38 Pine Street N.,
Timmins ON P4N 6K6
Telephone: (705) 267-7799
Facsimile: (705) 360-2014

Ministère du Procureur général

Cour supérieure de justice
Cour des petites créances

Pièce 127, 38 rue Pine N.,
Timmins ON P4N 6K6
Téléphone: (705) 267-7799
Télécopieur: (705) 360-2014

FACSIMILE TRANSMISSION
TRANSMISSION PAR TÉLÉCOPIEUR

ADDRESSEE / DESTINATAIRE	
Name: Nom:	**Julia Croome and Charles Hatt**
Fax : 416-363-2746	

ORIGINATOR / ÉMETTEUR	
Name: Nom:	**Ashley Lefebvre**
Address: Adresse:	**OCJ**
	Timmins, ON P4N 6K6
Telephone: Téléphone:	**(705)360-2041**
Fax: Télécopieur:	**(705) 360-2014**

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COMMENTS / REMARQUES

Please see attached is the written decision for Trevor Hesselink and De Beers Canada Inc.

Have a great day!

Ashley Lefebvre

ONTARIO COURT OF JUSTICE

DATE:2019 November 27th
COURT FILE No: 170148
Timmins Judicial District of Cochrane

B E T W E E N :
TREVOR HESSELINK
- **AND —**

DE BEERS CANADA INC.

Before Justice D.A. Thomas
Heard on June 25th, 2019
Reasons for Judgment released on December 17th, 2019

Julia Croome & Charles Hatt .....counsel for Trevor Hesselink
Tracey Pratt & Neil Smitheman..... counsel for the defendant De Beers Canada Inc

THOMAS J.:

OVERVIEW

[1] The Victor Diamond Mine is an open pit mine operated by the defendant De Beers Canada Inc. It is located on wetlands up along the Attawapiskat River near the remote, northern, First Nations community of Attawapiskat on the James Bay Coast, in the judicial District of Kenora.

[2] De Beers Canada Inc. is a subsidiary of the De Beers Group of Companies, which produces 35% of the world's rough diamonds. The mining corporation was issued an *Amended Certificate of Approval,* by the Ministry of the Environment pursuant to section 53 of the *Ontario Water Resources Act.* It governed the defendant's monitoring/reporting duties regarding the discharge, treatment and disposal of contaminants generated during the operation of its Victor Diamond Mine open pit. The *Amended Certificate of Approval* was issued on March 13th, 2009, out of Toronto, by the Director responsible at Ministry of the Environment.

[3] The *Certificate of Approval* amongst other terms and conditions, stipulated that De Beers was to self-monitor and report on the Victor Diamond Mine's effluent discharge, and specifically the total mercury and methyl mercury levels, on a monthly or quarterly

basis, pursuant to protocols approved by the Ministry of the Environment's District Manager.

[4] On December 1st, 2016 the private prosecutor, Trevor Hesselink, swore a 7-count *information* in Toronto against the corporate defendant De Beers Canada Inc., alleging it had failed to report these mercury levels as required, contrary to s. 107 (3) of the *Ontario Water Resources Act.* Just over two years later, December 13, 2018, Her Worship Bourbonnais entered a stay of proceedings in Timmins, for unreasonable delay, pursuant to s.11 (b*) of the Charter*. The learned trial Justice determined that there would have been 25.5 months, *net* delay, before the anticipated conclusion of the trial on March 1st, 2018.

[5] Mr. Hesselink now appeals that decision, contending that had Her Worship properly characterized the various, intervening periods of delay and temporal detours, occasioned primarily by the defendant De Beers alleged *indifference towards delay*, the *net* delay would fall well under the prescribed 18-month *Jordan*[1] ceiling.

[6] Throughout the proceedings, the private prosecutor remained resolute, and focused on arriving at the destination--a day in court---seeking adjudication on the merits—in as timely a fashion as possible. In stark contrast, the defendant appears to have had no interest in arriving at this destination, but rather, to have been clearly dilatory, and far more interested in drifting off into detours along the way. The defendant DeBeers had every opportunity to express its concerns about delay throughout the process, and yet over the course of 22 months, remained silent regarding delay. Indeed, to the contrary, to defendant appears to have resisted any and all efforts to expedite the proceedings, including the setting of trial dates, until some four months after the *Jordan* ceiling had been breached.

[7] It is certainly open to a defendant to approach a case as though it had all the time and resources in the world, to turn every stone--even twice--or to play out the string, no matter how unproductive—with complete indifference towards delay. What it cannot then do however, as clarified by the Supreme Court in *Cody* [2], is complain that the clock has run out, and that its constitutional right to a speedy trial has been infringed:

> *All* justice system participants — defence counsel included — must now accept that many practices which were formerly commonplace or merely tolerated are no longer compatible with the right guaranteed by s. 11(*b*) of the *Charter.*

[8] The Court has made it abundantly clear, that all players must assume responsibility for avoiding unnecessary delay---if there is to be a meaningful shift in the culture of complacency required to ensure a more efficient criminal justice system.

[9] I accordingly, conclude that the learned trial Justice erred in her characterizations of the delay in question.

[10] I would allow the appeal and order that the charges proceed to trial.

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[1] *R v Jordan*, 2016 SCC 27 [*R v Jordan*].
[2] *R v Cody*, 2017 SCC 31 at paras 31-35 [*R v Cody*].

BACKGROUND

Procedural History

[11] The private prosecutor, Trevor Hesselink, is a Director of the Wildlands League, a nonprofit conservation organization, with a focus on protecting public lands and resources in Ontario. Following an extensive investigation, Mr. Hesselink alleged that De Beers had continuously failed to comply with the stipulated self-monitoring and reporting of mercury and methyl mercury level conditions at the Victor Mine, thereby breaching the *Certificate of Approval* on an ongoing basis, commencing in June of 2009, two months after it had been issued.

[12] The Ministry of the Environment had apparently neglected to notice the alleged failure on the part of De Beers to report the mercury and methyl mercury levels from its Victor Diamond Mine in Attawapiskat. Mr. Hesselink accordingly, brought the results of his investigation and specifically, De Beers alleged ongoing breach of the *Certificate of Approval,* to the Ministry's attention. He also publicly shared his findings in a detailed 30-page Special Report which was released to the media in Dec. 2015, entitled, *"Nothing to See Here...Failures of Self-monitoring and Reporting of Mercury at the De Beers Victor Diamond Mine in Canada."* [3]

[13] The Ministry of the Environment evidently, opted not to pursue charges.

[14] As noted, and as permitted under section 23(1) of the *Provincial Offenses Act*, Mr. Hesselink therefore attended before a Justice of the Peace in Toronto on December 1, 2016 and swore to the seven-count *information* in question. It alleges that De Beers had committed continuing offences between June 29, 2009 and July 1, 2016, by failing to report the mercury and methyl mercury levels, at various sites at its Victor Diamond Mine as required under the *Certificate of Approval,* contrary to *section 107(3)* of the *Ontario Water Resources Act.*

[15] The Justice of the Peace issued a *summons* requiring De Beers to attend at the *Provincial Offences Court* at Old City Hall in Toronto, on January 12, 2017.

[16] It is agreed that there was approximately 27 months between the swearing of the *information* on December 1, 2016, and the anticipated conclusion of an estimated five-day trial on March 1st, 2018, thereby exceeding the 18-month ceiling for *summary conviction* proceedings as prescribed by the Supreme Court of Canada in *R. v. Jordan*[4], by 9 months.

The Contested Periods of Delay

[17] The three most contested periods of delay, approached chronologically involve:

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[3] Affidavit of David Simms, De Beers Environmental Lead at para 8, Exhibit B (March 7, 2018) [*Affidavit of David Simms*].

[4] *R v Jordan*, *supra* note 1.

A) the delay in traversing the charges from Toronto to Timmins;

B) the lengthy delay occasioned by the defendant, De Beers' unsuccessful *abuse of process* motion;

C) the delay associated with the defendant's waiting to provide notice of, and schedule it's s.11(b) motion.

[18] There were approximately 8 months between the *information* being sworn in Toronto on Dec. 1st, 2016, and the eventual first appearance in the Timmins *POA* court on Aug. 10. 2017. In addition to the explicit defence waiver/unavailability, the private prosecutor contends that at a minimum, an additional 12 weeks of this initial period of delay, were directly caused by the defendant De Beer's unreasonable withholding of its consent to transfer the charges to the proper jurisdiction, which properly characterized, should be deducted as defence delay.

[19] De Beer's announced its intention to bring its *abuse of process* motion seeking a stay of proceedings in July 2017, prior to the first appearance in Timmins on Aug. 10th, 2017. Arguments on this motion however, were only completed on July 31st, 2018, over a year later. Her Worship summarily dismissed this motion on August 23rd, 2018 ruling that it was, "*...unsupported by the facts and law...*" and was... "*in large part without merit.*"[5]

[20] The appellant argues that that this middle period of delay, the longest temporal detour in the proceedings--approximately 12 months--was directly occasioned by the defendant's *indifference towards delay* in advancing its *abuse of process* motion. In these circumstances, the appellant argues that the trial Justice erred in not characterizing a minimum of 8 months of this period, primarily as defence caused delay, especially given her findings that despite the time this motion consumed, it had no legal or factual foundation, and was therefore, essentially bereft of merit.[6]

[21] After receiving this ruling dismissing its *abuse of process* motion on Aug. 23rd, 2018, then already some three months beyond the presumptively unreasonable June 1, *Jordan* ceiling, the defendant waited an additional 12 weeks to provide notice of its intention to bring a s.11(b) application. It only did so at a *judicial pre-trial*--scheduled on Oct. 2nd, 2018, in relation to confirming a trial date on the merits—, thereby pushing available trial dates even further back. The appellant argues that 50%, or 6 weeks of this final period of delay, should have been properly characterized as defence caused delay.

The trial Justice's Decision

[22] The learned trial Justice of the Peace granted the defendant DeBeer's s.11(b) motion on December 13, 2018, after failing to find any *defence delay* or *exceptional*

[5] *Trevor Hesselink v De Beers Canada Inc.*, Reasons for Judgement at p. 12, lines 4-7, 21-23 (August 23, 2018), Timmins 170148 (ONCJ).
[6] *Ibid.*

circumstances, save and except 1.5 months of explicit waiver resulting from counsel unavailability, thereby bringing the net delay in her estimation, down to 25.5 months and therefore, still 7.5 months above the presumptive ceiling.

[23] The private prosecutor appeals this decision, contending that Her Worship failed to properly characterize any of three distinct periods of delay, as either *defence delay* or alternatively, *exceptional circumstances*.

[24] The private prosecutor further asserts that the learned trial Justice neglected to properly weigh or examine the evidentiary record before her, resulting in some palpable and overriding errors in findings of fact, which likely contributed to her mischaracterization of some of the contested delay that arose throughout the proceedings.

[25] The defendant De Beers asserts amongst other arguments, that the learned Justice of the Peace, properly apprehended the evidentiary record before her, that she applied the correct legal analyses as directed by the Supreme Court of Canada, and that she accordingly, made no errors in her characterization of the periods of delay in dispute.

[26] The Justice of the Peace who heard the defendant's initial *abuse of process* motion, was the same Justice who then heard the ensuing s.11(b) *application* in question, and who scheduled to hear the trial on the merits, had it proceeded-- and will accordingly, be referred to as the 'trial Justice' throughout.

THE APPLICABLE LAW

The Jordan Framework

[27] The s.11(b) analytical framework ushered in by *Jordan* has now been in effect for over 3 years. It was recently clearly and helpfully articulated by the Court of Appeal in *R. v. Shaikh*:

> *[5] It will assist in understanding the material facts and issues in this appeal if I provide, at the outset, a brief overview of the legal tests to be used in determining whether the delay in prosecuting charges has been unreasonable, contrary to s. 11(b). The analytical framework to be applied was established in R. v. Jordan, 2016 SCC 27, [2016] 1 S.C.R. 631, and helpfully synthesized in R. v. Coulter, 2016 ONCA 704, 133 O.R. (3d) 433, at paras. 32, 34-40, which I summarize here.*
>
> *[6] The initial step in the Jordan framework is to calculate the "total delay", the period from the charge to the actual or anticipated end of trial. Then "defence delay" is identified and calculated. The entire "defence delay" is then subtracted from the "total delay" to identify the "net delay". If the "net delay" exceeds the presumptive ceilings identified in Jordan of 18 months for cases going to trial in the provincial court or 30 months for cases going to trial in the superior court or in the provincial court after a preliminary inquiry, the delay is presumptively unreasonable.*

[7] To rebut that presumption, the Crown must establish "exceptional circumstances". In general, "exceptional circumstances" will be established in two ways.

[8] First, the Crown may show that "discrete events" have occurred due to unforeseeable circumstances. If deducting the delay caused by discrete events from the net delay produces a "remaining delay" that is below the relevant presumptive ceiling, the delay in prosecuting the charges is presumed to be reasonable.

[9] Or, the Crown may satisfy the court that the case is particularly complex such that the time the case has taken is justified.[7]

The Standard of Review

[28] The standard of review on findings of fact, was again made clear by the Court of Appeal in *Iroquois Falls Power Corp. v Ontario Electricity Financial Corp.*[8]:

A court of appeal will interfere with the findings of fact of a trial judge only if a finding is shown to be the product of "palpable and overriding error". A factual finding unsupported by any evidence is inevitably a "palpable" error. That error will also be "overriding" if it is shown to have affected the result: H.L. v. Canada (Attorney General), 2005 SCC 25 (CanLII), [2005] 1 S.C.R. 401, at paras. 53-56; Waxman v. Waxman (2004), 2004 CanLII 39040 (ON CA), 44 B.L.R. (3d) 165 (Ont. C.A.), at paras. 292-96, 335, leave to appeal refused, [2004] S.C.C.A. No. 291

[29] It is a high standard, however as recently clarified by the Court in *R. v. Jurkus*:

[25] First, I do not agree that the designation of a period of time as defence delay is a finding of fact that is owed deference. Although underlying findings of fact are reviewed on a standard of palpable and overriding error, the characterization of those periods of delay and the ultimate decision as to whether there has been unreasonable delay are subject to review on a standard of correctness: R. v. M.(N.N.) (2006), 2006 CanLII 14957 (ON CA), 209 C.C.C. (3d) 436 (Ont. C.A.), at para. 6; R. v. Schertzer, 2009 ONCA 742 (CanLII), 248 C.C.C. (3d) 270, at paras. 71-72, leave to appeal refused [2010] S.C.C.A. No. 3; R. v. Tran, 2012 ONCA 18 (CanLII), 288 C.C.C. (3d) 177, at para. 19. [Emphasis added].

[26] Consequently, while I agree that the application judge's determination of the facts is to be accorded deference, her decision to assign each of the respondents only a part of the delay from March 8 to July 29, 2016 is a decision

[7] *R v Shaikh*, 2019 ONCA 895 at paras 5-9.
[8] *Iroquois Falls Power Corp. v Ontario Electricity Financial Corp.*, 2016 ONCA 271 at para 70.

reviewable on a standard of correctness. Applying that standard, I find that the application judge erred in how she characterized this period of delay.[9]

ANALYSIS

[30] There can be no issue that the learned trial Justice of the Peace was correct in concluding that the *Jordan* framework must be applied with full rigor to this case, notwithstanding that the defendant is a multi-national corporation, that the prosecution was conducted by a private citizen, or that there was no hint of prejudice occasioned by the delay. The appellant no longer contests this determination but takes issue with Her Worship's characterization of the contested periods of delay arising throughout these proceedings.

[31] The appellant contends that De Beers demonstrated a consistent, apathetic approach to delay throughout the proceedings and that the defendant's conduct has been the primary, indeed direct cause of the delay occasioned during the three periods in question. The appellant alternatively argues, that if the delay was not 'solely or directly' attributable to the defence, that there were also sub-periods of delay caused by *discrete events*, that could and should have accordingly, been properly characterized as "*exceptional circumstances*."

[32] I have undertaken a careful review of the remarkably voluminous evidentiary record, including all the transcripts, affidavit testimony, cross-examinations, correspondence, motion records etc., in relation to the many (20+) court appearances in relation to this matter. The arguments advanced on appeal will be analyzed chronologically where possible, considering whether on a *standard of correctness*, the learned trial Justice erred in failing to characterize any of the disputed delay as *defence delay*, or whether she erred in concluding that the prosecution had failed to establish the existence of *exceptional circumstances*.

A) The Delay in Transferring the Charges to the Proper Jurisdiction

The Law and Background

[33] Section 23(2) of the *Provincial Offences Act of Ontario* (*POA*) provides that:

An information may be laid anywhere in Ontario. [*Emphasis added*].

[34] However, section *29 ss. (1) & (3) of the POA provide* that:

(1) Subject to subsection (2), a proceeding in respect of an offence shall be heard and determined by the Ontario Court of Justice sitting in the county or district in which the offence occurred or in the area specified in the transfer agreement made under Part X. 2009, c. 33, Sched. 4, s. 1 (35). [*Emphasis added*].

[9] *R v Jurkus*, 2018 ONCA 489 at paras 25-26 [*R v Jurkus*].

> *(3) Where a proceeding is taken in a county or district other than one referred to in subsection (1) or (2), the court shall order that the proceeding be transferred to the proper county or district and may where the defendant appears award costs under section 60. R.S.O. 1990, c. P.33, s. 29 (3).* [*Emphasis added*].

[35] The private prosecutor as noted, attended before the Justice of the Peace in Toronto as permitted by *s. 23(2)* of the *POA,* to swear the *information,* alleging ongoing offences, *"in the District of Kenora, at or near the City of Toronto, and at or near the City of Timmins".*

[36] It was evidently at least initially, somewhat unclear as to where the physical duty to report the Victor Diamond Mine's mercury levels, pursuant to the *Certificate of Approval,* was to have taken place, given: the fact that the *Amended Certificate of Approval* had been issued by the Ministry of the Environment out of Toronto; the fact that the defendant De Beers' head offices are located in Toronto, the fact that Attawapiskat is located some 1000 km north of Toronto in the Judicial District of Kenora, and that Timmins is located somewhere in between, in the District of Cochrane.

[37] Upon further review and with input from the supervising Crown attorney from the Ministry of the Environment, (whose involvement is discussed below), it became almost immediately apparent, that the duty to report the mercury levels arose neither in the Judicial District of Toronto, nor in the Judicial District Kenora, but rather, where the Ministry's closest District Office to the Victor Diamond Mine was located-- in Timmins in the Judicial District of Cochrane. The *Provincial Offences Act* court in Timmins was unquestionably confirmed as the proper venue for the matter to be heard. There was no doubt based on the location of the Victor Diamond Mine, its duty to report to the closest Ministry District Office, and the dictates of s. 29 of the *POA*, that Cochrane was the "*district in which the offence occurred*" and therefore, the proper venue. This jurisdictional imperative had been determined and confirmed early on in the proceedings, indeed by the second appearance in Toronto on March 23, 2017, when it was in fact acknowledged and agreed by all concerned.

The Evidentiary Record

[38] When the parties appeared before the court on March 23, 2017, counsel for the private prosecutor, Ms. Croome, confirmed that it had now been definitively determined and agreed, that Timmins was the proper jurisdiction. She further advised she had confirmed that it would take approximately five weeks to transfer the charges, and that she had accordingly, obtained a return date of April 27, 2017 to have the matter *spoken to* before the Timmins *Provincial Offences Act* Court.[10]

[39] Counsel for the defendant De Beers, Mr. Smitheman indicated that he understood why the matter had to be transferred to the Timmins *POA* Court's jurisdiction, and that he *'didn't necessarily disagree'* with it being transferred to Timmins, as the proper jurisdiction, but that...

[10] Transcript of Proceedings at p. 4 (March 23, 2017).

> *".... we haven't got complete disclosure.... And I would like to have disclosure completed before we traverse this matter to the Timmins Court...."*[11] [*Emphasis added*].

[40] There was some further back and forth during which, counsel for the private prosecutor expressed concerns about the delay-- and the timing---associated with bringing a needless motion to transfer. She expressed some surprise, in that she thought the transfer issue had been resolved, and that there was an agreement between counsel that the matter should and would be transferred, and that the private prosecutor would in fact appear as agent on behalf of De Beers at the *speak to* in Timmins at the April 27th 2017 *POA* date, to facilitate, *".... pushing through...as the dates in Timmins are not terribly frequent."*[12]

[41] Counsel for the defendant De Beers once again confirmed that it, *"sounds reasonable"* however, he wanted to, *"deal with disclosure before making any decisions...."*[13]

[42] The presiding Justice of the Peace accordingly adjourned the matter to the next *speak to* date in Toronto, but not before noting:

> *".... I get a sense that the Crown is making best attempts to officially move the matter along. Fair enough. But there appears some opposition, so that's fine."*[14]

[43] Some might perhaps perceive His Worship's observation as a harbinger of things to come, and that this appearance was emblematic of the approach embraced by the respective parties throughout the balance of the proceedings.

[44] It took three more court appearances in the Toronto *POA* Court before the defendant De Beers ultimately agreed on June 15, 2017, that the matter had to be transferred to Timmins---but not before the private prosecutor had been forced to formally file and serve motion materials pursuant to *s. 29(3)* of the *POA*, returnable on the June 15, 2017 appearance, to actually argue that the matter had to be transferred to Timmins.

[45] Ms. Pratt, counsel for the defendant, only then conceded the obvious, advising:

> *" .... And just to be clear on the record, it's our position that we're consenting to the fact that the Toronto court does not have jurisdiction over these charges. It's on that basis that it being transferred to Timmins."*[15] [*Emphasis added*].

[46] The fact that the Toronto *POA* court did not have jurisdiction over the charges was, and never could have been, in contest, as had been basically acknowledged by her co-counsel Mr. Smitheman back on March 23, 2017, when the private prosecutor had

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[11] *Ibid*, p.
[12] *Ibid*.
[13] *Ibid*.
[14] *Ibid* at p. 7.
[15] Transcript of Proceedings at p. 4, lines 28-30 (June 15, 2017).

expressed concerns about delay, and based on discussions between counsel, had first sought to transfer the matter on consent to the proper jurisdiction. There was never any issue that the matter had to be traversed to the Timmins *Provincial Offences Court*---it was a *fait accompli,* and yet it took 3 additional court appearances over 12 weeks (84 days) to achieve, in light of the defendant withholding its consent--- apparently because it had not received, "complete disclosure".

[47] Had the defendant agreed to transfer the matter to the April 27, 2017 *speak to* court in Timmins on the second appearance in Toronto on March 23rd 2017, as had been apparently agreed to, or at least urged by the private prosecutor, rather than waiting until June 15, 2017 to do so, the first appearance in Timmins could have been facilitated on April 27th 2017, which was 15 weeks (105 days) sooner than the eventual August 10, 2017 *speak to* date in Timmins.

Her Worship's Ruling

Transfer Delay Considered as an Exceptional Circumstance

[48] In relation to this period of delay, the learned Justice of the Peace, appears to have first considered it as *exceptional circumstance* delay, and concluded:

> *"We're talking about further disclosure issues and the transfer of the file from Toronto to Timmins which resulted in eight weeks and six days of delay: November 30th, 2017 to January 31, 2018. Clearly, the prosecution is responsible for the delay associated with traversing the matter to Timmins. The fact that the defence eventually agreed to transfer the matter to Timmins does not change anything. This is still actions of the private prosecutor and the Crown, which falls squarely at the feet of the prosecution and which cannot possibly qualify as a so-called discrete exceptional circumstance."*[16] [*Emphasis added*].

[49] Apart from referencing dates and time periods that have virtually no relation to the transfer delay in question, (November 30th, 2017 to January 31, 2018 and *eight weeks and six days of delay*) the learned trial Justice, analyzed this period initially through the lens of a discrete event, and concluded that the private prosecutor was somehow exclusively responsible for the delay in transferring the matter to Timmins—without any apparent analysis or review of the evidentiary record as set out and highlighted above.

[50] This conclusion would appear to be a palpable and overriding error—even allowing that the learned trial Justice had simply misspoke in referencing the much later November 30, 2017 to January 31, 2018 time period---and a mischaracterization of the real reason behind the delay. It is undoubtedly true that the private prosecutor must be held accountable for the matter being initially returnable in the wrong judicial District on January 12, 2017 first appearance. Contrary to Her Worship's finding however, and as clearly demonstrated by the evidentiary record, the private prosecutor then acted with alacrity in attempting to redress the error, even prior to the second appearance on March 23, 2017, by: definitively confirming the proper jurisdiction; by confirming the first

[16] Reasons for Judgement at p. 13, lines 3-16 (December 13, 2018) [*Reasons for Judgement Dec 13*].

available return date in Timmins; by seeking the defendant De Beers' consent to traverse the matter; and by even offering to appear as agent on its behalf--only to be met with *"opposition,"* as described by the Justice of the Peace presiding at the second appearance.

[51] When analyzed through the lens of *exceptional circumstances*, which apparently wasn't argued, but which Her Worship appears to have first considered , it is difficult, if not impossible to conclude how the, *"the prosecution is responsible for the delay associated with traversing the matter to Timmins,"* after March 23rd. 2017, when the defendant's withholding its consent to do so, was completely outside of the private prosecutor's control— while it was doing everything it could to remedy the delay. While I believe that this delay is likely more accurately characterized as *defence-delay* as discussed below, the evidentiary record demonstrates that these circumstances were also *reasonably unforeseeable or unavoidable* and that the private prosecutor *took all reasonable steps available to avoid* any further delay.[17]

[52] As ultimately conceded by the defendant, the Toronto *POA* Court could never have assumed jurisdiction over these charges--- they had to be transferred to Timmins as clearly mandated by section 29 of the *Provincial Offenses Act*. While it was certainly the defendant's prerogative to withhold its consent to transfer the matter to Timmins and force the private prosecutor to bring a formal motion, the outcome of which would have been a foregone conclusion, the ensuing delay after March 23, 2017, surely cannot be said to fall, *squarely at the feet of the prosecution and which cannot possibly qualify as a so-called discrete exceptional circumstance."*[18]

[53] The delay occasioned by the defendant's brinkmanship in forcing the private prosecutor to bring a redundant *motion to traverse*, returnable June 15th, 2017, resulted in the first appearance in Timmins being pushed back from April 27th, 2017, to August 10th, 2017, as note above in paragraph 47:

- March 23rd, 2017-- June 15, 2017: There were 84 days or 12 weeks between the second appearance on March 23rd when the defendant could have reasonably conceded that the transfer of charges was clearly unavoidable-- and the 5th appearance on June 15th when it chose to do so.

- April 27, 2017--- August 10, 2017: There were 105 days or 15 weeks between the first available *speak to / first appearance* court date in Timmins on April 27, 2017, had the defendant agreed to the transfer on March 23, 2017---and the eventual *first appearance* in Timmins, occasioned by its waiting until the fifth appearance in Toronto, on June 15, 2017 to do so.

Given that it is not absolutely certain that the transfer of the charges would have been completed in the 5 weeks between March 23rd and the first available Timmins return date of April 27th as proposed by the private prosecutor, and giving the benefit of this

[17] *R v Jordan*, *supra* note 1 at paras 69-70.
[18] *Reasons for Judgement Dec 13*, *supra* note 16.

uncertainty to the defendant, I would determine that this period of delay, characterized as an *exceptional circumstance*, should nonetheless be at least 12 weeks.

Transfer Delay Considered as Defence Delay

[54] The learned trial Justice firstly concluded that the delay in traversing the charges could not possibly be characterized as a *discrete event*, as the delay resulted solely from, the..." *actions of the private prosecutor and the Crown, which falls squarely at the feet of the prosecution...."* My review determined that this finding with respect, was clearly not supported by the evidentiary record, and that exceptional circumstances could be established as discussed above.

[55] As suggested, however, this period of delay might more aptly be characterized as defence-caused delay. In this regard, Her Worship later in her reasons, appears to have revisited this period of delay, and made additional or alternative findings that there were *"disclosure issues"*, and ongoing *"resolution discussions"* that made any delay caused by De Beers' continued refusal to consent to the transfer the charges, reasonable, and hence, incapable of being characterized as defence delay:

> *".....I agree with De Beers that it made absolutely no sense for the defendant to initially consent to such a transfer when resolution discussions were still ongoing. Accordingly, the delay relating to the transfer of the file from Toronto to Timmins is not considered either a defence delay nor does it constitute a discrete event."*[19]

[56] I will address the finding that *disclosure issues* and *resolution discussions* were responsible for the delay.

[57] At first blush this case would appear to have been a relatively straightforward matter wherein the private prosecutor might prove its case, by relying primarily on documentation from the Ministry of the Environment that would simply demonstrate whether or not De Beers had filed the required mercury monitoring reports during the operative time periods. Indeed, it was ultimately determined at a *JPT* on Oct 2018, that the prosecution could, and would file a comprehensive document, a *certificate*, or *official document*, as provided for under section 115 (1) of the *Ontario Water Resources Act*, to establish its case at trial. This *certificate*, which is essentially a compendium of the various reporting documentation and responses between the defendant and the Ministry, streamlines the proceedings by obviating the need to call prosecution evidence *viva voce*, and,

> *"....shall be received in evidence in any proceeding as proof, in the absence of evidence to the contrary, of the facts stated in the official document without proof of the signature or position of the person appearing to have signed the official document."*[20]

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[19] *Ibid.*

[20] *Ontario Water Resources Act*, RSO 1990, c O.40, s 115(2).

In this instance, the *certificate,* admissible as convenient compilation of what the defendant had and had not reported, (which records and documentation De Beers presumably had also retained and had available), was signed by District Manager Caroll Leith and was disclosed on May 12, 2017. (It might be noted as regards this *certificate*, that the private prosecutor estimated that it would take one day to present its case, whereas De Beers advised it would take five or more days to present its defence).

[58] There is no issue that subtantial disclosure, *albeit* not complete disclosure, delineating De Beers alleged failure to the report mercury levels at the Victor Diamond Mine, had been provided prior to the first appearance in Toronto on January 12, 2017. The defendant had presumably received the private prosecutor's detailed 30-page Special Report released Dec. 2015, and entitled, *"Nothing to See Here…Failures of Self-monitoring and Reporting of Mercury at the De Beers Victor Diamond Mine in Canada."*[21]

[59] The private prosecutor had also of course provided anticipated witness *will says* and other pertinent documentary evidence, allegedly demonstrating that the defendant De Beers had not complied with its mandatory mercury level reporting obligations as required under its *Certificate of Approval.* A review of the evidentiary record indicates that the disclosure concerns expressed by the defendant, revolved in large measure, around the presentation, formatting or completeness of the disclosure, for example; 'some notes being undated', or certain attachments having been 'disclosed independently' and 'not being attached to the relevant email correspondence', or requests for explanations or for hard copies of electronic disclosure that had already been provided *via* email and DVD, etc.

[60] While there was accordingly, some 'continuing disclosure', both electronic, and hard copy, with 'clarifications' provided as requested, the private prosecutor maintained that the, *"disclosure was substantially complete…"* and *"that they were waiting on one piece of evidence from the Ministry."* [22] All throughout this period, the private prosecutor, as clearly demonstrated in the record, continued to seek the defendant's consent to transfer the charges to the proper jurisdiction--to no avail.

[61] The private prosecutor had taken the firm position by mid-May, that it had provided all of the disclosure in its possession and control to the defendant, with the exception of the notes, or work product in the possession of the supervising Crown attorney, Ms. Meuleman from the Ministry of Environment, which material was not, nor had it ever been, in its possession or control. In this regard, Ms. Meuleman directly wrote counsel for the defendant on May 25th, 2017, advising them that she would *be "more than happy to discuss",* her review of the file and supervisory role with them. It would appear from the record, that they never took her up on her offer.

[62] The fact that Timmins as detailed above—was the proper jurisdiction—was a foregone conclusion---and an inexorable reality conceded by the defendant De Beers at both the second and last court appearances in Toronto, and between which, nothing in

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[21] *Affidavit of David Simms, supra* note 3.
[22] Transcript of Proceedings at p. 3, line 20 (April 13, 2017).

the disclosure would or could change. This was an incontrovertible certainty that had absolutely nothing to do with any apparent outstanding disclosure. While it is trite to say that a defendant must have meaningful disclosure before being expected to take a significant step in the proceedings, that is clearly not was at issue here. There was no substantial disclosure outstanding, and in any event, even if there were, the defendant was not being called upon to make a decision, or take a step, that was even remotely contingent on some piece of disclosure. The matter had to be transferred to Timmins.

[63] Even assuming that there was substantial disclosure outstanding, which was clearly not the case, as repeatedly affirmed by the Court of Appeal in cases like, *R. v. Kovacs-Tatar,* disclosure need not be complete before dates are set for trial or preliminary hearing.

> *"...because the obligation of the Crown to make disclosure is a continuing one, the Crown is not obliged to disclose every last bit of evidence before a trial date is set. The defence was not forfeiting its "Stinchcombe rights" by agreeing to set a trial date. Counsel for the appellant did not act reasonably in insisting that he receive the expert report before setting a trial date."*[23]

[64] And similarly, in *R. v. N.N.M.* 209 CCC (3d) 436, at para 37, the Court explained,

> *Even when the Crown has clearly failed to make mandated disclosure, the defence is not necessarily entitled to refuse to proceed to the next step or to set a date for trial. As this court stated in R. v. Kovacs-Tator (2004), 2004 CanLII 42923 (ON CA), 192 C.C.C. (3d) 91 at para. 47 (Ont. C.A.): "the Crown is not obliged to disclose every last bit of evidence before a trial date is set."*

[65] In this case, the defendant De Beers was not being asked to set a date for the trial, nor a *preliminary inquiry*, nor for a *pre-trial motion*, nor even to set a date for a judicial *pretrial*—but rather, to simply consent to traversing the matter *to be spoken to* in the proper jurisdiction, which inevitable procedural step could in no way be impacted by some outstanding disclosure.

[66] Even if the defendant was insisting on awaiting the s. 115 *certificate*, which was essentially a compilation of other previously disclosed documentation, and which was disclosed on May 12th 2017, or the supervising Crown attorney's notes, which were not requested again until 8 months later at the *JPT* on Nov. 14th 2017---these pieces of disclosure had virtually nothing to do with the jurisdictional imperative in question. There was consequently, no *"disclosure issues"* at play in relation to the transfer delay, that could somehow be asserted to make the defendant's position otherwise reasonable. Indeed, the defendant ultimately consented to the transfer, without having the 'disclosure finalized,' which concession again underscores the fact any extant "disclosure issues" could in no way have been essential to taking this inevitable procedural step.

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[23] *R v Kovacs-Tatar*, 73 OR (3d) 161, 192 CCC (3d) 91 at para 47.

[67] As regards the assertion that resolution "*discussions were still ongoing*", which the private prosecutor denies, there is simply no basis in the evidentiary record to support the need to delay the transfer, even if this were true. In an email dated March 16, 2017, prior to the second appearance, on March 23rd, 2017, the private prosecutor did write counsel for De Beers advising that they would, *"...like to raise the possibility of (a) an agreed statement of facts and (b) settlement discussions.... [P]lease let us know if your client is open to one or both of the above..."* [24] There was no response from the defendant's counsel. Even if there had been a response, some back and forth amounting to *ongoing resolution discussions*, which was not the case, it would in no way trench on the fact that Timmins was the proper jurisdiction for the matter to be heard.

[68] Even were the learned trial Justice's findings of fact to be accorded complete deference, which for the reasons discussed, I am unable to do, neither disclosure nor (imagined) resolution discussions ought to derail a necessary procedural step (such as an unavoidable jurisdictional imperative – in this case a transfer to Timmins POA court), unless the defendant was willing to waive the resultant delay. By opposing the transfer, the defendant took a step which created delay that otherwise would have not occurred but for the defendant's opposition. It was the defendant De Beers, *"own delay-causing action or inaction"*, that *"directly caused the delay"* (*Jordan*, *supra*, at paras. 66, 113).

[69] Finally, within the overall period of delay occasioned by the defendant's continued opposition to having the matter traversed from Toronto to Timmins, there were other developments resulting in shorter sub-periods of delay, that the appellant contends in the alternative, were either *defence unavailability delay*, or *exceptional circumstance / discrete events*. For instance, on the April 13th, 2017th second appearance, when the defendant again refused to consent to the transfer of the matter until disclosure was finalized, both the prosecutor and court were available on May 4th, but counsel for defendant was not available until May 18th 2017. The appellant argues this represents 2 weeks of obvious *defence unavailability delay*, which contention appears to be borne out by the evidentiary record.

[70] On the May 18th, 2017 fourth appearance, a non-lawyer agent for the supervising Crown attorney from the Ministry of Environment, who had misunderstood that her instructions were to simply attend and observe---unexpectedly attempted to speak to the matter, causing some minor concern and confusion, which resulted in a further adjournment to June 15th, 2017. The private prosecutor argues that he had no control over this unexpected development and acted immediately, within the week, to mitigate further delay, by definitively confirming that the confused agent's unexpected appearance had no bearing on the private prosecution. He contends this was surely a reasonably unforeseeable development, and represents an obvious *discrete event* as described in *Jordan*.

[71] There would certainly appear to be significant merit to the appellant's arguments regarding these sub-periods of delay, however, I find it unnecessary to further consider them at this point. Contrary to Her Worships' finding that the delay in transferring the

[24] Affidavit of Charles Hatt, Exhibit 1.D (October 24, 2018) [*Affidavit of Charles Hatt*].

matter, *"falls squarely at the feet of the prosecution,"* and consonant with the evidentiary record, I find that it was the defendant's continued unreasonable refusal to consent to the transfer until disclosure was 'finalized', that was the sole overarching reason, directly responsible for any delay after the March 23rd 2017. Ms. Pratt's intervening unavailability, or the surprise attendance of the Ministry agent, would never have arisen, had De Beers simply consented to the inevitable transfer of the charges, as they acknowledged was both reasonable and necessary back on March 23, 2017.

Conclusion Regarding the Delay in Traversing the Matter to Timmins

[72] As noted above, in the discussion under *exceptional circumstances,* in paragraph 53, the same analysis and timelines would also, accordingly apply. On March 23rd, 2017, Ms. Croome had confirmed an available return date in the Timmins *POA* Court for April 27th, 2017. The defendant De Beers finally agreed to the transfer on June 15th, 2017 resulting in the first appearance in Timmins being pushed back until August 10th, 2017. There are 85 days or 12 weeks between March 23rd, 2017 and June 15th, 2017. There are 105 days, or 15 weeks between April 27th, 2017 and August 10th, 2017:

- March 23rd, 2017-- June 15, 2017: There were 84 days or 12 weeks between the second appearance on March 23rd when the defendant could have reasonably conceded that the transfer of charges was clearly unavoidable-- and the 5th appearance on June 15th when it chose to do so.

- April 27, 2017--- August 10, 2017: There were 105 days or 15 weeks between the first available *speak to / first appearance* court date in Timmins on April 27, 2017, had the defendant agreed to the transfer on March 23, 2017---and the eventual *first appearance* in Timmins, occasioned by its waiting until the fifth appearance in Toronto, on June 15, 2017 to do so.

[73] I find that the learned trial Justice mischaracterized this period of delay and have determined that it was directly occasioned by the defendant De Beers unreasonable approach to the inevitable transfer, resulting in at least **12 weeks** of delay, which must be counted as defence delay, and deducted from the total delay. The learned trial Justice found that this the contested period was neither defence delay nor an *exceptional circumstance*, this was unsupported by the evidence, and it ought to have been found to be defence delay.

[74] In the event I am incorrect in this analysis, and / or in the alternative, as discussed above, I find that this period of delay might also be characterized as a *discrete exceptional circumstance,* which could then accordingly, be deducted from the calculated *net delay.*

B) The Delay Occasioned by Defendant's *Abuse of Process Pre-trial Motion*

Background

[75] In or around mid-July 2017, prior to the first appearance in the Timmins *POA* court, on August 10, 2017, counsel for De Beers advised that they would be bringing an *abuse of process motion* seeking to have the charges stayed. On August 23rd, 2018, over a

year later, the *abuse of process motion* was dismissed when the learned trial Justice of the Peace concluded that it was, "*in large part, without merit.*"[25]

[76] The defendant's *abuse of process* motion seeking a stay of proceedings, consisted of three grounds, with De Beers arguing that:

i. the charges were an abuse of process as a collateral attack against the regulatory scheme administered by the Ministry,

ii. the private prosecution was prohibited by section 107 (5) of the *Ontario Water Resources Act*, and thirdly,

iii. the interaction between the private prosecutor and supervising Crown attorney amounted to an abuse of process.

[77] In relation to the first ground, Her Worship, after reviewing the evidence, including the defendant's supporting documentation, which she concluded, "*on its face, [it] was obvious*", did not support what the defendant was contending, ruled, *"Therefore, clearly this is not a case of collateral attack and duplicative proceedings."* [26] [*Emphasis added*].

[78] As regards the second ground the learned trial Justice determined there *was "no comparison"* between the case at bar, and the cases presented by the defendant, and similarly, that the arguments advanced, were, *"a far cry from the case herein, where charges are laid by a private prosecutor...."* and that consequently, the defendant's argument, *"has no foundation."*[27] [*Emphasis added*].

[79] Finally, in relation to the third ground, the learned trial justice determined that while the supervising Crown attorney appeared to have perhaps "overstepped" her oversight role, "*there is no evidence that Ms. Meuleman's interactions with the private prosecutor have prejudiced DeBeers ability to make full answer and defence.*"[28] [*Emphasis added*].

[80] In dismissing the motion Her Worship concluded that it was,

> *"For all the reasons mentioned already, this case is a far cry from the clearest of cases considering it is unsupported by the facts and the law. Accordingly, this motion for stay of proceedings is dismissed on all three grounds." [Emphasis added].*

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[25] Reasons for Judgement at p. 12 (August 23rd, 2018).
[26] *Ibid* at p. 7, lines 3-4.
[27] *Ibid* at p. 8, lines 12, 28, 30.
[28] *Ibid* at p. 11, lines 15, 23-25.

> *"And based on what I heard, the facts, the applicable case law provided by both parties, this motion for stay of proceeding is, in large part, without merit."*[29] *[Emphasis added].*

[81] My review of the evidentiary record would certainly support these findings. Notwithstanding these conclusions, and the urging of the private prosecutor, Her Worship nevertheless declined to find that the defendant's abuse of process motion was 'frivolous'. While the defendant argues that *"there are no degrees of frivolity,"* one cannot help but note the similarity between Her Worship's findings and the language she used to characterize the motion, and the definitions of "frivolous" in for instance, in *Miriam Webster*

> *having no sound basis (as in fact or law) a frivolous lawsuit; or in Black's Law Dictionary: lacking a legal basis or legal merit.*

[82] Apart from its evidently, barely marginal merit, the appellant argues that much of the protracted, nearly one-year period, consumed in dealing with the *abuse of process motion*, was characterized by marked *inefficiency or indifference towards delay*, on the part of De Beers, and the unavailability of its counsel

[83] The private prosecutor contends that the learned trial Justice of the Peace erred in the way she approached the various types delay within this 12-month period, and ought to have found that at least eight months, properly characterized as either defence-caused delay, and/or exceptional circumstances/discrete events, would in itself, almost bring the resulting delay in under the *Jordan* ceiling.

[84] The defendant as noted, contends that *"there are no degrees of frivolity"* and that in light of the learned Justice of the Peace having declined to declare its motion frivolous, it must be found to have been a legitimate action taken to respond to the charges. The appellant argues that, given that the defendant's *abuse of process* motion cleared the frivolity bar by an imperceptible hairbreadth, the court should have considered its alleged, dilatory approach and indifference towards delay in advancing it, with a somewhat more critical eye.

[85] Once again for ease of understanding, I will consider the events and subperiods within this period chronologically, dealing firstly with alleged defence delay, as clarified in *Coulter*,[30] where the onus is on the applicant, before then moving on to consider exceptional circumstances, wherein the onus shifts to the prosecution.

The Law

[86] The Supreme Court of Canada's decision in *R. v. Cody*, [2017] 1 S.C.R. 659, released the year following *Jordan,* provides helpful direction to trial judges trying to determine and assess when delay is attributable to defence conduct, apart from the more obvious, explicit or implicit defence waiver:

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[29] *Ibid* at p. 12, lines 4-7, 21-23.
[30] *R v Coulter*, 2016 ONCA 704, 133 OR (3d) 433, at paras 32, 34-40.

> *In broad terms, the second component is concerned with defence conduct and is intended to prevent the defence from benefitting from "its own delay-causing action or inaction" (Jordan, at para. 113). It applies to any situation where the defence conduct has "solely or directly" caused the delay (Jordan, at para. 66).* para 28. [*Emphasis added*].

[87] The Court further explained that this assessment of defence conduct must include a consideration of both—the objective in question—and manner in which it was pursued;

> *Defence conduct encompasses both substance and procedure — the decision to take a step, as well as the manner in which it is conducted, may attract scrutiny. To determine whether defence action is legitimately taken to respond to the charges, the circumstances surrounding the action or conduct may therefore be considered. The overall number, strength, importance, proximity to the Jordan ceilings, compliance with any notice or filing requirements and timeliness of defence applications may be relevant considerations. Irrespective of its merit, a defence action may be deemed not legitimate in the context of a s. 11(b) application if it is designed to delay or if it exhibits marked inefficiency or marked indifference toward delay.*[31] [*Emphasis added*].

The *Judicial Pre-Trials*

[88] Prior to the eventual first appearance in Timmins on August 10th, 2017, after advising of their intention to bring the *abuse of process* motion, in an email to the appellant dated August 9, 2017, defense counsel advised that their motion would likely take a day,

> "*To be on the prudent side I think we should book a day, although that might not be necessary.*" [32]

[89] The *POA* protocol for the Northeast Region required that any motion expected to exceed three hours, must first proceed to a judicial *pretrial (JPT)*, prior to being scheduled for hearing. It was the private prosecutor who then contacted the Regional Senior Justice of the Peace (RSJP) on behalf of the defendant De Beers, to confirm local practice and to obtain dates for its abuse of process motion, which it then provided to the defendant, along with a copy of the Region's *JPT* practice memorandum, on August 23, 2017.[33]

[90] It might be noted that this example of private prosecutor's interest and diligence in seeking to move the matter along, as first observed by the Justice of the Peace on the second appearance in Toronto, was illustrative of the approach taken throughout the balance of the proceedings.

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[31] *R v Cody*, *supra* note 2 at para 32.
[32] *Affidavit of Charles Hatt*, *supra* note 24, Exhibit O.
[33] *Ibid.*

i) Defence Unavailability During the JPT Process

[91] The first judicial pretrial was accordingly scheduled for September 20, 2017 *via* teleconference. The private prosecutor and the court were available on September 12, the defence was not, and these eight days of defence unavailability were properly deducted as defence delay by the trial Justice.

[92] During September 20, 2017 *JPT teleconference*, the presiding JP directed that the parties provide him with further materials, and that the defendant specifically, provide him with a draft notice of their motion in order to assist him at the required continuation of the JPT. The dates he offered for the continuation were September 27th, October 3rd, and 4th—all of which were available to the private prosecutor—none of which were available to the defendant's counsel. The continuation of *JPT* was accordingly scheduled for November 14, 2017. The learned trial Justice found that two weeks of this approximate seven-week delay (6 weeks, six days) should be deducted as defence delay. The appellant argues that the entire seven-week period, should have been similarly characterized. Having reviewed the evidentiary record, I have determined that this is the proper characterization of the additional five weeks in dispute.

[93] Her Worship appeared to lump the continuance of the *JPT* into a single, extended event which was fine—but did so without any regard or analysis of the evidentiary record, so as determine who was available—when—to resume it, over the ensuing three teleconferences,

> *Also, it is Justice of the Peace Kitlar who ordered continuation and continuation of continuation of judicial pre-trials (four all together), as well as requesting written submissions from the parties, which accounted for a good part of the delay. Hence, I am satisfied that this timeframe for the judicial pre-trials should count as part of the overall delay.*[34]

[94] The evidentiary record is clear that both the court and the private prosecutor were available to continue the *JPT* as early as September 27, 2017, whereas the defendant was only available to do so on the mutually available November 14th, 2017 date, some seven weeks later. What is unclear, is why the trial Justice chose to characterize only two of the seven weeks in question as defence unavailability, contrary to the clear pronouncement in *Jordan*, and confirmation in *Cody,* at para. 30,

> *The only deductible defence delay under this component is, therefore, that which: (1) is solely or directly caused by the accused person; and (2) flows from defence action that is illegitimate insomuch as it is not taken to respond to the charges. As we said in Jordan, the most straightforward example is "[d]eliberate and calculated defence tactics aimed at causing delay, which include frivolous applications and requests" (Jordan, at para. 63). Similarly, where the court and Crown are ready to proceed, but the defence is not, the resulting delay should also be deducted (Jordan, at para. 64).* [*Emphasis added*].

[34] Reasons for Judgment, Transcript at p. 12 (December 13, 2018).

[95] The defendant argues that the decision of the Supreme Court in *R. v. Godin*, 2009 SCC 26, which pre-dates *Jordan,* militates against a finding that defence unavailability should be construed as defence-delay in these circumstances. Given the helpful clarification provided from the Ontario Court of Appeal in recent cases like *R.v Mallozzi*[35] and *R.v. Albinowski,*[36] I cannot accede to such an interpretation. I find that Her Worship mischaracterized this additional **five-week** period of defence unavailability as "part of the overall delay", and that it must accordingly, be properly characterized as defence delay, based on the clear evidentiary record.

ii) The Crown Attorney's Notes

Considered as Defence Caused Delay

[96] Upon the resumption of the *JPT* on November 14th, 2017, the defendant De Beers for the first time, declared that it had to have the notes and investigative work product of Ms. Meuleman, the supervising Crown Attorney from the Ministry of the Environment, in order to now proceed with its abuse of process motion.

[97] *Section 11* of the *Crown Attorneys Act* provides that amongst other administration of justice duties, *every Crown attorney shall,*

> *(d) watch over cases conducted by private prosecutors and, without unnecessarily interfering with private individuals who wish in such cases to prosecute, assume wholly the conduct of the case where justice towards the accused seems to demand his or her interposition;* [*Emphasis added*].

In other words, avoid 'meddling' unless required, but check in, make sure things are proceeding properly in accordance with pertinent legal principles and recognized precepts of fairness, to ensure justice to the defendant----but don't assume carriage of the prosecution unless it is necessary in order to protect the defendant. Ms. Meuleman was the Crown Attorney assigned to exercise this oversight function in relation to Mr. Hesselink's private prosecution of De Beers. She for instance, was the one who confirmed that Timmins was proper jurisdiction for the case to be heard, and who advised what disclosure obligations were owed by the private prosecutor in these circumstances.

[98] As noted above in paragraph 61, the Crown Attorney's notes had been discussed some six months earlier back in May, when De Beers was refusing to consent to the transfer until they, amongst other items, were provided---and the private prosecutor confirmed that they did not have these third-party records and invited the defendant to ask Ms. Meuleman directly for them. The Crown Attorney Ms. Meuleman, herself, also wrote the defendant, inviting them to contact her directly as she would be more than happy to discuss any concerns involving her supervision of the file. They did not take her up on her offer.

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[35] *R v Mallozzi*, 2018 ONCA 312.
[36] *R v Albinowski*, 2018 ONCA 1084.

[99] A couple of months later, in a letter dated July 7, 2017, counsel representing the private prosecutor again confirmed that they did not have these third-party records in their possession and once again invited De Beers to contact the Crown Attorney directly:

> "All existing notes in the possession or control of the prosecution have been provided. Ms. Meuleman is a delegate of the Crown Attorney (Toronto) with oversight of this prosecution under s. 11 of the *Crown attorneys Act*. She is not otherwise affiliated with the prosecution. You have. Ms. Meuleman's information and may certainly contact her directly with respect of her documents."

[100] The appellant strongly contests the defendant's assertion that anything was said during the *JPT* on November 14, 2017, that would have triggered this sudden and unexpected need to now have these documents--after having done nothing to try and secure them in the intervening six months. In a letter dated November 29, 2017, the only contemporaneous evidence in relation to this issue, counsel for the private prosecutor maintained that there was no additional information announced during the November 14, *JPT*, and that counsel for De Beers had not explained what it was that had prompted the renewed interest in the Crown Attorney's notes. The letter also confirmed that the private prosecutor had long since provided all its notes of conversations, emails, and letters etc., in relation to all of its interactions with the Crown Attorney.

[101] In a reply affidavit dated October 24, 2018, nearly a year after the November 14, 2017 *JPT,* counsel for the defendant advised that they had in fact been, *"content to wait to address"* the issue of the Crown Attorney's notes until after their abuse of process motion, but that something was said during that JPT that, *"suggested" that the Crown Attorney "may" have been coaching and assisting the private prosecutor* in relation to the motion.[37] [*Emphasis added*].

[102] In the interests of expediency and hope of avoiding any further delay, the private prosecutor at the behest of the *JPT* Justice, undertook to ask the Crown Attorney that very day to provide her notes. She responded by agreeing to participate in a teleconference with all counsel on November 24th, 2017, and subsequently provided all of her notes, prior to the resumption of the *JPT* on November 30, 2017.

[103] As noted, the private prosecutor had already disclosed all their documentation in relation these interactions with the Crown Attorney—what the defendant was now again requesting after six months, and which was provided, was the Crown attorney's documentation in relation to these same interactions. As might be expected, much of this information had already been provided in the private prosecutor's earlier disclosure. Nevertheless, the defendant advised that it could not proceed with the *JPT* on November 30th as it now required further time to review the Crown Attorneys materials.

[104] Once again it was the private prosecutor who then contacted the RSJP's Office to secure dates for the continuation of the *JPT* regarding the defendant's *abuse of process* motion. It then wrote the defendant on December 4, 2017 to provide the available dates

[37] Reply Affidavit of Neal Smitheman at para 11 (October 24, 2018) [*Reply Affidavit of Neal Smitheman*].

of, January 23, January 25, or January 31, and to confirm both the prosecution's, and the *JPT* Justice's concerns over the delay occasioned by the defendant's failure to finalize its motion so that it could be set down for hearing.

[105] The final *JPT* teleconference was accordingly adjourned to January 31, 2018 for continuation, which date was initially the first date available to the court, the defendant, and private prosecutor. The court subsequently opened up January 2nd and 3rd as available dates for the resumption of the *JPT*, both of which were available to the private prosecutor, however, the defence advised that this would conflict with the holiday break.

[106] The appellant contends that this period of delay from November 14, 2017 to January 31, 2018 (11 weeks / one day) should have been characterized as defence delay given that: it resulted directly from the defendant's marked *inefficiency or indifference* towards securing the Crown Attorneys notes, which it had been invited to do some six months earlier; that it had announced its intention to bring an *abuse of process application* back in July, yet had failed to finalize its grounds for doing so until the fourth ontinuance of the *JPT* in late January; that the majority of the information in question had already been disclosed and did not impact the abuse of process motion---indeed De Beers had indicated as late as Nov. 14th, that it had been otherwise content to wait until after the *abuse of process* motion, to see if the notes were required; and finally, the motion was as noted, ultimately dismissed as being, *"in large part without merit."*

[107] Her Worship declined to consider this period of delay as either defence delay or a discrete event based on her finding that the there was no point in De Beers even having tried to secure the notes earlier;

> *Based on the evidence, it was futile for De Beers to make any such request directly with the Crown who, according to the evidence, was being uncooperative with the defence.*
>
> *Further, since, during the judicial pre-trial, Justice of the Peace Kitlar specifically urged the private prosecutor to ask the supervising Crown to produce all notes, records or documents related to her role or activities in the matter, this is a very good indication that supports that there were indeed issues that needed to be addressed concerning documentary evidence and the supervising Crown. As such, this cannot count as neither defence delay nor a discrete event.*[38]

[108] Having carefully reviewed the evidence presented in the motion materials, I could not find anything in the record to support the conclusion that it would have been futile for De Beers to ask the Crown attorney for her notes or that she was being uncooperative with the defence during the period in question. In fact, the only evidence was, that she had written the defence directly advising them that she would be 'more than happy to discuss any information regarding her review of the file with them' back on May 25th, 2017, which invitation they chose to never follow up on. Moreover, she promptly produced her notes following a teleconference with all counsel.

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[38] Reasons for Judgment, Transcript at p. 14 (December 13, 2018).

[109] The appellant argues that the defendant's apathetic approach in seeking to secure the Crown attorney's notes, and more pointedly, the admission that they were "content to wait until after the motion" to pursue them if necessary, demonstrated *the marked inefficiency or indifference* towards delay, that the Supreme Court in *Cody* suggests should be characterized as illegitimate, in the context of an 11(b) analysis, given, defence,

> *.... inaction may amount to defence conduct that is not legitimate (Jordan, at paras. 113 and 121). Illegitimacy may extend to omissions as well as acts (see, for example in another context, R. v. Dixon, 1998 CanLII 805 (SCC), [1998] 1 S.C.R. 244, at para. 37). Accused persons must bear in mind that a corollary of the s. 11(b) right "to be tried within a reasonable time" is the responsibility to avoid causing unreasonable delay. Defence counsel are therefore expected to "actively advanc[e] their clients' right to a trial within a reasonable time, collaborat[e] with Crown counsel when appropriate and . . . us[e] court time efficiently" (Jordan, at para. 138)*[39] [*Emphasis added*].

[110] The private prosecutor cites the Ontario Court of Appeal decision in *R. v. Gopie*, where the defendant waited to secure necessary transcripts,

> *As the Supreme Court noted at para. 32 of Cody, "[i]rrespective of its merit, a defence action may be deemed not legitimate in the context of a s. 11(b) application if it is designed to delay or if it exhibits marked inefficiency or marked indifference toward delay." Bearing that admonition in mind, in my view, much of the delay resulting from the missing transcripts must be attributed to the appellants as defence-caused delay. The appellants were not diligent in ordering and following up on the transcripts. They did not follow the Brampton protocol despite repeated urgings by the court. In the words of Cody, the appellants' conduct exhibited "marked inefficiency or marked indifference toward delay.*[40]

[111] I conclude based on the evidentiary record as discussed above, that this period of delay (**11 weeks, one day**) between November 14, 2017 and January 31, 2018 should be properly characterized as defence-caused delay. I could, with respect, find nothing to support Her Worship's conclusion that it would have been "futile" for the defendant to pursue the Crown attorney's notes because of a "climate of distrust." They never asked her for them—and in any event, admitted that up until Nov. 14, 2017, were content to wait until after the motion to do so—if necessary.

Considered as a Discrete Event / Exceptional Circumstance

[112] In the event I am wrong in my determination that this period of delay should be characterized as defence -caused delay, and bearing in mind that the trial court's findings of fact are to be accorded a high degree of deference, I must now consider whether it this contested period of delay could alternatively, be characterized as an exceptional circumstance, wherein the onus of proof shifts to the prosecution.

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[39] *R v Cody*, *supra* note 2 at para 33.
[40] *R v Gopie*, 2017 ONCA 728 at para 156.

[113] Assuming that there was indeed some unanticipated announcement by the private prosecution counsel during the third continuance of the JPT on November 14, 2017, a real game changer as construed and contended by the defendant, though denied by the appellant—how could this be anything but reasonably unforeseen and unavoidable? The Crown attorney's notes had not been discussed for some five or six months and nor had they been mentioned during the first 2 *JPT* teleconferences. Surely this was the type of discrete event contemplated by the Supreme Court in *Jordan, at para. 69*:

> *Exceptional circumstances lie outside the Crown's control in the sense that (1) they are reasonably unforeseen or reasonably unavoidable, and (2) Crown counsel cannot reasonably remedy the delays emanating from those circumstances once they arise. So long as they meet this definition, they will be considered exceptional. They need not meet a further hurdle of being rare or entirely uncommon.* [41]

[114] How could the private prosecutor have reasonably foreseen that the defendant would suddenly express renewed interest in the Crown attorney's notes, after some five or six months, and it not having even mentioned them during the first two *JPT* teleconferences? How could this have been reasonably avoided? Clearly this was an unexpected development that was completely outside the control of the private prosecutor. As further explained by the Court in *Jordan*, at para. 73:

> *Discrete, exceptional events that arise at trial may also qualify and require some elaboration. Trials are not well-oiled machines. Unforeseeable or unavoidable developments can cause cases to quickly go awry, leading to delay.*[42]

[115] Moreover, having regard to the second requirement as enunciated by the Supreme Court, in *Jordan,* that is the prosecution's reasonable efforts to mitigate delay occasioned by exceptional circumstances, the private prosecutor sought to reduce the delay arising from this exceptional event by immediately prevailing upon the Crown Attorney to provide her notes to the defendant, and then contacting the court and making itself available on the earlier dates of January 2 and 3 which were opened up by the court, but which dates the defendant declined, even though it would have simply involved calling in to again participate *via* teleconference.

[116] In the result, even if the learned trial Justice's findings of fact are accorded complete deference, and this period of delay (November 14, 2017 to January 31, 2018) cannot therefore be characterized as defence-caused delay—it must surely be characterized as a classic example of an exceptional circumstance as elucidated by the SCC. This resulting delay of **11 weeks and 1 day,** either way, **must** accordingly be subtracted from the total period of delay for the purpose of determining whether the *Jordan* ceiling has been exceeded.

<u>iii) The Delay in Scheduling the Motion</u>

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[41] *R v Jordan, supra* note 1 at para 69.
[42] *Ibid* at para 73.

[117] The *JPT* Justice had directed that the defendant provide a draft notice of its motion during the first JPT on Sept. 20th, 2017. It provided the finalized motion just prior to the final *JPT* on January 30th, 2018. At the conclusion of final continuation of the *JPT* on January 31st, 2018, the presiding Justice of the Peace directed that the defendant's motion be scheduled for a one-day hearing at the earliest possible, mutually convenient date. As noted in paragraph 88 above, the defendant had estimated back in August that its motion would take one day to complete. That estimate evidently remained unchanged following the comprehensive *JPT* process. Once again, it was the private prosecutor who took the initiative on February 1, 2018, of immediately contacting the *POA* Trial Coordinator to secure potential dates for the anticipated one-day hearing, which dates were then provided to the defendant; February 20, 21, or 26-or March 5, 6 or 7, along with a draft *agreed statement of facts*, and proposed timetable for the motion.[43]

[118] As evidenced in the ensuing exchange of correspondence between counsel, counsel for De Beers subsequently contacted the Trial Coordinator themselves, seeking additional dates in later March or early April, contingent upon them confirming the availability of co-counsel. As the defendant sought to push the motion date further back still, the private prosecutor urged the defendant De Beers to finalize its motion and confirm a timetable, and hearing date;

> "We note the defence has been contemplating this pretrial abuse of process motion since July 27, 2017 at the latest. We have still not received your motion materials and you have not proposed or agreed to a timetable, nor have you set down a date for the motion.
>
> We remain very concerned that your ongoing delay in finalizing and scheduling the defence's proposed motion is causing unnecessary delay in this proceeding. We reiterate our concern—expressed to you and the court many times already—that further delay risks a contested s.11(b) Charter motion that has nothing to do with either the merits of this proceeding or the grounds of the defence's proposed motion".[44]

[119] During the court appearance on March 8, 2018 to set the date for *the abuse of process motion*, the same day the defendant finally served its motion record[45], counsel for the private prosecutor once again expressed his 'very serious concerns' over the delay, referencing the fast approaching, presumptive *Jordan* ceiling (June 1, 2018). He therefore urged the court to schedule the motion in late March or early April, or alternatively, to schedule the actual trial dates then and there, with the understanding that a day or two would be reserved at the commencement of the assigned trial dates to hear the motion. He argued that this would ensure that trial dates were secured and would impose some discipline on the parties to work within the resulting deadline. The defendant's counsel strenuously objected to either of these proposals, citing her busy schedule, and the fact she argued, that *Jordan* does not obligate courts to expedite

[43] *Affidavit of Charles Hatt*, *supra* note 24 at paras 44-52.
[44] *Ibid*, Exhibit GG.
[45] *Reply Affidavit of Neal Smitheman*, *supra* note 37, para 41.

matters for the sake of avoiding delay—where to do so would cause prejudice to the defendant.

> *[Jordan] it does not impose, in my respectful submission, an obligation on courts to expedite proceedings or otherwise prejudice an accused when approaching the presumptive ceiling. It does not require courts to expedite proceedings specifically to avoid the presumptive ceiling at all costs, and that's effectively what the private prosecutor wants to do.*[46]

[120] Counsel argued that what the private prosecutor was proposing was "*completely outrageous*" and would cause "*grave prejudice*" to the defendant De Beers.[47] In the result the presiding Justice of the Peace acceded to the defendant's request to keep the motion date separate from the trial dates, and scheduled the motion for one day on April 25th 2018, as requested by the defendant. Her Worship then expressed her desire to then also identify possible dates for trial, however counsel for De Beers advised that she was not prepared to do so, as she did not have the available dates for her witnesses.

[121] The period between January 31st, 2018, when the *JPT* Justice ordered that the defendant's motion be scheduled to be heard as soon as possible, and the motion being scheduled to be argued on April 25, 2018, is 85 days (approximately 12 weeks). There were 65 days (approximately 9 weeks) between February 20, 2018 the first potential date that the private prosecutor had secured from the Trial coordinator to schedule the motion, and April 25, 2018, when it was scheduled at the defendant's request. Her Worship deducted two weeks of explicit defence waiver between February 22 and March 8 in light of conceded defence unavailability, however she refused to consider any further time throughout this period as defence delay, and characterized it as "*part of the overall delay,*" as there was no evidence to suggest that De Beers was doing anything other than following accepted practice,

> *Contrary to the R. v. Gopie case that was cited, there is no evidence to support a finding that the defence failed to follow court practice or direction in scheduling its, for example, its two motions. Nor is there evidence that De Beers took excessive time to prepare its motion material.*[48]

[122] The appellant argues that Her Worship should have properly characterized at least a further three weeks within this period, as defence-caused delay, given De Beers demonstrated "marked inefficiency" in scheduling their motion to be heard, considering amongst other circumstances, some of the factors outlined in *Cody*[49]:

- "Proximity to the *Jordan* ceiling"—the abuse of process motion was announced back in July 2017, but only scheduled to be heard April 25, 2018, just over a month before the June 1, 2018 *Jordan* ceiling.

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[46] Transcript of Proceedings at p. 12 (March 8, 2018).
[47] *Ibid*, p. 13, 15.
[48] Reasons for Judgment, Transcript at p. 5 (December 13, 2018).
[49] *R v Cody*, *supra* note 2 at para 32.

- "The manner in which it was conducted"—the *JPT* Justice had directed that it be heard as soon as possible, which the appellant strove to facilitate, but which efforts the defendant appeared to resist, despite contemplating the motion for some significant time, and having had the benefit of a thorough *JPT* process to help focus the issues

- "Strength and importance:"—The learned trial justice, as noted above, ultimately dismissed the motion as being, *unsupported by the facts and the law*....and "*in large part, without merit.*"

[123] While it may be accurate to conclude that the defendant 'did not fail to follow court practice or direction' in scheduling its abuse of process motion, it would certainly appear from evidentiary record, that it did so with a *marked indifference toward delay*, especially given the particular circumstances of this case, including the constant concern over delay expressed by the private prosecutor. I accordingly find that the learned trial justice erred in law in refusing to characterize at least a further **two weeks** during this period as defence-caused delay.

iv) The Delay Occasioned by Underestimating the Time Required to Argue the Motion Considered as Defence Unavailability

[124] The defendant's motion *abuse of process* proceeded as scheduled on April 25, 2018, however it was unable to be completed, and had to be re-scheduled for an additional two days, finally concluding on July 31, 2018. The appellant contends that this approximate 12--14-week delay---depending on whether it is properly characterized as being either defence-caused, or attributable to *exceptional circumstances*—should be deducted from the overall delay. Her Worship considered this period of delay, only through the lens of defence-caused delay. She made a finding that as it was not caused solely by the defendant, it could not be attributed to defence unavailability alone, and therefore declined to deduct any of this period from the overall delay.

[125] The private prosecutor's counsel's flight from Toronto to Timmins the evening before the motion on April 24th, 2018 was unexpectedly cancelled at the last minute, requiring them to re-book on the first available flight on a different airline the following morning. It resulted in them arriving at the courthouse approximately 30 minutes late on the 25th. As they entered the court room, they found the proceedings had commenced and that the defendant De Beers had moved for a *mistrial*, in their absence, based on a letter that the supervising Crown attorney had sent the court.[50]

[126] A Crown attorney from the Ministry of the Environment had evidently, also planned on attending the proceedings that day to simply observe, however, their flight had also been cancelled, and unlike the private prosecutor, were unable to rebook flights out on the morning of the 25th. Counsel for both the private prosecutor and for the defendant De Beers, were therefore sent correspondence the evening before, on the 24,th to advise

[50] *Affidavit of Charles Hatt, supra* note 24 at para 57.

that the Crown attorney would not be attending the proceedings, and confirming as had been previously determined and conveyed, that there was no need to intervene in the private prosecution, and she would therefore continue to simply *watch over* it as mandated by section 11(d) of the *Crown Attorneys Act.*

[127] The Crown attorney Miss Meuleman, unbeknownst to the private prosecutor had sent a letter directly to the court the morning of the 25th essentially confirming what had already been conveyed to all counsel the previous evening, as noted above, and advising the Court that decision to not intervene ought not to be taken as a comment on the merits of the defendant's abuse of process motion. There is no transcript of this proceeding, but presumably the defendant's mistrial application was abandoned or dismissed, in short order.

[128] Counsel for De Beers then commenced his submissions which consumed the balance of the day and remained unfinished at the conclusion of the sittings on the 25th. As it became increasingly evident that the defendant's submissions were taking much longer than anticipated, counsel for the private prosecutor rose on two occasions, expressing concern over the impending *Jordan* ceiling, and proposing ways to try and ensure that the oral arguments were completed that day, including asking that the court consider receiving follow-up written submissions.

[129] Her Worship chose not to accede to the private prosecutor's proposal, but rather, at the end of the day, directed that the parties contact the Regional Senior Justice of the Peace and secure two additional days in order ensure completion of the defendant's *abuse of process* motion. The following day, April 26, 2018 the private prosecutor again wrote the RSJP, urging that she convene an urgent conference call with the parties, and that active steps be taken to ensure that the motion was completed as soon as possible.

[130] The RSJP wrote back to advise that a conference call would not be necessary, that she would do her best to ensure that the learned trial justice was available as soon as possible, and that counsel should therefore proceed to set the two additional days as directed in the ordinary course. She accordingly provided them with the dates that Her Worship Bourbonnais, would not otherwise be available due to other commitments.[51]

[131] Based on this schedule confirming the trial Justice's potential availability, provided directly by the RSJP, counsel for the private prosecutor then followed up with counsel for De Beers, providing a series of 7 possible hearing dates, comprised of 2 consecutive days, when both they and the court were available, commencing the week of May 7-14 and concluding on July 30 and 31st. Counsel for De Beers replied advising that she was involved in 'lengthy examinations for discovery in June and July and then taking a short family vacation' and provided dates wherein the only date proposed that coincided with those of the Court's and the private prosecutor's availability--was the last one--at the end of July.[52]

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[51] *Ibid*, paras 63-66, Exhibit QQ. Correspondence RSJP Scully (dated April 30, 2018).
[52] *Ibid*, Exhibit RR. Email correspondence dated May 1, 2018.

[132] The learned trial Justice acknowledged that the defendant De Beers had clearly '*underestimated the time required for its abuse of process motion*', having maintained since July 2017, and throughout the extensive *JPT* process, that it would take one day to complete, and yet required part of second day, just to complete its own submissions. Her Worship however, determined that other factors, as described above, such as the half-hour delay in the in the arrival of the private prosecutor's counsel, having to *"address the correspondence from the Crown attorney"*, and the appellant's counsel rising to express his concerns over delay and propose ways to complete oral argument, which submissions, *"took considerable court time,"* all contributed to the delay,

> *Therefore, since the delay associated with the need to schedule and continue the initial defence motion was not solely attributed to De Beers' action or inaction, and the fact that I have no evidence showing deliberate and calculated tactics aimed at causing defence delay, I am not prepared to deduct this time period from the overall delay. Clearly, both parties, as well as the court, were all partly responsible for the delay.*[53] [*Emphasis Added*].

[133] While I might not have been inclined to conclude that the intervening events made any significant contribution to the obvious underestimation of time by the defendant De Beers in relation to arguing its own motion, I will of course defer to Her Worship's finding of fact in this regard. She also concluded that the responsibility for the underestimation of time required to complete the defendant De Beers motion, should be shared by the private prosecutor and the *JPT* Justice. In any event, I do not believe, as will be discussed below, that ascribing fault for miscalculations of time estimations, plays a major role in the *Jordan* calculus. At this point in considering defence-caused delay, the more pressing question would be, once it became clear that more time was required to complete the motion on April 25, 2018, why was it only scheduled to be heard some 14 weeks later at the end of July?

[134] Her Worship determined that she was not available for much of May or June and that was why the July 30 and 31st date was eventually selected by the RSJP,

> *Further, as I indicated on the record at the end of the first day of the initial defence motion, I was not available for much of May and June of this year. Therefore, the motion could not possibly continue before July and, ultimately, was indeed scheduled by the Office of the Regional Senior Justice of the Peace at the very end of July of this year.*[54] [*Emphasis Added*].

[135] The private prosecutor argues that this was a palpable and overriding error, having regard to the evidentiary record, specifically the correspondence from the RSJP in response to his urgent request for scheduling help, which correspondence as mentioned, indicated that Her Worship Bourbonnais would have been potentially available for significant blocks of time throughout May and June,

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[53] Reasons for Judgment, Transcript at p. 6 (December 13, 2018).
[54] *Ibid* at p. 8.

I would suggest you (in conjunction with defence counsel) provide Miss John's dates that are agreeable to both of you in May, June and July and I will do my best, as I do in all cases, to make HW Bourbonnais available as soon as possible.

I can advise that HW Bourbonnais will not available on the following dates: May 15 to June 5, June 11-15 and June 22 and 25.[55] [*Emphasis Added*].

[136] As noted above in paragraph 131, the private prosecutor had then written the defendant's counsel indicating their availability to proceed on 7 potential, 2-day dates that coincided with Her Worship Bourbonnais' potential availability as provided directly by the RSJP. The only date that the defendant's counsel provided that coincided with this availability, was the two-day date of July 30 and 31.

[137] It would appear that Her Worship assessed her apparent non-availability on what she had asserted on the record back on April 25, 2018 at the conclusion of the first day of the motion, and not on her actual potential availability as determined by the RSJP on May 1, 2018, following the RSJP's receipt of the urgent request for scheduling help from the appellant's counsel, as established by the evidentiary record. As was the case throughout the proceedings, the RSJP was the ultimate arbiter in determining the availably and scheduling of all the Region's Justices of the Peace, including the trial Justice, Her Worship Bourbonnais. It is accordingly unclear why the RSJP's determination of her potential availability at this juncture, should not be also presumed accurate?

[138] I would conclude that this misapprehension of the record resulted in the learned trial Justice erroneously determining that the motion "could not possibly" have continued before July 30 and 31st due to her unavailability, as believed on April 25th, when in fact it appears, she was potentially available to continue the matter much earlier, as determined by the RSJP on May 1 2018.

[139] In the result, the period of delay arising by having to wait until to July 31st to resume the defendant's motion, should be properly characterized as defence unavailability, based on the jurisprudence as discussed in paragraphs 70, 71 above. The defendant De Beers has not discharged the onus of demonstrating that this period of delay, resulting from counsel's unavailability, was otherwise reasonable, and the **12-week** period from May 7, 2018 to July 31, 2018 should accordingly be deducted from the total delay.

Considered as Exceptional Circumstance / Discrete Event

[140] In the event I am error in this determination, and mindful of the high degree of deference that must be accorded to the trial court's findings of fact, I must now consider whether this period of delay should in the alternative, more aptly, be characterized as having arisen from exceptional circumstances. Of note, the learned trial justice did not turn her mind to whether this period of delay might be considered as a discrete event—regardless of who was available when, and who was responsible for underestimating the time required to hear the defendant De Beer's, abuse *of process motion*.

[55] *Ibid*, Exhibit QQ. Email correspondence dated May 1, 2018.

[141] In *Jordan* the Court actually used the unintentional miscalculation of trial time to illustrate what might constitute a *discrete event*,

> *Discrete, exceptional events that arise at trial may also qualify and require some elaboration. Trials are not well-oiled machines. Unforeseeable or unavoidable developments can cause cases to quickly go awry, leading to delay. For example, a complainant might unexpectedly recant while testifying, requiring the Crown to change its case. In addition, if the trial goes longer than reasonably expected — even where the parties have made a good faith effort to establish realistic time estimates — then it is likely the delay was unavoidable and may therefore amount to an exceptional circumstance.* [56]

[142] The Court of Appeal in *Jurkus*,[57] also recently considered circumstances where the trial proceeding ran longer than anticipated, and once again confirmed that it should likely be characterized as a discrete event, *supra at para. 55:*

> *These are precisely the types of discrete events that Jordan contemplated. Trials are not "well-oiled machines" and things can quickly go awry in a way that leads to delay: Jordan, at para. 73. An example given in Jordan, is where a trial goes longer than "reasonably expected", even where the parties have in good faith attempted to establish realistic timelines. In these circumstances, it is "likely the delay was unavoidable" and will constitute an exceptional circumstance: Jordan, at para. 73. These comments have equal application when it comes to a preliminary inquiry.*[58] [*Emphasis Added*].

[143] I would conclude that Court's comments, *a fortiori*, have equal application when it comes to the defendant's own abuse of process, *pretrial motion*.

[144] As regards the efforts to remedy the delay, as noted above, counsel for the private prosecutor rose twice during the actual proceedings on April 25th, 2018 to propose ways to avoid further delay, including offering to provide written submissions. When that suggestion was declined, and the motion had to be adjourned and re-scheduled to be heard over 2 additional days, he wrote the RSJP the very next day, seeking her immediate assistance to ensure that it be re-scheduled as soon as possible. Upon receiving the trial Justice's available dates, he then wrote counsel for the defendant, providing and confirming his availability from the earliest date onward. One must ask, what other reasonable steps could the private prosecutor possibly have taken in an effort to further remedy this unexpected period of delay?

[145] I conclude that the need to schedule 2 additional days for the defendant's motion, is most accurately characterized as a discrete event, and that the ensuing delay was both reasonably unavoidable and that the private prosecutor could have done nothing more to have reasonably remedied it in the circumstances. The approximate **14-week** period from April 25, 2018, to July 31st (13 weeks, 6 days) when the motion was finally completed,

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[56] *R v Jordan*, *supra* note 1 at para 73.
[57] *R v Jurkus*, *supra* note 7 at para 55.
[58] *Ibid.*

must therefore be deducted from the net delay. It was an error in law, for the trial Justice to have simply characterized it as part of the over all, inherent delay.

C) Delay Arising from Defendant's Alleged *'marked inefficiency or marked indifference toward delay'* in Scheduling It's 11(b) Application

[146] The learned trial Justice as noted, dismissed the defendant's *abuse of process* motion seeking a stay of proceedings, on August 23, 2018, nearly three months after the presumptive June 1st *Jordan* ceiling had been breached. The defendant's subsequent s.11(b) application was argued approximately 12 weeks later, over 2 days, on November 16, 2018. The appellant argues that the defendant's failure to provide notice and schedule its s.11 (b) motion without the slightest regard for expediency, demonstrated *a marked indifference towards delay*, inconsistent with the culture change demanded by *Jordan,* and should result in at least 50% of this period, six additional weeks, being deducted as defence delay.

[147] Her Worship throughout her reasons, as discussed and suggested above, appears to have focused almost exclusively on the one, perhaps more readily discernable type of potential defence delay delineated by the Supreme Court—that is: *"deliberate and calculated defence tactics aimed at causing delay"* [59], and more recently restated, defence actions, "designed to delay."[60] [*Emphasis Added*]:

i) *Based on the evidence, I am satisfied that throughout these proceedings there was no illegitimate conduct **aimed** at delaying proceedings on the part of De Beers.*[61] [*Emphasis Added*].

ii) *And there's no evidence that would show a "marked indifference to delay and a deliberate and calculated defence tactic **aimed** at causing delay" here.*[62] [*Emphasis Added*].

iii) *Therefore, since the delay associated with the need to schedule and continue the initial defence motion was not solely attributed to De Beers' action or inaction, and the fact that I have no evidence showing deliberate and calculated tactics **aimed** at causing defence delay, I am not prepared to deduct this time period from the overall delay.*[63] [*Emphasis Added*].

iv) *It is indeed only "deliberate and calculated defence tactics **aimed** at causing delay", such as frivolous applications and requests that meet the high standards of illegitimate defence conduct contemplated in Jordan.*[64] [*Emphasis Added*].

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[59] *R v Jordan, supra* note 1 at para 63.
[60] *R v Cody, supra* note 2 at para 32.
[61] Reasons for Judgement at p. 5, line 17 (December 13, 2018).
[62] *Ibid* at p. 6, lines 10-12.
[63] *Ibid* at p. 7, lines 17-20.
[64] *Ibid* at p. 9, lines 17-18.

v) *I accept that the defence pursued that avenue for the bona fide purpose of responding to the charges laid by the private prosecutor. As such, it cannot reasonably be characterized as an illegitimate defence tactic* ***aimed*** *at causing delay.*[65] [*Emphasis Added*].

[148] As evidenced by the foregoing examples throughout Her Worship's reasons, she appears to have neglected to consider that *marked inefficiency or marked indifference toward delay* might well, disjunctively, constitute defence- caused delay. Such conduct need not necessarily have been aimed at delay. As explained in *Cody* at para 32, the defendants' actions or inactions might be characterized as illegitimate, regardless of its aim or merit, if it demonstrated pronounced inefficiency, or indifference towards delay:

> *Defence conduct encompasses both substance and procedure — the decision to take a step, as well as the manner in which it is conducted, may attract scrutiny. To determine whether defence action is legitimately taken to respond to the charges, the circumstances surrounding the action or conduct may therefore be considered. The overall number, strength, importance, proximity to the Jordan ceilings, compliance with any notice or filing requirements and timeliness of defence applications may be relevant considerations. Irrespective of its merit, a defence action may be deemed not legitimate in the context of a s. 11(b) application if it is designed to delay* ***or*** *if it exhibits marked inefficiency or marked indifference toward delay.*[66] [*Emphasis Added*].

[149] In this application, the learned trial Justice appears to have concluded throughout, that once it had been determined that the defence action or inaction in question was *bona fide*--in that it was taken to respond to the charges and in compliance with basic procedural protocols--that ended the analysis---as it was therefore not aimed at causing delay. There was really no further scrutiny brought to bear in assessing whether the manner in which it was pursued, *'exhibited marked inefficiency or marked indifference towards delay.'* (This mischaracterization of the law can also be noted throughout the defendant's *factum,* wherein the arguments are focused only on conduct aimed at or designed to cause delay). Such an approach, with respect, is contrary to the above passages in *Cody*, and contrary to culture change that the Court has exhorted all justice participants to embrace:

> [34] *This understanding of illegitimate defence conduct should not be taken as diminishing an accused person's right to make full answer and defence. Defence counsel may still pursue all available substantive and procedural means to defend their clients. What defence counsel are not permitted to do is to engage in illegitimate conduct and then have it count towards the Jordan ceiling. In this regard, while we recognize the potential tension between the right to make full answer and defence and the right to be tried within a* reasonable time *— and the need to balance both — in our view, neither right is diminished by the deduction of delay caused by illegitimate defence conduct.*

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[65] *Ibid* at p. 9, lines 28-30.
[66] *R v Cody*, *supra* note 2 at para 32.

> [35] *We stress that illegitimacy in this context does not necessarily amount to professional or ethical misconduct on the part of defence counsel. A finding of illegitimate defence conduct need not be tantamount to a finding of professional misconduct. Instead, legitimacy takes its meaning from the culture change demanded in Jordan. All justice system participants — defence counsel included — must now accept that many practices which were formerly commonplace or merely tolerated are no longer compatible with the right guaranteed by s.11 (b) of the Charter.* [67]

[150] As noted above, the Justice of the Peace in Toronto on the second appearance back on March 23rd, 2017, observed that the private prosecutor was being proactive, in seeking *"to move the matter along"*, but that this approach was apparently being opposed by the defendant De Beers. The appellant argues that the defendant's apparent indifference towards delay continued throughout, and was evident some 18 months later, when it waited until Oct. 2, 2018, some four months after the presumptive *Jordan* ceiling had been breached, and nearly six weeks after it's *abuse of process* motion had been dismissed--to provide notice of its intention to bring a s. 11(b) application.

[151] It only did so on Oct. 2. 2018, at the mandatory *JPT* that had been scheduled in order to set a trial date, as per the Northeast's presumably, now well-known *POA* scheduling protocols. Upon learning of the defendant's intentions, the presiding *JPT* Justice then abandoned seeking to set the matter down for trial, and instead directed that the newly announced s. 11(b) application be scheduled. It was accordingly, scheduled to be heard for two days, November 13th and 16th, some 12 weeks after the abuse of process motion had been dismissed. The appellant argues that given De Beers apparent *marked indifference* toward delay, in pursuing this application, that at least 50%, or six weeks of this period should be characterized as defence delay.

[152] Consonant with his concern over delay throughout the proceedings, following the dismissal of the defendant's abuse of process motion on Aug. 23, and prior to the mandatory *JPT* on Oct. 2, where the defendant first announced its intention to bring its s.11(b) application, the private prosecutor's counsel had already written the RSJP directly on September 4, 2018, requesting another conference call, and seeking her assistance and direction in scheduling the trial as soon as possible, and specifically seeking to schedule the mandatory *JPT* and trial date simultaneously, so as to forestall any further delay:

> *"The delay involved in setting dates for trial only after a JPT has been completed would be unacceptable in the context of this proceeding.*
>
> *This court must take steps to ensure that further delay in proceeding to trial on the merits is minimized to the greatest extent possible.*
>
> *We shared a draft of this letter with defence counsel but received no reply."*[68]

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[67] *Ibid* at paras 34, 35.
[68] *Affidavit of Charles Hatt, supra* note 24, Exhibit SS.

[153] Counsel for the defendant then did respond on September 7th, resisting the private prosecutor's proposal to secure a trial date before the *JPT* was completed, (as it had similarly resisted efforts to confirm a trial date prior to first completing their abuse of process motion) , contending that, *"... it makes good sense to follow the court's normal process of conducting a pretrial prior to trial dates being set."* Counsel also expressed that while they were *"loath to do so"*, they nevertheless felt constrained to advise, *"that the defence does not agree with the private prosecutor's characterization of the delay in this matter."*[69]

[154] The RSJP wrote back on September 17 advising that a conference call would not necessary given that the *JPT* for the trial was now scheduled to occur on October 2, 2018, which would then facilitate a more accurate assessment of the estimated six-day trial--- and that counsel should therefore now get together and submit potential trial dates in November and December.[70]

[155] Following the Oct. 2, *JPT* the presiding Justice ordered the matter be set down for a five-day trial, following the s.11(b) application, as and if necessary. It might be noted that there is nothing in the evidentiary record to substantiate or explain why a seemingly straightforward *POA* matter would require 5-6 days of trial (apart from the private prosecutor advising that it intended to prove its case relying on documentary evidence that would take one day to present). On October 17 the private prosecutor again submitted trial availability for all counsel. While the record is unclear, presumably the earlier potential November and December trial dates suggested by the RSJP were relinquished, giving way to the defendant's s. 11(b) application, (which saw reasons only delivered on Dec. 13, 2018). In the result, the week of February 25 to March 1 was tentatively assigned, pending the outcome of the s. 11(b) application.

[156] As already discussed, the learned trial Justice combined her reasons regarding the delay alleged in completing the *abuse of process motion*, together with her reasons regarding the delay alleged in bringing the s.11(b) *application*, concluding that the defendant was simply following court practice or direction, and any associated delay was therefore part of the overall delay,

> *Contrary to the R. v. Gopie case that was cited, there is no evidence to support a finding that the defence failed to follow court practice or direction in scheduling its, for example, its* ***two*** *motions.*[71] [*Emphasis Added*].

> *Likewise, it was His Worship Kitlar who ordered that the current motion for a stay of proceeding be held before the actual trial. As such, the time spent in relation to the current motion counts as part of the overall delay. Similarly, it was the presiding justice of the peace who ordered that the first defendant motion for a stay of*

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[69] *Ibid*, Exhibit TT.
[70] *Ibid*, Exhibit UU.
[71] Reasons for Judgement at p. 5, lines 28-30 (December 13, 2018).

> *proceeding be held before the trial. Therefore, again, the time spent for that initial motion also counts as part of the overall delay.*[72] [*Emphasis Added*].

[157] In relation to the appellant's argument that the defendant ought to have demonstrated greater concern for delay, and consequent alacrity in providing notice and scheduling of its 11(b) motion, rather than waiting until the October 2 *JPT* to announce its intentions, the defendant declares,

> *It is ridiculous that Mr. Hatt asserts that the defence "did not indicate an intention to bring a 11(b) motion... prior to trial at any point" prior to the October 2, 2018 JPT. The Jordan issue had been a "live" one for several months. Mr. Hatt repeatedly took the opportunity to make self-serving statements concerning what he viewed as unreasonable delay by the defence and the court. There can be no doubt that Mr. Hatt fully expected the defendant to raise a 11(b) Charter issue once the abuse of process motion was dismissed.*[73]

[158] It was the elephant in the room to be sure. A review of the evidentiary record clearly confirms that delay had indeed, always been of paramount concern to the private prosecutor, which concerns the defendant dismissed, if not actively resisted, as noted for example, in paragraphs 119 and 120 above.

[159] Nearly 7 months earlier, on the March 8, 2018, set date appearance when the appellant had stated, "...*'we're very concerned about delay in this proceeding" ...* , counsel for the defendant had cited cases like *Jordan* (and *Vitalis?)* and provided the court with copies, ironically, bucking any efforts to expedite proceedings, as it would cause grave prejudice and impinge on its right to adequately prepare. As De Beers acknowledged, the private prosecutor, "repeatedly took the opportunity to make" his concerns over delay known, it seems, at every turn in the proceedings.

[160] In all of these circumstances, there is no doubt that the defendant knew full well back on August 23, 2018, when its abuse of process motion was dismissed--nearly 3 months beyond the *Jordan* ceiling, that the next logical, ineluctable step, would be to bring its 11(b) application—a realization it was quick to impute to the private prosecutor. The light bulb did not just go off during the Oct. 2, 2018 *JPT*. Virtually nothing changed in the 12 weeks between August 23 and October 2, when De Beers chose to first provide notice of its intention to bring a 11(b) application—except that clock continued to tick, and the already exceedingly rare, available dates for five or six-day *POA* trial--continued to move further and further onto the horizon.

[161] One must ask for instance, even in its September 7, 2018 correspondence directly to the RSJP, why the defendant did not give notice of its intention then and there to bring its 11(b) motion? Why waste time and go through the pretense of discussing the timing of dates in relation to a *JPT* and a trial on the merits, with the RSJP, when it knew then it would be bringing a 11(b) application, and was well familiar with the Northeast POA

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[72] Reasons for Judgement at p. 8, lines 22-31 (December 13, 2018).
[73] *Reply Affidavit of Neal Smitheman, supra* note 37 at para 24.

scheduling protocols? It knew that any *pre-trial* motion taking longer than three hours, required a mandatory *JPT* that had to be scheduled through the RSJP's office.

[162] This was the perfect opportunity for the defendant to demonstrate some initiative, some of the "culture change demanded by *Jordan"* and advise the court and the appellant of its intention. Instead, it chose once again say nothing-- other than advising that it was *loath to comment* on the private prosecutor's concerns regarding delay. In the circumstances it might appear "ridiculous" to some, that the defendant would sit on its hands and wait until October 2 to give notice of its intentions. It is uncertain precisely what this decision to withhold notice of its intention to bring an 11(b) application in its Sept. 7th correspondence to the RSJP may have had in relation to the eventual hearing date, but it is certainly emblematic of the *defendant's marked indifference toward delay.*

[163] Her Worship concluded that because there was no evidence that the defendant had failed to follow basic court practice/direction, that any delay associated in bringing the 11(b) *application* must accordingly be counted as part of the overall delay. She did so without any apparent scrutiny as to the timing, and specifically, the indifference towards delay, that the defendant demonstrated in deliberately choosing to delay providing notice of its intention to bring the 11(b) motion. Such an approach, with respect does not accord with the clear direction provided by the Supreme Court.

[164] Upon further review, I conclude that the entire 12 weeks of delay associated with bringing the 11(b) application cannot simply be attributed to "overall delay. Some portion of it must be characterized as defence caused delay. The Supreme Court's direction in *Cody* provides that factors such as *"proximity to the Jordan ceiling"* and *"notice or filing requirements and timeliness of defence applications",* ought to be considered in determining whether the defendant's conduct demonstrates a *marked indifference towards delay.*

[165] Here, the defendant De Beers asserts that even the private prosecutor, *"fully expected the defendant to raise a 11(b) Charter issue once the abuse of process motion was dismissed,"* on August 23rd, 2018-- three months beyond the *Jordan* ceiling. Why then did it inexplicably make the decision to hold off providing notice of its intention to do so, for some for some 40 days between August 23 and October 2? The defendant was by now fully familiar with all the Northeast Region's *POA* officials' and practice directions----why not give notice, contact the court, and try to secure dates, as the private prosecutor had repeatedly done over the course of the proceedings? Was it expecting the private prosecutor to do so again in this instance? The defendant chose instead to remain silent, even in its correspondence to the RSJP on September 7 as noted above, and wait until the Oct. 2nd *JPT*, scheduled in relation to the trial on the merits, to provide notice.

[166] The appellant argues that given the 12 weeks between August 23, 2018 and November 16, 2018, when the defendant's 2-day 11(b) motion was eventually scheduled, that six weeks or 50% of that time ought to be characterized as defence-caused delay.. While I have concluded that the defendant's approach to providing notice and therefore the ultimate scheduling of this application demonstrates *a marked indifference towards*

delay, especially given the circumstances of this case, I am not prepared to so readily accede to the appellant's calculation that the six weeks ought to be deducted.

[167] When the defendant finally gave notice on October 2, 2018, the two-day 11(b) application was scheduled just about a month and a half later (45 days) on November 16, 2018. Had the defendant provided timely notice and contacted the RSJP shortly after August 23, 2018, would the application have then also been scheduled approximately just a month and a half later in early October? What difference might this have made in the tentative trial dates that were eventually provided? Would the November and December dates suggested by the RSJP and agreed to by counsel have then still been available? While the answers to all these questions would in all likelihood be answered in the affirmative-- the variables in evidentiary record make a precise calculation of the resulting delay difficult. I would nevertheless conclude that at least **five weeks** must be characterized as defence caused delay and accordingly be deducted from the total delay.

Conclusion

[168] The learned trial Justice determined that 1.5 months of explicit defence delay should be deducted from the total delay of 27 months, resulting in a net delay at 25.5 months. My review of the evidentiary record, as discussed above has led me to conclude with respect, that Her Worship, appears to have misapprehended the evidentiary record in some instances, but more importantly, mischaracterized the contested delay arising throughout the proceedings.

[169] Reviewing the proceedings chronologically, I have determined that the following periods must be characterized as defence caused delay;

I) The Delay in Transferring the Charges to the Proper Jurisdiction.....12 weeks

II) The Delay arising from Unavailability during the 1st motion *JPT* process....5 weeks (there were 7 weeks, however the trial Justice had deducted 2 weeks)

III) The Delay arising in relation to the Crown attorney's notes.....11 weeks

IV) The Delay in Scheduling the 1st motion.....2 weeks

V) The Delay arising from Underestimating the Time for the 1st motion.....12 weeks

VI) The Delay in providing Notice and Scheduling the 2nd motion.....5 weeks

[170] This would amount to approximately 47 weeks, or 10.8 months of delay arising directly from the defendant's conduct, specifically its *indifference towards delay* throughout the proceedings. After deducting 10.8 months from the 25.5 months, left after Her Worship had deducted explicit defence delay, or waiver, the net delay would therefore be under 15 months, (14.7 months) bringing it well within the presumptively reasonable 18-month *Jordan* ceiling.

[171] In the result there is likely no need to consider *exceptional circumstances or discrete events.* As discussed above however, I have determined that some periods of delay could in the alternative, be more properly characterized as *exceptional circumstances or discrete events.* This would not significantly impact the final analysis, with the exception of number four above, the delay arising in relation to the miscalculation of the time required to hear the first motion. Were it to be characterized as a *discrete event,* which as discussed, would likely be a more appropriate characterization, the delay arising would be 14 weeks, as opposed to 12 weeks, when considered as defence delay, resulting in remaining delay of just over 14 months.

[172] Complexity, which is to be considered outside of the context of the presumptive *Jordan* ceiling, was not advanced by the private prosecutor either at trial nor on appeal. It was not necessary. The apparent complexity of this case, which might otherwise have been argued however, is so far outside the realm of what one might expect to see in a comparable *Part III POA* prosecution, that it warrants brief comment.

[173] By way of example, the Chief Justice of the Ontario Court of Justice, has implemented a practice direction, subject to leave, limiting oral argument on 11(b) applications to 1 hour for criminal matters—this application took 2 days at the trial level—and a full day on appeal. Oral argument on the *abuse of process* motion, took 3 days—accompanied by the lengthy affidavits, reply affidavits, transcripts of cross-examinations on the affidavits, and endless documentary exhibits, comprising the voluminous motion records. The trial was estimated to take for 5-6 days---that following 5 *JPTS* and over 20 court appearances. The evidence is not complicated. No one died, no one was even hurt. The prosecutor intended to present his case *via* a *certificate* in one day. It was the approach taken by counsel that has resulted in this matter getting derailed and weighed down in minutiae, resulting in an artificial and completely unnecessary layer of complexity—this on top of the inherent procedural challenges occasioned by orchestrating the calendars of 4 four counsel flying in and out of Timmins from Toronto.

[174] Such a needlessly complicating approach to a comparatively simple *POA* prosecution is simply unacceptable in this post *Jordan* era, where all participants share responsibility for ensuring the efficient use of limited resources.

Disposition

[175] The appeal is therefore granted, and the matter is accordingly remitted to the Part III *Provincial Offences Act* Court in Timmins, scheduled on January 9th, 2020, City Hall Council Chambers

Released: December 24th, 2019

Signed: Justice D.A. Thomas