

ONTARIO COURT OF JUSTICE

CITATION: *York (Regional Municipality) v. Tomovski*, 2017 ONCJ 785

DATE: 2017 11 21

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IN THE MATTER OF an appeal under subsection 135(1)
of the *Provincial Offences Act*, R.S.O. 1990, c. P.33, as
amended;

B E T W E E N :

THE REGIONAL MUNICIPALITY OF YORK

Appellant

— AND —

STEVE TOMOVSKI

Respondent

Before Justice John McInnes
Heard on February 17, 2017
Reasons for Judgment released on November 21, 2017

Chris Bendick counsel for the Appellant
Robert Tomovski counsel for the Respondent

On appeal from a stay of proceedings entered by Justice of the Peace H. Radtke
on June 21, 2016.

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Judgment

McInnes J.:

I INTRODUCTION

[1] On December 30, 2014, something happened to the respondent that happens to Ontarians from all walks of life every day: he was pulled over by police and given a speeding ticket. He decided to fight the charge in court and so he ticked the applicable box on the back of the ticket and filed it at the provincial

offences court office. In early March 2015, a notice came in the mail advising him the trial would be held a little over two months later, on May 22. In April, he requested disclosure, most of which the prosecutor provided.

[2] The respondent appeared on the trial date without a legal representative and requested an adjournment to pursue two items of disclosure the prosecutor regarded as irrelevant and had declined to disclose. The adjournment was granted and a new trial date was set for October 29, 2015.

[3] The respondent never pursued the two items of disclosure but he retained counsel who brought a s. 11(b) application on the new trial date. The prosecutor objected to proceeding because counsel had not served the provincial and federal Attorneys General as s. 109 of the *Courts of Justice Act* [“CJA”] requires. The matter was adjourned to a third trial date, February 10, 2016, at which time Radtke J.P. heard the application and reserved his decision.

[4] On June 21, 2016, Radtke J.P. ruled the delay breached s. 11(b) and he stayed the proceedings. Applying the analytic framework from *R. v. Morin*, [1992] 1 S.C.R. 771, he found the first adjournment was necessitated by untimely disclosure of the radar manual and attributed all 165 days of resulting delay to the prosecutor. He attributed all but 30 of the 104 days delay caused by the second adjournment to the prosecutor too on the basis that most of that delay was due to overcrowded court dockets. He deducted 45 days for intake, leaving just over 11 months of institutional/prosecution delay which he found was unreasonable.

[5] The appellant, York Region, argues that Radtke J.P. erred in finding a s. 11(b) breach and, more particularly, in attributing any of the 259 days of delay caused by adjournments to the prosecution. The respondent submits Radtke J.P. correctly allocated the periods of delay with one exception: he should not have attributed even 30 days to the defence for the second adjournment because the prosecutor raised his noncompliance with the CJA notice requirement for an oblique purpose.

[6] Two weeks after Radtke J.P. delivered his ruling, the Supreme Court of Canada handed down its landmark decision in *R. v. Jordan*, 2016 SCC 27, introducing a new framework for assessing s. 11(b) claims which I must apply in reviewing the correctness of the decision in appeal. In brief compass, *Jordan* requires me to calculate the relevant period of delay and assess its reasonableness in these steps:

- (1) Calculate the Relevant Period of Delay
 - (a) First, calculate “the total delay from the charge to the actual or anticipated end of trial”: *Jordan*, para. 60; and,

- (b) then calculate the “delay attributable to the defence [that] must be subtracted” from the total delay to determine the “net delay”: *Jordan*, para. 60;
- (2) Compare Net Delay to Applicable Presumptive Ceiling
 - (a) Identify the applicable ceiling;
 - (b) if the net delay falls below that ceiling the delay is presumptively reasonable and to make out a s. 11(b) breach the defence has the onus of proving:
 - it took meaningful steps that demonstrate a sustained effort to expedite the proceedings;
 - however, “the defence need not demonstrate having taken initiative to expedite matters for the period of delay preceding this decision”: *Jordan*, paras. 82 and 99; and,
 - “the case took markedly longer than it reasonably should have”: *Jordan*, para. 82;
 - (c) if the net delay is above the ceiling it is presumptively unreasonable and a stay will follow unless the Crown establishes an exceptional circumstance such as:
 - the case is “complex”; or,
 - a discrete unforeseeable event caused the delay (eg. illness of Crown witness): *Jordan*, para. 69; and,
 - (d) where the charge pre-dates *Jordan* the Crown may also avoid a stay by establishing a “transitional exceptional circumstance” justifies the delay: *Jordan*, paras. 95 and 96.

[7] An important element of *Jordan* was the establishment of an 18-month presumptive ceiling for cases tried in provincial courts. In this appeal, both parties argue the Supreme Court of Canada set that ceiling with the criminal process in mind and that a different ceiling should apply in proceedings under

Part I of the *POA*. The appellant submits the ceiling should be 24 months and the respondent submits it should be 14 months.

[8] For the reasons that follow I have concluded the Supreme Court of Canada calibrated the presumptive ceilings to the specifications of the criminal process and implicitly left open the possibility that a different presumptive ceiling would apply in proceedings under Part I of the *POA* and its analogues in the other provinces. The prosecution of minor regulatory infractions is inherently less time-consuming and the presumptive ceiling should be commensurately lower; for the purpose of my decision in this appeal I find the applicable presumptive ceiling is 14 months. The Justice of the Peace misattributed much of the delay caused by adjournments to the prosecution and the correct tally for “deductible defence delay” is 212 days; the net delay is 10 months and 22 days and is therefore presumptively reasonable. The respondent has not demonstrated the delay was nevertheless unreasonable and, accordingly, I allow the appeal, set aside the stay of proceedings and order a new trial.

II STEP I: CALCULATING THE RELEVANT PERIOD OF DELAY

1. Total Delay

[9] The respondent was charged on December 30, 2014. The decision staying the proceedings was delivered June 21, 2016. The trial would have proceeded on that date had the charge not been stayed. The total delay “from the charge to the actual or anticipated end of trial” was 538 days (17 months and 21 days).

2. Net Delay

(a) Applicable Legal Principles

[10] “Net delay” equals total delay minus “defence delay”. Defence delay consists of two components: waived time periods – there were none in the present case; and, any period of delay “which...is solely or directly caused by the accused person”, i.e. delay-generating inaction and/or actions not “legitimately taken to respond to the charges”: *R. v. Cody*, 2017 SCC 31, paras. 26, 28 to 30; *Jordan*, paras. 61 and 63.

[11] In *Cody*, the Supreme Court explained that “[i]n broad terms, the second component is...intended to prevent the defence from benefitting from ‘its own delay-causing action or inaction’” and it includes “[d]eliberate and calculated defence tactics aimed at causing delay, which include frivolous applications and requests” and situations “where the court and Crown are ready to proceed, but

the defence is not.” These, the Court added, however, are only examples and do not exhaustively define deductible defence delay: *Cody*, paras. 28 and 30.

[12] Defence actions should not be too readily second-guessed but nor should courts “be reticent about finding defence action to be illegitimate where it is appropriate to do so.” Both “the decision to take a step, *as well as the manner in which it is conducted*, may attract scrutiny... 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.”: *Cody*, paras. 31 and 32; [emphasis in original]; *Jordan*, paras. 53, 65 and 83.

[13] Importantly, to count as “illegitimate”, defence action need not rise to the level of professional or ethical misconduct; “[i]nstead, 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.”: *Cody*, para. 35 [emphasis added].

[14] Finally, the Court reiterated in *Cody*, “[t]he determination of whether defence conduct is legitimate is “by no means an exact science” and is something that “first instance judges are uniquely positioned to gauge” [citation to *Jordan* omitted]...It is highly discretionary, and appellate courts must show a correspondingly high level of deference thereto.”: *Cody*, para. 31.

(b) Positions of the Parties

[15] The appellant argues Radtke J.P. erred in (i) attributing the 161 days delay caused by the adjournment of the trial from May 22 to October 29, 2015 to “the lateness in disclosure being provided on [the May 22] trial date” when it was caused by the respondent’s failure to pursue disclosure promptly; and, (ii) in attributing to the defence only 30 of the 105 days delay caused by the second adjournment because of “overcrowded court dockets”.

[16] The respondent submits that Radtke J.P. got it right except that he ought not to have attributed even 30 days to the defence for the second adjournment as “the prosecutor’s insistence that the trial be adjourned...was nothing more than a calculated tactic to have the trial adjourned” as demonstrated by “her words and conduct ... [which] demonstrated an initial willingness to proceed without service of the Attorney Generals [*sic*].”

[17] Accordingly, if the appellant is correct the net delay is 275 days (nine months). If the respondent is correct, the net delay is the full 538 days (17 months and 21 days). I will now examine each disputed period of delay in detail.

(c) First Adjournment

[18] The respondent filed the *Notice of Intention to Appear* on January 9, 2015, well within the prescribed time period. On March 3, the clerk mailed the *Notice of Trial* indicating the trial would be held on May 22. The *Notice of Trial* included the statement “[y]ou have a right to receive disclosure of the evidence that may be used at your trial. You must ask the prosecutor for disclosure in order to receive it.” The respondent enlisted a lawyer to help him obtain disclosure. On April 13 the lawyer faxed a request to the prosecutor’s office for “initial disclosure in this matter, including but not limited to” the officer’s memo book notes, any *McNeil* report for the officer, a copy of the in-car camera recording, particulars of the speed detection device used and a copy of the manufacturer’s and user’s manuals, calibration logs and other records pertaining to the device and the officer’s training in the use of the device.

[19] On April 28, the prosecutor’s office advised counsel the disclosure was ready to be picked up and it was picked up on May 4. The package did not include a copy of the radar manual but a note advised that “full manuals on all speeding measuring devices can be viewed at the Prosecutor’s office.”

[20] On May 16 – the Saturday of the Victoria Day long weekend – counsel faxed a letter to the prosecutor advising he had received “initial disclosure” but had not received:

- i. the requested *McNeil* report for the officer;

and, given his review of initial disclosure, was now requesting these further items:

- ii. a copy of the manufacturer’s and operator’s manuals regarding the “MPH Ranger rear antenna” system installed in the cruiser (in order to understand how the system technically functions, specifically regarding speed detection);
- iii. a downloaded, electronic copy and hardcopy (printout) of the software data from the MPH Ranger rear antenna system commencing at 9:24.00; and,
- iv. a copy of an extended portion of the in-car camera footage commencing at 9:26:47.

[21] On Tuesday, May 19, the prosecutor's office sent an e-mail to counsel advising there was no *McNeil* Report for the officer. The e-mail did not refer to requested items (ii), (iii) or (iv).

[22] The respondent appeared on his own behalf on the May 22 trial date. He requested an adjournment because he "had requested further disclosure and I have not received the information as of yet." The prosecutor explained that the *McNeil* issue had been resolved, that he was now providing the respondent with item (ii), a copy of the "full manual", and that the prosecution's position was that items (iii) and (iv) were not relevant, would not be disclosed and could be requested through the "*Freedom of Information Act*" if the respondent still wanted them. The respondent indicated he was still seeking items (iii) and (iv). Forrest J.P. granted the adjournment to allow the respondent time to "investigate options." The new trial date was October 29, 2015.

[23] Radtke J.P. gave these reasons for finding the prosecutor responsible for this period of delay:

... On March 3 the trial notice was served with the first trial date of May 22, 2015.

The first disclosure request was sent in by the defence April 13th, 2015. Prosecution made available this disclosure on April 28th, 2015. Defence picked up the disclosure on the 4th of May 2015, six days later.

Within 12 days a second disclosure request was submitted on the 16th of May in a timely fashion once again. Prosecution provided further disclosure by fax the 19th of May, 2015 to the defence, some three days before trial.

On the date of the first trial, May 22, 2015, a further or second trial date was set for October 29, 2015 because of the lateness in disclosure being provided on that trial date. [emphasis added]

[24] The appellant submits the real cause of the adjournment was that the respondent was dilatory in requesting and picking up disclosure given the looming trial date. While I agree the respondent's pursuit of disclosure was not a model of promptitude, the trial finding that it was "timely" attracts deference and I see no basis for disturbing it. Within a little more than a month of the *Notice of Trial* being mailed out the respondent had arranged for a lawyer to send a detailed and appropriate disclosure request letter on his behalf. The information about requesting disclosure on the *Notice of Trial* conveyed no greater sense of urgency. The prosecutor's office advised counsel's office the disclosure was ready on a Tuesday (April 28) and it was picked up the following Monday (May

4), 18 days ahead of the trial date. Those materials might have been reviewed and the second disclosure letter prepared a little more quickly, but reviewing disclosure and preparing follow-up correspondence takes time and counsel presumably had more than one case on the go.

[25] But Radtke J.P. erred in attributing this adjournment to “lateness in disclosure being provided on that trial date” as this finding rested on three false premises: (i) the adjournment of the trial had anything to do with the timing of disclosure of the radar manual; (ii) the prosecution did not disclose the radar manual in a timely manner (by making it available in the prosecutor’s office); and, (iii) the prosecution was even obliged to disclose the radar manual.

[26] The respondent has consistently maintained that he was unrepresented when he appeared on the first scheduled trial date and that counsel’s only involvement at that stage was assisting him to obtain disclosure. The sole reason *he*, the respondent, gave for seeking the adjournment was that he still wanted items (iii) and (iv) from the May 16 letter, items the prosecution made clear it regarded as irrelevant and did not intend to disclose.

[27] This is important because by the time the s. 11(b) application was filed on August 25, 2015, two months ahead of the October 29 trial date, the respondent was represented by counsel who took no steps to pursue items (iii) and (iv), whether with follow-up correspondence to the prosecutor’s office explaining its relevance or a disclosure motion. Nor did counsel rely on the non-disclosure of items (iii) and (iv) when arguing the s. 11(b) application before Radtke J.P.; instead, this was his argument:

We know that Mr. Tomovski was self-represented up until the trial date. The original trial date of May 22. Perhaps for obvious reasons people are – Your Worship can infer many people are self-represented. I practice criminal defence, he is my brother. At some point Mr. Tomovski enlists my – not even my services, my – my pro bono kindness, if I can put it that way. And because no disclosure has been provided, which is the duty of the prosecutor and trial as fast approaching, I get involved and I’m approached and – well there’s – well, let me – let me see what’s going on. Let me fax a letter. And that’s what’s faxed, reminding the Crown of, look, there’s a trial coming up, it’s a speeding charge, here are the obvious things that should be disclosed. We want it, and it still enough time to get it before May 22nd. And once again, we know the manual wasn’t provided till the morning of, inexplicably. So I can go through the transcript, but ultimately what it says in there is Mr. Tomovski shows up for his trial, he still hasn’t been provided the manual. It is relevant. It is disclosed by the prosecution and the trial gets adjourned for that. [emphasis added]

[28] The respondent still maintains that “it was clearly the disclosure given the morning of trial by the prosecutor that necessitated the adjournment.” Items (iii) and (iv) are mentioned only once in the *Respondent’s Factum*, in a footnote: “[a]t no time has the respondent resiled from his position that the footage from the time of the actual offence is anything but (extremely) relevant”.

[29] That the respondent has “not resiled” from this position is immaterial. What matters is that he has never explained *why* items (iii) and (iv) were “extremely relevant” or sought an order compelling the prosecutor to produce or disclose them. Nothing in the record establishes the respondent’s stated reason for seeking the first adjournment had any validity.

[30] It is not lost on me that the respondent probably focused on items (iii) and (iv) because they were the items still notionally outstanding. But the fact remains that neither at the time nor since has the respondent demonstrated that the trial could not proceed on May 22 because of the radar manual having only been given to him that morning. Had the respondent sought the adjournment on that basis, the possibility of the trial proceeding later that morning or perhaps in the afternoon after he reviewed the manual might well have been canvassed: see, *R. v. Aboushaka*, [2007] O.J. No. 230 (CA, in chambers). Without information about the contents and potential relevance of the manual the Justice of the Peace could not find an adjournment was required without speculating.

[31] Even had it been open to Radtke J.P. to find the adjournment was necessary for the respondent to make full answer and defence, the resulting delay was not attributable to the prosecution unless it had been (i) tardy (ii) in fulfilling a disclosure obligation.

[32] Nearly a month before the trial date the prosecutor advised the respondent the manual could be viewed at its office; there is no evidence anything prevented the respondent from examining it there to his heart’s content: see, *R. v. Irwin*, 2007 ONCJ 440, paras. 4, 19 to 27. The respondent counters “[t]here is nothing in *Stinchcombe* that mandates an accused to accede to the prosecuting authority’s terms in order to have access to relevant disclosure.” True enough, but nor is there anything in *Stinchcombe* that specifies accused persons are entitled to receive disclosure in the form and manner of his or her choice. The Crown’s discretion as to the manner of disclosure is reviewable, but here no review was ever sought. This is especially significant, given Madam Justice Healey’s recent holding in *York (Regional Municipality) v. McGuigan*, 2017 ONSC 436, para. 34, that “in this region and others throughout the province, as is apparent from the case law, [radar manuals are] readily available for review at the prosecutor’s office. There is no impediment to an accused making full answer and defence” [emphasis added].

[33] Which brings me to my final point: the prosecutor was not obliged to disclose the manual for at least two reasons. First, the respondent has not established it was not in the public domain and he could not have obtained it well before trial by, say, typing “MPH Ranger rear antenna system” into Google. Second, it was not part of the “fruits of the investigation” and therefore not part of first party *Stinchcombe* disclosure, as Healey J. explained in *McGuigan* at para. 32:

...the prosecutor's office has possession of the very manual containing the testing procedures sought to be disclosed. Nonetheless, as I read *Jackson* and *McNeil*, unless the document can properly be characterized as "fruits of the investigation", there is no obligation on the prosecutor's office to provide it as part of routine disclosure in speeding offences. This is so even if there is a reasonable possibility that the disclosure sought may assist Mr. McGuigan in the exercise of his right to make full answer and defence.”

See also, *R. v. Jackson*, 2015 ONCA 832, paras. 91 to 106.

[34] The prosecutor’s office did not have to disclose the manual but did; first, by making it available for inspection in its offices and then by giving the respondent his own copy on the trial date. This disclosure, particularly in the latter form, was *ex gratia*. Wise prosecutors sometimes disclose material beyond *Stinchcombe* requirements to keep cases moving. Courts should not discourage this by retroactively creating a disclosure obligation for such material and then labelling its fulfillment “untimely”.

[35] Radtke J.P. erred in attributing the adjournment from May 22 to October 29, 2015 to “lateness in disclosure being provided on that trial date.” The adjournment request was a defence action and it has not been established it was “legitimately taken to respond to the charges.” Consequently, this 164-day period of delay is deductible defence delay.

(d) The Second Adjournment

[36] Now represented by counsel, the respondent served and filed his s. 11(b) application materials two months ahead of the October 29 return date but, in doing so, he did not comply with s. 109 of the CJA:

109 (1) Notice of a constitutional question shall be served on the Attorney General of Canada and the Attorney General of Ontario in the following circumstances:

1. The constitutional validity or constitutional applicability of an Act of the Parliament of Canada or the Legislature, of a regulation or by-law made under such an Act or of a rule of common law is in question.
2. A remedy is claimed under subsection 24 (1) of the Canadian Charter of Rights and Freedoms in relation to an act or omission of the Government of Canada or the Government of Ontario.

[37] The respondent's s. 11(b) application materials were accepted for service and filing despite this noncompliance. When the matter was first spoken to in court on October 29, the prosecutor, Ms. Tonery, stated:

I did discuss the matter with counsel upon arrival this morning, Your Worship. I understand there is a *Charter* application before the court. The prosecution did provide a response to that application. I understand that it's the intent of the parties to proceed on the merits with respect to the application, as well, and, obviously, if that application is unsuccessful then with the trial proper...

[38] After a recess was taken to allow Ms. Tonery to review the in-car camera video she said this:

Thank you. I did take an opportunity at the recess, Your Worship, to review the video and I thank you for that opportunity. Also, during the recess, I had an opportunity to review the materials and I've brought to my friend's attention my concern that all of that [*sic*] parties haven't been served in this application in that the Attorney General of Ontario and the Attorney General of Canada were not served as part of the normal practice under Section 109 of the *Courts of Justice Act* and it's – I understand my friend's position – well, perhaps I'll let him articulate his position.

[39] In response, counsel for the respondent said this:

Well, Your Worship, in my experience in 13 years of arguing 11(b)'s in the provincial offences court I've never once had the Attorney General or the Attorney General of Ontario attend or have any interest in attending.

. . .

I would ask Your Worship to exercise your discretion, as you are entitled to do, and find that this matter can proceed, that the two relevant parties are here and are prepared to argue the motion on their – on its merits and that service, although technically required for good reason would not change the participants and the argument that Your Worship would be hearing.

[40] Turtle J.P. then ruled:

I appreciate what you say but the rules are there and as far as this court's concerned they're there to be followed. The likelihood, as you say, of the Attorney General showing up in this case is, to say the least, not strong, but my position has always been the rules are there and they're there to be followed. So, you would have to put it over to do the appropriate serving of the documents.

[41] At the hearing of the s. 11(b) application, defence counsel argued Ms. Tonery had only raised the notice issue after “[s]omething happened during that break when she reviewed and assessed her case” and “she walked into court and strategically tactically decided to invoke a strict literal application of the rules.” Counsel argued “there is discretion in the rules” and invited Radtke J.P. to take “judicial notice of the fact that 11(b)'s are routinely proceeded on without service to the Attorney General.”

[42] Radtke J.P. made these findings regarding the second adjournment:

The calculation from that October 29th day takes seven months since the first trial date. On October 29th, the prosecution indicated its intention to go ahead with the 11(b) motion before His Worship Turtle, and trial, if it was not successful. The prosecutor of the day then requested a recess because the video had not been viewed by her.

After recess, the issue of service to the Attorney General was raised as being not proper. The presiding Justice ruled that the prosecutor's vague response two days before the second trial date was insufficient.

The transcript of October 29th, 2015 reflects the Court's comments and concerns. The prosecutor makes a comment that because she doesn't get the court dockets until two days before the trial date, she was unaware of the matter or issues of disclosure until counsel appeared on 29th of October and raised them.

The matter was put over to respond to the defence's request to clarify and provide a more detailed response than the vague one provided.

The issue of proper service to the Attorney General [*sic*] were to be rectified by the defence for the third trial date or motion argument on February 10, 2016. Defence counsel stated his availability in the next month of November, December 2015 and January 2016 to perfect service, none of which in those months the prosecution could provide dates as available because of full court dockets.

The Court finds that only 30 days will be held against the defence for perfecting the service to the Attorney Generals as they were available and the prosecution could not find space in our overcrowded court dockets.

[43] The Justice of the Peace’s finding that the “matter was put over to respond to the defence’s request to clarify and provide a more detailed response than the vague one provided” is not supported by the record. Turtle J.P. adjourned the matter for one reason and one reason only: counsel for the respondent did not comply with s. 109 of the CJA. Counsel was prepared and eager to proceed; it was only after Turtle J.P. adjourned the matter that he asserted “[s]he is adamant that she is entitled to request that I serve the appropriate parties. I equally am entitled to receive a proper response in accordance with the *Rules*,” prompting Turtle J.P. to ask the prosecutor, “[y]our office doesn’t have a problem with [providing a fuller response] in the meantime?” I note in passing that counsel was mistaken in asserting the *Rules* required a detailed response; in contrast to our *Criminal Rules*, the *Rules* governing POA trials require no written response from the prosecution.ⁱ

[44] The respondent submits Radtke J.P. “erred in not finding that the prosecutor’s insistence that the trial be adjourned in order for the Respondent to provide notice to the Attorney Generals [*sic*] was nothing more than a calculated tactic to have the trial adjourned...it is reasonable to infer that the prosecutor did not wish to proceed with the *Charter* motion and the trial on the merits and used the rules as a sword.”

[45] This argument is misconceived and vexatious. Counsel has not presented a shred of evidence that Ms. Tonery raised the notice issue for an oblique purpose. There is nothing even slightly implausible about a busy POA prosecutor noticing noncompliance with s. 109 for the first time while reviewing the file on a recess. Once she noticed it she was duty-bound to raise the issue. I find it surprising that experienced counsel would baselessly impugn the municipal prosecutor’s integrity in response to her properly pointing out his error.

[46] Radtke J.P. further erred in finding that “overcrowded court dockets” justified attributing all but 30 days of this delay to the prosecution. The first date available to the court for what everyone agreed would be a two hour hearing was

February 2, 2016, just over three months later (defence counsel was not available until February 10). In Part I proceedings, a three month delay for a two hour hearing is neither unreasonable nor abnormal and as such it was an objectively foreseeable consequence of failing to comply with s. 109. In these circumstances, defence counsel's availability on earlier dates furnished no basis for attributing anything less than the full 104 days of delay to the defence.

[47] But for two other reasons I would not deduct all 104 days of this period of delay from net delay.

[48] First, the respondent served and filed his s. 11(b) application materials two months in advance without proof of service on the two Attorneys General and the prosecutor's office did not raise the notice issue until the proceedings were already underway on October 29. For this I do not fault Ms. Tonery, who conducted herself professionally throughout. But it appears that s. 109 is susceptible to being overlooked by s. 11(b) applicants and to generating delay when discovered for the first time in court. Procedures should be in place to verify s. 109 compliance before the s. 11(b) application materials are accepted as served at the prosecutor's office and/or for filing at the court office. I appreciate that it is the s. 11(b) applicant's obligation to comply with s. 109, but all "those who play an important role in ensuring that the trial concludes within a reasonable time: court administration, the police, Crown prosecutors, accused persons and their counsel, and judges" must be proactive in avoiding delay: *Jordan*, para. 50.

[49] Second, while the respondent had to comply with the notice requirement, given the plain wording of s. 109 as interpreted by the Court of Appeal in *R. v. Vellone*, 2011 ONCA 785, paras. 17 to 27, this did not necessitate a wholesale adjournment. There were at least two better options.

[50] The first was to hear submissions on the merits of the s. 11(b) application and adjourn on the understanding the defence would serve the Attorneys General within, say, 3 days (which Turtle J.P. had authority to do by virtue of s. 109(2.2)) and obtain and forward to the court confirmation that neither Attorney General intended to participate (which almost certainly would have been forthcoming). Turtle J.P. could then have delivered judgment on the return date. In the very unlikely event of either Attorney General electing to participate, a transcript of the argument that had already taken place could be forwarded with any other relevant materials and the hearing could continue on the return date.

[51] I appreciate there is no discretion to disregard the s. 109 notice requirement and Turtle J.P. correctly declined defence counsel's invitation to do so. But noncompliance with s. 109(1) only deprives the court of jurisdiction to grant the s. 24(1) remedy, not to enter upon the hearing: *CJA*, s. 109(2); see also, *Paluska v. Cava* (2002), 59 O.R. (3d) 469, 212 D.L.R. (4th) 226 (CA),

para. 24; *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241, para. 49; *R. v. Briggs* (2001), 55 O.R. (3d) 417. The Legislature's choice of the narrower consequence of noncompliance is lent further significance by s. 109 (2.2), which as noted empowers the court to make a different order regarding the timing of service.

[52] Section 109 operates in many situations and in most the primary purpose of the notice requirement is to enable the Attorneys General to decide whether to participate in the litigation. Here, however, the Legislature obviously did not expect the Attorneys General to show up every time someone claimed a s. 11(b) breach. The reason s. 11(b) applications were not exempted from the notice requirement is that “the Government of Ontario... [has an] important interest in monitoring the performance of municipalities under Memoranda of Understanding” and notice “of a s. 11(b) challenge – or, perhaps, an avalanche of such notices – provides the Government of Ontario with important data about key components of the provincial justice system”: *Vellone*, paras. 25 and 26. Fulfillment of those objectives would not have been impeded by proceeding in this manner.

[53] *Morine v. L & J Parker Equipment Inc.*, 2001 NSCA 53, lends authoritative support to this interpretation of s. 109. After hearing an appeal raising the constitutional validity of a provincial regulation and reserving its decision, the Nova Scotia Court of Appeal raised with counsel whether notice to the Attorney General had been given under s. 10(3) of that province's *Constitutional Question Act* which, like s. 109(1) & (2), directs that courts “shall not adjudge ... the regulation ... to be invalid until after notice is served on the Attorney General”: *Morine*, para. 43. After acknowledging there “are many authorities decided under similar provisions in other jurisdictions which hold that a finding that a statute or regulation is unconstitutional in absence of notice is made without jurisdiction,” Cromwell J.A. (as he then was) held [at paras. 44 and 45]:

...However, neither the statute, nor the case law supports the proposition that late notice (as opposed to no notice) prevents the Court from considering the constitutional issue.

What the statute requires is notice to the Attorney General before any finding of invalidity: s. 10(3). The notice is to be given at least 14 days before the day of argument: s. 10(4). In the present case, the conclusion of the argument of the appeal was postponed to permit the notice to be given and submissions to be made. In my view, what the statute requires is that the Attorney General have the opportunity to be heard prior to any adjudication of invalidity. While the notice required by the *Act* should be given as part of the normal sequence of events leading up to the scheduling of the hearing, failure to do so does not deprive the Court of discretion to permit the defect to be remedied

provided, of course, that the right of the Attorney General to be heard on the issue is fully protected.

The authorities are consistent with this view...In *Eaton*, Sopinka, J. stated as follows at (paragraph) 54:

There is, of course, room for interpretation of s. 109 [the section requiring notice in that case] and there may be cases in which the failure to serve a written notice is not fatal either because the Attorney General consents to the issue's being dealt with or there has been a *de facto* notice which is the equivalent of a written notice...

I conclude, therefore, that complete failure to give notice precludes a finding of invalidity, but whether to permit late notice to be given is a matter for the Court's discretion. [emphasis added]

See also, *R. v. Mohla*; *R. v. Singh*, 2012 ONSC 30, paras. 72 to 76, 116 to 123.

[54] The second better option was to adjourn the s. 11(b) application *sine die* and proceed with the trial without prejudice to the respondent's right to renew the s. 11(b) application later if he were convicted. I acknowledge that "[a] motion to stay proceedings for a s. 11(b) breach is ordinarily argued before trial absent unusual circumstances": *Ontario (Ministry of Labour) v. Pioneer Construction Inc.*, [2006] O.J. No. 1874 (CA), para. 27. But here there were unusual circumstances and I question whether the main rationale for dealing with s. 11(b) first – to avoid a lengthy trial that may be stayed anyway – even applies. Here it might well have been more a case of avoiding a comparably lengthy s. 11(b) application by conducting a short speeding trial.

[55] I acknowledge identifying alternative procedural solutions is much easier with the benefit of hindsight, a transcript and a little time for legal research. However, the transcript makes it clear that neither the parties nor the presiding Justice of the Peace examined s. 109 to see if it allowed for something less disruptive than a full scale adjournment. In the post-*Jordan* world we now inhabit, justice system participants faced with a second adjournment of almost four months for, of all things, a s. 11(b) application would be expected to stop and say in unison "there has to be a better solution." As the Supreme Court reminded in *Cody*, "[a]ll justice system participants...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": *Cody*, para. 35 [emphasis added].

(e) Adjournment for Decision

[56] The above comments also apply to the adjournment for decision. At the conclusion of argument, Radtke J.P. advised counsel he would reserve his decision. While discussing scheduling, he indicated he required a transcript of the submissions and inquired of the court clerk how long it would take to get one produced. The reply was 6 to 8 weeks, and Radtke J.P. then indicated he would therefore require three or three and a half months. The matter was adjourned to June 1, 2016, on the understanding the trial would proceed that day if the application was dismissed (although on June 1 there was a further adjournment to June 21). The application was argued on a busy day in a busy court and taking some time to review the material and reflect on the submissions was not unreasonable. Were this situation to arise today in the shadow of *Jordan*, however, I imagine the presiding judge or justice of the peace would either dispense with a transcript of counsel's submissions or ensure it was expedited.

(f) Conclusion

[57] The deductible defence delay is all 165 days for the first adjournment and 52 of the 104 days for the second adjournment as there is some shared responsibility for the failure to find a better solution than an outright adjournment. Consequently, 212 of the 264 days of delay due to adjourned trial dates is "deductible defence delay" and the net delay is 326 days (10 months and 22 days).

III Step 2: Comparing Net Delay to the Presumptive Ceiling

1. Introduction

[58] The appellant submits the Part I presumptive ceiling should be 24 months because certain unique features of the process and the high volume of charges combine to elevate the "inherent time requirements" of these cases, especially in York Region. The "lack of stigma associated with minor regulatory offences for which the maximum penalty is a \$1,000 fine and for which imprisonment is not an option" and the fact that "*Charter* rights in the regulatory context are different than in the criminal context" also favour a higher ceiling.

[59] The respondent argues "many of the factors referenced initially in *Morin* and recently in *Jordan* simply do not, or minimally, apply to provincial offence matters" including bail hearings, lengthy intake processes, voluminous disclosure, complex pretrial motions, difficult legal issues, lengthier trials and so forth. The presumptive ceiling should be reduced to 14 months to reflect the reduced complexity of the process.

[60] Irrespective of the merits of either argument, I am mindful that my authority to “reset” the presumptive ceiling for Part I proceedings is subject to various legal and practical constraints which I will address later in these reasons.

2. The Evidence Tendered on Appeal

(a) Admissibility of the Evidence Tendered on Appeal

[61] In support of its proposed 24-month ceiling, the appellant has tendered evidence on appeal in the form of affidavits from York Region’s (i) Director of Prosecutions Hans Saamen; (ii) Director of POA Court Services Lisa Brooks; and, (iii) POA court administration clerk May Petherick. This material provides statistical and other background information concerning the operation of POA courts in York Region.

[62] A proper factual foundation is essential to judicial review of legislation under the *Charter*: *R. v. Mills*, [1999] 3 S.C.R. 668, para. 38; *R. v. DeSousa*, [1992] 2 S.C.R. 944, at p. 954; *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086, at p. 1099; *R. v. Levkovic*, 2010 ONCA 830, para. 28. There is no *Charter* challenge *per se* in this appeal but identifying the point at which delay becomes presumptively unconstitutional for a statutory procedural scheme is a similar exercise. The respondent concedes this evidence is relevant and consents to its admission.

[63] Accordingly, I admit the evidence tendered on appeal.

(b) The Evidence

[64] The nub of the appellant’s argument is that the high volume of Part I charges and number of adjournment requests owing to the peculiarities of the Part I trial scheduling and disclosure processes combine to bloat the inherent time requirements for these cases. Director of POA Court Services Lisa Brooks expresses it this way:

Based on statistics published on the Ontario Courts website, the number of POA charges filed is significantly higher than the number of criminal charges filed. Based on these statistics, there were 1,516,883 POA Part I charges and 147,121 Part III charges filed in Ontario in 2015 (a total of 1,664,009) compared to 216,660 criminal charges filed in Ontario in 2015, a difference of 768%. In York Region, the number of Part I and III POA charges filed in 2015 was 155,775 compared to 11,162 criminal charges filed in 2015, a difference of 1395.5%. (NOTE: this does not include Part II parking charges). Given the significant

difference in the number of POA charges compared to criminal charges, and the difference in the trial scheduling process, POA courts are faced with unique challenges that do not arise in criminal cases. In POA matters, there is no input by the prosecutor or defendant in selecting a trial date or the number of witnesses that will testify, or the time required for a trial. In criminal matters, a date is agreed upon between the parties, along with a time estimate. In POA matters, a defendant may request an early resolution meeting before deciding whether to proceed to trial. In criminal matters, there is no early resolution option, however the defendant does appear in court and can discuss a potential resolution with the crown before setting a trial date. Crown attorneys screen charges to determine if a case is in the public interest to proceed, or that they have a reasonable prospect for a conviction before the case is set for trial. In POA matters where a trial is requested by a defendant, there is no prior screening by a prosecutor of cases set for trial by the clerk. The clerk simply sets the case for trial once a NIA is filed. [emphasis added]

[65] Part I proceedings are commenced by the police officer issuing the ticket at the roadside (the *Notice of Offence*) and then filing a *Certificate of Offence* with the court. Until recently, defendants had three options, which are set out on the back of the ticket: (i) pay the set fine; (ii) request an Early Resolution Meeting (ERM) with a prosecutor to discuss the charge with a view to a potential resolution; or (iii) request a trial by filing a *Notice of Intention to Appear*.

[66] The ERM was typically held three or four months after the alleged offence date which caused inordinate delay for the cases that did not resolve. Because of this, and in response to *Jordan*, York Region suspended the ERM option at the start of this year. Defendants are now offered the second option of attending before a Justice of the Peace to plead guilty and request a lower penalty.ⁱⁱ

[67] When a *Notice of Intention to Appear* is filed, the trial scheduler sets the trial date based on court time and officer availability with no information from the prosecutor or the defendant about the estimated length of the trial. After selecting a date, the clerk of the court sends a *Notice of Trial* to the defendant and the prosecutor's office. Trial dates are thus set with no court appearances or other judicial involvement. In York Region, this process generally takes 2 to 4 months, but it can take longer when there is a surge in trial requests and in the summer months when staff are away on vacation. The evidence filed on appeal lists many reasons why the process takes so long that relate either to the surprising number of steps involved in determining the trial date or other demands unrelated to trial scheduling that compete for the trial schedulers' time. It is implicit in the proffered explanation for York Region's tortoiselike Part I

intake process that if there were more trial schedulers the intake period would be shorter.

[68] The appellant's policy is to provide disclosure to Part I defendants only upon request. As mentioned, there is a statement at the bottom of the *Notice of Trial* form advising defendants "[y]ou have a right to receive disclosure of the evidence that may be used at your trial. You must ask the prosecutor for disclosure in order to receive it." When such requests are received – invariably after the defendant has received the *Notice of Trial* in the mail – the prosecutor's office requisitions the disclosure from the police agency, reviews and copies it and then notifies the defendant it is ready to be picked up. The process repeats itself if there are follow-up requests.

[69] It frequently occurs that disclosure cannot be provided in time for the trial date and an adjournment is therefore required. This happens because self-represented defendants – which describes most persons charged under Part I – often request disclosure on or shortly before the trial date and because a large proportion of those who retain a legal representative wait until shortly before the trial date to do so.

[70] Another frequent cause of adjournment requests stems from scheduling trials without input from the defendant: it often happens that a defence witness is unavailable on the chosen trial date or that the defendant himself cannot attend and a family member or friend appears to request an adjournment.

[71] Because of all this, case management often occurs on the first trial date, "with the justice of the peace and the prosecutor spending valuable court time explaining the process to defendants, determining whether disclosure was requested and obtained, whether any witnesses need an interpreter, and whether any *Charter* issues will be raised." Such discussions often lead to an adjournment. According to Mr. Saamen, approximately 15 percent of trials are adjourned at the request of defendants due to the defendant or their witness not being available on the date set by the trial scheduler, wanting to obtain legal advice, or because of not having requested and received disclosure. As he points out, "[a] second appearance in these matters only contributes to delays and heavier dockets in the future with further cases coming into the system."

3. The Presumptive Ceiling Should Not be Raised to 24 Months

(a) The Disclosure Process

[72] I begin by addressing the delays associated with the disclosure process which the appellant submits are an unavoidable consequence of the POA procedural scheme and so "[i]f legitimate actions taken to defend a charge (such

as obtaining disclosure) are not to be deducted from the overall delay (see para. 65 of *Jordan*), then the presumptive ceiling must be adjusted to reflect this reality.”

[73] I am not persuaded by this submission. Its major flaw is that it rests on the unfounded premise we are simply stuck with this inefficient disclosure procedure and the delay it evidently generates. Before any serious consideration could be given to raising the presumptive ceiling, the appellant would have to demonstrate that modifications to the process have been tried and have failed or are otherwise impracticable.

[74] The evidence before me leaves me with the impression that instead of impelling the responsible authorities – including the provincial overseers – to take decisive action to correct the problem, the systemic challenges the appellant describes have inculcated a syndrome of learned helplessness.

[75] I do not quarrel with the policy of providing disclosure only upon request, but by dint of it the prosecutor’s office assumes a passive and reactive posture from the outset. Perhaps more thought should be given to whether waiting helplessly for the inevitable late disclosure requests to come in before acting, by then too late to avoid an adjournment request and resulting delay, is optimal.

[76] If I have correctly understood the statistical information in the affidavits, disclosure was requested in about 32% of Part I cases in 2014, 50% in 2015, and possibly close to 60% in 2016.ⁱⁱⁱ Perhaps it is time to reassess the current policy, given this trend. It is not obvious that generating disclosure in every case as it is brought into the system would consume more resources than the current practice of going back to the police weeks or months later to obtain disclosure in 50% or 60% of cases, especially since, according to the appellant, the negative effects it generates ramify throughout the entire Part I court process.

[77] Another option would be to retain the current policy but start routinely requesting the basic disclosure material from the police agency at the same time the *Notice of Trial* is sent out. That way, the review and copying could be done immediately upon receipt of a disclosure request. I expect the objection would be this would defeat the whole purpose of providing disclosure only upon request, and I suppose from the viewpoint of the police agency that is true. But since it is the appellant’s position that an epidemic of adjournment requests due to unavailable disclosure “contributes to delays and heavier dockets in the future with further cases coming into the system,” perhaps waiting passively for a request before even initiating the disclosure process with the police is no longer a tenable practice.

[78] Another alternative would be to replace the terse and minimally informative statement on the current *Notice of Trial* form (“You have a right to

receive disclosure of the evidence that may be used at your trial. You must ask the prosecutor for disclosure in order to receive it”) with something that explains to the layperson *how* to “ask the prosecutor for disclosure” (is it by fax, in person, by e-mail, by regular mail and what is the contact information?) and even more importantly *when* to ask the prosecutor for disclosure to ensure it is available in time for trial. If late requests are such a problem, why not put a date on the form by which the request must be received to ensure disclosure is available before trial?

[79] An even more radical innovation would be to put the information about the right to disclosure on the *Notice of Intention to Appear* (i.e. the back of the ticket issued at the roadside) so that when the defendant ticks the box indicating he wants a trial he can tick another box indicating he wants disclosure. That way the trial scheduler could ensure the trial is scheduled on a date that leaves enough time for the disclosure request to be fulfilled and the prosecutor’s office could commence the process for obtaining disclosure from the police right away.

[80] On the limited record before me I cannot say whether these ideas would reduce delays and I appreciate that designing and implementing an efficient disclosure process is an executive, not a judicial, function. My point is simply that if the appellant thinks it needs a higher ceiling because the process generates chronic delay it first must demonstrate that it really is stuck with the process in its current form. No such demonstration has been made.

[81] I also reject the appellant’s contention that late disclosure requests are necessarily “legitimate action taken to defend a charge” and as such not deducted in calculating net delay. Requesting disclosure is a legitimate action taken to defend a charge and delays associated with the routine provision of disclosure are not ordinarily deducted. But, as with *Charter* rights generally, Part I defendants must be reasonably diligent in exercising their right to receive disclosure: *R. v. Dixon*, [1998] 1 S.C.R. 244, paras. 37-38.

[82] When a represented defendant waits for no good reason until the last minute or the trial date to request disclosure, he cannot be said to have exercised his right diligently. If an adjournment is necessitated by such conduct, the resulting delay “is caused solely by the conduct of the defence” and generally should be deducted in the net delay calculation: *Jordan*, para. 63 [emphasis added]. The point of deducting such delay from the total is, after all, “to prevent the defence from benefitting from “its own delay-causing action or inaction”... [and] ... [i]t applies to any situation where the defence conduct has “solely or directly” caused the delay...”: *Cody*, para. 28; citing *Jordan*, paras. 66 and 113.

[83] I appreciate Mr. Bendick’s point is that courts are generally reluctant to attribute delays due to these late-disclosure-request adjournments to *unrepresented* defendants who may not appreciate that a late request is likely to lead

to an adjournment. I agree that is so, but it is worth considering *why* so many unrepresented defendants do not realize that untimely disclosure requests will lead to an adjournment: no one has bothered to tell them. The information about obtaining disclosure on the *Notice of Trial* form certainly does not educate unrepresented defendants on this point. In fact, it arguably leaves the impression that disclosure can be requested “whenever” and as such it does not inform so much as it misinforms.

[84] If the Notice of Trial form were improved even to the limited extent of providing a date by which the request must be received for the disclosure to be available before trial, delays caused by defendants who seek adjournments after ignoring the deadline *could* be deducted as defence delay. Unrepresented defendants are not held to a different standard of diligence; rather, allowance is made for the fact they may lack the information to appreciate what diligence requires in the circumstances. Giving them that information would serve the interests of both the prosecution and those unrepresented defendants who want a timely trial.

[85] These positive effects would be amplified if a new and improved statement about disclosure was also presented more effectively. On the current *Notice of Trial* form the information appears in a tiny font size along with unrelated information about certificate evidence and the consequences of non-attendance at trial, almost as if intentionally disguised as inconsequential boilerplate. The focus should perhaps shift from notionally informing defendants to actually informing them.

(b) The Part I Intake Process

[86] The appellant’s argument that delays associated with processing *Notices of Intention to Appear* and generating *Notices of Trial* warrant a higher presumptive ceiling is similarly unpersuasive. It is difficult to evaluate the appellant’s claim that the volume of charges makes it impracticable to consult with the defendant and the prosecutor as to a suitable date. Libman J. questioned that proposition in *Toronto (City) v. Andrade*, 2011 ONCJ 470, paras. 48 to 62 on the different record before him in that case. Whatever the case, the unilateral approach to trial scheduling method results in more adjournment requests and more delay.

[87] But, again, before any thought is given to raising the presumptive ceiling some consideration should be given to other potential solutions. One rather obvious possibility is to include information on the *Notice of Trial* form about how to change the date if it will not be possible for the defendant to attend. That way, adjournment requests could be dealt with well in advance and the resulting delay would be reduced. Such a step would also make the process fairer to

unrepresented defendants: *Andrade*, para. 58. I see no reason why this could not be done administratively, as s. 5(3) of the *POA* contemplates.

[88] Like all constitutional provisions, s. 11(b) must be construed as “capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers”: *Hunter v. Southam*, [1984] 2 S.C.R. 145, p.155. One social and technological reality unimagined by the framers of the *Charter* is especially pertinent here: Canadians now use the Internet to conduct business of all kinds – buying goods, registering for school, banking, booking flights, paying taxes etc., and do so because it is generally much more efficient. It is not clear why the Part I scheduling and disclosure processes have not moved into the 21st century with the rest of the world, especially given that York Region, like other municipalities, does offer online options for Part I defendants who want to pay the set fine.

(c) The Volume of Charges

[89] I also reject the appellant’s contention that the “sheer volume of *POA* matters” in comparison to criminal charges warrants a higher presumptive ceiling. The evidence establishes the “sheer number” of Part I charges filed each year is indeed considerably higher than the number of criminal charges. For example, in Ontario in 2015 there were 1,516,883 Part I charges, 147,121 Part III charges and 216,660 criminal charges filed; in York Region for the same year, there were 155,775 charges under Parts I and III of the *POA* combined, compared with 11,162 criminal charges, which, the appellant notes, is “a difference of 1395.5%” (these numbers do not include Part II charges, i.e. parking tickets).

[90] According to the appellant this is significant because “the number of criminal charges dealt with by the provincial court compared to the Superior Court was an important factor in *Morin* in establishing longer institutional delay guidelines and *Jordan* considered the *Morin* timeline as a baseline” in setting the 18-month ceiling, “similar considerations should apply in determining the appropriate level of institutional delay within the presumptive ceiling for *POA* courts to those within the provincial court dealing with criminal cases.”

[91] This submission invites a statistically pointless comparison. Even if one assumes that more charges means more delay (as opposed to more funding), the evidence tells me nothing about how a given number of criminal charges correlates with the same number of Part I charges vis-à-vis resource consumption. I cannot say whether the average criminal charge utilizes 5, 10, 15 or 25 times more court time and associated resources than the average Part I charge. Nor do I have evidence establishing the resources each kind of charge injects into the pool in the form of fine payments.^{iv}

[92] The fact “there are 1395.5% more Part I charges than there are criminal charges” is not meaningful information. The comparison in *Morin* was between the number of criminal cases disposed of in provincial courts and superior courts respectively. The comparison the appellant invites me to find significant is between the number of apples in one facet of this court’s work and the number of oranges in another.

[93] While I cannot be statistically specific on this record, I can safely say that, on average, a Part I charge takes less court time than a criminal charge. Most criminal cases that come before this court resolve at a relatively early stage by way of an agreed resolution. Sometimes this comes in the form of a withdrawn charge in exchange for the defendant entering a peace bond and/or having completed “up front work” in the form of counselling, restitution, etc. It may also come in the form of a guilty plea, often with a reduction in the number and/or seriousness of the charge(s) and most of time involving a joint submission on sentence which tends to reduce the time taken to “process” these cases.

[94] For less serious criminal charges, the time spent in the courtroom dealing with resolutions usually seems brief, but nowhere near as brief as a typical guilty plea to, say, speeding with the certificate amended to reflect a reduced speed so the defendant avoids points. In my direct experience in York Region even the provincial offences appeal court disposes of many more “charges per hour” than any criminal plea court does.

[95] Again, without attempting to be specific, on average consumption of behind-the-scenes resources is also significantly higher in criminal cases. In criminal court even the simplest resolutions generally happen after some remand appearances, charge screening, a pretrial meeting between Crown and defence counsel and sometimes one or two judicial pre-trials. Time is taken to work out POA resolutions behind the scenes too, but charge for charge it is on a much smaller scale.

(d) Prejudice/Regulatory Context

[96] The appellant submits “*Charter* rights in the criminal context are different than in the regulatory context since criminal cases deal with morality whereas regulatory offences deal with public order and safety” and this supports its proposal to raise the presumptive ceiling for Part I proceedings.

[97] The scope of a *Charter* right is often influenced by the context in which it arises. As the appellant correctly points out, for example, that regulatory and criminal legislation have different objects was relevant to whether minimum fault requirements for true crimes apply to regulatory offences: *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, para. 124. Similarly, the stigma associated with

criminal charges necessitates heightened protection “against overzealous or reckless use of the powers of search and seizure by those responsible for the enforcement of the criminal law” in the form of a more robust reasonable expectation of privacy in relation to state action in enforcing the criminal law: *Thomson Newspapers Ltd. V. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, para. 124, per La Forest J.

[98] In contrast, however, the broad distinction between regulatory and criminal charges does *not* modulate the right to be tried within a reasonable time in this same way. In *R. v. CIP Inc.*, [1992] 1 SCR 843, a s. 11(b) claim arose when a serious *Occupational Health and Safety Act* charge commenced under Part III of the *POA* was assigned to a judge instead of a justice of the peace and was then twice adjourned because priority was given to criminal cases on the judge’s docket. The Crown argued it was reasonable to give the criminal cases higher priority and so there was no violation of s. 11(b). Writing for the Court, Stevenson J. disagreed [at para.44]:

If I understand that argument correctly, the respondent is suggesting that because the appellant was charged with a regulatory offence, the allowable time frame for bringing it to trial should somehow be greater than it would be in other circumstances. I am not persuaded by that argument. The right to be tried within a reasonable time is engaged when a person is “charged with an offence”. The Charter does not distinguish between types of offences, and it seems to me that doing so for the purposes of assessing the reasonableness of delay would unduly stretch the principles of contextual analysis. The interest of an accused in the availability and reliability of substantiating evidence will exist irrespective of the nature of the offence with which that person is charged. [emphasis added]

[99] The appellant also submits that “since the presumptive ceiling was premised, in part, on prejudice to the liberty and security of the person interests and these interests are not engaged in the context of a Part I *POA* proceeding, then a higher presumptive ceiling is thereby warranted.”

[100] I agree that delayed Part I proceedings have no impact on liberty because there is no possibility of arrest, imprisonment or restrictive bail conditions except in very rare circumstances which can be safely ignored for present purposes.^v Nor do delays in Part I cases impact any personal security interest. In criminal cases “[s]ecurity of the person is impacted because a long-delayed trial means prolonging the stress, anxiety, and stigma an accused may suffer”: *Jordan*, para. 20. To attribute constitutional significance to the degree of “stress, anxiety, and stigma” that could arise from an unreasonably long wait to fight a speeding ticket would risk trivializing the *Charter* and the important protections it bestows:

Blencoe v. British Columbia (Human Rights Commission), [2000] 2 SCR 307, para. 55-57; *R. v. Donnelly*, 2016 ONCA 988, paras. 105-109; *Cunningham v. Canada*, [1993] 2 S.C.R. 143, at p. 151.

[101] Before *Jordan*, the absence of these forms of prejudice was sometimes treated as a justification for tolerating delays exceeding the *Morin* guidelines: *R. v. Omarzadah*, [2004] O.J. No. 2212 (CA, in chambers), para. 3; see also, *Toronto (City) v. Andrade*, 2011 ONCJ 470, para. 36. But at the time *Jordan* was decided it remained an open question whether the presumption of prejudice applied in Part I proceedings and, more generally, whether its relative absence allowed for longer delays.^{vi} In *Andrade*, Libman J. observed that results in Part I s. 11(b) cases were unpredictable with courts sometimes emphasizing that “speedy justice is the hallmark of the *Provincial Offences Act*” and other times “the minor nature of the charge, and the absence of any prejudice and/or stigma”: *Andrade*, para. 36.

[102] The notion of allowing the absence of these forms of prejudice to stretch constitutional boundaries is problematic for at least two reasons. First, the reason there is no stigma associated with being given a speeding ticket is that society does not regard simple speeding as morally blameworthy. But this generates a countervailing effect: a commensurately less urgent public interest in seeing the charge prosecuted on its merits. Having to wait 18 months to fight a speeding ticket causes no stigma-related prejudice but nor is it any great affront to substantive justice if the motorist avoids having to pay the \$75 set-fine because the ticket takes too long to come to trial.

[103] I recognize the appellant’s point is that “the concept of prejudice underpins the entire framework” and “[was] accounted for in the creation of the ceiling” [*Jordan*, para. 109] and since delay causes little or no prejudice in Part I cases that should also be “accounted for in the creation of the ceiling” that applies to them. The appellant is correct that, viewed in isolation, this consideration favours a higher presumptive ceiling. But its influence is offset by the correlatively reduced societal interest in seeing the charge prosecuted on its merits and, in the final analysis, the absence of stigma or risk of imprisonment is a wash.

[104] Second, allowing the absence of stigma to elasticize constitutional limits made s. 11(b) assessments in Part I cases highly subjective. The Part I delay cases decided before *Jordan* exemplify what the Supreme Court described as the “highly unpredictable” quality of the *Morin* analytic framework because of its “endless flexibility” which “turned s. 11(b) into something of a dice roll”: *Jordan*, at para.32.

[105] For these reasons, neither prejudice nor the seriousness of the offence continues to play any role in the s. 11(b) analysis after *Jordan* and its companion case, *R v Williamson*, 2016 SCC 28.

[106] The absence of prejudice “can in no circumstances be used to justify delays after the ceiling is breached”: *Jordan*, paras. 54 and 82. As the Court explained [at paras.109-110]:

Instead of being an express analytical factor, the concept of prejudice underpins the entire framework. Prejudice is accounted for in the creation of the ceiling. It also has a strong relationship with defence initiative, in that we can expect accused persons who are truly prejudiced to be proactive in moving the matter along.

* * *

... Understanding prejudice as informing the setting of the ceiling, rather than treating prejudice as an express analytical factor, also better recognizes that, as we have said, prolonged delays cause prejudice to not just specific accused persons, but also victims, witnesses, and the system of justice as a whole.

[107] Similarly, the Court also jettisoned “seriousness of the offence” as an express analytic factor in *Williamson* where the majority held [at para 34] “...a person's right to a trial within a reasonable time cannot be diminished based solely on the nature of the charges he or she faces.” The specific issue in *Williamson* was whether longer delays were constitutionally tolerable in the instance of very serious charges. Writing in dissent, Cromwell J. said this [at para. 80]:

...in a case like this one, in which the delay is excessive but not so long as to be clearly unreasonable, it is one of the considerations that should be taken into account in the final balancing process. The jettisoning of this consideration as irrelevant is, in my view, one of the most unsatisfactory aspects of the majority's new template for assessing unreasonable delay in *Jordan*. The jurisprudence has been clear that societal interests, both those mirroring and those adverse to the interests of the accused, underlie the concept of reasonableness in assessing whether the right to trial within a reasonable time has been violated. Far from diminishing the right, this approach requires the sort of balancing that is the essence of reasonableness. [emphasis added]

[108] This is how the majority responded [at paras. 35 to 38]:

...we note that s. 11(b) guarantees the right “to be tried within a reasonable time”. It does not admit of gradients of reasonableness where the charges are serious. For example, it does not guarantee the right to be tried within “somewhat longer” than a reasonable time, or

within a time that is "excessive but not so long as to be clearly unreasonable" when the charges are serious...Delay is either unreasonable, or it is not...

...while our colleague uses the seriousness of the offence to dilute the constitutional right to a trial within a reasonable time, we consider that the *Charter* right is respected, and the public interest is best served, by trying serious charges on their merits in a timely fashion. These are precisely the cases that should be heard promptly, on the strongest possible evidence.

Third, the seriousness of the offence does not sit comfortably with the notion of reasonable time. Some grave charges require very little time to be tried, while some less serious charges require more time. [emphasis added]

[109] In my respectful view, the above reasoning applies with equal force to charges at the opposite end of the gravity spectrum. After *Jordan/Williamson* the quantum of constitutionally acceptable delay is a function of procedural complexity, not substantive seriousness.

[110] Finally, the appellant's argument neglects to account for the third component of prejudice, "[f]air trial interests", which "are affected because the longer a trial is delayed, the more likely it is that some accused will be prejudiced in mounting a defence, owing to faded memories, unavailability of witnesses, or lost or degraded evidence": *Jordan*, para. 20. As Stevenson J. noted in *CIP* [at para. 44]: "[t]he interest of an accused in the availability and reliability of substantiating evidence will exist irrespective of the nature of the offence with which that person is charged."

[111] The impact of "faded memories, unavailability of witnesses, or lost or degraded evidence" is admittedly marginal in many Part I cases in which the evidence is limited to the testimony of a police officer describing how she performed a routine procedure like using a radar device to identify speeders based on her notes and a memorized routine. But in many cases the defendant is prejudiced by degradation in his own ability to recall events and, as Mr. Saamen's affidavit informs, "[m]any Part I charges involve motor vehicle collisions with witnesses who were involved in, or saw the collision and who are summonsed to appear in court to testify on what occurred." The ability of these witnesses to recall and relate the event will also suffer over time.

[112] Perhaps the most compelling reason for rejecting the appellant's diminished prejudice argument is that the fair trial interest in its broadest sense

also belongs to the public and in this dimension finds its voice in this passage from *Jordan* [at para. 25]:

...the interests protected by s. 11(b) extend beyond those of *accused* persons. Timely trials impact other people who play a role in and are affected by criminal trials, as well as the public's confidence in the administration of justice...

...timely trials are important to maintaining overall public confidence in the administration of justice. As McLachlin J. (as she then was) put it in *Morin*, "delays are of consequence not only to the accused, but may affect the public interest in the prompt and fair administration of justice..."[emphasis added]

[113] As the majority held in *Jordan*, to characterize a long delay as "reasonable" because it does not result in any prejudice to the accused person's protected interests "is a problem because the accused's and the public's interests in a trial within a reasonable time does not necessarily turn on how much suffering an accused has endured. Delayed trials may also cause prejudice to the administration of justice": *Jordan*, para. 34 [emphasis added].

[114] In *Andrade*, Libman J. observed [at para. 35] that "the provincial offences court is the forum in which most persons in this province will experience the justice system in action. It is truly the "peoples' court". His point was that "[a]s such, it is an extremely busy place" which meant longer delays were inevitable. But this cuts both ways. If the Part I process is the only forum in which the majority of the public see the justice system in action, it is all the more important that the process be and be seen to be "a system that can deliver quality justice in a reasonably efficient and timely manner": *Jordan*, para. 27.

(e) Conclusion

[115] A question worth asking is why someone disputing a speeding ticket is entitled to a trial before an appointed judicial officer and the protections of the enumerated legal rights in s. 11 of the *Charter* when disputes relating to far more important subjects – human rights, tenancy, entitlement to social assistance, licensure in one's chosen profession to name only a few examples – are determined administratively and without engaging s. 11 *Charter* rights?

[116] In criminal proceedings, due process rights are strongly linked to the potential loss of liberty and stigma that a criminal conviction entails. As we have already seen, such consequences do not arise in Part I cases and it is well-settled that these proceedings do not engage s. 7 as there is no possibility of imprisonment as a consequence of conviction: *R. v. Pontes*, [1995] 3 S.C.R. 44;

London (City) v. Polewsky, [2005] O.J. No. 4500, 202 C.C.C. (3d) 257 (CA); *R. v. Transport Robert (1973) Lteé*, [2003] O.J. No.4306, 180 C.C.C. (3d) 254 (CA).

[117] The legal rights in s. 11, including s. 11(b), apply in Part I proceedings for one reason and one reason only: the Legislature in its wisdom clothed its chosen procedural scheme for trying minor infractions with the essential trappings of the criminal process: See, *Guindon v. Canada*, 2015 SCC 41, paras. 44, 45 and 64; *R. v. Wigglesworth*, [1987] 2 S.C.R. 541 at pp. 559-560, *Martineau v. M.N.R.*, 2004 SCC 81, para. 21.

[118] This means there are options for addressing chronic delay in Part I proceedings that would be constitutionally impermissible in the criminal context. For example, most if not all provincial offences typically commenced under Part I could be dealt with through an administrative monetary penalty system. The Law Commission of Ontario urged the Government of Ontario to consider taking that very step in its 2011 report *Modernization of the Provincial Offences Act, a New Framework and Other Reforms* ["LCO Report"]. The Ministry of the Attorney General launched a public consultation on this issue on March 3, 2015.^{vii}

[119] I have no information about the status of that consultation or what if any plans the Government of Ontario has in this regard. It is certainly not my place to second guess past, present or future political decisions regarding the mechanism for adjudicating traffic violations. I simply note that enlisting the judicial process for this purpose has constitutional implications extending well beyond the *Charter*-protected legal interests of the charged individual; the comparatively trivial consequences of conviction do not relieve the other branches of provincial government of their constitutional obligation to ensure the Part I process is designed and funded in a manner that ensures fair trials will be held within a reasonable time having regard for the complexity of the procedures required. As Iacobucci J. explained on behalf of the Court in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, para. 50:

... Although in the context of a civil proceeding this does not engage a *Charter* right, the right to a fair trial generally can be viewed as a fundamental principle of justice... Although this fair trial right is directly relevant to the appellant, *there is also a general public interest in protecting the right to a fair trial. Indeed, as a general proposition, all disputes in the courts should be decided under a fair trial standard. The legitimacy of the judicial process alone demands as much.* Similarly, courts have an interest in having all relevant evidence before them in order to ensure that justice is done. [emphasis added]

[120] The policy of conferring a surfeit of due process rights on people ticketed for minor provincial infractions is oddly juxtaposed with the many elements of the

process in practice that seem calculated to deter the citizenry from actually exercising those rights. I have already referred to some examples of this, including the content and format of the disclosure information on the *Notice of Trial* form and the antediluvian system used for trial scheduling. The *LCO Report* provides another excellent example: that defendants must attend an inconveniently located courthouse open only during regular business hours (when most people are at work) and stand in line to file their *Notice of Intention to Appear*. The *LCO Report* mentions the one plausible explanation for this requirement, which “questionable as it may be, is that the physical act of attending a courthouse creates a disincentive to dispute an offence notice ... [and if] this is the primary rationale, it is worthy of reconsideration”: *LCO Report*, p. 127.

[121] Whether or not these and similar practices are *actually* designed to deter people from disputing traffic tickets in court, in my experience that is certainly a widespread public perception. I can think of no better way to deepen this cynicism than by announcing that waits of up to two years less a day for a 15 minute speeding-ticket trial are presumptively reasonable.

[122] Unreasonably delayed Part I trials implicate the legitimacy of the judicial process both by impairing individual trial fairness interests and by undermining overall public confidence in the administration of justice. For that reason, it is just as important that disputes adjudicated under Part I are decided *both* fairly and within a reasonable time measured in light of their relative lack of complexity as it is in criminal cases.

[123] It should take the average or typical Part I case *less* time to complete than its criminal counterpart, not more time. I accept that the Part I process includes unique procedural steps that can generate delay; at the same time, however, by design many of these steps avoid the even greater delay the correlative step in the criminal process entails. Scheduling Part I trials and notifying defendants takes time, for example, but it need not and definitely should not require as much time as the equivalent intake stage of the criminal process with its bail hearings, multiple court appearances, Crown pre-trials, judicial pre-trials and so forth.

[124] With all this in mind, I reject the appellant’s submission that the volume of charges and associated difficulties with processing trial and disclosure requests make Part I prosecutions inherently more time consuming than criminal prosecutions. If York Region and/or the overseeing Government of Ontario find it impossible to bring defendants to trial within a time frame that is reasonable given the limited inherent complexity of these adjudications, then they must either stop using the courts for this purpose or reallocate resources so the police, prosecution and court services can process a higher volume of cases more quickly. I highlight this important message the Supreme Court of Canada sent legislators in *Jordan* [paras. 117, 140, 141]:

We are aware that resource issues are rarely far below the surface of most s. 11(b) applications. By encouraging all justice system participants to be more proactive, some resource issues will naturally be resolved because parties will be encouraged to eliminate or avoid inefficient practices. At the same time, the new framework implicates the sufficiency of resources by reminding legislators and ministers that unreasonable delay in bringing accused persons to trial is not merely contrary to the public interest: it is constitutionally impermissible, and will be treated as such.

* * *

For provincial legislatures and Parliament, this may mean taking a fresh look at rules, procedures, and other areas of the criminal law to ensure that they are more conducive to timely justice and that the criminal process focusses on what is truly necessary to a fair trial...Government will also need to consider whether the criminal justice system (and any initiatives aimed at reducing delay) is adequately resourced.

Thus, broader structural and procedural changes, in addition to day-to-day efforts, are required to maintain the public's confidence by delivering justice in a timely manner. Timely trials are possible. More than that, they are constitutionally required. [emphasis added]

4. The Presumptive Ceiling Should be Lower than 18 Months

[125] I agree with the respondent that Part I prosecutions are inherently less time consuming than criminal cases and the presumptive ceiling must reflect that.

[126] According to York Region's Director of Prosecutions Hans Saamen...:

...[t]rials for POA cases can vary a great deal in length and complexity. Some cases have only one or two witnesses while others may have 10 or more witnesses. Some cases have no exhibits while others may have several exhibits. Some trials can take as little as 15 minutes to complete, while others can take several days for the same offence. For example, we have had some speeding charges take 15 minutes to complete while others have taken up to 4 different days to complete due to lengthy cross examination and various defence motions and *Charter* issues being raised. Cases are often adjourned by defendants to deal with late disclosure requests or late retainers of legal representatives, or adjourned by the trial justice where no disclosure

request has been made by an unrepresented defendant, leading to further delays. Some Ministry trials and Municipal laid charges can require several weeks of trial time to complete. There are hundreds of Federal and Provincial statutes, regulations and by-laws which can form the basis of a *POA* charge. It is therefore difficult to categorize all *POA* charges as simple cases that should be dealt with expeditiously.

[127] I accept this description is accurate but it is not complete. To begin with, it does not differentiate between Part I and Part III of the *POA* and I suspect most charges that take “several weeks” to complete are Part III cases. Elsewhere in his affidavit, Mr. Saamen indicates “[m]any Part I charges involve motor vehicle collisions with witnesses who were involved in, or saw the collision and who are summonsed to appear in court to testify on what occurred.” It is not clarified what “many” means in this context but common sense and experience suggest the proportion of traffic tickets issued as a result of a motor vehicle collision or other circumstances requiring testimony from civilian witnesses is modest. Mr. Saamen implicitly confirms this by averring elsewhere in his affidavit that “trial court dockets for Part I proceedings have 80 to 100 trials scheduled in each courtroom each day, which allows only 3 minutes per case.”

[128] The evidence tendered on appeal does not indicate what percentage of those 80 to 100 scheduled trials actually take place. I am informed 15% are adjourned at the defendant’s request but I have not been given any information about the proportion of the remaining matters that resolve with a guilty plea, are withdrawn when the officer fails to attend or, for some other reason, end in a “deemed not to dispute” conviction when the defendant fails to appear. Common sense and experience tells me that only a small proportion of Part I charges end in a contested trial and those that do are comparably straightforward. I cannot make any specific finding on the inherent time requirements of the “average” or “mean” criminal or Part I case but I do not think it can reasonably be disputed that the latter are significantly lower.

[129] I agree with Libman J. who observed in *Andrade* that “the short time lines under Part I of the *Provincial Offences Act* serve to place a premium on speedy justice.”^{viii} The public appreciates that most Part I matters are simple and the process is intended to be simpler than the criminal or Part III processes.

5. Scope of my Authority to Set a New Presumptive Ceiling for Part I

[130] It follows from the foregoing that the presumptive ceiling should be lower for Part I cases. Does this mean I should fix a new and lower presumptive ceiling for Part I cases going forward as part of my decision in this appeal? As mentioned earlier, there are constraints on my authority to do so which I will now address.

(a) **Stare Decisis**

[131] No matter how compelling the argument for a lower ceiling may be, the 18-month presumptive ceiling for trials held in this court is a core element of the precedent set in *Jordan*. Unless there is a valid legal basis for distinguishing this component of the holding, I am bound to apply it.

[132] Because *Jordan* was decided in the criminal context its narrow *ratio decidendi* – the express or implied legal conclusions necessary to the result on the facts of the case – is silent on whether the same presumptive ceiling applies to non-criminal proceedings. Provincial regulatory proceedings are not even mentioned in *Jordan*, *Williamson* or *Cody*.

[133] The binding precedent set in *Jordan* extends beyond the narrow *ratio* and includes the “wider circle of analysis which is obviously intended for guidance and which should be accepted as authoritative”: *R. v. Henry*, [2005] 3 S.C.R. 609, paras. 52-59. The question, then, is whether anything in the “wider circle of analysis” implies a conclusion on this issue.

[134] As the majority explained in *Jordan*, the concept of a presumptive ceiling lies at the very heart of the new framework [at para. 49]:

The most important feature of the new framework is that it sets a ceiling beyond which delay is presumptively unreasonable. For cases going to trial in the provincial court, the presumptive ceiling is 18 months from the charge to the actual or anticipated end of trial. For cases going to trial in the superior court, the presumptive ceiling is 30 months from the charge to the actual or anticipated end of trial. [emphasis added]

[135] The ceilings serve as a line in the sand that shifts only under narrowly drawn rules so as “to give meaningful direction to the state on its constitutional obligations” and to incent everyone involved to take active, meaningful and sustained steps to expedite proceedings. The stated goal of the new framework is to transform the “culture of complacency towards delay...in the criminal justice system” that had developed over time largely because the *Morin* framework was “too unpredictable, too confusing, and too complex”: *Jordan*, paras. 38 to 41, 50.

[136] The new framework may have gutted the *Morin* edifice and rebuilt it from the foundation up but the Supreme Court did not pick up stakes and build on entirely new legal ground. The legal interests underlying the s. 11(b) right remain the same, and many of legal rules governing s. 11(b) applications continue to apply. It is a safe assumption the Supreme Court was aware the *Morin*

framework applied to Part I proceedings with some modifications and intended the new framework to apply in the same way, *mutatis mutandis*. This includes its “most important feature”, the presumptive ceiling.

[137] However, it is important to distinguish between the *concept* of a presumptive ceiling and the *number* chosen for it in a particular procedural context. While it is clear the concept applies in Part I proceedings, it is not at all clear the number does. The majority’s detailed explanation of the methodology used to set the ceilings makes it clear its focus was the criminal process [paras. 52 and 53]:

First, it takes as a starting point the *Morin* guidelines. In *Morin*, this Court set eight to ten months as a guide for institutional delay in the provincial court, and an additional six to eight months as a guide for institutional delay in the superior court following an accused’s committal for trial. Thus, under *Morin*, a total of 14 to 18 months was the measure for proceedings involving both the provincial court and the superior court.

Second, the presumptive ceiling also reflects additional time to account for the other factors that can reasonably contribute to the time it takes to prosecute a case. These factors include the inherent time requirements of the case and the increased complexity of criminal cases since Morin. In this way, the ceiling takes into account the significant role that process now plays in our criminal justice system. [emphasis added]

[138] In *Morin*, Sopinka J. explained what “inherent time requirements of the case” means:

As well as the complexity of a case, there are inherent requirements which are common to almost all cases. The [Crown] respondent has described such activities as “intake requirements”. Whatever one wishes to call these requirements, they consist of activities such as retention of counsel, bail hearings, police and administration paperwork, disclosure, etc. All of these activities may or may not be necessary in a particular case but each takes some amount of time. As the number and complexity of these activities increase, so does the amount of delay that is reasonable. Equally, the fewer the activities which are necessary and the simpler the form each activity takes, the shorter should be the delay. The respondent suggests that this Court should set an administrative guideline for such an “intake period”. We decline to do so on the basis of the record that is before us. The length

of time necessary will be influenced by local practices and conditions and should reflect that fact. No doubt the intake period in a particular region will tend to be the same for most offences. There may, however, be a significant variation between some categories of offences, such as between summons cases and cases of arrest. This will mean that courts in a particular region will tend to hear the same evidence repeated with each s. 11(b) application. It will then become apparent that this period falls within a range of a certain number of weeks or months. A de facto administrative guideline will thus develop that will reflect conditions in that region. [emphasis added]

[139] As the above passage makes clear, just as the actual “inherent time requirements” varies across cases, the mean “inherent time requirements” can vary across *categories* of cases. Indeed, the categorization cited as the example – “between summons cases and cases of arrest” – is thematically related to the categorization we are concerned with in this case. It is also clear the “reasonable time requirements of the case will increase proportionally to a case's complexity”: *Jordan*, para. 88.

[140] The above quoted passages from *Jordan* leave no room for doubt that the ceilings were determined based on the “inherent time requirements” of *criminal* cases. The language used throughout the whole decision evinces a clear and exclusive focus on criminal proceedings,^{ix} starting with the introductory paragraphs:

Timely justice is one of the hallmarks of a free and democratic society. In the criminal law context, it takes on special significance. Section 11(b) of the *Canadian Charter of Rights and Freedoms* attests to this, in that it guarantees the right of accused persons “to be tried within a reasonable time”.

Moreover, the Canadian public expects their criminal justice system to bring accused persons to trial expeditiously. As the months following a criminal charge become years, everyone suffers. Accused persons remain in a state of uncertainty, often in pre-trial detention. Victims and their families who, in many cases, have suffered tragic losses cannot move forward with their lives. And the public, whose interest is served by promptly bringing those charged with criminal offences to trial, is justifiably frustrated by watching years pass before a trial occurs.

An efficient criminal justice system is therefore of utmost importance. The ability to provide fair trials within a reasonable time is an indicator

of the health and proper functioning of the system itself. The stakes are indisputably high. [emphasis added]

[141] Another sign the majority calibrated the ceilings to the specifications of the criminal process is that it conducted and relied on a “qualitative review of nearly every reported s. 11(b) appellate decision from the past 10 years, and many decisions from trial courts” which were read “with the new framework in mind...to get a rough sense of how the new framework would have played out in some past cases.” The Court noted that “in the seminal case of *Askov*, the delay was in the range of 30 months, as it was in *Godin* some 19 years later, and in both cases, this Court found the delays to be unreasonable.” By all appearances, the cases that were “qualitatively reviewed” were all criminal cases.

[142] The primary objective of the new framework is behavioural change. The specific numbers the Court chose for the new presumptive ceilings were not the intended change agent so much as the very idea of conditioning compliance with s. 11(b) on time limits and narrowly drawn criteria for departing from those limits designed to incent expeditious conduct.

[143] Underscoring this point, the *Jordan* Court made it clear there is “little reason to be satisfied” with the current ceilings. “This is a long time to wait for justice”, the Court observed, but this reflects “the realities we currently face” and, as the Court added, “[w]e may have to revisit these numbers and the considerations that inform them in the future.”

[144] The “realities we currently face” in the Part I process are different realities than the ones reflected in the ceilings set in *Jordan*. Had the Supreme Court used data derived exclusively from Part I and its analogues in the other provinces, its methodology would have generated a lower number of months than 18.

[145] Accordingly, I find the lower overall inherent time requirements of Part I proceedings furnishes a valid legal basis to distinguish *Jordan* to the extent of allowing for a lower presumptive ceiling. A lower ceiling is required to ensure fidelity to the broader principles announced in *Jordan* in this very different procedural context.

[146] In reaching this conclusion I draw comfort from the guidance concerning a lower court’s authority to depart from otherwise binding constitutional precedent delivered in *Canada (Attorney General) v. Bedford*, 2013 SCC 72, paras. 42-46:

...a trial judge can consider and decide arguments based on *Charter* provisions that were not raised in the earlier case; this constitutes a new legal issue. Similarly, the matter may be revisited if new legal issues are raised as a consequence of significant developments in the

law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate.

The intervener...argues that the common law principle of *stare decisis* is subordinate to the Constitution and cannot require a court to uphold a law which is unconstitutional. It submits that lower courts should not be limited to acting as "mere scribe[s]", creating a record and findings without conducting a legal analysis.

I agree...however, a lower court is not entitled to ignore binding precedent, and the threshold for revisiting a matter is not an easy one to reach. In my view, as discussed above, this threshold is met when a new legal issue is raised, or if there is a significant change in the circumstances or evidence. This balances the need for finality and stability with the recognition that when an appropriate case arises for revisiting precedent, a lower court must be able to perform its full role.

[147] Here I am not asked to revisit precedent so much as to determine how it applies in a context the higher court did not contemplate when setting it. But the broader principle is the same. The very different procedural and substantive context in which Part I proceedings take place is functionally equivalent to a change in circumstances that “fundamentally shifts the parameters of the debate”.

[148] Accordingly, I conclude the *Jordan* Court set the presumptive ceilings to meet the requirements of criminal proceedings and implicitly left open the possibility that a different ceiling would apply in this very different context. I have also concluded the ceiling should be lower than the 18-month ceiling applicable in criminal cases. The question of whether the presumptive ceiling should be different for Part III *POA* proceedings is not before me and I refrain from commenting on it.

(b) Decision Not to “Set” New Ceiling

[149] As I will explain, I find the appropriate presumptive ceiling for Part I proceedings is in the 13 to 15-month range and for the purpose of deciding this appeal the applicable presumptive ceiling is 14 months. For several reasons, however, I decline to “set” a specific presumptive ceiling for Part I cases generally.

[150] First, I lack the institutional resources required for the jurisprudential policy-making exercise the Supreme Court conducted in *Jordan*, including the “qualitative review of nearly every reported s. 11(b) appellate decision from the past 10 years, and many decisions from trial courts” which informed the setting

of the ceiling: *Jordan*, para. 106. I feel comfortable identifying a likely range but not with identifying a specific number, especially because the evidence before me relates almost exclusively to York Region rather than the Province as a whole.

[151] Second, a crucially important player was not represented in the appeal before me: the Attorney General of Ontario. The appellant, York Region, has tendered evidence relating to York Region and has made submissions from the perspective of its particular delegated role in the Part I process. In the absence of submissions from the Attorney General it would be improvident for me to “set” a new presumptive ceiling for Part I generally.

[152] Third, I am mindful that the *POA* appellate scheme assigns the function of charting broader legal policy in this field to the Court of Appeal for Ontario. In the present case there is also an important practical reason why that Court would be better placed to set a presumptive ceiling for Part I matters were it to otherwise see fit to do so: the Attorney General of Ontario regularly seeks and is granted leave to intervene in *POA* appeals that reach the Court of Appeal.

[153] Finally, as the Supreme Court explained in *Jordan*, it set presumptive ceilings “in order to give meaningful direction to the state on its constitutional obligations.” Setting a presumptive ceiling for a statutory procedural scheme to give “meaningful direction to the state on its constitutional obligations” states a general principle of constitutional entitlement. It would amount to a determination *in rem*, akin to a declaration in the remedial sense. Legal judgments of that character are generally the purview of higher courts.

[154] Promulgating frameworks and setting ceilings is the responsibility of senior appellate courts, not judges of this court.

(c) Identifying the Ceiling to Apply in This Case

[155] In this procedural context the point at which delay is presumptively unreasonable is much closer to the respondent’s proposed 14-month ceiling than it is to the 18-month ceiling set in *Jordan*. In *Andrade*, Libman J. examined the application of the *Morin* framework in Part I proceedings comprehensively and he concluded the allowable intake period – the time between issuance of the ticket and the scheduling of the trial date – was 60 days and the allowable institutional delay was 8 to 9 months. Both before and after *Andrade*, provincial offences trial courts took different approaches to delays exceeding the 11 to 12-month range and, more particularly, to whether the absence of prejudice justified longer delays: *Andrade*, para. 36. Despite these uncertainties, the legal principles governing s. 11(b) claims in Part I matters when *Jordan* was decided can be distilled:

- (1) in general, the *Morin* framework of analysis applied in all *POA* matters, including Part I;
- (2) the typical allowable “intake period” of 60 days was shorter than the intake period allowed a criminal case, reflecting the more streamlined procedural steps required to set a trial date in Part I matters;
- (3) the “administrative guidelines” governing the allowable period of institutional delay were the same as in criminal cases, or possibly a little shorter;
- (4) apart from the above, the “inherent time requirements” of Part I cases were otherwise lower than in criminal cases and, in particular, the process entailed fewer opportunities for procedures such as pre-trial applications that would count as “neutral time” under *Morin*; and,
- (5) the relative absence of prejudice in Part I cases allowed for more flexibility in determining the constitutional limit for delay.

[156] I have already explained why the fifth point above is no longer a relevant consideration. For the purpose of determining how much lower the presumptive ceiling should be for Part I, the main considerations are that Part I requires less time for intake, the adjudications are much simpler and there are far fewer procedural add-on steps that would have been characterized as “neutral time” under the *Morin* framework. The potential for these additional procedural steps is baked into the ceilings set in *Jordan*. Part I requires a buffer too, but a substantially shorter one.

[157] In light of those considerations, I find the appropriate presumptive ceiling for Part I proceedings is in the 13 to 15-month range and I have applied a 14 month ceiling to determine the result in this appeal.

(d) Reasons for Exercising Discretion to Decide Constitutional Issue

[158] Given that I have found the net delay was well below even the respondent’s proposed 14-month ceiling, it was not necessary to decide the constitutional issue raised by the parties to decide the appeal. For analogous reasons to those set out in *R. v. Lloyd*, 2016 SCC 13, paras. 14 to 20, however, it was open to me to decide the issue (subject to the limits expressed above) and I have done so for two reasons. First, *POA* trial courts routinely apply the 18-month ceiling which, as I have found, is too high to adequately protect Part I defendants’ constitutional right to be tried within a reasonable time. Second, the

issue was fully argued and a first level determination might be of assistance should this case reach a higher court.

[159] Meanwhile, my legal conclusions concerning the application of *Jordan* in Part I POA matters should be read with the above comments in mind. In proceedings commenced under Part I, POA trial courts should not apply the 18-month ceiling and may apply the 14 month ceiling but are not bound by that particular number. This is not ideal from the point of view of certainty in the application of the law but it is preferable to the alternative of continuing to apply a ceiling that is too high to adequately vindicate constitutional rights.

IV CONCLUSION AND RESULT

[160] The net delay in this case was 326 days (10 months and 22 days) which is well below the 14-month ceiling I have found applies and as such is presumptively reasonable.

[161] Because this case was concluded before *Jordan* was released, the respondent need not demonstrate it took meaningful steps that demonstrate a sustained effort to expedite the proceedings to rebut this presumption: *Jordan*, paras. 82 and 99.

[162] The respondent does have to demonstrate the case took markedly longer than it reasonably should have, however: *Jordan*, para. 82. From the point of view of total delay in fact it did. But the defence was responsible for the majority of that delay and the net delay does not reflect a case that took markedly longer than it should have.

[163] It follows there was no s. 11(b) breach and Radtke J.P. erred in concluding otherwise. I therefore allow the appeal, set aside the stay of proceedings and direct a new trial.

Released: November 21, 2017

Signed: “Justice John McInnes”

ⁱ *Rules of the Ontario Court (Provincial Division) in Provincial Offences Proceedings*, R.R.O. 1990, Reg. 200

ⁱⁱ The suspension of the ERM is likely to increase the percentage of cases in which a trial is requested, just as it will probably increase the number of cases in which the defendant simply pays the set fine. This does not mean there will be any appreciable increase in the number of trials that are actually held, however. Common sense

suggests the cases that would have resolved at ERM will now resolve by way of a guilty plea at trial or in advance in accordance with the second option, or by payment of the set fine.

ⁱⁱⁱ According to the evidence, the appellant received approximately 14,180 disclosure requests for Part I charges in 2014 and 23,430 in 2015. In those same two years there were 44,824 and 46,598 trial requests, respectively. The appellant reasonably suggests the likely explanation for the sizeable increase in 2015 is that beginning in January of that year the statement advising defendants of their right to request disclosure was added to the *Notice of Trial* form. It appears the rate of disclosure requests is continuing to climb: in 2016 there were about 29,000 disclosure requests and while there is no evidence as to the number of Part I trial requests for last year, if that number rose in the same proportion as it did the previous year, it would be 48,443, in which case disclosure was requested about 60% of the time. I note the above calculations assume that a single disclosure request in respect of two (or more) charges is counted as two (or more) requests. If that assumption is incorrect and one request for multiple charges counts as one request, the proportion of cases in which there is a disclosure request would be even higher.

^{iv} What the evidence does establish is that of the 147,003 Part I charges filed in York Region in 2015, only 46,598 led to trial requests and 39,482 led to a request for an early resolution meeting. This means the remaining 60,973 charges, about 42% of Part I charges that year, ended with the defendant simply paying the set fine. Since some or all of those fine payments end up in the coffers of York Region (according to the *Memorandum of Understanding*) it would seem that a significant proportion of Part I charges infuse rather than consume resources, although to be clear I draw no inference from this.

^v The *POA* does not confer any general power of arrest. Some provincial regulatory statutes create a power of arrest applicable in certain situations or to particular offences. For example, s. 217(2) of the *HTA* authorizes peace officers to arrest without warrant any person who they have reasonable grounds to believe has committed certain offences (e.g. operating vehicle while licence suspended, stunt driving) or who fails to comply with certain duties (e.g. a driver failing to identify himself when unable to produce a driver's licence). Almost invariably, charges associated with an arrest power would be commenced under Part III because of the available penalties. However, in rare situations an individual could be arrested for a charge that is ultimately commenced under Part I. According to the *LCO Report*, “[i]n 2009, of the approximate 2.1 million provincial offence charges that were received by the court under Parts I and III, there were only 4,009 bail hearings (or 0.002% of all charges received). At those hearings, bail was denied in 426 cases involving Part III offences. Bail was allowed in all 18 Part I bail hearings: *LCO Report*, p.100 [emphasis added].

^{vi} In *R. v. Vellone*, [2009] O.J. No. 1607 (CA, in chambers), Gillese J.A. granted leave to appeal in a case on two “very serious and important questions of law”, one of which was “[h]ow is s. 11(b) of the *Charter* to be interpreted in the context of a Part I prosecution under the *Provincial Offences Act*? In particular, what are the guidelines for

intake delay and institutional delay; does the presumption of prejudice apply to such a proceeding... [emphasis added]: paras. 2-3. The *Vellone* appeal was decided on another basis, however, and this issue was left for another day: *R. v. Vellone*, 2011 ONCA 785, paras. 3 and 30. At around the same time, Cronk J.A. granted leave on the same question of law in *Toronto (City) v. Andrade*, 2011 ONCA 739, but the City of Toronto later abandoned its appeal and so the issue remained unresolved.

^{vii} see: https://www.attorneygeneral.jus.gov.on.ca/english/POA%20ConsultationPaper%20Final_ENG.html

^{viii} The short time lines Libman J. was referring to are the 15 days the defendant has to respond to his/her ticket, the 15 days to appear before a justice upon becoming aware of a conviction without a hearing, in order to seek a re-opening and have a trial on the merits (s. 11(1)); the certificate of offence issued by a police officer must be filed in the court office "as soon as is practicable", a period of which is not to be later than seven days after service of the offence notice or summons (s. 4); and the clerk of the court is required to provide notice of trial to the defendant and prosecutor "as soon as is practicable" following the defendant's filing of his/her notice to appear in court for trial (s. 5(2)).

^{ix} The majority explicitly referred to the "criminal" process in paras. 1, 2, 3, 5, 19, 20, 22, 23, 25, 26, 27, 28, 40, 43, 45, 53, 62, 94, 105 and 115. Implicit reference to it is made throughout.