

CANADA / JUDGMENT

R. v. Hillier

2026 ONCA 202

COURT

Court of Appeal for Ontario

DECIDED

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COA-24-CR-1248

Judges

van Rensburg, Katherine; Paciocco, David M.; Wilson, Darla A.

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COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Hillier, 2026 ONCA 202

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van Rensburg, Paciocco and Wilson JJ.A.

BETWEEN

His Majesty the King

Appellant

and

Randall Hillier

Respondent

Étienne Lacombe and Jeremy Tatum, for the appellant

Mark Ertel and Jon Doody, for the respondent

Heard: September 22, 2025

On appeal from the stay entered by Justice Kerry Lee McVey of the Superior Court of Justice, on November 14, 2024, with reasons reported at 2024 ONSC 6300.

van Rensburg J.A.:

A. Overview [1] This is a Crown appeal from a stay of proceedings entered pursuant to s. 24(1) of the Charter for a violation of the respondent's s. 11(b) right to be tried within a reasonable time.

[2] On March 28, 2022, the respondent, Randall Hillier, was charged with obstructing or resisting a peace officer, counselling an indictable offence, mischief, and assaulting a peace officer. The charges were laid in connection with the respondent's alleged participation in the Freedom Convoy in downtown Ottawa in the winter of 2022.

[3] The proceedings commenced in the Ontario Court of Justice (the "OCJ"), but the respondent ultimately elected to be tried by a judge and jury in the Superior Court (the "SCJ"). The trial was set for January 27 to February 21, 2025, leading to an anticipated total delay of 1,061 days, or 34 months and 27 days. The respondent brought a s. 11(b) application in August 2024, and it was heard in October 2024. After deducting 65 days for defence delay, and 40 days for a discrete exceptional circumstance, the application judge found a remaining delay of 31 months and 13 days. As this quantum exceeded the 30-month presumptive ceiling applicable to matters in the SCJ (see *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631), the application judge granted the s. 11(b) application and stayed the proceedings.

[4] The Crown raises two issues on appeal. First, the Crown submits that the application judge erred in refusing to attribute an additional 101 days to defence delay because the respondent refused to attend a judicial pre-trial conference ("JPT") in the OCJ or to elect his mode of trial until he received disclosure of video footage of his alleged assault on a peace officer that was captured by Parliament Hill security cameras (the "Parliament Hill video"). Second, the Crown asserts that the application judge erred in her approach to the delay resulting from the release of the Supreme Court's decision in *R. v. Haevischer*, 2023 SCC 11, [2023] 1 S.C.R. 416. The Crown submits that 93 more days should have been attributed to this exceptional circumstance. If either ground of appeal is successful, the remaining delay will fall within

the presumptive ceiling set in Jordan.

- [5] For the reasons that follow, I would give effect to the Crown's second ground of appeal. As I will explain, the application judge erred by not according a sufficient number of days to the exceptional circumstance resulting from the need to reconsider the defence motion for a change of venue (which had been summarily dismissed), in light of the *Haevischer* decision. The application judge erred in concluding that the Crown had not made reasonable efforts to mitigate the delay resulting from this unforeseen event. On the evidence that was before the application judge, and applying the correct principles, I would deduct an additional 93 days from the net delay on account of this exceptional circumstance. This brings the remaining delay under the Jordan threshold.
- [6] Although success on the second ground is determinative of the appeal, for the sake of completeness, I will also address the first ground and explain why I have concluded that the application judge did not err in failing to characterize as defence delay the refusal of the defence to participate in a JPT in the OCJ or to make an election until after the Parliament Hill video was available.

B. The Relevant Procedural History [7] The respondent was charged on March 28, 2022. Throughout the summer and fall of 2022, the Crown repeatedly sought to schedule a JPT in the OCJ for the purpose of discussing pretrial motions, a trial time estimate and outstanding disclosure issues. Defence counsel refused to schedule a JPT or to have the respondent make his election until after he received the Parliament Hill video. The Crown gradually provided disclosure over the course of 2022; on August 23 and 24, it indicated in writing that it considered the disclosure that had been provided to be sufficient for a JPT and listed several available JPT dates for September. The respondent maintained his refusal. On October 26, 2022, the Crown disclosed the Parliament Hill video. On December 2, 2022, the respondent elected to be tried by a judge and jury in the SCJ.

- [8] At the first JPT in the SCJ on January 19, 2023, the respondent informed the Crown of his intention to bring a motion for a change of venue from Ottawa to another court in the SCJ's East Region. The hearing of the motion was scheduled for April 27 and 28, 2023.
- [9] On April 26, 2023, Phillips J. summarily dismissed the change of venue motion without hearing submissions. Two days later, on April 28, 2023, the Supreme Court released its decision in *Haevischer*, which modified the standard for summarily dismissing an application in criminal proceedings by requiring a finding that the application is "manifestly frivolous". On June 7, 2023, after inviting and considering submissions from the parties, Phillips J. concluded that his original analysis did not conform to the new standard under *Haevischer*. He set aside the dismissal and permitted the respondent to renew his motion and to have it heard by another justice. Two days later, the change of venue motion was rescheduled for a hearing on September 19, 2023.[1]

- [10] While the change of venue motion was pending, the Crown asked defence counsel three times – in February, May and June 2023 – to schedule a second JPT in the SCJ to discuss a trial time estimate and to set provisional trial dates in Ottawa. Defence counsel refused to do so.
- [11] After a full hearing on September 19, 2023, and for written reasons issued on September 25, 2023, London-Weinstein J. dismissed the respondent's change of venue motion. The parties then scheduled a second JPT for November 30, 2023. The appellant discharged his counsel and represented himself at the JPT. Shortly thereafter, the parties agreed to schedule a four-week trial before a judge and jury from January 27 to February 21, 2025, with Crown pre-trial motions scheduled for September 3 to 6, 2024, and a follow-up JPT on February 12, 2024 to discuss whether the respondent wished to bring any pretrial motions.
- [12] The respondent retained counsel to argue a s. 11(b) application, and on July 24, 2024 counsel advised the Crown of his intention to bring the application. The application was heard on October 3, 2024.

C. The Application Judge's Decision [13] At the time the application was heard, the anticipated total delay from the date of the charges to the end of trial was 1,061 days, or 34 months and 27 days.

1. Defence Delay [14] The application judge addressed five areas of alleged defence delay. The Crown argued that the respondent unilaterally and illegitimately caused delay by: (1) refusing to schedule a JPT in the OCJ until after the Parliament Hill video was disclosed; (2) refusing to accept the first date offered for the change of venue motion in the SCJ; (3) refusing to schedule provisional trial dates pending the outcome of his change of venue motion; (4) refusing to attend a second JPT pending the outcome of his change of venue motion so the parties could immediately set trial dates once in receipt of the court's ruling; and (5) failing to provide timely notice of the s. 11(b) application.
- [15] The application judge accepted the Crown's argument with respect to one period of alleged defence delay (i.e., item (4) above): the 66-day period between September 25, 2023 (when the change of venue decision was dismissed by London-Weinstein J.) and November 30, 2023 (when the parties had their second JPT in the SCJ).[2] She held that it was unreasonable for defence counsel to refuse to attend a second JPT in the SCJ to discuss trial and pretrial motion dates while the change of venue motion was pending. The Crown had suggested a second JPT for the purpose of discussing trial estimates on February 13, 2023. On May 3, 2023, the Crown again wrote to defence counsel, requesting cooperation in setting a JPT and expressing concern about the passage of time and the respondent's right to a timely trial. It was not until the Crown's third request on June 13, 2023 that the Crown received a response from defence counsel indicating that, while he too was concerned about delay, it was "putting the cart before the horse" to schedule a JPT without knowing which jurisdiction the trial was proceeding in. The application judge rejected this position. She concluded that there were things that could have been done at a second JPT that would have had significant

value regardless of the ultimate venue in which the trial proceeded. If defence counsel had attended a JPT before September 25, 2023, the parties would have been able to immediately set trial and pretrial motion dates after the release of the decision on the change of venue motion. She observed that attending a second JPT at that time was “precisely the type of proactive step envisioned in Jordan” and found that “counsel should have been willing to take all reasonable and collaborative steps to mitigate delay.”

- [16] The application judge’s refusal to attribute defence delay in respect of items (2) and (5) noted above is not relevant to this appeal and, accordingly, I do not address her reasons on those issues here. However, her reasons for declining to deduct defence delay in relation to item (3) (i.e., the defence’s refusal to schedule provisional trial dates pending the outcome of the change of venue motion) are indirectly relevant to the second ground of appeal, and I address them further below in my discussion of discrete exceptional circumstance delay.
- [17] The Crown appeals the application judge’s refusal to attribute any delay to the defence as a result of the latter’s insistence on receiving the Parliament Hill video before proceeding with a JPT in the OCJ (i.e., item (1) noted above).
- [18] The period in question is 101 days, running from August 23, 2022 (the date the Crown took the position that disclosure was sufficient for purposes of a JPT and asked the defence to accede to one) to December 2, 2022 (the date the respondent elected trial by a judge and jury in the SCJ). In respect of this period, the application judge concluded that the “real issue” was whether it was reasonable for the respondent to wait for the video before making his election. She reasoned that, if he was entitled to await the video before electing, then the matter would have remained in the OCJ for the same duration regardless of whether his counsel attended for a JPT in the OCJ.
- [19] In determining this issue, the application judge considered five factors. First, she observed that the respondent’s approach to disclosure was responsive and reasonable. Defence counsel consistently maintained his position that the respondent could not make his election without viewing the Parliament Hill video. Once the video was disclosed on October 26, 2022, and despite other disclosure remaining outstanding, the respondent formally made his election on December 2, 2022. Although the application judge noted that the respondent’s election could have been made earlier, she was not prepared to find that five weeks was necessarily unreasonable.
- [20] Second, the application judge concluded that counsel’s decision to wait for the specific Parliament Hill video was justified in the circumstances. Although other videos of the alleged offence had already been disclosed in the summer and early fall of 2023, they emanated from open source searches, such that the makers of the videos were unknown. The application judge observed that the video footage from Parliament Hill could easily be authenticated by the Crown and would arguably constitute the most reliable form of video evidence at trial.

- [21] Third, the application judge did not accept that the poor quality of the video was relevant. Although Crown counsel advised at an early stage that the video was of poor quality, very little information was given to defence counsel upon which he could have satisfied himself that the video was unlikely to impact the respondent's election.
- [22] Fourth, the application judge was satisfied that defence counsel was not intentionally delaying the proceedings, nor did his conduct reflect a "marked indifference" towards delay.
- [23] Finally, the application judge emphasized that there was a difference between the defence refusing to attend a JPT or to set a trial date without full disclosure, and the decision to wait for material disclosure before electing a mode of trial. The application judge was satisfied that the Parliament Hill video was "truly material" to the respondent's election and that waiting for it was therefore legitimate defence conduct.
2. Exceptional Circumstances [24] The application judge considered the Crown's argument that the need to reconsider the change of venue motion was a discrete exceptional circumstance, and that therefore the delay of about 5 months between April 28, 2023 (the date Haevischer was released) and September 25, 2023 (the date the motion was dismissed by London-Weinstein J.) should be deducted from the net delay. The defence argued that because the parties had already prepared their change of venue motion materials and were therefore ready to proceed immediately, any delay resulting from the hearing having to be rescheduled was institutional in nature and not exceptional.
- [25] The application judge agreed with the Crown that the Supreme Court's release of its decision in Haevischer was an exceptional circumstance insofar as it was outside the control of the Crown and could not have been foreseen. However, citing *R. v. Cody*, 2017 SCC 31, [2017] 1 S.C.R. 659, at para. 59, she held that only the delay the Crown could not reasonably mitigate would be deducted.
- [26] The application judge deducted the period of 40 days between April 28, 2023 and June 7, 2023 (when Phillips J. set aside his order dismissing the change of venue motion) as delay emanating from the exceptional circumstance posed by the release of Haevischer. She accepted that, with respect to this period, the Crown had acted reasonably in an effort to mitigate the delay, by promptly turning its mind to the substantive issues that arose from the decision's release and providing the court with written submissions.
- [27] With respect to the remaining period between June 7, 2023 and September 25, 2023 (when London-Weinstein J. released her decision), the application judge stated:

In my view, in the circumstances, the Crown did not do all it could to ensure the motion was re-heard promptly. Reasonably available steps include prompt resort to case management processes to seek the assistance from the Court, where appropriate: *Jordan*, at para. 70. The Crown did not advise trial coordination of the unique circumstances that had arisen such that an earlier date was required, nor did it bring the matter forward to address the urgency on the record. The Crown simply accepted the later of the three dates offered by trial coordination. The Crown is

“not required to establish the steps it took were ultimately successful – rather, just that it took reasonable steps in an attempt to avoid the delay”: Cody, at para. 59. As a result the Crown is not required to show that earlier dates would necessarily have been made available, only that it tried to secure that result. The Crown did not make those efforts despite the circumstances clearly calling for it, in my view.

[28] Although the application judge acknowledged that the record did not disclose an attitude of complacency towards delay, she found that the Crown could not satisfy the second prong of the test for exceptional circumstances in relation to the period between June 7, 2023 and September 25, 2023. This second prong required the Crown to show that it could not reasonably remedy the delays emanating from the discrete event in question. Accordingly, she did not deduct any of that additional period as delay resulting from an exceptional circumstance.

[29] After deducting 65 days for defence delay and 40 days for the exceptional circumstance, the remaining delay was 956 days, or 31 months and 13 days. Since this exceeded the 30-month presumptive ceiling, the application judge stayed the proceedings.

D. Issues [30] The Crown raises two grounds of appeal. First, the Crown submits that the application judge erred by failing to characterize any period in which the matter was in the OCJ as defence delay. The Crown contends that the respondent’s refusal to schedule a JPT in the OCJ because disclosure of the Parliament Hill video was outstanding should have resulted in the deduction of 101 days as defence delay.

[31] For its second ground of appeal, the Crown asserts that the application judge erred in her approach to the discrete exceptional circumstance arising from the release of Haevischer. The Crown contends that, instead of deducting only 40 days on account of this exceptional circumstance, the application judge ought to have deducted the additional 93 days between the date a new hearing of the motion was ordered and the first available court date for the hearing. In total, the Crown argues that 133 days should have been deducted to account for the exceptional circumstance in this case.

E. ANALYSIS [32] On appeal from an order made on a s. 11(b) application, deference is owed to a trial judge’s underlying findings of fact, while characterizations of periods of delay and the ultimate decision concerning whether there has been unreasonable delay are reviewable on a standard of correctness: *R. v. Pauls*, 2020 ONCA 220, 149 O.R. (3d) 609, at para. 40, *aff’d* *R. v. Yusuf*, 2021 SCC 2, [2021] 1 S.C.R. 5, at para. 2.

[33] A trial judge’s determinations about what occurred and how that is to be understood in the local context constitute findings of fact that are owed a high level of deference on appeal. These determinations are reviewed on a standard of palpable and overriding error: *R. v. Coates*, 2023 ONCA 856, 169 O.R. (3d) 401, at paras. 6, 54, leave to appeal refused, [2024] S.C.C.A. No. 41.

- [34] First, I will deal with the defence delay ground of appeal. Then I will turn to the ground of appeal that determines the result of this appeal: that the application judge erred by declining to attribute additional days to the exceptional circumstance posed by the release of the Haevischer decision, after concluding that the Crown had not taken reasonable steps to have the motion rescheduled promptly.
1. Defence Delay [35] The Crown asserts that the application judge erred by not treating as defence delay the delay resulting from the respondent's refusal to elect or to attend a JPT in the OCJ until after the respondent received the Parliament Hill video. This is the period between August 23, 2022, when the Crown indicated that disclosure was substantially complete, and December 2, 2022, when the respondent elected to be tried in the SCJ.
- [36] There are two prongs to the Crown's argument. First, the Crown submits that the application judge's refusal to attribute any delay to the defence for this period is inconsistent with this court's recent decision in *R. v. Anderson*, 2025 ONCA 172, 446 C.C.C. (3d) 476, leave to appeal refused, [2025] S.C.C.A. No. 218. The Crown says that *Anderson* confirms that "disagreements regarding disclosure and being unsure how to elect do not entitle an accused to forego a JPT." It argues that, regardless of which party is right about the sufficiency of disclosure in this case, *Anderson* stands for the principle that JPT judges have case management powers that can help avoid delay, and therefore the defence in this case ought to have agreed to the Crown's repeated requests for a JPT in the OCJ. Second, the Crown takes issue with the application judge's view of the Parliament Hill video as material to the respondent's election.
- [37] The s. 11(b) issue in *Anderson* that the Crown invokes here was whether any of the seven-month "intake" period between when charges were laid, and when trial dates were set in the OCJ, constituted defence delay. The defence position was that the entire delay was due to inadequate Crown disclosure, while the Crown pointed to the defence refusal to schedule a JPT and to elect the mode of trial. Code J. (ad hoc), echoing the views of the trial judge, observed that there were a number of issues, including disclosure problems, that would have benefited from an early JPT. The trial judge had apportioned responsibility for two months of the seven-month delay equally between the Crown and the defence, resulting in a deduction of one month from the total delay as defence delay caused by the failure to schedule an early JPT. Code J. was of the view that the trial judge's conclusion was reasonable and disclosed no error, and that his approach was entirely consistent with various cases in our court that encourage both parties to proactively take steps to move a case along: see paras. 15-19.
- [38] In my view, the Crown's reliance on *Anderson* in this appeal is misplaced.

- [39] In *Anderson* the lower court concluded, and this court agreed, that a JPT would have helped to avoid delay. The application judge in that case had made a finding of fact that “delays in this case regarding election, conflict, severance, and disclosure could have been dealt with much sooner in the process with the intervention of a judicial officer in a judicial pre-trial.” With respect to disclosure in particular, the outstanding items of disclosure were in the possession of the police.
- [40] In this case, by contrast, the application judge reasonably concluded that having a JPT would not have advanced the case. This was not because she believed that a JPT in the OCJ would never assist in avoiding delay in a case that would ultimately be tried in the SCJ; it was because she found it was reasonable for defence counsel to wait for the video before the respondent made his election. The parties did not disagree about whether the Parliament Hill video would be disclosed and there was nothing a JPT judge could have done to speed up the disclosure of the video, which was held up due to Parliamentary procedures. As the application judge observed: “If Mr. Hillier was entitled to wait for the video disclosure before making his election, then whether a judicial pretrial in the Ontario Court of Justice took place in the interim becomes neither here nor there in terms of delay. In other words, Mr. Hillier’s matter would have remained in the Ontario Court of Justice for the same duration regardless of whether his counsel attended for a judicial pretrial. The delay would be the same either way.”[3]
- [41] To be characterized as defence delay, the delay must (1) be solely or directly caused by the accused; and (2) flow from illegitimate defence action, being actions not taken to respond to the charges: *Cody*, at para. 30. The fatal flaw with the Crown’s argument in the court below and on appeal is that it ignores the causation element in the definition of defence delay. Whether or not a JPT had taken place in the OCJ, the cause of the delay before the respondent could make his election was the necessary wait for the Parliament Hill video. For this reason, the application judge reasonably concluded that a JPT in the OCJ would not have made a difference.
- [42] By contrast, and consistent with the exhortations of this court in *Anderson*, the application judge did attribute a period of delay to the defence for refusing to proceed to a second JPT in the SCJ after the election had been made and while the change of venue motion was pending. Causation was made out in respect of that period of delay because, if the defence had acceded to a second JPT while the change of venue motion was pending, the parties would have been in a position to select trial and pretrial motion dates immediately upon the release of the change of venue motion decision; instead, they had to wait until after the next JPT was held, more than two months later, to set those dates.
- [43] The Crown’s second argument related to this ground of appeal impugns the application judge’s finding that the Parliament Hill video constituted disclosure that was material to the respondent’s election decision – in other words, that the delay before the respondent made his election constituted legitimate defence conduct.

- [44] The Crown contends that the application judge's finding about the reasonableness of the defence conduct is not owed deference because the application judge did not explain why the Parliament Hill video was material. Moreover, the Crown argues that the application judge's findings about the importance of the video to the respondent's election was a finding for which there was no evidence.
- [45] I disagree. In response to the Crown's submission that the Parliament Hill video was not necessary for the respondent's election, and that other videos of the alleged assault which had already been disclosed were sufficient, the application judge noted that the latter videos emanated from open source searches. "Unlike those videos," she reasoned, "the video footage from Parliament Hill could easily be authenticated by the Crown and would arguably constitute the most reliable form of video evidence at trial." This observation was correct, contrary to the Crown's submission on appeal.
- [46] Authenticating a recording involves establishing that it is what it purports to be: *R. v. C.B.*, 2019 ONCA 380, 146 O.R. (3d) 1, at para. 65. Whether a recording, such as the video footage at issue here, can be admitted depends on (1) its accuracy in representing the facts; (2) its fairness and the absence of any intention to mislead; and (3) its verification on oath by a person capable of doing so: *R. v. Creemer*, [1968] 1 C.C.C. 14 (N.S. S.C.(A.D.)), at p. 22. It is true that the person verifying the authenticity of a video need not be its maker and can instead be a person who was "at the scene" when the video was made. However, authentication may prove more stringent where the video purports to depict an event than when it is adduced for a simpler issue, like identity: David M. Paciocco, Palma Paciocco & Lee Stuesser, *The Law of Evidence*, 8th ed. (Toronto: Irwin Law, 2020), at pp. 559-560. In *R. v. Andalib-Goortani*, 2014 ONSC 4690, 13 C.R. (7th) 128, for instance, the court declined to admit a photograph that purported to show an assault by a police officer on a protester because it had been posted anonymously online and its metadata had been removed. In this light, the court expressed unease that "no one [was] prepared to step forward to say, 'I took that photo and it has not been altered or changed [at all]'"': at para. 33.
- [47] This court has no information about the open source videos disclosed by the Crown in this case, or any suggestion they might have been altered. The point, however, is that the Parliament Hill video would clearly be more straightforward for the Crown to authenticate, i.e., by calling as a witness the individual responsible for Parliament Hill security video footage. Moreover, the Parliament Hill video would pose fewer reliability concerns than the videos obtained from open source searches. It is much harder to conceive of an air of reality to an allegation of tampering in relation to this video as compared with such a claim in respect of the open source videos.
- [48] Nor did the application judge's refusal to view the Parliament Hill video during the hearing of the application (i.e., to assess whether the video was indeed of lower quality than those already disclosed) undermine her finding of its materiality to the respondent's election. The issue was the reasonableness of the defence conduct in relation to the disclosure based on what was known at the time, and not the actual quality of the video. It is in this light that the

application judge responded to the Crown submission that the lower-quality Parliament Hill video would have added nothing to the disclosure already made. As she observed, while Crown counsel had advised defence counsel of his understanding that the video was taken from a significant distance and was of poor quality, there was no evidence that the Crown had disclosed the source of his belief, or whether that source had viewed the video or simply drew an inference of poor quality based on the location of the video cameras. She concluded that “[t]here was little information given to [defence] counsel upon which he could have satisfied himself that the video was unlikely to impact Mr. Hillier’s election.”

- [49] Ultimately, there is no reason to interfere with the application judge’s conclusion that the Parliament Hill video was material to the defence election. In concluding that this was legitimate defence conduct, it was appropriate for the application judge to consider the overall conduct of the defence: Cody, at para. 32. She found that, given defence counsel’s willingness to move the matter along once the Parliament Hill video was disclosed – even though other disclosure remained outstanding – he was not intentionally delaying the proceedings. Nor did his position that he could only properly advise his client after seeing the video reflect a “marked indifference” towards delay.
- [50] Contrary to the Crown’s submission, the application judge fully explained why the video was material. She squarely addressed the issue at hand: whether the defence conduct that led to the delay was reasonable. There is no reason to disturb her finding. Accordingly, I would not give effect to this ground of appeal.
2. The Discrete Exceptional Circumstance [51] This ground of appeal concerns the application judge’s treatment of the 93-day period between the date Phillips J. vacated his summary dismissal of the respondent’s change of venue motion (June 7, 2023) and the first date offered by the SCJ for rescheduling that motion (September 8, 2023).
- [52] Two requirements must be met to ground a finding of an “exceptional circumstance” in the s. 11(b) context: (i) the circumstance must be “reasonably unforeseen or reasonably unavoidable”; and (ii) it must be found that the Crown could not “reasonably remedy the delays emanating from” the circumstance once it arises. According to Jordan, at para. 70, to meet this second requirement, the Crown must show “that it took reasonable available steps to avoid and address the problem before the delay exceeded the ceiling.” There is no need for the Crown to demonstrate that these steps were successful; it need only show “that it took reasonable steps in an attempt to avoid the delay.” Further, “the Crown need not exhaust every conceivable option for redressing the event in question to satisfy the reasonable diligence requirement”: Cody, at para. 54.
- [53] The application judge accepted the Crown’s argument that the release of Haevischer – a Supreme Court decision that called into question the correctness of the summary dismissal of the change of venue motion – was a discrete exceptional circumstance in the sense and to the extent that it was out of the Crown’s control and could not have been foreseen. With respect to the period between April 28, 2023 (when Haevischer was released) and June 7,

2023 (when Phillips J. set aside his summary dismissal of the motion), she concluded that the Crown addressed the development with appropriate dispatch by “promptly turn[ing] its mind to the substantive issues that arose from the decision’s release and provid[ing] the Court with written submissions.” Accordingly, she accepted that this 40-day period of delay was deductible on account of an exceptional circumstance.

- [54] With respect to the period that followed, between June 7, 2023 and September 25, 2023 (when London-Weinstein J. released her decision), the application judge concluded that the Crown had not satisfied the second prong of the test for exceptional circumstances. She faulted the Crown for failing to resort to case management, to bring the matter forward to have the urgency noted on the record, or to advise trial coordination of the unique circumstances that had arisen, such that an earlier date was required. She observed that “[t]he Crown simply accepted the later of the three dates offered by trial coordination” and remarked that “the Crown did not do all it could to ensure the motion was re-heard promptly.” The Crown should have recognized such urgency, in her view, because the case had been in the system for “approximately fifteen months” by June 7, 2023, the date when Phillips J. ordered that the new date be set “forthwith”. She stated that, even if the Crown’s efforts would not have proven successful, it was required to at least try to obtain an earlier date.

a. Positions of the Parties

- [55] The Crown submits that the application judge erred when she declined to deduct the disputed period either in whole or in part. The Crown argues that the period between June 7 and September 8, 2023 (the first court date offered when defence counsel was available) should have been deducted for the same reason the application judge deducted the April 28 to June 7, 2023 period, namely that it was a direct and unavoidable result of the exceptional circumstance the application judge had recognized.
- [56] The Crown asserts that the application judge erred in her assessment of the trial Crown’s efforts to mitigate the delay during this period. She set the bar too high when she concluded that the Crown had not done “all it could” to mitigate the delay, and she ignored evidence bearing on the issue of the reasonableness of the Crown’s conduct. Such evidence included the parties’ appearance in court on June 9, 2023 to obtain a new date, only two days after Phillips J. had ordered a new hearing. It also included the fact that information first provided by the trial coordinator in January 2023 – namely, that the court was “fully booked, overbooked” and that nothing could be “squeezed in” from April to September 2023 – was reconfirmed at, or just before, that June 2023 appearance. Indeed, defence counsel at that time had asked for all available dates from June 2023 onward.
- [57] The Crown also submits that the record does not indicate that case management was even available before the September motion date, and it stresses that Jordan frames case management as an option or a possibility rather than as a “categorical imperative”. In any event, the Crown argues, the application judge did not explain how and to what extent the

further efforts she found the Crown should have taken (i.e., seeking case management, bringing the matter forward, advising trial coordination that unique circumstances had arisen) would have affected the duration of the disputed period.

- [58] The Crown also points out that the ‘rehearing’ of the change of venue motion could not have taken place the same day that Phillips J. set aside his earlier decision (June 7, 2023). Accordingly, it argues that it cannot be correct that no deduction at all is warranted for this entire period.
- [59] The respondent does not challenge the application judge’s characterization of the release of the Haevischer decision, and the resulting need to reschedule his change of venue motion, as a discrete exceptional circumstance. Nor does the respondent suggest on appeal that any part of the delay that followed was institutional.[4] Instead, the respondent urges deference to the application judge’s finding that the Crown failed to take reasonable steps to mitigate the delay during this contested period. The respondent submits that a contextual reading of the application judge’s reasons shows that she did not truly require the Crown to “do all it could”; rather, she concluded that the Crown ought to have taken reasonable steps of the sort suggested in *Jordan and Cody*, such as resorting to case management processes to seek the court’s assistance.
- [60] In the respondent’s view, whether or not the Crown’s request could have been accommodated, the Crown could have discharged its duty by simply telling the trial coordinator that the September dates she offered were not soon enough and citing the urgency posed by the prospect of this matter moving to another jurisdiction.
- [61] The respondent agrees that the application judge should have quantified how much sooner his change of venue motion hearing could have been scheduled if the Crown had taken reasonable steps. He argues, however, that it is implicit in her finding that the Crown should have taken reasonable steps to secure an earlier date that such a date could have been found had those steps been taken.

b. Discussion

- [62] As a preliminary matter, I agree with the respondent that, while the application judge stated that “the Crown did not do all it could to ensure the change of venue motion was re-heard promptly”, the focus of her inquiry was on whether the Crown had taken reasonable steps to avoid the delay resulting from what she otherwise found to be an exceptional circumstance. As she stated, “the Crown must take reasonable steps to mitigate and minimize delay” and “[o]nly delay that the Crown could not reasonably mitigate is deducted from the total.” Accordingly, I reject the Crown’s submission on appeal that the application judge erred in law when she articulated the second part of the exceptional circumstances test, by setting the bar too high.

- [63] The issue on this ground of appeal is whether the application judge made reversible errors when she concluded that the Crown had not taken reasonable steps to mitigate the delay flowing from the exceptional circumstance posed by the release of the Haevischer decision.
- [64] Before addressing the disputed period, I note that, at the hearing of the appeal, the parties agreed that the six days that elapsed while the change of venue motion was under reserve (i.e., September 19 to 25, 2023) should have been deducted as part of the exceptional circumstance delay caused by the release of Haevischer. There was nothing the Crown could have done to reduce this period, and six days was a quick turn-around on the court's part in any event.
- [65] Turning to the disputed period of June 7 to September 8, 2023, in my view the application judge made reversible errors when she concluded that the Crown failed to take reasonable steps to mitigate delay with respect to this period.
- [66] First, the application judge erred in law in declining to deduct any part of this period based on her finding that the Crown had not taken reasonable steps to mitigate the delay. Some delay was inevitable because there was nothing the Crown could have done to obtain an immediate date for the 'rehearing' of the change of venue application.
- [67] Second, the application judge made a palpable and overriding error in failing to consider all of the circumstances, including her own explicit findings about the Crown's efforts to advance the proceedings while the change of venue motion was pending. As the application judge recognized (albeit indirectly) elsewhere in her decision, the Crown did take steps to mitigate the delays occasioned by the release of Haevischer, both during the disputed period and before and after it.
- [68] Third, on the record in this case, it would not have been a reasonable step for the Crown to press for an earlier rehearing date: the trial coordinator had told the parties on January 19, 2023 that no dates were available between April and September, and the parties received fresh confirmation of this period of court unavailability on or around June 9, 2023, when they set the new hearing date for September 19.
- [69] Accordingly, in the absence of any indication that the steps the application judge faulted the Crown for not having taken could reasonably have mitigated any part of the delay, the entire period of delay between June 7 and September 8, 2023 – that is, an additional 93 days – should have been treated as flowing from the discrete exceptional circumstance posed by the release of the Haevischer decision.
- i. At least some delay was inevitable irrespective of the Crown's mitigation efforts

- [70] As both parties recognized at the appeal hearing, at least some delay was inevitable following Phillips J.'s decision on June 7, 2023 to vacate his earlier ruling and to order a new hearing of the change of venue motion. The 'rehearing' of the motion could not have taken place that same day, even though counsel had already filed their materials. Accordingly, some deduction of the disputed period was in order even if the Crown had not taken reasonable steps to mitigate it.
- ii. Based on the application judge's findings, the Crown did in fact take reasonable steps to mitigate the delay emanating from the release of the Haevischer decision
- [71] Earlier in her reasons, the application judge considered the Crown and defence conduct surrounding the respondent's change of venue motion, including its rescheduling, in the context of her discussion of defence delay. She recognized that the Crown took a range of reasonable steps to mitigate delay stemming from Haevischer's release and the resulting need to 'rehear' the respondent's change of venue motion.
- [72] The Crown made repeated requests of defence counsel to schedule a JPT and to reserve provisional trial dates while the change of venue motion was pending. As noted earlier, these requests were made on February 13, 2023 (3.5 weeks after the first JPT in the SCJ, where the respondent signalled his intention to bring the change of venue motion); May 3, 2023 (less than a week after Haevischer's release); and June 13, 2023 (less than a week after Phillips J. vacated his earlier decision and ordered a new hearing). While the application judge declined to deduct any delay for the refusal of the defence to set provisional trial dates, she credited the Crown's efforts as "appropriately thinking outside the box and being proactive about delay", and she noted that "[a]nother accused in a future case may very well wish to avail themselves of provisional dates in these circumstances should the Court agree to offer them."
- [73] While the Crown's May 3 and June 13 requests for a JPT were not aimed at shortening the disputed period, they are nevertheless relevant to an evaluation of the reasonableness of the Crown's conduct in relation to that period. This is because Jordan's examples of reasonable steps on the Crown's part in this context are not limited to "prompt resort to case management processes to seek the assistance of the court"; they also include "seeking assistance from the defence to streamline evidence or issues for trial or to coordinate pre-trial applications": at para. 70. In my view, that is what the Crown did in this case.
- [74] Moreover, because defence counsel did not answer the Crown's February 13 or May 13 requests, and answered its June 13 request by arguing that a JPT would be premature, it was reasonable for the Crown to not persist in seeking a JPT until after the change of venue motion was determined (at which time the Crown did indeed seek and obtain defence consent to scheduling a JPT).
- [75] The application judge deducted the period from September 25, 2023 (the date the change of venue motion was dismissed) to November 30, 2023 (the date the next JPT took place) as defence delay because defence counsel refused to accede to a JPT before the change of

venue motion was resolved. This meant that the parties were unable to set trial dates immediately following London-Weinstein J.'s ruling, as they had not obtained judicial approval for the trial and pretrial motion dates. The application judge observed that "[a] pretrial discussion regarding trial estimates, admissions, anticipated pretrial motions, challenges for cause, etc., would have had significant value regardless of the ultimate venue in which the trial proceeded." In other words, she considered the Crown's efforts to push for a JPT as a reasonable step to mitigate delay overall, at the very time that coincided with the delay occasioned by the Supreme Court's release of Haevischer.

[76] Although there is no onus on the defence to mitigate delay caused by exceptional circumstances, it is relevant to note these defence responses – or failures to respond – to the Crown's efforts over the disputed period. Considering this defence conduct offers at least some helpful context for assessing the reasonableness of the Crown's attempts to mitigate exceptional circumstance delay. As this court recently recognized in *R. v. J.S.*, 2024 ONCA 794, 443 C.C.C. (3d) 439, at para. 81, leave to appeal refused, [2024] S.C.C.A. No. 548, "where a discrete exceptional circumstance arises, it is incumbent on all to make best efforts to get the trial completed in as timely a way as possible."

[77] I would also observe that the Crown, together with defence counsel, complied with Phillips J.'s direction by arranging for the new change of venue motion date to be set "forthwith". The date of September 19, 2023 was set on June 9, just two days after Phillips J. vacated his earlier decision.

[78] Accordingly, based on the evidence that was before the application judge, and her own findings about the Crown's efforts to address the delay while the defence's change of venue motion was pending, the Crown did in fact take reasonable steps to avoid the delay caused by the release of the Haevischer decision.

iii. The further steps the application judge suggested the Crown should have taken were not reasonable

[79] As noted, two days after Phillips J. vacated his dismissal of the change of venue motion, counsel attended to request dates between June and September for the one-day motion to be heard. The trial coordinator had previously informed counsel on January 19, 2023 that the court was "fully booked [and] overbooked" from April to September 2023; she provided fresh confirmation of this unavailability on, or just before, June 9. In other words, the information provided by the trial coordinator was not "stale", as the respondent initially suggested. It reflected the circumstances that existed at the time the parties attended to schedule the hearing date.

[80] The Crown accepted one of the earliest dates offered by the court (i.e., September 19, as opposed to the first date offered, September 8). In this case, at the time a new date was being sought, there was nothing more the Crown could reasonably have done other than to have accepted the first available court date: see, e.g.: *R. v. Carbone*, 2020 ONCA 394, 150 O.R. (3d) 758, at para. 56; *Coates*, at paras. 2-5, 54-72; *R. v. Dos Santos*, 2025 ONCA 598, 178 O.R. (3d)

481, at paras. 45-46. See also *R. v. Jurkus*, 2018 ONCA 489, 363 C.C.C. (3d) 246, at para. 58, leave to appeal refused, [2018] S.C.C.A. No. 325.

- [81] The effect of the application judge's holding (and the respondent's submissions on appeal) is that the Crown – in spite of the trial coordinator's fresh confirmation that the court was fully booked until September 8 – should have pushed for an earlier date all the same, and that this simple act would have sufficed to discharge its duty of reasonable diligence. In my view, it would be artificial to have required the Crown to take this step, which would have seemed a futile gesture in the circumstances.
- [82] It is true that the Supreme Court in *Jordan* noted that the Crown's demonstration that it took reasonable steps in the exceptional circumstances context "might include [its] prompt resort to case management processes", among other measures: at para. 70. However, given the circumstances I have outlined above, it would not have been a reasonable step for the Crown in this case to seek case management in the hope of securing an earlier motion date, or to bring the matter forward to address the urgency of 'rehearing' the change of venue motion on the record. By all accounts, the parties were clearly and legitimately under the impression that no date earlier than September 2023 could be found.
- [83] As such, the application judge erred in (i) finding that seeking case management or bringing the matter forward were reasonable steps that the Crown should have taken in the context of this case; and (ii) concluding that the Crown failed to take reasonable steps to mitigate delay across the disputed period by declining to take these steps in particular. These are palpable errors, in that they plainly cannot be true in light of the application judge's other factual findings and the undisputed facts in this case; they are overriding in that they overwhelmed her analysis of the disputed period and affected her ultimate findings on delay.
- [84] The respondent asserts that the application judge would not have suggested these "reasonable steps" if she did not think an earlier date might have been found. This court's decision in *Coates*, however, suggests that the "practical reality" is that the application judge here – and even the trial coordinator, had she testified – would have been hard pressed, at the time the s. 11(b) application was heard, to determine whether these efforts would have borne any fruit (i.e., whether the court's "fully booked, overbooked" schedule over the late spring and summer of 2023 could have been adjusted to accommodate an earlier hearing date): see *Coates* at para. 70. Indeed, the application judge here did not quantify what portion of the disputed period the Crown could have mitigated by taking the steps she prescribed after the fact; this was likely impossible to calculate.

iv. The disputed period should be deducted in full

- [85] Having concluded that the Crown took reasonable steps to mitigate delay in relation to the disputed period, in my view the only available result on this record is a deduction of this entire period of delay for s. 11(b) purposes.

- [86] The application judge made no finding about the extent to which the justice system could have mitigated this period of delay, whether or not the Crown had taken the additional “reasonable steps” she prescribed. Nor did she make a finding as to whether any portion of this period represented chronic institutional delay. As noted, her conclusion that the release of Haevischer and the resulting need to reschedule the change of venue motion amounted to a discrete exceptional circumstance was an implicit rejection of defence counsel’s submission that the delay during this period constituted “institutional” delay.
- [87] This court has consistently upheld decisions fully deducting discrete exceptional event delay in cases where there is no suggestion the justice system could have mitigated the delay or did not try to do so (*R. v. Coulter*, 2016 ONCA 704, 133 O.R. (3d) 433, at para. 84; *Jurkus*, at para. 58) or where there is no evidence that some part of it is attributable to chronic institutional delay (*R. v. Majeed*, 2019 ONCA 422, at para. 9; *Carbone* at para. 57). Only where a trial judge has found that some portion was due to systemic limitations rather than to the discrete event has this court upheld an ‘apportionment’ of discrete event delay: *R. v. Locknick*, 2019 ONCA 625, 379 C.C.C. (3d) 470, at paras. 13-17; *R. v. Villanti*, 2020 ONCA 755, 153 O.R. (3d), at paras. 23-47; *R. v. K.C.*, 2022 ONCA 738, 164 O.R (3d) 255, at paras. 63-74. This court has never imposed an apportionment of discrete event delay, i.e., to ascribe some portion of it to institutional delay, in the absence of a finding to this end in the court below.
- [88] Accordingly, I would deduct the entire 93-day period between June 7 and September 8, 2023 as additional time attributable to a discrete exceptional circumstance. This brings the remaining delay in this matter to 856 days,[5] or 28 months and 4 days, which falls below the 30-month presumptive ceiling.

F. DISPOSITION [89] For these reasons, I would allow the Crown’s appeal, set aside the stay and remit the proceedings to the Superior Court.

Released: March 20, 2026 “K.M.v.R.”

“K. van Rensburg J.A.”

“I agree. David M. Paciocco J.A.”

I agree. D.A. Wilson J.A.”

- [1] By this point, the parties had agreed that the change of venue motion would require only one day to be heard (as opposed to the two days originally scheduled for it on April 27 and 28, 2023).
- [2] The application judge found this period to amount to 65 days, but it totals 66 days. This discrepancy has no bearing on the outcome of this appeal.
- [3] In oral argument Crown counsel sought to characterize the Parliament Hill video as “third party disclosure”, and submitted that, in order to avoid delay, the defence ought to have taken steps to bring a third party records application. This, of course, is inconsistent with how the parties proceeded in the court below. The trial Crown did not resist disclosure of

the Parliament Hill video or urge the defence to bring a motion for third party disclosure. Rather, the Crown undertook to obtain the video and, although it asserted that this delay should not impede the progress of the proceedings (including the respondent's election), it treated the production of the video as falling within its own disclosure obligations.

- [4] The defence argued at first instance that any delay resulting from the change of venue hearing having to be rescheduled was institutional. The application judge implicitly rejected this submission when she characterized the entire period as attributable to an exceptional circumstance, limiting the deductibility of this period only because of the Crown's failure to take reasonable steps to mitigate the delay.
- [5] Total delay of 1,061 days minus 66 days (defence delay from September 25 to November 30, 2023 – deducted below, arithmetic corrected on appeal), minus 40 days (discrete event delay from April 28 to June 7, 2023 – deducted below), minus 6 days (discrete event delay from September 19 to 25, 2023 – conceded at the appeal hearing), minus 93 days (discrete event delay – deducted on appeal).

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