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CASE LAW UPDATE

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Her Majesty the Queen (Ex Rel City of Toronto) v Andrade; Her Majesty the Queen (Ex Rel City of Toronto) v Hariraj

(Ontario Court of Justice, released September 15, 2011)

***Provincial Offences Act – Canadian Charter of Rights and Freedoms* section 11(b) – Part I Offences – Unreasonable Delay**

The question of constitutionally tolerable delay with respect to the prosecution of minor regulatory and human welfare offences under the *Provincial Offences Act*, R.S.O., 1990, c. P.33 ("**POA**") has been the source of much recent debate.[1] In this most recent judicial installment, Justice Libman of the Ontario Court of Justice dismissed two appeals and upheld the decisions to stay charges under the *Highway Traffic Act*, R.S.O. 1990 c.H.8 ("**HTA**") as a result of violations of the defendants' 11(b) rights under the *Canadian Charter of Rights and Freedoms* ("***Charter***").

Section 11(b) of the *Charter* provides that every person charged with an offence is entitled to be "tried within a reasonable time". The Supreme Court has found that the 11(b) *Charter* right protects both the individual interest of an accused person, including: (a) the right to security of the person by minimizing anxiety, concern and stigma, (b) the right to liberty by limiting pre-trial custody, and (c) the right to a fair trial by proceeding when evidence is fresh, and a societal interest in having matters dealt with according to law and in an expeditious manner to enhance public confidence in the judicial system.[2]

There is a long line of jurisprudence with respect to assessing the reasonableness of delay for criminal matters. As a first step, courts consider the total length of the delay and the reason for the delay to determine whether the delay should be discounted. The second step is to weigh the delay as against factors including the severity of the charge, complexity of the matter, and prejudice suffered. These factors are then weighed against a guideline for tolerable delay which, for criminal matters in the provincial court, has been determined to be 8–10 months. The guideline does not include delay as a result of the "intake period" which reflects the amount of time for a matter to be set down for trial.

There are several key differences between criminal prosecutions and prosecutions under Part I of the POA. Criminal prosecutions are typically more serious, carry greater stigma, are the source of greater anxiety to defendants, and are more complicated and time consuming to

dispose of than POA proceedings. There is also a greater societal interest in having criminal matters heard on the merits. Part I of the POA, on the other hand, was devised as a mechanism for "speedy justice" for minor offences for which the defendant may, at most, receive a fine and where there is minimal, if any, stigma or prejudice caused by delay. The POA is also the place where most people will experience the justice system. In 2010, 600,000 criminal charges as compared to over 2 million POA charges were laid.

Justice Libman concluded that with respect to POA Part I prosecutions, an intake period of 30–45 days was appropriate as a result of strict legislative timelines imposed for POA matters. He then concluded that a guideline of 8–9 months for delay is constitutionally tolerable systemic or institutional delay. As both matters fell outside of this guideline, the decision of the trial judges to stay the charges was upheld.

On November 21, 2011, the Court of Appeal for Ontario will hear the matter of *R. v. Vellone*, 2009 ONCJ 150, leave to appeal granted, [2009] O.J. No. 1607 (C.A.), where the application of section 11(b) to POA Part I offences will again be considered.

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1. See Ontario Law Commission, Modernizing the Provincial Offences Act: A New Framework and Other Reforms (Interim Report, March 2011) (Toronto: Law Commission of Ontario, 2011)

2. *R. v. Morin*, [1992] 1 S.C.R. 771 at paras. 27-30