

**ONTARIO COURT OF JUSTICE  
(Provincial Offences Appeal)**

CITATION: *Ontario (Superintendent of Financial Services) v. Dies*, 2018 ONCJ 641  
COURT FILE No.: Newmarket 4960 15-1126  
DATE: 2018-09-21

**B E T W E E N :**

**HER MAJESTY THE QUEEN  
(Superintendent of Financial Services)**

**- AND -**

**STEPHEN D. DIES**

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Before Justice Marcella Henschel  
Heard on June 7, 2018  
Reasons for Judgment  
Released on September 21, 2018

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**Me-Hae Hur .....counsel for the Crown**  
**Simon M. Brown ..... Agent for the defendant Stephen D. Dies**

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**HENSCHEL J.:**

**A. Overview and Summary of the Facts**

[1] On April 6, 2017, the appellant, Stephen Dies, was convicted of knowingly making a false or misleading statement or representation in order to obtain payment for goods or services provided to an insured contrary to section 447(2)(a.3) of the *Insurance Act*.

[2] The appellant appeals his conviction but does not dispute that he knowingly made a false statement or representation when he signed a chiropractic “treatment confirmation form” on February 5, 2013, holding himself out as a licensed chiropractor. The form was completed in support of a chiropractic insurance claim to RBC Insurance Home and Auto by the claimant, Tanya Van Leeuwen. At the time the appellant signed the document he was not entitled to provide treatment as a chiropractor. A Certificate of the Registrar of the College of Chiropractors of Ontario (CCO), dated April 1, 2016, (Exhibit 2) established that the appellant had not been a member of the CCO since July 30, 1998. His membership was suspended on July 30, 1998, and revoked on July 30, 2000. On May 19, 2006, the appellant was ordered by the Superior Court not to use the

title “doctor” or “chiropractor” and not to hold himself out as a chiropractor or provide any controlled acts, unless registered with the CCO (Exhibit 10).

[3] In a statement to an investigator, the appellant admitted that he had been treating Ms. Van Leeuwen for some time and signed the February 5, 2013 “treatment confirmation form” representing himself as a licensed chiropractor when he was not. He acknowledged that he was paid cash by Ms. Van Leeuwen for the treatment provided.

[4] On April 3, 2013, a claims investigator for RBC, Michelle Davidson, notified the Financial Services Commission of Ontario (FSCO) that RBC had received receipts from an insurance claimant, Ms. Van Leeuwen, signed by the appellant for chiropractic treatment that he was not authorized to provide (Exhibit 3). A Certificate prepared by FSCO, Exhibit 1, established that the letter was received by the Financial Services Commission on April 11, 2013.

[5] The information charging the appellant under s. 447(2)(a.3) of the *Insurance Act* with making a false or misleading statement or representation was sworn almost two years later by a FSCO investigator on April 2, 2015. It alleged that the offence was committed on or about February 5, 2013.<sup>1</sup>

[6] Although the allegations were simple, the proceedings were not. The appellant brought numerous motions which had a significant impact on the length and complexity of the proceedings. The appellant sought to quash the information, alleging that it was sworn outside of the limitation period provided for by the *Insurance Act*. The appellant challenged the constitutionality of s. 449 of the *Insurance Act*, which creates a limitation period of two years for offences under the *Act*, arguing that it violated s. 7 and/or s. 11(d) of the *Charter*. Finally, late in the proceedings, the appellant applied for a stay of proceedings, alleging that his rights under s. 11(b) were violated as a result of unreasonable delay.

[7] At trial, the presiding Justice of the Peace dismissed the applications, and found the appellant guilty. The Justice of the Peace imposed a \$10,000 fine, ordered restitution of \$175.00 to R.B.C., and placed him on probation for 12 months.

## **B. Positions of the Parties**

[8] The appellant appeals both his conviction and sentence. In respect of the conviction, the appellant submits that the Justice of the Peace erred in:

- (1) Failing to quash the information which the appellant alleges was sworn outside of the limitation period provided for in s. 449 of the *Insurance Act*;
- (2) Failing to find s. 449 of the *Insurance Act* unconstitutional and of no force and effect under s. 52 of the *Charter* on the basis that it violated s. 7 and/or 11(d) of the *Charter*.

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<sup>1</sup> The original offence period charged was between “on or about October 23, 2016 to on or about February 5, 2013”. On April 21, 2016, the first day of trial, at the request of the Crown, the offence date was amended to on or about February 5, 2013.

(3) Dismissing the application for a stay of proceedings under s. 24(1) due to a violation of s. 11(b) of the *Charter* on the basis that:

- (i) The trial exceeded the 14 month presumptive ceiling for provincial offences matters; or
- (ii) The trial exceeded the 18 month presumptive ceiling expressed by the Supreme Court of Canada in *Jordan*<sup>2</sup> for trials in a provincial court.

[9] In respect of the sentence, the appellant submits that it was demonstrably unfit.

[10] Finally, the appellant seeks an order of costs on the basis of exceptional circumstances.

[11] The respondent submits that:

- (1) Under the *Provincial Offences Act*, (*POA*) there is no route to appeal the dismissal of an application to quash an information;
- (2) The constitutional challenge to s. 449 of the *Insurance Act* was properly dismissed because:
  - (i) Section 449 of the *Insurance Act* does not engage any interest (life, liberty, or security of the person) protected by s. 7 of the *Charter*;
  - (ii) If a s. 7 interest is engaged by s. 449, the section is not vague or overbroad, and does not violate s. 11(d) of the *Charter*.
- (3) The Justice of the Peace did not err in dismissing the s. 11(b) *Charter* application because:
  - (i) the net delay (total delay less defence delay) is less than the presumptive ceiling of 18 months established in *Jordan*;
  - (ii) Even if the net delay is greater than the presumptive ceiling, the case is a transitional case, the parties relied upon the law as it previously existed, and there are exceptional circumstances that apply to justify the delay such that it is not unreasonable.

[12] In respect of the sentence appeal, the respondent submits that the sentence imposed by the trial judge was at the low end of the range of appropriate sentences and was fit. There was no error in principle and this court should not vary the sentence.

[13] Finally, the respondent submits that there was no conduct by the Crown that merits sanction in the form of costs, nor is there any evidence of exceptional circumstances that exist such that fairness requires an award of costs to the appellant.

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<sup>2</sup> 2016 SCC 27, [2016] 1 S.C.R. 631.

[14] For the reasons that follow, I find that pursuant to s. 116 and s. 120 of the *POA* there is jurisdiction for the appellant to appeal the order dismissing the motion to quash but that this ground of appeal must fail because the Justice of the Peace properly dismissed the motion. Secondly, I find that the constitutional challenge to s. 449 of the *Insurance Act* was properly dismissed because the offence with which the appellant was charged did not engage the appellant's s. 7 rights, and did not violate his rights to a fair trial under s. 11(d) of the *Charter*. Finally, I have concluded that the s. 11(b) *Charter* application to stay the proceedings under s. 24(1) was properly dismissed. To the extent that the Justice of the Peace committed any legal error in his assessment of s. 11(b), there was no substantial wrong or miscarriage of justice.

### **C. Did the Justice of Peace Err in Dismissing the Application to Quash?**

#### *History of Proceedings – Motion to Quash*

[15] At trial, the appellant sought to quash the information on the basis that it was laid outside of the limitation period provided for by s. 449 of the *Insurance Act*. He submitted that the version of s. 449 applicable to the proceedings created a limitation period that prohibited an information being laid more than two years after *the earlier of the date of the offence and the date that the facts underlying the offence were discovered by the Superintendent*. The appellant submitted that a legislative amendment to s. 449 enacted on July 24, 2014 made a substantive change to the limitation period that changed the limitation period from one tied to the date of the offence, to one tied to the time of discovery by the Superintendent. The appellant submitted that because this is a substantive change, the pre-July 24, 2014 provision applied, and prohibited the laying of an information after February 5, 2015, two years from the date of the offence.

[16] At trial, the Crown, argued that the limitation period in both the pre- and post-July 24, 2014 versions of s. 449 was a knowledge based limitation period that provided that a proceeding could not be instituted more than two years *after the facts upon which the proceedings were based came to the knowledge of the Superintendent*. The Crown submitted that the July 24, 2014 amendment was simply a technical amendment to correct an earlier drafting error and that the information should not be quashed because it was laid within two years of the date when the facts upon which the proceedings were based first came to the knowledge of the Superintendent.

[17] At the outset of the trial, during argument of the motion to quash, the Crown sought an amendment of the offence period charged in the information from “on or about October 23, 2006 to on or about February 5, 2013” to an offence alleged on February 5, 2013 pursuant to s. 36 of the *POA*. The Crown argued that an information should not be quashed where it can be amended without prejudice to the accused and in accordance with the “ends of justice”.

[18] On May 2, 2016, Justice of the Peace Radtke dismissed the motion to quash, and accepted the Crown position that both the pre- and post-July 24, 2014 versions of s. 449 created a 2 year limitation period from the date on which the facts upon which the proceedings were based first came to the knowledge of the Superintendent.

[19] Justice of the Peace Radtke held that the July 24, 2014 amendment made no substantive change to the limitation period. He amended the offence period as requested by the Crown. He dismissed the application to quash, concluding that the facts first came to the attention of the Superintendent on April 11, 2013, and the information was laid on April 2, 2015, a period within two years of when the facts first came to the knowledge of the Superintendent.

[20] The appellant renews his arguments made on the motion to quash at trial and submits that Justice of the Peace Radtke erred in failing to quash the information which the appellant alleges was sworn outside of the limitation period provided for in s. 449 of the *Insurance Act*.

[21] In response, the respondent, relying upon *R. v. Sarazin*<sup>3</sup>, submits that this court has no jurisdiction to review the trial judge's dismissal of the motion to quash because the power to appeal a "conviction" does not include an appeal from the dismissal of a motion to quash. The respondent submits that to review the dismissal of the motion to quash, the appellant should have initiated a *certiorari* application pursuant to s. 140 of the *POA*.

*Powers of Appeal: Does an Appeal lie from the order dismissing the application to quash the information?*

[22] I disagree with the respondent's position that this court has no jurisdiction to review the dismissal of the motion to quash and find that I have the required jurisdiction. Rather than supporting the respondent's position, *Sarazin* confirms that I have jurisdiction to consider whether the conviction should be set aside on the basis that the presiding Justice of the Peace erred in law in dismissing the motion to quash.

[23] Section 116 of the *POA* establishes the jurisdiction to appeal proceedings commenced by an information under Part III. It provides:

116(1). Where a proceeding is commenced by information under Part III, the defendant or the prosecutor or the Attorney General by way of intervention may appeal from,

- (a) a conviction;
- (b) a dismissal;
- (c) a finding as to ability, because of mental disorder, to conduct a defence;
- (d) a sentence; or
- (e) any other order as to costs.

[24] Section 120 of the *POA* sets out the powers of the court on an appeal against conviction as follows:

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<sup>3</sup> 2014 ONCJ 148.

120. On the hearing of an appeal against a conviction or against a finding as to the ability, because of mental disorder, to conduct a defence, the court by order,

(a) may allow the appeal where it is of the opinion that,

- i.) the finding should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,
- ii.) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
- iii.) on any ground, there was a miscarriage of justice; or

(b) dismiss the appeal where,

- i.) the court is of the opinion that the appellant, although the appellant was not properly convicted on a count or part of an information, was properly convicted on another count or part of the information,
- ii.) the appeal is not decided in favour of the appellant on any ground mentioned in clause (a), or
- iii.) although the court is of the opinion that on any ground mentioned in sub-clause a(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred.

[25] The case upon which the Crown relies as authority for its position, *Sarazin*, relied upon the reasons of Then J. in *Ontario Securities Commission (OSC) v. Cartel Ltd.*<sup>4</sup> In *OSC v. Cartel*, Justice Then considered a *certiorari* application in which the applicant sought to set aside the order of the trial judge dismissing a pre-trial motion to quash the information on the basis that it constituted a nullity because the information did not contain a statement confirming that it had been laid within the limitation period. The application before Justice Then was heard after the dismissal of the motion to quash *and prior to the determination of the trial on the merits*. At the time the matter was before Justice Then, the charges had not resulted in either a conviction or a dismissal.

[26] As a result, Justice Then was considering whether relief was available to the applicant by way of *interlocutory appeal* or by *certiorari*. Justice Then concluded that s.116 of the *POA* granted the applicant a right to appeal his conviction on the basis that the trial judge had erred in law in dismissing the motion to quash. Consequently, the applicant had a route to appeal the pre-trial ruling of the trial judge *following the completion of the trial*. As a result, Justice Then held that the applicant had no right to an interlocutory appeal of the ruling dismissing the motion to quash because an adverse ruling on the motion was not a conviction nor a dismissal, for the purposes of s.116(1). In reaching this conclusion, Justice Then relied upon s. 141(3) of the *POA*. Sections 140 and 141 of the *POA* set out when relief in the nature of *certiorari* is available.

<sup>4</sup> [1992] O.J. 1910 (Gen. Div.), affirmed 12 O.R. (3d) 319 (CA).

[27] Section 141(3) of the *POA* provides:

(3) No application shall be made to quash a conviction, order or ruling *from which an appeal is provided by this Act*, whether subject to leave or otherwise.

[28] Justice Then held that the privative clause in s. 141(3) of the *POA* constituted an absolute bar to the accused's application to quash the trial judge's ruling by way of *certiorari*, finding that s. 141(3) of the *POA* was intended by the legislature to restrict judicial review where there is a right of appeal and that the legislature demonstrated a clear intent in s. 141(3) to preclude resort to an application in the nature of *certiorari* when a right of appeal is available.<sup>5</sup>

[29] The decision of Justice Then was upheld by the Ontario Court of Appeal. In the endorsement the Court of Appeal stated that "Then J. was correct in holding that no appeal lay from the order of Judge Dnieper". This did not mean, as the respondent erroneously contends, that an order dismissing a motion to quash cannot be a ground of appeal on an appeal of conviction. The Court's endorsement confirmed Justice Then's finding that he had no jurisdiction to hear *an interlocutory appeal* of a motion to quash, prior to a final disposition of the charge on its merits. I am satisfied that I have jurisdiction to consider whether the Justice of the Peace erred in dismissing the motion to quash the information.

*Did the Justice of the Peace Err in Dismissing the Motion to Quash?*

[30] There was no merit to the appellant's motion to quash the information. It had no foundation in law or fact, but nonetheless served to substantially lengthen the proceedings.

[31] At the time of the offence (February 5, 2013), s. 449 of the *Insurance Act* read as follows:

449. No proceeding for an offence under this *Act* may be commenced more than two years *after the earlier of* the date on which the facts upon which the proceedings are based first came to the knowledge of the Superintendent.<sup>6</sup> (emphasis added)

This version of s. 449 was in force between July 1, 1998, and July 23, 2014.<sup>7</sup>

[32] An amendment to s. 449 came into force on July 24, 2014. The amendment deleted the words "the earlier of" so that the current section of s. 449 reads:

449. No proceeding for an offence under this *Act* may be commenced more than two years after the date on which the facts upon which the proceedings are based first came to the knowledge of the Superintendent.

<sup>5</sup> *OSC. v. Caratel Ltd.*, at paras. 27, 29, and 36.

<sup>6</sup> The Superintendent is defined in the *Insurance Act* as the Superintendent of financial services, the Chief Executive Officer of the Financial Services Commission of Ontario.

<sup>7</sup> *Insurance Act*, R.S.O. 1990, c. I.8, s. 449. *Building Opportunity and Securing our Future Act (Budget Measures)*, S.O. 2014, c. 7. s. 7.

This version of s. 449 was in force at the time the information was laid and during the prosecution.

[33] As noted above, the appellant submits that the pre-July 24, 2014 version of the legislation created a limitation period that required that an information could not be laid more than two years after *the earlier of* the date of the offence and the date that the facts underlying the offence were discovered by the Superintendent. The appellant submits that the July 24, 2014 amendment made a substantive change by extending the limitation period from the date of the commission of the offence to the date that the facts were discovered by the Superintendent. The appellant submits that because it is a substantive change, the pre-July 2014 provision should apply, and it prohibited the laying of an information after February 5, 2015, two years from the date of the offence.

[34] There is no merit to this position. A review of the legislative history of the section makes clear that the 2014 amendment was passed to correct an earlier legislative error. When the section was amended in 1998, the words “the earlier of” were inadvertently left in the section, but were meaningless.

[35] Between January 1, 1990 and June 30, 1998, s. 449 provided as follows:

449. No proceeding for an offence under this *Act* may be commenced more than two years after **the earlier of** the date on which the facts upon which the proceedings are based first came to the knowledge **of the Commissioner or the Superintendent.**<sup>8</sup>

The pre-July 1, 1998 version of s. 449 created a knowledge based limitation period based on when the facts came to the knowledge of the Commissioner *or* to the knowledge of the Superintendent, both persons in authority, whichever occurred first.

[36] In 1998 the Ontario Insurance Commission was re-organized to create the current FSCO. At this time, the position of Commissioner was eliminated. The Act establishing FSCO included a number of complementary amendments.<sup>9</sup> The definition of Commissioner in s.1 of the *Insurance Act* was repealed and, as a result, the words “Commissioner or the” were deleted from s. 449. Due to a legislative oversight, the words “the earlier of” were not deleted. However, they were superfluous because there was now only one person in authority to whom the facts might come to the attention of.

[37] The suggestion that the July 1, 1998 amendment was intended to create a limitation period based on the date of the commission of the offence instead of a knowledge based limitation period is entirely baseless and illogical. Nowhere did the July 1, 1998 version of s. 449 avert to a limitation period tied to the date of the commission of the offence. If interpreted as suggested by the appellant the limitation period would always be two years from when the facts underlying the offence occurred

<sup>8</sup> *Insurance Act*, RSO 1990, c. I8, s. 449 (between January 1, 1990 and June 30, 1998) and Bill 140, *An Act to establish the Financial Services Commission of Ontario and to make complementary amendments to other statutes*, 1<sup>st</sup> Session, 36<sup>th</sup> Leg, Ontario, 1997, s. 147 (assented to December 8, 1997), S.O. 1997, c. 28.

<sup>9</sup> Bill 140.

(which must always be the earlier event) and the inclusion of the language referring to when facts first came to the knowledge of the Superintendent would be absurd.

[38] Furthermore, the interpretation advanced by the appellant is inconsistent with the French version of the July 1, 1998 provision which provides:

449. Est irrecevable le poursuite intentee relativement a une infraction a la presente loi plus de deux ans apres la date a laquelle les faits sur lesquels elle se fonde ont ete portes a la connaissance du commissaire ou du surintendant pur la premiere fois.

[Translation]

449. There is no proceeding for an offence under this *Act* more than two years after the date on which the facts on which it is based have been brought to the attention of the Superintendent for the first time.

[39] The French and English versions of s. 449 of the *Act* are equally authoritative.<sup>10</sup> To the extent that there is any ambiguity in the English version, it is resolved by reference to the French version, which makes clear that no proceeding may be commenced more than two years after the date on which the facts have been brought to the attention of the Superintendent for the first time.

[40] In 2014, the legislature corrected the drafting error by making a technical amendment, deleting the words “the earlier of”.<sup>11</sup> The deletion of the words “the earlier of” made no substantive change to the meaning of the provision or to the limitation period. The limitation period under both versions is the same. Consequently, the operative version of s. 449 at the time the information was laid and throughout the prosecution was the post-July 24, 2014 version.

[41] Justice of the Peace Radtke made no error in law. He correctly held that the amendments that came into force on July 24, 2014 made no substantive change to the limitation period created by s. 449 of the *Insurance Act*, that the limitation period was based on when the knowledge of the facts underlying the offence first came to the attention of the Superintendent, and that the facts first came to the attention of the Superintendent on April 11, 2013. He properly dismissed the application to quash because the information was laid on April 2, 2015, a period within 2 years of when the facts first came to the knowledge of the Superintendent.

**D. Did the Justice of the Peace Err in failing to find s. 449 of the *Insurance Act* unconstitutional and of no force and effect under s. 52 of the *Charter* on the basis that it violated s. 7 and/or 11(d) of the *Charter*?**

*Did Justice of the Peace Radtke err in finding that s. 449 does not engage an interest protected by s. 7 of the Charter?*

<sup>10</sup> *Legislation Act*, 2006, SO, c. 21, Sched F. s. 65.

<sup>11</sup> See Bill 14, *An Act to Implement Budget Measures and to enact and amend various Acts*. Schedule 14.

[42] In order to establish that s. 449 of the *Insurance Act* violated s. 7, the appellant was required to show that the law (a) interfered with one of the interests protected by s. 7: life, liberty or security of the person, *and* (b) that it did so in a manner that did not comport with the principles of fundamental justice.<sup>12</sup> If the appellant was unable to establish that his s. 7 interests were engaged, there was no need for the court to consider whether the law was in accordance with the principles of fundamental justice.

[43] Justice of the Peace Radtke held that s. 7 of the *Charter* was not engaged because imprisonment was not an option available as a sanction upon conviction and the potential for imprisonment for non-payment of a fine was too remote. As a result of this finding he did not go on to consider whether s. 449 was unconstitutional due to vagueness.

[44] The appellant submits that Justice Radtke erred in finding that s. 7 was not engaged and submits that s. 7 was engaged because the potential penalties under s. 447 included a significant fine under s. 447(3) of the *Insurance Act*, and probation under s. 72(1)(b) of the *POA* which have a direct effect on an individual's liberty and security of the person. The appellant argued that the Supreme Court has not resolved the question of whether a liberty interest is at stake in a proceeding where the sole penalty is the payment of a fine; and that the Supreme Court held in *Re Motor Vehicle Act (B.C.)*<sup>13</sup> that an individual's s. 7 interests are engaged by the potential of a probation order. The appellant argues that if s. 449 is struck down for vagueness, the general limitation period in s.76 of the *POA* should apply. It creates, where no limitation period is prescribed by an act, a limitation period of six months after the date on which the offence was committed. The application of the six month limitation period would bar the laying of the information against the appellant.

[45] The respondent submits that s. 7 is not engaged because imprisonment was not an available sanction, and submits that an individual's liberty interest is not at stake in a proceeding where the sole penalty is a fine and probation, and that the possibility of imprisonment for non-payment is remote. The respondent submits that in *Schmidt*<sup>14</sup>, the Ontario Court of Appeal determined that a probation order, such as the one imposed in the present case, does not engage a s.7 interest.

[46] I am satisfied that Justice of the Peace Radtke properly concluded that the appellant's interests under s. 7 of the *Charter* were not engaged and that as a result, it was unnecessary for Justice of the Peace Radtke to consider whether s. 449 was in accordance with the principles of fundamental justice.

[47] Upon conviction for an offence contrary to s. 447(2)(a.3), s. 447(3) of the *Insurance Act* provides that on a first conviction, an individual is liable to a fine of not more than \$250,000. In addition, an individual may be ordered to make restitution, and pursuant to s. 72(2) of the *POA*, the court may impose a probation order of up to two

<sup>12</sup> Hamish Stewart. *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms*. (Toronto, Irwin Law. 2012), at p. 62.

<sup>13</sup> [1985] 2 S.C.R. 46, at paras. 73, 74 and 77.

<sup>14</sup> 2014 ONCA 188, at para. 44 leave to appeal refused [2014] S.C.C.A. No. 208.

years. A court cannot sentence an individual to a period of time in custody for the offence.

[48] Section 7 of the *Charter* is engaged in any proceeding where there is the possibility that a sentence of imprisonment will be imposed.<sup>15</sup> Section 7 may also be engaged when imprisonment is not directly available for the offence in question, however the conviction for the offence may ultimately expose the accused to imprisonment in some other way, such as for the non-payment of a fine where enforcement mechanisms may lead to imprisonment.<sup>16</sup> Where imprisonment may only occur following a separate proceeding in which a fault element for non-payment of a fine must be established, then the risk of imprisonment in default of payment of the fine is sufficiently remote so as not to engage a liberty interest under s. 7 of the *Charter*.<sup>17</sup> Section 69 of the *POA* separates default proceedings from the original trial and provides for an assessment of the means of the offender to pay his or her fine. As a result, risk of imprisonment flowing from non-payment of a fine imposed as a result of a conviction under s. 447(3) is too remote to engage a liberty interest under s. 7. Consequently, the potential for a fine under s. 447(3) of the *Insurance Act* does not engage the respondent's liberty interest.

[49] The potential for a high fine also does not implicate the appellant's right to security of the person. In *R. v. Transport Robert (1973) Ltee*<sup>18</sup> the Ontario Court of Appeal held that a large fine for a *Highway Traffic Act* offence does not engage security of the person stating as follows:

The diminished stigma attached to the s. 84.1 offence is not sufficient to trigger the security interest in s. 7 even when coupled with the possibility of a significant fine. *This is simply not the kind of serious state-imposed psychological stress that is intended to be covered by security of the person. It is qualitatively different than the kinds of stresses that have been recognized in the cases.* A review of those cases demonstrates a concern with state action that intrudes in an intimate and profound way as in *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46 (attempt to take a child away from its parents); *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 (criminal prohibition on assisting suicide for a desperately ill patient) and *R. v. Morgentaler*, [1988] 1 S.C.R. 30 (regulating abortion).<sup>19</sup>

<sup>15</sup> *Stewart*, at p. 69.

<sup>16</sup> *Stewart*, at p. 70.

<sup>17</sup> *London (City of) v. Polwesky* (2005), 202 CCC (3d) 257 (Ont. C.A.), at para. 4, wherein the court held that s. 69 of the *POA* separates default proceedings from the original trial and provides for an assessment of the means of the offender to pay his or her fine and as a result the potential for imprisonment for non-payment of a fine is too remote to engage s. 7 interests. Section 69 of the *POA* governs the steps that must occur where an individual defaults on the payment of a fine. Section 69(9) provides for a hearing in which the justice shall determine whether the person is unable to pay the fine within a reasonable period of time. Pursuant to s. 69(14) a justice may only issue a warrant of committal for non-payment of a fine if "the justice is not satisfied that the person who has defaulted is unable to pay the fine within a reasonable period of time and incarceration of the person would not be contrary to the public interest." See also *R. v. Schmidt*, 2014 ONCA 188, at paras. 43-44, leave to appeal refused [2014] S.C.C.A. No. 208.

<sup>18</sup> (2003), 180 CCC (3d) 254 (Ont. C.A.), leave to appeal dismissed [2004] S.C.C.A. No. 8; at para. 27.

<sup>19</sup> *Transport Robert (1973) Ltee*, at para. 28.

[50] The findings of the Court of Appeal in *Transport Robert (1973) Ltee* are applicable to this case. Like the applicant in *Transport Robert Ltee*, who was operating in the highly regulated commercial trucking industry, the appellant was operating in a regulated industry. In my view the right to security of the person does not protect the appellant, operating in the highly regulated insurance industry “from the ordinary stress and anxieties that a reasonable person would suffer as a result of government regulation of that industry ...[I]f the right were interpreted with such broad sweep, countless government initiatives could be challenged on the ground that they infringe the right to security of the person, massively expanding the scope of judicial review, and, in the process, trivializing what it means for a right to be constitutionally protected.”<sup>20</sup>

[51] The appellant also argues that s. 7 is engaged because it is open to a judge to impose probation under s. 72 of the *POA*. In *Re BC Motor Vehicle Act* the Supreme Court considered the constitutionality of s. 94(2) of the *Act* which made driving while suspended or without a valid licence an absolute liability offence and upon conviction resulted in a mandatory term of imprisonment. The Supreme Court held that s. 7 was engaged because of the possibility of imprisonment and held that the combination of imprisonment and absolute liability violates s. 7 of the *Charter*. In reaching this finding the Court stated as follows:

A law enacting an absolute liability offence will violate s. 7 of the *Charter* only if and to the extent that it has the potential of depriving of life, liberty, or security of the person.

Obviously, imprisonment (*including probation orders*) deprives persons of their liberty. An offence has that potential as of the moment it is open to the judge to impose imprisonment. There is no need that imprisonment, as in s. 94(2) be made mandatory.<sup>21</sup> (emphasis added)

[52] Although this passage suggests that s. 7 will be implicated where an individual is liable to a period of imprisonment *or* probation for an offence, the issue of whether the potential for probation impacts liberty was not directly before the Court.<sup>22</sup> Subsequently

<sup>20</sup> *Transport Robert (1973) Ltee*, at para. 29.

<sup>21</sup> *Re BC Motor Vehicle Act*, at para. 73 and 74. See also paragraph 77.

<sup>22</sup> It is of note that subsequent to *Re BC Motor Vehicle Act*, in *R. v. Pontes*, [1995] S.C.J. No. 70, at paras. 25-26, and 47, the SCC did not make reference to probation, in addition to imprisonment, as engaging s. 7 liberty interests. In *Pontes* the Supreme Court again considered whether s. 92 and s. 94 of the *BC Motor Vehicle Act* resulted in an absolute liability offence and if so whether s. 7 interests were engaged. The Court concluded that although the provisions created an absolute liability offence s. 7 was not engaged due to the enactment of s. 4.1 of the *Offences Act*, (enacted subsequent to the SCC decision in *Re BC Motor Vehicle Act*). Section 4.1 precluded imprisonment as a penalty for an absolute liability offence. While the issue was not directly addressed, reference to probation was noticeably absent in the Court’s summary regarding when s. 7 interests are engaged. At para. 26 the court stated:

From the cases which followed the passage of the *Charter*, the following can be derived: first, generally speaking, an offence of absolute liability is not likely to offend s. 7 of the *Charter* unless a prison sanction is provided; secondly, an accused charged with an absolute liability offence cannot avoid liability by demonstrating that he exercised due diligence; thirdly, one of the prime bases for distinguishing a strict liability offence from an absolute liability offence is the availability of the defence of due diligence; fourthly, any provincial regulatory offence providing for a term of

in *Schmidt*<sup>23</sup>, the Ontario Court of Appeal concluded that a probation order will not engage s. 7 where the terms have no significant impact on liberty or security of the person. In this case, the only term of the appellant's probation order, aside from the statutory terms, provided that he "refrain from making false or misleading statements or representations that he is a licenced chiropractor to an insurer in order to obtain payment for services provided to an insured". This term adds nothing to the statutory terms already prohibiting the appellant from committing the same or similar offences and has no more impact on the appellant's liberty and security than does the mere existence of s. 447(2)(a.3) of the *Insurance Act*. The appellant's probation order is of a similar nature to the probation order in *Schmidt* which the Court held did not engage liberty or security interests. Section 72 of the *POA* provides for probation orders where an individual is convicted of an offence in a proceeding commenced by information. It may apply to a very wide range of provincial offences. In my view, if s.7 were engaged for every offence for which probation is an available option it would trivialize the right to life, liberty, and security of the person, and the protections afforded by s. 7. As the nature of the probation order in this case illustrates the imposition of probation in many instances will not have a significant impact on liberty or security of the person. I do not believe that such a "broad sweep", which would "massively expand the scope of judicial review" was intended by the Supreme Court in *BC Motor Vehicle Act*, nor is such an interpretation consistent with subsequent interpretation of s. 7 of the *Charter*.<sup>24</sup>

[53] For these reasons, I am satisfied the appellant's probation order, does not engage his liberty or security interests under s. 7 of the *Charter*. I am satisfied that the Justice of the Peace did not err in finding that the appellant's s. 7 *Charter* interests were not engaged.

*Principles of Fundamental Justice: Is s. 449 unconstitutional for vagueness or over breadth?*

[54] Even if the appellant could establish that his s. 7 interests were engaged, the constitutional challenge would nonetheless fail. The claim that s. 449 is unconstitutional for vagueness or over breadth has no merit.

[55] Where there is a deprivation of life, liberty, or security of the person, to establish a violation of s. 7 the appellant must show that such the deprivation is not in accord with the principles of fundamental justice. The appellant submits that s.449 is contrary to the principles of fundamental justice because it is unconstitutionally vague. The appellant,

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imprisonment must make a defence of due diligence available to the accused. I would leave open for future consideration the situation presented by an absolute liability offence punishable by fine with the possibility of imprisonment for its non-payment in those circumstances where the legislation provides that the imposition and collection of any fine is subject to a means test.

See also paragraph 9 where the court stated: "Obviously, if the offence is one of absolute liability, but there is no risk of imprisonment, then the provision will not offend s. 7...". When *Pontes* was decided s. 79 of the *British Columbia Offences Act* provided for imposition of a suspended sentence with a recognizance and conditions, but did not provide for a "probation order". See also *R. v. Vaillancourt*, [1987] 2 S.C.R. 630, at p. 652.

<sup>23</sup> *Schmidt*, at para. 43.

<sup>24</sup> *Transport Robert (1973) Ltee*, at para. 29; *Horsefield v. Ontario (Registrar of Motor Vehicles)* (1999), 134 C.C.C. (3d) 161, (Ont. C.A.) at 182.

relies on the same arguments utilized in support of the motion to quash. The appellant submits that s. 449 is unclear and impermissibly vague because it does not explicitly create a limitation period based on when the Superintendent came to know of the offence (discoverability). The appellant also argues that the legislation does not permit an individual to ascertain how far back he or she may be liable for prosecution. He further argues that because the relevant information is held by a third party (the insurance company), there is no clear limit upon which the state can act against its citizens.

[56] In reply, the respondent submits that s. 449 is not unconstitutionally vague because it provides sufficient guidance for legal debate, and a basis for coherent judicial interpretation on an application of the provision to the facts of the case.<sup>25</sup> The respondent submits that the date at which the matter came to the attention of the superintendent, April 11, 2015, was readily discernable.

[57] A law is unconstitutionally vague only if it provides insufficient guidance for legal debate, it is not intelligible, or it cannot provide the basis for coherent judicial interpretation. Legislation is not unconstitutionally vague simply because it is subject to interpretation. Only “where a court has embarked upon the interpretative process, but has concluded that interpretation is not possible” should a law be declared unconstitutionally vague.<sup>26</sup>

[58] There is no lack of clarity in the limitation period in s. 449. Contrary to the assertion of the appellant, the section is clearly “knowledge”, not “event”, based. Section 449 contains absolutely no language that ties the limitation period to the date that the facts underlying the offence occurred. The limitation period is explicitly and exclusively tied to the knowledge of the Superintendent. Proceedings cannot be commenced more than two years after the date upon which the facts...first came to the knowledge of the Superintendent.

[59] The ability of the section to provide clear guidance for legal interpretation is demonstrated by the facts of the case. The Superintendent received the letter from RBC notifying FSCO of the facts upon which the proceedings were based on April 11, 2013. Therefore, a proceeding cannot be commenced more than two years after April 11, 2013. This is the date upon which the facts came to the knowledge of the Superintendent.

[60] Underlying the concept of vagueness is the principle of fundamental justice requiring that a criminal provision must afford citizens fair notice of the consequences of their conduct and limit the discretion of those charged with its enforcement. Assuming the concept of fair notice is applicable to a limitation period, (it is the offence provision, not the limitation period, that informs a citizen of the nature of conduct that may expose them to criminal or quasi-criminal liability), s.449 clearly provides fair notice to a citizen that the charges can be laid within two years of the relevant authority becoming aware of the facts underlying the offence. It also clearly limits the discretion of the authorities.

<sup>25</sup> *Nova Scotia Pharmaceutical Society*, at para. 72.

<sup>26</sup> *Nova Scotia Pharmaceutical Society*, *supra*. *R. v. Levkovic*, 2010 ONCA 830, at paras. 89, 92-94, *aff'd*, 2013 SCC 25, *Ontario v. Canadian Pacific Ltd.*, [1995] 2 SCR 1031, at paras 46-47, 60-70.

The state does not have discretion to lay charges after two years of discovering the conduct. This permits a period of time for investigation, but does not allow for a “standardless sweep”.<sup>27</sup>

[61] The assertion that *any* limitation period tied to discoverability is contrary to the principles of fundamental justice because an individual cannot know with certainty when a matter might be brought to the attention of a person in authority and as a result cannot know when they might be subject to prosecution, is in direct conflict with authority from the Ontario Court of Appeal and the Supreme Court of Canada. Firstly, there is no requirement that a law provide “certainty” as to its scope. Guidance not precision, is required by s. 7 of the *Charter*.

It cannot be argued that an enactment can and must provide enough guidance to predict the legal consequences of any given course of conduct in advance. All it can do is enunciate some boundaries which create an area of risk. But it is inherent to our legal system that some conduct will fall along the boundaries of the area of risk; no definite prediction can then be made. Guidance, not direction, of conduct is a more realistic objective.<sup>28</sup>

[62] Secondly, discoverability is a core principle of limitation periods. Limitation periods frequently run from the date a cause of action was discovered or ought to have been discovered. In *Pickles*, the Ontario Court of Appeal, referred to, by way of example, the limitation period in s. 129(1) of the *Securities Act*<sup>29</sup> which mirrors the limitation period in s. 449, and made clear that “in the context of regulatory statutes ... it is open to the legislature to specifically build the discoverability principle into the wording of a limitation period”.<sup>30</sup>

[63] Finally, it would be contrary to the best interests of justice to suggest that the legislature cannot create limitation periods based upon when offending conduct comes to the attention of the relevant authorities. Such an interpretation would potentially lead to immunity from prosecution where the violation is hidden or remains undiscovered for a sufficient period of time.<sup>31</sup>

[64] A provision will be overly broad where the means chosen are broader than necessary to achieve the legislature’s objective. The appellant did not articulate how s. 449 overreaches, and I am satisfied that there is no merit to this submission.

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<sup>27</sup> Don Stuart. *Charter Justice in Canadian Criminal Law*. Chapter 2: Life, Liberty and Security of the Person.” 7<sup>th</sup> Edition, (Toronto: Thomson Reuters, 2018) , at p. 129-137.

<sup>28</sup> *Nova Scotia Pharmaceutical Society*, (1992), 74 C.C.C. (3d) 289 (S.C.C.), at para. 62.

<sup>29</sup> *R. v. Pickles*, [2004] O.J. No. 662, 237 D.L.R. 4<sup>th</sup> 568 (CA), at para. 16. Section 129 of the *Securities Act*, provided: “No proceeding under this Part shall be commenced in a court more than one year after the facts upon which the proceeding is based first came to the knowledge of the Commission”.

<sup>30</sup> *Deposit Insurance Corporation of Ontario v. Vinski*, 2014 ONCJ 301, at paras. 57-67; *Nova Scotia Pharmaceutical Society*, *Pickles*, at para. 16; Graeme Mew, “The Law of Limitations”, 3<sup>rd</sup> ed. (Toronto: LexisNexis Canada, 2016), at p. 75-102; Sheilagh Stewart. *Stewart on Provincial Offences Procedure in Ontario*. Chapter 3: Commencement of Proceedings by Certificate. (Salt Spring Island, EarlsCourt Legal Press, 2005) at p. 112.

<sup>31</sup> *R. v. Commercial Spring and Tool Company*, [2009] O.J. No. 3839 (SCJ).

[65] For these reasons there was no merit to the constitutional challenge to s. 449 of the *Insurance Act*. Section 449 is not vague or overly broad, and does not violate s. 7 of the *Charter*. Having regard to the above, there is no basis upon which a court could conclude that s. 449 of the *Insurance Act* rendered the appellants' trial unfair contrary to s. 11(d) of the *Charter*.<sup>32</sup>

### E. Did the Trial Judge Err in Dismissing the s. 11(b) application?

#### *The Jordan Framework for Analysis*

[66] In *Jordan*, the Supreme Court of Canada established a presumptive ceiling of 18 months for cases going to trial in the provincial court to be heard. The analysis required by *Jordan* begins with calculating the “total delay” from the charge to the actual or anticipated end of trial. Once that period is determined, any delay attributable to the defence must be subtracted in order to determine the period of “net delay”. Delay will be attributable to the defence where: there has been an explicit s. 11(b) waiver for a specific period or where delay is “*caused solely or directly by the conduct of the defence*”. In *Cody*, the Supreme Court explained that defence delay includes, “deliberate and calculated defence tactics aimed at causing delay, *which includes frivolous applications and requests*” and situations “where the court and Crown are ready to proceed but the defence is not.”<sup>33</sup> While the defence cannot benefit from its own delay-causing conduct, defence actions legitimately taken to respond to the charges do not constitute defence delay.<sup>34</sup>

[67] Where the “net delay” from the charge to the actual or anticipated end of trial exceeds 18 months, then the delay is presumptively unreasonable.<sup>35</sup> To rebut this presumption the Crown must establish the presence of “exceptional circumstances”. If it cannot, the delay is unreasonable and a stay must follow.<sup>36</sup>

[68] Exceptional circumstances have two components: “(1) they are reasonably unforeseen or reasonably unavoidable, and (2) Crown counsel cannot reasonably remedy the delays emanating from those circumstances once they arise”.<sup>37</sup> In general there are two categories of exceptional circumstances – discrete events and particularly

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<sup>32</sup> The appellant did not articulate any independent basis in support of the finding that there was a violation of s. 11(d) of the *Charter*. In his authoritative text *Charter Justice in Canadian Criminal Law*, 7<sup>th</sup> Edition, (Toronto: Thomson Reuters, 2018), at p. 22, Professor Don Stuart indicates the following: “Section 11(d) guarantees one charged with an offence the right, *inter alia*, to a “fair and public hearing”. In criminal courts, judges frequently speak more loosely of a constitutional right to a fair trial or a constitutional right to make full answer and defence. Sometimes the right is located in s. 11(d), at other times in s. 7, while sometimes ss. 7 and 11(d) are referred to in the same breath. It seems preferable to consider what is included in the right to a fair trial in the context of s. 7. After all, whatever is included in a right to a fair hearing under s. 11(d) would “in any event be protected under s. 7 as an aspect of the principles of fundamental justice.” (citations omitted).

<sup>33</sup> *R. v. Cody*, 2017 SCC 31, at para. 28 and 30; *York (Regional Municipality) v. Tomovski*, 2017 ONCJ 785, at paras. 11 and 12.

<sup>34</sup> *Jordan* at paras. 47, and 64-66; *R. v. Coulter*, 2016 ONCA 704 at paras. 34-41.

<sup>35</sup> *R. v. Manasseri*, 2016 ONCA 703, leave to appeal refused [2016] S.C.C.A. No. 513, at para. 306; *Jordan* at para. 47.

<sup>36</sup> *Jordan*, at para. 47 and 68.

<sup>37</sup> *R. v. Jurkus*, 2018 ONCA 489. *Jordan*, at para. 69; *Cody*, at para. 58.

complex cases. Where discrete events cause delay, that period of time must be subtracted from the net delay. This produces what is referred to as the “resulting delay.” Where the resulting delay exceeds the presumptive 18 months ceiling, the court will conduct a qualitative analysis of the complexities of the case to determine whether the passage of time is nonetheless reasonable.<sup>38</sup>

### *Transitional Cases*

[69] For cases where delay exceeding the ceiling is not explained by the complexity of the matter, a transitional exceptional circumstance may apply. For cases in the justice system at the time of *Jordan*’s release, a “transitional exception circumstance” applies if the Crown satisfies the court that the time the case took is justified based on the parties’ reasonable reliance on the previous state of the law. This requires consideration of whether delay would have been considered unreasonable under the *Morin* framework.<sup>39</sup>

[70] If the “resulting delay”, after defence delay and any period of delay attributable to exceptional circumstances is subtracted, is less than 18 months, the onus is on the defence to show that the delay is unreasonable. To do so the defence must establish that:

- (i) It took meaningful steps that demonstrate a sustained effort to expedite the proceedings; and,
- (ii) The case took markedly longer than it reasonably should have.

The Supreme Court indicated that it expected “stays below the presumptive ceiling to be rare and limited to clear cases”.<sup>40</sup>

### *Findings at Trial and Positions of the Parties*

[71] On March 8, 2017 the appellant filed a s. 11(b) *Charter* application alleging that his rights to be tried in a reasonable time had been violated and seeking a stay of proceedings under s. 24(1) of the *Charter*. The motion was returnable on April 6, 2017, the date scheduled for judgment on the trial proper. The appellant argued that the delay from the date the charge was laid, April 2, 2015, to the date scheduled for judgment, April 6, 2017 a period of 2 years and 4 days, was unreasonable and contrary to s. 11(b) of the *Charter*.

[72] On April 6, 2017, Justice of the Peace Radtke dismissed the s. 11(b) application. He held that the case “was not the most standard or simplest case”. He noted that there were a number of pre-trial motions. In addition, Justice of the Peace Radtke held that the period of delay between February 28, 2017 and April 6, 2017, one month and 9 days, was a period necessary for the court to render a decision, and should have been treated as neutral. At sentencing, Justice of the Peace Radtke characterized the motions as meritless.

<sup>38</sup> *Jurkus*, at paras. 7 and 8.

<sup>39</sup> *R. v. Gopie*, 2017 ONCA 728, at para. 119; *Jordan* at para. 94; *Coulter*, paras. 88-89.

<sup>40</sup> *Jordan*, at para. 48; and para. 56; *Coulter*, at paras. 38-41 and 53.

[73] The appellant submits that Justice of the Peace Radtke erred in dismissing the s. 11(b) application because the “net delay” was 24 months and 4 days, exceeding the 18 month ceiling identified in *Jordan* for matters tried in the Ontario Court of Justice and this was presumptively unreasonable. The case was not complex and there were no exceptional circumstances. The appellant further submits that as a result of recent case law the ceiling above which delay is presumptively unreasonable for provincial offences is 14 months. The appellant argues that throughout the proceedings there was no waiver of the appellant’s s. 11(b) rights, nor was there any defence caused delay and the Justice of the Peace erred in characterizing the defence motions as meritless. Instead, he submits, that the defence properly launched a vigorous defence. The appellant also submits that the delay was purely systemic and that Justice of the Peace Radtke erred in analyzing all of the delay utilizing the *Morin*<sup>41</sup> framework and in treating the delay between February 28, 2017 and April 6, 2017 as neutral.

[74] The respondent submits that the Justice of the Peace properly dismissed the s. 11(b) application because the “net delay” was less than 18 months and is presumptively reasonable. The respondent submits that the pre-trial motions initiated by the appellant were meritless and caused at least 7 months delay that should be subtracted from the total delay and that the appellant failed to properly estimate the time required for the motions, which resulted in the originally scheduled trial dates being utilized entirely for the pre-trial motions. In addition, the respondent submits that further delay was caused because the appellant was not prepared to cross-examine witnesses on the first day of trial, October 14, 2016, leading to a further delay of 17 days from October 14 to October 31, 2016. In addition, the respondent submits that the matter was a transitional case and the parties relied on the law prior to *Jordan*. A review of the record demonstrates that the appellant was content with the pace of the proceedings and consented to adjournments.

[75] I have concluded that although the Justice of the Peace provided insufficient reasons to make clear his reasoning process, he correctly concluded that the delay was not unreasonable, that there was no violation of s. 11(b), and that a stay of proceedings was not justified. I am satisfied that there was no substantial wrong or miscarriage of justice and that this ground of appeal should be dismissed.

### *Standard of Review*

[76] In conducting a review of the Justice of the Peace’s determination that there was no violation of s. 11(b) of the *Charter*, the underlying findings of fact are to be reviewed on a standard of palpable and overriding error. The characterization of the periods of delay and the ultimate decision as to whether there has been unreasonable delay are subject to review on a standard of correctness.<sup>42</sup>

<sup>41</sup> *R. v. Morin*, [1992] 1 S.C.R. 771.

<sup>42</sup> *Jurkus*, at para. 25.

### *History of Proceedings and Findings of the Trial Judge*

[77] The following chart summarizes the history of the proceedings and identifies my conclusions regarding the characterization of the delay, including periods attributable to the defence.

| <b>Date and Time from swearing of the information.</b> | <b>Summary of Proceedings</b>                                                                                                                                                                                                                                   | <b>Attribution of delay, additional comments.</b>                                                                                                                                                                                                                                                     |
|--------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>April 2, 2015</b>                                   | Information Sworn                                                                                                                                                                                                                                               |                                                                                                                                                                                                                                                                                                       |
| <b>April 24, 2015</b><br>22 Days                       | First Appearance. Parties agree to put the matter over for 1 month TBST.                                                                                                                                                                                        | *Under the <i>Morin</i> framework this would have been characterized as part of the neutral intake period.                                                                                                                                                                                            |
| <b>May 29, 2015</b><br>1 months and 27 days.           | Disclosure previously provided. Counsel pre-trial held. Joint request by parties to adjourn for counsel to consider settlement discussions.                                                                                                                     | *Under the <i>Morin</i> framework this would have been characterized as part of the neutral intake period.                                                                                                                                                                                            |
| <b>September 11, 2015</b><br>5 months and 9 days       | Adjourned to October 9, 2015 TBST.<br><br>Pre-trial scheduled for November 29, 2015.                                                                                                                                                                            | Neither counsel indicated whether earlier pre-trial dates were available and counsel did not place their availability on the record. The parties appear to be content with the pace of the proceedings. Under <i>Morin</i> the time from September 11 to November 29, 2015 would be a neutral period. |
| <b>October 9, 2015</b><br>6 months and 7 days          | Third party records application filed by appellant returnable October 9, 2015. RBC and College of Chiropractors not present. Insured patient (claimant) not given notice. Records application adjourned to October 30, 2015.<br><br>Appellant directed to serve | The record demonstrates that the defence was proactive in bringing the records application prior to the pre-trial. The records application was not frivolous and although the appellant should have served the insurance claimant sooner I am not satisfied that under the                            |

|                                                   |                                                                                                                                                                                                                                                                                                     |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
|---------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|                                                   | the claimant with the records application.                                                                                                                                                                                                                                                          | <i>Jordan</i> framework that this period should be considered defence delay.                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
| <b>October 30, 2015</b><br>6 months and 28 days   | Records application in respect of the OCC abandoned. Further production/disclosure by OCC and Crown provided prior to October 30, 2015.<br><br>Records application abandoned as a result of consent production and disclosure of previously redacted information.                                   | As noted, this was a proactive step by the appellant and was not frivolous. I am not satisfied that under <i>Jordan</i> that this period should be considered defence delay.                                                                                                                                                                                                                                                                                                                                                          |
| <b>November 27, 2015</b><br>7 months and 25 days. | Judicial Pre-trial held.<br><br>Trial dates set. Defence indicates intention to seek to quash the information, and to bring a constitutional challenge to the legislation, and abuse of process application. Parties estimate 2 days for trial. Trial dates set for April 21, 2016 and May 2, 2016. | *The 2 day trial estimate was inaccurate and resulted in insufficient time scheduled for trial. On the <i>Morin</i> framework only some of the 4 months and 25 days between the pre-trial and the trial dates would be considered institutional delay.<br><br>A total of 7 separate days were ultimately required including 1 day for the motion to quash, 1 day for the constitutional challenge, 1 day for judgment on the constitutional challenge, 2 days for evidence, 1 day for judgment, and 1 day for imposition of sentence. |
| <b>April 21, 2016</b><br>12 months and 19 days.   | Motion to Quash Argued. Judgment reserved. Witnesses bound over to May 2, 2016.<br><br>Additional days scheduled for trial on October 14 and 31, 2016. (August 8 and 15 offered, Crown and Defence available, Justice of the Peace not                                                              | *Defence Delay. The motion to quash the information was meritless<br><br>*On May 1, 2017 – Justice of the Peace Radtke described the motion as meritless.                                                                                                                                                                                                                                                                                                                                                                             |

|                                                    |                                                                                                                            |                                                                                                                                                                                                                                                                          |
|----------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|                                                    | available).                                                                                                                |                                                                                                                                                                                                                                                                          |
| <b>May 2, 2016</b><br>13 months                    | Application to Quash Dismissed.<br>Constitutional challenge to s. 449 Argued.                                              | *Defence delay. The constitutional challenge to s. 449 was meritless.<br><br>On May 1, 2017 Justice of the Peace Radtke described the motion as meritless.                                                                                                               |
| <b>June 7, 2016</b><br>14 months and 5 days        | Constitutional challenge to s. 449 of the <i>Insurance Act</i> dismissed.                                                  | *Defence delay                                                                                                                                                                                                                                                           |
| <b>October 14, 2016</b><br>18 months and 12 days   | Trial                                                                                                                      | Additional time required due to inaccurate estimate of trial time.<br><br>Under the <i>Morin</i> framework only the period of delay from August 8 to October 14, 2016 would be treated as institutional delay.                                                           |
| <b>October 31, 2016</b><br>18 months and 28 days.  | Trial<br>11(b) application, dismissed due to lack of transcripts and because not brought at first available opportunity.   | Additional time required due to inaccurate estimate of trial time.                                                                                                                                                                                                       |
| <b>February 28, 2017</b><br>22 months and 26 days. | Scheduled for Reasons for Judgment.<br>Further time required for reasons for Judgment. Judgment adjourned to April 6, 2017 | Additional time required due to inaccurate estimate of trial time.<br><br>Under the <i>Morin</i> framework some period of time would be considered inherent for reasons for judgment. 2.5 months of the period between October 31 and April 6, 2017 institutional delay. |
| <b>April 6, 2017</b>                               | 11(b) application dismissed filed on March                                                                                 |                                                                                                                                                                                                                                                                          |

|                                              |                              |  |
|----------------------------------------------|------------------------------|--|
| 24 months and 4 days.                        | 8, 2017.<br>Finding of Guilt |  |
| <b>May 1, 2017</b><br>24 months and 29 days. | Sentencing                   |  |

### *Analysis and Conclusions*

#### *Presumptive Ceiling for Part III Provincial Offences*

[78] The appellant, relying on the *Region of York v. Tomovski*<sup>43</sup>, submits that recent case law has lowered the presumptive ceiling from 18 months to a range of 14 months for provincial offences. This assertion is a misstatement of the courts findings in *Tomovski*. In *Tomovski*, Justice McInnes did not hold that a presumptive ceiling of 14 months should be applied to all provincial offences. Justice McInnes, sitting as a provincial offences appeal court, was considering the appeal of a conviction for a speeding charge commenced by certificate of offence under Part I of the *POA*. In his comprehensive decision, Justice McInnes made clear that his findings as to the presumptive ceiling were applicable to Part I offences only, stating “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”.<sup>44</sup>

[79] Secondly, even in respect of Part I *POA* offences, Justice McInnes explicitly declined to “set” a specific presumptive ceiling. He held that in proceedings commenced under Part I, *POA* trial courts should not apply the 18 months ceiling and may apply the 14 month ceiling but are not bound by that number”. Justice McInnes carefully circumscribed his findings, noting that it would be inappropriate for an Ontario Court of Justice, Provincial Offences Appeal court to pronounce a province wide ceiling noting that “promulgating frameworks and setting ceilings is the responsibility of senior appellate courts, not judges of this court”.<sup>45</sup>

[80] The Crown applied for leave to appeal Justice McInnes’s findings in *Tomovski* regarding the presumptive ceiling to the Court of Appeal. In dismissing the application for leave to appeal, the Court of Appeal made clear that the court “should not be understood as approving the provincial appeal judge’s view that the appropriate presumptive ceiling for Part I proceedings is in the 13 to 15 months range”.<sup>46</sup>

[81] Put simply, contrary to the appellant’s position, *Tomovski* did not establish a 14 months ceiling for Part III offences.

<sup>43</sup> 2017 ONCJ 785, at paras. 58 -158; leave to appeal refused 2018 ONCA 57. (Although Justice McInnes applied a presumptive ceiling of 14 months for Part I offences under the *POA*, he ultimately allowed the appeal of the Crown and set aside the Justice of the Peace’s order staying the proceedings for unreasonable delay. Despite the favourable ruling for the Crown appellant, the Crown sought to appeal the decision of Justice McInnes in order to obtain an advisory opinion of the court in regard to the findings regarding a presumptive ceiling for Part I offences. Leave to appeal was dismissed on the basis that the appeal could not be based on a disagreement with determinations in the reasons for judgment.

<sup>44</sup> *Tomovski*, at para. 148.

<sup>45</sup> *Tomovski*, at paras. 149 and para. 159.

<sup>46</sup> *Tomovski*, 2018 ONCA 57, at paras. 19 and 20.

[82] What then is the appropriate presumptive ceiling for Part III provincial offences? In my view, the applicable presumptive ceiling in this case is 18 months as identified by the Supreme Court in *Jordan* for cases tried in the provincial court. There is no principled basis to reduce the presumptive ceiling. Firstly, a wide range of offences are governed by Part III of the *POA*. Many such offences, although regulatory in nature, have many similarities to criminal offences. In some instances the offences share the same or very similar essential elements to a corresponding criminal offence. Proceedings for Part III offences may be as lengthy and complex as criminal proceedings. This case provides a good example. The offence of making a false statement contrary to s. 447(2)(a.3) of the *Insurance Act* requires proof of a specific *mens rea*. It has very similar essential elements to making a false statement contrary to s. 362 of the *Criminal Code*. The proceedings although not “complex” as the term is used in *Jordan*, were not simple, involving a third party records application, a motion to quash the information, a constitutional challenge to s. 449 of the *Insurance Act*, a voluntariness *voir dire*, and an application to stay the proceedings pursuant to s. 11(b) of the *Charter*. This case did not enjoy the simplified process, or issues, typical of many Part I provincial offences.

[83] In addition, I do not have a proper evidentiary foundation to properly assess whether a lesser or greater presumptive ceiling is warranted. At trial, the appellant did not argue that a lower presumptive ceiling should apply to Part III provincial offences, and, as a result, no evidence was called that might inform a determination of the issue.

[84] Before leaving this issue, in my view, there is a danger in creating a myriad of presumptive ceilings for different types of criminal and regulatory offences. The *Jordan* framework provides sufficient flexibility to respond to simple cases that take an inordinate period to be tried. It remains open to an applicant to establish that although within the presumptive ceiling, delay is unreasonable because a simple case took markedly longer than it should have. In *Jordan*, the Supreme Court chose to create bright line rules to address a culture of complacency, but also to provide greater certainty, clarity, consistency, and simplicity to litigants. In my view, the establishment of a variety of presumptive ceilings (varying by nature of offence, circumstances of the offender, or jurisdiction) may detract from the underlying policy rationales that guided the Supreme Court’s findings in *Jordan* which were intended, at least in part, to redress the highly unpredictable and complex nature of the *Morin* analytical framework.<sup>47</sup> The *Jordan* framework is sufficiently flexible to accommodate the wide range of cases tried by criminal and provincial offences courts.<sup>48</sup>

#### *Calculation of Net Delay and Resulting Delay*

[85] The total delay under consideration was 24 months and 4 days. This was the period from April 2, 2015, the day the information was laid, to April 6, 2017, the date of judgment on the trial proper, and the date of the 11(b) application.

[86] In calculating the “net delay”, I agree with the appellant’s submission that there was no explicit waiver of s. 11(b) at any point by the appellant. However, in my view,

<sup>47</sup> *Tomovski*, at para. 104 and 135 citing *Jordan* at para. 32, 38-41, and 50.

<sup>48</sup> *Cody*, at para. 3.

there are a number of periods that are properly characterized as defence delay and must be subtracted from the period of “total delay”.

[87] During the sentencing proceedings, Justice of the Peace Radtke characterized all of the pre-trial motions and *Charter* applications as “meritless”. Such a finding is entitled to deference, and I agree with this finding, with the exception of the third party records applications. Although both third party records applications were ultimately abandoned, this occurred after production of new materials and provision of previously redacted records on consent by RBC and OCC. In addition, even though the appellant failed to serve the insurance claimant on the first date scheduled for the records application, it did not delay the proceedings because the appellant had been proactive in scheduling a date for the applications in advance of the already scheduled judicial pretrial.

[88] I agree with the Justice of the Peace’s characterization of the motion to quash and the constitutional challenge as meritless. As set out above, the motion to quash the information was unfounded as was the constitutional challenge. In *Cody*, the Supreme Court explained that defence delay includes “frivolous applications and requests” and indicated that “While trial judges should take care to not second-guess steps taken by defence for the purposes of responding to the charges, they must not be reticent about finding defence action to be illegitimate where it is appropriate to do so”. The deduction of defence delay is intended to prevent the defence from benefitting from “its own delay-causing action or inaction” and applies to any situation where the defence conduct has “solely or directly” caused the delay.<sup>49</sup>

[89] In my view, the motion to quash the information and the constitutional challenge to s. 449 had no foundation in fact or law. The applications should not have been pursued. Had they not proceeded, the trial would have been held on April 21, 2016 and May 2, 2016, and the judgment could have been delivered on June 7, 2016. As a result, but for the frivolous motions, the trial could have been completed within 14 months and 5 days. A period of time well under the presumptive ceiling.

[90] Even if I did not treat the defence motions as frivolous, the additional time required for trial is properly deducted from the net delay as a “discrete event” due to the inaccurate trial estimates by the parties. The matter was pre-tried on November 27, 2015, before the trial was scheduled to proceed. Both counsel agreed that it would take two days to complete the trial. This estimate was clearly insufficient. Ultimately, a total of 7 court days were required to complete the trial, including one day for the motion to quash, one day for the constitutional challenge, one day for judgment on the constitutional challenge, two days for evidence, one day for judgment, and a day for imposition of sentence. In *Jurkus*<sup>50</sup>, the Court of Appeal observed that in *Jordan*, the court specifically adverted to the potential that trials may take longer than “reasonably expected”, even where the parties have in good faith attempted to establish realistic timelines. The court held that in these circumstances, it is “likely the delay was unavoidable” and will constitute an exceptional circumstance.<sup>51</sup>

<sup>49</sup> *Cody*, at paras. 28 -35.

<sup>50</sup> *R. v. Jurkus*, 2018 ONCA 489.

<sup>51</sup> *Jurkus*, at para. 55, citing *Jordan*, at para. 73.

[91] Either way, whether delay is attributed to the frivolous defence motions, or due to the inaccurate estimate of time required for trial, the period between May 2, 2016 and February 28, 2017, a period of 9 months and 29 days must be deducted from the total period of delay. This incorporates the additional time required, beyond the original estimate to hear the evidence and for a decision to be rendered. 24 months and 4 days less 9 months and 29 days, leads to a period of “resulting delay” of 14 months and 6 days. This period of delay is presumptively reasonable.

*Meaningful Steps that Demonstrate a Sustained Effort to Expedite*

[92] With the exception of bringing the third party records application at an early stage, the defence did not take meaningful steps that demonstrate a sustained effort to expedite the proceedings. To the contrary, the defence significantly delayed the trial by bringing the frivolous motion to quash and constitutional challenge. In addition, although on October 14, 2016 the appellant raised s. 11(b) as a concern, the notice of application was not filed until shortly before October 31, 2016 and was deficient due to lack of transcripts. The appellant renewed the s. 11(b) application only after the Justice of the Peace adjourned the case from February 28, 2017 to April 6, 2017 for additional time to review the transcripts and render a judgment.

*The Period Did Not Markedly Exceed Reasonable Time Requirements*

[93] There was no evidence of comparative trial times for similar cases in this jurisdiction. On the evidence placed before me, I am not satisfied that the case markedly exceeded reasonable time requirements as a result of any institutional delay or conduct of the Crown.

[94] The reasonable time requirements derive from a variety of factors including the complexity of a case, local considerations, and whether the Crown took reasonable steps to expedite the proceedings.<sup>52</sup> This case was being tried in a very busy high volume jurisdiction. The Crown was proactive in taking steps to expedite the proceedings. At the outset of the trial, the Crown sought an amendment to the information which substantially narrowed the allegations from a broad and continuing offence period between October 23, 2006 and February 5, 2013, to a single offence date of February 5, 2013. The third party records application was resolved with the consent production of additional materials without a hearing.

[95] The Crown did its part to ensure that the matter proceeded expeditiously. No delays were caused by the Crown. This was not a case where failure of the Crown to provide disclosure caused delays. It is not a case where the accused was required to appear on multiple trial dates because the matter was not reached or was delayed due to the unavailability of witnesses.

[96] I am satisfied that the length of time for this case to come to trial, had it been completed when it could have been, absent the frivolous motions, is not markedly longer than it reasonably should have been in light of the relevant local and systemic circumstances. In fact at the point the parties were ready to proceed they received very

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<sup>52</sup> *Jordan*, at para. 87.

speedy trial dates, only 4 months and 25 days after the judicial pretrial. The primary reasons the case took as long as it did was because of the frivolous and time consuming defence motions and applications and the inaccurate estimate of the time required for trial.

### *Transitional Exceptional Circumstances*

[97] This is a transitional case. A significant portion of the proceedings occurred prior to the release of *Jordan* on July 8, 2016. For transitional cases that exceed the presumptive ceiling, the parties' reasonable reliance on the law as it previously existed" may justify the delay.<sup>53</sup> This requires a consideration of whether the delay would have been considered unreasonable under the *Morin* framework. In *Williamson*<sup>54</sup>, a majority of the Supreme Court identified the following relevant considerations as informing the transitional exceptional circumstances: i.) the complexity of the case, ii.) the period of delay in excess of the *Morin* guidelines; iii.) the Crown's response if any to any institutional delay; iv) the defence efforts, if any, to move the case along, and v.) prejudice to the accused.<sup>55</sup>

[98] Given my conclusions above, it is not necessary that I consider the transitional exceptional circumstances and whether the delay would have been considered unreasonable under the *Morin* framework. However, I have done so for completeness. I have concluded that the delay would not have been found to be unreasonable under *Morin*. If the "resulting delay" exceeded the presumptive ceiling, in my view transitional exceptional circumstances would justify the delay such that it was not contrary to s. 11(b).

[99] In *Morin*, the court recognized that there were inherent time requirements for a case which may include intake procedures, retention of counsel, provision of disclosure, and pre-trial conferences.<sup>56</sup> A reasonable intake period was considered to be neutral in the delay calculus.

[100] In this case, the intake period was brief. Between April 2, 2015 and May 29, 2015, the second appearance, disclosure was provided, and a counsel pre-trial had been held. This period would have been considered part of the inherent requirements of the case, and would have been treated as neutral intake period.

[101] As the case moved through the early stages, the record demonstrates that the defence was content with the pace of the litigation. No concern about delay was expressed prior to commencement of the trial. On May 29, 2015, the second appearance, the Crown and defence jointly requested a lengthy adjournment to consider settlement discussions. The matter was adjourned for 3 months and 13 days with no explanation as to why such a lengthy delay was required. On September 11, 2015 a pretrial was scheduled 2.5 months later on November 29, 2015. No indication

<sup>53</sup> *R. v. Pyrek*, 2017 ONCA 476.

<sup>54</sup> 2016 SCC 28.

<sup>55</sup> *Gopie*, at para. 178.

<sup>56</sup> *Morin*, at paras. 41-43; *R. v. Tran*, [2012] O.J. No. 83 (C.A.), at 34-40. *R. v. Khan*, [2011] O.J. No. 937 (C.A.) at para. 53.

was made on the record regarding whether earlier judicial pre-trial dates were available or whether counsel were available at an earlier time.

[102] On November 27, 2015, following the judicial pre-trial, when the trial coordinator offered dates in April and May, the defence sought later, not earlier dates, by inquiring if there were any dates available in June.<sup>57</sup> The first time the defence expressed any concern about delay, was on the first day of trial, October 14, 2016.

[103] In my view, all of the delay between April 2, 2015 and November 27, 2015, would have been treated as part of the inherent time requirements and as a neutral period. The transcripts show the appellant was not prepared to set a trial date until November 27, 2015. Under the *Morin* framework, institutional delay did not begin to run until counsel was in a position to proceed with the trial.<sup>58</sup> The period of delay from the judicial pre-trial until the first trial date was only 4 months and 25 days.<sup>59</sup> Only some of this period would be considered institutional delay, as the parties required time to prepare for trial, including filing the materials for the motion to quash and the constitutional challenge. In addition counsel did not indicate their availability for trial. It is unlikely counsel would have been immediately available to start the trial. In *Tran*<sup>60</sup> the Court of Appeal made clear that institutional delay did not commence until counsel was ready to proceed to trial and the court is unable to accommodate.

[104] As noted earlier, the trial did not complete in the time originally set aside due to the frivolous motions of the defence and the underestimate of the trial time. An additional day for judgment was obtained within one month, and two additional days were set for trial 5.5 months later. This was not an unreasonable period of delay to accommodate 2.5 additional days in a busy jurisdiction. The trial coordinator offered dates on August 8 and 15, 2016. However, the Justice of the Peace was not available. In my view, only the two month period between August 15 and October 14, 2016 should be treated as institutional delay.

[105] The only additional period of institutional delay is during the period between October 31, 2016 and February 28, 2017, and February 28, 2017 and April 6, 2017, the 5 month period during which the Justice of the Peace reserved to give reasons for Judgment. Under the *Morin* framework, some of this period would be treated as neutral. For the purpose of the analysis, I will treat 2.5 months of the reasoning period as institutional delay, allowing for a reasonable period of time for completion of the reasons for judgment.

[106] Thus, on an assessment generous to the appellant, under the *Morin* framework there is at most 9.5 months of institutional delay. In *Morin*, the court set eight to ten months as a guideline for institutional delay in the provincial court. This guideline was in addition to time required for the inherent time requirements of a case, defence delay,

<sup>57</sup> The trial coordinator did not have the June schedule and as a result, the dates of April 21, 2016 and May 2, 2016 were selected.

<sup>58</sup> *Tran*, at para. 32; *R. v. Brissett*, 2017 ONSC 401 at para. 38.

<sup>59</sup> *Tran* at paras. 32-40.

<sup>60</sup> *Tran*, at 34-40.

and reasonable institutional delay.<sup>61</sup> I find that the period of institutional delay of 9.5 months falls within the *Morin* guidelines.

[107] Although this case was not sufficiently complex to meet the requirement of exceptional circumstances under *Jordan*, for transitional cases, moderate complexity bears on the reasonableness of the delay. This case was of at least moderate complexity given the number and complexity of the motions and applications.<sup>62</sup>

### *Prejudice*

[108] The delay caused little prejudice to the appellant. There was no specific evidence of prejudice. The appellant did not experience any of the more significant types of prejudice that may be caused by delay in cases of pre-trial detention, or restrictive bail conditions. There is no evidence that the appellant's ability to mount a defence was affected due to unavailability of witnesses or lost or degraded evidence. Some minimal prejudice may be inferred. I find that the prejudice suffered as a result of delay was minimal and that this is a factor that weighs against the appellant's submission that the delay was unreasonable.

[109] I am satisfied that in the period prior to the release of *Jordan* the parties placed reliance on the law as it stood. Had the matter been considered utilizing the *Morin* framework for analysis, a court would conclude that the delay was not unreasonable and did not violate the appellant's s.11(b) right to be tried in a reasonable time. In addition, the case was of moderate complexity, the Crown was diligent in moving the case forward, the conduct of the defence was not duly diligent and delayed the proceedings, and the prejudice if any was very limited. In my view, even if the net delay did exceed the presumptive ceiling, the transitional exceptional circumstances justify the reasonableness of the delay in this case.

### *Conclusion 11(b)*

[110] Stepping back from the minutiae what is abundantly clear is that the primary reason that the case took 24 months and 4 days to reach judgment was as a result of the frivolous motions initiated by the appellant that used up all of the time initially scheduled for trial. The second major factor was the inaccurate estimate of how long those motions would take. The Crown was prepared to proceed and move the case forward on each occasion, and took steps to narrow the issues by narrowing the offence period on the information. The delay was not unreasonable. I am satisfied that the Justice of the Peace correctly dismissed the s. 11(b) application and, to the extent that the Justice of the Peace committed any errors in law in reaching his conclusion, there was no miscarriage of justice and no substantial wrong.

## **F. Fitness of Sentence**

<sup>61</sup> In *Jordan*, at para 53, the presumptive ceiling incorporates additional time to account for inherent time requirements of the case.

<sup>62</sup> *Pyrek*, at para. 30.

[111] After dismissing the 11(b) application, Justice of the Peace Radtke held that the Crown had proven the essential elements of the offence beyond a reasonable doubt, noting that the evidence was overwhelming, and convicted the appellant. The Crown sought a \$10,000 fine, and restitution of \$175.00, and probation. The appellant proposed a \$1200 fine.

[112] Justice of the Peace Radtke imposed a \$10,000 fine, 12 months' probation, and \$175.00 restitution to RBC. In imposing the sentence Justice of the Peace Radtke observed that:

- The appellant's chiropractic licence had been suspended since 1998.
- In 2006 he was ordered to refrain from using the title of doctor or holding himself out as a licensed chiropractor and in 2014 was subject to a further order. He was found guilty of contempt of court for practicing as a chiropractor without a licence.
- He admitted to having made the false representations, and acknowledged having held himself out as a chiropractor and having issued a significant number of receipts to patients, and receiving hundreds of thousands of dollars in fees charged for unauthorized chiropractic services.
- He is not remorseful.
- The overwhelming evidence, ongoing defiance of court orders, and meritless motions and *Charter* applications, require a severe sentence.
- Fraudulent insurance claims leads to an increase in insurance premiums charged to the public.

[113] Section 447(3) of the *Insurance Act* prescribes a maximum fine of \$250,000 against a person convicted of a first offence under s. 447(2)(a.3). I agree with the respondent's submission that the fine of \$10,000 was at the lower end of the range of acceptable sentences. The offence undoubtedly was one motivated by financial profit. The moral culpability of the appellant was high. The act of making a false statement to RBC took place in the context of the appellant providing medical services for financial benefit that he was not entitled to provide, and doing so in flagrant disregard of prior court orders. This engaged important social welfare interests. A significant fine was necessary for both specific and general deterrence. The fine was required to be "substantial enough to warn others that the offence will not be tolerated...and must not appear to be a mere licence fee for illegal activity".<sup>63</sup> I am satisfied that the sentence imposed was fit. The appeal against sentence is dismissed.

## G. Conclusion

[114] In respect of the issues raised by the appellant on the appeal against conviction, I find that the trial judge did not err in law in dismissing the motion to quash the

<sup>63</sup> *R. v. Cotton Felts*, [1982] OJ No. 178 (CA), at paras. 71, 19-20, and 22-24.

information, and properly dismissed the constitutional challenge pursuant to ss. 7 and 11(d) of the *Charter*. In respect of the s. 11(b) application, the Justice of the Peace was correct in dismissing the application. To the extent there was any error of law in his reasoning process, I am satisfied that there was no substantial wrong or miscarriage of justice. The appeal against conviction is dismissed. As regarding the appeal against sentence, the sentence was fit and the appeal against sentence is dismissed.

[115] The appellant sought that costs be ordered against the respondent pursuant to s. 129 of the *POA*. There was no merit to the application to quash or constitutional challenge at first instance, nor on appeal. There will be no order as to costs.

Released: September 21, 2018  
Signed: Justice Marcella Henschel