

**ONTARIO COURT OF JUSTICE
(TORONTO REGION)**

Case No. 4863 83771150

Citation: *R. v. Ovided*, 2008 ONCJ 317

HER MAJESTY THE QUEEN

Respondent

- and -

BEN-AHMED FADHALOUI OVIDED

Appellant

Case No. 4862 76996008

HER MAJESTY THE QUEEN

Respondent

- and -

DELWAR HOWLADER

Appellant

Case No. 4862 75052730

HER MAJESTY THE QUEEN

Respondent

-and -

BAGHER POURAMEZANI

Appellant

Case No. 4862 83819578

HER MAJESTY THE QUEEN

Respondent

- and -

1363437 ONTARIO LIMITED

Appellant

REASONS FOR JUDGMENT

Heard: June 24-25, 2008; Judgment: 9 July 2008.

Paralegal Practitioner for Appellants: Mr. V.H.S. Manoukian
Prosecutor for Respondent City of Toronto: Mr. Richard Raczkowski

Libman J.: -

Introduction

[1] Appeals play an integral role in the administration of justice. This is especially so in the case of criminal trials and quasi-criminal or regulatory offences proceedings. As Justice Doherty recently explained, appeals “protect against wrongful convictions and enhance the fairness of the process”: *R. v. R.R.*, 2008 ONCA 497, [2008] O.J. No. 2468 at para.16 (QL) (C.A.). At the same time, appeals “extend the life” of the proceedings in question, thus “exacerbating the uncertainty and anxiety the process causes to individuals caught up in it.” In the majority of cases, appeals are unsuccessful, which ultimately delays the imposition of the appropriate order made by the court of first instance: *R.R.* [QL] para.16.

[2] In the context of proceedings under the *Provincial Offences Act*, R.S.O. 1990, c.P.33, the appeal process, even for “minor offences” is particularly important. Some appellants may have been convicted without the holding of a trial, as where they are deemed not to dispute the charge; others may have been convicted at an *ex parte trial* where they did not appear but evidence was adduced before the court. Still others may have appeared on their own behalf and unsuccessfully defended themselves, or relied on the services of a paralegal practitioner, and perhaps opted not to be present in person, as the Act permits.

The provincial offences appeal court, in all these circumstances, discharges an important function in reviewing the record of the proceedings in the courts below, so as to ensure that such persons have been tried fairly in what is, most likely, the only contact they will ever have with the justice system in Ontario, and that there is a legally sound basis for any finding of guilt which is imposed.

[3] However, there is a long standing problem in the conduct of these appeals in this jurisdiction: timely preparation of trial transcripts. In order for the provincial offences appeal court to conduct a meaningful review of the proceedings giving rise to the appeal, a transcript of the trial needs to be produced. In the cases which are the subject of these appeals, the trial transcripts, none of which is more than 10 pages in length, have taken anywhere from 15 and one-half months to 27 months to produce. In one instance, there is still no transcript of the trial.

[4] For the reasons which follow, I conclude that the appellants' rights to fundamental justice under s.7 of the *Charter of Rights and Freedoms* have been violated on account of these inordinate delays. Such delay constitutes an abuse of process, as it is incompatible with the notion of "speedy justice", which is the hallmark of the *Provincial Offences Act*. This justifies a stay of proceedings being entered on appeal, along with an order of costs, in each of these four cases.

History of Proceedings

Regina v. Ben-Ahmed Fadhaloui Ovided

[5] The appellant in this case was charged on 8 September 2005 with failing to stop for a school bus, contrary to s.175(11) of the *Highway Traffic Act*, R.S.O. 1990, c.H.8. The total payable fine for this offence, as set out on the certificate of offence, is \$490.

[6] In accordance with the procedure extended to all those charged with offences under Part I of the *Provincial Offences Act*, the appellant acted within 15 days to indicate his intention to dispute the charge and have a trial. He attended in person and completed the Notice of Intention to Appear for trial on 16 September 2005, just after one week of being charged. The Notice of Trial was not issued until 4 May 2006, stating that the appellant's trial would take place on 30 October 2006, at 3:00p.m., at the Markham Road Courthouse.

[7] On the trial date, Mr. Manoukian appeared on behalf of the appellant. He indicated that he had only been retained five days earlier, and had made a request for disclosure on that date. He asked the trial court for an adjournment, having just been given disclosure in the body of the court. The justice of the peace summarily dismissed the request, stating "there's no adjournment when you get retained at the last minute, so your request is denied." Although Mr. Manoukian initially remained in the body of the court after the ruling, he explained that he was unable to proceed to trial without reviewing the disclosure with his client, who was not present. The case was subsequently re-called at

the end of the list, and with no one present, the appellant was deemed not to dispute the charge. A conviction was registered and the set fine of \$400. imposed.

[8] Under the provisions of s.135(2) of the *Provincial Offences Act*, appeals against conviction for Part I certificate of offence proceedings must be filed within 15 days after the making of the decision appealed from. The appellant dutifully filed his Notice of Appeal on 14 November 2006. He also completed a Request for Transcript form on this same date, paying the \$25. deposit. The sole ground of appeal was that the trial justice erred in law in the exercise of his discretion in dismissing the adjournment request, as the “transcript will show.”

[9] A substantial period of time passed with no indication as to the status of the transcript order. Consequently, the appellant attempted to obtain an update from the Supervisor of Court Support Services East, sending an “Urgent” fax on 13 July 2007, inquiring when the transcript would be received as it was required for the purposes of the appeal.

[10] No one bothered to respond to this request.

[11] The appellant sent three more “Urgent” fax letters, asking about the transcript. The date of the letters were: September 9, 2007; October 3, 2007; and November 13, 2007. Once again, the letters went unanswered by Court Support Services.

[12] By this point, one year had passed since the appellant filed his Notice of Appeal. There had been no response to any of the four requests in writing as to the status of the trial transcript.

[13] The appellant next filed a Notice of Motion for “Directions” respecting the conduct of the appeal. This was done before the provincial offences appeal court on 14 December 2007, under the authority of O.Reg. 722/94, s.12. The motion indicated that the appellant was unable to perfect the appeal “as a result of non-production of the trial transcript.” The motion was scheduled to be heard on 19 January 2008.

[14] The material filed before the provincial offences appeal court reviewed the history of proceedings to date, indicating that there had been no response to any of the appellant’s queries as to the transcript order. Paragraph 8 of the Notice of Motion states the following:

Due to lack of diligence on the part of Court Support Services in preparing and making the trial transcript available to the Applicant (via my office) about thirteen (13) months after ordering the aforesaid and due to the failure of the Court Support Services to respond to my numerous requests, I am advised by the Appellant and verily believe that the delay, as detailed above, is causing him undue stress, causing him to lose faith in the administration of Justice and is compromising both his right to have his appeal heard and, should the appeal be successful, to have a new trial, if necessary, heard within a reasonable time.

[15] There is no transcript of the motion proceedings before the appeal court on 19 January 2008 (there are in two of the other appeals). However, Justice Sharni was clearly concerned with the appellant's inability to proceed to appeal on account of the absence of the trial transcript, and the total lack of response by Court Support Services. Her endorsement on the Notice of Motion stated that Court Support Services were directed (1) to respond to agent Manoukian in this matter; and (2) advise when the transcript will be ready to expedite a speedy hearing of appeal.

[16] Once again, no response was given to this request for a transcript update, neither to the appeal court, nor to the appellant's paralegal representative, who notified Court Support Services in writing on 10 February and 25 February 2008 as to the appeal court's order.

[17] The first communication from Court Services on Markham Road came on 29 February 2008, in a letter to the appellant advising that the transcript was completed and ready for pick-up. There was an outstanding balance of \$5.10. The appellant was advised in this letter that failure to pick-up the transcript within 30 days might result in the matter being referred to the Collections Unit for follow-up, which might include civil enforcement and/or notification to the Credit Bureau of Canada. He was also advised that the prosecutor's office might also bring a motion to have the appeal dismissed for lack of perfection.

[18] To this date, which is the first and only communication as to status of the transcript, a period of 15 and one-half months had passed since it had been ordered by the appellant.

[19] The trial transcript was picked up by the appellant the following week, on 6 March 2008, and the outstanding balance paid. It is 7 pages in length. This includes the title page, index and certificate of transcript, which accounts for 3 of the 7 pages.

[20] On 2 April 2008 the appellant filed his Notice of Constitutional Question and Application, seeking a stay of proceedings under s.7 of the *Charter of Rights* on account of the lengthy period of appeal delay. Notice, as required by s.109 of the *Courts of Justice Act* (Ont.), was given to all the appropriate parties: the Attorney General of Canada, the Attorney General of Ontario, the City Prosecutor, and Clerk of the Court. The appeal was scheduled to be heard on 23 April but adjourned to 6 May. On that date, the appeal was adjourned until 24 June 2008 to allow the parties to file written materials.

Regina v. Delwar Howlader

[21] This appellant was charged with two offences under the *Highway Traffic Act* on 7 April 2004: disobeying a stop sign and driving without a validated permit. This appeal concerns only the stop sign charge, although findings of guilt were made in respect of both charges. However, the fine on the permit charge was reduced to a suspended sentence, and no appeal has been taken against this conviction.

[22] Mr. Howlader responded to the two certificates of offence in a timely manner, delivering his Notice of Intention to Appear for trial on 16 April 2004. The Notice of Trial was issued on 9 August 2004, setting the trial for night court on 17 January 2005. The trial proceedings were held at the courthouse at 2700 Eglinton Avenue West.

[23] The appellant appeared in person on the trial date, representing himself. The trial commenced with the provincial offences officer giving his evidence. The appellant did not ask him any questions. Neither did the trial justice. The appellant did state that he was stopped at the stop sign after the police officer concluded testifying. He was then invited to take the witness stand to give his own evidence.

[24] The totality of the appellant's evidence in his own defence occupies but 13 lines, or half of one page, of the trial transcript. Neither the prosecutor or the justice of the peace had any questions. The appellant was found guilty of both charges. When asked if he had anything to say before sentence was imposed, he requested that the court "withdraw my case." A \$90. fine was imposed for disobeying the stop sign.

[25] A Notice of Appeal, against the disobey stop sign conviction only, was filed by the appellant on 16 February 2005. It states, as the sole ground of appeal, "I am not guilty of the offence." Because his Notice of Appeal was filed 14 days past the 15 day appeal period, he was required to apply for an extension of time to file an appeal. This motion was not scheduled to be heard until 3 November 2005. The prosecutor indicated that it was opposed to the motion.

[26] After a brief adjournment, the motion for extension of time was heard on 9 November 2005. Mr. Manoukian appeared for the appellant. Over the objections of the prosecutor, the motion was granted by Justice Cavion, and the appellant was given 30 days to file his Notice of Appeal.

[27] On 14 November 2005, the appellant filed the Notice of Appeal, in accordance with the extension of time granted by the provincial offences appeal court. He also ordered copies of the trial transcript, paying the \$25 deposit to Toronto Court Services.

[28] For the next two years the appellant heard nothing. And not without any efforts on his part to find out when he could expect to receive the transcript. On six separate occasions, he faxed letters to the Supervisor of Court Support Services West, indicating that the transcript was required for required for the appeal hearing. None of these letters was answered.

[29] As a result, the appellant brought a motion for directions to the appeal court, due to the non-production of the trial transcript. This motion was filed on 14 December 2007. It was scheduled to be heard on 21 January 2008, but was adjourned a number of times until it was finally heard on 3 March 2008 by Justice Hogan.

[30] There is a transcript of the proceedings before Justice Hogan. It is 7 pages in length. It was prepared within one month of the 3 March 2008 hearing date. As it was not clear

what occurred in the appeal court on 21 January 2008 and 28 January 2008, the Motion for Directions was adjourned by Justice Hogan one final time, until 1 April 2008. The following day, 2 April 2008, the appellant filed a Notice of Constitutional Question and Application, serving the materials on all the required parties.

[31] The 10 page transcript of the trial proceedings themselves, which had been held on 17 January 2005, is dated as being completed on 12 February 2008. It appears, however, that the appellant was not made aware of this until 8 March 2008, when the outstanding balance of \$5.10 was paid and the transcript released to him, hence the Motion for Directions proceeded before Justice Hogan on 3 March 2008, but not on the 1 April 2008 date.

[32] From the time that the transcript of the appellant's trial was ordered (14 November 2005), until the time that it was certified as being completed (12 February 2008), a 27 month period had elapsed.

[33] There is an affidavit from the appellant, sworn 27 March 2008, concerning the impact of this lengthy delay on him. He states that he drives a Toronto Transit Wheel Chair Van for a living, and that it is necessary for him to maintain an effective driver's abstract. He is the sole source of income for his family. As a result of the appeal not being heard for the past three years, he has not been able to benefit from lower insurance rates due to having to disclose the fact of the conviction, even though it does not appear at present on his driver's record; in the event the appeal is unsuccessful, it will reappear on his record for a 16 month period from the date of the disposition of the appeal.¹ He has incurred additional expenses due to ordering transcripts of the motions for directions in the appeal court, as well as filing the Notice of Constitutional Question "as a last resort" since the respondent was not prepared to expedite the hearing of the appeal, despite his numerous efforts to do so. Not knowing when the appeal would be heard has caused him "undue stress as well as substantial legal fees and expenses." The affidavit concludes that the appellant's faith in the administration of justice in Ontario has been compromised as he never imagined that he would have to take such extraordinary measures to secure the production of the trial transcript, which is required in order to have his appeal heard.

R. v. Bagher Pouramezani

[34] On 26 May 2004, the appellant was issued a certificate of offence for speeding 135 kilometers per hour in a posted 100 kilometers per hour zone on Highway 401. He gave his Notice of Intention to Appear the following week, and a trial date was issued a few months afterward. The trial date was 28 February 2005, 10:30am at the Courthouse at 2700 Eglinton Avenue West.

[35] The appellant defended himself at his trial. According to the 10 page transcript (page 11 is the certificate of transcript), the officer's evidence went unchallenged; the appellant asked no questions, other than to indicate that he asked the officer at the time to show him his speed. He then testified that he did not believe he was traveling at that

¹ O. Reg 339/94, s.5.

speed, as his car would shake if he exceeded 115 kilometers per hour. This evidence occupies 12 lines of the transcript. No one asked the appellant any questions. The justice of the peace found him guilty and imposed the set fine of \$215, although the appellant indicated he was not working at the moment.

[36] Mr. Pouramezani waited until 23 June 2005 to file his Notice of Appeal. A Notice of Motion seeking an extension of time to file the appeal was scheduled to be heard on 8 February 2006. The appellant indicated he was not guilty of the offence; no grounds of appeal were stated in the Notice of Appeal itself. The prosecutor was opposed to the motion. However, it was granted by Justice Lane, and the appellant was given 15 days to file his Notice of Appeal.

[37] Two days later, on 10 February 2006, Mr. Manoukian filed the Notice of Appeal and ordered a transcript of the trial. The \$25. deposit was paid. The appellant then waited the preparation of the transcript.

[38] After 17 months there had been no indication as to the status of the transcript. Four letters were sent by the appellant, between 13 July 2007 and 12 November 2007, asking about the transcript. Once again, no one bothered to reply. This caused the appellant to seek directions in the appeal court on 14 December 2007. There were four separate hearing dates, transcripts having been ordered for two of them. It appears that the motions were argued at the same time as the Howlader case. After the 3 March 2008 appearance before Justice Hogan, the matter was adjourned to 1 April 2008. It did not proceed, however, as the appellant filed a Notice of Constitutional Question and Application.

[39] On 29 April 2008, the trial transcript was finally prepared. It appears that the appellant was not notified until 13 June 2008, and the remaining balance was paid. From the time of the ordering of the transcript (10 February 2006) until the completion date (29 April 2008), a period of 26 and one-half months had passed.

[40] There is an affidavit from the appellant, dated 11 April 2008, describing the effects of the delay in this case on him. At the date of writing, he had still not been provided with the transcript of his trial. He had been put to the additional expense of having his agent appear in the appeal court three times to enlist the court's assistance in obtaining the transcript, as well as filing the Notice of Constitutional Question since "it appears that no one is interested and willing to do anything about my case." Apart from being unable to attempt to benefit from lower insurance rates and facing the prospect of the conviction re-appearing on his driver's record for two additional years should his appeal fail, the appellant averred that his memory of the speeding offence was 'almost non-existent' due to the passage of 4 years from the offence date. In the event that a new trial was ordered, he believed that he would not be able to have a fair trial due to the "passage of this inordinate period of time."

R. v. 1363437 Ontario Limited

[41] Finally, there is the case of this numbered company appellant. It was charged with selling tobacco to a minor on 24 January 2006, contrary to the *Tobacco Control Act*. The total fine for this strict liability offence, as indicated in the certificate of offence, is \$210.

[42] It appears that the appellant's first trial, which was scheduled on 12 June 2006, at 2700 Eglinton Avenue West, was adjourned due to lack of disclosure. It went ahead on 14 August 2006, at which time a finding of guilty was imposed. The appellant was fined \$200. Mr. Manoukian represented the appellant at trial.

[43] Four days later, on 18 August 2006, a Notice of Appeal was filed. Although there is no transcript of the trial proceedings, I understand that two witnesses were called by the prosecution, the charging officer and the "test" shopper; one of the directors of the corporation testified in its defence. An unsuccessful challenge was also brought at the outset to the jurisdiction of the court to hear the matter, on account of the clerk of the court accepting for filing a certificate of offence outside of the seven day period for doing so, contrary to the provisions of O. Reg 200, s.11. This issue had also been raised before the presiding justice on the first trial date, who declined to give effect to the argument.

[44] Copies of the trial transcript were ordered from Court Support Services West on 18 August 2006. Once again, the \$25. deposit was paid. The appellant heard nothing for the balance of the 2006 year. Four letters were then sent, by way of "Urgent" fax, between 8 March 2007 and 14 December 2007. As was the case in the three other appeals before me, no one at Court Support Services bothered to respond.

[45] Once again, the appellant applied for directions to the appeal court, due to its inability to perfect the appeal on account of the outstanding transcript. This motion was filed on 14 December 2007. There were five appearances in the appeal court, between 28 January 2008 and 23 April 2008, during which time this motion was adjourned. The appellant complained, in its motion material, that these delays were causing it "undue stress" and to lose faith in the administration of justice.

[46] Interestingly, on 23 April 2008, the last date that the Motion for Directions had been scheduled to be heard in the appeal court, the appellant was sent his first communication from Court Support Services. By now a period of 20 months had passed since the ordering of the trial transcripts. Unlike the previous cases, where the transcript had been completed and the appellant was advised to pick it up within 30 days and pay the outstanding balance, this letter advised that the estimated cost for the trial transcript was \$305.30 and that, accordingly, a further \$280.30 was required in order for the order to be processed. Once the fee was paid, Court Services would proceed with the completion of the transcript. No date was provided, however, indicating when the transcript would be available.

[47] The appellant filed its Notice of Constitutional Question and Application on 26 April 2008. Notice was served on the appropriate parties. This brought to an end the need to adjudicate on the motion for directions, and the appeal was listed with the other appeals for 24 June 2006.

Trial Transcripts and Provincial Offences Appeals

[48] In *R. v. Hannemann*, [2001] O.T.C. 162, [2001] O.J. No. 839 at para. 103 (QL) (S.C.J.), Hill J. observed that there “cannot be a meaningful right of appeal without an accurate transcript.” As is the case for appeals under the *Criminal Code*, transcripts of trial proceedings are required for provincial offences appeals in respect of proceedings commenced by information under Part III of the legislation: O. Reg 723/94, s.8.

[49] However, the four appeals under consideration all involve Part I certificate of offence trials. Under the appeal rules which apply to such proceedings, there is no mandatory requirement for transcripts: O. Reg. 722/94, s.9(1). On the other hand, s.9(2) expressly authorizes the appeal court to require a transcript of the evidence taken at such trials, and thus contemplates the use of transcripts on Part I appeal hearings.

[50] The practice of ordering trial transcripts for Part I appeals is consistent with an “implied management power” in the provincial offences court to control its own process and ensure the rights of the parties before it to a fair hearing. See in this regard *R. v. Felderhof*, [2003] O.J. No. 393, 2003 CarswellOnt 488 (S.C.J.); affirmed [2003] O.J. No. 4819, 235 D.L.R. (4th) 131, 180 O.A.C. 288, 17 C.R. (6th) 20, 180 C.C.C. (3d) 498, 2003 CarswellOnt 4943 (C.A.) where it was held that as an incident of a judge’s common law and inherent power to control the proceedings, a trial judge has a general power, which must be exercised with care, to manage the trial and promote efficient use of court time. See further *Waterloo (City) v. Singh*, 2006 CarswellOnt 769, [2006] O.J. No. 525 (QL) (S.C.J.).

[51] The respondent submits, however, that as there is no mandatory transcript requirement in these Part I appeal cases, but merely a practice that has developed to furnish them, it cannot be faulted for any delay in their preparation. As an alternative, he states that the tapes of the trial proceedings themselves could be played in the appeal court, where the transcript is unavailable.

[52] I do not consider these submission to be persuasive. The trial tape may constitute part of the record, but it is not a substitute for the “official record” which is certified by a qualified person as to its authenticity and accuracy: *Hannemann* [QL] para. 145.

[53] Moreover, it would pose intractable problems to turn the clock back and play trial tapes in the provincial offences appeal court, as was once done decades ago in this jurisdiction. Apart from sound reproduction issues and the acoustics in a busy courtroom, as well as determining how to provide access to the tapes in advance to all the parties and guaranteeing their integrity, proper preparation for the appeal would be compromised by the uncertainty as to whether there is an accurate record of the trial which can be reviewed in advance of the appeal hearing. Many appellants, who represent themselves, may be unable to understand or articulate the basis for their grounds of appeal; in the case of paralegal practitioners, competency requirements have only recently been mandated by the Law Society: *Paralegal Rules of Conduct*, rule 3.01(1). The advantage of a trial

transcript is that it informs the parties in advance as to the issues that are involved in the case. In short, dispensing with a requirement on appeal to order a written record of the trial proceedings would be to ignore modern technology which “gives reality to instant availability of transcripts”: *R. v. Trochym* (1999), 124 O.A.C. 20, 138 C.C.C. (3d) 517, [1999] O.J. No. 3307 at para. 20 [QL] (C.A.) [In Chambers]). It would constitute a pyrrhic victory for the Crown, in this backwards race in time.

[54] The workload of the appeal court is such that hearing time is a particularly precious commodity: appeals compete with motions to extend time to appeal, applications to enter into a recognizance in lieu of payment of a fine, applications for bail pending appeal, motions to stay probation orders, motions for directions, and the like. Multiple prosecutors appear on behalf of the province and municipality alike, as well as appear for other government ministries and transit agencies. To accommodate these various court-users, the appeal court has both a morning and afternoon docket. The playing and re-playing of trial tapes in the appeal court would result in the proceedings grinding to a halt, and frustrate the many persons who appear before the court on a daily basis, and expect their cases to be heard.

[55] Takach J. recently adverted to the problems caused by not having trial transcripts in a provincial offences appeal case, *R. v. Akeelah*, 2008 ONCJ 279, 2008 CarswellOnt 3602, [2008] O.J. No. 2418 at para. 2 (QL) (C.J.), where he observed:

It has been difficult, if not impossible, for this court to sift through the court documents that may or may not reflect the totality of documents in an attempt to trace the history of each case. The appropriate way to put such matters before the court is by transcript or agreed statement of fact. These matters could have been dealt with much more expeditiously but for that failing.

[56] Transcripts of trial proceedings are thus not a luxury; they are the staple of the practice of appeals. As Justice Hill observed in *Hanneman* [QL] para.107: “Appellate review is frustrated, if not defeated, in those circumstances where a verbatim record of proceedings is not produced.” Hence, delays occasioned in the preparation of trial transcripts constitute “a detriment to the administration of justice”: *Trochym* [QL] para. 20.

[57] It is significant that in the case of Part III appeal proceedings, there is a Certificate of Clerk of the Ontario Court of Justice as to Transcript of Evidence (Form 2). Paragraph 4(3) of this document requires the Clerk of the Court to certify the following:

I have accepted the order, will ensure that the transcript is prepared with *reasonable diligence* and will provide the number of copies ordered.
[emphasis added]

[58] I cannot accept that there is a requirement to prepare transcripts in a timely and efficient way only in the case of Part III appeals, but not for those in Part I appeals.

Indeed, under both sets of appeal rules, there are identical provisions stating that failure to file transcripts in a timely manner may lead to the dismissal of the appeal: O. Reg 723/94, s.17(c) [Part III appeals]; O. Reg. 722/94, s.13(c) [Part I appeals]. For a recent example of an application to have an appeal dismissed on this basis, see *Ontario (Ministry of Labour) v. Di Franco*, [2007] O.J. No. 2149 (QL) (S.C.J.).

[59] Part I trial proceedings are, of course, less serious than proceedings which are commenced by information under Part III. There is a \$500 fine ceiling and no possibility of imprisonment in the case of the former. The appeal proceedings for Part I matters are less formal than those for Part III, thus reflecting this distinction.

[60] It has been noted, however, that traffic fines have overtaken the quantum of fines which are levied for many criminal offences: *R. v. Hughes*, [2004] A.J. No. 895 (QL) (Q.B.). Since the increased sanctions for traffic offences in terms of “high fines and demerit points” can result in licence suspensions, sentences for traffic offences have become “very much penal in nature in many cases,” resulting in the need for a “high standard of adjudication” in the conviction and sentencing process: *Hughes* [paras 20-21]. See more recently *R. v. Welcher*, 2007 NLTD 87, 267 Nfld. & P.E.I.R. 211, 46 M.V.R. (5th) 113, 2007 CarswellNfld 145, [2007] N.J. No. 153 at para. 33 (QL) (S.C.) where the court commented on the “adverse effects” which flow from the demerit point system on one who is convicted under the *Highway Traffic Act* (Nfld.).

[61] To return to the appeal proceedings in issue, it is immediately apparent that the trial transcripts furnish the court with the means to review the record of the courts below in an expeditious and efficient manner. Neither is this process an academic or useless one: in the case of the appellant *Ben-Ahmed Fadhaloui Ovidé*, the transcript reveals that the appellant’s adjournment request was denied barely before the words left his agent’s mouth advising that he had just been retained. For both the appellants *Delwar Howlader* and *Bagher Pouramezan*, the transcripts demonstrate that they hardly participated in their trials, and there was minimal assistance or guidance from the presiding justices. In the case of *1363437 Ontario Limited*, the lack of transcripts prevents a proper review of the rulings dismissing its challenge to the jurisdiction of the court to hear the matter, as well as an assessment of the due diligence defence it unsuccessfully advanced in a multiple-witness trial. Thus, the respondent’s submission that there is not a “viable ground of appeal” in these cases, and hence no prejudice to the appellants as there is “no real expectation of success”, is not borne out.

[62] Transcripts are not required, in any event, in the case of every appeal respecting Part I proceedings. For the many cases where the appellant fails to respond and is deemed not to dispute the charge under s.9 of the *Provincial Offences Act*, which is often followed by a re-opening application before a justice of the peace prior to an appeal being brought (s.11), there are no trial proceedings, and thus no transcript is necessary. In other cases, a transcript may not be required, as where the appellant does not appear for trial, but the appeal concerns sentence only, and it will only be on appeal that for the first time information will be provided as to his/her ability to pay a fine. Other examples include where there may be an agreed statement of facts as to the proceedings below, or the

appeal is being expedited. There may be other instances where the lack of a transcript results in no real prejudice to the parties: see *R. v. Mango* (2006), 212 O.A.C. 16, 210 C.C.C. (3d) 500, [2006] O.J. No. 2590 at para. 26 (QL) (C.A.), leave to appeal dismissed, [2006] S.C.C.A. No. 407 (QL).

[63] But where there is a need for trial transcripts, the administration of justice must do better than imposing a period of 15 days for requesting a trial, 15 days for filing for an appeal in the event of conviction, and then sanction a period of 15 and one-half months to 27 months to produce the brief record of the trial proceedings, so that the appellant's right of appeal can meaningfully take place.

[64] There is no evidence before me as to the reasons for the delays in producing the transcripts in these cases, or for ignoring the many requests, both from the appellants and the directions from the appeal court, as to the status of the trial transcripts. The fact that the timelines required for producing transcripts for appeals in many other jurisdictions in the province has been indicated as being only a few months is of limited value, given the absence of information as to the relevant institutional factors in those or the instant cases, such as intake periods, prioritization of transcript orders, staffing and equipment issues. Certainly, the timelines to produce a transcript of the proceedings in the appeal court, on the appellants' motions for directions, required no more than a matter of weeks. These transcripts are approximately the same length as the trial transcripts. In any event, it appears that the delays here are by no means unique: a letter sent to a paralegal practitioner (not Mr. Manoukian) from Court Services at 2700 Eglinton Avenue West, dated 15 May 2007, and filed by the appellants in their materials, states in part:

We cannot truly estimate the length of time that remains until this transcript order is completed, however we can advise that *the average waiting period for transcripts required for appeal purposes is approximately 24 to 30 months.* [emphasis added]

[65] Delays of this nature frustrate the ability of the appeal court to ensure the fairness of the process. It also suggests institutional indifference to the rights of those who have been convicted of minor offences under the *Provincial Offences Act*. But this is not enough to entitle the appellants to constitutional relief. For this there must be a violation of their rights under the *Charter of Rights and Freedoms*. It is to this issue that I will turn next.

Charter of Rights and Freedoms

[66] The right to be tried without unreasonable delay is set out under s.11(b) of the *Charter of Rights and Freedoms*. This right applies in the case of both criminal and regulatory offences: *R. v. C.I.P. Inc.*, [1992] 1 S.C.R. 843, [1992] S.C.J. No. 34 (QL).

[67] The trials of these four appellants were held within 8 months to 13 months of the offence date. There has been no complaint that their trials were not held in a timely manner. "Simpler matters", such as these cases, should be "simpler, speedier and less

costly to resolve”: *R. v. Rowan*, 2004 ONCJ 153, [2004] O.J. No. 3504 at para. 49 (QL) (C.J.).

[68] As persons convicted of provincial offences, the appellants’ presumption of innocence under s.11(d) of the *Charter of Rights* has been spent. Moreover, the s.11(b) *Charter* right is inapplicable to delay following conviction: *R. v. Potvin*, [1993] 2 S.C.R. 880, [1993] S.C.J. No. 63 (QL).

[69] The majority of the court in *Potvin* indicated, however, that while s.11(b) is inapplicable to delay in such cases, this does not leave the parties without a remedy when “delay of appeal proceedings affects the fairness of the trial”: [QL] para. 70, per Sopinka J. Section 7 of the *Charter of Rights and Freedoms* will, in appropriate circumstances, afford a remedy. As Justice Sopinka explained, this is due to the court’s power to remedy an abuse of process which finds expression under s.7 as a principle of fundamental justice: see also *R. v. Jewitt*, [1985] 2 S.C.R. 128, [1985] S.C.J. No. 53 (QL); *R. v. Keyowski*, [1988] 1 S.C.R. 657, [1988] S.C.J. No. 28 (QL).

[70] The goals of the abuse of process doctrine are to prevent unfairness and to preserve the integrity of the justice system: *R. v. Nelson Granite Ltd.*, 2007 ONCJ 258, 49 C.R. (6th) 125, 2007 CarswellOnt 3699, [2007] O.J. No. 2296 (QL) (C.J.), leave to appeal refused (August 3, 2007) (C.A. [In Chambers])

[71] A stay of proceedings should only be granted in the rare instances where “compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community’s sense of fair play and decency” or where the proceedings are “oppressive or vexatious”: *Keyowski* [QL] para. 2.

[72] Since the delay in these cases has occurred in its entirety before the provincial offences appeal court, it is this court which is in the best position to “assess the consequences of the delay”: *Potvin* [QL] para. 72

[73] Delay caused by administrative procedures is by no means unknown to appeal courts. In the context of provincial offences proceedings, it may lead to *Charter* complaints, for example, due to the notice of trial procedure: see, for example, *R. v. Kwoon* (1999), 50 M.V.R. (3d) 94, [1999] O.J. No. 4989 (S.C.J.); *Brampton (City) v. Dilloo*, 2008 CarswellOnt 323 (S.C.J.); *R. v. Farokhshadfar*, [2001] O.J. No. 6015 (QL) (C.J.).

[74] Failure to act in accordance with the timelines set out in the appeal rules may have adverse consequences to the parties: *Ontario (Ministry of Labour) v. Di Franco*, [2007] O.J. No. 2149 (QL) (S.C.J.). The court in *Potvin* adverted to this when it observed that litigants are afforded a range of remedies at virtually every stage of appeal proceedings so that a party who is “interested in a timely disposition of the appeal” has the opportunity to eliminate “any substantial delay on the part of the adversary”; where the delay is systemic, s.7 of the *Charter* will assist in cases of “real prejudice”: [QL] para. 72

[75] I cannot accept the respondent's submission that the appellants' s.7 *Charter* fairness of trial rights have not been compromised in the circumstances of these cases. The inordinately lengthy delays on the part of Court Support Services in the preparation of trial transcripts, and its cavalier attitude evidencing a complete lack of interest in facilitating the appellants' right to a timely disposition of their appeals, such as the repeated refusals to answer any queries by the parties or the appeal court as to the status of the transcripts, constitute a "shocking aberration in our court reporting system: *Trochym* [QL] para. 20.

[76] In my opinion, there are a number of particularly disturbing aspects of these appeal proceedings that are offensive to the community's sense of decency and fair play. To begin, these appellants were given 15 days to decide whether they wished to proceed to trial, or risk conviction if they did not. Upon being convicted, they were given 15 days to determine whether to pursue their cases on appeal. Their response was to wait between 15 and one-half months to 27 months just to be able to have a transcript of a few pages of their trial, in order to properly prepare for the appeal, and present a legitimate argument for review of their convictions. Each and every communication sent on their behalf about the transcripts went unanswered. As a result, multiple appearances on appeal were required, all to allow them to do what the *Provincial Offences Act* guarantees they may do: review their findings of guilt on appeal, with the aid of a transcript. When this did not succeed in producing the trial transcripts, they instituted further legal proceedings as a last resort, filing a Notice of Constitutional Question, with its requisite notice and record requirements, including filing an application record, factum, casebook, transcripts of appeal appearances and affidavits.

[77] Appeals are not a mere indulgence. The right of appeal minimizes possible injustice, such as may occur when defendants are convicted without the prosecution having to adduce evidence at trial: see *R. v. Richard*, [1996] 3 S.C.R. 525, [1996] S.C.J. No 43 (QL).

[78] The appellants stood in jeopardy of having their appeals dismissed if they did not act within 30 days, and retrieve and file their transcripts. They also faced the prospect of the matters being referred to collection, and having their credit rating affected. However, there would be no redress they could seek for their appeal rights being delayed, if the respondent's views were to prevail. These appellants were not seeking to put off a review of their convictions, and delaying their day in court. To the contrary, they were seeking an expeditious hearing of their matters so that there could be finality to them. They were entitled to pursue their matters "until the end of the saga": *R. v. Rahey*, [1987] 1 S.C.R. 588, [1987] S.C.J. at para. 40 (QL), per Lamer J. There was no other avenue available to them in order to secure the transcripts. The fact that equivalent or longer periods of delay, due to other reasons, have been tolerated in other cases, is of no assistance to the respondent: see *United States of America v. Comisso* (2007), 47 O.R. (3d) 257, 129 O.A.C. 166, [2000] O.J. No. 468 (QL) (C.A.), leave to appeal dismissed, [2000] S.C.C.A. No. 190 (QL); *R. v. Hayes*, [2003] O.J. No. 4590 (QL) (C.A.). It is not uncommon for appellants to acquiesce to delay, or waive their rights to speedy trials, in which case lengthy delays may be found to survive constitutional scrutiny. This is not the case here.

[79] Most disquieting of all, in my opinion, is the detrimental effect that is caused to the administration of justice by the delays in these appeal proceedings. By effectively frustrating an appellants' ability to pursue an appeal over the course of several years, there is a danger that some will conclude that the game is not worth the candle, and simply abandon the appeal. There may be an air of mootness to the appeal, since the matter will no longer be current, and any re-trial that is ordered will occur when events have long since faded into the past. The additional costs of sending letters about transcripts, bringing motions for directions to the appeal court, ordering appeal transcripts, and filing *Charter* motions for constitutional relief, may well discourage appellants from bringing appeals, and paralegal practitioners or others from agreeing to argue such cases, thus placing a significant barrier to access to justice. The prosecutor is also impacted by these delays, since its witnesses will suffer from the same difficulties of memory, many years later, should a new trial be ordered. Were the roles of the parties reversed, and the prosecutor to be the one appealing a verdict of acquittal, it would hardly wish to countenance such a lengthy delay of its appeal proceedings. The public, in turn, is deprived of an expeditious determination of the merits of the matter, whether on appeal or further trial proceedings.

[80] Intestinal fortitude and strength of conviction should not be required ingredients of the provincial offences appeal system. In a case decided shortly after the enactment of the *Provincial Offences Act*, *R. v. Jamieson* (1981), 64 C.C.C. (3d) 550, [1981] O.J. No. 1937 at para.8 (QL) (C.A. [In Chambers]), MacKinnon A.C.J.O. stated:

The *Provincial Offences Act* is not intended as a trap for the unskilled or unwary but rather ... as an inexpensive and efficient way of dealing with, for the most part, minor offences."

[81] While more than 25 years have passed since the making of these observations, they continue to apply with equal force today. Those who are involved in the operation and administration of the provincial offences court, such as Court Support Services, should be mindful of these sentiments in the discharge of their important duties, such as the preparation of trial transcripts for appeal hearings.

[82] These individual appellants have had the uncertainty of the appeal process linger over them for many years now. While there was "speedy justice" in their trial proceedings, there has been nothing but interminable delay afterward. Their feelings of anxiety and stress are understandable. Even in the case of the corporate appellate, while it is incapable of enjoying life, liberty or security of the person: *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, [1989] S.C.J. No. 36 (QL), its trial fairness interests are certainly in issue given its exposure to the vicarious liability provisions of the *Smoke-Free Ontario Act*, S.O. 2005, c.18, which provides for an automatic prohibition from selling tobacco for a six month period where there have been two tobacco sales offences committed in the same place during the preceding five year period. See further *R. v. National Steel Car Limited* (2003), 63 O.R. (3d) 693, 169 O.A.C. 321,

[2003] O.J. No. 856 (QL) (C.A.) as an example of a corporation asserting its s.7 *Charter* right on an abuse of process motion.

[83] Throughout the entire appeal process, these appellants have consistently exhibited a keen interest in effecting a timely disposition of their cases. Through no fault of their own, they have not been able to do so. The protracted delay in the hearing of their appeals represents a failure of the system to respond properly to litigants who evidenced a genuine desire to proceed “expeditiously and did nothing to delay the appeal”: see *R. v. Hein*, [2006] O.J. No. 1098 at para. 8 (QL) (S.C.J.).

[84] The appellant *Ben-Ahmed Fadhaloui Ovided* was forced on to trial, over his agent’s request for an adjournment, on the one trial date he was given in the provincial offences court. By way of contrast, his appeal has been adjourned 5 times. In the case of the appellants *Delwar Howlader* and *Bagher Pouramezani*, both of whom were present at trial on the only day they were required to attend, there have been 8 and 9 appearances in the appeal court, respectively, since January, 2008. Finally, the appellant 1363437 *Ontario Limited* has had its matter adjourned times 8 times over this same period. While courthouses are busy places, and adjournments on hearing dates, for a multitude of reasons, are a fact of life, this litany of delay and adjournments on appeal is extraordinary. These delays have resulted for reasons completely beyond the control of the appellants, and indeed, quite opposite to their wishes to proceed expeditiously to appeal.

[85] I conclude that this is one of those rare cases where the community’s sense of fair play and decency has been violated. The proceedings have become “oppressive or vexatious”, and constitute a violation of the appellants’ s.7 *Charter* rights to fundamental justice. As a result, it is appropriate to order a stay of proceedings in each of these appeal cases.

Costs

[86] There is jurisdiction in the provincial offences court to fashion remedies for breaches of the *Charter of Rights and Freedoms*, including the awarding of costs as a remedy under s.24(1): *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575, [2001] S.C.J. No. 79 (QL).

[87] Proceedings under the *Provincial Offences Act* are quasi-criminal in nature. Costs are therefore governed by the same principles which govern costs in all provincial prosecutions and summary conviction proceedings under the *Criminal Code*. Applying the 974649 decision, Campbell J. ruled in *R. v. Felderhof*, [2003] O.J. No. 393 at para. 9 (QL) (S.C.J.), aff’d (2003), 68 O.R. (3d) 481, [2003] O.J. No. 4819 (QL) (C.A.), that the governing rule is that “costs in provincial prosecutions and other quasi-criminal matters do not ordinarily follow the event.”

[88] Consequently, costs against the prosecution in a provincial offences prosecution is an “exceptional tool”, reserved for cases which involve “a marked and unacceptable departure from reasonable prosecution standards”: *Felderhof*, [2003] O.J. No. 393 at

para. 10 (QL) (S.C.J.). An absence of misconduct by the Crown is dispositive of this issue: see, for example, *London (City) v. Maywood*, [2003] O.T.C. 771, [2003] O.J. No. 3353 (QL) (S.C.J.), aff'd [2005] O.J. No. 2177 (QL) (C.A.); *R. v. Sault Ste. Marie (City)*, [2007] O.J. No. 4356 (QL) (S.C.J.).

[89] However, there is a proper basis for awarding costs against the Crown where the defendant's s.11(b) rights were violated having regard to "numerous unnecessary court appearances" resulting from "sloppy" and "indecisive" police work: *R. v. Foster* (2003), 64 O.R. (3d) 152, [2003] O.J. No. 1133 (QL) (S.C.J.).

[90] The appellants submit that they have been put to unnecessary expense in pursuing their statutory right to have their convictions reviewed by an appellate court, and that these additional costs were both for reasons beyond their control and of which they were powerless to avoid, given the refusal by Court Support Services to respond to their repeated transcript queries, hence the many appearances in the appeal court and application for *Charter* relief. The respondent, on the other hand, submits the delays, while unfortunate, do not merit the sanction of costs, particularly where there has been no prior adjudication on the issue of appeal delay due to the circumstances in issue, and that this is, essentially, a test case involving a novel point of law.

[91] Administrative costs due to ordering trial transcripts, filing materials and appearances for oral argument, it must be acknowledged, are a necessary part of any appeal. Moreover, as Doherty J.A. noted in the *R. v. R.R.*, decision, most appeals are unsuccessful. As such, costs attributable to such expenditures are not ordinarily recoverable.

[92] In these appeal proceedings, however, the additional administrative costs that the appellants have been subjected to could not be reasonably contemplated. Indeed, had the appellants been made aware in advance of the many court appearances and additional expenses necessitated by the mere fact of appealing their convictions, they may well have decided otherwise. Their desire to appeal in a timely way has been met by institutional intransigence and indifference. On any reasonably foreseeable view, a delay of up to 27 months to obtain a trial transcript of less than 10 pages is unjustifiable. The May, 2007 letter from Court Support Services included in the appellants' materials, indicates that a period of delay of 24 months to 30 months for the preparation of these brief trial transcripts is the norm. The lengthy delay in these cases of 15 and one-half months to 27 months is thus no mere aberration. It falls, for the most part, within these timelines. An award of costs is merited in the circumstances, so as to express the court's disapproval of these shocking periods of delay, which have an obvious detrimental effect on the administration of justice. It is little wonder that these appellants are losing faith in the justice system.

[93] I was advised during oral argument that the administrative costs portion of these provincial offences appeal cases is in the range of \$300, or 40% of the total fee structure. No additional costs than these are being sought by Mr. Manoukian. These appellants, effectively, have been subjected to a number of additional expenses in each case,

including the sending of many unanswered letters to Court Support Services, filing of motions for directions to compel a response, multiple appearances in the provincial offences appeal court, ordering additional transcripts of appeal court appearances, and eventually filing a Notice of Constitutional Application, accompanied by affidavits, factums, application records and casebook.

[94] The appellants should not be expected to bear the brunt of these additional expenses, which were not within their contemplation or control. There was merit to their appeals against conviction, at least as the transcripts, which are available, demonstrate. Further, their *Charter* rights have been vindicated on appeal. There is a “causal connection” between the *Charter* breach and costs: *Foster* [QL] para. 16. In the circumstances, it is appropriate to order the respondent to pay costs of \$300. in each of these four cases, this amount representing the administrative costs associated with the appellants’ appeals.

Disposition

[95] The appeals are allowed and a stay of proceedings entered. The respondent is ordered to pay costs in the amount of \$300 to each of the appellants.

R. Libman J.
9 July 2008