

ONTARIO COURT OF JUSTICE

IN THE MATTER OF applications for extensions of time under subsections 85 and 135(1) and waivers of payment of fines under section 111 of the *Provincial Offences Act*, R.S.O. 1990, c. P.33, as amended;

B E T W E E N :

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Respondent

— AND —

WAYNE POMEHICHUK

Applicant

Before Justice Y. Renaud

Reasons for Order released on May 14, 2009

Not present, not served	for the prosecution
Michael G. Scott, agent	for the defendant

On applications involving possible appeals from findings of guilt under the *Highway Traffic Act* (Ontario), R.S.O. 1990, c.H.8, as amended, dated September 12, 2008.

Y. Renaud, J.:

[1] The present reasons address two different applications in three separate convictions of the defendant on September 12, 2008 pursuant to the Highway Traffic Act of Ontario, specifically:

- a. failure to maintain a daily log, s. 190(3) resulting in a fine and surcharge totalling \$800.00 (two fines of \$400.00); and
- b. drive after 12 hours on duty, s.13(3), O.Reg. 555\06, resulting in a fine of \$400.00.

[2] These applications come before the court, in the absence of the parties and are considered in chambers on the basis of materials received May 5, 2009.

[3] The applicant is a resident of Manitoba and is a long haul truck driver.

[4] On the first application, the applicant requests an extension of time to appeal under s. 85 of the *Provincial Offences Act* and on the second, the application is for authorization to appeal without paying the fine under s. 111(2) of the Act.

[5] In each case, the applicant has also filed a notice of appeal against conviction. In support of the first application, namely for extension of time to appeal, the same reason is stated in each application explaining the failure to appeal within the allotted time (with minor variations):

I am a long haul driver A2 license. I left my tickets in my logbook and forgot all about them. My license is my livelihood and I must fight these tickets to stay on the road. Greatly appreciate my day in court.

[6] In support of the authorization to file the appeal without paying the fine, the appellant states in each case, with minor variation:

My fines are all \$400. I am fighting several tickets including federal charges and I just can't afford to pay these fines.

[7] Sections 85 and 111(2) of the *Provincial Offences Act* provide authority to the court to grant the relief sought. The regulatory provisions found in O.Reg. 722/94 also have application as is addressed below.

[8] It is noted that on the same day these applications were received at the court office, the applicant also delivered Notices of Appeal. Paragraph 16 of the Notice of Appeal requires a statement of the grounds of appeal. In each of the three notices of appeal, the defendant states the grounds of appeal are limited to the following:

I left my tickets in my log book and handed it in to my company. I have a defence to the charge.

Time for filing notice of appeal

[9] Section 135(1) of the *Provincial Offences Act* sets out the procedure for filing an appeal, namely that a notice of appeal in the prescribed form stating the reasons why the appeal is taken shall be filed with the clerk of the court within fifteen days of the decision appealed from, in accordance with the rules of court.

Payment of fine before appeal is filed

[10] Section 111 of the *Provincial Offences Act* provides that the notice of appeal shall not be accepted for filing if the defendant has not paid the fine in full but adds that a judge

may waive compliance with this and order that the appellant enter into a recognizance to appear on the appeal, the recognizance to be in such amount, with or without sureties, as the court directs.

Rules of the Ontario Court of Justice in Appeals under section 135: O.Reg.722/94

[11] Pursuant to the Rules that govern appeals under section 135, in particular section 8 of O.Reg. 722/94, a judge may extend or abridge the time for bringing an appeal and for doing any other act in connection with an appeal for which a time is prescribed, before or after the expiration of the time prescribed. Subsection 8(2) of the regulation requires that a motion to extend or abridge time shall be given to the opposite party, unless otherwise directed by a judge.

Service of the motion

[12] This last provision arguably allows a court to grant the extension or abridgment of time even where a notice of motion has not been served on the respondent. If the notice requirement is not waived by a judge, pursuant to section 11 of the regulation, the motion shall be served at least three days before the date for hearing the motion and the motion shall be filed at least two days before the hearing of the motion. Section 11(6) provides guidance on when the motion may be heard without service of a motion, namely:

- (a) where the motion is on consent (which would suggest that there was some form of notice in any event;
- (b) where the motion for waiver of payment of the fine before filing the appeal or for a stay of the conviction pending the appeal; or
- (c) where, having regard to the subject-matter or the circumstances of the motion, it would not be unjust to hear the motion without service of the notice of motion.

[13] Pursuant to section 11(4), evidence on a motion may be given by:

- (a) affidavit;
- (b) with permission of the court, orally;
- (c) in the form of a transcript of the examination of a witness.

[14] It is not necessary to consider in what circumstances the court may consider a motion by an appellant for an abridgment or extension of time without service of the motion upon the respondent. There are cases where clearly it would not be unjust to hear the motion, without notice. Perhaps there is urgency. Perhaps an appellant is only slightly out of time. Perhaps the stated grounds of appeal are so obviously meritorious that the court can readily anticipate that the respondent would not object, for instance, the absence of an appellant at trial and failure to meet time limits due to hospitalization or absence from his place of residence. Perhaps, with no fault of the appellant, notice of the conviction did not

come to the appellant's attention (though here the 're-opening' under s. 11 of the Provincial Offences Act may more properly be of assistance).

[15] In the present case, it is unclear whether the convictions resulted from the failure to appear at trial pursuant to section 9.1 of the Act or the failure of the defendant to respond to the offence notice under section 9 of the Act.

[16] In either case, I express concern that:

- a. the convictions were entered on September 12, 2008, over 7.5 months ago;
- b. the appellant does not provide any information as to when he became aware of the convictions, which is unhelpful in assessing the appellant's diligence or *bona fides* of the appeal;
- c. the appellant does not provide any clear reason for the delay in filing the application for extension of time;
- d. the appellant does not provide any information supporting the assertion that he cannot afford to pay the fines in advance, adding in fact that he is also 'fighting federal charges', the significance of this last comment being unclear;
- e. the appellant does not offer any reason why the court should consider the application for extension of time without notice first being given to the respondent;
- f. the appellant does not begin to offer any grounds of appeal that would permit even a superficial appreciation of the *bona fides* of the assertion that he 'has a defence to the charge'; and
- g. the potential that the significant passage of time may have some effect on the ability of the prosecution to present a case or at least militates in favour of requiring notice to the prosecution.

Proceeding without notice

[17] The general principle expressed in the regulations governing these appeals is that the rules shall be construed liberally to obtain as expeditious a conclusion of every proceeding as is consistent with a just determination of the proceeding: s. 1(4), O.Reg. 722/94. This does not mean that notice of the application should not be served upon the opposing party. In fact, we have often observed in the consideration of such applications and appeals themselves, that the responding party may sometimes consent to the application or even to the appeal itself where circumstances warrant which in itself facilitates an expeditious conclusion of a proceeding.

Principles for extending time

[18] Although the case involved an appeal following a criminal conviction, the comments of the Ontario Court of Appeal in *R. v. Menear*, [2002] O.J. No. 244, provides useful guidance when considering a request for extension of time:

20 There is no absolute rule to be applied in the exercise of the discretion whether or not to grant an extension of time. The court will, however, usually consider the following three factors:

- (i) whether the applicant has shown a bona fide intention to appeal within the appeal period;
- (ii) whether the applicant has accounted for or explained the delay; and
- (iii) whether there is merit to the proposed appeal.

21 Depending on the case, the court may take into consideration other factors such as whether the consequences of the conviction are out of all proportion to the penalty imposed, whether the Crown will be prejudiced and whether the applicant has taken the benefit of the judgment. In the end, the main consideration is whether the applicant has demonstrated that justice requires that the extension of time be granted. In our view, the appellant has not met the onus of demonstrating that an extension of time should be granted.

[19] In addition to the criteria mentioned above, the Court of Appeal also commented on the lengthy delay by the appellant and the absence of a satisfactory explanation. Notwithstanding the delay, the Court of Appeal noted that an extension of time has been allowed even where the delay is unexplained:

24 Courts have granted an extension of time to allow an accused to attempt to set aside a guilty plea notwithstanding lengthy unexplained delay where there are unexpected consequences of the conviction and there is good reason to doubt the validity of the conviction. The appellant attempts to bring himself within that line of cases and relies upon *R. v. Gaudreault* (1992), 76 C.C.C. (3d) 188 (Que. C.A.) and *R. v. Hetsberger* (1979), 47 C.C.C. (2d) 154 (Ont. C.A.). In our view, the correct principle is as stated by Carthy J.A. in *R. v. Closs* (1998), 105 O.A.C. 392 (C.A.) at 394:

It is my view that such orders should be made only in exceptional circumstances where there is a real concern that an injustice may have occurred. There are many negative consequences of having a criminal conviction and it cannot be expected that these will all be explained to an accused prior to a plea; nor should the convicted person expect the judicial system to provide a fresh start when a surprising consequence of the conviction is encountered. We must have finality except where the demands of justice dictate otherwise.

[20] Aside from the assertion of the appellant that he has a defence to the charges, there is nothing in the documents received that speaks to a concern that an injustice may have occurred. Wishing one's day in court at this late stage does not in and of itself provide justification for granting the extension.

[21] In the result, the following order may leave open the opportunity to file adequate

material and as well serve to emphasize the expectation that applications such as the present ones will provide some substance, some basis for appreciating the merits of the application, and the bona fides of the appeal. As well, the present order may underscore that, particularly in the face of a lengthy delay in filing an appeal, the appellant bears an onus to show that justice requires that the extension be granted.

[22] Justice Libman comments in *R. v. Ovided et al.* [2008] O.J. No. 2780, on the increasing significance of fines and other sanctions imposed in traffic offences. I agree with his observations on this point and the reality that to most Ontarians, provincial offence cases represent the only contact they will have with the justice system in Ontario. Trials and appeals are important but at the same time, parties who seek to contest a result at trial ought not simply presume that latitude will easily be granted to permit the pursuit of an appeal unless there is some basis for excusing the non-compliance with procedures and time limits. Provincial offence appeals are time-consuming and parties who participate should either devote the effort necessary to diligently prepare the appeals in a timely manner or consider accepting the outcome of the trial.

Order

[23] This court orders that the applications for an extension of time to file an appeal and to appeal without the payment of the fines are adjourned for further consideration, on the following conditions:

1. the applicant shall serve the applications and all supporting documentation upon the respondent and shall file proof or acknowledgement of service;
2. the applicant shall be permitted until June 5, 2009 to prepare, serve and file a draft notice of appeal setting out with particularity the grounds of appeal, i.e. a summary of the evidence he would intend to challenge and the argument he would intend to present on the appeal that would suggest that the convictions were not well-founded or that the convictions were entered in error, all of which should be offered in support of the bona fides of the appeals;
3. the applicant shall serve an affidavit in support of the application for an extension of time, at a minimum, addressing the following:
 - (a) when and how he learned of the convictions;
 - (b) when he in fact ‘handed in’ his misplaced ‘tickets’ to ‘his company’;
 - (c) what request he made of ‘his company’ regarding the appeal and to whom this request was made;
 - (d) the financial circumstances that prevent him from paying the fines in advance and as well, a declaration of his approximate net worth to support a meaningful recognizance and a consideration of the need for sureties and the amount of the recognizance;

- (e) whether he holds an Ontario driver's licence or alternatively why he believes that a licence from another province may be affected by these convictions; and
 - (f) his address(es) since September 2008.
- 4. The applications are adjourned to June 8, 2009 in courtroom B at 10:00 a.m. to consider the dismissal of the applications for an extension of time if the above conditions are not complied with, to hear submissions or to give further direction for the hearing of the applications.

Released: May 14, 2009

Signed: "Justice Y. Renaud"