Date: 19981110 **Docket**: C.A.C. 147010

NOVA SCOTIA COURT OF APPEAL
Cite as: R. v Trimper, 1998 NSCA 235

Glube, C.J.N.S.; Pugsley and Cromwell, JJ.A.

BETWEEN:

HER MAJESTY THE QUEEN	)	Robert C. Hagell
	)	for the Appellant
Appellant	)	
- and -	)	
	)	Walton W. Cook, Q.C.
	)	David R. Hirtle
	)	for the Respondent
PAUL GORDON TRIMPER	)	
	)	
Respondent	)	Appeal Heard:
	)	November 10, 1998
	)	
	)	
	)	Judgment Delivered:
	)	November 17, 1998
	)	
	)	
	)	
	)	
	)	
	)	
	)	

THE COURT: Application for leave to appeal is dismissed with costs to the respondent in the amount of $750.00, plus reasonable disbursements, per reasons for judgment of Glube, C.J.N.S.; Pugsley and Cromwell, JJ.A. concurring.

GLUBE, C.J.N.S.:

An application to extend the time for service of a notice of appeal in a Summary Conviction case was dismissed by Associate Chief Justice MacDonald. The Provincial Crown seeks leave to appeal.

The respondent, Paul Gordon Trimper, was driving his motor vehicle when he was stopped by the Royal Canadian Mounted Police. They laid several charges, namely, resisting arrest contrary to s.129(a) of the **Criminal Code**, refusing a breathalyser contrary to s. 254(3)of the **Code**, driving with blood alcohol over 80 contrary to s.253(b)of the **Code**, and possession of a narcotic contrary to s.3(1) of the **Narcotic Control Act**.

The respondent pleaded not guilty to the charges. His trial took place over a three-day period in July of 1997. On September 22, 1997, Provincial Court Judge Nichols gave an oral decision, acquitting Mr. Trimper of the s. 253(b) charge of the **Code**. After citing violations of s. 10(b) of the **Charter of Rights and Freedoms** and a "possible" violation of Mr. Trimper's s. 7 rights, Judge Nichols stayed the other three charges as a remedy pursuant to s. 24 of the **Charter.**

Judge Nichols advised counsel he would file a written decision on October 8, 1997 and stated the Crown was to have 30 days from that date to appeal. The

written decision was not forthcoming on October 8. Judge Nichols then promised it would be ready on October 15, again adding that the appeal period would run from that new date. Although the Crown checked on October 27 and on November 28, no decision was filed. On December 4, the Provincial Crown wrote to Judge Nichols asking for the decision on January 14, 1997. On that date, Judge Nichols said he would have it ready for January 28. On the 28th, he said he would leave it at Kentville on January 30, 1998. Although the Crown checked on February 4 and 9, no decision was filed on these dates or any other date.

On February 10, the Provincial Crown recommended filing an Appeal and on February 27, 1998, the Crown requested the trial transcript.

On March 2, 1998, the Provincial Crown filed a Notice of Application to extend the time for filing a Notice of Appeal from the decision of Judge Nichols and if successful to set a date for the appeal. On March 16, the Federal Crown filed a similar application relating to the **Narcotic Control Act** charge. Both applications were heard by MacDonald, A.C.J., on March 24, 1998. On the same day, he gave an oral decision dismissing the applications.

Counsel agreed the 30-day appeal period for purposes of filing a Notice of Appeal ran from September 22, 1997, the date of Judge Nichols' oral decision.

In his decision, MacDonald, A.C.J., cited **R. v. Harris (J.L.)** (1996), 154 N.S.R.(2d) 399 and in particular, the passage setting out the four criteria required for granting a successful application for an extension of time to file an appeal:

> If the Notice of Appeal raises an arguable ground, the appellant has shown a consistent intention to appeal, provided a reasonable explanation for the delay, and the delay is minimal, the application pursuant to the **Summary Conviction Appeal Rule** should be allowed. (p. 401)

He then paraphrased this passage and dealt with each criterion. Although finding there was an arguable appeal with potential merit and valid reasons for the delay as the Crowns were waiting for the written decision, he concluded that they failed to establish a “consistent intention” to appeal. Although Counsel for the Provincial Crown submitted that an appeal was being actively considered from September 22, 1997, he also acknowledged he was waiting to see whether the reasons given by the trial judge would reveal that no appeal should be taken. If they did not, then he would recommend an appeal.

MacDonald, A.C.J., dismissed both applications on the ground the Crowns failed to establish they had a “consistent intention” to appeal. Although acknowledging the Provincial Crown was “consistently considering” an appeal, he found they were not “consistently intending” to appeal. He also held the Crown had not made a final

decision as they were waiting for the judge's written reasons, yet they were

> "eventually able to file and articulate detailed grounds of appeal without the benefit of the written transcript.... Furthermore, at no time was there any indication to the accused of the Crown's intention to appeal." (Decision p. 4)

Only the Provincial Crown appealed from this decision, raising the following grounds:

1. THAT the summary conviction appeal court judge erred in law in ruling the Crown had not demonstrated a consistent intention to appeal from the order staying proceedings.

2. THAT the summary conviction appeal court judge erred in law in his ruling as to what constitutes a "consistent intention" to appeal from the summary conviction court.

3. Such other grounds as may appear from a review of the record of the proceedings under appeal.

Section 813(b)(i) of the **Code** permits the Attorney General to appeal from an order staying proceedings on an information. Section 815 requires a person wishing to appeal to give notice of appeal in the manner and "within such period as may be directed by rules of court."

The Supreme Court of Nova Scotia passed rules relating to Summary Conviction Appeals. They are contained in **Practice Memorandum No. 21.** Where the Crown is the appellant, s. 1(3) of **Practice Memorandum No. 21**, requires the Crown to serve on the defendant and file the Notice of Appeal within 30 days after the order was made. Section 2 of the **Practice Memorandum** is entitled, "Extension of Time ..." and states:

> 2(1) An application to extend the time for service...may be made to the appeal court, or a judge ex parte, and shall be supported by proof, by affidavit or otherwise, that the appellant has consistently intended to appeal, and showing adequate grounds for the order sought. (emphasis added)

As stated in **Harris**, **supra**, an application for an extension should be granted when the Notice of Appeal: (1) raises an arguable ground; (2) shows a consistent intention to appeal; (3) provides a reasonable explanation for the delay; and (4) the delay is minimal.

The evidence before MacDonald, A.C.J. was contained in an affidavit by David E. Acker, Crown Attorney, and the February 27, 1998 letter from Mr. Acker to the Court Administration asking for a typed transcript of the trial proceedings. The Federal Crown also filed an affidavit.

In relation to the "consistent intention" to appeal, Mr. Acker stated in his affidavit the following:

> 6. On December 4, 1997 I discussed with James H. Burrill, Regional Crown Attorney, moving ahead with an appeal without a written decision. Mr. Burrill requested I make some further efforts to obtain a written decision in a hope Judge Nichols decision might be made clear.
>
> 12. On February 10, 1998 I prepared a Recommendation for Appeal and sent it by courier to James F. Burrill for his approval which was immediately granted.
>
> 14. The Crown has been actively considering an appeal since September 22, 1997.

There are a number of cases dealing with the issue of whether a party has shown a "consistent intention" to appeal. It is necessary to examine the facts of the case to decide whether there were words or actions by the appellant which would lead the trier of fact to conclude they showed a "consistent intention." MacDonald, A.C.J., held on the evidence before him an indication of "...consistently *considering* an appeal but not consistently *intending* to appeal." (Decision p. 3)

In **R. v. Scheller et al.** (No.2) (1976), 32 C.C.C. (2d) 286, Lacourciere, J.A. (Ont. C.A.), sitting in Chambers, dealt with an application to extend the time for service and filing a notice of appeal from the dismissal of certain charges. Although he held there was a wide discretion to extend the time, he expressed the view this discretion must be exercised judicially and fairly. At p. 290, he went on to say:

> One of the cardinal principles is that the party seeking the extension must have displayed a *bona fide* intention to appeal within the time limit. The discretion must be exercised in a way that will promote justice in a criminal case between the prosecution and the accused persons. In the case at bar the Crown has not offered an acceptable explanation for the

> delay. While the Crown may have intended to continue its prosecution against the accused, it chose to do it by disregarding the dismissals made by Judge McEwan. There was no intention to appeal these decisions within the statutory time. In view of the delay caused entirely by the prosecution, I am not prepared to grant an extension of time. The application is refused.

R. v. Osgoode Sand & Gravel Ltd. (1978), 41 C.C.C. (2d) 503, (Ont. Div. Ct.) deals with the issue of the applicant showing a *bona fide* intention to appeal within the time limited for appeal. In that case, two parties were charged with provincial offences. The respondent company was acquitted and the affiliate company was convicted. The affiliate company appealed and its conviction was overturned. Only after this successful appeal did the Crown file an application to extend the time to appeal the acquittal of the respondent company. At p. 510, O'Driscoll, J. held:

> In this case there is no indication in the affidavit in support of the motion before His Honour Judge Matheson that the Crown intended to appeal within the statutory period; unless there is some evidence of that intention, in my view, such an application should not be granted.

On the issue of whether this was a question of law alone, O'Driscoll, J. held it was, stating at p. 508:

> Unless and until the Crown obtained an order extending the time for appeal under s. 750(2) of the **Code**, no appeal existed.
>
> In my view, the question of whether or not there was any evidence to justify the exercise of the discretion to extend the time for filing and serving the notice of appeal is a question of law: see **Gauthier v. The King** (1931), 56 C.C.C. 113, [1931]

> 4 D.L.R. 582, [1931] S.C.R. 416. **R. v. Hook** (1955), 113 C.C.C. 248, [1955] O.R. 946, 22 C.R. 378.

Grewal v. M.E.I., [1985] 2 F.C. 263, a decision of the Federal Court of Appeal, deals with extension of time to bring an application to review and set aside the decision of the Immigration Appeal Board. The legislation required an application to set aside be made within 10 days of the decision being first communicated. There was provision to extend the period. The court held, that in addition to requiring an arguable case, there had to be some justification for not bringing the application to review within the time frame of the appeal period. Thurlow, C.J., held, that the underlying consideration is to ensure justice is done and that there was a *bona fide* intention to appeal within the time prescribed. He discussed cases involving very short periods of delay and delays of long periods where the law changed giving rise to a possibility of appeal. Based on a decision of the Supreme Court of Canada which came after the decision of the Appeal Board, he held there was an arguable case for having a new hearing. He then went on to deal with justification and stated at p. 277:

> There remains, however, the questions whether there is any satisfactory reason, any proper justification, for not bringing the application within the 10-day period and whether justice requires that the extension be granted.
>
> Among the matters to be taken into account in resolving the first of these questions is whether the applicant intended within the 10-day period to bring the application and had that intention continuously thereafter. Any abandonment of that intention, any laxity or failure of the applicant to pursue it as diligently as could reasonably be expected of him could but militate strongly against his case for an extension. The length of the period for which an extension is required and whether

> any and what prejudice to an opposing party will result from an extension being granted are also relevant. But, in the end, whether or not the explanation justifies the necessary extension must depend on the facts of the particular case and it would, in my opinion, be wrong to attempt to lay down rules which would fetter a discretionary power which Parliament has not fettered.

The appellant refers to the Crown's request for a transcript as some indication of the intention to file an appeal. It is noted this request was made after filing the application to extend the time for appeal. The Crown did not request the transcript in the 30-day period which counsel agree was applicable. Even if it had been within that period, that would not by itself justify granting an extension if the accused did not receive notice within the time limited for appeal. (**R. v. Grover** (1967), 3 C.C.C. 387 (Ont. C.A.))

In the present case we are dealing with the Crown who was fully aware of the 30-day appeal period. I see no error in the conclusion drawn by MacDonald, A.C.J., that the Crown was "considering" its position, but had not formed the opinion during the 30 days that it intended to appeal. That is clear from the words used in the affidavit. To put a different meaning onto those words now would not reflect the position of the Crown at the time. They did not finally decide to appeal until some five months after the September 1997 oral decision. If during the 30-day period, the Crown had advised the respondent that it was appealing, but awaiting the decision of the Trial Judge, that might have made a difference.

I find there was no error in law by MacDonald, A.C.J., in ruling the evidence of the Crown had not demonstrated a “consistent intention” to appeal from the order staying the proceedings. Further, I find he committed no error in law as to what constitutes a “consistent intention” to appeal from the Summary Conviction Court.

Accordingly, I would dismiss the application for leave to appeal.

The respondent asks for costs. This application for leave to appeal raised no fairly arguable point. I would grant the respondent costs fixed at $750.00, plus reasonable disbursements.

C.J.N.S.

Concurred in:

Pugsley, J.A.

Cromwell, J.A.