

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20121122**

**Docket: 12-A-40**

**Citation: 2012 FCA 309**

**Present: PELLETIER J.A.**

**BETWEEN:**

**IRVIN KANE**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on November 22, 2012.

**REASONS FOR ORDER BY:**

**PELLETIER J.A.**

**Federal Court of Appeal**



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**BETWEEN:**

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**REASONS FOR ORDER**

**PELLETIER J.A.**

[1] Mr. Kane seeks an extension of time to bring an appeal from an order of the Tax Court of Canada rendered some 10 years ago. Mr. Kane's original dispute involved the taxation of amounts included in his income as a result of dealings with his pension. The Minister assessed Mr. Kane on the basis that \$50,516 which was paid to him because of limitations on the amount that can be transferred from a pension fund to a Locked-In Retirement Account was income. Mr. Kane appealed that assessment and chose to proceed using the Informal Procedure.

[2] The amount of tax in issue was more than \$12,000. According to the Crown, Mr. Kane was advised of this but he did not respond. In the end result, the Tax Court dismissed Mr. Kane's appeal but did not deliver written reasons.

[3] According to Mr. Kane's affidavit, he explored the possibility of retaining a lawyer to pursue an appeal on a contingency basis but was unsuccessful in finding a lawyer to take his case. For various reasons, including a medical condition as well as his role as the sole caregiver for his wife, Mr. Kane did not pursue his right to appeal, or to seek an extension of time to appeal till now.

[4] The leading case on the criteria to be considered when deciding whether to grant an extension of time for launching an appeal are set out in this Court's decision in *Pharmascience v. Canada (Attorney General)*, 2003 FCA 333, [2004] 2 F.C.R. 349 at paragraph 6:

In deciding whether or not to grant an extension of time to commence an appeal, the basic test is whether the interests of justice favour granting the extension. The factors to be considered are conveniently summarized in *Karon Resources Inc. v. Canada* (1993), 71 F.T.R. 232, [1994] 1 C.T.C. 307 (F.C.T.D.): (1) whether there is an arguable case on appeal, (2) whether there are special circumstances that justify the delay in commencing the appeal, (3) whether there was a continuing intention to appeal, (4) whether the delay has been excessive, and (5) whether the respondent will be prejudiced if the extension of time is granted. The weight to be given to each of these factors will vary with the circumstances.

[5] When there has been a long time between the date of the judgment and the date of the application for an extension of time, certain factors become more significant, notably, the presence of a continuing intention to appeal, the explanation for the delay and prejudice to the other party. In this case, there is no evidence of a continuing intention to appeal. Mr. Kane's affidavit and numerous exhibits set out various conversations and items of correspondence he has had over the years but they do not show that he had an intention to appeal the Tax Court's decision. If anything,

they show that Mr. Kane resolved to pursue his grievance by administrative and political means. Other than the steps which he took to pursue his grievance by alternative means, there is no explanation for the delay in bringing this motion for an extension of time. Finally, the Crown has provided evidence that it will be prejudiced if an extension of time is granted since all the material records have been destroyed.

[6] In the circumstances, I am of the view that the motion for an extension of time should be dismissed. In my view, the merits of the appeal are not a determining factor after the passage of this much time.

"J.D. Denis Pelletier"

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J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** 12-A-40

**STYLE OF CAUSE:** **Irvin Kane and  
Her Majesty the Queen**

**MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES**

**REASONS FOR ORDER BY:** PELLETIER J.A.

**DATED:** November 22, 2012

**WRITTEN REPRESENTATIONS BY:**

Irvin Kane

FOR THE APPLICANT

Ainslie Schroeder

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Irvin Kane, Winnipeg, Manitoba

FOR THE APPLICANT

William F. Pentney,  
Deputy Attorney General of Canada

FOR THE RESPONDENT