Court of Appeal File No: M50303
Court File Nos. 35-2395487 and 35-2395481

COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF NOTICES OF INTENTION TO MAKE A PROPOSAL OF 1732427 ONTARIO INC. AND 1787930 ONTARIO INC. BOTH OF THE CITY OF ST. THOMAS, IN THE PROVINCE OF ONTARIO

BRIEF OF AUTHORITIES OF THE MOVING PARTY TRANSIT PETROLEUM INC.
(Returnable April 15, 2019)

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BRIEF OF AUTHORITIES OF THE MOVING PARTY
TRANSIT PETROLEUM INC.

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2003 BCCA 652
British Columbia Court of Appeal [In Chambers]

Canada v. MKM Manufacturing Ltd.

2003 CarswellBC 2897, 2003 BCCA 652, 188 B.C.A.C. 233, 308 W.A.C. 233, 48 C.B.R. (4th) 222

Her Majesty the Queen in Right of Canada (Respondent / Appellant) and MKM Manufacturing Ltd. (Appellant / Respondent)

Levine J.A.

Heard: October 21, 2003
Judgment: October 21, 2003
Docket: Vancouver CA031254

Counsel: R.A. Chorneyko for Appellant
J.W. Craddock for Respondent, HMTQ, Workers' Compensation Board

Subject: Civil Practice and Procedure; Insolvency

APPLICATION by corporation for extension of time to file notice of appeal after assignment in bankruptcy.

***Levine J.A.*:**

1 I have before me applications brought by two parties to a bankruptcy and insolvency matter. The bankrupt company brings an application to extend the time for filing a notice of appeal from the order of Madam Justice Beames made September 17, 2003. She annulled a proposal in bankruptcy made by the company with the effect that the company is deemed to have made an assignment in bankruptcy.

2 The respondents are the major creditors of the bankrupt company, the Canada Customs and Revenue Agency and the Workers Compensation Board. They were owed, at the date of the proposal, approximately $144,000, and are now owed almost $500,000. The respondents object to the application for an extension of time primarily on the basis that there is no merit to an appeal from Madam Justice Beames' order. Their applications are premised on the extension of time being granted and are for cancellation of the stay of proceedings that arises pending an appeal pursuant to s. 195 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, security for costs, an order that the company pay the insurance premium to insure the property, that the appeal be set for hearing, and the time for filing the materials for the appeal be abridged.

3 I will deal first with the application for an extension of time. The notice of appeal was filed on 1 October 2003. The *Act* provides that a notice of appeal must be filed within 10 days of the order appealed from. Thus the notice of appeal was filed four days late. The reason for the delay is that counsel thought that the time for filing the notice of appeal was 14 days and simply erred in filing after the 10 day period provided by the statute.

4 Counsel for the company states that there was an intention to appeal from the outset and the intention was discussed with Madam Justice Beames at the hearing. Madam Justice Beames granted a stay of her order for two weeks to allow an appeal to be filed; thus it appears from her reasons that this discussion did take place. There was no direct communication to the respondents that an appeal was intended, but this discussion took place at the hearing which indicated that an appeal was being considered.

5 The primary issue with respect to the extension of time is whether there is a meritorious appeal. The threshold with respect to the merits is not very high. Nonetheless there is some onus on the applicant to demonstrate that there is an

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arguable case or that the appeal is not frivolous. The argument raised by counsel for the company is that while the *Act* provides discretion to the court to annul a proposal when a default is made (about which there is no dispute has occurred here), there is little or no case authority providing guidance to a court as to how that discretion should be exercised. In other words, on what grounds may a court exercise its discretion to refuse to annul a proposal where there is a default?

6 Madam Justice Beames rejected factors raised by the applicant company including the delay of CCRA and WCB in bringing the application for annulment, which was five years after the company defaulted under the proposal. She also refused to consider that an annulment might bring about some personal liability of a principal of the company.

7 The overriding factor in this application for an extension of time, as in all such applications, is whether it is in the interests in justice to grant the extension. It is my opinion that the delay resulting from an error of counsel should not be visited on the company. While it appears that the merits of the appeal are not very high I cannot say that it is a frivolous appeal.

8 I therefore find that it is in the interests of justice to grant the extension and will do so. That requires me to consider the applications of the respondents. Counsel for the respondents has advised the Court that he is not pressing his application to lift the stay of proceedings, but is prepared to adjourn that application. He suggests with respect to security for costs the amount that should be provided is $6,000 in addition to the insurance payment which would be $4,257. The suggestion with respect to abridging the time and setting the date for hearing of the appeal is that the hearing date be set for January 6, 2004 for half a day, the appeal books and, I would assume, appeal record, as well, be filed within two weeks, and the factums follow within the following five weeks.

9 In my view, the respondents' applications are reasonable conditions for the extension of time to file the appeal. While counsel for the company says that the company does not have the resources to pursue the appeal, clearly it intends to do so. I have to presume that there are resources available to pay its costs of pursuing the appeal. The onus is on it to show that it should not have to post security for costs. In my view, it has not satisfied that onus. I therefore order that the company post security for costs in a form acceptable to the respondents no later than 31 October 2003.

10 I have also not heard any reason why the company should not pay the insurance premium on this property. The property is the only asset available for the payment of creditors and its value, as I understand it, has been decreasing over the years that this proposal has been outstanding. In order to sell the property, it would appear to me important to insure it. It is an appropriate condition for the extension of time to appeal that the insurance payment be paid on or before 31 October 2003 by certified cheque. I so order.

11 Finally, the *Act* sets out short deadlines, as demonstrated by the 10 day deadline for filing the notice of appeal. The authorities cited by counsel for the respondents point out that the *Act* provides for summary proceedings in order that matters may proceed expeditiously. While this matter has not proceeded as expeditiously as it might have up to this date, I see no reason to allow it to drag on further.

12 I therefore set the date for hearing of the appeal for half a day on 6 January 2004, order the appeal record and appeal books be filed within two weeks from today and that the factums be filed within the five weeks following the filing of the appeal record and appeal books.

(discussion with counsel)

***Levine J.A.*:**

13 Costs in any event of the cause.

Application granted.

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2017 ONCA 938
Ontario Court of Appeal

Cunningham v. Hutchings

2017 CarswellOnt 19112, 2017 ONCA 938, 287 A.C.W.S. (3d) 12

Cunningham (Moving Party) and Hutchings (Responding Party)

David Brown J.A., In Chambers

Heard: November 23, 2017
Judgment: November 30, 2017
Docket: CA M48514

Counsel: Bryan Fromstein, A. Fabio Longo, for Moving Party, Mildred Cunningham
Nawaz Tahir, for Responding Party, Deanna Walsh

Subject: Civil Practice and Procedure; Torts

MOTION by plaintiff for extension of time to appeal dismissal of action.

***David Brown J.A., In Chambers*:**

I. OVERVIEW

1 Mildred Cunningham moves for an extension of time to appeal the March 8, 2017 order of Gordon J. dismissing her action (the "Dismissal Order"). The respondent, Deanna Walsh, opposes the motion.

2 Ms. Cunningham was involved in two automobile accidents: one on June 16, 2010; the other on April 29, 2011. She commenced this action on March 30, 2012 seeking damages for injuries she alleges she suffered in those accidents.

3 Ms. Cunningham has been less than diligent in moving her action along. The pressure of an August 2014 Status Notice prompted her undertaking examinations for discovery, which took place in early 2015. However, on January 6, 2016 Ms. Cunningham's action was dismissed administratively for delay. She had it restored in September, 2016.

4 Before a global mediation scheduled for December, 2016 took place, Ms. Cunningham's then counsel moved to get off the record. The mediation did not occur.

5 By order dated November 16, 2016 Reilly J. (i) ordered Ms. Cunningham's then counsel removed as solicitor of record and (ii) required Ms. Cunningham to either appoint a new lawyer "or serve a notice of intention to act in person under subrule 15.03(3)."

6 She did neither.

7 As a result, Ms. Walsh moved to dismiss the action due to Ms. Cunningham's failure to appoint a lawyer or file a notice of intention to act in person. Ms. Cunningham did not attend on the return of the motion. Gordon J. granted the Dismissal Order. He gave no reasons for the order.

8 Ms. Cunningham retained new counsel.

9 Instead of appealing the Dismissal Order, in April 2017 Ms. Cunningham moved to set aside the Dismissal Order on the basis it was made without notice to her. By order dated September 14, 2017 Flynn J. dismissed her motion, concluding

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the materials for the March 8, 2017 motion had been delivered to Ms. Cunningham's residence. He took the view Ms. Cunningham really was arguing the Dismissal Order was wrong and therefore her remedy was to appeal to the Court of Appeal.

10 Ms. Cunningham has appealed the order of Flynn J. All materials needed to perfect that appeal are ready.

11 Ms. Cunningham then brought this motion for an extension of time to file a notice of appeal from the Dismissal Order. If granted, she requests the appeals of the Dismissal Order and the order of Flynn J. proceed together.

II. ANALYSIS

12 The applicable principles are those set out by Gillese J.A. at para. 26 of *Laski v. Laski Estate*, 2016 ONCA 337 (Ont. C.A.). I examine them in turn below.

A. An intention to appeal within the relevant time period

13 There is no doubt Ms. Cunningham formed the intention to challenge the Dismissal Order, but it is far from clear she formed an intention to appeal the order within the relevant time period. She did not file an affidavit on this motion, so there is no direct evidence of her intention.

14 Her conduct, however, indicates that within the prescribed appeal period she elected to move to set aside the Dismissal Order. That is not the same as forming an intention to appeal.

15 A motion to set aside or vary an order under rule 37.14 is not a "free kick at the can" which, if it fails, then permits a party to launch an appeal of the order. Such an application of the *Rules of Civil Procedure* would be antithetical to their objective in securing timely and cost-effective adjudications of cases on their merits.

16 Here, Ms. Cunningham decided to advance technical arguments on a motion to vary instead of taking the direct route and appealing the Dismissal Order on its merits. Accordingly, this factor weighs against her.

B. The length of and explanation for the delay in filing

17 The delay of eight months before seeking this extension of time to appeal is not inordinately long. But, as mentioned, Ms. Cunningham's explanation of first bringing a motion to set aside rather than appealing the Dismissal Order hints more at tactical maneuvering than dealing with the merits of the order head-on. This factor is at best neutral.

C. Prejudice to the responding party

18 The responding party cannot point to any actual prejudice in the sense of lost evidence or diminished memory of witnesses. Yet, the responding party is faced with a plaintiff who seems unwilling to proceed with due dispatch and such delay brings with it its own prejudice. This factor is neutral.

D. Merits of the proposed appeal

19 On a motion to extend the time to appeal, the court considers whether the proposed appeal "has so little merit that the court can reasonably deny the moving party his or her important right of appeal": *Laski*, at para. 37.

20 Gordon J. did not give reasons for granting the Dismissal Order. Accordingly, I am left to assume that the reason he dismissed Ms. Cunningham's action was because she failed to appoint a new lawyer or file a notice of intention to act in person as required by the order of Reilly J.

21 Why the dismissal of her action was a proportionate response to that failure cannot be ascertained in the absence of reasons. A party is not obligated to appoint a lawyer to represent her in a civil action; she is entitled to represent

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herself: Rule 15.01(3). And one would think that if a party does not appoint a new lawyer, that signifies the party intends to represent herself.

22 The notice of intention to act in person seems designed to ensure the party's address for service and telephone number are known to the court and to the other parties: Rule 15.03(3). Here, the responding party knew where Ms. Cunningham resided; she delivered the motion materials seeking the action's dismissal to Ms. Cunningham's residence.

23 Consequently, it is unclear what would have led Gordon J. to adopt the most draconian remedy in the circumstances of this case. It follows Ms. Cunningham's proposed appeal of the Dismissal Order raises a very arguable issue.

24 This factor weighs strongly in Ms. Cunningham's favour.

The holistic view: the justice of the case

25 Stepping back to take a holistic view of the circumstances, I am persuaded the justice of the case favours granting Ms. Cunningham an extension of time to appeal. I am not impressed by her lack of diligence in pursuing her claim and she may well have hit the bottom of the well of judicial indulgence. But her proposed appeal is arguable, and I see no real prejudice to the responding party.

III. DISPOSITION

26 I therefore grant Ms. Cunningham's request for an extension of time to appeal, but on terms. First, she must perfect this appeal no later than December 15, 2017. Second, I direct this appeal be heard with her appeal from the order of Flynn J., which I order be perfected no later than December 15, 2017. Finally, although Ms. Cunningham has succeeded on this motion, I make no order as to costs. Had Ms. Cunningham taken the direct route of appealing the Dismissal Order instead of taking a detour through her motion to vary, this motion would have been unnecessary.

27 One final comment. Assuming Ms. Cunningham perfects both appeals by December 15, 2017, it will take several months before they are heard. That would provide all parties involved in the Cunningham-related actions with the opportunity to conduct a global mediation session and get down to the business of addressing the merits of her disputes.

Motion granted.

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1987 CarswellNB 29
New Brunswick Court of Appeal

Atlantic Pressure Treating Ltd. v. Bay Chaleur Construction (1981) Ltd.

1987 CarswellNB 29, [1987] N.B.J. No. 528, 205 A.P.R. 165, 65 C.B.R. (N.S.) 122, 81 N.B.R. (2d) 165

ATLANTIC PRESSURE TREATING LTD. v. BAY CHALEUR CONSTRUCTION (1981) LIMITED

Ryan J.A.

Heard: May 28 and June 12, 1987
Judgment: June 23, 1987
Docket: No. 128/87/CA

Counsel: *B.R. Bell* and *B. Buchanan*, for appellant.
P. Glennie and *C.D. Whelly*, for respondent.

Subject: Corporate and Commercial; Insolvency; Civil Practice and Procedure

Applications to extend time to appeal.

***Ryan J.A.*:**

1 The bankruptcy of the garnishee, Bay Chaleur Construction (1981) Limited, has caused the intended appellant to lose the benefit of an attaching order for $42,378.89. The intended appellant, Atlantic Pressure Treating Ltd., seeks leave to extend time for filing two notices of appeal. The first is a notice of appeal from a decision dated 20th January 1987 about which it had not formed an intention to appeal until more than three months after the decision was given. The second is for an extension of time for an appeal which had been filed within the 30-day period prescribed by the Rules of Court but not within the 10 days prescribed by the Bankruptcy Rules.

2 On 20th January 1987 the intended appellant, a judgment creditor, obtained an order in the Court of Queen's Bench at Fredericton attaching certain moneys owed by a receiver to a judgment debtor, Bay Chaleur Construction (1981) Limited. In making his decision in the garnishee application, the judge of the Court of Queen's Bench referred to s. 159 of the Income Tax Act, S.C. 1970-71-72, c. 63, which requires that the receiver obtain a certificate from the minister under certain circumstances before distribution of moneys. He said:

> I'm going to order that the receiver, Collins, Barrow, Maheu, Noiseux Inc., pay into court at the office of the clerk of the Court of Queen's Bench in the judicial district of Fredericton the sum of $42,779.89, and that any of the Atlantic Pressure, the receiver, or any other interested party will be at liberty to make an application to the court at Fredericton for direction as to payment out of that money following the disposition of the interpleader proceeding that has been commenced in the judicial district of Bathurst...

3 The receiver held a surplus of $95,533.43. An affidavit filed at the January hearing disclosed that Revenue Canada had notified the receiver that it had a claim against Bay Chaleur Construction for $29,016.38. Payment to Revenue Canada of its claim would still have left ample funds to cover the garnishee order.

4 Before the interpleader proceeding at Bathurst had been disposed of, other creditors of Bay Chaleur Construction petitioned for a receiving order under the Bankruptcy Act, R.S.C. 1970, c. B-3. This froze the assets. The intended appellant moved for an order in the Court of Queen's Bench at Fredericton that the money paid into court on the garnishee application be paid to it. The trustee, Touche Ross Limited, opposed the application and moved that the

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money be paid to it. On 30th April 1987 the judge hearing the motion directed the clerk of the court to pay the $42,379.89 to the trustee [64 C.B.R. (N.S.) 260].

5 The January and April decisions of the judge of the Court of Queen's Bench are directly related to one another: the first attaches the money and orders it paid into court, and the second is an order for payment of the moneys.

6 The intended appellant has filed a notice of appeal from the decision of the hearing judge of 30th April 1987 which directed payment of the money to the trustee. The respondent trustee concedes that the intended appellant promptly formed an intention to appeal the second decision. This notice of appeal is dated 30 days after the decision, which puts it within the time prescribed by the Rules of Court, but beyond the 10-day period for filing notices of appeal as set out in R. 49 of the Bankruptcy Rules. It subsequently occurred to the intended appellant that the January decision in the Court of Queen's Bench attaching the money might not be covered by the later decision directing payment to the trustee instead of to the intended appellant. The intended appellant moves under R. 3.02 of the Rules of Court of New Brunswick for two extensions of time to file notices of appeal. During the hearing of the motions to extend time the parties have agreed that a consent application will be made to a judge of the Court of Queen's Bench for an order nunc pro tunc granting leave to the appellant to continue with these appeal proceedings under s. 49(1) of the Bankruptcy Act. But the trustee opposes the motion to extend time to file an appeal from the earlier January decision on the ground that the intended appellant did not have a bona fide intention to appeal and in fact took a fresh step by relying upon the earlier decision when it subsequently applied for payment out of court of the moneys.

7 Was it necessary for the intended appellant in this case to form an intention to appeal the earlier favourable decision of the court within the time prescribed by the Bankruptcy Rules or the Rules of Court? I think not. The intended appellant had been successful in its application to garnishee the moneys following a judgment against the debtor. One must relate the intention to appeal to the merits of the results at the time of the decision. To do otherwise in this case would mean that the intended appellant would have had to predict that other creditors would petition the judgment creditor into bankruptcy, as they did, after the 30-day time for appeal had expired. The success of the intended appellant in its garnishee application may have precipitated the dilatory creditors to petition. But the two decisions, for garnishee and for payment, are bonded to each other. Formulation of the intention to appeal within the time limited for appeal is therefore not the predominant criterion which must be considered in these two motions. The inextricable connection between the two decisions is the determining factor along with the equally impor tant factor of whether the intended appellant has an arguable case in this situation where one minute it appeared assured of having its money and the next minute the money was beyond reach.

8 Over 100 years ago it was determined that the basic rule to be followed in dealing with an application to extend time for appeal is that leave should be granted if justice requires that it be given. Brett M.R. in *Re Manchester Economic Building Society* (1883), 24 Ch. D. 488 at 497, said:

> ... I know of no rule other than this, that the Court has power to give the special leave, and exercising its judicial discretion is bound to give the special leave, if justice requires that leave should be given.

Generally, an intention to appeal must be formulated prior to the time for an appeal expiring. But if any rule is necessary, it would have to be that the judge hearing the motion is bound, above all other considerations, to do justice in each particular case. By extending the times on both motions, the trustee is not prejudiced. Not to extend the times may well prejudice the intended appellant.

9 The intended appellant claims that it is not bound by the Bankruptcy Act because its application was under the Garnishee Act and that the moneys were preserved for it prior to bankruptcy. It says further that there was a distribution by the receiver in January under s. 159(2) of the Income Tax Act when the receiver paid the moneys into court, and that the judge misinterpreted the section. The trustee says that, regardless of the outcome, any payment would be a preference under s. 73 of the Bankruptcy Act. Without commenting in depth on the merits, I conclude that the intended appellant has an arguable case. Leaves to extend time to appeal the two decisions of the judge of the Court of Queen's Bench are

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granted. There will be one appeal in which the appellant will forthwith file an amended notice of appeal setting forth all its grounds.

10 The parties have agreed that if leaves are granted they will consent to a motion that the Minister of National Revenue be added as a party appellant. Any such motion, if in satisfactory form and if in accordance with the Rules of Court, will be considered. In the meantime the parties have agreed that the moneys in question will be invested pending the outcome of the appeal. Costs on these motions will be costs in the appeal. In view of the appellant's contention that it is not bound by the Bankruptcy Act, there will be no order with respect to security for costs as requested by the trustee.

Application granted.

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Proceeding commenced at London

BRIEF OF AUTHORITIES
OF THE MOVING PARTY
TRANSIT PETROLEUM INC.
(RETURNABLE APRIL 15, 2019)

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