Date:19990923
CA 157415

NOVA SCOTIA COURT OF APPEAL

[Cite as: Robert Hatch Retail Inc. v. Canadian Auto Workers Union Local 4624, 1999 NSCA 107]

BETWEEN:

ROBERT HATCH RETAIL INC. and KAVANAGH INVESTMENTS LTD.	)	Alan J. Stanwick and Gerard MacKenzie for the appellants
Appellants	)	
- and -	)	
CANADIAN AUTO WORKERS UNION LOCAL 4624	)	N. Blaise MacDonald for the respondent
Respondent	)	
	)	Application heard: September 22, 1999
	)	Decision delivered: September 24, 1999

BEFORE THE HONOURABLE JUSTICE CROMWELL IN CHAMBERS

CROMWELL J.A.: (in Chambers)

[1] There are three applications before me:

1. The respondent applies to dismiss the appeal because it was filed out of time and in the wrong form;
2. The appellants apply to extend the time for serving and filing the notice of appeal, if such extension is needed; and
3. The respondent applies to set a date for a hearing by the Court of an application to quash the appeal as moot and requests that the application to quash be heard before and separately from the hearing of the appeal.

[2] These applications arise from the dismissal by Edwards, J. in Chambers, of an application for an interim injunction in the context of a labour dispute. The strike out of which these proceedings arose has been settled.

[3] The Chambers judge released his written decision on June 10, 1999; his order was issued on June 18. The Notice of Appeal in Form 62.04A, the form appropriate for appeals from final orders, was filed on July 16. The appellants applied in Chambers to set down the appeal on August 18th. As a result of the respondent's applications to quash and dismiss the appeal, the matter was set over to September 21, 1999, for hearing, which on consent was held by way of telephone conference.

[4] It is convenient to address first the matters relating to timeliness and form of

the appeal. In my opinion, this is an interlocutory appeal: see R. J. Sharpe, *Injunctions and Specific Performance* (Looseleaf edition, updated to November, 1998) at para 2.1310; **Nova Scotia v. Morgentaler** (1990), 96 N.S.R. (2d) 54; **Gateway Realty v. Arton Holdings** (1990), 98 N.S.R. (2d) 39; and **Breton Bay Nursing Home Ltd. v. C.U.P.E. Local 1183** [1999] N.S.J. 212. That being the case, the appellants require leave of the Court to appeal: see **Judicature Act**, R.S.N.S. 1989, c. 240, s. 40. The Notice of Appeal should have been given within 10 days of the date of the order for judgment appealed from (see Rule 62.02 (1)(a)) and should have contained notice of intention to apply on the first Thursday following the filing of the notice of appeal to the Chambers judge in the Court of Appeal to set down the appeal: see Rule 62.05(1) and (3).

[5] The affidavits filed by the appellants indicate that they were advised by their solicitors that the appeal period was 30 days, that they met promptly with their solicitors after Edwards, J. released his decision, thought about the matter for a couple of weeks and then gave instructions to appeal.

[6] The respondent says that no extension should be granted in these circumstances because the appellants have not demonstrated that they had formed the intention to appeal within the 10 day appeal period. It is also submitted that the appeal should be dismissed because the appellants used the wrong form of notice of appeal. The appellants say that I have the authority to extend the time, even if there was no

intention to appeal within the appeal period, provided it is in the interests of justice to do so. In the alternative, they submit they satisfy the three-part test.

[7] I agree with the respondents that the three part test for extensions of time set out in such cases as **Maritime Co-op Services Limited and Martin v. Maritime Processing Company Limited et al** (1979), 32 N.S.R. (2d) 71 does not have to be met in all cases and that Rule 62.31(8)(e) provides me with much more flexibility: see **Tibbetts v. Tibbetts** (1992), 112 N.S.R. (2d) 173; **Irving Oil Ltd v. Sydney Engineering Inc.** (1996), 150 N.S.R. (2d) 29 ; **Hanna v. Maritime Life Assurance Co.** (1995), 150 N.S.R. (2d) 324. While the traditional three part test provides useful guidance, it cannot be applied inflexibly.

[8] Here, the late filing came about as a result of what I have found to be erroneous advice concerning the appeal period. The Notice of Appeal was filed within the 30 day period which the solicitors thought applied. Accordingly, the delay was not lengthy. There is no evidence of any prejudice to the respondent caused by the delay. It is conceded that there is none. It is also conceded that the appellants raise arguable issues. Moreover, the rationale of the short time periods for interlocutory appeals does not apply with much force to the situation here. The short time period for filing and setting down interlocutory appeals is to help ensure that such appeals do not unduly delay the progress of the main action. Here, there is no ongoing dispute to form the subject of the main action and hence the delay in proceeding with the interlocutory

appeal will have no such adverse effect. The short extension sought should be granted.

[9] The form of the notice of appeal, although wrong, was not misleading and the appeal should not be quashed or dismissed on that account.

[10] I will, therefore, make an order extending the time for service and filing of the Notice of Appeal to July 16, 1999. I will also grant leave to amend it to comply with the Rules, such amendment to be made within 10 days of today's date. The respondent's application to quash the appeal on these grounds is dismissed. The costs of both the respondent's application to dismiss and the appellants' application for an extension of time will be costs in the cause of the appeal and fixed at a total of $1,000.00 for both applications, inclusive of disbursements.

[11] That leaves the application to set down the respondent's application to quash. Both parties are in agreement that it would be more efficient to set that application down for hearing prior to and separate from the date for hearing the appeal proper. While I am not sure this will be so in every case in which an application is brought to quash an appeal as moot, I will accept the joint view of the parties that it is in this case. I accordingly set the following dates for the hearing of the application to quash:

> The Appeal Book for use on the application and the Memorandum of Argument on behalf of Canadian Auto Workers Union, Local 4624: October

18, 1999;

Appellants' responding Memorandum of Argument on the application to quash: November 1, 1999.

Hearing date: Wednesday, December 1, 1999 at 10 a.m. with one-half day reserved.

Cromwell, J.A.