Date: 19971112 Docket: C.A. 141912

NOVA SCOTIA COURT OF APPEAL
Cite as Mitchell v. Montreal Trust Company of Canada, 1997 NSCA 9

BETWEEN:

MARGARET MITCHELL, DIANE BUCHANAN and SUZANNE CERS Applicants	)	Jean A. McKenna for the Applicants
- and -	)	
MONTREAL TRUST COMPANY OF CANADA and MARY PRICE, in their capacity as Executors of the Estate of Lucy A. Massey Respondents	)	Peter M.S. Bryson for the Respondents
	)	Application Heard: November 6, 1997
	)	Decision Delivered: November 12, 1997

BEFORE THE HONOURABLE JUSTICE FLINN IN CHAMBERS

FLINN, J.A.: (in Chambers)

This is an application for an order to extend the time for filing a Notice of Appeal pursuant to the provisions of s. 140 of the **Probate Act**, R.S.N.S. 1989 c. 359.

The intended appeal is from a decision and Order of Justice Hall, sitting as a Judge of the Court of Probate. The respondents, as executors of the late Lucy Massey, had applied for proof in solemn form of her Last Will and Testament dated February 15th, 1994. The applicants had opposed the Will.

Under **s. 134(1)** of the **Probate Act**, a notice of appeal shall be filed "within 30 days from the making of the order, decree or decision".

Justice Hall's decision, upholding the Will, was filed on May 12th, 1997. The Order issued pursuant thereto was taken out on June 13th, 1997. The Notice of Appeal, which is the subject of this application, was filed on October 1, 1997. Since the Notice of Appeal was required to have been filed by July 13th, 1997, it is over two and

one-half months late.

Before considering the merits of this application, it would be helpful to review some of the background which gives rise to this matter, and which is set out in greater detail in the trial judge's decision.

The testatrix was a french teacher by profession. She had a Ph.D degree, and during her career taught at various institutions in New York. She returned to the family home in Wolfville, Nova Scotia, in 1973, where she resided and cared for her mother. Her mother died in 1979. Her only sibling was a sister, whose three daughters are the applicants.

The relationship between the testatrix and her nieces had always been warm and friendly until 1993 when problems developed. The details of those problems are not relevant for the purposes of this application except to mention that the testatrix became resentful over the nieces' interference in her affairs (which she regarded as an

indication on their part that she was not competent to make her own decisions and to look after her business herself); the nieces made accusations concerning the testatrix's family doctor, eventually reporting those accusations to the police and the Provincial Medical Board. No action was ever taken with respect to those accusations, and the testatrix was concerned and upset over the harm and embarrassment which this had caused her doctor. The testatrix was also annoyed that her nieces were neglecting her.

In 1994, when she was 86 years of age, she made a new Will. In prior wills the three nieces received the entire residue of her estate, outright. In the new Will, after making eight money bequests ($25,000.000) to various charitable organizations and to one of her grand nephews, she divided the residue into six parts. Three of those parts provided life income to her three nieces (and their husbands in two of the cases). The gifts over on their death would see the capital paid to the children of her niece Dianne Buchanan. Of the three other one-sixth interests, one was paid to the Canadian Red Cross, one to the Salvation Army and one was divided five ways to charitable

organizations and individuals.

In his decision following the trial of this matter, the trial judge said the following concerning the circumstances surrounding the preparation and execution of the new Will:

> At the request of the testatrix, Mr. Edward B. Chase, Q.C., a barrister and solicitor of Kentville, attended at the residence of the testatrix on February 8th, 1994, for the purpose of obtaining instructions for a new ill. The testatrix had last made a will dated March 5, 1990, which was prepared by Mr. Chase. It appears that Mr. Chase continued to be the testatrix's legal advisor following that time. In September, 1993, the testatrix had discussed with Mr. Chase the possibility of setting up the trusts for the nieces and also had discussed with him the possibility of making a new will.
>
> At the time of executing the will the testatrix also executed an "enduring power of attorney". By this document the testatrix appointed the Montreal Trust Company to be her attorney in case of her incompetence and directed, among other things, that it consult with Henry Hicks, whom she described as her "investment counsellor", and also her physician, Dr. Wayne Phillips, "with respect to any decision that has to be made in their capacity as guardian of my person."
>
> Initially the testatrix had instructed Mr. Chase to include Dr. Phillips as one of five or six to share in a one-sixth share of the residue, which would have been worth approximately $40,000.00 according to Ms. Foshay Kimball. Mr. Chase, however, advised her that this may be a questionable kindness to Dr. Phillips in view of the accusations made against him by the nieces. The matter was left with the testatrix and apparently after giving it due consideration she telephoned Mr. Chase the next day and instructed him not to include the bequest.

> Knowing that the nieces were questioning the testatrix's mental competence, Mr. Chase suggested to the testatrix that she should be examined by a psychiatrist as to her competence to make a will. She agreed to this and Dr. David R. Mulhall, a psychiatrist practicing in Wolfville, attended at her residence on February 15, 1994, for that purpose and after the examination Dr. Mulhall concluded that she was competent to make a will. Dr. Mulhall had examined her a few days previously at the request of Dr. Phillips to determine whether she was, in general, mentally competent to manage her own affairs with a view to determining whether she should be referred to a nursing home. In that respect, as well, Dr. Mulhall found her to be competent.
>
> Before and while taking instructions for the will Mr. Chase also made inquiries and observations of the testatrix to satisfy himself that she was mentally competent and had capacity to make a will.
>
> On February 15, 1994, Mr. Chase attended at the testatrix's residence with the new will and reviewed it with her in detail. She then signed the will in the presence of Mr. Chase and Dr. Mulhall.
>
> The testatrix said nothing to the nieces about making any changes to her will.

The testatrix continued to live in her home until May of 1995 when she took up residence at the Wolfville Nursing Home. She remained there until her death on June 26th, 1995.

This matter came on for hearing before Justice Hall in December, 1995. In his decision, the trial judge set out the position

which the applicants, as opponents of the Will, took on this hearing:

> The opposers maintain that the deceased did not have testamentary capacity at the time of making her will, that her strength of mind was diminished as a result of the surgery that she had undergone and the medication that she was taking. As a result she was easily influenced and her mind was poisoned against her nieces by Dr. Phillips, intentionally and unintentionally. Counsel for the opposers say that the testatrix was suffering from a false belief that her family did not love her and that her mind was poisoned against the nieces by the police investigation which occurred as a result of the actions of Dr. Phillips. They maintain that this demonstrated a lack of testamentary capacity.
>
> The opposers further contend that the testatrix's will was the produce of undue influence in that the mind of the testatrix was poisoned against the nieces by the influence of Dr. Phillips.

On the question of testamentary capacity, the trial judge reached the following conclusion:

> In view of the overwhelming weight of the evidence supporting the mental competency of the testatrix, I have no hesitation in concluding that the propounders of the will have established not only on a balance of probabilities but well beyond a reasonable doubt that the testatrix had capacity to make a will within the parameters set out in Banks v. Goodfellow (supra). ..... [emphasis added]

The applicants are not appealing this finding of testamentary capacity in the proposed appeal.

On the question of undue influence the trial judge said the following:

> A review of the evidence presented by the opposers as well as by the propounders does not show that any undue influence was exercised on the testatrix in the making of her will. Indeed, Mrs. Buchanan acknowledged on cross-examination that she had no knowledge of anyone influencing her Aunt in the making of her will. It would appear that the only person who did exercise any influence was Mr. Chase, who questioned whether it would be wise to include Dr. Philips as a residual beneficiary. [emphasis added]

And further:

> After a careful consideration of all the evidence including a review of the medical notes of Dr. Phillips, I am unable to find any evidence of Dr. Phillips exercising any influence on the testatrix in the making of her will, let alone undue influence. In particular, I find no support in the evidence for the proposition that Dr. Phillips influenced or poisoned the mind of the testatrix against the nieces. No doubt the opposers strongly suspect that Dr. Phillips played a major role in causing the testatrix to believe in this state of affairs, which they say poisoned their Aunt's mind against them. They were, however, unable to produce any evidence that he did so. [emphasis added]

As to the issue of insane delusion or mistaken belief, the trial judge said the following:

> As to the suggestion that the testatrix was suffering from an insane delusion or simply a mistaken belief as to the nieces loss of affection for her and lack of confidence in her ability to make her own decisions, there was ample evidence, and evidence that the testatrix was aware of, to support her

belief. The fact of the intervention with respect to the cheques and the complaints to the police and the Medical Board without any prior consultation with the testatrix, in itself, would probably suffice to provide a rational basis for the testatrix's belief. In addition to this, however, there was evidence that the nieces had made inquiries about a nursing home for the testatrix, again without discussing it with her and without her approval. Then there was the matter of the testatrix spending Christmas day alone and virtually no visits from the nieces or their families during the Christmas season. From this I conclude that the testatrix was not suffering from any insane delusion or mistaken belief and that there was a rational basis for her resentment and sense of abandonment by the nieces. Furthermore, it is my opinion that a mistaken or false belief by a testator as to certain facts that may have affected the provisions make in a will, would not have any bearing on the question of testamentary capacity unless the mistaken or false belief was the result of an insane delusion. [emphasis added]

And also:

In any event, I find that there was in fact a rational basis for the testatrix to become somewhat disenchanted with her nieces. She apparently was a fiercely independent person and resented greatly the interference by the nieces in her affairs. She felt betrayed by the breach of confidence by her grant niece Suzanne Eye. She was aware that the nieces had made inquiries about her going to a nursing home. As well, she felt neglected by the nieces as they had not been giving her as much attention as previously. All of this caused her to become disappointed with her nieces and to feel that they had not much genuine concern for her. There was ample evidence to provide a factual basis for the beliefs held by the testatrix. [emphasis added]

The applicants wish to appeal the decision and order of the

trial judge, and are seeking leave to file a notice of appeal, albeit, two and one-half months late.

Applicable Principles

Section 140 of the **Probate Act** makes specific provision for extension of the time to file a notice of appeal:

> **140** The Nova Scotia Court of Appeal, or any judge thereof at chambers, upon special cause shown at any time within six months after the time limited for filing notice of appeal, may allow a notice of appeal to be filed in the court of probate upon such terms as seem just, in which case the same proceedings shall be had as when a notice of appeal is filed in other cases. [emphasis added]

I have emphasized the phrase "upon special cause shown" to indicate that the burden on the applicant is more onerous than it is on a similar application in an ordinary civil appeal under **Civil Procedure Rule 62.31(8)(e)**. There is no requirement under that **Rule** to show "special cause".

In the case of **Blundon v. Storm** (1970), 1 N.S.R. (2d) 621, this Court dealt with an application for extension of time to file a notice of appeal pursuant to a statutory provision containing similar limiting words. The Court was dealing with **s. 65(1)** of the **Supreme**

Court Act, R.S.C. 1952, c. 259 which provided as follows:

> 65. (1) Notwithstanding anything in this Act, the court proposed to be appealed from or any judge thereof or the Supreme Court of Canada or any judge thereof may under special circumstances, either before or after the expiry of the time prescribed by section 64, extend the time within which the appeal may be brought. [emphasis added]

In **Blundon**, the Court found that there were "special circumstances" where the applicant's solicitor notified the solicitor for the other side, of his client's intention to appeal; however, the solicitor had incorrectly interpreted the **Supreme Court Act**. He had concluded, wrongly, that the time for filing of the appeal commenced on the date of the filing of the Rule (Order), and not the date of judgment. The Court decided that "in the interests of justice" the Court should grant leave to appeal.

Blundon, and the decision of this Court which followed shortly thereafter, namely, **Scotia Chevrolet Oldsmobile Ltd. V. Whynot** (1970), 1 N.S.R. (2d) 1041 are the foundation of the present test which applies to applications, for extension of time to file an appeal, under the **Civil Procedure Rules**. That test, enunciated by Hallett J.A. in **Tibbetts v. Tibbetts** (1992), 112 N.S.R. (2d) 173 at p.

177 is as follows:

> The simple question the court must ask on such an application is whether justice requires that the application be granted.

In view of the express provisions of **s. 140** of the **Probate Act**, the applicants must demonstrate that there is "special cause" in the circumstances of this case, and that justice requires that I exercise my discretion in favour of granting the application to extend the time for filing the notice of appeal.

In deciding whether justice requires that discretion be exercised in favour of granting the extension of time to file a notice of appeal (where that time has expired), judges of this Court have considered certain "guidelines", namely:

(i) whether there was a *bona fide* intention to appeal while the right to appeal existed;

(ii) whether the applicant has provided a reasonable excuse for the delay; and

(iii) whether the proposed appeal raises arguable issues.

These are not necessarily the only guidelines, or factors, which a Chambers judge should take into account, although they are referred to most often. A decision that "justice requires" a Chambers judge to exercise discretion one way or another is, in essence, dictated by circumstances. Each case must be considered in relation to its own circumstances. For that reason the "guidelines" are just that guidelines. They are not rules to which strict adherence is required in every case. They are only factors to be taken into account in determining the ultimate question: whether or not justice requires that the extension of time be granted. (See Hallett, J.A. in **Tibbetts, supra** and see also Bateman, J.A. in **Irving Oil Ltd. v. Sydney Engineering Inc. et al.** (1996), 150 N.S.R. (2d) 29.)

The Respective Positions of the Parties

The applicants' position is stated by their counsel as follows:

> The delay in filing is a result of their lack of understanding and awareness of the limitation period and the process of appeal, and indeed, a complete unawareness that the appeal period had begun to run. Once they became aware that the Order had indeed been taken out, they acted promptly in ordering the tapes and providing instructions to counsel.

Counsel for the applicants submits that there are arguable issues on the appeal, and that justice requires that the applicants should be given a right to be heard.

Counsel for the respondents submits that the applicants did not have a *bona fide* intention to launch this appeal within the time limit prescribed. Further, he says that the respondents have not provided a reasonable excuse for failing to file their notice of appeal within that time limit. Lastly, he submits that the notice of appeal does not raise arguable issues, and therefore the appeal has no merit.

Analysis

This application is supported by the affidavit of Diane Buchanan, one of the applicants, and the affidavit of the present solicitor for the applicants. Further to an Order of Bateman, J.A., discovery examinations were conducted of two of the applicants

(Diane Buchanan and Margaret Mitchell) as well as their counsel who conducted the initial hearing (trial counsel). That discovery evidence is before me by agreement.

The respondents have submitted an affidavit from the trust officer of Montreal Trust Company of Canada, one of the executors.

All of this material discloses the following.

On May 23rd, 1997, the applicants' trial counsel contacted the applicant Mrs. Buchanan (her principal contact) to advise her of Justice Hall's decision. During a telephone conference, which lasted 40-45 minutes, counsel advised Mrs. Buchanan of the substance of the decision, and she read out portions of the decision. Mrs. Buchanan deposes, in her discovery examination, that one of the first things which she asked of her trial counsel was for advice concerning a possible appeal. Trial counsel deposes that she advised Mrs. Buchanan, in her opinion, and that of her partner's with whom she had discussed the matter, there were no grounds of appeal from

Justice Hall's decision.

Trial counsel further deposes that she advised Mrs. Buchanan that the applicants had 30 days in which to appeal the decision of Justice Hall if that was their wish. She could not recall if there was any discussion as to when the 30 day time period commenced, i.e., from the date of the decision or from the date of any order.

Mrs. Buchanan acknowledges that trial counsel advised her that there were no grounds of appeal; however, Mrs. Buchanan denies that trial counsel advised her that the time within which to appeal was limited in any way.

In her discovery examination, Mrs. Buchanan, in response to a question as to how long she thought she had to launch an appeal, testified:

> Actually this was a question I raised between my sisters and myself. I said "I wonder if we decide to appeal do we have time? Is there a time limitation? and so on.

On this same point, in discovery examination, the applicant, Mrs. Mitchell, testified as follows:

> Q. When did the 30-day appeal period come to your knowledge?
> A. We -- my sisters and I had spoken -- we suspected there might be some sort of time limit, but again, didn't know what it would be.

Between the months of May and July, 1997, Mrs. Buchanan had several meetings with trial counsel over an unrelated matter dealing with her father's estate. In the course of their discussions, with respect to Mrs. Buchanan's father's estate, trial counsel was never advised that the applicants wished to appeal Justice Hall's decision, her advice was never requested on how to appeal, nor was her advice requested on how much an appeal would cost. Mrs. Buchanan did not ask trial counsel for any advice on time limits within which to launch an appeal.

Mrs. Buchanan testified that the applicants did not intend to use trial counsel on any appeal. She also testified that between May and August of 1997 neither she nor her sisters had sufficient funds to

retain alternate counsel, although it is clear that they sought no advice on what an appeal would cost. Further, it should be noted, that the trial counsel conducted the initial hearing on a contingent fee basis.

I accept the evidence of trial counsel that she advised Mrs. Buchanan that the applicants had 30 days in which to launch an appeal. I also find that this matter was discussed among all of the applicants, and they were all aware that there was a 30 day time limit within which to launch an appeal, albeit they would not have known that the 30 day time limit ran from the date of the order as opposed to the date of the decision. In any event, it is equally clear from the evidence, and I so find, that the applicants did not bother to make an inquiry concerning the commencement of this 30 day time limit.

The first action towards a proposed appeal occurred in mid to late July, when the applicant Mrs. Mitchell, who knew the applicants' present counsel socially, asked whether Justice Hall's decision was "appealable". Mrs. Mitchell was advised:

(i) that such an opinion could not be given without examining the exhibits and reviewing transcripts of the evidence at trial;

(ii) that any appeal would have to be filed within 30 days of the decision or order; and

(iii) that Mrs. Mitchell should speak to her sister Mrs. Buchanan who should speak to trial counsel to determine whether the order had been taken out and, if so, when.

This information was relayed from Mrs. Mitchell to Mrs. Buchanan. Mrs. Buchanan contacted trial counsel. Mrs. Buchanan did not ask trial counsel, as it is indicated she was requested to do, if an order had been taken out, and when it had been taken out. Mrs. Buchanan says she did not ask the question because “we didn’t intend to use her for an appeal”. There was a general discussion concerning matters involving the estate. Mrs. Buchanan interpreted her discussions with trial counsel, concerning these general estate matters, to mean that an order giving effect to Justice Hall’s decision

would not be taken out until September.

In September the applicants decided that they should take steps “to bring the appeal forward”. They ordered copies of the tape recordings of the initial hearing and provided them to their present counsel on September 9th, 1997.

The applicants instructed their present counsel to pursue the appeal on September 28th, 1997, following a review of the matter by their present counsel.

Whatever reason the applicants advance for failing to bring the appeal forward sooner than they did, the indecision on their part had consequences.

In her affidavit, the trust officer of Montreal Trust Company deposes as follows:

> In reliance on the Order of Justice Hall and following expiry of the 30-day appeal period after June 13, 1997, Montreal Trust proceeded to distribute the cash bequests referred to in paragraph 3(c) of the Will, wrote to the nieces concerning income tax elections regarding taxation of their

> share of trust income, filed income tax returns based on the validity of the Will and the establishment of three trusts as contemplated by the residuary clause of the Will and issued T3 supplementary slips to the nieces pursuant to the trusts. Closing of the Estate has been scheduled for October 29, 1997.

The "cash bequests referred to in paragraph 3(c) of the Will" refer to the eight different bequests totalling $25,000.00 referred to earlier in these reasons.

There is no explanation given as to why the applicants, who knew that the executors were proceeding with the administration of the estate, did not give the executors any indication whatsoever that they were considering an appeal of Justice Hall's decision.

Further, in the trust officer's affidavit, sworn to October 7th, 1997, she deposes as follows:

> At no time have I ever been advised by any of the nieces that they wished to appeal the decision of Justice Hall. In fact, I spoke with Margaret Mitchell last week concerning the timing of the Closing, distribution and investment of estate assets. During our telephone conversation, Ms. Mitchell acknowledged receipt of a cash bequest to her son. She did not make any mention to me that she or her sisters intended to appeal the decision of Justice Hall, that such decision had been made, that other counsel had been retained by her and her sisters or that she

> was in any way unhappy with administration of the Estate in accordance with the Will. [emphasis added]

Mrs. Mitchell, in her discovery examination, acknowledged the correctness of this deposition, and testified that she did not mention the appeal to the trust officer because “it didn’t occur to me”.

It is apparent that the applicants adopted a casual approach to the time limit within which to launch their appeal. On two separate occasions (May and July) this subject of time limitations was raised with them and, for all intents and purposes, ignored. This apparent lack of concern, with respect to time limits, is not consistent with a *bona fide* intention to appeal. When I consider this apparent lack of concern with respect to time limits, and the applicants’ refusal to advise the executors of their intentions, it is clear to me, and I so find, that the applicants did not make a decision to launch this appeal until they instructed their counsel on September 28th, 1997.

Their indecision (in the face of knowledge that there were

time constraints upon them), coupled with their silence, (in the face of knowledge that the executor was taking action and moving the estate to its closing) compels me to the conclusion that the applicants do not have a reasonable excuse for their failure to file a notice of appeal in this matter on a timely basis. I do not accept the submission of counsel that the delay resulted from "their lack of understanding and awareness of the limitation period, and the process of appeal; and, indeed, a complete unawareness that the appeal period had begun to run."

There is another basis for concern with respect to this application. From my review of the decision of the trial judge, the proposed notice of appeal, and the submissions of counsel, it is my view that the proposed appeal does not raise arguable issues.

The following are the grounds of appeal set out in the notice of this proposed appeal:

a. That the Learned Trial Judge erred admitting the hearsay evidence of witnesses without considering reliability;

b. That the Learned Trial Judge erred in finding that the Testatrix was not suffering from a delusion or mistaken belief at the time

of the execution of her Will;

c. That the Learned Trial Judge erred in finding that there was irrational [sic] basis for the Testatrix's resentment and sense of abandonment by her nieces;

d. That the Learned Trial Judge erred in failing to find that undue influence was exercised on the Testatrix at the time of making her Will;

e. That the Learned Trial Judge erred in relying on the medical notes of Dr. Wayne Phillips; and

f. Such further or other grounds as counsel may advise and this Honourable Court may allow.

I note here that the applicants do not appeal the trial judge's findings of testamentary capacity, a matter upon which the executors bore the burden of proof at the trial. Their appeal is limited to those matters (undue influence and delusion or mistaken belief) upon which the applicants bore the burden of proof at the trial, and did not succeed.

With respect to ground f., counsel for the applicants has not advised me of any other proposed grounds of appeal.

With respects to grounds b., c., and d., these are broad, general, grounds of appeal against factual findings made by the trial

judge. I have set out those findings previously in these reasons for judgment. Counsel for the applicants has not satisfied me, as she must, that these grounds of appeal amount to anything more substantive than a request of the Court of Appeal to retry the case. That is not the role of the Court of Appeal in a matter such as this, and, therefore, these grounds of appeal do not raise arguable issues.

With respect to grounds a. and e., counsel for the executors, in his submissions to me, states the following:

> The burden of proof with respect to the appeal allegations lies with the Appellants. As a matter of law, allegations of undue influence and mistake rest with those who make those allegations. It is of no assistance to complain about the admission of hearsay evidence or reliance on Dr. Phillips' notes, unless that evidence related to those matters on which the Executors carried the burden of proof -- namely, testamentary capacity. The Appellants have not appealed Justice Hall's findings of testamentary capacity.
> .....
>
> The allegation here is general and vague and not related to any finding which the nieces seek to impugn. For example, the nieces have not challenged Justice Hall's decision as to competency and testamentary capacity. It therefore must follow that the nieces argue that hearsay evidence was received on the issue of undue influence which should not have been received. However, the burden of proof with respect to undue influence lies with the nieces and Justice Hall made a clear finding that there was ***no*** evidence of undue influence. It therefore follows that there was no hearsay evidence that had any bearing whatsoever on his finding. To the contrary, there was a total ***absence*** of evidence on this point.

I agree with those submissions.

I conclude, therefore, that even if I determined that the applicants had provided a reasonable excuse for their failure to file a notice of appeal in a timely fashion (which I have not), the appeal, as proposed, does not raise arguable issues.

I adopt the words of Macdonald J.A. of this Court in **Maritime Co-op Services Ltd. v. Maritime Processing, et al.** (1979), 32 N.S.R. (2d) 71 at p. 84:

> In my opinion, the proposed appeal lacks that degree of merit or substance as required before it can be said that it is fairly arguable that the trial judge was wrong.

In my consideration of this application, I have taken into account the fact, which was related to me by counsel, that this estate would have a residue of about $1,000,000.00. There is, therefore, a lot of money at stake here. That is something which I should consider. I have also taken into account the fact that the executors, and the other beneficiaries, have an entitlement to assurances that,

at a certain point in time, the litigation over this will is at an end. It is now over two years since the testatrix passed away.

The applicants have had their “day in court”. In fact, the hearing lasted three days. There is no suggestion that the points which the applicants wished to make to the trial judge were not made and considered. They did not succeed. Their appeal, which does not, in my view, raise arguable issues, was, without reasonable excuse, advanced two and one-half months late.

Taking into account all of the circumstances which were put forward - both for and against this application - the applicants have not persuaded me that there is “special cause” here, and that justice requires that I grant the extension of time to file the notice of appeal.

I, therefore, dismiss the application. The executors are entitled to their costs, on a solicitor and client basis, to be paid by the estate. The applicants will bear their own costs of this application.

Flinn, J.A.

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C.A. No. 141912

NOVA SCOTIA COURT OF APPEAL

**BETWEEN**:

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| MARGARET MITCHELL, DIANE BUCHANAN and SUZANNE CERS | ) | |
| | ) | |
| Applicants | ) | |
| - and - | ) | BEFORE THE HONOURABLE |
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| MONTREAL TRUST COMPANY OF CANADA and MARY PRICE, in their capacity as Executors of the Estate of Lucy A. Massey | ) | MR. JUSTICE FLINN (in Chambers) |
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| Respondents | ) | |
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