

NOVA SCOTIA COURT OF APPEAL
Cite as Nova Scotia (Attorney General) v. Mossman, 1994 NSCA 9

BETWEEN:

ATTORNEY GENERAL OF THE PROVINCE
Q.C.
OF NOVA SCOTIA

Appellant

) J.D.F. Theakston,
) for the Appellant

- and -

MANSON MOSSMAN

Respondent

AND BETWEEN:

ATTORNEY GENERAL OF THE PROVINCE
Q.C.
OF NOVA SCOTIA

Appellant

) J.D.F. Theakston,
) for the Appellant

- and -

LAMONT B. MOSHER and CAROLE-ANNE MOSHER

Respondents

AND BETWEEN:

ATTORNEY GENERAL OF THE PROVINCE
Q.C.
OF NOVA SCOTIA

Appellant

) J.D.F. Theakston,
) for the Appellant

- and -

2102660 NOVA SCOTIA LIMITED

Proposed Respondent

) R. Dexter
) for the Proposed
) Respondent

) Application Heard:
) June 2, 1994

) Judgment Delivered:
) June 2, 1994

BEFORE THE HONOURABLE JUSTICE ELIZABETH A. ROSCOE IN CHAMBERS

ROSCOE, J.A.:

This is an application made by the Attorney General of Nova Scotia for leave to amend a Notice of Appeal pursuant to Rule 62.04(4). The amendment sought is to add an additional respondent, 2102660 Nova Scotia Ltd., the so-called numbered company. The numbered company was the plaintiff in a **Quieting Titles Act** application heard by Carver, J. in which a certificate of title was granted on December 23, 1993. At the same time certificates of title were also granted to two other sets of plaintiffs, Mossman and Mosher. The three sets of plaintiffs were all represented by the same counsel and the land involved in each matter is all in the same vicinity of Lunenburg County. Each of the actions however was a separate and distinct matter having separate file numbers in the Supreme Court and each was commenced on a different date with its own Originating Notice.

When the Attorney General commenced this appeal it filed one Notice of Appeal with two headings, including the Mossman matter and the Mosher matter. It did not include the numbered company and now seeks to amend that notice by adding another respondent. The appeal should have been commenced by filing separate notices in each matter. Arrangements could then have been made at the setting down hearing in Chambers to have the matters heard on the same date and to file joint appeal books and factums. Therefore the issue before me is not whether the Notice of Appeal should be amended pursuant to Rule 62.04 (4), but whether the time for filing the appeal should be extended pursuant to Rule 62.31(8)(e).

As indicated, the order being appealed was dated December 23, 1993. The Notice of Appeal in the other two matters was dated and filed on January 21, 1994. The application to amend the Notice was made on March 3, 1994 and originally set down to be heard in Chambers on March 31, 1994. An affidavit of James Fanning, a staff solicitor in the Attorney General's Department, was filed in support of the application. The application was adjourned by consent to today's date in order to give counsel for the proposed respondent the opportunity to discover Mr. Fanning. The affidavit is to the effect that the Attorney General intended to appeal the order in respect of the numbered company, but through oversight, the name of the numbered company was left off the Notice of Appeal.

In the three actions commenced under the **Quieting Titles Act** the Attorney General was added as a defendant and served with the appropriate notices. Appearances by counsel were made before Carver, J. on four separate occasions. After the newspaper advertisements, several members of the public became concerned about whether public access to Kingsburg Beach would be affected by the quieting of titles applications. In response to the public concern, the Municipality of the County of Lunenburg instructed its counsel to file a defence. The solicitors representing the Attorney General were instructed not to consent to the certificate of title because of the concern over public access to the beach. They were not instructed to file a defence. Apparently the Attorney General was content to let the County represent the public interest in the matter. Eventually the County reached a settlement with the three landowners respecting a right of way and the County withdrew its defence on December 13, 1993. A new plan and new descriptions were prepared and filed. An appearance before Justice Carver on December 16, 1993 was adjourned to December 23rd. The record before me does not reveal what transpired on December 16, 1993. At the hearing on December 23rd, there was no request by the two lawyers representing the Attorney General to set the matter down for trial or to adjourn the matters so that defences could be filed. Their position was that the Court should not grant the certificates of title because the Attorney General did not consent because the issue of public access was not, in their view, satisfactorily resolved. Carver J. was of the view that the matter had been delayed far too long and since the Attorney General had not filed a defence, the certificates should be granted.

The grounds of appeal in the matter respecting Mossman and Mosher are as follows:

- "1. THAT the learned trial Judge erred in granting the Final Order and Certificate of Title to the Respondents.
2. THAT the learned trial Judge erred in finding that the Appellant had a duty to file a defence pursuant to subsection (3) of Section 7 of the Quieting Titles Act.
3. THAT the learned trial Judge erred in finding that the Appellants were not entitled to file a defence pursuant to subsection (3) of Section 7 of the Quieting Titles Act.
4. THAT the learned trial Judge erred in granting a Certificate of Title without properly considering outstanding interests of the public thereby leaving those interests unresolved.

5. THAT the learned trial Judge erred in failing to properly exercise his discretion pursuant to subsection (1) of Section 9 of the Quieting Titles Act.
6. And such further grounds as may appear hereafter."

I am advised that the grounds of appeal as against the numbered company would be the same.

The test for granting an extension of time for an appeal is as set out in the decision of this Court in **Maritime Co-op. Services Ltd. v. Maritime Processing Co.** (1979), 32 N.S.R. (2d) at p. 71, as summarized in Nova Scotia Annotated Rules of Practice (Ehrlich) at p. 308:

" The time period for filing a notice of appeal should only be extended where:

- (1) The appeal has sufficient merit, on the basis that it is arguable that the trial judge made a clear error in his perception and evaluation of the evidence;
- (2) There was a **bona fide** intention to appeal while the right to appeal existed;
- (3) A reasonable excuse for the delay in launching the appeal is advanced."

Most of the argument on this application has been directed to the first prong of the test. I find, based on the discovery evidence of Mr. Fanning that has been filed, that the second and third requirements of the test have been met, that is, that there always was an intention to appeal and there is a reasonable excuse for the delay. I also find that the delay is not that significant and that the relevant delay from January 21, 1994 to March 3, 1994 is not so great as to cause prejudice to the proposed respondent.

The remaining issue is whether there is an arguable issue on the appeal. Counsel for the numbered company makes a strong argument that there is no evidence before me, nor was there any evidence before Carver, J. that there is any right of public access to the beach over the lands of the numbered company. That is an attractive argument, however the grounds of appeal relate more to the process and procedure before Justice Carver and the major issues on the appeal will be whether it was proper to grant a certificate of title without a trial in the face of the objection of the Attorney General, and whether it was proper

for the trial judge to grant a certificate of title for lands with a different description and plan from those described in the Statement of Claim and the advertisements. Those issues are, in my view, arguable and deserve consideration by this Court on appeal.

I would allow the application to extend the time to file the Notice of Appeal and so extend the time to June 10, 1994. The numbered company shall have its costs of the application which I fix at \$1,000.00 payable forthwith and reasonable disbursements. I also direct that the appellant appear in Chambers on June 16, 1994 to set the date of the appeal.

Roscoe, J.A.