# CASES 1839

DETERMINED IN THE

# EXCHEQUER COURT OF CANADA.

JACOB P. CLARKE AND JOHN R. BARBER..... } SUPPLIANTS; 1892 Mar. 16.

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

*Practice—Extension of time for leave to appeal after period prescribed by statute has expired—The Exchequer Court Act (1887) sec. 51; 53 Vic. c. 35, s. 1—Grounds upon which extension will be granted.*

Where sufficient grounds are disclosed, the time for leave to appeal from a judgment of the Exchequer Court of Canada prescribed by section 51 of *The Exchequer Court Act* (as amended by 53 Vic. c. 35, s. 1) may be extended after such prescribed time has expired. [The application in this case was made within three days after the expiry of the thirty days within which an appeal could have been taken.]

2. The fact that a solicitor who has received instructions to appeal has fallen ill before carrying out such instructions, affords a sufficient ground upon which an extension may be allowed after the time for leave to appeal prescribed by the statute has expired.

3. Pressure of public business preventing a consultation between the Attorney-General for Canada and his solicitor within the prescribed time for leave to appeal is sufficient reason for an extension being granted although the application therefor may not be made until after the expiry of such prescribed time.

MOTION for extension of time for leave to appeal (1).

The judgment from which the defendant desired to appeal to the Supreme Court of Canada was pronounced

(1) 50-51 Vic. c. 16, s. 51, as amended by 53 Vic. c. 35, s. 1:—

Any party to any action, suit, cause, matter or other judicial proceeding, in which the actual amount in controversy exceeds five hundred dollars, who is dissatisfied with any final judgment

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herein on the 16th day of December, 1891. The ordinary time in which the defendant had leave to appeal under the statute expired on the 16th January, 1892. The reasons why the ordinary time was allowed to expire before an extension was asked by the defendant, and the grounds upon which the present motion is made, appear from the following affidavits:

(1.) "I, James Morris Balderson, of the City of "Ottawa, in the County of Carleton, Barrister, make "oath and say:—

"1. I am a member of the firm of O'Connor, Hogg & "Balderson, solicitors herein for Her Majesty's Attor- "ney-General for the Dominion of Canada.

"2. The judgment of the Exchequer Court in this "case was delivered on the sixteenth day of Decem- "ber, 1891.

"3. Owing to the Christmas Vacation immediately "succeeding the date of delivery of said judgment and "owing to the subsequent absence from Ottawa of "Her Majesty's said Attorney-General of Canada the "said solicitors herein for the Attorney-General of "Canada have been unable to consult with him to

given therein by the Exchequer Court, in virtue of any jurisdiction now or hereafter, in any manner, vested in such court, and who is desirous of appealing against such judgment, may, within thirty days from the day on which such judgment has been given, or within such further time as the judge of such court allows, deposit with the registrar of the Supreme Court the sum of fifty dollars by way of security for costs; and thereupon the registrar shall set the appeal down for hearing before the Supreme Court on the first day of the next session; and the party appealing shall thereupon, within ten days after the deposit, give to the parties affected by the appeal, or their respective attorneys or solicitors, by whom such parties were represented before the judge of the Exchequer Court, notice in writing that the case has been so set down to be heard in appeal as aforesaid; and in such notice the said party so appealing may, if he so desires, limit the subject of the appeal to any special defined question or questions; and the said appeal shall thereupon be heard and determined by the Supreme Court.

" ascertain if it is his intention to appeal to the " Supreme Court of Canada from the said judgment " herein of the Exchequer Court, and consequently the " said solicitors herein for the Attorney-General for " Canada desire to have the time for the appealing to " the Supreme Court extended for one month from the " date hereof to allow them an opportunity to consult " with the said Attorney-General for Canada on his " return to Ottawa and ascertain if he desires to " appeal....."

(2.) " I, William Drummond Hogg, of the City of " Ottawa, in the County of Carleton, Barrister-at-Law, " make oath and say :—

" 1. That I have had and still have the conduct of " the defence in this case on behalf of the Attorney-" General of Canada.

" 2. That the judgment herein confirming the report " of the referees was pronounced by the court on the " 16th day of December, 1891.

" 3. That within the thirty days allowed by the " Supreme and Exchequer Courts Act within which " an appeal to the Supreme Court of Canada may be " taken I was instructed to give notice of appeal in " this case to the said Supreme Court.

" 4. That on or about the 8th day of January I was " taken ill with a severe attack of the grip and for " upwards of ten days I was confined to my house " unable to attend to any of the business of my office, " and for some part of the time, not allowed by my " medical adviser to consult with reference to any " legal matters which were at that time pending in " my office.

" 5. That I was not allowed to return to my business " until the 18th day of January last past, and, as a " consequence of my illness and the confinement to " my house, the time within which notice of appeal

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" should have been given in this case had elapsed " and I immediately instructed a motion to be made " to have the time extended.

" 6. That at the time I gave such instructions I was " not attending to active duties in my office, and " my partner, James Morris Balderson, made the affi- " davit upon which the motion herein was based; and " I am desirous of adding, to the grounds set out in " his affidavit in support of the motion, the facts above " set out in this affidavit....."

March 18th, 1892.

*Hogg*, Q. C., in support of motion :—

The application is made under the 51st section of the Act 50–51 Vic. c. 16, which gives the party desirous of appealing leave to do so within thirty days from the day on which the decision has been given or within such further time as the judge or the court may allow. Under this section your Lordship has full discretion to grant such an order under the circumstances of this case. The circumstances of this case are such as will commend themselves to your Lordship's mind. The application for extension of time was made three days after the thirty days mentioned in the section had elapsed. I propose to submit that this case does not come within the rules at all. It arises under the statute. The rules of court do not seem to deal specifically with the extension of time. There is nothing in the rules that is applicable to this case.

It appears to me that the effect of the whole practice of the courts is to allow an extension where a proper case is made out. As it does not come within the rules of court in any way, it must be treated in the same way as cases of similar character in other courts.

It will, no doubt, be contended that the application not having been made within the thirty days, your

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Lordship's discretion is at an end. But on this point I wish to refer to the case of *Banner* v. *Johnson* (1) which was a case arising under the *Companies' Act*; but the powers which your Lordship has under this Act are greater in respect to exercising discretion than the provisions of the *Companies' Act*. At page 170 the Lord Chancellor (Hatherly) says:—

> An argument was adduced in favour of that view from an ordinary rule of our courts, namely, that where an application is made for an extension of time, the application must be made before the period of time has elapsed. That, no doubt, is so in cases of putting in answers, and such like. But there is this to be said with reference to that, that in Chancery the court has all its own orders and rules under its own control; and, although, as a rule, it would say that the application ought to be made before the actual time has run out; yet case after case has occurred where, on payment of the costs, which the parties are always made to pay on such occasions, the court, having its orders under its own control, has extended the time and allowed the matter to be entered into.

The result of this case was that an order for an extension of time was granted some ten months after the time had expired. And, notwithstanding the lapse of time, the order made by the Court of Appeal was confirmed by the House of Lords upon the words of the statute. In *Wheeler* v. *Gibbs* (2) we have a fully stronger case in support of my contention. In that case the appeal had been dismissed for want of prosecution, on the ground that a certain notice had not been given within a certain time. Subsequent to the judgment dismissing the appeal, an application was made to the court below to extend the time for giving the notice. The court below so extended the time. The appeal had been reinscribed, and upon motion to quash, the question came up whether the time should have been extended in this way, and it was held that the judge of the court below in extend-

(1) L. R. 5 H. L. 157. (2) 3 Can. S. C. R. 374.

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ing the time had acted properly within the words of the statute. (See the judgment of the Chief Justice at page 395.) I submit that the words used by the learned Chief Justice are most applicable to the words of our statute.

I submit, under section 51 of *The Exchequer Court Act*, your Lordship has full right to exercise your discretion although the prescribed time has expired within which the appeal had to be taken out and the notice given. You have a perfect right under this section to allow the extension of time where the application is made after the thirty days.

There are a large number of cases in the reports dealing with the question of discretion in matters of this kind, the result of them being that you find fifty per cent of them one way and fifty per cent the other. But the rule deducible from them would seem to be that an application for an extension after the prescribed time has expired will be granted, unless by the lapse of time the position or rights of the parties have been changed, and unless some reason why the time should not be extended be shown by the adverse party. The question is fully discussed in the case *re Manchester Economic Building Society* (1). That decision is based upon a rule of court. There is another case, that of *re Ambrose Lake Tin and Copper Company* (2). In this case the time was extended, and it is perhaps a case as nearly like the present case as one can be. No length of time elapsed after the last day of the time prescribed for giving notice of appeal and when the application was made.

Now there is a case in our reports, *The Glengarry Election Case* (3). I submit that *The Glengarry Elec-*

(1) 24 Ch. D. p. 488. (2) 8 Ch. D. 643.
(3) 14 Can. S. C. R. 453.

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*tion Case* does not affect the rule as laid down in *Banner* v. *Johnson* (1).

Now as to the facts set out in the affidavits. While there would seem to be some contradiction between the affidavits made in support of the motion for the extension, I can explain it by saying, with regard to Mr. Balderson's affidavit, that where he states that the solicitors for the Crown had been unable before the expiration of the thirty days to consult with the Attorney-General to ascertain if it was his intention to appeal, he is under a misapprehension. As a matter of fact I had instructions to appeal before that date. Your Lordship will observe that I have stated that I was instructed to give notice of appeal within the thirty days. I had abundance of time after the 8th of January to do that. In my letter of the 18th of December, I had written to the Deputy Minister and asked him as to whether an appeal would be taken. This shows very plainly that the question of taking an appeal was under discussion, and it was in consequence of this report of mine that that letter was written by the Deputy Minister. I submit that here we have a case where if ever there were one in which the time should be extended after the prescribed period had expired, it should be done here. If ever there could be a case where, the exercise of your discretion should be applied to it, that case is this. The 16th of January was Saturday, and the 17th was Sunday, and on Tuesday the 19th the application was made. There is nothing to show that the respondents have suffered by reason of the delay of two days. In the case of *Banner* v. *Johnson* (1) the time was extended although ten months had elapsed from the expiry of the prescribed time before the application was allowed. It cannot be shown that the suppliants have been prejudiced by the delay,

(1) L. R. 5 H. L. 157.

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and at least it should have been set out in their affidavits. (He cites *re New Callao* (1) which is followed in *re Manchester Economic Building Society* (2), and *re Blyth and Young*) (3).

Argument of Counsel.

*McCarthy*, Q.C., *contra:*

The various questions which my learned friend has discussed at considerable length I do not propose to occupy time in answering; but I do not wish to be considered as conceding them. The case of *Banner* v. *Johnson* (4), I am inclined to think, is decisive of the practice in such matters. I am inclined to regard that case as decisive as to what extent discretion may be exercised in a case such as the present. I don't think that *The Glengarry Election Case* (5) should be considered to affect it in any way. But I do not propose to labour that point; and while not conceding it I leave it for your Lordship to decide.

The next question that arises is, what is the ground put forward here for the exercise of your Lordship's discretion? It is certainly not sufficient to take out a summons without grounds being given for it, or an affidavit showing that the Crown has been placed in some position which gives an equity against the suppliants. The legislature has fixed the period of thirty days in an ordinary case in which an appeal should be taken, and where that period has expired something more must be shown than the Crown has undertaken to do here in order to obtain an extension of that time. Now with regard to the affidavits upon which this motion is based, they are not consistent. The first affidavit on which the summons was issued states that an extension of time was required for the purpose of enabling the solicitors to obtain instructions to appeal

(1) 22 Ch. D. 484.
(2) 24 Ch. D. 488.
(3) 13 Ch. D. 416.
(4) L.R. 5 H.L. 157.
(5) 14 Can. S. C. R. 453.

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from the Attorney-General. The date of this affidavit was the 19th January, 1892. (Reads the affidavit of J. M. Balderson) (1). Apparently up to that time no instructions to appeal had been given.

[*Hogg*, Q.C.—If my learned friend will allow me I can explain the matter in three words: The explanation is simply this, the consultations and instructions which I had were had with and obtained from the Deputy Minister. The instructions I got were obtained from the Deputy Minister, but we wanted to see the Attorney-General of Canada who was at that time absent.]

Now, if the case were that the solicitor was instructed to appeal and fell ill before he had carried out his instructions it would be quite a different matter. That, I fancy, would be a case falling within the equity mentioned in the authorities. I prefer to rely on the statement made by Mr. Balderson as to how the matter stood. Mr. Balderson's affidavit is to the effect that it was owing to the Christmas Vacation intervening and the absence of the Attorney-General previously to the application being made, that they wished further time to consult with him as to the expediency of taking the appeal. Now it seems as a matter of fact that the Attorney-General was absent but a few days during that vacation. And at all events it is not shown that he was pressed with business to such an extent that an opportunity was lacking to promptly consult with him. If he had been really pressed with business and it was so stated, I think that would be a good ground for the extension. All the cases referred to in the *Annual Practice* of 1892 go to show that there must be an equity subsisting in favour of the party applying for an extension. In *Holmstead & Langdon's*

(1) *See* p. 2.

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*Ontario Judicature Acts* (1), the authorities are collected, and they show that there must be an equity of some sort (2).

Now what is the equity on which they rely in this case? I admit that the sickness of the solicitor, if it had been more particularly stated, might have justified an extension. For instance, if it had been so that he had sole charge of the business and the business had to stand still during the sickness. Here nothing of the sort was shown, and there is no equity of any kind to put forward to entitle the Crown to the relief sought. To grant an extension under such circumstances would be contrary to justice. In this case they have consented to the judgment and the reference to a master. And they have allowed the suppliants to go to all this great expense before they ask for the right to appeal. At this late date they ask your Lordship to exercise your discretion to enable them to raise all the questions in the case by an appeal to the Supreme Court and, ultimately, to the Privy Council. Taking the case as it stands it would seem to be the better way and a way more consonant with our ideas of justice to leave the parties as they are. There is no particular equity that they have shown while it is clearly their duty to do so.

Then your Lordship has to consider even if there be an equity shown if it is not overborne by the equities of the other side (2).

It seems to me that the facts that have been mentioned show that this is a case in which justice requires that the extension should not be allowed (4).

BURBIDGE, J.—I think I should make the order.

(1) P. 81.

(2) Cites *re New Callao* 22 Ch. D. 484, and *Cusack* v. *London & N.W. Ry. Co.*, 1 Q.B. 347 (1891).

(3) Cites *Manchester Economic Building Society*, 24 Ch. D. 497 and *Curtis* v. *Sheffield* 21 Ch. D. 1.

(4) Cites *Platt* v. *The Grand Trunk Railway Company*, 12 Pr. (Ont.) 380.

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With reference to an appeal on the questions decided in the *McLean Case* (1) and in view of which the judgment by consent was given in this case, and the reference made as in the *Boyd Case* (2), the suppliants would, it appears to me, have some reason to complain; for the delay has been long and they have been allowed to go to great expense in proving the damages. But the only ground for appeal given, although there may be others not disclosed upon which the Crown may rely, is that which arises on my own judgment in respect of the evidence that the referees declined to admit. As to that, I do not think a delay of two or three days ought to prevent me from extending the time. The Crown on the 19th January asked me for an order which I would have granted on the 16th January if a motion had been made therefor, and I think I ought not now to refuse it.

Taking the facts established by Mr. Hogg's affidavit it is conceded that grounds for the order asked for are disclosed. Then, as to Mr. Balderson's affidavit,—it simply amounts to a statement by one of the solicitors for the Crown that they needed further time to consult the Attorney-General; and that, also, in view of the large amount of public business Her Majesty's Attorney-General for Canada is called upon to transact, appears to me, under the circumstances of this case, to afford a sufficient reason for making the order to extend the time within which the appeal may be taken. The only question is as to the terms.

[*McCarthy*, Q.C.—Your Lordship will make the order then on terms ?]

I think there should be conditions to secure you the fruits of your judgment, and one of the conditions should be that you have interest upon the judgment.

(1) *The Queen* v. *McLean* 8 Can. S. C. R. 210.

(2) *Boyd* v. *The Queen* 1 Ex. C.R. 186.

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Of course, I have no right to give interest after judgment, that is a matter for the Minister of Finance.

[*Hogg*, Q.C.—Then by this condition you really vary your judgment ?]

Not at all ; I merely give you leave to appeal on condition that an undertaking be filed to the effect that if the judgment of this court is ultimately sustained the Crown will pay interest on it at the rate of four per cent.

I extend the time for leave to appeal seven days from this date, and upon the terms of the Crown paying the costs of this application (except the enlargements at the request of the suppliants) and on condition of the Crown undertaking to pay interest at the rate of four per cent from the date of the judgment of the Exchequer Court, upon any judgment ultimately recovered.

*Order extending time for leave to appeal granted.*

Solicitors for suppliants: *Macdonald, Merritt & Shepley.*

Solicitors for respondent: *O'Connor, Hogg & Balderson.*