S.C.A. No. 02772

**IN THE SUPREME COURT OF NOVA SCOTIA**

**APPEAL DIVISION**

Cite as: Eisner v. 809039 Ontario Ltd., 1992 NSCA 43

| | | |
|---|---|---|
| **BETWEEN:** | | |
| DONALD EISNER | | Randall P. H. Balcome for the Appellant |
| | Appellant | |
| **- and -** | | |
| 809039 ONTARIO LIMITED | | David Farrar for the Respondent |
| | Respondent | |
| | | Application Heard: December 10, 1992 |
| | | Judgment Delivered: December 10, 1992 |

**BEFORE THE HONOURABLE MR. JUSTICE DAVID R. CHIPMAN ORALLY IN CHAMBERS:**

**CHIPMAN, J.A.:**

The appellant makes an application under Rule 62.05 to set an interlocutory hearing down for appeal. The question arises whether the notice of appeal was delivered in time and if not,

whether I should exercise my jurisdiction pursuant to Rule 62.31(8)(e) to extend the time.

On January 15, 1991, Mr. Justice Nathanson dismissed the applicant's application to intervene in a proceeding, open up a default judgment entered on December 11, 1990 against the defendant and file a defence on the defendant's behalf. In his brief oral reasons, Mr. Justice Nathanson found that the applicant did not have an interest in the subject matter of the proceedings. No formal order was taken out giving effect to this decision until October 30, 1992 when new counsel for the applicant applied to Mr. Justice Nathanson for an order. The notice of appeal (interlocutory) incorporating an application for leave to appeal was filed on November 6, 1992 within ten days of the date of the order.

Rule 62.02 provides:

> "Rule 62.02(1) An appeal, other than a tribunal appeal, shall be brought by filing a notice of appeal with the Registrar
>
> (a) in the case of an appeal from an interlocutory order or an order as to costs only, within ten days, and
>
> (b) in the case of an appeal from a judgment under the Divorce Act, within thirty days, and
>
> (c) in the case of an appeal from any other judgment, within thirty days.
>
> from the date of the order for judgment appealed from or, if no order has been made, from the date of the decision."

The applicant says that since the notice was filed within ten days of the order, this rule has been complied with. The respondent maintains that since no order was taken out within 30 days of Mr. Justice Nathanson's decision, the matter was one involving "any other judgment" to which sub-rule (c) applied and that since no order had been made within 30 days from the date of the decision, the time had expired. The respondent relied on the following passage from the decision of Mr. Justice Hallett in **Attorney General of Nova Scotia v. Bowater Mersey Paper Co. Ltd.** (1992), 112 N.S.R. (2d) 329 at p. 331:

> "In my opinion, as the successful party is required by Rule 51.03 to take out the order and has ten days to do so before another party has the right to do so, it would be unreasonable to interpret Rule 62.02(1) to mean that an appeal from an interlocutory matter must be started

> within ten days of the decision. Rule 62.02(1) provides for an appeal from an interlocutory order by filing a notice within ten days of the order. Considering the wording of this paragraph and of the provisions of Rules 51.03 and 51.12 I would interpret Rule 62.02(1) as requiring a notice of appeal in an interlocutory matter to be filed within ten days of the order and failing the taking out of any order within thirty days of the decision."

I agree with this. Mr. Justice Hallett was dealing with a case where the respondent did not enter an order following the trial decision and the appellant filed a notice within 30 days from the decision. In such a case, sub-rule (c) was clearly operative and the appellant was in time. Here we are dealing with a different situation. The clock which was running here was the ten day clock following the granting of the interlocutory order. The rule is so worded that even after the running of the 30 day clock under sub-rule (c) (which operates when no order has been taken out), it is possible for the ten day clock to start ticking if an order is subsequently taken out. If a successful party wishes to make sure that both clocks have run, the proper step is to take an order. See Rule 51.03. That was not done here. Instead, the matter was allowed to rest until the appellant's new counsel took out an order on October 30, 1992. The notice of appeal from it was in time and it is not necessary for me to extend the time.

The appellant also asks leave to appeal. Section 40 of the Judicature Act provides:

> "40 There is no appeal to the Appeal Division of the Court from any Interlocutory Order whether made in Court or in Chambers, save by leave as provided in the Rules or by leave of the Appeal Division."

The rules do not give power to a judge in Chambers to grant leave here. In my opinion this is a matter for the panel hearing this appeal.

Accordingly, I will set the matter down for hearing.