

1931
*April 2.
*April 13.

IN THE MATTER OF THE AUTHORIZED ASSIGNMENT OF
LOUIS WEBBER DOING BUSINESS UNDER THE STYLE
AND NAME OF "NEW YORK MILLINERY COMPANY."
MAX VALINSKYAPPLICANT;

AND

G. R. BACON (TRUSTEE)RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN
BANC

Bankruptcy—Application to judge of Supreme Court of Canada for special leave to appeal—Time for application—Extension of time—Jurisdiction—Bankruptcy Act, R.S.C., 1927, c. 11, ss. 174, 163 (5), 2 (1), 152; Bankruptcy Rules 72, 68.

The Supreme Court of Nova Scotia *en banc* cannot, nor can a judge of the Supreme Court of Canada, extend the time fixed by Bankruptcy Rule 72 for an application to be made to a judge of the Supreme Court of Canada for special leave to appeal to this Court. (Strong doubt was expressed whether even the court exercising the original jurisdiction in bankruptcy could grant such extension†).

By its decision made on February 7, 1931, and order dated February 28, 1931, the Supreme Court of Nova Scotia *en banc* dismissed an appeal

*Cannon J. in chambers.

†Reporter's Note: See, further, *In re Smith & Hogan Ltd.*, *infra*, p. 503, where Cannon J. held that a grant of such extension by the judge exercising original jurisdiction in bankruptcy was made without jurisdiction.

from an order of Chisholm J., sitting in bankruptcy, setting aside an order of the Official Receiver for the sale to appellant of certain of the bankrupt's stock in trade. On March 10, 1931, said Court *en banc* made an order extending the time for application to a judge of the Supreme Court of Canada for leave to appeal, to 60 days from February 7, 1931. The application came before Cannon J. on April 2, 1931, who dismissed it, holding that he had no jurisdiction, as the application was not made within the period (30 days from pronouncement of the decision complained of) fixed by Rule 72, and the order extending the time was made without jurisdiction.

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Bankruptcy Act, R.S.C., 1927, c. 11, ss. 174, 163 (5), 2 (1), 152; Bankruptcy Rules 72, 68, considered. *In re Gilbert*, [1925] Can. S.C.R. 275, at 278, 277; *Eastern Trust Co. v. Lloyd Mfg. Co.*, 3 C.B.R. 710, at 713-714, referred to.

APPLICATION for special leave to appeal to the Supreme Court of Canada from the judgment of the Supreme Court of Nova Scotia *en banc* (1) dismissing (two judges dissenting) an appeal from the order of Chisholm J., sitting in bankruptcy (2), setting aside an order made by the Registrar and Official Receiver directing a sale to the appellant of certain of the bankrupt's stock in trade. The material facts of the case, for the purposes of the present judgment, are sufficiently stated in the judgment now reported and are indicated in the above headnote. The application was dismissed with costs, on the ground that it was made too late and a judge of this Court had now no jurisdiction to entertain it.

E. F. Newcombe K.C. for the applicant.

Pierre Casgrain K.C. for the respondent.

CANNON J.—This is an application brought before me in chambers on the 2nd day of April, 1931, by Max Valinsky, for special leave to appeal to this court from the decision of the Supreme Court of Nova Scotia *in banco* rendered herein on February 7, 1931 (1), and to fix the security for costs. The material facts are the following:

On 14th June, 1930, Louis Webber made an assignment for the benefit of creditors.

On 16th June, 1930, the Official Receiver (Harris) appointed Canadian Credit Men's Trust Association, Custodian.

(1) (1931) 12 C.B.R. 274.

(2) (1930) 11 C.B.R. 490.

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On 21st June, 1930, an order was made by the (Registrar and) Official Receiver, for the sale of certain of the stock in trade, consisting of women's hats, to one Max Valinsky.

On 28th June, 1930, a meeting of the creditors of the bankrupt appointed George R. Bacon, Trustee, and authorized him to institute proceedings by way of appeal, to set aside the order of 21st June, and

On 30th June, 1930, Bacon appealed to the Judge in Bankruptcy to set that order aside.

On 6th August, 1930, Mr. Justice Chisholm (1) set aside and vacated the Official Receiver's order of 21st June.

On 20th September, 1930, Max Valinsky, the purchaser of the said stock in trade at the said sale, appealed against the order of the Bankruptcy Judge, and

On 28th February, 1931, the Supreme Court of Nova Scotia *in banco* dismissed Valinsky's appeal with costs, (Mellish J. and Paton J. dissenting) (2).

On 10th March, 1931, the Supreme Court of Nova Scotia *in banco* extended the time within which an application for leave to appeal could be made to a Judge of the Supreme Court of Canada, to 60 days from 7th February, 1931, (*viz.*, to 8th April, 1931).

The learned counsel for the trustee opposed the application for several reasons, the first of which was that I had no jurisdiction to grant leave to appeal under the General Bankruptcy Rule 72, because this application is presented to me after thirty days from the pronouncing of the decision complained of. The relevant section and rule are:

174. Any person dissatisfied with an order or decision of the court or a judge in any proceedings under this Act may appeal to the Appeal Court if the

- (a) question to be raised on the appeal involves future rights; or
- (b) order or decision is likely to affect other cases of a similar nature in the bankruptcy or authorized assignment proceedings; or
- (c) amount involved in the appeal exceeds five hundred dollars; or
- (d) appeal is from the grant or refusal to grant a discharge and the aggregate of the unpaid claims of creditors exceeds five hundred dollars.

2. The decision of the Appeal Court upon any such appeal shall be final and conclusive unless special leave to appeal therefrom to the Supreme Court of Canada is obtained from a judge of that court.

(1) 11 C.B.R. 490.

(2) 12 C.B.R. 274. The date of the decision was 7th February, 1931; the date of the order was 28th February, 1931 (Reporter's note).

Rule 72:

An application for special leave to appeal from a decision of the Appeal Court and to fix the security for costs, if any, shall be made to a Judge of the Supreme Court of Canada within thirty days after the pronouncing of the decision complained of and notice of such application shall be served on the other party at least fourteen days before the hearing thereof.

Is the order of the Supreme Court of Nova Scotia *in banco*, rendered on the 10th March, 1931, extending the delay fixed by the above rule 72 for a further period of thirty days, making the time within which such application for special leave to appeal can be made a period of sixty days from February 7, 1931, sufficient to give me jurisdiction to hear this application and grant an appeal, if good cause is shown?

The applicant relies on section 163, paragraph 5, which says:

Where by this Act, or by General Rules, the time for doing any act or thing is limited, the court may extend the time either before or after the expiration thereof, upon such terms, if any, as the court may think fit to impose.

The court, as defined by sec. 2 (1), is the one "which is invested with original jurisdiction in bankruptcy under this Act"; and section 152 invests the Supreme Court of Nova Scotia during term, and in vacation or in chambers, "with such jurisdiction at law and in equity as will enable it to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by the Act."

It appears to me that, even if the Supreme Court of Nova Scotia was empowered to extend the delay, such power should be exercised by a judge thereof exercising the original jurisdiction above defined. In this instance, however, the extension of delay was granted by the Supreme Court of Nova Scotia *en banc*, whose jurisdiction is limited by section 152, par. 3, of the *Bankruptcy Act* "to make or render on *appeal asserted*, heard and decided according to their ordinary procedure, except as varied by General Rules, the order or decision which ought to have been made or rendered by the court appealed from."

Clearly, in my mind, the Supreme Court *in banco* has no jurisdiction in bankruptcy, except on appeal from a decision or order covered by paragraphs a, b, c, or d of section 174. They cannot in the first instance hear or entertain a

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petition to extend the delay. Moreover, I entertain grave doubts whether such a petition could be granted even by the original court in bankruptcy.

Rule 68 reads as follows:

68. No appeal from a judge to the Appeal Court shall be brought unless notice thereof is filed with the registrar and served within ten days after the pronouncing of the order or decision complained of or *within such further time* as may be allowed by a judge.

(2) At or before the time of entering an appeal the party intending to appeal shall lodge in the court the sum of one hundred dollars to satisfy, in so far as the same may extend, any costs that the appellant may be ordered to pay. Provided that the Appeal Court may in any special case increase or diminish the amount of such security or dispense therewith.

This clearly gives to a judge the right to extend the time to give notice of appeal to the Appeal Court. Rule 72, concerning the appeals to the Supreme Court, does not contain a similar provision and gives to no judge, either of the provincial courts or of this court, power to extend the thirty days within which an application for special leave to appeal and to fix the security for costs must be made to a judge of the Supreme Court of Canada. As pointed out by Mignault J., in *In re Gilbert* (1), "the time fixed by bankruptcy rule 72, *supra*, for applying for leave to appeal goes to the jurisdiction of the judge to whom this application is made and who here acts as *persona designata*"; and "it is to be observed that these rules, provided they are not inconsistent with the terms of *The Bankruptcy Act*, must be judicially noticed and have effect as if enacted by the Act" (section 161, R.S.C., 1927, chapter 11). I have no power to extend the delay and *a fortiori* the court below has no jurisdiction to do so, no more than they can issue an order allowing an appeal to this court. I agree with Harris C.J., in *Eastern Trust Co. v. Lloyd Mfg. Co.* (2), who says:

An examination of the bankruptcy Rules shows that they are a full and complete code and framed for the obvious purpose of providing summary and expeditious methods for determining questions arising in bankruptcy matters with the minimum of cost. It is of the utmost importance that bankrupt estates should be wound up as cheaply and expeditiously as possible and Parliament had the right in dealing with the question of bankruptcy and insolvency to do what I think it has done in this case—prescribe a special procedure for determining questions raised in realizing the assets of the estate.

(1) (1925) 5 C.B.R. 790, at 792, 791-2; [1925] Can. S.C.R. 275, at 278, 277. (2) (1923) 3 C.B.R. 710, at 713-714 (N.S.).

A judgment of the Appeal Court can be depended upon by the trustee as "res judicata," unless leave to appeal is obtained within 30 days; the object of the Act and Rules would be defeated if such leave could be granted at any time at the discretion of any judge.

The order extending the time for the present application was made without jurisdiction, could not, at all events, prevail against a statutory delay such as provided by rule 72, and, therefore, I cannot now entertain the application, which comes too late and is dismissed with costs.

Application dismissed with costs.

Solicitor for the applicant (appellant): *L. A. Lovett.*

Solicitor for the respondent: *T. R. Robertson.*

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