

1961
 *Mar. 10
 Mar. 20

PHILIPPE FERLAND (*Creditor*)APPLICANT;

AND

HECTOR DESJARDINS (*Debtor*)RESPONDENT;

AND

GERARD BLAIS (*Trustee*)MIS-EN-CAUSE.

MOTION FOR LEAVE TO APPEAL

Jurisdiction—Appeal—Bankruptcy—Extension of time for applying for leave to appeal—The Bankruptcy Act, 1949 (Can.), 2nd Sess., c. 7, ss. 2(g), 144 (11), 151 (R.S.C. 1952, c. 14, ss. 2(g), 144 (11), 151)—Bankruptcy Rules 50, 53, 54, 105.

A judge of this Court has no jurisdiction to extend the time, prescribed by Rule 53 of the General Rules established under the *Bankruptcy Act*, for applying for leave to appeal to this Court from the decision of a Court of Appeal rendered in a bankruptcy matter.

No such jurisdiction can be found in Rule 53 governing appeals to this Court, nor can it be validly derived from the Rules of this Court which in bankruptcy matters are subject to Rule 53.

APPLICATION for leave to appeal and for an extension of time to make such application from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec, in a bankruptcy matter. Application dismissed.

R. Quain, Q.C., for the applicant.

C. Beland, for the respondent.

FAUTEUX J. (in chambers):—This is an application, in a bankruptcy matter, for special leave to appeal from a decision made, on the 15th of November, 1960, by the Court of Appeal for the Province of Quebec.

The relevant provisions of the *Bankruptcy Act*, 1949, and of the General Rules established thereunder on the 16th day of December 1954, (P.C. 1954-1976) are respectively:

Section 151 of the Act:

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

Rule 53:

An application for special leave to appeal from a decision of a Court of Appeal and to fix the security for costs, if any, may be made to a Judge of the Supreme Court of Canada within 60 days after the date of the decision appealed from and notice of the application shall be served on the other party at least 14 days before the hearing thereof.

*PRESENT: Fauteux J. in chambers.

Rule 54:

Subject to section 53, appeals to the Supreme Court of Canada shall be regulated as nearly as may be by the rules of that Court relating to appeals in civil actions or matters.

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Section 53, referred to in Rule 54, is manifestly Rule 53 above and not section 53 of the Act which deals with the effect of sales of property by the trustee.

Dated the 12th of January, 1961, the present application was served on the 6th of March, 1961, filed two days later with the Registrar of this Court, and came for hearing on the date indicated in the notice of application, to wit, on the 10th of March, 1961. The material date according to Rule 53 is not that of the application or of its filing with the Registrar, but the date when it is actually made to a Judge of this Court. *In re Boivin v. Larue*¹. Thus it appears that the application was not made within the delay of sixty days specified in Rule 53. This delay was expired on the 15th of January, 1961. For this reason, counsel for the applicant also demanded that the time set in Rule 53 be extended. Counsel for respondent consented to the granting of this request. The trustee was not represented and the material does not show that he received notice of the application.

As jurisdiction cannot be acquired by consent, the question to be determined is whether a power to extend the time for applying for leave to appeal to this Court from a decision of a Court of Appeal, rendered in a bankruptcy matter, is in the jurisdiction of a Judge of this Court.

A right of appeal is a right of exception which exists only when authorized by statute. *Okalta Oils Limited v. Minister of National Revenue*². Substantive and procedural provisions related to the exercise of this right, when given, are generally regarded as exhaustive and exclusive. This need not be expressly stated in the statute authorizing the appeal; it necessarily flows from the exceptional nature of this right. *Welch v. The King*³.

¹ [1925] S.C.R. 275, 5 C.B.R. 790, 3 D.L.R. 311.

² [1955] S.C.R. 824, 55 D.T.C. 1176, [1955] C.T.C. 271, 5 D.L.R. 614.

³ [1950] S.C.R. 412, 97 C.C.C. 177, 10 C.R. 97, 3 D.L.R. 641.

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With respect to appeals to the Court of Appeal in bankruptcy matters, a power to extend the time within which an appeal may be brought is given in the following rule:

Rule 50(1). No appeal to the Court of Appeal shall be brought unless notice thereof is filed with the Registrar and served within ten days after the day of the order or decision appealed from or within such further time as a Judge of the Court of Appeal allows.

A power to extend time, however, cannot be found in Rule 53 governing appeals to the Supreme Court of Canada. Nor can it be validly derived from the Rules of this Court which, as provided by Rule 54 of the *Bankruptcy Act*, regulate appeals to this Court in bankruptcy matters, subject, however, to the provisions of Rule 53.

Rule 53 corresponds to and is in terms similar to the 1949 Rule 65(1) and to the pre-1949 Rule 72(1). In all the reported decisions in this Court, with respect to pre-1949 Rule 72(1), it was held that the power to extend the delay specified in the statutory rule was not in the jurisdiction of a Judge of this Court. *In re Boivin v. Larue, supra*; *In re North Shore Trading Company*¹; *In re Louis Webber*². It was also decided that a Judge of the Supreme Court of Canada is not empowered to abridge the delay of fourteen days specified in statutory Rule 50. *In re Hudson Fashion Shoppe*³.

In re North Shore Trading Company, supra, Migneault J. made the following comments at the bottom of page 181:

I must say, however, that I think General Rule 72 should be amended so as to give a Judge of this Court the power to extend the time for application for leave to appeal either before or after the expiration. It seems incongruous and it adds to the costs as well as delays the proceedings, to oblige an applicant to go back to the trial Court to obtain an extension of the time specified by Rule 72. I may add that Rule 68 governing appeals to the Appeal Court gives a like power to a Judge of the Court of Appeal.

The relevant part of Rule 68, referred to by Migneault J., was paragraph (1) of the Rule, the provisions of which are literally the same as those of the 1949 Rule 62(1) and those of present Rule 50. Notwithstanding the amendment suggested by Migneault J., and the fact that since that decision, the Bankruptcy Rules have twice been subjected to revision, the Rule governing appeals to this Court has

¹[1928] S.C.R. 180.

²[1931] S.C.R. 498, 4 D.L.R. 244.

³[1926] S.C.R. 26.

not been changed. Nor has there been, up to this time, any reported cases in this Court showing that the views expressed in the above quoted decisions have been modified. See also Bradford & Greenberg's Canadian Bankruptcy Act, 3rd ed., p. 322, as to 1949 Rule 65(1), and Houlden and Morawetz, Bankruptcy Law of Canada, p. 342, as to present Rules 53 and 54.

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In a memorandum filed subsequent to the hearing, counsel has referred to s. 144(11) of the *Bankruptcy Act* and also to Rule 105 made thereunder, as affording support to the application.

144(11). Where by this Act, 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 it thinks fit to impose.

A like submission has previously been made, but it was rejected by Migneault J., in the case of *In re North Shore Trading Co., supra*, and by Cannon J., in the case of *In re Webber, supra*. Referring to the definition of the word "court", then appearing in s. 2(l), and now in s. 2(g), both of them held that the power given in s. 163(5), the predecessor to s. 144(11), was in the Court vested with original jurisdiction in bankruptcy under the Act. The original and amended definition of the word "court" read:

s. 2(l). "Court" or "the Court" means the Court which is invested with original jurisdiction in bankruptcy under this Act.

s. 2(g). "Court" means the Court having jurisdiction in bankruptcy or a Judge thereof and includes a registrar when exercising the powers of the Court conferred upon him under this Act.

While s. 2(g) has widened the original definition of the word "Court" in order to include Judges and Registrars, the section does not purport to constitute the Supreme Court of Canada as "*the Court having jurisdiction in bankruptcy . . .*", even though under and in the terms of s. 140(3), this Court "has jurisdiction to hear and to decide according to its ordinary procedure any appeal so permitted and to award costs."

It may be added that the opening words of s. 163(5) were: "Where by this Act or by General Rules" and that the words "or by General Rules" have been deleted in s. 144(11).

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Rule 105:

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Non-compliance with any of these rules or with any rule of practice shall not render any proceeding void unless the court so directs, but the proceeding may be set aside, either wholly or in part, as irregular, or amended or otherwise dealt with in such manner and upon such terms as the court considers necessary or desirable.

This Rule corresponds to 1949 Rule 120 and pre-1949 Rule 168 and is, in terms, literally similar to the former and substantially similar to the latter.

If, as I think, the power to extend the time for applying for leave to this Court from a decision of a Court of Appeal rendered in a bankruptcy matter, is not in the jurisdiction of a Judge of this Court, Rule 105 is not, in my opinion, apt *per se* to confer such a jurisdiction.

It is appropriate to say, I think, that I have considered the grounds raised in support of the application for special leave to appeal, the reasons for judgment delivered in the Court of Appeal and the sections of the *Bankruptcy Act* having relevancy on the merits of the application. Even if I had jurisdiction, I would not, under all the circumstances, be justified to grant leave.

The application is dismissed with costs.

Motion dismissed with costs.

Attorneys for the creditor, applicant: Quain & Quain, Ottawa.

Attorneys for the debtor, respondent: Badeaux, Fillion & Beland, Montreal.
