Byers, by her Litigation Guardian Byers et al. v. Pentex Print Masters Industries Inc. et al.

[Indexed as: Byers (Litigation Guardian of) v. Pentex Print Masters Industries Inc.]

62 O.R. (3d) 647
[2003] O.J. No. 6
Docket Nos. M28623/C38114

Court of Appeal for Ontario
Carthy, Laskin and Borins JJ.A.
January 8, 2003

Civil procedure -- Appeals -- Costs -- Judgment on merits and judgment with respect to costs separate appealable judgments -- Different procedures for appeal of judgment on merits and for appeal of judgment with respect to costs -- Judgment on merits takes effect from time it is pronounced unless there is a substantial matter remaining to be determined -- Judgment as to costs a collateral and not a substantial matter that extends time for delivering notice of appeal -- Judgment on merits appealable before court makes judgment as to costs -- Leave may be granted to extend time for appeal -- Courts of Justice Act, R.S.O. 1990, c. C.43, ss. 6(1)(a), (b), 131(1) and 133(b) -- Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 61.03.1(1), (16), (17), (18) and 61.04(1).

In a jury action, Ms. Byers sued Canadian Professional Engravers Association Inc. ("CPEA"), Pentex Print Master Industries Inc. ("Pentex") and Mr. Black for damages for negligence. The jury assessed damages of $1,607,199.21, including the damages of family members under the Family Law Act, but dismissed the action on November 26, 2001. The trial judge heard submissions with respect to costs on January 24, 2002 and March 8, 2002, and released her judgment on costs,

ordering that no costs be paid, on April 10, 2002. On April 23, 2002, Ms. Byers served a notice of appeal. On May 1, 2002, Pentex and Black served a notice of cross-appeal seeking leave to appeal from the disposition of costs. To date, the parties had not taken out a formal judgment.

CPEA moved to have the appeal quashed on the ground that it was not commenced within the time stipulated by rule 61.04(1) of the Rules of Civil Procedure. Pentex and Black joined in the motion and, in addition, sought an order permitting them to proceed with their cross-appeal.

Held, the motion should be dismissed; the notice of appeal was out of time, but leave should be granted to extend the time for service to the date of service.

When read together ss. 6(1)(a) and (b), 131(1) and 133(b) of the Courts of Justice Act and rules 61.03.1(1), (16), (17), (18) and 61.04(1) give rise to separate and discrete rights of appeal from the judgment on the merits ("merits judgment") and the judgment with respect to costs ("costs judgment"). The merits judgment and the costs judgment are separate appealable judgments. For the merits judgment, the 30-day period under rule 61.04(1) in which to serve a notice of appeal commences from the date of the judgment on the substantive merits. For the costs judgment (when it is made at the same time as the merits judgment and an appeal as of right has been commenced), under rule 61.03.1(1), the request for leave to appeal must be included in the notice of appeal as part of the relief sought. Where a costs judgment is rendered after the merits judgment and a notice of appeal has already been served, a different procedure applies, and an appellant must move in writing for leave to appeal the costs judgment. Alternatively, and preferably, the appellant may, pursuant to rule 61.08(1), amend the notice of appeal and join the costs appeal with the merits appeal. [page648]

In this case, the jury verdict on November 26, 2001 finally determined the action on its merits. A judgment takes effect from the time it is pronounced and not from the date that it is signed and entered unless there is a substantial matter

remaining to be determined and such matters do not include a costs judgment. A costs judgment raises legal issues collateral to the main cause of action. A merits judgment is appealable before the court makes a decision as to costs. Therefore, the notice of appeal should have been served within 30 days of that date. (The formal judgment must be signed and entered, however, before the appeal can be perfected.) The appellant's submission that the release of the trial judge's costs decision on April 10, 2002, in effect, extended the time for serving the notice of appeal was incorrect. The appellant's notice of appeal was served out of time. However, leave should be granted to extend the time for service to the date of service.

Cases referred to

Atkinson v. Ault Foods Ltd., [1997] O.J. No. 5222 (Quicklaw) (Gen. Div.); Baksh v. Sun Media (Toronto) Corp., [2002] O.J. No. 2272 (Quicklaw) (S.C.J.); Blundon v. Storm (1970), 10 D.L.R. (3d) 576, 1 N.S.R. (2d) 621 (C.A.); Bratti v. Wabco Standard Trane Inc. (c.o.b. Trane Canada) (1994), 25 C.B.R. (3d) 1 (Ont. C.A.); Budinich v. Becton Dickinson & Co., 486 U.S. 196 (1988); Byers (Litigation Guardian) v. Pentex Print Master Industries Inc. (2002), 59 O.R. (3d) 409, 21 C.P.C. (5th) 161 (S.C.J.); Craig v. Phillips (1887), 7 Ch. Div. 250; Duca Community Credit Union Ltd. v. Giovannoli (2001), 4 C.P.C. (5th) 189 (Ont. C.A.); Elgin (County) v. Robert (1905), 36 S.C.R. 27; Ex parte Hinton, In re Hinton (1875), L.R. 19 Eq. 266, 31 L.T. 852, 23 W.R. 488, 44 L.J. Bcy. 36; Fawkes v. Swayzie (1899), 31 O.R. 256 (Div. Ct.); Ferguson, Ferguson v. Ferguson and National Trust Co. (Re), [1944] 4 D.L.R. 28 (Man. C.A.); Frey v. MacDonald (1989), 33 C.P.C. (2d) 13 (Ont. C.A.); Frumento v. Shortt, Hill & Duncan Ltd. (1916), 22 B.C.R. 427 (C.A.); Hickey v. Stover (1885), 11 P.R. 88 (Ont. Div. Ct.); Hilltop Group Ltd. v. Katana (1998), 117 O.A.C. 384 (Div. Ct.); Hyman v. Kinkel, [1938] O.W.N. 135 (C.A.); International Financial Society v. City of Moscow Gas Company (1877), 7 Ch. Div. 244; Kefeli v. Centennial College of Applied Arts and Technology, [2002] O.J. No. 3023 (Quicklaw) (C.A.); Lancer Partners v. Handleman Co. of Canada, [1999] O.J. No. 4033 (Quicklaw) (S.C.J.); Martley v. Carson (1886), 13 S.C.R. 439; Murano v. Bank of Montreal (1998), 41 O.R. (3d) 222,

163 D.L.R. (4th) 21, 41 B.L.R. (2d) 10, 22 C.P.C. (4th) 235, 5 C.B.R. (4th) 57 (C.A.), affg (1996), 20 B.L.R. (2d) 61, 31 C.B.R. (3d) 1 (Ont. Gen. Div.), supp. reasons (1995), 41 C.P.C. (3d) 143 (Ont. Gen. Div.); O'Sullivan v. Harty (1885), 13 S.C.R. 431; Permanent Investment Corporation Ltd. and Township of Ops and Graham (Re), [1967] 2 O.R. 13, 62 D.L.R. (2d) 258 (C.A.); Texaco Canada Ltd. v. Oak Bay (City) (1970), 72 W.W.R. 557 (B.C.C.A.), quashing (1969), 69 W.W.R. 373 (B.C.S.C.); Wallace v. Bath (1904), 7 O.L.R. 542 (H.C.); Walmsley v. Griffith (1886), 13 S.C.R. 434; White v. New Hampshire Dept. of Employment Security, 455 U.S. 445 (1982); Winnipeg (City) v. Wright (1887), 13 S.C.R. 441

Statutes referred to

Courts of Justice Act, R.S.O. 1990, c. C.43, ss. 6(1), 17, 131(1), 133(b)
Family Law Act, R.S.O. 1990, c. F.3
Supreme and Exchequer Courts Act, R.S.C. 1886, c. 135, s. 40

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 1.03, 1.04(1), 3.02(1), 57.01, 57.03, 58, 58.11, 59.01, 59.03(3) (b), 59.04, 61.03.1, 61.04(1), 61.08(1), 62.01

MOTION to quash an appeal. [page649]

David A. Zuber, for moving party Canadian Professional Engravers Association Inc.
A. Peter Trebuss, for moving parties Pentex Print Master Industries Inc. and Dosey George Black.
Wayne P. Cipollone and Mary Marafioti, for responding parties.

The judgment of the court was delivered by

[1] BORINS J.A.: -- This is a motion by the respondent

Canadian Professional Engravers Association Inc. ("CPEA") to quash the plaintiffs' appeal on the ground that it was not commenced within the time stipulated by rule 61.04(1) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194. The other respondents, Pentex Print Master Industries Inc. ("Pentex") and Dosey George Black ("Black"), join in the motion and, in addition, seek an order permitting them to proceed with their cross-appeal from the trial judge's costs disposition.

Background

[2] Ms. Byers' claim for damages caused by the alleged negligence of the respondents was dismissed by a jury on November 26, 2001. The jury assessed the damages of Ms. Byers, as well as the damages of her family members under the Family Law Act, R.S.O. 1990, c. F.3, in the amount of $1,607,199.21. In her endorsement, the trial judge dismissed the appellants' action in accordance with the verdict of the jury. The trial judge heard submissions with respect to costs on January 24, 2002 and March 8, 2002. On April 10, 2002, she released her reasons for judgment on costs, now reported as Byers (Litigation Guardian) v. Pentex Print Master Industries Inc. (2002), 59 O.R. (3d) 409, 21 C.P.C. (5th) 161 (S.C.J.). She made no order for the payment of costs.

[3] Following the jury's verdict, the trial judge adjourned to January 22, 2002, CPEA's claim for contribution and indemnity against Ms. Byers' mother, Gail Byers, and her mother's company. Given the finding of no liability, this claim was dismissed as moot on January 4, 2002.

[4] On April 23, 2002, the appellants served a notice of appeal on the respondents asking that the jury's decision on liability be set aside. On May 1, 2002, the respondents Pentex and Black served a notice of cross-appeal seeking leave to appeal from the trial judge's disposition of costs, in which they allege that the trial judge erred in not awarding them their costs of the trial in which they had prevailed.

[5] To date, the parties have not taken out a formal judgment. This is because they cannot agree on its date and

content. Counsel [page650] for the respondent CPEA drafted a judgment dated January 22, 2002, which in its recital refers to the action having been heard on certain dates in November 2001 and, in its operative part, orders the dismissal of the action, counterclaim and crossclaim, with the issue of costs being adjourned to March 8, 2002. The appellants' draft judgment is dated April 10, 2002. Its recital refers to the action having been heard with a jury on certain dates in November 2001, with further attendances by counsel on January 22, 2002, and March 8, 2002 to make submissions with respect to costs; its operative part orders the dismissal of the action without costs. This disagreement concerning the date and the content of the operative part of the formal judgment reflects the positions taken by the parties on this motion.

[6] It is to be observed that counsel for CPEA raised the issue of an appeal in correspondence to the appellants' counsel. On December 21, 2001, CPEA's counsel, Mr. Zuber, proposed that the claim and the counterclaim be dismissed on the understanding "that no costs will be enforced" and that the appellants undertake not to appeal. When he received no response to his letter, Mr. Zuber wrote again on January 3, 2002: "However, given that more than 30 days has elapsed from November 29, 2001, [sic] the time in which to commence an appeal, has passed obviously your client is not appealing the verdict." Once again, the appellants' counsel did not respond, resulting in Mr. Zuber writing to him on January 15, 2002, noting that "the 30 days for appeal has passed."

[7] On January 18, 2002, appellants' counsel wrote to Mr. Zuber: "Further to our recent telephone conversation, I confirm my advice to you that there can be no doubt in my mind in terms of procedure that the 30-day period to serve Notice of Appeal cannot run until Judgment is finalized and dated." Finally, on April 23, 2002, which was after the trial judge had released her costs judgment, the appellants' counsel wrote to Mr. Zuber to inform him that he had received instructions to appeal the jury verdict on liability, and enclosed a notice of appeal.

[8] The main issue presented by the respondents' motion to quash the appeal is whether the 30-day period in which the

appellants are required to serve their notice of appeal from the dismissal of their action, as provided in rule 61.04(1), commenced on November 26, 2001, when the jury dismissed the appellants' claim, or on April 10, 2002, when the trial judge delivered her costs judgment.

[9] This issue takes on added significance in light of O. Reg. 284/01 that came into effect on January 1, 2002, and amended the costs provisions of the Rules of Civil Procedure. Rules 57.01 [page651] and 57.03 now require the court to fix costs in accordance with a costs grid established by Part I of Tariff A, save in "exceptional" cases when costs may be referred for assessment under Rule 58. After a trial, a motion that disposes of a proceeding or an application is completed, a party who is awarded costs must serve a bill of costs on the other parties and file it. On the basis of the bill of costs, the court will then fix the amount of costs in accordance with the costs grid.

[10] Where the court is able to give its decision at the conclusion of the hearing, it is usually able to fix costs at that time. The result is that it is able to decide the merits of the proceeding and award and fix costs at the same hearing. In other situations, particularly where the court has reserved its decision, or in circumstances like those that occurred in this case, a re-attendance by counsel or written submissions will be required for the court to decide the entitlement to costs, if any, as well as the scale and the amount of costs. When this occurs, of necessity there will be an interval, sometimes lengthy, between the court's decision on the merits and its decision on costs. Similarly, after this court releases a reserved judgment, there is usually a lengthy interval before it is able to consider counsels' submissions on costs and to release its costs judgment. Unfortunately, the interval between the court's merits judgment and its costs judgment is one of the consequences of the amendments of the Rules of Civil Procedure that require the court to fix the costs of proceedings on the basis of a costs grid and has resulted in some confusion as to when the time begins to run for serving a notice of appeal from the merits judgment.

Legislation and Rules of Civil Procedure

Courts of Justice Act, R.S.O. 1990, c. C.43

6(1) An appeal lies to the Court of Appeal from,

(a) an order of the Divisional Court, on a question that is not a question of fact alone, with leave of the Court of Appeal as provided in the rules of court;

(b) a final order of a judge of the Superior Court of Justice, except an order referred to in clause 19(1)(a) or an order from which an appeal lies to the Divisional Court under another Act.

. . . . .

17. An appeal lies to the Superior Court of Justice from,

. . . . .

(b) a certificate of assessment of costs issued in a proceeding in the Superior Court of Justice, on an issue in respect of which an objection was served under the rules of court. [page652]

. . . . .

131(1) Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

. . . . .

133. No appeal lies without leave of the court to which the appeal is to be taken,

. . . . .

(b) where the appeal is only as to costs that are in the discretion of the court that made the order for costs.

Rules of Civil Procedure

61.04(1) An appeal to an appellate court shall be commenced by serving a notice of appeal (Form 61A) together with the certificate required by subrule 61.05(1) on every party whose interest may be affected by the appeal, other than,

(a) a defendant who was noted in default; or

(b) a respondent who has not delivered a notice of appearance, unless he or she was heard at the hearing with leave,

and on any person entitled by statute to be heard on the appeal, within thirty days after the date of the order appealed from, unless a statute or these rules provide otherwise.

. . . . .

61.03.1(1) Where an appeal to the Court of Appeal requires the leave of that court, the motion for leave shall be heard in writing, without the attendance of parties or counsel.

. . . . .

(16) Where leave is granted, the notice of appeal shall be delivered within seven days after the granting of leave.

(17) Where a party seeks to join an appeal under clause 133(b) of the Courts of Justice Act with an appeal as of right,

(a) the request for leave to appeal shall be included in the notice of appeal as part of the relief sought;

(b) leave to appeal shall be sought from the panel of the Court of Appeal hearing the appeal as of right;

(c) where leave is granted, the panel may then hear the appeal.

(18) Where a party seeks to join a cross-appeal under clause 133(b) of the Courts of Justice Act with an appeal or cross-appeal as of right,

(a) the request for leave to appeal shall be included in the notice of appeal or cross-appeal as part of the relief sought; [page653]

(b) leave to appeal shall be sought from the panel of the Court of Appeal hearing the appeal or cross-appeal as of right;

(c) where leave is granted, the panel may then hear the appeal.

(19) Subrules (1) to (16) do not apply where subrules (17) and (18) apply.

. . . . .

61.08(1) The notice of appeal or cross-appeal may be amended without leave, before the appeal is perfected, by serving on each of the parties on whom the notice was served a supplementary notice of appeal or cross-appeal (Form 61F) and filing it with proof of service.

. . . . .

58.11 The time for and the procedure on an appeal under clause 6(1)(c) or 17(b) or subsection 90(4) of the Courts of Justice Act from a certificate of an assessment officer on an issue in respect of which an objection was served is governed by rule 62.01.

. . . . .

62.01(1) Subrules (2) to (10) apply to an appeal that is made to a judge,

. . . . .

(b) from a certificate of assessment of costs, under clause 6(1)(c) or 17(b) or subsection 90(4) of [the Courts of Justice Act];

. . . . .

(2) An appeal shall be commenced by serving a notice of appeal (Form 62A) on all parties whose interests may be affected by the appeal, within seven days after the date of the order or certificate appealed from.

. . . . .

59.04(1) Every order shall be submitted in accordance with subrules (5) to (9) for the signature of,

(a) in the case of an order of the Court of Appeal, the Registrar of the court;

. . . . .

unless the court, judge or officer who made the order has signed it.

. . . . .

(16) After an order has been settled under subrule (12) by the judge or officer who made it, or under subrule (13) or (14), the registrar shall sign it unless it was signed by a judge or officer at the time it was settled.

Analysis

[11] The appropriate starting point is an analysis of the

relevant provisions of the Courts of Justice Act ("CJA") and the Rules of Civil Procedure that apply to appeals to the Court of Appeal from a judgment of a judge of the Superior Court of Justice on the [page654] merits of a proceeding ("merits judgment") and a judgment on the costs of a proceeding ("costs judgment"). I use "proceeding" as a compendious term that includes trial, application, a motion in which a final order has been made and an order of the Divisional Court.

[12] As I will explain, when read together, ss. 6(1)(a) and (b), 131(1) and 133(b) of the CJA and rules 61.03.1(1), (16), (17) and (18) and rule 61.04(1), give rise to separate and discrete rights of appeal from a merits judgment and a costs judgment. However, these substantive rights will attract different procedural considerations, depending on the circumstances of particular proceedings. This can best be illustrated by reference to the two most common situations: (1) where the merits judgment and the costs judgment are part of the same proceeding, as when at the conclusion of a proceeding in which the judge determines the entitlement to costs, the scale of costs and the amount of costs after giving a decision on the merits; (2) where judgment has been reserved and the judge renders a costs judgment on the basis of written and/or oral submissions more than thirty days after the release of the merits judgment.

[13] In considering the first situation, s. 6(1)(b) of the CJA provides for an appeal as of right to the Court of Appeal on the merits in the circumstances described in that subsection, while s. 133(b) provides for an appeal as to costs, with leave of the Court of Appeal. Where the merits judgment and the costs judgment are rendered at the conclusion of the proceeding and an appeal as of right has been commenced, under rule 61.03.1(17) the request for leave to appeal costs must be included in the notice of appeal as part of the relief sought, leave to appeal shall be sought from the panel hearing the appeal and, where leave is granted, the panel may then hear both the merits appeal and the costs appeal. This procedure is explained in Murano v. Bank of Montreal (1998), 41 O.R. (3d) 222, 163 D.L.R. (4th) 21 (C.A.) at pp. 241-43 O.R., pp. 43-44 D.L.R.

[14] In considering the second situation, where a costs judgment is rendered more than 30 days after the rendering or release of the merits judgment and a notice of appeal from the merits judgment has been served and the appellant intends to appeal from the costs judgment, the procedure described in the previous paragraph is inapplicable, and a different procedure applies. Given that the right to appeal the costs judgment to the Court of Appeal with the leave of that court is given by s. 133(b) of the CJA, under rule 61.03.1(1) the appellant is required to move in writing for leave to appeal. Where leave is granted, the notice of appeal must be delivered within seven days after the [page655] granting of leave: rule 61.03.1(16). The result is that the appellant then has two appeals -- one from the merits judgment and the other from the costs judgment. This, in my view, produces an unsatisfactory situation and could involve expense to litigants and duplication in effort on the part of this court.

[15] Because many costs judgments will not be rendered until more than 30 days after the rendering of the merits judgment, in my view there is a better procedure available to the appellant under rule 61.08(1) that will enable the appellant to avoid this cumbersome procedure. Rule 61.08(1) permits an appellant to amend a notice of appeal without leave before an appeal is perfected. Where an appellant intends to appeal from the costs judgment in addition to the merits judgment, the notice of appeal should be amended to join the costs appeal with the merits appeal, thus enabling the procedure set out in rule 61.03.1(17) to apply. This would permit the panel of this court hearing the merits appeal to determine the request for leave to appeal from the costs judgment, and, if leave is granted, to hear that appeal.

[16] On the basis of this analysis, the CJA and the Rules of Civil Procedure clearly contemplate that a costs judgment, when the subject of a separate or collateral proceeding as in this case, is a separate determination rather than a part of the main merits proceeding. As such, it is a separate appealable judgment governed by its own procedure. Similarly, a merits judgment, whether rendered by a judge or granted by a judge in

accordance with a jury's verdict, is a separate appealable judgment, even though the costs consequences of the case remain to be decided by the trial judge.

[17] As I will explain, this analysis finds support in the case law, which underscores that litigants are best served by a rule which accords with the traditional understanding that a decision on the merits is final for the purpose of appeal when it is rendered, notwithstanding the pendency of the determination of the costs attributable to the case. It follows that the plaintiffs' notice of appeal from the merits judgment was not served within 30 days of the jury's verdict as required by rule 61.04(1). Subsequently, I will consider whether leave should be granted to extend the time for service of the notice of appeal to the date of its service.

[18] Before leaving this discussion, I should indicate that there appears to be an anomaly where the court determines the entitlement and scale of costs, but orders that costs be assessed. In this situation, there are two avenues of appeal. An appeal from the entitlement and scale of costs is governed by s. 133(b) of the CJA and lies to the Court of Appeal. However, under s. 17(b) of the [page656] CJA an appeal from a certificate of assessment of costs lies to the Superior Court of Justice.

[19] As I have noted, rule 61.04(1) requires that an appeal to this court shall be commenced "within thirty days after the date of the order appealed from". Pursuant to rule 1.03, an "order" includes a judgment and "'judgment' means a decision that finally disposes of an . . . action on its merits". In this case, it was the verdict of the jury on November 26, 2001, dismissing the appellants' claims that finally disposed of this action. It follows, for the purpose of rule 61.04(1), that the date of the order appealed from by the appellants is November 26, 2001. Therefore, their notice of appeal should have been served within 30 days from November 26, 2001.

[20] Counsel for the appellants takes the position that the release of the trial judge's costs decision on April 10, 2002, in effect, extended the time for serving the appellants' notice

of appeal from the merits judgment to 30 days following that date. The decision of this court in Re Permanent Investment Corporation Ltd. and Township of Ops and Graham, [1967] 2 O.R. 13, 62 D.L.R. (2d) 258 (C.A.) is cited as authority for this position. As I will explain, I do not agree with this submission.

[21] In Re Permanent Investment an appeal was taken from an order of Brooke J. pronounced on September 1, 1966, and varied by him on November 29, 1966, dismissing an application for an order of mandamus to compel the township to issue certain building permits. The variation made by Brooke J. was the result of a disagreement between the parties about whether the formal order of the court should provide that the dismissal of the application was "without prejudice to any further or other application". On November 29, 1966, Brooke J. held that these words should be deleted from the formal order on the ground that they were not in conformity with the order that he had pronounced on September 1, 1966. The respondents contended that as the appellants' notice of appeal was not delivered until December 6, 1966, it was out of time because it should have been delivered within fifteen days of the date on which the order had been pronounced, as required by the Rules of Practice as they read at that time.

[22] This court disagreed for the reasons given by Schroeder J.A. at pp. 24-25 O.R.:

> Lastly, it was contended by counsel for the respondents that the appeal from the order pronounced on September 1, 1966, notice of which was not served until December 6, 1966, was out of time. While under the Rules the time for appealing generally runs from the date of pronouncement of the judgment or order, where any substantial matter remains to be determined on the settlement of a judgment or order the time for appealing will run from the [page657] date of entry thereof: O'Sullivan v. Harty (1885), 11 S.C.R. 322; Wallace et al. v. Bath (1904), 7 O.L.R. 542, and County of Elgin v. Robert (1905), 36 S.C.R. 27 at p. 32. It was contended that on December 6th more than 15 days had expired from the date of entry of the order pronounced on September 1, 1966, and

> that even if that standard were to be applied the appeal was still out of time. I take the view that the respondents having moved to vary the order as entered, the time for appealing did not commence to run until November 29, 1966, when Brooke, J., made an order directing that the words "without prejudice to any further or other application" be deleted from the formal order dated September 1, 1966. It was only then that there was a final determination of the issue upon which the respondents, despite the earlier consent given by their solicitor, sought an adjudication. It follows that the appeal from the first order is in time and that it is competent to this Court to entertain.

(Emphasis added)

[23] The appellants contend that as the costs of the trial remained to be determined on the date of the jury's verdict, costs constituted a "substantial matter [remaining] to be determined", with the result that the time for serving their notice of appeal did not begin to run until the pronouncement of the costs judgment on April 10, 2002.

[24] O'Sullivan v. Harty, [See Note 1 at end of document] one of the authorities on which Schroeder J.A. relied, was one of a number of cases decided by the Supreme Court of Canada in the late 19th century and the early 20th century in which the Supreme Court considered the event from which the time to serve a notice of appeal was to be calculated. At that time, the relevant legislation provided for the service of a notice of appeal "within thirty days from the signing or entry or pronouncing of the judgment appealed from": Supreme and Exchequer Courts Act, R.S.C. 1886, c. 135, s. 40.

[25] There is a similarity in the facts of this case and those of O'Sullivan where judgment was pronounced in the Ontario Court of Appeal on June 30, 1884, but was not entered until November 14, 1884. The entry of the judgment was delayed as it became necessary for the parties to return to the Court of Appeal for the purpose of determining which party was to pay the costs of the appeal. The issue before the Supreme Court was whether the time for serving the notice of appeal began to run

on June 30, 1884 or November 14, 1884. Sir W.J. Ritchie C.J. resolved the issue as follows as p. 432 S.C.R.: [page658]

> The decision was pronounced in June, but the minutes were not settled and entered until some time in the autumn. The question is whether the time runs from the date of the pronouncing of the judgment, or from the entry of the certificate. I understand the practice in Quebec to be that the judgment is always entered as of the date on which it was pronounced, and therefore no question can arise as to appeals coming from the Province of Quebec; and also in Ontario where there is simply a judgment declaring that the appeal is dismissed or allowed as the case may be, and there is nothing more to be done; but when the decision requires something more to be done at the settlement of the minutes, as in this case whether the plaintiff should be held personally liable for the costs, then I think that until the settlement of the minutes and entry of the certificate a party should not be compelled to take his appeal. I am therefore inclined to think the time ought to run in this case from the date of the entry of the certificate, which was entered on the 14th of November last.

(Emphasis added)

[26] O'Sullivan was explained by the Supreme Court in Walmsley v. Griffith (1886), 13 S.C.R. 434. In Walmsley, the issue was whether the time for appealing ran from the date of the pronouncing of the judgment of the Ontario Court of Appeal, October 15, 1884, or from December 16, 1884, when the judgment was entered. Unlike O'Sullivan, nothing remained for the Court of Appeal to do from the time the judgment was pronounced until it was entered. The Court of Appeal, relying on O'Sullivan, concluded that the time to appeal did not begin to run until the judgment was entered. At p. 438 S.C.R., Sir W.J. Ritchie C.J. explained O'Sullivan as follows:

> What we decided in that case was:
>
> That where any substantial matter remains to be determined before the judgment can be entered the time for appealing

> runs from the entry of the judgment. Where nothing remains to be settled, as for instance in the case of the simple dismissal of a bill, or where no judgment requires to be entered, the time for appealing runs from the pronouncing of the judgment. The Court of Appeal, however, appears to have been under the impression that this court had laid down a cast-iron rule that the time should run in every case from the entry of the judgment.

Consequently, in Walmsley the time for appeal began when the judgment was pronounced.

[27] In Martley v. Carson (1886), 13 S.C.R. 439, the issue was whether the time for appealing commenced when the judgment was pronounced or when it was varied by the court by striking out certain declarations and also with respect to the costs payable by one of the parties. Applying O'Sullivan, the Supreme Court held that as there were substantial questions to be decided before the judgment could be entered, the time for appealing ran from the date of the entry of the judgment.

[28] In Winnipeg (City) v. Wright (1887), 13 S.C.R. 441, in which the issue was whether the Supreme Court ought to [page659] interfere with an order made in chambers by Taschereau J. dismissing an appeal on the ground that it was brought out of time, Sir W.J. Ritchie C.J. referred to three English cases which considered the rights of parties arising from judgments pronounced in their favour. After stating that the cases had a "bearing" on O'Sullivan and Walmsley, he quoted at length from the reasons for judgment delivered in International Financial Society v. City of Moscow Gas Company (1877), 7 Ch. Div. 244, Craig v. Phillips (1887), 7 Ch. Div. 250 and Ex parte Hinton, In re Hinton (1875), L.R. 19 Eq. 266, 44 L.J. Bcy. 36 where the court considered the circumstances in which it could exercise its discretion to extend the time for commencing an appeal. The propositions derived from these cases are:

(a) a judgment takes effect from the time when it is actually pronounced;

(b) a judgment on the merits is final and appealable when it finally disposes of the proceeding, there is nothing to be done and the litigation is at an end; and

(c) it is at that time that the unsuccessful party is able to see from what he or she is appealing, and the successful party knows that if an appeal is not brought within the period permitted by the procedural rules that he or she can rely upon the judgment or order in their favour.

[29] In Elgin (County) v. Robert (1905), 36 S.C.R. 27, at pp. 32-33, the Chief Justice approved the following passages from the reasons of the Registrar refusing to extend the time in which to commence an appeal:

> In O'Sullivan v. Harty [13 Can. S.C.R. 431], and Martley v. Carson (13 Can. S.C.R. 439) where the court held that the time ran from the date of the entry of the judgment, we find that questions arose upon settlement of the minutes by the Registrar which were brought before the court appealed from for determination, and this, it seems to me, was the factor which, in the view of the Supreme Court, determined in these cases the date from which the time should begin to run.
>
> In my opinion, according to the jurisprudence of the Supreme Court, the date from which time begins to run in appeals under sec. 40 of the Act is always the date of the pronouncing of the judgment, unless an application is made to the court appealed from to review some decision made by the Registrar on the settlement of the minutes, or some substantial question affecting the rights of the parties has not been clearly disposed of by the judgment as pronounced, and the determination of this has delayed the settlement of the minutes.

(Emphasis added) [page660]

[30] Elgin was referred to by Schroeder J.A. in Re Permanent Investment, as was the decision of Osler J.A. in Wallace v. Bath (1904), 7 O.L.R. 542 (H.C.). In Wallace, as in O'Sullivan, the issue was whether the time to appeal commenced from the

date when the Master released his reasons for judgment in a mechanic's lien action, or from the later time when costs of the action were decided on the entry of the judgment. Osler J.A. resolved the issue in this way at p. 543 O.L.R.:

> I am of opinion that the month within which, by Rule 799, notice of appeal is to be given, ran in this case, under the circumstances, from the signing of the judgment on the 12th March, and not the 24th February, the day on which the Master signed his findings and decision, or the 26th February when the parties received the copy thereof. The findings and decision do not represent the judgment as signed and entered, as it is by the latter alone that any order or judgment has been pronounced or awarded as to the costs. The case stood as if the question of costs had been reserved, and the judgment was incomplete until they had been awarded. The date of signing the judgment is, therefore, the only date which can be looked to. O'Sullivan v. Harty (1885), 13 S.C.R. 431, and Walmsley v. Griffith (1886), ib. 434, may be cited for the principle.

(Emphasis added)

[31] Given that no formal judgment has been signed or entered in this case in respect to either the merits judgment or the costs judgment, reference should be made to two early Ontario decisions, Hickey v. Stover (1885), 11 P.R. 88 (Ont. Div. Ct.) and Fawkes v. Swayzie (1899), 31 O.R. 256 (Div. Ct.). These cases stand for the proposition that the time for appealing runs from the date that a judgment is pronounced and not from the date that it is signed and entered. This proposition is based on the settled principle that the binding effect of a judgment or order commences on the date of its pronouncement. This principle has been given effect by rule 59.01 which provides that an order (which includes a judgment) is effective from the date on which it is made, unless it provides otherwise, and by rule 59.03(3)(b) which requires that every formal order shall contain the date on which it was made. The formal judgment must be signed and entered, however, before the appellant's appeal can be perfected.

[32] A relatively early decision of this court which anticipated the holding in Re Permanent Investment, but was not referred to by Schroeder J.A. in that case, is Hyman v. Kinkel, [1938] O.W.N. 135 (C.A.). In that case the issue was whether the time to appeal to the Supreme Court of Canada commenced on the date that the judgment of the Court of Appeal was pronounced, or from the date on which the court clarified certain aspects of its judgment that were uncertain and upon which the court had not adjudicated. In resolving the issue, Middleton J.A. held at pp. 135-36 O.W.N.: [page661]

> It was determined by the Supreme Court in three cases reported in 13 Supreme Court Reports, O'Sullivan v. Harty (1883), 13 S.C.R. 431; Walmsley v. Griffith, ib. 434; Martley v. Carson, ib. 439, that where a judgment was uncertain and required something to be done on the settlement of the minutes, time did not start to run until after the Court had finally settled the judgment. In such a case the time runs from the entry of the judgment and not from the date of its original pronouncement.
>
> Here the Court did not determine either of the two matters concerning which the minutes were spoken to until the 10th of November, and the judgment was finally settled and issued on the 9th of December. Time commenced to run for the purpose of an appeal on that date.

[33] A similar conclusion was reached by the Manitoba Court of Appeal in Re Ferguson, Ferguson v. Ferguson and National Trust Co., [1944] 4 D.L.R. 28 (Man. C.A.). After reviewing the Supreme Court decisions, as well as Hyman, McPherson C.J.M. reached this conclusion at p. 31 D.L.R.:

> In view of the above decisions, I am of the opinion that the time begins to run under the section from the date judgment is pronounced, unless it can be shown that further application to the Court has to be made on the settlement of the minutes on some substantial question affecting the rights of the parties which had not been clearly disposed of in the judgment. No such difficulty arose in this case, and I would hold that the time within which an appeal could be brought

had expired.

(Emphasis added)

[34] The decision of the British Columbia Court of Appeal in Texaco Canada Ltd. v. Oak Bay (City) (1970), 72 W.W.R. 557 (B.C.C.A.) is helpful because its circumstances were similar to those in this appeal. Following the judgment of Wilson C.J.S.C. refusing a motion for a writ of mandamus, a supplementary motion was made asking that he adjudicate the costs of the original motion. The issue was whether the time for appealing the merits judgment commenced from the date of its pronouncement or from the date on which the costs judgment was delivered. In holding that the costs judgment did not have the effect of extending the time for appealing the merits judgment, Nemetz J.A. stated at p. 559 W.W.R.:

> The only question that troubled me at an earlier stage was whether the supplementary motion made to the learned chief justice in regard to costs would vary the requirement set out in the time provision. Having examined Frumento v. Shortt, Hill & Duncan Ltd. (1916), 22 B.C.R. 427 (especially what was said by Macdonald, C.J.A. at p. 430) I now have no doubt on this matter at all. In dealing with the question of a supplementary matter that arose in that case, Martin J.A. (at p. 431) said this: ". . . it is impossible to support the contention that the implementing order regarding costs had any effect on the finality of a judgment." In this case, it seems to me that the question of costs had no effect on the finality of the judgment, which was, of course, the refusal of the motion for the mandamus. [page662]

[35] In Frumento [Frumento v. Shortt, Hill & Duncan Ltd. (1916), 22 B.C.R. 427 (C.A.)], to which reference was made by Nemetz J.A., in rejecting the contention that a costs order extended the time for appealing from the merits judgment, Martin J.A. stated at p. 431 B.C.R.:

> It is clear that the final judgment was submitted to the counsel on the other side on the 4th and 9th, I think, and nothing was done for over a month. That disposes of the whole

matter, in view of the fact that it is impossible to support the contention that the implementing order regarding costs had any effect on the finality of the judgment; it was something that had really no bearing on that aspect of the case.

[36] It is necessary to recognize that the conclusion in Texaco Canada Ltd. that the subsequent decision on costs did not extend the time for appealing from the merits judgment to when the costs judgment was rendered is at odds with the result of the early cases of O'Sullivan v. Harty and Wallace v. Bath in which the opposite conclusion was reached. In each case the view of the court was that the judgment was incomplete until costs had been awarded, with the result that the time to appeal did not begin to run until that time. Subsequent cases have reached the same result as Texaco Canada Ltd. As I will explain, this is the correct result where the court determines cost issues by way of a discrete proceeding subsequent to rendering its decision on the merits of the original proceeding.

[37] A similar issue was considered by the Nova Scotia Court of Appeal in Blundon v. Storm (1970), 10 D.L.R. (3d) 576, 1 N.S.R. (2d) 621 (C.A.) where the appellants unsuccessfully contended that the time for appealing the merits judgment did not commence until the court appealed from had settled the outstanding question of the distribution of costs. In the view of Coffin J.A., the resolution of a question concerning costs did not constitute a substantial question affecting the rights of the parties that would extend the time for appealing from a judgment on the merits.

[38] Finally, I will refer to several recent Ontario trial court decisions that considered whether a costs award constitutes a "substantial matter [remaining] to be determined" within the contemplation of Re Permanent Investment and, thus, extends the time from which to appeal a merits judgment to the date of the costs judgment. Although these decisions are merely conclusory, they are uniform in holding that a costs judgment does not have that effect. See: Atkinson v. Ault Foods Ltd., [1997] O.J. No. 5222 (Quicklaw) (Gen. Div.); Hilltop Group Ltd.

v. Katana (1998), 117 O.A.C. 384 (Div. Ct.); Lancer Partners v. Handleman Co. of Canada, [1999] O.J. No. 4033 (Quicklaw) (S.C.J.); Baksh v. Sun Media (Toronto) Corp., [2002] O.J. No. 2272 (Quicklaw) (S.C.J.). [page663]

[39] It is instructive to note that the Supreme Court of the United States has considered this issue, albeit in the context of attorney's fees which, for the purposes of my analysis, may be considered as the equivalent of costs in Ontario. The Supreme Court has determined that a decision on the merits is final and appealable prior to when the court that rendered the decision makes a determination on the payment of attorney's fees.

[40] In White v. New Hampshire Dept. of Employment Security, 455 U.S. 445 (1982), the Supreme Court held that an attorney's fees award is independently appealable as it is not inherent in, or necessarily assumed by, the decision on the merits. In Budinich v. Becton Dickinson & Co., 486 U.S. 196 (1988), the Supreme Court considered White and other cases in the following analysis from the opinion of Justice Scalia at pp. 199-201:

> The question before us, therefore, is whether a decision on the merits is a "final decision" as a matter of federal law under 1291 when the recoverability or amount of attorney's fees for the litigation remains to be determined. "A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Catlin v. United States, 324 U.S. 299, 233 (1945). A question remaining to be decided after an order ending litigation on the merits does not prevent finality if its resolution will not alter the order or moot or revise decisions embodied in the order. See, e.g., Brown Shoe Co. v. United States, 370 U.S. 294, 308-309 (1962); Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 513-516 (1950). We have all but held that an attorney's fees determination fits this description. In White v. New Hampshire Dept. of Employment Security, 455 U.S. 445 (1982), we held that a request for attorney's fees under 42 U.S.C. 1988 is not a motion "to alter or amend the judgment" within the meaning of Federal Rule of Civil Procedure 59(e) because it does not

seek "reconsideration of matters properly encompassed in a decision on the merits." 455 U.S., at 451. This holding was based on our conclusion that "a request for attorney's fees under 1988 raises legal issues collateral to" and "separate from" the decision on the merits. Id., at 451-452. We went so far as to observe in dicta that "[t]he collateral character of the fee issue establishes that an outstanding fee question does not bar recognition of a merits judgment as 'final' and 'appealable.'" Id., at 452-453, n. 14. See also Sprague v. Ticonic National Bank, 307 U.S. 161, 170 (1939) (observing that a petition for attorney's fees in equity is "an independent proceeding supplemental to the original proceeding and not a request for a modification of the original decree").

The foregoing discussion is ultimately question-begging, however, since it assumes that the order to which the fee issue was collateral was an order ending litigation on the merits. If one were to regard the demand for attorney's fees as itself part of the merits, the analysis would not apply. The merits would then not have been concluded, and 1291 finality would not exist. See Liberty Mutual Insurance Co. v. Wetzel, 424 U.S. 737, 740-742 (1976). As a general matter, at least, we think it indisputable that a claim for attorney's fees is not part of the merits of the action to which the fees pertain. Such an award does not remedy the injury giving rise to the action, and indeed is often available to the party defending against the action. At common law, attorney's fees were regarded as an element of "costs" awarded to the prevailing [page664] party, see 10 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure: Civil 2665 (1983), which are not generally treated as part of the merits judgment, cf. Fed. Rule Civ. Proc. 58 ("Entry of the judgment shall not be delayed for the taxing of costs"). Many federal statutes providing for attorney's fees continue to specify that they are to be taxed and collected as "costs," see Marek v. Chesny, 473 U.S. 1, 43-48 (1985) (BRENNAN, J., dissenting) (citing 63 such statutes) -- as does, in fact, the Colorado statute at issue here.

Conclusion

[41] I find the reasoning of the Supreme Court of the United States, together with the authorities that I have reviewed, helpful in formulating my response to the appellants' contention that in the circumstances of this case Re Permanent Investment extended the commencement of time for appealing from the dismissal of their claim until the date the trial judge pronounced her judgment on costs. In Re Permanent Investment, this court held that "where any substantial matter remains to be determined on the settlement of a judgment or order the time for appealing will run from the date of entry thereof". Earlier cases, such as Elgin (County) v. Roberts in 1905 and Re Ferguson in 1944, stated this proposition somewhat differently, in terms of a "further application to the Court . . . on some substantial question affecting the rights of the parties which had not been clearly disposed of in the judgment". Thus, in my view, the substantial matter that remains to be determined is one that affects the rights of the parties. What these cases, and others, recognize is that the court possesses the power to alter, modify or amend its judgment, or to rectify its own mistake, following the release of its decision and before it has been signed as the formal judgment of court and entered. In other words, the court may reconsider matters properly encompassed in its decision on the merits before it is entered. When the court does so, and alters or modifies its merits judgment, the time for service of the notice of appeal from that judgment commences when that judgment has been altered or modified and entered.

[42] By contrast, a request for costs, including the scale and the amount of costs, raises legal issues collateral to the main cause of action. Generally, costs are awarded to the successful party and provide that party with partial or substantial indemnity for the expenses of the litigation, to be paid by the unsuccessful party. In my view, costs cannot fairly be characterized as an element of the relief sought in the main proceeding. Unlike other judicial relief, costs are not compensation for the injury (in the broad sense of that word) giving rise to a proceeding in which damages or other monetary relief, is claimed. In many proceedings no monetary [page665] relief is claimed. Thus, an award of costs is uniquely

separable from the cause of action to be proved at trial, or by way of application, or from the decision of an appellate court.

[43] It follows that a request for costs is unlike a motion to alter, modify or amend a judgment within the contemplation of Re Permanent Investment. A request for costs does not imply a change in the judgment, but merely seeks what is due because of the judgment. A decision on costs requires an inquiry separate from the decision on the merits, an inquiry that cannot commence until one party has prevailed on the merits. This is most obvious in a case such as this where the decision on the merits follows the verdict of a jury. Thus, an unresolved issue of the costs of a proceeding at the time the proceeding is decided on its merits does not prevent the judgment on the merits from taking effect and becoming final and appealable from the date that it is rendered. Under rule 61.04(1), a notice of appeal must be served within 30 days from that date. The subsequent resolution of costs does not extend the time for appealing the decision on merits to when the court has pronounced its costs judgment, from which a separate appeal lies under s. 133(b) of the CJA. It follows that the appellants' notice of appeal was served out of time.

[44] What emerges from the foregoing analysis is that it is the procedure by which a costs determination is made that will determine whether the costs award is a separately appealable judgment, or whether it is appealable as an element of an appeal on the merits. In a proceeding where costs are determined by the court at the conclusion of the hearing, and where an appeal is taken from the merits judgment and leave to appeal costs is sought, as discussed in Murano v. Bank of Montreal and provided for by rule 61.03.1(17), the request for leave to appeal must be included in the notice of appeal as part of the relief sought. Where costs are awarded in a proceeding subsequent to the judgment on the merits, this is a separately appealable judgment governed by s. 133(b) of the CJA. If the party that has appealed the merits judgment also intends to appeal from the costs judgment, as a practical matter, as I have described in para. 15, that party should amend its notice of appeal from the merits judgment to add a motion for leave to appeal from the costs judgment to enable

the panel hearing the merits appeal to consider the costs appeal as well. Such a case-by-case approach seems inevitable given the amendments to the Rules of Civil Procedure that require the court to fix the costs of a proceeding. [page666]

Extension of time to serve the plaintiffs' notice of appeal

[45] In response to the motion to quash their appeal, the appellants neglected to request that the court exercise its discretion pursuant to rule 3.02(1) to extend the time for service of their notice of appeal in the event that we should find that it was not served within the time stipulated by rule 61.04(1). While the court was considering the merits of the motion to quash the appeal, it asked counsel to present written submissions on this issue. Having reviewed the submissions of the parties, it is my opinion that the time to serve the notice of appeal should be extended to April 23, 2002, the date on which it was in fact served.

[46] On a number of occasions, this court has reviewed the factors that it will consider in the exercise of its discretion under rule 3.02(1). Most recently, relying on Frey v. MacDonald (1989), 33 C.P.C. (2d) 13 (Ont. C.A.), Simmons J.A. referred to the following factors in Kefeli v. Centennial College of Applied Arts and Technology, [2002] O.J. No. 3023 (Quicklaw) (C.A.) at para. 14:

> In determining whether to extend the time for filing a notice of appeal the court will generally consider whether the appellant formed an intention to appeal within the relevant time period, the length of the delay, any prejudice to the respondent, and the merits of the appeal. The general rule that the appellant must have formed an intention to appeal within the relevant time period and must provide a reasonable explanation for any subsequent delay is subject to a broader principle that an extension should be granted if the justice of the case requires it.

[47] In an earlier case, Bratti v. Wabco Standard Trane Inc. (c.o.b. Trane Canada) (1994), 25 C.B.R. (3d) 1 (Ont. C.A.) at p. 3, Laskin J.A. expressed the test somewhat more broadly:

> While appellate courts have considered a number of different factors in determining whether to grant leave to extend the time for appealing, the governing principle is simply whether the "justice of the case" requires that an extension be given. See Frey v. MacDonald (1989), 33 C.P.C. (2d) 13 (per Blair J.A.).

In my view, this analysis imports an overriding objective on a motion to extend the time to appeal, as reflected in rule 1.04(1), to deal with cases justly and if fairness demands, an extension of time should be granted. See also Duca Community Credit Union Ltd. v. Giovannoli (2001), 4 C.P.C. (5th) 189 (Ont. C.A.) per MacPherson J.A. at p. 192.

[48] Although I confess that it is a close call, I am persuaded that the appellants have satisfied the first two factors referred to by Simmons J.A. As well, in my view "the justice of the case" requires that an extension of the time for service of the notice of [page667] appeal should be granted. Moreover, the respondents have conceded that they have not been prejudiced by the appellants' delay in serving their notice of appeal.

[49] As for the first two factors, I discern from the correspondence between counsel for the appellants and CPEA that the appellants had always intended to appeal from the jury's verdict dismissing their action. Their intention to appeal is supported by their counsel's mistaken beliefs that the time to appeal from the merits decision did not begin to run until the trial judge delivered her costs decision and that a notice of appeal could not be served until the formal judgment had been "finalized and dated". As I have explained in para. 5, counsel for the parties have been unable to agree on the form and content of the formal judgment. Consistent with the appellants' intention to appeal from the merits judgment and their counsel's belief that time to appeal did not begin to run until after the release of the trial judge's costs judgment is the service of their notice of appeal within two weeks of the release of the costs judgment.

[50] The failure to comply with rule 61.04(1) was certainly not intentional. There is an explanation for the failure which, even if it cannot be characterized as "good", is not unreasonable and is one which ought to incline this court in the relatively early days of the new costs regime to be generous, everything else being equal.

[51] The "justice of the case" requires a consideration of the merits of the appeal. It appears that this was a complex liability and catastrophic damage action which required four weeks to be tried. The trial judge required almost an entire day to instruct the jury. In their notice of appeal, the appellants allege that the trial judge made a number of erroneous rulings in respect to evidentiary issues and that she committed several reversible errors in instructing the jury. Indeed, it is alleged that the trial judge further erred in permitting the jury to commence deliberating before the appellants' counsel had completed his objections to her instructions and in accepting the jury's verdict before counsel had completed his objections. In the circumstances, I cannot say that there is so little merit in the appeal that the appellants should be denied their important right of appeal.

Result

[52] Although the respondents are correct in submitting that the appellants failed to serve their notice of appeal from the dismissal of their action within the 30 days stipulated by rule 61.04(1), consequent to my decision to extend the time to serve the notice of appeal to the date on which it was in fact served I [page668] would dismiss the respondents' motion to quash the appeal. As counsel have not had an opportunity to address the costs of this motion, if the parties are unable to reach an agreement on costs, the appellants are to file written submissions within 14 days from the release of these reasons and the respondents are to file their responding submissions within ten days from their receipt of the appellants' submissions.

[53] There is one final matter to address. In addition to seeking an order quashing the appellants' appeal, the

respondents Pentex and Black seek an order permitting them "to continue" their cross-appeal, served on May 1, 2002, from the trial judge's costs judgment. In the circumstances, it is unnecessary to make such an order. As I explained in paras. 12-15, the respondents' costs cross-appeal is governed by s. 133(b) of the CJA and rule 61.03.1(1) and (18).

Order accordingly.

Notes

Note 1: The citation given for this case in the reasons of Schroeder J.A. is the citation for the result of the appeal. The correct citation on the procedural issue is O'Sullivan v. Harty (1885), 13 S.C.R. 431.