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THE GOVERNMENT OF CANADA (*Respondent*) ..... APPELLANT;

*Jan. 24
Mar. 27

AND

THE GOVERNMENT OF THE PROVINCE OF NEWFOUNDLAND (*Claimant*) ..... RESPONDENT.

AND

THE ATTORNEY GENERAL OF CANADA ON BEHALF OF HER MAJESTY THE QUEEN IN RIGHT OF CANADA ..... APPELLANT;

AND

THE GOVERNMENT OF THE PROVINCE OF NEWFOUNDLAND (*Claimant*) ..... RESPONDENT.

MOTIONS TO QUASH PROCEEDINGS BY WAY OF CROSS-APPEAL

Courts—Order of Exchequer Court for examination for discovery of Crown official—Applications for leave to appeal to Supreme Court granted—Whether notices of cross-appeal appeals in substance—Whether leave of Judge of Supreme Court required—Exchequer Court Act, R.S.C. 1952, c. 98—Supreme Court Act, R.S.C. 1952, c. 259—Supreme Court rules 63 and 100.

In an action with respect to an alleged breach of an agreement between the Government of Canada and the Government of the Province of Newfoundland, pertaining to employment of the Royal Canadian Mounted Police, a notice of motion was served on behalf of Newfoundland, pursuant to Exchequer Court rule 130, for the examination for discovery of a departmental or other officer of the Crown. The notice did not name the officer sought to be examined. At the hearing of the motion counsel for Newfoundland requested that the person to be examined should be the Attorney General of Canada. In the event that such request should be denied, the suggestion was made that the then Deputy Minister of Justice should be the officer named and that, failing the naming of either of these, an officer who was one of the then Assistant Deputy Ministers should be named. In his judgment the President of the Exchequer Court directed that the Assistant Deputy Minister, who in the meantime had been appointed Deputy Minister, be examined.

*PRESENT: Kerwin C.J. and Taschereau, Locke, Cartwright, Fauteux, Martland, Judson and Ritchie JJ.

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Applications on behalf of Canada and the Attorney General of Canada for leave to appeal to this Court from the order of the Court below having been granted, notices of cross-appeal were served on behalf of Newfoundland pursuant to Supreme Court rule 100. Motions were then brought for orders quashing the proceedings by way of cross-appeal commenced by Newfoundland, on the ground that no appeal lies to this Court from an interlocutory judgment pronounced by the Exchequer Court except with leave of a judge of this Court and Newfoundland had neither sought nor obtained such leave.

Held: The motions should be dismissed.

Had there been no appeal taken by Canada, Newfoundland could not have appealed from the order of the President of the Exchequer Court without first obtaining leave; but the notices which it was sought to quash were not the initiation of appeals by Newfoundland, they gave notice that on the hearing of Canada's appeals Newfoundland would ask the Court to exercise in a particular way the jurisdiction which it possessed by reason of the fact that those appeals were properly before it, a jurisdiction which it was free to exercise whether or not notice under rule 100 had been served.

While the notices served by Newfoundland were not necessary to clothe this Court with jurisdiction to give the relief for which they asked, it was proper to serve them.

The procedure to be followed by a respondent in an appeal taken to this Court who wishes to cross-appeal or to contend that the decision of the Exchequer Court should be varied is regulated by rule 100. The question whether this Court has jurisdiction to entertain an appeal brought from a decision of the Exchequer Court must be determined by reference to the provisions of the *Exchequer Court Act*, but once that question has been answered in the affirmative the procedure to be followed by a respondent who seeks a variation of the judgment appealed from and the powers of this Court to treat the whole case as open and to give the judgment that the Court appealed from should have given are to be found in the *Supreme Court Act* and the rules made thereunder.

British American Brewing Company Ltd. v. The King, [1935] S.C.R. 568, considered.

MOTIONS to quash proceedings by way of cross-appeal commenced by the respondent by notice of cross-appeal from an order of Thorson P. of the Exchequer Court of Canada directing the examination for discovery of a Crown official.

W. R. Jackett, Q.C., for the respondent, appellant.

K. E. Eaton, for the claimant, respondent.

The judgment of Kerwin C.J. and of Judson J. was delivered by

THE CHIEF JUSTICE:—I am not persuaded that the respondent has the right to proceed as it did but as the majority of the Court are of a contrary opinion, I do not register a formal dissent.

The judgment of Taschereau, Locke, Fauteux, Abbott, Martland and Ritchie JJ. was delivered by

CARTWRIGHT J.:—These are motions brought on behalf of the appellant for orders "quashing the proceedings by way of cross-appeal commenced herein by the respondent by notice of cross-appeal dated the 31st day of October 1960 on the ground that no appeal lies to the Supreme Court of Canada from an interlocutory judgment pronounced by the Exchequer Court except with leave of a judge of the Supreme Court of Canada and the respondent has neither sought nor obtained leave as required by law". As a matter of convenience the appellant will hereinafter be referred to as "Canada" and the respondent as "Newfoundland".

On October 2, 1959, pursuant to s. 30 of the *Exchequer Court Act*, a statement of claim was filed in the Exchequer Court on behalf of Newfoundland as claimant, commencing proceedings against Canada as respondent. The statement of claim alleged an agreement dated June 12, 1957, between the Government of Canada and the Government of the Province of Newfoundland although the agreement referred to is in fact expressed to be between Her Majesty the Queen in right of Canada, of the first part, and the Government of the Province of Newfoundland, of the second part. This document has reference to the employment in Newfoundland of the Royal Canadian Mounted Police Force or any portion thereof, in aiding the administration of justice in the province and in carrying into effect the laws of the legislature of the province. Clause 13 provides:

> 13. Where in the opinion of the Attorney General of the Province an emergency exists within the province requiring additional members of the Force to assist in dealing with such emergency, Canada shall, at the request of the Attorney General of the Province addressed to the Commissioner, increase the strength of the division as requested if in the opinion of the Attorney General of Canada, having regard to other responsibilities and duties of the Force, such increase is possible.

The Commissioner referred to is the Commissioner of the Royal Canadian Mounted Police Force. The claim is for a declaration that the agreement is valid and subsisting, that Canada is in breach of Clause 13, and for damages.

The statement of defence was filed on November 12, 1959. Pursuant to Exchequer Court Rule 130 a notice of motion was served on behalf of the claimant on December 2,

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1959, for an order for the examination for discovery of a departmental or other officer of the Crown. The notice did not name the officer sought to be examined. The motion was returnable before the Presiding Judge in Chambers of the Exchequer Court on December 17, 1959; it came on before the President on January 12, 1960, when it was adjourned to February 23, 1960. In the meantime, pursuant to leave granted by the President, an affidavit was filed on behalf of the claimant which had as an exhibit a copy of the agreement of June 12, 1957, showing that the parties to the agreement were as noted above instead of as mentioned in the statement of claim. That affidavit also contained the following paragraphs:

3. That I am informed and verily believe that the Honourable Edmund Davie Fulton is the Minister of Justice of Canada and Her Majesty's Attorney General of Canada, appointed pursuant to the Department of Justice Act, Revised Statutes of Canada 1952, Chapter 71.

4. That I am informed and verily believe that Wilbur Roy Jackett is the Deputy Minister of Justice and the Deputy Attorney General of Canada, appointed pursuant to the said Act.

5. That I am informed and verily believe that Elmer A. Driedger and Guy Favreau are Assistant Deputy Ministers of Justice, appointed pursuant to the said Act.

6. That I believe that the persons mentioned in paragraphs 3, 4 and 5 of this affidavit are officers of the Respondent who are in positions of responsibility and authority and are qualified to represent the Respondent on examination for discovery in this proceeding, make discovery of the relevant facts within the knowledge of the Respondent and make such admissions on its behalf as may properly be made.

As appears from the reasons for judgment, when the motion came on for argument on February 23, 1960, the first request made to the President by counsel for the claimant was that the person to be examined should be the Attorney General of Canada. In the event that such request should be denied, the suggestion was made that the then Deputy Minister of Justice should be the officer to be named and that, failing the naming of either of these, Mr. E. A. Driedger, Q.C., of the Department of Justice, should be named.

Judgment upon this motion was delivered on July 15, 1960. The President refused to name the Attorney General of Canada as he was of opinion that the Attorney General was not an officer of the Crown within the meaning of Rule 130; he refused to name the then Deputy Minister of

Justice as that officer had been instructed to act as senior counsel for the respondent in the proceedings, and directed that Mr. Driedger, who in the meantime had been appointed Deputy Minister of Justice and Deputy Attorney General, be examined.

At the same time the President considered that it would be appropriate that the style of cause should be changed so that the party against whom the proceedings were taken should be described as Her Majesty the Queen in right of Canada instead of the Government of Canada, and that the statement of claim should be amended so that the allegations in it might conform to the agreement in order to make it clear that any reference in it to the Government of Canada or to Canada meant Her Majesty the Queen in right of Canada and it was so ordered. It does not appear whether the necessary steps were taken by the claimant to carry out the order of the President that the style of cause be amended, but it may be assumed that this either has been done or will be done.

Two notices of motion for leave to appeal to the Supreme Court of Canada from the order of the President of July 15, 1960, were thereupon served, on behalf of Canada. Both notices used the old style of cause, i.e., The Government of the Province of Newfoundland, claimant, and The Government of Canada, respondent. In one the application was made on behalf of the Attorney General of Canada asking for leave to appeal from the President's order; this was signed by Mr. Driedger as Deputy Attorney General of Canada. In the other notice of motion, which was for the same purpose, the application was made on behalf of the respondent as originally named in the statement of claim and was signed by Mr. Driedger, as solicitor for the respondent. These applications came before the Chief Justice of Canada who made the orders requested on October 25, 1960.

The appeals are brought pursuant to s. 82(1)(*b*) of the *Exchequer Court Act*, which reads:

> 82. (1) An appeal to the Supreme Court of Canada lies
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> * * *
>
> (*b*) with leave of a judge of the Supreme Court of Canada, from an interlocutory judgment,
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> pronounced by the Exchequer Court in an action, suit, cause, matter or other judicial proceeding, in which the actual amount in controversy exceeds five hundred dollars.

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It is conceded that the actual amount in controversy in the action exceeds five hundred dollars.

On the argument of these motions to quash counsel for Canada stated that his appeals are based on two grounds: (i) that in an action of this sort there is no right to order the examination of any officer of the Crown and (ii) that, if this first ground be rejected, the learned President erred in naming Mr. Driedger as the officer to attend.

Newfoundland served notices dated October 31, 1960, each of which so far as relevant reads as follows:

NOTICE OF CROSS-APPEAL

TAKE NOTICE that the Respondent intends upon the hearing of this appeal to contend that the Order of the Honourable the President of the Exchequer Court of Canada dated the 15th day of July, 1960, should be varied so as to provide that the Honourable Edmund Davie Fulton be examined for discovery herein instead of Elmer A. Driedger.

This Notice is given pursuant to Rule 100.

Counsel for Canada argues that these notices are in substance appeals from the order of the learned President which do not lie without leave. He submits that the power of this Court to make rules does not extend to creating a right of appeal without leave in a case in which an Act of Parliament makes the granting of leave a condition precedent to the existence of a right of appeal, and that therefore the plaintiff is not assisted by rule 100 of the Supreme Court Rules.

Rule 100 is as follows:

Rule 100. It shall not, under any circumstances, be necessary for a respondent to give notice of motion by way of cross-appeal, but if a respondent intends upon the hearing of an appeal to contend that the decision of the court below should be varied, he shall, within fifteen days after the security has been approved, or such further time as may be prescribed by the Court or a Judge in Chambers, give notice of such intention to all parties who may be affected thereby. The omission to give such notice shall not in any way interfere with the power of the Court on the hearing of an appeal to treat the whole case as open, but may, in the discretion of the Court, be ground for an adjournment of the appeal or for special order as to costs.

In the case at bar the effect of this rule is not to create a right of appeal but to set out the manner in which the Court may exercise the jurisdiction conferred upon it by the *Supreme Court Act,* and particularly s. 46 thereof, in appeals properly brought before it.

It is clear that if there had been no appeal taken by Canada Newfoundland could not have appealed from the order of the learned President without first obtaining leave; but the notices which it is sought to quash are not the initiation of appeals by Newfoundland, they give notice that on the hearing of Canada's appeals Newfoundland will ask the Court to exercise in a particular way the jurisdiction which it possesses by reason of the fact that those appeals are properly before it, a jurisdiction which it is free to exercise whether or not any notice under rule 100 has been served.

In my opinion while the notices served by Newfoundland were not necessary to clothe this Court with jurisdiction to give the relief for which they ask, it was proper to serve them.

This Court is now validly seized of Canada's appeals; if those appeals should succeed on the first ground mentioned above and the Court should decide that, in this case, there is no power to order any officer to attend for examination that will, of course, be an end of the matter. If, on the other hand, the Court should be of opinion that the first ground of appeal should be rejected it would then have to enter upon the second ground and decide whether Mr. Driedger was the proper officer to be selected. Under s. 46 of the *Supreme Court Act* the Court has power to give the judgment and award the process or other proceedings that the learned President should have given or awarded, and I think it clear that the Court would have jurisdiction to name the officer who, in its opinion, should be ordered to attend for examination.

The rules of this Court have the force of statute by virtue of s. 103(3) of the *Supreme Court Act* which reads:

(3) All such rules as are not inconsistent with the express provisions of this Act have force and effect as if herein enacted.

Rule 63 is as follows:

Rule 63. Except as otherwise provided by the Exchequer Court Act, these Rules shall, so far as applicable, apply to appeals from the Exchequer Court of Canada.

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I can find nothing in the *Exchequer Court Act* providing that rule 100 shall not apply to appeals from that Court. Neither in the *Exchequer Court Act* nor in the rules made thereunder is there any provision as to the procedure to be followed by a respondent in an appeal taken to the Supreme Court who wishes to cross-appeal or to contend that the decision of the Exchequer Court should be varied. In my opinion that procedure is regulated by rule 100. The question whether this Court has jurisdiction to entertain an appeal brought from a decision of the Exchequer Court must be determined by reference to the provisions of the *Exchequer Court Act,* particularly ss. 82, 83 and 84, but once that question has been answered in the affirmative the procedure to be followed by a respondent who seeks a variation of the judgment appealed from and the powers of this Court to treat the whole case as open and to give the judgment that the court appealed from should have given are to be found in the *Supreme Court Act* and the rules made thereunder.

I have not overlooked Mr. Jackett's argument based on s. 82(4) of the *Exchequer Court Act* which corresponds to s. 64 of the *Supreme Court Act* and reads as follows:

> 82 (4) In such notice the party so appealing may, if he so desires, limit the subject of the appeal to any special defined question or questions.

In the case at bar one of the questions raised by Canada's appeals is as to which officer of the Crown should be ordered to attend; the appeals have not been limited so as to exclude that question.

In my opinion nothing that I have said above conflicts with the decision of this Court in *British American Brewing Company Ltd. v. The King*[1].

The nature of the judgment of the Exchequer Court from which the appeal in that case was brought is described in the reasons of the Court at page 571, as follows:

> This is a judgment at the trial of the action dismissing it. True, as the suppliant was not prepared to prove his case, the matter of substance considered by the trial judge was whether or not the trial should be adjourned in order to give the suppliant a further opportunity to produce evidence. Nevertheless, it is a judgment pronounced at a trial, both parties being present, after the suppliant, on whom the burden of proof lay, had declared he had no evidence to offer. Such a judgment, we have no doubt, is a final judgment within the meaning of section 82, subsection 4, of the *Exchequer Court Act.*

[1] [1935] S.C.R. 568, 4 D.L.R. 750.

At the date of the decision s. 82 of the *Exchequer Court Act*, R.S.C. 1927, c. 34, was worded somewhat differently from the corresponding section, s. 82 of the present act, but it did not differ in substance. It gave to any party to an action a right of appeal to the Supreme Court provided two conditions existed (i) the judgment sought to be appealed was a final judgment and (ii) the actual amount in controversy in the judicial proceeding in which such judgment was given exceeded five hundred dollars.

Sections 38 and 44 of the *Supreme Court Act*, R.S.C. 1927, c. 35 (the predecessors of sections 44 and 42 of the present Act) were as follows:

38. No appeal shall lie to the Supreme Court from any judgment or order made in the exercise of judicial discretion except in proceedings in the nature of a suit or proceeding in equity originating elsewhere than in the province of Quebec.

* * *

44. Notwithstanding anything in this Act contained the court shall also have jurisdiction as provided in any other Act conferring jurisdiction.

The Court having quoted section 44, said in part at page 570:

As regards appeals from the Exchequer Court, the right of appeal is given by section 82 of the *Exchequer Court Act*; and it is contended on behalf of the Crown that section 38 of the *Supreme Court Act* applies to such appeals. In our opinion, the jurisdiction of this Court in respect of appeals in exercise of a right of appeal given by the *Exchequer Court Act* is not affected by section 38 of the *Supreme Court Act*; which section, we think, is limited in its application to those cases in respect of which the jurisdiction is set forth and defined immediately or referentially by the *Supreme Court Act*.

Assuming for the purposes of the argument that this lays down the principle that the question whether this Court has jurisdiction to entertain an appeal from the Exchequer Court in any given case depends on the provisions of the *Exchequer Court Act* alone, it does not appear to me to suggest that where those provisions confer jurisdiction on this Court it shall deal with the appeal otherwise than in conformity with the relevant provisions of the *Supreme Court Act* and the rules made thereunder in regard to all matters which are not dealt with in the *Exchequer Court Act*.

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For these reasons I would dismiss the motions with costs.

Motions dismissed with costs.

Solicitor for the respondent, appellant: E. A. Driedger, Deputy Attorney General of Canada, Ottawa.

Solicitors for the claimant, respondent: Gowling, MacTavish, Osborne & Henderson, Ottawa.