CANADIAN UTILITIES LIMITED AND WESTERN CHEMICALS LIMITED ..... APPELLANTS;

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE ..... RESPONDENT.

1963

*Oct. 1, 2
Oct. 10

MOTION TO QUASH APPEAL FROM JUDGMENT OF THE EXCHEQUER COURT OF CANADA

Appeals—Practice and procedure—Customs and Excise—Sales tax—Exemption—Refusal by Exchequer Court of leave to appeal from Tariff Board decision—Whether appeal lies to Supreme Court from refusal—Exchequer Court Act, R.S.C. 1952, c. 98, s. 82—Supreme Court Act, R.S.C. 1952, c. 259, s 42—Excise Tax Act, R.S.C. 1952, c. 100, ss. 57, 58.

The appellants applied to the Exchequer Court for leave to appeal from a declaration of the Tariff Board that natural gas used in their gas turbines for producing electricity was subject to and not exempt from sales tax. The president of the Exchequer Court refused leave to

*PRESENT: Cartwright, Fauteux, Abbott, Ritchie and Hall JJ.

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appeal on the ground that no question of law was involved in the declaration of the Board and that, in any event, this was not the kind of case in which leave should be given. The appellants served a notice of appeal to this Court from this refusal, and the Crown moved to quash for lack of jurisdiction.

Held: The motion to quash should be granted.

There was no right of appeal to this Court from the decision of the Exchequer Court to refuse leave to appeal, either under s. 58(6) of the *Excise Tax Act,* R.S.C. 1952, c. 100, or under s. 82(1) of the *Exchequer Court Act,* R.S.C. 1952, c. 98. *Lane et al. v. Esdaile et al.,* [1891] A.C. 210, applied. It has been consistently held in our Courts and in the Courts of England that where a statute grants a right of appeal conditionally upon leave to appeal being granted by a specified tribunal there is no appeal from the decision of that tribunal to refuse leave, provided that the tribunal has not mistakenly declined jurisdiction but has reached a decision on the merits of the application. In the present case, the application was considered on its merits. In no sense was jurisdiction declined. Consequently, regardless of whether the decision of the Exchequer Court should be described as a final order or an interlocutory order, there was no appeal.

MOTION by respondent to quash appeal from a judgment of Thorson P. of the Exchequer Court of Canada. Motion granted.

C. R. O. Munro, Q.C., for the motion.

G. H. Steer, Q.C., and *B. V. Massie, Q.C.,* contra.

The judgment of the Court was delivered by

CARTWRIGHT J.:—Each of the appellants applied to the Tariff Board, pursuant to s. 57 of the *Excise Tax Act,* R.S.C. 1952, c. 100, for a declaration that natural gas used in its gas turbines for producing electricity is exempt from sales tax imposed by the Act. By agreement the two applications were joined for hearing. On January 31, 1963, the Tariff Board declared that the natural gas so used is subject to and not exempt from sales tax. This was a decision of the majority of the Board; Mr. Elliott, dissenting, would have declared the natural gas to be exempt from the tax. The amount of the tax involved exceeds $123,000.

The appellants served a notice returnable on February 28, 1963, before the presiding judge of the Exchequer Court in chambers applying for leave to appeal to the Exchequer Court from the declaration of the Tariff Board, "upon the following questions of law":

1. Did the Tariff Board err as a matter of law in deciding that Brown Boveri gas turbine equipment for producing electricity is an internal com-

bustion engine within the meaning of Schedule III of the Excise Tax Act?

2. Did the Tariff Board err as a matter of law in deciding that natural gas when used in Brown Boveri gas turbine equipment for producing electricity, is not natural gas for heating purposes within the meaning of Schedule III of the Excise Tax Act.

The application for leave to appeal was heard by the learned President of the Exchequer Court on March 28, 1963, and at the conclusion of the hearing leave was refused. Subsequently the learned President gave written reasons for his decision. At the commencement of these reasons after reciting the making of the application and the two questions set out above he said in part:

> After hearing counsel for the applicants as well as for the respondent I refused leave to appeal on the ground that, in my opinion, no question of law was involved in the declaration of the Tariff Board and that, in any event, this was not the kind of case in which leave should be given and I dismissed the application with costs.
>
> Since then I have been requested by counsel for the applicants to give written reasons for my decision and these are now given.

The learned President went on to examine the proceedings before the Tariff Board, the reasons of the majority and those of the dissenting member and formed the opinion that the questions on which leave to appeal was sought were questions of fact and not of law. He did not elaborate his reasons for holding "that, in any event, this was not the kind of case in which leave should be given".

The decision of the learned President was embodied in a formal order of the Exchequer Court the operative part of which reads as follows:

> IT IS ORDERED that leave to appeal be and the same is hereby refused and that the application for leave be and the same is hereby dismissed with costs.

On May 24, 1963, the appellants served a notice of appeal to this Court from the order of Thorson P. which reads in part as follows:

> This Notice of Appeal is given pursuant to the provisions of Section 58, Subsection 6 of the Excise Tax Act being Chapter 100 of the Revised Statutes of Canada 1952.

The grounds of the appeal are as follows:

> (1) The learned Judge erred in holding that the majority finding of the Tariff Board that the Brown Boveri gas turbine equipments of the appellants were internal combustion engines were findings of fact.
>
> (2) The learned Judge erred in failing to find that the question whether the natural gas used in the appellants' Brown Boveri gas turbine

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equipment was used for heating purposes within the meaning of the Excise Tax Act was a question of law.

(3) The learned Judge erred in holding that the Court had no jurisdiction to grant the leave to appeal for which the application was made, and in finding that the decision of the Judge of the Exchequer Court that a question of law was or was not involved in the application for leave to appeal was not subject to review.

(4) The learned Judge erred in refusing to grant the appellants leave to appeal.

The respondent moves to quash this appeal "on the ground that the Supreme Court of Canada has no jurisdiction to hear this appeal, and alternatively on the ground that this appeal must be dismissed".

For the appellants it is contended that this Court has jurisdiction to entertain the appeal under the combined effect of s. 42 of the *Supreme Court Act*, subss. (1) (4) and (6) of s. 58 of the *Excise Tax Act* and subss. (1) and (5) of s. 82 of the *Exchequer Court Act*. These read as follows:

42. Notwithstanding anything in this Act the Supreme Court has jurisdiction as provided in any other Act conferring jurisdiction.

58. (1) Any of the parties to proceedings under section 57, namely,

(*a*) the person who applied to the Tariff Board for a declaration,

(*b*) the Deputy Minister of National Revenue for Customs and Excise, or

(*c*) any person who entered an appearance with the Secretary of the Tariff Board in accordance with subsection (2) of section 57,

may, upon leave being obtained from the Exchequer Court of Canada or a judge thereof, upon application made within thirty days from the making of the declaration sought to be appealed, or within such further time as the Court or judge may allow, appeal to the Exchequer Court upon any question that in the opinion of the Court or judge is a question of law.

* * *

(4) The Exchequer Court may dispose of an appeal under this section by dismissing it, by making such order as the Court may deem expedient or by referring the matter back to the Tariff Board for re-hearing.

(6) Any order or judgment of the Exchequer Court made under this section may be appealed to the Supreme Court of Canada in like manner as any other judgment of the Exchequer Court, and the provisions of the *Exchequer Court Act* as to appeals apply to any appeal taken under this subsection.

82. (1) An appeal to the Supreme Court of Canada lies

(*a*) from a final judgment or a judgment upon a demurrer or point of law raised by the pleadings, and,

(*b*) with leave of a judge of the Supreme Court of Canada, from an interlocutory judgment,

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.

(5) A judgment is final for the purpose of this section if it determines the rights of the parties, except as to the amount of the damages or the amount of liability.

As already mentioned, the declaration of the Tariff Board was made under s. 57 of the *Excise Tax Act*. Subsection (3) of that section reads:

(3) A declaration by the Tariff Board under this section is final and conclusive, subject to appeal as provided in section 58.

In my opinion the reasoning of the House of Lords in *Lane et al v. Esdaile et al*[1] is decisive against the existence of a right of appeal to this Court from the decision of Thorson P. to refuse leave to appeal. The relevant words of *The Appellate Jurisdiction Act,* 1876, 39 and 40 Vict., c. 59, which was the statute conferring jurisdiction on the House of Lords were those of s. 3, reading as follows:

3. Subject as in this Act mentioned an appeal shall lie to the House of Lords from any order or judgment of any of the courts following, that is to say,

(1) Her Majesty's Court of Appeal in England;

There was no provision in the Act restricting the generality of the words just quoted. By Order LVIII Rule 15, dealing with the jurisdiction of the Court of Appeal, it was provided:

No appeal to the Court of Appeal from any interlocutory order, . . . shall, except by special leave of the Court of Appeal, be brought after the expiration of twenty-one days, and no other appeal shall, except by such leave, be brought after the expiration of one year. . . .

In July 1885, Kay J. gave judgment for the plaintiffs in an action against several defendants two of whom were the appellants. Some of the defendants other than the appellants appealed to the Court of Appeal and being unsuccessful in that Court appealed again to the House of Lords where, on August 10, 1888, they succeeded in reversing the judgments below against them. The appellants thereafter applied to the Court of Appeal for special leave to appeal against the judgment of Kay J. Their application was refused by the Court of Appeal and against that refusal they appealed to the House of Lords. A preliminary objection that no appeal lay to the House of Lords was unanimously sustained and the appeal was dismissed as incompetent.

[1] [1891] A.C. 210.

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Lord Halsbury points out the absurdity which would result from holding that there is a right of appeal from the refusal, and presumably also from the granting, of leave to appeal by the particular body appointed by the statute to decide whether leave should be given. I refrain from quoting from his speech and that of the other Lords who took part in the judgment. All that they say appears to me to be applicable to and decisive of the question before us.

The point has already come before this Court. In *Canadian Horticultural Council et al v. J. Freedman & Sons Limited*[1], Thorson P. refused two applications for leave to appeal made under s. 45(1) of the *Customs Act*, R.S.C. 1952, c. 58, the wording of which is indistinguishable from that of s. 58(1) of the *Excise Tax Act*. At page 551 of the report there is a note reading:

> An appeal from the above decision to the Supreme Court of Canada was quashed by order of the Court on October 18, 1954.

The decision of the Court quashing the appeal was pronounced at the conclusion of the hearing and there is no record of the reasons which were given. In view of this I do not base my judgment on that decision.

In the case of *In re Smith v. Hogan Ltd.*[2], this Court set aside an order of Cannon J. refusing an application for special leave to appeal from a judgment in bankruptcy proceedings pronounced by the Appeal Division of the Supreme Court of New Brunswick but the reasons of the Court expressly approve the decision in *Williams v. The Grand Trunk Railway Co.*[3] to the effect that no appeal lies to the Supreme Court of Canada from an order of a Judge of that Court granting or refusing leave to appeal from a decision of the Board of Railway Commissioners. The order of Cannon J. was set aside because, owing to a misunderstanding touching the effect of a statute, he had erroneously decided that he had no jurisdiction to entertain the application; the order of this Court provided that the applicants might proceed with their application for leave.

[1] [1954] Ex. C.R. 541.
[2] [1931] S.C.R. 652, 1 D.L.R. 287, 13 C.B.R. 144.
[3] (1905), 36 S.C.R. 321.

In re Smith v. Hogan Ltd. is explained by Duff C.J. giving the unanimous judgment of the Court in *Duval v. The King*[1], as follows:

> The decision proceeded upon the ground that the dismissal of the application constituted a refusal to entertain an application which the applicant was legally entitled to have heard and decided on the merits.
>
> There is nothing in that judgment, or in any of the previous judgments there referred to, which suggests that, consistently with the intendment of the provisions of the *Railway Act*, or the provisions of the *Bankruptcy Act*, for example, this Court could, after an application for leave to appeal has been fully heard on the merits and dismissed by the judge to whom the application was made, review the decision on the merits and allow the application; and we think that applies with equal force to applications under the provisions of article 1025 of the *Criminal Code*.
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> Here the application was made to Mr. Justice Hudson, was fully heard by him and dismissed, and we think that must be final.

I have considered all the decisions referred to in the arguments of counsel and I am satisfied that as a matter of construction the opening words of subs. (6) of s. 58 of the *Excise Tax Act*, "Any order or judgment of the Exchequer Court made under this section", do not include the decision of a judge of that Court granting or refusing leave to appeal under subs. (1) of that section. I am equally satisfied that no appeal from such a decision lies under either cl. (*a*) or cl. (*b*) of subs. (1) of s. 82 of the *Exchequer Court Act*.

It appears to me to have been consistently held in our courts and in the courts of England that where a statute grants a right of appeal conditionally upon leave to appeal being granted by a specified tribunal there is no appeal from the decision of that tribunal to refuse leave, provided that the tribunal has not mistakenly declined jurisdiction but has reached a decision on the merits of the application.

In the case at bar it is clear that the learned President considered the applications for leave to appeal on their merits and reached the conclusion that the questions on which leave was sought were not questions of law and that, in any event, this was not the kind of case in which leave should be given. In no sense did he decline jurisdiction. In these circumstances it is my opinion that no appeal from his decision lies to this Court regardless of whether that decision should be correctly described as a final order or an interlocutory order, a question which was fully argued

[1] [1938] S.C.R. 390 at 391, 4 D.L.R. 737, 71 C.C.C. 75.

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before us but as to which I do not find it necessary to express an opinion.

I would grant the motion to quash. The respondent is entitled to the costs of the motion.

Motion to quash granted with costs.

Solicitors for the appellants: Milner, Steer, Dyde, Massie, Layton, Cregan & Macdonnell, Edmonton.

Solicitor for the respondent: C. R. O. Munro, Ottawa.

EDITOR'S NOTE: Immediately after the conclusion of the hearing of the above motion to quash, the appellants applied for leave to appeal. This application was heard by Mr. Justice Cartwright and was dismissed with costs on October 10, 1963. His Lordship came to the conclusion that for the reasons given on the motion to quash there was no appeal from the decision of the Exchequer Court and, consequently, there was no jurisdiction to grant leave to appeal therefrom.