

COAST CONSTRUCTION COMPANY }
LIMITED } APPELLANT;

AND

HIS MAJESTY THE KING RESPONDENT.

1951
*Sept. 11
*Sept. 13

MOTION FOR LEAVE TO APPEAL UNDER SECTION 82(1) (b)
(NEW) OF THE EXCHEQUER COURT ACT.

Appeal to judge of the Supreme Court of Canada from an order of an Exchequer Court judge made in Chambers—Jurisdiction—The Exchequer Court Act, R.S.C. 1927 c. 34, s. 82(1) (b) as enacted by S. of C. 1949, c. 5, s. 2 (2nd Sess.).

The appellant moved under section 82(1) (b) of the *Exchequer Court Act* for leave to appeal to the Supreme Court of Canada from an order of the President of the Exchequer Court made in chambers dismissing its application made under Exchequer Court rule 130 to examine for discovery, as an officer of the Crown, the chief engineer of the International Pacific Salmon Fisheries Commission.

Held: that, assuming a judge of the Supreme Court of Canada had jurisdiction, although the order in the Exchequer Court was made in chambers, it was clear from the fact that leave of a judge of the Supreme Court was necessary, that it was never intended that decisions of the Exchequer Court on ordinary questions of practice and procedure should be subject to revision by the Supreme Court of Canada. There was no indication that anything out of the ordinary was decided on the motion in the Exchequer Court.

MOTION by appellant before Kerwin J. in Chambers for leave to appeal to this Court under s. 82(1) (b) of the *Exchequer Court Act* from an Order of Thorson J., President

*PRESENT: Kerwin J. in chambers.

1951
 }
 COAST
 CON-
 STRUCTION
 CO. LTD.
 v.
 THE KING
 —

of the Exchequer Court, made in Chambers, May 15, 1951, dismissing the application of the suppliant, Coast Construction Co. Ltd., in a petition of right against His Majesty, for an order that it be at liberty to examine the chief engineer of the International Pacific Salmon Fisheries Commission, as an officer of the Crown.

George Perley-Robertson for the motion.

W. R. Jackett K.C. contra.

KERWIN J.:—Leave is sought to appeal to this Court from an order of the President of the Exchequer Court made in chambers on May 15, 1951, dismissing the application of the suppliant, Coast Construction Company Limited, in a petition of right against His Majesty for an order that it be at liberty to examine Milo Bell, Chief Engineer of the International Pacific Salmon Fisheries Commission as an officer of the Crown for the purposes of discovery. That application had been made pursuant to Rule 130 of the General Rules and Orders of the Exchequer Court which, as it stood at the time of the application, provides:—

“Any departmental or other officer of the Crown may, by order of the Court or a Judge, be examined at the instance of the party adverse to the Crown in any action for the same purpose and before the same officers or before the Court or a Judge, if so ordered.”

The present application is made under subsection 1 of section 82 of the *Exchequer Court Act* which, as enacted by section 2 of chapter 5 of the Statutes of 1949 (2nd Sess.), reads as follows:—

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

* * *

(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.”

For the Crown it was argued that there was no jurisdiction to grant leave to appeal as it was contended that the order of May 15, 1951, was not “an interlocutory judgment pronounced by the Exchequer Court” since it was made in chambers. I do not deal with this objection as I am of opinion that in any event leave should not be given.

In the petition of right it is alleged that a contract was entered into bearing date August 24, 1944, between the suppliant as party of the first part, and, as party of the second part, His Majesty the King in right of Canada, acting and represented by the International Pacific Salmon Fisheries Commission, constituted pursuant to the Fraser River Sockeye Convention, ratified by chapter 10 of the Statutes of Canada, 1930, whereby the suppliant contracted and agreed to provide all and every kind of labour, superintendence, services, tools, implements, machinery, plant, materials, articles and things necessary for the due execution and completion of works known as the Fishway to be constructed on the Fraser River in the Province of British Columbia at Hell's Gate.

It is further alleged that the engineer of the Commission (admittedly Milo Bell) who was given certain powers by the contract, failed to act impartially, that he was not qualified, and that the Commission required the work to be carried on in a manner different to that contemplated in the contract so that the provisions thereof became inapplicable. The claim is then made that the fishway was fully constructed to the satisfaction of the Commission and that the suppliant should be paid on a *quantum meruit* basis. Alternatively, it is claimed that the provisions of the contract vesting various powers in the engineer became invalid by reason of his alleged disqualification, and that he ceased to be as between the suppliant and the Commission other than the Commission's agent, and that, as such, and in breach of the contract, he unreasonably interfered with the work in various ways for which damages are claimed, and a further claim for extras is advanced. Finally, in addition, there is a claim for damages represented by bank interest, which the suppliant alleges it was obliged to pay because of the failure of the Crown to pay certain progress certificates.

It was contended on behalf of the Crown that Mr. Bell was not a departmental or other officer of the Crown within the meaning of General Exchequer Court Rule 130 since, pursuant to the Convention, the Commission is composed of three members on the part of Canada and three on the part of the United States of America, and Mr. Bell was appointed by the Commission. On behalf of the suppliant,

1951
 COAST
 CON-
 STRUCTION
 Co. LTD.
 v.
 THE KING
 ———
 Kerwin J.
 ———

1951
COAST
CON-
STRUCTION
CO. LTD.
v.
THE KING
Kerwin J.

it is pointed out that in the contract "Commission" is defined as meaning "His Majesty the King in right of Canada and shall include the reigning Sovereign, or the successors or assigns of the Sovereign." No opinion is expressed upon these contentions. No reasons were given upon the dismissal of the Suppliant's application in the Exchequer Court, and it is not to be assumed that anything was decided that would interfere with any inquiry at the trial as to whether Mr. Bell was an officer of the Crown, if such inquiry be found necessary. All that appears is that the suppliant was unsuccessful in obtaining an order for Mr. Bell's examination for discovery,—without which order the suppliant could not, of course, conduct such examination. Assuming that I have jurisdiction, it is quite clear from the fact that leave of a judge of this Court is necessary, that it was never intended that decisions in the Exchequer Court on ordinary questions of practice or procedure should be subject to revision by this Court. There being nothing to indicate that anything out of the ordinary was decided on the motion in the Exchequer Court, the application is dismissed with costs.

Leave to appeal dismissed.
