

Montreal
1968
Dec 18
Dec. 23

BETWEEN :

LORD ELGIN HOTEL LIMITED APPELLANT;

AND

THE MINISTER OF NATIONAL }
REVENUE } RESPONDENT.

Income tax—Ontario corporation appealing from dismissal of appeal by Tax Appeal Board—Dissolution of corporation whilst appeal pending—Status of appeal—Corporations Act, R S O 1960, c. 71, s 326a(b), construction of.

Lord Elgin Hotel Limited, an Ontario corporation, appealed to this court from the dismissal of an appeal by the Tax Appeal Board. Whilst the appeal to this court was pending the corporation was dissolved under s 326(2) of the *Corporations Act*, R S O 1960, c 71.

Held, quashing the appeal, the corporation's existence was not prolonged by s 326a(b) beyond three years from the dissolution. The judgment of the Tax Appeal Board dismissing the corporation's tax appeal could not be regarded as not "fully executed" within the meaning of s. 326a(b).

HEARING on order to respondent to show cause why appeal should not be quashed.

A. Garon and G. J. Rip for respondent.

Maurice A. Regnier, *amicus curiae*.

JACKETT P.:—In this income tax appeal, there was argued before me, on an order made by the court of its own motion to the respondent to show cause, the question whether this appeal should be quashed on the ground that there is no appellant.

1968
LORD ELGIN
HOTEL LTD.
v.
MINISTER OF
NATIONAL
REVENUE

The circumstances giving rise to the show cause order are as follows:

1. On September 18, 1964, the Tax Appeal Board dismissed the named appellant's appeal from its income tax assessments for 1958 and 1959.

2. On January 7, 1965, the named appellant filed an appeal from that decision in this court.

3. On October 7, 1965, the Provincial Treasurer of Ontario made an order reading in part as follows:

NOW THEREFORE KNOW YE that I, JOHN YAREMKO, Provincial Secretary and Minister of Citizenship, do by this order hereby cancel the Letters Patent of the following corporation:

NAME OF CORPORATION	DATE OF INCORPORATION
Lord Elgin Hotel Limited	January 5, 1950

and declare that the said Corporation shall be dissolved on the Eleventh day of November A.D. 1965.

4. The notice of appeal having been amended on December 27, 1966, a reply was filed by the respondent on October 8, 1968, alleging *inter alia* that the appellant had been "declared to be dissolved on November 11, 1965".

5. On November 8, 1968, my brother Noël made an order reading as follows:

Upon application by counsel on behalf of the appellant and upon hearing read the pleadings herein and upon hearing what was alleged by counsel on behalf of the appellant;

THIS COURT DOTH ORDER that prior to the trial of this appeal, the following question of law:

Whether the appellant will continue in existence after the 11th day of November 1968, notwithstanding the cancellation of its letters patent and its dissolution on the 11th day of November 1965, pursuant to subsection 2 of section 326 of the Corporations Act, Revised Statutes of Ontario, 1960, c. 71, with the consequence that this appeal will become a nullity,

be decided by special case stated for the opinion of this Honourable Court on the 18th day of December 1968 at 2:00 o'clock in the afternoon.

1968
 LORD ELGIN
 HOTEL LTD.
 v.
 MINISTER OF
 NATIONAL
 REVENUE
 —
 Jackett P.
 —

6. When the matter came on, pursuant to that order, for hearing before me, Mr. Regnier, who had appeared for the named appellant on the application for the order of November 8, 1968, appeared and indicated that he had formed the view that the appellant had ceased to exist on November 11, 1968, and had therefore concluded that whatever mandate he had had to act on behalf of the named appellant had come to an end so that he had not been able to agree on behalf of the named appellant to a special case, and could not appear for it at the hearing. That being so, it was impossible to proceed with the argument of the question of law pursuant to the order made by my brother Noël.

7. Nevertheless, it appeared that the question whether the named appellant was an existing person or not required to be determined before the court could know whether these appeals were before it, and counsel for the respondent indicated that he had instructions to contend that the appellant was still in existence. Furthermore, Mr. Regnier, who had prepared himself to take the opposite view, was agreeable to assisting the court in the matter. I therefore ordered the respondent to show cause why the appeal should not be quashed on the ground that there was no appellant, and I directed Mr. Regnier to assist the court as *amicus curiae*. That order reads as follows:

The Court having assembled to hear the question of law set down by Mr. Justice Noël by his order of November 8, 1968, to be decided by special case;

Mr. Regnier having explained to the court that he had not signed a special case because, before the case was ready to be signed the appellant, in his view, no longer existed, and he, Mr. Regnier, could not therefore regard himself as having any mandate to act for the appellant;

It appearing from the letters patent incorporating the appellant (a copy of which is attached hereto as Schedule A to this order) and from the order of the Provincial Secretary of Ontario dated October 7, 1965 (a copy of which is attached hereto as Schedule B) that an order was made by the Minister purporting to dissolve the appellant with effect November 11, 1965;

It is hereby ordered that this hearing be turned into the hearing of a show cause order directed to the respondent to show cause why the appeal should not be quashed on the ground that there is no appellant.

It is further directed that Mr. Regnier, who has prepared himself to make submissions on the legal question involved, be directed to assist the court on the hearing as an *amicus curiae*.

1968
 LORD ELGIN
 HOTEL LTD.
 v.
 MINISTER OF
 NATIONAL
 REVENUE
 ———
 Jackett P.
 ———

Counsel being ready, the argument proceeded forthwith after the order was made.

The relevant provisions of the *Ontario Corporations Act*, R.S.O. 1960, chapter 71, as amended, read as follows:

5. The Provincial Secretary may in his discretion and under the seal of his office have, use, exercise and enjoy any power, right or authority conferred by this Act on the Lieutenant Governor, but not those conferred on the Lieutenant Governor in Council.

* * *

326 (2) Where it appears that a corporation is in default for a period of one year in filing its annual returns under *The Corporations Information Act* or a predecessor thereof and that notice of such default has been sent by registered mail to each director of record in the office of the Provincial Secretary to his last address shown on the records of that office and has been published once in *The Ontario Gazette*, the Lieutenant Governor may by order,

- (a) cancel the letters patent of the corporation and declare it to be dissolved on such date as the order fixes; or
- (b) declare the corporate existence of the corporation, if it was incorporated otherwise than by letters patent, to be terminated and the corporation to be dissolved on such date as the order fixes.

(3) Where a corporation has been or is dissolved under subsection 2, the Lieutenant Governor, on the application of any interested person made within one year after the date of dissolution, may in his discretion by order, on such terms and conditions as he sees fit to impose, revive the corporation, and thereupon the corporation shall, subject to the terms and conditions of the order and to any rights acquired by any person after its dissolution, be restored to its legal position, including all its property, rights, privileges and franchises, and be subject to all its liabilities, contracts, disabilities and debts, as at the date of its dissolution, in the same manner and to the same extent as if it had not been dissolved.

326a Notwithstanding its dissolution under section 326, a corporation continues in existence,

- (a) for a period of three years after the date of its dissolution for the purpose only of prosecution or defending any action, suit or other proceeding commenced by or against it prior to its dissolution; and
- (b) until such time, beyond the three-year period mentioned in clause a, if necessary, as any decree, order or judgment of a court of competent jurisdiction in any such action, suit or other proceeding is fully executed.

It is clear that the named appellant was a corporation that had been created by letters patent and that the Provincial Secretary did, pursuant to section 5 of the

1968
 LORD ELGIN
 HOTEL LTD.
 v.

MINISTER OF
 NATIONAL
 REVENUE

Jackett P.

Ontario Corporations Act, exercise the power conferred on the Lieutenant Governor by section 326(2) of that Act to cancel the letters patent of the corporation and declare it to be dissolved on November 11, 1965.

The only problem arises under section 326a. Counsel for the respondent agrees that, as far as paragraph (a) of that section is concerned, the named appellant's existence was only continued to November 11, 1968, for the purpose of prosecuting the appeals from the income tax assessments which had been commenced prior to its dissolution on November 11, 1965. He agrees further that he can only rely on paragraph (b) for a further extension of the existence of the named appellant if there is an order or judgment of a court of competent jurisdiction in a legal proceeding of the kind referred to in paragraph (a) that had been made before the expiration of the three-year period referred to in paragraph (a), and that was not "fully executed" on the expiration of that period.

Counsel for the respondent relies on the judgment of the Tax Appeal Board dismissing the appeal as being a judgment made before the expiration of the three-year period that is not as yet "fully executed". That judgment reads as follows:

"The appeal herein is hereby dismissed."¹

Counsel's submission was that, if the words of section 326a(b) are to have any meaning in respect of such judgment, it cannot be regarded as "fully executed" until the appeal proceedings have been finally disposed of by a judgment of the Supreme Court of Canada or by a judgment of this court from which no appeal has been taken within the prescribed time. I cannot agree that this argument assists the respondent. It seems clear to me that when the legislature talks in this context of a judgment or order having been "executed", it means that everything must have been done which, by the terms of the judgment or order, is required to be done and that, if a particular

¹ This is not, expressly or impliedly, an order or judgment requiring that anything be done. The taxes that were the subject of the assessment are collected by action quite apart from the appeal. They can, for example, be enforced as debts due the Crown under section 118 of the *Income Tax Act*, or by proceeding by way of "certificate judgment" under section 119. The Tax Appeal Board does not have the power, given to the Court in appeal proceedings by section 101, of ordering payment of the tax.

judgment or order (such as the judgment of the Tax Appeal Board herein) does not require anything to be done, paragraph (b) of section 326a cannot be given any effect by reference thereto.

1968
LORD ELGIN
HOTEL LTD.
v.
MINISTER OF
NATIONAL
REVENUE
Jackett P.

Counsel for the respondent agreed that if section 326a(b) has no application, the appellant is non-existent and the appeal must be quashed.

There will be judgment, therefore, quashing the appeal. There will be no order as to costs.