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 Oct. 9
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BETWEEN:

WALTER HERBERT BIGGS APPLICANT;

AND

THE MINISTER OF NATIONAL }
 REVENUE } RESPONDENT.

*Revenue—Income tax—The Income Tax Act, R.S.C. 1952, c. 148, s. 126(3)
 —Search of taxpayer's premises—Motion to set aside approval granted
 by one of the judges of the Court upon ex parte application made
 under s. 126(3) of the Act—Lack of jurisdiction on the part of any
 judge of the Court to grant relief claimed—Judge granting approval
 one of the persons designated by s. 126(3) of the Act—Power of the
 judge to approve or disapprove of the authorization of the Minister
 a discretionary one—Discretion to be exercised summarily and finally—
 Judge functus officio once duty delegated to him by statute performed
 —Motion dismissed.*

Section 126(3) of the Income Tax Act, R.S.C. 1952, c. 148 is as follows:

The Minister may, for any purpose related to the administration or enforcement of this Act, with the approval of a judge of the Exchequer Court of Canada or of a superior or county court, which approval the judge is hereby empowered to give upon *ex parte* application, authorize in writing any officer of the Department of National Revenue, together with such members of the Royal Canadian Mounted Police or other peace officers as he calls on to assist him and such other persons as may be named therein, to enter and search, if necessary by force, any building, receptacle or place for documents, books, records, papers or things which may afford evidence as to the violation of any provision of this Act or a regulation and to seize and take away any such documents, books, records, papers or things and retain them until they are produced in any court proceedings.

On June 9, 1954, an application was made *ex parte* by the Deputy Minister of National Revenue to Potter J., one of the judges of this Court, for the *approval* of a judge of the Court of the issue of an authorization under that section of the Act in respect of the defendant and his residence in Hamilton. The application, supported by an affidavit of an officer of the Department of National Revenue, was approved by Potter J. in writing and, subsequently, under the authority of the Minister and that approval, the taxpayer's premises were entered and certain documents and records seized and removed. On a motion by defendant for an order rescinding that *ex parte* order made by Potter J.:

Held: That neither Potter J. nor any member of the Exchequer Court of Canada, has power to rescind the approval granted on June 9, 1954.

2. That Potter J. made no *order* of any sort. What he did was to "approve" of the authorization of the Minister pursuant to the terms of that section of the Act. In signifying his approval he acted not by virtue of the powers he possessed as a judge of the Court, but as one of the persons designated by that section. The section does not purport to confer any right of appeal from a judge who has refused or granted

his authorization, or any right on any of the other judges of the Court to review or rescind any approval so granted; nor does it confer any power on the judge who has given his approval to review or reconsider the matter or to recall his approval. No such rights or powers exist.

3. The intention of Parliament was to confer upon the judges designated a discretion to approve or to disapprove of the "authorization" of the Minister, such discretion to be exercised summarily and finally. When the duty designated to a judge by the Statute has been performed, he becomes *functus officio*.

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MOTION to set aside an approval granted by one of the judges of the Court upon an *ex parte* application made under section 126(3) of the Income Tax Act.

The motion was heard before the Honourable Mr. Justice Cameron at Ottawa.

M. H. Fyfe, Q.C. for the motion.

K. E. Eaton, F. J. Dubrule and J. L. Gourlay contra.

The facts and questions of law raised are stated in the reasons for judgment.

CAMERON J. now (October 9, 1954) delivered the following judgment:

This application, entitled in the Notice of Motion as above, is stated therein to be for an order

1. Rescinding the *ex parte* order made on the 9th day of June, 1954, pursuant to Section 126(3) of the Income Tax Act.

2. For the production for the inspection of this Court of all documents taken pursuant to the said *ex parte* order and not heretofore returned to the applicant.

3. For the delivery to the applicant of all of the said documents so seized and not heretofore returned to him.

4. If considered necessary, permitting the applicant to cross-examine Douglas Hamilton McAlpine on his affidavit sworn herein on the 20th day of May, 1954, and enlarging this application pending the completion of such cross-examination,

or for such further or other order as the nature of this application may require.

On June 9, 1954, an application was made *ex parte* by the Deputy Minister of National Revenue for Taxation to Mr. Justice Potter, one of the judges of the Exchequer Court

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of Canada, for the *approval* of a judge of that Court of the issue of an authorization under subsection (3) of section 126 of the Income Tax Act, in respect of the taxpayer W. H. Biggs of Hamilton, Ontario, and his residence there.

Cameron J. That subsection is as follows:

126(3) The Minister may, for any purpose related to the administration or enforcement of this Act, with the approval of a judge of the Exchequer Court of Canada or of a superior or county court, which approval the judge is hereby empowered to give upon *ex parte* application, authorize in writing any officer of the Department of National Revenue, together with such members of the Royal Canadian Mounted Police or other peace officers as he calls on to assist him and such other persons as may be named therein, to enter and search, if necessary by force, any building, receptacle or place for documents, books, records, papers or things which may afford evidence as to the violation of any provision of this Act or a regulation and to seize and take away any such documents, books, records, papers or things and retain them until they are produced in any court proceedings.

The application so made was supported by an affidavit of D. H. McAlpine, an officer of the Department of National Revenue, Taxation Division, attached to its Hamilton district office. The application so made was approved by Potter J. in writing. Subsequently, under the authority of the Minister and the approval so granted, the premises of the taxpayer were entered and certain documents and records were seized and removed, some of which have since been returned to the taxpayer.

In the absence of Potter J. through illness, the motion for the order set out above is now made before me, as a judge of the Exchequer Court of Canada.

Counsel for the Deputy Minister opposed the application on the ground that neither Potter J. nor any other judge of this Court has power to grant any part of the relief claimed. Certain material in support of the motion has been filed by counsel for the taxpayer, dealing with the merits of the case. No material was filed by or on behalf of the Deputy Minister in answer thereto, his counsel intimating that he was prepared to argue the matter only on the question of jurisdiction; and that if his contention in that regard were not upheld, he would ask leave to have the motion adjourned to enable him to file such material as he might consider necessary.

In the limited time at my disposal I have given consideration to the arguments of counsel and to the cases cited and have reached the conclusion that I must give effect to the contention put forward on behalf of the Deputy Minister that neither Potter J., nor any other member of this Court, has power to rescind the approval granted by Potter J. on June 9, 1954. The other items of relief claimed in the Notice of Motion were not pressed before me; in any event I think it is clear that if I have no power to rescind that approval, I am likewise powerless to deal with the other matters.

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 Cameron J.

It is to be noted that Potter J. made no *order* of any sort. What he did was to “approve” of the authorization of the Minister pursuant to the terms of section 126(3). Even if the matter were properly before this Court, I have serious doubts as to the applicability of Rule 259 of the General Rules and Orders of this Court, on which counsel for the applicant relied.

In my opinion, Potter J., in signifying his approval, acted not by virtue of the powers he possessed as a judge of this Court, but as one of the persons designated by section 126(3) of the statute, and with the powers conferred by that Act alone. Had any person other than a judge been named, his powers would have been precisely the same as those of a judge acting under the statute. The section does not purport to confer any right of appeal from a judge who has refused or granted his authorization, or any right on any of the other judges of the Court to review or rescind any approval so granted; nor does it confer any power on the judge who has given his approval to review or reconsider the matter or to recall his approval. In my opinion, no such rights or powers exist.

In my view, the intention of Parliament was to confer upon the judges designated a discretion to approve or to disapprove of the “authorization” of the Minister, such discretion to be exercised summarily and finally. When the duty delegated to a judge by the statute has been performed, he becomes *functus officio*.

Reference may be made to *Chambers and Canadian Pacific Railway Co.* (1), and to the cases there referred to;

(1) (1910-11) 20 Manitoba Reports 277 at 279.

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BIGGS and more particularly to *Canadian Pacific Railway v. Little
Seminary Ste. Therese* (1).

v.
MINISTER OF NATIONAL REVENUE For these reasons I have reached the conclusion that the
motion fails and it will be dismissed with costs.

Cameron J.

Judgment accordingly.