THE ROYAL BANK OF CANADA, TRUSTEE FOR SIR HERBERT HOLT, GEORGE UNDERWOOD AND ESTATE OF THE LATE SIR WILLIAM C. VAN HORNE (DEFENDANT)..... APPELLANT;

1921
*May 23.
*June 7.

AND

HIS MAJESTY THE KING (PLAINTIFF)..... RESPONDENT.

ON APPEAL FROM THE APPEAL DIVISION OF THE SUPREME COURT OF NEW BRUNSWICK.

Timber—Crown lands——Licence to cut—Option to cut or not cut—Payment of stumpage dues without cutting—Operating in subsequent years—Claim of anticipated payments.

Licences for lumbering on Crown lands in New Brunswick contain a regulation passed by the Lieutenant Governor in Council which provides that the licensee may be required to cut, annually, at least 10,000 superficial feet of lumber for each square mile of his holding with the option in any case of paying the stumpage that would be due on the required quantity and not cutting.

Held, that a licensee who, for one or more years, had elected to pay and not cut is not entitled to have the amount so paid deducted from the stumpage fees due to the Crown when he eventually operates over the limits.

APPEAL from a decision of the Appeal Division of the Supreme Court of New Brunswick reversing the judgment at the trial in favour of the defendant.

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*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Brodeur and Mignault JJ.

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The defendant was holder of a licence to cut lumber on Crown lands with a right of annual renewal for a number of years on complying with all stipulated conditions. The licence was subject to, and contained, the following regulation passed by the Governor in Council:—

"As a protection to the Government against lands being held under licence for speculative purposes, and not operated on, all licensees shall make such operations annually on the lands held by them under licence as may be deemed reasonable to the Minister of Lands and Mines, and the Minister of Lands and Mines shall have the power to call upon any licensee to cut an amount equal to at least ten thousand superficial feet of lumber for each square mile of licensed land held by the licensee as the Minister of Lands and Mines may determine or direct. Should the licensee prefer to pay the stumpage that would be due on such quantity of lumber at ten thousand superficial feet per mile, instead of making the required operation or cut, he shall have the right to do so in any year, on his notifying the Minister of Lands and Mines to that effect, and obtaining his consent thereto, and such charge in lieu of stumpage shall be payable on or before the first day of August. On failure of the licensee to comply with any of the foregoing conditions, the licences shall be forfeited and the berths held under them shall become vacant, and be open for application by any other person."

For three years the defendant paid the stumpage dues without cutting. In the fourth year the lumber was cut and the stumpage paid without question, but the next year when operations were continued the claim was set up that the amounts paid in the first three years should be credited to defendant and

deducted from the stumpage for that season's cut. This claim was allowed by the trial judge but his judgment was reversed on appeal to the Appeal Division.

H. A. Powell K.C., for the appellant: Regulation 17 is *ultra vires* of the Governor in Council. Power is given to make regulations in regard to the cutting and removing of lumber which only covers the mode of operating and does not authorize compulsion or restriction as to quantities to be cut.

Assuming it to be *intra vires*, it is not reasonable. If the 10,000 feet per mile is cut the Crown has the stumpage fees and the licensee the lumber. If not cut the Crown has both the money and the timber since it is possible that the licensee may never cut it. If he does the Crown gets the same amount again as the regulation has been construed.

The principle that should govern in this case, if necessary to invoke it, has been laid down in several judicial decisions. It is that where the construction of an Act according to its ordinary meaning would work a manifest injustice an interpretation that would not have that effect should be adopted if a grammatical and reasonable construction of the language so permits. See *In re Brocklebank* (1); *Plumpstead Board of Works* v. *Spackman* (2); *Moon* v. *Durden* (3).

J. J. F. Winslow for the respondent: The right of the defendant to pay without cutting is one to be exercised "in any year." He holds only an annual licence and the right to renewal does not make it anything else. *Lakefield Lumber Co.* v. *Shairpe* (4). Hence the right exercised in any year is exhausted when that year ends.

(1) 23 Q.B.D. 462.
(2) 13 Q.B.D. 878 at p. 887.
(3) 2 Ex. 22, at page 68.
(4) 19 Can. S.C.R. 657.

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The intention of this regulation is to have the licensee pay for the privilege of leaving the timber standing. The defendant recognized this when in the fourth year the lumber was cut and the stumpage dues paid without any claim for deduction.

The rule of the maxim *verba fortius accipiuntor contra proferentem* does not apply to Crown grants which are construed more strongly against the grantee. *Bulmer* v. *The Queen* (1).

THE CHIEF JUSTICE.—This was an action brought by the Attorney General of New Brunswick to recover the sum of $5,616.68, being the alleged balance due for "stumpage" on Crown lands during the year ending August 1st, 1919, with interest.

The defence was that this sum had already been paid by the defendant appellant to the Crown in the years 1913, 1914 and 1915, excepting $619.20 which was admitted to be due, and paid before action.

In the year 1913, pursuant to c. XI of the Acts of Assembly of New Brunswick of that year, the then holders of licences were permitted to take out new licences very similar to the old ones, but providing for annual renewals for 20 years from August 1st, 1913.

In addition to "stumpage" on lumber cut, the province charges annual mileage at $8.00 per mile and other fees, and it was stated and was not denied that from these stumpage, mileage and other fees, the province derives about one-half of its total annual revenue.

The whole contest in this appeal turns upon the construction of Regulation 17 issued under and pursuant to the statute before referred to. Shortly put it is this:

(1) 23 Can. S.C.R. 488, at page 496.

Is the licensee of any area having elected not to cut timber under his licence in any year, and having paid to the Crown the "charge in lieu of stumpage," provided for in the regulation for that year, entitled, in a subsequent year when he has elected to cut lumber on his lot, to set off or deduct from the amount payable under the regulation for such cutting the amounts he had paid in previous years when he had elected not to cut as and for stumpage, or "in lieu of stumpage."

Mr. Powell contended very strongly for the appellant that to hold he was not so entitled was tantamount to asking him to pay stumpage twice over.

Section 17, on the construction of which the controversy between the parties depends, reads as follows:—

As a protection to the Government against lands being held under licence for speculative purposes, and not operated on, all licensees shall make such operations annually on the lands held by them under licence as may be deemed reasonable to the Minister of Lands and Mines, and the Minister of Lands and Mines shall have the power to call upon any licensee to cut an amount equal to at least ten (10) M superficial feet of lumber for each square mile of licensed land held by him, and may require that such operation or cut shall be made on such blocks of timber lands held by the licensee as the Minister of Lands and Mines may determine or direct. Should the licensee prefer to pay the stumpage that would be due on such quantity of lumber at 10 M superficial feet per mile, instead of making the required operation or cut, he shall have the right to do so in any year, on his notifying the Minister of Lands and Mines to that effect, and obtaining his consent thereto; and such charge in lieu of stumpage shall be payable on or before the first day of August. On failure of the licensee to comply with any of the foregoing conditions, the licences shall be forfeited and the berths held under them shall become vacant, and be open for application by any other person.

The learned trial judge held that under the true construction of this section the licensee having once paid the charge for stumpage, or, as the regulation

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states, "in lieu of stumpage" for a specific year, he could, in a subsequent year when he elected to cut, claim to have the sum so previously paid by him credited to the charge he was liable to pay in the year he elected to cut.

On appeal to the Appeal Division of the Supreme Court of New Brunswick, that court unanimously reversed the finding of the trial judge. Mr. Justice Grimmer, in delivering the judgment of the court, puts the question very clearly and I fully agree with his construction of the section.

He says:—

> In my opinion the intention of this section is clear. It enabled the Crown to secure a certain amount of protection as far as revenue was concerned, from the lands held by the licensee thus preventing the tendency to speculation and it conferred upon the licensee an option either to cut or to pay for the privilege of not cutting, which option if elected by the licensee, in my opinion simply entitled him to retain his licence and prevent the forfeiture, which otherwise would take place under the provisions of the regulation. The words "such charge in lieu of stumpage" are to my mind clear and unmistakable, and the choice once made by the licensee and consented to by the Minister became final, the licensee thereby paying for the option which he enjoyed as hereinbefore stated * * *. I cannot and do not consider that Section 17 requires a payment from the licensee in any sense as a penalty for not making the operation or cut required by the Minister, but it does confer upon him, as stated, the privilege of holding his lands without making a cut or operation, upon payment of a sum fixed by the Minister. In such a case an election to pay would not be in the nature of an anticipated payment for stumpage, but would be simply for the enjoyment of the privilege which was conferred. Should there be any uncertainty in the words "the stumpage that would be due" in my opinion it is fully explained and the purpose and intention made plain by the other words "such charge in lieu of stumpage" which to my mind place upon the object of the section a construction clear, plain and unequivocal.

I do not consider it necessary to elaborate upon the learned judge's remarks. I would, therefore, dismiss the appeal with costs.

IDINGTON J.—The respondent sued appellant for stumpage dues it had become responsible for, as holder of a licence to cut timber in the Province of New Brunswick in the year from 1st August, 1918, to 1st August, 1919, which amounted to $6,070.25, but was reduced before action by the payment of $602.75.

The appellant's licence was one of the kind that was renewable from year to year and the annual stumpage dues might be increased from year to year without the consent of the licensee by the Minister of Lands and Mines as he saw fit.

Section 4 of the Act of 1913 relative to such Crown timber lands and licences to cut thereon, reads as follows:—

> The Lieutenant Governor in Council shall from time to time fix and determine the rates of stumpage to be paid upon the various kinds of lumber cut from the Crown lands by the licensees, and shall determine the mileage to be paid annually by the licensee, and shall make such other rules and regulations in regard to the cutting and removing of lumber from the Crown land areas as may seem to him just, wise and prudent.

Thereunder the Lieutenant Governor in Council made the following amongst other regulations:—

> (c) As a protection to the Government against lands being held under license for speculative purposes, and not operated on, all licensees shall make such operations annually on the lands held by them under licence as may be deemed reasonable to the Minister of Lands and Mines, and the Minister of Lands and Mines shall have the power to call upon any licensee to cut an amount equal to at least ten thousand superficial feet of lumber for each square mile of licensed land held by the licensee as the Minister of lands and Mines may determine or direct. Should the licensee prefer to pay the stumpage that would be due on such quantity of lumber at ten thousand superficial feet per mile, instead of making the required operation or cut, he shall have the right to do so in any year, on his notifying the Minister of Lands and Mines to that effect, and obtaining his consent thereto, and such charge in lieu of stumpage shall be payable on or before the first day of August. On failure of the licensee to comply with any of the foregoing conditions, the licences shall be forfeited and the berths held under them shall become vacant, and be open for application by any other person.

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Idington J.

That was set forth in full in the licence issued to the appellant in 1913 as part of the terms upon which the licence was continued in force; and also in each succeeding renewal thereof.

The parties hereto at the trial agreed upon the facts to be had in view in determining the issue raised.

That remarkable issue is that the appellant, after having acted upon the said regulation not only for the year 1913-1914, but also for each of the two succeeding years, and paid each year the sum of $1,822.50 as the yearly price for the privilege of refraining from cutting, without any resistance, now sets up the contention that such payments were mere payments on account of future cutting under later licences.

The amusing feature of appellant's claim is that it did cut in the fourth year and paid the full amount of the dues for and in respect of said year's actual cut, and never suggested what now is claimed until settlement demanded for the actual cutting of the fifth year.

Not only did it forget to raise the question when paying for the dues it owed for its actual cut of the year August 1917 to August, 1918, but in the admissions made at the trial it described what had transpired in respect to the first year's exercise of a privilege of refraining from cutting, as follows:—

> And the Minister, after the issuing of such renewal licences called upon the defendant, as licensee, to cut during the said term upon the said lands 1,225,000 superficial feet of timber, an amount equal to 10,000 superficial feet of timber, for each square mile of the same, and the defendant preferring to pay the stumpage that would be due on such quantity of timber, namely, 1,225,000 superficial feet, instead of making the said required operation or cut during the said term thereupon notified the Minister of its said preference and the Minister consented that the defendant should exercise such preference and fixed at $1,822.50 the amount of stumpage the defendant should pay

on such quantity of timber in accordance with the rates of stumpage then payable by licensees of Crown timber lands for timber cut thereon by the licensees thereof, and the defendant accordingly did not cut during the said term any timber on the said lands but paid to the provincial treasurer the sum of $1,822.50, being the amount of stumpage so fixed to be paid * * *

There does not seem to have been a shadow of doubt in the minds of those concerned at the times of the several renewals and payments made by appellant of the nature of the transaction being what respondent contends. Nor was any pretension to the contrary set up till two years of cutting had taken place.

Had such a pretension been set up at an earlier date doubtless it would have been ended by the Minister advising an increase of the stumpage dues under the licence to what was necessary to cure the complaint.

The appellant, I submit, cannot now, properly, steer in silence past such a danger for two years and then set up what rests on nothing but a war of words, regardless of the conduct of appellant in paying on the actual basis of what was clearly a common mutual understanding quite inconsistent with what is now contended for.

I always prefer the interpretation so given, to results to be got by doubtful argument as to words, suggested by afterthought, of what either might have claimed long ago.

However, I doubt if the interest to be saved the province would ever have occurred to its Minister as worth taking such pains for or as an effectual check upon speculation.

For these reasons, and adopting in the main the reasoning of the Court of Appeal, I think the appeal should be dismissed with costs.

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DUFF J.—My opinion touching the questions in controversy accords with that of Mr. Justice Grimmer whose reasoning is, I think, conclusive. The appeal should be dismissed with costs.

BRODEUR J.—This appeal turns upon the construction of Regulation 17 made by the Lieutenant Governor in Council of New Brunswick concerning the persons having saw mill licences on Crown lands.

A licence was issued in 1913 in favour of the Royal Bank *in trust* for different persons and it contained a provision that the licensee would carry out the rules and regulations made in connection with the Crown land areas.

Regulation 17 in dispute reads as follows:—

17. As a protection to the Government against lands being held under licence for speculative purposes, and not operated on, all licensees shall make such operations annually on the lands held by them under licence as may be deemed reasonable to the Minister of Lands and Mines, and the Minister of Lands and Mines shall have the power to call upon any licensee to cut an amount equal to at least ten (10) M superficial feet of lumber for each square mile of licensed land held by him, and may require that such operation or cut shall be made on such blocks of timber lands held by the licensee as the Minister of Lands and Mines may determine or direct. Should the licensee prefer to pay the stumpage that would be due on such quantity of lumber at 10 M superficial feet per mile, instead of making the required operation or cut, he shall have the right to do so in any year, on his notifying the Minister of Lands and Mines to that effect, and obtaining his consent thereto, and such charge in lieu of stumpage shall be payable on or before the first day of August.

It appears that before the legislation of 1913 there was no disposition by which the Government could get the timber limits under licence exploited, and the licensees could for years and years keep the limits without making any cutting. This regulation 17 remedied this undesirable state of affairs and gave the Minister of Lands the power of forcing the licensees to make a certain quantity of cutting.

However, the right of the Minister was not absolute, for the regulation provided that if the licensee preferred not to do the cutting required by the Minister then he would have to pay

> the stumpage that would be due on the quantity of timber which he had been ordered to cut

and such *charge in lieu of stumpage* should be payable on the first day of August.

For three years the appellant did not make the operations ordered by the Minister and paid to the Government the charge stipulated in the regulation. In the fourth, the appellant cut a larger quantity than the one required by the Minister for that year and paid the stumpage dues on the whole quantity he cut. In the fifth year, he still cut a much larger quantity than the one required; but this time, instead of paying the dues, he claimed that he should be given credit for the sums which he had paid in the first three years. It is contended on the contrary by the Government that the amount which was paid did not form part of the stumpage dues but that it was an additional charge.

If the first part of the regulation in which is mentioned the payment of stumpage were alone, there would be no doubt, according to my opinion, that the licensee would be entitled to claim that the money which he paid was an advance payment of stumpage on lumber to be cut, but the last part of the regulation makes it very clear that the payment which he makes is a *charge in lieu of stumpage*. This charge or payment is for the privilege which he acquires to have his licence renewed in paying a sum of money representing the dues which he would have paid if he had cut the quantity of timber required by the Minister.

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Brodeur J.

This payment is not an advance payment, but it is a charge which he is called upon to pay if he does not fulfil the obligation imposed upon him by the Minister. The appellant itself appears to have so construed the agreement, since, in the fourth year, it did not claim, when it paid its dues, that the previous payments were to be considered as advance payments.

I, therefore, agree with the construction made by the court below of this regulation 17 and the appeal should be dismissed with costs.

MIGNAULT J.—The learned counsel for the appellant left nothing unsaid that could serve as an argument against the judgment appealed from. At first sight, there appeared to be a certain plausibility in his contentions which prevailed before the trial court, but when carefully scrutinized, I cannot accept these contentions as being sound. The whole question turns upon the construction to be placed upon the licence under which the appellant held from the Crown the right to cut timber on 122½ square miles of land belonging to His Majesty in right of the province of New Brunswick.

The clause which gave rise to the difficulty is section 17, which reads as follows:—

As a protection to the Government against lands being held under licence for speculative purposes, and not operated on, all licensees shall make such operations annually on the lands held by them under licence as may be deemed reasonable to the Minister of Lands and Mines, and the Minister of Lands and Mines shall have the power to call upon any licensee to cut an amount equal to at least ten (10) M superficial feet of lumber for each square mile of licensed land held by him, and may require that such operation or cut shall be made on such blocks of timber lands held by the licensee as the Minister of Lands and Mines may determine or direct. Should the licensee prefer to pay the stumpage that would be due on such quantity of lumber at 10 M superficial feet per mile, instead of making the required operation or cut, he shall have the right to do so in any year, on his notifying the

Minister of Lands and Mines to that effect, and obtaining his consent thereto; and such charge in lieu of stumpage shall be payable on or before the first day of August. On failure of the licensee to comply with any of the foregoing conditions, the licenses shall be forfeited and the berths held under them shall become vacant, and be open for application by any other person.

I may add that the licence was also subject, as a condition of its renewal, to the payment of $8.00 per square mile over and above all stumpage dues, and this mileage has been regularly paid.

In February, 1912, Hilyard Brothers assigned to the appellant a saw mill licence for the territory in question. In the two years ending August 1st, 1912, and 1913, no lumber was cut on these lands and a new licence was issued to the appellant on August 1st, 1913, for another year ending August 1st, 1914. In the latter and subsequent licences was inserted section 17 above quoted.

During the years beginning on August 1st, 1914, 1915, and 1916, the licensee was called upon by the Minister of Lands and Mines to cut an amount of at least ten thousand superficial feet of lumber for each square mile. The appellant did not cut this lumber but under section 17 paid to the Government $1,822.50 in each year, which would correspond to the stumpage on the quantity which it had been required to cut. In the year beginning on August 1st, 1917, the appellant being again called upon to cut this quantity of lumber, cut an excess amount and paid the stumpage thereon without asserting any right to set off previous payments.

The claim to offset these previous payments was first made in answer to the demand of stumpage dues on lumber cut during the year beginning on August 1st, 1918. Whether the appellant is entitled to have these payments applied so as to reduce the stumpage due for the latter year is the question to be decided.

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Mignault J.

Briefly the appellant's contention is that although it cut no lumber during the three years beginning on August 1st, 1914, 1915, and 1916, it paid the stumpage dues that would have been payable on the required cut of ten thousand superficial feet per square mile, and that when it subsequently did cut lumber, these stumpage dues should be credited on the lumber then cut. It lays stress on the words in section 17:—

> Should the licensee prefer to pay the stumpage that would be due on such quantity of lumber * * *

The respondent answers that the amounts paid for the years wherein lumber was not cut were paid for the privilege of holding the lands without cutting lumber thereon, and relies on the words

> such charge in lieu of stumpage shall be payable, etc.,

as shewing that the appellant paid a charge, *not* for stumpage but in lieu thereof, for this privilege.

Section 17 expressly states that its purpose is to protect the Government against lands being held under licence for speculative purposes and not operated on. Reading the whole clause, it appears clear that the intention was to require the payment each year of a minimum amount whether or not the licensee cut any lumber. Had the required quantity been cut, this payment would undoubtedly be for stumpage, but where no lumber was cut, I cannot, on my construction of this clause, come to the conclusion that the payment was on account of stumpage, for stumpage being by definition "a tax charged for the privilege of cutting timber on State lands" (New English Dictionary), there could be no stumpage in the absence of the cutting of any lumber. And although the licensee, to use the language of this clause, was allowed to pay the stumpage that would be due on the minimum

quantity required to be cut instead of making the required operation or cut, he really paid a charge in lieu of stumpage, for it would be an abuse of language to term such a payment as one made for stumpage when no lumber was cut and no stumpage had accrued, and the only meaning it can have is that it was made for the privilege of not cutting the quantity specified by the Minister.

Another consideration is that stumpage dues might increase and did in fact increase in the subsequent years, and it would be unreasonable to allow the licensee, when he actually did cut lumber, to escape from paying the increased stumpage, by reason of previous payments at a lower rate for the privilege of making no cut of lumber.

For these reasons my conclusion is that the appeal fails and should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *H. A Powell.*

Solicitors for the respondent: *Winslow & McNair.*