BOOTH v. THE KING

(1913), 10 D.L.R. 371 (a1so reported: 12 E.L.R. 144, 14 Ex.C.R. 115.)

Exchequer Court of Canada, Cassels J., 13 February 1913

(Appealed to Supreme Court of Canada, infra p.27)

1. PUBLIC LANDS (I B--7)--LICENCE TO CUT STANDING TIMBER--RIGHT OF RENEWAL, HOW LIMITED.

Under the provisions of sec. 54, of ch. 43, R.S.C. 1886, and the later revision of R.S.C. 1906, ch. 81, sec. 73, giving authority to the Superintendent-General of Indian Affairs to grant licenses to cut timber on Indian lands, the licensee is not entitled at the expiration of his term of license to a renewal of the privilege as a matter of right, but his right to such renewal must depend upon whether or not a contract has been entered into between the Crown and himself entitling him to such renewal, in view of the provisions of sec. 55 of ch. 43, R.S.C. 1886, to the effect that no license shall be granted for a longer period than twelve months.

[Bulmer v. The Queen, 23 Can. S.C.R. 488; Lakefield Lumber Co. v. Shairp, 19 Can. S.C.R. 657, followed; Attorney-General v. Contois, 25 Grant 346; Muskoka Mill Co. v. McDermott, 21 A.R. (Ont.) 129; Smylie v. The Queen, 27 A.R. (Ont.) 172; W. C. Edwards Co. v. D'Halewyn, 18 Que. K.B. 419, applied.]

2. STATUTES (II A--97)--CONSTRUCTION AND EFFECT--TO UPHOLD STAT- UTES AGAINST INCONSISTENT DEPARTMENTAL RULES--LICENSE TO CUT STANDING TIMBER.

Any regulation or contract whereby the Crown binds itself to grant a license to cut timber on Indian lands from year to year, practically in perpetuity, is *ultra vires*, as being contrary to the terms of the statute R.S.C. 1886, ch.43, and the later revision R.S.C. 1906, ch. 81, since the lands in question are held by the Crown in trust for the Indians and the only right conferred by the statute is the granting of a license for one year.

PETITION of right to restrain the sale of certain timber and [Statement] for a declaration that the petitioner is entitled to a renewal of a license to cut said timber issued to him and renewed for a large number of years.

The petition was refused.

Shepley, K.C., and A.C. *Hill*, for suppliant.

Chrysler, K.C., and *Bethune*, for the Crown.

CASSELS, J.:--This was a petition of right on behalf of John Rudolphus Booth. The suppliant sets forth in his petition that on October 5, 1891, a license was issued to him by the Superintendent-General of Indian Affairs, to cut timber on Indian lands. The license was issued pursuant to the authority of ch. 43, of the Revised Statutes of Canada, and amendments thereto. The suppliant alleges that the said license, since the date thereof, had been renewed from year to year, the last renewal expiring on April 30, 1909. He then alleges that due application for a renewal of the said license for the year ending on April 30, 1910, had been applied for which application was refused by the Superintendent-General; and the suppliant further alleges that the said limits and the timber aforesaid had been advertised for sale by his authority.

The prayer of the petition is that the said sale may be re- strained, and that the suppliant may be declared to be entitled to the renewal of the said license and to a renewal from year to year thereafter.

The Crown in its defence denies the right of the suppliant and alleges, among other grounds of defence, that the lands comprised in the timber limits affected were, in fact, required for purposes incompatible with the licenses in question. There are other defences set out, which, on reference to the statement of de- fence, will appear.

The license bearing date the 5th day of October, 1891, purports to be signed by Mr. VanKoughnet, the deputy of the Superintendent-General of Indian Affairs. It purports to be made pursuant to the provisions of ch. 43 of the Revised Statutes of Canada, and amendments thereto; and it gives to J. R. Booth of the city of Ottawa, his agents and workmen, full power and license to cut pine timber and saw logs from trees of not less than nine inches diameter at the stump upon the location described upon the back hereof; and to hold and occupy the said location to the exclusion of all others except as hereinafter mentioned, from October 5, 1891, to April 30, 1892, and no longer.

The license provides among other things, that the dues to which the timber cut under its authority

are liable shall be paid as follows: namely, as set forth in the regulations for the disposal of timber on Indian lands and reserves established by order of His Excellency the Governor-General-in-council, dated September 15, 1888.

The amount payable for ground rent is mentioned as the sum of $324--the renewal fees, $2--and it provides that the above named licentiate shall be bound before or when paying the ground rent and renewal fee, if the license is renewed, to declare on oath whether he is still the *bonâ fide* proprietor of the limit hereby licensed, or whether he has sold or transferred it or any part of it, or for whom he may hold it.

A series of renewals, so called, were granted down to January 4, 1909; and they are practically all to the same effect, namely, that the conditions of the within license having been complied with the same is hereby renewed. Subsequently, certain manufacturing conditions were imposed by order-in-council of April 19, 1901, and the renewals were made subject to the manufacturing conditions. There is no objection to this term subsequently imposed, in order to conform apparently to regulations which had been provided for by the Province of Ontario in regard to licenses granted by them of timber berths owned by the province.

No question arises in regard to the form of renewals. I will deal with this subject later on when discussing the various authorities bearing on the case. In point of fact "renewals" was the wrong term. There is no authority in ch. 43, R.S., referred to, or in any of the subsequent statutes which provided for renewals of licenses. Each so-called annual renewal was a new and independent license by itself.

The right of the suppliant to maintain his petition must depend upon whether or not a contract has been entered into between the Crown and himself entitling him to such renewal.

The statute, ch. 43 of the Revised Statutes of Canada, 1886, provides in the interpretation clause, that the expression "Superintendent-General," means Superintendent-General of Indian Affairs; and the expression "Deputy Superintendent-General" means the Deputy Superintendent-General of Indian Affairs.

It is provided by sec. 4 of this statute that the Minister of the Interior or the head of any other Department appointed for that purpose by the Governor-in-council, shall be the Superintendent-General of Indian Affairs, and shall as such have the control and management of the lands and property of the Indians in Canada.

It is also provided that there shall be a department of the civil service of Canada, which shall be called the Department of Indian Affairs, over which the Superintendent-General shall preside.

It is provided by sec. 14 of the said statute that all reservations for Indians or for any band of Indians or held in trust for their benefit shall be deemed to be reserved and held for the same purposes as they were held before the passing of the Act and shall be subject to the provisions of this Act.

Sec. 41 of the statute provides that all Indian lands which are reserves or portions of reserves, surrendered or to be surrendered to Her Majesty, shall be deemed to be held for the same purposes as before the passing of this Act, and shall be managed, leased and sold as the Governor-in-council directs, subject to the conditions of surrender and the provisions of this Act.

Chapter 81 of the Revised Statutes of Canada, 1906, is practically similar to ch. 43, Revised Statutes of Canada, 1886. Section 15 of said ch. 43, provides that the Superintendent-General may authorize surveys, plans, and reports to be made of any reservation for Indians, shewing and distinguishing the improved lands, the forest and lands fit for settlement, and such other information as is required, and may authorize the whole or any portion of a reserve to be subdivided into lots.

Sec. 20 of ch. 81, of the Revised Statutes of Canada, 1906, is in similar terms.

By ch. 81, sec. 48, of R.S.C. 1906, it is provided that except as in this part otherwise provided no reserve or portion of a reserve shall be sold, alienated or leased, until it has been re- leased or surrendered to the Crown for the purposes of this part.

By ch. 43, sec. 54, of the Revised Statutes of 1886, it is provided as follows:--

> The Superintendent-General or any officer or agent authorized by him to that effect may grant licenses to cut trees on reserves and ungranted Indian lands at such rates and subject to such conditions, regulations and restrictions as are from time to time established by the Governor-in-council, and such conditions, regulations and restrictions shall be adapted to the locality in which reserves or lands are situate.

Sec. 55 provides that no license shall be so granted for a longer period than 12 months from the

date hereof.

Then follow subsequent provisions as to making returns, etc.

Sec. 73, ch. 81, R.S.C. 1906, and the following sections, are in similar terms to the earlier statute of 1886.

It is obvious that the Superintendent-General or other officer authorized by him to that effect had no power to grant a license for a longer period than twelve months from the date thereof.

It is equally obvious that the conditions, regulations and restrictions referred to in sec. 54 ch. 43, R.S.C. 1886 and of sec. 73, ch. 81, R.S.C. 1906, could only refer to such conditions, regulations and restrictions as are applicable to the yearly license, and would not include any such regulations which contemplated a further renewal of the license to a period beyond the year referred to.

In point of fact the license of the 5th October, 1891, referred merely to the payment of the dues. It reads:--

> That the dues to which the timber cut under its authority are liable, shall be paid as follows, namely: As set forth in the regulations for the disposal of timber on Indian lands and reserves established by order of His Excellency the Governor-General-in-council, dated the 15th September, 1888.

I am of opinion that, taking the license of October 5, 1891, by itself, and considering the authority conferred upon the Superintendent-General by sec. 54 of the earlier revision of the Revised Statutes, 1886, and sec. 73 of the later revision of 1906, there is no contract between the Crown and the suppliant which would entitle the suppliant to a judgment against the Crown as prayed for. The suppliant is, therefore, forced to rely upon the Indian land regulations and timber regulations adopted and established by orders of His Excellency the Governor-General-in-council on September 15, 1888, and to maintain his claim he must establish a contractual relation existing between the Crown and himself by reason of these regulations.

Sec. 2 of these regulations provides that the Superintendent- General of Indian Affairs, before granting any licenses for new timber berths in unsurveyed Indian reserves or lands, shall cause such berths to be surveyed; and the Superintendent-General of Indian Affairs may cause any reserve or other Indian lands to be sub-divided into as many timber berths as he may think

proper. Then, there is a provision for sale by auction; and section 5 provides that license holders who shall have com- plied with all existing regulations shall be entitled to have their licenses renewed on application to the Superintendant-General of Indian

Affairs.

Sec. 11 provides that all timber licenses are to expire on the 30th April, next, after the date thereof, and all renewals are to be applied for before the first of July following the expiration of the last preceding license. In default thereof the berth or berths shall be treated as *de facto* forfeited.

Sec. 12 provides that no renewal of any license shall be granted unless the limit covered thereby has been properly worked during the preceding season, or sufficient reason be given under oath and the same to be satisfactory to the Superintendent-General of Indian Affairs for the non-working of the limit; and unless or until the ground rent and all costs of survey and all dues to the Crown on timber, saw-logs or other lumber cut under and by virtue of any license other than the last preceding shall have been first paid.

Mr. Shepley, in his very able and lucid argument before me, rested his case in the main upon these regulations. His argument is shortly that while, by the statute, the Superintendent-General can only grant a license for a year, nevertheless the Crown might, by valid contract, bind itself to grant a renewal or a new license from year to year, practically in perpetuity. I am unable to agree with this contention. The lands in question are held in trust for the Indians. There are provisions referred to above which contemplate sales of Indian reserves by the Crown for the benefit of the Indians. I don't think the Crown was bound for all time to keep lands set apart as timber berths if in its discretion it was considered advisable in the interest of its *cestui que trustent* to sell these lands. In the present case it appears that a surrender was made with the view to enable the Crown to sell the limits in question. They were put up for sale by auction. There is nothing imputing want of good faith on the part of those representing the Crown, and I must assume that the Crown is dealing with the lands in question in a manner best calculated to promote the interest of those whom it represents. Moreover, I have come to the conclusion that any regulation which would have the effect of tying up for practically all time the limits in question would, if they are so construed, be *ultra vires* as being contrary to the terms of the statute. The statute is that the Superintendent-General may grant licenses.

While I do not consider myself as bound to follow the various decisions which I shall refer to, with the exception of *Bulmer v, The Queen*, 23 Can. S.C.R. 488, they are the decisions of Judges of very great eminence; and even if I held a view contrary to their views, I would be loth to set up my personal judgment as against their opinions, but would prefer to leave it to a higher Court, to place a different construction upon the statutes. I may say, however, that I agree with their conclusions.

The first case which is important is the case of *Contois v. Bonfield*, 27 U.C.C.P. 84. This was an appeal from the judgment of the Court of Common Pleas. In this particular case a patent had been issued by mistake. It had been intended that the rights of the licensee to the timber should have been re- served to the patentee. The official of the Crown merely endorsed the reservation on the patent and it was held that this had no effect. An action was subsequently brought in the Chancery Division and tried by the late Chancellor Spragge, in the suit of the *Attorney-General v. Contois*, 25 Grant 346, and the patent was set aside. The importance of the *Contois* case in the Court of Appeal is the reference--the further renewal is made after the issue of the patent.

The case of *Attorney-General v. Contois*, 25 Grant 346, was decided under the Act respecting the sale and management of timber on public lands, ch. 23, of the Consolidated Statutes of Canada, 1859. That Act provides as follows:--

> The Commissioner of Crown Lands or any officer or agent under him authorized to that effect may grant licenses to cut timber on the ungranted lands of the Crown at such rates, and subject to such conditions, regulations and restrictions as from time to time be established by the Governor-in-council, and of which notice shall be given in the Canada Gazette.

By sub-sec. 2 it was enacted that no licenses shall be so granted for a longer period than 12 months from the date there- of. And then follow provisions very similar in terms to the provisions of the statutes governing this case.

The late Chief Justice Thomas Moss, in his judgment is reported, as follows:--

> The patent on its face grants the land absolutely and unconditionally. It may, therefore, be said to grant more than the subject -matter of the treaty between the Crown and the patentees. This excess in the grant may be fairly taken to have been the result of an improvident act of the official whose duty it was to draw a proper patent, and we are not prepared to hold that in such a case the Crown cannot, in equity, obtain the relief which, under analogous circumstances would be awarded to a subject. But we rest our judgment upon the ground that, even if the memorandum endorsed had been embodied in the patent, the appellant would, for all that is alleged, have been without defence to this action. On that supposition the language of the patent would have been that it was subject to the rights, powers, and privileges of the defendant under the existing license.

Proceeding, the late Chief Justice Moss states:--

> It was suggested upon the argument that the difficulty arising from want of privity was met by the commissioner's renewal of the license for the period of a year, and that this should be treated as a quasi

> assignment by the Crown of any rights which could have been enforced against the plaintiff at its instance. The answer offered to this was that the powers of the commissioner are prescribed and regulated by statute; that an agreement for a renewal of a license is something which the law has not empowered him to make, and is, in- deed, not within the contemplation of the statute; and that he can only give a right to cut timber upon ungranted lands, and even that for no longer period than twelve months.
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> These positions are fully supported by the statute.

In the case of the *Muskoka Mill and Lumber Co. v. McDermott et al.,* 21 A.R. (Ont.) 129--also a case in the Court of Appeal for Ontario--the following is the language of the Court. Osler, J., states at page 132, as follows:--

> The Act respecting timber on public lands expressly enacts that no license to cut timber on the ungranted lands of the Crown shall be so granted for a longer period than twelve months.

And he proceeds to point out the terms and the rights conferred upon the licensee. Then he states:--

> No language could more forcibly express the limitation of the right of the holder to the period of the license, as well as the limitation of the period for which it may be granted, and the license itself is expressed, as it ought to be, in accordance with the requirements of the Act. It is needless to say that no conditions, regulations or restrictions can be established by the Lieutenant-Governor-in-council which are opposed to these requirements. . . . The legal right of the license, except as excepted by the last clause of sec. 2 of the Act, ceased with the expiration of each license, and I am not aware of any equitable right to renewal capable of being enforced against the Crown. That is a matter which rests with the Crown, which no doubt will act justly in each particular case. But there is nothing so far as I know to prevent the Crown from withdrawing any lot from a timber limit, and declining to renew the license over such lot at the expiration of the license year.

Then he refers to the language of the late Chief Justice Moss, in the case of *Contois v. Bonfield*, 27 U.C.C.P. 84, which I have quoted. The late Chief Justice Hagarty concurred with the judgment of Mr. Justice Osler.

The next case of importance is the case of *Smylie v. The Queen,* 31 O.R. 202, decided by the late Mr. Justice Street. This decision was based upon the contract entered into between the parties. The contention in that case was that the subsequent orders-in-council which required the timber to be manufactured in Canada were not binding upon the licensee. The judgment of Mr. Justice Street proceeded upon the ground that by the original contract the rights of the licensee to a renewal were subject to such regulations as may from time to time be established. The licensee

refused to accept a renewal of the license containing the regulations requiring him to comply with these subsequent regulations, and Mr. Justice Street dismissed the action, basing his judgment upon the ground that the licensee, if he took a renewal, was compelled to take it subject to these regulations, and having refused to do so he was out of Court.

I rather gather from the judgment of Mr. Justice Street that his own opinion would more than likely have been in favor of the right to a renewal. This case was taken to the Court of Appeal in Ontario, and while the reasons of the various Judges may have been obiter dicta, nevertheless their views are en- titled to very great weight. The case is reported, *Smylie v. The Queen*, 27 A.R. (Ont.) 172, 176. Mr. Justice Osler refers to the regulations, and amongst others, is one that licensed holders who have duly complied with all existing regulations, shall be entitled to a renewal of their licenses on complying with certain conditions. He states at p. 177, as follows:--

> In these regulations we find for the first time language which might imply an intention to take authority to sell the timber berths or limits themselves, instead of, as hitherto, selling the yearly license to cut timber thereon, and stress was laid on this by the appellant as if he had thereby acquired some larger title to the timber than the yearly license would confer upon him. We cannot, however, assume that the Lieutenant-Governor-in-council intended to do anything op- posed to the statute, which only authorizes the Commissioner of Crown Lands to grant licenses to cut timber on the lands--licenses which by law must expire at the expiration of twelve months from their date. Such a license was, in my opinion, the only thing authorized and intended by these regulations to be sold, however large the sum paid at the sale, which can only be regarded as a premium or bonus for the license, as indeed the conditions of sale in each case expressly describe it. It may be, that, under the power to make "conditions, regulations, and restrictions," the Lieutenant-Governor- in-council had authority to provide, as these regulations purport to do, for renewing the license on proper terms. It is not necessary to decide that, although it does appear to be quite opposed to the clear words of the Act, which seem to contemplate that the Crown should be perfectly unfettered and free to deal with the timber at the expiration of each license year as it might think fit.

On page 181, he says:--

Considering, however, that every license is a new and independent license.

Mr. Justice Maclennan, at page 182, refers to the various statutes, and he points out that

> Sec. 2 of the statute declares that no license shall be so granted for a longer period than twelve months from the date thereof.

And he says:--

> Now, there is not, and there has never been, during fifty years, any enactment in any way qualifying or limiting that plain declaration of the Legislature, that no license shall be for a longer term than twelve months, and the law has been re-enacted during that period three different times. How absolute the intention of the Legislature was, and has been, in thus limiting the duration of licenses, appears from sec. 3, which defines the rights which the license was intended to confer.

He proceeds--

> I think the Legislature could hardly have used more clear, unambiguous, emphatic language to express its intention, that there should be no license for a longer period than twelve months, that at the end of that time they should expire. . . . They have always been for a term not exceeding twelve months, terminating on a day certain, which for many years has been the 30th of April, and no longer. Such is the language of the statute, and such is the title which has been granted to and accepted by the suppliants in pursuance thereof.

> They contend, however, that the clear language of the Legislature and of the license issued in pursuance thereof, is to be qualified by the regulations, particularly regulation 5, and by the practice of the land department for many years of granting renewals annually to the previous licensee. Regulation 5 provides that license holders who have complied with all existing regulations shall be entitled to have their licenses renewed on application. . . .

The question is, whether these two regulations were intended or can be held to weaken or qualify the clear terms of the statute, and to confer a right not expressed in the license itself, and I think it impossible so to hold.

He then proceeds:--

> I think, therefore, the intention of the regulations is to comply with, and not to qualify, the statute. But if the regulation is not in accordance with the statute, if it assumes to confer a right of renewal, it must give way to the statute, and can confer no right beyond what the statute authorized the land commissioner to grant, and that is a license for a term not exceeding twelve months. The regulations which the Lieutenant-Governor-in-council was authorized to establish were in respect of licenses which were not to exceed twelve months in duration. So far as they go beyond that they cannot bind the Crown. I think the regulations in question were ordained, merely for the guidance of the officials of the land department, and not for the purpose of conferring any contractual or other right of renewal upon licenses, which they could enforce against the Crown.

The learned Judge came to the conclusion, as follows:--

> I am, therefore, of opinion that the suppliants have no contractual or other right, as licensees, to compel the

> Crown to renew their licenses.

The late Sir Charles Moss, at his death Chief Justice of the Court of Appeal, points out as follows:--

> There powers are prescribed and regulated by the statute, and reference to it must be had in every case when it becomes necessary to as- certain what may and what may not be done in regard to the public timber. I fail to find in the statute any warrant for the suppliant's contention. On the contrary, I think it is made thereby very plain that the authority to give or grant a right to any one to cut timber upon the public lands of the province for the purpose of manufacturing it into logs, lumber, or square timber, is limited to the grant of a license for a period of twelve months from the date thereof.
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> These enactments indicate an intention to retain the entire right to and control over all timber not cut during the term of a license, and over the grant of licenses from year to year, and the power to withhold from the licensee of one year any claim whatever to the issue to him of a license for the next or any future year.

He further states:--

> The term "renewal" seems to be applied to licenses issued after the first. But in reality this is not an accurate description. They are not in the nature of a restoration or revival of a right. Each is a new grant. It bears no necessary relation to the proceeding license.

In regard to this latter point, reference may be had to the case of the *Lakefield Lumber and Manufacturing Co. v. Shairp*, 19 Can. S.C.R. 657. Mr. Justice Gwynne, in his judgment at page 671, states:--

> As to the point that the license, which issued on the 3rd May, 1888, was the same license as that issued in all the years subsequent to and in the year 1873, when the first appears to have been granted and before the lot in question was sold, and that, therefore, the license of 1888 covered the lot in question equally as did that issued in 1883, and in prior years, it does not seem to me to be necessary to make any observations, further than that it cannot be entertained.

To the same effect in the Province of Quebec, in the case of *W. C. Edwards Co., Ltd. v. D'Halewyn*, 18 Que. K.B. 419.

The only other case that I have been referred to, and which has a bearing, is the case of *Bulmer v. The Queen*, 3 Can. Ex. R. 184. At page 212, the late Judge of the Exchequer Court, Mr. Justice Burbidge, seems to have yielded to Mr. McCarthy's argument and read the word "may" as meaning the word "shall," and came to the conclusion there was a contract to re- new. In that

particular case it appeared subsequently that the Dominion had no right or title to the limits, the subject-matter of the suit. The question therefore resolved itself into one of damages, the title not being in the Dominion, and the learned Judge proceeded to assess damages under the doctrine enunciated in *Bain v. Fothergill*, L.R. 7 H.L. 158, and allowed some $5,000 damages.

This case was taken to the Supreme Court, and the judgment of that Court was pronounced by the late Chief Justice Strong, and is reported, *Bulmer v. The Queen*, 23 Can. S.C.R., at 488. The Court differed entirely from the view taken by the Judge in the Court below. Apparently it declined to read the word "may" as "shall." And it is pointed out that, by the words of the statute, the right conferred is discretionary. No valid cross-appeal was taken so that the Supreme Court was unable to reduce the damages and therefore dismissed the appeal. The case is important as shewing that no contract had been entered into merely by the orders-in-council not acted upon by the granting of the license. The learned Chief Justice points out that the right of the suppliant must, therefore, depend upon the terms of the lease or license itself, and no contract was evidenced by the terms of the license.

One or two other cases were cited before me, as, for in- stance, *Booth v. McIntyre*, 31 U.C.C.P. 183, and *Foran v. McIntyre*, 45 U.C.Q.B. 288, and *McArthur v. The Northern and Pacific Junction* R. Co., 17 A.R. (Ont.) 86.

I have carefully read these various cases, but do not find that they assist in any way to a determination of this case.

I am of opinion for the reasons given that the suppliant has failed to prove a contract enforceable against the Crown.

The petition is dismissed with costs.

Petition dismissed.