BOOTH V. THE KING

(1915), 21 D.L.R. 558 (also reported: 51 S.C.R. 20)

Supreme Court of Canada, Davies, Idington, Duff, Anglin and Brodeur JJ., 2 February 1915

(On appeal from judgment of Exchequer Court of Canada, supra p.16)

1. TIMBER (I--1)--Licenses to cut--Renewal of License--Compliance With Regulations--Effect.

The departmental regulation declaring that holders of licenses to cut timber on Indian lands shall be entitled to renewal if they have complied with existing regulations, does not confer a right of perpetual renewal as such would be inconsistent with the limitation of licenses to twelve months under the Indian Act, R.S.C. 1906, ch. 81.

[Booth v. The King, 10 D.L.R. 371, 14 Can. Exch. 115, affirmed]

[Statement]APPEAL from a judgment of the Exchequer Court of Canada, dismissing the suppliant's edition of right with costs.

Shepley, K.C., and *Lafleur*, K.C., for the appellant.

Chrysler, K.C., for the respondent.

DAVIES, J.:--I concur with Mr. Justice Anglin.

IDINGTON, J.:--The appellant obtained in 1891 from the Superintendent of Indian Affairs a license to cut timber on certain Indian lands. This license was granted under the Indian Act, ch.

43, of R.S.C. 1886, sec. 54 of which is as follows:--

> 54. The Superintendent-General or any officer or agent authorized by him to that effect, may grant licences 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 such reserves or lands are situated.

Section 55 provides, amongst other things, as follows:--

No license shall be so granted for a longer period than twelve months from the date thereof.

Section 56 provides that:--

> 56. Every licence shall describe the lands upon which the trees may be cut, and the kind of trees which may be cut, and shall confer, for the time being, on the licensee the right to take and keep exclusive possession of the land so described, subject to such regulations as are made: . . .

and proceeds to declare that every license shall vest in the holder thereof the property in all trees of the kind specified

cut within the limits of the licence during the term thereof

and to give a right of action against any trespassers and to recover damages, if any, and

> all proceedings pending at the expiration of any licence may be continued to final termination, as if the licence had not expired.

The license in question was in conformity with these provisions and upon a number of conditions expressed therein and further upon condition that the said licensee or his representatives must comply with all regulations that are or may be established by order in council, etc., on pain of forfeiture of the license. There is not a word express or implied therein looking to a renewal thereof, much less expressive of any obligation to renew. In fact from year to year there was indorsed on this license for many years a renewal of said license and each renewal as such

accepted by appellant.

It is certainly difficult to understand how, under such a statute and such an instrument there can be claimed a right of another renewal; yet that is what is insisted upon herein, though the term "renewal" used throughout by the department and the regulations to be referred to hereafter, is in argument disclaimed.

It is conceded that the respondent at the expiration of any single year could insist upon raising the amount of stumpage dues to become payable in future. One might suppose that this alone should end all argument. Yet it does not, for the appellant relies upon the fact that amongst the regulations made, which the Governor in Council is alleged to have been acting under the powers in the said statutes to make, are the following:--

> Sec. 5. Licence holders who shall have complied with all existing regulations, shall be entitled to have their licences renewed on application to the Superintendent-General of Indian Affairs.
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> Sec. 11. All timber licences are to expire on the 30th of April next after the date thereof, and all renewals are to be applied for before the 1st of July following the expiration of the last preceding licence; in default whereof the berth or berths may be treated as *de facto* forfeited.

It seems almost too clear for argument that in face of the absolute restriction in the statute limiting the duration of a license to twelve months, that the Governor in Council could make any regulation which would in fact nullify the statute.

And if the said regulation, sec. 5, means what appellant urges, then it exceeds the power given in the statute.

This is not a regulation which by publication as in some cases is provided by statute shall after the lapse of a certain period of time within the next ensuing session of Parliament become law unless revoked by Parliament.

Its publication is simply for the enlightenment of those concerned, including members of Parliament. If *ultra vires* it goes for nothing. Its frame may be misleading, but in no sense can it create any legal right. If it did mislead in fact, and thereby do the appellant any damage, that might form ground for an appeal to the proper consideration of Parliament, but no such case is made here, nor if attempted could the Court, without Parliamentary sanction, entertain such a claim.

It cannot rest on contract, for it is not within the terms of the contract. It cannot rest upon statute, for the regulation is not a statute in itself or to be deemed as having statutory force and so far as exceeding the statutory power is non-operative.

The only regulations pointed to in the contract are of an entirely different character and for an entirely different purpose. Indeed the word "regulation" as used in the statute is of an entirely different meaning and for an entirely different purpose from what is sought herein to be imparted to it.

In short it seems to me that to give any legal effect to this sec. 5 of the regulations in the way the appellant claims would be to give him a license in perpetuity which certainly would be quite inadmissible, even for Parliament to attempt if regard is had to the trust reposed in it by the transactions leading to Canadian control over the subject-matter of these Indians and their lands so called.

Counsel tried to disclaim this by suggesting that a general regulation could be passed annulling the section. The annulling regulation then could be passed the day before the expiration of any renewal of the license.

It is idle to say that it could not be made so as to apply to the territory over which the license prevails, for the very terms of the sec. 54, looking to such regulations expressly preserves the right to deal with that which shall be adapted to the locality. That is almost exactly what did happen. An order in council was passed dealing with the tract of Indian lands over which the license in whole or chief part prevailed.

Instead of taking the form of a regulation it took the form of an order in council.

If the argument is good it would seem that all that is to be complained of is matter of form, having no substance.

It is not necessary that I should try and give the sec. 5 relied upon either the meaning and purpose counsel for the Crown suggested, or any meaning. But I do not think it would be very difficult to make a reasonable surmise of its purpose which would shew it never necessarily conveyed to the minds of those concerned the idea of its containing either a contractual or statutory obligation upon which they had a right to seek a remedy at law.

I think the appeal should be dismissed with costs.

DUFF, J.:--The license in question in this case was issued on October 5, 1891, under the authority of secs. 54, 55, 56 and 57 of R.S.C., 1886, ch. 43. The legislation is still in force, being now contained in chapter 81, R.S.C., 1906, secs. 73-76. These sections are as follows: [The learned Judge here cited the sections referred to.]

The appellant alleges that by virtue of certain regulations dated September 15, 1888, and professedly made in pursuance of sec. 54, ch. 43, R.S.C., 1886, now sec. 73, ch. 81, R.S.C., 1906, and which regulations are still in force, he became entitled and is still entitled to have his license annually renewed at the expiration of the term thereof on the condition that during each term he should have complied with all the existing regulations affecting his license. This contention is based upon sections 5, 11, and 12 of the regulation. Secs. 5 and 11 are as follows:--

> 5. License holders who shall have complied with all existing regulations, shall be entitled to have their licenses renewed on application to the Superintendent-General of Indian Affairs.
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> 11. All timber licences are to expire on the 30th day of April next after the date thereof, and all renewals are to be applied for before the 1st day of July, following the expiration of the last preceding license; in default whereof the berth or berths may be treated as forfeited.

The original license granted to the appellant in October, 1891, expired on April 30, 1892. But the Superintendant of Indian Affairs for the time being granted renewals down to the year 1909, the last expiring on April 30, 1909, the grant of the renewal in each case being recorded in a simple memorandum declaring that the license was renewed. At the expiration of the last mentioned license the Government refused to grant any further renewals. Interpreting the regulations in accordance with the natural meaning of the words there could hardly be a serious answer to the appellant's contention in the absence of any dispute touching their legal validity when construed in that sense. The only question in debate, as I understand the controversy between the parties, is whether the regulations so read were beyond the competence of the Governor in Council exercising the powers conferred by section 54, or, to put the question in another way, whether assuming the regulations to have been validly made, we are not constrained by the provisions of the statute from which they derive their force to construe them in a way which necessarily defeats the appellant's claim. This question must be considered under two heads. First, what is the true construction of the Act of 1886, reading it as it stands, without reference to the course of legislation or judicial or administrative interpretation before and since the statute was passed; secondly, if, as I am constrained to hold that the view of the regulations upon which the appellant's claim necessarily rests is incompatible with the statute when effect is given to its language construed apart from the course of legislation and interpretation just referred to, does

this course of legislation and interpretation justify another construction and one which will support the appellant's claim? As to the first point. The enactment of sec. 55, "No license shall be so granted for a longer period than twelve months from the date thereof" appears to me to import a prohibition which disables the Governor in Council when exercising authority conferred by sec. 54 from validly passing any regulations having for their effect, (1) the constituting of a contract for renewal such as that alleged between the Crown and the licensee as one of the incidents of a license granted under sec. 54, or (2) the vesting in a licensee as such of a right whether contractual or not to have a fresh license issued to him on the expiration of the term of the license upon the sole condition that the stipulations of the original license have been fulfilled. It may be assumed that if the word "license" in the enactment of sec. 55 quoted ought to be read as merely descriptive of the instrument there would be no necessary incompatibility between that section and such a regulation. But if it were the instrument as such that was contemplated by that section one would naturally expect to find some other form of expression than the words "shall be so granted"' which words seem more appropriate as making pro- vision for the duration of the right than as merely dictating the form of the instrument; and, I think, reading these sections as a whole, that it is the duration of the right which is being provided for. If that is the true construction it would follow that the Governor in Council is powerless to attach to the grant of a license any incident by

regulation or otherwise having the effect of entitling the grantee as such to exercise the rights of a licensee for a longer term than a single year.

As to the second point. Regulations in the form in question were, as pointed out by Mr. Justice Osler and Mr. Justice Maclennan in the passages quoted from their judgments in *Smylie v. The Queen*, 27 A.R. Ont. 172, promulgated under the Ontario Act of 1868, and these regulations had been in force for more than twenty years when the regulations now in question were framed in professed exercise of authority conferred in terms identical in effect with those of the Act of 1868.

The statute of 1886 was re-enacted in 1906 and if one had to consider the statute and the regulations alone, one would, I think, be driven to the conclusion that there had been an administrative interpretation of the statute in accordance with the view contended for by the appellant, and it would have been necessary then to consider whether there had not been a legislative adoption of that interpretation. I am disposed to think, however, in view of the course of judicial opinion, that this administrative interpretation is not entitled to very much weight. Questions as to the proper effect of these or identical enactments and regulations have many times come before the Courts during the last forty years and have been the subject of many expressions of judicial opinion, and these expressions have been overwhelmingly against the appellant's view; it is unnecessary to specify the decisions, which are referred to in the judgments *in Smylie v. The Queen*, 27 A.R. Ont. 172. In these circumstances, we are, I think, compelled to give effect to the statue in accordance with what appears to us to be the proper reading of the language of the sections themselves.

ANGLIN, J.:--The facts of this case are sufficiently set forth in the judgment of the learned Judge of the Exchequer Court. By his petition the suppliant prays that he may be declared entitled to the renewal of a timber license held by him over Indian lands, which the Crown refuses to grant, and he asks consequential relief.

The material parts of the relevant sections of R.S.C. 1886, ch. 43, are as follows:--

> 54. The Superintendent-General or any officer or agent authorized by him to that effect may grant licences to cut trees on reserves and ungranted Indian lands . . . subject to such . . . regulations . . . as are from time to time established by the Governor-in-Council....
>
> 55. No license shall be so granted for a longer period than twelve months from the date thereof . . . .

Secs. 73 and 74 of ch. 81, R.S.C., 1906, are in terms similar to secs. 54 and 55 of the Act of 1886. The original provisions, which these sections reproduce, were consolidated as secs. 1 and 2 of the Public Lands Timber Licenses Act, ch. 23 in the C.S.C., 1859, which were made applicable to Indian lands by 31 Vict. ch. 42, sec. 35.

Pursuant to the provisions of sec. 54 of the Revised statutes of 1886 the following regulations *inter alia* were duly enacted and promulgated on September 5, 1888:--

> 5. Licence holders who shall have complied with all existing regulations, shall be entitled to have their licences renewed on application to the Superintendent of Indian Affairs.
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> 11. All timber licences are to expire on the 30th day of April next after the date thereof and all renewals are to be applied for before the first day of July following the expiration of the last preceding licence, in default whereof the berth or berths may be treated as forfeited.

A number of other provisions in the regulations contain references to the renewal of licenses.

The suppliant, appealing from an adverse judgment of the Exchequer Court, contends that the statute, properly construed, does not prohibit the issue of a renewable license; that the regulations expressly authorize the issue of such licenses and that, having been laid before Parliament, they must be taken to have received its sanction; and that, having paid a large sum of money for his license on the faith of obtaining a right to a renewal under the statute and regulations, he is either contractually or equitably entitled to such renewal as of right.

On the construction of the statute the appellant's contention is, in my opinion, hopeless. The language of sec. 55 is too plain to admit of any doubt. To interpret it as authorizing the issue of a license renewable as of right after the lapse of the year for which it was granted, and so on from year to year, would defeat its obvious intent. There is no real distinction between a perpetual license and a license perpetually renewable. Both are equally obnoxious to a provision which forbids the granting of a license for a longer period than twelve months.

Nor is the appellant's position improved by invoking regulation No. 5. The early history of that regulation is given by Maclennan, J.A., in *Smylie v. The Queen*, 27 A.R. Ont. 172, at pp. 183-4, as follows:--

> Regulation 5 provides that license holders who have complied with all existing regulations shall be entitled to have their licences renewed on application, and regulation 11, that all licenses shall expire on the 30th of April next after the date thereof, and that renewals are to be applied for and issued before the 1st of July following the expiration, on default whereof the right to renewal shall cease, and the berth shall be treated as forfeited. The original regulations of the 5th of September, 1849, Canada Gazette, vol. 8, p. 6999, are expressed differently. Regulation 8 declares that licensees who have complied, etc., will be considered as having a claim to the renewal of their licences in preference to all others on application, etc., failing which the limits are to be considered vacant, etc. A change was made on the 23rd of June, 1866, since which the regulation relating to renewal has continued to be in the form approved of on the 16th of April, 1869.

The learned Judge continues in language which I respectfully adopt:--

> 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 licence itself, and I think it impossible so to hold. In the first place it was not so intended. The second clause of the order in council expressly refers to the requirements of the statute, as matters which were to govern licences and renewals thereof, as well as the regulations, conditions and restrictions, which were then being ordained. Again by regulation 24, the exact form of the licence is prescribed, and in the form the term is expressed to be from its date to the 30th of April and no longer; and there is not a word in it about renewal. 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.

That the holder of a license, subject to a regulation identical with that now relied upon, was not entitled to a renewal as of right had been held in a series of Ontario cases. *Contois v. Bonfield*, in 1875-6, 25 U.C.C.P. 39, 27 U.C.C.P. 84; *McArthur v. Northern and Pacific J.R. Co.*, in 1890, 17 A.R. Ont. 86; *Shairp v. Lakefield Lumber Co.*, in 1890-1, 17 A.R. Ont. 322, 19 Can. S.C.R. 657; and *Muskoka Mill and Lumber Co. v. McDermott*, in 1894, 21 A.R. Ont. 129.

As put by Moss, J.A., in Smylie v. The Queen, in 1900, 27 A.R. Ont. 172, at pp. 190-191:--

> It is enough to say that an agreement for a renewal is something which the law has not empowered the Commissioner of Crown Lands or the Department of Crown Lands to enter into. It is not within the statute, which authorizes no more than the giving of a right to cut timber, and even that for a period not longer than twelve months.
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> The regulations must be construed as not intending to enlarge the rights of persons dealing in respect of timber beyond such as the statute authorizes, and no greater effect has been attributed to them by the Courts of the province whenever it has become necessary to consider them.
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> The term "renewal" seems to be applied to licences 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 preceding licence. It may or not be couched in the same language and subject to the same conditions, regulations and restrictions, as the former. It is not the continuance of an old or existing right, but the creation of a new original right.

It is probably now quite too late to contend that regulation No. 5 should be given a construction which, assuming its validity, would confer on timber licensees, complying with the regulations, an absolute right to renewal; but, if the 5th regulation should be so construed, it is still more hopeless to contend for its validity in the face of the explicit language of sec. 55 of the statute.

It was conceded at bar that regulation No. 5 might be revoked or altered at any time by the Governor in Council and that the suppliant's rights as licensee would be subject to such revocation or alteration. But it is maintained that, in the absence of such revocation or alteration, the regulation is binding upon the Crown. In so far as it is authorized and subject to proper construction, this is no doubt the case. But the fact that it may be so revoked or altered does not warrant a construction of an existing regulation in conflict with the prohibition of the statute. Nor does it render it valid while it stands unrepealed or unchanged, if only such a construction can be put upon it.

Although the statute requiring regulations passed under the Indian Act to be laid before Parliament appears to have been enacted only in the year 1894 (57 & 58 Vict. (D.), ch. 32, sec. 12), if it may be assumed in favor of the appellant that the regulation in question was duly laid before both Houses of Parliament that would not materially affect his case. Parliament may be taken to have known the construction which the Courts had put upon this regulation and to have allowed it to remain unchallenged in the expectation that that construction would be adhered to. Moreover, although the fact that a regulation which has been laid before Parliament remains in force unchanged is, no doubt, a circumstance entitled to weight as raising a probability of its

being valid and in conformity with the intention of Parliament, it does not suffice to render the regulation effectual and unimpeachable, if, on the only construction of which it is susceptible, it contravenes an express statutory provision. On the other hand, it affords a very strong ground for giving

to the regulation a construction not obnoxious to the statute.

Nor has the suppliant any such right as he asserts to the favorable consideration of a Court of equity.

His original license in 1891 was expressly limited to the term "from 5th October, 1891, to 30th April, 1892, and no longer." It contained no provision for renewal. Each of the so-called renewals in like manner extends only to the ensuing April 30, and contains no allusion to further renewal. There is no evidence of any contract for renewal, and, if there were, no such contract which its officers might purport to make could bind the Crown in the face of the statutory prohibition. But whether the suppliant bases his claim upon contract or upon the effect of the regulation, he must be assumed to have known the law applicable to the license which he sought and obtained, and to have taken it subject to that law.

There is no evidence before us as to the value of the timber limits in question when the appellant became licensee or of their subsequent appreciation. But it is common knowledge, which we cannot disregard, that this appreciation has been very great of recent years. Whether the sum paid by the suppliant for his license, by way of bonus, premium or otherwise, should be deemed large or small would necessarily depend upon these considerations. Whatever sum he paid to obtain the license was, no doubt, paid in the expectation that it would probably be renewed from year to year, as is ordinarily the case with Crown timber licenses, but always subject to the right of the Crown, in its discretion, to refuse such renewal. Of an adverse exercise of that discretion at any time he took the risk and he can- not be heard to complain. Under such circumstances there can be no ground for curial intervention in his behalf.

A construction of the regulations which would give to licensees who have complied with them an absolute right to renewals not only directly conflicts with the prohibition of the 55th section of the statute, but would also do grave injustice to the bands of Indians for whom the Crown holds the Indian lands in trust.

The appeal, in my opinion, fails, and must be dismissed with costs.

BRODEUR, J.:--The appellant claims that he was entitled to have a renewal of his license to cut

timber on Indian lands.

The license itself, which embodies the rights and obligations of the department, on one side, and of the licensee on the other, does not contain any such right on the part of the licensee.

He relies on certain regulations passed by the Governor in Council.

It would not be necessary for me to examine if those regulations could bear such a construction, because, then, they would be in violation of the statute, which declares that no licenses should be granted for a longer period than twelve months, and the Governor in Council could not make any regulations that would be in contravention with a statutory enactment so explicit.

It could be stated also that the Indians are the wards of the state and no policy should be adopted that would deprive the Indians of the fruits that their reserves could procure for them. It may be that at one time their lands could be more advantageously exploited as timber lands, but at some other time they should be converted into farm lands in the interest of the Indians. Then it would be a pity that through some previous concessions to timber license holders that beneficial change could not take place.

For those reasons the appeal should be dismissed with costs.

Appeal dismissed with costs.