BETWEEN:

D. R. FRASER & COMPANY LIMITED ..... } APPELLANT:

AND

THE MINISTER OF NATIONAL REVENUE ..... } RESPONDENT.

1945
Sep. 19, 20 & 21
Dec. 20

Revenue—Income—Income War Tax Act, R.S.C. 1927, c. 97, s. 5 (1) (a)—License to cut timber is a contract for sale of goods containing lease of land on which timber is growing—Claim for allowance for exhaustion of timber limits—Discretion of Minister exercised on proper legal principles—Extent of discretion given Minister by s. 5 (1) (a) of Income War Tax Act—Appeal dismissed.

Appellant has, for many years, operated a logging, sawing, planing and general lumber milling business in the Province of Alberta, and during its fiscal year ending October 31, 1941, produced 8,031,305 board feet of lumber from three timber limits, licenses for which were granted to it by the Minister of Lands and Forests of Alberta. In making its income tax return for the year 1941 appellant claimed an allowance for exhaustion of these timber limits which claim was disallowed. On appeal the court found that the contract entered into between the appellant and the Minister of Lands and Forests of Alberta, called a license, is one for the sale of goods which also gave appellant a right to enter upon the land for the purpose of cutting and removing the goods agreed to be sold, and, therefore, contained a lease of the land. The appellant is not the owner of the timber being exhausted and has no depletable interest therein. It has already benefited by deductions from its income over a period of years of all costs which could possibly be called capital costs (as well as all costs of operation) and, therefore, by such deductions, has been allowed to keep its capital investment intact. The Province of Alberta is not subject to income tax and indicated its consent to 99 per cent of any allowance for exhaustion being made to appellant.

Held: That the allowance provided for by s. 5 (1) (*a*) of the Income War Tax Act is permissive as contrasted with obligatory and the section must be so read unless such an interpretation would be so inconsistent with the context as to render it irrational or unmeaning.

2. That the discretion given to the Minister extends not only to the determination of what is a fair and just allowance but also as to whether or not, under all the circumstances, any allowance should be made.

3. That the Minister having concluded that an allowance for exhaustion should not be made to appellant exercised his discretion upon proper legal principles and the appeal must be dismissed.

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APPEAL under the provisions of the Income War Tax Act.

The appeal was heard before His Honour Judge J. C. A. Cameron, Deputy Judge of the Court, at Edmonton.

S. B. Smith K.C. and *C. W. Clement, K.C.* for appellant.

G. Auxier and *J. G. McEntyre* for respondent.

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

CAMERON D.J. now (December 20, 1945) delivered the following judgment:

This is an appeal from an assessment dated February 5, 1944, made in respect of the Appellant's income for the year 1941. Notice of Appeal is dated March 4, 1944, and on September 26, 1944, the Minister, by his decision, affirmed the assessment, stating in part:

> The Honourable the Minister of National Revenue having duly considered the facts as set forth in the Notice of Appeal, and matters thereto relating, hereby affirms the said Assessment on the ground that the taxpayer is not entitled to an allowance under the provisions of Subsection (*a*) of Section 5 of the Income War Tax Act for the exhaustion of timber limits owned by the Crown in right of the Province of Alberta on which the taxpayer has been licensed to cut timber. Therefore on these and related grounds and by reason of other provisions of the Income War Tax Act and Excess Profits Tax Act the said Assessment is affirmed.

On October 23, 1944, the Appellant gave Notice of Dissatisfaction and the reply of the Minister dated December 2, 1944, affirmed the Assessment. Pleadings were delivered. At the trial, on motion of Appellant's counsel, I approved of two amendments to the Statement of Claim (1) by substituting an amended schedule of timber limits in Paragraph 14; (2) by adding to the prayer of the Statement of Claim the following clause:

> (*aa*) That the Appellant's assessment be amended by making it an allowance for exhaustion of $1.40 per thousand feet board measure, or a just, fair and reasonable allowance for exhaustion.

I also approved of an amendment to the Statement of Defence by adding thereto Paragraph 17 as follows:

> 17. That in the years prior to the taxation year 1941 the Minister has allowed to the Appellant amounts for exhaustion which have enabled the Appellant to recover, free of income tax, its entire cost of any timber

licenses or permits held by it, and in making the said allowances the Minister has exercised the discretionary power vested in him by the provisions of Section 5 1 (*a*) of The Income War Tax Act.

The Appellant has, for many years, operated a logging, sawing, planing and general lumber milling business in Alberta and during its fiscal year ending October 31, 1941, produced 8,031,305 board feet of lumber from 3 timber limits, licenses for which were granted to it by the Minister of Lands and Forests of Alberta. It claims to be entitled to an allowance for exhaustion of these timber limits under the provisions of Section 5 (1) (*a*) of the Income War Tax Act which is as follows:

Depletion 5. 1 "Income" as hereinbefore defined shall for the purposes of this Act be subject to the following exemptions and deductions:—

(*a*) The Minister in determining the income derived from mining and from oil and gas wells and timber limits may make such an allowance for the exhaustion of the mines, wells and timber limits as he may deem just and fair, and in the case of leases of mines, oil and gas wells and timber limits the lessor and the lessee shall each be entitled to deduct a part of the allowance for exhaustion as they agree and in case the lessor and the lessee do not agree the Minister shall have full power to apportion the deduction between them and his determination shall be conclusive.

For the Respondent it is urged that the Appellant has no proprietary or other depletable interests in the timber limits; that it is not such a lessee as is referred to in Section 5 (1) (*a*) but merely a purchaser of timber the cost of which has been allowed as a deduction in determining the profits subject to tax; and, alternatively, that in the years prior to 1941 the Minister has allowed the Appellant amounts for exhaustion which enabled it to recover free of income tax its entire cost of such timber limits or permits and in so doing that the Minister has exercised the discretionary powers vested in him under the said section.

It is clearly established that the Appellant did recover the above mentioned amounts of timber from the said limits in 1941. Exhibit 21 is a statement, dated June 8. 1944, signed by the Minister of Lands and Forests of Alberta, indicating that the Appellant is entitled to 99 per cent of the allowance for exhaustion and the Province of Alberta is entitled to 1 per cent thereof for the year 1941.

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In approaching the problems involved, it is necessary to first consider the agreements under which the Appellant operated these timber limits.

Berth 1161 was originally acquired in 1904 from the Dominion Government by the Appellant and an associate; the latter's interest was subsequently acquired by the Appellant. The license was renewed from year to year by the issue of a new license and Exhibit 8 is a photostatic copy of the last one issued by the Minister of the Interior; Exhibit 9 is the first license issued to the Appellant by the Province of Alberta and is for the year ending March 31, 1932. It has been renewed from year to year by the issue of a new license, and apparently without tender. Exhibits 10 and 11 are respectively the licenses for the years ending March 31, 1941, and March 31, 1942.

Berth 1727 was acquired from the Dominion Government in 1912 by the Appellant and Walters but later the licenses were granted in the name of the Appellant only. Exhibit 13 is a copy of the last license issued by the Dominion Government, expiring April 30, 1931. Subsequently annual licenses were granted by the Province of Alberta and Exhibits 14 and 15 are copies of such licenses for the year ending March 31, 1941, and March 31, 1942, respectively.

Berth 6722 was acquired in 1940 from the Province of Alberta. Exhibits 19 and 20 are respectively the licenses for the years ending March 31, 1941, and March 31, 1942. This berth was secured by the Appellant following a sale by public tender and Exhibit 17 is the advertisement of such "sale of timber by public tender".

In 1941, therefore, the Appellants were operating all these berths under Provincial licenses, identical in character, except as to the consideration and description of the property.

As mentioned above, berths 1161 and 1727 were originally acquired from the Dominion Government. Tenders were called for and the license was granted to the highest bidder, who, in addition to the amount of his bid, was required to pay an annual ground rent, certain costs for fire protection and dues according to the amount of lumber and timber manufactured and sold. The

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amount of this bid or "bonus", as it was called, was not returned to the licensee. The amount of dues varied from time to time.

In the Provincial licenses for the year 1941, in addition to the dues fixed by the regulations, there was paid at the time of granting the annual license, an amount expressed to be for ground rent, license fee, fire guarding charges and Timber Areas tax. When new areas are put up for public tender the bidder makes an offer of a certain amount per 1,000 feet board measure; and in addition makes a deposit which, if his bid has been successful, is retained as a guarantee of compliance with the conditions of sale. Eventually it is credited or returned to the licensee. For the year 1941 all amounts paid by the Appellant to the Province of Alberta in respect of the licenses (other than the deposit) and whether for ground rent, or for dues, were allowed as deductions in arriving at the taxable income.

As regards the cost of acquiring berths 1161 and 1727, for cruising, "bonus" and purchase of the interests of the former associates etc. the Appellant entered these in its own books as capital assets and annually wrote off an amount as an operating expense to earn the income. In its income tax returns it showed these amounts so written off, merely as an expense of operation, and the amounts so shown were allowed by the Income Tax Department and by 1939 the entire cost had been fully written off. The basis on which they were passed by the Department is not shown; it may have been as an expense of operation as claimed in the appellant's tax return; or it may have been as an allowance for exhaustion under the then Sec. 5 (1) (*a*). In any event it is clear that the appellant, by its return, indicated that it viewed it as a matter of ordinary operating expense. If in fact, it were a capital asset, then by the provisions of Sec. 6 1 (*b*) no allowance for depletion or exhaustion could be allowed except as otherwise provided in the Act, namely Sec. 5 1(*a*) as it then stood. While the appellant in 1928 had on its own books appreciated the value of the berths, it continued to claim as deductions from income on the basis of cost only. After 1939 no additional claim

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was made for further deductions in respect of these items, the entire cost having been written off. The cost of road, mill and camp. construction was written off from year to year during the life of the particular area served, as depreciation. Wages and normal operating costs were allowed as deductions under the heading of operating expenses.

I am satisfied that the income here is derived from timber limits and I think it is clear also that the words "derived from" apply equally to oil, gas wells and timber limits as well as to mining notwithstanding the suggestion of Respondent's counsel to the contrary.

It is to be noted that the allowance provided for is "for the exhaustion of the timber limits". The marginal note to the section is "depletion" but the word is not used in the section nor is it defined in the interpretation section. There is no provision for depletion as such in the English Act and while in the United States of America such an allowance is made, it is on an entirely different basis. So far as I am aware there are no reported Canadian cases where the principles applicable to an extractive industry have been fully considered. I think I can assume that this section is made part of the Income War Tax Act in order to ensure that the tax is levied on income and not on capital and that, therefore, special consideration is given to the industries where the capital asset is extracted and disposed of and where in the ordinary course of things the proceeds of such disposal would be income. The apparent intention is to provide for a deduction from gross income of an amount which in part at least will take the place of the capital assets so extracted and disposed of. The first part of the section, in my opinion, is intended to give such relief to the owner of the capital asset being exhausted. But with the knowledge that some extractive industries are frequently worked under a lease special provision is made later in the section for the division of such allowance as the Minister *may* make, between the lessor and the lessee as they agree; and failing agreement, to be apportioned between them as the Minister may determine.

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It would seem that except for the special provision relating to the case of lessor and lessee, the allowance should be made to the owner of the industry, for it is his capital asset that is being exhausted.

But the section does include a provision for the case where timber limits are operated under a *lease* and that in such cases each is entitled to that portion of the allowanace agreed upon. I think that what is here contemplated is that when the Minister has determined, after consideration of all the facts, that an allowance for exhaustion should be made, that the lessor and the lessee may then deduct such allowance in the proportions they have agreed upon.

The appellant here is clearly not the owner of the capital asset being exhausted i.e. the standing timber; the owner is the Province of Alberta and the terms of the annual licences clearly provide for the vesting of the right of property in the appellant only when the trees have been cut. The ownership of all uncut trees is clearly still in the Province and remains so until such trees have been cut in any subsequent year under the terms of a new license.

Reference may be made to *Smylie* v. *The Queen* (1). While the question there had to do with the right of the Province of Ontario to attach new conditions upon the granting of a renewal of the license to cut timber, the Court had to consider timber licenses very similar to the one here in question. At p. 178, Osler J.A. said:

> The case was argued as if by the purchase, as it is called, of the berth or limit, the licensee acquired some title to or ownership of the timber beyond that which by virtue of the Act the license conferred upon him for the time it was in force. That contention cannot, in my opinion, be supported. The right acquired was to cut, during the term of the license, timber belonging to the Crown. That timber, when it was cut, and not until then, became the property of the licensee, as provided by the Act. When a new license was granted the Crown was dealing with its own property and not the property of the licensee * * *

And on p. 2 of the license here in question certain rights are given the appellant regarding proceedings against trespassers "and any such proceedings which have commenced and are pending at the expiration of the license may be continued *as if this license had not expired*". The rights of the licensee were confined to the

(1) (1900) 27 O.A.R. 172.

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timber cut during the term of the license; see judgment of Maclennan J.A. in *Smylie* v. *The Queen* (*supra*) at p. 183.

Unless, therefore, the appellant is a lessee of the Province of Alberta, it cannot, in my view, come within the provisions of Section 5 (1) (*a*). Are the documents, under which the appellant operated the timber limits in 1941 and which are called "licenses to cut timber on the provincial lands", licenses or leases? In deciding whether a grant amounts to a lease or is only a license, regard must be had to the substance of the agreement; Halsbury 2 ed. Vol. 20, p. 9. Exhibit 19 is a copy of the provincial license for berth 6722 for the year ending March 31, 1942, and for all practical purposes is the same as all the other "licenses" under which the appellant operated in 1941.

The Respondent argued that in fact this "licence" is actually nothing more than a sale of goods and in support of that contention he referred to *Marshall* v. *Green* (1) and to *Kauri Timber Co. Ltd.* v. *Commissioner* (2). In the former case it was held that a sale of growing timber to be taken away as soon as possible by the purchaser is not a contract or sale of land or any interest therein within the fourth section of the Statute of Frauds. Brett, J. at p. 42 outlined the judicial test in regard to the question and said:

> Then there comes the class of cases where the purchaser is to take the thing away himself. In such a case where the things are fructus industriales, then, although they are still to derive benefit from the land after the sale in order to become fit for delivery, nevertheless it is merely a sale of goods, and not within the section. If they are not fructus industriales, then the question seems to be whether it can be gathered from the contract that they are intended to remain in the land for the advantage of the purchaser, and are to derive benefit from so remaining; then part of the subject-matter of the contract is the interest in the land, and the case is within the section.

In the case at bar it is clear that the timber is not *fructus industriales* and that, as the licenses were renewable for a period of some years, the timber would derive benefit by way of increase from so remaining in the soil. The timber here appears to be *fructus naturales*.

(1) (1875) 1 C.P.D. 35 at 38. (2) (1913) A.C. 771 at 778.

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The principles enumerated in that case were followed in the *Kauri Timber* case (*supra*) and Lord Shaw of Dunfermline stated at p. 778:

> The law—so clearly settled with regard to the working of coal and of nitrates, and settled upon a broad general principle—is in no way different when it comes to be applied to timber-bearing lands. The principle set out above in the present judgment as to the true reason for holding that such timber rights are of the nature of possession of, and interest in, the land itself has long been settled. A note by the learned editor in the first volume of Saunders' Reports, p. 277c, puts the matter thus: "The principle of these decisions appears to be this: that wherever at the time of the contract it is contemplated that the purchaser should derive a benefit from the further growth of the thing sold, from further vegetation and from the nutriment afforded by the land, the contract is to be considered as for the interest in the land; but where the process of vegetation is over, or the parties agree that the thing sold shall be immediately withdrawn from the land, the land is to be considered as a mere warehouse of the thing sold and the contract is for goods.
>
> There may have been certain necessary modifications of the generality of this principle with respect to emblements or the products of industry like ordinary agricultural crops; but it is unnecessary to analyse these instances or to make any pronouncement upon some of the dicta of judges in later times. For the present is a broad case of the natural products of the soil in timber—a crop requiring long-continued possession of land until maturity is reached, and the contract with regard to it in the present case raises none of the difficulties springing out of a covenant for immediate severance and realization. The judgment of Brett J. in *Marshall* v. *Green* (1) distinguishes this broad case and properly accepts the note in Saunders' Reports which has just been cited.

I was also referred to *St. Catherines Milling & Lumber Co.* v. *The Queen* (2) in which it was held that a permit under which the purchaser had the right within a year to cut from Crown property 1,000,000 feet of lumber is a contract for sale of chattels. But by reason of a particular term of that contract it was not within the contemplation of the parties that the purchasers were to derive any benefit from its future growth in the soil. The same judge (Burbidge J.) in the case of *Bulmer* v. *The Queen* (3) stated at p. 217:

> Here, however, the facts are very different. The licensee is given, subject to certain exceptions that are not material, the exclusive possession of the lands and the right to bring an action against any person unlawfully in possession thereof and to prosecute all trespassers thereon, and a ground-rent is reserved. Then, if the licenses were renewable from year to year, possibly for twenty years or more, at the request of the licensee, subject only to a revision of the ground-rent and royalty, and that is a necessary part of the claimant's case, how can it be said that the agreements entered into were for the sale of goods and not of an interest in land?

(1) (1875-76) 1 C.P.D. 35.
(2) (1877-91) 2 Ex. C.R. 202.
(3) (1893) 3 Ex. C.R. 124.

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These decisions however were made before the passing of the Sale of Goods Act. This Act in Alberta is Chap. 146, R.S.A. 1922. It defines "goods" as follows:

> "Goods" shall include all chattels personal other than things in action or money. The term shall include emblements, industrial growing crops and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

In Lord Hailsham's 2 Ed. Halsbury, Vol. 29, p. 11, dealing with the Sale of Goods Act, it is stated.

> The concluding words of the definition appear to give a general rule for dealing with all things attached to the land, other than emblements and industrial growing crops, and to get rid of subtleties as to whether they were to be severed by buyer or seller, or whether they were to get any benefit from remaining attached to the land before severance. Under the Act the sole test appears to be whether the thing attached to the land has become by agreement goods, by reason of the contemplation of its severance from the soil.

Applying this test to the instant case it would seem that as the "license" itself provides for vesting all rights of property in the trees, timber, etc., *which have been cut,* that the thing attached to the land, namely the trees, has become by agreement "goods" by reason of contemplation of its severance from the soil.

The case of *Carlson* v. *Duncan* (1) dealt with the contention that "timber" was within the defintion of "goods" in the Sale of Goods Act and, while the Court of Appeal there held that in that case they were not goods the decision was arrived at because of the special conditions of the contract. There the sale was an out and out sale of all the trees mentioned, the purchaser to have as much time as he desired to remove them from the land. The agreement did not provide that the timber should be severed before sale; and the Court held (presumably because the timber had been sold for cash) that before severance the purchaser had title to an interest in the timber which was part of the land. Macdonald J.A. said at p. 349:

> Whether a contract relating to timber constitutes a sale of chattels or relates to an interest in land depends upon the terms of the contract. Because of the special terms of the contract we are considering it is not one for the sale of goods.

(1) (1931) 2 W.W.R. 343.

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In the case of *James Jones & Sons Limited* v. *Tankerville* (1) after discussing *Marshall* v. *Green* (*supra*) it was said:

Lastly, in determining the effect of such a contract at law the effect of the Sale of Goods Act, 1893, has now to be considered. Goods are there defined in such a manner as to include growing timber which is to be severed under the contract of sale, whether by the vendor or the purchaser.

In *Fredkin* v. *Glines* (2) *Perdue* J.A. said:

By this definition we are to consider as goods things attached to, or forming part of, the land which are agreed to be severed under the contract of sale. It appears to me that by this definition the intention of the parties as evidenced by the contract is the determining factor in arriving at the conclusion whether the article in question is, or is not, a chattel. If, therefore, growing trees, or natural grass, be sold for the purpose of being cut and taken away, pursuant to the contract, they are goods under this definition. There does not appear to be any limit of time imposed by the statute within which the intended severance is to take place. The question is well discussed in Benjamain on Sales, 5th ed. 190.

In Benjamin on Sales 7th ed. 199, in discussing the question "What are goods" it is stated:

The definition therefore includes such things, when sold as chattels as fixtures, buildings and other erections and *fructus naturales*.

And at page 200:

It should be remarked that the Act in referring to severance lays down no limit of time, thus going beyond *Marshall* v. *Green* (*supra*); for even if the "things" sold are to derive further benefit from the soil, and are not to be removed within a short period, provided that they are agreed to be severed "under the contract of sale", they are declared to be "goods" within the Act.

I have reached the conclusion that in this particular case the contract, in so far as it relates to the acquisition of timber by the appellant, was a contract for the sale of goods. The timber had to be cut before it became the property of the appellant and it was then completely severed from the soil. The severance was clearly in the contemplation of the parties and payment was provided for on the basis of board measure after milling.

But in the view that I have taken of the whole contract that does not dispose of the matter. In my opinion the contract is something more than a mere sale of goods. It is also a right to enter upon the land for the purpose of cutting and removing the goods agreed to be sold. Do these rights in the land constitute a license or a lease?

(1) (1909) 2 Ch. 440 at 445. (2) (1908) 18 M.L.R. 249 at 252.

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Counsel for the appellant relied strongly on the case of *Glenwood Lumber Co. Ltd.* v. *Phillips* (1), in support of his contention that the licenses were in fact leases. The court there was dealing with the effect of certain timber cutting rights in Newfoundland. Lord Davey said at p. 408:

> The appellants contended that this instrument conferred only a license to cut timber and carry it away, and did not give the respondent any right of occupation or interest in the land itself. Having regard to the provisions of the Act under the powers of which it was executed and to the language of the document itself, their Lordships cannot adopt this view of the construction or effect of it. In the so-called license itself it is called indifferently a license and a demise, but in the Act it is spoken of as a lease, and the holder of it is described as the lessee. It is not, however, a question of words but of substance. If the effect of the instrument is to give the holder an exclusive right of occupation of the land, though subject to certain reservations or to a restriction of the purposes for which it may be used, it is in law a demise of the land itself.

The Provincial Lands Act of Alberta 1939 is an Act to amend and consolidate the Provincial Lands Act. It provides for the disposal of agricultural land, grazing land, hay and marsh land and mineral lands by lease. Then follows certain sections under the heading "Disposal of Timber".

Section 49 gives to the Lieutenant Governor in Council power to make regulations for the disposal by public competition of the right to cut timber on berths to be defined in the public notice of such competition.

Section 50 reads:

> The person to whom a timber berth is awarded under the last preceding section shall be granted a license therefor. . . .

Throughout the section the person to whom the berth is awarded is referred to as a licensee and the authority granted to him is called a license and not a lease.

Under the regulations of July 25, 1940, a timber license means "any permit granted under these or any former regulations for the cutting and removal of Crown timber for any purposes." It was under that Act and those regulations that the licenses in question were granted. By the terms of exhibit 17—in regard to berth 6722—the successful bidder was required to apply for a license and the appellant apparently did so. All the documents under which the appellant operated in 1941 were called licenses throughout.

(1) (1904) A.C. 405.

The distinction between licenses and leases is discussed in the 24th Edition of Woodfall on Landlord and Tenant p. 6, and in English and Empire Digest Vol. 30, p. 501, and all the relevant cases are referred to therein. In Woodfall it is stated "it has been seen above that there is a demise where a right is granted to the exclusive possession of the lands or tenements for a determinate term. The grant of such exclusive possession is a lease although there may be certain reservations or restrictions of the purpose for which the possession may be used and although it may be described as a license".

In proceedings between the parties to the contract it might well be impossible to successfully assert that what each has called a license was in fact a lease. But this is not such an action and I have to determine whether under the Income War Tax Act the contract is a lease of timber limits. There being no definition of lease in the Act I think I am not entitled to construe the word as it may have been defined in any Provincial Act but rather to ascertain how it has been judicially construed.

In the case of *Grand Trunk Railway* v. *Washington* (1) it was said: "As these are enactments emanating from a different legislative body from that which passed the statute to be interpreted and cannot be said to be in *pari materia* with it, their Lordships are unable to see that they ought to have any influence upon the question to be decided arising exclusively upon the Dominion Act."

Exhibit 19, as to the rights conferred on the appellant in the land, seems to answer all the tests laid down in the cases referred to in the text books I have mentioned and in the cases therein noted as well as the ones I have specifically referred to. A fixed rental is provided for; exclusive possession, subject to specific reservations, is given and there is a definite term—1 year. Rights of action against trespassers are given the appellant and the latter is required to pay all rates and assessments and taxes imposed by any municipal improvement scheme or drainage district to be charged on the timber berth. Looking, therefore, at the substance of the agreement

(1) (1899) A.C. 275 at 280.

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I must on the authorities reach the conclusion that, notwithstanding the words used in the document itself, it contains a lease of the land, and I so find.

The so-called license is, I think, both a contract for the sale of goods and a lease. Reference to the regulations (Ex. 28 sec. 8) and to the conditions of sale (Ex. 17) shows that a bidder in addition to tendering for the sawn lumber, is required also to enter into a contract to pay rent. The "license" embodies both in one document. See *Bulmer* v. *The Queen* (1).

Counsel for the Appellant urged upon me that his client had a statutory right to an allowance for depletion and referred me to the *Pioneer Laundry* Case (2). The decision in that case was made under section 5 (*a*) which then read:

5. "Income" as hereinbefore defined shall for the purposes of this Act be subject to the following exemptions and deductions:—

(*a*) Such reasonable amount as the Minister, in his discretion, may allow for depreciation, and the Minister in determining the income derived from mining and from oil and gas wells and timber limits shall make such an allowance for the exhaustion of the mines, wells and timber limits as he may deem just and fair;

And in the case of leases of mines, oil and gas wells and timber limits, the lessor and the lessee shall each be entitled to deduct a part of the allowance for exhaustion as they agree and in case the lessor and the lessee do not agree, the Minister shall have full power to apportion the deduction between them and his determination shall be conclusive.

In Lord Thankerton's judgment he stated:

Their Lordships are unable to agree with these views, and they agree with the opinion of Davis J., in which the Chief Justice concurred, and in which he states: The appellant was entitled to an exemption or deduction in "such reasonable amount as the Minister, in his discretion, may allow for depreciation". That involved, in my opinion, an administrative duty of a quasi-judicial character—a discretion to be exercised on proper legal principles.

In their Lordships' opinion, the taxpayer has a statutory right to an allowance in respect of depreciation during the accounting year on which the assessment in dispute is based.

But following that decision the section was changed and insofar as depletion or exhaustion is concerned from 1940 on the section has been as shown on page 2 herein. The changes in my view are important and it is necessary to consider whether, under the new wording the taxpayer, has

(1) (1894) 23 S.C.R. 488 at 496. (2) (1940) A.C. 127 at 136.

now a statutory right to the deduction or whether the granting of such an allowance by the Minister is purely permissive.

Before the amendment it is to be noted that the words were: "Income as hereinbefore defined shall for the purposes of this Act be subject to the following exemptions and deductions: (*a*) Such reasonable amount as the Minister in his discretion may allow for depreciation" * * *

As stated in the *Pioneer Laundry* case the taxpayer had a statutory right to an allowance, the amount of which was in the discretion of the Minister, and as laid down by the Privy Council the Minister had a duty to fix a reasonable amount with which decision the Court would not interfere unless it was manifestly against sound and fundamental principles. As the section then read it was only the amount of the allowance which was left to the discretion of the Minister.

As it now stands the first part of the section reads:

"Income" as hereinbefore defined shall for the purposes of this Act be subject to the following exemptions and deductions:—

(*a*) The Minister in determining income derived from mining and and from oil and gas wells and timber limits *may* make such an allowance for the exhaustion of the mines, wells and timber limits as he may deem just and fair . . .

The discretion here conferred on the Minister is in my view quite different from that which he had prior to the amendment. In my opinion the word "may" is used in its permissive sense and not as imperative. The Interpretation Act, section 37 (24) says "shall" is to be construed as imperative and "may" as permissive.

Reference may be made to the judicial interpretation of the words "may" and "shall" in the case of *Canada Cement* v. *The King* (1) and cases therein referred to. In that case Audette J. quoted the judgment of Lord Moulton in *McHugh* v. *Union Bank* (2), as follows:

It is true that (as is customary in interpretation clauses) these subsections are prefaced by the words "unless the context otherwise requires", but that does not take away from the authority of the express direction as to the construction of the words "shall" and "may". The Court is bound to assume that the legislature when it used in the present instance the word "may" intended that the imposition of the penalties should be permissive as contrasted with obligatory unless such an interpretation would be inconsistent with the context, that is,

(1) (1923) Ex. C.R. 145 at 150. (2) (1913) A.C. 299 at 314.

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would render the clause irrational or unmeaning. But there is nothing in the context which creates any difficulty in accepting this statutory interpretation of the word "may". The clause is just as intelligible with the one interpretation as with the other. So far from creating any difficulty the interpretation which leaves it permissive appears more reasonable seeing that there is no exception in the clause for cases where the excess has been taken either under mistake or by inadvertence, and it is not likely that the Legislature would insist on penalties being enforced where no blame attached. Be this as it may, there is nothing in the clause which will permit their lordships to depart from the express provision of the Interpretation Ordinance stating that "may" shall be construed as permissive.

This being the case, it is not necessary to examine the English decisions which establish that in certain cases "may" must be taken as equivalent to "must". In the light of these decisions it is often difficult to decide the point, and in their Lordships' opinion the object and the effect of the insertion of the express provision as to the meaning of "may" and "shall" in the Interpretation Ordinance was to prevent such questions arising in the case of future statutes.

In this case I think the court is bound to assume that when Parliament changed the wording of the section it intended that the allowance should be permissive as contrasted with obligatory and it must be so read unless such an interpretation would be inconsistent with the context, that is, render the clause irrational or unmeaning. No such inconsistency appears in the section. Here a much wider direction is given to the Minister than if the wording were "shall be entitled to such an allowance as the Minister may deem fair and just." In my view the discretion extends not only to the determination of what is a fair and just allowance but also as to whether or not, under all the circumstances, any allowance should be made. It may seem to be a somewhat arbitrary power but it is not for the Court to question the wisdom of Parliament in so enacting.

But, in fact, in this particular case the discretion of the Minister does not seem to have been used in any arbitrary way as will appear from a consideration of all the facts. As I have found, the appellant is not the owner of the timber being exhausted, and has no depletable interest therein. In addition, it has already benefited by deduction from its income over a period of years of all costs which could possibly be called capital costs (as well as all costs of operation) and, therefore, by such deductions, has been allowed to keep its capital investment intact. And while, appar-

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ently, the appellant had never previously claimed these deductions as depletion under section 5 (1) (*a*), but rather by way of depreciation or as disbursements or expenses wholly, exclusively and necessarily laid out or expended for the purpose of earning the income, they were in fact allowed. The result was that the appellant was eventually able to write off its full capital investment.

Moreover, there is a special situation here which deserves comment. It sems to me that Parliament in providing for the division of any allowance made by the Minister between the lessor and lessee "as they agree" may have had in mind that a lessor and lessee, both of whom were interested in a share of such allowance, would endeavour to reach an agreement which would reasonably reflect their actual respective interests in the thing which was being exhausted. Failing such an agreement the Minister would have had to give similar consideration to the facts disclosed to him. But here it is to be observed that the Province of Alberta is not subject to payment of income tax and having no interest in claiming a part of such allowance has indicated its consent to 99 per cent of such allowance being made to the appellant. The result is quite clear, namely that the appellant, having little or no proprietary interest in the asset being exhausted and having had all its costs already taken care of by annual deductions would escape a considerable degree of taxation. It is true of course that a taxpayer may take such legal steps in managing his affairs as may avoid attracting tax to his income. But it seems to me that situations such as I have outlined are matters which the Minister is quite entitled to consider in reaching any conclusion as to whether any allowance should be made. It is apparent that he has had them or some of them in mind and has concluded that no allowance in this case should be made. It is not a case where allowances had formerly been made to operators of timber limits, holding under such an agreement as this over a long period of time; the evidence indicates that they had never been made up to 1941. Inasmuch therefore as the Minister appears to have reached a conclusion which, in my interpretation of his powers,

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he was quite entitled to reach and the decision on which is left to him, it is not a matter where the Court should interfere.

Nor can I find that in exercising his discretion the Minister has proceeded on any wrong principles. All the facts necessary to determine the matter were in his possession and it has not been shown that in reaching his conclusion he did not follow the principles laid down for the exercise of discretion in the *Pioneer Laundry* and other cases.

At the trial I allowed certain evidence to be given subject to later ruling as to its relevancy and admissibility. Certain "rulings" given by the Department and published in Gordon's Digest of Income Tax Cases (1939) were tendered. This digest was published by the direction of the then Minister of National Revenue and printed by the King's Printer. These "rulings appear to have been issued from time to time by the Department and sent to the various branch offices of the Income Tax Department as an indication of the view taken by the Department in certain problems; they sometimes included information as to changes in rates of depletion and gave lists of cases in which shareholders were entitled to depletion allowances and other matters of a like nature. They have received fairly wide publicity and are well known to lawyers and accountants.

The statement of claim brings in issue the practice of the department in regard to the administration of depletion allowances; generally speaking, I think it may be said that evidence of departmental practice is inadmissible in construing a statute; but there are cases in which it would be of assistance in interpreting an ambiguous statute, particularly when such practice has long continued and is clearly not contrary to the Act itself. And as the "rulings" referred to have to do with other extraction industries mentioned in the subsection, I have reached the conclusion that they are relevant to the issue and should be admitted.

Evidence was also tendered as to certain special allowance for sawlogs scaled in 1943 west of the Cascade Range (in which area the appellant was not included) and as to several allowances for depletion granted in 1945 to the

pulp and paper industry only, to commence in the 1941 period. This evidence is, I think, quite irrelevant to the issue before me. These special allowances were made as a war measure to stimulate production of certain commodities in certain areas and they do not affect the appellant. I recall no evidence that they were made under Sec. 5 (1) (*a*), and if, as a war measure, the Minister exercised his discretion in a special way for certain limited groups of the industry, I can see no reason why it must be made applicable to all.

My conclusions, therefore, are that while the contracts in question are leases as to the land mentioned therein, and are contracts for the sale of goods as to the timber purchased, that the Minister having a discretionary power, after considering all the facts in the case to grant or withhold any allowances, and having exercised that discretion according to proper legal principles, his discretion should not be interfered with.

The appeal is therefore dismissed with costs.

Judgment accordingly.