

Privy Council Appeal No. 157 of 1915.

The Vancouver Lumber Company - - - - - *Appellants*

v.

The King - - - - - *Respondent*

FROM

THE SUPREME COURT OF CANADA.

REASONS FOR JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 23RD
OCTOBER, 1919.

Present at the Hearing :

VISCOUNT HALDANE.

LORD DUNEDIN.

LORD PARMOOR.

[*Delivered by* VISCOUNT HALDANE.]

This is an appeal from a judgment of the Supreme Court of Canada, which dismissed an appeal from the Exchequer Court of that Dominion. What had been decided by the Exchequer Court was that an indenture varying the terms of a lease and purporting to have been made between Her Majesty, the then Queen, acting through the Minister of Militia and Defence in Canada, and the appellants, on the 14th April, 1900, was a nullity.

By an indenture made a little over a year previously to that in question, namely on the 14th February, 1899, the Crown in right of the Dominion, acting through the same Minister, had demised Deadman's Island, situated in Coal Harbour in Burrard Inlet near the City of Vancouver, to the appellants, to be used as a lumbering location. The demise was for twenty-five years "renewable," to be computed from the 1st March, 1899, and to be ended at the expiration of the term or on earlier notice which

might be given as and for the purposes in the lease mentioned. The appellants covenanted to pay an annual rent of 500 dollars, and entered into various further covenants for payment of taxes and otherwise as in the deed specified. The grant of this lease was made, not under the Great Seal of Canada, but under a statutory authority, conferred by 57 and 58 Vict. (Canada), c. 26, which provided that the Governor-in-Council might authorise the sale or lease of any lands vested in Her Majesty which were not required for public purposes, and for the sale or lease of which there was no other provision in the law. It is obvious that this provision made it necessary that the requisite authority should be conferred by an Order in Council.

The Order so required was made on the 16th February, 1899, two days after the execution of the lease. No question has been raised as to its retrospective validity, and it is of course possible that the deed was not delivered until after it was made. Its terms were as follows :—

“ On a Memorandum, dated 10th February, 1899, from the Minister of Militia and Defence, recommending that authority be given him to lease Deadman's Island, situated in Coal Harbour, Burrard Inlet, British Columbia, to the Vancouver Lumber Company, of Vancouver City, British Columbia, for a term of twenty-five years, at an annual rental of five hundred dollars.”

“ The Committee submit the same for your Excellency's approval.”

It appears that the approval of the Governor-General was duly given.

Subsequently to this Order in Council the appellants, through their legal adviser, Mr. Macdonell, opened negotiations at Ottawa with Sir Frederick Borden, the then Minister of Militia, and with the Deputy Minister, Colonel Macdonald. Mr. Macdonell desired to obtain for his clients certain variations of the terms of the lease which will presently be referred to. He said in his evidence that he submitted his suggested amendments to the Minister, who shortly afterwards informed him that he had laid the matter before the Council, and that the Council wished for the opinion of the Deputy Minister of Justice upon them. Mr. Macdonell went on to say that he then had a consultation with the Deputy Minister of Justice and Colonel Macdonald, and that the amendments and the terms of the requisite Order in Council were agreed on. He added that a day or two after, on the 3rd April, 1900, the Minister told him an Order in Council had been passed approving of the amendments. A few days later the original lease, with the new terms which varied it endorsed on it, was, he said, sent to him after he had left Ottawa. In cross-examination the witness said that he was not sure where it was that Sir Frederick Borden told him that the Order in Council had been made; it was immediately after the latter had attended the Council, and it might have been at his office or it might have been at the Rideau Club in Ottawa. He thought that Colonel Macdonald was present.

An indenture containing the amended terms was endorsed on the old indenture. It was under seal like the original document, and it proceeded on the recital that it was deemed advisable to modify the original lease by removing the proviso giving power to determine it by notice in writing, and by adding a provision that "the said lease, at the expiration of the first term of twenty-five years, and from time to time at the end of each renewal term of twenty-five years, shall be renewed for a further term or terms of twenty-five years," at a rental for each renewal term to be determined in case of difference by arbitration.

Sir Frederick Borden as Minister appears to have executed the indenture thus endorsed, and to have affixed to it his seal as Minister of Militia and Defence, and Colonel Macdonald witnessed it.

The question is whether there actually was made an Order in Council authorising these new terms which embodied very substantial concessions to the appellants. Their Lordships have quoted the statements of Mr. Macdonell, the legal adviser of the appellants, as to what he alleges to have been said by Sir Frederick Borden and the two officials who took part in the discussions on behalf of the Government of Canada. The deed was duly executed by Sir Frederick Borden. But that is obviously not sufficient in the absence of the Order in Council that was requisite. It is impossible to speculate as to what really happened. He may have executed the deed before any Order in Council had actually been obtained, anticipating wrongly that this would prove to be a mere formality. Was such an Order actually passed? Mr. Macdonell says that Sir Frederick Borden told him so, but his statement as to what Sir Frederick Borden and also the other two officials said is obviously not evidence, especially in the absence of proof that they could not be called as witnesses. Now no such proof was offered. So far as appears there is therefore no evidence that the Order in Council was ever made. No doubt there is the fact that the second indenture was duly executed. But although that would afford some ground for presuming that the Minister had authority, it is not conclusive.

However the matter does not rest here. For the Crown important evidence was called to show that no Order in Council was ever made. The Clerk of the Privy Council of Canada, Mr. Rudolph Boudreau, was called. He swore that there was no record in the office of such an Order. He was not cross-examined on behalf of the appellants. Again the Secretary of the Department of Militia and Defence, Mr. Ernest F. Jarvis, was called for the Crown. He said that any modification of the original Order in Council would be based on a recommendation from the Department, and that there was no record of any such recommendation. Upon this point he was not cross-examined. Coupling the evidence so given with the fact that the appellants did not call as witnesses either Sir Frederick Borden or the two officials who are said to have taken part in the transaction, their Lordships are unable to come to any other conclusion than that

the appellants have wholly failed to prove that the Order in Council in question ever existed. They regard this issue of fact, moreover, as one on which there is a concurrent finding by the two Courts below. There is no other point of substance in the case, and their Lordships only desire to add the observation that the question on which the appeal turns is of such a nature as to render the opinion arrived at by the Courts in Canada an opinion from which they would be reluctant to differ.

They will humbly advise His Majesty that the appeal should be dismissed with costs.



In the Privy Council.

THE VANCOUVER LUMBER COMPANY

v.

THE KING.

DELIVERED BY VISCOUNT HALDANE.

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