

D. R. Fraser & Company Limited - - - - *Appellant*

*v.*

The Minister of National Revenue - - - - *Respondent*

FROM

THE SUPREME COURT OF CANADA

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF  
THE PRIVY COUNCIL, DELIVERED THE 13TH OCTOBER, 1948.

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*Present at the Hearing :*

VISCOUNT SIMON  
LORD MACMILLAN  
LORD SIMONDS  
LORD OAKSEY  
LORD MACDERMOTT

[*Delivered by* LORD MACMILLAN]

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In the fiscal year 1940-41 the appellant company, in pursuance of their business as lumbermen, held three Government licences under which they cut timber in three areas of Crown Land in the Province of Alberta. In making their income tax return for the year they deducted a sum which they claimed as an allowance for depletion of the timber included in their licences at the rate of \$1.40 per thousand feet of timber cut. To this deduction they claimed that they were entitled under section 5 (1) (a) of the Dominion Income War Tax Act, R.S.C. 1927 c. 97 which, as amended by section 10 of 1940 c. 34, reads as follows:—

“ 5. ‘ 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 lessee shall be entitled to deduct a part of the allowance for exhaustion as they agree, and in case the lessor and lessee do not agree the Minister shall have full power to apportion the deduction between them and his determination shall be conclusive.”

In the assessment subsequently made upon the appellant company the deduction which they claimed was disallowed. They thereupon served a notice of appeal upon the respondent, the Minister of National Revenue, in which they set out as the ground of their appeal that under the above-quoted provision of the Income War Tax Act they had a “ statutory right ” and were “ entitled to an allowance for the exhaustion of the said timber limits ”, being the areas included in their licences; and that the Minister had “ a duty of a quasi-judicial character, to be exercised on proper legal principles, to fix a just, fair and reasonable amount as an allowance to the appellant for the exhaustion of the said timber limits ”, which duty the Minister had failed to perform.

The Minister affirmed the assessment, stating his decision as follows:—

“ 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 sub-section (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.”

The appellant company gave notice to the Minister of their dissatisfaction with his decision and of their desire that their appeal be set down for trial. In an accompanying statement of particulars they repeated their contention that they had a statutory right to a deduction for depletion. The Minister replied denying the appellant company's allegations and re-affirming the assessment. The documents were thereupon transmitted to the Exchequer Court at Edmonton and the matter was under the Statute deemed to be an action in the Court ready for trial or hearing. An order for formal pleadings was pronounced. The appellant company lodged an amended statement of claim, in which they reasserted their statutory right to a deduction. The Minister lodged a statement of defence denying the right claimed and further submitting that the appellant company had no proprietary or other depletable interest in the timber limits, that they were not lessees within the meaning of the Act but were simply purchasers of the timber and that the cost of the timber in the year in question had been allowed as a deduction in determining the profits subject to tax.

The case having come on for hearing before His Honour Judge Cameron both parties were allowed to amend their pleadings. The Minister's amendment, to which no objection was taken, consisted in adding to his statement of defence the following paragraph:—

“ 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 licences 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.”

No evidence was led at the trial on behalf of the Minister but each party put in evidence extracts from testimony given on examination for discovery by Mr. C. Fraser Elliott, the Deputy Minister, who, as the duly authorised delegate of the Minister, had made the decision impugned. Several witnesses were called and gave evidence on behalf of the appellant company.

In the extract from the evidence of Mr. Elliott on discovery put in by the appellant company the following passage occurs in his examination of behalf of the company:—

“ Q. Mr. Elliott, in exercising your discretion here you have taken the position that the appellant is not entitled to an allowance under the provisions of section 5 (a) for the exhaustion of timber limits, I take it because the timber limits are owned by the Crown and the appellant has only been licensed to cut the timber?

A. Because he has only a licence.

Q. And that is your sole objection to the allowance, I take it?

A. That is right.”

In another passage, put in evidence on behalf of the Minister, Mr. Elliott in cross-examination explained that his disallowance of the deduction claimed was based not only on his conception of the legal position of the appellant company in relation to their timber limits but also on the

view that they had been allowed as expenses " all expenditures incurred in securing the timber " and had " made no capital investment which we feel required depletion ".

His Honour Judge Cameron on 20th December, 1945, dismissed the appeal, holding that the Minister on a sound interpretation of the Statute had " a discretionary power, after considering all the facts, to grant or withhold any allowance " and that the Minister had " exercised that discretion according to proper legal principles ". The appellant company then appealed to the Supreme Court of Canada which unanimously affirmed the judgment of the Exchequer Court and dismissed the appeal.

Special leave to appeal having been granted to the appellant company by Order in Council, their Lordships have heard the case fully argued and now express the conclusions which they have reached.

In both of the Courts in Canada there was much argument as to the precise legal position of the appellant company as licensees of their timber limits. The Minister contended that being mere purchasers of the timber which they cut and not being lessees they were not entitled to invoke section 5 (1) (a) of the Statute and were not eligible for any depletion allowance, so that his discretion to make an allowance was not called into action. Before their Lordships counsel for the Minister abandoned this contention and no more need be said about it.

The argument at their Lordships' bar was mainly directed to two questions, (1) whether under the Statute the Minister is bound in law to make a deduction for depletion in determining the income derived from the enumerated classes of undertakings and has a discretion only as to the amount to be allowed; or whether he has a discretion not limited to the amount of the allowance but entitling him to refuse to make any allowance at all; and (2) whether on either view the Minister in the present case validly exercised his discretion.

(1) Taking the Statute as it stands, their Lordships are of opinion that the section in providing that the Minister *may* make under the head of " depletion " such an allowance for exhaustion of timber limits as he *may* deem just and fair, plainly confers on the Minister a discretion to determine whether the case before him is one for making any allowance at all and does not limit his discretion to determining the extent of the allowance to be made. He has a double discretion, first, to determine whether the case is one for an allowance and second, if so, to determine how much shall be allowed. The Minister " may " not " shall " make an allowance. The language is permissive not obligatory. The Dominion Interpretation Act, R.S.C. 1927 c. 97 s.37, provides that " in every Act unless the context otherwise requires. . . (24) ' shall ' is to be construed as imperative and ' may ' as permissive ". It was suggested that the opening words of section 5 of the Income War Tax Act—" Income . . . shall for the purposes of this Act be subject to the following exemptions and deductions " supplied a context which required " may " in head (a) to be read in an obligatory sense. But these opening words merely require the Minister to make a deduction under head (a) if he has decided that the case is one for a deduction. They cover a whole series of heads from (a) to (o) some of which prescribe automatic deductions and others deductions involving the exercise of the Minister's discretion. Reference was also made to the words in the latter part of head (a) providing that in the case of leases " the lessor and lessee shall be entitled to deduct a part of the allowance for exhaustion as they agree and in case the lessor and lessee do not agree the Minister shall have full power to apportion the deduction between them ", and it was suggested that this implied that there must be a deduction, otherwise there would be nothing to apportion. But all that is meant is that if the Minister allows a deduction then it shall be apportionable between lessor and lessee.

So far their Lordships have considered the language of the Statute as it at present stands. But their reading of it is strongly reinforced by the

history of the enactment. In the statute as originally framed section 5 (1) provided for the deduction under head (a) of

“ 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.”

Here depreciation and exhaustion are included under the same head and as regards exhaustion it is provided that the Minister shall make such an allowance as he may deem just and fair. In the case of *Pioneer Laundry and Dry Cleaners Limited v. Minister of National Revenue* [1940] A.C. 127, which related to a claim for depreciation, the Board held that the appellants were entitled to a deduction for depreciation to such extent as the Minister might allow, and that the Minister had not properly exercised his discretion inasmuch as he had had regard to inadmissible considerations. It was after this decision that the Statute was amended. Depreciation was transferred for treatment to section 6 which was amended so as to provide that no deduction should be allowed for depreciation except such amount as the Minister in his discretion might allow; and in the provision of section 5 relating to depletion or exhaustion “ may ” was substituted for “ shall ”. The contrast is pointed. When an amending Act alters the language of the principal Statute, the alteration must be taken to have been made deliberately. In tax legislation it is far from uncommon to find amendments introduced at the instance of the Revenue Department to obviate judicial decisions which the Department considers to be attended with undesirable results. The Minister in their Lordships' opinion was accordingly not under any legal obligation to make a depletion allowance in the case of the appellant company.

(2) There remains the question whether the Minister, in exercising his discretion as to whether he should or should not make a depletion allowance in the present case and deciding not to do so proceeded on just, reasonable and admissible grounds. In order to deal with this question it is necessary to explain in some detail the facts which were before the Minister. Of the three licences operated by the appellant company two had been granted originally by the Dominion Government while the third had been granted by the Provincial Government after the transfer of certain natural resources from the Dominion Government to the Government of Alberta. The first two had been renewed successively by the Dominion and by the Provincial Governments from year to year and the third had been annually renewed by the Provincial Government. In the case of the two original Dominion grants the licensee was required to pay down a lump sum or bonus in addition to the rent and other dues payable under the licence. This sum was not repayable to the licensee. In the case of the Provincial grant no lump sum or bonus was payable by the licensee but he was required to deposit a sum as security for the payment of dues and this sum so far as not applied to the payment of dues was repayable to the licensee. The only irrecoverable capital outlay by the appellant company or their predecessors in acquiring right to cut the timber in the three areas thus consisted of the two sums paid to the Dominion Government on the grant of the first two licences. In each year up to 1939 the appellant company in computing their income for tax purposes had deducted as an expense part of the sums paid to the Dominion Government for the first two licences and this deduction had been allowed. By 1939 those successive deductions amounted in total to the whole sums originally paid to the Dominion Government. The view of the Minister in the exercise of his discretion was that this circumstance afforded a fair and proper reason for not making any further allowance for depletion or exhaustion, having regard to the fact that the appellant company were not the owners of the land or of the timber thereon which was in process of being exhausted. For the appellant company it was contended that it was wrong in principle to have regard to the capital cost of obtaining the right to cut and carry away the timber and that under the Statute the Minister's duty was to consider what was a just and

reasonable allowance for the progressive exhaustion of the timber on their limits without relation to what the company had paid for the right to cut and acquire it.

It was argued that the Minister in originally intimating his decision had in effect stated that he based it on the ground that the appellant company as licensees were not as such entitled under the Statute to any allowance for depletion of timber limits which belonged to the Crown, and in this connection reference was made to the evidence of Mr. Elliott, quoted above. This, it was said, showed that the Minister had misdirected himself in exercising his discretion and it was contended that he was not entitled subsequently to justify the exercise of his discretion by adducing reasons not present to his mind when he gave his decision. But in his decision the Minister relied on other "related grounds" and Mr. Elliott in later passages of his evidence qualified and explained what he had said in the quoted passage, while in the amendment of his statement of defence allowed by the Court the Minister amplified and made clear his grounds for the disallowance. Moreover, in a letter to the legal advisers of the appellant company before the decision was given Mr. Elliott had taken the point that their clients had already received allowances or deductions to the extent of the capital sum which they had paid for their licences.

It was thus made abundantly clear in the course of the proceedings that the Minister in exercising his discretion proceeded on the view that what was being exhausted was the timber belonging to the Crown which the appellant company were licensed to cut and acquire and that the only allowance for depletion which ought properly to be made in favour of the appellant company was in respect of the sum which they had paid for the privilege of cutting and acquiring the timber; this was the only capital asset of the appellant company which was in process of wasting as the cutting proceeded; and for such depletion the appellant company had already received allowances in past years to the extent of 100 per cent.

In their Lordships' opinion the Minister was entitled in exercising his discretion to proceed upon this view of the circumstances. It was an intelligible view which was both tenable and admissible and in adopting it the Minister cannot be said to have transgressed the bounds of his discretion so as to justify any interference with his decision. The criteria by which the exercise of a statutory discretion must be judged have been defined in many authoritative cases, and it is well settled that if the discretion has been exercised *bona fide*, uninfluenced by irrelevant considerations and not arbitrarily or illegally, no Court is entitled to interfere even if the Court, had the discretion been theirs, might have exercised it otherwise. The appellant company would gain no advantage by a remitting of their claim to the Minister for a fresh exercise of his discretion for he would doubtless only repeat his decision with a more explicit statement of the grounds on which it is now clear that he originally proceeded and on which, in their Lordships' opinion, he was entitled in his discretion to proceed.

An attempt was made in the Courts in Canada to show that the Minister had unfairly discriminated against the appellant company in view of the allowances which he had given in the case of other undertakings elsewhere, but this plea completely failed and was not pursued before their Lordships.

Having thus disposed of all the matters raised on behalf of the appellant company, their Lordships will accordingly humbly advise His Majesty that the appeal be dismissed and the judgment of the Supreme Court of Canada of 4th February, 1947, be affirmed. The appellant company will pay the respondent's costs of the appeal.

In the Privy Council

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D.R. FRASER & COMPANY LIMITED

v.

THE MINISTER OF NATIONAL REVENUE

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DELIVERED BY LORD MACMILLAN

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