B.C. TIMBER LTD.

v.

ASSESSOR OF AREA 21 - NELSON

Supreme Court of British Columbia (A832006), Vancouver Registry

Before: MR. JUSTICE C.C. LOCKE (in chambers)

Vancouver, August 25, 1983

B.J. Wallace for the Appellant
J.E.D. Savage for the Respondent

Reasons for Judgment October 20, 1983

This is a stated case in the nature of an appeal from a decision of the Assessment Appeal Board handed down March 10, 1983 and brought pursuant to s. 74 of the *Assessment Act*, R.S.B.C. 1979, c. 21.

The facts are set out in paras. 1-6 of the stated case which I reproduce:

> "1. Kootenay Forest Products Ltd., was the owner of nine blocks of forested land located in the Kootenay Land District.
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> 2. By way of Quit Claim Deed, a copy of which is attached hereto and marked Exhibit 1 , made the 5th day of February, 1979, Kootenay Forest Products granted to Her Majesty the Queen in right of British Columbia, all its estate, right, title, interest, claim and demand in the aforementioned nine blocks, but reserved to the Grantor all right, title and interest to all the timber growing, standing or lying on the said lands.
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> 3. On or about December 31, 1980 Kootenay Forest Products was amalgamated with Canadian Cellulose Company, Limited under the name Canadian Cellulose Company, Limited, which name was changed on or about June 30, 1981 to BC Timber Ltd.
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> 4. During the assessment years in issue the Appellant logged approximately 500 acres of the approximately 30,000 acres available for logging. The balance of the acreage contains standing timber.
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> 5. Some of the aforesaid blocks have mineral claims filed against the title to the lands which were not being worked. All of the blocks have unrestricted logging access road through them; however, the Appellant was not assessed in respect of them.
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> 6. The Assessment Appeal Board found the Appellant to be an occupier of the timbered lands. Attached hereto and marked Exhibit '2' is a copy of the Assessment Appeal Board's decision dated the 10th day of March, 1983."

The quit claim deed mentioned in para. 2 dated Feb. 5, 1979 reads in part that Kootenay Forest Products Limited, the grantor,:-

> ". . . DOTH GRANT, RELEASE AND QUIT CLAIM unto the Grantee his heirs and assigns forever all of the estate, right, title, interest, claim and demand whatsoever of the Grantor, excepting therefrom and reserving unto the Grantor those rights hereinafter set forth, of, in or to, or out of, all and singular those certain parcels or tracts of land and premises situate in the Nelson Land Registration District. . .
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> RESERVING UNTO THE GRANTOR all right, title and interest to all the timber growing, standing or lying on the said lands together with the right of ingress or egress, to and from the said lands and the right to remain on the said lands and to do all things in relation thereto for the purpose of cutting and removing the said timber for a period of fifteen (15) years from the date hereof and further provided that this Reservation may be extended for one further consecutive period of five (5) years provided that the Minister of Forests is satisfied that the harvesting plan proposed by the Grantor for the extended period of five (5) years will not result in the deterioration of merchantable value of timber through over maturity. . . ."

In giving its reasons the Board stated in the last two paragraphs:-

> "In considering the evidence, the Board finds that the Appellant is an occupier in fact of those portions of the subject nine blocks wherein timber was growing, standing or lying in the years immediately preceding the assessment years in question. In so finding, the Board is mindful of the reservation clause of the Indenture bearing the 5th day of February, 1979, which retained for the Appellant's predecessor right, title and interest in the timber. In those portions of the subject Blocks where such timber was growing, standing or lying, the Appellant clearly was in possession or occupation of Crown land and consequently assessable pursuant to section 34 of the *Assessment Act*.
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> The parties are hereby directed to ascertain the portions of the subject lots containing timber meeting the required conditions for the assessment years in question. Such findings are to be brought to the attention of the Board for confirmation."

Of the four questions put to the Board the first two decide the issue:-

> "(1) Did the Assessment Appeal Board err in law in failing to find that the Appellant was not an occupier within the provisions of section 34 of the *Assessment Act* 1979, R.S.B.C. chapter 21 and amendments thereto and consequently not assessable?
>
> (2) Did the Assessment Appeal Board err in law in not finding that only those areas logged during the assessment years in question should be assessed?

The case was argued by the appellant on the basis that it was not an "occupier" of land within the meaning of the *Assessment Act*. I quote the relevant legislation:-

> "1. In this Act
>
> 'occupier' means
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> (a) a person who, if a trespass has occurred, is entitled to maintain an action for trespass;
>
> (b) the person in possession of Crown land that is held under a homestead entry, pre-emption record, lease, licence, agreement for sale, accepted application to purchase, easement or other record from the Crown, or who simply occupies the land: . . . ."

"34. (1) Land, the fee of which is in the Crown, or in some person on behalf of the Crown, that is held or occupied otherwise than by, or on behalf of. the Crown, is, with the improvements on it, liable to assessment in accordance with this section."

As noted, the Assessment Appeal Board found the appellant to be taxable as an occupier of the land of all the parcels under appeal, logged or unlogged.

The leading case in British Columbia on "occupation" is *R. in Right of British Columbia et al.* v. *Newmont Mines Limited*, [1982] 3 W.W.R. 317. The headnote of that case reads:

"A holder of Crown-granted mineral claims, mineral leases and located mineral claims is assessable and taxable as an occupier under the *British Columbia Taxation (Rural Area) Act* on the land and improvements of which it has possession in fact, and such possession need not be exclusive. It is not assessable or taxable on land which it has not reduced to possession and which it has not occupied, even if that land is within the boundaries of a mineral claim part of which is taxable."

That appeal was argued on the basis that if Newmont was an occupier it was assessable and taxable. The definition of "occupier" was that contained in the *Assessment Act*.

The *ratio* of the case is accurately set out in the headnote. In the body of the judgment Lambert, J.A. said for the Court at p. 319:

"The mineral leases and located mineral claims confer on the holder and the rights set out in s. 10 (1) of the *Mineral Act*, R.S.B.C. 1979, c. 259.

'10. (1) The holder of a mineral claim, 2 post claim, lease, mining lease or certified mining lease *may use and possess* the surface of his claim or leasehold for the purpose of exploring for, developing and producing minerals, including the treatment of ore and concentrates, and all operations related to the exploration, development and production of minerals and the business of mining.' (The italics are mine.)

In short, the ownership of the mineral claims, no matter of which type, confers on Newmont a right or a power to use the surface, and a right or a power to possess the surface. There is no deemed possession or use. Possession and use remain questions of fact. Ownership of the claims only puts Newmont in a position where it can take possession of the surface if it wishes to do so. The ownership does not put Newmont into possession. This distinction is important, and I will return to it."

and at p. 322:-

". . . possession in fact, or occupation in fact, based on an exclusive or on a non-exclusive right to possession or occupation, or even on no right at all, is sufficient to make the person in possession or occupation subject to assessment and taxation.

On each of its claims Newmont is given a right to possess and use the surface of the land. The Crown is not seeking to assess or tax Newmont merely because Newmont holds those rights. No assessments were issued and no taxation levied on the claims where Newmont has done nothing on the surface. But in the exercise of those rights on some of the claims Newmont has removed the surface completely and dug a hole in the ground; in the exercise of those rights on other claims it has completely covered the surface of the claims with a pile of waste rock; and in the exercise of those rights on still further claims it has cleared the land and built a road or a conveyor or a construction camp or the footings for a bridge. To suggest that those uses of the land amount to anything less than exclusive possession and occupation in fact of the land so used would be absurd.

> Perhaps Newmont would not have done so had it not been for the fact that the Crown has sought to assess and tax the whole of every claim on which Newmont has exercised its right of possession by occupying a small part. To the extent that the Crown had done that, in my opinion, it has done so wrongly."

and at p. 325:

> "In my opinion, Newmont is assessable and taxable on the land and improvements of which it has possession in fact and which it holds by reason of the exercise of its rights under its Crown-granted mineral claims, mineral leases and located mineral claims.
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> In my opinion, Newmont is not assessable or taxable on land which it has not reduced to possession and which it has not occupied, even if that land is within the boundaries of the same mineral claim as land on which Newmont is assessable and taxable."

The Act taxes "land" defined in s. 1 as:-

> "'land' includes land covered by water and all quarries and substances in or under land."

but it defines various kinds of land such as rural land, timber land, tree farm land, and wild land and assigns to each a technical classification.

The *Interpretation Act* defines the word as follows:

> "'land' includes any interest in land, including any right, title or estate in it of any tenure, with all buildings and houses, unless there are words to exclude buildings and houses, or to restrict the meaning."

Jowitt's Dictionary defines it (in part) as:-

"Land, in its restrained sense, means soil, but in its legal acceptation it is a generic term, comprehending every species of ground, soil or earth, whatsoever, as meadows, pastures, woods, moors, waters, marshes, furze, and heath; it includes also houses, mills, castles, and other buildings; for with the conveyance of the land, the structures upon it pass also. And besides an indefinite extent upwards, it extends downwards to the globe's centre, hence the maxim, *Cujus est solum ejus est usque ad caelum et ad inferos*; or, more curtly expressed, *Cujus est solum ejus est altum* (Co. Litt. 4a)."

It would seem the common law understanding is the widest and the statutes mentioned above do nothing but define or classify land for a particular purpose. To state the obvious, to obtain a right, title, or interest in soil, or anything on or part of "common law" land, there must be a grant, reservation, or exception of a specific thing or substance. It is also seen in other ways: licences to take or remove, leases etc.

Carlson v. *Duncan,* [1931] 2 W W.R. 343 in the Court of Appeal of this Province makes it clear, following many authorities, that according to its interpretation, a contract for cutting timber may constitute a mere sale of chattels or else is an interest in land: and the contract in that case giving "as much time to be desire" to cut and remove standing timber was held not to be a chattel sale only but an interest in land. In the case at bar it was not argued as to whether or not the transaction in question was a chattel interest but, as earlier remarked, solely as to whether the petitioner was an occupier within the meaning of the taxing statute.

In an illuminating judgment in the Ontario Court of Appeal in 1982, *John Austin and Sons Ltd.* v. *Smith et al.,* [1982] 35 O.R. (2) 272 Arnup, J.A. canvasses in detail the previous law and states that two well-established principles of law provide the appropriate legal background in considering a deed containing a clause reserving all timber and the privilege of entry to remove it. The first

principle is that there may be a fee simple estate in trees. The second is that acts of adverse possession must be considered related to the nature of the interest in land and in particular the use and enjoyment intended to be made by the owner. That second proposition is restated in *Kirby* v. *Cowderoy,* [1912] A.C. 599 where the headnote says:

> "Possession of land must be considered in every case with reference to its peculiar circumstances, the character and value of the property, the suitable and natural mode of using it, and the course of conduct which its proprietor might reasonably be expected to follow with due regard to his own interest."

In the case at bar where the only matter argued was whether the petitioner was or was not an "occupier", the problem is created by the simple reservation of the right to cut. This is an interest in land - it was never argued otherwise. If, as the authorities show, a reservation of trees is a fee simple estate in inheritance, technically described as a fee conditional on the life of the tree (*Austin's* case, p. 279), I see no reason why there cannot be a fee simple in trees limited to a term of years, as in this case.

It is not the owner of the fee but the occupier who is taxed under this statute. Had it been argued that B.C. Timber was the owner, no question could have arisen as the fee in the soil belongs to the Crown and it was not alleged that any trespass had occurred as against the timber. The neat point is, therefore, what land, if any, does the holder of a fee simple in trees "occupy?"

What "land" does a fee in trees embrace? *Austin's* case refers to text and authority (pp. 278-279) and in particular:-

> ". . . In *Washburn on Real Property* (1860), the following appears at p. 4:
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> > 'But if the owner of land grants the trees growing thereon to another and his heirs, with liberty to cut and carry them away at his pleasure, forever, the grantee acquires an estate in fee in the trees, with an interest in the soil sufficient for their growth, while the fee in the soil itself remains in the grantor.'
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> The estate may be created by exception from a grant as well as by a grant of the trees only. See *Leake on the Law of Uses and Profits of Land* (1888), at p. 30 as follows:
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> > 'A grant, or an exception from a grant, of the trees growing in certain land, creates a property in the trees, separate from the property in the soil; but with the right of having them grow and subsist upon it. An estate of inheritance in a tree may thus be created.'
>
> Both of these quotations were used by Duff J. in his dissenting judgment in *Beatty et al.* v. *Mathewson* (1908), 40 S.C.R. 557 at 568. The court in that case divided three to two on the proper construction of the deed under which the defendants claimed. The majority held that on its true construction what was conveyed was a right to cut trees, not a grant of a fee simple estate in the trees. They found the deed to be ambiguous (a clause in the printed form used by the grantor contained a provision intended to be used to specify a time limit within which the right to cut could be exercised, but the space for the time had been left blank); they therefore looked at the surrounding circumstances and concluded that the parties had not intended to create a fee simple estate.
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> All of the judges writing opinions were of the view that if an estate in fee simple in trees has been created, no additional right to enter and take the trees need be conferred. The right is one of the necessary incidents of the estate created (or reserved)."

The result of the above is that the grantor retains the fee in the trees ". . . separate from the property in the soil; but with the right of having them grow and subsist upon it . . .". In *Carlson* v.

Duncan, the main question was whether the contract was a sale of chattels or an interest in land but Macdonald J.. at p. 349 said:

> "But the agreement did not provide that the timber should be 'severed before sale' nor 'under contract of sale'. In the meantime before severance, he has title to an interest in the timber which is part of the land. This point was considered in *Morgan* v. *Russell & Sons* [1909] 1 K.B. 357, 78 L.J.K.B. 187, where it was contended that a contract for the sale of slag and cinders attached to or forming part of the land was 'goods' within the meaning of a section of the English Act corresponding to our own. Lord Alverstone, C.J., dealing with this contention and rejecting it, said:
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> > 'The contract appears to me to be exactly analogous to a contract which gives a man a right to enter upon land with liberty to dig from the earth *in situ* so much gravel or brick, earth or coal on payment of a price per ton.'"

Looking at the above law, I see no difference in principle between a deposit of slag (which occupies space on the land), of waste rock as in the *Newmont* case, and a "deposit" of trees occupying space on another's land, which is this case. I, therefore, think the grantor in the case at bar "occupies" within the meaning of the statute and the area his standing or felled timber presently occupies is reduced into possession in fact and he should be taxed accordingly, following the directions of the Assessment Appeal Board to ascertain the appropriate area.

The answer to questions 1 and 2, therefore, is "No". It is not necessary to decide questions 3 and 4 as they are decided by the answers to the first two.

As the respondent Assessor has been successful, costs will go against the petitioner.