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CROWN FOREST INDUSTRIES LIMITED

v.

**ASSESSORS OF AREAS: 6-COURTENAY,
20-VERNON,
21-NELSON TRAIL,
24-CARIBOO,
25-NORTHWEST**

Supreme Court of British Columbia (A882155) Vancouver Registry

Before the HONOURABLE MR. JUSTICE FINCH

Vancouver, B.C., October 21, 1988

Peter D. Feldberg for the appellant
John E. D. Savage for the respondent

Reasons for Judgment November 15, 1988

I

This is an appeal by way of stated case pursuant to s. 74 of the Assessment Act, R.S.B.C. 1979, c. 21, as amended, by Crown Forest Industries Limited ("Crown") from a decision of the Assessment Appeal Board (the "Board") dated the 20th day of May 1988.

There were two issues on Appeal before the Board:

(a) Are Crown's timber licences (the "timber licences") exempt from taxation pursuant to s. 13. (1) (l) of the Taxation (Rural Area) Act, R.S.B.C. 1979, c. 400?

(b) If the timber licences are not so exempt from taxation, is land which is not occupied by Crown within the timber licence areas liable to assessment under the Assessment Act?

The Board found that the lands were not exempt from taxation because they did not comply with the requirements of s. 13. (1) (l) of the Taxation (Rural Area) Act.

The Board held, pursuant to s. 34 of the Assessment Act, that Crown was not assessable for those timber licences upon which it had not obtained a cutting permit or upon which it had not actually done work. However, it concluded that where Crown had performed work on a part of a timber licence or had obtained a cutting permit for a part of the timber licence that the entire timber licence was assessable.

The questions posed for the opinion of this Court are:

1. Did the Assessment Appeal Board err in law in concluding that the timber licences were not exempt from taxation pursuant to s. 13. (1) (l) of the Taxation (Rural Area) Act?

2. (2) Did the Assessment Appeal Board err in law in concluding that occupation of a part of the timber licence rendered Crown an occupier of all lands covered by that timber licence?

II

The facts upon which this appeal is based are set out in the Agreed Statement of Facts. The essential terms of a timber licence are as set out in Licence T0690, which is exhibited to the material. The rights and obligations under a timber licence are also set out in the Forest Act, R.S.B.C. 1979, c. 40. The timber licences at issue are identified in the material and are located on the coast of British Columbia and the interior of British Columbia as indicated in Exhibits 2 and 3.

The Agreed Statement of Facts continues:

"3. The degree of operations by the company varies from licence to licence. In respect to a timber licence the operations may include:

(a) harvesting timber;

(b) reforestation;

(c) brush control;

(d) operational timber cruising;

(e) fire protection;

(f) road building;

(g) active logging;

(h) logging camp activity;

(i) building and operation of airstrips;

(j) logging poles and pilings;

(k) extraction of shake blocks and material.

On some licences the licence area is not actively used but is held as a reserve of mature timber to be logged in accordance with the licensee's depletion plan. An annual rent is paid to the Crown of $1.25/hectare and, until the roll in issue, taxes paid. There may be use of some of the areas in a timber licence by prospectors, hunters, trappers, free miners, hikers and fishermen. A trapper may be granted a registered trap line over areas included in the timber licence. A miner may be granted by the Crown a special use permit, to develop a mine and such areas are then deleted from the licence. Notice is given to the licensee to harvest the timber within a specific period of time.

Land which is not being actively used unless waste land is growing timber.

"4. Also found under Tab 3 in Exhibit 1 are a typical operating plan, cutting plan, and Annual Report required under the licence. In addition, a Development Plan may be filed at the

requirement of the District Manager of the Forest Service in consultation with the licensee which indicates the areas and volumes to be logged over a five year period.

"5. With the first Forest Act in 1912 no further licence could be granted. The Forest Act of 1978 did away with the Old Temporary Tenures which include Pulp leases, Pulp licences, special Timber Licences and Timber berths which were area-based tenures granting the rights to cut mature timber only, with the land reverting to the Crown after harvesting. Over the years, renewal licences were issued and licences sold or assigned to third parties but no new licences were granted after 1907. With the Forest Act of 1978 all these tenures were replaced with timber licences. Pursuant to s. 51 of the Forest Act, after 1978 timber licences could be exchanged by mutual agreement for agreed upon areas of Crown land containing equivalent volumes of timber of equivalent value. In 1978 there was added under s. 25 (h) of the Forest Act the requirement of the licensee to replace the timber harvested by reforestation which became effective December 31, 1981 when the new timber licences were issued.

"6. On a typical Timber Licence area the first operation is logging or harvesting pursuant to a cutting permit. Two years following logging the area logged is surveyed to determine restocking levels. At this time the amount of area which requires planting is determined, and between years 3 and 4 the area determined to require planting is planted to Ministry of Forests standards as per the Ministry of Forests preharvest silvicultural prescription attached to the cutting permit application. The standards are specific to a timber supply area. In year 5 to year 6 a planting survival survey is done and at that time it is determined whether the trees planted are growing to a sufficient standard indicated in the prescription. Assuming a sufficient standard is achieved, the area is monitored to determine whether any further treatment for brush encroachment is necessary. If brush is encroaching a brush weeding project is undertaken (either by chemical or mechanical means). By year 12 after harvest the area is usually classified 'free to grow' and is a candidate for deletion from the timber licence. Normally the licensee makes application to have the areas inspected to determine that it is 'free to grow' and to have the area deleted from the timber licence. Provided that the area for deletion is administratively convenient, it is then deleted from the licence and reverts to the Crown and becomes part of the land base for a Timber Supply area. At deletion the licensee's obligations cease.

"7. All of the timber licences in issue have final expiry dates. The expiry date is established by the licensee in consultation with the Crown through review of the licensee's depletion plan. The expiry dates are indicated on Tab 1 of Exhibit 1. The length of the timber licence varies from five years to 50 years, and on expiration the licence areas revert to the Crown and become part of the timber supply area. If mature timber is not harvested during the term of the licence it nevertheless reverts to the Crown. The length of the timber licence is based on an estimation of the length of time it will reasonably take the licensee to harvest all of the timber in the timber licence area.

"8. The objective of reforestation is to replace merchantable timber to standards required by the Minister pursuant to s. 145 of the Forest Act.

"9. Each timber licence is located within a timber supply area as defined under the Forest Act.

"10. The timber licences are not subject to the allowable annual cut regulations. The allowable annual cut is a rate of timber harvesting specific for an area of land. Although the timber licence land base is not subject to the allowable annual cut regulation, portions of that land base are considered in the calculation of the allowable annual cut. The Ministry of Forests takes the maximum expiry date of the timber licences and phases in consideration of the land base at a constant rate until expiry of all of the timber licences at which time all of the land base of the timber licence is included in the Timber Supply Area ('TSA') and is subject to the Annual Allowable Cut ('AAC') regulations. This evens out the rate at which the land base of Timber Licence areas is included in the calculation which otherwise would be irregular based on the expiration of individual licences.

"11. 'Sustained Yield' is defined by Peter H. Pearse in Timber Rights & Forest Policy in British Columbia, as, 'a forest management regime that involves more or less continuous harvesting, balanced by growth, over managed forest units'.

"12. It takes between 80 and 120 years to grow timber of merchantable quality.

"13. This appeal is for the 1987 assessment year. Assessment Notices for the timber licences were prepared and issued in September, 1986."

There are photographs of timber licence areas in the material filed on this application.

III

The first question posed for the opinion of this Court was:

(1) Did the Board err in law in concluding that the timber licences were not exempt from taxation pursuant to s. 13. (1) (l) of the Taxation (Rural Area) Act?

Counsel for the appellant argued that in deciding the issue of exemption the Board erred on the following grounds:

(a) The Board erred in applying a wrong onus of proof in adopting the proposition that, ". . . where a subject alleges he is exempt from taxation the onus is on him to show that he comes within the exemption, and, unless he can show beyond a reasonable doubt that he does, he has failed to discharge his onus."; and b) The Board erred in law in concluding: (i) that s. 13. (1) (l) of the Taxation (Rural Area) Act requires that the agreement referred to must involve the filing of a "management and working plan" as defined in s. 1 of the Forest Act; and (ii) that the appellant must be engaged in growing timber continuously and perpetually on the land and harvesting successive crops and forest products on a sustained-yield basis to qualify for the exemption.

The first ground urged by the appellant on the claim for exemption arises from the decision of the Board where it said, at page 9: "Regarding the status of an appellant making a claim for an exemption from assessment of land, which is normally assessable under the Assessment Act, the Board subscribes to the proposition that: '. . . where a subject alleges he is exempt from taxation the onus is on him to show that he comes within the exemption, and, unless he can show beyond a reasonable doubt that he does, he has failed to discharge his onus.' ("The Construction of Statutes", written by F. A. Driedger at page 153.)" Then the Board concluded, at page 11 of its decision, in this part of its reasons as follows: "The Appellant has not fulfilled the onus placed upon it to prove that it is entitled to an exemption from taxation pursuant to Section 13. (1) of the Taxation (Rural Area) Act.

Counsel for the respondent Assessors conceded in argument that the Board applied the wrong onus of proof. He agreed the law does not impose an onus upon the taxpayer to establish its entitlement to an exemption. He agreed with counsel for the appellant that the law in this respect is as stated in Stubart Investments Ltd. (Appellant) v. Her Majesty the Queen (Respondent), [1984] 38 D.T.C. 6305 (S.C.C.) However, counsel for the respondents says that even though the Board applied the wrong onus of proof, it nevertheless reached the right conclusion. He says that even if the Board had applied the correct onus of proof, it would have come to the same conclusion. He says the Board's interpretation of the exemption provision in s. 13 was correct.

I turn therefore to the next branch of the appellant's argument on this first question.

At page 9 of its decision, the Board said this: "Section 13. (1) of the Taxation (Rural Area) Act also refers to an agreement with the Crown under the Forest Act providing for the 'management by the licensee or holder'. The Board considers this to be the type of plan as defined in Section 1 of the Forest Act. There, a 'management and working plan' means 'a management and working plan approved under a tree farm licence, forest licence, timber sale licence or woodlot licence'; (underlining by the Board)"

The appellant says the second sentence of this passage is in error.

The Board's decision continues, at pages 10-11, as follows: "The Appellant does not hold any of the tenures referred to in the definition of a 'management and working plan' contained in Section 1 of the Forest Act and has not entered into a 'management plan' of the type envisaged in Section 13. (1) of the Taxation (Rural Area) Act.

It would appear to the Board, that if the Legislature intended that Timber Licences (which are different from Forest Licences) be exempted as well as the other forms of licences subject to management under the Forest Act, it would have specifically included Timber Licences in the definition of 'management and working plan'."

The appellant says these passages repeat the error first expressed in the passage quoted above from page 9 of the decision. Then the Board's decision continues at page 10: "The Board acknowledges that the Appellant, because of the change in the Forest Act, is now required to obtain a permit to cut down mature timber and to agree to do reforestation, but this is on a limited basis only.

Crown Forest, as the holder of a Timber Licence, is not engaged in growing timber continuously and perpetually on this land, and it is certainly not harvesting successive crops of forest products on a Sustained Yield basis."

The appellant says the Act does not require it to grow or harvest timber in the way described in this language taken from s. 13. (1) (l) in order to qualify for the exemption. It says it is only required to manage for the purposes of growing and harvesting in accordance with the language of that subsection.

As to the Board's conclusion that the word "management" in s. 13. (1) (l) required the filing of a "management and working plan" as defined in s. 1 of the Forest Act, counsel points out that such a requirement is not stated in the exemption provision. He says that if the Legislature had wished to impose that requirement it could have done so. The fact that it has not done so indicates that management in a broader sense was contemplated.

The appellant's argument continues, that timber licences are managed by the appellant pursuant to the licences themselves and an operating plan which requires reforestation of the areas of the timber licences logged to British Columbia Forest Service specifications. These are the same reforestation standards which apply to tree farm licences.

The appellant says the Board erred in concluding that s. 13. (1) (l) of the Taxation (Rural Area) Act required the harvesting of successive crops of forest products by the licensee. He says the sole requirement of the statute's exemption provision is that the land and timber area ". . . are subject to management by the licensee or holder for the purpose of growing continuously and perpetually, and harvesting, successive crops of forest products on a Sustained Yield basis."

The appellant says the timber licences are located in timber supply areas, and that pursuant to the Forest Act timber supply areas are managed and harvested on a sustained yield basis.

Following harvesting, the appellant is required to reforest the area of the timber licences logged so as to ensure either through natural growth or replanting that the harvested timber is replaced and tended to the "free-to-grow stage". The purpose of reforestation is to ensure that a successive crop of merchantable timber is established. The appellant's obligations are to satisfy the reforestation requirements of the Forest Act as the land base underlying the timber licences is added to the timber supply area following harvesting.

So the appellant says that in determining whether or not it qualified for an exemption under this provision of the Act, the Board should have asked two questions. The first question is, "What are you doing?" The second question is, "Why are you doing it?"

The appellant says that the Board looked only at the appellant's conduct to see what it was in fact doing, without going on to ask the second question and to determine the "purpose" to which the appellant's conduct was directed.

According to the appellant, s. 13. (1) (l) of the Taxation (Rural Area) Act requires management for the purpose of growing continuously and perpetually, and harvesting successive crops of forest produced on a sustained-yield basis. It says that these management requirements are satisfied by:

(a) silvicultural requirements in the timber licence and operating plan that require extensive and rigorous management of land and timber with respect to cut and regeneration; and

(b) the inclusion, following harvesting, of the land base of the timber licence in the calculation of the annual allowable cut for other tenure holders in the timber supply area. This ensures that the timber supply area produces timber on a sustained-yield basis.

The appellant says that when its reforestation requirements are read together with the scheme of management of a timber supply area in the Forest Act, it is clear that the purpose of its management requirements under its timber licences is to provide for those things which the exemption describes.

The appellant therefore says that the purpose of s. 13. (1) (l) of the Act is met by the management requirements in the timber licences and operating plans, and that the appellant's timber is exempted from taxation. The appellant says that s. 13. (1) (l) does not require the licensee to harvest timber on a sustained-yield basis internal to the area described in the timber licence. It says that the Legislature could have made that a requirement for exemption, but chose not to do so.

The respondents maintain that something more than the act of reforestation is required of an applicant to qualify for the exemption. The respondents say the exemption of s. 13. (1) (l) requires the licensee to manage in accordance with the terms of that section. In order to obtain exemption under s. 13. (1) (l) the licensee would have to determine the rate of cut, and balance it as against the projected growth, so that the yield would be sustained. Management and cut for sustained yield are related to the rate at which the licensee uses the timber.

The respondents' argument is that if the licensee's management is merely for the purpose of reforestation that does not meet the requirements of s. 13. (1) (l), because then the purpose of the licensee's management is not sustained yield. That, say the respondents, is what the section requires.

That is also the conclusion reached by the Board, and the respondents say that that was the correct conclusion, even though the Board applied the wrong onus of proof in reaching it.

I respectfully disagree with the legal conclusions of the Board, and with the submissions made by counsel for the respondents. The appellant's argument is, in my view, compelling.

Reforestation is one aspect of forest management. Lands that are being reforested are "subject to management". Under the Forest Act, there could be no "purpose" to reforestation other than the purposes described in s. 13. (1) (l). Reforestation is undertaken so that there may be continuous and perpetual growth, and eventual harvesting of successive crops of forest products on a sustained-yield basis. The exemption provision does not, however, require that the applicant be the person to grow continuously and perpetually, nor to harvest successive crops. One act done to effect a purpose may not of itself be sufficient to achieve the purpose. However, so long as it is a necessary step directed to achievement of the ultimate goal, one cannot say that the actor did not have that purpose in mind.

According to paragraph 6 of the Agreed Statement of Facts, the licensee's obligations in respect of reforestation usually end about Year 12 after the harvesting of an area when the lands are classified "free-to-grow", and when the licensee may apply to have those areas inspected and deleted from the timber licence.

If the Board's view were correct, the purpose envisaged in s. 13. (1) (l) could never be satisfied until it had in fact been fulfilled.

In my view, it is correct, as the appellant argues, to look at what the applicant did, and then to determine what the purpose of that conduct was.

According to paragraph 8 of the Agreed Statement of Facts: The objective of reforestation is to replace merchantable timber to standards required by the Minister pursuant to s. 145 of the Forest Act."

In my view, that is a sufficient showing of purpose to bring the applicant within the provisions of s. 13. (1) (l). To accede to the respondents' contention would require me to read into the language of that section words which do not there appear.

I accordingly answer the first question posed in the affirmative, and conclude that the Board did err in finding that the exempting provision requires the filing of a "management and working plan" as defined in s. 1 of the Forest Act; and further erred in finding that the exempting section requires that the appellant itself must be engaged in growing timber continuously and perpetually on the land, and harvesting successive crops and forest products on a sustained-yield basis.

In view of these conclusions, it is unnecessary for me to deal with the second question posed in this stated case as to whether the Board erred in law in concluding that occupation of a part of the timber licence rendered the (sic) Crown an occupier of all lands covered by that timber licence.

The appeal is allowed with costs.