1943

*Feb. 3, 4, 5.
*May 4.

MARK ANTHONY AND OTHERS (PLAINTIFFS) ..... APPELLANTS;

AND

THE ATTORNEY-GENERAL OF THE PROVINCE OF ALBERTA AND THE MINISTER OF LANDS AND MINES OF THE PROVINCE OF ALBERTA (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Constitutional law—Natural Resources Agreement of 1929, section 2—Timber leases issued by Dominion—Increase of dues by province on renewals—Whether ultra vires the province—Right of province to alter dues at discretion—"Terms" of licenses—Dues alleged to be prohibitive—Acceptance by licensee of licenses issued by province—The Dominion Lands Act (D), 1908, c. 20—The Provincial Lands Act (Alta.), 1931, c. 48, and 1939, c. 10

The plaintiffs, appellants, for many years prior to 1930, were holders of licenses to cut timber. These licenses, issued for one year but renewable, had been granted by Dominion officials under the authority of the *Dominion Lands Act*. The ground rentals and annual dues were increased by regulations from 1886 until 1930, when the rates payable were $10 per square mile for ground rental and $1 for dues per 1,000 feet board measure. In 1929, an arrangement, the Natural Resources Agreement, was made between the Dominion of Canada and the province of Alberta, under which all Crown lands were to be transferred by the Dominion to the province, subject to outstanding obligations which the province undertook to implement; and on the 1st of October, 1930, the provincial officials took over the administration of these lands. In 1931, the *Provincial Lands Act* was enacted and the *Dominion Lands Act* ceased to have force of law in the province. Under the authority of the *Provincial Lands Act*, the province, for each of the years 1931 to 1939, issued licenses to the appellants or their predecessors in title in practically the same form as theretofore issued by the Dominion. These licenses were formally accepted, signed and sealed by the appellants; and similar renewals were issued in each year until 1939. These licenses contained a clause that the licensee should be entitled to renewal of his license from year to year, provided that such renewal should be subject to the payment of such rental and dues and to such terms and conditions fixed by the regulations in force at the time the renewal was made. In 1940, by order in council passed under the authority of a new *Provincial Lands Act* enacted in 1939, new regulations were made for the disposition of timber lands belonging to the province and the fixing of dues thereon. On the 25th of July, 1940, it was provided that the licensee of timber berths acquired pursuant to regulations theretofore established under the *Dominion Lands Act* should pay dues at the rate of $2.50 per 1,000 feet board measure, and on the 28th of May, 1941, the rate was increased to $3.

*PRESENT:—Rinfret, Davis, Kerwin, Hudson and Taschereau JJ.

On May 30th, 1941, by order in council, it was also provided that the Minister of Lands and Mines was authorized to grant licenses for the fiscal year ending March 31st, 1942, for the operation of these same berths, subject to the payment of dues on all timber cut under such licenses, the rate being made $1.75 per 1,000 feet. The appellants brought an action to have it declared that the province had no power to increase the dues payable by them as licensees beyond the sum of $1 per 1,000 feet, being the sum payable at the date of the transfer by the Dominion to the province; and it was contended that, if it has such power, it has not effectively exercised it. The trial judge held that the order in council of the 30th of May, 1941, fixing the rate of dues at $1.75 per 1,000 feet, was *intra vires* of the province; but he declared that the regulations passed by orders in council of the 25th of July, 1940, and of the 28th of May, 1941, in so far as they fixed the rate of dues at $2.50 and $3 per 1,000 feet were *ultra vires*. The appellants appealed to the Appellate Division from the first part of the judgment of the trial judge; and the respondents cross-appealed from the second part of that judgment. The Appellate Division dismissed the appellants' appeal and allowed the respondents' cross-appeal.

Held, affirming the judgment of the Appellate Division ([1942] 2 W.W.R. 554), that the provincial regulations at present being enforced were not *ultra vires* and that the appeal should be dismissed with cost.

Held.—The provincial government had the right to increase the rates of dues payable by the appellants over the amount of $1 per 1,000 feet named in the Dominion Government regulations at the time of the transfer. The Dominion licenses then in force were not conditional on the observance by the province of the regulations passed by Federal orders in council under the *Dominion Lands Act*. The terms of the transfer agreement from the Dominion to the province amount to a statutory novation, as held by the Judicial Committee in *In re Timber Regulations for Manitoba* ([1935] A.C. 184). Moreover, upon the facts in the present case, it must be held that the power possessed by the Dominion to vary the dues became vested in the province. The appellants, after the transfer, each year for nine successive years, applied for, received and accepted licenses from the Provincial Government, thus formally and definitely accepted its jurisdiction and agreed to abide by its regulations and paid the fees imposed by the Provincial Government.

Held, also, that the authority so transferred has not been limited or fettered by the "terms" of the Natural Resources Agreement (approved and confirmed by statute), and specially by clause 2 under which the province had agreed to carry out the terms of every subsisting lease or arrangement and not to alter or affect any of these terms. In construing the terms of that agreement, sanctioned by legislation which in effect amounts to a constitutional limitation, it must be held that the provincial authorities have the right to alter the dues in their discretion, provided that the alteration is not done with the purpose, or with the effect, of nullifying the agreement. The question, as to whether such point has been reached, must be determined according to the facts in each particular case. In the present case, there is no adequate evidence on which to decide such question, as held by the appellate court. At the argument, it was submitted on behalf of the respondents that the orders

1943

ANTHONY ET AL. v. THE ATTORNEY-GENERAL FOR ALBERTA ET AL.

in council when properly interpreted do not impose any rate after March 1st, 1942; and, accordingly, the appellants will still be entitled to apply again to the courts in the event of any attempt being made to enforce, in the future, rates which they may deem prohibitive.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), dismissing an appeal by the plaintiffs from the first part of the judgment of the trial judge, O'Connor J. (2) and allowing a cross-appeal by the respondents from the second part of the same judgment.

The material facts of the case and the questions at issue are stated in the above head-note and in the judgment now reported.

S. Bruce Smith K.C. for the appellants.

S. W. Field K.C. for the respondents.

The judgment of the Court was delivered by

HUDSON J.—This is an appeal from a unanimous decision of the Appellate Division of the Supreme Court of Alberta.

The question involved is whether or not the Government of Alberta has the right to increase dues payable on licenses to cut timber on Crown lands, when such licenses were originally granted by the Dominion Government prior to the transfer of the lands to the province in 1930.

For many years prior to 1930 the plaintiffs were holders of licenses to cut timber. These licenses were granted by Dominion officials under the authority of the *Dominion Lands Act* and regulations made thereunder from time to time.

The licenses were secured at a sale by auction and very substantial sums were paid therefor by the successful bidders. They were issued for a term not exceeding one year but were renewable.

The form of renewal license issued by the Dominion Government in 1930 read in part as follows:

> Know all men by these presents, that by virtue of the authority vested in me by the *Dominion Lands Act* and by an order of His Excellency the Governor General in Council of the first day of July, 1898, as amended by subsequent Orders in Council, I, the Honourable Frank Oliver, the Minister of the Interior of Canada, do hereby, in consideration of two dollars and fifty cents ($2.50) ground rent now paid to me

(1) (1942) 2 W.W.R. 554. (2) (1942) 1 W.W.R. 833.

for the use of His Majesty King Edward the Seventh, and in consideration of the royalty hereinafter mentioned, give unto R. Ritchie, of the town of Strathcona, in the province of Alberta, hereinafter called the licensee, his executors and administrators, full right, power and license, subject to the conditions and restrictions hereinafter mentioned and contained, and such other conditions and restrictions as are in that behalf contained in the *Dominion Lands Act*, and the amendments thereto, and in the regulations respecting timber passed by the Governor General in Council, to cut timber on the following tract of land (hereinafter called the "berth" or "berths"), that is to say:

* * *

This license is subject to the following conditions and restrictions in addition to such of the conditions and restrictions as are in that behalf contained in the *Dominion Lands Act* and the amendments thereto and in the regulations respecting timber passed by order of the Governor General in Council:

* * *

2. So long as the licensee complies with the conditions of this license and of the regulations he shall be entitled to a renewal of his license from year to year while merchantable timber remains upon the area licensed, provided, however, that such renewal shall be granted subject to any change which may have been made in the Regulations increasing or altering the rental or dues to be paid, or otherwise varying the terms or conditions under which the licenses are granted, etc.

The relevant provisions of the *Dominion Lands Act* then in force were as follows:

49. The Governor in Council may 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: Provided that

(*a*) no berth shall exceed an area of twenty-five square miles, excepting a timber berth granted for the cutting thereon of pulpwood, which pulpwood berth shall be of such area as may be determined by the Governor in Council.

(*b*) no berth shall be awarded except to the person who offers the highest bonus or bid therefor; and

(*c*) no offer by tender shall be accepted unless accompanied by the full amount of the bonus.

50. The person to whom a timber berth is awarded under the last preceding section shall be granted a license therefor, which license shall describe the land upon which the timber may be cut, the kind, etc.

51. The license shall be for a term not exceeding one year, but shall be renewable from year to year while there is on the berth timber of the kind and dimension described in the license, in sufficient quantity to make it commercially valuable, such renewal being subject to the payment of such dues and to such terms and conditions as are fixed by the regulations in force at the time the renewal is made.

2. The Minister shall be the judge as to whether the terms and conditions of the license and the provisions of this Act and of the regulations made hereunder respecting timber berths have been fulfilled.

The ground rentals and annual dues were increased from time to time by regulation; for example, from 1886

1943

ANTHONY ET AL. v. THE ATTORNEY-GENERAL FOR ALBERTA ET AL.

Hudson J.

to 1898 the ground rentals were $5 per square mile and the dues 5 per cent on the amount of the sales of all products from the berth. From 1898 to 1920 the ground rental was still $5 per square mile but dues were 50 cents per thousand feet board measure. From 1920 to 1921 the ground rental was $10 per square mile and the dues 75 cents per thousand feet board measure. From 1921 onwards the ground rental was $10 per square mile and the dues $1 per thousand feet board measure, which were the rates payable in 1930. The right of the Dominion to increase these rates is not questioned. In 1929, an arrangement was made between the Dominion of Canada and the province of Alberta, by which all Crown lands, with some exceptions not here material, were to be transferred by the Dominion to the province, subject to outstanding obligations which the province undertook to implement. This arrangement was thereafter incorporated in a formal written agreement which was subsequently ratified by Acts of the legislature of Alberta, chapter 21 of the statutes of Alberta 1920, the Parliament of Canada, chapter 3 of the statutes of Canada 1930, and the United Kingdom, chapter 26 of the statutes of 1930, being the *British North America Act,* 1930.

The material provisions of this agreement are as follows:

1. In order that the Province may be in the same position as the original Provinces of Confederation are in virtue of Section 109 of the *British North America Act,* 1867, the interest of the Crown in all Crown lands, mines, minerals (precious and base) and royalties derived therefrom within the Province, and all sums due or payable for such lands, mines, minerals or royalties, shall, from and after the coming into force of this Agreement and subject as therein otherwise provided, belong to the Province, subject to any trust existing in respect thereof, and to any interest other than that of the Crown in the same, and the said lands, mines, minerals and royalties shall be administered by the Province for the purposes thereof, subject, until the Legislature of the Province otherwise provides, to the provisions of any Act of the Parliament of Canada relating to such administration; any payment received by Canada in respect of any such lands, mines, minerals or royalties before the coming into force of this Agreement shall continue to belong to Canada whether paid in advance or otherwise, it being the intention that, except as herein otherwise specially provided, Canada shall not be liable to account to the Province for any payment made in respect of any of the said lands, mines, minerals, or royalties before the coming into force of this Agreement, and that the Province shall not be liable to account to Canada for any such payment made thereafter.

2. The Province will carry out in accordance with the terms thereof every contract to purchase or lease any Crown lands, mines or minerals

and every other arrangement whereby any person has become entitled to any interest therein as against the Crown, and further agrees not to affect or alter any terms of any such contract to purchase, lease or other arrangement by legislation or otherwise, except either with the consent of all the parties thereto other than Canada or in so far as any legislation may apply generally to all similar agreements relating to lands, mines or minerals in the Province or to interests therein, irrespective of who may be the parties thereto.

3. Any power or right, which, by any such contract, lease or other arrangements, or by any Act of the Parliament of Canada relating to any of the lands, mines, minerals or royalties hereby transferred or by any regulation made under such Act, is reserved to the Governor in Council or to the Minister of the Interior or any other officer of the Government of Canada, may be exercised by such officer of the Government of the Province as may be specified by the Legislature thereof from time to time, and until otherwise directed, may be exercised by the Provincial Secretary of the Province.

Under this legislation the agreement took effect on the 1st of October, 1930, and thereupon the provincial officials took over the administration of the lands in question. Meanwhile, the legislature of Alberta, in anticipation of the transfer of these lands, had passed an Act to provide for the *Administration of the Provincial Natural Resources,* being chapter 22 of the statutes of Alberta, 1930, and it was there provided by section 2 that a number of Acts, including the *Dominion Lands Act,*

shall, in so far as the terms thereof are within the legislative capacity of the Province and in so far as they apply to the transferred property, have force in the Province as if they had been originally passed by the Legislature of the same, subject, however, to the conditions, restrictions and limitations hereinafter contained.

In 1931, the legislature of Alberta passed a *Provincial Lands Act,* chapter 43, making provisions for the administration of the public lands which had been acquired by the province, and providing that the *Dominion Lands Act* which had been in force in the province pursuant to the *Administration of the Provincial Natural Resources Act* should cease to be in force. Under section 46 of this Act

the Lieutenant-Governor in Council was authorized to make regulations for the disposal by public competition of the right to cut timber and to issue licenses therefor.

Section 48 was a repetition of section 51 of the *Dominion Lands Act,* and the other sections of the Act corresponded very closely with those of the Dominion Act in all relevant matters, substituting, of course, the Lieutenant-Governor in Council for the Governor General in Council, and the provincial officials for Dominion officials.

1943

ANTHONY ET AL. v. THE ATTORNEY-GENERAL FOR ALBERTA ET AL.

Hudson J.

Under the authority of this last-mentioned statute, the province issued licenses to the plaintiffs or their predecessors in title in practically the same form as had theretofore been issued by the Dominion, substituting, however, reference to the *Provincial Lands Act* in place of the *Dominion Lands Act,* the Lieutenant-Governor in Council for the Governor General in Council, and corresponding changes in regard to the Minister and other provincial authorities. They provided:

> This license is subject to the following conditions and restrictions in addition to such of the conditions and restrictions respecting timber as are contained in the *Provincial Lands Act* and the amendments thereto, and in the regulations respecting timber passed by order of His Honour the Lieutenant-Governor in Council.
>
> * * *
>
> (*b*) The licensee shall be entitled to a renewal of his license from year to year while there is on the berth timber of the kind and dimensions described in the license in sufficient quantity to make it commercially valuable, if the terms and conditions of the license and the provisions of the *Provincial Lands Act* and of the regulations affecting the same have been fulfilled, as to which the Minister shall be the judge:
>
> Provided that each such renewal shall be subject to the payment of such ground rental and royalty dues and to such terms and conditions as are fixed by the regulations in force at the time the renewal is made.

These licenses when issued were formally accepted, signed and sealed by the plaintiffs.

Similar renewals were issued in each year until 1939.

Between 1931 and 1939 the dues payable in respect of these licenses were reduced substantially below the $1 per thousand payable under the last Dominion license.

In 1939 another Act was passed respecting provincial lands, being chapter 10 of the statutes of that year. In section 75 (*m*) it was provided that the Lieutenant-Governor in Council may,—

> (*m*) from time to time make such regulations and orders, not inconsistent with this Act, as are necessary to carry out the provisions of this Act according to their true intent, or to carry out the Agreement of Transfer, or to meet cases which may arise and for which no provision is made by this Act.

Subsection 2:

> (2) For the purpose of implementing any obligation affecting any lands vested in His Majesty in the right of the Province by virtue of the Agreement of Transfer, which, by the terms of the said agreement, the Province is bound to perform, the Lieutenant-Governor in Council is empowered to do or cause to be done all or any acts and things, and to

make any disposition of the said lands for the purpose aforesaid, and, to the extent only that it may be necessary for effecting such purpose, to depart from or vary any other provision of this Act.

On the 25th of July, 1940, the Lieutenant-Governor in Council passed new regulations which provided:

(*a*) Timber license is defined as meaning "any license granted under these or any former regulations for the cutting and removal of Crown timber for any purpose".

(*b*) No license for a timber berth shall be renewable after the tenth year from the date of sale.

(*c*) The licensee of a timber berth acquired pursuant to regulations heretofore established under the *Dominion Lands Act* shall pay dues as set out in Form E.

(*d*) Form E provided for a rate of dues on sawn lumber of other timber than poplar of $2.50 per M. feet B.M.

(*e*) The rate of dues payable by holders of timber permits was decreased from $3 per thousand to $2.50 per thousand.

On the 30th of July, 1940, the Lieutenant-Governor in Council authorized the issue of licenses for the fiscal year ending the 31st of March, 1941, for the operation

of timber berths acquired pursuant to regulations heretofore established under the *Dominion Lands Act,* subject to the payment of dues in accordance with the attached schedule;

the attached schedule provided for a rate of dues of $1 per thousand feet board measure on sawn lumber of other timber than poplar.

On the 28th of May, 1941, the Lieutenant-Governor in Council increased the rate of dues provided by schedule E of the regulations of the 25th of July, 1940, to $3 per thousand feet on sawn lumber of other timber than poplar.

On the 30th of May, 1941, the Lieutenant-Governor in Council authorized the issue of licenses for the fiscal year ending the 31st day of May, 1942, for the operation

of timber berths acquired pursuant to regulations heretofore established under the *Dominion Lands Act* subject to the payment of dues as set out in the attached schedule

and that schedule provided a rate of $1.75 per thousand feet on sawn lumber of other timber than poplar.

On May 30th, 1941, an order in council was passed reciting that section 23 of the said Regulations established by order in council should become effective on April 1st, 1941, and that it was proper and convenient to postpone the operation of section 23 to a later date. The order in council then provided that the Minister of Lands and

1943

ANTHONY ET AL. v. THE ATTORNEY-GENERAL FOR ALBERTA ET AL.

Hudson J.

Mines was authorized to grant licenses for the fiscal year ending March 31st, 1942, for the operation of timber berths acquired pursuant to Regulations heretofore established under the *Dominion Lands Act*, subject to the payment of dues on all timber cut under such licenses in accordance with the attached schedule, which rate should come into force on April 1st, 1941. By the attached schedule the rate was made $1.75 per thousand feet.

After the action was commenced an agreement was made between the parties whereby licenses for the years 1941 and 1942 were granted in consideration of $1 per thousand feet being paid to the Government and 75 cents per thousand feet being paid into court to abide the result of the action.

The appellants in this action claim:

(*a*) A declaration that certain regulations made by the Lieutenant-Governor in Council of Alberta purporting to increase the rates of dues payable by the appellants were *ultra vires*.

(*b*) A declaration that a provision in such regulations to the effect that no license should be renewable after the tenth year from the date of sale was *ultra vires*.

(*c*) An interlocutory injunction and an injunction restraining the respondents from exacting dues from them in excess of 50 cents or $1 per thousand feet board measure.

(*d*) Interim orders directing that the appellants might execute their licenses for the current period and deposit such licenses in court without prejudice to their rights and might during the course of the litigation pay the Crown $1 per thousand feet and into court 75 cents per thousand feet in respect of all spruce lumber cut by them after the 31st day of March, 1941.

The action was tried before Mr. Justice O'Connor who held,—

(*a*) That the regulations passed on the 25th day of July, 1940, as amended by the order in council passed on the 28th of May, 1941, were *ultra vires* against the appellants (1) in so far as they provided that no license for a timber berth should be renewable after the tenth year from the date of sale, and (2) in so far as they fixed a rate

of dues on license timber berths in respect of sawn lumber of other timber than poplar at $2.50 and subsequently at $3 per thousand feet.

The learned judge so decided the second point because he concluded that dues of $2.50 or $3 per thousand were so high as to be prohibitive and were adopted improperly with the purpose of causing a forfeiture of the appellants' licenses and constituted a violation of the provisions of the Natural Resources Agreement and legislation.

(*b*) That Order in Council passed on the 30th day of May, 1941, which fixed a rate of dues for the year from the 1st of April, 1941, to the 31st day of March, 1942, at $1.75 per thousand feet, was *intra vires* of the province of Alberta.

The appellants appealed to the Appellate Division of the Supreme Court of Alberta, and the respondents cross-appealed with respect to such regulations as were found to be *ultra vires* excepting the regulation providing that no license for a timber berth should be renewable after the tenth year from the date of sale. The trial judge's finding that the last-mentioned regulation was *ultra vires* therefore stands.

The Appellate Division held:

(*a*) That all of the increase in dues to $1.75 per thousand feet effected by regulation passed by the Lieutenant-Governor in Council was *intra vires*.

(*b*) That the finding of the trial judge that the rates of dues of $2.50 and $3 per thousand feet board measure were prohibitive and were adopted improperly did not arise on the pleadings, that if it did arise the evidence fell short of justifying the finding and that it was not convenient to make a declaration that rates which had not yet been imposed would have been prohibitive, having regard to the course of trial.

On the appeal before this Court the first point raised by counsel for the appellant is—

(1) that the provincial regulations in question were *ultra vires* in so far as they purported to increase the rates of dues payable by appellants over $1 per thousand for sawn lumber, being the amount named in the Dominion Government regulations at the time of the transfer. He

1943

ANTHONY ET AL. v. THE ATTORNEY-GENERAL FOR ALBERTA ET AL.

Hudson J.

argued that inasmuch as the Dominion licenses then in force were conditional on the observance of regulations passed by the Governor General in Council under the *Dominion Lands Act,* the appellants were under no obligation to pay to the province on any other basis, and that the contract was analogous to a contract for personal services because here a discretion was vested in the other party whom the plaintiff knew and trusted to exercise the reserved discretion reasonably.

The terms of the transfer agreement from the Dominion to the province came up for consideration before the Judicial Committee in a reference *In re Timber Regulations for Manitoba* (1), and it was there held that the transfer amounted to a statutory novation. It was said by Lord Wright at p. 198:

> But their Lordships agree with the Supreme Court that in the special circumstances of this case the statute of 1930 did effect such a novation. Under clase 2 it is the Province, to which the lands have been transferred, that can alone as a matter of law thereafter grant the patent to an entrant; the agreement, made law by the Act of 1930, requires the Province to carry out the various specified obligations in respect of the lands transferred; these obligations are now imposed on the Province by law; by the same reasoning they do not any longer attach to the Dominion; that implies that by law the entrant must go to the Province to obtain the carrying out of the various obligations which the statute of 1930 by confirming the agreement requires the province to fulfil.

In the present case, in addition to the statutory novation, the facts are important. The appellants after the transfer each year for nine successive years applied for, received and accepted licenses from the Provincial Government and thus formally and definitely accepted its jurisdiction and agreed to abide by its regulations and paid the fees imposed by the Provincial Government. The fact that these fees were lower than those imposed by the Dominion Government does not alter the position in consideration of this particular point.

The formal acceptance of the licenses by the appellants distinguishes the case from that of *Nokes* v. *Doncaster Amalgamated Collieries, Ltd.* (2). In that case the employee was not aware of the transfer of employers and there was nothing in the nature of formal novation or acquiescence to bind him.

(1) [1935] A.C. 184.

(2) [1940] A.C. 1014.

Upon these facts, it should be held that the power possessed by the Dominion to vary the dues became vested in the province. This is substantially the view of Mr. Justice O'Connor and the members of the Appellate Division.

Having arrived at this opinion, it must next be considered whether or not the authority so transferred is limited or fettered by the terms of the Natural Resources Agreement. The appellants claim that it is. They contend that the increases in dues payable by the appellants provided by the provincial regulations were steps in a colourable attempt by the province to forfeit the appellants' licenses and, accordingly, that such increases were *ultra vires* of the province, that the rate of $1.75 per thousand was prohibitive and invalid as well as the rates of $2.50 and $3. On this point, the appellants were partially successful. As has been stated, at the trial Mr. Justice O'Connor held that although the province had the right to fix dues, there was a limit to such power; that the dues so fixed must not be prohibitive because, if prohibitive, they would affect or alter the plaintiffs' lease or arrangements contrary to clause 2 of the Natural Resources Agreement. He then went on to find on the facts that $1.75 per thousand was excessive but was not prohibitive, but that $2.50 or $3 was prohibitive.

Clause 2 of the Natural Resources Agreement provides firstly, that the province will carry out the terms of every subsisting lease or arrangement, and secondly that it will not affect or alter any terms of such contract except with the consent of the parties or in so far as legislation may apply generally to similar agreements.

I do not think that the plaintiffs' acceptance of the licenses can be taken as a consent to any alteration in the agreement which would vest in the province a right to destroy or nullify indirectly the contract which he had with the Dominion Government.

The language of subsection 2 was the subject of much discussion in the *Spooner* case (1). It was there said by the Chief Justice of this Court at p. 645:

but if the enforcement of a tax, imposed by provincial legislation, would involve a nullification in whole or in part of competent Dominion legis-

(1) *Spooner Oils Ltd.* v. *The Turner Valley Gas Condensation Board* [1933] S.C.R. 629.

1943

ANTHONY ET AL. v. THE ATTORNEY-GENERAL FOR ALBERTA ET AL.

Hudson J.

lation under which the right is constituted, then it is, to say the least, doubtful whether such provisions could take effect.

The matters for discussion in the *Spooner* case (1) were very different from those here, but the remarks of the Chief Justice have some relevance. It must be kept in mind that we are here construing the terms of an agreement sanctioned by legislation which in effect amounts to a constitutional limitation.

In my view, the provincial authorities have the right to alter the dues in their discretion, provided that the alteration is not done with the purpose or with the effect of nullifying the agreement. It is difficult to ascertain in particular cases where such point will be reached. In the present case, I agree with the court of appeal that there is no adequate evidence on which to decide the question, although there is sufficient evidence to excite suspicion as to the motives for increasing the dues to the higher figures. In argument, counsel for the Attorney-General submitted that the orders in council when properly interpreted do not impose any rate after 1st March, 1942, and I think we are entitled to accept this as the attitude of the Provincial Government.

I agree that the course adopted by the court of appeal should be followed with, of course, a right to the appellants to again apply in the event of any attempt being made to enforce the rates in excess of $1.75 per thousand, or any other rates which they may deem prohibitive.

There were two other minor points put forward by counsel for the appellants. The first is regarding saw-mills, but it does not seem to me that this materially affects the situation. A provision as to saw-mills existed in Dominion legislation from the year 1885 onwards, and the second point is that there was no power to substitute the Lieutenant-Governor in Council for the Provincial Secretary, as mentioned in the agreement. This is a matter of governmental procedure and not a matter of substance affecting the appellants.

I would dismiss the appeal. There should be no costs of this appeal.

Appeal dismissed, no costs.

Solicitors for the appellants: *Parlee, Smith, Clement & Parlee.*

Solicitor for respondents: *J. J. Frawley.*