Osgoode Hall Law Journal

Volume 2, Number 1 (April 1960)

Article 9

Comments on the Crown Timber Act, 1952

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Lawyers have a tendency to work with a statute as if the whole aim and purpose of the enactment was to be found within its four corners. Since solicitors are called upon by clients to express legal opinions on the consequences of the application of statutes even though the policy of the Government may not be manifest, an examination of the background of a relatively unknown statute may be of considerable value.

About five-sixths of the sixty million acres of Ontario forest land occupied by pulpwood and sawlog companies are licensed from the Crown under the provisions of *The Crown Timber Act*.[1] Before the Minister of Lands and Forests will grant a licence to an applicant a contract for the sale of timber must be negotiated. At one time, and to a very limited extent now, Crown timber was offered for sale by public tender;[2] however, on account of the large transactions in disposing of Crown timber today the contract of sale is drawn up to correspond with the applicant's particular case. Section 3 of The Crown Timber Act (hereinafter referred to as "the Act"), gives a very wide discretion to the Minister as to the terms and conditions of sale provided that they are not inconsistent with the Act. All sales under section 3 must be approved by the Lieutenant-Governor in Council. These last-mentioned sales are usually described as "negotiated stumpage sales", a description which makes sense once the basic terms of the sale are understood.

The licensee is required to pay statutory Crown dues[3] which vary according to the species of tree cut and the volume of timber taken from the licensed area (for example, for each thousand board feet of maple wood cut the Crown dues would be $5.00). Secondly, the licensee must pay an additional charge based upon the terms of the contract of sale set by bidding under sealed tender, or by Crown evaluation in respect to negotiated stumpage sales; a consideration in setting the Crown evaluation would be the rate paid by licensees in the neighbouring areas under licence. The additional charge is small when compared with the Crown dues. These two charges are commonly referred to as stumpage charges.

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1 The Crown Timber Act, 1952 (Ont.), c. 15.

2 *Supra*, footnote 1, sec. 2(2).

3 Ontario Regulations 43/53, Regulation 3.

In addition to the foregoing the licensee is required to pay each year a nominal ground rent[4] of $1.00 per square mile and a fire protection charge of $12.80 per square mile except in respect of unproductive lands.[5] These two charges may be considered as the price for reserving the licensed area for the licensee.

A number of foresters[6] believe that stumpage charges result in the waste of standing timber due to the fact that while forests generally contain timber particularly well adapted to a number of end products the licensee is usually associated with a specific enterprise. Under the Act the licensee pays for only the timber that he actually cuts; therefore, any species of tree unsuitable for his mill is left standing.

Quite a different position is taken by Mr. Somers Barron of the Ontario Department of Lands and Forests. In a discussion relating to the practice of pulpwood companies to utilize softwood species in preference to hardwood species, he submits:[7]

> That the amount of Crown charges has little or no bearing on the decision of the company to utilize these species (hardwood and inferior species). For example, in Ontario the Crown dues on poplar, birch and other hardwood pulpwood, are 50¢ per cord. This figure is insignificant in the overall costs of a cord of this wood landed at the mill. Even if this timber were passed free of dues to the companies there would be no appreciable effect in the utilization of hardwood pulpwood. This is evident from the fact that there are companies which are not utilizing these species on their own freehold land.

Mill equipment to process some species of wood is very expensive. Softwoods are far easier to handle and less expensive to convert into wood products than the hardwoods. At present there are vast areas of poplar and white birch which are far more accessible than the desirable softwood species, but which are being ignored by the forest industries.

The Licence

Accompanying or as part of the contract for the sale of Crown timber the applicant is granted a licence to cut and remove the timber.[8] The licence is issued for a period varying from three to twenty-one years and may be renewed upon expiration. Section 8 of the Act sets out the limited rights of the licensee, as follows:

> A licence shall not confer on the licencee any right to the soil or freehold of the licenced area or to the exclusive possession thereof except as may in the opinion of the Minister be necessary for the cutting and removal of the timber thereon and the management of the licenced area and operations incidental thereto.

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[4] *Ibid.* Regulations 3 and 4.
[5] *Supra,* footnote 1, sec. 5(2).

[6] See the brief presented to the Royal Commission on Canada's Economic Prospects by the Canadian Institute of Forestry, Feb., 1956, p. 13.

[7] Report of the Eleventh Annual Tax Conference convened by the Canadian Tax Foundation at Toronto, Nov., 1957, pp. 102-103.

[8] *Supra,* footnote 1, secs. 2(2) and 3(1).

Under section 50(1) of the Act the Lieutenant-Governor in Council has the authority to:

> Make regulations increasing or decreasing the Crown dues . . . or increasing or decreasing the annual ground rent and fire protection charge payable in respect of licenced areas. . . .

He has this power notwithstanding any provision contained in any act, order-in-council or licence. As a result, the Crown unilaterally and without notice, if it so desires, may vary its charges irrespective of any previous arrangement with the licencee. In practice the Crown has never fully extended its authority under this section unilaterally; however, the power exists. The fact that such does exist may be sufficient to restrain a cautious licencee from fully developing the potential within his licenced area, especially when he is unable to forecast what his expected profits will be.

A licence is not assignable[9] nor can a licencee grant permission to cut to a third party without the written consent of the Minister who is, in fact, not bound to consent. Moreover, any assignment or permission to cut not consented to shall not have any force or validity.[10] Not only does a licencee have a licence limited in scope by the discretionary power of the Minister under Section 8 of the Act but also a right to transfer the licence subject to the same limit.

Section 16 of the Act serves as another illustration of the Minister's discretion:

> Notwithstanding the granting of a licence, the Minister may,
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> (b) after thirty days' written notice to the licencee specifying the action proposed to be taken and giving the licencee an opportunity to be heard, sell, lease, grant or otherwise dispose of any public lands included in a licenced area for any purpose for which public lands may be disposed of under *The Public Lands Act*, and upon such sale, lease or grant being made, all rights of the licencee in respect of the timber on such lands shall cease.

In reference to the disposal of a timber licence for agricultural purposes, The Public Lands Act,[11] sec. 57(4) states that:

> The Minister may compensate the holder of any such licence by granting him a licence to cut timber elsewhere.

As a result, the licensee may lose a portion of his lands with or without compensation depending upon the Minister's discretion.

The rigid control policy of the Government in respect to Crown lands has been severely criticized by various forestry groups:

> Security of tenure is required for the forest industry; we believe that there is a direct relationship between secure tenure and good forestry practice. We feel that under the present system of land tenure there is neither the economic opportunity nor the incentive to practise intensive forestry.[12]

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[9] *Ibid.*, sec. 14(1).
[10] *Ibid.*, sec. 14(2).
[11] R.S.O. 1950, c. 309, s. 57, as amended by 1951 (Ont.), c. 71, s. 3.
[12] See the brief presented to The Public Lands Investigation Committee, 1959, by the Ontario Forest Industries Association, Dec., 1959, p. 4.

> We would go so far as to say that at the present time intelligent large-scale experimentation in forest management is virtually impossible in some cases, and perhaps nowhere in Canada is it openly and actively encouraged by legislation or regulation.[13]

The modern trend towards administrative discretion is aptly illustrated by the Act. In the author's opinion it is unfortunate that this discretionary power strikes at the very basis of the licencee-licencor relationship. Here the Crown as licencor, can alter unilaterally the area under licence and the price of Crown timber.

Furthermore, there are no settled principles set forth in the statute to limit the discretion. As a result the licencee cannot at any time know with certainty what the profits will be from his business or his actual interest in the licensed land.

Certain limitations to the Minister's discretionary powers may, however, lie outside the Act.

(1) Crown land in most parts of the province may be of value only to resource industries and therefore it is in the Crown's interest to secure available income from any forest industry willing to set up and maintain operations. The Crown's relationship with other licencees could have a considerable bearing upon the willingness of a new operator to negotiate with the Crown.

(2) The forest industry employs a great labour force which, on account of the locale, would find it difficult to obtain work elsewhere. The government has a vital interest, economically and politically, in keeping this group employed.

(3) Public opinion would respond to any quick or radical change in the policy of the Government, especially if such a change had an adverse effect on the country's biggest resource industry.

(4) Since the Crown is both administrator and licensor under the Act, the use of discretionary power in a certain situation might be subject to court reviews as contrary to the concepts of natural justice.[14]

FOREST MANAGEMENT

Under the authority of the Act[15] the Minister may require all licencees to practice what amounts to "sustained yield". The concept of sustained yield is that the industry within a given land area should be regulated and managed so that the volume of timber cut in the first year from a given area can be cut every year to perpetuity. It follows that the most satisfactory rate of exploitation of our forest resource under this concept, from the first year forward, would be a rate which is in balance with the capacity of the forest to renew itself. What effect does sustained yield have on our wood-

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[13] *Supra*, footnote 6, p. 9.

[14] See *Re General Accident Assurance Co. of Canada* (1926), 58 O.L.R. 470 (C.A.).

[15] *Supra*, footnote 1, secs. 22-29.

using industries? For them the most desirable rate of exploitation is the most profitable one. So long as that rate of exploitation is below the productive capacity of the forest the industries in question need not be concerned with sustained yield. But when the most profitable rate of cut is likely to impair the productive capacity of our forests, sustained yield may be detrimental to the best interests of these industries.

In practice, the avoidance of overcutting by means of a sustained yield plan may be advantageous to the forest industries. The moving of a logging operation from a depleted site to a forested one is costly, especially if a manufacturing plant is involved. But the buildings alone are a small part of the financial burden. It is reasonable to assume that the most heavily forested unoccupied areas in Ontario are the least accessible. The cost of transportation and labour in isolated areas is very high. Under the sustained yield plan the Minister of Lands and Forests sets out the rate of exploitation which the licencee must follow. This plan may be altered as the circumstances warrant. If the licencee wishes to increase the prescribed rate he must be willing to make the additional expenditures on his own that will increase the productive capacity of his licenced area.

The present plan has its opponents. Mr. Milton Moore in *Foresty Tenures and Taxes in Canada*[16] thinks that there is no need for it at all. He states that the most desirable rate of cut is an economic decision. The plan does not take into account future economic conditions. If a plan were drawn up for a certain area in 1950 with the productive capacity of forests and mills nicely matched, today, on account of technical improvements, it would have an industrial capacity which would use timber at a rate faster than it was produced. He states that the rate of the production of timber, the demand for it, and the technological innovations, all are unpredictable whereas sustained yield is a static concept which, in practice, limits the location from which a licensee may draw raw material regardless of the abundance of timber resources in other areas. As well, sustained yield stresses the preservation of an existing productive capacity of forests rather than an increased productive capacity. Instead, Mr. Moore favours regulations to prevent forest depletion which would impair productive capacity. Provided that provision is made for the regeneration of a second forest crop and the protection of water tables the rate of exploitation should be determined economically.

The author hesitates to recommend sweeping changes in the Act on account of the unexpected results such changes might possibly bring about in actual practice. It is doubtful if the Crown would ever relinquish ownership of large parcels of land to a resource industry;

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[16] See Canadian Tax Foundation, Canadian Tax Papers No. 11, pp. 126-129.

therefore, it is submitted that there should be a lease[17] of lands to the individual or company rather than a licence. This change in the Act would give the so-called licencee a substantial and recognizable interest in Crown land.

Another suggested improvement would be compulsory compensation,[18] under either the Act or The Public Lands Act, for any lands withdrawn from the lease wherein the right to withdraw areas would be retained by the Crown.

Furthermore, it is suggested that stumpage charges should be predictable and carefully adjusted to allow the most proper utilization of each species of tree.[19] This consideration stems from the fact that there are various processing expenses which depend upon the species of timber cut. The timber most expensive to process should have the lowest stumpage charges and *vice versa*. Perhaps the variations in economic conditions could be employed to adjust stumpage charges; consequently, an increase or decrease in the charges would be matched by an increase or decrease in the price of wood products.

Finally, it is submitted that there is a need for a quasi-judicial body[20] to determine all questions arising out of the contract upon application by either party to the contract.

These recommendations, if adopted, may prove to be beneficial to the Crown by encouraging licencees to invest in their lands by fostering second timber crops. The added security of tenure would, of course, provide this encouragement.

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[17] Under this submission, rent becomes a problem. It is suggested that the ground-rent be increased. The stumpage charges relate to timber and therefore need not be considered in setting the rent.

[18] *Supra*, footnote 12, p. 11.

[19] *Supra*, footnote 16, p. 142.

[20] *Ibid.*, p. 143.