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1947

In the Privy Council

No. 1948.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

IN THE MATTER OF THE INCOME WAR TAX ACT

UNIVERSITY OF LONDON
W.C.1

— and —

IN THE MATTER OF THE APPEAL OF D. R. FRASER,
AND COMPANY LIMITED, OF THE CITY OF EDMON-
TON, IN THE PROVINCE OF ALBERTA.

-3 OCT 1956

INSTITUTE OF FINANCE
LEGAL STUDIES

BETWEEN:

D. R. FRASER AND COMPANY LIMITED,

14236

Appellant,

AND:

THE MINISTER OF NATIONAL REVENUE,

Respondent.

RECORD OF PROCEEDINGS

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In the Privy Council

No.....1948.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

IN THE MATTER OF THE INCOME WAR TAX ACT,

and

IN THE MATTER OF THE APPEAL OF
D. R. FRASER AND COMPANY LIMITED,
OF THE CITY OF EDMONTON,
IN THE PROVINCE OF ALBERTA.

BETWEEN :

D. R. FRASER AND COMPANY LIMITED,

Appellant,

AND:

THE MINISTER OF NATIONAL REVENUE

Respondent.

RECORD OF PROCEEDINGS

PART I.

No. 1
Notice of
Appeal
4th
March,
1944.

No. 1

NOTICE OF APPEAL

NOTICE OF APPEAL is hereby given from the assessment bearing date the 5th day of February, 1944, wherein a tax in the sum of \$14,129.46 was levied in respect of income for the taxation year 1941.

FULL STATEMENT OF FACTS

The appellant is a company incorporated in the year 1904.

It operates a logging, sawing, planing and general lumber milling business at Breton, in the Province of Alberta, and during the fiscal year ending 1941, it produced 8,374,000 board feet of lumber. By its amended income tax returns in respect of the fiscal year mentioned, filed with the Inspector of Income Tax at Edmonton, Alberta, the appellant, in accordance with the provisions of Section 5 (a) of The Income War Tax Act, claimed an allowance for the exhaustion of its timber limits of \$1.50 per thousand board feet on the 8,374,000 board feet produced during the said fiscal year. 10

The timber limits of the appellant consist of timber licences and timber permits granted by the Minister of Lands and Mines of Alberta on behalf of the Crown in the right of the Province of Alberta, and the lessor or grantor, namely, the Crown in the right of the Province of Alberta, is not taxable under the provisions of The Income War Tax Act and cannot and does not claim on its behalf any part of the said allowance. 20

The appellant submits and claims:

1. That under section 5 (a) of The Income War Tax Act it has a statutory right and is entitled to an allowance for the exhaustion of the said timber limits.

2. That under the said section the Minister of National Revenue has 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. 30

3. That the said Minister has neglected and refused to perform his said duty to fix a just, fair and reasonable amount as an allowance for the exhaustion of the said timber limits and has not made any allowance whatever for the exhaustion of the said timber limits to the appellant.

No. 1
Notice of
Appeal
4th
March,
1944.

4. The amount of the said allowance claimed by the appellant, namely \$1.40 per thousand feet board measure, is a fair and just and reasonable allowance for exhaustion of the said timber limits and the appellant is entitled to an allowance of \$1.40 per thousand board measure for the exhaustion of the said timber limits in the year 1941.

continued.

10 DATED this 4th day of March, 1944.

D. R. FRASER & CO., LIMITED.

E. R. MACDONALD, Secretary

No. 2

DECISION OF THE MINISTER

WHEREAS the taxpayer duly filed an Income and Excess Profits Tax Return showing its income for the year ended 31st October, 1941.

AND WHEREAS a tax was assessed by Notice of Assessment dated the 5th February, 1944.

AND WHEREAS a Notice of Appeal was received dated the 4th
20 March, 1944, in which objection is taken to the assessed tax for the reasons therein set forth.

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 Subsection (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
30 Act and Excess Profits Tax Act the said Assessment is affirmed.

Notice of such decision is hereby given pursuant to Section 59 of the Act and is based on the facts presently before the Minister.

In accordance with the provisions of Subsection 2 of Section 60 of the Act any further facts, statutory provisions and reasons which the taxpayer intends to submit to the Exchequer Court must be included in a Notice of Dissatisfaction, or statement attached thereto.

No. 2
Decision
of the
Minister,
26th
September,
1944.

No. 2
Decision
of the
Minister,
26th
September,
1944.
continued.

DATED at OTTAWA, this 26th day of September, A.D. 1944.

COLIN GIBSON,
Minister of National Revenue.

Per C. F. ELLIOTT,
Deputy Minister of National Revenue
for Taxation.

TO:

D. R. Fraser Company Limited,
10149 97th Street,
Edmonton, Alberta.

10

NOTICE.

Section 65 of the Income War Tax Act provides that after an Appeal has been set down for trial, any fact or statutory provision not set out in the Notice of Appeal or Notice of Dissatisfaction may be pleaded or referred to in such manner and upon such terms as the Court may direct and the Court may refer the matter back to the Minister for further consideration.

If on appeal to the Exchequer Court any facts are pleaded or brought before the Court which are not contained in the Notice of Appeal or Notice of Dissatisfaction, then a motion will be made for the Court to refer the matter back to the Minister for further consideration with the request that costs be charged against the taxpayer in respect of all proceedings up to the time of the said motion. 20

No. 3

No. 3
Notice of
Dissatis-
faction,
23rd
October,
1944.

NOTICE OF DISSATISFACTION

By its notice of appeal dated the 4th day of March, 1944, D. R. Fraser & Company Limited (hereinafter called the "APPELLANT"), gave notice of appeal from the assessment herein dated the 5th day of February, 1944, whereby income tax in the sum of \$14,129.46 was levied in respect of income for the taxation year 1941. By his decision dated the 26th day of September, 1944, the Minister of National Revenue affirmed the assess- 30
ment appealed against.

The appellant hereby states that it desires its appeal to be set down for trial.

RECAPITULATION OF ALL FACTS, STATUTORY PROVISIONS AND REASONS INCLUDED IN THE AFORESAID NOTICE OF APPEAL TOGETHER WITH SUCH FURTHER FACTS, PROVISIONS AND REASONS AS THE APPELLANT INTENDS TO SUBMIT TO THE COURT IN SUPPORT OF THE APPEAL.

No. 3
Notice of
Dissatis-
faction,
23rd
October,
1944.

continued.

1. The appellant is a company incorporated in the year 1904.
2. The appellant at all times material to the appeal operated a logging, sawing, planing and general lumber milling business in the Province of
10 Alberta, and during the fiscal year ending 1941, it produced 8,374,000 board feet of lumber, and derived its income in the said fiscal year from timber limits.
3. The said timber limits referred to are described in detail in certain so called timber licenses and timber permits, which were in force and effect at all times material to the appeal, which were given and granted by the Minister of Lands and Mines of the Government of the Province of Alberta, by each of which ;
 - (a) The appellant was given full right, power and license subject
20 to the conditions therein mentioned and the relevant regulations respecting timber, to cut timber on the said lands.
 - (b) The appellant was given, subject to the said conditions, full right, power and authority to take and keep exclusive possession of the said lands except for certain immaterial exceptions therein mentioned.
 - (c) There was vested in the appellant, subject to the conditions
30 therein mentioned, all rights of property whatsoever in all trees, timber, lumber or other products of timber which it was entitled by the said licenses and permits to cut and which have been cut within the limits of the berth during the continuance thereof, whether such trees, timber, lumber or other products are cut by consent of the appellant or by any other person without its consent and there was vested in the appellant as against any other person other than the Crown in the right of the Province all rights of property whatsoever in all trees, lumber and other products of timber cut within the limits of the berth by any other person without its consent.
 - (d) That the appellant should pay and discharge all rates, assess-
40 ments and taxes imposed by any Municipal, Improvement, School, Irrigation and Drainage Districts then charged or thereafter to be charged upon the berth, as occupant, or upon the appellant or occupier in respect thereof or payable by either in respect thereof.

No. 3
Notice of
Dissatis-
faction,
23rd
October,
1944.

continued.

4. The lumber produced by the appellant during the taxation year in question, namely, 1941, was cut from the said timber berths.

5. Subsection (a) of Section 5 of The Income War Tax Act, at all times material provided 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 each 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.”

10

6. The appellant during the taxation year in question derived its income from the said timber limits.

7. The said licenses and permits were leases of timber limits to the appellant within the meaning of subsection (a) of Section 5 of The Income War Tax Act, and the lessor, namely, the Minister of Lands and Mines of the Government of the Province of Alberta, and the lessee, namely, the appellant, have agreed as to the part of the allowance for exhaustion in the said section provided for which each shall be entitled to deduct; such agreement is in writing, and reads as follows:

“As lessor of the Timber Berths listed hereunder, I, the Minister of Lands and Mines for the Province of Alberta, agree that you—D. R. Fraser & Company Limited—as lessee are entitled under the provisions of Section 5, subsection (a) of The Income War Tax Act to ninety-nine per centum (99%) of the allowance for exhaustion and that the Province of Alberta is entitled to one per centum (1%) of the allowance for exhaustion for the year 1941 in respect thereto.”

30

A schedule of the said timber berths follows.

8. Alternatively to paragraph 7 hereof, the appellant at all times material was the owner of the said timber limits, having been granted by the said so called licenses and permits in respect to the land therein described an interest in the said lands being a right in the nature of a profit a prendre, an incorporeal hereditament lying in grant, and the said licenses and permits were an out and out sale to the appellant of a portion of the lands therein described, such portion being the said timber limits or the

40

right to enter upon the said lands and cut down trees and carry them or the products of them away as its own property.

9. By its amended income tax returns in respect of the fiscal year ending 1941, filed with the Inspector of Income Tax at Edmonton, Alberta, the appellant in accordance with the provisions of subsection (a) of Section 5 of the Income War Tax Act claimed an allowance for the exhaustion of its timber limit of \$1.40 per thousand feet on 8,374,000 board feet produced during the said fiscal year.

10 Under subsection (a) of Section 5 of The Income War Tax Act, the appellant has a statutory right and is entitled to an allowance for the exhaustion of the said timber limits.

11. Under the said subsection the Minister of National Revenue has 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.

12. The Minister of National Revenue has neglected and refused to perform his said duty to fix a fair, just and reasonable amount as an allowance for the exhaustion of the said timber limits and has not made any allowance whatever to the appellant for the exhaustion of the said timber limits, and has affirmed the assessment of the appellant following the giving of the said Notice of Appeal on the ground that the appellant is not entitled to an allowance under the provisions of subsection (a) of Section 5 of The Income War Tax Act for the exhaustion of the said timber limits.

13. Under the authority of subsection (a) of Section 5 of The Income War Tax Act the Minister of National Revenue has made an allowance for exhaustion to many other extractive industries such as:—

- (a) In the case of mining operations for gold, silver, or other precious metals—
- 30 33 1/3% of the net income derived therefrom; 20% of the dividends received from precious metal mining companies.
- (b) In the case of mining operations for base metals—
- 33 1/3% of the net income derived therefrom; 20% of the dividends received from base metal mining companies.
- (c) In the case of coal companies —
- 10c per ton (with some provision for additional allowances) the allowances admitted to every coal company operating under a lease when not claimed by the lessor.

No. 3
Notice of
Dissatis-
faction,
23rd
October,
1944.
continued.

No. 3
Notice of
Dissatis-
faction,
23rd
October,
1944.

continued.

- (d) In the case of the operation of oil wells—
33 1/3% of the income derived therefrom; 20% of the dividends received from oil companies.
- (e) In the case of gas wells—
25% of the income derived therefrom; 20% of the dividends received from producing gas well companies.
- (f) In the case of gravel pits—
2c per yard on gravel produced out of the ground before washing and cleaning.

14. Under the authority of subsection (a) of Section 5 of The Income War Tax Act, the Minister of National Revenue made to British Columbia loggers, west of the Cascades, an allowance for exhaustion on saw-logs converted on the basis of \$1.00 per M. B. M. on all saw-logs scaled in the calendar year 1943, and a further allowance of \$1.00 per M. B. M. for all saw-logs scaled in the calendar year that are in excess of either:—

- (1) 60% of saw-logs scaled in the calendar year, 1941, or
- (2) If the 1941 scalings are 75% or less of the saw-logs scaled in 1942, then the 1942, scalings will be used in lieu of the 1941 scalings and the 60% of the 1942 scalings.
- (3) 60% of the saw-logs scaled in 1943—if it should be that any person for the first time enters upon the production of saw-logs in 1943. 20

15. Under the authority of subsection (a) of Section 5 of The Income War Tax Act, the Minister of National Revenue made to certain lumber operators in Ontario an allowance for exhaustion of the nature of that claimed by the appellant.

16. The allowances for exhaustion described in paragraphs 13, 14 and 15 hereof were in no way conditioned by or related to any matter of cost of the substance or product being extracted by the industries in question.

17. The allowances for exhaustion made by the Minister described in paragraphs 13, 14 and 15 hereof, in many cases were made to the operator of the extractive industry in question where the taxpayer's interest in the mines or oil wells, or gas wells, or timber limits was an interest equivalent or analogous to the appellant's interest in its said timber limits. 30

18. The decision of the Minister in affirming the appellant's assessment in respect of the fiscal period ending 1941, and ruling that the appellant is not entitled to an allowance under the provisions of subsection (a) of Section 5 of The Income War Tax Act for the exhaustion of the said timber limits is manifestly against sound and fundamental principles.

19. The Minister of National Revenue in refusing to make the appellant an allowance for the exhaustion of the said timber limits has failed to exercise his discretion as required by subsection (a) of Section 5 of The Income War Tax Act, and accordingly has not performed the duty required of him, namely, to exercise such discretion on proper legal principles.

No. 3
Notice of
Dissatis-
faction,
23rd
October,
1944.

20. The amount of the said allowance for exhaustion claimed by the appellant, namely, \$1.40 per thousand feet board measure, is a fair, just and reasonable allowance for exhaustion of the said timber limits and the appellant is entitled to an allowance of \$1.40 per thousand feet board
10 measure for the exhaustion of the said timber limits in the fiscal year ending 1941.

continued.

DATED at Edmonton, Alberta, this 23rd day of October, A.D. 1944.

[SEAL]

D. R. FRASER & COMPANY LIMITED.

E. R. MACDONALD, Secretary.

No. 4

REPLY OF THE MINISTER

20 Notice of Dissatisfaction with the Decision of the Minister affirming the Assessment levied upon the Appellant for the year 1941 having been received, and security for costs having been duly furnished as required by Section 61 of the said Act, and the facts and reasons submitted in support of the Appeal having been further and fully considered, the Honourable the Minister of National Revenue replies thereto as follows:—

No. 4
Reply of
the
Minister,
2nd
December,
1944.

(1) Denies the allegations contained in the said Notice of Appeal and Notice of Dissatisfaction in so far as they are incompatible with the allegations of his Decision.

(2) Affirms the Assessment as levied.

Notice of such affirmation is hereby given pursuant to the provisions of Section 62 of The Income War Tax Act.

DATED AT OTTAWA, this 2nd day of December, A.D. 1944.

30

COLIN GIBSON,
Minister of National Revenue.

(Sgd.) Per: C. F. ELLIOTT,
Deputy Minister of National
Revenue for Taxation.

No. 4
Reply of
the
Minister,
2nd
December,
1944.

To: Messrs. Parlee, Smith, Clement and Parlee,
Barristers,
Bank of Commerce Building,
Edmonton, Alberta.

continued.

No. 5

ORDER OF THE REGISTRAR

No. 5
Order
of the
Registrar,
15th
January,
1945.

Upon the application of the Solicitor for the Respondent and upon hearing read the Consent of counsel for the Appellant and Respondent,

1. IT IS ORDERED that formal pleadings be filed in this cause.
2. IT IS FURTHER ORDERED that the Statement of Claim of the 10
Appellant be filed within forty-five days from the date of service of
this Order upon the Appellant's Solicitor after entry thereof, and that
within the said period a copy of such statement of Claim be served upon
the Deputy Minister of National Revenue for Taxation or other respon-
sible officer of the Income Tax Division of the Department of National
Revenue.
3. IT IS FURTHER ORDERED that the Statement in Defence on
behalf of the Minister of National Revenue shall be filed and served within
twenty days from the date of service of the Appellant's Statement of
Claim. 20
4. IT IS FURTHER ORDERED that the reply, if any, of the Appel-
lant be filed and served within fourteen days after the service of the
Statement in Defence on the said Appellant.
5. IT IS FURTHER ORDERED that no further pleadings shall be
filed thereafter without the consent of the Court or Judge thereof.

DATED at Ottawa, this 15th day of January, A.D. 1945.

(Sgd.) ARNOLD W. DUCLOS,
Registrar.

No. 6

AMENDED STATEMENT OF CLAIM

Filed the 8th day of March, 1945.
Amended pursuant to praecipe the
16th day of August, 1945.

*In the
Exchequer
Court of
Canada*

No. 6
Amended
Statement
of Claim,
7th
March,
1945.

1. The appellant is a company incorporated in the year 1904.
2. By its notice of appeal dated the 4th day of March, 1944, the appellant gave notice of appeal from the assessment herein dated the 5th day of February, 1944, whereby income tax in the sum of \$14,129.46 was levied
10 in respect of income for the taxation year 1941. By his decision dated the 26th day of September, 1944, the respondent affirmed the assessment appealed against.
3. On or about the 23rd day of October, 1944, the appellant after receipt of the said decision and being dissatisfied therewith mailed to the respondent by registered post a Notice of Dissatisfaction in pursuance of Section 60 of The Income War Tax Act.
4. On or about the 2nd day of December, 1944, the respondent replied to the said Notice of Dissatisfaction affirming the assessment as levied.
5. The appellant at all times material to the appeal operated a logging,
20 sawing, planing and general lumber milling business in the Province of Alberta, and during the fiscal year ending 1941, it produced 8,374,000 board feet of lumber, and derived its income in the said fiscal year from timber limits.
6. The said timber limits referred to are described in detail in certain so-called timber licenses and timber permits, which were in force and effect at all times material to the appeal, which were given and granted by the Minister of Lands and Mines of the Government of the Province of Alberta on behalf of His Majesty the King in the right of the Province of Alberta, by each of which:
 - 30 (a) The appellant was given full right, power and license subject to the conditions therein mentioned and the relevant regulations respecting timber, to cut timber on the lands therein described.
 - (b) The appellant was given, subject to the said conditions, full right, power and authority to take and keep exclusive possession of the said lands except for certain immaterial exceptions therein mentioned.
 - (c) There was vested in the appellant, subject to the conditions therein mentioned, all rights of property whatsoever in all

*In the
Exchequer
Court of
Canada*

No. 6

Amended
Statement
of Claim,
7th
March,
1945.

continued.

trees, timber, lumber or other products of timber which it was entitled by the said licenses and permits to cut and which have been cut within the limits of the berth during the continuance thereof, whether such trees, timber, lumber or other products are cut by consent of the appellant or by any other person without its consent and there was vested in the appellant as against any other person other than the Crown in the right of the Province all rights of property whatsoever in all trees, lumber and other products of timber cut within the limits of the berth by any other person without its consent.

10

- (d) That the appellant should pay and discharge all rates, assessments and taxes imposed by any Municipal, Improvement, School, Irrigation and Drainage Districts then charged or thereafter to be charged upon the berth, as occupant, or upon the appellant or occupier in respect thereof or payable by either in respect thereof.

7. The appellant pleads Sections 52 to 77 of The Provincial Lands Act, being Chapter 10, of the Statutes of Alberta, 1939, and the regulations governing the granting of yearly licenses and permits to cut timber on Provincial Lands in the Province of Alberta, made by Order-in-Council dated the 25th day of July, 1940, and numbered O.C. 1020-40.

8. The so-called licenses and permits have been in existence, that is to say, renewed from year to year, for many years in some cases, and for several years in other cases.

9. The lumber produced by the appellant during the taxation year in question, namely, 1941, was cut from the said timber berths.

10. The rights of the appellant in the said timber limits are valuable capital assets, in respect of which it suffered exhaustion in the year in question.

11. Subsection (a) of Section 5 of The Income War Tax Act, at all time material provided 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 each 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.”

40

12. The appellant during the taxation year in question derived its income from the said timber limits.

13. The so-called licenses and permits were leases to the appellant of timber limits within the meaning of subsection (a) of Section 5 of The Income War Tax Act.

14. The lessor, namely, the Minister of Lands and Mines of the Government of the Province of Alberta, and the lessee, namely, the appellant, have agreed as to the part of the allowance for exhaustion in the said section provided for which each shall be entitled to deduct; such agreement is in writing, and reads as follows:—

“As lessor of the Timber Berths listed hereunder, I, the Minister of Lands and Mines for the Province of Alberta, agree that you—D. R. Fraser & Company Limited—as lessee are entitled under the provisions of Section 5, subsection (a) of The Income War Tax Act to ninety-nine per centum (99%) of the allowance for exhaustion and that the Province of Alberta is entitled to one per centum (1%) of the allowance for exhaustion for the year 1941 in respect thereto.

SCHEDULE OF TIMBER BERTHS

20	School Lands Berth.....	198
	License Berth.....	1008
	License Berth.....	1242
	License Berth.....	1727
	Permit Berth.....	6604
	Permit Berth.....	6725
	Permit Berth.....	6855
	Permit Berth..... (damaged).....	6882
	Permit Berth..... (damaged).....	6883
	Permit Berth..... (damaged).....	6884
30	Permit Berth..... (damaged).....	6887
	Permit Berth (Green).....	6981
	Special Timber Permit.....	2578”

15. Alternatively the licensor or lessor of the so-called licenses and permits is not liable to tax under The Income War Tax Act and has no taxable income and the appellant is entitled to be allowed the whole of the allowance for exhaustion in respect of the said timber limits.

16. The effect of the so-called licenses and permits was to confer a title to the land therein described on the appellant.

17. The appellant at all times material was the owner of the said timber limits, having been granted by the said so-called licenses and permits in respect to the land therein described an interest in the said lands being a right in the nature of a profit a prendre, an incorporeal heredita-

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March,
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continued.

ment lying in grant, and the said licences and permits were an out and out sale to the appellant of a portion of the lands therein described, such portion being the said timber limits or the right to enter upon the said lands and cut down trees and carry them or the products of them away as its own property.

18. By its amended income tax returns in respect of the fiscal year ending 1941, filed with the Inspector of Income Tax at Edmonton, Alberta, the appellant in accordance with the provisions of subsection (a) of Section 5 of The Income War Tax Act claimed an allowance for the exhaustion of its timber limit of \$1.40 per thousand feet on 8,374,000 board feet produced during the said fiscal year. 10

19. Under subsection (a) of Section 5 of The Income War Tax Act, the appellant, has a statutory right and is entitled to an allowance for the exhaustion of the said timber limits.

20. Under the said subsection the respondent has a duty of a quasi-judicial character to be exercised on proper legal principles to fix a just, fair and reasonable amount of an allowance to the appellant for the exhaustion of the said timber limits.

21. The respondent has neglected and refused to perform his said duty to fix a fair, just and reasonable amount as an allowance for the exhaustion of the said timber limits and has not made any allowance whatever to the appellant for the exhaustion of the said timber limits, and has affirmed the assessment of the appellant following the giving of the said Notice of Appeal on the ground that the appellant is not entitled to an allowance under the provisions of subsection (a) of Section 5 of The Income War Tax Act for the exhaustion of the said timber limits. 20

22. Under the authority of subsection (a) of Section 5 of The Income War Tax Act the respondent has made an allowance for exhaustion to many other extractive industries such as:—

(a) In the case of mining operations for gold, silver or other precious metals— 30

33 1/3% of the net income derived therefrom; 20% of the dividends received from precious metal mining companies.

(b) In the case of mining operations for base metals—

33 1/3% of the net income derived therefrom; 20% of the dividends received from base metal mining companies.

(c) In the case of coal companies—

10c per ton (with some provision for additional allowances), the allowances admitted to every coal company operating under a lease when not claimed by the lessor. 40

(d) In the case of the operation of oil wells—

33 1/3% of the income derived therefrom; 20% of the dividends received from oil companies.

(e) In the case of gas wells—

25% of the income derived therefrom; 20% of the dividends received from producing gas well companies.

(f) In the case of gravel pits—

2c per yard on gravel produced out of the ground before washing and cleaning.

10 (g) Pulp companies.

23. Under the authority of subsection (a) of Section 5 of The Income War Tax Act, the respondent made to British Columbia loggers, west of the Cascades, an allowance for exhaustion on saw-logs converted on the basis of \$1.00 per M. B. M. on all saw-logs scaled in the calendar year 1943, and a further allowance of \$1.00 per M. B. M. for all saw-logs scaled in the calendar year that are in excess of either:—

(1) 60% of saw-logs scaled in the calendar year, 1941, or

(2) If the 1941 scalings are 75% or less of the saw-logs scaled in 1942, then the 1942 scalings will be used in lieu of the 1941 scalings and the 60% of the 1942 scalings.

(3) 60% of the saw-logs scaled in 1943—if it should be that any person for the first time enters upon the production of saw-logs in 1943.

25. The allowances for exhaustion described in paragraphs 22 and 23 hereof were in no way conditioned by or related to any matter of cost of the substance or product being extracted by the industries in question.

26. The allowances for exhaustion made by the respondent described in paragraphs 22 and 23 hereof, in many cases were made to the operator of the extractive industry in question where the taxpayer's interest in the mines or oil wells, or gas wells, or timber limits was an interest equivalent or analogous to the appellant's interest in its said timber limits.

27. The decision of the respondent in affirming the appellant's assessment in respect of the fiscal period ending 1941, and ruling that the appellant is not entitled to an allowance under the provisions of subsection (a) of Section 5 of The Income War Tax Act for the exhaustion of the said timber limits is manifestly against sound and fundamental principles.

28. The respondent in refusing to make the appellant an allowance for the exhaustion of the said timber limits has failed to exercise his discretion as required by subsection (a) of Section 5 of The Income War Tax Act,

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and accordingly has not performed the duty required of him, namely, to exercise such discretion on proper legal principles.

29. The reasons given by the respondent for his decision were not proper grounds for the exercise of the duty laid upon him as aforesaid.

30. The amount of the said allowance for exhaustion claimed by the appellant, namely, \$1.40 per thousand feet board measure, is a fair, just and reasonable allowance for exhaustion of the said timber limits and the appellant is entitled to an allowance of \$1.40 per thousand feet board measure for the exhaustion of the said timber limits in the fiscal year ending 1941.

10

WHEREFORE THE APPELLANT CLAIMS:

- (a) That the said assessment be set aside.
- (b) That the matter be referred back to the respondent to be dealt with upon proper principles and grounds.

DATED this 7th day of MARCH, 1945, AND DELIVERED pursuant to the order made herein dated the 15th day of January, 1945, by MESSRS. SMITH, CLEMENT, PARLEE & WHITTAKER, Solicitors for the appellant, whose address for service is the office of MESSRS. GOWLING, MacTAVISH & WATT, 56 Sparks Street, Ottawa, Ontario.

No. 7

20

STATEMENT OF DEFENCE

Filed the 23rd day of August, 1945.

In answer to the Appellant's Amended Statement of Claim filed herein, the Respondent:—

1. Admits the allegations contained in paragraphs 1, 2, 3 and 4 thereof.
2. Denies each and every allegation contained in paragraphs 5 and 6 thereof.
3. Denies each and every allegation contained in paragraph 7 thereof and further says that the Statutes of Alberta speak for themselves.
4. Denies each and every allegation contained in paragraphs 8, 9 and 10 thereof.
5. Denies each and every allegation of paragraph 11 thereof and further says that The Income War Tax Act speaks for itself.

30

No. 7
Statement
of Defence,
22nd
August,
1945.

6. Denies each and every allegation contained in paragraphs 12 and 13 thereof.
7. Denies each and every allegation contained in paragraphs 14 and 15 thereof and further says that there is no relationship of lessor and lessee between the Appellant and the Minister of Lands and Mines of the Government of Alberta, that the Government of the Province of Alberta is not subject to taxation under The Income War Tax Act and neither receives nor is entitled to an allowance for exhaustion under the provisions of the said Act.
- 10 8. Denies each and every allegation contained in paragraphs 16 and 17 thereof.
9. Admits paragraph 18 thereof.
10. Denies each and every allegation contained in paragraphs 19, 20 and 21 thereof.
11. Denies each and every allegation contained in paragraphs 22, 23, 25 and 26 thereof and further says that such allegations are immaterial, irrelevant and foreign to the issues between the parties.
- 20 12. Denies each and every allegation contained in paragraphs 27, 28, 29 and 30 thereof.

And further in answer to the Appellant's Amended Statement of Claim the Respondent says:—

13. That the timber limits from which the Appellant derives its income are given by the Government of the Province of Alberta under contracts in writing known as licenses or permits which are to be interpreted by this Honourable Court.
14. That the taxpayer has no proprietary interest or other depletable interest in the said timber limits.
- 30 15. That the taxpayer is not a lessee within the contemplation of section 5 (a) of The Income War Tax Act.
16. That the taxpayer, under the licences granted to it, is simply the purchaser of timber and the cost of such timber in the year 1941 has been allowed as a deduction in determining the profits subject to tax.

WHEREFORE THE RESPONDENT CLAIMS:

- (a) That the assessment herein be affirmed;

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of Defence,
22nd
August,
1945.

continued.

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Statement
of Defence,
22nd
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continued.

- (b) That the Appellant be ordered to pay any unpaid portions of the said assessment with interest as provided by the terms of the said Act;
- (c) That the Appellant be ordered to pay the costs of this action;
- (d) Such further and other relief as to this Honourable Court may seem just and proper.

DATED AT OTTAWA, this 22nd day of August, A.D. 1945.

(*Sgd.*) H. H. STRIKEMAN,
Solicitor for the Respondent.

No. 8
Reply in
Joinder of
Issue
4th
September,
1945.

No. 8

10

REPLY IN JOINDER OF ISSUE.

The Appellant joins issue upon Respondent's Statement in defence.

DATED at Ottawa, this 4th day of September, 1945.

Messrs. Smith, Clement, Parlee & Whittaker,
Edmonton, Alberta.
Solicitors for the Appellant.
By their Agents,
Messrs. Gowling, MacTavish & Watt.

TO: The Minister of National Revenue.

No. 9
Opening of
Proceed-
ings
at Trial
19th
September,
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No. 9

20

OPENING OF PROCEEDINGS AT TRIAL

Evidence and proceedings at trial of this action before His Honour Judge Cameron at the Court House, Edmonton, commencing on Wednesday, September 19, 1945.

Mr. S. Bruce Smith, K.C., and Mr. C. W. Clement, K.C.
Counsel for appellant,

Mr. G. W. Auxier and Mr. J. G. McEntyre,
Counsel for respondent.

No. 10

APPLICATION TO AMEND STATEMENT OF CLAIM

In the
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No. 10
Application
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MR. SMITH: I have some amendments to the Statement of Claim I would like to lay before your Lordship and I believe my friend also has an application for amendment. I hand to your Lordship notice of the three amendments:

TAKE NOTICE that the Appellant will, at the hearing of this appeal, apply for leave to amend its Statement of Claim herein by striking out the Schedule of Timber Berths set forth in paragraph 14 and substituting in lieu thereof the following:

“SCHEDULE OF TIMBER BERTHS

License Berth	1161
License Berth	1727
License Berth	6722.”

DATED at Edmonton, Alberta, this 5th day of September, 1945.

TAKE NOTICE that the Appellant will, at the hearing of this appeal, apply for leave to amend its Statement of Claim herein by inserting in the prayer thereof the following,—

20 “(aa) That the Appellant’s assessment be amended by making it an allowance for exhaustion of \$1.40 per thousand feet board measure, or a just, fair and reasonable allowance for exhaustion, or”

DATED at Edmonton, Alberta, this 18th day of September, A.D. 1945.

TAKE NOTICE that the Appellant will, at the hearing of this appeal, apply for leave to amend its Statement of Claim herein by inserting therein as paragraph 31 the following,—

30 “31. In refusing to the Appellant the said allowance for exhaustion claimed by it, the Respondent, under the facts and circumstances hereinbefore set forth, has unjustly, unlawfully and unfairly discriminated against the Appellant.”

DATED at Edmonton, Alberta, this 18th day of September, A.D. 1945.

I understand from my friends that they have no objection to the first two amendments but they wish to say something with respect to the third. That is Paragraph 31.

MR. AUXIER: With respect to the first amendment my friend is not quite correct when he says we have no objection. We understand from my friend that the agreement referred to in paragraph 14 of the statement of claim which was entered into between the appellant and The Minister

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continued.

of Lands and Mines for the Province of Alberta regarding such depreciation allowances which might be granted listed through an error the wrong timber berths. The amendment has been made by substituting one schedule for another.

MR. SMITH: Yes, it contained a list of berths for the wrong year, my Lord. That was the only mistake.

THE COURT: That was for the year 1941.

MR. AUXIER: Well if it is established it was through an error.

THE COURT: Well I assume it will appear later when the licenses are produced. Is it a fact that the licences under which the company operated in 1941 refer to these berths that now appear in your amendment? 10

MR. SMITH: That is so, my Lord.

THE COURT: Then I assume there can be no amendment.

MR. AUXIER: If it is simply a matter of amending the schedule we have no objection to that.

MR. SMITH: That is a completely accurate statement. It was not amended in any way—simply the correct schedule was inserted in lieu of the wrong schedule which had been included by mistake.

MR. AUXIER: With respect to the second amendment we have no objection. 20

THE COURT: That is "aa" of the prayer?

MR. AUXIER: Yes, my Lord.

THE COURT: That will be granted.

MR. AUXIER: With respect to the third amendment, the amendment claiming that the respondent has unjustly, unlawfully and unfairly discriminated against the appellant. We feel that we must make some objection to that. We wish to say at the outset that we conceive our position as counsel for the respondent in this case to be somewhat different from the position of counsel representing a party an ordinary individual in a dispute with another individual. We do not wish in any way to hinder the tax payer placing his position fairly before the Court. But this allegation I submit can be read as nothing else than a bad faith of some dishonest accountant and coming at this stage I feel that we must take objection to it. Mr. Smith has pointed out the other allegations made in his statement of claim. In paragraph 20 he says: the respondent has a duty of a quasi-judicial character to be exercised on proper legal principles to fix a fair, just and reasonable amount of an allowance and that he has neglected to perform this duty to fix a fair, just and reasonable amount as an allowance. This, I submit, is a different allegation. It is an allegation, if anything, of the failure to exercise discretion. I can see no allegation in that of improper 30 40

conduct. In paragraph 27 he alleges that the failure to make the allowance in this case was manifestly against sound and fundamental principles. That is an allegation that the Minister failed to—similarly with paragraphs 28 and 29—those allegation are of a different nature to the allegations now being made. There is a judgment from the Court of the United States which I would like to refer to. It is a judgment of Mr. Justice McReynolds in 62 Law Edition of the U.S. Supreme Courts Reports, page 1154; Sunday Lake Iron Company versus the Township of Wakefield. Now I wish the record cleared up on that point and I cannot accept the amendment with-

10 out more—

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continued.

MR. SMITH: I submit it is not for my friend to accept or reject the amendment. It is for the Court. I would say this, that the paragraphs my friend refers to set up that the respondent has a duty of a quasi-judicial character “to be exercised on proper legal principles to fix a just, fair and reasonable amount of an allowance to the appellant for the exhaustion of the said timber limits. That is paragraph 20 and then paragraph 21 and then we go on in paragraph 22 to set out allowances in the case of mining operations for base metals, also the allowance to the receiver. And the operation of oil wells. And in the case of gas wells the same with a varia-

20 tion in amount, and in the case of gravel pits and in the case of pulp companies. And we allege an allowance to loggers operating west of the Cascades in British Columbia. We go on to allege that these allowances were made to operators of extractive industries, having interests and a parallel situation to the parties in this case. And in 28 I say (reading) and also in paragraphs 29 and 30. So I have already pleaded all of the facts. My friend Mr. Auxier and his associate Mr. McEntyre have been apprised of what we allege and intend to prove. And in paragraph 21 (reading). Now my friends are surely not taken by surprise by this amendment. My friend

30 Mr. McEntyre applied to the president of this Court in Ottawa to strike out all these paragraphs relating to the allowance to other industries. That is paragraph 22, paragraph 23 and the related paragraphs. That was argued at length before the president of this Court at Ottawa, and I would like to submit a copy of the decision in that respect.

THE COURT: There is a copy of that in the pleadings?

MR. SMITH: Yes, my Lord.

MR. AUXIER: If the facts are as already stated in the statement of claim there is no necessity for this amendment. I want to clear up the matter of allegation of improper conduct involving bad faith on the part of the respondent and I submit if an allegation of that kind is made—and

40 I submit that this without more must be read as involving that— then the amendment should not be allowed at this stage of the proceedings.

THE COURT: With respect to the proposed amendment. Paragraph 31, I have reached the conclusion that the amendment should not be made, for two reasons. The first is that it is not proper to ask for an

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amendment of that sort immediately before the trial. If it had been necessary to use that clause it should have been done in the original statement of claim or at some subsequent stage prior to the hearing. It is too late to make the application now. But, in addition to that, I do not think the amendment is necessary. Paragraph 20 of the Statement of Claim is as follows: (Reading). Now that in my view covers the entire matter. If I should find that the Minister of National Revenue or the one who acts for him has not carried out his duty in a quasi-judicial manner or in a manner that is not fair or equitable my judgment will provide for the proper remedy. And the third proposed amendment will be denied. The other two amendments as submitted will be permitted. 10

No. 11

No. 11
Application
to Amend
Statement
of Defence
19th
September,
1945.

APPLICATION TO AMEND STATEMENT OF DEFENCE

MR. AUXIER: I ask leave to amend Paragraph 17 of the Statement of Defence in accordance with the following Notice of Motion:

TAKE NOTICE that the Respondent will, at the hearing of this appeal, apply for leave to amend its Statement of Defence herein by adding thereto as Paragraph 17 thereof the following:—

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 licenses 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 Sections 5.1 (a) of "The Income War Tax Act". 20

DATED at Edmonton, in the Province of Alberta, this 13th day of September, A.D. 1945.

The notice of this was submitted to my friend on the 13th of September and I understand he takes no exception to it.

MR. SMITH: That is correct, sir. 30

THE COURT: Paragraph 17 of the statement of defence will be added in the terms of the Notice of Motion dated September 13th, 1945. Does that dispose of all preliminary matters?

MR. SMITH: Yes, sir, so far as I know. While the Section of The Income War Tax Act provides that the Registrar has to submit certain documents I judge the correct procedure is to submit as part of the Exhibits the income tax assessment, the dissatisfaction and the reply of the Minister—

THE COURT: I have before me certain documents. The first is the Return of the Appellant for the year 1941 attached to which are certain financial statements, and the Notice of Appeal with the full Statement of Facts, Notice of Assessment the parties set out on February 15th, 1944, the decision of the Minister with the Notice attached, Notice of Dissatisfaction and the Minister's Reply and a certificate by the Deputy Minister of Taxation that the attached are the documents in the matter. I think that covers all you speak of.

10 MR. SMITH: And we are talking about the correct return. The Return in question is an amended Return dated January 25th, 1944.

THE COURT: I have no copy of that before me. The copy I have is January 28th, 1943.

MR. SMITH: Well that is not the correct return, sir.

MR. AUXIER: We have no objection. It is quite clear it is this we are talking about.

MR. SMITH: It is the one I have in my hand and my friend consents to my placing a duplicate on the record. Should these documents be marked?

20 THE COURT: Well they are already part of the record. You can file that one you submit just now as Exhibit 1.

Amended Return, T 2-1941, marked Exhibit 1.

MR. SMITH: There is a typewritten memorandum which will be a private office memorandum.

THE COURT: I take it Exhibit 1 will be returned to you.

MR. AUXIER: It is understood the other documents will be considered as attached to this.

MR. SMITH: Yes, my Lord.

No. 12

**EXTRACTS FROM EXAMINATION FOR DISCOVERY OF
30 C. FRASER ELLIOTT.**

MR. SMITH: Next I propose to tender answers from the examination of Mr. C. Fraser Elliott in this case on his examination for discovery before Mr. Spankie the Deputy Registrar. I would like an admission by my friend Mr. Auxier that Mr. Elliott the Deputy Minister of the Department of National Revenue, Income Tax Division was examined pursuant to the Order of the Court as the Officer of the Crown.

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—
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Extracts
from
Examina-
tion for
Discovery
of C.
Fraser
Elliott

MR. AUXIER: He was examined by consent and an Order was obtained afterwards.

MR. SMITH: The application was made in Chambers and it was not opposed and it was entered subsequently.

MR. AUXIER: Oh, we are not questioning he was examined properly.

MR. SMITH: Now these questions and answers are not numbered as ours usually are here. The best I can do is to read along and stop when I come to the end of the portion I am tendering:

MR. C. FRASER ELLIOTT, sworn:

10

BY MR. SMITH:

Q. Mr. Elliott, you are the Deputy Minister of Taxation in the Department of National Revenue, Taxation Division, of the Government of the Dominion of Canada at Ottawa?

A. That is correct.

Q. And you have occupied that position for some years, I believe?

A. By another title since 1932.

Q. An equivalent position?

A. Since 1932; in charge of the Department since 1932.

Q. The Title was changed some years ago, but the duties of the office continued to be the same; is that correct? 20

A. That is right."

MR. SMITH: Then I go to page 5, 9th line:

Q. Now, Mr. Elliott, you are familiar to some extent with the facts and issues in this particular appeal, that is the appeal of the D. R. Fraser Company?

A. Yes.

Q. And you are aware of the fact that the company claimed in respect of its operations in the taxation year 1941 an allowance for depletion under the provisions of 1941 an allowance for depletion under the provisions of Section 5 (a) of The Income War Tax Act? 30

A. They made a claim for that, yes.

Q. And that claim was disallowed by you?

A. That is right.

Q. And so far as the decisions made in this particular case are concerned, those decisions were made by you personally as the delegate of the Minister?

A. I would say that that is correct.

Q. And there is no issue between us in that respect. When the Minister's discretion is to be exercised under Section 5 (a) that is what occurs? 40

A. That is correct.

Q. But in actual fact the decision is made by you as the authorized delegate of the Minister?

A. That is correct. Authorized by the proper delegation which has been published.

Q. Have you a copy of that with you?

A. It is in some Canada Gazette.

Q. I have seen a copy of it.

MR. MCENTYRE: Since Mr. Elliott has been Deputy Minister his delegation of powers would be under The Interpretation Act.

MR. SMITH: That may be. As Mr. Elliott says, there is a form of delegation.

10 BY MR. SMITH:

Q. Perhaps we can make this arrangement with you: That form of document by which responsibility is delegated to you by the Minister may be considered as marked as an Exhibit to this examination and then you can give me a copy subsequently. Would you agree to that?

A. It is in the Canada Gazette. You have the right to produce the Gazette any time.

Q. I would think so, if it is in the Gazette. If it is not in the Gazette you would have no objection to making that arrangement?

A. It is in the Gazette, I think.

20 Q. There is no issue between us on this point; I take it that it is common ground. I just want to clear the atmosphere and our record.

MR. MCENTYRE: I think it is a question of law and I think it is in The Interpretation Act. I doubt very much if it is anywhere else.

MR. SMITH: There is a specific document because I have seen it, and Mr. Elliott appears to agree with me in that respect. May we take it that if it is not in The Canada Gazette I can get a copy in due course?

MR. MCENTYRE: Yes.

BY MR. SMITH:

Q. I suppose you have the actual assessment here, have you?

30 A. I would think it is in the record. That would be transferred to the Court when the action was set down for trial and hearing.

MR. SMITH: Now I suppose that this is perhaps a convenient point to tender the document published in The Canada Gazette to which Mr. Elliott referrel. My friend Mr. McEntyre has been kind enough to give me a reference to the published authorization which appears in Volume 75, Canada Gazette at page 852. I would like to tender that, my Lord. I will read this and put a copy in later to be marked (reading).

**Copy of Proclamation, August 8th, 1940, as
published in Canada Gazette, marked
Exhibit 2.**

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from
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tion for
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Fraser
Elliott

continued.

MR. SMITH: I take it my friend admits Mr. Gibson was the Minister and Mr. Elliott the Deputy?

MR. AUXIER: Yes.

Q. The fact is that upon the Notice of Assessment herein, which is in the record, the allowance for depletion that was claimed was disallowed?

A. That is right.

Q. So that there may be no question as to the proper issue or issues, I take it that there is nothing else in issue in respect of the assessment of the appellant for the year 1941 saving this depletion allowance?

A. I believe that is so. 10

Q. The income was assessed and what was disallowed was the depletion allowance claim in respect of the taxation year 1941. That was the only item I think that was disallowed and the appeal relates only to the disallowance of that claim for depletion allowance?

A. I think that is correct.

Q. I suppose it is fair to say that your decision sets out the ground on which you have disallowed the claim for allowance for exhaustion under the provisions of Section 5 (a) of this appellant?

A. I would think so. I have not read the decision for a very long time. I fancy it does. I will read it again, if you like. 20

Q. Perhaps it would be well if you would.

A. The decision of the Minister is what you have handed me. I observe that it reads:

'—hereby confirm 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 the right of the Province of Alberta on which the taxpayer has been licensed to cut timber. Therefore on this and related grounds and by reason of other provisions of The Income War Tax Act and the Excess Profits Tax Act the said 30 assessment is affirmed.' "

Q. Is it fair to say that what you have just stated is the real issue between us?

A. That is correct.

Q. At the moment you do not recall any other provisions in The Income War Tax Act or The Excess Profits Tax Act that have any bearing upon the issue?

I suppose those are thrown in out of an abundance of caution?

A. I would think that is correct. You have to mention all the sections because the whole act as a measure imposes the tax and naturally you have 40 to invoke the sections that impose the tax.

Q. The document which I show you, the decisions dated September 26th, 1944, purports to be signed by you, and I take it that it is signed by you?

A. That is right; that was my signature on it.

EXHIBIT No. 1—Decision of Department, dated September 26, 1944,
with letter attached.

MR. MCENTYRE: Is that letter in the Court file?

MR. SMITH: No, it is not. I am not really particularly concerned about the letter if you have any objection to it.

MR. MCENTYRE: I would just like to know what the letter is.

MR. SMITH: It is the usual form letter.

BY MR. SMITH:

10 Q. Mr. Elliott, following the giving of the Notice of Appeal herein, was consideration given to the issue in this case about the depletion and exhaustion allowance by you and your Department?

A. That is correct.

Q. And that was about a year ago, I believe?

A. Yes, I would think that is correct on the evidence I am looking at.

Q. You have in your department a number of legal advisers and I believe informally you call in a committee to review—

A. No, that is not right.

Q. That is not correct?

A. No.

20 Q. They are simply legal advisers?

A. Legal advisers, that is all.

Q. You will recall about a year ago we had a hearing in this case with respect to the issue that is claimed before the Court before your legal advisers of your department?

A. Were you there?

Q. Yes, I was there.

A. I certainly would not want to say that from memory because I have so many appointments. I could not say whether it was so or not. I would rather be told by you and accept it as so.

30 Q. I will tell you and you will accept it?

A. I will accept it gladly.

Q. Then following the hearing before your legal advisers the decision, Exhibit No. 1, was given. I will tell you that and I suppose you will accept it?

A. Certainly.

Q. Following the hearing before your legal advisers about a year ago, through reasons or I suppose properly through reasons, we were told in a letter to my firm dated the 12th June, 1944—

MR. MCENTYRE: I object to that question.

40 THE WITNESS: There is a letter dated the 12th of June signed by the Deputy Minister of Taxation addressed to Messrs. Parlee, Smith,

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Clement and Parlee, Edmonton, for your attention, and it is headed 'Re Swanson Lumber Company Limited.'

BY MR. SMITH:

Q. There were a group of them. That is the name of one of them but they were considered to be taken together.

THE WITNESS: The heading is there but we are dealing with this one company.

BY MR. SMITH:

Q. Perhaps I should tell you that we were not dealing with one company. I was here representing a group and the Swanson Company assessment was the first one and subsequently, by agreement with your solicitor in this matter, we agreed that the Fraser case would be selected as the test case. 10

A. I will accept that, of course, but you are asking me what this letter refers to and I notice that it refers to the Swanson Lumber Company Limited. I take it that what you say is correct.

MR. SMITH: I am going to tender that letter as an exhibit.

THE WITNESS: May I read it?

MR. MCENTYRE: I object to the letter being put in as an exhibit. It is irrelevant and deals with another taxpayer. 20

MR. SMITH: That is hardly correct.

THE DEPUTY REGISTRAR: I will mark it subject to your objection.

EXHIBIT No. 2—Letter dated June 12, 1944, from Department to Messrs. Parlee, Smith, Clement and Parlee.

**Letter, June 12, 1944, Department to Appellant's solicitors,
marked Exhibit 3.**

BY MR. SMITH:

Q. Mr. Elliott, would it be correct to say that Exhibit No. 2, which you have just read, sets forth the position of the Minister of National Revenue in this appeal? 30

A. I think it is a pretty fair summary of it.

Q. On the other hand it is not the Inspector of Income Tax who makes the assessments or who makes the decision when notice of appeal is given?

A. He files the information; the decision is mine.

Q. Then coming back to this question: When the Assessment was made in this case you are the person who makes the decision?

A. That I think would be correct.

Q. The effect of Section 5 (a) has been in the Act throughout?

A. I think so.

Q. I would like to show you in the appendix to Gordon's Digest of Income Tax Cases, under the heading 'Depletion—coal mining companies' a document which is dated 11th December, 1928. There is another, 'Depletion allowance in respect of base metals,' 8th December, 1929. One covering depletion of dividends of mining companies dated April 9, 1935, on page 11. One on depletions in respect of mining companies, on pages 11 to 12, dated 9th April, 1935, and one with respect to depletion allowable on dividends of base and precious metal mining companies, at page 12, dated 8th September, 1931, headed, 'Depletion allowances on dividends of oil companies.' I think that is the lot that are published here. You are familiar with the contents of the documents that are printed there?

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MR. MCENTYRE: I object to that question; that matter does not relate to the issues in this case.

THE WITNESS: Well, I know that memoranda have been issued on the depletion of various companies but in order to say that I am familiar with what Mr. Gordon, the author, has published in his book I would have to read them all. Their general import I fancy is in accord with—

Q. I would like to question you about them. I hate to make you read them all, but perhaps you would not mind glancing over them for me?

A. If I have to do that I will do it, if you say so.

MR. MCENTYRE: We are going to object to any questions relating to these rulings which deal with the treatment of other industries with respect to depletions.

THE WITNESS: Is that germane to this case?

MR. SMITH: I think it is. We have paragraphs in our Statement of Claim which your Department applied to the Exchequer Court to have struck out and we were upheld by the President of the Court.

MR. MCENTYRE: You were not upheld.

MR. SMITH: He refused to strike them out.

MR. MCENTYRE: There was no determination as to the admissibility of the evidence in support of those paragraphs.

MR. SMITH: There could not be any determination as to the admissibility of evidence until the trial, but he refused to strike them out.

MR. MCENTYRE: We will object to any evidence you seek to give in support of those allegations.

MR. SMITH: I am quite content to proceed subject to the objection.

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MR. AUXIER: I think this is a proper stage to object to any question of depletion allowances in other industries and companies. I want to reiterate that we do not wish to be in the position of taking technical objections. We feel that the position of the Minister in this case is somewhat different from that of an ordinary litigant. But we feel no useful purpose could be served and the record would be cluttered with a lot of evidence which I submit is irrelevant entirely to the issues before the Court. The only question to be considered here is the exercise of the Minister's discretion in this particular case. How that discretion may have been exercised in dealing with another taxpayer in the same industry is, I submit, irrelevant, but certainly I submit that the exercise of his discretion in dealing with a completely different industry cannot have any possible bearing on the exercise of his discretion here. Now in the Pioneer Laundry case, about which Your Lordship will possibly hear more before this appeal concludes, it was sought to put in at the trial certain inter-office memos dealing with depreciation and depreciation of the same type of assets referred to in these records. The trial Judge allowed them in and the matter was discussed by the Judges of the Supreme Court of Canada.

MR. SMITH: The ground upon which I put this evidence was not discussed in that case at all.

MR. AUXIER: The whole question of admissibility was discussed of these inter-office memos dealing with the question of depreciation. I propose to put in a notice signed by the Deputy Minister dealing with the fact of the inter-office memos which have been referred to by my friend and which were referred to in Gordon's text book. They were simply inter-office memos and had not the force of regulations or anything of that nature.

But in the Pioneer Laundry case Mr. Justice Davis and Mr. Justice Hudson, of the Supreme Court of Canada, found that these inter-office memos were not evidence and were not the exercising of discretion by the Minister, and that was upheld although the judgment of the Court was reversed by the Privy Council. I should not have said Mr. Justice Davis; I mean Mr. Justice Crocket. I have here the D.L.R. Report. That is the last stage of the first Pioneer Laundry case.

MR. SMITH: Perhaps it would save time if I again pointed out that my application to have this evidence in was on entirely different grounds.

THE COURT: You were proceeding to read from the examination for discovery and objection was taken to certain questions you put to Mr. C. Fraser Elliott and the objection was noted and the question answered?

MR. AUXIER: Yes.

THE COURT: Counsel objects to your reading those questions on the ground that they are irrelevant.

MR. SMITH: All I am pointing out is my friend is answering something I am not going to argue. He is referring to statements in the Pioneer case which have no bearing at all on the point we are discussing now.

10 MR. AUXIER: My friend is making this point—that he is simply asking for the admission of these inter-departmental memos and he is not claiming that they are the exercise of discretion by the Minister on a particular case.

MR. SMITH: May I be allowed to state the ground on which I put them? I raised the admissibility on three separate grounds. And I have considerable numbers of authorities to support me on all three grounds, and I will be glad to give your Lordship these authorities, if you want them, in detail. The first one deals with the administrative interpretation on which the issue relies.

20 THE COURT: You suggest that administration by a Department over a length of time may establish a practice?

MR. SMITH: It is an administrative interpretation. I have the books in the library and if your Lordship will permit me to bring them in I would like to.

THE COURT: I think it would be just as well.

30 MR. SMITH: And I might tell you what my second ground is. And that is that they are evidence to support our allegation that the Minister has not acted in a quasi-judicial manner and has ruled contrary to sound fundamental principles and that relates closely to what we were discussing when I applied for the third amendment. It is evidence to support our allegation that he has not acted fairly or equitably or justly. And the third point is that extraneous evidence to facilitate the analysis of the legislation under consideration may assist in disclosing its real effect and purpose is always admissible. And I will tender in support of that a judgment of the Supreme Court of British Columbia and a decision of the Supreme Court of Canada.

THE COURT: Before you proceed would you indicate more clearly exactly the material that you are now trying to introduce?

40 MR. SMITH: The material which I am now endeavouring to prove is material of the type referred to in paragraph 22 of the Statement of Claim and paragraph 23, and the related paragraphs, which are 25 and 26.

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THE COURT: What actually are you offering in the way of evidence? I notice on Page 16 of the examination which you have read you produce an appendix from Gordon's Digest.

MR. SMITH: Yes, which the witness goes on to identify.

THE COURT: Are you asking now for permission to introduce Mr. Gordon's book, or the appendix?

MR. SMITH: The arrangement was as evidence that the pages would be typewritten and considered as marked and I have them typewritten here.

THE COURT: Was objection taken to the admissibility at that time? 10

MR. AUXIER: Yes, objection was taken not only to those particular memos but also to any evidence dealing with the manner of treatment of any particular taxpayer or taxpayers generally in the coal mining, gold mines, petroleum or base metal fields or any other fields other than the lumber industry itself and with respect to the lumber industry the objection may be taken as to the exercise of the Minister's discretion. We submit in effect that the only question at issue here is the exercise of the Minister's discretion in this case. And the exercise of his discretion in other cases can have no bearing on what is fair and proper under these circumstances.

THE COURT: In order that I might have it fixed fairly in my mind— 20 following the question put to Mr. Elliott was there any admission made to what you produced as copies obtained by the Department?

MR. AUXIER: It was only as to their relevance.

MR. SMITH: Purely as to their relevancy and nothing else. If they are relevant they are correct. And I have a judgment issued by your Lordship recently in the case of Gilhooly vs. The Minister of National Revenue. Your Lordship in that judgment said towards the end: "Some reference should be made to the practice in the Department . . ." Reading). Now I suggest that is a correct summary of the law and Your Lordship I presume heard the decisions argued in the Gilhooly case. I have here also 30 additional ones. I have decisions of The United States Supreme Court and also in this Court and decisions of The House of Lords and decisions of the English Courts other than The House of Lords and decisions of The Supreme Court of Canada. And I suggest beyond doubt they all support me in that position. If your Lordship would be glad to hear me I will read them.

THE COURT: I would at least like your decisions.

MR. SMITH: The first is Schell vs. Fauch, 138 U.S., 562 at page 572.

THE COURT: Could you read the pith of those decisions?
We will adjourn till a quarter to twelve. 40

At 11:35 Court adjourns to 11:45.

At 11:50 Court resumes.

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MR. SMITH: There is a brief but very clear statement of Chief Justice Duff on the question of Administrative Practice in the case of Spooner Oils Limited vs. Turner Valley Gas Conservation Board, 1933, S.C.R. 642. It is a unanimous judgment of The Supreme Court of Canada and the Court consisted of six Judges: "The practice of the Department based upon this view of the effect of the regulations of 1910 and 1911 is not without weight in any controversy as to its construction." That, I submit, is a very concise statement. And I refer to the case of Queen vs. Commissioners of
10 Inland Revenue, 1891, L.R., 1 Q. B., 485 to 489. At 489 Mr. Justice Stevens: "What weighs very greatly with me in coming to a conclusion is the practice in The Inland Revenue Commissioners for the past sixteen years" and he says: "That is a very strong contemporaneous exposition of the meaning of the Act." And as a slight variation of that principle I refer to a case in The House of Lords, Commissioners of Special Purposes for Income Tax vs. Pemsel, 1891, A.C. 531 at 590 and 591, the judgment of Lord McNaughton at the top of Page 591. That I think summarizes briefly the effect of the decisions. The United States Supreme Court perhaps goes somewhat further in the Schell case which I referred to, and there says: "In all cases
20 of ambiguity the contemporaneous construction not only of the Courts but of the Departments and even of the officials whose duty it is to carry the law into effect is universally held to be controlling."

Now, sir, with regard to my second ground that relates to the allegation that the Minister has not acted fairly or properly—

THE COURT: Do you need to deal with that point now?

MR. SMITH: Well it is relevant on the ground of support of admissibility of the evidence.

THE COURT: I do not just see your connection on the second ground.

30 MR. SMITH: Well as to administrative practice. If that ground did not exist they would still be admissible for the purpose of proving or establishing that the Minister has not acted fairly and justly with regard to the assessment of this particular company. And if I am correct on that premise then the evidence is admissible on that ground. I have authorities on that.

And the third ground is extraneous evidence to facilitate the analysis of legislation and disclose the real purpose and effect is always admissible. That has already been held by The Supreme Court of Canada confirming the authorities of British Columbia. I also have authorities on that, My Lord.

40 THE COURT: Yes, I would like to hear that.

MR. SMITH: Turner's Dairy vs. Lower Mainland Dairy Products Board, 1941, S.C.R. 573; Chief Justice Duff at page 576 and Mr. Justice Taschereau at page 583. That is the third, my Lord.

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THE COURT: What evidence was it that was in question in that last case? Do you recall?

MR. SMITH: It was general evidence I believe as to how the operations were carried on by the Board. I think it is subject to the corrections, my Lord. I think it was evidence as to the manner in which the operations of the Administrative Board was carried on, which was tendered to show the real purposes and meaning of the legislation itself. The issue was as to whether the legislation was or was not constitutional.

MR. AUXIER: My Lord, we submit that the cases cited by my friend under his first heading do nothing more than say that where there is a question of the meaning of a particular word or the interpretation of a section of a Statute and there has been a long continued practice by the Department or the Board administering this regulation that the continuity in practice is material in interpreting the Statute. With that proposition we cannot take any objection. But this is a different matter. Here the Act provides certain discretionary powers in the Minister. And the question before this Court, and I submit the only question, is whether that discretion has been administered properly. Now it might be that under exactly similar circumstances—that if under exactly similar circumstances a continued practice was followed, that might be of some materiality. On the other hand that proposition itself may be open to question. This as I say was a discretionary power. In the Board of Education vs. Rice a judgment of The House of Lords reported in 1911 A.C. at page 179, the question was whether or not discretion had been exercised at all or properly exercised with regard to the payment of teachers by The Board of Education.

THE COURT: That case, as I recall it—but I am not clear about it—certain generous offers had been made to one Board, but that did not entitle the other Board to accept that as a solution.

MR. AUXIER: Yes. The Lord Chancellor said there had been no decision on the particular point submitted and it was referred back, but with reference to the fact that one school was treated in a different manner to the other Lord Loreburn says: (reading).

THE COURT: But that does not deal with the admissibility of evidence of what payments had been made to the other school.

MR. AUXIER: No, but what treatment is given to one individual as different from another has no relevancy under the Act.

THE COURT: But they find it was irrelevant, or did they find that because the Board had exceeded its powers in the one case that was no reason why they should exceed them in the other case?

MR. AUXIER: The question of the admissibility of evidence was not decided. The whole case was decided on the point that The Board of Education did not direct its mind to the matters submitted to it. In other words, there was no exercise of discretion. I would like to state in the case of Zimmerman vs. Can. Hanson & Van Winkle Company, 1939, D.L.R. page 184—

THE COURT: Did the question of the admissibility arise?

MR. AUXIER: It arose before The Exchequer Court and Mr. Justice Maclean the President of the Court, found that they were admissible. 10 The matter was mentioned again in the Supreme Court of Canada and the remarks of Mr. Justice Crocket and Mr. Justice Hudson were subsequently confirmed by the Privy Council. Mr. Justice Maclean had this to say when the matter was before him originally, in 1938 Exchequer Court Reports, 185 . . . (reading). I submit that the remarks of the Judges of the Supreme Court of Canada cannot imply anything else than that these were incorrectly admitted.

THE COURT: Was it definitely touched on in The Supreme Court of Canada?

MR. AUXIER: Not that I know of. But they do hold it is in effect 20 irrelevant. It is the exercise of discretion which can have no bearing as in the case of A.B. I should like to refer to Gardner vs. Jay, L.R. 29, Chan. Div. at page 58. That case dealt with an appeal from the exercise of a Judge of discretionary powers under a rule in which the appellant had asked for a trial by jury and it had been disallowed. Lord Justice Bowen stated: (reading), and a reference was made in that to a case Cardinal vs. Cardinal. As a matter of fact there is strong authority in the case of ex parte Quarrie reported in 1918, 1 K.B. page 68; that a body in whom discretion is vested should not make a blanket order but must treat each case on its individual merits. In that case The London County Council was 30 given discretion to grant or refuse permission to sell goods in public parks in London. They passed a resolution that no permission would be given to sell goods in a particular park, and a person who claimed to be injured took the matter to Court on mandamus and the Court found they had not exercised their discretion—that they had to deal with each individual case. And I submit it logically follows from that that any regulations which the Minister or his Deputy may make dealing with the question of depletion allowances can possibly be nothing more than simply a guide for the convenience of the various assessors in the Department and cannot be taken to be an exercise of discretion nor can it be of any relevance in deciding 40 whether or not discretion was exercised in any particular case. I should like to mention another judgment of no less an authority of Mr. Justice Holmes of the United States. It is reported in 204 U.S. Supreme Court Reports, page 585, 51 Law Edition page 600. It is an attack on valuations made by a State Board of equalization. The Board members had been sub-

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ject to cross-examination as to how they arrived at decisions and when the matter came before the Supreme Court Mr. Justice Holmes, giving the judgment of the majority of the Court had this to say: (reading). It seems to me that all of these cases point out that this is a question as to whether or not the Minister exercised his discretion properly. What he may have done in other cases and in other industries can, I submit, have no possible bearing, and my friend has not put forward any case which shows that in the exercise of a discretionary power any such thing as prior practice is relevant or admissible.

THE COURT: Are you suggesting, Mr. Auxier, that the practice of the Department over a long period of time would not be of any use in interpreting an ambiguous section? There are many cases, I think, in which it is considered of great importance. 10

MR. AUXIER: I submit that in the strict interpretation the practice of the Department may be relevant. But there is no such question here. And the only purpose which I can see in putting in any of this evidence is that on this occasion he exercised his discretion improperly.

THE COURT: Well how is the practice of the Department to be ascertained except by these so-called rulings of the Minister to the Deputy Minister? Individual tax reports are secret and cannot be disclosed and assuming that you consider yourself entitled to depletion I assume you would go to the local inspector and find out what the departmental rulings were on it so you could make out a proper return. Now if these rulings, so-called, are not available how is the taxpayer going to be able to make out his own return properly? 20

MR. AUXIER: The taxpayer has the right to determine what he considers fair for deterioration and that comes before The Minister's attention and he exercises his discretion. The rulings themselves—it is true the Department endeavoured generally speaking I am sure, to have some degree of uniformity; it is desirable to lay down some general outline as to how the minds run of the persons who have discretion vested in them. But there is a right in the taxpayer only to such depreciation as the Minister may allow. And the matter rests entirely in the Minister's discretion subject to this—that if he exercises his discretion on some wrong principle of law, as the Privy Council found he had done in the Pioneer Laundry case, then it is a matter of review for the Courts and is to be sent back to him for the exercise of his discretion on proper principles. But I submit that any general rulings or memoranda he has issued to inspectors throughout the country as a guide and to avoid the piling up of a lot of additional work cannot be relevant in an enquiry as to whether his discretion has been properly exercised in the case before the Court. 30 40

THE COURT: I do not see how any taxpayer could complete his form and claim as a proper deduction for depletion any amount at all without knowing what the rulings of the Department were in that particular

industry. I think it is common knowledge, and the matter came before me in another case—I think it was in the Gilhooly case, that it was not practical to treat each case individually in the question of depletion, for a good many reasons I need not enlarge on and as a matter of convenience to the taxpayer certain rates were agreed upon. Now if the taxpayer has no knowledge of what those are how can he possibly complete his form?

MR. AUXIER: He can claim what he deems fair and just.

10 THE COURT: How is the Court to have any control over various decisions? Can they be arbitrary or should they be uniform or should they be equitable? Without reference to these rulings how can that be ascertained?

MR. AUXIER: The discretion is essentially a discretion vested in the Minister and not any particular Board. If the Minister adopts any wrong legal principles or fails to exercise his discretion or exercises it dishonestly, or on a number of grounds, the Court has a right to interfere. But as to the exercise of his discretion per se that is entirely in the Minister's hands. But these rulings, or what are generally termed rulings are nothing more than what their Lordships in the Pioneer case say—they are nothing more than for the guidance of the officers.

20 THE COURT: The question of the relevancy or otherwise would not enter into that judgment at all as I recall it.

MR. AUXIER: As a matter of fact it did. These particular circulars of inter-departmental memos were submitted at the trial and objection was taken to them and the learned Trial Judge overruled the objection, allowed these documents in and found they were to be exercised by the Minister in his discretion and he was reversed by The Supreme Court of Canada and the reversal was upheld by the Privy Council although the Privy Council upheld the judgment.

30 THE COURT: The question of the admissibility was not dealt with before The Supreme Court of Canada or the Privy Council.

40 MR. AUXIER: They said it was not the exercise of discretion and that was the only ground upon which the appellant has put them in so the question as such became unimportant. But the ground on which they were originally admitted was found to be an improper ground by The Supreme Court. And that is tantamount to—of course they were from the standpoint of relevance—they were in that case a great deal more nearly relevant than the information sought to be admitted here. My friend seeks to put on the record information as to how mining companies, oil companies and companies operating gravel beds and so on were treated from the standpoint of depletion allowance. I submit that is considerably further afield than the depreciation schedules which were sought to be admitted in the Pioneer case.

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THE COURT: The others were in 1943—the ones you have just referred to—the British Columbia industry.

MR. AUXIER: Yes, one or two of those regulations or rather inter-departmental memos were issued after the end of the year.

THE COURT: I dealt with certain inter-departmental correspondence in another case and my opinion may not be of importance because I understand the case is appealed. There was an effort made to set aside the assessment on the ground that one certain document had not been submitted to the appellant. I held in that case the Crown was not bound to admit it—that it was inadmissible. I do not know whether you have a copy 10 of that judgment. Is there anything further?

MR. AUXIER: No, my Lord. I submit the sole question here is as to the exercise of The Minister's discretion and also that the issuing of inter-departmental documents can have no bearing and are inadmissible.

MR. SMITH: I would like to dispose of the Pioneer Laundry case. There is no question at all what they decided. There is nothing to indicate whether they are the same type of documents we have here at all because of their trying to establish they were rulings. But this is what Lord Tankerton says: (Reading): "The amount of depreciation claimed by the Appellant Company . . ." The Pioneer Company—they did not tender it 20 as evidence to convince the Court as to the illustration of the Section. They said: "The Minister has issued certain departmental rulings—that ruling as he applied to us." There is no such issue in this case. And the other cases that have been produced here this morning. There has not been one word in any of the decisions to the effect that the departmental practice is not admissible evidence. One single quotation my friend read mentions a departmental practice or its relevancy in aiding the Court as to what the section meant. Those decisions are not relevant and do not bear on the points I have raised except as to the Rice case. Let us see what they decided. My friend quoted from Lord Loreburn, and I will quote from 30 him too (reading). "Page 183. In some of the judgments in the Courts below it is affirmed as a matter of law that under this Act a local authority is not entitled to differentiate between schools . . ." That is what the Lord Chancellor says, and my friend did not read that part. But let us go on. Lord Loreburn says it is most cogent evidence. But that is not the end. The Earl of Halsbury says at page 186 (reading): "As I have said, here is a question of difference traced simply to the fact that one is provided and the other is not . . ."

My friend said time after time "We have absolute discretion". Apparently he exercises arbitrarily at the whim of the Minister according 40 to his intention. The Master of the Rolls has put the question plainly and given the matter very plainly and entirely. And Lord Shaw says (reading): "On the point of discrimination I say this . . ."

My friend wants to shut out evidence of discrimination. This Department that comes into Court and says they are very glad to facilitate a taxpayer was the Court and Judge of the case and they want to shut out evidence of discretion. And then the Earl of Halsbury says—and I am reading from the Law Journal Reports, House of Lords, 80 King's Bench 796 and 799 and 801. And I am now reading from the same case in the English Court of Appeal and whose decision was affirmed by the House of Lords unanimously, 79 L.J., K.B. 595, and the judgment of the Master of Rolls Cozens-Hardy, page 600. And it was quashed and upheld by the

10 House of Lords. And there are other decisions.

The Appellate Division of Alberta has dealt with the question of compensation in *Rex vs. McDougall Construction*, 1929, 3 W.W.R. 650 at page 654, the unanimous judgment of the Appellate Division. In that case the Appellate Division quashed the assessment, quashed it on certiorari not withstanding the decision of the Board that any decision was not open to review or otherwise. And here the Judicial Committee of the Privy Council has said that this is not exercising administrative interpretation; "it is the exercise of a quasi judicial duty which far from being conclusive is expressly open to appeal and that he must exercise it reasonably on

20 a fair basis."

At 12:30 Court adjourns to 2:30 p.m.

At 2:30 p.m. Court resumes.

THE COURT: Gentlemen, during the brief adjournment at noon I have given some consideration to the admissibility of Mr. Elliott's evidence or certain parts of it taken on the examination for discovery and certain documents that were referred to in that examination. The points, I think, are important and I have not been able yet to reach a decision. I have, however, come to the conclusion that I should reserve my finding on those points, but I will admit the evidence subject to the objection made by

30 Mr. Auxier and my decision on the admissibility will be given in my judgment. I hope I have made that clear to Counsel.

No. 14

FURTHER EXTRACTS FROM THE EXAMINATION FOR DISCOVERY OF C. FRASER ELLIOTT

MR. SMITH: I will proceed with my reading of the discovery. And I had got I believe to the bottom of page 17.

THE COURT: You had got down to "I am quite content to proceed subject to the objection."

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MR. SMITH: (Reading):

“THE WITNESS: As a witness I want to be as helpful as I can. The first one concerns depletions in coal companies. I will not read it out loud, I will just read it myself. As to the coal companies I find this is a pretty good reflection of our memoranda, but when he puts on the date 11th December, 1928, I do not know where he gets that date.

BY MR. SMITH:

Q. Otherwise it is apparently correct, is it?

A. The substance of it is what we are doing.

Q. And have been doing for years past?

A. That is right.

10

MR. MCENTYRE: These questions are all subject to my objection.

MR. SMITH: You can make it a blanket objection if you like.

MR. MCENTYRE: I do not want to object to every question as we go along.

MR. SMITH: It is agreed you will be taken to have objected to these questions that are going to follow relating to the other depletion allowances.

MR. MCENTYRE: That is correct.

THE WITNESS: I think the one on base metals is the substance of our approach to the quantum of depletion. Again I do not know anything about those dates he has in here.

Q. I do not want to tie you down to those dates.

A. Then the next covers depletion on dividends. I have read the one on dividends partly. The author is talking about something that appeared in Hansard. Of course I pass no comment on that. He quoted from page 2152 of Hansard.

Q. The memorandum apparently quoted from it, not the author.

A. Yes, but the author is putting it in his book. What the background of these are I do not know exactly, or just where he got them. I do not think I will make any comment on what Hansard said because Hansard speaks for itself for whatever use it has. But the reduction from 50 per cent. to 20 per cent. as referred to in this paragraph on depletion that is now given to the recipients of such dividends from such companies. I think that is all you want me to say on that.

Q. Yes, I think so.

A. Then the next one is depletion in respect of mining companies. Again he is referring to Hansard and I do not think I will bother mentioning that. But the rate of depletion was reduced from 50 per cent. to 33 1/3 per cent. Then the next one relates to depletion allowable on the dividends of base and precious metals mining companies. There is an internal operative document in which we inform our Inspectors in respect of a long list of companies there mentioned that they are of that character and when they pay dividends they are entitled to depletion as therein

40

referred to and that the inspectors should report those to Ottawa for approval accordingly. The same comment applies to the dividends of oil companies. Again there is a list of companies that we tell the inspectors that that is where depletion will be exercised as and when they are reporting dividends to us, and not to do it otherwise, to do it as directed.

Q. Is there another one?

A. No, that is the end.

MR. SMITH: I do not want to make this book as an exhibit, but I would like to have it identified. Would you agree, subject to your objection as already noted, that I may substitute a copy for the pages to which I have referred and that that copy will be considered as Exhibit No. 3.

MR. MCENTYRE: I agree to that.

MR. SMITH: It will be a copy of the documents relating to depletion as set out on pages 10 to 18 inclusive of Gordon's Digest of Income Tax cases.

EXHIBIT No. 3—Copies of documents set out on pages 10 to 18 inclusive Gordon's Digest of Income Tax Cases."

THE COURT: This is all subject to your objection, Mr. Auxier.

MR. AUXIER: Yes, my Lord, and any documents in the future that may be tendered I would like to have tendered subject to my blanket objection.

Copies of documents set out on pages 10 to 18 inclusive, Gordon's Digest of Income Tax cases, marked Exhibit 4.

THE COURT: The accuracy of these is admitted I understand?

MR. SMITH: Yes, my Lord.

MR. SMITH: By agreement I am permitted to tell your Lordship that the volume from which Exhibit 4 is taken was arranged according to subject matter by Molyneux R. Gordon, and printed in 1939.

THE COURT: There is nothing of the heading of this exhibit. I do not know what part of the book it is taken from. Are these pages, Exhibit 4, supposed to be copies of the rulings?

MR. SMITH: It is contained in the appendix in the book and the index is "Departmental Rulings, pages 1 to 42" and then there is "Rulings" and including the pages from which the extracts are taken the word "Rulings" appears at the top of every page.

THE COURT: They are from the appendix, then, under the heading of "Rulings."

MR. SMITH: Yes. The allowance to coal companies, it is an admitted rate of 10 cents per ton. It is a straight ten cents per ton and there is

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provision for division between the lessor and the lessee and in the event of both claiming it it is to be apportioned between them. In the case of base metals the rate is 33 1/3 per cent. and that is a deduction from net profits. It has no relationship to cost and it has no relationship to type of ownership. The same can be said about the depletion of dividends of mining companies, but in addition to the allowance which the mining company is given by the deduction of a certain rate. The shareholder receives an additional amount. So there is an allowance to the company by a deduction from net profits, and there is a further allowance to the shareholder when he gets his dividend. And in respect of oil companies there is also 10
an allowance to the shareholders. In all these cases it appears the allowance is unrelated to costs and has no relationship to ownership. And then I go to the bottom of page 22:

Q. Mr. Elliott, in the depletion to coal companies, an allowance of ten cents per ton is admitted for a coal company operating under lease where the depletion is not claimed by the owner. That is a correct statement of departmental policy?

A. I think that is what we do.

Q. Then if there is no agreement between the owner and the lessee, in those circumstances the relevant facts must be submitted to the depart- 20
ment for instructions of the department; you make the decision?

A. You will have to link that up with the word "license" which is used.

Q. I am talking about leases at the moment?

A. Yes.

Q. That is the language used in the coal companies depletion memorandum?

A. Is it lease or license.

Q. Would you answer this question? Is it correct to say that depletion allowances have been granted to lessees in extractive industries where 30
the lease of the product being extracted is a lease from the Crown?

A. Well I cannot answer specifically because I have not the information.

Q. Could you answer generally?

A. Generally I would think that would be so.

Q. That would be your present knowledge, that that is so?

A. I would think so.

Q. Now, I am going to show you a statement issued by you on December 26th, 1942, with respect to saw logs in the coastal logging area. I presume you recall that statement? 40

MR. MCENTYRE: I object to the question as being irrelevant and foreign to the issue.

MR. SMITH: We take it you are objecting to the questions relating to saw logs.

MR. MCENTYRE: That is correct.

THE WITNESS: Yes, I remember that statement. Wait a minute. When I turn over the page I see it goes into a lot of details, but I guess I still remember that statement.

Q. I think that is correct because I remember receiving it at the time, it was following the negotiations we had here and I believe that is an exact copy of the statement that was put out at that time?

A. I do not know where it ends here.

Q. I think it goes on.

A. I do not know where it ends. I will go this far to help you: the opening part of it reminds me of the memorandum that was issued. I do not remember this particularly. I was more concerned with what we were granting in principle, and then again this would be instructions as to work by giving examples.

Q. I think that was circularized to the lumbering industry.

A. Yes; something very similar to it was in any event. Again it is the case in substance, yes."

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No. 15

ARGUMENT AS TO ADMISSIBILITY OF EXTRACTS FROM EXAMINATION FOR DISCOVERY OF C. FRASER ELLIOTT

20 MR. AUXIER: In addition to the general objection I have taken with respect to these circulars, my memorandum with respect to the mining and oil industry and so forth, I am taking an additional objection to the admission of any of these inter-departmental circulars which were issued after the year of the assessment—after the tax year on which the present appeal is based. I submit that they can have no bearing whatever on the position prior to that time. They certainly cannot establish any departmental practice when they came into existence later, which is I take it the ground relied on by my friend in seeking admission of the other memorandum.

30 MR. SMITH: First of all it is evidence of departmental practice and has a great bearing on the question of discrimination. If a certain section of the lumber area got an allowance under this Section—this assessment made in January, 1944—

THE COURT: It would be based on the principles on which the practice was carried on in 1941, surely?

MR. SMITH: Yes. But in relation to discrimination we say again can the Minister grant a certain section of this industry and can he discriminate between the year 1941 and 1942 on certain sections in the same industry? I submit it is clear evidence on the subject of discrimination.

40 Will my friend admit this is applicable to the area west of the Cascades, that is the West Coast of British Columbia?

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MR. AUXIER: Yes. It was a special allowance made for a special purpose and being made after the year of the assessment under appeal it can have no bearing on the departmental practice or otherwise prior to that time.

MR. SMITH: I say it is most cogent evidence of discrimination.

THE COURT: I think I will make the same ruling on this matter as on the others.

MR. SMITH: I think I can give your Lordship another point. This deals with the weight of administration practice on the interpretation of a section in an earlier stage. The case is one in the United States Circuit Court of Appeals, 1927, Shearer vs. Anderson, 51 American Law Reports Annotated page 534 and judgment is delivered by the Circuit Judge. He says: "The latter views of the department as to the meaning of this Act can be at the best too persuasive." But that is admissible on two grounds and on the third ground I mentioned this morning. 10

No. 16

FURTHER EXTRACTS FROM THE EXAMINATION FOR
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And then I proceed. I had read up to the last question on page 25:

Q. I believe that is so because I believe I received a copy at the time. Perhaps if Mr. Swift has a copy we can determine from it whether this is a copy and just where it ends. That is what I had in mind. I see it ends at the end of the second last paragraph on page 2089; I suppose you will agree that that is correct? 20

A. The last sentence is 'It is not required that an entry is to be made in the books of the taxpayer.'

MR. SMITH: May we make a similar arrangement here? I am referring to Volume One of Dominion of Canada Taxation Services, pages 2087 and 2089 inclusive, and again I do not want to mark the book as an exhibit. Can we make an arrangement similar to the one we made in connection with the other book and substitute a copy of this to be marked as Exhibit No. 4? 30

MR. MCENTYRE: As this book is in loose-leaf form and the pages would be subject to change I think we ought to obtain the actual loose-leaf pages and put them in as an exhibit.

MR. SMITH: I am quite content to do that. Mr. Registrar, do you think we could mark the exact pages and then we could furnish an exact copy of those pages to be used.

MR. MCENTYRE: Yes.

MR. SMITH: Would there be objection to marking the book, Mr. Registrar?

THE DEPUTY REGISTRAR: Whose book is it?

MR. SMITH: It belongs to the law library. My volume is not here.

MR. MCENTYRE: I will get the sheets for you.

MR. SMITH: They will be considered as marked?

MR. MCENTYRE: Yes, that is quite satisfactory.

10 EXHIBIT No. 4—Pages 2087 to 2089 inclusive of Vol. 1 Dominion of Canada Taxation Services.”

And those were marked as Exhibit 4 and going to the bottom of page 26.

THE COURT: That will go in subject to the same objection?

MR. AUXIER: Subject to the same objection, my Lord.

MR. SMITH: And by arrangement, in lieu of the loose pages we are tendering a typewritten copy.

**Typewritten copy of pages 2087 to 2089 inclusive of Vol. 1
Dominion of Canada Taxation Services marked Exhibit 5.**

20 MR. SMITH: I would like to refer to that document in some detail (reading from Exhibit 5) “Re special allowances for saw-logs scaled in the calendar year 1943. For all saw-logs scaled in the area generally described as West of the Cascade Range of mountains or all saw-logs scaled that go to the salt water of the Pacific, or commonly referred to as the Coastal Logging area, or in case of doubt, such area as the Minister may determine, there will be granted as a special allowance in determining income of persons engaged in this industry. Part One.” I do not think it is necessary to go into details at the time being. An then Part Two: “And a further allowance of—\$1.00 per M.B.M. for all saw-logs scaled in the Calendar year that are in excess of either (a) 60 per cent. of saw-logs
30 scaled in the calendar year 1941, or (b) if the 1941 scalings are 75 per cent. or less of the saw-logs scaled in 1943, then the 1942 scalings will be used in lieu of the 1941 scalings and the 60 per cent. immediately above referred to will apply to the saw-logs scaled that are in excess of 60 per cent. of the 1942 scalings. (c) 60 per cent. of the saw-logs scaled in 1943—if it should be that any person for the first time enters upon the production of saw-logs in 1943.” And examples are given of the application of those formulae and provision is made on the next page where they are not coincident.

THE COURT: What is this taken from?

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MR. SMITH: From "The Dominion of Canada Taxation Service" and by the discovery it is admitted to be a document which was circularized to the lumber industry, by the Deputy Minister, who was being examined.

MR. AUXIER: It is admitted subject to the same objection as to relevancy.

THE COURT: That is the Deputy Minister for Taxation?

MR. SMITH: Yes, my Lord. And I stopped at the bottom of page 26. And I turn to page 28. I omit 27 and I start two-thirds of the way down page 28;

Q. I think it is correct to say that the allowances that are referred to in Exhibit No. 3 are all allowances that are made under Section 5 (a) of The Income War Tax Act, that is, the coal companies, the gold mining companies, the base metal mining companies, and the oil and gas companies? 10

A. Oh, no, I could not say that that is correct because there are many other kinds of extractive industries that are entitled to depletion. That is just a memorandum, I call it incomplete—relating, first, to general policy and, second, to the list of names of those that have already been considered.

Q. I understand that, but what I am trying to get at at the moment is the source of the power of the Minister to grant depletion allowance, and I say that that source is Section 5 (a)? 20

A. I agree with that.

THE COURT: I think there may have been a misunderstanding there. Your question was whether they were all allowed.

MR. SMITH: I think I will withdraw my application to have that question put in. It is a bit confusing. I will start with the next question.

THE COURT: I was trying to give some meaning to the reply of Mr. Elliott. He apparently thought the question was that the allowances referred to in Exhibit 3 were all the allowances. He goes on to say that is not the case, there are many others. But I think your question meant were these allowances all made under Section 5 (a). 30

MR. SMITH: Well, with that explanation I think I will tender that question.

Q. I think it is correct to say that the allowances that are referred to in Exhibit No. 3 are all allowances that are made under Section 5 (a) of The Income War Tax Act, that is, the coal companies, the gold mining companies, the base metal mining companies, and the oil and gas companies? 40

A. Oh, no, I could not say that that is correct because there are many other kinds of extractive industries that are entitled to depletion. That is just memorandum—I call it incomplete—relating, first, to general

policy and, second, to the list of names of those that have already been considered.

Q. I understand that, but what I am trying to get at at the moment is the source of the power of the Minister to grant depletion allowance, and I say that that source is Section 5 (a),

A. I agree with that."

10 Q. I am not complaining about it. The depletion allowances that are referred to in Exhibit No. 3, that is, to coal companies, base metal mining companies, precious metal mining companies and oil and gas companies have been in effect for many years, prior even to 1941, subject perhaps to variation in the amount as circumstances changed or as the policies of the department changed; would that be a fair statement?

A. They have been in force since 1919; as you state they have been changed, the rates have been changed.

Q. But the principle was in effect?

A. The principle of allowance was.

Q. Now, all these industries described in Exhibit No. 3, coal companies, base metal mining companies, precious metal mining companies and oil and gas companies—

20 A. Yes, that is correct.

Q. They had nothing to do with war, the allowances described in Exhibit No. 3?

A. I think that is correct.

Q. I am asking about the history of them before the war.

A. That must be so; that was between the wars.

Q. I do not think the allowances in Exhibit No. 3, that is, to coal companies, base metal and precious metal mining companies and gas and oil companies have changed since the war, have they?

30 A. Since the beginning of this war?

Q. Yes.

A. I will have to think.

Q. I am not sure either.

A. I do not think they have.

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 license.

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

A. That is right."

MR. AUXIER: At that point I take it that our rights with respect to the examination of this kind—of an officer of the Crown—I may put it in our own case, not only what has been read by my friend but also any other part we may care to use. Now whether those should go in at the same time to present the logical sequence here or whether as part of our own case

at the proper time, I would like your Lordship's opinion. There are several questions which explain the position, which I claim I should be at liberty to put in.

THE COURT: You certainly will have the right to read any sections as you think fit as part of your case.

MR. AUXIER: But any part that is logically tied up with the parts put in might be easier for your Lordship.

THE COURT: If there is any point as we go along which you think varies the meanings of the sections you might draw my attention to it and I will ask Mr. Smith to read it as well. You ask me to read in conjunction with part of page 31 the rest of the page? 10

MR. AUXIER: Yes, and the following page down to—well all of the following page, that is all of page 32 practically the rest of the examination. It is all logically tied together.

THE COURT: You want me to read at page 31: "Why do you take that position" to the end of the examination?

MR. AUXIER: Yes, my Lord.

MR. SMITH: It appears in due course that my friend has the right to use the remainder of the examination or any part as evidence on behalf of the Crown and I have no serious objection if it is more convenient to your Lordship to have it put in now. But I do think it is better practice for one side to put its case in now and the other put theirs in later on. 20

THE COURT: Well I would like to have anything that reads on. But are you reading anything further?

MR. SMITH: One-third way down page 33:

Q. I think you will grant me this, that a company such as the Appellant, operating under timber licenses and timber permits, as it cuts from year to year it is depleting its timbers?

A. Cutting its timber?

Q. It is depleting the timber from which it cuts its timber? 30

A. Only the timber is being depleted."

MR. SMITH: And as part of the examination, by arrangement with my friends I am tendering a statement made by the Deputy Minister, Mr. Elliott, on the 4th of January, 1945, and a document bearing the same date—January 4th, 1945, relating to the pulp and paper industry and those are applicable to the year 1941 and subsequent years. These are to be taken, I understand it, as true copies of the letter written by the Deputy Minister and a memorandum signed by him on the 4th of January, 1945.

MR. AUXIER: Subject to the objection that it is irrelevant and also as being a document coming in after the year of appeal. 40

Copy of letter, January 4th, 1945, C. F. Elliott, Deputy Minister (Taxation) to Walter Gordon marked Exhibit 6.

Memorandum, January 4th, 1945, signed C. F. Elliott, Deputy Minister (Taxation) to Inspectors of Income Tax re depletion to be allowed in respect of pulp; and paper industry only marked Exhibit 7.

10 MR. SMITH: (Reading from Exhibits 6 and 7). So I take it that those allowances—there will be evidence as to what a cord is. And Exhibit 7, I do not need to read the whole of it, I think. Then follows a statement to the same effect as the portion of Exhibit 6 relating to depletion. That applies to the period 1941 and subsequent periods. Both the memorandum and the letter so stated. In Exhibit 7 there is a word “allowance” which Mr. Auxier and I both agreed should be “allowable.” I will make that change.

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No. 17

**ARGUMENT AND RULING OF THE TRIAL JUDGE AS TO THE
ADMISSIBILITY OF EXAMINATION FOR DISCOVERY OF
C. FRASER ELLIOTT IN A FORMER ACTION**

20 Then, my lord, is the evidence I am tendering and propose to read—the examination of Mr. C. Fraser Elliott, the Deputy Minister—his examination for discovery in this Court in the case of Gilhooly vs. The Minister of National Revenue. I propose to tender that as evidence in this case and I understand my friend is going to object to the admissibility of that evidence. I am prepared to argue the objection.

MR. AUXIER: We are objecting to it on the ground that there is a deposition in one lawsuit between different parties and it should not be admitted in this lawsuit.

THE COURT: I think I prefer to hear what Mr. Smith has to say as to why it should be admitted.

30 MR. SMITH: The examination for discovery in the Exchequer Court is for all practical purposes taken under rules in effect in most of the Provinces. I see no material differences. Rule 130 says (reading). First, I say that the position of the officer here is analogous to the position of an officer being examined on behalf of a corporation. That is my first ground. And I submit there is no doubt about this proposition, that in the case of a private individual any statement under oath by him is always admissible against him if it is relevant. I suppose my friend makes the objection as to relevancy and also additionally that because of the form of the evidence it

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is not admissible. And I say if this were the examination of an individual, that is if we were suing Mr. Elliott personally and we had examined him the evidence would always have been admissible against him. I suggest there is no doubt about that proposition. In the case of Fleet vs. Perrins, 37 L.J.Q.B. 233, the headnote reads (reading). And in Saskatchewan in Rex vs. Drew, 1933, 2 W.W.R. at page 248 (reading). So I take it my first surmise is there can be no doubt if Mr. Elliott were examined as a private individual his answers under oath would afterwards be admissible against him. And the next step in my argument is that Mr. Elliott under the Rules is in a position analogous to that occupied by an officer being examined 10 on behalf of a corporation. I would then like to examine into the legal position of the company which cannot speak for itself and which is examined through its officer. In that connection I refer to the well known case of Welsbach Incandescent Gas Light Company vs. New Sunlight Incandescent Company, 69 L. J. Chan. 546—Webster, Master of the Rolls at 548 and also Mr. Justice Collins, 550. That is, they are admissions by the person who is taken to make them—in this case the Company. Also the subject was dealt with by Chief Justice Harvey in Caven vs. C.P.R. 1924, 2 W.W.R. 200 at page 202. So I say here that by analogy the examination of the Deputy Minister is in law the examination of the Minister. It being 20 then the examination of the Minister it is always admissible against the Minister in subsequent proceedings. The same point was discussed by The English Court of Appeal recently in Bank of Russian Trade vs. British Screen Productions, 99 L.J. K.B. 562. Lord Justice Greer said (reading).

THE COURT: Do any of these cases hold that answers given by officials of a company are admissible in another action between the parties or by one of the parties and another?

MR. SMITH: No, my Lord; but on the principle that a statement is always admissible against the officer being examined, and the answer of the individual is always admissible against him in subsequent proceedings. 30 And Section 31 of The Interpretation Act, Chapter I of The Revised Statutes of Canada, 1927-31 (1). In addition to that I refer to the Canada Gazette, a portion of which we have put in this morning, in which The Minister of National Revenue authorized the Commissioner of Income Tax to exercise the powers conferred on him by the Acts in question as fully and effectively as he himself could do. When those authorities are taken in conjunction with the profession of Mr. Fraser Elliott that he is in fact the person who conducts the assessment, that he is the senior official in charge, then I suggest it becomes plain that while the Minister of National Revenue is the authority in reality the Deputy Minister is the person whose 40 examination I now seek to tender against him.

MR. AUXIER: There is a principle that a statement made by a person in one action may under certain circumstances be tendered in another action. Then there is the principle that an admission made by a party, whether on oath or not on oath in Court or out of Court may under

certain circumstances be used. I do submit that the Crown is in a somewhat different position than the ordinary litigant. An official of the Crown would not be subject to examination for discovery were it not for special provisions. I take it that that is the reason the special provision was made in this case and it is dealt with in a separate rule, which applies to officers of the Crown and the other to examinations in actions against corporations. It does seem to me it would be rather an astonishing proposition that although the Deputy Minister, the man who exercised the discretion in this case, was subject to examination for discovery by my friend in which he

10 had had ample opportunity to bring out everything he cared to bring out, that examinations for discovery conducted in various actions could be used in order to find out whether there would be anything in the examinations that might be construed to his detriment. It seems to me that in order to allow such an examination to be used it would require something in the nature of a very special judicial authority and something more than a mere inference that might be drawn from the admission of examinations or statements made in examination by a party or individuals.

MR. SMITH: My friend says an officer of the Crown would not be liable to examination unless the Rules of Court permit. That is so, nor

20 would a private individual, nor would an officer of the company. But fortunately the rules do make provision in those cases. And I say it has the effect of an admission.

Then on broader grounds. If there is relevant evidence on the subject that is germane to this inquiry which was possibly—assuming it might have been more fully or more freely given—is there any reason why the taxpayer should not have the benefit of the evidence as to practice given by the Minister in the examination? We are entitled to establish practice. I submit that fairly on the authorities that I have stated these are admissions by the Minister and are admissible against him.

30 THE COURT: The matter you have just raised is novel in my experience and I think novel because it has never occurred to anyone who was here before me—never suggested that an examination in an action between other parties could be used as evidence in a matter of this sort. Mr. Smith refers to the Gilhooly case. I am definitely of the opinion that that evidence is quite inadmissible. It would seem to me that if that evidence were admissible on any other examination that Mr. Elliott had been subjected to would also be admissible and if I admit it I will have in a way to re-try every case where he was examined and where the evidence was introduced or attempted to be introduced, and that I do not propose to do.

40 You have had an examination of Mr. Elliott and I think at that examination if his answers were contradictory to other answers that he had given in previous examinations it probably would have been quite proper to ask him whether on certain occasions he had not explained the practice in a certain way. Then it could have been pointed out to him that he had made certain admissions. But that was not done and in my view it is much too

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late to establish that point by the indirect method of using statements made on another occasion in an entirely different case. It would be impossible for a Court to re-try cases and ascertain all the conditions under which such statements are given. And for that and other reasons I have given I am of the opinion it should not be admitted.

MR. SMITH: My friend does admit this is a true copy of the examination of Mr. Fraser Elliott under oath. I would like to have it marked for identification.

Transcript of examination of C. Fraser Elliott for discovery in
Gilhooly vs. The Minister of National Revenue, marked
Exhibit 1 for identification.

10

MR. SMITH: That now gets me to the oral evidence. May I have a few minutes adjournment in order that I may discuss the situation with my associate as to the order of our witnesses?

THE COURT: We will adjourn for ten minutes.

At 3:35 the Court adjourns.

At 3:45 the Court resumes.

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EVIDENCE OF RONALD MACDONALD, being called as a witness on behalf of the Appellant and having been duly sworn was examined by Mr. Smith and testified:

Q. You live in Edmonton?

A. Yes.

Q. And you have lived here for a great many years have you not?

A. 43.

Q. You are now Secretary of the Appellant, D. R. Fraser Company Limited?

A. Yes.

Q. How long have you occupied that position?

A. Since 1926.

Q. When did you first become associated with D. R. Fraser & Company Limited?

A. In 1903, but I was away from them for a period, from about 1907 till 1922.

Q. Except for the years 1907 to 1922 you have been employed by the company continuously since 1904—saving for the period 1907 to 1922?

A. Yes.

Q. And I understand that the Appellant Company was incorporated by Act of the Legislature of The North West Territories which was Chapter

30

33 of the Statutes of The North West Territories 51st Legislative Assembly held in 1904?

A. Yes.

Q. And you have produced here for me the original Statute incorporating the Company?

THE COURT: It is a special Act, is it?

MR. SMITH: It is a special Act. I would like to tender it as an exhibit and I think Mr. Macdonald would like to retain it. And would my friend consent to a copy?

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10 THE COURT: There is no objection, is there?

MR. AUXIER: Oh no; it is a Statute.

MR. SMITH: We may agree that the Court may take judicial notice of the Statute?

MR. AUXIER: Yes.

THE COURT: What is the number of the Chapter?

MR. SMITH: Chapter 33 of the Ordinances of the North West Territories, 1904.

20 Q. MR. SMITH: Now we have under consideration here a claim for an exhaustion allowance in respect of timber cut by the D. R. Fraser Company and manufactured into lumber and sold during the taxation year 1941. We are concerned here, I understand, with three timber berths, 1161, 1727 and 6722?

A. Yes.

Q. In fact those were not all the timber berths owned or controlled by the company in the taxation year 1941, were they?

A. No, we had others.

Q. You had one from the Hudson's Bay Company?

A. Yes.

Q. And some others that are not very material?

30 A. Both Dominion and Provincial.

Q. The bulk of the cutting was done in the taxation year 1941 from these three berths, 1161, 1727 and 6722?

A. Yes.

Q. You have ascertained, I understand from the records of your company that the cut with respect to these three berths in question in the year ending October 31, 1941, were for timber berth 1161; 3,128,886?

A. Yes.

Q. On Timber Berth 1727; 1,623,471?

A. Yes.

40 Q. And on 6722; 3,278,948?

A. That is right.

Q. And those all refer to feet board measure?

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A. Yes.

Q. Now Timber Berths 1161 and 1727 have, I understand, been held by the Appellant Company for a very considerable length of time?

A. Yes.

Q. And in the case of Timber Berth 1161, will you tell the Court when that was acquired by the appellant?

A. In 1904.

Q. And it has been held continuously by the appellant company up to and including the taxation year 1941?

A. Yes. First of all, jointly of course. 10

Q. By the way, your fiscal year ends on what date?
That is the appellant's fiscal year?

A. October 31st.

Q. So that the fiscal year in respect to the year 1941 would be the year ending the 31st of October, 1941?

A. That is right.

Q. That is when your financial statements are prepared?

A. Yes.

Q. And is the twelve months preceding the 31st of October in each year in respect of which you refer in your income tax return? 20

A. Yes.

Q. Now who in the first instance acquired Berth 1161?
You mentioned you had it jointly?

A. Ourselves and John Walter Limited who for some years now has been dead and out of business.

Q. And did you subsequently acquire the interest in Timber Berth 1161 from the Walter interests?

A. Yes, but it was from the Imperial Bank. The Imperial Bank had secured the Walter interests in that berth.

Q. Mr. Walter banked at the Imperial Bank, I take it? 30

A. Yes.

Q. And eventually the bank took over his holdings?

A. Yes, the bank took over his holdings for some years and we bought it from the bank.

Q. And Timber Berth 1161 was acquired—from whom was it acquired by you and Mr. Walter?

A. From the Dominion Government.

Q. That was acquired under and pursuant to Dominion regulations then in effect?

A. Yes. 40

Q. And what was the procedure under which the berth was acquired at that time under the regulations relating to the disposal of Dominion timber?

A. A large part of the country in those days was unsurveyed and we had to apply to the Government for permission to look up a tract of timber and give them the approximate location after which they notified us that

we could take up a tract of a certain size. They limited us to a certain size. It was usually approximately half the width of the length and a limit to the total area. We then located this timber and blazed the boundaries and advised them roughly what it comprised after which this tract was advertised for sale in the press. The date of the sale was set and we tendered our bonus or our bid to Ottawa before that date and when we were successful with our tender we were advised to that effect and after that we were obliged to take a Dominion land surveyor out to the area and he thoroughly surveyed it, described it, and the description of that berth was kept as a permanent record. This record is alluded to in all subsequent licences and also the licences that are in force today.

10

Q. In the case of Timber Berth No. 1161 I take it that you and Mr. Walter were the successful tenderers?

A. That is right.

Q. And following the acceptance of the tender what was the next step in the relationship about the timber berth?

There would be a document issued to you? What did you get to evidence your interest in this timber berth?

A. A licence.

20

Q. From whom?

A. From the Dominion Government.

Q. And that was the standard form of licence under the Dominion Timber Regulations as then in force?

A. Yes.

Q. And that was renewed from year to year to the present time?

A. Yes.

Q. Up to 1941 in any case?

A. Yes.

30 Q. The first licence which we appear to have available covering Berth 1161 is a photostatic copy of one issued by The Minister of The Interior of Canada for the period from the 1st of May, 1930, to the 30th of April, 1931. This is an exact photostatic copy of the licence issued to your company by The Minister of the Interior of Canada?

A. Yes. Yes, that is made out to our company.

MR. SMITH: My friend has agreed with me that we may use these photostatic copies as originals. In some of these older documents the originals are no longer available and we have made photostatic copies from the files.

THE COURT: Have you many of them available?

40 MR. SMITH: Yes, my Lord.

THE COURT: Well perhaps they had better go in separately.

**Dominion Licence, Berth 1161, May 1st, 1930, to April 30th, 1931,
marked Exhibit 8.**

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Q. MR. SMITH: That would be the last licence issued by the Dominion?

A. Yes. I am not quite sure of the date but I presume that is right.

Q. Well Mr. Auxier agrees that is the right date. I now show you a photostatic copy from the Minister of Lands and Mines of Alberta covering the same berth from the 1st day of April, 1931, to the 31st day of March, 1932?

A. Yes.

**Provincial Licence, Berth 1161, April 1st, 1931, to March 31st,
1932, marked Exhibit 9.**

10

Q. You identify that?

A. I identify that. That has my signature on it.

Q. That would be the first licence issued in respect of Berth 1161 by the Province of Alberta after the transfer of the resources?

A. Yes, that is right.

MR. SMITH: As a matter of fact there appears to be an overlap, my Lord.

THE COURT: Yes, but the berth number is the same?

MR. SMITH: Yes, my Lord.

Q. My friend admits the validity of these documents?

20

MR. AUXIER: Yes.

MR. SMITH: I tender the licence from the Minister of Lands and Mines covering the same berth 1161 period from the 1st day of April, 1940, to the 31st day of March, 1941.

**Provincial Licence Berth 1161, April 1st, 1940, to March 31st,
1941, marked Exhibit 10.**

Q. And as number 11 I tender Provincial Licence for the same berth for the period from the 1st day of April, 1941, to the 31st day of March, 1942.

**Provincial Licence Berth 1161, April 1st, 1941, to March 31st,
1942, marked Exhibit 11.**

30

Q. And turning to Timber Berth 1727. When did your company acquire that berth?

A. 1912.

Q. I produce here a photostatic copy of a letter from the Assistant Secretary, Department of the Interior to the Crown Timber Agent at Edmonton, dated October 17th, 1912, intimating that this berth was purchased by John Walter, acting on behalf of John Walter Limited and The Edmonton Lumber Company Limited.

**Letter, October 17th, 1912, Assistant Secretary, Department of
the Interior to Crown Timber Agent, Edmonton,
marked Exhibit 12.**

Q. And then I tender also the last Dominion Licence covering Berth 1727 for the period May 1st, 1930, to April 30th, 1931.

**Dominion Licence Berth 1727, May 1st, 1930, to April 30th, 1931,
marked Exhibit 13.**

Q. And I tender as Exhibit 14, Provincial Licence, covering Berth 1727 from the 1st of April, 1940, to the 31st of March, 1941.

10 **Provincial Licence Berth 1727, April 1st, 1940, to March 31st,
1941, marked Exhibit 14.**

Q. And then I produce Provincial Licence covering Berth 1727 for the period from the 1st of April, 1941, to the 31st of March, 1942.

**Provincial Licence Berth 1727, April 1st, 1941, to March 31st,
1942, marked Exhibit 15.**

Q. THE COURT: In these last two exhibits is the wording of the Licence identical as to the termination and the commencement?

MR. SMITH: The wording is identical as far as I know. There is no variation. They are both issued under the same regulations, and I will put
20 in the regulations.

Q. By the way, I notice that Exhibits 10, 11, 14 and 15 were marked as exhibits in the action of Anthony vs. Attorney General of Alberta. Your company was a party to those proceedings?

A. Yes.

Q. That is with respect to the amount of dues after the transfer of the resources of the Province?

A. Yes.

Q. That is the decision that went to the Supreme Court of Canada?

A. Yes.

30 Q. And those licences were some of the licences that were in issue in that litigation?

A. Yes.

Q. What was the rate of dues currently payable in the year 1941, that is, your fiscal year ending October 31st, 1941, in respect of Timber Berths 1727 and 1161?

Do you remember offhand?

A. One dollar.

Q. What does that mean?

40 A. A dollar per thousand feet which was paid, when the lumber was sold, to the Provincial Government.

Q. And when the Dominion Government was lessor it was paid to the Dominion Government?

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A. Oh yes.

Q. And since the transfer of the resources it has been paid to the Province?

A. Yes.

Q. THE COURT: You mean the dues have been the same throughout?

A. Yes.

Q. On those two berths?

A. Yes, until 1942.

Q. And that is payable when? 10

A. Monthly as the lumber is sold, according to our monthly dues returns. For a time with the Dominion Government we only had to return our dues every quarter. Now, with the Province we have to return them every month.

Q. After the lumber is sold?

A. After the lumber is sold.

Q. And you mean a thousand board measure when you say 1000?

A. Yes.

Q. And is it the same with regard to the tree?

A. No; that is the rate for what is described in the licences "Species 20 other than poplar." Poplar has a lower rate of dues.

Q. MR. SMITH: And what kind of timber have you been getting on these berths 1161, 1727 and 6722?

A. Chiefly spruce. There is very little jack pine. We do not get any poplar.

Q. Coming to 6722. You acquired that in the year 1940?

A. Yes.

Q. From the Province of Alberta?

A. Yes.

MR. SMITH: I tender a photostatic copy of the tender for 6722. 30

**Tender for Licence for Berth 6722, July 31st, 1940,
marked Exhibit 16.**

At Mr. Auxier's request I also put in the advertisement of the sale by public tender in respect of Berth 6722.

**Advertisement of sale by public tender, Berth 6722,
marked Exhibit 17.**

And then I file next as Exhibit 18 an undertaking by the D. R. Fraser Company to carry out regulations and so on in respect of that berth.

**Undertaking by appellant with respect to Berth 6722,
marked Exhibit 18.**

40

And I then tender a photostatic copy of the Provincial Licence in respect of Berth 6722 from the Minister of Lands and Mines to the appellant for this berth 6722 for the period from April 1st, 1940, to March 31st, 1941.

Provincial Licence Berth 6722, April 1, 1940, to March 31st, 1941, marked Exhibit 19.

And I tender Licence covering Berth 6722 for the period from the 1st of April, 1941, to March 31st, 1942.

Provincial Licence Berth 6722, April 1st, 1941, to March 31st, 1942, marked Exhibit 20.

10

Q. Now would you mind describing fairly briefly to the Court what the difference was between the system under which you acquired the berth under the old Dominion Timber Regulations and under the Provincial Regulations which were in force at the time you obtained your interest in Berth 6722. There was a difference in the arrangements?

A. Yes. This Berth 6722 I understand was one of the first licenced berths that was put up for sale by the Province. Prior to that they had all been small areas and had been permit berths. There is quite a considerable difference in the way you acquire a licence.

20

Q. I am interested in the difference in the method by which you acquired a licence from the Dominion and under the Provincial Regulations?

A. Well in the case of the procedure in locating the tract it is the same. We asked the Dominion Government to put up for sale, describing the area. They then send one of their cruiser's out and cruise it and determine the amount of timber that is on the tract, after which they advertise it for sale publicly in the press and they send us copies.

Q. THE COURT: You say advertise it for sale?

A. Yes, by auction.

30

Q. Do you mean the right to cut or ownership?

A. Well it is really the right to cut.

MR. SMITH: I think it is clearly defined by the Timber Regulations what you get.

Q. THE COURT: They put it up for tender in accordance with the timber regulations?

A. Yes.

Q. MR. SMITH: Under the Old Dominion Regulations what did you have to pay?

40

A. Well we paid under the old Dominion Regulations—we paid a lump sum as a bonus or bid on the whole berth.

We had to pay the full amount down at the time before we were awarded the berth.

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Q. THE COURT: And what did you get for that? The right to cut for one year?

A. We got a one year's licence.

MR. SMITH: Renewable more or less indefinitely. The licence will describe that.

Q. THE COURT: As a matter of fact it was renewed?

A. Renewable for year to year?

Q. And then when it came along again did you pay again?

A. No; it was renewed.

Q. MR. SMITH: Providing you were living up to the regulations? 10

A. Yes, and paying all the rental and carrying charges.

Q. And this is with respect to the lumber cut?

A. Yes.

Q. THE COURT: Was there a fixed rental in these Dominion licences?

A. Yes.

Q. In addition to the dues which varied with the amount you cut?

A. Yes.

Q. And the rental?

A. The rental is based upon the area. 20

Q. MR. SMITH: Was there any essential difference between the earlier Dominion Licences and the last one that was issued prior to the transfer of the natural resources to the Province?

A. None that I know of.

Q. I have the old Dominion Regulations here for every year since 1885, but it is a bulky volume. Now in the case of 1161, that is the one that was bought jointly by D. R. Fraser and John Walter?

A. Yes.

Q. And subsequently you bought out Walter's interest from the Imperial Bank? 30

A. Yes.

Q. Or the Imperial Bank's interest which was the same as Walter's had been?

A. Yes.

Q. And what did you pay by way of bonus to the Dominion Government when you acquired Timber Berth 1161?

A. \$3050.00.

Q. And what did you pay the Imperial Bank when you acquired Walter's interest?

Q. THE COURT: When you say "we paid that" do you mean you 40 and Walter or the company?

A. I cannot be sure how that was arranged. It was quite a long time ago. I think in a case like that that one of the companies pay the whole bonus and it is under agreement that they share the berth.

Q. You mean by "we" Walter and the Fraser Company?

A. Yes.

Q. MR. SMITH: What do you say was the cost of the half interest purchased from the Imperial Bank of 1161?

A. I am not quite sure of that figure, but I have it. I was wondering whether it showed on anywhere.

Q. It was \$1094?

A. Yes.

Q. And the cost of cruising made a total of \$2969.42.

10 In the first instance you paid \$1516 as your portion of the bonus to the Dominion Government?

A. Yes.

Q. Making a total of \$2969.42 and the cost of the cruisers \$362.98.

A. Yes.

Q. In 1928 I understand you appreciated that berth by the sum of \$5179.34 in your own books?

A. Yes.

Q. Making a total in your books of \$8149.76 as being the total of the appreciation plus what you had paid?

20 A. Yes.

Q. And in your income tax returns in respect of 1161 how was the item of the cost of the timber dealt with?

A. Well the timber was not dealt with individually by berths.

Q. How was it entered as an item in your financial statements?

A. As a capital asset.

Q. I am talking about your profit and loss statements. As you cut timber from year to year in your profit and loss statements and income tax returns what did you do? You must have written it off in some way?

A. Oh yes; I see what you are asking now.

30 Q. What did you do?

A. In regard to all the berths we held jointly we wrote off a certain figure annually as an expense in order to earn the income.

Q. An operating cost, in other words?

A. Yes.

Q. Were your returns accepted on that basis? Were your income tax returns accepted?

A. I do not think there was ever any question about it.

MR. AUXIER: Is that a fair question? It seems to me that is a matter upon which better evidence should be available.

40 THE COURT: I think I will let the question go for the moment. I do not know yet what Mr. Smith is trying to determine.

Q. MR. SMITH: So far as income tax returns to the Dominion are concerned by what time was the cost fully written off as an operating cost?

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A. 1939.

Q. In the case of what berths?

A. All berths. That is all the Dominion berths.

Q. Including 1161 and 1727?

A. Yes.

Q. It would not include 6722 because you did not acquire it until 1940?

A. No.

Q. And you have the figures available with respect to the bonus in respect of 1727, also, if Mr. Auxier wants that? 10

A. Yes.

Q. Where does your company carry on business? Where are the mills and where is the office?

A. In the district adjacent to Breton southwest of Edmonton. That is the mill.

Q. Where is it from Edmonton?

A. It is approximately 30 miles south and about 70 miles west of Edmonton.

Q. And there have been very considerable tracts of merchantable timber, largely spruce? 20

A. Yes, there was a lot of timber out there.

Q. And has that been accessible to a railway?

A. It has been in the past.

Q. Was it in the year 1941?

A. In 1941 we were operating a considerable distance from the railway.

Q. How far from the railway?

A. 14 miles was the nearest.

Q. And as your existing timber is cut what do you do? What do you do when it is fully cut and you have to go to new timber? 30

A. We have to spend a lot of time and a lot of money going out to locate it in some manner as we did when we acquired the Dominion berths, but we find it is considerably harder to locate an area of timber today that would be large enough for our operation anywhere.

Q. If you do locate one do you find it as accessible to railroad facilities as formerly?

A. No, not by any means.

Q. Why is that?

A. Well I presume it is because the timber has been worked out of the country and those who work it secure the timber nearest transportation. 40

Q. And what has been the tendency? I asked you a while ago, and I think we got off on to something else. You described the purchase of a timber berth under the Dominion Regulations whereby you paid a bonus?

A. Yes.

Q. But in the case of 6722 did you pay any bonus?

- A. No, no.
- Q. What is the difference?
- A. The regulations are different in connection with Provincial Licence berths to what they were with the Dominion berths.
- Q. What is the effect of the Provincial Regulations so far as 6722 is concerned?
- A. When the timber is advertised for sale the notice gives you the amount of timber on the berth and it also states the amount of a guarantee deposit that you have to pay to the Provincial Government if you are a successful tenderer. But the tendering is done on the basis of the rate of dues payable per thousand board measurement.
- Q. That is, you pay a deposit but you do not pay a bonus?
- A. Yes.
- Q. What is the function of the deposit and what is it used for? That is, the one you pay the Provincial Government?
- A. The deposit is just what it is described. It is a guarantee deposit which the Government hold during the whole tenure of the berth as a guarantee we will fulfil the regulations of the Department in operating the timber and paying the dues and disposing of tops and brush and that kind of thing. I think there is a provision whereby we were allowed to apply part of it each year on dues. But we did not do that.
- Q. You have had a long experience with both Dominion and Provincial timber licences. Do you regard your company's tenure of these berths as secure under Dominion and Provincial licences as we have been talking about?
- A. Yes, as long as we behave ourselves and live up to the regulations.
- Q. And so far you have behaved yourselves and had your licences renewed without any trouble?
- A. That is right.
- Q. And so far your licence has gone on from year to year without any interference?
- A. That is right.
- Q. Has there been any tendency in relation to the rate of dues payable in respect of the cutting of timber since the Province of Alberta received the natural resources from the Dominion Government?
- A. Yes.
- Q. What has been the tendency as to the rate of dues?
- A. The tendency has been to raise them, right along.
- Q. Prior to 1930 with respect to Spruce Lumber what was the rate of dues under a Dominion timber licence?
- A. I cannot be sure of that, whether it was a dollar, or it may have been less.
- Q. It was one dollar at that time?
- A. It was—yes.
- Q. And then the Province took over. And were there changes in the rate of dues?

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A. Not immediately.

Q. Subsequently?

A. Subsequently they did.

Q. About 1940 they began to increase, I understand?

A. Yes.

Q. And your rate was increased in 1940, first to \$3.00, was it not? That is when the new Provincial Regulations came into effect. You remember the rate was raised to \$3.00 and then it was reduced as the result of negotiations?

A. Yes, it was reduced to \$2.50. 10

Q. And then increased to \$2.75?

A. Yes.

Q. And then there were negotiations and the rate was fixed at \$1.75?

A. Yes.

Q. With respect to Provincial licences such as 6722 what rate do you pay there? Is the rate fixed by the licence?

A. We acquired that berth by bidding on a rate of dues and we bid a rate of dues at \$2.50.

Q. And in the advertisement calling for bids, calling for tender, is a minimum rate of dues fixed by the Provincial Government? 20

A. Yes.

Q. And what has the tendency been about fixing that minimum rate of dues? What is the tendency?

A. It has been increased since.

Q. And when timber is exhausted and you have to go to more inaccessible places to cut it what is your experience or your expectation as to whether you will have to pay more dues?

A. We will decidedly have to pay more dues. In fact there is a clause in the Regulations today whereby the Government will not tie themselves down to one particular rate of dues. I understand there is a clause which 30 gives them the power to raise the dues during the terms of the licence.

Q. That does not apply to Berth 6722?

A. No.

Q. But it might apply to a berth you would acquire in the future?

A. That is right.

Q. And you have been in the business a long time. Are there any hazards in operating the business?

A. THE COURT: Do you mean financial or physical?

MR. SMITH: Physical, my Lord.

A. Well the chief and the most devastating is fire. 40

Q. Have you had personal experience with fire in your company's operations?

A. Oh, yes, yes. We had a fire in 1937 which our foreman could just barely keep ahead of with a team and wagon. It covered approximately three miles an hour the timber.

- Q. Was that in the vicinity of these berths, 1161, 1727?
 A. Yes.
 Q. In the same area?
 A. Yes.
 Q. **THE COURT:** Who bears the loss?
 A. Well if it is these old Dominion Licences we bear the loss.
 Q. By reason of having paid a bonus?
 A. Yes. If it is a Provincial permit berth whereby we only pay the dues the Provincial Government suffers the loss.
- 10 Q. **MR. SMITH:** Suppose you have a mill. It costs money to erect a mill?
 A. Considerable.
 Q. Does it cost money to construct roads into the berth?
 A. Yes.
 Q. And what else do you have to do besides building the roads and the mill?
 A. You have to build camps and roads and bridges.
 Q. And are these improvements expensive?
 A. Yes, they cost quite a lot of money. I would say a set of camps for
 20 one crew would run as high as \$4000.
 Q. Well take 6722. Supposing all the timber in that area were destroyed would you suffer any loss?
 A. We would suffer considerable loss.
 Q. Why?
 A. In the first place the camps have been burned down probably. Even if the camps were not burned down they would be of no use to us in that vicinity and the roads are of no value whatsoever and the bridges also burn and the mill is of no value in that vicinity when the timber is gone.
 Q. Well I suppose it has a scrap value?
 30 A. Well if we had to dispose of it we would get very little for it.
 Q. Are there any other physical hazards besides fire?
 A. Well wind has robbed us of a lot of timber during the time we have been operating.
 Q. Any other hazards?
 A. There is a hazard that I call the state of the timber—the timber having become over ripe.
 Q. What do you mean by that?
 A. Well in an area of timber as I understand it as soon as it gets to that condition where there is not enough moisture in the ground to keep
 40 all the trees growing normally the older ones cannot get enough moisture and they commence to die and over a period of years they do not grow normally; they grow slower and slower until finally they die.
 Q. And are there any other special physical hazards?

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A. We have never experienced them, but I understand there is an insect pest coming through the Province now. I have seen evidence of it in other areas.

Q. Taking into account these hazards you have described what would you say as to whether the lumber business in this Province is or is not a hazardous business to be engaged in?

A. From my experience I think it is a very hazardous business to be engaged in, producing spruce lumber.

Q. Would you go back to Timber Berth 1727. Would you tell me what bonus was paid? That was acquired in the first instance from John 10
Walter Limited and the Edmonton Lumber Company and D. R. Fraser.

A. Well the arrangement was made with the three companies. The three companies had an interest in it. The bonus payment was \$6610.00.

Q. And how much of that did the D. R. Fraser Company claim?

A. Well I suppose a third.

Q. Later you acquired John Walter's Company's interest in the Edmonton Lumber Company?

A. Yes.

Q. And according to your auditor you paid for all this interest the sum of \$6942.60? 20

A. That is right.

Q. THE COURT: That is including your original one-third of the bonus?

A. Yes.

Q. MR. SMITH: You appreciate that item in 1928 by the amount of \$3464.93?

A. Yes.

Q. Bringing the cost to \$10,457.53?

A. Yes.

Q. And has that amount been completely written off in your books 30
and in the Dominion Income Tax Returns of the appellant?

A. You mean—

Q. Has the \$6942.60 been written off?

A. Yes.

Q. And that was completed in 1939?

A. Yes.

Q. I am tendering a letter from The Minister of Lands and Mines of Alberta, or agreement, dated June 8th, 1944, signed by N. E. Tanner, Minister of Lands and Mines.

**Letter, June 8th, 1944, from N. E. Tanner, Minister of Lands and
Mines, marked Exhibit 21.**

40

CROSS EXAMINATION BY MR. AUXIER.

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Q. You have told my friend that the amounts which you paid as a bonus to the Dominion Government on berths 1161 and 1727 were entered in the books of the company as capital assets. That is correct, is it not?

A. Yes, I suppose. I only got those figures that I gave you from my berth book.

Q. And you have said that you claimed each year, or you deducted from your gross income an item which by the end of 1929 had completely retired the original cost or the original amount of the bonus paid with
10 respect to these berths?

A. 1939.

Q. I mean 1939. And you charged that in your returns?

A. As an operating expense.

Q. And I suppose the capital asset—the amount spent by way of bonuses on these two berths—would be reduced by the same amount each year? That is by the amount of your claim for operating expenses or whatever you care to call it?

A. Well I am not sure about that because the matter of the whole cost of the berths did not as I understand it—our auditor may correct me
20 on it—I do not think it cropped up until 1938 or 1939.

Q. But you claimed this amount each year as an expense of operation?

A. We just put it in as an expense of operation. It was not put in in the form of a claim.

Q. And what it amounted to was this; it was an amount which while year after year gradually equalled the amount of money you had paid by way of bonus in the acquisition of these berths?

A. Yes.

Q. And in 1939 when these original costs had been retired you made no further claims of that nature?

A. We did not make the claim. We were just advised by The Income
30 Tax Department that the cost of our berths has been written off.

Q. I thought you told me the other day on your examination for discovery that you never made any claim after 1939 because the cost of your berths had been written off?

A. Well it did not effect our write-off in our books. The only difference was the Income Tax Department would not allow it.

Q. Did you make any claim for it?

A. No.

Q. After your costs were written off you made no further claim for
40 this particular expense you have mentioned?

A. Yes.

Q. In 1928, I believe you told my friend you appreciated on your books the value of these two timber berths and other Dominion berths which you have?

A. Yes.

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Q. You increased the value from cost to a figure somewhere about cost?

A. Yes.

Q. And you continued for the purpose of income tax claims against cost only?

A. I do not get that.

Q. In spite of the fact you had written up the value of these berths in your own books you continued to use cost as the basis for your claim and at the time your costs had been retired you made no further claim?

A. Well I do not recall that as having been a claim at all. We wrote off certain sums. We did not offer to make a claim to the Department. It was a matter for the Department to decide whether they were allowable expenses on it. 10

Q. Isn't it a matter of making a claim and then the Department decides whether it is a proper claim and if you are not satisfied you appeal? You claimed it in your returns as an offset against gross revenue?

A. Yes.

Q. And it was allowed?

A. Yes.

Q. And in 1939 when this particular type of claim had equalled the cost to you of these timber berths you did not claim any more? 20

MR. SMITH: My friend uses phraseology of a claim and an allowance, as though we had to go to the Income Tax Department and get down on our knees and ask them for something. There are no such words in the Act. We have rights under the Act.

THE COURT: There is no misleading at all. I am not misled at all, Mr. Smith.

MR. AUXIER: I am not trying to include —

Q. THE COURT: Up to and including 1938 his company wrote off a certain amount to finally cover the total cost of this berth? 30

A. Yes.

Q. And on each year's return they claimed a certain reduction?

A. Yes.

Q. And when it was finally written off the amount which totalled the original cost—they did not refer to it again in subsequent years. Do you understand what I say?

A. Yes. No we did not because the Department advised us it was not an allowable expense, I presume.

MR. AUXIER: You know that as a fact—what I am trying to get at is this; whether you discussed the matter with them and as a result of your discussion with them you made no further claim or whether you simply having written off your costs did not enter that item in your future returns? 40

Q. THE COURT: Wouldn't the fact be that your auditor would point out you had already written off the total cost and it would not be proper to ask for any more?

A. That is it, my Lord. The auditor and The Income Tax Department arrived at this together.

Q. That is left to your auditor pretty well?

A. Yes.

MR. AUXIER: And for the purpose of your own records. Apart from any income tax records, on account of your appreciation in value in your
10 books you did set up in your books the amount called stumpage in each year but for the purpose of income tax you charged it back for profit and loss, that no claim was made that you were entitled to any further allowance?

A. That is right. That is right.

Q. THE COURT: I suppose your write-off in your own books represented what you felt was the actual value of the berth?

A. Yes. When it came towards the end I suppose that is what was agreed between the auditor and the Department.

Q. But in your own books, I mean?

20 A. Oh yes. Of course we write off in our own books that kind of expense every year because, even though it is not allowed by the Department we write it down just the same.

Q. MR. AUXIER: And in all of the years since your acquisition of these berths originally you have set off against your income received from your operations amounts which have equalled your costs of these berths and in the other expenses timber dues, ground rent, fireguarding charges, licence fees and any other expenses which are properly chargeable under these licences which you hold?

A. Yes.

30 Q. They have all been set off against your gross revenue and the Department has not attempted to levy any tax with regard to any of these items which you have so charged off?

A. That is right.

Q. And the expenses of other operations of your company and the costs of building roads and moving the mill from berth to berth and the cost of your camps and so on—they are also written off, are they not?

A. No.

Q. Well they are in the normal course?

A. No, we do not write them off in the season in which they are built.

40 Q. You charge those things as an item of expense?

A. Yes, but they are not all written off in one year.

Q. The cost of those items is written off?

A. Yes. That is dealt with under the classification of depreciation.

Q. And your cost of building roads and matters of that kind are charged in the expense during the life of the particular area served?

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A. Yes.

Q. And there is no tax on money you pay out?

MR. SMITH: How in the world can a company be taxed on money it pays out? We are taxed on income.

Q. MR. AUXIER: What I intended to say is this—that you do claim those items either as an item of depreciation charged off year by year or as an item of expenses charged in the year in which it is spent or you pay off in your net income?

A. They are dealt with under the clause of depreciation.

Q. THE COURT: But your labour costs are charged as an expense 10 and allowed?

A. Yes.

Q. Your stumps charges are allowed as annual expenses?

A. Yes.

Q. And the normal cost of operation is charged as expense to ascertain that income?

A. Yes.

Q. And in addition to that there are certain capital charges such as the construction of roads and mills?

A. Yes.

Q. There are capital expenses to a certain extent? 20

A. Yes.

Q. And you are allowed to write off by way of depreciation certain amounts which are allowed?

A. Yes, that is right.

At 5:00 p.m. Court adjourns to 10:00 a.m. Thursday,
September 20th, 1945.

Thursday, September 20th, 1945, Court resumes at 10:00 a.m.

Q. MR. AUXIER: Mr. Macdonald, the last berth which you mentioned was 6722, which you obtained from the Province and you told the 30 Court yesterday that under the Provincial regulations you made no down payment except a deposit?

A. That is right.

Q. And you bid for it on a rate of dues, so much a thousand?

A. Yes.

Q. And if someone else bids a higher rate of dues they get the berth?

A. Yes.

Q. And in addition to that you pay additional dues under the licence?

A. No. Those are the dues.

Q. You pay ground rent and fireguarding charges and your licence 40 fee. And is there anything else?

A. We have to pay the cost of the Government cruising and estimating.

Q. And how do you set that upon your books?

MR. SMITH: I submit—there is nothing very serious about this question—but I suggest it has no bearing at all because we are operating under a Statute and that provides we are to pay taxes on a certain basis. How an item is set up in the books of the company apart from any returns does not affect anybody here.

MR. AUXIER: There is a great mass of authority to the effect that if the taxpayer chooses to treat receipts or payments in a particular manner that he cannot complain if the Income Tax authorities choose to follow the precedent he has set. I am not suggesting that under these circumstances it determines anything. But it is some indication of how the company itself chose to treat these payments and I think it is material on that basis.

THE COURT: It seems to me that the question is relevant.

The proceedings have to do with depletion. As I recall the evidence yesterday he said the capital cost had been written off by depreciation and I am assuming that you are interested not only for the year 1941 but with what happened before that date.

MR. AUXIER: Well under the Provincial regulations no lump sum payment is made except a deposit, and the tender on the basis of a rate of dues.

THE COURT: I think the question is quite proper.

Q. MR. AUXIER: I will ask you again how you treated on the books of your company Provincial Berth 6722?

A. Well this deposit was put into an account we call "Timber deposits." We have other timber deposits besides the deposit on that particular berth.

Q. And that carried on as long as it was outstanding?

A. Yes, until it was finished.

Q. At the same figure \$1165, or whatever you told us. That was the figure?

A. Yes, \$1125.

Q. And that continued until the deposit was returned?

A. Yes.

Q. And the rate of dues and these other charges—they are charged off annually as paid out?

A. Yes.

Q. Now do you know with reasonable accuracy at the time you tender for a berth how much timber is on it?

A. Are you alluding to Provincial berths?

Q. Well any of these berths?

A. The reason I asked the question is that with the Provincial berths we are told by the Department from their cruiser what his estimate is.

Q. They make their own cruise?

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A. Yes, and they state the amount of their estimate on the notice of sale.

Q. And with respect to berths you acquired from the Dominion you made your own cruise on those?

A. Yes.

Q. And you can tell from a timber cruise within pretty close limits what is on the berth?

A. No, it is pretty difficult to get anywhere near it. In the old days on the old Dominion berths it was probably very difficult to get the correct cruise.

Q. Well have you any figures as to what your estimate was on say Berth 1161? I think that is your oldest?

A. Yes, at a certain date but I haven't it in my mind just now.

Q. Did you cut on that berth continually for thirty-five or forty years.

A. Oh, no; we only operated that berth about five or six years.

Q. Well I notice on Exhibit 17—the notice of sale of the Provincial berth that there was approximately 4,200,000 feet on it according to the Provincial Government's cruise. Would that be about right?

A. Just about. We cut a little more than that off it.

Q. And on these other berths did you cut less or more than the amount of your original cruise?

A. Generally speaking we cut more because for a period of forty years or so there is considerable growth.

Q. This is practically all spruce timber?

A. Yes.

Q. How long does it take for that timber to replace itself?

A. I would say at least ninety to one hundred years.

Q. You told me the other day I believe on the examination for discovery that you calculated that the growth was about three to four per cent. per year?

A. Yes, that is right—between two and three, I think.

MR. SMITH: What question is it? I think you should quote it accurately.

MR. AUXIER: (Reading from examination for discovery):

“Q. And this growth over the period of ownership is an inconsequential matter in the type of operations you conduct?”

“A. Well it would have some bearing. I have made some study in regard to growth. I have made observations and measurements and determined a growth of one, two and three per cent. a year between the trees. Some cruisers tell me it would never reach three per cent. I have found instances where it would be as high as four. I have had other instances where it has been one and a half.”

Q. You say that on the average you think it would take ninety to one hundred years?

A. Well ninety to 100 years is a little different estimation to the growth of standing timber, you see. In saying ninety to one hundred years I mean from the first growth of the tree to maturity.

Q. You mean suppose the berth is cut off completely and new timber started it would take from ninety to one hundred years?

A. Yes.

Q. But it is possible to operate a timber berth this way—that you go in and take out the larger trees and come back next year and the trees that have attained a particular size you take those off and go on from year to 10 year in that way?

A. Not year to year; there would have to be a lapse of several years before it would be worth while going back for timber.

Q. Well isn't it a practice to operate berths continuously over a long period of time?

A. Oh yes, you would probably operate the same berth but you would operate different parts of it.

Q. You would move to another part and then go back and in the meantime the timber had grown and so on ad infinitum?

A. Well it would not be worth while going back to the old part less 20 than twenty-five or thirty years.

Q. I suppose that would depend on the type of timber and the size of berth and size of operations?

A. Yes, and the hazards.

Q. But there are some berths in Canada that have been operated over a period of one hundred years or more. Isn't that correct?

A. Well I don't know. I can't answer that.

Q. When you acquired Berth 1161 back in 1904 how far was it back from the railroad at that time?

A. It was at least eighty-five miles from a railroad.

30 Q. And then the railroads began to move into that part of the country?

A. Yes, the railway was extended into that country in 1926.

Q. Did you operate the berth at all on from 1904 to 1926?

A. No.

Q. I take it you were not obliged under the regulations in force at that time to conduct operations as you are now?

A. They did not individualize on berths as long as we were continuously operating, and we took off so much timber each year.

Q. And that is the case now under the Provincial regulations, isn't 40 it?

A. No, no; you are obliged to operate the berth each year.

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RE-EXAMINATION BY MR. SMITH

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This question is strictly one that should have been asked in direct examination, but probably you won't object.

Q. You have a map with respect to one of your berths prepared after a fairly recent cruise, which shows the damage by fire on that berth. Have you that map with you?

A. Yes, I can produce it (produced).

**Plan of Timber berths of D. F. Fraser and Company Limited,
copied from original cruise plan, marked Exhibit 22.**

Q. Would you describe to the Court what this map represents and 10
what the various colours are?

A. This is a map that we had prepared in the summer of 1940 and 1944.

Q. Does it cover any of the berths we are discussing?

A. Yes, 1727. It does not cover 1161 or 6722 because they had at that time been all cut off. And this map was prepared by our bush foreman who is a very experienced cruiser. We had him cruise all the timber we had left and he has prepared it showing the cut-off areas, the burnt-off areas and the green timber.

Q. And those areas are shown in what colour?

A. The green is in green, the cut over in yellow and the burnt areas 20
are shown in red. There is another colour here "Burnt mixed with patches of green."

Q. And that map shows all of 1727?

A. Yes.

Q. And some small parts of other berths?

A. Yes.

Q. The red area on that map has been burned off?

A. That is right.

Q. And the small red and green patch mixed has been burned, but 30
there is some good timber and some destroyed?

A. Yes, but there is no red and green on 1727.

Q. It looks from that as though the red is a very substantial part of the
berth?

A. It looks that way.

Q. You have lost a good deal of timber by fire?

A. Yes, considerably.

Q. At a rough look it looks as though you had lost more by fire than
the amount you cut off?

THE COURT: I do not know what hinges on it, Mr. Smith, but it
does not seem to me as though this map should come from this witness. 40

MR. AUXIER: Well I take objection to it.

Q. THE COURT: I assume you are the manager?

A. I am not the manager, my Lord, but I am the secretary of the company and I look after the administration of the company.

Q. You had nothing to do with the preparation of that map yourself?

A. None whatever.

Q. And you have no personal knowledge that the information shown on it is correct?

A. The only way I can answer that is that we had such confidence in this foreman of ours, McIntyre, and he was in our employ since 1923 until 1944 and he always proved to us a man with very great ability in timber cruising and estimating.

Q. But have you any personal knowledge that the information shown on that map is correct?

A. No.

Q. You are relying on the ability and integrity of your former employee?

A. Yes.

MR. AUXIER: We are not questioning the accuracy of the information although we feel it is not strict proof. But we are prepared to let it go in.

20 THE COURT: You are allowing it to go in as an exhibit, but are you admitting the information as correct?

MR. AUXIER: Well we are prepared to accept it as if proven.

A. (The witness): I might say that that is the only map we have and the only guide we have to go on with respect to the timber we have today.

Q. THE COURT: By that you say you need it back urgently?

A. Well either that or a copy of it.

MR. SMITH: My friend and I can work out an arrangement to have it copied and the copy substituted, I am sure. I suppose the Registrar will accept my undertaking to put in a copy in lieu of this?

30 THE COURT: Well if it is to be an essential part of the case and you want to take it to make a copy the copy should be returned?

MR. SMITH: Oh yes. I will undertake to do that.

MR. SMITH: Now those questions should really have come in direct examination. If my friend wishes to cross-examine I have no objection.

CROSS EXAMINATION BY MR. AUXIER

Q. This map covers timber other than timber contained in Berth 1727?

A. Yes.

40 Q. These numbers that are underlined in each section or part of section—does that refer to timber berths?

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A. Yes, those are the timber berth numbers.

Q. This 31. What is that?

A. That is part of 1727. It extends over this area (indicating), all the whole block north of that line with the exception of section 34.

Q. THE COURT: Is Berth 1727 outlined in some way that it can be identified on that map?

A. Yes.

Q. MR. AUXIER: 1727 is underlined. There was one particular section I had some doubt about.

A. Well this section is marked in 1727. 10

Q. I think it should be identified as to what part is in 1727 and I suggest it might be underlined on this plan or in the tracing by a distinctive colour.

A. Could it be done after the copy is made?

Q. I would suggest that should be done. I suggest that on the copy the outline of Berth 1727 be put in in some distinctive colour.

A. Well that can be done. I could do it myself.

Q. You still have quite a lot of green timber on Berth 1727?

A. Of course we have had one cut-off since then.

Q. How much timber have you cut off all told on Berth 1727? 20

A. I could not answer that question without referring to my berth book.

Q. Well I would like you to refresh your memory from whatever information you have?

A. 23,281,062 feet.

Q. Have you the figures there of your original cruise of that berth?

A. Yes.

Q. THE COURT: Is that up to 1945 or to what date?

A. Up to date—including last winter's cut. It was cruised by Nagel in 1912—and that was the year we acquired it—and estimated at 20,380,- 30
720 feet.

Q. And you still show more timber?

A. Well the cruise taken by Nagel was taken down to a ten inch stump. Since the resources have been turned over to the Province the Province have allowed us to cut down to a seven inch stump and that has increased the amount of timber considerably.

Q. And there is still quite a bit of timber left?

A. Not so much—may be 12,000,000 to 15,000,000.

Q. This burnt over timber can be salvaged if it is cut within a limited time? 40

A. You have to cut it the year after it is burned before it is any good and even then a lot is not any good.

Q. But a great deal can be salvaged?

A. No I would not say a great deal. The jacking and the damage especially when it is grounded almost puts it out of the area of marketability.

Q. Well these areas that are shown burned were cut over by your company after that?

A. No they were not.

Q. Did you not do any cutting on these burned areas?

A. No.

10 THE COURT: I am referring now to the two berths you acquired originally from the Dominion Government, 1161 and 1727. Is it a fact that up to the end of the year 1941, which is the tax year we are interested in at the moment, all your operating expenses had been allowed as expenses by the Income Tax Department? I am speaking about expense such as stumpage dues and labour costs and all that sort of thing. I am not thinking of your capital investment at the moment.

A. Yes, that is true.

20 Q. And all your capital expense, that is your bonus I think you called it and any other capital expense—a certain portion of that was allowed each year as depreciation until the full amount had been written off. Is that correct?

MR. SMITH: Well we are not dealing with depreciation, my Lord.

THE COURT: Yes, but I want to know whether that is a fact or not.

MR. SMITH: The witness has already given that information.

THE COURT: Yes, but I want to check on that point. I want to see whether my recollection is right or wrong.

MR. SMITH: He gave definite answers about that in a certain way.

THE COURT: Do you suggest I may not question the witness?

30 MR. SMITH: Certainly not. I do not want to use any words that will suggest something to the witness. That is all. And the word "Depreciation" was not used. I would be most glad to have you question the witness.

THE COURT: You understood what I meant by "Depreciation?"

A. Well we regard depreciation as that on buildings and roads and other physical assets. I think previously I answered a similar question in saying that a certain amount was written off annually on the timber as an operational expense and as far as I remember it was not tied in any way until the time came when by discussion between our auditor and the Department it was found that the whole original cost of these berths had been written off.

Q. That would be about what time?

40 A. 1939.

Q. And had they been written off by deducting a portion as annual expense or depreciation? I have not seen your income tax return and I do not know in which way you claim it.

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continued.

A. Well we based that on so much a thousand feet of the cut.

Q. And did you put it in as an expense or depreciation?

A. As an expense.

Q. It was shown as a certain percentage of the annual cut?

A. So much per thousand feet.

Q. And in the result the total cost had been written off as found by the auditor?

A. Yes.

Q. MR. SMITH: I would like to ask the witness how it was written off year by year. 10

THE COURT: Oh there is no objection.

Q. MR. SMITH: Have you the records to show what was written off year by year up to 1939?

A. Well it would be very difficult to.

Q. I thought your records showed that—the record you have with you there?

A. I do not know. Possibly our auditor could answer that question.

Q. You wrote off a certain rate per thousand each year?

A. Yes.

Q. How much a thousand did you write off? 20

A. It varied as far as I remember from twenty to fifty cents a thousand and.

Q. And does that twenty or fifty cents relate to any other figure, or was it just an arbitrary figure?

A. I do not think it relates to any other figure.

Q. Just a figure selected and used?

A. Yes.

Q. Does it relate to cost in any way?

A. No.

MR. AUXIER: You say you simply picked a figure out of the air to 30 charge up each year as an expense?

A. No; it was so much per thousand feet on the cut.

Q. But how do you arrive at the figure of so much per thousand? Perhaps I might put it this way: was that figure designed to recoup to your company the original cost of these berths?

A. Not that I know of.

Q. Was not that the purpose of making that write-off?

A. Not that I know of.

Q. What was the purpose in making the write-off?

A. Well apart from any feature of income tax returns, as a matter 40 of bookkeeping we wrote a certain amount off the timber.

Q. And what was the purpose of writing that off? Is not the real purpose to enable you to recover your costs?

A. Well I suppose it would be.

No. 19

EVIDENCE OF ERIC RICHARDSON, being called as a witness on behalf of the appellant and having been duly sworn was examined by Mr. Smith and testified:

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tion.

Q. You are a member of the Institute of Chartered Accountants of Alberta?

A. I am.

Q. You practise your profession at Calgary in this Province?

A. I do.

10 Q. How long have you been practising that profession?

A. Thirty years.

Q. In Calgary?

A. In Calgary.

Q. And in your practice have you had any experience with the so-called extractive industries—coal mines and oil wells?

A. Only with coal and with oil.

Q. Have you had much experience with coal and oil companies?

A. I have had a lot of experience with the coal industry and some experience with the oil industry.

20 Q. Are you interested in the coal mining business yourself in a personal capacity?

A. I am.

Q. Are you familiar with this book published by Gordon: "Digested Income Tax Cases" printed by The King's Printer at Ottawa and published by direction of The Honourable Mr. Ilsley, Minister of National Revenue?"

A. Yes.

Q. Are you familiar with the pages put in here, 10 to 18, relating to other companies?

30 A. Yes.

Q. Are those rulings only known amongst the accounting profession?

A. Yes.

Q. Have they been for how long?

A. For many years. That is insofar as they are of long standing. Some of those rulings are comparatively recent.

Q. From your knowledge and experience in preparation of income tax returns, contact with the Department of National Revenue and preparing returns for your clients and your accounting practice what would you say those rulings represent?

40 MR. AUXIER: I think this might be an appropriate time to state my objection, that if this witness proposes to give evidence with respect to the treatment of coal and oil companies under Section 5(1) (a) of The Income Tax Act I submit that that is completely irrelevant to this inquiry and I

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simply want to make my position clear that if your Lordship rules the question be allowed and answered that it will all be subject to my objection.

THE COURT: I will allow the questions subject to your objection.

MR. SMITH: What do you say these rulings represent?

A. They represent the accepted practice of the Department, in my opinion.

Q. THE COURT: It is understood by counsel that my ruling is the same?

A. Yes.

Q. MR. SMITH: And would that answer of yours be true and would it apply to the year 1941?

A. Yes.

Q. I suppose as an accountant you have prepared, as most chartered accountants prepare, numerous income tax returns?

A. Yes.

Q. And that has been one of your prime functions, certainly for some years past?

A. Yes.

Q. They are pretty complicated, aren't they, very often?

A. Some are.

Q. And when you come to prepare income tax returns where do you go and what source do you look to for the information on which you base the ascertainment of the income?

A. From several sources. First, from our experience with the Department in connection with previous returns and, secondly, information we do obtain from the tax services. There are two services available to us—C.C.H. and one published by DeBoo.

Q. And in the DeBoo case the editor is Mr. H. H. Stikeman who is the Assistant Minister of the Department of National Revenue.

A. I think so.

Q. And with particular relation to rulings. I am speaking now of rulings confined to extractive industries. Is there any secrecy in the rulings that appear in the pages of Gordon's supplement?

A. Many of them are. There are rulings which are not published there.

Q. But as far as those rulings published there. Has it been difficult at any time to ascertain what those rulings are?

A. No.

Q. And you must have contact with the office of the Inspector of Income Tax?

A. Very frequent contact.

Q. Well suppose a young man just starting and he had a report on the affairs of the extractive industry. Could he get to the inspector and ascertain what the rulings are?

20

30

40

A. Generally speaking the practice has been that they will refuse an answer to a hypothetical case but if you present actual facts they will give you a ruling on it. Those rulings there are common knowledge.

Q. If rulings of that type were not available to the profession—if you had to go at the preparation of an income tax return for an extractive industry without any knowledge as to the basis of allowance set forth in an industry of this nature would there be any difficulties in the preparation of the return?

A. Yes.

10 Q. Why?

A. Part of the original cost would be included as an expense of the operation. That would be the normal procedure.

Q. And that would be under Section 6?

A. It is an expense wholly necessary and exclusively made for earning the income.

Q. And you would be able to ascertain cost and you would be able to make the proper computation with respect of cost?

A. Yes.

20 Q. But so far as any allowance over and above cost, how would you ascertain what that was?

A. We would make no such allowance were it not for the provisions of 5A of the Act.

Q. And in the case of an industry such as the coal industry which is covered by a ruling which is common knowledge?

A. Well we would take ten cents a ton, which has been the accepted practice of the Department for many years.

Q. And these rulings in Mr. Gordon's book. Have you found them to be applied by the Department?

A. Yes, in every case.

30 Q. For how long back?

A. Well for many years.

Q. How far back would you say?

A. I would say twenty years anyway.

Q. You said you were interested in the coal mining business yourself. Were you connected with a company Mohawk Bituminous Mines Limited?

A. Yes, I am secretary.

Q. And where does that company operate?

A. It operated in 1939.

Q. And where was the mine?

40 A. At Bellevue, Alberta, in the Crow's Nest Pass.

Q. And what was the nature of the title to the coal which that company held?

A. In its original operations it held the title to the lands from which it extracted coal. Subsequently the operations proving unprofitable on that area it acquired a lease from one Joseph Little on adjacent property.

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MR. SMITH: My friend is agreeable I use a copy of the original lease here.

Q. I am showing you a lease from Joseph Little to Mohawk Bituminous Mines dated 5th of August, 1939. Is that the lease that was made in 1939?

A. I have not compared this but if you will assure me it is in exact agreement with the other one I will say yes.

Q. The original is here and that was copied and compared and I can assure you it is a copy.

A. Yes, I will agree it is a copy. 10

Q. Was that the first lease with Little in 1939?

A. No, there was an earlier lease. This is a renewal of the lease in precisely the same terms, which previously existed.

Lease, August 5th, 1939, Joseph Little—Mohawk Bituminous Mines, marked Exhibit 23.

Q. What date was the previous lease entered into?

A. Approximately 1924.

Q. And you say it was in substantially the same terms as Exhibit 23?

A. Yes. The difference is there are further properties which were not in the other lease. 20

Q. And this provides to pay a royalty of so much a ton?

A. Yes.

Q. And was anything paid under this lease saving the royalty?

A. Nothing except the royalty.

Q. And did Mohawk Bituminous Mines Limited make a claim or did it ask for the allowance of depletion or exhaustion?

A. Yes, but not in the early years of the lease.

Q. But commencing what year?

A. I think it was 1935.

Q. I have some correspondence and documents here. My friend agrees that I may use carbons as originals. The originals will be in the custody of his Department. I have not served a notice to produce. 30

MR. AUXIER: Of course this evidence is completely inadmissible and we feel it is a matter in which the coal mining company received from the Department and it can have no possible treatment which the appellant lumber company should proceed with. But so far as the particular letters themselves are concerned we are prepared to admit they are accurate copies of the correspondence.

THE COURT: I have noted your objection to all this correspondence.

MR. SMITH: Yes, my Lord. 40

Q. Would you identify this as a letter written by you to the Inspector of Income Tax at Calgary on behalf of Mohawk Bituminous Mines on October 15th, 1945?

A. I dictated that letter.

Q. And do you recognize this as the letter forwarding the notice of appeal?

A. Yes.

Q. And what is this?

A. A letter received from the Department of National Revenue.

Q. What signature is that?

A. I think it is Mr. Elliott's signature. I have seen it many times and I think it is his signature.

Q. And this letter of the 10th of October, 1935?

10 A. A letter received from the Department of National Revenue signed by Mr. Alexander, Inspector of Income Tax at Calgary.

Q. And this is an assessment following the decision contained in Mr. Alexander's letter?

A. It is a receipt for monies paid under the amended assessment.

Q. Which the receipt and correspondence tell about when I read them?

A. Yes.

**File of correspondence re Mohawk Bituminous Mines,
marked Exhibit 24.**

20 Q. I read first the letter of October 15th, 1935, to the Inspector of Income Tax at Calgary. (Reading). Had that any relation to cost whatever?

A. No.

Q. And then there is the notice of appeal dated December 5th (reading). And Mr. Elliott writes back on the 3rd of January stating that an investigation is being made and you will be advised in due course (reading). Then a letter from Mr. Alexander dated October the 10th. He was the Inspector of Income Tax at that time?

A. Yes.

30 Q. The letter was written, the return was filed and notice given it would be disallowed and then Notice of Appeal. And on the 31st of December Mr. Alexander wrote from Calgary (reading). Was the amended assessment notice issued?

A. Yes.

Q. And this is the receipt for payment of the tax as based on the assessment notice?

A. Yes. The allowance is ten cents. We originally claimed five cents. They allowed us 3 1/3 cents.

Q. Now thereafter did you continue to get this allowance unrelated to cost?

A. It has been received ever since on the same basis.

40 Q. Any connection at all with cost?

A. Not at all. We paid nothing for the lease.

Q. And the royalties that are payable under the lease. Have you deducted them?

A. They have been allowed as a deduction in the ascertaining of the income tax payable.

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Q. As a depletion allowance?

A. Yes, but unrelated to cost.

Q. Well would you say as an expense of the business?

A. As an expense of the business.

Q. From a perusal of these rulings in Gordon's book and the ruling with respect of coal companies and the ruling with respect to collieries and the coastal logging area. On the face of them they appear to be unrelated to cost. Have you any observation to make with respect to the allowances and their relation to cost?

A. My opinion is they never have borne any relation to cost even where cost has been paid. For instance, in the two industries which I am acquainted with, that is coal and oil the cost of the coal in situ must vary with every company and yet the allowance is a uniform rate of ten cents a ton. 10

Q. And you got it anyway?

A. Yes, they got exactly the same allowance.

Q. It makes no difference whether there is any cost or no cost?

A. None at all.

Q. It is continued after the allowance has met the amount of the cost?

A. I know of no cases where there has been a cost in which the allowance has reached cost, in the coal industry. 20

Q. And so far as cost of the asset which is being extracted is concerned. If there were no Section 5A in the Act at all and the basis on which you make your return for the companies what would you say as to whether cost would be deductible?

A. In the case of Mohawk Bituminous Mines where there was no ruling we would not be permitted to claim it, except where it had been paid to Mr. Little.

Q. And you have had experience with oil companies?

A. Yes.

Q. And have they the right to claim? 30

A. Yes.

Q. And under Section 5A in the case of oil companies has there been a ruling by the Department as to the amount of the existing allowance that is granted?

A. There have been a number of rulings in connection with oil companies.

Q. Have they been in effect for long?

A. Ever since the oil industry commenced.

Q. And are those allowances related in any way to cost? 40

A. No.

Q. What has been the rate of the allowance under Section 5A with respect to the operation of oil companies?

A. So far as my memory assists me it was ten per cent. of the revenue. That was changed quite recently to a varying rate which varies from five to fifteen per cent.

Q. In the fiscal period of 1941 was it not thirty-three per cent.?

A. I am speaking of the Provincial charge. In the Income Tax Department it is now 33 1/3 per cent. of the net income from the wells.

Q. And before it was 33 1/3 what do you think it was?

A. I think it was twenty-five per cent.

Q. I understood it was twenty?

A. You may be quite right.

Q. Has an allowance of that kind been in effect for very long?

A. For many years. I am not sure of the rate, but an allowance of that type has been in effect.

10 Q. Prior to 1941?

A. Yes.

Q. For how long?

A. As far as I can remember.

Q. Related to cost in any way?

A. No, not at all.

Q. A percentage of the net profit?

A. Yes.

Q. Is that practice under Section 5 A commonly known?

A. It is known to all the accountants engaged in that industry.

20 Q. Is it only followed by the oil companies?

A. It is followed by all the companies with which I am familiar.

Q. Besides the deduction of a portion of the net income the rulings published in Gordon appear to indicate that there is a further allowance with respect to dividends?

A. Yes, of twenty per cent.

Q. And so far as the oil companies are concerned you have gained your knowledge and experience in the practice of your profession in Calgary?

A. I have.

Q. In dealing with the affairs of the oil companies?

30 A. Yes.

Q. Do you know of what kind of a title or right with respect of oil these companies that you aided, have? Have they a fee simple? Are they the owners in fee simple or have they leases?

A. All the companies I have had contact with have leases.

Q. From whom?

A. Usually from lessors who acquired the original lease from the Crown and then assigned to my companies.

Q. And your clients would be the lessees by virtue of the assignment?

A. That is the position.

40 Q. And do some of these oil companies operate under a licence from the Dominion?

A. Yes.

Q. And some from the Province subsequent to the transfer of the resources?

A. Yes.

Q. And then they were issued by the Crown in the right of the Province?

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A. Yes.

Q. And do these get the allowance of 33½ per cent.?

A. Yes.

Q. Unrelated to costs?

A. Yes.

Q. Do they get their cost as an addition to operating expense?

A. For operating expense.

Q. Including costs, if any?

A. Including costs.

Q. The operation of Mohawk Bituminous—how did you charge up 10 royalties in your financial statements in the income tax returns?

A. As royalties in the profit and loss account—as an expense of the annual operations.

Q. And how are royalties dealt with in the return of oil companies?

A. In exactly the same way.

Q. And has that practice as to setting up and dealing with royalties in that fashion, has that been accepted by the Department of National Revenue?

A. Without exception.

Q. Is that practice general or otherwise?

A. I think it is quite general.

20

Cross-Ex-
amination.

CROSS-EXAMINATION BY MR. McENTYRE

Q. In the coal lands that the Mohawk Bituminous Company come under did they pay anything for the lands?

A. Originally—yes.

Q. And with respect to the lease which you took from Mr. Little do you know whether Mr. Little bought those coal lands and paid a cash payment for them?

A. Yes I do, not directly, but only because Mr. Little told me he did.

Q. With respect to the coal lands when you bought them. Were you 30 able to tell with any kind of accuracy how much coal was there?

A. No. The reason for that being that is a statement which is not generally applicable to the coal industry. It is usually possible to determine with some degree of accuracy how much coal you have but due to the geological strata in that district it was impossible to say how much coal might be extracted in that area. It was very badly folded.

Q. As you mined the coal you realized there was less coal in the ground and it was actually being exhausted?

A. Yes.

Q. And with respect to the coal mine that you owned I suppose on 40 your books you made some allowance for that?

A. No.

Q. Did you treat the coal mine that you owned as a capital asset?

A. Yes.

Q. And you realized that gradually as you took the coal out of the ground that that capital asset would become less in value?

A. That is quite true.

Q. In determining your profit for the year did you take into consideration that diminution in value?

A. No, we had no profit in the earlier years until we took that lease.

Q. In the determination of your loss did you take that into consideration?

A. No.

10 Q. With respect to the oil wells of which you have some knowledge is there any way of telling how much oil will be taken out of any particular well?

A. No.

Q. The allowance which you claim with respect to coal and which has been allowed by the Department is based on what measure?

A. Ten cents per ton.

Q. The measure is the number of tons taken out?

A. The number of tons extracted annually.

Q. And with respect to oil wells what is the measure of the allowance?

20 A. The net income.

Q. Is it a percentage of the profit?

A. A percentage of the profits.

Q. Have you any reason to give why the measure should be different in the coal industry to the oil industry?

A. No.

Q. In the oil industry in addition to the 33 1/3 per cent. of the profit which is allowed for depletion are there any other allowances made?

A. Yes, for depreciation.

Q. And any other besides depreciation?

30 A. Provincial taxation.

Q. Do you know whether there is an allowance for pre-production costs?

A. No, I have had no experience with that.

Q. In the oil industry I understand it is very expensive to drill a well?

A. It is.

Q. About how much would it cost?

A. It varies very considerably. I have seen wells that cost from \$150,000 to \$500,000.

40 Q. And before it is completed is there any way of knowing whether there will be oil?

A. No, not with any degree of absolute certainty.

Q. How long would it take to drill a well?

A. That also varies. I know one well now drilling which has been drilling to my knowledge for ten years.

Q. From your experience, on an average, with the 33 1/3 per cent. profit which is allowed to an oil company, would it be sufficient to recover to them the cost of the well?

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A. It would depend upon the production that was obtained. If it was a very small well it would never pay the original cost.

Q. As an accountant what is the practice in your profession with respect to depletion and depreciation?

A. Would you separate the two and allow me to answer them one by one, because I do not think they should be combined in the same answer?

Q. Well tell us about depreciation, first.

MR. SMITH: I do not want to interfere with my friend except to say this—that there have been full books and many of them on depreciation and also exhaustion. But I do not want to interfere. I suppose a man may ask for a month or two or a week. I do not know what my friend wishes. 10

THE COURT: I suppose he wants to know the difference between depreciation and depletion.

A. Well depreciation. The allowance by the Department is not an allowance for depreciation as such but as an expense of earning income. There is an essential difference between those two. You may not be entitled to depreciation on certain assets which are not earning the income. Your depreciation as allowed by the Department is an expense of earning income.

Q. MR. McENTYRE: I am more interested in the accountant's view as to the report you would present to the shareholders or the proprietors? 20

A. In the great majority of instances the allowance for depreciation shown in the taxpayers' books is shown in accordance with the allowances the Department make.

Q. Or would you say the Department followed the allowances set up in the taxpayers' books?

A. Not in every case—no.

Q. I understand the accounting system came into being before the income tax?

A. The Department on occasion will set up sustained depreciation where it is not recorded at all on the books of the taxpayer. 30

Q. THE COURT: I suppose the reason for that is that in regard to certain things the Department fixes an annual depreciation rate which the taxpayer claims whether in fact he is entitled to it or not?

A. The case in which the Department sets it up is the case in which he sustained the loss.

At 11:30 Court adjourns for ten minutes.

At 11:45 Court resumes.

MR. McENTYRE:—

Q. Apart from income tax as a matter of accounting practice do you think that a depreciation reserve should be set up with respect to capital physical assets in arriving at the annual profit? 40

A. Yes.

Q. What would be the basis of the annual amount set off as a reserve for depreciation?

A. The estimated life of the asset less salvage value. It should be apportioned over the annual life.

Q. So you would divide some amount by the number of years that that asset might be expected to exist. What would be the amount that you would apportion over those years?

A. You would divide that final value by the number of years, that is
 10 the original cost less the salvage over the number of years which you might anticipate the asset might usefully serve. There is another factor and that is the probability of obsolescence, which you would probably include under the same heading.

Q. And with respect to depletion what would be the basis on which you would compute?

MR. SMITH: My friend's question seems to assume that the witness has already given an answer with respect to depletion. He has given no answer to that.

THE COURT: Well he has described how he would allow for depre-
 20 ciation.

MR. SMITH: But in the case of depreciation he preceded that with what is proper accounting and good business. Now he seems to assume he has given a similar answer with respect to depletion, which he has not.

THE COURT: Well, state the question again.

Q. MR. McENTYRE: In arriving at the profits of the company apart from income tax and in accordance with good accounting practice do you think that a reserve should be set up for depletion with respect to assets which are suffering exhaustion?

A. Yes.

30 Q. And in setting up this reserve in the annual profit statement what would be the basis for arriving at the amount which should be set up?

A. It would be necessary to have some authoritative statement as to the quantity of that asset which might be produced—which might be expected to produce and to apportion that over the expected life of production. I would not be competent to make an estimate as an accountant.

Q. First of all you would estimate the quantity of the asset suffering exhaustion?

A. Yes.

40 Q. And secondly you would estimate the duration of time over which this exhaustion would go on?

A. Yes.

Q. THE COURT: Would you do that or take into consideration the amount extracted that year?

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A. I think it would be better to follow the method—I was going to qualify my remark that in the earlier years it would be necessary to take a larger percentage because in the declining years it might not cover operating costs.

Q. I take it your answer means this—you would require, first to know as closely as you could the physical volume of the asset?

A. Yes.

Q. And then you might take into consideration the length of time—the number of years—which that asset would last if the extraction were to proceed in a regular way; or you might take the amount extracted in any one year? 10

A. I would not take the amount extracted in any one year and base the whole depletion allowance on the extraction for that year, for the reason I have mentioned. But in the latter years with declining production—I am thinking of oil production—it would not be sufficient and therefore a heavier load must be applied to the earlier years.

Q. MR. McENTYRE: Well there must be a figure in dollars and cents which would be your basis?

A. Yes.

Q. What would that figure be? 20

A. Well I do not know. It would vary in each individual case.

THE COURT: Vary with what?

A. With the annual amount which might be expected to be produced and the relationship which it bore to the total volume which you expect would be taken from that particular production.

Q. What amount would you start with—that is the total amount?

A. Well I would obtain the opinion of what in my science would be the opinion of a competent expert and that would be based on original pressure and original production.

Q. MR. McENTYRE: In the case of the coal mine which the Mohawk Bituminous bought. In the earlier years do you think the cost of that would be a fair basis? 30

A. The apportioned cost on the tonnage extracted—yes.

Q. Then the purpose of setting up depletion is to cover over a period of years the cost originally put into it?

A. That would be a normal purpose of depletion. That is not the purpose of depletion as I understand it under tax regulations.

Q. We are talking of general accounting principles?

A. Yes, we are talking from sound accounting practice and not from the Income Tax Act. 40

Q. You have taken an active interest in the coal industry and in the oil industry for a number of years. Do you remember any discussion on behalf of those industries with the Income Tax authorities for the purpose of arriving at an allowance for depletion?

A. No, I cannot remember any discussion direct that I have had with them.

RE-EXAMINATION BY MR. SMITH

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ination.

- Q. Depreciation is a very involved subject, isn't it?
A. Yes.
- Q. For instance there are varying theories as to how the write-off should take place?
A. There are. There are many methods.
- Q. There is what is known as the straight line method?
A. Yes.
- Q. And the sinking fund method?
10 A. Yes.
- Q. And they often have an effect on the profit and loss statement each year?
A. Yes.
- Q. And are there some accountants favourable to the straight line method?
A. Yes. That is the method generally adopted.
- Q. And some favour the sinking fund method?
A. Well not in my experience.
- Q. And you were answering certain questions with relation to the
20 setting up of a depletion reserve and there I take it that you were talking about the income for business purposes and not for income tax purposes?
A. My replies were on what sound accounting practice should be.
- Q. That is if from a business point of view a business man wants to know what his sound financial position is?
A. Yes.
- Q. But for income tax purposes and your experience with respect to extractive industries and with respect to oil wells what have you to say as to how cost of depletion practice is dealt with?
A. It is now the custom to accept the ruling of the Department. The
30 original costs are entirely ignored and they set up only the allowances which the Department permit.
- Q. That has no relation to cost?
A. Not at all.
- Q. And Mr. McEntyre asked you a question and you answered—if the oil well was a small well he would never get back his depletion costs?
A. No—that is true.
- Q. Well suppose it is a large well and profitable and continues to produce for a long time would he get more than his cost?
A. Well that is to be expected but I have had no experience myself.
- 40 Q. The allowance is in no way related or tied up to cost?
A. No.

No. 20

In the
Exchequer
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Canada

Appellant's
Evidence

No. 20
John A.
McDougall
Examina-
tion.

EVIDENCE OF JOHN A. MCDOUGALL, being called as a witness on behalf of the appellant and having been duly sworn was examined by Mr. Smith and testified:

MR. SMITH: This is related to the evidence Mr. Richardson gave. I am tendering certified copies of the certificates of title to the coal lands leased by Little to Mohawk Bituminous Mines Limited. They are certified copies from the Land Titles Office. My friend accepts them as being properly proven. There are three of them.

**Certified copy Duplicate Certificate of Title
Joseph Little; West half 22; west half of
west half 27-7-3, W. 5th; Southwest
Quarter 28, marked Exhibit 25.** 10

**Certified copy Duplicate Certificate of Title
Joseph Little; All section 33-7-3, W. 5th,
marked Exhibit 26.**

**Certified copy Duplicate Certificate of Title
Joseph Little; Northeast Quarter 21; East
half 28; Northwest Quarter 28-7-3, W. 5th,
marked Exhibit 27.** 20

MR. SMITH: They are titles evidencing that the fee simple to the lands is owned by Little the Lessor.

(Examination of John A. McDougall):

Q. MR. SMITH: You are engaged in the lumber business in Alberta?

A. Yes, sir.

Q. Your principal company is Etter McDougall Sawmills?

A. Yes.

Q. And you have some associated companies?

A. Yes.

Q. Have you had much experience in the lumber business? 30

A. About 30 years.

Q. In the Province of British Columbia?

A. British Columbia and Alberta, both.

Q. I think in your case your father was in the business before you were, was he not?

A. Yes.

Q. And were you more or less brought up in lumber camps yourself?

A. Yes.

Q. From the time you were a boy?

A. Yes.

Q. And you conduct operations in Alberta?

A. Yes, at Winfield and Brule. 40

Q. The Winfield operations are approximately in the same district as the Fraser Company?

A. Yes.

Q. Some 85 miles from Edmonton?

A. Yes.

Q. And the Brule operations are on the main line somewhat east of Jasper Park?

A. Yes.

10 Q. In your experience what have you to say as to whether or not the lumbering business is or is not a hazardous business?

A. I would say it is very hazardous.

Q. What are the chief physical hazards the business has to meet?

A. Chiefly wind and fire.

Q. Any additional physical hazards?

A. Well insects. But the ordinary operator in this Province is not very much concerned with them. I understand at Banff, though, they are having quite an insect plague there.

Q. And are there insects in existence which damage spruce timber?

A. Well I haven't run across them, but there are.

20 Q. How serious are those hazards—the fire and the wind?

A. Well the fire can clean you out of hand.

Q. Are you insured against fire for standing timber?

A. No.

Q. Is there insurance in this Province against fire in standing timber?

A. I do not think it is possible to get any in this Province. I have never heard of it.

Q. You have had experience with trying to measure the amount of timber on lands through cruising?

A. Yes, some experience.

30 Q. Have you cruised yourself on occasions?

A. Well I have been around crews.

Q. There are professional cruisers?

A. Yes.

Q. Do you engage professional cruisers when you want a cruise made?

A. Yes.

Q. How exactly can a holder have the timber measured, by cruising or any other way?

A. Not exactly. It is just a good guess.

40 Q. Does your experience bear that statement out?

A. Yes, it does.

Q. What does the accuracy of the cruise depend on?

A. Chiefly the man's judgment, which can vary.

Q. And there are different methods of cruising—as to how much land he has to cover and so on?

A. Well different percentages.

Q. Well will you describe what the percentages are?

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McDougall
Examina-
tion.*

continued.

A. A ten per cent. cruise is about the closest you can get. That is, you go through ten times; twenty per cent. five times and fifty per cent. you go through twice.

Q. What does a cruiser do? Does he count every tree and measure it?

A. No, he does not measure it. He estimates the size and they have a table.

Q. Does he count every tree?

A. No. As he goes through he will take a strip and count the trees on each side and a man goes ahead and will give him the direction with a chain between them, to get the right distance.

Q. And what happens to your cruise if wind or fire affects the land after the cruise is made?

A. If you buy private timber it is your loss.

Q. And the amount of standing timber left is lessened by that amount, of course?

A. Yes.

Q. And when you put up camps and cut out blocks of timber does it make it susceptible to fire and wind?

A. Of course when you cut down it makes it more susceptible to wind, while the roads make it more susceptible to fire—in work going on.

Q. How did you acquire the land at Winfield?

A. It was originally a Dominion lease and we bought it from Macdonald in Ottawa—a seed company, I believe.

Q. Was there a cruise on that timber?

A. Yes, I believe possibly around 1915 they had it cruised and estimated around 90,000,000 to 100,000,000.

Q. And you bought it when?

A. We bought it in 1933.

Q. And did you have it cruised then?

A. Yes.

Q. And what did your cruise show?

A. 60,000,000.

Q. And how do you account for the difference in the two cruises?

A. There was very little fire. I think the wind had blown down three or four sections and the timber had deteriorated.

Q. No cutting?

A. No cutting.

Q. And variation in the methods of the cruisers or the accuracy of the cruisers?

A. Yes.

Q. Is any cruise accurate within a reasonable percentage at all?

A. Not very close. It depends a lot on who is hiring the cruiser.

Q. You mean whether a seller or a buyer?

A. Yes.

Q. If it is a seller who is anxious to dispose of his timber sometimes there is a tendency for the cruisers to build it up for his employer?

10

20

30

40

A. Yes.

Q. And in the case of a buyer, what?

A. Well it is the other way around.

Q. But in the case of a careful honest cruiser can you get it very accurately?

A. I don't think you can, not very accurately.

Q. And then there is the case where it is susceptible to fire and wind?

A. Yes.

Q. And is the damage from fire extensive?

10 A. Well a fire can clean you out in three hours.

Q. And can you use it after the fire?

A. Not unless you cut it immediately.

Q. And what about the wind?

A. Well sometimes it blows a whole tree over, and it is costly to log.

Q. Why is it costly to log?

A. Well the trees get interlocked.

Q. That is what is called a windfall?

A. Yes.

Q. And how high would the windfall be of these interlocked trees?

20 A. I have seen them down in that district ten feet high.

Q. You have got to be a monkey almost to climb over it?

A. Yes.

Q. Coming back to this limit of yours at Winfield. Have you ever had a fire in the timber limit out there?

A. Yes, in 1938 I think it was. We had been fighting the fire all day and the sun went down and the wind changed and inside of half an hour it went practically through half the berth that was left.

Q. I think you said the cruise showed 60,000,000 feet and your cruise 90,000,000. How much did you lose?

30 A. Well we put in sawyers and salvaged about 18,000,000 feet. And there was a lot of loss to the salvaged stuff of course.

Q. In addition to the other?

A. Yes.

Q. And you have cut certain timber off this berth at Winfield, have you?

A. It is all cleaned off now.

Q. You spoke of an original cruise. You cruised at 60,000,000 and 10,000,000 or 12,000,000 or 15,000,000 was disposed of by fire. How much have you got off that limit?

40 A. Roughly I would say around 40,000,000 feet—between 40,000,000 and 50,000,000 feet. I do not really remember.

Q. You certainly did not get 90,000,000?

A. Nor 60,000,000.

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John A.
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continued.

CROSS-EXAMINATION BY MR. AUXIER

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No. 20

John A.
McDougall
Cross-Ex-
amination.

- Q. On that particular limit I presume you claimed in your tax returns a certain amount to recover your costs?
- A. The costs of operating.
- Q. Your original costs?
- A. Of buying the timber?
- Q. Yes.
- A. No, no.
- Q. Didn't you make any claim for depreciation or stumpage?
- A. Well stumpage is the cost of operating. 10
- Q. But what comes into that?
- A. Into what?
- Q. Into stumpage?
- A. There are two ways of classifying stumpage. There is stumpage and royalty. When you buy timber from Alberta it is combined. When you buy private timber stumpage is one thing and royalty is another.
- Q. Did you make a lump sum payment on this particular berth?
- A. No. We agreed to pay so much—
- Q. And your costs were covered—when the fire destroyed the balance of the timber you had nothing further to pay? 20
- A. Yes, we had agreed to pay \$60,000.
- Q. Measured?
- A. At a dollar per thousand when it was taken off.
- Q. And had you completed it when you had this fire?
- A. No, I remember there was a balance owing.
- Q. And you did subsequently pay it?
- A. Yes.
- Q. And did you pay it out of the timber you got on the berth?
- A. Yes.
- Q. And it was allowed you as an expense? 30
- A. Yes.
- Q. This was an Alberta licence?
- A. An old Dominion licence.
- Q. And on these licence limits—you are familiar with the licence limits I am sure. Under the Provincial regulations of Alberta where you get wind and fire damage your stumpage of royalty stops with the destruction of the timber whether by fire or wind?
- A. Yes.
- Q. And the Province bears that loss? 40
- A. Yes.
- Q. Is it possible for you to insure your mills?
- A. You can insure your mills.
- Q. And your camps?
- A. It is possible but they have to be pretty well protected.
- Q. But insurance can be obtained?

- A. It can be—yes.
 Q. Do you say that these cruisers are not particularly accurate?
 A. No.
 Q. They give you a general idea of what timber is on the berth?
 A. That is right.
 Q. Well by going through the timber you could arrive—
 A. Well pretty close.
 Q. And if you want to go to the pains it can be measured after?
 A. Oh yes, it could be.
 10 Q. There is some distinction between that and an oil well where there
 is not any possible way of finding out exactly what is under the ground?
 A. I don't know much about an oil well.

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 McDougall
 Cross-Ex-
 amination.

continued.

RE-EXAMINATION BY MR. SMITH

Re-Exam-
 ination.

- Q. You said that on this limit on which you had agreed to pay \$60,000
 —one dollar a thousand as you cut?
 A. Yes.
 Q. You lost by that fire?
 A. Yes.
 20 THE COURT: Was the amount a minimum?
 A. No, it was a fixed amount.
 Q. MR. SMITH: They bought this timber from a man in Ottawa and
 had agreed to pay him \$60,000 to be paid at the rate of one dollar per thous-
 and as cut and in addition they undertook to pay the Province the royalty?
 A. Yes.
 Q. So you had to pay the \$60,000 to Macdonald in Ottawa, even though
 it was all burned?
 A. Yes.
 Q. Now Mr. Auxier was talking to you about insurance on mills and
 buildings. Do you usually insure camp buildings?
 30 A. Well it depends. Some people might. We don't as a rule.
 Q. Suppose you have a mill in the centre of timber and you have roads
 and bridges and suppose the timber burns up but the mill does not burn up,
 is the mill of much value?
 A. Just salvage value.
 Q. And are the roads of any value?
 A. No.
 Q. And if you do not have any timber to operate with in that vicinity
 you cannot write off the cost of the mill by future profits?
 A. No.
 40 Q. Because you have no future profits?
 A. No.

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continued.

Q. From a practical point of view. Mr. Auxier suggested to you that you go through timber and count every tree. Have you ever in your life-time heard of timber being cruised that way?

A. No.

Q. From a practical point of view is it practical to do it in the way Mr. Auxier suggested?

A. I never heard of it being done.

Q. Would it be costly?

A. Oh terribly.

Q. From an economic point of view is it possible? 10

A. No.

Q. What is the practice followed in this Province? The cruising practices you have described?

A. Yes.

Q. And not the kind Mr. Auxier suggested?

A. No.

Q. That is just his own invention, is it?

A. I would imagine so.

At 12:25 Court adjourns to 2:00 p.m.

At 2:00 p.m. Court resumes. 20

No. 21

No. 21
Francis
George
Winspear
Examina-
tion.

EVIDENCE OF FRANCIS GEORGE WINSPEAR, being called as a witness on behalf of the appellant and having been duly sworn was examined by Mr. Smith and testified:

Q. You are a member of the Institute of Chartered Accountants of Alberta?

A. Yes.

Q. How long have you been practising your profession?

A. Since 1930.

Q. And you are a member of the firm of Winspear, Hamilton and 30 Company, Edmonton?

A. Yes.

Q. You have also been associated with the Accounting Department in the Faculty of Commerce at the University?

A. Yes.

Q. For how long?

A. I am presently Professor of Commerce and have been associated with the Faculty since 1931.

Q. You have lectured in the University during that period?

A. Yes. 40

Q. And you are still practising your profession in addition?

- A. Yes—right.
- Q. And you have been carrying on a general accounting business in Edmonton?
- A. Edmonton, and Vancouver—we have a branch there.
- Q. And I suppose in the practice of your profession you and your firm prepare many income tax returns?
- A. Yes, we do.
- Q. And have for years?
- A. Yes.
- 10 Q. That is an important function that you do perform?
- A. Yes.
- Q. Do you know Mr. Swift over here?
- A. Yes, I have met him.
- Q. Who is he?
- A. I know he was concerned in negotiations we had in Ottawa with respect to this matter.
- Q. When this matter was launched a year ago—discussing extractive industries?
- A. Yes. I rather got the impression that was his particular field.
- 20 Q. But he is employed by the Department at Ottawa and not in Edmonton?
- A. At Ottawa—yes.
- Q. And he is sitting here?
- A. Yes.
- Q. You have been present in Court throughout the hearing of this appeal?
- A. Yes, I have.
- Q. And you have heard a reference made to the rulings with respect to exhaustion allowances to extractive industries as set forth in pages 10 to 15 in Gordon's appendix to the Digest of Income Tax Cases?
- 30 A. Yes.
- Q. Were you familiar with those rulings before they were discussed here?
- A. Yes.
- Q. Have you been familiar with them for some time?
- A. I have.
- Q. To what extent are those rulings known amongst the accounting profession?
- A. I would say they are generally known.
- 40 Q. And have been?
- A. And have been.
- Q. For how long?
- A. Well I would think pretty well as long as they have been in effect.
- Q. And during the period of your practice as a chartered accountant since 1930 have you been familiar with the rulings relating to extractive industries?

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continued.

A. Yes, as they were in effect from time to time.

Q. Nothing secret about them?

A. No.

Q. When you come to prepare income tax returns for your clients how do you get the information on which you base the ascertainment for income tax purposes?

A. The first stage of course is to get the data from the books of the client. The next stage is to refer to the ascertainment of income as set out in the Wartime Income Tax Act and the regulations and rulings that have been made under the Act. 10

Q. And you get rulings with respect to oil and coal companies and things of that kind. They are available. From whom do you get them?

A. Yes—the C.C.H. Tax Service and the De Boo Tax Service and sometimes the chartered accountants themselves publish a tax service.

Q. And there is information got from the Department at Ottawa?

A. Yes.

Q. From Mr. Elliott's assistants?

A. Yes.

Q. Is it any assistance to a chartered accountant to have these rulings available insofar as they govern extractive type of business? 20

A. Oh, yes. They are books that are used more than any others in our office.

Q. Would it be difficult to prepare the income tax return of a coal company if you were not familiar with the ruling with regard to exhaustion?

A. Well you have to refer to the rulings and if you have not committed it to memory you have to refer to it again.

Q. And if it was not made known to the public how would you get along?

A. You would have to go and interview tax officials on every single return that came up. 30

Q. And if you went to a tax official with respect to a coal mine—well, you would not have to go there because it is available?

A. Yes.

Q. And if someone did not know it and went to the Tax Department what information would they get?

A. Well you would go with your particular case and say "How much can I claim under this particular section?" and they would tell you. They very often tell you what is general practice to taxpayers in a similar line of business. 40

Q. And whenever a case for exhaustion has arisen has a ruling that would be applicable to that industry been applied for instance to a coal mine?

A. I do not get that.

Q. In your practice when you are dealing with an extractive industry does that ruling apply?

A. Oh, yes, very generally. In fact, frankly I know of no exceptions.

Q. Would you tell me from your point of view as a chartered accountant and as Professor of Commerce what is the difference between income of a company and an individual point of view other than that of income tax and income for the purposes of The Income War Tax Act?

A. Well in ascertaining income for income tax purposes the accountant is concerned of course with making sure that his client is benefitting from the general incidents of the tax on an equitable basis. If it were not for income tax purposes he would only be concerned with ascertaining income for the purpose of his particular client and having regard to his own particular opinions. Mr. Stikeman in a lecture in 1943 says that income for tax purposes is an artificial concept and has no relationship to the usual accounting.

Q. Well is there anything for the benefit of a company for the purpose of writing off the cost of a building?

A. No, if it is not contrary to the ruling of the books.

Q. Well for his own purpose after writing it off is there anything to stop him?

A. For the purpose of ascertaining his income on that basis there is nothing to stop him.

Q. THE COURT: But you would not allow it?

A. Well it depends on the circumstances.

Q. Have you ever done it?

A. Oh, yes, I have seen circumstances under which in my view it would be quite proper to write off a building in one year.

Q. \$9,000.00, say?

A. Well it would depend. If there is one year's operations and one year's income and the expenditure is for the purpose of earning the income in that year it would be a proper depreciation for that year.

Q. Well you could visualize a case of one year?

A. Well circumstances have arisen like that quite a lot during the war.

Q. MR. SMITH: In connection with what type of business?

A. War contracts and that of business.

Q. The function has been performed by that building?

A. Yes. There would be the physical existence of the building but it would no longer have an earning power.

Q. In auditing coal companies do you know whether the exhaustion allowance referred to of ten cents a ton that is referred to in the memorandum—whether that has been made to companies irrespective of the cost of the coal and irrespective of the type of ownership of the land?

A. Yes, I do know it has been allowed irrespective of the cost and irrespective of the type of ownership.

Q. In your practice have you had much to do with the lumber industry in this Province?

A. Yes, I have. We audit eight lumber companies in this Province, three in the interior of British Columbia and three at the Coast.

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continued.

Q. Have you any idea of the combined production of those companies?

A. No, but it would be well over fifty per cent. of the production in Alberta.

Q. What is the production in Alberta?

A. It runs between 300,000,000 and 400,000,000 feet a year.

Q. And have you been doing audit work for lumber companies for some years?

A. Yes, since 1930.

Q. Have you been intimately associated with the lumber industry?

A. Yes, I have acted as consultant for the Alberta Forest Products Associations, in numerous moves. 10

Q. What have you to say as to whether the lumber industry in Alberta is or is not a hazardous industry?

A. In my view it is a very hazardous industry.

Q. Would you tell us why in your view it is a hazardous industry?

A. Well in the first place there are the physical hazards which have already been referred to in evidence—hazards of fire—hazards of pests—hazards of tree disease—hazards of wind and other hazards of the elements. I have known frost and drought also to affect lumber production. And in addition to that there are the economic hazards. Incidentally the Department of Lands and Mines of this Province—the Forestry Branch—supplied me with figures from the years 1932 to 1942. The total lumber cut was one billion five hundred and fifty million feet; the fire loss was two billion four hundred and thirteen million feet. 20

Q. More timber burned than was cut?

A. Yes. That is from their aspect alone and actually throughout Canada the Dominion Year Book indicates that the loss from other physical causes exceeds the loss from fire. I do not think that is generally true in this Province.

Q. Fire is the greatest hazard here?

30

A. Yes.

Q. At least from the experience to date?

A. Yes.

Q. Does that describe your views about the physical hazards or do you wish to add to that?

A. No, except to point out that these hazards do exist.

Q. Are there any hazards which you can insure against?

A. No, you cannot insure standing timber. You cannot in an economic sense. I have never heard of it being done.

Q. From an economic point of view do you wish to add anything?

40

A. Well lumbering is definitely a feast or famine business. There is variation in the selling prices. It is affected by tariffs, freight rates, labour conditions and wage costs. I have known instances in which an operation has become impracticable over night due to a variation in freight tariffs. The variation in the selling price of lumber from 1929 to 1940—from \$14.00 in 1933 to \$24.00 in 1939 according to the Canada Year Book, might be

mentioned. It is up to \$40.00 in Alberta at the present time. That is the average selling price.

Q. For instance, at the present time is there any market in the United States for Alberta lumber?

A. Yes.

Q. Was that market open before the war?

A. For a considerable period before the war it was a very limited market because of tariffs and freight conditions.

Q. Is there any assurance that the market will continue?

10 A. No, there is no assurance.

Q. Speaking of the economic hazards. How many times a year does a lumber operator in this Province cut logs? Is it a one year operation or a shorter period?

A. Ordinarily he goes in to do his logging once a year.

Q. When does he commence it, usually?

A. In the Winter; he makes his plans in the Fall. Most logging is done in the Winter.

Q. Why?

20 A. Well haulage costs tend to be less when there is snow on the ground and muskeg conditions very often apply, and that is taken care of in the winter months.

Q. Logging is commenced in the Fall and Winter?

A. Plans are made in the Fall to commence when freeze-up comes in. And ordinarily logs are hauled to the mill and they cut all summer or saw all summer. And then of course unless artificial drying methods are used, and they are exceptional, then lumber has to stand a considerable time before it is seasoned and dry.

Q. How long does it take to cut standing timber into lumber and market?

30 A. At least a year.

Q. And are there any hazardous conditions during that time?

A. Yes, during that time—fluctuations in market price are of course going to have a tremendous effect. If you have an operation of five million feet and if there is a variation in the selling price of \$10.00 the operator has a \$50,000.00 loss from that cause alone.

Q. Suppose an operator goes into an operation in the Fall and fixes his cut. Does he have to make his plans according to that?

A. Well yes he has to make his plans for the cut.

Q. Why?

40 A. Well to arrange for his camps and the loads and the roads. Everything is on that basis.

Q. And costs are as they were at the time he continues on that scale?

A. Yes, and in the meantime all sorts of things may have happened.

Q. It is not like a man who buys a grocery store and gets fifty pounds of butter today and sells it tomorrow?

A. No. There is a very slow turn-over in that sense.

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continued.

Q. And coming back now to the physical hazards—fire and wind. I would like you to describe in a general way what happens when a company acquires a tract of timber. How does it proceed to manufacture lumber? What does it do?

A. Well it puts the mill adjacent to the timber—a planing mill and sawmill. It then proceeds to put arterial roads to the timber.

Q. It is generally in a country where there are no roads?

A. Yes.

Q. And if there are creeks and rivers to be crossed?

A. They have to be bridged.

Q. And are the camp buildings and the type of buildings used—are they removeable?

A. Ordinarily they are not removed. Logging camps are ordinarily abandoned.

Q. And bridges the same?

A. Yes.

Q. And what about roads when the operation is through?

A. Well they have no value.

Q. Suppose a lumber company goes into a virgin tract of timber and builds a sawmill and planing mill and constructs the necessary roads and bridges and gets his operation under way. Then suppose his whole tract of timber, owned by him in that area—suppose that it is totally lost by fire. I am speaking of destruction of the timber and not the mill. Suppose the timber is entirely destroyed, of what use is the mill?

A. Well it has a use only to the extent that it has a scrap value and can be moved somewhere else.

Q. And is it expensive to move mills of that type?

A. Yes. Of course there is a lot you cannot move ordinarily. You cannot move foundations. You cannot move foundations to machines, you cannot move roads or bridges, you cannot move installation costs. They have a scrap value only.

Q. Supposing an operator has not any timber in any other area or he cannot get any other timber or has not enough money to enable him to move and make a fresh start. Suppose his timber burned down the first year and his mill is left intact where would he be then?

A. He would be facing a loss to that extent.

Q. What has he lost?

A. He has lost the cost—the difference between the initial cost and the scrap value.

Q. And can he write depreciation of his plans and his buildings off out of future operations?

A. Well I question whether he can write it off against future operations in a new area.

Q. Why?

A. Because it is not necessarily an expense incurred in earning income in that year.

Q. THE COURT: Are the costs of roads and buildings claimed as annual expenses and written off of any one year?

A. Not as a general rule because there is not ordinarily enough income in the first year in which to write them off.

Q. After the company has been operating for some time is it not a fact that the Department allows that company to write off the expenses incurred during that year?

A. Well that is correct insofar as side roads are concerned. But we are considering now the case where a company goes into a new stand and constructs arterial roads and there is not enough income during the first year. And in my experience that is written off against the expected production in that year.

Q. MR. SMITH: That is if it is a road designed to serve a certain area during the life of that operation?

A. Now the secondary roads which are extended year to year—that of course is extended.

Q. That road is only useful for a year?

A. Yes.

Q. Now you have described the operation as if all the timber is lost by fire. Suppose half of it is lost by fire when he has not written off the equipment?

A. Well that is only a question of time. He may well be in a position that the income from the remaining timber is not sufficient to bear the costs.

Q. The depreciation?

A. Yes.

Q. And in that event what happens if he has not been able to depreciate his road and camps and buildings? What happens to his investment in the roads and buildings?

A. Well they are lost. What of course happens is that if he loses half his timber he endeavours to amortize those costs for the remaining half but that would be reflected in an operating loss because the income from the remaining timber is not sufficient to recover.

Q. And these hazards. Do all businesses have hazards as serious as the lumber business? I am speaking of physical as well as economic hazards.

A. Well it is difficult to compare hazards of course. All businesses have their peculiar hazards. I do say in my experience and opinion lumber and timber is a very very hazardous business and from a purely physical point of view it would be difficult for me to conceive of a business which had more.

Q. Do you think coal mining in this Province is a hazardous business?

A. Yes, it is particularly in the type of economic hazards.

Q. Is coal mining going to be more hazardous?

A. Well it is difficult to make comparisons of that type.

Q. What do you say?

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A. Well it varies very much; sometimes it is hazardous and sometimes not. I think any generalizations would be misleading.

Q. Well take the physical and economic risks combined. Is it greater in certain industries?

A. Yes, I think so and I think that is why certain concessions are given in 5A.

Q. THE COURT: Why do you say that?

A. Well the function of the Act is to place taxation equally on all citizens. Now here are certain types of operators who are operating on a different basis than the ordinary business. The ordinary business has per- 10
petuity of life. An extractive industry has a definite limited life and as such is entitled to high returns from that fact alone. And then there are particular and peculiar hazards which are applicable to most extractive industries—the type that we have been discussing—and consequently in considering questions of taxation—it seems to me to be fair and proper to place extractive industries on a different basis, and that is what is ordinarily done with the exception of lumbering.

Q. Well have you anything to support that view?

A. The only thing I have to support is my discussion with officials in Ottawa and elsewhere. 20

Q. MR. SMITH: And your experience?

A. Well I have discussed the situation with Mr. Stikeman and other officials and subsequently with Mr. Stikeman's legal advisers and with Mr. Fraser Elliott and the view they expressed was, amongst others—

MR. AUXIER: I do not want to interfere but I do think that discussions with Departmental officials is going perhaps a little too far.

Q. THE COURT: Probably his answer was given in reply to a question of mine.

These discussions took place during the negotiations of an appeal in connection with this and probably a similar one? 30

A. Yes.

Q. MR. SMITH: From the point of view of economics what do you say as to the justifiableness of granting some special allowance by way of exhaustion to an extractive industry as compared with others. Are there justifications economically?

A. Yes, there are economic justifications. One is the difference in the rate of return which anyone must get on a business with a relatively short life as compared with a more perpetual business. Or you might say as compared to a business with physical hazards compared with one that has only economic hazards. 40

Q. Now coming back to this matter. Say with regard to the permanent industry and the extractive industry. You say there should be a difference in return. Has the shortness of life something to do with it as well as the risk?

A. I think that is expected. As between two gilt-edged investments—one which is a long period of investment or even perpetual investment the short period one will demand a greater interest rate.

Q. Ordinarily is a hazardous investment one in which a larger return can be expected than in a safe and sound industry?

A. Oh yes, because any investment in a hazardous undertaking you take into consideration first, the return on your capital and secondly the risk.

10 Q. Coming back to the difference between an extractive industry and a permanent industry. Supposing a man puts up a building and supposing he can write off the cost of his building for a period of twenty years and he establishes a market and good-will and he writes off say five per cent. per year for a period of twenty years. Does he also write off the cost of maintenance of the plant from year to year as operating cost?

A. Yes.

Q. And at the end of twenty years he has got his plant written down for income tax purposes?

A. Yes.

20 Q. And the machinery the same?

A. Yes.

Q. And he still has the good-will?

A. Yes.

Q. And if he has maintained his plant properly has he still got a workable plant able to do business?

A. Conceivably. Income tax allowance is sometimes written off the plant. Is that what you mean?

A. Yes. You mean at the end of the period of write-off he still has got the ability?

30 A. Yes. Well what is more important he still has the money to invest and continue operations.

Q. Comparing that with the extractive industry what is the difference between the position that man is in at the end of his twenty year term of operation and the extractive industry such as a lumber company which goes into a tract of timber and builds roads and mills and bridges and operates? What happens to him?

A. Well in the first place in actual practice there are not many operations that can look forward to a twenty year life. There are very few tracts of timber in this Province which will guarantee twenty years.

40 Q. Suppose he goes along—and you have described what happens if he has a fire in the meantime. But suppose he gets through the end of his operation and he has not had a fire, what is his position then?

A. If he has operated sufficiently long—the depreciation rates which are allowed, then he is in a position where he has got his money back and his plant and equipment and unless he can get more timber then he has to discontinue business.

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Q. He has his plant, but he has to get more timber and build a new plant somewhere else?

A. Yes.

Q. And what are the experiences in this Province where he gets more timber? Has he to pay more or just the same?

A. Yes, there has been a very definite increase in price not only in this Province but elsewhere.

Q. Is it fair to say the cost would be upwards or downwards?

A. It would be correct to say it would be upwards.

Q. And are his prospects as good as they were at the first if he has to get more timber? 10

A. Well they are not. He has to go further off and his costs are consequently greater.

Q. That is, he gets timber less available and he has to pay more for it?

A. Yes, in a stumpage sense and in an operating sense.

Q. And do these costs have any bearing on what may be a fair and reasonable allowance for exhaustion?

A. They seem to have had some bearing on the allowances for exhaustion which would influence the other extractive industries.

Q. Do you know of any other extractive industry in which the allowance for exhaustion under Section 5A of the Income War Tax Act is in any way related to cost? 20

A. No.

Q. What are they related to?

A. In the case of base metals they are related to income and in the case of gold mines and gas wells, in gravel pits, that is in addition to costs.

Q. And pulp companies?

A. Well I do not audit pulp companies, nor any of the others as far as that goes but with pulp companies it is on the quantity produced.

Q. How much do you consider is considered as a cord? 30

A. I am told 500 feet—two cords to a thousand feet.

Q. Are there any other industries other than these extractive industries, mines, gold mines and oil wells where an allowance for exhaustion is applied for than in 5A? There is no exhaustion allowed except in 5A?

A. No, I do not think so.

Q. Now I suppose all your company clients are holders of Provincial Government timber under Provincial Government regulations?

A. Yes.

Q. And witnesses have described about deposits being made when timber was acquired from the Provincial Government. In your practice and in your view how should that deposit be dealt with insofar as the books of the company and the income tax is concerned? 40

A. Well opinions differ in that respect. We have clients who take the position that the year in which the expenditure is made—if a deposit is made it is only recovered under certain conditions, which are very restrictive and harried with regulations, and they take the position it is for the

purpose of earning the income in the year in which the expenditure is made and they write it off.

Q. And that has been done?

A. Yes, that has been done.

Q. And accepted by the Income Tax Department?

A. Yes. Other clients prefer to set it up in a deposit account and amortize it during the life of the timber. In other words they look upon it as an addition to timber rentals and timber dues.

10 Q. THE COURT: If the conditions are carried out the whole amount is returnable?

A. Yes.

Q. How is it shown then? Is it shown as income?

A. If it has been written off it would be shown as income.

Q. It has been or is what should be done?

A. It should be done. The deposit is ordinarily a deposit on the timber dues and is ordinarily returned to the operator by reducing the dues which he otherwise would have paid.

20 Q. MR. SMITH: I understood that amount remained there intact as a guarantee of due performances of the contract. Mr. Macdonald said they paid the amount which they would have paid and left it intact. But the usual practice is to pay them off against dues?

THE COURT: Has not the deposit got to be maintained?

MR. SMITH: No, my Lord. After the first year of the operations I think you can commence to use it but you do not have to.

Q. The Crown says here that we have no ownership of the timber. You have been auditing lumber companies doing business in this Province for many years. I suppose all of them have been operating on Provincial timber or timber they were allowed to cut under Provincial licence or under a licence originally issued by the Province?

30 A. Yes.

Q. And those are all yearly licences renewable?

A. Yes.

Q. And have you ever heard of any licenses of your clients not being renewed when there was still merchantable timber?

A. No.

Q. Is there security with respect to that timber so far as your clients are concerned?

A. I never heard of such a case.

40 Q. Well inside your practice do you mean? So far as your experience is concerned where men are living up to the terms have you ever heard of any licences being cancelled?

A. No, I have not.

Q. That seems to have been borne out in the Fraser case here because some of the licences have been renewed for twenty years?

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A. Yes. I think they are consistently renewed where there has been continuous operation.

Q. THE COURT: Where there is no default on the part of the licensees?

A. Yes.

Q. MR. SMITH: If you get timber from the Provincial Government is it of use to the person to whom the grant is made. Is it of value to him?

A. Yes, I think so. In fact I do not see how he could operate without it.

Q. In your auditing of the affairs of lumber companies how do you treat timber dues payable to the Government, rental and fireguarding charges, and so on? 10

A. Write off as an expense in the year in which they are paid.

Q. And suppose a lumber company has had to pay something to a private individual to buy a Crown licence from him what do you do about the money he has paid for the licence? How do you deal with it?

A. We look upon that as being an addition to the annual stumpage.

Q. I am speaking of a lump sum being paid at the time of acquisition?

A. We look upon it as a prepayment of stumpage.

Q. What do you do about writing it off?

A. Well we add it to the royalties paid each year to the Crown. 20

Q. THE COURT: You mean a portion of it or do you charge it all back in the year in which it is paid?

A. No. As a rule we amortize it over the life of the timber.

Q. You amortize it as what?

A. As an expense incurred during the operation.

Q. Not as an exhaustion allowance?

A. No, I never heard of it being an exhaustion allowance under Section

5A. Similar charges are incurred of course in other extractive industries.

MR. SMITH: We have in evidence certain rulings of the Department with respect to allowances to pulp companies for exhaustion and the letter of the Minister dated January 4th, 1945, starts out (reading): 30

"This will advise you that the subject of depreciation and depletion for those engaged in the Forest Products Industry has had consideration and you are advised that the determinations made are as follows."

I think this is quite elementary, but I want to prove it.

Q. What is pulp made from?

A. Pulp is made from small timber. They function in pretty well the same way as a logging and lumber concern except instead of sawing timber into lumber it is ground into pulp.

Q. And they have to acquire timber to carry on their operations? 40

A. Yes.

Q. And carry on logging operations?

A. Yes.

Q. And eventually it is taken to a mill somewhere?

A. Yes.

- Q. And what is done with it there?
A. Well I do not audit any pulp companies.
Q. Ever been through paper mills?
A. Yes, I have been through pulp mills.
Q. What happens to a log in a pulp mill?
A. It is ground up into a mass of pulp.
Q. And then taken to a paper mill?
A. Yes.
Q. And instead of being planed and sawn up it is ground up?
10 A. Yes.
Q. Do the pulp companies derive their incomes from timber limits, in your opinion?
A. In my opinion they do.
Q. Now you said you had acted as consultant to The Forest Products Association of this Province. D. R. Fraser Company is a member of that association?
A. Yes.
Q. And you have had to do only with the affairs of this company by its being a member of that association?
20 A. Yes.
Q. You are not the auditor of this company?
A. No.
Q. And as a member of The Forest Products Association where allowance for exhaustion is claimed for the year 1941 and subsequent years?
A. Yes.
Q. Would you have anything to do with discussing or arriving at the amount for exhaustion allowance?
A. Yes, I advised them to claim that figure—\$1.40.
Q. Taking into account your knowledge and experience as an account-
30 ant, as an auditor for years back of these various lumber companies, as consultant to The Alberta Forest Products Association, is that claim of \$1.40 a thousand in your opinion fair, just and reasonable?
A. In the instance of taxation, yes. Of course it was subsequently allowed elsewhere under similar conditions or approximately that.
- MR. AUXIER: I did not hear that.
A. It seemed to me to be fair and reasonable because it was allowed elsewhere under conditions which were somewhat similar.
- Q. MR. SMITH: In the light of conditions under which the lumber industry is operated in this Province—its hazards, physical and otherwise
40 —in your opinion what is a reasonable and proper amount?
A. I would say at least \$1.40 per thousand.
Q. And you have referred to industries elsewhere. That is not the sole ground for arriving at that figure. Or what grounds altogether do you take into account?
A. Well the operators did have the right under 5A, the Minister did not exercise his discretion—that he did not exercise it under these conditions, and that seemed to be a proper figure.

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Q. Taking into account the hazards you have described which in your view expressed here today are economic justification for granting of a special allowance for exhaustion, is that \$1.40 in your opinion fair and reasonable in view of the hazards and risks and the fact that it is an extractive industry?

A. Yes, I would say it was a fair and reasonable allowance having regard to the hazards and extractive nature of the industry.

Q. You are referring to an allowance made elsewhere. What are you referring to?

A. To the allowance given operators west of the Cascades during 1943. 10

MR. AUXIER: This of course is all subject to my objection.

Q. MR. SMITH: Do you relate the \$1.40 to the allowance under that ruling?

A. Well that gives the operators \$1.00 per thousand feet on all logs scaled, during 1943, and a further allowance of \$1.00 a calendar year which is in excess of the saw logs scaled in 1941, and in the case of a new operation a further dollar over sixty per cent. of the saw logs scaled in 1943. So if under these three conditions an operator west of the Cascades produces logs either equal to the 1941 production or is a new operator or produces logs in 1942 to the extent of 75 per cent. less of what can be produced in 1941 he is going to get in effect \$1.40 per thousand. That is to say, accepting these conditions as normal. 20

Q. THE COURT: Is that a wartime measure, or do you know?

MR. SMITH: Mr. Elliott says it is made under Section 5A of the Act.

MR. AUXIER: Of course the discovery will speak for itself as to that.

THE COURT: The question I asked the witness arose out of his statement that under normal conditions that would be the result and I asked whether it was a normal condition or a wartime condition or whether he knew. What is the answer?

A. What I meant to convey is that assuming that an operator in 1943 produces logs up to the extent of the 1941 production or in certain circumstances equal to the 1942 production or if he is a new operator he will get \$1.40. 30

Q. Was that first provided in 1943?

A. The memorandum is dated January 13th, 1944, and is applicable to 1943 production.

Cross-Ex-
amination.

CROSS-EXAMINATION BY MR. AUXIER

Q. I am not very well acquainted with the practice or theory of accountancy and I hope you will bear with me if my phraseology is not always correct. Isn't this a correct statement with respect to your profession—that the general purpose of accountancy, leaving income tax out of 40

the consideration entirely—prior to the Income Tax Act coming into force was not the prime purpose of the accountant to investigate the accounts and to be able to show the owner of the business his true position, whether he was making money or whether he was losing it and if so how much?

A. Yes, I think so.

Q. That is the real function of the accountant?

A. Yes—the existing financial position.

Q. In carrying on this work in the course of time certain situations arose and certain terms were devised. Now depreciation—am I not right in
10 this that because a plant is a wasting asset in a sense, it does deteriorate over years and it becomes obsolete also in certain industries over years—what you attempt to do is to take that cost and spread it over the life of the asset so that in time the asset has ceased to be of any value—the amount paid in the acquisition of that asset will be returned?

A. That is one school of thought—yes. One school of thought would say: “We will attempt in ascertaining the operating income to equalize the cost of the plant over the entire life of the operating income?” Another school of thought says that the operation must be placed in the position that he has a new physical plant; just as it was a body of accountants which
20 maintained that appreciation should be based on depreciation cost. There is another school of thought which maintains that the charge is the difference between the appraisal which takes into consideration the operating power of money. But I think your statement is a fair statement according to one very prominent school of thought in accountancy.

Q. But in this country and the United States accountants use costs as a criterion?

A. They do at the present time, because of the income tax influence.

Q. You say that is to some extent the influence of the income tax?

A. Yes, I think the accounting practice is very wide and varied and
30 very inconsistent since the coming into force of the Income Tax Act.

Q. Well it is a matter of political economy I suppose, and they have been very much influenced?

A. Yes, very largely influenced by the Engineering profession.

Q. Wouldn't it be fair to say in general practice that before The Income Tax Act came into effect in Canada the cost was generally taken as the
40 criterion?

A. I won't go that far. Before The Income Tax came into being there was a great tendency to charge off what seemed to be appropriate. But to make it perfectly clear on your statements what you are doing if you had a profit you wrote off depreciation and if you had not a profit you did not. Now The Income Tax Act tended to interfere with that.

Q. Well it does make a difference. Naturally the shareholders are anxious to show—the company is anxious to show its shareholders in as good a position as possible and similarly they are not anxious to show that position to the Income Tax authorities?

A. Of course our function as accountants is to make sure that all the facts are brought out.

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Q. You do say that that is one very important school of thought in the profession, that accounting should be the base?

A. Yes.

Q. In your lectures in accountancy to the students of the University of Alberta don't you tell them that that is the proper base after explaining the other theories?

A. I would not use the word "proper." I try to draw attention to all the theories.

Q. And in your own practice?

A. My own practice has grown up of course since income tax times. 10
We follow the Income Tax rates and the methods in respect to writing off depreciation.

Q. Now aside from Income Tax. The matter of depletion and exhaustion. Just what do those terms signify?

A. Well I think I ought to point out that this Section 5A does not use the word "depletion" at all.

Q. I would like to know what, in the accounting profession is meant by depletion and exhaustion and I take it the two terms are practically synonymous?

A. No; one is based on usage and the other is slightly different. 20

Q. Well you deplete something or you exhaust it. Isn't it pretty much the same term?

A. No. I want to qualify that.

Q. Well what do the terms mean in the accounting world, apart from any influence that the use of the term in Section 5A may have?

A. Well it is not used.

Q. Well give us the accounting meaning of each term?

A. Of the word "depletion?"

Q. Yes.

A. Well depletion is the using up in value of a wasting asset through 30
operation. Depreciation is an economic condition—of a decline in value of a fixed asset due to wear and tear, the action of the elements and functional and obsolescence.

Q. It is applied to wasting assets?

A. Yes.

Q. And leaving income tax out of the question. At the end of the life of that particular asset you will have recovered the amount of money you paid?

A. Yes, except that I would say that that school of thought which 40
recognizes the necessity of getting a new asset after it is exhausted is considerably more credited in fact with respect to depletion than depreciation. I think there would be some accountants who would recognize the necessity of basing depletion on the replacement value on the replacement necessity of continuous operations.

Q. Well why should there be any difference?

A. Because of the limited life of that asset.

Q. And is that not also the basis of depreciation—the fact of its wearing out?

A. Well as I have already pointed out there is this, generally characteristic of extractive industries—that you tend to use the more valuable asset first and when you try to replace afterwards you are going into higher costs in a capital sense and also an operative sense.

Q. Well isn't that true also with respect to depreciation? Your price level may fluctuate?

A. Oh, yes, either up or down.

10 Q. Isn't it generally considered proper that the consumer of a product which is being manufactured or produced today, that the cost to him should be based on what that article cost to manufacture or produce today—not on what the probable cost of what the same article may be three or four or ten or twenty years hence?

A. Well there is quite a lot to be said pro and con there. The question is what constitutes cost. Does it include the integral part of what something cost you fifteen years ago, or what something may cost you five years hence? It is a difficult question.

20 Q. If one of your clients purchased an asset, whether it is a wasting asset or not, for \$1,000.00 and sells that asset for \$2,000.00 that is in your parlance a capital gain providing he is not in the business of buying and selling this?

A. Yes.

Q. You do not say that asset cost \$1,000.00, but due to the fact—

A. Well more and more accountants particularly in the field of standard costs and particularly those who are concerned with inventory valuations they would say that income comprises the excess over the selling price for what it will cost you to replace the particular commodity you are selling. The theory is recognized in the United States for income tax purposes.

30 Q. There is a large group who believe that all these things, whether from the standpoint of depletion or depreciation—the figures should be based on cost?

A. Yes.

Q. And you were speaking about the difference between certain ordinary businesses and certain extractive industries. The fundamental difference, is it not this, that in the one business while there may be depreciation on the plant there is no such thing as depletion entering into it? Depletion is something which relates to an extractive industry.

A. That is one difference—yes.

40 Q. Is not that the primary difference? One is a wasting asset and the other is not?

A. Well that is the fundamental difference in a physical sense, one is a working and wasting asset and the other is not.

Q. And if the business is not one which is working a wasting asset no question of depletion or exhaustion enters into it at all?

A. I would say that is true. This particular section mentions the term timber as being one that is a wasting asset.

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Q. Well we are getting into income tax again. I am trying just now to stay in the field of general accounting theory. But that is the fundamental difference between extractive industry?

A. Yes.

Q. And the question of depletion relates only to wasting assets?

A. That is right.

Q. Now in calculating expense of operation in the accounting profession in order to arrive at a fair statement of profit, items of expense are always charged to cost?

A. Yes.

10

Q. You charge against the profits of today the rent that you are paying today, not the rent you are paying three or four or five years hence or the rent you may have paid in the past. It is based on the actual out of pocket cost?

A. What you mean is that in so far as possible the expenses incurred should articulate with the income?

A. Yes.

Q. Yes, that is the theory. But it is difficult to apply. Of course there are numerous expenses we are making today which are generally applicable to earning income. But whether it will earn the income this year or whether it earned it in the past is a different question. Advertising is a good example.

20

Q. But in the expenditure you charge it?

A. Yes. The expenditure made in the year is the best test.

Q. Naturally you may get some advantage there much later on?

A. Yes, but if you see it is going to interfere with the taxpayer you negotiate and make an arrangement. For instance, you may embark on expenditures for enlargement to an hotel, and you know you cannot bear it this year and you write it off for two or three years.

Q. Haven't you found in your experience with the Income Tax Department that where a company may have berths in several sections and operating here today and there tomorrow—have you had personal experience where fire has destroyed the properties of your clients?

30

A. Yes.

Q. And there might be a road or mill or some other asset not yet written off. Haven't you found that they will be glad to write it off as against the operations as a whole?

A. Yes, I have found they were glad to write it off if my client had not any income.

Q. THE COURT: We may have an income irrespective of the loss?

40

A. Well the tendency there would be—and I have seen it reflected in the statements—that the cost of amortizing what is left in the way of road development is so high that it throws the client into a loss in succeeding years.

Q. MR. AUXIER: But supposing the client had enough assets to absorb it, it would be allowed?

A. Yes.

Q. Now you were speaking of these timber or lumber companies being short lived. You would not say that applied to the appellants here, after the years they have been in operation?

A. No. I think that is rather an exception.

Q. And you spoke with respect to hazards and freight rates and tariffs and so on. These hazards exist to a more or less degree in almost all productive industries—to all industries—manufacturing industries and so on?

10 A. They apply to a greater or less degree to those industries which have their productive facilities a long way from their market and are dependable to a considerable extent on their export market.

Q. And that applies particularly to the farming industry and the fishing industry?

A. Certainly the price factor applies to the farming industry. Transportation and freight rates do not apply to the same extent because those rates to the farmer have been very consistent. To the lumber operator it varies up and down. One year he finds himself in a position where he can operate and next year he cannot.

20 Q. Well that also applies to farming, does it not? One year we have bumper crops and next year a failure?

A. Well we were talking about transportation costs.

Q. But those are all examples of the hazards to which business generally is subjected?

A. Yes.

Q. What is the term used in the accounting profession with respect to money used to purchase stock in trade? Isn't that what you call circulating capital?

A. Well circulating capital tends to take into consideration total capital invested and accounts receivable.

30 Q. What turns over as opposed to fixed capital, which would be for example capital in a mine or timber berth or building and so on?

A. Yes "working capital" is the usual term; not "circulating."

Q. And the circulating capital or working capital is charged against that year's operation without any write-off for a period of years?

A. What is that?

Q. Money expended by way of circulating capital—for example the money spent by a merchant in acquiring an inventory is allowed as a charge against that year's business, because that is money he lays out and gets back?

40 A. Supposing a merchant spent \$50,000.00 in an inventory. That is not what he can write off, not until he sells it. He deducts the cost of sale, of course.

Q. And that is where the distinction comes in between the two forms of capital?

A. I think it is rather a remote difference. The fundamental difference between working capital and fixed capital is that fixed capital is invested in assets which you actually use; land and equipment and so on.

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Working capital on the other hand is the assets which you must of necessity have for the continuance of the business apart from fixed capital.

Q. THE COURT: Seasonal operations and labour and costs?

A. Yes.

Q. MR. AUXIER: You spoke of the methods by which the lumber company charged their stumpage—I think that is the all-inclusive term they used—you spoke of the berths they had acquired under the old Dominion Regulations for which they had paid a lump sum of money—that that was frequently charged off as an expense. That is, I assume, a cost of the material they were using.

10

A. Yes.

Q. It would be charged in the same way as a merchant would charge the cost of an article against the sale price of that article?

A. I would presume so—yes, as part of the cost.

Q. Now are you familiar with the oil industry?

A. No, I am not. I have a few oil leases and royalties, but that is the extent of my familiarity.

Q. You are not familiar with the accounting methods as applied to the oil industry outside your general theoretical knowledge?

A. Outside of my conversation with my colleagues. I know they expect to get a thirty per cent. allowance.

Q. From your general knowledge as obtained in the various ways you have outlined. It is true, is it not, that a company may spend a great deal of money drilling an oil well and find they have a dry hole and producing no income?

A. Yes, and it is also true that in certain proven areas they consistently get into production and are so sure they put down production on the basis of bank allowance.

Q. But there are instances that various elements in their depletion allowance equals their costs. You heard Mr. Richardson?

30

A. Well Mr. Richardson comes from a field where they have very high capital costs and particular hazards, production and corresponding gains. But there are other fields where production is obtained on different stratas on which the returns are lower but the capital costs are also lower and the hazard is lower.

Q. Are you familiar with the discussions that preceded the publication of this inter office memo which my friend refers to in dealing with depletion in the mining industry?

A. The discussion with the Minister of National Revenue—no, I was not present.

40

Q. Can you give any reason for the underlying basis for the allowance?

A. Well not in those I have given other than the fact that mines are an extractive industry and the Act seems to grant a special allowance and they claimed what they thought was their right.

Q. And you do not think the underlying basis was to recover costs generally?

A. I am quite convinced it is not, not as the section has been interpreted and administered. I am quite convinced costs have nothing to do with it.

Q. Not to a taxpayer. But you will admit there is a substantial difference between the mining industry on the one hand and timber operations on the other?

A. Yes, there is a difference but they all have this parity, that they are extractive.

Q. Well there is this difference that you can see this timber on the ground and you can use it; and oil you cannot. They say oil is where you
10 find it and they have to spend a lot of money to find it. And perhaps to a more limitable degree doesn't it also apply to coal?

A. I agree with Mr. Richardson's statement that in coal mines the tendency is at present to ascertain the extent of reserves with a great deal of accuracy. I can also assure you from observation in the Wainwright and Vermilion oil fields that they are able to ascertain oil deposits.

Q. But there is always the chance of it disappearing over night.

A. Well it can be eliminated or they are trying to eliminate it.

Q. And are there not a lot of mines, in your experience, where a great deal of money has been spent in tunnelling and a body of ore has been found
20 and it has pinched out and they find they have spent a great deal more money than can be recovered?

A. I have no doubt that is true. I have not experienced it myself.

Q. And aren't those all items that have to be taken into account in determining whether there has been a profit on the operations?

A. I certainly think those risks and hazards ought to be taken into consideration.

Q. Even the best producing oil wells may produce for a year or so and then be cut off?

A. Yes.

Q. And the only possible way of determining your costs would be by
30 spreading income received from one well to offset the losses incurred in another well? I mean taking operations of the company or the industry as a whole, to find out whether the oil industry has made money?

A. Do I understand your statement correctly that the safest way is to diversify your practice to numerous wells?

Q. Well I did not put it that way. I do not know what is the proper practice. But if you are operating several wells and one is in production and you are drilling others which may or may not be producers you have to take care of that cost out of what your income is from the producing plant?

40 A. Well I am not competent to tell you just what is general accounting practice in the oil exploring industry in that respect but I would say it would be more sensible to start a diversified practice and drill as many wells as you can.

Q. You have heard it expressed often that the oil industry has made so
50 much money and so much money has gone in and so many dollars have come out and taking the whole picture it has been a loss. Now with respect to this

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business and the saw logs west of the Cascades. You act for other companies who are claiming and receiving that allowance?

A. Yes.

Q. You have noted no doubt in looking over this ruling, or whatever it may be termed, that it is not mentioned as depletion or exhaustion but as a special allowance for a certain limited period?

A. I believe that is correct. The word "allowance" is used.

Q. Special allowance?

A. It has the adjective "Special" as well, has it?

Q. Do you know the reason behind this particular allowance? 10

A. Well the reason was a sharp decline in log production at the Pacific Coast and the fact that the operators intended to hold on to their limits rather than exhaust them under 75 per cent. taxation. And a similar situation existed almost identical, here.

Q. And there was a demand for these saw logs?

A. Yes; they were in a position to put on the pressure because a large proportion of the logs come from the Coast.

Q. And it was wartime?

A. Yes.

Q. MR. SMITH: With respect to this allowance to loggers west of the Cascades. Under what authority was it made? Do you know? 20

A. I was told it was under Section 5A.

MR. AUXIER: That, I submit is not admissible.

THE COURT: I would certainly want to know the sources of that statement.

MR. SMITH: I do not know what his answer is. I was just asking. It was re-examination which arose out of my friend's cross examination.

A. To go back to the conversation—

MR. AUXIER: Well those other conversations were ruled out.

Q. THE COURT: You mean at these interviews of a certain type of individuals these conversations took place? 30

A. Yes.

THE COURT: I think I will have to abide by my previous rulings.

MR. SMITH: I was there to so I happen to know. They were not negotiations with a view to a settlement. It was an argument in which we were contending for the actual allowance we are asking for here.

THE COURT: Well he may not know that. You may have perhaps arranged that before.

Q. MR. SMITH: You recall being in Ottawa in June, 1944? 40

A. Yes.

Q. And we were not having negotiations with a view to settlement but we were advocating we were entitled to what is now in dispute?

A. Yes.

Q. And we had an interview before the officials of the Legal Department in Ottawa?

A. Yes.

Q. In which we advanced reasons we had for considering we were entitled to the allowance. Is that right?

A. Yes, that is right.

MR. SMITH: I have already got in evidence the statement of Mr. Elliott, at the bottom of page 28: "I understand that, but what I am trying
10 to get at at the moment is the source of the power of the Minister to grant depletion allowance, and I say that that source is Section 5A?"

A. I agree with that."

THE COURT: Well I do not know what Mr. Auxier intends to do.

MR. SMITH: It is very apparent that that is the only power to grant that allowance for exhaustion—Section 5A.

MR. AUXIER: Well Mr. Elliott makes that quite clear, my Lord.

Q. MR. SMITH: Mr. Auxier was asking you about depletion and exhaustion. And what have you to say as to whether if there were under Section 5A in The Income Tax Act this power whether in your opinion the
20 lumber companies for which you act as auditor would be entitled by virtue of other provisions of the Act to get back the cost of their lumber?

A. That is only my opinion but I have not heard any other suggestion made.

Q. And what about the coal companies?

A. Well all the payable costs—the annual payment for leases, royalties and so on, are all deductible as expense apart from the allowance the coal companies get under Section 5A and I understand that is applicable to other extractive industries.

Q. By the way, that allowance with respect to saw logs scaled west of
30 the Cascades. Was that circularized in the lumber industry? Do you know that?

A. Yes, it was sent to the secretary of—I believe—the British Columbia Lumber Association and it appeared in the Vancouver press.

Q. Have you a copy of that?

A. Well I think I have press copies. It will be in the files.

Q. THE COURT: Prior to 1941 do you know from your own experience what allowances for depletion were made to timber operators and owners of timber limits? Do you know of your own knowledge? Or was it
40 claimed solely by way of depreciation?

A. No allowance has been made for depletion at any time.

Q. No matter what the nature of the ownership was—whether it operated under a Crown licence or by a lessee or by an owner. Is that what you say?

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A. I say no allowance has been made.

Q. For depletion?

A. For exhaustion.

Q. Well there is not much distinction between exhaustion and depletion in the sense of dues for income tax?

A. No, the only distinction is depletion is worked as an accounting connotation. My understanding is that expenses which are incurred would have been allowed and would be claimable and would be acceptable by the Tax Department, and other sections.

Q. Provided the whole thing had not previously been written off by way of depreciation? 10

A. Yes.

Q. And this issue did arise after cost had been written off in full by way of depreciation?

A. Well in some instances of course that was the case and in other instances it was not. In this particular case—Fraser's—it was many years after the cost had been written off.

Q. There is one thing that concerns me—that when the full amount as in the case of two of these berths had been allowed to the appellant over a period of years by way of depreciation, that now there is a claim for what is called exhaustion or depletion. Have you any comment to make on that? 20

A. I do not think your are quite correct that it has been allowed in the way of depletion. I think that what happens is that an operator has got two alternatives. He may buy or acquire timber from the Crown on which he will be forced to pay \$3.00 or \$3.50 stumpage as it is cut and which in my view is unquestionably an expense and which has always been treated as such. Now his other alternative is to acquire timber which has rights going back for some years and on which he only needs to pay stumpage of \$1.00 a thousand as it is cut. He can, therefore, afford to pay an additional \$2.50 per thousand to the existing owner of those rights and he possibly does pay \$2.50 a thousand which is only additional stumpage. Whether he pays it in a lump sum as Fraser's did or as it was cut as McDougall did is another point, but in fact what he is paying is an additional stumpage and it is expense incurred in earning the income. That is what they refer to as cost. 30

Q. MR. SMITH: With respect to the writing off of those costs. Have you ever heard of any lumber writing off this cost which you describe as stumpage which you paid in a lump sum at the beginning or over a period as it is cut. Have you heard of it being written off for income tax purposes as depletion or exhaustion loss? 40

A. No. It has been written off as stumpage.

Q. And that is the reason you say that if Section 5A were not in the Act at all these people would still be entitled to write it off in the manner you have described?

A. Yes.

Q. And you say Section 5A grants them all an allowance of a type entirely that has been granted to all other extractive industries?

A. Yes.

Q. And you say therefore the lumber industry is entitled to the same cost?

A. Yes.

Q. MR. AUXIER: This money that is spent when you acquire a timber berth. In one of the Provincial berths where you pay no money but where you go out and buy a timber berth—whether you buy timber or rent timber on it, the money you spend in that way is considered capital expenditure?

10 A. Not in my opinion.

Q. It is not capital at all?

A. Not in my view.

Q. Well what you are doing is simply buying goods?

A. You are prepaying an expense—a deferred charge.

Q. A cost of inventory?

A. Not exactly. It is an expense you are incurring applicable to future operations. We have that sort of thing from time to time in accounting. If he acquires the land and the surface rights are valued that is something else.

Q. But you do not set the costs up as a capital expenditure?

20 A. The circumstances are very exceptional where I would allow that as capital expenditure. The operating life in this world is far too short. I charge it as an operating expense for the life of the operation.

Q. And you would not consider that to be a capital expenditure?

A. No.

Q. But if you bought a mine or you bought a mining lease would you consider that to be a capital expenditure?

30 A. That would depend on the practice—what the operators would understand by the statements presented to them—and the expected life of operations. The expenditures which my clients make for lease rentals, and a coal mine for the next two years, I do not think is a capital expenditure. They write that off over the operations in two years.

Q. Would you consider money spent by a concern like the Fraser Company in the acquisition of these timber berths—would you consider that exactly the same as if they had gone to John Smith and bought so many thousand saw logs which might keep their plant operating the next few years?

A. No, not exactly the same. There is only one element of cost. To the extent it constitutes an element of cost I would treat it in the same way.

40 Q. And you feel that any of your clients in the lumber business who received back the lump sums of money they spent in the acquisition of a timber berth or timber licence—would you consider that the allowance given your clients by the Income Tax Department has anything to do with the wasting end of that asset? It is simply the allowance for inventory or for the raw product that goes into their manufactures?

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A. I think we are quibbling with terms. I say it is an expense which has been incurred for operating. Whether it is analogous to wages paid from—well, I think it is remote.

Q. And you would not consider the acquisition of an oil well on that basis, or an oil lease?

A. Well if I acquired an oil lease—well that too would be dependant on the length of time I would expect to recover that lease from operations.

Q. But you would not consider it capital expenditure?

A. It would depend on the length of time I would expect to recover it from operations. 10

Q. Well if it extended over 40 years?

A. Well I would look upon it as capital expenditure because I have to put capital into it to maintain it.

Q. And 20 years?

A. Yes.

Q. And what about five years?

A. Well it depends on the circumstances. We do not ordinarily have deposits which go much beyond two or three or four years.

Q. And in the case of two of these leases—one was taken out in 1904 or 1905 and the other in 1911 or 1912— 20

MR. SMITH: But they were not operated on for years after that.

Q. MR. AUXIER: You would not treat expenditures like that where you took from the Province an oil lease and you proceeded to drill on that oil lease, or you bought from the freehold holder of the minerals the minerals and the right to drill if the operation was going to extend over two or three years—you would not consider that as a capital outlay?

A. I said if it was going to extend over a considerable period of time I would.

Q. But if it was going to extend only two or three years?

A. If I would expect to recover from income in a relatively short period of time as most lumber operators do, it would be a capital cost. Quite a number of operators write off their deposits immediately, and bonuses. 30

Q. But I mean the purchase price of the right to cut timber or the purchase of land with timber on it?

A. Well quite a number of operators tend to follow that procedure—write off deposits and bonuses.

Q. Supposing that instead of taking only a licence to cut that they bought the land outright?

A. Well they buy surface rights and the surface rights have a value of themselves. 40

Q. You would treat that as capital?

A. I would treat the value of surface rights as capital.

Q. And you would capitalize it. But in so far as the purchase price included timber you would simply treat that as an item of expense?

A. If I expected to recover the expense in a short period of time.

Q. With respect to the purchase of this land with growing timber on it, in which you got both land and timber, you say if you expected to recover your investment over a short period of time or expected to sell the timber off it you would not consider that as a capital outlay although you would consider the portion of the money that went into the surface itself?

A. Well we do not buy timber in that way in this Province.

Q. But what would you do if a client of yours laid out \$10,000 in the acquisition of a tract of timber in which he got the surface rights and the timber and he expected to clean up the operations in five years?

10 A. As a matter of accounting practice if my client is able to differentiate those costs and say: "I am paying so much for the surface rights and for the rights of cutting timber" and these rights would extend to over a one or two year period I would say it was a distinct charge rather than a capital cost.

Q. MR. SMITH: Alberta is a great coal producing Province?

A. I believe that is correct.

Q. And I suppose you do know of your general knowledge that very many coal companies are operating under licence granted by the Crown?

A. Yes.

20 Q. Licences to enter and extract the coal, or a lease. You know that, of course?

A. Yes.

Q. And do you know whether the majority of coal companies are operating on leases of that kind?

A. I would not know whether the majority are, but a great number.

Q. And you are aware of this allowance of ten cents?

A. Yes.

Q. Do all coal companies operate on that allowance?

30 A. All with whom I come into contact and I have been in contact with quite a number. They get their ten cents a ton regardless of their type of ownership.

Q. Are there any material differences between that title or lease and the timber licence and lease here?

MR. AUXIER: I submit that is a question of law this witness is not entitled to answer.

A. Well so far as I know there is very little difference.

Q. THE COURT: Have you seen the leases or licences?

A. Yes.

Q. Well are they leases or licences?

40 A. They are usually leases.

Q. MR. SMITH: Well there are leases or licences and they are both payable to the Provincial Government?

A. Yes.

Q. And the coal companies get the cost of their rentals as a cost of operating expense?

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A. Yes.

Q. And they get ten cents a ton under Section 5A?

A. Yes, in addition.

MR. SMITH: I would like to file this book of regulations.

**Book containing Alberta (Provincial)
Timber Regulations, marked Exhibit 28.**

MR. SMITH: That is my case.

At 4:20 p.m. Court adjourns for ten minutes.

At 4:35 p.m. Court resumes.

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**RESPONDENT'S EXTRACTS FROM THE EXAMINATION
FOR DISCOVERY OF C. FRASER ELLIOTT.**

MR. AUXIER: My Lord, I am putting in from the examination for discovery of Mr. C. Fraser Elliott, as I claim I am entitled to under The Exchequer Court Rules, certain portions of the discovery. Starting on page 3, 4 and 5.

Q. Would you agree with me that an exhaustion of depletion allowance is a deduction from income, the theory of the deduction being that to the extent that the timber is depleted or exhausted during the taxation year there is a return of capital?

20

A. To the extent that capital was put in to the timber limit and the timber limit is being cut and thereby depleted or exhausted there is a measure of return.

Q. If the taxpayer is cutting timber and he has capital, then there is a return of capital. There is the question, I suppose, of whether capital is money or whether it is the sum total of the assets of the corporation. I suppose you can take it back that step, can you not?

A. I suppose capital is the amount of money that a man puts in it; any kind of asset.

Q. Perhaps we are getting into a field that is too far away. I suggest to you that capital is really the sum total of the assets of the operator rather than the money invested in the assets; would you agree with me in that?

30

A. I would think they would be synonymous. The sum total of the assets were acquired by the sum total of the investment.

Q. So you think they would be interchangeable more or less?

A. I think—

Q. When the taxpayer acquires assets with capital, the money that he has put into it to acquire the assets is then gone and is represented by the assets which the taxpayer owns?

A. I would sum that up by saying that when we use the word 'capital' as I think you are using it, when we have in mind a man with so much money.

Q. I am using "capital" in contra-distinction to 'income' really.

A. To finish my statement—

Q. I am sorry.

A. I say that "capital" is the sum of money that a man may have, that is his capital asset, the sum of money. Then he converts that into another form of asset by paying away the money and taking in its place some other form of asset which is not money.

10 Q. And if in the acquisition of assets a lumber company acquires timber rights or timber limits with the right to cut timber, then they become part of the assets of the company and I suggest to you that they become part of the capital of the company?

A. Whatever he paid for it, of course that would be changed from money into some other asset.

Q. So then when the lumber company cuts timber during its usual business operations off the limits which it owns, we are agreed that it does deplete or exhaust the timber limits as it cuts?

20 A. If it bought timber limits and cut timber off it exhausts them, there is no doubt about that.

Q. To the extent that the timber is depleted, the selling price of the lumber cut off those limits is then a return of capital to some extent?

A. I would think that is right.

Q. I suppose the things we have been talking about here illustrate the reason for the provision of depletion of allowances under the Canadian income tax law as compared with the income tax law of some other jurisdiction where there is not any allowance for depletion, the theory being that when a man cuts off his timber and sells the lumber, to some extent he has a return of capital mixed up in the selling price?

30 A. That is right.

Q. So that as he cuts his timber he is exhausting his capital to some extent?

A. I would think so.

Q. And the real purpose of our income Tax Act is not to tax capital but to tax income and therefore a depletion allowance is provided in order that there will not be a tax on capital?

A. I would think that is right.

Q. Now, Mr. Elliott, there have been certain rulings issued by your department with respect to depletion allowances?

40 A. I do not know what you mean by rulings.

Q. Perhaps I do not describe them correctly?

A. I will not quarrel with that, but I want to help you. What we do is this: Inasmuch as there are certain groups of circumstances, local in character but common to every part or a large part of Canada because of people carrying on specifically the same kind of business in different parts of Canada, we issue what is called memoranda to the inspectors saying in effect, 'If these particular circumstances arise in your district you will

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report the matter to Ottawa for our decision on the following basis.' Thus all the inspectors across Canada report their work on an uniform basis to Ottawa for examination.

Q. I do not want to argue about the word used to describe them because I think we are talking about the same thing.

A. I think my description is better.

Q. That may be. The documents that you have referred to, instructions I believe you call them?

A. Memoranda.

Q. Perhaps I did not phrase my question clearly. There is no doubt 10 that any depletion allowance that has been granted to any type of extractive industry, that is to say extractive industry within Section 5 (a), to companies described in that section, are granted under Section 5 (a) of the Income War Tax Act?

A. All the legal authorities, yes, but for the exercise of illegal authority for war purposes and war exigencies, that is a horse of another colour.

Q. That may well be.

A. And these special allowances—I am not stating—it might be that a special allowance under a war exigency is or is not related to Section 5 20 (a).

Q. You mean that the source of the legal power under which the allowances described in Exhibit No. 4 were made would also be Section 5 (a) whatever the background of the effect might be?

A. No, I would not agree to that.

Q. You would not?

A. No. I can envisage allowances following public statements—

Q. Under a war measure?

A. —in the exigencies of war being granted, and I can even go further; I can envisage general allowance under the heading of depletion to some groups that perhaps technically in law might not be allowed. The Minister, 30 thinking it in the public interest, might be a little beyond the legal scope of the Income War Tax Act.

Q. Now, in any event—

A. I will finish that statement to make it more clear to you because I want to be as frank as I can about this. Exhibit No. 3 refers to depletions on dividends.

Q. I really am not much interested in that.

A. I understood that you said that the exhibit covered it all, and I want to point out—

Q. I did not intend to ask you to cover them all; what I intended to 40 ask you was whether the allowances referred to in Exhibit No. 3, whether the source of the legal power to grant those allowances was Section 5 (a)?

A. So far as any grounds are legal, the source lies in Section 5 (a).

Q. You realize that that is all I am interested in. If you want to go further, all right.

A. I was just going to say, perhaps for general information although it probably is not germane to this case, whether dividends are legally sub-

ject to depletion or not—I think Lord Bennett when he was Mr. Bennett said in the House that he did not think it was so, and I think he was Prime Minister at the time, but nevertheless he did nothing about it, nor did anybody else.

Q. Why do you take that position. Can you explain to me the reasoning upon which you do take that position?

A. Yes, I will try. A licence is not an interest by way of ownership in land or its contents within the legal sense, a licence is a right to enter upon, to cut, sever and take away, and all expenses incurred in doing that are necessarily expenses incurred in earning income.

Q. And are deductible?

A. And are deductible in determining net income from gross. No property under the licence passes in the land or its legal appurtenances, which would include standing trees until they have been severed from the soil, but at that point it becomes the property of the licensee, and the cost of acquiring that property or inventory, as it is sometimes called, is allowed as described as an expense.

Q. And properly, I take it.

A. Therefore we say that the licensee has had all expenditures that he incurred in securing the timber and that under that licence he made no capital investment which we feel required depletion.

Q. Therefore when he is selling you say that he is not getting any return of capital because he has not any capital invested?

A. Not when he acquires the timber in that manner or the lumber in that manner.

Q. That is your conception of the rights of the Appellant in respect of its timber or the right to cut its timber?

A. That is right.

Q. If you are wrong in that conception and if we are the owners of that timber in the legal sense, then the basis of your objection would be removed?

MR. MCENTYRE: I object to that question as being a question of law which is not proper to ask a witness.

MR. SMITH: Perhaps you will allow him to answer subject to objection?

THE WITNESS: That is not wholly correct; it is only half correct. If he had legal title to the standing timber as part of the land he also has to have capital expenditures.

BY MR. SMITH:

Q. On what do you base your contention that it takes an investment in timber besides ownership to entitle a taxpayer to depletion allowance?

MR. MCENTYRE: The same objection.

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THE WITNESS: Because he has no capital expenditure which he may not recruit out of the logs when sold, when delivered as logs or in manufactured form, therefore we cannot give him depletion.

Q. Perhaps you would agree in this respect: The Appellant Company in cutting trees down from year to year and manufacturing them into lumber was operating under timber licences and permits and having the right to cut those trees from year to year; it was operating under a right granted to it, the right to cut?

A. No, it has the right, if you are speaking of that—it is a right in the abstract, to go and do something on the land to create a profit a prendre. 10

Q. But as the appellant cuts its timber from year to year its profit a prendre is being reduced?

A. No, that would not be accurate because his right under the licence is always there undiminished because the right is an abstract one.

Q. His right continues, but as he cuts from year to year under the licence his profit a prendre is governed by the amount of timber remaining which he can cut?

A. There is no doubt the physical volume of the timber that was on the property when he signed the contract becomes less.

Q. As he cuts it off?

20

A. As he cuts it off and the owner is being depleted of his timber, but the right is equally as strong up to the time that the last tree is merchantable is cut as it was when they were all there. It is an abstract right.

Q. Perhaps you can tell me on what ground you say that depletion allowances is only allowable with respect to the expenditures for timber rather than the value of the timber; on what legal ground do you put that?

A. The legal ground is that the cost of an article that becomes merchantable, that is an expense recognized by the law. It applies to timber or any kind of commercial commodity.

Q. If a man makes shoes he has to buy leather?

30

A. Certainly.

Q. And the cost of the leather enters into the product, into the cost of the product?

A. That is right, therefore legally we have to admit that on that general law.

Q. You are likening the position of the depletion to the cost of material which goes into a manufactured product?

A. No, indeed I am not. Let us listen to your question: I am likening depletion to the cost of buying an amount of merchandise?

Q. That is what I intended to say.

40

A. No, I do not liken them. I do not think depletion and the cost of your raw materials are the same. That is, I think depletion is one thing and the cost of acquiring your inventory is another thing. I do not liken them one to the other at all."

MR. AUXIER: We are calling no oral evidence at all. There is one thing further I should like to put in. Mr. Smith will take probably consid-

erable objection to it and I admit I have some doubts myself as to whether it is properly admissible. But there has been considerable evidence adduced.

- I submit irrelevant, with respect to the depletion allowances given to the coal mining industry, the oil industry and the mining industry generally and an attempt has been made to liken those industries to the operation of a company such as the appellant. The basis or the cause—the point of origin of all these departmental circulars which were in Mr Gordon's book was a budget speech of The Minister of Finance in which he goes into this question of depletion allowances to the mining industry particularly.
- 10 I do not know that he mentions the oil industry. And I submit—I haven't it with me—if Your Lordship rules it cannot be admitted there will be no necessity to acquire it. I have not been able to obtain it so far. I do feel that it is admissible in showing the underlying basis of these departmental circulars. Inasmuch as these circulars have gone in I submit, as I submitted at the time that they were not admissible and they were not relevant. And your Lordship has not ruled on that question yet. Nevertheless if they are allowed and if any importance is attached to them the explanation behind them should also go in. Now the only legal authority on that point that I have located is an extract from a judgment in Queen vs. Bishop of Oxford,
- 20 4 Q.B.D. 525, in which a reference made by The Lord Chancellor in the House of Lords was allowed in the Court of Appeal. And the Judges had considerable to say about it. I do not think there was an attempt to put it in as evidence but it was referred to in argument and it was pointed out they could see no particular distinction between that and putting in a judgment of Court.

- THE COURT: I do not know which budget speech you refer to. But in another case I was informed that a certain address in the House may have been a public way of exercising ministerial discretion or rather of bringing that to the notice of the public. I would suggest that you might
- 30 show that to Mr. Smith and may be it will be tied up in the same way as the ones he wants to put in, and I will make my ruling tomorrow morning.

MR. AUXIER: I find myself in an awkward position in asking for something to go in which I personally think is irrelevant, but if the circulars have gone in—

THE COURT: I think the law is that addresses made in the House of Commons which lead to enactment—well Mr. Smith might agree that these will come in the same category as the ones he wants in.

- MR. SMITH: I feel that in some way it puts the appellant at a disadvantage. Here we are carrying on an appeal with the Dominion Government. My friend has here Mr. Swift from the departmental branch
- 40 which he represents and there is a proper means of giving evidence, and were it not for the rather peculiar Rule of The Exchequer Court Mr. Auxier could not have got in here the remaining portion of the evidence of Mr. Elliott as he did. I suggest the best way in any Court is to have oral evidence.

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My friend has Mr. Swift here and if he desires to prove anything by departmental practice, rather than prove it by the back door I would suggest he put Mr. Swift in the box.

THE COURT: Well Mr. Auxier will conduct his own case.

MR. AUXIER: Well I have asked Mr. Swift and he says he does not know anything about it.

At 5:00 p.m. Court adjourns to 9:00 a.m.
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Friday, September 21st, 1945, Court resumes at 9:40 a.m.

MR. SMITH: My Lord, my friend and I have come to an arrangement 10
as to the admission of the discovery in the Gilhooly case. The arrangement
as I understand it is this—that the examination is tendered generally by
both sides as evidence in the case, by consent, subject to this: That my
friend has objected throughout to the admissibility of evidence of that
type so that he reserves to himself in so objecting, to the admissibility of
this evidence as well as evidence of the same type. There is a condition tied
on to the admission of the evidence. And that is that I admit on behalf of my
client that the statement purporting to be a statement of Mr. Ilsley set forth
in the examination in the Gilhooly case is a statement made by Mr. Ilsley in
the House of Commons. I admit this part of the examination in the Gilhooly 20
case and my friend has asked me to admit that it was a statement made by
Mr. Ilsley in the House of Commons and I am prepared to make that admis-
sion.

THE COURT: This is being tendered by you, Mr. Smith?

MR. SMITH: No sir; tendered jointly by both sides.

**Transcript of examination for discovery
of C. Fraser Elliott in re Gilhooly and
Minister of National Revenue,
marked Exhibit 29.**

MR. AUXIER: I felt yesterday that all evidence dealing with other 30
industries is irrelevant, but I feel that this should go in if the other goes
in.

THE COURT: Does that include your case, Mr. Auxier?

MR. AUXIER: Yes.

THE COURT: Is there any reply?

MR. SMITH: No reply, my Lord.

THE COURT: Then we are ready for the argument and I take it that
you will proceed first, Mr. Smith.

Argument.

12:30 Court Adjourns Till 2:00 p.m.

At 2:00 p.m. the Court Resumes.

Argument Continues.

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Reasons for Judgment.

CAMERON, DEPUTY JUDGE.

This is an appeal from an assessment dated February 5, 1944, made in respect of the Appellant's income for the year 1941. Notice of Appeal is dated March 4, 1944, and on September 26, 1944, the Minister, by his deci-
10 sion, affirmed the assessment, stating in part:

“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 Subsection (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
20 and by reason of other provisions of the Income War Tax Act and Excess Profits Tax Act the said Assessment is affirmed.”

On October 23, 1944, the Appellant gave Notice of Dissatisfaction and the reply of the Minister dated December 2, 1944, affirmed the Assessment. Pleadings were delivered. At the trial, on motion of Appellant's counsel, I approved of two amendments to the Statement of Claim: (1) By substituting an amended schedule of timber limits in Paragraph 14; (2) By adding to the prayer of the Statement of Claim the following clause:

“(aa) That the Appellant's assessment be amended by making it an allowance for exhaustion of \$1.40 per thousand feet board measure, or a just, fair and reasonable allowance for exhaustion.”

30 I also approved of an amendment to the Statement of Defence by adding thereto Paragraph 17 as follows:

“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

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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".

The Appellant has, for many years, operated a logging, sawing, planing and general lumber milling business in Alberta and during its fiscal year ending October 31, 1941, produced 8,031,305 board feet of lumber from 3 timber limits, licences for which were granted to it by the Minister of Lands and Forests of Alberta. It claims to be entitled to an allowance for exhaustion of these timber limits under the provisions of Section 5 (1) (a) of the Income War Tax Act which is as follows:

10

Depletion "5.1 "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 the lessee shall each be entitled to deduct a part of the allowance for exhaustion as they agree and in case the lessor and the lessee do not agree the Minister shall have full power to apportion the deduction between them and his determination shall be conclusive."

20

For the Respondent it is urged that the Appellant has no proprietary or other depletable interests in the timber limits; that it is not such a lessee as is referred to in Section 5 (1) (a) but merely a purchaser of timber the cost of which has been allowed as a deduction in determining the profits subject to tax; and, alternatively, that in the years prior to 1941 the Minister has allowed the Appellant amounts for exhaustion which enabled it to recover free of income tax its entire cost of such timber limits or permits and in so doing that the Minister has exercised the discretionary powers vested in him under the said section.

30

It is clearly established that the Appellant did recover the above mentioned amounts of timber from the said limits in 1941. Exhibit 21 is a statement, dated June 8, 1944, signed by the Minister of Lands and Forests of Alberta, indicating that the Appellant is entitled to 99% of the allowance for exhaustion and the Province of Alberta is entitled to 1% thereof for the year 1941.

In approaching the problems involved, it is necessary to first consider the agreements under which the Appellant operated these timber limits.

Berth 1161 was originally acquired in 1904 from the Dominion Government by the Appellant and an associate; the latter's interest was subsequently acquired by the Appellant. The licence was renewed from year to year by the issue of a new licence and Exhibit 8 is a photostatic copy of

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the last one issued by the Minister of the Interior; Exhibit 9 is the first licence issued to the Appellant by the Province of Alberta and is for the year ending March 31, 1932. It has been renewed from year to year by the issue of a new licence, and apparently without tender. Exhibits 10 and 11 are respectively the licences for the years ending March 31, 1941, and March 31, 1942.

10 Berth 1727 was acquired from the Dominion Government in 1912 by the Appellant and Walters but later the licences were granted in the name of the Appellant only. Exhibit 13 is a copy of the last licence issued by the Dominion Government, expiring April 30, 1931. Subsequently annual licences were granted by the Province of Alberta and Exhibits 14 and 15 are copies of such licences for the years ending March 31, 1941, and March 31, 1942, respectively.

Berth 6722 was acquired in 1940 from the Province of Alberta. Exhibits 19 and 20 are respectively the licences for the years ending March 31, 1941, and March 31, 1942. This berth was secured by the Appellant following a sale by public tender and Exhibit 17 is the advertisement of such "sale of timber by public tender".

20 In 1941 therefore, the Appellants were operating all these berths under Provincial licences, identical in character, except as to the consideration and description of the property.

As mentioned above, berths 1161 and 1727 were originally acquired from the Dominion Government. Tenders were called for and the licence was granted to the highest bidder, who, in addition to the amount of his bid, was required to pay an annual ground rent, certain costs for fire protection and dues according to the amount of lumber and timber manufactured and sold. The amount of this bid or "bonus", as it was called, was not returned to the licensee. The amount of dues varied from time to time.

30 In the Provincial licences for the year 1941, in addition to the dues fixed by the regulations, there was paid at the time of granting the annual licence, an amount expressed to be for ground rent, licence fee, fire guarding charges and Timber Areas tax. When new areas are put up for public tender the bidder makes an offer of a certain amount per 1,000 feet board measure; and in addition makes a deposit which, if his bid has been successful, is retained as a guarantee of compliance with the conditions of sale. Eventually it is credited or returned to the licensee. For the year 1941 all amounts paid by the Appellant to the Province of Alberta in respect of the licences (other than the deposit) and whether for ground rent, etc., or for dues, were allowed as deductions in arriving at the taxable income.

40 As regards the cost of acquiring berths 1161 and 1727, for cruising, "bonus" and purchase of the interests of the former associates, etc., the Appellant entered these in its own books as capital assets and annually wrote off an amount as an operating expense to earn the income. In its income tax returns it showed these amounts so written off, merely as an

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expense of operation, and the amounts so shown were allowed by the Income Tax Department and by 1939 the entire cost had been fully written off. The basis on which they were passed by the Department is not shown: it may have been as an expense of operation as claimed in the Appellant's tax return; or it may have been as an allowance for exhaustion under the then Sec. 5.1. (a). In any event it is clear that the Appellant, by its return indicated that it viewed it as a matter of ordinary operating expense. If in fact, it were a capital asset, then by the provisions of Sec. 6.1 (c) no allowance for depletion or exhaustion could be allowed except as otherwise provided in the Act, namely Sec. 5.1 (a) as it then stood. While the Appellant in 1928 had 10
on its own books appreciated the value of the berths, it continued to claim as deductions from income on the basis of cost only. After 1939 no additional claim was made for further deductions in respect of these items, the entire cost having been written off. The cost of road, mill and camp construction was written off from year to year during the life of the particular area served, as depreciation. Wages and normal operating costs were allowed as deductions under the heading of operating expenses.

I am satisfied that the income here is derived from timber limits and I think it is clear also that the words "derived from" apply equally to oil, gas wells and timber limits as well as to mining notwithstanding the sug- 20
gestion of Respondent's counsel to the contrary.

It is to be noted that the allowance provided for is "for the exhaustion of the timber limits". The marginal note to the section is "depletion" but the word is not used in the section nor is it defined in the interpretation section. There is no provision for depletion as such in the English Act and while in the United States of America such an allowance is made it is on an entirely different basis. So far as I am aware there are no reported Canadian cases where the principles applicable to an extractive industry have been fully considered. I think I can assume that this section is made part of 30
the Income War Tax Act in order to ensure that the tax is levied on income and not on capital and that, therefore, special consideration is given to the industries where the capital asset is extracted and disposed of and where in the ordinary course of things the proceeds of such disposal would be income. The apparent intention is to provide for a deduction from gross income of an amount which in part at least will take the place of the capital asset so extracted and disposed of. The first part of the section, in my opinion, is intended to give such relief to the owner of the capital asset being exhausted. But with the knowledge that some extractive industries are frequently worked under a lease special provision is made later in the section 40
for the division of such allowance as the Minister may make, between the lessor and the lessee as they agree; and failing agreement, to be apportioned between them as the Minister may determine.

It would seem that except for the special provision relating to the case of lessor and lessee, the allowance should be made to the owner of the industry, for it is his capital asset that is being exhausted.

But the section does include a provision for the case where timber limits are operated under a lease and that in such cases each is entitled to that portion of the allowance agreed upon. I think that what is here contemplated is that when the Minister has determined, after consideration of all the facts, that an allowance for exhaustion should be made, that the lessor and the lessee may then deduct such allowance in the proportions they have agreed upon.

10 The Appellant here is clearly not the owner of the capital asset being exhausted i.e. the standing timber; the owner is the Province of Alberta and the terms of the annual licences clearly provide for the vesting of the right of property in the Appellant only when the trees have been cut. The ownership of all uncut trees is clearly still in the Province and remains so until such trees have been cut in any subsequent year under the terms of a new licence.

Reference may be made to *Smylie v. The Queen* ⁽¹⁾. While the question there had to do with the right of the Province of Ontario to attach new conditions upon the granting of a renewal of the licence to cut timber, the Court had to consider timber licences very similar to one here in question. At p. 178, Osler J. A. said:

20 “The case was argued as if by the purchase, as it is called, of the berth or limit, the licensee acquired some title to or ownership of the timber beyond that which by virtue of the Act the licence conferred upon him for the time it was in force. That contention cannot, in my opinion, be supported. The right acquired was to cut, during the term of the licence, timber belonging to the Crown. That timber, when it was cut, and not until then, became the property of the licensee, as provided by the Act. When a new licence was granted the Crown was dealing with its own property and not the property of the licensee . . .”

30 And on p. 2 of the licence here in question certain rights are given the appellant regarding proceedings against trespassers “and any such proceedings which have commenced and are pending at the expiration of the licence may be continued as if this licence had not expired”. The rights of the licensee were confined to the timber cut during the term of the licence (see judgment of MacLennan, J. A. in *Smylie v. The Queen* (supra) at p. 183):

40 Unless, therefore, the Appellant is a lessee of the Province of Alberta, it cannot, in my view, come within the provisions of Section 5 (1) (a). Are the documents, under which the Appellant operated the timber limits in 1941 and which are called “licences to cut timber on the provincial lands”, licences or leases? In deciding whether a grant amounts to a lease or is only a licence, regard must be had to the substance of the agreement

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(1) (1900) 27 O.A.R. 172.

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(Halsbury, 2 Ed. Vol. 20 p. 9). Exhibit 19 is a copy of the provincial licence for berth 6722 for the year ending March 31, 1942, and for all practical purposes is the same as all the other "licenses" under which the Appellant operated in 1941.

The Respondent argued that in fact this "licence" is actually nothing more than a sale of goods and in support of that contention he referred to *Marshall v. Green* ⁽¹⁾ and to *Kauri Timber Co. Ltd. v. Commissioner* ⁽²⁾. In the former case it was held that a sale of growing timber to be taken away as soon as possible by the purchaser is not a contract or sale of land or any interest therein within the fourth section of the Statute of Frauds. 10
Brett, J. at p. 42 outlined the judicial test in regard to the question and said:

"Then there comes the class of case where the purchaser is to take the thing away himself. In such a case where the things are *fructus industriales* then although they are still to derive benefit from the land after the sale in order to become fit for delivery nevertheless it is merely a sale of goods and not within the section. If they are not *fructus industriales* then the question seems to be whether it can be gathered from the contract that they are intended to remain in the land for the advantage of the purchaser and are to derive benefit from so remaining; then part of the subject matter of the contract is the interest in the land and the case is within the section" 20

In the case at bar it is clear that the timber is not *fructus industriales* and that, as the licenses were renewable for a period of some years, the timber would derive benefit by way of increase from so remaining in the soil. The timber here appears to be *fructus naturales*.

The principles enumerated in that case were followed in the *Kauri Timber* case (*supra*) and Lord Shaw of Dunfermline stated at p. 778:

"The law—so clearly settled with regard to the working of coal and of nitrates, and settled upon a broad general principle—is in no way different when it comes to be applied to timber-bearing lands. The principle set out above in the present judgment as to the true reason for holding that such timber rights are of the nature of possession of, and interest in, the land itself has long been settled. A note by the learned editor in the first volume of *Saunders' Reports*, p. 277c, puts the matter thus: "The principle of these decisions appears to be this: that wherever at the time of the contract it is contemplated that the purchaser should derive a benefit from the further growth of the thing sold, from further 40
vegetation and from the nutriment afforded by the land, the contract is to be considered as for the interest in the land; but where

(1) (1875) 1 C.P.D. 35 at 38.

(2) (1913) A.C. 771 at 778.

the process of vegetation is over, or the parties agree that the thing sold shall be immediately withdrawn from the land, the land is to be considered as a mere warehouse of the thing sold and the contract is for goods."

10 There may have been certain necessary modifications of the generality of this principle with respect to emblements or the products of industry like ordinary agricultural crops; but it is unnecessary to analyse these instances or to make any pronouncement upon some of the dicta of judges in later times. For the present is a broad case of the natural products of the soil in timber . . . a crop requiring long-continued possession of land until maturity is reached, and the contract with regard to it in the present case raises none of the difficulties springing out of a covenant for immediate severance and realization. The judgment of Brett J. in *Marshall v. Green* ⁽¹⁾ distinguishes this broad case and properly accepts the note in *Saunders' Reports* which has just been cited."

20 I was also referred to *St. Catherines Milling & Lumber Co. v. The Queen* ⁽²⁾ in which it was held that a permit under which the purchaser had the right within a year to cut from Crown property 1,000,000 feet of lumber is a contract for sale of chattels. But by reason of a particular term of that contract it was not within the contemplation of the parties that the purchasers were to derive any benefit from its future growth in the soil. The same judge (*Burbidge, J.*) in the case of *Bulmer v. The Queen* ⁽³⁾ stated at p. 217:

30 "Here, however, the facts are very different. The licensee is given, subject to certain exceptions that are not material, the exclusive possession of the lands and the right to bring an action against any person unlawfully in possession thereof and to prosecute all trespassers thereon, and a ground-rent is reserved. Then, if the licences were renewable from year to year, possibly for twenty years or more, at the request of the licensee, subject only to a revision of the ground-rent and royalty, and that is a necessary part of the claimant's case, how can it be said that the agreements entered into were for the sale of goods and not of an interest in land?"

40 These decisions however were made before the passing of the Sale of Goods Act. This Act in Alberta is Chap. 146, R.S.A. 1922. It defines "goods" as follows: "goods shall include all chattels personal other than things in action or money. The term shall include emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale."

(1) 1 C.P.D. 35.

(2) 2 Ex. C.R. 202.

(3) (1893) 3 Ex. C.R. 184.

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In Lord Hailsham's 2 Ed. Halsbury, Vol. 29, p. 11, dealing with the Sale of Goods Act, it is stated:

"The concluding words of the definition appear to give a general rule for dealing with all things attached to the land, other than emblements and industrial growing crops, and to get rid of subtleties as to whether they were to be severed by buyer or seller, or whether they were to get any benefit from remaining attached to the land before severance. Under the Act the sole test appears to be whether the thing attached to the land has become by agreement goods, by reason of the contemplation of its severance from the soil . . ."

10

Applying this test to the instant case it would seem that as the "licence" itself provides for vesting all rights of property in the trees, timber, etc., which have been cut that the thing attached to the land, namely the trees, has become by agreement "goods" by reason of contemplation of its severance from the soil.

The case of *Carlson v. Duncan* ⁽¹⁾ dealt with the contention that "timber" was within the definition of "goods" in the Sale of Goods Act and, while the Court of Appeal there held that in that case they were not goods the decision was arrived at because of the special conditions of the contract. There the sale was an out and out sale of all the trees mentioned, the purchaser to have as much time as he desired to remove them from the land. The agreement did not provide that the timber should be severed before sale; and the Court held (presumably because the timber had been sold for cash) that before severance the purchaser had title to an interest in the timber which was part of the land. MacDonal, J. A. said:

"Whether a contract relating to timber constitutes a sale of chattels or relates to an interest in land depends upon the terms of the contract. Because of the special terms of the contract we are considering it is not one for the sale of goods"

30

In the case of *James Jones & Sons Limited v. Tankerville* ⁽²⁾, after discussing *Marshall v. Green* (*supra*) it was said:

"Lastly, in determining the effect of such a contract at law the effect of the Sale of Goods Act, 1893, has now to be considered. Goods are there defined in such a manner as to include growing timber which is to be severed under the contract of sale, whether by the vendor or the purchaser."

In *Fredkin v. Glines* ⁽³⁾, Perdue, J. A. said:

"By this definition we are to consider as goods things attached to, or forming part of, the lands which are agreed to be

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(1) (1931) 2 W.W.R. 343.

(2) (1909) 2 Ch. 445.

(3) (1908) 18 Man. R. 249 at 252.

severed under the contract of sale. It appears to me that by this definition the intention of the parties as evidenced by the contract is the determining factor in arriving at the conclusion whether the article in question is, or is not, a chattel. If, therefore, growing trees, or natural grass, be sold for the purpose of being cut and taken away, pursuant to the contract, they are goods under this definition. There does not appear to be any limit of time imposed by the statute within which the intended severance is to take place. The question is well discussed in Benjamin on Sales, 5th ed. 190."

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10 In Benjamin on Sales 7th ed. 199, in discussing the question "What are goods" it is stated:

continued.

"The definition therefore includes such things, when sold as chattels as fixtures, buildings and other erections and *fructus naturales*."

And at page 200:

20 "It should be remarked that the Act in referring to severance lays down no limit of time, thus going beyond *Marshall v. Green* (supra); for even if the "things" sold are to derive further benefit from the soil, and are not to be removed within a short period, provided that they are agreed to be severed "under the contract of sale", they are declared to be "goods" within the Act."

I have reached the conclusion that in this particular case the contract, in so far as it relates to the acquisition of timber by the Appellant, was a contract for the sale of goods. The timber had to be cut before it became the property of the Appellant and it was then completely severed from the soil. The severance was clearly in the contemplation of the parties and payment was provided for on the basis of board measure after milling. (See exhibit 17)

20 But in the view that I have taken of the whole contract that does not dispose of the matter. In my opinion the contract is something more than a mere sale of goods. It is also a right to enter upon the land for the purpose of cutting and removing the goods agreed to be sold. Do these rights in the land constitute a licence or a lease?

Counsel for the appellant relied strongly on the case of *Glenwood Lumber Co. Ltd. v. Phillips* ⁽¹⁾, in support of his contention that the licences were in fact leases. The Court there was dealing with the effect of certain timber cutting rights in Newfoundland. Lord Davey said at p. 408:

40 "The appellants contended that this instrument conferred only a licence to cut timber and carry it away, and did not give the respondent any right of occupation or interest in the land itself. Having regard to the provisions of the Act under the powers of

(1) (1904) A.C. 405.

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which it was executed and to the language of the document itself, their Lordships cannot adopt this view of the construction or effect of it. In the so-called licence itself it is called indifferently a licence and a demise, but in the Act it is spoken of as a lease, and the holder of it is described as the lessee. It is not, however, a question of words but of substance. If the effect of the instrument is to give the holder an exclusive right of occupation of the land, though subject to certain reservations or to a restriction of the purposes for which it may be used, it is in law a demise of the land itself.”

10

The Provincial Lands Act of Alberta 1939 is an act to amend and consolidate the Provincial Lands Act. It provides for the disposal of agricultural land, grazing land, hay and marsh lands, mineral lands, etc. by lease. Then follows certain sections under the heading “Disposal of Timber”.

Section 49 gives to the Lieutenant Governor in Council power to 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.

Section 50 reads:

“The person to whom a timber berth is awarded under the last preceding section shall be granted a license therefor. . . .”

20

Throughout the section the person to whom the berth is awarded is referred to as a licensee and the authority granted to him is called a licence and not a lease.

Under the regulations of July 25, 1940, a timber licence means “any permit granted under these or any former regulations for the cutting and removal of Crown timber for any purposes.” It was under that Act and those regulations that the licences in question were granted. By the terms of exhibit 17—in regard to berth 6722—the successful bidder was required to apply for a licence and the appellant apparently did so. All the documents under which the appellant operated in 1941 were called licences throughout.

30

The distinction between licences and leases is discussed in the 24th Edition of Woodfall on Landlord and Tenant p. 6 and in English and Empire Digest Vol. 30 p. 501, and all the relevant cases are referred to therein. In Woodfall it is stated “it has been seen above that there is a demise where a right is granted to the exclusive possession of the lands or tenements for a determinate term”. The grant of such exclusive possession is a lease although there may be certain reservations or restrictions of the purpose for which the possession may be used and although it may be described as a licence.

40

In proceedings between the parties to the contract it might well be impossible to successfully assert that what each has called a licence was in fact a lease. But this is not such an action and I have to determine whether

under the Income War Tax Act the contract is a lease of timber limits. There being no definition of lease in the Act I think I am not entitled to construe the word as it may have been defined in any Provincial Act but rather to ascertain how it has been judicially construed.

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In the case of *Grand Trunk Railway v. Washington* ⁽¹⁾ it was said: "As these are enactments emanating from a different legislative body from that which passed the statute to be interpreted, their Lordships are unable to see that they ought to have any influence upon the question to be decided arising exclusively upon the Dominion Act."

10 Exhibit 19, as to the rights conferred on the appellant in the land, seems to answer all the tests laid down in the cases referred to in the text books I have mentioned and in the cases therein noted as well as the ones I have specifically referred to. A fixed rental is provided for; exclusive possession, subject to specific reservations, is given and there is a definite term—1 year. Rights of action against trespassers are given the Appellant and the latter is required to pay all rates and assessments and taxes imposed by any municipal improvement scheme or drainage district to be charged on the timber berth. Looking therefore at the substance of the agreement I must on the authorities reach the conclusion that, notwithstanding the
20 words used in the document itself, it contains a lease of the land, and I so find.

continued.

The so-called license is, I think, both a contract for the sale of goods and a lease. Reference to the regulations (Ex. 28 sec. 8) and to the conditions of sale (Ex. 17) shows that a bidder in addition to tendering for the sawn lumber, is required also to enter into a contract to pay rent. The "licence" embodies both in one document. (See *Bulmer v. The Queen* (1894) 23 S.C.R. 488 at 496).

Counsel for the Appellant urged upon me that his client had a statutory right to an allowance for depletion and referred me to the *Pioneer Laundry Case* ⁽²⁾. The decision in that case was made under section 5 (a) which
30 then read:

"5. "Income" as hereinbefore defined shall for the purposes of this Act be subject to the following exemptions and deductions:

(a) 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;

40 And in the case of leases of mines, oil and gas wells and timber limits, the lessor and the lessee shall each be entitled to deduct a part of the allowance for exhaustion as they agree and in case the

(1) (1899) A.C. 280.

(2) (1940) A.C. 127.

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lessor and the lessee do not agree, the Minister shall have full power to apportion the deduction between them and his determination shall be conclusive."

In Lord Thankerton's judgment he stated:

"Their Lordships are unable to agree with these views, and they agree with the opinion of Davis J., in which the Chief Justice concurred, and in which he states: The appellant was entitled to an exemption or deduction in "such reasonable amount as the Minister, in his discretion, may allow for depreciation". That involved, in my opinion, an administrative duty of a quasi-judicial character—a discretion to be exercised on proper legal principles.

10

In their Lordship's opinion, the taxpayer has a statutory right to an allowance in respect of depreciation during the accounting year on which the assessment in dispute is based."

But following that decision the section was changed and insofar as depletion or exhaustion is concerned from 1940 on the section has been as shown on page 2 herein. The changes in my view are important and it is necessary to consider whether, under the new wording the taxpayer, has now a statutory right to the deduction or whether the granting of such an allowance by the Minister is purely permissive.

20

Before the amendment it is to be noted that the words were: "Income as hereinbefore defined shall for the purposes of this Act be subject to the following exemptions and deductions: (a) Such reasonable amount as the Minister in his discretion may allow for depreciation" . . .

As stated in the Pioneer Laundry case the taxpayer had a statutory right to an allowance, the amount of which was in the discretion of the Minister, and as laid down by the Privy Council the Minister had a duty to fix a reasonable amount with which decision the Court would not interfere unless it was manifestly against sound and fundamental principles. As the section then read it was only the amount of the allowance which was left to the discretion of the Minister.

30

As it now stands the first part of the section reads:

"Income as hereinbefore defined shall for the purposes of this Act be subject to the following exemptions and deductions:—

- (a) The Minister in determining 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." . . .

The discretion here conferred on the Minister is in my view quite different from that which he had prior to the amendment. In my opinion the word "may" is used in its permissive sense and not as imperative. The

40

Interpretation Act, section 37 (24) says "shall" is to be construed as imperative and "may" as permissive.

Reference may be made to the judicial interpretation of the words "may" and "shall" in the case of *Canada Cement v. The King* ⁽¹⁾ and cases therein referred to. In that case Audette J. quoted the judgment of Lord Moulton in *McHugh v. Union Bank* ⁽²⁾, as follows:

10 "It is true that (as is customary in interpretation clauses) these subsections are prefaced by the words "unless the context otherwise required", but that does not take away from the authority of the express direction as to the construction of the words "shall" and "may". The Court is bound to assume that the legislature when it is used in the present instance the word "may" intended that the imposition of the penalties should be permissive as contrasted with obligatory unless such an interpretation would be inconsistent with the context, that is, would render the clause irrational or unmeaning. But there is nothing in the context which creates any difficulty in accepting this statutory interpretation of the word "may". The clause is just as intelligible with the one interpretation as with the other. So far from creating any difficulty the interpretation which leaves it permissive appears more

20 reasonable seeing that there is no exception in the clause for cases where the excess has been taken either under mistake or by inadvertence, and it is not likely that the legislature would insist on penalties being enforced where no blame attached. Be this as it may, there is nothing in the clause which will permit their lordships to depart from the express provision of the Interpretation Ordinance stating that "may" shall be construed as permissive.

30 This being the case, it is not necessary to examine the English decisions which establish that in certain cases "may" must be taken as equivalent to "must". In the light of those decisions it is often difficult to decide the point, and in their Lordships' opinion the object and the effect of the insertion of the express provision as to the meaning of "may" and "shall" in the Interpretation Ordinance was to prevent such questions arising in the case of future statutes."

40 In this case I think the court is bound to assume that when Parliament changed the wording of the section it intended that the allowance should be permissive as contrasted with obligatory and it must be so read unless such an interpretation would be inconsistent with the context, that is, render the clause irrational or unmeaning. No such inconsistency appears in the section. Here a much wider direction is given to the Minister than if the wording were "shall" be entitled to such an allowance as the Minister may

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(1) (1923) Ex. C.R. 145 at 150.

(2) (1913) A.C. 299 at 314.

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continued.

deem fair and just. In my view the discretion extends not only to the determination of what is a fair and just allowance but also as to whether or not, under all the circumstances, any allowance should be made. It may seem to be a somewhat arbitrary power but it is not for the Court to question the wisdom of Parliament in so enacting.

But, in fact, in this particular case the discretion of the Minister does not seem to have been used in any arbitrary way as will appear from a consideration of all the facts. As I have found, the appellant is not the owner of the timber being exhausted, and has no depletable interest therein. In addition, it has already benefitted by deductions from its income over a period of years of all costs which could possibly be called capital costs (as well as all costs of operation) and, therefore, by such deductions, has been allowed to keep its capital investment intact. And while, apparently, the appellant had never previously claimed these deductions as depletion under section 5 (1) (a), but rather by way of depreciation or as disbursements or expenses wholly, exclusively and necessarily laid out or expended for the purpose of earning the income, they were in fact allowed. The result was that the appellant was eventually able to write off its full capital investment. 10

Moreover, there is a special situation here which deserves comment. 20
It seems to me that Parliament in providing for the division of any allowances made by the Minister between the lessor and lessee "as they agree" may have had in mind that a lessor and lessee, both of whom were interested in a share of such allowance, would endeavour to reach an agreement which would reasonably reflect their actual respective interests in the thing which was being exhausted. Failing such an agreement the Minister would have had to give similar consideration to the facts disclosed to him. But here it is to be observed that the Province of Alberta is not subject to payment of income tax and having no interest in claiming a part of such allowance has indicated its consent to 99% of such allowance being made to the appellant. 30
The result is quite clear, namely that the appellant, having little or no proprietary interest in the asset being exhausted and having had all its costs already taken care of by annual deductions would escape a considerable degree of taxation. It is true of course that a taxpayer may take such legal steps in managing his affairs as may avoid attracting tax to his income. But it seems to me that situations such as I have outlined are matters which the Minister is quite entitled to consider in reaching any conclusion as to whether any allowance should be made. It is apparent that he has had them or some of them in mind and has concluded that no allowance in this case should be made. It is not a case where allowances had formerly been made 40
to operators of timber limits, holding under such an agreement as this over a long period of time; the evidence indicates that they had never been made up to 1941. Inasmuch therefore as the Minister appears to have reached a conclusion which, in my interpretation of his powers he was quite entitled to reach and the decision on which is left to him, it is not a matter where the Court should interfere.

Nor can I find that in exercising his discretion the Minister has proceeded on any wrong principles. All the facts necessary to determine the matter were in his possession and it has not been shown that in reaching his conclusion he did not follow the principles laid down for the exercise of discretion in the Pioneer Laundry and other cases.

At the trial I allowed certain evidence to be given subject to later ruling as to its relevancy and admissibility. Certain "rulings" given by the Department and published in Gordon's Digest of Income Tax Cases (1939) were tendered. This digest was published by the direction of the then Minister of National Revenue and printed by the King's Printer. These "rulings" appear to have been issued from time to time by the Department and sent to the various branch offices of the Income Tax Department as an indication of the view taken by the Department in certain problems; they sometimes included information as to changes in rates of depletion and gave lists of cases in which shareholders were entitled to depletion allowances and other matters of a like nature. They have received fairly wide publicity and are well known to lawyers, accountants, etc.

The statement of claim brings in issue the practice of the department in regard to the administration of depletion allowances; generally speaking, I think it may be said that evidence of departmental practice is inadmissible in construing a statute; but there are cases in which it would be of assistance in interpreting an ambiguous statute, particularly when such practice has long continued and is clearly not contrary to the Act itself. And as the "rulings" referred to have to do with other extraction industries mentioned in the subsection. I have reached the conclusion that they are relevant to the issue and should be admitted.

Evidence was also tendered as to certain special allowance for saw-logs scaled in 1943 west of the Cascade Range etc. (in which area the appellant was not included) and as to several allowances for depletion granted in 1945 to the pulp and paper industry only, to commence in the 1941 period. This evidence is, I think, quite irrelevant to the issue before me. These special allowances were made as a war measure to stimulate production of certain commodities in certain areas and they do not affect the appellant. I recall no evidence that they were made under Sec. 5 (1) (a), and if, as a war measure, the Minister exercised his discretion in a special way for certain limited groups of the industry, I can see no reason why it must be made applicable to all.

My conclusions, therefore, are that while the contracts in question are leases as to the land mentioned therein, and are contracts for the sale of goods as to the timber purchased, that the Minister having a discretionary power, after considering all the facts in the case to grant or withhold any

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allowances, and having exercised that discretion according to proper legal principles, his discretion should not be interfered with.

The appeal is therefore dismissed with costs.

Judgment accordingly.

(*Sgd.*) J. CHAS. CAMERON,
D.J.

Ottawa,
Dec. 20, 1945.

No. 24

Formal Judgment

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No. 24
Formal
Judgment
20th
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1945.

The appeal of the Appellant herein under the provisions of the Income War Tax Act from the Decision of the Minister of National Revenue, dated the 26th day of September, A.D. 1944, confirming the assessment made upon the Appellant in respect of the year 1941, having come on for hearing before this Court at the City of Edmonton, in the Province of Alberta, on the 19th, 20th and 21st days of September, A.D. 1945, in the presence of counsel both for the Appellant and Respondent; UPON READING the papers and documents filed with the Court as required by the said Act and the pleadings filed; AND UPON HEARING the evidence adduced and what was alleged by counsel aforesaid; the Court was pleased to direct that the cause should stand over for judgment and the same coming on this day for judgment; 20

THIS COURT DOTH ORDER AND ADJUDGE that the said appeal be and the same is hereby dismissed with costs.

BY THE COURT,

(*Sgd.*) H. R. L. HENLY,
REGISTRAR.

No. 25

Notice of Appeal

*In the
Supreme
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No. 25
Notice of
Appeal
4th
January,
1946.

TAKE NOTICE that the Appellant intends to appeal and does hereby appeal to the Supreme Court of Canada from the Judgment of this Court rendered in this cause on the 20th day of December, 1945.

DATED at Ottawa, this 4th day of January, 1946.

Messrs. Smith, Clement, Parlee &
Whittaker,
Edmonton, Alberta,
Solicitors for the Appellant,

10

By their Agents,
Messrs. Gowling, MacTavish & Watt.

TO:

The Registrar of this
Honourable Court, and

TO:

The Minister of National Revenue.

No. 26

Agreement as to the Contents of Appeal Book

No. 26
Agreement
as to the
Contents
of
Appeal
Book,
February,
1946.

20 IT IS AGREED between the Solicitors for the Appellant and the Solicitors for the Respondent that the appeal book in the appeal pending herein to the Supreme Court of Canada shall consist of the following:

1. Notice of Appeal.
2. Decision of the Minister.
3. Notice of Dissatisfaction.
4. Reply of the Minister.
5. Order of the Registrar.
6. Pleadings:
 - (a) Amended Statement of Claim.
 - (b) Statement of Defence.
 - (c) Reply in Joinder of Issue.

30

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of
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continued.

7. Evidence and proceedings at trial.
8. The exhibits at trial.
9. Reasons for judgment of the learned Trial Judge.
10. Formal Judgment of the Exchequer Court of Canada.
11. Notice of Appeal to the Supreme Court of Canada.
12. Agreement as to contents of appeal book.
13. Order dispensing with printing of Exhibit number 28 and authorizing the said Exhibit number 28 to be filed in a separate volume, with twelve (12) copies of each volume, such copies to exclude all regulations made prior to the 25th day of July, A.D. 1940. 10
14. Registrar's Certificate.
15. Solicitors' Certificate.

DATED at the City of Edmonton, in the Province of Alberta, this 20th day of February, A.D. 1946.

SMITH, CLEMENT, PARLEE & WHITTAKER,
Solicitors for the Appellant.

(*Sgd.*) GEORGE W. AUXIER,
of Counsel for the Respondent.

No. 27
Order
Dispensing
with the
Printing
of One
of the
Exhibits.
24th
February,
1946.

No. 27

Order Dispensing with the Printing of One of the Exhibits 20

BEFORE THE REGISTRAR IN CHAMBERS, Monday, the 24th day of February,
A.D. 1946.

UPON the application of counsel for the Appellant in the presence of counsel for the Respondent, upon reading the Affidavit of William Ogden Parlee, filed, and upon hearing what was alleged by counsel aforesaid,

IT IS ORDERED that, the printing of Exhibit 28 herein be and the same is hereby dispensed with on condition that twelve copies of the said Exhibit, excluding all regulations made prior to the 25th day of July, A.D. 1940, be filed for the use of the Court bound in a separate volume.

AND IT IS FURTHER ORDERED that the cost of and incidental to this application which are hereby fixed at the sum of \$15.00 and disbursements be costs in the Appeal.

(Sgd.) PAUL LEDUC,
Registrar.

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Court of
Canada*

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Order
Dispensing
with the
Printing
of One
of the
Exhibits.

continued.

No. 28

Registrar's Certificate

10 I, the undersigned, Registrar of the Exchequer Court of Canada, hereby certify that the foregoing printed documents from pages 2 to 151 inclusive, is the case stated by the parties pursuant to Section 68 of the Supreme Court Act and the Rules of the Supreme Court of Canada in a certain case in the said Exchequer Court of Canada in which the D. R. Fraser and Company Limited was Appellant and the Minister of National Revenue was Respondent.

IN WITNESS WHEREOF I have hereunto subscribed my hand and affixed the seal of the Exchequer Court of Canada this 26th day of March, 1946.

(Sgd.) ARNOLD W. DUCLOS,
Registrar.

No. 28
Registrar's
Certificate.

20

No. 29

Solicitor's Certificate

I, William Ogden Parlee, of the City of Edmonton, Province of Alberta, a Solicitor in the Supreme Court of Alberta, and a member of the firm of Smith, Clement, Parlee and Whittaker, Solicitors for the Appellant, hereby certify that I have personally compared the annexed Print of the case in appeal to the Supreme Court of Canada with the originals, and that the same is a true and correct reproduction of such originals.

(Sgd.) WILLIAM OGDEN PARLEE,
A Solicitor for the Appellant.

No. 29
Solicitor's
Certificate.

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No. 30

Formal Judgment.

*In the
Supreme
Court of
Canada*

No. 30
Formal
Judgment.

IN THE SUPREME COURT OF CANADA

Tuesday, the 4th day of February, A.D. 1947.

PRESENT:

THE HONOURABLE MR. JUSTICE KERWIN
THE HONOURABLE MR. JUSTICE
TASCHEREAU
THE HONOURABLE MR. JUSTICE RAND
THE HONOURABLE MR. JUSTICE ESTEY

10

BETWEEN:

D. R. FRASER AND COMPANY LIMITED,
Appellant,

AND:

THE MINISTER OF NATIONAL REVENUE
Respondent.

The Appeal of the above named Appellant from the judgment of the Exchequer Court of Canada pronounced on the 20th day of December, in the year of Our Lord One Thousand Nine Hundred and Forty-five, whereby the appeal from the Decision of the Minister of National Revenue was dismissed, having come on to be heard before this Court on the 23rd day of April in the year of Our Lord, One Thousand Nine Hundred and Forty-six in the presence of counsel as well as for the Appellant as for the Respondent, whereupon and upon hearing what was alleged by counsel aforesaid, this Court was pleased to direct that the said appeal should stand over for judgment, and the same coming on this day for judgment. 20

THIS COURT DID ORDER AND ADJUDGE that the said judgment of the Exchequer Court of Canada should be and the same was affirmed and that the said appeal should be and the same was dismissed with costs to be paid by the said Appellant to the Respondent. 30

SETTLED this 1st day of May, A.D. 1947.

By the Court

(Signed) PAUL LEDUC.
REGISTRAR.

No. 31

Reasons for Judgment.

IN THE SUPREME COURT OF CANADA

D. R. FRASER & COMPANY LIMITED,

v.

THE MINISTER OF NATIONAL REVENUE

Coram: Kerwin, Taschereau, Rand and Estey, JJ.

The judgment of Kerwin and Taschereau, JJ. was delivered by Kerwin, J.:—

10 The appellant in this appeal against a decision of the Exchequer Court, D. R. Fraser and Company Limited, complains that the Minister of National Revenue has made no allowance for the exhaustion of its timber limits in connection with its income tax for the year 1941 and bases its claim to such allowance upon section 5, subsection 1 (a) of *The Income War Tax Act*, R.S.C. 1927, chapter 97, which since the amendment by section 10 of chapter 34 of the Second Session of 1940 reads as follows:

5. "Income" as hereinbefore defined shall for the purposes of this Act be subject to the following exemptions and deductions:

20 (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 each 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 Revised Statutes, paragraph (a) reads as follows:

30 (a) 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;

The effect of this clause as to depreciation was considered by the Judicial Committee in *Pioneer Laundry and Dry Cleaners Limited v. Minister of National Revenue* (1940) A.C. 127, but immediately after this

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and
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decision, the part relating to depreciation was removed from paragraph (a) and inserted in section 6 where it is provided that a deduction shall not be allowed in respect of

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Kerwin
and
Taschereau
JJ.
continued.

(n) depreciation except such amount as the Minister in his discretion may allow, etc. . . .

We are not concerned in this appeal with depreciation but with exhaustion and it is significant that Parliament, by the amendment in 1940, instead of the provision in the original clause that the Minister *shall* make such an allowance for the exhaustion of the mines, wells and timber limits as he may deem just and fair, enacted that he *may* make such an allowance. I cannot read the change otherwise than as giving the Minister a discretion not merely as to the amount but also as to whether any allowance for exhaustion should be made. 10

In the present case it has been determined by the Minister through his deputy that no such allowance should be made and the Court is not free, even if it so desired, to make one. The appellant complains that allowances have been made in the cases of mines, oil and gas wells, for all saw-logs scaled in the area generally described as west of the Cascade Range of mountains or all saw-logs scaled that go to the salt water of the Pacific, or commonly referred to as the coastal logging area, and also in the case of pulp companies. I have no doubt that the Minister is not required to make an allowance for all classes and the fact that it was thought advisable to provide for allowances in the two last named categories does not give the Court jurisdiction to replace the exercise of the Minister's discretion with its own. On the face of it many reasons might be advanced for treating mines and gas and oil wells differently from timber limits where there is a natural growth of the trees that are not felled. 20

In this view of the matter it is unnecessary to consider the arguments that were advanced as to whether the appellant who now holds licenses from the Province of Alberta is a lessee. The reasons for judgment of the Judicial Committee in *Minister of National Revenue v. Wright's Canadian Ropes Limited* are now at hand but there is nothing in them that is of assistance in determining the present appeal which should be dismissed with costs. 30

RAND, J.

Reasons for
Judgment
Rand, J.

The appellant carries on a lumbering business in the Province of Alberta. It holds three agreements with the Government of the Province, granting the right to cut lumber of certain dimensions on described areas of land. The company is vested with the right of possession of the lands, subject to reservations which, in my opinion, do not affect the substance 40

of that possession; title to the timber passes upon severance, and the company is entitled to any trees severed by third persons and the value of those growing on portions of the limits withdrawn and put to other uses. Various directive powers are retained by the Province designed to enable the Government to bring about the most efficient utilization of the timber. The term is one year, but subject to the fulfilment of its conditions, the agreements are renewable from year to year while the quantity remains commercially valuable, indefinitely as to two and until 1950 as to the third.

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Judgment
Rand, J.

continued.

10 A great deal of discussion took place before Cameron, J. as well as this Court as to the precise interest created by the agreement. But the specific rights and powers granted seem to me to be sufficient to enable us to deal with it in relation to the questions raised. Although title to the timber passes only on severance, and apart from possession, with the limitation of tree dimensions in cutting and the periods over which the rights extend, it is, I think, impossible to say that the appellant has not some interest in the growth of the trees and so in the land. The income of the company is clearly derived from "timber limits", but whether the relation to the Crown is that of lessor and lessee is not an essential feature of the controversy.

20 That question is whether the company has a right to an allowance for exhaustion or depletion under section 5 (1) (a) of *The Income War Tax Act*:

5. (1) "Income" as hereinbefore defined shall for the purposes of this Act be subject to the following exemptions and deductions:—

30 (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 each 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;

40 The decision or allowance, under this language, is distributive not only as to the general groups enumerated, but also to classes within the group. In dealing with enterprise of such dimensions, the right or administrative power created can only mean that Parliament had in mind a flexible applicability; any other intention must have been indicated by language of specific limitation.

The Crown's position is, first, that the grant of an allowance lies entirely within the discretion of the Minister, and alternatively, that deductions sufficient to satisfy any right given by the statute have already been claimed and allowed in income returns submitted.

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Reasons for
Judgment
Rand, J.
continued.

I think it necessary, at the outset, to clarify the conception of what is intended by the paragraph. The company in its business, acquires timber limits for the purpose of their operation, terminating in the sale of milled lumber. It does not purchase either the land or the standing timber outright, but it holds an interest through the agreements mentioned. For that, as to two of the berths, it has paid, first, what is known as the price of the berth, a sum generally competitive, for the grant of the interest; then, what are called "timber dues", in this case a charge of so much on each 1,000 feet board measure of the lumber produced; and finally, ground rent, taxes, fire rates, etc. The third was acquired under competitive bidding for dues payable, plus the last items. For the operation itself, there are the disbursements for mills, plant, roadways, bridges, wages and other usual expenses. 10

Accounting principle which allocates outlays to capital and operation, conceives capital in two forms, fixed and working or circulating. So far as fixed assets may be partially consumed or worn out during the operation, the principle of depreciation applies and excludes that element of capital from net income; obsolescence similarly takes care of wastage in operating value. Ordinary working capital is kept intact by return from gross income. There remains what may be called consumable or wasting capital. 20

Here the distinction between capital and assets becomes material. Capital is essentially the funds brought together for the purpose of setting the enterprise under way; but in dealing with depreciation, depletion or obsolescence, the attention is directed primarily to the asset or property by which it is represented. In relation to these elements of accounting, however, the asset must be regarded in terms of its capital value. Normally that value is cost and is conceived as distributed throughout the property; and for depletion we must look to the property in the aspect of that value unless by the terms of the statute or by the discretion of the Minister some other basis is prescribed or allowed. 30

In the present case, admittedly the company has recovered by way of deductions from its income all of the outlay, capital and operating, which it has put into the business. What is contended is that it has a valuable asset in the standing timber; that the capital employed in the operations and allowed was deductible as expense necessary to earning the income; and that the right to depletion is in respect of the remaining asset over and above any capital investment.

The express language of the statute throws little light on what is intended. Section 6 (1), paragraphs (a) and (b) are as follows:

6. (1) In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of 40

(a) disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income;

(b) any outlay, loss or replacement of capital or any payment on account of capital or any depreciation, depletion or obsolescence, except as otherwise provided in this Act;

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Supreme
Court of
Canada*

The implication of (a) seems to be that all disbursements or expenses “wholly, exclusively and necessarily” laid out or expended to earn the income are deductible items; and (b) appears to deal only with fixed capital assets; and it is not wholly clear whether the deductions in this case were claimed or allowed under 6 (a) or 5 (1) (a).

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continued.

Under accounting theory, depreciation and obsolescence in fixed assets may, perhaps, be looked upon as value used up “wholly, exclusively and necessarily” in the earning of the income and so expenses to be taken into the account; but they are not mathematically measureable and resort is necessary to such standards as will approximate the averages in experience. For that reason, allowances for these two items must be brought within some judgment and hence we have then removed from the general field of expense and made subject to the Minister’s determination.

A further complexity arises in enterprise in which investment takes not only the ordinary and commercial risks, but also risks of physical speculation. Large sums of money are spent in sinking mining pits and building plants or drilling oil or gas wells; but the recoverable quantities of these substances are in fact largely unknown. Virtually the total funds of a company may be committed exclusively to a venture of uncertain production and length of life. On what basis can there be assurance of the recovery of outlay in such case “wholly, exclusively and necessarily” made before a net gain can be said to have been reached? It is this desideratum that the allowance for exhaustion is, I think, intended to supply. It calls for judgment of experience; and considering the unknown factors in the complication of actual operations in the mining industry, and the different accounting methods or measures by which the object in view might be attained, any award made by the Minister “as just and fair” on that broad basis of fact would be unchallengeable.

We have thus three items of necessary expense, depreciation, obsolescence and exhaustion placed in the discretionary judgment of the Minister; and with the general operating expense, they constitute the debit to be made against gross income before profit is reached. But just as clearly, if they are in fact included as general expense, they cannot be duplicated under these special deductions.

Now, Parliament might have in mind the extension of such an allowance beyond capital value as a means of stimulating enterprise in these fields; that for the risk of investing \$100,000 in a gold mine, in addition to the provision of return of the investment, and as a bonus to the industry,

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continued.

a measure of further exemption from taxation in the net profit should be made. This would place on the Minister the duty of administering the Act for a purpose foreign to its main object. No doubt the economic health of these particular industries is sensitive to a tax on income; but having regard to the purpose and structure of the Act, the allowance to be given is not, in my opinion, intended to conflict with the principle of taxation of the net gains. If that were not so, I should expect to see the statutory language clear and precise.

The evidence on discovery of Mr. Elliott, representing the respondent, particularly where he indicates the considerations presented to the Department by the mining interests, does not support the appellant's contention. What these interests were seeking was security against the failure of an operation to return the funds committed to its hazard, but that has nothing to do theoretically with the making of allowances out of what is otherwise admittedly net income. 10

It is, therefore, sufficient to say that whatever the effect of depletion allowance may, in particular cases, be, it nevertheless is designed only to enable the Minister broadly in time, factors and basis, to afford assurance of the recovery of investment committed to the risk undertaken. But what is to be the basis of returnable value? For instance, cost may be inapplicable to property demised: special considerations might affect it in mining ventures, and, as in the United States, place it either at the fair market value at the time of discovery, or a value ultimately ascertained by a percentage of gross return. But, apart from the latter, where there has in fact been a return of basic value or investment, the warrant for allowance has been removed. If here the measure, under the statute, is to be taken to be cost, then without more the case for the appellant disappears. 20

Even conceding an absolute right to an allowance, it is necessarily bound by the limitation of value spread evenly over the asset as a whole; and since the statute does not prescribe the basis, the Minister must be free in any case to adopt one reasonably designed to carry out the purpose intended. On this assumption, I take the word "may" to include a discretion in that choice; and that the basis of actual capital investment may be used by him in any case is, I think, beyond doubt. Ordinarily the increments of return would attach to every unit of asset and value, but here the whole has been recovered by relation to part only of the asset. 30

It is objected that in a case of logging operations in British Columbia, an allowance for exhaustion was made and it is urged that the statute implies an equality of treatment to all operators which has here been denied. But the evidence falls far short of establishing a similarity of conditions sufficient to raise the question of equality; and as the lumber industry as a whole is not a single unit for discretionary treatment, no foundation for the complaint has been laid. 40

The appeal should, therefore, be dismissed with costs.

ESTEY, J.:

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Judgment
Estey, J.

This is an appeal from a judgment in the Exchequer Court of Canada affirming the Minister's decision refusing an allowance for exhaustion of timber limits in the appellant's 1941 income tax assessment.

The appellant carries on the business of logging and general milling in the Province of Alberta. In the 1941 tax year it cut timber upon three timber limits under licenses from the Government of Alberta and numbered respectively 1161, 1727 and 6722. The appellant has been a licensee of timber limit No. 1161 since 1904, and of No. 1727 since 1912, at first in association with others but in the year 1941 and for years prior thereto it was the sole licensee. In 1940 the appellant became the licensee of timber limit No. 6722. These licenses are from year to year with a right in the licensee, upon compliance with the conditions specified, to renew from year to year (now by 1939 S.A., c. 10, s. 49 (e) not renewable after the tenth year). These licenses give to the licensee exclusive possession of the premises and the property in timber as and when cut.

In 1941 the appellant claimed as a deduction in determining its income tax an allowance for the exhaustion of these timber limits under section 5 (1) (a) of *The Income War Tax Act*, 1927, R.S.C., c. 97, which the Minister disallowed. Section 5 (1) (a) 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 each 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.

The Minister affirmed his disallowance 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 Subsection (a) of Section 5 of *The Income War Tax Act* for the exhaustion of timber limits owned by the Crown in the 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.

At the trial the Crown set up a further reason for this disallowance by amending its defence as follows:

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 licenses 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*".

The learned trial Judge found as follows:

10

As I have found, the appellant is not the owner of the timber being exhausted, and has no depletable interest therein. In addition, it has already benefitted by deductions from its income over a period of years of all costs which could possibly be called capital costs (as well as all costs of operation) and, therefore, by such deductions, has been allowed to keep its capital investment intact. And while, apparently, the appellant had never previously claimed these deductions as depletion under section 5 (1) (a), but rather by way of depreciation or as disbursements or expenses wholly, exclusively and necessarily laid out or expended for the purpose of earning the income, they were in fact allowed. The result was that the appellant was eventually able to write off its full capital investment.

20

The appellant does not dispute these findings of fact but submits that under section 6 (a) it was entitled to deduct the costs of acquiring timber as disbursements or expenses wholly, exclusively and necessarily laid out or expended for the purpose of earning the income. Further, that the allowance for the exhaustion of timber limits under section 5 (1) (a) is an allowance unrelated to costs or to the nature of its holding in the land; that under this section if the income is derived from timber limits, then in the determination of the assessment an exhaustion allowance must be made. This it suggests is supported in the view that lumbering is an extractive industry, short-lived and hazardous both from an economic and operating point of view and therefore:

30

. . . Parliament, probably because of these hazardous conditions and the short life of the ordinary extractive industry made this extra allowance for exhaustion over and above and completely unrelated to cost of the product or substance and the land from which it is extracted.

40

The record in this case justifies the conclusion that Parliament had in mind some such considerations and concluded that the ordinary methods of determining depreciation (which prior to the amendment was in the same section) and other appropriate allowances were not always adequate to

deal with the investments in a business subject to such risks as lumber, but it must not be overlooked that section-5 is dealing with exemptions and deductions, and there is no suggestion that the allowance is to be treated as other than a deduction or an exemption.

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No. 31

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Judgment
Estey, J.

continued.

The language of the section supports the appellant's contention that its interest in the land as lessee, licensee or otherwise (except in cases of leases where provision is made for apportionment) is not the material consideration but rather that its income is derived from timber limits which is here admitted.

10 The appellant's contention then is that when its income is derived as it is here in 1941 from timber limits it has a statutory right to an exhaustion allowance under section 5 (1) (a), or as its counsel otherwise states his contention:

. . . the Minister had an administrative duty of a *quasi* judicial character to make a reasonable allowance for the exhaustion of timber limits to those who derive their income from timber limits.

This submission is made upon the authority of the Privy Council decision in *Pioneer Laundry & Dry Cleaners Limited v. Minister of*
20 *National Revenue* (1940) A.C., 127, where Lord Thankerton stated at p. 136:

The taxpayer has a statutory right to an allowance in respect of depreciation during the accounting year on which the assessment in dispute is based.

The Minister has a duty to fix a reasonable amount in respect of that allowance. . . .

That decision was made under section 5 (1) (a) prior to the amendment thereof in 1940. The section prior to that amendment read:

30 5. "Income" as hereinbefore defined shall for the purposes of this Act be subject to the following exemptions and deductions:

(a) 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; . . .

As amended by 1940 Dom., c. 34, s. 10, the section reads in part as follows:

40 10. Paragraph (a) of subsection one of section five of the said Act, as amended by section four of chapter twelve of the statutes of 1928, is repealed and the following substituted therefor:

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Judgment
Estey, J.
continued.

(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, . . .

This 1940 amendment deleted the provision relative to depreciation from this section and as amended placed it in section 6 (n). That part with respect to timber limits was left in section 5 (1) (a) but the word "shall", where it appears before the phrase "make such an allowance", was changed to "may". The section, therefore, as it now reads gives to the taxpayer no statutory right to an allowance as it did with respect to a reasonable amount (with reference to depreciation), but leaves the question of "an allowance for the exhaustion" to be dealt with by the Minister. The Minister first decides whether he may make "such an allowance" for the exhaustion of the timber limits, and if he so decides, then he must fix an amount that "he may deem just and fair". The effect of this amendment is that the Minister may, not that he must, make such an allowance and therefore there is no absolute statutory right to an exhaustion allowance. The fact that the permissive word "may" is used would justify this conclusion under section 37 (24) of *The Interpretation Act*, 1927 R.S.C., c. 1, but in this instance it is emphasized by the fact that Parliament changed the imperative word "shall" to the permissive "may". *Conger v. Kennedy*, (1896) 26 Can. S.C.R. 397, at 404; *Corporation of the City of Ottawa v. Hunter*, (1900) 31 Can. S.C.R. 7, at 10.

It was suggested that the concluding words of section 5 (1) (a) "his determination shall be conclusive" meant that the Minister's determination should be final. It would appear rather that these words relate only to a disagreement which may arise between the lessor and the lessee, in which case the Minister makes the apportionment and "his determination shall be conclusive". It does not refer back to the earlier part of the section dealing with the granting or refusing of an allowance.

The nature and character of the duties imposed upon the Minister under this section 5 (1) (a) would appear to be unchanged by the amendment. They remain, as stated by Lord Thankerton in *Pioneer Laundry and Dry Cleaners, Limited v. Minister of National Revenue* (1940) A.C., 127 at 136:

. . . so far from the decision of the Minister being purely administrative and final, a right of appeal is conferred on a dissatisfied taxpayer; but it is equally clear that the Court would not interfere with the decision, unless, as Davis J. states, "It was manifestly against sound and fundamental principles".

If, therefore, granting as the respondent contends, the Minister now has a discretion to make or refuse an allowance, the question still remains, did he in exercising that discretion violate sound and fundamental principles?

The amended Statement of Defence sets out that the Minister in determining the assessment for income tax in the year 1941 refused an exhaustion allowance because the appellant had, by virtue of previous allowances, been allowed free of income tax its entire cost of any timber licenses or permits. In the exercise of his discretion the Minister therefore decided that no further exhaustion allowance should be made in 1941. Counsel for the respondent contended that these allowances prior to 1941 could not have been made under any of the provisions of section 6 but only under those of section 5 (1) (a). The learned trial judge intimated that these allowances were claimed under section 6 but in fact, and this is not disputed, these amounts were allowed, and as the learned judge found:

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. . . it has already benefitted by deductions from its income over a period of years of all costs which could possibly be called capital costs (as well as all costs of operation) and, therefore, by such deductions, has been allowed to keep its capital investment intact.

20

It seems that even if these allowances were made under section 6, it is nevertheless open to the Minister in the exercise of his discretion to conclude, after giving to the parties every opportunity to present their views (which he did in this case), that in a given case the taxpayer has received so much by way of either depreciation or exhaustion allowances that no further exhaustion allowance should be made. Certainly the record here indicates that there is at least this relation between depreciation and exhaustion that they are both deductions or allowances with respect to capital investments and that in exercising his discretion with respect to an exhaustion allowance the Minister may take into consideration all allowances already made in relation thereto. As previously intimated, it is the hazardous nature of the industry that makes these determinations so difficult and therefore the whole matter is left in the discretion of the Minister. The statute therefore under section 5 (1) (a) imposes no obligation upon the Minister to make an exhaustion allowance and it would seem that in arriving at his decision he may take into account any facts or circumstances certainly related to the capital investment in order to arrive at his decision.

30

This exhaustion allowance being a matter entirely in the discretion of the Minister, and he having arrived at his conclusions as above indicated, I am not prepared to say that he violated any sound and fundamental principles.

40

The other or alternative basis suggested in the Minister's affirmation of the disallowance, that he had refused the allowance because the appellant was not the owner of the timber limits, raises questions of an entirely different character with regard to which in exercising his discretion it is not necessary to here determine.

*In the
Supreme
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Reasons for
Judgment
Estey, J.

continued.

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Court of
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Reasons for
Judgment
Estey, J.
continued.

In the course of argument it was suggested that the Minister in refusing the exhaustion allowance in 1941 acted in an arbitrary if not a discriminatory manner. In support of this it was pointed out that he had made such allowances in other extractive industries such as coal mines and the mines of precious metals and even to lumber interests in the Cascades. It is surely a notorious fact that conditions with respect to both mining and lumber vary materially in different parts of Canada. This fact, together with the difficulty in determining what the allowance should be in any given case, no doubt caused Parliament to leave the problem to be dealt with by the Minister and in a way that he could exercise his discretion either with respect to different extractive industries, to geographical divisions or individual cases. The fact that those engaged in the lumbering industry in the Cascades area or in any other area are treated on a basis different from those operating in Alberta or some other part does not in any way suggest discrimination but merely corroborates what has been established in this case, that the great differences with respect to the operation of the industry in different parts are such as may justify a variation in the allowances, and in the absence of evidence to the contrary it cannot be concluded that the decisions arrived at are either arbitrary or discriminatory. 10

The appeal should be dismissed with costs. 20

151n

IN THE PRIVY COUNCIL

No. 32

Order Granting Leave to Appeal.

(L.S.)

AT THE COURT AT BUCKINGHAM PALACE

The 3rd day of July, 1947

PRESENT

THE KING'S MOST EXCELLENT MAJESTY

10	LORD PRESIDENT	MR. HALL
	VISCOUNT ADDISON	MR. MATHERS
	MR. SECRETARY CREECH	
	JONES	

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 1st day of July 1947, in the words following, viz.:—

20 “Whereas by virtue of His late Majesty King Edward the Seventh’s Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of D. R. Fraser and Company Limited in the matter of an Appeal from the Supreme Court of Canada between the Petitioner Appellant and The Minister of National Revenue Respondent setting forth (amongst other matters): that the Petitioner desires special leave to appeal from a Judgment of the Supreme Court dated the 4th February 1947 which in a test case raising important questions under the Income War Tax Act (R.S.C. 1927 chapter 97 as amended) affecting not only the Petitioner but a number of other lumber companies in Alberta dismissed the Petitioner’s Appeal from a judgment of the Exchequer Court of Canada dated the 20th December 1945: that the Petitioner who at all material times carried on a logging sawing planing and general lumber-milling business in the Province of Alberta by its amended return under the Income War Tax Act claimed an allowance for exhaustion of its timber limits in the year 1941 under Section 5 of the Act: that the Petitioner’s claim for exhaustion was disallowed and the Petitioner appealed to the Exchequer Court which dismissed the Appeal: that the Petitioner appealed to the Supreme Court which likewise dismissed the Appeal: And humbly praying Your Majesty

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*In the
Privy
Council*

—
No. 32

Order
granting
leave to
appeal

*In the
Privy
Council*

—
No. 32

Order
granting
leave to
appeal
continued.

in Council to grant the Petitioner special leave to appeal from the Judgment of the Supreme Court dated 4th February 1947 and for such further or other Order as to Your Majesty in Council may appear fit:

“THE LORDS OF THE COMMITTEE in obedience to His late Majesty’s said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioner to enter and prosecute its Appeal against the Judgment of the Supreme Court of Canada dated the 4th day of February 1947 upon depositing in the Registry of the Privy Council the sum of \$400 as security for costs:

10

“AND Their Lordships do further report to Your Majesty that the authenticated copy under seal of the Record produced by the Petitioner upon the hearing of the Petition ought to be accepted (subject to any objection that may be taken thereto by the Respondent) as the Record proper to be laid before Your Majesty on the hearing of the Appeal.”

HIS MAJESTY having taken the said Report into consideration was pleased by and with the advice of His Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution. 20

Whereof the Governor-General or Officer administering the Government of the Dominion of Canada for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

E. C. E. LEADBITTER.

[1]

151p

**EXHIBITS
AND
DOCUMENTS**



PART II

Exhibits
and
Documents

No. 12

Letter
Assistant
Secretary
Depart-
ment
of the
Interior to
Crown
Timber
Agent,
17th
October,
1912.

EXHIBITS AND DOCUMENTS

PART II.

No. 12

**Letter, Assistant Secretary, Department of the Interior to
Crown Timber Agent, Edmonton.
(Appellant's Document)**

Do Not Write About More Than One Subject in the Same Letter—Write
Legibly Your Full Name and Address.

Address your reply
"To the Secretary
Department of the Interior C.W.
Ottawa."

[CREST]

In Your Reply
Please Quote This 10
File No.
573375 T & G.

DEPARTMENT OF THE INTERIOR.
Canada.

Ottawa, October 17th, 1912.

Copy for Inspector C.T.A., Winnipeg, Man.

Sir:

I am directed to acknowledge the receipt of your letter of the 7th instant, File No. 170922, stating that Timber Berth No. 1727, which was offered for sale at your office on the 2nd instant, was purchased by Mr. John Walter, acting on behalf of John Walter, Limited, D. R. Fraser and Company, Limited, and the Edmonton Lumber Company, Limited, who jointly purchased the berth for the sum of \$6,610.00. 20

Your obedient servant,

LYNWODE PEREIRA,
Assistant Secretary.

[SEAL]

The Crown Timber Agent,
Edmonton,
Alberta.

30

Certified a true copy of the original of record in the Department of
Lands and Mines.—T. L. DALKIN.

Certified Copy Duplicate Certificate of Title (Appellant's Document)

Exhibits and Documents No. 25 Certified Copy Duplicate Certificate of Title 15th July, 1926.

CERTIFIED COPY

34 P. 93



Form with registration details: Registered on instrument registered at 10.23, A on the 15 day of JULY, 1926, Number 4685, D.K. 172, SGD. S.H. GARNHAM (L.S.), A/D Registrar, S.A.S. 20.

LAND TITLES ACT, Sec. 86. The land mentioned in any certificate of title granted under this Act shall be impugned and without any special mention therein unless the contrary is expressly declared, be subject to: (a) Any subsiding encumbrances or easements mentioned in the original grant of the land from the Crown; (b) All unpaid taxes, including irrigation and drainage district rates; (c) Any public highway or right-of-way or other public easement, however created upon, over or in respect of the land; (d) Any subsiding lease or agreement for a lease for a period not exceeding three years, where there is actual occupation of the land under the lease; (e) Any division, order or agreement against or affecting the interest of the owner of the land which have been registered and maintained in force against the owner; (f) Any right of appropriation which may be statute be vested in any body corporate, or His Majesty; (g) Any right-of-way or other easement granted or acquired under the provisions of any Act or law in force in the Province.

Duplicate Certificate of Title

SURFACE. Assoe. Fund Value \$12000 Unearned Inc. Value \$12000 MINERALS \$24800 \$24800 Refer Cert. No. 13 B. 38 N.Z. 166 N.Z. 168 N.Z. 170

South Alberta Land Registration District

This is to Certify that JOSEPH LITTLE OF BLAIRMORE IN THE PROVINCE OF ALBERTA, CAPITALIST

IMPORTANT NOTICE: It will be in the interest of every Owner and Mortgagee to furnish the Land Titles Office, Calgary, with his full address (Post Office and Street number) or any change in address where notices of discharge with this Title may be sent.

is now the owner of an estate in fee simple of and in THE NORTH EAST QUARTER OF SECTION TWENTY ONE (21) AND THE EAST HALF AND THE

NORTH WEST QUARTER OF SECTION TWENTY EIGHT (28) ALL IN TOWNSHIP SEVEN (7) RANGE THREE (3) WEST OF THE FIFTH MERIDIAN IN THE PROVINCE OF ALBERTA CONTAINING TOGETHER SIX HUNDRED AND FORTY (640) ACRES MORE OR LESS.

SUBJECT AS TO THE NORTH EAST QUARTER OF SECTION TWENTY ONE (21) TO THE PAYMENT OF THE ROYALTY PROVIDED FOR IN THE GRANT FROM THE CROWN REGISTERED AS 3839 A.E. AND SUBJECT AS TO THE NORTH WEST QUARTER OF SECTION TWENTY EIGHT (28) TO THE PAYMENT IN RESPECT TO COAL OF THE ROYALTY PROVIDED FOR AND TO THE PROVIDORS AND CONDITIONS CONTAINED IN THE GRANT FROM THE CROWN REGISTERED AS 3841 A.E.

subject to the encumbrances, liens and interests notified by memorandum underwritten or endorsed hereon, or which may hereafter be made in the register.

In Witness Whereof I have hereunto subscribed my name and affixed my

official seal this FIFTEENTH day of JULY A.D. 19 26

SGD. S.H. GARNHAM A/D Registrar (L.S.)

P.O. Address BLAIRMORE, ALBERTA.

South Alberta Land Registration District

WRIT OF EXECUTION, JOSEPH LITTLE ATS LIQUIDATORS OF HOME BANK OF CANADA, \$5000.00 & COSTS, S.C. EDM. 14665 S. 11 DEC. 1924, 10.25 AM, 22 DEC. 1924,1855 D.I. (SHG) WITHDRAWAL OF WRIT, 1855 D.I. 21 JAN. 1927, 1.41 PM, 25 JAN. 1927,6991 D.K. (G) MINERALS, 28, IS 12 & 13, ADRIANO CERVO, 48 K. 207, 15 MAR. 1934, 10.23AM, 17 MAR. 1934, .8643 E.L. (G) 21, IS 9, 10 & 15) CAVEAT, (AS TO COAL) (G) MOHAWK BITUMINOUS MINES LTD, 6 JULY 1934, 10.23 AM, & NE 1/4,) 9 JULY 1934,2523 E.M. (G) WE 1/4 21,) CAVEAT, (AS TO COAL) HILLCREST MOHAWK COLLIERIES LTD, 27 NOV. 1939, 11.10 AM, 28, IS 1, 2, 7 & 8) 6 DEC. 1939,5710 E.U. (L) 9, 10, 11, 14 & 15 & 16,)

OVER

Exhibits
and
Documents

No. 25
Certified
Copy
Duplicate
Certificate
of Title
15th July,
1926.

continued.

WITHDRAWAL OF CAVEAT, NO. 2523 E.M. 31 JAN. 1940, 11.16 AM, 24 FEB. 1940,5976 E.W. (L)

... Certificate of ...
... new Certificate 59 X 104 ...
MARTEL K. LITTLE (EXEC.)
TRANSMISSION
... 18 NOV. 1942
... 3.01 ... P.M. this 18 day of
NOV. ... 42 ... 391 P.E.
SGD. G. PARKER (L.S.)
A/D

20768
Fraser
min. N.T.O.W.
Ex. 27
Sept. 20 1945
P.M.
O.R.

[Handwritten notes and signatures, including "LITTLE" and "PARKER"]

CERTIFIED COPY.
34 P. 93 27
**Duplicate
Certificate of Title**

JOSEPH LITTLE
NE 1/4 21)
E 1/2 28) 7. 3. W 5TH
NW 1/4 28)
(640 ACRES)

I certify that the within instrument is a true duplicate of the certificate of title as contained in the register in the Land Titles Office for the South Alberta Land Registration District at Calgary in the Province of Alberta.

Issued on instrument registered at 10.23
o'clock A m. on the 15 day
of JULY A.D. 19 26

Number 4683 Book D.K. Folio 172
SGD. S.H. GARNHAM (L.S.)
A/D Register SAALRD.

Certified Copy Duplicate Certificate of Title (Appellant's Document)

Exhibits and Documents

No. 26 Certified Copy Duplicate Certificate of Title 15th July, 1926.

CERTIFIED COPY 34 P. 94



EW

Issued on instrument registered at 10.23 A.M. on the 15th day of JULY A.D. 1926 Number 5683 Book D.K. Folio 172 SGD S.H. GARNHAM (L.S.) A/D Registrar S.A.S.P.D.

LAND TITLES ACT, Sec. 27. The land mentioned in any certificate of title granted under this Act shall by implication and without any special mention therein, unless the contrary is expressly declared, be subject to: (a) Any subsisting reservations or exceptions contained in the original grant of the land from the Crown; (b) All unpaid taxes, including irrigation and drainage district rates; (c) Any public highway or right-of-way or other public easement, however created upon, over or in respect of the land; (d) Any subsisting lease or agreement for a lease for a period not exceeding three years, where there is actual occupation of the land under the same; (e) Any decrees, orders or executions against or affecting the interest of the owner of the land which have been registered and maintained in force against the owner; (f) Any right of expropriation which may by statute be vested in any person, body corporate, or His Majesty; (g) Any right-of-way or other easement granted or acquired under the provisions of any Act or law in force in the Province.

Duplicate Certificate of Title

Assoe. Fund Value \$24,800.00 Unearned Inc. Value \$24,800.00

Refer Cert. No. N.Z. 160 N.Z. 167

South Alberta Land Registration District.

This is to Certify that JOSEPH LITTLE OF BLAIRMORE IN THE PROVINCE OF ALBERTA, CAPITALIST.

IMPORTANT NOTICE It will be to the interest of every Owner and Mortgagee to furnish the Land Titles Office, Calgary, with his full address (Post Office and Street number) or any change in address where Notice of dealings with this Title may be sent.

is now the owner of an estate in fee simple

of and in ALL MINERALS OTHER THAN GOLD AND SILVER WITHIN UPON OR UNDER THE WHOLE OF SECTION THIRTY THREE (33) IN TOWNSHIP SEVEN (7) RANGE THREE (3) WEST OF THE FIFTH MERIDIAN IN THE PROVINCE OF ALBERTA CONTAINING SIX HUNDRED AND FORTY (640) ACRES MORE OR LESS, AND THE RIGHT TO WORK THE SAME, AND

subject to the encumbrances, liens and interests notified by memorandum underwritten or endorsed hereon, or which may hereafter be made in the register.

In Witness Whereof I have hereunto subscribed my name and affixed my official seal this FIFTEENTH day of JULY A.D. 1926

SGD. S.H. GARNHAM A/D Registrar (L.S.)

P.O. Address BLAIRMORE, ALBERTA.

WRIT OF EXECUTION, JOSEPH LITTLE ATS LIQUIDATORS OF HOME BANK OF CANADA \$5000 & COSTS, S.C. EDM. 14665 S. 11 DEC. 1924, 10.25 AM, 22 DEC. 1924, 1855 D.I. (SHG.) WITHDRAWAL OF WRIT, 1855 D.I. 21 JAN. 1927, 1.41 PM, 25 JAN. 1927, 6991 D.K. (G) LS 4,5, 12 & 13, ADRIAN CERVO, 48 K. 207, 15 MAR. 1934, 10.23 AM, 17 MAR. 1934, 8643 E.L. (G) LS 1,2,3,6,7,8,9,10,11, 14 & 15, CAVEAT, (AS TO COAL (G)) MOHAWK BITUMINOUS MINES LTD, 6 JULY 1934, 10.23 AM, 9 JULY 1934, 2523 E.M. (G) LS.1,2,3,6,7,8,9,10,11, 14 & 15, CAVEAT, (AS TO COAL) HILLCREST MOHAWK COLLIERIES LTD. 27 NOV. 1939, 11.10 AM, 6 DEC. 1939, 5710 E.U. (L) WITHDRAWAL OF CAVEAT NO. 2523 E.M. 31 JAN. 1940, 11.16 AM, 24 FEB. 1940, 5976 E.W. (L) OVER

Certified Copy Duplicate Certificate of Title (Appellant's Document)

Exhibits and Documents

No. 27

Certified Copy Duplicate Certificate of Title 15th July, 1926.

57

CERTIFIED COPY 34 P. 95



EW

Issued on instrument registered at 10.23 A.M. on the 15 day of JULY A.D. 1926 Number 5683 Book D.K. Page 172 S.G.D. S.H. GARNHAM (L.S.)

LAND TITLES ACT, Sec. 26. The land mentioned in any certificate of title granted under this Act shall by implication and without any special mention therein, unless the contrary is expressly declared, be subject to— (a) Any subsisting reservations or exceptions contained in the original grant of the land from the Crown; (b) All unpaid taxes, including irrigation and drainage district rates; (c) Any public highway or right-of-way or other public easement, however created upon, over or in respect of the land; (d) Any subsisting lease or agreement for a lease for a period not exceeding three years, where there is actual occupation of the land under the same; (e) Any decree, order or appointment against or affecting the interest of the owner of the land which have been registered and maintained in force against the owner; (f) Any right of preemption which may by statute be vested in any person, body corporate, or His Majesty; (g) Any right-of-way or other easement granted or acquired under the provisions of any Act or law in force in the Province.

Duplicate Certificate of Title

Assoc. Fund Value \$24,800.00 Unearned Inc. Value \$24,800.00

Refer Cert. No. N.Z. 140 N.Z. 161 N.Z. 162

South Alberta Land Registration District.

This is to Certify that JOSEPH LITTLE OF BLAIRMORE IN THE

PROVINCE OF ALBERTA, CAPITALIST,

IMPORTANT NOTICE It will be to the interest of every Owner and Mortgagee to furnish the Land Titles Office, Calgary, with his full address (Post Office and Street number) or any change in address where Notices of discharge with this Title may be sent.

is now the owner of an estate in fee simple of and in ALL MINERALS OTHER THAN GOLD AND SILVER WITHIN UPON OR UNDER THE WEST HALF

OF SECTION TWENTY TWO (22) THE WEST HALF OF THE WEST HALF OF SECTION TWENTY SEVEN (27) AND THE SOUTH WEST QUARTER OF SECTION TWENTY EIGHT (28) ALL IN TOWNSHIP SEVEN (7) RANGE THREE (3) WEST OF THE FIFTH MERIDIAN IN THE PROVINCE OF ALBERTA CONTAINING TOGETHER SIX HUNDRED AND FORTY (640) ACRES MORE OR LESS AND THE RIGHT TO WORK THE SAME SUBJECT AS TO THE SOUTH WEST QUARTER OF SECTION TWENTY EIGHT (28) TO THE PAYMENT OF THE ROYALTY PROVIDED FOR IN THE GRANT FROM THE CROWN REGISTERED AS 3834 A.E. AND

CANCELLED

subject to the encumbrances, liens and interests notified by memorandum underwritten or endorsed hereon, or which may hereafter be made in the register.

In Witness Whereof I have hereunto subscribed my name and affixed my official seal this FIFTEENTH day of JULY A.D. 1926

SGD. S.H. GARNHAM A/D Registrar (L.S.)

P.O. Address BLAIRMORE, ALBERTA.

South Alberta Land Registration District.

WRIT OF EXECUTION, JOSEPH LITTLE ATS LIQUIDATORS OF HOME BANK OF CANADA \$5000 & COSTS, S.C. EDM. 14665 S. 11 DEC. 1924, 10.25 AM, 22 DEC. 1924,1855 D.I. (AHG) WITHDRAWAL OF WRIT, 1855 D.I. 21 JAN. 1927, 1.41 PM, 25 JAN. 1927,6991 D.K. (G) 28, LS 4 & 5 ADRION CERVO, 48 K; 207, 15 MAR. 1934, 10.23 AM, 17 MAR. 1934,8645 E.L. (G) 28, LS 3 & 6) CAVEAT, (AS TO COAL (G)) MOHAWK BITUMINOUS MINES LTD, 6 JULY 1934, 10.23 AM, 27, LS 12 & 13)2523 E.M. (G) 28, LS. 3 & 6) CAVEAT, (AS TO COAL) HILLCREST MOHAWK COLLIERIES LTD, 27 NOV. 1939, 11.10 AM, 27, LS 12, 13, 4 & 5) 6 DEC. 1939,5710 E.O. (L) WITHDRAWAL OF CAVEAT NO. 2523 E.M., 31 JAN. 1940, 11.16 AM, 24 FEB. 1940,5976 E.W. (L.)

OVER

Exhibits
and
Documents

No. 27
Certified
Copy
Duplicate
Certificate
of Title
15th July,
1926.

continued.

Without charge
 Certificate No. 59 X. 106 issued to MARTEL K. LITTLE (EXEC.)
 for the purpose of TRANSMISSION from the
 original certificate entered 18 NOV. 1942
 at 3.01 P.M. this 18 day of
NOV. 1942 at 391 P.E.
SGD. C. PARKER (L.S.)
 A/D

CERTIFIED COPY
 34 P. 95 **25**
Duplicate
Certificate of Title

JOSEPH LITTLE
 W 1/2 22)
 W 1/2 OF W 1/2 27) 7. 3. W 5TH
 SW 1/4 28)
 (640 ACRES)

MINERALS

I certify that the within instrument is a true
 duplicate of the certificate of title as contained in the
 register in the Land Titles Office for the South Alberta
 Land Registration District at Calgary in the Province
 of Alberta.

Issued on instrument registered at 10.23
 o'clock A m. on the 15 day
 of JULY A.D. 19 26

Number 5683 Book D.K. Folio 172
SGD. S.H. GARRHAM (L.S.)
 A/D Registrar

20,768
 Fraser
 Mrs. N.A.B. ...
 Ex. 25
 Sept. 20 1945
 PWS
 O.K.

No. 13

Dominion Licence Berth 1727
(Appellant's Document)

Exhibits
and
Documents
—
No. 13
Dominion
Licence
Berth 1727
19th May,
1930.

T. and G. 2B.
2000—1-30

[CREST]

W.M.
E.B.

File No. 573375 T&G.
Licence No. 1068
Berth No. 1727

10 LICENCE TO CUT TIMBER ON DOMINION LANDS

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 twenty-sixth day of March, 1924, and subsequent amending Orders in Council,

I, The Honourable Charles Stewart, the Minister of the Interior of Canada, do hereby, in consideration of the sum of One hundred and sixty dollars (\$160.00), ground rent now paid to me for the use of His Majesty King George the Fifth, and in consideration of the dues hereinafter mentioned, give unto D. R. Fraser and Company Limited, hereinafter called
 20 the licensee, his executors and administrators, full right, power and licence, subject to the conditions 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:—

Timber Berth No. 1727, situate in the Province of Alberta, comprising Sections 3, 4, West half of Section 9, South East quarter of Section 10, West three-quarters of Section 18, Section 24, North East quarter of
 30 Section 26, Sections 27, 31, 32, 33 and 35, in Township 48; also Sections 2, 3, 4, South half of Section 5, South half of Section 6, South East quarter of Section 9, Section 10, and that part of Section 21, South of Timber Berth No. 1242, in Township 49, all in Range 6, West of the 5th Meridian, containing an area of 16.00 square miles, more or less, divided into five blocks, as shown on plan of survey thereof, approved by the Surveyor General, and dated the 15th of February, 1912, Islands which occur in bodies of water within this berth are excluded;

and to take and keep exclusive possession of the said lands except as hereinafter mentioned for and during the period of one year from the 1st
 40 day of May, 1930, to the 30th day of April, 1931, and no longer

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Dominion
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Berth 1727
19th May,
1930.
continued.

This licence shall vest in the licensee, subject to the conditions mentioned in the licence, all right of property whatsoever in all trees, timber, lumber and other products of timber which he is entitled by the licence to cut, and which have been cut within the berth during the continuance thereof, whether such trees, timber, lumber or other products be cut by authority of the licensee or by any other person with or without his consent; and shall vest in the licensee as against any person other than the Crown, in the right of the Dominion, subject to the conditions mentioned in the licence, all right of property whatsoever, in all trees, timber, lumber and other products of timber cut within the berth, during the continuance thereof by any other person without his consent; and shall entitle the licensee to seize in replevin, revendication or otherwise, as his property, all timber of any kind cut upon the berth where the same is found in the possession of any unauthorized person, and also to bring any action or suit-at-law or in equity against any person unlawfully in possession of any such timber or of any lands within the berth and to prosecute any person to conviction and punishment for any offence in connection with such timber or land, and all proceedings pending at the expiration of the licence may be continued and completed as if the same had not expired. 10.

This licence is subject to the following conditions and restrictions, in addition to such of the conditions and restrictions respecting timber as are contained in the Dominion Lands Act and the amendments thereto, and in the regulations respecting timber passed by order of His Excellency the Governor General in Council: 20

(a) That the licensee shall not have the right thereunder to cut timber of a less diameter than ten inches measured eighteen inches from the ground, except such as may be actually necessary for the construction of roads and other works to facilitate the taking out of merchantable timber, and shall not have the right to cut any trees that may be designated by the proper officer of the Department of the Interior as required to provide a supply of seed for the reproduction of the forest. 30

(aa) All merchantable timber of the class authorized to be cut under licence shall be cut and taken from a berth as cutting progresses, and any timber of that class left uncut and unremoved after a date named in a notice served on the licensee or his authorized agent, shall be estimated in feet board measure by a Dominion timber inspector, and shall be subject to payment to the department, on demand, of ordinary royalty dues.

In the event of timber on a licensed berth, of the class authorized to be cut, becoming fire-killed or dead, and a report being made by a timber inspector that the same can be cut and marketed by the licensee without monetary loss, the minister may require the licensee to cut and remove the same, and all such timber left uncut and unremoved from the berth after a date named in a notice served upon the licensee, or his authorized agent, shall be estimated in feet board measure by a timber inspector, and the 40

licensee shall pay dues thereon, as provided in the regulations according to such estimate.

Exhibits
and
Documents

(b) The licensee shall be entitled to a renewal of his licence from year to year, while there is on the berth timber of the kind and dimensions described in the licence in sufficient quantity to be commercially valuable, if the terms and conditions of the licence and the provisions of the Dominion Lands Act and of the regulations affecting the same have been fulfilled:

No. 13
Dominion
Licence
Berth 1727
19th May,
1930.

continued.

10 Provided that such renewal shall be subject to the payment of such rental and dues and to such terms and conditions as are fixed by the regulations in force at the time renewal is made.

(c) When, in the opinion of the minister, any portion of a timber berth has not a sufficient quantity of the kind and dimensions of timber specified in the licence for such berth to make it profitable to remove the timber upon such portion of the berth, and when, in the opinion of the minister such portion of the berth is not necessary for the proper working of the remainder of the berth, the minister may withdraw such portion from the berth:

20 Provided that no withdrawal shall be made unless the licensee or his legal representative has had sixty days' notice thereof, and that upon such withdrawal the ground rent shall be reduced in proportion to the area withdrawn.

30 (d) If the Minister of the Interior ascertains, after an inspection has been made, that any land within the berth hereby licensed is fit for settlement and is required for that purpose, he may require the licensee to carry on the cutting of timber provided for by Clause 32 of The Timber Regulations on the said land, and on the expiration of the time within which the timber which the licensee is entitled to cut should be removed therefrom, may withdraw such land from the berth and from the operation of the licence covering it, and upon such withdrawal the ground rent shall be reduced in proportion to the area withdrawn.

(e) That the licensee shall take from every tree he cuts down all the timber fit for use and manufacture the same into sawn lumber or some other saleable product, and shall dispose of the tops and branches and other debris of lumbering operations in such a way as to prevent as far as possible the danger of fire, in accordance with the directions of the proper officers of the Department of the Interior. Failure on the part of the licensee will subject him to the penalty of having his manufactured timber seized and his bush operations closed down.

40 (f) That the licensee shall prevent all unnecessary destruction of growing timber on the part of his men and exercise strict and constant supervision to prevent the origin and spread of fire, and shall also comply, during the term of the licence and of any renewal thereof, with all regula-

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No. 13

Dominion
Licence
Berth 1727
19th May,
1930.

continued.

tions made in that respect by the Governor in Council, and with all laws and regulations in that respect in force in the province or territory in which the berth is situate.

(g) That the licensee shall furnish to the Dominion timber agent having jurisdiction in the matter, at such periods as may be required by the Minister of the Interior or by regulations under the Dominion Lands Act, returns sworn to by him or his agent or employee cognizant of the facts, showing the quantities manufactured, sold or disposed of, of all sawn lumber, timber, or any other product of timber from the berth, in whatever form the same may be sold or otherwise disposed of by him during such period, and the price or value thereof. 10

(h) That the licensee shall pay, in addition to the said ground rent, dues in the manner prescribed in Section 20 of the Timber Regulations, and also one-half of the cost incurred by the Crown in guarding the timber from fire, the Government paying the other half. A statement will be furnished the licensee showing his share of the cost incurred, and payment thereof shall be made to the Crown within thirty days thereafter.

(i) That the licensee shall keep a "Lumber Sales Book," in which shall be entered all sales of the products of the berth, both cash and credit sales, also a book accounting for the number of feet of sawn lumber manufactured each day at the mill, with the day and date; all books and memoranda kept at the logging camps shall be carefully preserved, and these and other books kept by the licensee in connection with his lumbering business he shall submit for the inspection of the Dominion timber agent or other officer of the Crown whenever required for the purpose of verifying his returns aforesaid. 20

(j) This licence shall be subject to the right of the Crown to deal, in accordance with the provisions of the said Act and the regulations made under it by the Governor in Council, with any and all stone, coal or other minerals found within the limits of the berth licensed; and the Crown shall have the right in dealing as above provided with any stone, coal or other minerals in lands licensed as timber limits, to authorize the persons to whom such stone, coal or other minerals are granted, to take possession of and occupy such extent of the land so licensed as is necessary to work such stone, coal or other minerals, and to open necessary roads through any such timber berth, paying the licensee of the berth the value of any and all timber of a diameter of ten inches at the stump and upwards necessarily cut in making such roads or in working the quarries or mines, such value, in case of dispute, to be fixed by the Minister of the Interior; and the provisions of this clause shall operate retrospectively, that is to say,— 40 they shall apply to all licenses of timber berths heretofore granted under any Act respecting Dominion Lands, as if they had been contained in such Act when it was passed.

(k) This licence shall also be subject to the right of the Crown to withdraw at any time from the said timber berth any portion or tract of the lands comprising it which is required for water-power purposes or is necessary in connection therewith by the lessee or lessees of the water-power, their executors, administrators or assigns, and which the Minister of the Interior as the representative of the Crown therein shall decide to be necessary for such water-power purposes, and which for such purposes shall be so withdrawn from the said lands and from the operation of the said licence; upon the condition, however, that the lessee or lessees of the said water-power, his or their executors, administrators or assigns, shall and will pay to the licensee of the berth, his executors, administrators or assigns, the value of all timber of ten inches and over in diameter at the stump on the portion of the tract so withdrawn, the value of such timber, in case of dispute, to be fixed by the Minister of the Interior.

10

(kk) This licence shall also be subject to the right of the Crown to withdraw at any time from the said timber berth any portion or tract of the lands comprising it which is required for drainage purposes by the Provinces of Manitoba, Saskatchewan, Alberta, and the Province of British Columbia in so far as affects the tract of 3½ million acres controlled by the Government of the Dominion in the Peace River district in such province, not to exceed one per centum of the total area covered by such berth; and to withdraw for road purposes from the said berth not exceeding 2½ per centum of the total area covered by said berth if in the Provinces of Manitoba, Saskatchewan or Alberta, or 5 per centum in the Peace River Block in the Province of British Columbia, and in the Railway Belt in the Province of British Columbia. In addition to the province being required to pay the value of any improvements on lands withdrawn for drainage or road purposes from the said berth, the province shall pay the licensee the value of any timber on the tract withdrawn of 10 inches and over in diameter at the stump, the value to be fixed by the Minister of the Interior.

30

(l) This licence shall be subject to forfeiture on the order of the minister for violation of any of the conditions to which it is subject or for any fraudulent return:

Provided that in case the minister shall decide to exercise the power of forfeiture conferred by this section, the licensee shall have the right, within ninety days of formal notification to him in writing by the minister of his intention to declare such forfeiture, and which notification shall be deemed to be sufficient, if addressed to the place last known to the minister as the address of the licensee, to appeal again such notification of forfeiture to the judge of any competent court of the district having jurisdiction in matters of contract. The licensee shall within ninety days of the notification to him by the minister, notify the minister in writing of appeal taken, and pending the report within reasonable delay from the judge on the question of appeal, no declaration of forfeiture shall be made by the minister. The judge to whom appeal is taken shall report to the minister his finding in the case,

40

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and
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continued

Exhibits
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Licence
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1930.

continued.

and on receipt of such report the minister may proceed under this section in accordance with his finding, and in case the finding be in favour of the minister, the judge shall, when transmitting his report, issue a summons directed to the appellant calling upon him forthwith to vacate or abandon or to cease using the berth, and if, upon the return of the summons, it appears that he has not vacated or abandoned or ceased using the said berth, the judge shall make an order or warrant for his summary removal from the berth, and the said order or warrant shall be executed by the sheriff, bailiff, constable or other person to whom it is delivered:

Provided that such report by the judge shall be appealable by either side in like manner as any other decision of the said court: 10

And provided further that if the violation of the regulations refers merely to payment of money due under the licence, the minister may waive the power of forfeiture on payment of double the amount found by the judge to be due and costs, and may enforce payment in the manner provided for by the Dominion Lands Act and the Timber Regulations, and take such action in regard to all other matters of forfeiture as may arise and be provided for by this section and the Dominion Lands Act.

(m) 1. If any railway company becomes entitled to a grant from His Majesty or His Successors of any portion of the lands hereby demised for the roadbed of the company's railway or branches thereof, or for stations, station-grounds, workshops, dockyards and water frontages on navigable rivers, or building yards or for other purposes required for the convenient, necessary, and effective construction and work of the company's railway or any of its branches; and if His Majesty or His Successors grant the same to such railway company, the land so granted shall from and after the date of such grant cease to be under the operation of this licence and to be part of the lands hereby demised, but the licensee or his legal representatives shall be at liberty to remove all property belonging to him or them and all timber then cut thereon, from the land so granted; and shall also be entitled to cut and remove from the said land so granted, as his or their own property, all trees then standing thereon or the timber obtained therefrom, provided that such property and cut timber, or property, cut timber and standing trees or the timber obtained therefrom are promptly removed from the said land upon receipt by the licensee or his legal representatives of notice from the railway company to remove such property and cut timber, or to cut and remove such standing trees so as not to hinder or interfere with any work being done or about to be done by the railway company for the convenient, necessary and effective construction and working of the company's railway or of any of its branches; provided also, however, that if the licensee or his legal representatives do not so remove such property or cut timber, or so cut and remove such standing trees or the timber obtained therefrom, the railway company may do so, and all cut timber and standing trees or timber obtained therefrom which have so to be removed or cut and removed by the railway company, shall be the property 20 30 40

of the Crown and be disposed of as the Governor in Council, upon the report of the Minister of the Interior, may decide to be fit and proper.

Exhibits
and
Documents

2. If any railway company becomes entitled to a grant from His Majesty or His Successors of any portion of the lands hereby demised, as part of its land subsidy as provided for by any statute of Canada, and if His Majesty or His Successors grant the same to such railway company, the land so granted shall from and after the date of such grant cease to be under the operation of this licence and to be part of the lands hereby demised, but the licensee or his legal representatives shall be at liberty to
10 remove all property belonging to him or them, and all timber then cut thereon from the land so granted.

No. 13
Dominion
Licence
Berth 1727
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1930.

continued.

3. From the date any parcel of land is granted to any railway company, and is so withdrawn from the operation of this licence, the ground rent hereby provided to be paid shall be reduced in proportion to the area withdrawn.

(n) (1) In any case where waters flowing through, over or along, or having their source in any timber berth, empty into any stream, or are tributary to any stream from which a domestic or municipal water supply is or may be obtained, or in any case where the pollution of any such waters
20 may, in the opinion of the minister, deleteriously affect any municipal or domestic water supply, the licensee of such timber berth shall comply with the following regulations:—

- (a) Locate all camp buildings, outhouses, cess-pools and other structures at a sufficient distance from any stream, lake or other source of water supply, to prevent the pollution of such municipal or domestic water supply.
- (b) Immediately remove and bury or burn any camp refuse or debris of any description, or any substance which would be likely to cause the pollution of any such waters, and otherwise keep the
30 ground in the vicinity of all logging camps in a neat, orderly and sanitary condition.
- (c) Prevent any depositing, leaving or accumulating in any stream, lake or other source of water supply within the berth, or in an exposed or insanitary condition on the berth, any debris of any description or any substance which would be likely to cause the pollution of such waters.
- (d) Prevent the depositing or leaving by any person employed or purporting to be employed about the berth, or the accumulation as a result of any operations carried on by reason of the licence in any stream, lake or other source of such water supply on any
40 Dominion Lands whatever, or in any exposed or insanitary condition on any such lands, of any such debris or substance.

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19th May,
1930.

continued.

(e) Observe all laws and regulations respecting sanitation and the protection of the purity of waters which are applicable to the premises, or any regulations which may be promulgated by the Governor in Council; and also comply with any requirements which may be made by the minister for the purpose of carrying out the above provisions.

(2) For each infraction of the provisions of Clause (1) hereof, the licensee shall, in addition to the other penalties provided in the said regulations, be liable on summary conviction to a penalty not exceeding one hundred dollars, and such sum shall be recoverable with costs at the suit of and in the name of the Crown. 10

(o) This licence cannot be assigned or transferred without the consent of the Minister of the Interior.

(p) The licensee shall have in operation within one year from a date when he is notified by the proper officer of the Department of the Interior that the Minister of the Interior regards such a step necessary or expedient in the public interest, and keep in operation for at least six months of each year of his holding, a saw-mill in connection with the berth herein described capable of cutting in one day a thousand feet board measure for every two and one-half square miles of the area licensed. 20

(q) Any notice, demand or other communication which His Majesty or the Minister of the Interior may require or desire to give or serve upon the licensee, may be validly given and served by the Minister, Deputy Minister, Assistant Deputy Minister, Commissioner of Dominion Lands or Assistant Commissioner of Dominion Lands.

Dated at the City of Ottawa, }
this Nineteenth day of May, }
one thousand nine hundred }
and thirty. } (Sgd.) Illegible,
for Deputy Minister of the Interior

I, accept this licence and agree to all the terms and conditions thereof. 30

D. R. FRASER & CO. LIMITED
per (Sgd.) I. MACDONALD,
President
Signature of Licensee.

[SEAL]

(Sgd.) E. R. MACDONALD,
Secretary

(Sgd.) RICHARD VARLEY,
Witness to Signature of Licensee.

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No. 8

Dominion Licence Berth 1161
(Appellant's Document)

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Dominion
Licence
Berth 1161
19th May,
1930.

T. and G. 2B.
2000—1-30

[CREST]

E.B.
D.B.

File No. 459351 T&G.
Licence No. 708
Berth No. 1161

10 **LICENCE TO CUT TIMBER ON DOMINION LANDS**

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 twenty-sixth day of March, 1924, and subsequent amending Orders in Council,

20 I, The Honourable Charles Stewart, the Minister of the Interior of Canada, do hereby, in consideration of the sum of Forty-eight dollars and twenty cents (\$48.20), ground rent now paid to me for the use of His Majesty King George the Fifth, and in consideration of the dues hereinafter mentioned, give unto D. R. Fraser and Company, Limited, hereinafter called the licensee, his executors and administrators, full right, power and licence, subject to the conditions 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:—

30 Timber Berth No. 1161, situate in Township 47, Ranges 5 and 6, West of the 5th Meridian, containing an area of 4.82 square miles, more or less, as shown on plan of survey thereof, signed by A. Driscoll, D.L.S., dated the 3rd June, 1908, and of record in the Technical Division of the Dominion Lands Administration, Department of the Interior, excluding therefrom the portion of Section 11, Township 47, Range 6, West of the 5th Meridian, covered thereby.

and to take and keep exclusive possession of the said lands except as hereinafter mentioned for and during the period of one year from the *1st day of May, 1930*, to the *30th day of April, 1931*, and no longer

40 This licence shall vest in the licensee, subject to the conditions mentioned in the licence, all right of property whatsoever in all trees, timber, lumber and other products of timber which he is entitled by the licence to cut, and which have been cut within the berth during the continuance thereof, whether such trees, timber, lumber or other products be cut by

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authority of the licensee or by any other person with or without his consent; and shall vest in the licensee as against any person other than the Crown, in the right of the Dominion, subject to the conditions mentioned in the licence, all right of property whatsoever, in all trees, timber, lumber and other products of timber cut within the berth, during the continuance thereof by any other person without his consent; and shall entitle the licensee to seize in replevin, revendication or otherwise, as his property, all timber of any kind cut upon the berth where the same is found in the possession of any unauthorized person, and also to bring any action or suit-at-law or in equity against any person unlawfully in possession of any such timber or of any lands within the berth and to prosecute any person to conviction and punishment for any offence in connection with such timber or land, and all proceedings pending at the expiration of the licence may be continued and completed as if the same had not expired. 10

This licence is subject to the following conditions and restrictions, in addition to such of the conditions and restrictions respecting timber as are contained in the Dominion Lands Act and the amendments thereto, and in the regulations respecting timber passed by order of His Excellency the Governor General in Council:

(a) That the licensee shall not have the right thereunder to cut timber of a less diameter than ten inches measured eighteen inches from the ground, except such as may be actually necessary for the construction of roads and other works to facilitate the taking out of merchantable timber, and shall not have the right to cut any trees that may be designated by the proper officer of the Department of the Interior as required to provide a supply of seed for the reproduction of the forest. 20

(aa) All merchantable timber of the class authorized to be cut under licence shall be cut and taken from a berth as cutting progresses, and any timber of that class left uncut and unremoved after a date named in a notice served on the licensee or his authorized agent, shall be estimated in feet board measure by a Dominion timber inspector, and shall be subject to payment to the department, on demand, of ordinary royalty dues. 30

In the event of timber on a licensed berth, of the class authorized to be cut, becoming fire-killed or dead, and a report being made by a timber inspector that the same can be cut and marketed by the licensee without monetary loss, the minister may require the licensee to cut and remove the same, and all such timber left uncut and unremoved from the berth after a date named in a notice served upon the licensee, or his authorized agent, shall be estimated in feet board measure by a timber inspector, and the licensee shall pay dues thereon, as provided in the regulations according to such estimate. 40

(b) The licensee shall be entitled to a renewal of his licence from year to year, while there is on the berth timber of the kind and dimensions described in the licence in sufficient quantity to be commercially valuable,

if the terms and conditions of the licence and the provisions of the Dominion Lands Act and of the regulations affecting the same have been fulfilled:

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Provided that such renewal shall be subject to the payment of such rental and dues and to such terms and conditions as are fixed by the regulations in force at the time renewal is made.

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(c) When, in the opinion of the minister, any portion of a timber berth has not a sufficient quantity of the kind and dimensions of timber specified in the license for such berth to make it profitable to remove the timber upon such portion of the berth, and when, in the opinion of the minister such portion of the berth is not necessary for the proper working of the remainder of the berth, the minister may withdraw such portion from the berth:

continued.

Provided that no withdrawal shall be made unless the licensee or his legal representative has had sixty days' notice thereof, and that upon such withdrawal the ground rent shall be reduced in proportion to the area withdrawn.

(d) If the Minister of the Interior ascertains, after an inspection has been made, that any land within the berth hereby licensed is fit for settlement and is required for that purpose, he may require the licensee to carry on the cutting of timber provided for by Clause 32 of The Timber Regulations on the said land, and on the expiration of the time within which the timber which the licensee is entitled to cut should be removed therefrom, may withdraw such land from the berth and from the operation of the licence covering it, and upon such withdrawal the ground rent shall be reduced in proportion to the area withdrawn.

(e) That the licensee shall take from every tree he cuts down all the timber fit for use and manufacture the same into sawn lumber or some other saleable product, and shall dispose of the tops and branches and other debris of lumbering operations in such a way as to prevent as far as possible the danger of fire, in accordance with the directions of the proper officers of the Department of the Interior. Failure on the part of the licensee will subject him to the penalty of having his manufactured timber seized and his bush operations closed down.

(f) That the licensee shall prevent all unnecessary destruction of growing timber on the part of his men and exercise strict and constant supervision to prevent the origin and spread of fire, and shall also comply, during the term of the licence and of any renewal thereof, with all regulations made in that respect by the Governor in Council, and with all laws and regulations in that respect in force in the province or territory in which the berth is situate.

(g) That the licensee shall furnish to the Dominion timber agent having jurisdiction in the matter, at such periods as may be required by

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the Minister of the Interior or by regulations under the Dominion Lands Act, returns sworn to by him or his agent or employee cognizant of the facts, showing the quantities manufactured, sold or disposed of, of all sawn lumber, timber, or any other product of timber from the berth, in whatever form the same may be sold or otherwise disposed of by him during such period, and the price or value thereof.

(h) That the licensee shall pay, in addition to the said ground rent, dues in the manner prescribed in Section 20 of the Timber Regulations, and also one-half of the cost incurred by the Crown in guarding the timber from fire, the Government paying the other half. A statement will be furnished 10
the licensee showing his share of the cost incurred, and payment thereof shall be made to the Crown within thirty days thereafter.

(i) That the licensee shall keep a "Lumber Sales Book," in which shall be entered all sales of the products of the berth, both cash and credit sales, also a book accounting for the number of feet of sawn lumber manufactured each day at the mill, with the day and date; all books and memoranda kept at the logging camps shall be carefully preserved, and these and other books kept by the licensee in connection with his lumbering business he shall submit for the inspection of the Dominion timber agent or other officer of the Crown whenever required for the purpose of verifying 20
his returns aforesaid.

(j) This licence shall be subject to the right of the Crown to deal, in accordance with the provisions of the said Act and the regulations made under it by the Governor in Council, with any and all stone, coal or other minerals found within the limits of the berth licensed; and the Crown shall have the right in dealing as above provided with any stone, coal or other minerals in lands licensed as timber limits, to authorize the persons to whom such stone, coal or other minerals are granted, to take possession of and occupy such extent of the land so licensed as is necessary to work such stone, coal or other minerals, and to open necessary roads through 30
any such timber berth, paying the licensee of the berth the value of any and all timber of a diameter of ten inches at the stump and upwards necessarily cut in making such roads or in working the quarries or mines, such value, in case of dispute, to be fixed by the Minister of the Interior; and the provisions of this clause shall operate retrospectively, that is to say,— they shall apply to all licenses of timber berths heretofore granted under any Act respecting Dominion Lands, as if they had been contained in such Act when it was passed.

(k) This licence shall also be subject to the right of the Crown to withdraw at any time from the said timber berth any portion or tract of 40
the lands comprising it which is required for water-power purposes or is necessary in connection therewith by the lessee or lessees of the water-power, their executors, administrators or assigns, and which the Minister of the Interior as the representative of the Crown therein shall decide to be necessary for such water-power purposes, and which for such purposes

shall be so withdrawn from the said lands and from the operation of the said licence; upon the condition, however, that the lessee or lessees of the said water-power, his or their executors, administrators or assigns, shall and will pay to the licensee of the berth, his executors, administrators or assigns, the value of all timber of ten inches and over in diameter at the stump on the portion of the tract so withdrawn, the value of such timber, in case of dispute, to be fixed by the Minister of the Interior.

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(kk) This licence shall also be subject to the right of the Crown to withdraw at any time from the said timber berth any portion or tract of the lands comprising it which is required for drainage purposes by the Provinces of Manitoba, Saskatchewan, Alberta, and the Province of British Columbia in so far as affects the tract of 3½ million acres controlled by the Government of the Dominion in the Peace River district in such province, not to exceed one per centum of the total area covered by such berth; and to withdraw for road purposes from the said berth not exceeding 2½ per centum of the total area covered by said berth if in the Provinces of Manitoba, Saskatchewan or Alberta, or 5 per centum in the Peace River Block in the Province of British Columbia, and in the Railway Belt in the Province of British Columbia. In addition to the province being required to pay the value of any improvements on lands withdrawn for drainage or road purposes from the said berth, the province shall pay the licensee the value of any timber on the tract withdrawn of 10 inches and over in diameter at the stump, the value to be fixed by the Minister of the Interior.

continued.

(l) This licence shall be subject to forfeiture on the order of the minister for violation of any of the conditions to which it is subject or for any fraudulent return:

Provided that in case the minister shall decide to exercise the power of forfeiture conferred by this section, the licensee shall have the right, within ninety days of formal notification to him in writing by the minister of his intention to declare such forfeiture, and which notification shall be deemed to be sufficient, if addressed to the place last known to the minister as the address of the licensee, to appeal again such notification of forfeiture to the judge of any competent court of the district having jurisdiction in matters of contract. The licensee shall within ninety days of the notification to him by the minister, notify the minister in writing of appeal taken, and pending the report within reasonable delay from the judge on the question of appeal, no declaration of forfeiture shall be made by the minister. The judge to whom appeal is taken shall report to the minister his finding in the case, and on receipt of such report the minister may proceed under this section in accordance with his finding, and in case the finding be in favour of the minister, the judge shall, when transmitting his report, issue a summons directed to the appellant calling upon him forthwith to vacate or abandon or to cease using the berth, and if, upon the return of the summons, it appears that he has not vacated or abandoned or ceased using the said berth, the judge shall make an order or warrant for his summary removal

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from the berth, and the said order or warrant shall be executed by the sheriff, bailiff, constable or other person to whom it is delivered:

Provided that such report by the judge shall be appealable by either side in like manner as any other decision of the said court:

And provided further that if the violation of the regulations refers merely to payment of money due under the licence, the minister may waive the power of forfeiture on payment of double the amount found by the judge to be due and costs, and may enforce payment in the manner provided for by the Dominion Lands Act and the Timber Regulations, and take such action in regard to all other matters of forfeiture as may arise and be provided for by this section and the Dominion Lands Act. 10

(m) 1. If any railway company becomes entitled to a grant from His Majesty or His Successors of any portion of the lands hereby demised for the roadbed of the company's railway or branches thereof, or for stations, station-grounds, workshops, dockyards and water frontages on navigable rivers, or building yards or for other purposes required for the convenient, necessary, and affective construction and work of the company's railway or any of its branches; and if His Majesty or His Successors grant the same to such railway company, the land so granted shall from and after the date of such grant cease to be under the operation of this licence and to be part of the lands hereby demised, but the licensee or his legal representatives shall be at liberty to remove all property belonging to him or them and all timber then cut thereon, from the land so granted; and shall also be entitled to cut and remove from the said land so granted, as his or their own property, all trees then standing thereon or the timber obtained therefrom, provided that such property and cut timber, or property, cut timber and standing trees or the timber obtained therefrom are promptly removed from the said land upon receipt by the licensee or his legal representatives of notice from the railway company to remove such property and cut timber, or to cut and remove such standing trees so as not to hinder or interfere with any work being done or about to be done by the railway company for the convenient, necessary and effective construction and working of the company's railway or of any of its branches; provided also, however, that if the licensee or his legal representatives do not so remove such property or cut timber, or so cut and remove such standing trees or the timber obtained therefrom, the railway company may do so, and all cut timber and standing trees or timber obtained therefrom which have so to be moved or cut and removed by the railway company, shall be the property of the Crown and be disposed of as the Governor in Council, upon the report of the Minister of the Interior, may decide to be fit and proper. 20 30 40

2. If any railway company becomes entitled to a grant from His Majesty or His Successors of any portion of the lands hereby demised, as part of its land subsidy as provided for by any statute of Canada, and if His Majesty or His Successors grant the same to such railway company, the land so granted shall from and after the date of such grant cease to be

under the operation of this licence and to be part of the lands hereby demised, but the licensee or his legal representatives shall be at liberty to remove all property belonging to him or them, and all timber then cut thereon from the land so granted.

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3. From the date any parcel of land is granted to any railway company, and is so withdrawn from the operation of this licence, the ground rent hereby provided to be paid shall be reduced in proportion to the area withdrawn.

10 (n) (1) In any case where water flowing through over or along, or having their source in any timber berth, empty into any stream, or are tributary to any stream from which a domestic or municipal water supply is or may be obtained, or in any case where the pollution of any such waters may, in the opinion of the minister, deleteriously affect any municipal or domestic water supply, the licensee of such timber berth shall comply with the following regulations:—

- (a) Locate all camp buildings, outhouses, cess-pools and other structures at a sufficient distance from any stream, lake or other source of water supply, to prevent the pollution of such municipal or domestic water supply.
- 20 (b) Immediately remove and bury or burn any camp refuse or debris of any description, or any substance which would be likely to cause the pollution of any such waters, and otherwise keep the ground in the vicinity of all logging camps in a neat, orderly and sanitary condition.
- (c) Prevent any depositing, leaving or accumulating in any stream, lake or other source of water supply within the berth, or in an exposed or insanitary condition on the berth, and debris of any description or any substance which would be likely to cause the pollution of such waters.
- 30 (d) Prevent the depositing or leaving by any person employed or purporting to be employed about the berth, or the accumulation as a result of any operations carried on by reason of the licence in any stream, lake or other source of such water supply on any Dominion Lands whatever, or in any exposed or insanitary condition on any such lands, of any such debris or substance.
- (e) Observe all laws and regulations respecting sanitation and the protection of the purity of waters which are applicable to the premises, or any regulations which may be promulgated by the Governor in Council; and also comply with any requirements
- 40 which may be made by the minister for the purpose of carrying out the above provisions.

(2) For each infraction of the provisions of Clause (1) hereof, the licensee shall, in addition to the other penalties provided in the said regula-

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tions, be liable on summary conviction to a penalty not exceeding one hundred dollars, and such sum shall be recoverable with costs at the suit of and in the name of the Crown.

(o) This licence cannot be assigned or transferred without the consent of the Minister of the Interior.

(p) The licensee shall have in operation within one year from a date when he is notified by the proper officer of the Department of the Interior that the Minister of the Interior regards such a step necessary or expedient in the public interest, and keep in operation for at least six months of each year of his holding, a saw-mill in connection with the berth herein described capable of cutting in one day a thousand feet board measure for every two and one-half square miles of the area licensed. 10

(q) Any notice, demand or other communication which His Majesty or the Minister of the Interior may require or desire to give or serve upon the licensee, may be validly given and served by the Minister, Deputy Minister, Assistant Deputy Minister, Commissioner of Dominion Lands or Assistant Commissioner of Dominion Lands.

Dated at the City of Ottawa,
this Nineteenth day of May,
one thousand nine hundred
and thirty.

(Sgd.) Illegible,
for Deputy Minister of the Interior 20

I, accept this licence and agree to all the terms and conditions thereof.

D. R. FRASER & CO. LIMITED,
per (Sgd.) I. MACDONALD,
President.
Signature of Licensee.

[SEAL]

(Sgd.) E. R. MACDONALD,
Secretary. 30

(Sgd.) RICHARD VARLEY,
Witness to Signature of Licensee.

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(Appellant's Document)

[CREST]

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GOVERNMENT OF THE PROVINCE OF ALBERTA
 Department of Lands and Mines

File No. 1148 T.L.
 License No. 83
 Berth No. 1161

10

LICENSE TO CUT TIMBER ON PROVINCIAL LANDS

KNOW ALL MEN BY THESE PRESENTS, that by virtue of the authority vested in me by *The Provincial Lands Act*, and by an order of His Honour the Lieutenant Governor in Council of the Eighteenth day of June, 1931, I, The Honourable Richard Gavin Reid, the Minister of Lands and Mines of the Government of the Province of Alberta, do hereby in consideration of the sum of Forty-eight Dollars and Twenty Cents (\$48.20) ground rent, now paid to me for the use of His Majesty King George the Fifth, and in consideration of the dues hereinafter mentioned, give unto D. R. Fraser and Company, Limited of the City of Edmonton, hereinafter called the licensee, his executors and administrators, full right, power and license, subject to the conditions hereinafter mentioned and contained, and such other conditions and restrictions as are in that behalf contained in *The Provincial Lands Act* and the amendments thereto, and in the regulations respecting timber passed by the Lieutenant Governor in Council, to cut timber on the following tract of land (hereinafter called the "berth" or "berths"), that is to say:

30 Timber Berth No. 1161, situate in Township 47, Ranges 5 and 6, West of the 5th Meridian, containing an area of 4.82 square miles, more or less, as shown on plan of survey thereof, signed by A. Driscoll, D.L.S., dated the 3rd June, 1908, and of record in the Department of Lands and Mines, Province of Alberta, Edmonton, as No. 72 T., excluding therefrom the portion of Section 11, Township 47, Range 6, West of the 5th Meridian, covered thereby.

and to take and keep exclusive possession of the said lands except as and hereinafter mentioned, for and during the period of one year from the first day of April, 1931, to the thirty-first day of March, 1932, and no longer. Entered, Plotted—P.

40 This license shall vest in the licensee, subject to the conditions mentioned in this license, all rights of property whatsoever in all trees, timber, lumber or other products of timber which he is entitled by this license to

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cut, and which have been cut within the limits of the berth during the continuance thereof, whether such trees, timber, lumber or other products are cut by consent of the licensee or by any other person without his consent, and shall vest in the licensee, as against any person other than the Crown in the right of the Province, subject to the conditions mentioned in this license, all right of property whatsoever in all trees, timber, lumber or other products of timber cut within the limits of the berth by any other person without his consent; and this license shall entitle the licensee to replevy, as his property, timber of any kind cut within the limits of the berth where it is found in the possession of any unauthorized person, and also to bring any action or suit for damages or any other appropriate remedy against such person who is unlawfully in possession of such timber, or who has unlawfully cut any timber of any kind in derogation of any rights of the licensee under this license, or who has entered without authority upon the berth covered by this license, and any such proceedings which have been commenced and are pending at the expiration of this license may be continued and completed as if the license had not expired. 10

This license is subject to the right of the Department, without compensating the licensee, to dispose of all dead or fallen timber on the area cut over by the licensee after due notice to such licensee, and to the right of the Department to remove all fire-killed or dead timber anywhere throughout the balance of the berth on failure of the licensee to remove same when requested to do so by the Minister, the cost of such removal to be borne by the licensee. 20

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.

(a) That the licensee shall not have the right thereunder to cut timber of a less diameter than seven inches measured eighteen inches from the ground, except such as may be actually necessary for the construction of roads and other works to facilitate the taking out of merchantable timber, and shall not have the right to cut any trees that may be designated by the proper officer of the Department of Lands and Mines as required to provide a supply of seed for the reproduction of the forest. 30

(aa) All merchantable timber of a class authorized to be cut under license shall be cut and taken from a berth as cutting progresses, and any timber of that class left uncut and unremoved after a date named in a notice, served on the licensee or his authorized agent, shall be estimated in feet board measure by a provincial timber inspector, and shall be subject to payment to the department, on demand, of ordinary royalty dues, provided that the licensee shall not be required to cut and remove timber which is inaccessible. 40

In the event of timber on a licensed berth, of the class authorized to be cut, becoming fire-killed or dead and a report being made by a timber inspector that the same can be cut and marketed by the licensee without monetary loss, the Minister may require the licensee to cut and remove the same, and all such timber left uncut and unremoved from the berth after a date named in a notice served upon the licensee, or his authorized agent, shall be estimated in feet board measure by a timber inspector, and the licensee shall pay dues thereon, as provided in the regulations according to such estimate.

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- 10 (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.

- 20 (c) When, in the opinion of the Minister, any portion of a timber berth has not a sufficient quantity of the kind and dimensions of timber specified in the license for such berth to make it profitable to remove the timber upon such portion of the berth, and, when in the opinion of the Minister, such portion of the berth is not necessary for the proper working of the remainder of the berth, the Minister may withdraw such portion from the berth:

- 30 Provided that in no case shall such withdrawal be made until the expiration of sixty days after a notice in writing of the proposed withdrawal has been given to the licensee of the berth, or to his legal representative, by the Minister; or by someone thereto authorized by the Minister, and that upon the withdrawal of any portion of a berth the rental to be paid under the license shall be reduced in proportion to the area withdrawn.

- 40 (d) If the Minister ascertains, after an inspection has been made, that any land within the berth hereby licensed is fit for settlement and is required for that purpose, he may require the licensee to carry on the cutting of timber provided for by section 27 of the timber regulations on the said land, and on the expiration of the time within which the timber which the licensee is entitled to cut should be removed therefrom may withdraw such land from the berth, and from the operation of the license covering it, and upon such withdrawal the ground rent shall be reduced in proportion to the area withdrawn.

(e) That the licensee shall take from every tree he cuts down all the timber fit for use and manufacture the same into sawn lumber or

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some other saleable product, and shall dispose of the tops and branches and other debris of lumbering operations in such a way as to prevent as far as possible the danger of fire, in accordance with the directions of the proper officers of the Department of Lands and Mines. Failure on the part of the licensee will subject him to the penalty of having his manufactured timber seized and his bush operations closed down, and, in the discretion of the Minister, to forfeiture of the license.

continued.

(f) That the licensee shall prevent all unnecessary destruction of growing timber on the part of his men and exercise strict and constant supervision to prevent the origin and spread of fire, and shall also comply during the term of the license and of any renewal thereof with all laws and regulations in that respect in force in the Province. 10

(g) That the licensee shall furnish to the timber agent for the district having jurisdiction in the matter, at such periods as may be required by the Minister or by the regulations under *The Provincial Lands Act*, returns sworn to by him or his agent or employee cognizant of the facts, showing the quantities manufactured, sold or disposed of, of all sawn lumber, timber or any other product of timber from the berth in whatever form the same may be sold or otherwise disposed of by him during such period and the price or value thereof. 20

(h) That the licensee shall pay, in addition to the said ground rent, dues in the manner prescribed in section 20 of the Timber Regulations, and also one-half of the cost incurred by the Crown in guarding the timber from fire, the Government paying the other half. A statement will be furnished the licensee showing his share of the cost incurred for fire guarding, and payment thereof shall be made to the Crown within thirty days thereafter.

(i) (i) That the licensee shall keep a "Lumber Sales Book," in which shall be entered all sales of the products of the berth, both cash and credit sales, also a book accounting for the number of feet of sawn lumber manufactured each day at the mill, with the day and date; all books and memoranda kept at the logging camps shall be carefully preserved and these and other books kept by the licensee in connection with his lumbering business he shall submit for the inspection of the local Timber Agent or other officer of the Crown whenever required for the purpose of verifying his returns aforesaid. 30

(ii) That the licensee shall keep a bush count of all sawlogs and other timber cut upon the berth, as well as the number of pieces hauled therefrom, in the form of a book to be obtained for the purpose from the Timber Agent. The books covering operations for twelve months ending the 31st of March in each year shall be returned to the said Agent duly completed by the foreman in charge of operations, who shall subscribe to the affidavit therein. 40

(j) This license shall be subject to the provisions of *The Provincial Lands Act*, or of any other Act or of any regulations made thereunder, dealing with or affecting the disposal of quarriable stone, salt, petroleum, natural gas, coal, gold, silver, copper, iron, or other minerals within or under lands within the boundaries of the berth; and in and by virtue of any grant, lease or permit issued under regulations made as aforesaid, the grantee, lessee, or permittee, shall have the right to have, use and hold possession of such land as is described in the grant, lease or permit, for quarrying stone, for the boring or operating of any salt, oil, or natural gas wells, or for the working of any mines, and the right to open any roads necessary in connection with such works:

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continued.

Provided that the licensee shall be paid by the grantee, lessee or permittee the value of all timber cut, damaged or destroyed in making such roads, or in boring or operating any salt, oil or gas wells, or in working any quarries, or mines, or as a consequence directly or indirectly of any such operation or work.

(k) This license shall be subject to the right of the Minister to permit prospecting on the berth for quarriable stone, salt, petroleum, natural gas, coal, gold, silver, copper, iron, or other minerals; but the licensee shall be notified of every such permission and shall be entitled to compensation from the prospector for any timber cut, damaged or destroyed by the prospector or as a consequence of his prospecting of the berths and the determination of such compensation shall be in a manner to be prescribed by the Minister.

(l) This license shall be subject to the right of the Minister to withdraw at any time from the said timber berth any portion or tract of the lands comprising it which is required for water-power purposes or is necessary in connection therewith by the lessee or lessees of the water-power, their executors, administrators, or assigns, and which the Minister of Lands and Mines, as the representative of the Crown therein, shall decide to be necessary for such water-power purposes, and which for such purposes shall be so withdrawn from the said lands and from the operation of the said license, upon the condition, however, that the lessee or lessees of the said water-power, his or their executors, administrators, or assigns, shall and will pay to the licensee of the berth, his executors, administrators, or assigns, the value of all timber of seven inches and over in diameter at the stump on the portion of the tract so withdrawn, the value of such timber in case of dispute to be fixed by the Minister.

(m) This license shall also be subject to the right of the Crown in the right of the Province to withdraw at any time from the said timber berth any portion or tract of the lands comprising it which is required for the construction of any colonization or other road, or any road in lieu of or partly deviating from an allowance for road, drain or drainage works without compensation therefor:

Exhibits
and
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No. 9
Provincial
Licence
Berth 1161,
12th April,
1932.

continued.

Provided that upon such withdrawal the ground rent shall be reduced in proportion to the area withdrawn.

(n) If any railway company becomes entitled to a grant from His Majesty or His Successors of any portion of the lands hereby demised for the roadbed of the company's railway or branches thereof, or for stations, station grounds, workshops, dockyards and water frontages on navigable rivers, or building yards, or for other purposes required for the convenient, necessary and effective construction and working of the company's railway or any of its branches; and if His Majesty or His Successors grant the same to such railway company, the land so granted shall from and after the date of the grant cease to be under the operation of this license and to be part of the lands hereby demised, but the licensee or his legal representative shall be at liberty to remove all property belonging to him or them and all timber then cut thereon from the land so granted; and shall also be entitled to cut and remove from the said land so granted as his or their own property, all trees then standing thereon or the timber obtained therefrom, provided that such property and cut timber, or property, cut timber and standing trees, or the timber obtained therefrom, are promptly removed from the said land upon receipt by the licensee or his legal representative of notice from the railway company to remove said property and cut timber, or to cut and remove such standing trees so as not to hinder or interfere with any work being done or about to be done by the railway company for the convenient, necessary and effective construction and working of the company's railway or of any of its branches; provided also, however, that if the licensee or his legal representative do not so remove such property or cut timber, or so cut and remove such standing trees or the timber obtained therefrom, the railway company may do so, and all cut timber and standing trees or the timber obtained therefrom, which have so to be removed or cut and removed by the railway company, shall be the property of the Crown in the right of the Province and be disposed of as the Minister may decide to be fit and proper. 10 20 30

(o) From the date any parcel of land is granted to any railway company and is so withdrawn from the operation of this license, the ground rent hereby provided to be paid shall be reduced in proportion to the area withdrawn.

(p) There is hereby reserved to the Crown out of the lands hereby demised, all rights of fishery and fishing and occupation in connection therewith upon, around and adjacent to the said lands.

(q) In any case where waters flowing through, over or along, or having their source in any timber berth, empty into any stream or are tributary to any stream from which a domestic or municipal water supply is or may be obtained or contain fish, or in any case where the pollution of any such water, may, in the opinion of the Minister, deleteriously affect any municipal or domestic water supply, the licensee of such timber berth shall comply with the following regulations: 40

- (i) Locate all camp buildings, outhouses, cesspools and other structures at a sufficient distance from any stream, lake or other source of water supply, to prevent the pollution of such municipal or domestic water supply.
- (ii) Immediately remove and bury or burn any camp refuse or debris of any description, or any substance which would be likely to cause the pollution of any such waters, and otherwise keep the ground in the vicinity of all logging camps in a neat, orderly and sanitary condition.
- 10 (iii) Prevent any depositing, leaving or accumulation in any stream, lake or other source of water supply within the berth, or in an exposed or insanitary condition on the berth, any debris of any description, or any substance which would be likely to cause the pollution of such waters.
- (iv) Prevent the depositing or leaving by any person employed or purporting to be employed about the berth, or the accumulation as a result of any operations carried on by reason of the license in any stream, lake or other source of such water supply on any Provincial lands whatever, or in any exposed or insanitary condition on any such lands, of any such debris or substance.
- 20 (v) Observe all laws and regulations respecting sanitation and the protection of the purity of waters which are applicable to the premises, or any regulations which may be promulgated by the Lieutenant Governor in Council, and also comply with any requirements which may be made by the Minister for the purpose of carrying out the above provisions.
- (vi) The licensee shall not pile logs or timber in the beds of any river or stream when there is not sufficient water in a river or stream to float said logs or timber.
- (vii) The licensee must provide a sufficient patrol of such river or stream when floating logs to prevent any log jams or piling up of timber which may result in damage to any bridge, or other property.
- 30 (r) For each infraction of the provisions of clause (q) hereof, the licensee shall, in addition to the other penalties provided in the said regulations, be liable on summary conviction to a penalty not exceeding one hundred dollars, and such sum shall be recoverable with costs at the suit of and in the name of the Crown in the right of the Province.
- (s) This license cannot be assigned or transferred without the consent of the Minister of Lands and Mines.
- (t) Any fire having caused damage to the timber on the berth must be reported immediately with full details to the timber agent for the district in which the berth is situated, and the responsibility so to do shall rest with the licensee.
- 40 (u) The licensee shall have in operation, within one year from a date when he is notified by a proper officer of the Department of Lands and Mines that the Minister regards such a step as necessary or expedient

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—
No. 9
Provincial
Licence
Berth 1161,
12th April,
1932.
continued.

Exhibits
and
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—
No. 9
Provincial
Licence
Berth 1161,
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1932.

in the public interest, a fully equipped sawmill in connection with the berth herein described of a value of not less than \$2,000, capable of cutting in one day 1,000 feet board measure for every two and one-half square miles of the area licensed.

(v) (i) This license shall be subject to forfeiture on the order of the Minister for violation of any of the conditions to which it is subject or for any fraudulent return.

(ii) Provided that before making an order for forfeiture the Minister shall cause written notice to be given to the licensee that it is the intention so to do, upon the grounds set forth in such notice, unless within sixty days after service of such notice the licensee shows cause to the contrary as hereinafter provided. 10

(iii) Service of such notice may be effected by mailing the same, duly registered, to the address or the last known address of the licensee, and in such case shall be deemed to have been made upon the day on which the notice reached the said address or in due course of mail should have done so.

(iv) The licensee may within the said period of sixty days apply to a Judge of the Supreme Court of Alberta for an order declaring that there is no ground or cause for the forfeiture of his license, and every such application shall be subject to and governed by the rules of court applicable to proceedings by way of originating notice. 20

(v) There shall be a right of appeal from any order made upon any such application to the Appellate Division of the Supreme Court of Alberta.

(vi) Pending the final disposition of the application, the Minister shall not exercise the power of forfeiture.

(vii) Provided further, that if the violation of the regulations refers merely to payment of money due under the license, the Minister may waive the power of forfeiture on payment of double the amount found by the judge to be due, and costs, and may enforce payment in the manner provided for by *The Provincial Lands Act* and the Timber Regulations and take such action in regard to all other matters of forfeiture as may arise and be provided for by this section and by *The Provincial Lands Act*. 30

(w) The licensee shall notify the timber agent immediately upon the erection of a sawmill together with its location.

(x) The licensee shall pay and discharge all rates, assessments and taxes imposed by any Municipal, Improvement, School, Irrigation and Drainage Districts, now charged or hereafter to be charged upon the said berth, as occupant, or upon the said licensee or occupier in respect thereof or payable by either in respect thereof.

(y) Any notice, demand or other communication which His Majesty or the Minister of Lands and Mines may require or desire to give or serve upon the licensee may be validly given and served by the Director of Lands 40

continued.

or by the Secretary of the Department of Lands and Mines or by the Timber Agent for the district.

Exhibits and Documents

DATED at the City of Edmonton, }
this twelfth (12th) day of April, }
one thousand nine hundred and }
thirty two. }

(Sgd.) W. HARVIE,
Deputy Minister of Lands
and Mines.

No. 9
Provincial
Licence
Berth 1161,
12th April,
1932.

WE, D. R. FRASER & CO. LTD., accept this license and agree to all the terms and conditions thereof.

continued.

10 D. R. FRASER & CO. LIMITED,
per (Sgd.) E. R. MACDONALD,
Signature of Licensee.
[SEAL]

(Sgd.) Illegible,
Witness to Signature of Licensee.

No. 24

File of Correspondence re Mohawk Bituminous Mines
(Appellant's Document)

No. 24
File of
Corres-
pondence
re Mohawk
Bituminous
Mines
10th
October,
1935, to
27th
February,
1936.

District of
Calgary

IMPORTANT
In Reply, Please
Refer to
M. 8610-G

20

[CREST]

DEPARTMENT OF NATIONAL REVENUE
Income Tax Division
Office of
The Inspector of Income Tax

18 Customs Building,
October 10th, 1935.

The Mohawk Bituminous Mines Ltd.,
515 Lancaster Building,
Calgary, Alberta.

30

Dear Sirs:—

With reference to your claim for an allowance of five cents per ton depletion on coal mined from areas leased from Joseph Little, Blairmore, I have to advise you that the Lessor has been informed of this claim and objects to the same.

As Mr. Little has always claimed and been allowed the full amount of the depletion and has claimed this in respect of the year 1934, it would

Exhibits
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appear that he is entitled to this. It is accordingly proposed to disallow your claim in this respect.

No. 24
File of
Corres-
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re Mohawk
Bituminous
Mines
10th
October,
1935, to
27th
February,
1936.

CA:H

Yours truly,

C. ALEXANDER,
Inspector of Income Tax.

October 15, 1935.

continued.

Dear Sir:

—re Depletion Allowance
Your File M.8610-A

10

With reference to the writer's conversation with your Mr. Alexander regarding the depletion allowance claimed by this Company in our 1934 return, it is our considered opinion that the Company is entitled to this claim.

We do not consider that Mr. Little's position is actually different from that of the Crown in respect of depletion allowance as both are the undoubted owners of the coal rights, and for many years it is the writer's knowledge that an allowance has been granted for depletion to Companies operating on Crown lands although title in these lands is vested in the Crown. 20

We do not wish to be placed in the position of going to Mr. Little and making the best arrangement we can for the surrender by him of his claim to depletion allowance. We consider this would be highly improper although such action is apparently contemplated by the present Act. If, however, the Department are not willing to make what we consider to be an equitable apportionment of the depletion allowance, it would appear that in our own interest we must go to Mr. Little and make such an arrangement, even though it should amount to this Company paying part of Mr. Little's income tax. 30

We would much prefer, instead of doing this, that your Department make an equitable apportionment of the allowance for depletion as contemplated by Subsec. (a) of Sec. 57 of the Income War Tax Act which states that both lessor and lessee are *entitled* to deduct a part of the allowance for exhaustion as they may agree. No mention is made in the Act that in making this apportionment any consideration shall be given to the cost of acquisition of the coal mining rights by the lessor.

Yours very truly,

MOHAWK BITUMINOUS MINES LTD. 40
per

ER/F

December 27, 1935.

Exhibits
and
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No. 24

File of
Corres-
pondence
re Mohawk
Bituminous
Mines
10th
October,
1935, to
27th
February,
1936.

continued.

Minister of National Revenue,
OTTAWA, Ont.

Dear Sir:

We enclose notice of appeal from assessment levied against this Com-
pany by the Inspector of Income Tax.

Yours very truly,

MOHAWK BITUMINOUS MINES LTD.
Calgary Office.

10 F
Enc.
Registered Mail.

IN RE

The Income War Tax Act

— and —

MOHAWK BITUMINOUS MINES LIMITED of the City of Calgary in
the Province of Alberta.

(Appellant)

20 Notice of Appeal is hereby given from the assessment bearing date
the 20th day of December, 1935, wherein a tax in the sum of \$433.90 levied
in respect of income for the taxation year 1934.

The above assessment is appealed from owing to the reason that no
allowance has been made for depletion contrary to the provisions of Second
Paragraph of Subsection (a) of Section 5 of the Income War Tax Act.

Dated this day of December, 1935.

MOHAWK BITUMINOUS MINES LTD.

per

Secretary.

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No. 24

File of
Corres-
pondence
re Mohawk
Bituminous
Mines
10th
October,
1935, to
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continued.

District of
Calgary.

[CREST]

IMPORTANT
In Reply, Please
Refer to
M. 8610-A.

DEPARTMENT OF NATIONAL REVENUE
Income Tax Division
Office of
The Inspector of Income Tax

18 Customs Building.
December 31st, 1935. 10

Mohawk Bituminous Mines Limited,
515 Lancaster Building,
Calgary, Alberta.

Dear Sirs:

With reference to your letter of 15th October last, and to assessment notice mailed to you on 20th inst., the matter has since received the further consideration of the Department and it has been ruled that the depletion should be allocated two-thirds to the lessor and one-third to the lessee. This would appear to be equitable and it is hoped will be satisfactory to you.

An amended assessment notice on this basis will be issued in due course. 20

Yours truly,

C. ALEXANDER,
Inspector of Income Tax.

CA/LO.

[CREST]

Address Reply to
"Commissioner of Income Tax"
Adressez Votre Response Au
Commissaire De L'impot Sur Le Revenu

Refer to
ACF.
Referez Au

DEPARTMENT OF NATIONAL REVENUE
Ministere du Revenu National
Income Tax Division
Division De L'Impot Sur Le Revenu

30

OTTAWA, 3rd January, 1936.

Mohawk Bituminous Mines Limited,
515 Lancaster Building,
CALGARY, Alta.

Dear Sirs: 1934 ASSESSMENT

This will acknowledge your letter of the 27th December last, addressed to the Honourable the Minister of National Revenue, enclosing Notice of Appeal in respect of an Income Tax assessment levied against you for the year 1934. 40

An investigation is being made into this matter and you will be advised further in due course. Meanwhile it is suggested that the assessment as levied be paid in order to avoid the accrual of interest under the provisions of the Income War Tax Act subject to a refund at a later date should an adjustment reducing the assessment be subsequently made.

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No. 24
File of
Corres-
pondence
re Mohawk
Bituminous
Mines
10th
October,
1935, to
27th
February,
1936.

Yours faithfully,

C. F. ELLIOTT,
Commissioner of Income Tax.

ACF/ECR.

10 Form T. 7a-1
Formule T. 7a-1 Series
CONFIRMATION RECEIPT A—No. 70087
Recu confirme Serie
Req. No. 2149—50M—1-32

continued.

ORIGINAL

For the Taxpayer—Pour Le Payeur De Taxes

DOMINION of CANADA
Du

DEPARTMENT OF NATIONAL REVENUE

Ministere Du Revenu National

20 INCOME TAX DIVISION District, Calgary
Division De L'Impot Sur Le Revenu

27th February, 1936.

Received from Mohawk Bituminous Mines Limited (M. 8610)
Address 515 Lancaster Bldg., Calgary, Alberta.

Amount, Nineteen	34/100 Dollars
Amount due as per Assessment notice number 10789, For Taxation year 1934	\$ 19.34.....
Additional interest from due date to date of payment (add) \$.....	
Interest allowed for prepayment..... (deduct) \$.....	
	Total \$ 19.34.....

30

Inspector of Income Tax
Inspecteur de l'impôt sur le revenu,

C. F. ELLIOTT
C. S. WATIERS

Per, R. GEMPEST,
Par Cashier—Caissier

Commissioner of Income Tax
Commissaire de l'impôt sur le revenu

This Receipt Not Valid Unless Signed by the Cashier
Ce Recu Ne Sera Valable Que S'il Est Signe Par Le Caissier

No. 23

Exhibits
and
Documents

No. 23

Joseph
Little
and
Mohawk
Bituminous
Mines
Limited
5th
August,
1939.

**Lease Joseph Little and Mohawk Bituminous Mines Limited
(Appellant's Document)**

THIS INDENTURE made in duplicate the 5th day of August, A.D. 1939.

BETWEEN:

JOSEPH LITTLE, of the Town of Blairmore, in the
Province of Alberta, Gentleman, hereinafter called
"THE LESSOR"

OF THE FIRST PART

and

10

MOHAWK BITUMINOUS MINES LIMITED, a body
corporate having its registered office at the City of
Calgary, in the Province of Alberta, hereinafter called
"THE LESSEE"

OF THE SECOND PART.

WHEREAS the lessor is possessed of the coal rights and privileges on,
in and under Legal Subdivisions Nine (9) Ten (10) Fifteen (15) and Six-
teen (16) of Section Twenty-one (21), all of Legal Subdivisions One (1)
Two (2) Three (3) Six (6) Seven (7) Eight (8) Nine (9) Ten (10)
Eleven (11) Fourteen (14) Fifteen (15) and Sixteen (16) of Section 20
Twenty-eight (28); all of Legal Subdivisions One (1) Two (2) Three (3)
Six (6) Seven (7) Eight (8) Nine (9) Ten (10) Eleven (11) Fourteen
(14) and Fifteen (15) of Section Thirty-three (33); and all of Legal Sub-
divisions Twelve (12) Thirteen (13) Four (4) and Five (5) of Section
Twenty-seven (27); all in Township Seven (7), of Range Three (3), West
of the fifth Meridian, in the Province of Alberta, and has agreed to and
with the lessee to lease the same to the lessee under the terms and conditions
and for the consideration hereinafter expressed.

NOW THIS INDENTURE WITNESSETH that the parties hereto
covenant and agree to and with each other as follows— 30

1. The lessor hereby demises to the lessee for the purpose of working,
winning and selling all coal obtainable on, in or under the lands herein-
before described, the coal rights on, in and under said lands for a term
expiring the ninth day of March, 1971, for which the lessee hereby cove-
nants and agrees to pay to the lessor (except in respect of slack coal as
hereinafter mentioned) a royalty of twenty cents (20c) for every ton of
coal which shall be got out of the demised premises which are not subject to
Provincial Government royalty and eighteen cents (18c) for every ton of
coal which shall be got out of the demised premises which are subject to
Provincial Government royalty and which irrespective being not or being 40

subject to Provincial Government royalty is sold or used by the lessee: "Provided however that in case the total monthly royalties exceed the sum of Seven Hundred and Fifty Dollars (\$750.00) in any month then only ten cents (10c) per ton shall be paid on any coal in excess of the amount needed to provide the sum of Seven Hundred and Fifty Dollars (\$750.00) per month", but in calculating this sum of Seven Hundred and Fifty Dollars (\$750.00) in any month, no consideration shall be given to slack coal the royalty on which is to be at the rate of five cents (5c) per ton.

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1939.

10 2. The lessee covenants that its operations in relation to mining said coal shall conform with the "Mines Act" of the Province of Alberta and that any and all mines to be developed upon said lands will be worked to the best ability of the lessee in a proper workmanlike manner and in the best interests of the parties hereto and that it will carry on its mining operations so long as it is able to mine and market under normal economical conditions.

20 3. In the event of any action being taken by the proper authorities under "The Bureau of Trade and Industries Act" in so far as same relates to coal mines the royalty payable hereunder shall be subject to review by agreement between the lessor or the lessee and failing agreement shall be settled by arbitration as hereinafter provided.

4. The lessee covenants with the lessor that if in any year the total royalty payable hereunder does not equal or exceed the sum of Four thousand dollars (\$4,000.00) the lessee will within ten (10) days from and after completion of any year pay to the lessor the difference between the amount of the rental paid and the said sum of Four thousand dollars (\$4,000.00) so that the minimum sum to be received by the lessor for any year hereunder shall be Four thousand dollars (\$4,000.00).

30 5. The lessee shall be entitled to possession of said lands from and after the date of the execution of this lease and may assign or sub-let or part with the possession of the said lands or any part thereof.

6. The lessor shall have the right at all reasonable times to inspect the records of the lessee for the purpose of checking or computing the quantity of coal mined on, in or under said lands and the workings of the lessee in relation thereto and to inspect the premises.

40 7. The lessee covenants and agrees to pay the said royalty and in default of payment which shall be by monthly payments on the 15th day of each and every month, commencing the 15th day of the month next after lapse of one clear month from the date hereof and such payment being in respect of said preceding month, the lessor shall be entitled to declare this lease to be null and void upon thirty (30) days notice in writing to be given by the lessor to the lessee at its registered office or place of business on said lands, always without prejudice to recovery of any and all royalty in arrear: and upon expiry of said notice to the lessee it shall deliver up possession of said lands and this lease shall be deemed cancelled and ter-

continued.

Exhibits
and
Documents
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No. 23
Joseph
Little
and
Mohawk
Bituminous
Mines
Limited
5th
August,
1939.
continued.

minated: Provided that notwithstanding the said delivery up of possession of said lands by the lessee and the cancellation and termination of this lease the lessee shall have a license to enter upon the said lands or remain upon the said lands for the purpose of removing any machinery, tools, plant, buildings, erections and fixtures whatsoever which the lessee may have placed on, in and under said lands in connection with the mining operations carried on by it.

8. No royalty shall be calculated or payable on coal used for working and ventilating the mines of coal including coal for engines and machines for draining water from the mines and workings and for hauling or winding the demised minerals. 10

9. The lessor covenants and agrees to pay and discharge all taxes assessed or payable in respect of said lands and to keep the same paid during the currency of this lease and on default by the lessor the lessee may pay the same and deduct the amount thereof from royalty payable hereunder to the lessor but the lessee shall be responsible for and hereby covenants and agrees to pay and discharge any Provincial or and Dominion tax or charge on or in respect of any and all coal mined on, in or under said lands.

10. This lease shall be in substitution for and in cancellation of all agreements previously entered into between the parties. 20

The terms and conditions hereof shall enure to the benefit of and be binding upon the heirs, executors and administrators of the lessor and the successors and assigns of the lessee.

IN WITNESS WHEREOF the lessor has executed these presents by subscribing his hand and affixing his seal and the lessee by affixing its corporate seal duly attested to by the signatures of its proper officers the day, month and year first above written.

SIGNED SEALED AND DELIVERED }
IN THE PRESENCE OF } (Sgd.) JOSEPH LITTLE 30
(Sgd.) J. M. SMITH. }

MOHAWK BITUMINOUS MINES LIMITED

per (Sgd.) W. L. CARLYLE,
per (Sgd.) E. RICHARDSON,
Secretary. (SEAL)

C A N A D A
PROVINCE OF ALBERTA
TO WIT:

I, JAMES MOORE SMITH, of the Town of Blairmore, in the Province of Alberta. make oath and say:— 40

1. That I was personally present and did see Joseph Little named in the within Indenture of Lease who is personally known to me to be the person named therein, duly sign, seal and execute the same for the purposes named therein.

2. That the same was executed at the Town of Blairmore, in the Province of Alberta, and that I am the subscribing witness thereto.

3. That I know the said Joseph Little and he is in my belief of the full age of twenty-one years.

10 SWORN before me at the Town of Blairmore, in the Province of Alberta, this 9th day of Aug., 1939.

(Sgd.) J. M. SMITH.

(Sgd.) D. B. YOUNG,
A Commissioner for Oaths in and for the Province of Alberta.

Exhibits and Documents — No. 23 Joseph Little and Mohawk Bituminous Mines Limited 5th August, 1939.

continued.

No. 17

Advertisement of Sale by Public Tender, Berth 6722 (Appellant's Document)

No. 17 Advertisement of Sale by Public Tender, Berth 6722 17th July, 1940.

(SEAL)

20

SALE OF TIMBER BY PUBLIC TENDER

1. PUBLIC NOTICE is hereby given that the Director of Forestry, Department of Lands and Mines, Edmonton, will offer for sale by public tender at 2:30 o'clock in the afternoon on Wednesday, July 31st, 1940, at Room 532, Administration Building, 109th Street, Edmonton, Alberta, the right to cut timber under license on Berth No. 6722, comprising:

30

All of Section 25, excepting Legal Subdivision 14 and that portion included in Timber Berth No. 1161; the North East quarter of Section 26; Legal Subdivisions 3 and 4, and the South halves of Legal Subdivisions 1, 2, 5 and 6 of Section 35 and the South half of Legal Subdivisions 1 and 2 of Section 36, all in Township 47, Range 6, West of the 5th Meridian, an area of approximately 1.44 square miles.

2. It is estimated there are at least four million, two hundred and fifty thousand feet board measure of merchantable spruce and pine on the timber berth.

3. The license will be awarded to the person tendering the highest rate of dues on sawn lumber of species other than poplar and no tender of a

Exhibits
and
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No. 17
Adver-
tise-
ment
of Sale
by Public
Tender,
Berth 6722
17th July,
1940.

continued.

rate of dues of less than \$2.50 per thousand feet board measure shall be considered. All timber cut under license on the timber berth, excepting sawn lumber of species other than poplar, shall be subject to the payment of dues at the rates to be announced immediately prior to the holding of the sale.

4. Tenders for the timber berth must be enclosed in a sealed container and submitted by the tenderer in person or through his duly authorized agent who must present his authorization with the tender and such authorization must be sufficient to empower the said agent to make application for a license in behalf of the tenderer and to bind such tenderer to full and complete compliance with the terms and conditions of sale. 10

5. Tenders must be accompanied by a deposit of \$1,165.00 in cash, marked cheque on a chartered bank, certified treasury branch order cheque, or certified non-negotiable transfer voucher payable to the Provincial Treasurer. The deposit made by an unsuccessful tenderer shall be returned to him and in the case of the person to whom the timber berth is awarded the deposit shall be retained as a guarantee of compliance with the terms of sale.

6. Every tender to purchase the timber berth shall include an offer on behalf of the person making the same to pay to the Crown in addition to all dues and taxes reserved or imposed by Statute the sum of \$55.60, being the cost incurred in cruising and advertising the timber berth. 20

7. The timber berth shall be subject to an annual rental of \$10.00 per square mile or fraction thereof, and one-half the cost incurred by the Crown in guarding the timber from fire shall be defrayed by the licensee.

8. The person to whom the timber berth is awarded must immediately sign a contract agreeing to carry out the terms and conditions of sale and shall at the same time apply for a license for the current year paying the costs incurred in cruising and advertising, together with the rental, license fee, fire-guarding charges and timber areas tax. 30

9. The license shall be for a term not exceeding one year and shall be renewable from year to year for a term of six years from the date of sale while there is on the timber berth a sufficient quantity of the kind and dimensions of timber specified in the license.

10. The cutting of timber on the timber berth shall be subject in all other respects to the Regulations Governing the Granting of Yearly Licenses to cut Timber on Provincial Lands or to any regulations that may be established hereafter in substitution of such regulations.

11. The Minister may, in his discretion, reject any or all tenders made for the purchase of the timber berth. 40

12. Further particulars may be obtained on application to the Director of Forestry, Department of Lands and Mines, Edmonton.

T. F. BLEFGEN,
Director of Forestry.

Department of Lands and Mines,
Edmonton, Alberta,
July 17th, 1940.

Exhibits
and
Documents

No. 17
Adver-
tise-
ment
of Sale
by Public
Tender,
Berth 6722
17th July,
1940.

continued.

No. 28

**Book Containing Alberta (Provincial) Timber Regulations
(See Volume Alberta Timber Regulations)**

10

(Appellant's Document)

No. 28
Provincial
Timber
Regulations
25th July,
1940.

No. 18

**Undertaking by Appellant with Respect to Berth 6722
(Appellant's Document)**

FORM "C"

Edmonton, Alberta,
31st day of July, 1940.

No. 18
Undertak-
ing by
Appellant
with
respect to
Berth 6722
31st July,
1940.

License Timber Berth No. 6722.

20 We, The Fraser Lumber Co., of Edmonton, having tendered for the Timber Berth above named the sum of \$2.50 per M B.M., and said tender having been accepted, do hereby promise and agree to carry out and complete the same forthwith in accordance with the terms and conditions as set forth in the notice of sale dated at Edmonton, the 17th day of July, 1940, and in the Regulations Governing the granting of Yearly Licenses and Permits to Cut Timber on Provincial Lands in the Province of Alberta established by the Lieutenant Governor in Council.

SIGNED, SEALED AND DELIVERED }
in the presence of }
T. F. BLEFGEN. }

D. R. FRASER & CO. LTD.
(Sgd.)
Per E. R. MACDONALD,
Secty.

Exhibits
and
Documents

No. 18

Undertak-
ing by
Appellant
with
respect to
Berth 6722
31st July,
1940.

continued.

CANADA
Province of Alberta }
To Wit:

I, T. F. BLEFGEN, of Edmonton, Alberta.

1. I was personally present and did see E. R. Macdonald, named in the within instrument, who is personally known to me to be the person named therein duly sign, seal and execute the same for the purpose named therein.

2. THAT the same was executed at Edmonton, in the Province of Alberta, and that I am the subscribing witness thereto.

3. THAT I know the said E. R. Macdonald and he is in my belief of the full age of twenty-one years.

10

SWORN before me at Edmonton,
in the Province of Alberta, this }
31st day of July, A.D. 1940.

(Sgd.) T. F. BLEFGEN

(Sgd.) A. G. URQUHART,
A Commissioner, etc.

(This declaration not necessary where contract signed under seal by a
Company)

No. 16
Tender for
Licence for
Berth 6722,
31st July,
1940.

No. 16

Tender for Licence for Berth 6722
(Appellant's Document)

20

FORM "B"

GOVERNMENT OF THE PROVINCE OF ALBERTA
DEPARTMENT OF LANDS AND MINES

TENDER FOR LICENSE

July 31st, 1940.

The Honourable the Minister of Lands and Mines,
Administration Building, Edmonton, Alberta.

Sir:

In response to the Notice of Sale of Crown Timber designated as
Timber Berth No. 6722.

30

We hereby tender the sum of \$2.50 Per M Feet Board Measure and
(I or We)
agree to execute a contract in the Form "C" of the Schedule to the Regula-
tions Governing the Granting of Yearly Licenses and Permits to cut Timber

on Provincial Lands in the Province of Alberta, made by Order in Council dated the 25th day of July, 1940, and numbered 1020/40:

Exhibits
and
Documents

AND We further agree to pay the Crown on all other classes of timber and products of the forest the dues now prescribed in Form "E" of the Schedule to the aforesaid regulations or such dues as may at any time hereafter be prescribed under the said regulations or any regulations made in substitution therefor, together with any other tax reserved or imposed by Statute;

No. 16
Tender for
Licence for
Berth 6722,
31st July,
1940.

continued.

10 And We further agree to pay an annual rent based on the square miles contained in the lands covered by the license, the license fee and fire-guarding charges, together with the costs incurred in cruising, surveying and advertising the said berth;

ENCLOSED herewith is the sum of \$1,165.00 covering the deposit as required in the Notice of Sale.

D. R. FRASER & CO. LTD.
(Sgd.) E. R. MACDONALD, Secretary.
Signature of Tenderer.

Tender Accepted, July 31st, 1940, Amount, \$1,165.00, \$2.50 Per M F.B.M., (Sgd.) T. F. BLEFGEN.

20

No. 2

**Copy of Proclamation as Published in Canada Gazette
(Appellant's Document)**

No. 2
Copy of
Proclama-
tion as
Published
in Canada
Gazette,
8th August,
1940.

DEPARTMENT OF NATIONAL REVENUE

IN THE MATTER OF THE INCOME WAR TAX ACT AND
AMENDMENTS.

and

IN THE MATTER OF THE EXCESS PROFITS TAX ACT.

To Whom It May Concern :

30 BE it hereby known that under and by virtue of the provisions of the Income War Tax Act, and particularly Section 75 thereof, and the provisions of the Excess Profits Tax Act, 1940, and particularly Section 14 thereof, that I do hereby authorize the Commissioner of Income Tax to exercise the powers conferred by the said Acts upon me, as fully and effectively as I could do myself, as I am of the opinion that such powers

Exhibits and Documents may be the more conveniently exercised by the said Commissioner of Income Tax.

No. 2
Copy of Proclamation as Published in Canada Gazette, 8th August, 1940.

Dated at Ottawa, this 8th day of August, A.D. 1940.

COLIN GIBSON,
Minister of National Revenue.

continued.

No. 19

**Provincial Licence Berth 6722
(Appellant's Document)**

No. 19
Provincial Licence Berth 6722, 17th May, 1941.

Form D.
3M-8-40 10
AHT/4

[CREST]

GOVERNMENT OF THE PROVINCE OF ALBERTA
Department of Lands and Mines

File No. 4834 T.L.
Permit No. 688
Berth No. 6722

LICENSE TO CUT TIMBER ON PROVINCIAL LANDS

KNOW ALL MEN BY THESE PRESENTS, that by virtue of the authority vested in me by The Provincial Lands Act, 1939, and by an order of His Honour the Lieutenant Governor in Council of the 25th day of July, 1940, I, The Honourable Nathan E. Tanner, the Minister of Lands and Mines of the Government of the Province of Alberta, do hereby in consideration of the sum of Twenty Dollars (\$20.00) ground rent, license fee, fire-guarding charges and Timber Areas Tax, now paid to me for the use of His Majesty, and in consideration of the execution of the sale contract and the dues hereafter mentioned, give unto Messrs. D. R. Fraser & Co. Ltd., of the City of Edmonton, in the Province of Alberta, hereinafter called the licensee, his executors and administrators, full right, power and license, subject to the conditions hereinafter mentioned and contained, and such other conditions and restrictions as are in that behalf contained in The Provincial Lands Act, 1939, and the amendments thereto, and in the Regulations respecting timber now passed or which may at any time hereafter be passed by the Lieutenant Governor in Council, to cut timber on the following tract of land (hereinafter called the "berth") that is to say:

The whole of Section 25 excepting Legal subdivision 14 and that portion included in Timber Berth No. 1161; the North East quarter of

Section 26; Legal Subdivisions 3 and 4 and the South halves of Legal Subdivisions 1, 2, 5 and 6 of Section 35; and the South halves of Legal Subdivisions 1 and 2 of Section 36; all in Township 47, Range 6, West of the 5th Meridian;

C O N T A I N I N G

1.44 square miles, more or less, and being designated License Timber Berth No. 6722, and to take and keep exclusive possession of the said lands except as hereinafter mentioned, for and during the period of one year, from the first day of April, 1940, to the thirty-first day of March, 1941, and no longer.

This license shall vest in the licensee, subject to the conditions mentioned in this license, all rights of property whatsoever in all trees, timber, lumber or other products of timber which he is entitled by this license to cut, and which have been cut within the limits of this berth during the continuance thereof, whether such trees, timber, lumber or other products are cut by consent of the licensee or by any other person without his consent, and shall vest in the licensee, as against any person other than the Crown in the right of the Province, subject to the conditions mentioned in this license, all right of property whatsoever in all trees, timber, lumber and other products of timber cut within the limits of this berth by any other person without his consent; and this license shall entitle the licensee to replevy, as his property, timber of any kind cut within the limits of this berth where it is found in the possession of any unauthorized person, and also to bring any action or suit for damages or any other appropriate remedy against such person who is unlawfully in possession of such timber, or who has unlawfully cut any timber of any kind in derogation of any rights of the licensee under this license, or who has entered without authority upon this berth covered by this license, and any such proceedings which have been commenced and are pending at the expiration of this license may be continued and completed as if this license had not expired.

This license is subject to the right of the Department, without compensating the licensee, to dispose of all dead or fallen timber on the area cut over by the licensee after due notice to such licensee, and to the right of the Department to remove all fire-killed or dead timber anywhere throughout the balance of the berth on failure of the licensee to remove same when requested to do so by the Minister, the cost of such disposition or removal to be borne by the licensee.

This license is subject to the right of the Department to retain, when deemed advisable, the cash deposit made at the time of sale until the berth is cancelled as a guarantee that the licensee will pay all ground rent, dues and fire-guarding charges, will remove all merchantable timber from the berth and will dispose of the brush and other debris to the satisfaction of the Director of Forestry, failing in any one of which the deposit shall be forfeited, as to which the Minister shall be the judge.

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—
No. 19
Provincial
Licence
Berth 6722,
17th May,
1941.

continued.

Exhibits
and
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No. 19
Provincial
Licence
Berth 6722,
17th May,
1941.

continued.

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, 1939, and the amendments thereto, and in the Regulations respecting timber now passed or which may at any time hereafter be passed by order of His Honour the Lieutenant Governor in Council.

1. That the licensee shall not have the right hereunder to cut timber of a less diameter than seven inches measured eighteen inches from the ground, except such as may be actually necessary for the construction of roads and other works to facilitate the taking out of merchantable timber, and shall not have the right to cut any trees that may be designated by the proper officer of the Department as required to provide a supply of seed for the reproduction of the forest. 10

2. All merchantable timber of a class authorized to be cut under this license shall be cut and taken from this berth as cutting progresses, and any timber of that class left uncut and unremoved after a date named in a notice, served on the licensee or his authorized agent, shall be estimated in feet board measure by a timber inspector, and shall be subject to payment to the Department, on demand, of ordinary dues, provided that the licensee shall not be required to cut and remove timber which the Director of Forestry deems to be inaccessible. 20

3. In the event of timber on this berth of the class authorized to be cut, becoming fire-killed or dead and a report being made by a timber inspector that the same can be cut and marketed by the licensee without monetary loss, the Minister may require the licensee to cut and remove the same, and all such timber left uncut and unremoved from this berth after a date named in a notice served upon the licensee, or his authorized agent, shall be estimated in feet board measure by a timber inspector and the licensee shall pay dues as provided in the Regulations according to such estimate thereon. 30

4. That the licensee shall be entitled to a renewal of this license from year to year while there is on this berth timber of the kind and dimensions described in this license in sufficient quantity to make it commercially valuable, or for the term set out in the notice of sale, if the terms and conditions of this license and the provisions of The Provincial Lands Act, 1939, and amendments thereto, and in the Regulations now passed or which may at any time hereafter be passed affecting the same have been fulfilled, as to which the Minister shall be the judge:

Provided that each renewal shall be subject to the payment of such ground rent, dues, license fee, fire-guarding charges and Timber Areas Tax, and to such terms and conditions as are fixed by the Regulations in force at the time the renewal is made and provided that the licensee shall have fully complied with all the terms and conditions of the sale contract covering this berth. 40

5. When, in the opinion of the Minister, any portion of this berth has not a sufficient quantity of the kind and dimensions of timber specified in this license for such berth to make it profitable to remove the timber upon such portion of this berth, and when in the opinion of the Minister, such portion of this berth is not necessary for the proper working of the remainder of this berth, the Minister may withdraw such portion from this berth:

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Berth 6722,
17th May,
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10 Provided that in no case shall such withdrawal be made until the expiration of sixty days after a notice in writing of the proposed withdrawal has been given to the licensee of this berth, or to his legal representative, by the Minister or by someone thereto authorized by the Minister.

continued.

6. If the Minister ascertains after an inspection has been made, that any land within the berth hereby licensed is fit for settlement and is required for that purpose, he may require the licensee to carry on the cutting of timber provided for by Section 21 of the timber regulations on the said land, and on the expiration of the time within which the timber which the licensee is entitled to cut should be removed therefrom may withdraw such land from this berth, and from the operation of this license.

20 7. That the licensee shall take from every tree he cuts down all the timber fit for use and manufacture the same into sawn lumber or some other saleable product, and shall dispose of the tops and branches and other debris of lumbering operations in such a way as to prevent as far as possible the danger of fire in accordance with the directions of the proper officers of the Department. Failure on the part of the licensee will subject him to the penalty of having his manufactured timber seized and his bush operations closed down, and in the discretion of the Minister, to forfeiture of this license.

30 8. That the licensee shall prevent all unnecessary destruction of growing timber on the part of his men and exercise strict and constant supervision to prevent the origin and spread of fire, and shall also comply during the term of this license and of any renewal thereof with all laws and regulations in that respect in force in the Province.

40 9. That the licensee shall furnish to the timber agent for the district having jurisdiction in the matter, at such periods as may be required by the Minister or by the Regulations now made or which may at any time hereafter be made under The Provincial Lands Act, 1939, returns sworn to by him or his agent or employee having a personal knowledge of the facts, showing the quantities manufactured, sold or disposed of, of all sawn lumber, timber or any other product of timber from this berth in whatever form the same may be sold or otherwise disposed of by him during such period.

10. That the licensee, in addition to the said ground rent and license fee, shall pay dues as prescribed in Form "E" of the Schedule to the timber

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No. 19
Provincial
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Berth 6722,
17th May,
1941.

continued.

regulations, the Timber Areas Tax, the amount due and payable pursuant to the sale contract, and one-half of the cost incurred by the Crown in guarding the timber from fire.

11. (a) That the licensee shall keep a "Lumber Sales Book," in which shall be entered all sales of the products of this berth, both cash and credit sales, also a book accounting for the number of feet of sawn lumber manufactured each day at the mill, with the day and date; all books and memoranda kept at the logging camps shall be carefully preserved and these and other books kept by the licensee in connection with his lumbering business he shall submit for the inspection of the Director of Forestry or other officer of the Crown whenever required for the purpose of verifying his returns aforesaid. 10

(b) That the licensee shall keep a bush count of all sawlogs and other timber cut upon this berth, as well as the number of pieces hauled therefrom, in the form of a book to be obtained for the purpose from the Department. The books covering operations for twelve months ending the 31st of March in each year shall be returned without delay to the Director of Forestry duly completed by the foreman in charge of operations, who shall subscribe to the affidavit therein.

12. This license shall be subject to the provisions of The Provincial Lands Act, 1939, or of any other Act or of any Regulations now made or which may at any time hereafter be made thereunder, dealing with or affecting the disposal of quarriable stone, salt, petroleum, natural gas, coal, gold, silver, copper, iron or other minerals within or under lands within the boundaries of this berth; and in and by virtue of any grant, lease or permit issued under Regulations made as aforesaid, the grantee, lessee, or permittee, shall have the right to have, use and hold possession of such land as is described in the grant, lease or permit, for quarrying stone, for the boring or operating of any salt, oil, or natural gas wells, or for the working of any mines, and the right to open any roads necessary in connection with such works. 20 30

Provided that the licensee shall be paid by the grantee, lessee or permittee the value of all timber cut, damaged or destroyed in making such roads, or in boring or operating any salt, oil or gas wells, or in working any quarries, or mines, or as a consequence directly or indirectly of any such operation or work.

13. This license shall be subject to the right of the Minister to permit prospecting on this berth for quarriable stone, salt, petroleum, natural gas, coal, gold, silver, copper, iron, or other minerals; but the licensee shall be notified of every such permission and shall be entitled to compensation from the prospector or as a consequence of his prospecting of this berth and the determination of such compensation shall be in a manner to be prescribed by the Minister. 40

14. This license shall be subject to the right of the Minister to withdraw at any time from this berth any portion or tract of the lands comprising it which is required for waterpower purposes or is necessary in connection therewith by the lessee or lessees of the waterpower, their executors, administrators, or assigns, and which the Minister, as the representative of the Crown herein, shall decide to be necessary for such water-power purposes, and which for such purposes shall be so withdrawn from the operation of this license, upon the condition, however, that the lessee or lessees of the said water-power, his or their executors, administrators, or assigns, shall and will pay to the licensee of this berth, his executors, administrators, or assigns, the value of all timber of seven inches and over in diameter at the stump on the portion of the tract so withdrawn, the value of such timber in case of dispute to be fixed by the Minister.

15. This license shall also be subject to the right of the Crown in the right of the Province to withdraw at any time from this berth any portion or tract of the lands comprising it which is required for the construction of any colonization or other road, or any road in lieu of or partly deviating from an allowance for road, drain or drainage works without compensation therefor.

16. If any railway company becomes entitled to a grant from His Majesty or His Successors of any portion of the lands herein described for the roadbed of the company's railway or branches thereof, or for stations, station grounds, workshops, dockyards and water frontage on navigable rivers, or building yards, or for other purposes required for the convenient, necessary and effective construction and working of the company's railway or any of its branches; and if His Majesty or His Successors grant the same to such railway company, the land so granted shall from and after the date of the grant cease to be under the operation of this license, but the licensee or his legal representative shall be at liberty to remove all property belonging to him or them and all timber then cut thereon from the land so granted; and shall also be entitled to cut and remove from the said land so granted as his or their own property, all trees then standing thereon or the timber obtained therefrom, provided that such property and cut timber, or property, cut timber and standing trees, or the timber obtained therefrom, are promptly removed from the said land upon receipt by the licensee or his legal representative of notice from the railway company to remove said property and cut timber, or to cut and remove such standing trees so as not to hinder or interfere with any work being done or about to be done by the railway company for the convenient, necessary and effective construction and working of the company's railway or of any of its branches; provided also, however, that if the licensee or his legal representative does not so remove such property or cut timber, or so cut and remove such standing trees or the timber obtained therefrom, the railway company may do so, and all cut timber and standing trees or the timber obtained therefrom, which have so to be removed or cut and removed by the railway company,

Exhibits
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—
No. 19
Provincial
Licence
Berth 6722,
17th May,
1941.

continued.

Exhibits and Documents shall be the property of the Crown in the right of the Province and be disposed of as the Minister may decide.

No. 19
Provincial
Licence
Berth 8722,
17th May,
1941.

17. Upon the withdrawal of any land from this berth the ground rent and Timber Areas Tax shall be reduced in proportion to the area withdrawn.

continued.

18. There is hereby reserved to the Crown:

(a) Out of the lands herein described all rights of fishery and fishing and occupation in connection therewith upon, around and adjacent to such lands;

(b) Out of the lands herein described all rights of trapping and shooting of game and occupation in connection therewith upon, around and adjacent to such lands; 10

(c) The right to such of the public as may at any time with the consent of the Minister pass and repass on foot or with or without vehicle, whether horse drawn or otherwise, across the lands herein described or any part thereof, excepting however any of the said lands occupied by any building, or any part thereof upon which the licensee has any building or other works properly connected with the project of the licensee.

19. In any case where waters flowing through, over or along, or having their source in this berth, empty into any stream or are tributary to any stream from which a domestic or municipal water supply is or may be obtained or contain fish, or in any case where the pollution of any such water, may, in the opinion of the Minister, deleteriously affect any municipal or domestic water supply, the licensee shall comply with the following Regulations: 20

(a) Locate all camp buildings, outhouses, cesspools and other structures at a sufficient distance from any stream, lake or other source of water supply, to prevent the pollution of such municipal or domestic water supply;

(b) Immediately remove and bury or burn any camp refuse or debris of any description, or any substance which would be likely to cause the pollution of any such waters, and otherwise keep the ground in the vicinity of all logging camps in a neat, orderly and sanitary condition; 30

(c) Prevent any depositing, leaving or accumulation in any stream, lake or other source of water supply within this berth, or in an exposed or insanitary condition on this berth, any debris of any description, or any substance which would be likely to cause the pollution of such waters;

(d) Prevent the depositing or leaving by any person employed or purporting to be employed about this berth, or the accumulation as a result of any operations carried on by reason of this license in any stream, lake or other source of such water supply on any Provincial lands whatever; or 40

in any exposed or insanitary condition of any such lands, of any such debris or substance;

Exhibits
and
Documents

(e) Observe all laws and regulations respecting sanitation and the protection of the purity of waters which are applicable to the premises, or any Regulations which may be promulgated by the Lieutenant Governor in Council, and also comply with any requirements which may be made by the Minister for the purpose of carrying out the above provisions.

No. 19
Provincial
Licence
Berth 6722,
17th May,
1941.

continued.

10 For each infraction of the provisions of this section the licensee shall, in addition to any other penalty, be liable on summary conviction to a fine not exceeding one hundred dollars, and such sum shall be recoverable with costs at the suit of and in the name of the Crown in the right of the Province.

20. (a) That the licensee shall not place logs or timber in any river or stream without first having obtained the written consent of the Director of Forestry; and

(b) Shall not pile logs or timber in the beds of any river or stream when there is not sufficient water in such river or stream to float such logs or timber; and

20 (c) Shall provide a sufficient patrol of the river or stream when floating logs to prevent any log jams or piling up of timber which may result in damage to any bridge, or other property.

21. This license cannot be assigned, sublet, or transferred without the consent of the Minister.

22. Any fire having caused damage to the timber on this berth must be reported immediately with full details to the Director of Forestry and the responsibility so to do shall rest with the licensee.

30 23. That the licensee shall have in operation within one year from the date of sale, and keep in operation for at least six months of each year of his holding, a saw-mill in connection with this berth, of a value of not less than \$2,000.00 capable of cutting in one day 1,000 feet board measure for every square mile of the area licensed, and shall manufacture in each year not less than 75,000 feet board measure of sawn lumber from timber cut on Provincial lands for each square mile or fraction thereof contained in this berth or shall establish such other manufacture of wood products as the Minister accepts as equivalent thereto.

40 24. That the licensee may in lieu of erecting a mill, be permitted to have the timber cut from this berth manufactured at a mill which is or is not his own property, provided that he cuts from this berth at the rate of 100,000 feet board measure annually for each square mile or fraction thereof held by him under this license.

25. That the licensee shall notify the Director of Forestry immediately upon the erection of a saw-mill together with its location.

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No. 19
Provincial
Licence
Berth 6722,
17th May,
1941.

continued.

26. (a) This license shall be liable to forfeiture on the order of the Minister for violation of any one of the conditions to which it is subject or for any fraudulent return.

(b) Before making an order for forfeiture the Minister shall cause written notice to be given to the licensee that it is the intention so to do, upon the grounds set forth in such notice, unless within sixty days after service of such notice the licensee shows cause to the contrary.

(c) Service of such notice may be effected by mailing the same, duly registered, to the address or the last known address of the licensee, and in such case shall be deemed to have been made upon the day on which the notice reached the said address or in due course of mail should have done so. 10

(d) Every order made by the Minister pursuant to this section shall be final and conclusive as against the licensee, and every person claiming by, through or under the licensee, and there shall be no appeal therefrom.

(e) If the violation of the Regulations refers merely to payment of money due under this license, the Minister may waive the power of forfeiture on payment of double the amount found by the Minister to be due, and costs, and may enforce payment in the manner provided for by The Provincial Lands Act, 1939, and the timber regulations now passed or which may at any time hereafter be passed, and take such action in regard to all other matters of forfeiture as may arise and be provided for by this section and by The Provincial Lands Act, 1939. 20

27. That the licensee shall pay and discharge all rates, assessments and taxes imposed by any Municipal, Improvement, School, Irrigation and Drainage Districts, now charged or hereafter to be charged upon this berth, as occupant, or upon the said licensee or occupier in respect thereof or payable by either in respect thereof.

28. Any notice, demand or other communication which His Majesty or the Minister may require or desire to give or serve upon the licensee may be validly given and served by the Deputy Minister of Lands and Mines, Director of Forestry or any person duly authorized in writing by the Minister. 30

DATED at the City of Edmonton }
this Seventeenth day of May, }
one thousand nine hundred and }
forty-one (1941). }

(Sgd.) T. F. BLEFGEN,
for Deputy Minister of Lands
and Mines.

We, D. R. Fraser & Co. Ltd., accept this license and agree to all the terms and conditions.

D. R. FRASER & CO. LIMITED

(Sgd.) E. R. MACDONALD,

Secretary.

Signature of Licensee.

[SEAL]

Exhibits
and
Documents

No. 19

Provincial
Licence
Berth 6722,
17th May,
1941.

continued.

(Sgd.) JAMES ILES,

Witness to Signature of Licensee.

10

EDMONTON: Printed by A. Shnitka, King's Printer.

No. 20

Provincial Licence Berth 6722

(Appellant's Document)

No. 20
Provincial
Licence
Berth 6722,
29th
November,
1941.

AHT/55

Form D.

3M-8-40

[CREST]

GOVERNMENT OF THE PROVINCE OF ALBERTA
Department of Lands and Mines

20

File No. 4834 T.L.

Permit No. 816

Berth No. 6722

LICENSE TO CUT TIMBER ON PROVINCIAL LANDS

30

KNOW ALL MEN BY THESE PRESENTS, that by virtue of the authority vested in me by The Provincial Lands Act, 1939, and by an order of His Honour the Lieutenant Governor in Council of the 25th day of July, 1940, I, The Honourable Nathan E. Tanner, the Minister of Lands and Mines of the Government of the Province of Alberta, do hereby in consideration of the sum of Forty-Four Dollars and Thirty-Five Cents (\$44.35), ground rent, license fee, fire-guarding charges and Timber Areas Tax, now paid to me for the use of His Majesty, and in consideration of the execution of the sale contract and the dues hereafter mentioned, give unto D. R. Fraser and Company, Ltd., of the City of Edmonton, in the Province of Alberta, hereinafter called the licensee, his executors and administrators, full right, power and license, subject to the conditions hereinafter mentioned and contained, and such other conditions and restrictions as are in that behalf contained in The Provincial Lands Act, 1939, and the amendments thereto, and in the

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and
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—
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Provincial
Licence
Berth 6722,
29th
November,
1941.

continued.

Regulations respecting timber now passed or which may at any time hereafter be passed by the Lieutenant Governor in Council, to cut timber on the following tract of land (hereinafter called the "berth") that is to say:

The whole of Section 25 excepting Legal Subdivision 14 and that portion included in Timber Berth No. 1161; the North East quarter of Section 26; Legal Subdivisions 3 and 4 and the South halves of Legal Subdivisions 1, 2, 5 and 6 of Section 35; and the South halves of Legal Subdivisions 1 and 2 of Section 36; all in Township 47, Range 6, West of the 5th Meridian;

C O N T A I N I N G

10

1.44 square miles, more or less, and being designated License Timber Berth No. 6722.

and to take and keep exclusive possession of the said lands except as hereinafter mentioned, for and during the period of one year, from the first day of April, 1941, to the thirty-first day of March, 1942, and no longer.

This license shall vest in the licensee, subject to the conditions mentioned in this license, all rights of property whatsoever in all trees, timber, lumber or other products of timber which he is entitled by this license to cut, and which have been cut within the limits of this berth during the continuance thereof, whether such trees, timber, lumber or other products are cut by consent of the licensee or by any other person without his consent, and shall vest in the licensee, as against any person other than the Crown in the right of the Province, subject to the conditions mentioned in this license, all right of property whatsoever in all trees, timber, lumber and other products of timber cut within the limits of this berth by any other person without his consent; and this license shall entitle the licensee to replevy, as his property, timber of any kind cut within the limits of this berth where it is found in the possession of any unauthorized person, and also to bring any action or suit for damages or any other appropriate remedy against such person who is unlawfully in possession of such timber, or who has unlawfully cut any timber of any kind in derogation of any rights of the licensee under this license, or who has entered without authority upon this berth covered by this license, and any such proceedings which have been commenced and are pending at the expiration of this license may be continued and completed as if this license had not expired.

This license is subject to the right of the Department, without compensating the licensee, to dispose of all dead or fallen timber on the area cut over by the licensee after due notice to such licensee, and to the right of the Department to remove all fire-killed or dead timber anywhere throughout the balance of the berth on failure of the licensee to remove same when requested to do so by the Minister, the cost of such disposition or removal to be borne by the licensee.

This license is subject to the right of the Department to retain, when deemed advisable, the cash deposit made at the time of sale until the berth is cancelled as a guarantee that the licensee will pay all ground rent, dues and fire-guarding charges, will remove all merchantable timber from the berth and will dispose of the brush and other debris to the satisfaction of the Director of Forestry, failing in any one of which the deposit shall be forfeited, as to which the Minister shall be the judge.

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10 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, 1939, and the amendments thereto, and in the Regulations respecting timber now passed or which may at any time hereafter be passed by order of His Honour the Lieutenant Governor in Council.

continued

20 1. That the licensee shall not have the right hereunder to cut timber of a less diameter than seven inches measured eighteen inches from the ground, except such as may be actually necessary for the construction of roads and other works to facilitate the taking out of merchantable timber, and shall not have the right to cut any trees that may be designated by the proper officer of the Department as required to provide a supply of seed for the reproduction of the forest.

2. All merchantable timber of a class authorized to be cut under this license shall be cut and taken from this berth as cutting progresses, and any timber of that class left uncut and unremoved after a date named in a notice, served on the licensee or his authorized agent, shall be estimated in feet board measure by a timber inspector, and shall be subject to payment to the Department, on demand, of ordinary dues, provided that the licensee shall not be required to cut and remove timber which the Director of Forestry deems to be inaccessible.

30 3. In the event of timber on this berth of the class authorized to be cut, becoming fire-killed or dead and a report being made by a timber inspector that the same can be cut and marketed by the licensee without monetary loss, the Minister may require the licensee to cut and remove the same, and all such timber left uncut and unremoved from this berth after a date named in a notice served upon the licensee, or his authorized agent, shall be estimated in feet board measure by a timber inspector and the licensee shall pay dues as provided in the Regulations according to such estimate thereon.

40 4. That the licensee shall be entitled to a renewal of this license from year to year while there is on this berth timber of the kind and dimensions described in this license in sufficient quantity to make it commercially valuable, or for the term set out in the notice of sale, if the terms and conditions of this license and the provisions of The Provincial Lands Act, 1939, and amendments thereto, and in the Regulations now passed or which may at any time hereafter be passed affecting the same have been fulfilled, as to which the Minister shall be the judge:

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Provided that each renewal shall be subject to the payment of such ground rent, dues, license fee, fire-guarding charges and Timber Areas Tax, and to such terms and conditions as are fixed by the Regulations in force at the time the renewal is made and provided that the licensee shall have fully complied with all the terms and conditions of the sale contract covering this berth.

5. When, in the opinion of the Minister, any portion of this berth has not a sufficient quantity of the kind and dimensions of timber specified in this license for such berth to make it profitable to remove the timber upon such portion of this berth, and when in the opinion of the Minister, such portion of this berth is not necessary for the proper working of the remainder of this berth, the Minister may withdraw such portion from this berth: 10

Provided that in no case shall such withdrawal be made until the expiration of sixty days after a notice in writing of the proposed withdrawal has been given to the licensee of this berth, or to his legal representative, by the Minister or by someone thereto authorized by the Minister.

6. If the Minister ascertains after an inspection has been made, that any land within the berth hereby licensed is fit for settlement and is required for that purpose, he may require the licensee to carry on the cutting of timber provided for by Section 21 of the timber regulations on the said land, and on the expiration of the time within which the timber which the licensee is entitled to cut should be removed therefrom may withdraw such land from this berth, and from the operation of this license. 20

7. That the licensee shall take from every tree he cuts down all the timber fit for use and manufacture the same into sawn lumber or some other saleable product, and shall dispose of the tops and branches and other debris of lumbering operations in such a way as to prevent as far as possible the danger of fire in accordance with the directions of the proper officers of the Department. Failure on the part of the licensee will subject him to the penalty of having his manufactured timber seized and his bush operations closed down, and in the discretion of the Minister, to forfeiture of this license. 30

8. That the licensee shall prevent all unnecessary destruction of growing timber on the part of his men and exercise strict and constant supervision to prevent the origin and spread of fire, and shall also comply during the term of this license and of any renewal thereof with all laws and regulations in that respect in force in the Province.

9. That the licensee shall furnish to the timber agent for the district having jurisdiction in the matter, at such periods as may be required by the Minister or by the Regulations now made or which may at any time hereafter be made under The Provincial Lands Act, 1939, returns sworn to by him or his agent or employee having a personal knowledge of the 40

facts, showing the quantities manufactured, sold or disposed of, of all sawn lumber, timber or any other product of timber from this berth in whatever form the same may be sold or otherwise disposed of by him during such period.

10. That the licensee, in addition to the said ground rent and license fee, shall pay dues as prescribed in Form "E" of the Schedule with the exception of sawn lumber of a species other than poplar, on which dues shall be payable at the rate of \$2.50 per thousand feet board measure.

(Typewritten)

10 to the timber regulations, the Timber Areas Tax, the amount due and payable pursuant to the sale contract, and one-half of the cost incurred by the Crown in guarding the timber from fire.

11. (a) That the licensee shall keep a "Lumber Sales Book," in which shall be entered all sales of the products of this berth, both cash and credit sales, also a book accounting for the number of feet of sawn lumber manufactured each day at the mill, with the day and date; all books and memoranda kept at the logging camps shall be carefully preserved and these and other books kept by the licensee in connection with his lumbering business he shall submit for the inspection of the Director of Forestry or
20 other officer of the Crown whenever required for the purpose of verifying his returns aforesaid.

(b) That the licensee shall keep a bush count of all sawlogs and other timber cut upon this berth, as well as the number of pieces hauled therefrom, in the form of a book to be obtained for the purpose from the Department. The books covering operations for twelve months ending the 31st of March in each year shall be returned without delay to the Director of Forestry duly completed by the foreman in charge of operations, who shall subscribe to the affidavit therein.

12. This license shall be subject to the provisions of The Provincial
30 Lands Act, 1939, or of any other Act or of any Regulations now made or which may at any time hereafter be made thereunder, dealing with or affecting the disposal of quarriable stone, salt, petroleum, natural gas, coal, gold, silver, copper, iron or other minerals within or under lands within the boundaries of this berth; and in and by virtue of any grant, lease or permit issued under Regulations made as aforesaid, the grantee, lessee, or permittee, shall have the right to have, use and hold possession of such land as is described in the grant, lease or permit, for quarrying stone, for the boring or operating of any salt, oil, or natural gas wells, or for the working of any mines, and the right to open any roads necessary in connection with
40 such works.

Provided that the licensee shall be paid by the grantee, lessee or permittee the value of all timber cut, damaged or destroyed in making such roads, or in boring or operating any salt, oil or gas wells, or in working any

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quarries, or mines, or as a consequence directly or indirectly of any such operation or work.

13. This license shall be subject to the right of the Minister to permit prospecting on this berth for quarriable stone, salt, petroleum, natural gas, coal, gold, silver, copper, iron, or other minerals; but the licensee shall be notified of every such permission and shall be entitled to compensation from the prospector or as a consequence of his prospecting of this berth and the determination of such compensation shall be in a manner to be prescribed by the Minister.

14. This license shall be subject to the right of the Minister to with- 10
draw at any time from this berth any portion or tract of the lands compris-
ing it which is required for waterpower purposes or is necessary in con-
nection therewith by the lessee or lessees of the waterpower, their exec-
utors, administrators, or assigns, and which the Minister, as the representa-
tive of the Crown herein, shall decide to be necessary for such water-power
purposes, and which for such purposes shall be so withdrawn from the
operation of this license, upon the condition, however, that the lessee or
lessees of the said water-power, his or their executors, administrators, or
assigns, shall and will pay to the licensee of this berth, his executors, admin- 20
istrators, or assigns, the value of all timber of seven inches and over in
diameter at the stump on the portion of the tract so withdrawn, the value of
such timber in case of dispute to be fixed by the Minister.

15. This license shall also be subject to the right of the Crown in the
right of the Province to withdraw at any time from this berth any portion
or tract of the lands comprising it which is required for the construction of
any colonization or other road, or any road in lieu of or partly deviating
from an allowance for road, drain or drainage works without compensation
therefor.

16. If any railway company becomes entitled to a grant from His 30
Majesty or His Successors of any portion of the lands herein described for
the roadbed of the company's railway or branches thereof, or for stations,
station grounds, workshops, dockyards and water frontage on navigable
rivers, or building yards, or for other purposes required for the convenient,
necessary and effective construction and working of the company's railway
or any of its branches; and if His Majesty or His Successors grant the
same to such railway company, the land so granted shall from and after
the date of the grant cease to be under the operation of this license, but the
licensee or his legal representative shall be at liberty to remove all property
belonging to him or them and all timber then cut thereon from the land so 40
granted; and shall also be entitled to cut and remove from the said land so
granted as his or their own property, all trees then standing thereon or the
timber obtained therefrom, provided that such property and cut timber, or
property, cut timber and standing trees, or the timber obtained therefrom,
are promptly removed from the said land upon receipt by the licensee or
his legal representative of notice from the railway company to remove said

- property and cut timber, or to cut and remove such standing trees so as not to hinder or interfere with any work being done or about to be done by the railway company for the convenient, necessary and effective construction and working of the company's railway or of any of its branches; provided also, however, that if the licensee or his legal representative does not so remove such property or cut timber, or so cut and remove such standing trees or the timber obtained therefrom, the railway company may do so, and all cut timber and standing trees or the timber obtained therefrom, which have so to be removed or cut and removed by the railway company,
- 10 shall be the property of the Crown in the right of the Province and be disposed of as the Minister may decide.
17. Upon the withdrawal of any land from this berth the ground rent and Timber Areas Tax shall be reduced in proportion to the area withdrawn.
18. There is hereby reserved to the Crown :
- (a) Out of the lands herein described all rights of fishery and fishing and occupation in connection therewith upon, around and adjacent to such lands;
- (b) Out of the lands herein described all rights of trapping and shooting of game and occupation in connection therewith upon, around and adjacent to such lands;
- 20 (c) The right to such of the public as may at any time with the consent of the Minister pass and repass on foot or with or without vehicle, whether horse drawn or otherwise, across the lands herein described or any part thereof, excepting however any of the said lands occupied by any building, or any part thereof upon which the licensee has any building or other works properly connected with the project of the licensee.
19. In any case where waters flowing through, over or along, or having their source in this berth, empty into any stream or are tributary to any stream from which a domestic or municipal water supply is or may be obtained or contain fish, or in any case where the pollution of any such water, may, in the opinion of the Minister, deleteriously affect any municipal or domestic water supply, the licensee shall comply with the following Regulations :
- 30 (a) Locate all camp buildings, outhouses, cesspools and other structures at a sufficient distance from any stream, lake or other source of water supply, to prevent the pollution of such municipal or domestic water supply;
- (b) Immediately remove and bury or burn any camp refuse or debris of any description, or any substance which would be likely to cause the pollution of any such waters, and otherwise keep the ground in the vicinity of all logging camps in a neat, orderly and sanitary condition;
- 40

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(c) Prevent any depositing, leaving or accumulation in any stream, lake or other source of water supply within this berth, or in an exposed or insanitary condition on this berth, any debris of any description, or any substance which would be likely to cause the pollution of such waters;

(d) Prevent the depositing or leaving by any person employed or purporting to be employed about this berth, or the accumulation as a result of any operations carried on by reason of this license in any stream, lake or other source of such water supply on any Provincial lands whatever, or in any exposed or insanitary condition of any such lands, of any such debris or substance;

10

(e) Observe all laws and regulations respecting sanitation and the protection of the purity of waters which are applicable to the premises, or any Regulations which may be promulgated by the Lieutenant Governor in Council, and also comply with any requirements which may be made by the Minister for the purpose of carrying out the above provisions.

For each infraction of the provisions of this section the licensee shall, in addition to any other penalty, be liable on summary conviction to a fine not exceeding one hundred dollars, and such sum shall be recoverable with costs at the suit of and in the name of the Crown in the right of the Province.

20

20. (a) That the licensee shall not place logs or timber in any river or stream without first having obtained the written consent of the Director of Forestry; and

(b) Shall not pile logs or timber in the beds of any river or stream when there is not sufficient water in such river or stream to float such logs or timber; and

(c) Shall provide a sufficient patrol of the river or stream when floating logs to prevent any log jams or piling up of timber which may result in damage to any bridge, or other property.

21. This license cannot be assigned, sublet, or transferred without the consent of the Minister.

30

22. Any fire having caused damage to the timber on this berth must be reported immediately with full details to the Director of Forestry and the responsibility so to do shall rest with the licensee.

23. That the licensee shall have in operation within one year from the date of sale, and keep in operation for at least six months of each year of his holding, a saw-mill in connection with this berth, of a value of not less than \$2,000.00 capable of cutting in one day 1,000 feet board measure for every square mile of the area licensed, and shall manufacture in each year not less than 75,000 feet board measure of sawn lumber from timber cut on Provincial lands for each square mile or fraction thereof contained in this berth or shall establish such other manufacture of wood products as the Minister accepts as equivalent thereto.

40

24. That the licensee may in lieu of erecting a mill, be permitted to have the timber cut from this berth manufactured at a mill which is or is not his own property, provided that he cuts from this berth at the rate of 100,000 feet board measure annually for each square mile or fraction thereof held by him under this license.

25. That the licensee shall notify the Director of Forestry immediately upon the erection of a saw-mill together with its location.

26. (a) This license shall be liable to forfeiture on the order of the Minister for violation of any one of the conditions to which it is subject or
10 for any fraudulent return.

(b) Before making an order for forfeiture the Minister shall cause written notice to be given to the licensee that it is the intention so to do, upon the grounds set forth in such notice, unless within sixty days after service of such notice the licensee shows cause to the contrary.

(c) Service of such notice may be effected by mailing the same, duly registered, to the address or the last known address of the licensee, and in such case shall be deemed to have been made upon the day on which the notice reached the said address or in due course of mail should have done so.

20 (d) Every order made by the Minister pursuant to this section shall be final and conclusive as against the licensee, and every person claiming by, through or under the licensee, and there shall be no appeal therefrom.

(e) If the violation of the Regulations refers merely to payment of money due under this license, the Minister may waive the power of forfeiture on payment of double the amount found by the Minister to be due, and costs, and may enforce payment in the manner provided for by The Provincial Lands Act, 1939, and the timber regulations now passed or which may at any time hereafter be passed, and take such action in
30 regard to all other matters of forfeiture as may arise and be provided for by this section and by The Provincial Lands Act, 1939.

27. That the licensee shall pay and discharge all rates, assessments and taxes imposed by any Municipal, Improvement, School, Irrigation and Drainage Districts, now charged or hereafter to be charged upon this berth, as occupant, or upon the said licensee or occupier in respect thereof or payable by either in respect thereof.

28. Any notice, demand or other communication which His Majesty or the Minister may require or desire to give or serve upon the licensee may be validly given and served by the Deputy Minister of Lands and Mines,
40 Director of Forestry or any person duly authorized in writing by the Minister.

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DATED at the City of Edmonton }
this Twenty-ninth day of Nov- }
ember, one thousand nine hun- }
dred and forty-one (1941). }

(*Sgd.*) T. F. BLEFGEN,
for Deputy Minister of Lands
and Mines.

We, The D. R. Fraser & Co. Ltd., of Edmonton, Alberta, accept this
license and agree to all the terms and conditions.

(*Sgd.*) E. R. MACDONALD,
Secretary.
Signature of Licensee.

[SEAL] 10

(*Sgd.*) JAMES ILES,
Witness to Signature of Licensee.

EDMONTON: Printed by A. Shnitka, King's Printer.

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26th
February,
1942.

No. 10

Provincial Licence Berth 1161
(Appellant's Document)

Form D.
250-9-40

[CREST]

4.

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GOVERNMENT OF THE PROVINCE OF ALBERTA
Department of Lands and Mines

File No. 1148 T.L.
License No. 692
Berth No. 1161

LICENSE TO CUT TIMBER ON PROVINCIAL LANDS

KNOW ALL MEN BY THESE PRESENTS, that by virtue of the authority vested
in me by the The Provincial Lands Act, 1939, and by an order of His
Honour the Lieutenant Governor in Council of the 25th day of July, 1940,
I, The Honourable Nathan E. Tanner, the Minister of Lands and Mines of
the Government of the Province of Alberta, do hereby in consideration of
the sum of Fifty Dollars (\$50.00), ground rent, license fee, fire-guarding
charges and Timber Areas Tax, now paid to me for the use of His Majesty,
and in consideration of the execution of the sale contract and the dues here-
after mentioned, give unto Messrs. D. R. Fraser & Company, Ltd., of the
City of Edmonton, in the Province of Alberta, hereinafter called the licensee,
his executors and administrators, full right, power and license, subject to

the conditions hereinafter mentioned and contained, and such other conditions and restrictions as are in that behalf contained in The Provincial Lands Act, 1939, and the amendments thereto, and in the Regulations respecting timber now passed or which may at any time hereafter be passed by the Lieutenant Governor in Council, to cut timber on the following tract of land (hereinafter called the "berth") that is to say:

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- All that parcel or tract of land, situate, lying and being in the Forty-Seventh (47) Township, in the Fifth (5) and Sixth (6) Ranges, West of the Fifth (5) Meridian, in the Province of Alberta, Dominion of Canada;
- 10 As shown upon a plan of survey dated the Third (3) of June, Nineteen Hundred and Eight (1908), by A. Driscoll, D.L.S., and of record in the Department of Lands and Mines at Edmonton as No. 72 T.

continued.

SAVING AND EXCEPTING thereout and therefrom that portion of Section Eleven (11), Township Forty-seven (47), Range Six (6), West of the Fifth (5) Meridian, which lies within the lines of survey.

- The land herein described containing by admeasurement Four and Eighty-two Hundredths (4.82) square miles, more or less, and designated as Timber Berth No. 1161, and to take and keep exclusive possession of the said lands except as hereinafter mentioned, for and during the period of
- 20 one year, from the first day of April, 1940, to the thirty-first day of March, 1941, and no longer.

- This license shall vest in the licensee, subject to the conditions mentioned in this license, all rights of property whatsoever in all trees, timber, lumber or other products of timber which he is entitled by this license to cut, and which have been cut within the limits of this berth during the continuance thereof, whether such trees, timber, lumber or other products are cut by consent of the licensee or by any other person without his consent, and shall vest in the licensee, as against any person other than the Crown in the right of the Province, subject to the conditions mentioned in
- 30 this license, all right of property whatsoever in all trees, timber, lumber and other products of timber cut within the limits of this berth by any other person without his consent; and this license shall entitle the licensee to replevy, as his property, timber of any kind cut within the limits of this berth where it is found in the possession of any unauthorized person, and also to bring any action or suit for damages or any other appropriate remedy against such person who is unlawfully in possession of such timber, or who has unlawfully cut any timber of any kind in derogation of any rights of the licensee under this license, or who has entered without authority upon this berth covered by this license, and any such proceedings which
- 40 have been commenced and are pending at the expiration of this license may be continued and completed as if this license had not expired.

This license is subject to the right of the Department, without compensating the licensee, to dispose of all dead or fallen timber on the area cut over by the licensee after due notice to such licensee, and to the right of

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the Department to remove all fire-killed or dead timber anywhere throughout the balance of the berth on failure of the licensee to remove same when requested to do so by the Minister, the cost of such disposition or removal to be borne by the licensee.

This license is subject to the right of the Department to retain, when deemed advisable, the cash deposit made at the time of sale until the berth is cancelled as a guarantee that the licensee will pay all ground rent, dues and fire-guarding charges, will remove all merchantable timber from the berth and will dispose of the brush and other debris to the satisfaction of the Director of Forestry, failing in any one of which the deposit shall be forfeited, as to which the Minister shall be the judge. 10

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, 1939, and the amendments thereto, and in the Regulations respecting timber now passed or which may at any time hereafter be passed by order of His Honour the Lieutenant Governor in Council.

1. That the licensee shall not have the right hereunder to cut timber of a less diameter than seven inches measured eighteen inches from the ground, except such as may be actually necessary for the construction of roads and other works to facilitate the taking out of merchantable timber, and shall not have the right to cut any trees that may be designated by the proper officer of the Department as required to provide a supply of seed for the reproduction of the forest. 20

2. All merchantable timber of a class authorized to be cut under this license shall be cut and taken from this berth as cutting progresses, and any timber of that class left uncut and unremoved after a date named in a notice, served on the licensee or his authorized agent, shall be estimated in feet board measure by a timber inspector, and shall be subject to payment to the Department, on demand, of ordinary dues, provided that the licensee shall not be required to cut and remove timber which the Director of Forestry deems to be inaccessible. 30

3. In the event of timber on this berth of the class authorized to be cut, becoming fire-killed or dead and a report being made by a timber inspector that the same can be cut and marketed by the licensee without monetary loss, the Minister may require the licensee to cut and remove the same, and all such timber left uncut and unremoved from this berth after a date named in a notice served upon the licensee, or his authorized agent, shall be estimated in feet board measure by a timber inspector and the licensee shall pay dues as provided in the Regulations according to such estimate thereon. 40

4. That the licensee shall be entitled to a renewal of this license from year to year while there is on this berth timber of the kind and dimensions described in this license in sufficient quantity to make it commercially

valuable, or for the term set out in the notice of sale, if the terms and conditions of this license and the provisions of The Provincial Lands Act, 1939, and amendments thereto, and in the Regulations now passed or which may at any time hereafter be passed affecting the same have been fulfilled, as to which the Minister shall be the judge:

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10 Provided that each renewal shall be subject to the payment of such ground rent, dues, license fee, fire-guarding charges and Timber Areas Tax, and to such terms and conditions as are fixed by the Regulations in force at the time the renewal is made and provided that the licensee shall have fully complied with all the terms and conditions of the sale contract covering this berth.

5. When, in the opinion of the Minister, any portion of this berth has not a sufficient quantity of the kind and dimensions of timber specified in this license for such berth to make it profitable to remove the timber upon such portion of this berth, and when in the opinion of the Minister, such portion of this berth is not necessary for the proper working of the remainder of this berth, the Minister may withdraw such portion from this berth:

20 Provided that in no case shall such withdrawal be made until the expiration of sixty days after a notice in writing of the proposed withdrawal has been given to the licensee of this berth, or to his legal representative, by the Minister or by someone thereto authorized by the Minister.

6. If the Minister ascertains after an inspection has been made, that any land within the berth hereby licensed is fit for settlement and is required for that purpose, he may require the licensee to carry on the cutting of timber provided for by Section 21 of the timber regulations on the said land, and on the expiration of the time within which the timber which the licensee is entitled to cut should be removed therefrom may 30 withdraw such land from this berth, and from the operation of this license.

7. That the licensee shall take from every tree he cuts down all the timber fit for use and manufacture the same into sawn lumber or some other saleable product, and shall dispose of the tops and branches and other debris of lumbering operations in such a way as to prevent as far as possible the danger of fire in accordance with the directions of the proper officers of the Department. Failure on the part of the licensee will subject him to the penalty of having his manufactured timber seized and his bush operations closed down, and in the discretion of the Minister, to forfeiture of this license.

40 8. That the licensee shall prevent all unnecessary destruction of growing timber on the part of his men and exercise strict and constant supervision to prevent the origin and spread of fire, and shall also comply during the term of this license and of any renewal thereof with all laws and regulations in that respect in force in the Province.

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9. That the licensee shall furnish to the timber agent for the district having jurisdiction in the matter, at such periods as may be required by the Minister or by the Regulations now made or which may at any time hereafter be made under The Provincial Lands Act, 1939, returns sworn to by him or his agent or employee having a personal knowledge of the facts, showing the quantities manufactured, sold or disposed of, of all sawn lumber, timber or any other product of timber from this berth in whatever form the same may be sold or otherwise disposed of by him during such period.

10. That the licensee, in addition to the said ground rent and license fee, shall pay dues as prescribed by Order in Council of the 30th day of July, 1940, and numbered O.C. 1023/40, the Timber Areas Tax, and one-half of the cost incurred by the Crown in guarding the timber from fire.

11. (a) That the licensee shall keep a "Lumber Sales Book," in which shall be entered all sales of the products of this berth, both cash and credit sales, also a book accounting for the number of feet of sawn lumber manufactured each day at the mill, with the day and date; all books and memoranda kept at the logging camps shall be carefully preserved and these and other books kept by the licensee in connection with his lumbering business he shall submit for the inspection of the Director of Forestry or other officer of the Crown whenever required for the purpose of verifying his returns aforesaid.

(b) That the licensee shall keep a bush count of all sawlogs and other timber cut upon this berth, as well as the number of pieces hauled therefrom, in the form of a book to be obtained for the purpose from the Department. The books covering operations for twelve months ending the 31st of March in each year shall be returned without delay to the Director of Forestry duly completed by the foreman in charge of operations, who shall subscribe to the affidavit therein.

12. This license shall be subject to the provisions of The Provincial Lands Act, 1939, or of any other Act or of any Regulations now made or which may at any time hereafter be made thereunder, dealing with or affecting the disposal of quarriable stone, salt, petroleum, natural gas, coal, gold, silver, copper, iron or other minerals within or under lands within the boundaries of this berth; and in and by virtue of any grant, lease or permit issued under Regulations made as aforesaid, the grantee, lessee, or permittee, shall have the right to have, use and hold possession of such land as is described in the grant, lease or permit, for quarrying stone, for the boring or operating of any salt, oil, or natural gas wells, or for the working of any mines, and the right to open any roads necessary in connection with such works.

Provided that the licensee shall be paid by the grantee, lessee or permittee the value of all timber cut, damaged or destroyed in making such roads, or in boring or operating any salt, oil or gas wells, or in working any

quarries, or mines, or as a consequence directly or indirectly of any such operation or work.

13. This license shall be subject to the right of the Minister to permit prospecting on this berth for quarriable stone, salt, petroleum, natural gas, coal, gold, silver, copper, iron, or other minerals; but the licensee shall be notified of every such permission and shall be entitled to compensation from the prospector or as a consequence of his prospecting of this berth and the determination of such compensation shall be in a manner to be prescribed by the Minister.

10 14. This license shall be subject to the right of the Minister to withdraw at any time from this berth any portion or tract of the lands comprising it which is required for waterpower purposes or is necessary in connection therewith by the lessee or lessees of the waterpower, their executors, administrators, or assigns, and which the Minister, as the representative of the Crown herein, shall decide to be necessary for such water-power purposes, and which for such purposes shall be so withdrawn from the operation of this license, upon the condition, however, that the lessee or lessees of the said water-power, his or their executors, administrators, or assigns, shall and will pay to the licensee of this berth, his executors, administrators, or assigns, the value of all timber of seven inches and over in diameter at the stump on the portion of the tract so withdrawn, the value of such timber in case of dispute to be fixed by the Minister.

15. This license shall also be subject to the right of the Crown in the right of the Province to withdraw at any time from this berth any portion or tract of the lands comprising it which is required for the construction of any colonization or other road, or any road in lieu of or partly deviating from an allowance for road, drain or drainage works without compensation therefor.

30 16. If any railway company becomes entitled to a grant from His Majesty or His Successors of any portion of the lands herein described for the roadbed of the company's railway or branches thereof, or for stations, station grounds, workshops, dockyards and water frontage on navigable rivers, or building yards, or for other purposes required for the convenient, necessary and effective construction and working of the company's railway or any of its branches; and if His Majesty or His Successors grant the same to such railway company, the land so granted shall from and after the date of the grant cease to be under the operation of this license, but the licensee or his legal representative shall be at liberty to remove all property belonging to him or them and all timber then cut thereon from the land so granted; and shall also be entitled to cut and remove from the said land so granted as his or their own property, all trees then standing thereon or the timber obtained therefrom, provided that such property and cut timber, or property, cut timber and standing trees or the timber obtained therefrom, are promptly removed from the said land upon receipt by the licensee or his legal representative of notice from the railway company to remove said

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property and cut timber, or to cut and remove such standing trees so as not to hinder or interfere with any work being done or about to be done by the railway company for the convenient, necessary and effective construction and working of the company's railway or of any of its branches; provided also, however, that if the licensee or his legal representative does not so remove such property or cut timber, or so cut and remove such standing trees or the timber obtained therefrom, the railway company may do so, and all cut timber and standing trees or the timber obtained therefrom, which have so to be removed or cut and removed by the railway company, shall be the property of the Crown in the right of the Province and be 10 disposed of as the Minister may decide.

17. Upon the withdrawal of any land from this berth the ground rent and Timber Areas Tax shall be reduced in proportion to the area withdrawn.

18. There is hereby reserved to the Crown:

(a) Out of the lands herein described all rights of fishery and fishing and occupation in connection therewith upon, around and adjacent to such lands;

(b) Out of the lands herein described all rights of trapping and shooting of game and occupation in connection therewith upon, around and 20 adjacent to such lands;

(c) The right to such of the public as may at any time with the consent of the Minister pass and repass on foot or with or without vehicle, whether horse drawn or otherwise, across the lands herein described or any part thereof, excepting however any of the said lands occupied by any building, or any part thereof upon which the licensee has any building or other works properly connected with the project of the licensee.

19. In any case where waters flowing through, over or along, or having their source in this berth, empty into any stream or are tributary to any stream from which a domestic or municipal water supply is or may be 30 obtained or contain fish, or in any case where the pollution of any such water, may, in the opinion of the Minister, deleteriously affect any municipal or domestic water supply, the licensee shall comply with the following Regulations:

(a) Locate all camp buildings, outhouses, cesspools and other structures at a sufficient distance from any stream, lake or other source of water supply, to prevent the pollution of such municipal or domestic water supply;

(b) Immediately remove and bury or burn any camp refuse or debris of any description, or any substance which would be likely to cause 40 the pollution of any such waters, and otherwise keep the ground in the vicinity of all logging camps in a neat, orderly and sanitary condition;

(c) Prevent any depositing, leaving or accumulation in any stream, lake or other source of water supply within this berth, or in an exposed or insanitary condition on this berth, any debris of any description, or any substance which would be likely to cause the pollution of such waters;

10 (d) Prevent the depositing or leaving by any person employed or purporting to be employed about this berth, or the accumulation as a result of any operations carried on by reason of this license in any stream, lake or other source of such water supply on any Provincial lands whatever, or in any exposed or insanitary condition of any such lands, of any such debris or substance;

(e) Observe all laws and regulations respecting sanitation and the protection of the purity of waters which are applicable to the premises, or any Regulations which may be promulgated by the Lieutenant Governor in Council, and also comply with any requirements which may be made by the Minister for the purpose of carrying out the above provisions.

20 For each infraction of the provisions of this section the licensee shall, in addition to any other penalty, be liable on summary conviction to a fine not exceeding one hundred dollars, and such sum shall be recoverable with costs at the suit of and in the name of the Crown in the right of the Province.

20. (a) That the licensee shall not place logs or timber in any river or stream without first having obtained the written consent of the Director of Forestry; and

(b) Shall not pile logs or timber in the beds of any river or stream when there is not sufficient water in such river or stream to float such logs or timber; and

(c) Shall provide a sufficient patrol of the river or stream when floating logs to prevent any log jams or piling up of timber which may result in damage to any bridge, or other property.

30 21. This license cannot be assigned, sublet, or transferred without the consent of the Minister.

22. Any fire having caused damage to the timber on this berth must be reported immediately with full details to the Director of Forestry and the responsibility so to do shall rest with the licensee.

40 23. That the licensee shall have in operation within one year from the date of sale, and keep in operation for at least six months of each year of his holding, a saw-mill in connection with this berth, of a value of not less than \$2,000.00 capable of cutting in one day 1,000 feet board measure for every square mile of the area licensed, and shall manufacture in each year not less than 75,000 feet board measure of sawn lumber from timber cut on Provincial lands for each square mile or fraction thereof contained in

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Exhibits and Documents this berth or shall establish such other manufacture of wood products as the Minister accepts as equivalent thereto.

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24. That the licensee may in lieu of erecting a mill, be permitted to have the timber cut from this berth manufactured at a mill which is or is not his own property, provided that he cuts from this berth at the rate of 100,000 feet board measure annually for each square mile or fraction thereof held by him under this license.

continued.

25. That the licensee shall notify the Director of Forestry immediately upon the erection of a saw-mill together with its location.

26. (a) This license shall be liable to forfeiture on the order of the Minister for violation of any one of the conditions to which it is subject or for any fraudulent return. 10

(b) Before making an order for forfeiture the Minister shall cause written notice to be given to the licensee that it is the intention so to do, upon the grounds set forth in such notice, unless within sixty days after service of such notice the licensee shows cause to the contrary.

(c) Service of such notice may be effected by mailing the same, duly registered, to the address or the last known address of the licensee, and in such case shall be deemed to have been made upon the day on which the notice reached the said address or in due course of mail should have 20 done so.

(d) Every order made by the Minister pursuant to this section shall be final and conclusive as against the licensee, and every person claiming by, through or under the licensee, and there shall be no appeal therefrom.

(e) If the violation of the Regulations refers merely to payment of money due under this license, the Minister may waive the power of forfeiture on payment of double the amount found by the Minister to be due, and costs, and may enforce payment in the manner provided for by The Provincial Lands Act, 1939, and the timber regulations now passed 30 or which may at any time hereafter be passed, and take such action in regard to all other matters of forfeiture as may arise and be provided for by this section and by The Provincial Lands Act, 1939.

27. That the licensee shall pay and discharge all rates, assessments and taxes imposed by any Municipal, Improvement, School, Irrigation and Drainage Districts, now charged or hereafter to be charged upon this berth, as occupant, or upon the said licensee or occupier in respect thereof or payable by either in respect thereof.

28. Any notice, demand or other communication which His Majesty or the Minister may require or desire to give or serve upon the licensee may 40 be validly given and served by the Deputy Minister of Lands and Mines,

Director of Forestry or any person duly authorized in writing by the Minister.

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DATED at the City of Edmonton }
this Twenty-sixth day of Feb- }
ruary, one thousand nine hun- }
dred and forty-two (1942). }

(Sgd.) T. F. BLEFGEN,
for Deputy Minister of Lands
and Mines.

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We, D. R. Fraser & Co. Ltd., accept this license and agree to all the terms and conditions.

continued.

10

D. R. FRASER & CO. LIMITED
(Sgd.) E. R. MACDONALD,
Secretary.
Signature of Licensee.

[SEAL]

(Sgd.) Illegible,
Witness to Signature of Licensee.

EDMONTON: Printed by A. Shnitka, King's Printer.

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**Provincial Licence Berth 1161
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AHT/4.

Form D.
250-9-40

[CREST]

GOVERNMENT OF THE PROVINCE OF ALBERTA
Department of Lands and Mines

File No. 1148 T.L.
Licence No. 772
Berth No. 1161

LICENSE TO CUT TIMBER ON PROVINCIAL LANDS

30 KNOW ALL MEN BY THESE PRESENTS, that by virtue of the authority vested in me by the The Provincial Lands Act, 1939, and by an order of His Honour the Lieutenant Governor in Council of the 25th day of July, 1940, I, The Honourable Nathan E. Tanner, the Minister of Lands and Mines of the Government of the Province of Alberta, do hereby in consideration of the sum of One Hundred and Twenty-Six Dollars and Eighty-One Cents (\$126.81), ground rent, license fee, fire-guarding charges and Timber Areas Tax, now paid to me for the use of His Majesty, and in consideration of the execution of the sale contract and the dues hereafter mentioned, give unto

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Messrs. D. R. Fraser & Company, Limited, of the City of Edmonton, in the Province of Alberta, hereinafter called the licensee, his executors and administrators, full right, power and license, subject to the conditions hereinafter mentioned and contained, and such other conditions and restrictions as are in that behalf contained in The Provincial Lands Act, 1939, and the amendments thereto, and in the Regulations respecting timber now passed or which may at any time hereafter be passed by the Lieutenant Governor in Council, to cut timber on the following tract of land (hereinafter called the "berth") that is to say:

All that parcel or tract of land, situate, lying and being in the Forty-Seventh (47) Township, in the Fifth (5) and Sixth (6) Ranges, West of the Fifth (5) Meridian, in the Province of Alberta, Dominion of Canada; As shown upon a plan of survey dated the Third (3) of June, Nineteen Hundred and Eight (1908), by A. Driscoll, D.L.S., and of record in the Department of Lands and Mines at Edmonton as No. 72 T. 10

SAVING AND EXCEPTING thereout and therefrom that portion of Section Eleven (11), Township Forty-seven (47), Range Six (6), West of the Fifth (5) Meridian, which lies within the lines of survey.

The land herein described containing by admeasurement Four and Eighty-two Hundredths (4.82) square miles, more or less, and designated as Timber Berth No. 1161, and to take and keep exclusive possession of the said lands except as hereinafter mentioned, for and during the period of one year, from the first day of April, 1941, to the thirty-first day of March, 1942, and no longer. 20

This license shall vest in the licensee, subject to the conditions mentioned in this license, all rights of property whatsoever in all trees, timber, lumber or other products of timber which he is entitled by this license to cut, and which have been cut within the limits of this berth during the continuance thereof, whether such trees, timber, lumber or other products are cut by consent of the licensee or by any other person without his consent, and shall vest in the licensee, as against any person other than the Crown in the right of the Province, subject to the conditions mentioned in this license, all right of property whatsoever in all trees, timber, lumber and other products of timber cut within the limits of this berth by any other person without his consent; and this license shall entitle the licensee to replevy, as his property, timber of any kind cut within the limits of this berth where it is found in the possession of any unauthorized person, and also to bring any action or suit for damages or any other appropriate remedy against such person who is unlawfully in possession of such timber, or who has unlawfully cut any timber of any kind in derogation of any rights of the licensee under this license, or who has entered without authority upon this berth covered by this license, and any such proceedings which have been commenced and are pending at the expiration of this license may be continued and completed as if this license had not expired. 30 40

This license is subject to the right of the Department, without compensating the licensee, to dispose of all dead or fallen timber on the area cut over by the licensee after due notice to such licensee, and to the right of the Department to remove all fire-killed or dead timber anywhere throughout the balance of the berth on failure of the licensee to remove same when requested to do so by the Minister, the cost of such disposition or removal to be borne by the licensee.

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10 This license is subject to the right of the Department to retain, when deemed advisable, the cash deposit made at the time of sale until the berth is cancelled as a guarantee that the licensee will pay all ground rent, dues and fire-guarding charges, will remove all merchantable timber from the berth and will dispose of the brush and other debris to the satisfaction of the Director of Forestry, failing in any one of which the deposit shall be forfeited, as to which the Minister shall be the judge.

20 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, 1939, and the amendments thereto, and in the Regulations respecting timber now passed or which may at any time hereafter be passed by order of His Honour the Lieutenant Governor in Council.

1. That the licensee shall not have the right hereunder to cut timber of a less diameter than seven inches measured eighteen inches from the ground, except such as may be actually necessary for the construction of roads and other works to facilitate the taking out of merchantable timber, and shall not have the right to cut any trees that may be designated by the proper officer of the Department as required to provide a supply of seed for the reproduction of the forest.

30 2. All merchantable timber of a class authorized to be cut under this license shall be cut and taken from this berth as cutting progresses, and any timber of that class left uncut and unremoved after a date named in a notice, served on the licensee or his authorized agent, shall be estimated in feet board measure by a timber inspector, and shall be subject to payment to the Department, on demand, of ordinary dues, provided that the licensee shall not be required to cut and remove timber which the Director of Forestry deems to be inaccessible.

40 3. In the event of timber on this berth of the class authorized to be cut, becoming fire-killed or dead and a report being made by a timber inspector that the same can be cut and marketed by the licensee without monetary loss, the Minister may require the licensee to cut and remove the same, and all such timber left uncut and unremoved from this berth after a date named in a notice served upon the licensee, or his authorized agent, shall be estimated in feet board measure by a timber inspector and the licensee shall pay dues as provided in the Regulations according to such estimate thereon.

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4. That the licensee shall be entitled to a renewal of this license from year to year while there is on this berth timber of the kind and dimensions described in this license in sufficient quantity to make it commercially valuable, or for the term set out in the notice of sale, if the terms and conditions of this license and the provisions of The Provincial Lands Act, 1939, and amendments thereto, and in the Regulations now passed or which may at any time hereafter be passed affecting the same have been fulfilled, as to which the Minister shall be the judge:

Provided that each renewal shall be subject to the payment of such ground rent, dues, license fee, fire-guarding charges and Timber Areas Tax, and to such terms and conditions as are fixed by the Regulations in force at the time the renewal is made and provided that the licensee shall have fully complied with all the terms and conditions of the sale contract covering this berth. 10

5. When, in the opinion of the Minister, any portion of this berth has not a sufficient quantity of the kind and dimensions of timber specified in this license for such berth to make it profitable to remove the timber upon such portion of this berth, and when in the opinion of the Minister, such portion of this berth is not necessary for the proper working of the remainder of this berth, the Minister may withdraw such portion from this berth: 20

Provided that in no case shall such withdrawal be made until the expiration of sixty days after a notice in writing of the proposed withdrawal has been given to the licensee of this berth, or to his legal representative, by the Minister or by someone thereto authorized by the Minister.

6. If the Minister ascertains after an inspection has been made, that any land within the berth hereby licensed is fit for settlement and is required for that purpose, he may require the licensee to carry on the cutting of timber provided for by Section 21 of the timber regulations on the said land, and on the expiration of the time within which the timber which the licensee is entitled to cut should be removed therefrom may withdraw such land from this berth, and from the operation of this license. 30

7. That the licensee shall take from every tree he cuts down all the timber fit for use and manufacture the same into sawn lumber or some other saleable product, and shall dispose of the tops and branches and other debris of lumbering operations in such a way as to prevent as far as possible the danger of fire in accordance with the directions of the proper officers of the Department. Failure on the part of the licensee will subject him to the penalty of having his manufactured timber seized and his bush operations closed down, and in the discretion of the Minister, to forfeiture of this license. 40

8. That the licensee shall prevent all unnecessary destruction of growing timber on the part of his men and exercise strict and constant

supervision to prevent the origin and spread of fire, and shall also comply during the term of this license and of any renewal thereof with all laws and regulations in that respect in force in the Province.

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9. That the licensee shall furnish to the timber agent for the district having jurisdiction in the matter, at such periods as may be required by the Minister or by the Regulations now made or which may at any time hereafter be made under The Provincial Lands Act, 1939, returns sworn to by him or his agent or employee having a personal knowledge of the facts, showing the quantities manufactured, sold or disposed of, of all sawn
10 lumber, timber or any other product of timber from this berth in whatever form the same may be sold or otherwise disposed of by him during such period.

10. That the licensee, in addition to the said ground rent and license fee, shall pay dues as prescribed by Order in Council of the 30th day of May 1941 and numbered (O.C. 747-41), the Timber Areas Tax, and one-half of the cost incurred by the Crown in guarding the timber from fire.

11. (a) That the licensee shall keep a "Lumber Sales Book," in which shall be entered all sales of the products of this berth, both cash and credit sales, also a book accounting for the number of feet of sawn lumber manu-
20 factured each day at the mill, with the day and date; all books and mem-
oranda kept at the logging camps shall be carefully preserved and these and other books kept by the licensee in connection with his lumbering business he shall submit for the inspection of the Director of Forestry or other officer of the Crown whenever required for the purpose of verifying his returns aforesaid.

(b) That the licensee shall keep a bush count of all sawlogs and other timber cut upon this berth, as well as the number of pieces hauled there-
from, in the form of a book to be obtained for the purpose from the Depart-
ment. The books covering operations for twelve months ending the 31st
30 of March in each year shall be returned without delay to the Director of
Forestry duly completed by the foreman in charge of operations, who shall
subscribe to the affidavit therein.

12. This license shall be subject to the provisions of The Provincial
Lands Act, 1939, or of any other Act or of any Regulations now made
or which may at any time hereafter be made thereunder, dealing with or
affecting the disposal of quarriable stone, salt, petroleum, natural gas, coal,
gold, silver, copper, iron or other minerals within or under lands within
the boundaries of this berth; and in and by virtue of any grant, lease or
permit issued under Regulations made as aforesaid, the grantee, lessee, or
40 permittee, shall have the right to have, use and hold possession of such land
as is described in the grant, lease or permit, for quarrying stone, for the
boring or operating of any salt, oil, or natural gas wells, or for the working
of any mines, and the right to open any roads necessary in connection with
such works.

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Provided that the licensee shall be paid by the grantee, lessee or permittee the value of all timber cut, damaged or destroyed in making such roads, or in boring or operating any salt, oil or gas wells, or in working any quarries, or mines, or as a consequence directly or indirectly of any such operation or work.

13. This license shall be subject to the right of the Minister to permit prospecting on this berth for quarriable stone, salt, petroleum, natural gas, coal, gold, silver, copper, iron, or other minerals; but the licensee shall be notified of every such permission and shall be entitled to compensation from the prospector or as a consequence of his prospecting of this berth and the determination of such compensation shall be in a manner to be prescribed by the Minister. 10

14. This license shall be subject to the right of the Minister to withdraw at any time from this berth any portion or tract of the lands comprising it which is required for waterpower purposes or is necessary in connection therewith by the lessee or lessees of the waterpower, their executors, administrators, or assigns, and which the Minister, as the representative of the Crown herein, shall decide to be necessary for such water-power purposes, and which for such purposes shall be so withdrawn from the operation of this license, upon the condition, however, that the lessee or lessees of the said water-power, his or their executors, administrators, or assigns, shall and will pay to the licensee of this berth, his executors, administrators, or assigns, the value of all timber of seven inches and over in diameter at the stump on the portion of the tract so withdrawn, the value of such timber in case of dispute to be fixed by the Minister. 20

15. This license shall also be subject to the right of the Crown in the right of the Province to withdraw at any time from this berth any portion or tract of the lands comprising it which is required for the construction of any colonization or other road, or any road in lieu of or partly deviating from an allowance for road, drain or drainage works without compensation therefor. 30

16. If any railway company becomes entitled to a grant from His Majesty or His Successors of any portion of the lands herein described for the roadbed of the company's railway or branches thereof, or for stations, station grounds, workshops, dockyards and water frontage on navigable rivers, or building yards, or for other purposes required for the convenient, necessary and effective construction and working of the company's railway or any of its branches; and if His Majesty or His Successors grant the same to such railway company, the land so granted shall from and after the date of the grant cease to be under the operation of this license, but the licensee or his legal representative shall be at liberty to remove all property belonging to him or them and all timber then cut thereon from the land so granted; and shall also be entitled to cut and remove from the said land so granted as his or their own property, all trees then standing thereon or the timber obtained therefrom, provided that such property and cut timber, or 40

property, cut timber and standing trees, or the timber obtained therefrom, are promptly removed from the said land upon receipt by the licensee or his legal representative of notice from the railway company to remove said property and cut timber, or to cut and remove such standing trees so as not to hinder or interfere with any work being done or about to be done by the railway company for the convenient, necessary and effective construction and working of the company's railway or of any of its branches; provided also, however, that if the licensee or his legal representative does not so remove such property or cut timber, or so cut and remove such standing trees or the timber obtained therefrom, the railway company may do so, and all cut timber and standing trees or the timber obtained therefrom, which have so to be removed or cut and removed by the railway company, shall be the property of the Crown in the right of the Province and be disposed of as the Minister may decide.

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17. Upon the withdrawal of any land from this berth the ground rent and Timber Areas Tax shall be reduced in proportion to the area withdrawn.

18. There is hereby reserved to the Crown:

(a) Out of the lands herein described all rights of fishery and fishing and occupation in connection therewith upon, around and adjacent to such lands;

(b) Out of the lands herein described all rights of trapping and shooting of game and occupation in connection therewith upon, around and adjacent to such lands;

(c) The right to such of the public as may at any time with the consent of the Minister pass and repass on foot or with or without vehicle, whether horse drawn or otherwise, across the lands herein described or any part thereof, excepting however any of the said lands occupied by any building, or any part thereof upon which the licensee has any building or other works properly connected with the project of the licensee.

19. In any case where waters flowing through, over or along, or having their source in this berth, empty into any stream or are tributary to any stream from which a domestic or municipal water supply is or may be obtained or contain fish, or in any case where the pollution of any such water, may, in the opinion of the Minister, deleteriously affect any municipal or domestic water supply, the licensee shall comply with the following Regulations:

(a) Locate all camp buildings, outhouses, cesspools and other structures at a sufficient distance from any stream, lake or other source of water supply, to prevent the pollution of such municipal or domestic water supply;

(b) Immediately remove and bury or burn any camp refuse or debris of any description, or any substance which would be likely to cause

Exhibits and Documents the pollution of any such waters, and otherwise keep the ground in the vicinity of all logging camps in a neat, orderly and sanitary condition;

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(c) Prevent any depositing, leaving or accumulation in any stream, lake or other source of water supply within this berth, or in an exposed or insanitary condition on this berth, any debris of any description, or any substance which would be likely to cause the pollution of such waters;

(d) Prevent the depositing or leaving by any person employed or purporting to be employed about this berth, or the accumulation as a result of any operations carried on by reason of this license in any stream, lake or other source of such water supply on any Provincial lands whatever, or in any exposed or insanitary condition of any such lands, of any such debris or substance;

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(e) Observe all laws and regulations respecting sanitation and the protection of the purity of waters which are applicable to the premises, or any Regulations which may be promulgated by the Lieutenant Governor in Council, and also comply with any requirements which may be made by the Minister for the purpose of carrying out the above provisions.

For each infraction of the provisions of this section the licensee shall, in addition to any other penalty, be liable on summary conviction to a fine not exceeding one hundred dollars, and such sum shall be recoverable with costs at the suit of and in the name of the Crown in the right of the Province.

20

20. (a) That the licensee shall not place logs or timber in any river or stream without first having obtained the written consent of the Director of Forestry; and

(b) Shall not pile logs or timber in the beds of any river or stream when there is not sufficient water in such river or stream to float such logs or timber; and

(c) Shall provide a sufficient patrol of the river or stream when floating logs to prevent any log jams or piling up of timber which may result in damage to any bridge, or other property.

30

21. This license cannot be assigned, sublet, or transferred without the consent of the Minister.

22. Any fire having caused damage to the timber on this berth must be reported immediately with full details to the Director of Forestry and the responsibility so to do shall rest with the licensee.

23. That the licensee shall have in operation within one year from the date of sale, and keep in operation for at least six months of each year of his holding, a saw-mill in connection with this berth, of a value of not less than \$2,000.00 capable of cutting in one day 1,000 feet board measure for every square mile of the area licensed, and shall manufacture in each year not less than 75,000 feet board measure of sawn lumber from timber cut

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on Provincial lands for each square mile or fraction thereof contained in this berth or shall establish such other manufacture of wood products as the Minister accepts as equivalent thereto.

Exhibits
and
Documents

No. 11

24. That the licensee may in lieu of erecting a mill, be permitted to have the timber cut from this berth manufactured at a mill which is or is not his own property, provided that he cuts from this berth at the rate of 100,000 feet board measure annually for each square mile or fraction thereof held by him under this license.

Provincial
Licence
Berth 1161,
26th
February,
1942.

continued.

10 25. That the licensee shall notify the Director of Forestry immediately upon the erection of a saw-mill together with its location.

26. (a) This license shall be liable to forfeiture on the order of the Minister for violation of any one of the conditions to which it is subject or for any fraudulent return.

(b) Before making an order for forfeiture the Minister shall cause written notice to be given to the licensee that it is the intention so to do, upon the grounds set forth in such notice, unless within sixty days after service of such notice the licensee shows cause to the contrary.

20 (c) Service of such notice may be effected by mailing the same, duly registered, to the address or the last known address of the licensee, and in such case shall be deemed to have been made upon the day on which the notice reached the said address or in due course of mail should have done so.

(d) Every order made by the Minister pursuant to this section shall be final and conclusive as against the licensee, and every person claiming by, through or under the licensee, and there shall be no appeal therefrom.

30 (e) If the violation of the Regulations refers merely to payment of money due under this license, the Minister may waive the power of forfeiture on payment of double the amount found by the Minister to be due, and costs, and may enforce payment in the manner provided for by The Provincial Lands Act, 1939, and the timber regulations now passed or which may at any time hereafter be passed, and take such action in regard to all other matters of forfeiture as may arise and be provided for by this section and by The Provincial Lands Act, 1939.

27. That the licensee shall pay and discharge all rates, assessments and taxes imposed by any Municipal, Improvement, School, Irrigation and Drainage Districts, now charged or hereafter to be charged upon this berth, as occupant, or upon the said licensee or occupier in respect thereof or payable by either in respect thereof.

40 28. Any notice, demand or other communication which His Majesty or the Minister may require or desire to give or serve upon the licensee may

Exhibits and Documents —
 be validly given and served by the Deputy Minister of Lands and Mines, Director of Forestry or any person duly authorized in writing by the Minister.

No. 11
 Provincial Licence
 Berth 1161,
 26th
 February,
 1942.

DATED at the City of Edmonton }
 this Twenty-sixth day of Feb- }
 ruary, one thousand nine hun- }
 dred and forty-two (1942). }

(Sgd.) T. F. BLEFGEN,
 for Deputy Minister of Lands
 and Mines.

continued.

We, D. R. Fraser & Co. Ltd., accept this license and agree to all the terms and conditions.

D. R. FRASER & CO. LIMITED 10
 (Sgd.) E. R. MACDONALD,
 Secretary.
 Signature of Licensee.
 [SEAL]

(Sgd.) JAMES ILES,
 Witness to Signature of Licensee.

EDMONTON: Printed by A. Shnitka, King's Printer.

No. 14
 Provincial Licence
 Berth 1727,
 26th
 February,
 1942.

No. 14

**Provincial Licence Berth 1727
 (Appellant's Document)**

Form D. 20
 250-9-40

4.

[CREST]

GOVERNMENT OF THE PROVINCE OF ALBERTA
 Department of Lands and Mines

File No. 1176 T.L.
 License No. 693
 Berth No. 1727

LICENSE TO CUT TIMBER ON PROVINCIAL LANDS 30

KNOW ALL MEN BY THESE PRESENTS, that by virtue of the authority vested in me by The Provincial Lands Act, 1939, and by an order of His Honour the Lieutenant Governor in Council of the 25th day of July, 1940, I, The Honourable Nathan E. Tanner, the Minister of Lands and Mines of the Government of the Province of Alberta, do hereby in consideration of the sum of One Hundred and Thirty Dollars (\$130.00) ground rent, license fee, fire-guarding charges and Timber Areas Tax, now paid to me for the use of His Majesty, and in consideration of the execution of the sale contract and the

dues hereafter mentioned, give unto Messrs. D. R. Fraser & Co. Ltd., of the City of Edmonton, in the Province of Alberta hereinafter called the licensee, his executors and administrators, full right, power and license, subject to the conditions hereinafter mentioned and contained, and such other conditions and restrictions as are in that behalf contained in The Provincial Lands Act, 1939, and the amendments thereto, and in the Regulations respecting timber now passed or which may at any time hereafter be passed by the Lieutenant Governor in Council, to cut timber on the following tract of land (hereinafter called the "berth") that is to say:

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—
No. 14
Provincial
Licence
Berth 1727,
26th
February,
1942.

continued.

- 10 *Firstly:* All those parcels or tracts of land, situate, lying, and being in the Forty-eighth (48) Township, in the Sixth (6) Range, West of the Fifth (5) Meridian, in the Province of Alberta, Dominion of Canada, and being composed of:

The South half and Legal Subdivisions Nine (9), Ten (10), Eleven (11), Twelve (12), and Sixteen (16), of Section Three (3), South half, North West quarter, and Legal Subdivisions Nine (9), Ten (10) and Fifteen (15) of Section Four (4), South West quarter and Legal Subdivisions Eleven (11), Twelve (12), and Thirteen (13) of Section Nine (9), Legal Subdivisions One (1) and Eight (8) of Section Ten (10), North half, South West quarter, and Legal Subdivisions One (1), Seven (7) and Eight (8) of Section Twenty-four (24), North East quarter of Section Twenty-six (26), North half and Legal Subdivisions Five (5), Six (6), Seven (7) and Eight (8) of Section Twenty-seven (27), North half, South East quarter, and Legal Subdivisions Three (3), Five (5) and Six (6) of Section Thirty-one (31), West half and Legal Subdivisions Seven (7), Eight (8), Nine (9), and Ten (10) of Section Thirty-two (32), East half, and Legal Subdivisions Three (3), Six (6), Eleven (11) and Fourteen (14) of Section Thirty-three (33), and South half and North East quarter of Section Thirty-five (35) of the said Township, as shown upon a map or plan of survey of the said Township, approved and confirmed at Ottawa on the Thirteenth (13) day of December, Nineteen Hundred and Eleven (1911), by Edouard Deville, Surveyor General of Dominion Lands, and on file in the Department of Lands and Mines at Edmonton.

Secondly: All those parcels or tracts of land, situate, lying, and being in the Forty-ninth (49) Township, in the Sixth (6) Range, West of the Fifth (5) Meridian, in the Province of Alberta, Dominion of Canada, and being composed of:

South East quarter, and Legal Subdivisions Ten (10), Thirteen (13) and Fifteen (15) of Section Two (2), the whole of Sections Three (3) and Four (4), South half of Section Five (5), South half of Section Six (6), South East quarter of Section Nine (9), Legal Subdivisions One (1), Two (2), Three (3) and Four (4) of Section Ten (10) and that portion lying South of Timber Berth No. 1242 of Section Twenty-one (21) of the said Township, as shown upon a map or plan of Survey of the said Township,

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No. 14
Provincial
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continued.

approved and confirmed at Ottawa on the Twenty-ninth (29) day of February, Nineteen Hundred and Twelve (1912), by Edouard Deville, Surveyor General of Dominion Lands and on file in the Department of Lands and Mines at Edmonton.

The lands herein described containing an area of Twelve and Thirty-eight Hundredths (12.38) square miles, more or less, and designated as Timber Berth No. 1727.

These lands are also shown on a plan of Survey of the said Timber Berth in Five (5) Blocks, approved and confirmed at Ottawa on the Fifteenth (15) day of February, Nineteen Hundred and Twelve (1912), by Edouard Deville, Surveyor General of Dominion Lands, and on file in the Department of Lands and Mines at Edmonton as No. 146 T, and to take and keep exclusive possession of the said lands except as hereinafter mentioned, for and during the period of one year, from the first day of April, 1940, to the thirty-first day of March, 1941, and no longer. 10

This license shall vest in the licensee, subject to the conditions mentioned in this license, all rights of property whatsoever in all trees, timber, lumber or other products of timber which he is entitled by this license to cut, and which have been cut within the limits of this berth during the continuance thereof, whether such trees, timber, lumber or other products are cut by consent of the licensee or by any other person without his consent, and shall vest in the licensee, as against any person other than the Crown in the right of the Province, subject to the conditions mentioned in this license, all right of property whatsoever in all trees, timber, lumber and other products of timber cut within the limits of this berth by any other person without his consent; and this license shall entitle the licensee to replevy, as his property, timber of any kind cut within the limits of this berth where it is found in the possession of any unauthorized person, and also to bring any action or suit for damages or any other appropriate remedy against such person who is unlawfully in possession of such timber, or who has unlawfully cut any timber of any kind in derogation of any rights of the licensee under this license, or who has entered without authority upon this berth covered by the license, and any such proceedings which have been commenced and are pending at the expiration of this license may be continued and completed as if this license had not expired. 20 30

This license is subject to the right of the Department, without compensating the licensee, to dispose of all dead or fallen timber on the area cut over by the licensee after due notice to such licensee, and to the right of the Department to remove all fire-killed or dead timber anywhere throughout the balance of the berth on failure of the licensee to remove same when requested to do so by the Minister, the cost of such disposition or removal to be borne by the licensee. 40

This license is subject to the right of the Department to retain, when deemed advisable, the cash deposit made at the time of sale until the berth is cancelled as a guarantee that the licensee will pay all ground rent, dues and fire-guarding charges, will remove all merchantable timber from the berth and will dispose of the brush and other debris to the satisfaction

of the Director of Forestry, failing in any one of which the deposit shall be forfeited, as to which the Minister shall be the judge.

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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, 1939, and the amendments thereto, and in the Regulations respecting timber now passed or which may at any time hereafter be passed by order of His Honour the Lieutenant Governor in Council.

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continued.

10 1. That the licensee shall not have the right hereunder to cut timber of a less diameter than seven inches measured eighteen inches from the ground, except such as may be actually necessary for the construction of roads and other works to facilitate the taking out of merchantable timber, and shall not have the right to cut any trees that may be designated by the proper officer of the Department as required to provide a supply of seed for the reproduction of the forest.

20 2. All merchantable timber of a class authorized to be cut under this license shall be cut and taken from this berth as cutting progresses, and any timber of that class left uncut and unremoved after a date named in a notice, served on the licensee or his authorized agent, shall be estimated in feet board measure by a timber inspector, and shall be subject to payment to the Department, on demand, of ordinary dues, provided that the licensee shall not be required to cut and remove timber which the Director of Forestry deems to be inaccessible.

30 3. In the event of timber on this berth of the class authorized to be cut, becoming fire-killed or dead and a report being made by a timber inspector that the same can be cut and marketed by the licensee without monetary loss, the Minister may require the licensee to cut and remove the same, and all such timber left uncut and unremoved from this berth after a date named in a notice served upon the licensee, or his authorized agent, shall be estimated in feet board measure by a timber inspector and the licensee shall pay dues as provided in the Regulations according to such estimate thereon.

40 4. That the licensee shall be entitled to a renewal of this license from year to year while there is on this berth timber of the kind and dimensions described in this license in sufficient quantity to make it commercially valuable, or for the term set out in the notice of sale, if the terms and conditions of this license and the provisions of The Provincial Lands Act, 1939, and amendments thereto, and in the Regulations now passed or which may at any time hereafter be passed affecting the same have been fulfilled; as to which the Minister shall be the judge:

Provided that each renewal shall be subject to the payment of such ground rent, dues, license fee, fire-guarding charges and Timber Areas Tax, and to such terms and conditions as are fixed by the Regulations in force at the time the renewal is made and provided that the licensee shall have

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continued.

fully complied with all the terms and conditions of the sale contract covering this berth.

5. When, in the opinion of the Minister, any portion of this berth has not a sufficient quantity of the kind and dimensions of timber specified in this license for such berth to make it profitable to remove the timber upon such portion of this berth, and when in the opinion of the Minister, such portion of this berth is not necessary for the proper working of the remainder of this berth, the Minister may withdraw such portion from this berth:

Provided that in no case shall such withdrawal be made until the expiration of sixty days after a notice in writing of the proposed withdrawal has been given to the licensee of this berth, or to his legal representative, by the Minister or by someone thereto authorized by the Minister. 10

6. If the Minister ascertains after an inspection has been made, that any land within the berth hereby licensed is fit for settlement and is required for that purpose, he may require the licensee to carry on the cutting of timber provided for by Section 21 of the timber regulations on the said land, and on the expiration of the time within which the timber which the licensee is entitled to cut should be removed therefrom may withdraw such land from this berth, and from the operation of this license. 20

7. That the licensee shall take from every tree he cuts down all the timber fit for use and manufacture the same into sawn lumber or some other saleable product, and shall dispose of the tops and branches and other debris of lumbering operations in such a way as to prevent as far as possible the danger of fire in accordance with the directions of the proper officers of the Department. Failure on the part of the licensee will subject him to the penalty of having his manufactured timber seized and his bush operations closed down, and in the discretion of the Minister, to forfeiture of this license. 30

8. That the licensee shall prevent all unnecessary destruction of growing timber on the part of his men and exercise strict and constant supervision to prevent the origin and spread of fire, and shall also comply during the term of this license and of any renewal thereof with all laws and regulations in that respect in force in the Province.

9. That the licensee shall furnish to the timber agent for the district having jurisdiction in the matter, at such periods as may be required by the Minister or by the Regulations now made or which may at any time hereafter be made under The Provincial Lands Act, 1939, returns sworn to by him or his agent or employee having a personal knowledge of the facts, showing the quantities manufactured, sold or disposed of, of all sawn lumber, timber or any other product of timber from this berth in whatever form the same may be sold or otherwise disposed of by him during such period. 40

10. That the licensee, in addition to the said ground rent and license fee, shall pay dues as prescribed by Order in Council of the 30th day of July, 1940, and numbered O.C. 1023/40, the Timber Areas Tax, and one-half of the cost incurred by the Crown in guarding the timber from fire.

11. (a) That the licensee shall keep a "Lumber Sales Book," in which shall be entered all sales of the products of this berth, both cash and credit sales, also a book accounting for the number of feet of sawn lumber manufactured each day at the mill, with the day and date; all books and memoranda kept at the logging camps shall be carefully preserved and these
10 and other books kept by the licensee in connection with his lumbering business he shall submit for the inspection of the Director of Forestry or other officer of the Crown whenever required for the purpose of verifying his returns aforesaid.

(b) That the licensee shall keep a bush count of all sawlogs and other timber cut upon this berth, as well as the number of pieces hauled therefrom, in the form of a book to be obtained for the purpose from the Department. The books covering operations for twelve months ending the 31st of March in each year shall be returned without delay to the Director of Forestry duly completed by the foreman in charge of operations, who shall
20 subscribe to the affidavit therein.

12. This license shall be subject to the provisions of The Provincial Lands Act, 1939, or of any other Act or of any Regulations now made or which may at any time hereafter be made thereunder, dealing with or affecting the disposal of quarriable stone, salt, petroleum, natural gas, coal, gold, silver, copper, iron or other minerals within or under lands within the boundaries of this berth; and in and by virtue of any grant, lease or permit issued under Regulations made as aforesaid, the grantee, lessee, or permittee, shall have the right to have, use and hold possession of such land as is described in the grant, lease or permit, for quarrying stone, for the
30 boring or operating of any salt, oil, or natural gas wells, or for the working of any mines, and the right to open any roads necessary in connection with such works.

Provided that the licensee shall be paid by the grantee, lessee or permittee the value of all timber cut, damaged or destroyed in making such roads, or in boring or operating any salt, oil or gas wells, or in working any quarries, or mines, or as a consequence directly or indirectly of any such operation or work.

13. This license shall be subject to the right of the Minister to permit
40 prospecting on this berth for quarriable stone, salt, petroleum, natural gas, coal, gold, silver, copper, iron, or other minerals; but the licensee shall be notified of every such permission and shall be entitled to compensation from the prospector or as a consequence of his prospecting of this berth and the determination of such compensation shall be in a manner to be prescribed by the Minister.

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continued.

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—
No. 14
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continued.

14. This license shall be subject to the right of the Minister to withdraw at any time from this berth any portion or tract of the lands comprising it which is required for waterpower purposes or is necessary in connection therewith by the lessee or lessees of the waterpower, their executors, administrators, or assigns, and which the Minister, as the representative of the Crown herein, shall decide to be necessary for such water-power purposes, and which for such purposes shall be so withdrawn from the operation of this license, upon the condition, however, that the lessee or lessees of the said water-power, his or their executors, administrators, or assigns, shall and will pay to the licensee of this berth, his executors, administrators, or assigns, the value of all timber of seven inches and over in diameter at the stump on the portion of the tract so withdrawn, the value of such timber in case of dispute to be fixed by the Minister. 10

15. This license shall also be subject to the right of the Crown in the right of the Province to withdraw at any time from this berth any portion or tract of the lands comprising it which is required for the construction of any colonization or other road, or any road in lieu of or partly deviating from an allowance for road, drain or drainage works without compensation therefor.

16. If any railway company becomes entitled to a grant from His Majesty or His Successors of any portion of the lands herein described for the roadbed of the company's railway or branches thereof, or for stations, station grounds, workshops, dockyards and water frontage on navigable rivers, or building yards, or for other purposes required for the convenient, necessary and effective construction and working of the company's railway or any of its branches; and if His Majesty or His Successors grant the same to such railway company, the land so granted shall from and after the date of the grant cease to be under the operation of this license, but the licensee or his legal representative shall be at liberty to remove all property belonging to him or them and all timber then cut thereon from the land so granted; and shall also be entitled to cut and remove from the said land so granted as his or their own property, all trees then standing thereon or the timber obtained therefrom, provided that such property and cut timber, or property, cut timber and standing trees, or the timber obtained therefrom, are promptly removed from the said land upon receipt by the licensee or his legal representative of notice from the railway company to remove said property and cut timber, or to cut and remove such standing trees so as not to hinder or interfere with any work being done or about to be done by the railway company for the convenient, necessary and effective construction and working of the company's railway or of any of its branches; provided also, however, that if the licensee or his legal representative does not so remove such property or cut timber, or so cut and remove such standing trees or the timber obtained therefrom, the railway company may do so, and all cut timber and standing trees or the timber obtained therefrom, which have so to be removed or cut and removed by the railway company, 20 30 40

shall be the property of the Crown in the right of the Province and be disposed of as the Minister may decide.

17. Upon the withdrawal of any land from this berth the ground rent and Timber Areas Tax shall be reduced in proportion to the area withdrawn.

18. There is hereby reserved to the Crown:

(a) Out of the lands herein described all rights of fishery and fishing and occupation in connection therewith upon, around and adjacent to such lands;

10 (b) Out of the lands herein described all rights of trapping and shooting of game and occupation in connection therewith upon, around and adjacent to such lands;

(c) The right to such of the public as may at any time with the consent of the Minister pass and repass on foot or with or without vehicle, whether horse drawn or otherwise, across the lands herein described or any part thereof, excepting however any of the said lands occupied by any building, or any part thereof upon which the licensee has any building or other works properly connected with the project of the licensee.

20 19. In any case where waters flowing through, over or along, or having their source in this berth, empty into any stream or are tributary to any stream from which a domestic or municipal water supply is or may be obtained or contain fish, or in any case where the pollution of any such water, may, in the opinion of the Minister, deleteriously affect any municipal or domestic water supply, the licensee shall comply with the following Regulations:

(a) Locate all camp buildings, outhouses, cesspools and other structures at a sufficient distance from any stream, lake or other source of water supply, to prevent the pollution of such municipal or domestic water supply;

30 (b) Immediately remove and bury or burn any camp refuse or debris of any description, or any substance which would be likely to cause the pollution of any such waters, and otherwise keep the ground in the vicinity of all logging camps in a neat, orderly and sanitary condition;

(c) Prevent any depositing, leaving or accumulation in any stream, lake or other source of water supply within this berth, or in an exposed or insanitary condition on this berth, any debris of any description, or any substance which would be likely to cause the pollution of such waters;

40 (d) Prevent the depositing or leaving by any person employed or purporting to be employed about this berth, or the accumulation as a result of any operations carried on by reason of this license in any stream, lake or other source of such water supply on any Provincial lands whatever, or

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continued.

Exhibits and Documents in any exposed or insanitary condition of any such lands, of any such debris or substance;

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(e) Observe all laws and regulations respecting sanitation and the protection of the purity of waters which are applicable to the premises, or any Regulations which may be promulgated by the Lieutenant Governor in Council, and also comply with any requirements which may be made by the Minister for the purpose of carrying out the above provisions.

continued.

For each infraction of the provisions of this section the licensee shall, in addition to any other penalty, be liable on summary conviction to a fine not exceeding one hundred dollars, and such sum shall be recoverable with costs at the suit of and in the name of the Crown in the right of the Province. 10

20. (a) That the licensee shall not place logs or timber in any river or stream without first having obtained the written consent of the Director of Forestry; and

(b) Shall not pile logs or timber in the beds of any river or stream when there is not sufficient water in such river or stream to float such logs or timber; and

(c) Shall provide a sufficient patrol of the river or stream when floating logs to prevent any log jams or piling up of timber which may result in damage to any bridge, or other property. 20

21. This license cannot be assigned, sublet, or transferred without the consent of the Minister.

22. Any fire having caused damage to the timber on this berth must be reported immediately with full details to the Director of Forestry and the responsibility so to do shall rest with the licensee.

23. That the licensee shall have in operation within one year from the date of sale, and keep in operation for at least six months of each year of his holding, a saw-mill in connection with this berth, of a value of not less than \$2,000.00 capable of cutting in one day 1,000 feet board measure for every square mile of the area licensed, and shall manufacture in each year not less than 75,000 feet board measure of sawn lumber from timber cut on Provincial lands for each square mile or fraction thereof contained in this berth or shall establish such other manufacture of wood products as the Minister accepts as equivalent thereto. 30

24. That the licensee may in lieu of erecting a mill, be permitted to have the timber cut from this berth manufactured at a mill which is or is not his own property, provided that he cuts from this berth at the rate of 100,000 feet board measure annually for each square mile or fraction thereof held by him under this license. 40

25. That the licensee shall notify the Director of Forestry immediately upon the erection of a saw-mill together with its location.

Exhibits
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Documents

26. (a) This license shall be liable to forfeiture on the order of the Minister for violation of any one of the conditions to which it is subject or for any fraudulent return.

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(b) Before making an order for forfeiture the Minister shall cause written notice to be given to the licensee that it is the intention so to do, upon the grounds set forth in such notice, unless within sixty days after service of such notice the licensee shows cause to the contrary.

continued.

10 (c) Service of such notice may be effected by mailing the same, duly registered, to the address or the last known address of the licensee, and in such case shall be deemed to have been made upon the day on which the notice reached the said address or in due course of mail should have done so.

(d) Every order made by the Minister pursuant to this section shall be final and conclusive as against the licensee, and every person claiming by, through or under the licensee, and there shall be no appeal therefrom.

20 (e) If the violation of the Regulations refers merely to payment of money due under this license, the Minister may waive the power of forfeiture on payment of double the amount found by the Minister to be due, and costs, and may enforce payment in the manner provided for by The Provincial Lands Act, 1939, and the timber regulations now passed or which may at any time hereafter be passed, and take such action in regard to all other matters of forfeiture as may arise and be provided for by this section and by The Provincial Lands Act, 1939.

30 27. That the licensee shall pay and discharge all rates, assessments and taxes imposed by any Municipal, Improvement, School, Irrigation and Drainage Districts, now charged or hereafter to be charged upon this berth, as occupant, or upon the said licensee or occupier in respect thereof or payable by either in respect thereof.

28. Any notice, demand or other communication which His Majesty or the Minister may require or desire to give or serve upon the licensee may be validly given and served by the Deputy Minister of Lands and Mines, Director of Forestry or any person duly authorized in writing by the Minister.

40 DATED at the City of Edmonton }
This Twenty-Sixth day of Feb- }
ruary, one thousand nine hun- }
dred and forty-two (1942). }

(Sgd.) T. F. BLEFGEN,
for Deputy Minister of Lands
and Mines.

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continued.

We, D. R. Fraser & Co. Ltd., accept this license and agree to all the terms and conditions.

D. R. FRASER & CO. LIMITED

(Sgd.) E. R. MACDONALD,
Secretary.

Signature of Licensee.

[SEAL]

(Sgd.) JAMES ILES,

Witness to Signature of Licensee.

EDMONTON: Printed by A. Shnitka, King's Printer.

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No. 15
Provincial
Licence
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26th
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AHT/4

No. 15

Provincial Licence Berth 1727

(Appellant's Document)

Form D.
250-9-40

[CREST]

GOVERNMENT OF THE PROVINCE OF ALBERTA
Department of Lands and Mines

File No. 1176 T.L. 20
License No. 795
Berth No. 1727

LICENSE TO CUT TIMBER ON PROVINCIAL LANDS

KNOW ALL MEN BY THESE PRESENTS, that by virtue of the authority vested in me by The Provincial Lands Act, 1939, and by an order of His Honour the Lieutenant Governor in Council of the 25th day of July, 1940, I, The Honourable Nathan E. Tanner, the Minister of Lands and Mines of the Government of the Province of Alberta, do hereby in consideration of the sum of Three Hundred and Twenty-Four Dollars and Thirteen Cents (\$324.13) ground rent, license fee, fire-guarding charges and Timber Areas Tax, now paid to me for the use of His Majesty, and in consideration of the execution of the sale contract and the dues hereafter mentioned, give unto D. R. Fraser & Company, Ltd., of the City of Edmonton, in the Province of Alberta, hereinafter called the licensee, his executors and administrators, full right, power and license, subject to the conditions hereinafter mentioned and contained, and such other conditions and restrictions as are in that behalf contained in The Provincial Lands Act, 1939, and the amendments thereto, and in the Regulations respecting timber now passed or which may at any time hereafter be passed by the Lieutenant Governor in

30

Council, to cut timber on the following tract of land (hereinafter called the "berth") that is to say:

Exhibits
and
Documents

Firstly: All those parcels or tracts of land, situate, lying, and being in the Forty-eighth (48) Township, in the Sixth (6) Range, West of the Fifth (5) Meridian, in the Province of Alberta, Dominion of Canada, and being composed of:

—
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The South half and Legal Subdivisions Nine (9), Ten (10), Eleven (11), Twelve (12), and Sixteen (16), of Section Three (3), South half, North West quarter, and Legal Subdivisions Nine (9), Ten (10) and
10 Fifteen (15) of Section Four (4), South West quarter and Legal Subdivisions Eleven (11), Twelve (12), and Thirteen (13) of Section Nine (9), Legal Subdivisions One (1) and Eight (8) of Section Ten (10), North half, South West quarter, and Legal Subdivisions One (1), Seven (7) and Eight (8) of Section Twenty-four (24), North East quarter of Section Twenty-six (26), North half and Legal Subdivisions Five (5), Six (6), Seven (7) and Eight (8) of Section Twenty-seven (27), North half, South East quarter, and Legal Subdivisions Three (3), Five (5) and Six (6) of Section Thirty-one (31), West half and Legal Subdivisions Seven (7), Eight (8), Nine (9), and Ten (10) of Section Thirty-two (32), East half,
20 and Legal Subdivisions Three (3), Six (6), Eleven (11) and Fourteen (14) of Section Thirty-three (33), and South half and North East quarter of Section Thirty-five (35) of the said Township, as shown upon a map or plan of survey of the said Township, approved and confirmed at Ottawa on the Thirteenth (13) day of December, Nineteen Hundred and Eleven (1911), by Edouard Deville, Surveyor General of Dominion Lands, and on file in the Department of Lands and Mines at Edmonton.

continued.

Secondly: All those parcels or tracts of land, situate, lying, and being in the Forty-ninth (49) Township, in the Sixth (6) Range, West of the Fifth (5) Meridian, in the Province of Alberta, Dominion of Canada, and
30 being composed of:

South East quarter, and Legal Subdivisions Ten (10), Thirteen (13) and Fifteen (15) of Section Two (2), the whole of Sections Three (3) and Four (4), South half of Section Five (5), South half of Section Six (6), South East quarter of Section Nine (9), Legal Subdivisions One (1), Two (2), Three (3) and Four (4) of Section Ten (10) and that portion lying South of Timber Berth No. 1242 of Section Twenty-one (21) of the said Township, as shown upon a map or plan of Survey of the said Township, approved and confirmed at Ottawa on the Twenty-ninth (29) day of February, Nineteen Hundred and Twelve (1912), by Edouard Deville,
40 Surveyor General of Dominion Lands and on file in the Department of Lands and Mines at Edmonton.

The lands herein described containing an area of Twelve and Thirty-eight Hundredths (12.38) square miles, more or less, and designated as Timber Berth No. 1727.

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continued.

These lands are also shown on a plan of Survey of the said Timber Berth in Five (5) Blocks, approved and confirmed at Ottawa on the Fifteenth (15) day of February, Nineteen Hundred and Twelve (1912), by Edouard Deville, Surveyor General of Dominion Lands, and on file in the Department of Lands and Mines at Edmonton as No. 146 T, and to take and keep exclusive possession of the said lands except as hereinafter mentioned, for and during the period of one year, from the first day of April, 1941, to the thirty-first day of March, 1942, and no longer.

This license shall vest in the licensee, subject to the conditions mentioned in this license, all rights of property whatsoever in all trees, timber, lumber or other products of timber which he is entitled by this license to cut, and which have been cut within the limits of this berth during the continuance thereof, whether such trees, timber, lumber or other products are cut by consent of the licensee or by any other person without his consent, and shall vest in the licensee, as against any person other than the Crown in the right of the Province, subject to the conditions mentioned in this license, all right of property whatsoever in all trees, timber, lumber and other products of timber cut within the limits of this berth by any other person without his consent; and this license shall entitle the licensee to replevy, as his property, timber of any kind cut within the limits of this berth where it is found in the possession of any unauthorized person, and also to bring any action or suit for damages or any other appropriate remedy against such person who is unlawfully in possession of such timber, or who has unlawfully cut any timber of any kind in derogation of any rights of the licensee under this license, or who has entered without authority upon this berth covered by this license, and any such proceedings which have been commenced and are pending at the expiration of this license may be continued and completed as if this license had not expired.

This license is subject to the right of the Department, without compensating the licensee, to dispose of all dead or fallen timber on the area cut over by the licensee after due notice to such licensee, and to the right of the Department to remove all fire-killed or dead timber anywhere throughout the balance of the berth on failure of the licensee to remove same when requested to do so by the Minister, the cost of such disposition or removal to be born by the licensee.

This license is subject to the right of the Department to retain, when deemed advisable, the cash deposit made at the time of sale until the berth is cancelled as a guarantee that the licensee will pay all ground rent, dues and fire-guarding charges, will remove all merchantable timber from the berth and will dispose of the brush and other debris to the satisfaction of the Director of Forestry, failing in any one of which the deposit shall be forfeited, as to which the Minister shall be the judge.

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, 1939, and the amendments thereto, and in the Regulations respecting timber now passed or which may at any time hereafter be passed by order of His Honour the Lieutenant Governor in Council.

1. That the licensee shall not have the right hereunder to cut timber of a less diameter than seven inches measured eighteen inches from the ground, except such as may be actually necessary for the construction of roads and other works to facilitate the taking out of merchantable timber, and shall not have the right to cut any trees that may be designated by the proper officer of the Department as required to provide a supply of seed for the reproduction of the forest.

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2. All merchantable timber of a class authorized to be cut under this license shall be cut and taken from this berth as cutting progresses, and any timber of that class left uncut and unremoved after a date named in a notice, served on the licensee or his authorized agent, shall be estimated in feet board measure by a timber inspector, and shall be subject to payment to the Department, on demand, of ordinary dues, provided that the licensee shall not be required to cut and remove timber which the Director of Forestry deems to be inaccessible.

continued.

3. In the event of timber on this berth of the class authorized to be cut, becoming fire-killed or dead and a report being made by a timber inspector that the same can be cut and marketed by the licensee without monetary loss, the Minister may require the licensee to cut and remove the same, and all such timber left uncut and unremoved from this berth after a date named in a notice served upon the licensee, or his authorized agent, shall be estimated in feet board measure by a timber inspector and the licensee shall pay dues as provided in the Regulations according to such estimate thereon.

4. That the licensee shall be entitled to a renewal of this license from year to year while there is on this berth timber of the kind and dimensions described in this license in sufficient quantity to make it commercially valuable, or for the term set out in the notice of sale, if the terms and conditions of this license and the provisions of The Provincial Lands Act, 1939, and amendments thereto, and in the Regulations now passed or which may at any time hereafter be passed affecting the same have been fulfilled, as to which the Minister shall be the judge:

Provided that each renewal shall be subject to the payment of such ground rent, dues, license fee, fire-guarding charges and Timber Areas Tax, and to such terms and conditions as are fixed by the Regulations in force at the time the renewal is made and provided that the licensee shall have fully complied with all the terms and conditions of the sale contract covering this berth.

5. When, in the opinion of the Minister, any portion of this berth has not a sufficient quantity of the kind and dimensions of timber specified in this license for such berth to make it profitable to remove the timber upon such portion of this berth, and when in the opinion of the Minister, such portion of this berth is not necessary for the proper working of the remainder of this berth, the Minister may withdraw such portion from this berth:

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Provided that in no case shall such withdrawal be made until the expiration of sixty days after a notice in writing of the proposed withdrawal has been given to the licensee of this berth, or to his legal representative, by the Minister or by someone thereto authorized by the Minister.

6. If the Minister ascertains after an inspection has been made, that any land within the berth hereby licensed is fit for settlement and is required for that purpose, he may require the licensee to carry on the cutting of timber provided for by Section 21 of the timber regulations on the said land, and on the expiration of the time within which the timber which the licensee is entitled to cut should be removed therefrom may withdraw such land from this berth, and from the operation of this license. 10

7. That the licensee shall take from every tree he cuts down all the timber fit for use and manufacture the same into sawn lumber or some other saleable product, and shall dispose of the tops and branches and other debris of lumbering operations in such a way as to prevent as far as possible the danger of fire in accordance with the directions of the proper officers of the Department. Failure on the part of the licensee will subject him to the penalty of having his manufactured timber seized and his bush operations closed down, and in the discretion of the Minister, to forfeiture of this license. 20

8. That the licensee shall prevent all unnecessary destruction of growing timber on the part of his men and exercise strict and constant supervision to prevent the origin and spread of fire, and shall also comply during the term of this license and of any renewal thereof with all laws and regulations in that respect in force in the Province.

9. That the licensee shall furnish to the timber agent for the district having jurisdiction in the matter, at such periods as may be required by the Minister or by the Regulations now made or which may at any time hereafter be made under The Provincial Lands Act, 1939, returns sworn to by him or his agent or employee having a personal knowledge of the facts, showing the quantities manufactured, sold or disposed of, of all sawn lumber, timber or any other product of timber from this berth in whatever form the same may be sold or otherwise disposed of by him during such period. 30

10. That the licensee, in addition to the said ground rent and license fee, shall pay dues as prescribed by Order in Council of the 30th day of May 1941 and numbered (O.C. 747-41), the Timber Areas Tax, and one-half of the cost incurred by the Crown in guarding the timber from fire.

11. (a) That the licensee shall keep a "Lumber Sales Book," in which shall be entered all sales of the products of this berth, both cash and credit sales, also a book accounting for the number of feet of sawn lumber manufactured each day at the mill, with the day and date; all books and memoranda kept at the logging camps shall be carefully preserved and these 40

and other books kept by the licensee in connection with his lumbering business he shall submit for the inspection of the Director of Forestry or other officer of the Crown whenever required for the purpose of verifying his returns aforesaid.

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- (b) That the licensee shall keep a bush count of all sawlogs and other timber cut upon this berth, as well as the number of pieces hauled therefrom, in the form of a book to be obtained for the purpose from the Department. The books covering operations for twelve months ending the 31st of March in each year shall be returned without delay to the Director of Forestry duly completed by the foreman in charge of operations, who shall subscribe to the affidavit therein.

12. This license shall be subject to the provisions of The Provincial Lands Act, 1939, or of any other Act or of any Regulations now made or which may at any time hereafter be made thereunder, dealing with or affecting the disposal of quarriable stone, salt, petroleum, natural gas, coal, gold, silver, copper, iron or other minerals within or under lands within the boundaries of this berth; and in and by virtue of any grant, lease or permit issued under Regulations made as aforesaid, the grantee, lessee, or permittee, shall have the right to have, use and hold possession of such land as is described in the grant, lease or permit, for quarrying stone, for the boring or operating of any salt, oil, or natural gas wells, or for the working of any mines, and the right to open any roads necessary in connection with such works.

Provided that the licensee shall be paid by the grantee, lessee or permittee the value of all timber cut, damaged or destroyed in making such roads, or in boring or operating any salt, oil or gas wells, or in working any quarries, or mines, or as a consequence directly or indirectly of any such operation or work.

13. This license shall be subject to the right of the Minister to permit prospecting on this berth for quarriable stone, salt, petroleum, natural gas, coal, gold, silver, copper, iron, or other minerals; but the licensee shall be notified of every such permission and shall be entitled to compensation from the prospector or as a consequence of his prospecting of this berth and the determination of such compensation shall be in a manner to be prescribed by the Minister.

14. This license shall be subject to the right of the Minister to withdraw at any time from this berth any portion or tract of the lands comprising it which is required for waterpower purposes or is necessary in connection therewith by the lessee or lessees of the waterpower, their executors, administrators, or assigns, and which the Minister, as the representative of the Crown herein, shall decide to be necessary for such water-power purposes, and which for such purposes shall be so withdrawn from the operation of this license, upon the condition, however, that the lessee or lessees of the said water-power, his or their executors, administrators, or

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assigns, shall and will pay to the licensee of this berth, his executors, administrators, or assigns, the value of all timber of seven inches and over in diameter at the stump on the portion of the tract so withdrawn, the value of such timber in case of dispute to be fixed by the Minister.

15. This license shall also be subject to the right of the Crown in the right of the Province to withdraw at any time from this berth any portion or tract of the lands comprising it which is required for the construction of any colonization or other road, or any road in lieu of or partly deviating from an allowance for road, drain or drainage works without compensation therefor.

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16. If any railway company becomes entitled to a grant from His Majesty or His Successors of any portion of the lands herein described for the roadbed of the company's railway or branches thereof, or for stations, station grounds, workshops, dockyards and water frontage on navigable rivers, or building yards, or for other purposes required for the convenient, necessary and effective construction and working of the company's railway or any of its branches; and if His Majesty or His Successors grant the same to such railway company, the land so granted shall from and after the date of the grant cease to be under the operation of this license, but the licensee or his legal representative shall be at liberty to remove all property belonging to him or them and all timber then cut thereon from the land so granted; and shall also be entitled to cut and remove from the said land so granted as his or their own property, all trees then standing thereon or the timber obtained therefrom, provided that such property and cut timber, or property, cut timber and standing trees, or the timber obtained therefrom, are promptly removed from the said land upon receipt by the licensee or his legal representative of notice from the railway company to remove said property and cut timber, or to cut and remove such standing trees so as not to hinder or interfere with any work being done or about to be done by the railway company for the convenient, necessary and effective construction and working of the company's railway or of any of its branches; provided also, however, that if the licensee or his legal representative does not so remove such property or cut timber, or so cut and remove such standing trees or the timber obtained therefrom, the railway company may do so, and all cut timber and standing trees or the timber obtained therefrom, which have so to be removed or cut and removed by the railway company, shall be the property of the Crown in the right of the Province and be disposed of as the Minister may decide.

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17. Upon the withdrawal of any land from this berth the ground rent and Timber Areas Tax shall be reduced in proportion to the area withdrawn.

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18. There is hereby reserved to the Crown:

(a) Out of the lands herein described all rights of fishery and fishing and occupation in connection therewith upon, around and adjacent to such lands;

(b) Out of the lands herein described all rights of trapping and shooting of game and occupation in connection therewith upon, around and adjacent to such lands;

(c) The right to such of the public as may at any time with the consent of the Minister pass and repass on foot or with or without vehicle, whether horse drawn or otherwise, across the lands herein described or any part thereof, excepting however any of the said lands occupied by any building, or any part thereof upon which the licensee has any building or other works properly connected with the project of the licensee.

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10 19. In any case where waters flowing through, over or along, or having their source in this berth, empty into any stream or are tributary to any stream from which a domestic or municipal water supply is or may be obtained or contain fish, or in any case where the pollution of any such water, may, in the opinion of the Minister, deleteriously affect any municipal or domestic water supply, the licensee shall comply with the following Regulations:

20 (a) Locate all camp buildings, outhouses, cesspools and other structures at a sufficient distance from any stream, lake or other source of water supply, to prevent the pollution of such municipal or domestic water supply;

(b) Immediately remove and bury or burn any camp refuse or debris of any description, or any substance which would be likely to cause the pollution of any such waters, and otherwise keep the ground in the vicinity of all logging camps in a neat, orderly and sanitary condition;

(c) Prevent any depositing, leaving or accumulation in any stream, lake or other source of water supply within this berth, or in an exposed or insanitary condition on this berth, any debris of any description, or any substance which would be likely to cause the pollution of such waters;

30 (d) Prevent the depositing or leaving by any person employed or purporting to be employed about this berth, or the accumulation as a result of any operations carried on by reason of this license in any stream, lake or other source of such water supply on any Provincial lands whatever, or in any exposed or insanitary condition of any such lands, of any such debris or substance;

(e) Observe all laws and regulations respecting sanitation and the protection of the purity of waters which are applicable to the premises, or any Regulations which may be promulgated by the Lieutenant Governor in Council, and also comply with any requirements which may be made by the Minister for the purpose of carrying out the above provisions.

40 For each infraction of the provisions of this section the licensee shall, in addition to any other penalty, be liable on summary conviction to a fine not exceeding one hundred dollars, and such sum shall be recoverable

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with costs at the suit of and in the name of the Crown in the right of the Province.

20. (a) That the licensee shall not place logs or timber in any river or stream without first having obtained the written consent of the Director of Forestry; and

(b) Shall not pile logs or timber in the beds of any river or stream when there is not sufficient water in such river or stream to float such logs or timber; and

(c) Shall provide a sufficient patrol of the river or stream when floating logs to prevent any log jams or piling up of timber which may result in damage to any bridge, or other property. 10

21. This license cannot be assigned, sublet, or transferred without the consent of the Minister.

22. Any fire having caused damage to the timber on this berth must be reported immediately with full details to the Director of Forestry and the responsibility so to do shall rest with the licensee.

23. That the licensee shall have in operation within one year from the date of sale, and keep in operation for at least six months of each year of his holding, a saw-mill in connection with this berth, of a value of not less than \$2,000.00 capable of cutting in one day 1,000 feet board measure for every square mile of the area licensed, and shall manufacture in each year not less than 75,000 feet board measure of sawn lumber from timber cut on Provincial lands for each square mile or fraction thereof contained in this berth or shall establish such other manufacture of wood products as the Minister accepts as equivalent thereto. 20

24. That the licensee may in lieu of erecting a mill, be permitted to have the timber cut from this berth manufactured at a mill which is or is not his own property, provided that he cuts from this berth at the rate of 100,000 feet board measure annually for each square mile or fraction thereof held by him under this license. 30

25. That the licensee shall notify the Director of Forestry immediately upon the erection of a saw-mill together with its location.

26. (a) This license shall be liable to forfeiture on the order of the Minister for violation of any one of the conditions to which it is subject or for any fraudulent return.

(b) Before making an order for forfeiture the Minister shall cause written notice to be given to the licensee that it is the intention so to do, upon the grounds set forth in such notice, unless within sixty days after service of such notice the licensee shows cause to the contrary.

(c) Service of such notice may be effected by mailing the same, duly registered, to the address or the last known address of the licensee, 40

and in such case shall be deemed to have been made upon the day on which the notice reached the said address or in due course of mail should have done so.

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(d) Every order made by the Minister pursuant to this section shall be final and conclusive as against the licensee, and every person claiming by, through or under the licensee, and there shall be no appeal therefrom.

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10 (e) If the violation of the Regulations refers merely to payment of money due under this license, the Minister may waive the power of forfeiture on payment of double the amount found by the Minister to be due, and costs, and may enforce payment in the manner provided for by The Provincial Lands Act, 1939, and the timber regulations now passed or which may at any time hereafter be passed, and take such action in regard to all other matters of forfeiture as may arise and be provided for by this section and by The Provincial Lands Act, 1939.

continued.

20 27. That the licensee shall pay and discharge all rates, assessments and taxes imposed by any Municipal, Improvement, School, Irrigation and Drainage Districts, now charged or hereafter to be charged upon this berth, as occupant, or upon the said licensee or occupier in respect thereof or payable by either in respect thereof.

28. Any notice, demand or other communication which His Majesty or the Minister may require or desire to give or serve upon the licensee may be validly given and served by the Deputy Minister of Lands and Mines, Director of Forestry or any person duly authorized in writing by the Minister.

DATED at the City of Edmonton }
This Twenty-Sixth day of Feb- }
ruary, one thousand nine hun- }
dred and forty-two (1942). }

(Sgd.) T. F. BLEFGEN,
for Deputy Minister of Lands
and Mines.

30 We, D. R. Fraser & Co. Ltd., accept this license and agree to all the terms and conditions.

D. R. FRASER & CO. LIMITED

(Sgd.) E. R. MACDONALD,
Secretary.
Signature of Licensee.

[SEAL]

(Sgd.) JAMES ILES,
Witness to Signature of Licensee.

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No. 5

Pages 2087 to 2089 Inclusive of Volume 1
 Dominion of Canada Taxation Services
 (Appellant's Document)

"RE: SPECIAL ALLOWANCES FOR SAW-LOGS
 SCALED IN THE CALENDAR YEAR 1943.

"For all saw-logs scaled in the area generally described as West of the Cascades Range of mountains or all saw-logs scaled that go to the salt water of the Pacific, or commonly referred to as the Coastal Logging area, or in case of doubt, such area as the Minister may determine, there will be granted as a special allowance in determining income of persons engaged in this industry:— 10

"Part 1. \$1.00 per M.B.M. on all saw-logs scaled in the calendar year 1943 in the area mentioned.

"All persons making claim for the special allowance herein provided for must submit to the Inspector of Income Tax at Vancouver, the following:

"Official statement from the Forestry Branch of the Provincial Government (or in the case of operators in Crown Grant Timber, a statement of scalings supported by affidavits) showing the total footage of logs scaled during the period, including a declaration that Royalties and Stumpage on Provincial Timber Sales included therein, have been paid in respect of:— 20

"(a) If the fiscal period is coincident with the calendar year, all saw-logs scaled during the calendar year,

"(b) If the fiscal period is not coincident with the calendar year, all saw-logs scaled from 1st Section 6, Ss. (2), Para. (a) 2087 January, 1943, to the close of the fiscal period in that year, and

"(c) As to the fiscal period ending in 1944 that is not coincident with the calendar year, all saw-logs scaled from the first day of the fiscal period commencing in 1943 to the 31st December, 1943. 30

"Part 2. And a further allowance of —

\$1.00 per M.B.M. for all saw-logs scaled in the Calendar year that are in excess of either—

"(a) 60% of saw-logs scaled in the calendar year 1941, or

“(b) If the 1941 scalings are 75% or less of the saw-logs scaled in 1943, then the 1942 scalings will be used in lieu of the 1941 scalings and the 60% immediately above referred to will apply to the saw-logs scaled that are in excess of 60% of the 1942 scalings.

“(c) 60% of the saw-logs scaled in 1943—if it should be that any person for the first time enters upon the production of saw-logs in 1943.

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Examples of the foregoing follows:—

10	M.B.M.	M.B.M.	M.B.M.	<i>continued.</i>
	1941 Scalings 1000	60% Base	600	
	1942 Scalings 1000			
	1943 Scalings 1000			
	Allowances at \$1.00 per M.B.M., 1943		\$1,000.00	
	Allowances on excess of bas—400 M.B.M. at \$1.00		400.00	
			\$1,400.00	
	(b) Scalings in 1941 75% or less of the 1942 scalings			
	1941 Scalings 700			
	1942 Scalings 1000			
20	1943 Scalings 1000			
	As 1941 Scalings are below 75% of 1942 Scalings, the base for the excess will be the 1942 scalings.			
	Allowance at \$1.00 per M.B.M. 1943		\$1,000.00	
	Allowance on excess scalings 60% of 1942—400 at \$1.00		400.00	
			\$1,400.00	
	(c) New business in 1943			
	1941 Not in production			
	1942 Not in production			
	1943 Scalings 1000 M.B.M.			
30	Allowance of \$1.00 per M.B.M. 1943		\$1,000.00	
	Allowance on excess of 60% at \$1.00 per M.B.M.—			
	400 at \$1.00		400.00	
			\$1,400.00	

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“All persons claiming the further allowance as provided in Part 2 hereof must submit an official statement from the Forest Branch as provided in Part 1 of this memorandum in respect of saw-logs scaled in the calendar year—

- (a) 1941;
- (b) 1942;
- (c) 1943;

“Where the fiscal period is not coincident with the calendar year, this further allowance is only to be granted to the extent that such persons increased their production for the whole of the calendar year 1943 over 60% referred to. 10

“The 60% base will be applied to all saw-logs scaled in the appropriate years 1941 or 1942 without having regard to the destination of the logs but the 1943 scalings shall not include any logs that were actually exported to higher-priced markets. In other words, the further allowance will only be allowed in respect of saw-logs not exported from Canada.

“It is emphasized that these additional allowances apply only in respect of logs scaled in the calendar year 1943 and are not intended to apply in respect of any year prior or subsequent thereto. 20

“The allowances will be granted only in respect of logs which pay royalty to the Government of British Columbia as saw-logs. Timber lands which were subject to royalty on a per cord basis in 1942 must be so classified in 1943.

“The allowances will be claimed by deducting the appropriate amount from taxable income shown on the 1943 return or, in the case of an operator with a fiscal period other than the calendar year, by deducting the appropriate amounts from the taxable income shown on the 1943 and 1944 returns. It is not required that an entry be made in the books of the taxpayer.” 30

No. 4

**Pages 10 to 18 Inclusive, Gordon's Digest of Income Tax Cases
(Appellant's Document)**

EX. No. 3.
Examination of C. F. Elliott.

DEPLETION—COAL COMPANIES.

10 Having regard to Section 5, Subsection 1 (a) of The Income War Tax Act, as amended by Section 4 of 18-19 George V, Chapter 12, you are hereby notified that 10 cents per ton for each ton mines will be admitted as Depletion to every coal company where the title to the mine is vested in such company.

A similar allowance of 10 cents per ton will also be admitted to every coal company operating under a lease where depletion is not claimed by owner. If any case develops where depletion is claimed by both owner and lessee, the relative facts must be submitted to the Department for instructions.

11th December, 1928.

DEPLETION ALLOWANCE IN RESPECT OF BASE METALS.

20 The Department has had under consideration the question of allowance of depletion to mining companies operating base metal mines as a result of which you are advised that commencing with the taxation year 1929 the depletion rate will be increased from 25 per cent to 33 1/3 per cent on such companies' mining profits. This ruling will include companies mining nickel, copper, lead, zinc, tin and asbestos.

This rate of 33 1/3 per cent is to cover also any precious metals which may be recovered during the course of base mining operations.

The shareholders of such companies commencing with the year 1929 will also be allowed 33 1/3 per cent in respect of the dividends from such companies as a return of capital.

30 8th November 1929.

DEPLETION OF DIVIDENDS OF MINING COMPANIES

Whereas the Honourable the Minister of Finance, in his Budget announcement of the 22nd ultimo, stated:—
(Page 2152 of Hansard)

With regard to the existing regulations allowing depletion to mines, it is believed that several of these provisions have been unduly generous in their operation. Not only has it been pointed out that the specific rate of fifty per cent in the case of precious metal mines could fairly be reduced, but also that the granting of depletion to

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both corporation and shareholder at the present rates cannot well be defended.

Dividends received by shareholders are to be taxed by reducing the allowance from fifty per cent to twenty per cent.

you are hereby advised that for the 1934 fiscal period and subsequent periods, in conformity with the foregoing, shareholders, irrespective of the depletion heretofore allowed, either to the company of which they hold shares or to themselves, will be allowed, in determining the portion of the dividend income taxable, a depletion rate of twenty per cent, unless a lesser rate of depletion has heretofore been allowed, in which case the lesser rate shall continue. 10

The above ruling modifies ruling No. 27 entitled "Depletion allowance in respect of Base Metals" issued 8th November, 1929, and ruling No. 41 entitled "Depletion Allowable on Dividends of Base and Precious Metal Mining Companies" issued 8th September, 1931.

9th April, 1935.

DEPLETION IN RESPECT OF MINING COMPANIES

Whereas the Honourable the Minister of Finance, in his Budget announcement of the 22nd ultimo, stated:—

(Page 2152 of Hansard)

20

With regard to the existing regulations allowing depletion to mines, it is believed that several of these provisions have been unduly generous in their operation. Not only has it been pointed out that the specific rate of fifty per cent in the case of precious metal mines could fairly be reduced, but also that the granting of depletion to both corporation and shareholder at the present rates cannot well be defended.

The rate of depletion allowance granted to precious metal mines is to be reduced from 50 per cent to 33 1/3 per cent.

you are hereby advised that for the 1934 fiscal period and subsequent periods the depletion rate to be allowed to precious and base metal mines will be 33 1/3 per cent. 30

The above ruling modifies ruling No. 27 entitled "Depletion Allowance in Respect of Base Metals" issued 8th November, 1929.

9th April, 1935.

DEPLETION ALLOWABLE ON DIVIDENDS OF BASE AND PRECIOUS METAL MINING COMPANIES

A revised list of metal producing companies and holding companies has been prepared showing depletion allowable on dividends in the case of producing companies. The classification is as per list below. 40

Where depletion is allowed on the dividends of a company which maintains a depletion reserve on its books, all disbursements to shareholders from the depletion reserve will be taxable in the shareholders' hands, less allowance for depletion as shown on the list.

Where a question of allowance for depletion arises and the company paying the dividend is not shown on the list, this office should be communicated with by letter for ruling so that the decision arrived at may be circulated to all Inspectors.

8th September, 1931.

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LIST (Revised 5th January, 1937).

BASE METALS

No Depletion Any Year.

(Holding or Exploration Companies)

Amalgamated Metal Corp. Ltd.
Anglo Huronian Ltd.
American Metal Co. Ltd.
Anglo American Corp. of South Africa.
Gold Fields Consolidated Mines Ltd.
Howe, F. Sound Co.
International Mining Corp.
International Silver Co.
McKinley Mines Securities Co. Ltd.
Metal & Mining Shares Inc.
National Lead Co.
Newmont Mining Co.
Petaling Tin Co.
Quebec Prospectors, Ltd.
Rand Mines, Ltd.
Rand Selection Corp. Ltd.
Revere Copper & Brass Co.
Reynolds Metals Company.
Rhodesian Anglo American Co. Ltd.
Tennessee Copper & Chemical Co.

20

30

20 per cent Depletion 1934 and Subsequent Years
33 1/3 per cent Depletion 1929-1933 Inclusive
25 per cent—1928 and Prior Years.

(Producing Companies)

American Smelting & Refining Co.
American Zinc, Lead & Smelting Co.
Anaconda Copper Co.
Andes Copper Co.
Bunker Hill & Sullivan Mining Co.

40

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Butte & Superior Mining Co.	
Butte Copper & Zinc Co.	
Bwana M'KUBwa Copper Mining Co. Ltd.	
Callahan Zinc Lead Co.	
Calumet & Arizona Mining Co.	
Calumet & Hecla Consolidated.	
Canam Metals Ltd.	
Chili Copper Co.	
Cerro De Pasco Copper Corp.	
Consolidated Coppermines Corp.	10
Consolidated Lead & Zinc Co.	
Consolidated Mining & Smelting Co. of Canada, Ltd.	
Copper Range Co.	
Federal Mining & Smelting Co.	
Fentic Standard Mining Co.	
Granby Consolidated Mining & Smelting Co.	
Green-Cananea Copper Co.	
Falconbridge Nickel Mines, Ltd.	
Hecla Mining Co.	
Hudson Bay Mining & Smelting Co.	20
Inspiration Consolidated Copper Co.	
International Nickel Co. of Canada Ltd. (1929 and sub. years only).	
Kenecott Copper Corp.	
Magna Copper Co.	
Miami Copper Co.	
Mohawk Mining Co.	
Motherlode Coalition Mines Ltd.	
Nevada Consolidated Copper Co.	
New Cornelia Copper Co.	30
New Jersey Zinc Co.	
Noranda Mines Ltd.	
New Quincy Mining Co.	
Noble Five Mines Ltd.	
Park Utah Consolidated.	
Patino Mining & Engineering Co.	
Phelps Dodge Company	
Ohio Copper Co.	
Quincy Mining Co.	
Rhodesian Congo Border Concession, Ltd.	40
Roan Antelope Copper Co.	
San Francisco Mines of Mexico Ltd.	
St. Joseph Lead Co.	
Seneca Copper Co.	
Silversmith Mines, Ltd.	
U. S. Smelting, Refining & Mining Co.	
Utah Copper Co.	

United Verde Extension Co.
Utah Apex Mining Co.
Walker Mining Co.

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GOLD AND SILVER

20 per cent—1934 and Subsequent Years—50 per cent 1933
and Previous Years.

(Producing Companies)

Alaska Juneau Gold Mining Co.
Beaverdale Wellington Syndicates Ltd.
10 Bell Mine, Ltd.
Brakpan Mines Ltd.
Bralorne Mines Ltd.
Buffalo Ankerite Gold Mines, Ltd.
Bulolo Gold Dredging Ltd.
Cariboo Gold Quartz Mining Co. Ltd.
Coniagas Mines Ltd.
Cressen Consolidated Gold Mining Co.
Crown Mines Ltd.
Dome Mines Ltd.
20 Goduld Proprietary Mines Ltd.
Government Gold Mining Areas Ltd.
Highland Lass Ltd.
Hollinger Consolidated Gold Mines Ltd.
Homestake Mining Co.
Howey Gold Mines Ltd.
Island Mountain Mines Co. Ltd.
Keno Hill Ltd.
Kirkland Lake Gold Mines Ltd.
Lake Shore Mines Ltd.
30 Langlaate Estates Ltd.
Macassa Mines, Ltd.
McIntyre Porcupine Gold Mines Ltd.
Manitowan Exploration Co. Ltd.
Mining Corporation of Canada Ltd.
New State Area Ltd.
Nipissing Mining Co. Ltd.
Pioneer Gold Mines of B.C. Ltd.
Pioneer Gold Mining Co. Ltd.
Randfontein Estates Gold Mining Co. Ltd.
40 Reno Gold Mines Ltd.
Rhodesian Gold Fields Development Co. Ltd.
San Antonio Gold Mines, Ltd.
Seven Troughs Gold Mines Ltd.
Siscoe Gold Mines Ltd.
Slocan Silver Mines Ltd.

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Spring Mines Ltd.
Sub Nigel Gold Mining Co. Ltd.
Sylvanite Gold Mines Ltd.
Teck-Hughes Gold Mines Ltd.
Toburn Gold Mines Ltd.
Tomopah Mining Co. of Nevada.
Van Ryn Development Ltd.
Wright-Hargreaves Mines Ltd.

NO DEPLETION

(Holding Companies)

10

Gachin Gold Syndicate
Kerr Lake Mines
Northern Canada Mining Corpn. Ltd.

SULPHUR

	1933 and Prior Years	1934 and Subsequent Years
Freeport Texas Company	33 1/3%	20%
Texas Gulf Sulphur Company	50%	20%

**DEPLETION ALLOWANCE ON DIVIDENDS OF OIL
COMPANIES**

20

A revised list of producing oil companies, oil refining or marketing companies and holding companies has been prepared showing depletion allowable on dividends in the case of producing companies. Classification is as per the list below.

Where depletion is allowed on the dividends of a company which maintains a depletion reserve on its books, all disbursements to shareholders from the depletion reserve will be taxable in the shareholders' hands, less allowance for depletion as shown on the list.

Where a question of allowance for depletion arises and the company paying the dividend is not shown on the list, this office should be communicated with by letter for ruling so that the decision arrived at may be circulated to all Inspectors. 30

8th September, 1931.

LIST (Revised 5th January, 1937).

CANADIAN

No Depletion Any Year.

(Refining or Marketing Companies).

British American Oil Ltd.
 Canadian Oil Companies, Ltd.
 Imperial Oil, Ltd.
 McColl Frontenac Oil, Ltd.
 North Star Oil, Ltd.
 Prairie Cities Oil Co. Ltd.
 Service Stations, Ltd.
 Supertest Petroleum Co. Ltd.

10

20% Depletion 1934 and Subsequent Years

25% Depletion 1933 and Prior Years

(Producing Companies).

Acme Gas & Oil Co. Ltd.
 Admiral Oils Ltd.
 Ajax Gas & Oil Co. Ltd.
 Calgary & Edmonton Corp. Ltd.
 Canadian Western Natural Gas, Light, Heat & Power
 Co. Ltd.
 Haldimand Gas Fields Ltd.
 Home Oil Co. Ltd.
 Hylco Oils Ltd.
 Maple Leaf Oil Co. Ltd.
 McLeod Oils Ltd.
 Mercury Oils Ltd.
 Merland Oils, Ltd.
 Model Oils, Ltd.
 Petrol Oil & Gas Company
 Provincial Natural Gas Fuel Co. of Ontario, Ltd.
 Royalite Oil Co. Ltd.
 Southern Alberta Exploration Co. Ltd.
 Spooner Oils, Ltd.
 Sterling Pacific Oil Co. Ltd.
 Union Gas Co. of Canada, Ltd. (1931 and sub. years).
 United Oil Ltd.
 Wellington Oil & Gas Co. Ltd.
 Widney Petroleums, Ltd.

20

30

10% Depletion All Years.

Canadian Royalty Oil Co. Ltd.
 Dominion Royalty Corp. Ltd.
 Premier Royalties Ltd.

40

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Royalties & Standard Shares, Ltd.
Second Standard Royalties Ltd.
Standard Royalties Ltd.

NON-CANADIAN

No Depletion Any Year.

(Refining and Marketing or Holding Companies)

Andian National Corp. Ltd.	
Anglo American Oil Co. Ltd.	
Apex Oil Corp.	
Atlantic Refining Co.	10
Bishop Oil Corp.	
Borne Scrymser Co.	
California Petroleum Co.	
Canadian Eagle Oil Co.	
Cities Service Co.	
Commonwealth Royalties Syndicate.	
Consolidated Oil Corporation (formerly Sinclair Consolidated).	
Gulf Oil Corporation	
Indian Refining Co.	20
Investors Royalty Co. Inc.	
Middle States Petroleum Corp.	
New Bradford Oil Co.	
Oil Shares Incorporated	
Pan-American Petroleum Transport Company	
Panhandle Producing & Refining Co.	
Petroleum Corp. of America	
Pierce Petroleum Corp.	
Royal Dutch Co.	
Rio Grande Oil Co.	30
Seaboard Oil of Delaware	
Shell Trans. & Trading Co.	
Shell Union Oil Corp.	
Simms Petroleum Co.	
Sinclair Consolidated Oil Corp.	
Standard Oil Co. of Kentucky	
Standard Oil Co. of Kansas	
Standard Oil Co. of Nebraska	
Standard Oil Co. of New Jersey	
Standard Oil Co. of Ohio	40
Sun Oil Co.	
Sun Ray Oil Corp.	
Swan-Finch Oil Corp.	

Texas Corp.
 Tide Water Associated Oil Co.
 Tide Water Oil Co.
 Wesson Oil & Snowdrift Co. Inc.
 All Pipe Line Companies

10% Depletion All Years.
 (Producing Companies).

10 Amerada Corp.
 Amerada Dixie Co.
 Associated Oil Co.
 Barnsdall Corp.
 Burma Oil Co. Ltd.
 Cosden Oil Co.
 Colonial Beacon Oil Co.
 Consolidated Royalty Oil Inc.
 Continental Oil Co.
 Donelon Oil Co.
 Hargay Oil & Refining Co.
 Houston Oil Co.
 20 Humble Oil & Refining Co.
 Imperial Royalties Co.
 Independence Oil & Gas Co.
 International Petroleum Ltd.
 Jefferson Lake Oil Co. Inc.
 Kirby Petroleum Company
 Lion Oil Refining Co.
 Louisiana Oil Refining Corp.
 Magnolian Petroleum Co.
 Mexican Eagle Oil Co. Ltd.
 30 Mid-Continental Petroleum Corp.
 Monarch Royalty Corp.
 Mountain Producers Corp.
 Mountain & Gulf Oil Co.
 Ohio Oil Co.
 Pacific Oil Co.
 Petroleum Exploration, Inc.
 Petroleum Royalties Co. of Oklahoma
 Phillips Petroleum Co.
 40 Pierce Oil Corp.
 Plymouth Oil Co.
 Prairie Oil & Gas Co.
 Producers Royalty Corp.
 Pure Oil Co.

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Richfield Oil Co.	
Royalty Corp. of America, Inc.	
Royalties Management Corp.	
Salt Creek Consolidated Oil Co.	
Salt Creek Producers Inc.	
Skelly Oil Co.	
Socony Vacuum Corp.	
Southland Royalty Co.	
South Penn. Oil Co.	
Standard Oil of California	10
Standard Oil of Indiana	
Standard Oil of New York	
Superior Oil Corp.	
Texas Canadian Oil Corp.	
Texas Pacific Coal & Oil Co.	
Transcontinental Oil Co.	
Union Oil Co. of California	
Washington Oil Co.	
Washington Royalties Co.	
Westland Oil Co.	20
White Eagle Oil Co.	
Wilcox Oil & Gas Company	
Vacuum Oil Co.	

No. 1
Amended Return T2 for Year Ending October 31st, 1941,
and Notice of Assessment
(Appellant's Document)

Exhibits and Documents
No. 1
Amended Return T2 for year ending October 31st, 1941, and Notice of Assessment 5th February, 1944.

All communications addressed to the Inspector of Income Tax must have sufficient postage affixed. Cheques must have excise stamps affixed.



AMENDED RETURN.

T 2-1941

Income and Excess Profits For use by corporations

Key No.
Carded by
Occupational Code
Income Code No.

DOMINION OF CANADA
INCOME AND EXCESS PROFITS TAX

DATE RECD BY INSP

#26768

Jan 1942

Sept. 1941

RETURN OF INCOME FOR THE FISCAL YEAR ENDED October 31st 1941

This return is to be prepared in triplicate. One copy is to be retained by the taxpayer and two copies must be delivered, or mailed, postpaid, to the Inspector of Income Tax, POST OFFICE BUILDING, EDMONTON, ALTA.

In every case within four months from the close of the 1941 fiscal year of the Company.

- 1. Name of Corporation... D. R. FRASER & COMPANY LIMITED
2. Descriptive nature of business... Lumber Manufacturers
3. (a) Address of Main Office in Canada... 10140 - 97th Street, Edmonton, Alberta
(b) Address to which it is desired mail be sent... As above.
(c) Names and addresses of Parent, Subsidiary or Affiliated Companies... Nil

If Head Office is outside Manitoba, are you carrying on business in Manitoba?
If yes, complete Income Tax Return Dom.-Man. T. 2
Note - Did you receive income from sources within the United States for or on account of:
(a) the company?
(b) any other person resident in Canada?
(c) any person not resident in Canada?

Table with 3 columns: Description, For Taxpayer's Use, For Departmental Use. Rows include Income Subject to Tax, Tax at 18%, Tax at 20%, Less Capital Expenditure allowance, Penalty of 5%, and Income Tax Payable.

7. PAYMENT herewith by cheque payable to the Receiver General of Canada as follows:
(a) INCOME TAX (Item 6E) \$2,664.00
(b) EXCESS PROFITS TAX (Item 52) \$4,335.00 Total \$7,000.00
A. Not less than one-third of the amount of the tax may be paid on the due date...
B. An amount equal to one-twelfth of the 1940 estimated tax during each of the last four months of the 1941 fiscal period...

8. I, E. H. Macdonald, on behalf of the above-named company DO HEREBY CERTIFY that this return in compliance with the requirements of the Income War Tax Act and the Excess Profits Tax Act and the statements and schedules attached, contain a full and complete disclosure of the total income of the said Company from all sources...

Date January 25th 1942 Telephone No. 21430
Signature of an authorized Officer of the Company
Position or Rank of Officer

9. INSTRUCTIONS:
(a) The information requested must be furnished.
(b) Every company, as well as completing this form, must attach a copy of auditor's complete unabridged report with certified financial statements in duplicate including Assets and Liabilities, Trading or Operating and Profit and Loss Statements for the accounting period covered by this return or attach completed T 2 Supplemental Forms (which are short financial statements) in duplicate.

10. PENALTIES:
(a) For failure to file return within four months from the close of the Company's fiscal year - Five per centum of the tax payable with a maximum penalty of Five Hundred Dollars.
(b) For False Return - Upon summary conviction a fine not exceeding Ten Thousand Dollars or six months' imprisonment or both fine and imprisonment.
(c) If any person omits to declare any dividends, rentals, interest, royalties or other like income such person may be assessed as if double the income so omitted had been received. This is in addition to all other penalties.
(d) For incomplete compilation of this Form - 1% of the tax payable. Minimum \$1.00, Maximum, \$20.00. Minor omissions are sufficient to incur the penalty.

1940 Assessed on T 6-2 No. FOR DEPARTMENTAL USE
1941 Assessed on T 6-2 No. Date 1941 Assessor I.O. H.O.

Exhibits and Documents

No. 1 Amended Return T2 for year ending October 31st, 1941, and Notice of Assessment 5th February, 1944.

continued.

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Read Items 9 and 10 before completing this form.

T 2-1941

The following questions are to be carefully answered and supplementary statements attached where necessary.

- 11. Did you make a return on Form T 2 for 1940? Yes. If "yes", where? Edmonton. If "no", why not?
12. Was an audit of the company's books made for 1941? Yes. If so, see Item 9 (b).
13. (a) Have any capital or personal items been charged to merchandise, manufacturing, revenue or expense accounts? No.
(b) State separately amounts paid to any non-resident controlling company on account of Administration \$ Management \$ Nil Patents, etc., \$ Nil Rents \$ Nil
(c) Were any salaries paid of \$14,000 or over to non-residents? No. If so, attach particulars.
14. Are the financial statements submitted herewith in accordance with the books of the company? Yes. If not, detailed statements reconciling the differences are to be attached hereto.
15. On what basis were inventories taken at the end of the 1941 fiscal period?
(a) Cost (b) Lower of Cost or Market (c) Other
(d) Have inventories taken at cost, or lower of cost or market or other basis been otherwise reduced in arriving at values shown in financial statements?
16. Does the inventory basis of 1941 differ from that previously used by the company? No. If so, explain and state when change effected.
17. Explain in detail (with attached explanation if space inadequate) method of determination of inventory values and any adjustment in quantities relating to:-
(a) raw materials (b) goods in process (c) finished products (d) supplies (e) other inventory
18. Has the company any reserves relating to tangible, intangible, real, personal, capital or current assets, or taken any discounts, which have not been disclosed in this return or attached statements? No. If so, give details.
19. Were any reserves or discounts taken in the past three years which were not disclosed in the appropriate prior Income Tax Returns? No. If so, give details.
20. Have any liabilities as shown been enhanced to include provision for any contingent or future probable liabilities (reserve for bad debts and depreciation excepted)? No. If so, explain.

Table with 5 columns: DESCRIPTION OF ALL RESERVE ACCOUNTS, Reserve at end of fiscal year 1940, Amount added reserve during fiscal year 1941, Amount charged reserve during fiscal year 1941, Balance reserve at end of fiscal year 1941.

INFORMATION AS TO SOME ITEMS OF INCOME REFLECTED IN PROFIT AND LOSS ACCOUNT

All questions are to be answered either by giving the information applicable or by the word "NIL"

- 22. RENTS OR ROYALTIES:- Rents received from (Furnish name and address in full) \$ Royalties received from (Furnish name and address in full) \$
23. INTEREST FROM BONDS Less carrying charges (if any) \$
24. DIVIDENDS (including Stock Dividends)---(a) CANADIAN \$ Less carrying charges (if any) \$ (b) NON-CANADIAN \$ Less carrying charges (if any) \$

continued.

T 2-1941

INFORMATION AS TO SOME ITEMS OF DEDUCTIONS CHARGED IN PROFIT AND LOSS ACCOUNT

All questions to be answered either by giving the information applicable or by the word "NIL"

25. INTEREST—COPYRIGHTS

- INTEREST PAID ON: (a) Registered Bonds, (b) Bearer Bonds, (c) Mortgages, (d) Other obligations, (e) COPYRIGHTS, paid to.

25(A) RENTS, ROYALTIES or SIMILAR PAYMENTS

- (f) Rents on Real Estate, (g) Rents on Movable Property, (h) Royalties or Similar Payments, paid to.

Form 609 must be filed as to payments to residents in (a) and Form 608 for 5% or 15% tax deduction in case of non-residents in (a) (c) (d) and (e).

The payments under (f), (g) and (h) should reconcile with amounts reported on Forms 700 and 701 respectively.

Write or Call the Inspector for Required Forms

26. INCOME, EXCESS PROFITS OR CORPORATION PROFIT TAXES AND INTEREST THEREON—Attach details.

Dominion \$, Provincial \$, Municipal \$, Total \$

27. CHARITABLE DONATIONS paid in 1941 fiscal year as per list herewith in duplicate and receipts attached.

28. Has a charge for depreciation been made in respect of abandoned or discarded assets? If so, give particulars.

29. Has any reserve for depreciation been transferred to a reserve of another nature or applied to a purpose other than that for which it was created? If so, give particulars.

Table with columns: Nature of Asset, Year acquired, COST OF THE DEPRECIABLE ASSETS (not including land), Rate % p.a., DEPRECIATION CHARGED AS REFLECTED BY THE BOOKS OF ACCOUNT. Includes a 'SEE SCHEDULE' entry.

NOTE—On separate sheet state nature of all debits and credits to fixed asset accounts.

NOTE.—Do not include Depreciation on Stock in Trade, Land or Securities or other Assets not subject to exhaustion through wear and tear.

INCOME FOR FISCAL YEAR 1941

31. NET INCOME for fiscal year ended October 31st, 1941 per (a) Financial statements attached or (b) Item 2 of Form T 2—Supplemental

NOTE Section 6 of the Income War Tax Act provides that—In computing the amount of profits to be assessed a deduction shall not be allowed in respect of (1) disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income; (2) any outlay, loss, replacement or payment on account of capital; (3) amounts transferred or credited to a reserve, contingent account or sinking fund, except limited reserves for bad debts and depreciation; (4) carrying charges of property the income from which is exempt except to the extent that such carrying charges exceed the exempt income; (5) carrying charges of unproductive property not acquired for the purpose of the business; (6) amounts paid to non-resident controlling companies except limited payments for actual services; (7) expenses incurred to earn non-taxable income. If any of the following items, or like items, were charged as an expense or deducted from gross income, in arriving at "net income" (Item 31) they must be added to the said net income as indicated below. If no such charge has been made insert the word "NIL".

Table for Income for Fiscal Year 1941 with rows for ADD (Income, Entertainment, Life Insurance, Loss on assets, etc.) and DEDUCT (Net dividends, etc.) and a final row for INCOME SUBJECT TO TAX.

NOTE.—Where space provided is not sufficient, supplementary sheets properly identified containing full information must be attached. Failure to deduct and remit 5% or 15% tax and the deduction referred to in Items 25 and 25(A) renders the debtor personally liable for the amount which should have been withheld and remitted. (See Section 84 of the Income War Tax Act.)

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Amended
Return T2
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ending
October
31st, 1941,
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Assessment
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February,
1944.

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FOR USE IN RESPECT OF THE EXCESS PROFITS TAX ACT 1940

T 2-1941

If the profits (Item 44) are less than \$5000 a supplementary statement must be attached showing the amount of remuneration in any form (salary, wages, commission, bonus, interest, etc.—Item 35) paid to shareholders (other than shareholders holding only qualifying shares). If the total amount of all such payments added to the taxable income (Item 44) does not produce a total in excess of \$5,000, no Excess Profits Tax is payable and the various items below need not be completed.

Taxable corporations with a calendar year fiscal period must complete Items 45, 47, 48, 49 and where applicable 51.

Taxable corporations with a fiscal period other than the calendar year must complete Items 46, 47, 48, 50 and where applicable 51.

ESTIMATE OF EXCESS PROFITS TAX PAYABLE		For Taxpayer's Use	For Departmental Use
45. A. FIRST PART—CORPORATIONS WITH CALENDAR YEAR FISCAL PERIOD			
B. INCOME SUBJECT TO TAX (from Item 44, page 3).....		\$	\$
C. TAX PAYABLE (22% on Item 45B) (See proviso Sec. 7 (a) Item 55)		\$	\$
46. A. CORPORATIONS WITH FISCAL PERIOD OTHER THAN CALENDAR YEAR			
B. INCOME SUBJECT TO TAX (from Item 44, page 3).....		\$ 20,560.17	\$
Apportionment of income (Item 46B) between 1940 and 1941 on a pro rata daily basis:			
C. 1940 $\frac{51}{365}$	Yos.	\$ 2,402.66	\$
D. 1941 $\frac{314}{365}$		\$ 18,157.51	\$
Total—as per Item 46B.....		\$ 20,560.17	\$
E. TAX at 12% on Item 46C.....		\$ 400.20	\$
F. TAX at 22% on Item 46D.....		\$ 3,720.65	\$
G. TAX PAYABLE. (See proviso Sec. 7 (c), Item 55).....		\$ 4,120.85	\$
47. A. SECOND PART—CALCULATION OF STANDARD PROFITS			
B. The standard profits are the average yearly profits in the calendar years 1936 to 1939, both inclusive. In the case of calendar year fiscal periods (1936-9 both inclusive) the standard profits are the profits after adjustment on the basis of 7½% for capital changes in those years. In the case of fiscal periods other than the calendar year, adjust the profits of the fiscal period on the basis of 7½% for changes in capital in those fiscal periods, then ascertain the per diem profits of each fiscal period and allocate them to the respective calendar years 1936-9.			
C. (1) Profits for 1936 on calendar year basis.....		\$	\$
(2) Profits for 1937 " "		\$	\$
(3) Profits for 1938 " "		\$	\$
(4) Profits for 1939 " "		\$	\$
Show particulars of adjustment and apportionment on separate statement.			
D. "Standard period" income 1936 to 1939 (total 47C).....		\$ 16,922.99	\$
E. Average or "Standard profits" for such years (minimum of \$5,000.00. See Sec. 2(i) Item 54)		\$ 4,230.75	\$
NOTE.—If proviso under Sec. 2(h) applies, (Item 53) make necessary elimination in 47C. (1) (2) (3) or (4) add profits of remaining years to arrive at 47D and divide by number of remaining years for 47E.			
48. A. 1941 TAXATION PERIOD—75% CALCULATION			
B. INCOME SUBJECT TO TAX (from Item 44, page 3).....		\$ 20,560.17	\$
C. LESS: Standard profits (Item 47E) See Item 58		\$ 4,230.75	\$
D. INCOME FOR 1941 IN EXCESS OF STANDARD PROFITS.....		\$ 16,329.42	\$
E. LESS: Income Tax—18% of 48D.....		\$	\$
F. EXCESS PROFITS, less Income Tax thereon.....		\$	\$
G. TAX PAYABLE (75% of 48F).....		\$ 3,165.08	\$
49. If corporation has a calendar year fiscal period insert the greater of items 45C or 48G.....		\$	\$
50. If corporation has a fiscal period other than the calendar year insert the greater of items 46G or 48G.....		\$ 4,120.85	\$
51. 5% Penalty for late filing (maximum \$500).....		\$	\$
52. TOTAL EXCESS PROFITS TAX PAYABLE.....		\$ 4,120.85	\$

53. Sec. 2. "(h) 'standard period' means the period comprising the calendar years 1936 to 1939, both inclusive, or such years or parts thereof since the first day of January, 1936, during which the taxpayer was in business. Provided that where the profits of a taxpayer in any one of such calendar years, after adjustment by the Minister pursuant to section four of this Act, were less than 50 per centum of the average of the profits for the remaining years of the standard period the taxpayer may designate as his standard period the remaining years aforesaid of the standard period."

54. Sec. 2. "(i) 'Standard profits' means the average yearly profits of a taxpayer in the standard period in carrying on what was in the opinion of the Minister the same class of business as the business of the taxpayer in the year of taxation or the standard profits ascertained in accordance with section five of this Act. Provided that for the purpose of this section profits shall be deemed to have accrued on an equal daily basis throughout any fiscal period or portion thereof which is in question; and provided further that losses incurred by the taxpayer during the standard period shall not be deducted from the profits in the standard period but the years of losses shall nevertheless be counted in determining the average yearly profits during the said standard period; and provided further that a taxpayer's standard profits shall not be deemed to be less than five thousand dollars before any adjustment is made in accordance with the provisions of this Act."

55. Sec. 7. "(c) The following profits shall not be liable to taxation under this Act—(c) The profits of taxpayers who in the taxation year do not earn profit in excess of five thousand dollars before providing for any payments to proprietors, partners or shareholders by way of salary, interest or otherwise: Provided that if the tax exigible under this Act reduces the profits of the taxpayer below five thousand dollars in the taxation year, before providing for any payments to proprietors, partners, or shareholders by way of salary, interest or otherwise then to the extent that it would so reduce the profits below five thousand dollars such tax shall not be payable."

56. If continuity of capital and surplus is not shown on financial statements such continuity must be shown on supplementary statements attached hereto.

57. Where the 75% rate applies and an inventory reserve is claimed under Section 5(b) of the Excess Profits Tax Act, full particulars of claim must be given on a separate statement.

58. (1) Where the 1941 fiscal period is less than twelve months adjust the Standard Profits (Item 48 C) to the basis of a fiscal period comparable in length with the 1941 fiscal period. (2) Where alterations in the capital stock have taken place since the commencement of the 1939 fiscal period see Section 4, Subsection 1 (b) of the Excess Profits Tax Act and adjust Standard Profits (Item 48 C) accordingly and attach supplementary statement showing the adjustment.

ORIGINAL FOR
TAXPAYER

DOMINION OF CANADA

T. 7
CORPORATION
(Combined)

FEB 8 - 1944

INCOME AND EXCESS PROFITS TAX

NOTICE OF ASSESSMENT FOR 1941

A 34687

RDT:jma

D. R. Fraser & Co. Ltd.,
10149 - 97th Street,
EDMONTON, Alberta.

FILE No. 173 ACCOUNT No. CODE 5mInca14

1. DISTRICT OFFICE 406 Post Office Bldg., DATE MAILED 5th February, 1944
EDMONTON, Alberta.

2. TAXABLE INCOME	\$ 32,083.27	3. (a) Income Tax at	% \$ 5,767.78
(See Item 6 below for adjustments (if any) of the income as declared by the taxpayer.)		(b) Excess Profits Tax at	% \$
		or	
		(c) 75% on Excess Profit of \$	\$ 8,361.68

4. (1) INCOME TAX		SUMMARY			
	Tax	Penalty for late filing	Interest	Total	
AMOUNT LEVIED (Item 3(a))	\$ 5,767.78	\$	\$ 123.86	\$	
AMOUNT PAID ON ACCOUNT	\$ 5,767.78	\$	\$ 123.86	\$	
BALANCE OF INCOME TAX DUE	\$ Nil	\$	\$ Nil	\$ Nil	
	(A)				
4. (2) EXCESS PROFITS TAX					
AMOUNT LEVIED (Item 3(b) or (c))	\$ 8,361.68	\$	\$ 80.54	\$	
AMOUNT PAID ON ACCOUNT	\$ 7,779.16	\$	\$	\$	
BALANCE OF EXCESS PROFITS TAX DUE	\$ 582.52	\$	\$ 80.54	\$ 663.06	
	(A)				
5. AMOUNT PAYABLE as at	5th March		1944	\$ 663.06	

6. ADJUSTMENT OF INCOME DECLARED

NET INCOME DECLARED	\$ 32,018.15
Add:	
Stumpage	\$ 366.37
Bad Debt Reserve	2,152.34
Income Tax Interest	58.07
	<u>2,576.78</u>
Deduct	
Bad Debts Written off	152.34
½ of Road Expense	2,359.38
	<u>2,511.72</u>
TAXABLE INCOME, ITEM 2	\$ 32,083.27

INSTRUCTIONS AS TO PAYMENTS

7. PREPAYMENT:
FOR EACH DAY THAT PAYMENT IS MADE IN ADVANCE OF THE DATE STATED IN ITEM 5, THE TAXPAYER MAY DEDUCT \$.....
8. ADDITIONAL INTEREST:
ONE MONTH FROM THE DATE HEREOF, ADDITIONAL INTEREST MUST BE ADDED AT THE RATE OF 8% PER ANNUM ON BALANCE OF TAX DUE (ITEMS 4(1) (A) AND 4(2) (A)).
9. REMITTANCE MAY BE MADE BY POSTAL NOTE, POSTAL MONEY ORDER, MARKED CHEQUE, EXPRESS OR BANK MONEY ORDER, TO THE INSPECTOR OF INCOME TAX AT THE DISTRICT INDICATED IN ITEM 1.
AVOID SENDING CURRENCY IN ENVELOPES.
Issued in accordance with Section 54, R.S.C. 1927, Chap. 97 and amendments, and Section 12 of the Excess Profits Tax Act 1940.

C. Frank White
Commissioner of Income Tax.
FEB 8 - 1944

No. 21

Exhibits
and
Documents

No. 21

Letter
from
N. E.
Tanner,
Minister of
Lands and
Mines,
8th June,
1944.

Letter from N. E. Tanner, Minister of Lands and Mines
(Appellant's Document)

[CREST]

DEPARTMENT OF LANDS AND MINES

Alberta

Office of the Minister

Edmonton, June 8th, 1944.

As Lessor of the Timber Berths listed hereunder, I the Minister of Lands and Mines for the Province of Alberta, agree that you—D. R. Fraser & Company Limited—as Lessee are entitled under the provisions of Section 5, Subsection (a) of The Income War Tax Act to ninety-nine per centum (99%) of the allowance for exhaustion and that the Province of Alberta is entitled to one per centum (1%) of the allowance for exhaustion for the year 1941 in respect thereto. 10

SCHEDULE OF TIMBER BERTHS

License Berth	1161
License Berth	1727
License Berth	6722

(Sgd.) N. E. TANNER, 20
Minister of Lands and Mines.

271

No. 3

**Letter, Dept. to Appellant's Solicitors
(Appellant's Document)**

Exhibits
and
Documents

No. 3

Letter
Dept.
to
Appellant's
Solicitors,
12th June,
1944.

Address Reply to
Deputy Minister (Taxation)

Refer to H.H.S.

[CREST]

Canada

DEPARTMENT OF NATIONAL REVENUE

Income Tax Division

10

Ottawa, 12th June, 1944

Messrs. Parlee, Smith, Clement & Parlee.
Barristers and Solicitors,
Bank of Commerce Bldg.,
Edmonton, Alberta.
Attention: S. Bruce Smith, K.C.

Re: SWANSON LUMBER CO. LTD.

Dear Sir:

20 With reference to your interview on June 2nd with legal officers of this Division relating to the appeal of the above mentioned company against an assessment in which no allowance had been permitted for depletion of timber limits, the facts are understood to be as follows:

In this particular case the company cut timber under license from the Alberta government. The deposit paid to the Alberta government for the performance of the contract to cut the merchantable timber is returnable and is mostly offset against the amount due to the provincial government for stumpage dues on the actual cut of timber. The amounts of these deposits are carried on the balance sheet of the company under the caption of "Timber Berths." The stumpage dues paid to the provincial government are allowed as one of the operating costs of logs.

30 The license to cut timber is an annual license subject to renewal provided the licensee has lived up to the contract. Nothing has been paid for the license. The provincial government offer certain areas of timberland for cutting and bids on stumpage dues per M.B.M. are requested. The stumpage dues are payable as and when the timber is cut and removed.

It is understood that your client is asking an amount for depletion based on an allowance of \$1.40 per M.B.M. Such depletion has so far been refused. Briefly the arguments which you submitted appear to have been as follows:

Exhibits
and
Documents
—
No. 3
Letter
Dept.
to
Appellant's
Solicitors,
12th June,
1944.
continued.

1. That the judgment of the Judicial Committee in the Pioneer Laundry case makes some allowance for depreciation a duty which the Minister must exercise, and that this judgment confirms the view that a taxpayer has a statutory right to some allowance which the Minister cannot refuse. You argue that the same conclusion must be reached in connection with depletion by parity of reasoning.

2. That 5 (a) does not mention depletion as such but merely mentions an allowance for exhaustion of timber limits. This, it is argued, does not require that the timber limits be owned by the taxpayer for him to claim the allowance for their exhaustion. As an example the language of 5 (a) 10 was cited where it says, "and in the case of leases of . . . timber limits the lessor and the lessee shall each be entitled to deduct a part of the allowance for exhaustion as they agree . . ." It was urged that this language sanctions the general principle that the exhaustion allowance can be granted where there is no ownership but merely, as here indicated, a lessor-lessee relationship. This is further supported by the factual evidence that the department has already granted \$1.40 M.B.M. on timber cut west of the Cascades.

3. That the same principle whose application is here desired has been recognized by the department in almost every other extractive industry, 20 notably coal mines, gas wells, gold mines and other non-precious metal mines. In all such cases, it was argued, the ownership of the taxpayer is not in the asset and is analogous to the relationship existing in the present case.

Consideration has been given to your representations and in the result it is the opinion of this Division:

- (1) That the statement relied on by the appellant in the Pioneer Laundry decision is distinguishable since it arose in a judgment which was;
- (a) considering depreciation not depletion;
 - (b) considering depreciation of assets which were owned by the 30 taxpayer and for which value had been given;
 - (c) a judgment which did not consider depreciation or depletion in the case where there was:
 - (i) no ownership in the asset; or
 - (ii) no value invested in obtaining a right to the asset.
- (2) That the definition of "license" is not at all analogous to that of "lease" and that the appellants cannot support their argument on the ground that they are in reality lessees of the timber lands.
- (3) That the appellants have no ownership in the timber nor any invested capital therein and therefore no right or asset which they have 40 suffers exhaustion since they get back all their costs.

(4) That the exhaustion allowance in Section 5 (a) can only permit the owner or lessee of timber, or the holder or lessee of a right to cut timber from Crown or private lands, to recover out of income such capital sums as he may have invested in acquiring such ownership or right, and no more.

Yours faithfully,

(Sgd.) C. F. ELLIOTT.

Deputy Minister (Taxation).

HHS/JC

Exhibits
and
Documents

—
No. 3

Letter
Dept.
to
Appellant's
Solicitors,
12th June,
1944.

continued.

No. 6

10 **Copy of Letter C. F. Elliott, Deputy Minister (Taxation)
to Walter Gordon
(Appellant's Document)**

STATEMENT ON DEPRECIATION
DEPARTMENT OF NATIONAL REVENUE

Office of
DEPUTY MINISTER (TAXATION)
4th January, 1945.

No. 6
Copy of
Letter
C. F.
Elliott,
Deputy
Minister
(Taxation)
to
Walter
Gordon,
4th
January,
1945.

20 Walter Gordon, Esq.,
Messrs. Clarkson, Gordon, Dilworth & Nash,
15 Wellington Street, W.,
Toronto, Ont.

Dear Sir:

This will advise you that the subject of depreciation and depletion for those engaged in the Forest Products Industry has had consideration and you are advised that the determinations made are as follows:—
Re: Depreciation: (Pulp and Paper Industry only).

- 30 (a) Rates of depreciation taken in pre-war years to be allowed to continue until the end of fiscal periods ended in 1943.
- (b) 5% overall rate shall be the maximum rate for fiscal periods ending in 1944 and thereafter. Companies which had been charging depreciation at a rate less than 5% prior to 1944 may increase their rates up to 5% only for fiscal periods ending in 1944 and thereafter, while companies which had been charging at a rate of more than 5% prior to the said periods ending in 1944 may not take more than 5% for 1944 and thereafter.
- (c) Where the cost to a company of its depreciable assets is not known or is in substantial doubt, the value for purposes of depreciation shall be deemed to be \$22,000 per ton daily capacity.

Exhibits
and
Documents

No. 6
Copy of
Letter
C. F.
Elliott,
Deputy
Minister
(Taxation)
to
Walter
Gordon,
4th
January,
1945.

continued.

- (d) In any case where a company has taken over such assets of a previously existing and operating company, the undepreciated cost (not written-up value) on the books of the previous taxpayer may be admitted as the cost to the present owner for depreciation purposes, unless the purchase price is below the said undepreciated cost, in which case the lower cost shall prevail.
- (e) In years of loss or low profit, companies will be required to write off an amount calculated at one-half of the rate of depreciation taken in years of profit but no change will be made if it is found that at least 2¼% was charged in years of loss or low profit prior to 1940. 10

NOTE: The assets to which the above statement applies are: Mill Buildings, machinery and equipment therein, excluding the hydro-electric power plants and their equipment. On all the other various assets, the rate will be the normal rate usually allowed to all other taxpayers, having regard to the particular asset.

Re: Depletion: (Pulp and Paper Industry only).

Allow in respect of pulpwood whether for domestic or export markets (but not in respect of fuel wood).

- (1) a rate of depletion, where depletion is allowable in the taxation year, equal to cost plus 15 cents per cord, and 20
- (2) a special deduction from income equal to 15 cents per cord, regardless of whether depletion is or is not being allowed,

commencing with fiscal periods ended in 1941 and thereafter until the repeal of, or substantial change in, the Excess Profits Tax Act.

Yours faithfully,

(Sgd.) C. F. ELLIOTT,
Deputy Minister (Taxation).

Ruling: 1 cord=500 ft. B.C. Log Scale.

No. 7

**Memorandum C. F. Elliott, Deputy Minister (Taxation) to
Inspectors of Income Tax Re Depletion
(Appellant's Document)**

Memo No. 88 (1944-45)
Memo E.P.T. No. 8 (1944-45)

File D.

MEMORANDUM TO INSPECTORS OF INCOME TAX:

Depletion to be allowed in respect of the Pulp and Paper Industry only.

- 10 You are hereby advised that the following is the basis upon which depletion will be allowed in respect of those in the Pulp and Paper industry, whether for domestic or export markets:

Allow, in respect of pulpwood whether for domestic or export markets (but not in respect of fuel wood):

- (i) a rate of depletion, where depletion is allowable in the taxation year, equal to cost plus 15 cents per cord, and
- (ii) a special deduction from income equal to 15 cents per cord, regardless of whether depletion is or is not being allowed,

- 20 commencing with fiscal periods ended in 1941 and thereafter until the repeal of, or substantial change in, the Excess Profits Tax Act.

4th January, 1945.

(Sgd.) C. F. ELLIOTT,
Deputy Minister (Taxation).

Exhibits
and
Documents
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No. 7
Memorandum
C. F.
Elliott,
Deputy
Minister
(Taxation)
to In-
spectors of
Income
Tax re
Depletion,
4th
January,
1945.

No. 29

Exhibits
and
Documents
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No. 29
Transcript
Examina-
tion for
Discovery
C. F.
Elliott in
re Gilhooly
vs. Minister
National
Revenue,
17th May,
1945.

**Transcription of Examination for Discovery of C. Fraser Elliott in Re
Gilhooly and Minister National Revenue
(Appellant's and Respondent's Joint Document)**

No. 20827.

IN THE EXCHEQUER COURT OF CANADA

GRACE GILHOOLY

Appellant

— and —

THE MINISTER OF NATIONAL REVENUE Respondent

Examination of discovery of C. FRASER ELLIOTT on behalf of the 10
Appellant before RALPH M. SPANKIE, Deputy Registrar, in the Ex-
chequer Court of Canada, Ottawa, Ontario, Thursday, May 17, 1945, at
2:30 P.M.

COUNSEL: M. L. Gordon, Esq., K.C., for Appellant)
A. T. Lewis, Esq., K.C.)

E. S. MacLatchy, Esq., for Respondent.

C. FRASER ELLIOTT Sworn

BY MR. GORDON:

Q. I think you have been in charge of the National Revenue Income
Tax Division for many years? A. Yes, for a number of years. 20

Q. And I understand that it is the practice to allow persons who
receive dividends from mining corporations a 20 per cent deduction?
A. That is correct.

Q. And how long has that practice been in force? A. Well, anticipat-
ing your question, Mr. Gordon, I took a look at what we have been doing,
and perhaps if I gave you what has been the practice it would help you out.

Q. Yes. A. I am reading from a document that I dictated myself,
so that they are really my words and not the words of somebody else
in the department: The departmental practice of the depletion rate
allowed operating companies may be properly set forth under three head- 30
ings, namely, depletion so far as it is granted in respect of base metals,
precious metals, and finally in respect of those who receive dividends from
either a base metal company or a precious metal company. Speaking first
in respect of base metals I think it is correct to say, from an examination

that I made, that from 1917 to 1928 we allowed those companies that were engaged in base metal operations 25 per cent of their net profits to represent depletion of the ore body. From 1929 and thereafter the depletion rate that we allowed was 33 1/3 per cent. That is the case today.

Then we come to precious metals—those companies engaged in the production of precious metals. From 1917 to 1933 there was allowed 50 per cent of the net profits to represent depletion of the precious metals; and from 1934 and thereafter that rate was 33 1/3 per cent. And that is what it is today.

10 Now, with regard to the departmental practice as to dividends received from operating companies, the history of the departmental allowance is as follows: Those persons who received dividends from companies operating base metal mines, the depletion was as follows: From 1917 to 1928, 25 per cent; from 1929 to 1933, 33 1/3 per cent; then from 1934 and thereafter, 20 per cent. And that is the amount that is allowed today. Those who received dividends from precious metal mines for 1933 and prior years, the dividend recipient was allowed 50 per cent depletion, so called; and from 1934 and thereafter, 20 per cent. And that is the amount that is allowed today.

20 Now, the departmental practice as to income received by beneficiaries from estates—I think you would wish me to put this in because it is pertinent—

Q. Yes. A. Prior to 1938 an estate receiving mining dividends reduced the dividends by the appropriate depletion allowances, depending upon the years that I have mentioned, and the remainder was included with the other income of the estate and distributed to the life interest for tax purposes. This means that if the executor distributed the depletion, it was not taxed at all to the life beneficiary and he thereby had the benefit of the exemption. However, in 1938 and thereafter, the mining dividend income, if passed to a life beneficiary has been taxed without considering depletion on the ground that such beneficiary is receiving an income from an estate, not a dividend from a mining company, and further that he has no capital to deplete, and he cannot trace the source of his dividend without becoming involved in the executor's allocation of expenses. And that is now the practice with respect to the distribution of the income of an estate to a beneficiary. I have summed that up because I anticipated what you want and I wanted to give you what you wanted.

Q. Could you tell me the reason for the change? A. Yes, I think I can. I don't know that I technically should endeavor to do that. In the sense that I am giving evidence for what it is worth I will give you my views. Your question was what are the reasons for—

Q. For making the change? A. For making the change from the concept of allowing depletion rates in respect of dividends to pass through the estate to the beneficiary? There was a good deal of need for revenue.

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Transcript
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tion for
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17th May,
1945.

continued.

Exhibits
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Documents

No. 29
Transcript
Examina-
tion for
Discovery
C. F.
Elliott in
re Gilhooly
vs. Minister
National
Revenue,
17th May,
1945.

continued.

I think the Rt. Hon. R. B. Bennett was in power at the time and he raised the question when he was Minister of Finance, and he thought that persons who buy stocks in the market are just buying an investment, and he, therefore, suggested that we should not grant depletion to a man who buys a stock today which may have changed hands half a dozen times. Further, he felt there was nothing in the law to allow the granting of depletion to a recipient of a distribution by way of dividends. I remember quite clearly that he at one time suggested that we cut it out entirely because it was not within the law, but after discussing the matter further with him and his advisors it was felt that we should let the matter rest. However, then came 1938 and the question had been— 10

Q. Is it your evidence that at the time Mr. Bennett made the suggestion nothing was done? A. Nothing was done. Then came 1938, and the then Minister of Finance—I think it was Mr. Ilsley—no, Mr. Dunning—I think Mr. Ilsley was Minister of National Revenue—at any rate it was decided at both times that we should either cut it out or greatly reduce it because it was 50 per cent depletion to dividend recipients from precious metal mines and 33 1/3 per cent from base metal mines; and in order to give notice to the public that this increased burden be put upon them so far as definite recipients of dividends from either base or precious metal mines are concerned, there was a resolution introduced in the House of Commons which was nothing more than a resolution. I remember quite clearly discussing it—notice to the country that this was what was going to happen; so that they put in the resolution that we were reducing the depletion allowance from 50 per cent and 33 1/3 per cent down to the level of 20 per cent, which we did. 20

Q. Would that be 1935? A. 1938, I think.

MR. MACLATCHY: I think Mr. Gordon is right.

WITNESS: I will stand corrected to any of these dates. I think it is substantially correct. I dug it up yesterday afternoon so I could give it to you. 30

BY MR. GORDON:

Q. Yes. Thank you. A. I do not think I have more to add, have I?

Q. No. After that resolution was placed in the House—I have a copy here for 1935—for three years the department continued to give life tenants the advantages? A. If it were 1935 it continued up to 1938, so the answer would be yes.

Q. And at the time the resolution was passed the minister would know that that allowance was being given to life tenants? A. No. I think what we would do if it were in 1935— 40

Q. I have a copy here. A. If it were in 1935 then I think we would obey the resolution at once. It would astound me at once if I found a resolution

went through the House in 1935 that we should only give 20 per cent and I obey it in 1938—it would astound me.

Q. Yes. What would you give? A. Twenty per cent.

Q. You gave it to life tenants as well as other people? A. Oh, I fancy that is correct. On my evidence of what I found yesterday I think that is correct.

10 Q. The answer I wanted to get was why the change was made with regard to these particular individuals? A. Well, because we felt that the law was not being interpreted properly at that time, that we had been allowing it contrary to law; and I expect that is the argument in your case, as to whether we were right in law in the change, or right in law before the change. I repeat, that is your case.

Q. Now, in 1940 Mr. Ilsley stated that at the time these rates were changed there was considerable discussion with the mining industry. Would you like to read the statement? A. You read it.

20 Q. Take the gold mining industry: "I think I would have to admit that it is impossible to fix a rate that has a scientific basis at all. The department establishes a flat rate for various classes of mines, oil wells, and so on. Just what they based it upon I do not know, but it is considered fair under all the circumstances. I know that is a very loose way of describing the principle underlying allowances, but that is what is done, and so far as I can learn that is what is done in the United States. It is a most difficult thing to set a depletion allowance that is exactly right. Take the gold mining industry, theoretically the depletion allowance should be such as to provide for a return of the capital over the life of the mine, but the lives of mines differ tremendously. The average life of a mine this year is different from the average life next year, so there is practically nothing to go on. As a matter of fact, there has been a long-standing debate between the gold mining industry and the department, not so acute in recent years, but very much so up to two or three years ago, as between 30 50 per cent and 33 1/3 per cent for depletion. The government allows 33 1/3; the industry contends the rate should be 50. I think 33 1/3 per cent would be too much if there were only one mine and it had a long life. But, of course it would be too little in a mine that had a very short life. As a result you simply have to do the best you can to fix the depletion allowances that strikes a number of intelligent people as fair." Now, can you tell me what that discussion was about? A. Of course, I could not say from the reading of that exactly what was in Mr. Ilsley's mind, but I should be very happy to sort of relate in story form something of the 40 later interesting developments of our conversations with the mining industry.

Q. That is what I would like to get. A. It is a very old story. I remember when I first came with the department of Finance—it was then in income tax work—the first principal meeting must have been about

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tion for
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Elliott in
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continued.

1920 or 1921 when about fifteen or twenty of the mining men came to Ottawa and we had a very interesting discussion as to how we should determine what depletion should be afforded on mining companies—and I emphasize that—a mining company should have. It was obvious from the evidence they gave in the meeting that there was no scientific way of really determining how much metal, precious or base, was beneath the surface of the ground in practically 99 per cent of the cases. Once in the ground you could tell, in coal, or a few things that were a little more capable of measurement, but for all of the precious and most of the base metals they could not tell how much was under the ground. So it resolved itself into making a guess after the scientific examination by the scientists, which would often then be a guess, versus striking some rationalization that would be easily understood, workable, and acceptable. The depletion is not to be considered for a company not having profits because we were only dealing with companies that had profits, so the question was what would we do with so-called profits. The further evidence given by these men at that time—I could name some of them, they are all leaders, and some of them still live—the further evidence that was generally accepted was that about as much money went into the developments of mines as ever came out, and that if they took all the losses against the gains that came out at that time they thought there would not be much left in the way of gain. That, of course, was a personal way of putting their case. On the other hand, they said those companies that were formed did exploration work, drilling, some shaft sinking, and finally found really nothing of real value. They lost all their capital. Looking at the industry as a whole, would it not be desirable to try to give some encouragement to the industry as a whole? Being an important natural resource of Canada we—the government representatives were sympathetically disposed towards that view; and lumping, therefore, the companies that got nothing and companies that had a fair chance of making money and companies that made a very successful mines putting them all together the thought was born that we will deal with those companies that have a profit by saying: well, we will give you 50 per cent of the net profit and represent the depletion of your mines by the extraction of the precious metal or base metal. It was realized by everybody that it was a broad overall concept, knowing that by the statute they were entitled to something, knowing they could not prove what they were entitled to scientifically. So that that formula of dealing with those that had companies was acceptable to them.

Q. That would be including the allowance on the dividends? A. That would include the allowance on the dividends at that time.

Q. I suppose that was a very important factor? A. The whole thing was important.

Q. I suppose you had numerous interviews about that? A. I say intermittently all down the twenty years. Since then we have had from time to time discussions on the matter. I fancy I conveyed all that to Mr. Ilsley

from time to time. In fact, I know I have. And he has summed it up in that rather good way in his announcement to the House.

Q. May I take it, Mr. Elliott, that the allowance for the mine and for the dividend was a result of a compromise to satisfy something which was difficult to prove? A. No, I would not say it was a compromise.

Q. An arrangement? A. It was an arrangement, sure. We did not think we were whittling anybody down on a larger claim they had; we were feeling out for the right thing to do. It was a compromise—I think the term “arrangement” was right and good—to satisfy the statute and those
10 who had some rights under the statute for depletion; but the discussions basically were as to the companies at that time; dividends sort of fell in.

Q. It was part of the arrangement? A. That is right. From time to time thereafter we modified the depletion allowances.

Q. I suppose each time there would be another discussion about it? A. There was never as important a discussion as we had in 1920 or 1921. I think there must have been thirty people there.

Q. I say there would have been discussions? A. After that they organized in the Ontario Mining Association—well, it is an Ontario association but it really represented all Canada; and so it was not so much a
20 delegation thereafter as it was the Ontario Mining Association represented by its paid executives bringing forward everything they had by way of advantage to the mining companies, and that is quite right and proper. But we varied over the years in accordance with my first statement. Then we had—what year was that?—section 11 come in the Act. Whatever year that was it had to do with the estates that were harbouring revenue for the benefit of unascertained persons or persons with contingent interests. We introduced that section to tax all estates as estates in respect
30 of income accumulating for the benefit of unascertained persons or persons with contingent interests. I mention that because it is germane to your case, and I want the court to have all that I know so far as I know about it.

Subsequent to that arose the question of whether dividend income from the precious or base metal operating companies should pass straight through the estate to the beneficiary receiving income from the estate. As I have already said, up to 1937—

Q. 1938. A. 1938 was it? It does not matter—1937 or 1938 I will put it—we let it pass through. But then related questions began to arise that became difficult. For instance, the estate charged—or the executor charged with the duty of administering an estate where there was a
40 life interest and a remainder found the question of depreciation arose. Some executors take out of the rentals from assets in the estate and set aside something for depreciation—not depletion—although it is a wasting asset, and others would simply pass it as to whether the income distributed

Exhibits
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continued.

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continued.

was wholly taxable when the executor kept nothing back to represent depreciation on the landed property.

Q. It was a practice of the department to allow a deduction? A. No. We have never had a definite practice. It was slow in rising but it rose in a rather indefinite way, I think.

Q. For some time after 1931 it was the practice, was it not? A. Well, my recollection—because I did not look it up as clearly as I did this question of depletion—my recollection is no; it arose from time to time in special cases. Finally we determined that any distribution to a beneficiary entitled to life income, that we taxed him on his life income, because he got it. 10
It was in following that same kind of determination that we came in 1938 upon this question and made the same ruling.

Q. In 1935 the minister and the department knew of these difficult points of law when Mr. Rhodes made that statement and the resolution was passed. Was that Mr. Rhodes' statement you read? A. I think it was Mr. Ilsley's.

Q. When the resolution was passed the dividend should be taxed for the allowance for depletion? A. I would not want to charge the minister with knowing all about that.

Q. His officers would have informed him? A. I have no doubt. I 20
may add voluntarily, because you have not asked me the question, that the United States on dealing with the question of depletion to companies for a long time have had their scientists and engineers go out with a view to measuring the quantity of precious metal and base metal in the soil and they found that was hit and miss after the event, and particularly when they came to oil. We did swing around to this very percentage of net profits that they adopted a long time earlier.

Q. And do they give an allowance for dividends? A. Oh, no, I do not think so, but you had better look that up; but they give the option today of this scientific judgment or of net profit. They told me that the 30
percentage of net profit is the method they use.

EXAMINATION CLOSED.

I certify the foregoing pages of evidence to be a faithful transcript of my shorthand notes taken in this examination.

(Sgd.) JOSEPH HOWE,
Chartered Shorthand Reporter
Sworn Stenographer.

Plan of Timber Berths of D. R. Fraser and Company Limited
(Appellant's Document)

Exhibits
and
Documents

No. 22
Plan of
Timber
Berths of
D. R.
Fraser &
Company,
Undated.



RANGE 7 ← → RANGE 6
--- RANGE LINE



RED = BURNT
 YELLOW = CUT OVER
 RED + GREEN = BURNT + GREEN MIXED
 GREEN = GREEN TIMBER
 LINED OVER COLORS = LICENCE BERTH #1727.

PLAN OF TIMBER BERTHS OF
 J. R. FRASER & CO LTD FORTYON
 COPIED FROM ORIGINAL CRUISE PLAN
 SCALE 2 INCHES = 1 MILE

In the Privy Council

No. 5191947
of 1948.

ON APPEAL FROM THE SUPREME
COURT OF CANADA.

IN THE MATTER OF THE INCOME WAR
TAX ACT,

— and —

IN THE MATTER OF THE APPEAL
OF D. R. FRASER AND COMPANY
LIMITED, OF THE CITY OF
EDMONTON, IN THE
PROVINCE OF
ALBERTA.

BETWEEN:

D. R. FRASER AND COMPANY LIMITED,
Appellant,

— and —

THE MINISTER OF NATIONAL
REVENUE,
Respondent.

RECORD OF PROCEEDINGS

BLAKE & REDDEN,
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