A. E. DUPONT AND EDWARD CHARLES MacLEOD ..... APPELLANTS;

1958
*Mar. 25, 26, 27
Jun. 26

AND

MERRILL OSBORNE INGLIS, WALTER BIRON AND FRANK MANN ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law—Creation of special tribunals—Jurisdiction of Ontario Mining Commissioner—The Mining Act, R.S.O. 1950, c. 236, as amended by 1956, c. 47, s. 7—The British North America Act, ss. 96, 99, 100.

The 1956 amendments to *The Mining Act* creating the office of Mining Commissioner and defining his jurisdiction are *intra vires*. The statute is primarily legislation providing for the administration of mining resources owned by the Province under the general direction of appointees of the Provincial Government. The Commissioner, who is appointed by the Lieutenant-Governor in council, has authority touching the entire administration of the Act; his decisions on disputes are only part of a general supervising function. This comprehensive administration, taken with the provisions expressly excluding resort to the ordinary Courts (except by appeal under s. 144), indicates that the determinations by statutory officers are integrated with and included in the rights dealt with by the Act, as conditions of their creation. *Florence Mining Co. Ltd. v. Cobalt Lake Mining Co. Ltd.* (1910), 43 O.L.R. 474 at 475, quoted and applied. The superior Courts had been excluded from any feature of this administration since before Confederation and determinations of fact, so far as they might be taken as possessing a judicial quality, were made by justices of the peace from the passing of the *Gold Mining Act* in 1864. They were clearly considered as matters to be decided by persons of experience and practical competence. *Labour Relations Board of Saskatchewan v. John East Iron Works, Limited et al.*, [1949] A.C. 134 at 151, quoted and applied. The fact that the Commissioner exercises a power of review of the decisions of the recorder and that there is a right of appeal from his decisions to the Court of Appeal does not affect the position. Since the Province can create and appoint justices of inferior Courts, there is no reason why it cannot establish an inferior appellate Court. *Shell Co. of Australia, Ltd. v. Federal Commissioner of Taxation*, [1931] A.C. 275 at 295, applied.

APPEAL from a judgment of the Court of Appeal for Ontario[1], reversing a judgment of Ferguson J.[2] Appeal allowed.

*PRESENT: Kerwin C.J. and Taschereau, Rand, Locke, Cartwright, Fauteux, Abbott, Martland and Judson JJ.

[1] [1957] O.R. 377, 8 D.L.R. (2d) 193.
[2] [1957] O.R. 193, 8 D.L.R. (2d) 26.

1958

DUPONT et al. v. INGLIS et al.

R. D. Poupore, for the appellants.

J. R. Stirrett, Q.C., and *H. T. McGovern,* for the respondents.

Hon. A. Kelso Roberts, Q.C., C. R. Magone, Q.C., and *Miss C. M. Wysocki,* for the Attorney-General for Ontario.

F. P. Varcoe, Q.C., and *E. R. Olson,* for the Attorney General of Canada.

The judgment of the Court was delivered by

RAND J.:—The issue here goes to the constitutional validity of a tribunal established under *The Mining Act,* R.S.O. 1950, c. 236, as amended by 1956, c. 47, s. 7. The attack is made on the ground that the tribunal is or, in the proceedings out of which this appeal arises, was attempting to exercise the jurisdiction of a Court within the meaning of s. 96 of the *British North America Act.*

The Mining Act is primarily legislation providing for the administration of mining resources owned by the Province in the way of promoting their development and exploitation in private ownership, according to provisions, rules and regulations contained in the Act or made by the Lieutenant-Governor in council. The administration is under the general direction of the Minister of Mines, with a deputy, a departmental organization and a number of statutory officers.

The Act specifies in detail the acts to be performed by licensees as conditions of rights reaching ultimately to a patent in fee simple or a renewable lease of either land including minerals or the latter alone. Licences are obtainable by any person over 18 years of age on payment of a fee. The initial step is the staking of a claim by means of posts set down in a prescribed manner on which certain information is inscribed. By s. 57: "Substantial compliance as nearly as circumstances will reasonably permit with the requirements of this Act as to the staking out of mining claims shall be sufficient." Within a fixed time the staking is to be recorded at the office of the recorder for the district within which the claim lies. A sketch or plan of the claim showing the posts and distances is forwarded with the application together with other information sufficient to enable the recorder to indicate the location of the claim

on the office map, and to record the day and hour when staked, the date of application and the inscriptions or markings made. Required also is a certificate, verified by affidavit, that there was nothing on the lands to indicate that they were not open for staking, such as buildings, clearings or improvements. Particulars of every application which the recorder "deems to be in accordance with this Act" are entered unless a prior application is already recorded and subsisting for the lands or "any substantial portion" of them. The application, with its accompanying documents, is filed with the office records; and the recording is to be deemed to be made as of the moment when the application is received in the office. Within 6 months, the licensee is required to affix to each of the corner-posts of the claim metal tags, supplied by the recorder, impressed with the numbers and letters of the claim. On a written report by an inspector that the tags have not been so attached, the recorder is to cancel the claim, and to notify the licensee accordingly.

In case of rejection, if the licensee desires it, the recorder, under s. 61(2), shall "file" the application pending adjudication of its sufficiency. For that purpose, the licensee must, within 60 days, bring the matter before the recorder or the Commissioner, but this step is not deemed a "dispute" of a recorded claim, to which particular reference appears later.

Up to this point the functions of the recorder are ministerial and administrative, that is, possessing some measure of discretion. But in the competition of licensees challenges to alleged stakings and other required acts are inevitable which must be settled without delay, more or less informally, in some proximity to the situs of the claims, and by persons made familiar by experience with the substance of those practical details. They are what the history and the exigencies of prospecting and mineral discovery have shown to be best suited to the orderly and efficient utilization of the resources, and in large measure are embodied in the statute. At the same time that experience has furnished a similar acquaintance with the practices, attitudes and tendencies of those who push discovery into these remote and difficult regions.

1958

DUPONT *et al.* v. INGLIS *et al.*

Rand J.

Provision is therefore made for filing with the recorder a "dispute" alleging the invalidity of a recorded claim; if the disputant claims to be entitled to be recorded in whole or part, a note of the filing is entered on the record of the claim. Unless it is otherwise ordered by the Commissioner or a transfer is made to the Commissioner by the recorder, the controversy is, in the first instance, decided by the recorder, whose decision, unless an appeal is taken to the Commissioner, is, by s. 123(5), "final and binding". By s. 124, as re-enacted by 1956, c. 47, s. 6, the recorder

> may give directions for the . . . carrying on of proceedings before him, and in so doing he shall adopt the cheapest and simplest methods of determining the questions raised before him.

Section 63, as re-enacted by 1954, c. 53, s. 3, provides for a "certificate of record". This certificate is issued after a claim has been recorded for 60 days or more and the recorder, among other things, "is satisfied that the requirements of the Act have been met". In the absence of mistake or fraud, it is conclusive evidence that, except for work to be done on the claim, those requirements have been met, but it may be set aside by the Commissioner on the grounds mentioned. When a certificate of work has been granted the conditions of a right to obtain a title have been met. In cases of forfeiture, the Commissioner may give relief on such terms as he considers just.

The Commissioner is appointed by the Lieutenant-Governor in council and his authority touches the entire administration. He may decide any claim, question, dispute or other matter and so far supersede the recorder. On appeal from the latter, the Commissioner is to make "such order in the premises as he deems just". He may require or admit new evidence, or may retry the matter; he is to decide questions "without unnecessary formality", select the place deemed most convenient for the parties, and his decisions on subsidiary issues are final and not appealable. He may obtain the assistance of "engineers, surveyors or other scientific persons" to examine the property, and make such use of their opinions or reports as he thinks proper. He may view the property and make use of any special skill or knowledge he possesses, in which case he is to make a statement of the fact sufficiently full to enable a judgment to be made of the weight to be given

it. When the parties consent in writing, he may proceed wholly on a view and his decision so based is, again, final. The order made by him, with the evidence, exhibits, statements, reports and reasons, is filed in the Department or the office of the recorder, as he directs. Subject to the provisions for finality, by s. 144, as re-enacted in 1956, an appeal from a decision by him lies to the Court of Appeal.

In the issue before us, some months after the recording of an alleged staking by the respondents, an application to record for the same area was made by the appellants; but in view of the prior entry the application was "filed". Following an inspector's adverse report on the respondents' claims, an enquiry was held by the recorder, who found that the staking had not been made as alleged and expunged the record of it; at the same time he recorded the application of the appellants. On appeal to the "judge", as under the existing legislation the appeal functionary was called, the dispute was aired *de novo;* but before decision, the statute was amended and a Commissioner was substituted for the judge without affecting the appeal jurisdiction. Steps were then taken to reinstate the appeal before the Commissioner, upon which the respondents applied for a writ of prohibition. For the purposes of the issue of fact raised, Ferguson J.[1] held the appointment of the Commissioner to have been within the legislative authority of the Province and refused the writ. The Court of Appeal[2], speaking through Schroeder J.A., took the view that adjudication by the Commissioner infringed s. 96 of the *British North America Act,* a view based largely, if not exclusively, on the fact of the provision for appeal from the recorder to the Commissioner, and directed the writ to issue.

I think it desirable to enquire first into the real character and content of the rights which the statute creates and the means it furnishes to give them recognition. The statute is dealing primarily with Crown lands; it would, in my opinion, be within provincial power to dispose of such land, over which legislative jurisdiction is exclusive, on any terms or conditions to be determined by, or in the

[1] [1957] O.R. 193, 8 D.L.R. (2d) 26.
[2] [1957] O.R. 377, 8 D.L.R. (2d) 193.

1958

DUPONT et al. v. INGLIS et al.

Rand J.

absolute judgment or discretion of, any functionary whatever; the award or adjudication, in that case, would itself be a constituent element in the rights created: does the Act here evidence such an intendment? Its language creates rights, but *sub modo*; consistently with equality of treatment, tribunals have been set up with officers, *ex officio* justices of the peace, to make determinations while the land still remains within the title of the Crown. The recorder is an officer of the Department; the Commissioner, although not declared a departmental officer, is a statutory officer. His decisions on disputes are only part of a general supervising function. This comprehensive administration taken with the provisions expressly excluding resort to the ordinary Courts, except by appeal under s. 144, indicates that the determinations by the statutory officers are integrated in the rights provided, that, including those given by the Court of Appeal, they inhere in the rights as conditions of their creation: *Florence Mining Co. Limited v. Cobalt Lake Mining Co. Limited*[1], where at p. 475 Lord Collins uses this language:

> They [the plaintiffs] have completely failed to establish their claim to have made a discovery within the provisions of the Mines Act to the satisfaction of the officer charged with the duty of seeing that the regulations are duly observed.

The first provincial mining statute was the *Gold Mining Act*, 27-28 Vict., c. 9. The machinery set up, though not so elaborate, was, for such an issue as that here, in substance what is now provided. By s. 3 the officers, likewise justices of the peace, had power to

> settle summarily all disputes as to the extent or boundary of claims, use of water, access thereto, damage by licensees to others, forfeitures of licenses, and generally to settle all difficulties, matters or questions which may arise under this Act,

and no case was to be removed into any Court by *certiorari*. The superior Courts, those mentioned in s. 96 of the *British North America Act*, were excluded from any feature of that administration. The determinations of fact, so far as they might be taken as possessing a judicial quality, were made by justices of the peace, inferior tribunals. The practical competence called for and, by experience, acquired

[1] (1910), 43 O.L.R. 474.

is of the character implied by Lord Simonds in *Labour Relations Board of Saskatchewan v. John East Iron Works, Limited et al.*[1], where he says:

> It is as good a test as another of "analogy" to ask whether the subject-matter of the assumed justiciable issue makes it desirable that the judges should have the same qualifications as those which distinguish the judges of superior or other courts.

The adjudications by the recorder and the Commissioner are not to be treated in isolation; the special elements of experienced judgment and discretion are so bound up with those of any judicial and ministerial character that they make up an inseverable entirety of administration in the execution of the statute. To introduce into the regular Courts with their more deliberate and formal procedures what has become summary routine in disputes of such detail would create not only an anomalous feature of their jurisdiction but one of inconvenience both to their normal proceedings and to the expeditious accomplishment of the statute's purpose.

By s. 129 of the *Confederation Act,* all laws, Courts and all "legal Commissions, Powers and Authorities, and all officers, Judicial, Administrative, and Ministerial" existing in Ontario at the union were continued subject to be repealed, abolished or altered by Parliament or Legislature according to the authority of each. Within this continuity was the *Gold Mining Act;* and the function of deciding the sufficiency of compliance with the statutory requirements, as, for example, of staking, by the officer, was either an integral part of the rights arising, or, if of a judicial character, of a type not then exercised by the superior Courts.

If judicial power was conferred and it is to be held to be of the type exercised by superior Courts, then either the officers under the Act, for all purposes of this administrative statute, would be required to be appointed by the Dominion, or the adjudicatory function notionally segregated and held to be beyond exercise by a provincial appointee. That question would arise on the death or cesser of tenure of the functionary so continued in office. In the latter alternative those sections of the statute providing for the determination of disputes would at that

[1] [1949] A.C. 134 at 151, [1948] 4 D.L.R. 673, [1948] 2 W.W.R. 1055.

1958

DUPONT et al. v. INGLIS et al.

Rand J.

moment automatically cease to have force, and resort, if any were open, would be to the superior Courts: it would be a constitutional absurdity that the Dominion should appoint, in accordance with ss. 96, 99 and 100, the officer of such a tribunal for his role as adjudicator of incidental disputes and the Province appoint the same person for all other purposes. I cannot accept a view that produces such a result as the effect of s. 129.

The interpretation of s. 96 has been authoritatively given by this Court in *Re The Adoption Act and other Statutes*[1], and by the Judicial Committee in *O. Martineau and Sons, Limited v. City of Montreal et al.*[2], and in *Labour Relations Board v. John East Iron Works, Limited et al., supra.* The Province, under its authority over the administration of justice, including the establishment of Courts, may and is in duty bound to maintain judicial tribunals and define their jurisdiction. The restriction of s. 96, with ss. 99 and 100, provisions vital to the judicature of Canada, is confined to Courts endowed with jurisdiction conforming broadly to the type of that exercised in 1867 by the Courts mentioned in the section or tribunals analogous to them. A distinction is here necessary between the character of a tribunal and the type of judicial power, if any, exercised by it. If in essence an administrative organ is created as in *Toronto Corporation v. York Corporation*[3], there may be a question whether provincial legislation has purported to confer upon it judicial power belonging exclusively to Courts within s. 96. Judicial power not of that type, such as that exercised by inferior Courts, can be conferred on a provincial tribunal whatever its primary character; and where the administrative is intermixed with *ultra vires* judicial power, the further question arises of severability between what is valid and what invalid.

With the greatest respect to the Court of Appeal, I cannot take the fact of a right of appeal to have any significant bearing on the issue. The Commissioner, by the terms of the statute, is not strictly an appeal Court; his

[1] [1938] S.C.R. 398, [1938] 3 D.L.R. 497, 71 C.C.C. 110.

[2] [1932] A.C. 113, [1932] 1 D.L.R. 353, [1932] 1 W.W.R. 302, 52 Que. K.B. 542.

[3] [1938] A.C. 415, [1938] 1 All E.R. 601, [1938] 1 D.L.R. 593, [1938] 1 W.W.R. 452.

function in appeal is essentially the same as that of the recorder, but on a review level; and its purpose is obviously to furnish the confirmation of a superior and here a possibly more independent functionary. That confirmation lies behind the appeal to the Court of Appeal, the precise nature or scope of which may call for some consideration. Since the Province can create and appoint justices of inferior Courts, there is no reason in the nature of things why it cannot establish an inferior Court of review or appeal; it is the subject-matter rather than the apparatus of adjudication that is determinative. Appeals in criminal matters from justices of the peace to quarter sessions were established procedure prior to Confederation in Ontario, in which, also, an appeal was long provided to the Division Court, the judge of which was appointed by the Province. In *Shell Company of Australia, Limited v. Federal Commissioner of Taxation*[1], Lord Sankey L. C. quotes with approval the reasons of Starke J. in the High Court[2], from the judgment of which the appeal was taken:

> A right of appeal in itself does not establish the vesting of judicial power either in the Commissioner or in a Board of Review.

Equally it does not of itself show judicial power of a superior Court character within the meaning of s. 96. On the same page the Lord Chancellor quotes the definition of "judicial power" given by Griffith C.J. in *Huddart, Parker and Co. Proprietary Limited v. Moorehead; Appleton v. Moorehead*[3], in which it is said:

> The exercise of the power does not begin until some tribunal which has the power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.

It was contended that several provisions of the Act purported to confer jurisdiction over matters affecting private rights beyond the administration of Crown lands, and ss. 115 and 119 were cited. In the former no action is to be taken in any Court on any "matter or thing concerning any right, privilege or interest conferred by or under the authority of this Act". Section 118 expressly removes from the jurisdiction of the Commissioner any "power or

[1] [1931] A.C. 275 at 295, [1931] 2 W.W.R. 231.
[2] (1926), 38 C.L.R. 153 at 212 (*sub nom. The Federal Commissioner of Taxation v. Munro; The British Imperial Oil Company Limited v. The Federal Commissioner of Taxation*).
[3] (1908), 8 C.L.R. 330 at 357.

1958

DUPONT et al. v. INGLIS et al.

Rand J.

authority to declare forfeited and void or to cancel or annul any Crown patent issued for lands, mining lands, mining claims or mining rights". This limits the scope of s. 115 to rights, privileges or interests arising up to the issue of patent. Confirmatory of that is the declaration by s. 66 of the interest of a licensee prior to the issue of a certificate of record as that only of a "licensee of the Crown" in the ordinary sense of the word "licensee", and after the issue and until patent, "a tenant at will of the Crown". These are preceded by the declaration that:

> The staking out or the filing of an application for or the recording of a mining claim, or all or any of such acts, shall not confer upon a licensee any right, title, interest or claim in or to the mining claim, *other than the right to proceed,* as in this Act provided, to obtain a certificate of record and a patent from the Crown . . .

(The italics are mine.)

In *Clarkson and Forgie v. Wishart and Myers*[1], that "right to proceed" was held to be within the *Execution Act* and that a purchaser was entitled to be substituted as owner of that right; but as between the licensee and the Crown there is only the licence or tenancy.

Section 119 contemplates proceedings which involve private civil and property rights and provides that a party may apply for an order transferring the proceedings to the Supreme Court. I should say that once that situation appears an order should go unless the party applying is willing to accept the Commissioner as an arbitrator. By reason of its terms s. 119 is clearly a severable provision and would be so apart from the provision for transfer.

Other sections, by general suggestion, were said to be similarly tainted, but nothing was specifically pointed out which, if encroaching on the judicial power of superior Courts, was so bound up with valid jurisdiction as to drag the latter down with it. The precise issue raised in this proceeding, which alone is in question, is clearly within provincial power and, contained in an administration statute with the scope of valid action clearly ascertainable, the separation of other encroachments, if any, would present no difficulty.

It was urged that the issue was in reality between the respondents and the individual appellants, but that confuses the matter. The question is the validity of the alleged

[1] [1913] A.C. 828, 13 D.L.R. 730, 24 O.W.R. 937.

first staking, and that is a matter between the licensee and the Crown. Its adjudication may affect a subsequent staking by another licensee; but there is no *vinculum juris* and no *lis* between the two licensees, and the disputant is before the tribunal only as he is permitted by the statute to have the claim of another put in question before the recorder. In the enquiry the subsequent staking is irrelevant, and the decision should be the same as if no such action had taken place.

Under the statute immediately before the amendments in 1956, R.S.O. 1950, c. 236, the judge, before whom the appeal here was brought, had been appointed by the Lieutenant-Governor in council of Ontario. This was confirmed by a commission issued under an order of the Governor General in council. The purpose of the latter was to provide against the contingency that the appointment by the Province should be held to be *ultra vires*. The order of confirmation recites that in the view of His Excellency's Government the responsibility for the appointment did not rest with that Government and that the commission was to be for the purpose of confirming the appointment only so far as it was competent to His Excellency to do so. In my opinion the appointment by the Lieutenant-Governor was valid and the confirmatory action by the Governor General in council of no effect.

I would therefore allow the appeal, set aside the judgment of the Court of Appeal and restore the order of Ferguson J., modified by striking out the allowance of costs to the Attorney-General for Ontario. The respondents Merrill Osborne Inglis, Walter Biron and Frank Mann shall pay the appellants A. E. Dupont and Edward Charles MacLeod their costs in this Court and in the Court of Appeal but there shall be no costs to or against the Attorney General of Canada or the Attorney-General for Ontario in any Court.

Appeal allowed.

Solicitors for the appellants: Macdonald & Macintosh, Toronto.

Solicitor for the respondents: J. R. Stirrett, Toronto.

Solicitors for the Attorney General of Canada: Varcoe & Duncan, Toronto.

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