

1960
*Oct. 5, 6, 7
Dec. 19

FELIX LETAIN (*Plaintiff*) APPELLANT;

AND

CONWEST EXPLORATION COM- }
PANY LIMITED (*Defendant*) } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH
COLUMBIA

Companies—Constitutional law—Date of incorporation as set out in letters patent—Badge of status—Whether evidence letters patent actually issued at later date precluded—Companies Act, R.S.C. 1952, c. 53, ss. 11, 132, 133.

An option agreement, whereby the appellant L granted an option to the respondent C to purchase certain mineral claims, provided for the transfer of the mineral claims to a mining company to be incorporated by C on or before October 1, 1958. It also provided for the transfer forthwith of the claims to C and that in the event that C should not duly exercise the option thereby granted, C would, at the request of L, retransfer the claims to L.

In an action for the return of the claims, L alleged that the letters patent of the mining company were actually signed, sealed and issued after October 1, 1958. C contended that under s. 133 of the *Companies Act* of Canada the letters patent, dated September 25, 1958, were conclusive proof that the company was incorporated on or before October 1, 1958. The dismissal of the action at trial was affirmed by the Court of Appeal. The appellant appealed to this Court.

Held: The appeal should be allowed, the order of the Court of Appeal set aside, and also all of the order of the trial judge except that part permitting the appellant to amend his statement of claim.

Per Kerwin C.J. and Taschereau, Fauteux and Judson JJ.: Sections 11, 132 and 133 of the *Companies Act* when read together are concerned with the status and capacity of a company incorporated under the Act. Therefore the Court was not concerned here with any question as to the right of Parliament to provide for what shall be evidence in a civil case in a provincial court.

The rights of the appellant and respondent must be determined by the meaning to be ascribed to clause 7 of the original agreement between them, and the appellant was not precluded by the mere production of the letters patent from showing at the trial that the respondent did not exercise the option in accordance with its terms.

Per Locke, Cartwright, Abbott, Martland and Ritchie JJ.: The fact that the letters patent were dated the 25th of September and the company had status as from that date for the purposes of the *Companies Act*, in no way precluded the appellant from adducing evidence to prove whether or not the option was exercised by the respondent in accordance with the terms of the contract.

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

APPEAL from a judgment of the Court of Appeal for British Columbia¹, affirming a judgment of Collins J. Appeal allowed.

1960
 LETAIN
 v.
 CONWEST
 EXPLORATION
 Co. LTD.

J. W. de B. Farris, Q.C., for the plaintiff, appellant.

C. W. Tysoe, Q.C. and *F. U. Collier*, for the defendant, respondent.

D. S. Maxwell and *G. W. Ainslie*, for the Attorney General of Canada, intervenant.

L. Tremblay, Q.C., for Attorney-General of Quebec, intervenant.

The judgment of the Chief Justice and of Taschereau, Fauteux and Judson JJ. was delivered by

THE CHIEF JUSTICE:—This is an appeal by the plaintiff Felix Letain against a judgment of the Court of Appeal for British Columbia¹ dismissing an appeal from the judgment of Collins J. dismissing the action. After the pleadings had been delivered the defendant Conwest Exploration Company Limited applied under Order XXV, Rule 2, of the Supreme Court Rules 1943 of British Columbia to dispose of a point of law arising under the pleadings. Collins J. decided the point in favour of the respondent and being of the opinion that such decision substantially disposed of the whole action, he thereupon dismissed the action under Rule 3 of Order XXV.

The action arises out of an option agreement, dated July 26, 1955, between the appellant and the respondent therein called Conwest, whereby the appellant for valuable consideration granted an option to the respondent to purchase certain mineral claims. Clause 7 of the agreement reads as follows:

In the event of Conwest electing to exercise fully the option hereby granted, it may do so by causing to be incorporated on or before the 1st day of October, 1958, under the Companies Act of Canada, or under the laws of such other jurisdiction in Canada as Conwest shall choose, a mining company to which reference is herein made as the proposed company, with an authorized capital comprising three million shares, either without nominal or par value, or of the par value of \$1.00 each, as Conwest shall decide. The proposed company, if incorporated, shall, in due course, be organized by Conwest, whereupon the said claims and such other mineral claims, if any, as Conwest shall elect, shall be transferred to the proposed company free of encumbrance.

¹ (1960), 31 W.W.R. 638, 23 D.L.R. (2d) 444.

1960
 LETAİN
 v.
 CONWEST
 EXPLORATION
 Co. LTD.
 ———
 Kerwin C.J.

The agreement provided for the transfer of the mineral claims to the company to be incorporated as provided in clause 7 in return for fifty thousand shares of the proposed company. It also provided for the transfer forthwith of the claims to the respondent and that in the event that Conwest should not duly exercise the option thereby granted, Conwest would, at the request of the appellant, retransfer the said claims to the appellant. Other agreements were made later between the parties but their provisions do not materially affect clause 7 of the original.

On September 15, 1958, the respondent caused an application to be made under the *Companies Act* of Canada, R.S.C. 1952, c. 53, for the incorporation under the name of "Stikine Asbestos Company Limited" of a mining company such as was contemplated by the option agreement. The director of the Companies Division of the Department of the Secretary of State of Canada raised a question as to the use of the word "Stikine" in view of the incorporation of a company with a similar name under the laws of British Columbia in 1952. It was therefore arranged that the name "Kutcho Creek Asbestos Company Limited" should be adopted and that name was accepted by the director on September 25, 1958. In a letter bearing that date he advised the solicitors for the applicants for letters patent that the application for incorporation, with an amendment already agreed upon, "has been recommended for approval under the name of Kutcho Creek Asbestos Company Limited and letters patent are being prepared upon the basis of their bearing date of September 25, 1958". In a telephone conversation of September 26, 1958, between solicitors on behalf of the applicants and the assistant director of the Companies Division, the former asked that the name read "Letain Asbestos Company Limited", instead of "Kutcho Creek Asbestos Company Limited", and on September 29, 1958, that was confirmed in a letter from the solicitors to the director enclosing the consent of Felix Letain. That consent was subsequently withdrawn.

On October 1, 1958, the Director wrote the solicitors the following letter:

In connection with the application for incorporation originally received under the name of STIKINE ASBESTOS COMPANY LIMITED, which corporate name was amended to read KUTCHO CREEK ASBESTOS COMPANY LIMITED. As intimated in my letter of September 25, 1958,

the application so revised was recommended for approval under the name of KUTCHO CREEK ASBESTOS COMPANY LIMITED and letters patent were being prepared on the basis of their bearing date of September 25, 1958.

1960
LETAIN
v.
CONWEST
EXPLORATION
Co. LTD.
Kerwin C.J.

In the interval, Mr. Lesage received a further telephone call in which you requested that the name should be further amended to read LETAIN ASBESTOS COMPANY LIMITED, which request was confirmed by your letter of September 29, 1958. A search of the records maintained by the department does not disclose the incorporation of any Canadian company under the precise name of LETAIN ASBESTOS COMPANY LIMITED.

There has been submitted in support of the application a consent to the use of the personal name "Letain: as part of the corporate name executed by Felix Letain. However, I should be obliged if the consent of Mr. Letain were supplemented by evidence to the effect that he is to be predominant in the company, a circumstance of which Mr. Hill has verbally advised Mr. Lesage.

Accordingly, the draft Letters Patent which have been prepared and approved have been amended so that the corporate name will read LETAIN ASBESTOS COMPANY LIMITED.

On October 15, 1958, the solicitors wrote the Director this letter:

re: *Letain Asbestos Company Limited*

In view of the misunderstanding which has apparently arisen over rights to use the above identified corporate name, this letter is to request you to amend the application for Letters Patent so that the corporate name reads

KUTCHO CREEK ASBESTOS COMPANY LIMITED

approval of which was indicated in your letter of September 25, 1958. As indicated during our telephone conversations it is most important to our client that the Letters Patent document bear a date prior to October 1, 1958 and we would most appreciate your arranging for this to be the case.

On October 20, 1958, the Director wrote the solicitors:

The application for incorporation of KUTCHO CREEK ASBESTOS COMPANY LIMITED has been approved and letters patent will be prepared upon the basis of their bearing date of September 25, 1958.

In the Canada Gazette of November 8, 1958, appears a notice dated October 31, 1958, by the Under-Secretary of State that under the *Companies Act* letters patent had been issued under the seal of the Secretary of State of Canada to Kutcho Creek Asbestos Company Limited, giving the name of the incorporators, the head office, the authorized capital and under the heading "Date" appears "September 25th, 1958". It is stated in an affidavit filed in the proceedings that in the meantime a meeting of the first directors of "Kutcho Creek Asbestos Company Limited" was held on or about September 29, 1958, and a

1960
 LETAIN
 v.
 CONWEST
 EXPLORATION
 Co. LTD.
 Kerwin C.J.

meeting of the shareholders immediately thereafter on the same day. The minutes are not before us. According to the material filed this is the usual practice when the applicants for incorporation of a company under the *Companies Act* of Canada have been advised that letters patent will issue bearing a certain date, but it is difficult in the present case, in view of the letter to the director of October 15, 1958, to understand how the meetings of a company "Kutcho Creek Asbestos Company Limited" could be held on September 29, 1958. However, in view of the conclusion arrived at, it is unnecessary to pursue the matter further.

The writ in this action was issued December 16, 1958, and the basis of the action as developed in the pleadings is that the letters patent were actually signed, sealed and issued after October 1, 1958, the relevant date mentioned in the agreement between the parties to this litigation. The provisions of the *Companies Act* referred to before this Court are s. 11:

11. The company shall be deemed to be existing from the date of its letters patent.

s. 132 and s. 133:

132. In any action or other legal proceeding, the notice in the *Canada Gazette* of the issue of letters patent or supplementary letters patent under this Part shall be *prima facie* proof of all things therein contained, and on production of such letters patent or supplementary letters patent or of any exemplification or copy thereof certified by the Registrar General of Canada, the fact of such notice and publication shall be presumed.

133. Except in any proceeding by *scire facias* or otherwise for the purpose of rescinding or annulling letters patent or supplementary letters patent issued under this Part, such letters patent or supplementary letters patent, or any exemplification or copy thereof certified by the Registrar General of Canada, shall be conclusive proof of every matter and thing therein set forth.

Counsel for the appellant stated that s. 132 had not been referred to in the Courts below.

The above provisions when read together are concerned with the status and capacity of a company incorporated under the Act and while in response to a notice that a constitutional point might be involved the Attorney General of Canada and the Attorney-General of Quebec intervened and were represented by counsel, my conclusion is that we are not concerned with any question as to the right of Parliament to provide for what shall be evidence

in a civil case in a provincial court. Kutcho Creek Asbestos Company Limited is not a party to this action; it continues to exist and not one of its powers is affected. The rights of the appellant and respondent are to be determined by the meaning to be ascribed to clause 7 of the original agreement between them and the appellant is not precluded by the mere production of the letters patent from showing at the trial that Conwest did not exercise the option in accordance with its terms.

1960
 LETAIN
 v.
 CONWEST
 EXPLORATION
 Co. LTD.
 Kerwin C.J.

The appeal should be allowed, the order of the Court of Appeal set aside and also all of the order of Collins J. except that part permitting the appellant to amend his statement of claim. The precise point of law raised by the application before Collins J. is that the letters patent referred to in paragraph 14 of the amended statement of defence are conclusive proof of the fact that Kutcho Creek Asbestos Company Limited was incorporated on or before the 1st day of October, A.D. 1958, under the "*Companies Act*" of Canada and the defendant having caused such a mining company to be so incorporated is a complete defence to the claims advanced by the plaintiff in this action. That point of law is decided in the negative. The appellant is entitled to his costs here and in the Courts below.

The judgment of Locke, Cartwright, Abbott, Martland and Ritchie JJ. was delivered by

ITCHIE J.:—The circumstances giving rise to this appeal are very fully set forth in the reasons for judgment of the Chief Justice, which I have had the benefit of reading.

As I understand the matter, the sole question before this Court is the determination of the point of law raised by para. 14 of the amended defence. By this paragraph the respondent, having recited that Kutcho Creek Asbestos Company Limited, a mining company which complied with the requirements of the option agreement referred to by the Chief Justice, was incorporated by letters patent dated September 25, 1958, went on to plead:

14. (b) That, under Sec. 133 of the said "*Companies Act*", except in a proceeding for the purpose of rescinding or annulling said letters patent, said letters patent are conclusive proof of the fact that such a mining company was incorporated prior to the said 1st day of October, 1958.

1960
 LETAIN
 v.
 CONWEST
 EXPLORATION
 Co. LTD.
 Ritchie J.

The point of law so raised was set down for hearing before Collins J. who adopted the view that as the terms of the option contemplated the incorporation of a company by the respondent in which the appellant was to become a substantial shareholder, the question before him must be determined on the basis that at the time when the option was granted both parties should be taken to have been aware of the provisions of s. 133 of the *Companies Act* which section "should be applied in determining the rights and obligations of the parties arising out of the option in question." He accordingly granted an order dismissing the action with costs.

Section 133 of the Dominion *Companies Act* upon which the respondent relies reads as follows:

Except in any proceeding by *scire facias* or otherwise for the purpose of rescinding or annulling letters patent or supplementary letters patent issued under this Part, such letters patent or supplementary letters patent, or any exemplification or copy thereof certified by the Registrar General of Canada, shall be conclusive proof of every matter and thing therein set forth.

In appealing from the judgment of Mr. Justice Collins, it was contended that s. 133 cannot be interpreted as meaning that the date specified in the letters patent is conclusive proof of the fact that the company came into existence on that date because this very fact is made the subject of a rebuttable presumption by s. 11 of the Dominion *Companies Act* which provides that: "The company shall be deemed to be existing from the date of its letters patent."

In rendering the decision of the Court of Appeal of British Columbia, Mr. Justice Sheppard held that:

The result is that the express words of Sec. 133 exclude any ambiguity from the phrase in Sec. 11 and that intention so expressed can be given effect to by construing the phrase "shall be deemed" in Sec. 11 to be conclusive, save for those exceptions provided for in Sec. 133.

It was also contended before the Court of Appeal of British Columbia and before this Court that because s. 133 is grouped with other sections in the *Companies Act* under the heading "Evidence" it must be regarded as legislation in relation to evidence and that to the extent that it precludes the hearing of evidence in a provincial Court concerning a provincial contract it is *ultra vires*.

As the requisite notice to the Attorney-General had not been furnished prior to the hearing in the Court of Appeal, Mr. Justice Sheppard held that the appellant could not contend before that Court that the section was *ultra vires*, but he went on to say:

The substance of Sec. 133 would appear to be primarily not evidence but those rights which are to flow from the charter and which are sometimes called the status of the company; such status in this company is a matter exclusively for the Parliament of Canada:

* * *

In the result it was held that:

. . . Sec. 133 precludes the plaintiff in this action controverting the date of incorporation appearing in the Letters Patent, and the appeal should be dismissed.

Notice of a constitutional issue raised in this appeal was duly served pursuant to order of this Court upon the agent for the Attorney-General of each province and upon the Attorney General for Canada wherein the issue was stated as follows:

- (1) In a civil action on a contract in any Province is a party precluded by virtue of Section 133 of the Companies Act of Canada from controverting the date of incorporation appearing on the Letters Patent of the Company incorporated under the said Companies Act of Canada?
- (2) If the answer to (1) is "yes", is the said Section 133 *ultra vires* of the Parliament of Canada or is the section merely inapplicable?

The Attorney General for Quebec and the Attorney General for Canada intervened and were represented at the hearing before this Court.

I agree with Mr. Justice Sheppard that s. 133 in its substance and true character is primarily concerned not with evidence but with the status of companies incorporated under the Dominion *Companies Act* and that the status of such companies is a matter within the exclusive jurisdiction of the Parliament of Canada, but in my view this does not, by any means, conclude the issue in the respondent's favour.

It is true that by conclusively fixing the status and powers of a Dominion company as being those set forth in the letters patent, except in a proceeding brought for the purpose of rescinding or annulling such letters patent, s.

1960
 LETAINE
 v.
 CONWEST
 EXPLORATION
 CO. LTD.
 Ritchie J.

1960
 LETAİN
 v.
 CONWEST
 EXPLORATION
 CO. LTD.
 Ritchie J.

133 may have an effect on the rules of evidence in provincial Courts in cases where the status of a Dominion company is in issue but this is not legislation "in relation to" civil rights, it is rather legislation having an incidental and consequential effect upon civil rights and as such it is within the power and authority of the Parliament of Canada (see *Gold Seal Limited v. Attorney-General for the Province of Alberta*¹). By its very nature, however, such effect is limited to matters which are incidental to the true character and subject-matter of the Dominion *Companies Act* and in a civil action in which the status and powers of a Dominion company are not involved it cannot be extended beyond the scope and purpose of that statute so as to preclude a party in a provincial Court from adducing evidence to establish that in fact the letters patent bear an earlier date than that upon which they were actually signed and sealed.

Kutcho Creek Asbestos Company Limited is a company incorporated under the authority of the Dominion *Companies Act*, endowed with the characteristics enumerated in that statute and in its letters patent granted pursuant thereto, one of which is that its date of incorporation is to be conclusively taken for all purposes of its corporate dealings and activities as being the 25th of September, 1958. The date of incorporation is one of the badges of a company's status and identity, it is an integral part of its corporate personality which flows from its charter as do the other ingredients of its status, the determination of which is, as has been said, a matter within the exclusive jurisdiction of Parliament. With the greatest respect, however, it seems to me that it is not the status of Kutcho Creek Asbestos Company Limited but the actions of the respondent Conwest Exploration Company Limited which are at issue in this case, and I am unable to see how conclusive proof of the fact that the former company has acquired status with effect from September 25th for the purposes of the Dominion *Companies Act* can preclude the appellant from proving whether or not the latter company exercised its option on or before the 1st of October.

¹(1921), 62 S.C.R. 424 at 460.

The only method of creating a body corporate under Part I of the Dominion *Companies Act* is for the Secretary of State to grant a charter by letters patent under his seal of Office (see s. 5(1)). If the charter so granted bears a date earlier than that upon which the Seal was affixed, then, by virtue of s. 133, the company acquires status with effect from the earlier date. The question here, however, is not whether or not Kutcho Creek Asbestos Company Limited is to be conclusively taken as having the status of a company incorporated on the 25th of September, but rather whether or not the respondent caused it to be "incorporated on or before the 1st day of October, 1958" within the meaning of those words as they are used in para. 7 of the agreement pursuant to which this action is brought.

1960
 LETAINE
 v.
 CONWEST
 EXPLORATION
 Co. LTD.
 Ritchie J.

I am of opinion that the fact that the letters patent of Kutcho Creek Asbestos Company Limited bear date the 25th of September and that company has status as from that date for the purposes of the Dominion *Companies Act* in no way precludes the appellant from adducing evidence to prove whether or not this option was exercised by the respondent in accordance with the terms of the contract now sued upon, and I would accordingly dispose of this appeal as proposed by the Chief Justice.

Appeal allowed with costs.

Solicitors for the plaintiff, appellant: Hogan, Webber, & Woodliffe, Vancouver.

Solicitors for the defendant, respondent: Guild, Yule, Schmidt, Lane, Collier & Hinkson, Vancouver.

Solicitor for the Attorney General of Canada: Wilbur J. Jackett, Ottawa.