D. R. FRASER AND COMPANY LIMITED ..... } APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... } RESPONDENT.

1946
*Apr. 23, 25

1947
*Feb. 4

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Income—Lumbering business—Claim for allowance for exhaustion of timber limits—Discretion of the Minister of National Revenue —Income War Tax Act, R.S.C. 1927, c. 97, s. 5(1)(a), as amended by 1940 (Dom.) 2nd session, c. 34, s. 10.

The appellant company carries on a lumbering business in Alberta and, when making its income tax return for 1941, claimed an allowance for exhaustion of three timber limits, for which licences had been granted by the province. The appellant's claim was disallowed by the Minister of National Revenue; and the Exchequer Court of Canada affirmed the Minister's decision.

*Present at hearing of the appeal: Kerwin, Hudson, Taschereau, Rand and Estey J.J. Hudson J. died before the delivery of the judgment.

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Section 5 (1)(*a*) of the *Income War Tax Act*, as amended in 1940, provides that "the Minister in determining the income derived from * * * timber limits may make such an allowance for the exhaustion of the * * * timber limits as he may deem just and fair * * *"; while, in the Revised Statutes, paragraph (*a*), contained the words "shall make" instead of "may make."

Held: The appellant company has no statutory right to the allowance claimed by it under section 5(1)(*a*).—That section gives the Minister a discretion not merely as to the amount but also as to whether any allowance for exhaustion should be made. Moreover, it is significant that Parliament, by the amendment in 1940, changed the imperative word "shall" as contained in the Revised Statutes to the permissive word "may". *Pioneer Laundry and Dry Cleaners Ltd.* v. *Minister of National Revenue* [1940] A.C. 127, ref.

Judgment of the Exchequer Court of Canada ([1946] Ex. C.R. 211) affirmed.

APPEAL from the judgment of the Exchequer Court of Canada (1), affirming the decision of the Minister of National Revenue disallowing a claim by the appellant company for an allowance for exhaustion of timber limits.

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

G. W. Auxier and *J. G. McEntyre* for the respondent.

The judgment of Kerwin and Taschereau JJ. was delivered by

KERWIN J.:—The appellant in this appeal against a decision of the Exchequer Court of Canada, 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:

(*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;

(1) [1946] Ex.C.R. 211; [1946] 2 D.L.R. 107.

In the Revised Statutes, paragraph (*a*) read as follows:

(*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* (1), but immediately after this 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

(*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.

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 discretiton with its own. On the face of it

(1) [1940] A.C. 127.

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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. In this view of the matter it is unnecessary to consider the arguments that were advanced as to whether the appellant who now holds licences 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* (1) 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.

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 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.

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

(1) [1947] 1 D.L.R. 721.

"timber limits", but whether the relation to the Crown is that of lessor and lessee is not an essential feature of the controversy.

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:—
>
> (*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 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.

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 of dues payable, plus the last items. For the operation itself, there are the disbursements for mills, plant, roadways, bridges, wages and other usual expenses.

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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.

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.

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
>
> (*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;

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*).

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 measurable 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 them 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

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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, 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. Elliot, 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.

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.

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.

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.

The appeal should, therefore, be dismissed with costs.

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 licences 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 licences are from year to year with a right in the licensee, upon compliance with the conditions specified, to renew from year to year (now

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by 1939 S. A., c. 10, s. 49 (*e*) not renewable after the tenth year). These licences 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 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 licences 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:

> 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 benefited 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.

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 holdings 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:

> * * * 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.

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.

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.

The appellant's contention then is that when its income is derived as it is here in 1941 from timber limits it has a

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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 National Revenue* (1), 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 whcih 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:

> 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:

> 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:
>
> (*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

(1) [1940] A.C. 127.

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*, (1); *Corporation of the City of Ottawa* v. *Hunter*, (2).

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 & Dry Cleaners Limited* v. *Minister of National Revenue* (3):

> * * * 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 set 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 licences or permits. In the exercise of his discretion the

(1) (1896) 26 Can. S.C.R. 397, at 404.
(2) (1900) 31 Can. S.C.R. 7, at 10.
(3) [1940] A.C. 127, at 136.

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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:

> * * * it has already benefited 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.

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.

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.

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 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 lumbering 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.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Smith, Clement, Parlee & Whittaker.*

Solicitor for the respondent: *W. S. Fisher.*