

**FORESTS AND WATER-POWERS OF THE PROVINCE OF QUEBEC  
AND THE LAWS APPERTAINING TO THEIR DEVELOPMENT.<sup>1</sup>**

I confess to a great deal of embarrassment in accepting the very courteous invitation of your President to address your Association on a subject of my own choosing—first: because of my lack of experience in anything of the kind, and second: because of the difficulty in choosing a subject. In discussing the matter with one of my associates he said that I would do well to select a subject about which you would be likely to know little or nothing, and could not be over critical. The advice seemed wise; but, on the other hand, it seemed to be only fair to you that I should select a subject concerning which I might at least pretend to know something and which might at the same time be of interest to you.

In my choice of the subject "The Forests and Water-Powers of the Province of Quebec and the Laws appertaining to their Development", I have been influenced largely by the consideration that the development of the forest industries and water-powers throughout Canada has been abnormally active in the past few years; that a considerable proportion of the capital has come from the United States and that the United States is by far the largest consumer of the commodities which have been produced. By way of illustration, I may be permitted to mention that over \$100,000,000. was invested by one American concern alone in the development of the forests and water-powers of Canada during the past year. The United States is the world's largest consumer of newsprint paper and Canada is the largest producer. The depletion of your forest reserves, coupled with the steady increase in your consumption of paper, is very rapidly leading to the transfer of the industry from the United States to Canada, engaging the attention, not only of your manufacturers and your capitalists, but also, I am glad to say, of a large body of the legal profession. Nearly two million tons of newsprint paper alone were exported from Canada to the United States last year and when it is considered that one and one-half cords of wood are consumed in the manufacture of each ton of newsprint paper, or a belt of cord wood sufficient to extend over the breadth of the continent from the Atlantic to the Pacific, some idea of the extent of the industry can be gathered. Exports of wood

<sup>1</sup> An address delivered before the American Bar Association at Buffalo, on the 31st August, 1927, by Mr. G. H. Montgomery, K.C., D.C.L.

pulp and paper for the first seven months of the current year were valued at \$98,633,491. while exports of pulp wood totalled 1,038,988 cords valued at \$10,288,884. or a total valuation of \$108,972,375. most of which went to the United States. While our Supreme Court, in considering the applicability of the War Measures Act has held that newsprint is not a "necessity of life," fortunately there are a few of us who are content to live without it and the matrimonial adventures of some of your celebrities and other breakfast table topics are adding materially to our national wealth. It has been estimated, for instance; that Colonel Lindbergh, in addition to the many other services which he has rendered, has been responsible for the consumption of over fifty thousand tons of newsprint.

However, it is not of the importance of the industry that I am here to address you, but of the laws appertaining to its development; and if I am limiting my remarks to the Province of Quebec it is—first, because I am naturally more familiar with the laws of that province; second because you are naturally less familiar with its laws than you are with those of the common law provinces; and third, because Quebec is the largest producer of pulp and paper of any of the provinces of Canada and by far the largest producer of hydro-electric power by private enterprise. It has been my privilege during a number of years past to act as General Counsel to the Canadian Pulp and Paper Association, as well as to be connected with the developments of a number of the pulp and paper and hydro-electric enterprises, and in that capacity I have been thrown in contact with a rapidly increasing number of your practitioners and have had to consider their problems; and it is of these I will attempt to speak to you.

First, let me mention certain prohibitory laws and regulations which have very materially hastened the developments in Canada of which I have spoken. For a number of years past most of the provinces of Canada have prohibited the export of pulpwood in an unmanufactured condition and have extended a cordial invitation to you to dwell among us and manufacture it in Canada. A somewhat similar policy has more recently been adopted by the Dominion as well as by the provinces in connection with the exportation of hydro-electric power, and it is our hope that it will become increasingly necessary for the legal profession of the United States to consider the benevolent provisions of our laws in other respects.

Turning to the laws of Quebec appertaining to our woods and forests, I might say that while a small proportion of our timber lands are held in fee simple by private owners, the title to by far

the greater portion or over eighty-seven per cent still rests in the Crown. The restrictions in regard to export do not apply to fee simple lands but only to those held under license from the Crown. The fee simple lands are largely the remains of the old seigniorial grants, or lands which have since been ceded for settlement or by way of bonus in connection with the construction of railways.

As regards Crown lands, which form the bulk of the limits which are being exploited, they are governed by the provisions of the Lands and Forests Act, Chapter 44 of the Revised Statutes of Quebec, 1925, as amended from time to time. The law requires that all timber limits within the unoccupied territory of the Crown belonging to the province shall be sold at public auction. In practice, a person or company wishing to acquire a timber limit makes an application to the Department of Lands and Forests asking that the limit in question be put up for sale. The conditions of sale frequently require that a mill be erected within a stated interval, particularly if the limit is not tributary to already existing mills. A substantial deposit is required from each bidder which has to be put up a given time before the sale in order to qualify him to bid. An upset price is fixed and the bidding is at so much per thousand feet over and above this upset price, and in addition to the regular ground rent and stumpage dues. The purchaser does not acquire a title in ownership to the land, but only the right to obtain an annual license to cut. The law provides that:

Every license shall describe the lands upon which the timber may be cut, and shall be deemed to confer, for the time being, on the licensee, the right to take and keep exclusive possession of the lands so described, subject to such regulations and restrictions as may be established. R.S. (1909) 1599.

Such license shall vest in the holder thereof all rights of property in all trees, timber and lumber cut within the limits of the license during the term thereof, whether cut by authority of the holder of such license or by any other person, with or without his consent. R.S. (1909) 1600.

Every such license shall entitle the holder thereof to seize or cause to be seized, in revendication or otherwise, such trees, timber or lumber where the same are found in the possession of any unauthorized person, and also to institute any action or suit against any wrongful possessor or trespasser, and to prosecute all trespassers and other offenders, and to recover the damages suffered. R.S. (1909) 1601.

These licenses cannot be granted for more than twelve months—the license year commencing on the first of May. Any license holder who has complied with the regulations and paid the ground rent and stumpage dues is entitled, up to the first of September following, to a renewal of his license taking effect as of the first of

May preceding. Some doubts were raised by a recent decision of the Supreme Court of Canada, confirming a judgment of the Exchequer Court in the case of *O'Brien et al v. The King*<sup>2</sup> as to the position of a license holder in the interval. In the case in question a fire occurred on the limit during the month of July and prior to the renewal of the license, which, in fact, was not renewed until the month of December following. The limit holder took an action against the railway, alleged to be responsible for the fire, and the action was dismissed on the ground that the limit holder had no vested right in the limit at the time of the fire and that the regulation which purported to give him a vested right to a renewal was not authorized by the statute. It is probable that legislation will be introduced to remove any such doubt since it has been the policy of the Government from time immemorial to treat the right of a license holder to renewal as one beyond question, and lands held under license are dealt in and taken as security on almost the same basis as if they were freehold.

The law does provide, however, for the withdrawal of lands from licenses for colonization purposes, but in such case the limit holder is given a reasonable time to remove the timber. Timber licenses can be transferred upon payment of a bonus of \$20. per square mile, and in such event the transfer is accepted by the Minister of Lands and Forests and endorsed upon the license. The regulations also provide for the transfer of limits by way of pledge. No transfer bonus is required, the pledge being simply noted on the license. As a very large proportion of the pulp and paper developments require the issue of bonds, the practice is to describe the limits in a schedule to the trust deed—the pledge being noted on the registers and endorsed on the licenses themselves.

Each limit holder is required to submit annually details of his operations during the preceding year, accompanied by statements sworn to by qualified cullers, and upon these the stumpage dues are figured. The regulations also prescribe the minimum diameter of the trees to be cut. The minimum requirements as to diameter are usually removed in the case of lands which have been swept by fire, and a clean cut is permitted. Each limit holder is required to provide a given number of fire rangers, in addition to which the increasing use of hydroplanes and watch-towers has greatly reduced the fire hazard.

While financiers and others were at one time inclined to look askance at a title which on its face appeared to be only an annual

<sup>2</sup> [1927] Ex. C.R. 154; [1927] 2 D.L.R. 1139.

license, this is no longer the case and the system is one which can now be regarded as assuring the possession of the limits to the holder so long as he may require them. From the point of view of public interest the license system presents great advantages. The Royal Commission on Pulpwood appointed by the Dominion in reporting upon the situation in Quebec remarked:—

Although the licenses under which this timber is held may be virtually perpetual, they are nevertheless subject to very definite control by the provincial authorities. Only upon compliance with regulations which may from time to time be established may the licenses be considered as permanent in character. From the viewpoint of the State, it is a fortunate circumstance that over the major portion of the merchantable timber stand, the province is strongly entrenched in a position which permits of developing the policy under which the forest estate is operated; making provision, as circumstances and economic conditions permit, for improved methods of utilization. Not only are methods of operation subject to control, but the province may and does apply the principle of home manufacture of the timber cut from licensed Crown lands.

Counsel who are called upon to advise intending purchasers of timber limits and bankers proposing to advance monies upon the security of them should assure themselves of two things: first, that the limit holder is in good standing with the Department and that a transfer, if made, would be accepted, and that there are no outstanding claims for ground rent and stumpage as these carry a privilege upon the timber; and second, that the limit holder has good title to his license. Although the license is only annual in form it has been held by our Courts that no one can validly obtain a license to cut timber on public lands who has not a chain of title tracing back to a sale by public auction from the Crown. A license issued by the Department to one whose title is defective in whole or in part may be declared to be null and void. This involves an examination of the chain of title in practically the same way as if the lands were held in fee simple, and as the earlier transfers were frequently made very informally and the records are by no means complete, this sometimes is not an easy matter.

Another point to which your attention should be drawn is to the formalities connected with corporate mortgages in the Province of Quebec. A mortgage created in favour of a Trust Company, not licensed to carry on the business of a Trust Company in the Province of Quebec, is of very doubtful validity. Quite recently a case presented itself where the Trust Deed was made in favour of an American Trust Company. Fortunately the situation was discovered in time to permit the trustee to be changed. A distinction between

the common and the civil law in force in the Province of Quebec is to be noted in connection with the giving of security on real estate. The "mortgage" as known under the common law is replaced by a "hypothec" under the civil law. Under this the legal title remains vested in the mortgagor, the lender acquiring the right to have the property brought to sale and to be paid by privilege out of the proceeds. Except in certain counties, hypothecs have to be created in notarial form. The practice where the real estate, upon which corporate mortgages are secured, is situate in part within the Province of Quebec and in part within one of the other provinces, is to have the deed executed both in notarial and in indenture form, or else a supplementary deed in notarial form is passed affecting the Quebec property. A notarial deed to be valid in the Province of Quebec must be received before a Quebec notary, who retains the original and issues certified copies which are by law authentic and avail as originals.

Formerly, the right to cut timber on the land of another was purely a personal right, but our Code has now been amended and includes the right to cut timber, among other immoveable or real rights capable of registration and attaching to the property, even in the hands of a subsequent purchaser of the fee.

We have no system of chattel mortgages, and the civil law does not recognize the validity of a pledge unless the thing pledged is placed in the possession of the pledgee or in the hands of a depositary appointed for the purpose. In 1914 to facilitate corporate mortgages our law was amended to provide that for the purpose of securing any bonds, debentures or debenture stock a company, being empowered thereto by its charter, may by authentic deed (i.e. a deed passed in notarial form), for the purpose of issuing any bonds, debentures or debenture stock which it is by law entitled to issue, hypothecate, mortgage or pledge any property, moveable or immoveable, present or future, which it may own in Quebec.

In 1924 a further Statute was enacted in the following terms:—

It is and always has been lawful for a company falling under articles 6119a and following of the Revised Statutes, 1909, besides hypothecating, mortgaging and pledging for the purposes set forth in the said articles, to cede and transfer, for the same purposes, the said properties to the Trustee, with power, in the event of failure of the company to fulfil the conditions of the trust deed, to take possession of the properties ceded and transferred to administer and sell them for the benefit of the bondholders.

This statute can only have been intended to be declaratory as it has always been the practice to make use of the ordinary form of

"Charging Clauses" which, in addition to hypothecating, mortgaging and charging, purports to cede and transfer to the trustee the properties affected and empowers the trustee upon default to sell with or without entry. The text of our trust deeds does not in fact, differ materially from your own and contains the usual floating charge in addition to the specific mortgage.

While both the Dominion and the provinces have the power to incorporate companies, it is customary in connection with the formation of Pulp and Paper Companies to use a Provincial Charter, thus obviating the necessity of obtaining mortmain licenses.

In government sales of timber limits the practice has been adopted of inserting a condition to the effect that only eighty per cent (80%) of the annual growth may be cut each year, the idea being to secure perpetuity of our timber supply.

#### WATER-POWERS.

The development of our water-powers is closely allied with the development of the Pulp and Paper industry. It is estimated that the potential capacity of the water-powers of the Province of Quebec is equal to 15,000,000 horse power, of which approximately 1,800,000 horse power have actually been developed.

The beds of navigable and floatable rivers belong to the Crown and those of non-navigable and non-floatable rivers belong to the riparian owners, but since 1884 the Crown grants of lands have been subject to a reserve in favour of the Crown three chains in width along all non-navigable rivers. This is done for the purpose of reserving for the Crown the right to any water-powers which may exist. The question as to whether individual rivers are navigable or non-navigable has been the subject of a great deal of litigation. It has been decided by the Judicial Committee of the Privy Council in *Maclaren v. Attorney General for Quebec*<sup>3</sup> that a river to be floatable for the purpose of the distinction must be floatable in rafts and not merely by loose logs. In the case referred to the Privy Council raised some doubt as to the power of the Crown to alienate the beds of navigable and floatable rivers, suggesting that they might be held to form part of the public domain and thus be incapable of becoming private property. To remove any such doubts a statute was passed in 1916, declaring that it had always been lawful for the Government to alienate or lease to such an extent as was deemed advisable the beds and banks of navigable rivers and lakes. In former years a title was given in fee simple but for

<sup>3</sup> [1914] A.C. 258.

some time past this practice has been discontinued and what are known as emphyteutic leases are granted for terms ranging from forty to ninety-nine years subject to compliance with certain stated conditions and the payment of an annual royalty based upon the horse power developed. An emphyteutic lessee has all the rights of an owner during the term of his lease and can alienate or hypothecate the property as fully as if he were the owner, subject to the termination of the rights with the lease. It is, however, customary to provide as a condition of the lease that transfers shall be approved by the Minister of Lands and Forests.

Persons wishing to develop water-powers are obliged to have their plans and specifications approved by the Minister of Lands and Forests of the province, and, if the work is to be carried on in a navigable river, the approval of the Dominion is also required in the interests of navigation.

If boundary waters are affected the approval of the International Joint Commission has also to be obtained.

By a statute passed in 1909 every water-power formed by a lake, pond, water course or river, whether floatable or not, was declared to be a matter of public interest, and the owner thereof was given the power to expropriate the adjacent land so as to allow him to utilize such water-power in the manner provided. These rights of expropriation extend not only to the property required for the development works themselves but also to the lands likely to be affected or flooded as well as for the necessary transmission lines. The limitations placed on the rights of expropriation are:

*First:* They can only be exercised in the case of a water-power of an average natural force of at least two hundred horse power;

*Second:* They shall not be exercised to the prejudice of an industry already established; and

*Third:* The area to be expropriated must first be approved by the Lieutenant-Governor in Council after notice to the interested parties. In the case of transmission lines, the owner can expropriate a servitude or easement in place of the land itself if he so desires.

As, in most of our rivers, there are seasonal variations between the flow at high and low water, storage work in the upper waters are usually required, if a continuous flow is to be maintained. Formerly this was left to private initiative but in later years the work has been undertaken by the Government itself for the benefit of all users on the river who are required to provide an amount sufficient to cover the interest and sinking fund on the expenditure as well as the cost of maintenance and operation. This is distributed

ratably between the several users in proportion to the benefit received.

In 1910 a permanent commission was appointed known as the Quebec Streams Commission, consisting of three commissioners who are experts in hydrography and the management of forests, and a secretary. This commission has been continuously engaged ever since in the investigation of the rivers and water courses of the province and in a survey of their potential resources. The results of their studies are set out in annual reports. Under their direction extensive storage works have been constructed at the head waters of a number of the important rivers, among which might be mentioned the Gouin Reservoir at the head of St. Maurice River, which is said to be one of the largest in the world and which has more than doubled the amount of continuous power at each of the several important developments on that river. The Mercier Reservoir, which is nearing completion, closely approaches it in size. It is situated at the head waters of the Gatineau River on which the International Paper interests are constructing four large developments.

Improved methods of transmission and the use of large blocks of power for electric chemical purposes have made possible the development of the water-powers in regions which had formerly been considered far too remote to permit of any commercial development, until today we have a system of hydro electric power developments and transmission lines capable of being linked together to form one continuous chain from the Falls of Niagara to the upper waters of the Saguenay River.

Quebec also has its Public Service Commission but as its powers are largely modelled on the laws governing the several public utilities commissions in the United States, with which you are all familiar, it is unnecessary to refer to it except to say that its constant policy is to encourage in every way the development and use of our natural resources.

As will be seen from the above, it has been possible for the Province of Quebec to profit by the mistakes made in other jurisdictions where the exploitation of their natural resources has been earlier in date. The policy of the Province of Quebec has always been opposed to public ownerships in matters of commerce and industry and has constantly favoured the development and use of our natural resources by private enterprise. It is its policy, however, while thus encouraging private development to itself retain the ownership and thereby the control of our natural resources. By this means it is hoped not only to prevent the exhaustion of

our timber supplies but to ensure the exploitation of both our forest and our water-powers in the most advantageous manner, according to the most approved practices as they may obtain from time to time. Coupled with this it would appear to be the fixed policy of the government not only to prohibit the exportation of wood cut on the public domain in a raw or unmanufactured condition but also to discourage the exportation of electric energy. While generally speaking, the jurisdiction to control trade and commerce including exports and imports rests with the Dominion, from whom a license to export has to be obtained in any event, the province now makes it a condition that every sale, lease or grant of water-powers belonging to the province shall contain a clause prohibiting the exportation outside of Canada of the electric energy developed in the province. This is not from any wish to be unneighbourly but because the development of the country is so essentially tied up with the most advantageous use of its natural resources as to make such a policy imperative, if we are to increase and retain our population. For instance, one of the slogans used in connection with a campaign against the exportation of pulpwood was that "for each cord of pulpwood exported in an unmanufactured condition a Canadian went with it." It will be reassuring to you, however, to know that your country has little to complain of since, while Canada's trade balance with the world is considerably in her favour, her imports from the United States exceed her exports by approximately \$235,000,000. It is also obvious that a policy requiring our natural resources to be utilized, as far as possible, within the provinces carried with it a corresponding duty towards those who are thus invited to conduct their operations in Canada and to furnish the large sums of capital required for the purposes. Self interest alone require this and in this respect it is to be hoped we will never be found lacking. It can safely be said that in no place in the world are the rights of capital and the protection of vested interests more jealously safeguarded than in the Province of Quebec.

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