

1918
 March 14.

ROBERT LOWE,

SUPPLIANT,

AND

HIS MAJESTY THE KING,

RESPONDENT.

Yukon—Intoxicating liquors—License—Customs—Illegal tax—Recovery.

Under the provisions of the statutes relating to Yukon Territory the Dominion Government has the power to exact a fee for the granting of a permit for the importation or bringing in of intoxicating liquors in the territory; such exaction is a mere charge for the granting of the permit and not in the nature of customs duties or tax within the provisions of the *Customs Act* (R.S.C. 1906, c. 48, s. 130).

(2) Where such a charge has been illegally imposed but paid voluntarily it cannot be recovered back.

PETITION OF RIGHT to recover taxes alleged to have been illegally exacted.

Tried before the Honourable Mr. Justice Cassels, at Ottawa, January 24, 1918.

W. D. Hogg, K.C., for suppliant.

C. P. Plaxton and *F. P. Varcoe*, for respondent.

CASSELLS, J. (March 14, 1918) delivered judgment.

This was a Petition of Right filed on behalf of Robert Lowe, of Whitehorse, in the Yukon Territory. The petition was filed in the Exchequer Court

on the 1st day of April, 1915. It is stated that the petition was deposited with the Secretary of State on February 12th, 1915.

The Petition of Right alleges as follows:

“2. That for a number of years past your suppliant imported into the said Territory, under permit duly obtained, large quantities of spirituous or malt liquors, wine, ale, porter, beer and lager beer, upon which spirituous or malt liquors he was obliged to pay in addition to the Customs and Inland Revenue tax already paid thereon, a tax of two dollars per gallon on all the said spirituous or malt liquors so imported by him into the said Territory as aforesaid, and upon the said wine, ale, porter, beer and lager beer he was obliged to pay a tax of fifty cents a gallon on such liquors so imported.

“3. That during the years between July, 1900, and the present time your petitioner has been obliged to pay, and has in fact paid on account of the said tax upon the spirituous and malt liquors, wine, ale, porter, beer and lager beer so imported into the said Territory as aforesaid to the officers of the Dominion Government and those employed under the said officers in the collection of revenue for the said Yukon Territory, the sum of eighty-seven thousand three hundred and forty-seven dollars.

“4 That the imposition of the said tax of two dollars per gallon on spirituous and malt liquors and the tax of fifty cents per gallon on wine, ale, porter, beer and lager beer so imported into the said Territory as aforesaid by your suppliant was and is based upon certain orders in council

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“passed by your Majesty’s government of Canada from time to time between the 26th day of July, 1900, and the 12th day of August, 1911, which Orders-in-Council purport to be founded upon the provisions and powers contained in the *Yukon Territory Act*, now consolidated in Revised Statutes of Canada, as Chapter 63, and the money so collected has been and is assigned under the provisions of the said orders in council to form part of the revenue of the said Yukon Territory.

“5. The suppliant alleges and the fact is that the said orders in council are *ultra vires* the government of Canada, the said government not having been authorized or empowered by the said *Yukon Territory Act* to impose the said tax on spirituous or malt liquors, ale, porter, beer or lager beer imported or brought into the said Territory; and the suppliant submits that the sum above mentioned has been exacted from him without warrant or legal authority by the officers of your Majesty’s government of Canada, and has been received by your Majesty’s said government as money paid to your Majesty for the use and benefit of your suppliant, and should be repaid to your suppliant with interest.”

The petitioner claims that it may be adjudged that he is entitled to payment of the sum of \$87,347, being the amount of the tax illegally exacted.

To this petition His Majesty the King, represented by the Attorney-General for the Dominion of Canada, filed a defence. The second paragraph of his defence reads, as follows:

“If the suppliant did make such payments as
“in the third paragraph of the petition of right
“alleged, which the Attorney-General does not
“admit, such payments were made voluntarily by
“him, and the Crown is under no liability to repay
“them.”

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In paragraph 2a the respondent alleges, as follows:

“The alleged debt, cause of action or claim
“pleaded herein did not accrue within six years
“before this action, and was and is barred by the
“statute of limitations. *Exchequer Court Act*,
“R.S.C. 1906, ch. 140, sec. 33. *North-West Terri-*
“*tories Act*, R.S.C. 1906, ch. 62, sec. 12. *Yukon*
“*Act*, R.S.C. 1906, ch. 63, sec. 19. *Yukon Consoli-*
“*dated Ordinances*, 1914, ch. 55, sec. 1. 21 James
“I, ch. 16, sec. 3.”

On the argument of the case respondent asked permission to supplement his defence by pleading the limitation which is provided by sec. 130, ch. 48, Revised Statutes of Canada, 1906. This section reads as follows:

“Although any duty of customs has been over-
“paid, or although, after any duty of customs has
“been charged and paid, it appears or is judicially
“established that the same was charged under an
“erroneous construction of the law, no such over-
“charge shall be returned after the expiration of
“three years from the date of such payment, un-
“less application for payment has been previ-
“ously made.”

The respondent was granted leave to file this supplemental defence, and although in the view I take

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of the case it is not necessary to determine this point, if a higher court should take a different view, the question will arise whether or not this sec. 130 is applicable to the facts of the case, and would protect the respondent from any repayment for a longer period than three years. No application for repayment had been previously made.

In connection with sec. 130, in the interpretation the Act respecting the customs, sec. 2, sub-sec. 2, contains the following: "All the expressions and "provisions of this Act or any law relating to customs, etc." If it were to appear, as Mr. Hogg argued, that the charges imposed and collected are in the nature of customs duties, my view is that this sec. 130 would be applicable.

Before dealing with the case it would be well to state that in the year 1902, by the statute 2 Ed. VII., cap. 34, the *Yukon Territory Act* was amended, and for the first time, as far as I can ascertain, sub-sec. 2, of sec. 8, was enacted. It reads as follows:

"2. Every ordinance made under the authority
 "of this section shall remain in force until the day
 "immediately succeeding the day of prorogation
 "of the then next session of parliament, and no
 "longer unless during such session of parliament
 "such ordinance is approved by resolution of both
 "Houses of Parliament."

The subsequent provision is in regard to publication in the Gazette.

On the argument Mr. Hogg, K.C., who appeared for the suppliant, and Mr. Newcombe, K.C., who appeared for the Crown, agreed that this provision of sub-sec. 2, of sec 8 cap 34. 2 Ed. VII., had been

complied with, and also that all the provisions relating to the advertisement had been complied with.

The *Yukon Territory Act* (intituled "An Act to provide for the Government of the Yukon Territory"), (1) reads as follows:

"113. No intoxicating liquor or intoxicants shall be manufactured, compounded, or made in the Territory; and no intoxicating liquor or intoxicants shall be imported or brought into the Territory from any province or territory in Canada or elsewhere, except by permission of the Governor-in-Council."

Sec. 114 reads as follows:

"114. All intoxicating liquors or intoxicants imported or brought from any place out of Canada, into the Territory, shall be subject to the customs and excise laws of Canada."

I suggested to counsel that it might be well to supplement the admission of facts, which had been agreed upon by a statement showing whether the liquors referred to were imported or brought into the Territory from any province or territory in Canada, or whether they were imported or brought from any place out of Canada, and the parties have agreed to supplement the admissions which are on file by stating that the liquor above referred to was brought into the Territory from other parts of Canada.

The parties have agreed upon a statement of facts, the first three paragraphs of which reads as follows:

"1. That under permits duly issued in pursuance of the provisions of the orders-in-council

(1) R.S.C. 1906, c. 63.

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“hereinafter mentioned, the suppliant, trading
 “under the name of Robert Lowe and Company,
 “at Whitehorse, in the Yukon Territory, during
 “the years between June 24, 1901, and April 1,
 “1915, imported and brought into the said Terri-
 “tory spirituous and malt liquors, ale, porter, beer
 “and lager beer.

“2. That during the period aforesaid the sup-
 “pliant paid to officers of the respondent in the
 “said Territory, in respect of the liquors so im-
 “ported, the following sums of money:

“1901-2	\$16,436.00
“1902-3	4,986.00
“1903-4	7,785.50
“1904-5	6,386.50
“1905-6	9,947.00
“1906-7	6,414.00
“1907-8	5,650.00
“1908-9	5,800.00
“1909-10.....	3,742.00
“1910-11.....	5,125.00
“1911-12.....	5,902.00
“1912-13.....	3,318.00
“1913-14.....	3,501.00
“1914-15.....	1,796.00

\$86,789.00

“3. That the said permits were issued and the
 “said payments were made in pursuance and sub-
 “ject to the provisions of the following Orders-in-
 “Council:

- “Order in Council dated Feb. 25, 1901, P.C. . . 256
- “Order in Council dated March 5, 1901, P.C. 257
- “Order in Council dated March 18, 1901, P.C. 579

“Order in Council dated June 22, 1904, P.C. 1159

“Order in Council dated Sept. 17, 1908, P.C. 2055

“Order in Council dated Dec. 9, 1909, P.C. 2475

“Order in Council dated August 12, 1911, P.C. 1794

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The various orders-in-council under which the fees were exacted are filed as part of the proceedings in the present action.

I have considered the various statutes relating to the Yukon Territory. Cap. 6 of 61 Vic. (13th June, 1898), which constitutes the Yukon a judicial district. Cap. 11, 62 & 63 Vic. (11th August, 1899, repealed the previous sec. 8, and provided as follows:

“Provided always that the Governor-in-Council
“or the Commissioner-in-Council may make regulations in respect to shop, tavern and other licenses, and may impose fees for the issue of the
“same.”

By cap. 41, 1 Ed. VII. (23rd May 1901) it was provided that the Yukon should no longer form part of the North-West Territories.

Colour is afforded to the argument advanced by Mr. Hogg that the fees which were exacted for the granting of the permit were in reality a tax by the language used in one or two of the ordinances which are filed. For instance, the ordinance which is dated September 17th, 1908, is headed “Ordinance respecting the imposition of a tax upon ale, porter, beer, or lager beer, imported into the Yukon Territory.” It purports to amend a previous ordinance of June 22nd, 1904, by providing that on and after the first day of November, 1908, a tax of 50 cents a gallon be imposed. A subsequent ordinance, passed on December 9th, 1909, is an ordinance to

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rescind an ordinance respecting the imposition of a tax.

Various permits were from time to time obtained by the suppliant permitting him to take into the Territory intoxicating liquor or intoxicants. The ordinances would indicate that as a term for obtaining these permits the applicant was asked to pay certain fees which apparently were graduated or based upon the quantity of intoxicating liquors which he sought permission to take into the Territory.

For a time my impression was that these exactions were in the nature of customs dues and in the nature of a tax, but on reflection I have come to the conclusion that they were mere charges made by the Dominion government for the granting of the permit.

It was conceded before me by Mr. Hogg, counsel for the suppliant, and who presented his case with great ability and considerable research, that the Dominion government had the right to impose license fees as a term for the granting of the permits. His contention, however, is that the amounts charged were so excessive as to show that they were really charged as customs dues or as a tax. If it be once conceded that the Governor in Council had the right to impose a fee for the granting of the permit, I do not think it would be open to the suppliant to question the amount. He paid what was asked, raised no objection, did not pay under protest, but acquiesced in the charges, and no doubt when he came to retail the liquor, the consumer paid what had been advanced for the permit.

I think that a fee could be legally exacted for the granting of the permit. It is not the case of a man

having the right to take liquor into the Territory, and then being charged with this so-called tax. He had the right to accept or refuse the permit.

The case of *Chappelle v. The King* (1), is of a different character. In that case the plaintiff had the legal right to mine for ores. Subsequent to the granting of this right the Crown attempted by regulations to alter his contract by requiring him to pay certain royalties. It was held that this was illegal so far as the first license was concerned. Subsequently the Privy Council adopted the judgment of Sir Louis Davies, to the effect that the subsequent licenses were practically new grants, and were subject to the regulations then in force.

The case was somewhat similar to the case of *Booth v. The King* (2), a case referring to the renewal of a license to cut timber.

In the present case before me, as I have pointed out, there was in no sense any change or attempted change of any contract entered into between the Crown and the suppliant. He voluntarily acquiesced in the charge made by the permit, and even if it were to be held illegal as a tax, I do not think he could recover.

In an elaborate judgment of the Court of Appeal in Ontario in the case of *Cushen v. City of Hamilton* (3), it was held that fees having been paid with full knowledge of the facts, under a claim of right, could not be recovered back.

Another case of taxes paid was that of *O'Grady v. Toronto* (4).

(1) 7 Can. Ex. 414; 32 Can. S.C.R. 586; [1904] A.C. 127.

(2) 51 Can. S.C.R. 20, 21 D.L.R. 558.

(3) 4 O.L.R. 265.

(4) 37 O.L.R. 139, 31 D.L.R. 632.

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I would in addition to the cases I have mentioned add the case of the *Grand Trunk Railway v. Quebec* (1),—and would refer to the language of Mr. Justice Strong at page 79. It is *obiter*, but nevertheless the opinion of a very eminent judge.

I have also been furnished with an elaborate list of authorities to show that under the general words authorizing the Governor in Council to enact laws for the peace, order and good government, etc., that as a matter of police regulation there was the power on the part of the Governor in Council to charge these fees. I do not think it necessary to rely upon this point, but I may add that any power to enact a law in the nature of a police regulation would fall rather to the Yukon government than to the Governor in Council of the Dominion.

Claims of this character become serious if after such length of time these moneys have to be paid back.

The case of *Schlesinger* (2) may be referred to as showing the views of the American courts.

I think the petition should be dismissed with costs.

Petition dismissed.

Solicitors for suppliant: *Hogg & Hogg.*

Solicitor for respondent: *E. L. Newcombe.*

(1) 30 Can. S.C.R. 73.

(2) 1 Court of Claims, p. 16.