Court File No.: 24108/07
DATE: 20080121

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
BONIFERRO MILL WORKS ULC	)	D. Hamer/G.Slaughter, Counsel for the Applicant
	)	
	)	
Applicant	)	
	)	
- and -	)	
	)	
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO	)	J. Minor/M. Dunn, Counsel for the Respondent
	)	
	)	
Respondent	)	
	)	
	)	**HEARD:** December 4, 2007

REASONS FOR ORDER

TRANMER, J.

Overview

[1] Boniferro Mill Works ULC challenges one of the components of the costs charged to it by the Province of Ontario for permitting it to harvest tress from Crown lands.

[2] The Respondent describes its "Crown Timber Pricing System" on its website as follows

> Ontario requires forest products companies to pay for the right to cut timber on Crown lands.
>
> The value received by the province for the sale of Ontario Crown timber includes monetary payments and several 'in-kind' payments.
>
> The monetary payment is composed of four Crown charges...
>
> 1) Minimum charge,
> 2) Forest renewal charge,

3) Forest futures charge,

4) Residual value charge.

...

Residual Value Charge

The Residual Value Charge is assessed when the price of the forest product produced from Crown timber reaches a certain level. It increases or decreases according to the market prices of forest products such as lumber, panels, paper and pulp.

The residual value charge ensures that the Crown, as the owner of the timber resource, shares in the financial rewards of strong end-product markets...

In general, the Residual Value charge represents 29% of the difference between the net mill sale price of a product, ... and the base cost allowance for that product, which is the sum of the total production costs plus an allowance for profit and risk.

[3] The Applicant owns a hardwood sawmill located in Sault Ste. Marie, Ontario. Boniferro annually harvests timber and produces forest products comprising more than 17,000,000 board feet of various hardwoods.

[4] In this Application, Boniferro asserts that the Residual Value Charge is unlawful. Boniferro seeks a declaration that the Respondent, Her Majesty the Queen in Right of Ontario, has not and has never had authority to require payment of the Residual Value Charge by Boniferro or its predecessors because that charge is in fact a tax which the Province has no authority to impose.

The Facts

[5] On March 13th, 2003, Boniferro entered into an Asset Purchase Agreement with Domtar Inc. to purchase the sawmill. At the same time, Domtar Inc, pursuant to a Share Purchase Agreement, conveyed to Boniferro eight of its common shares in the capital stock of Clergue Forest Management Inc.

[6] Boniferro, together with five other companies, thus became a "partner company" and a shareholder of Clergue Forest Management Inc. The Clergue Shareholder Amendment Agreement to which Boniferro is a party with the five other forestry companies is effective April 15th, 2003.

[7] Clergue was originally established by shareholder agreement dated December 12th, 1997 by six partner companies to obtain, manage and administer the Clergue Sustainable Forest Licence.

[8] The recitals to the Clergue Shareholder Agreement provided as follows:

Whereas the shareholders do now operate and have traditionally operated forest resource processing facilities in and about the District of Algoma in the province of Ontario and in so doing they have relied upon the Crown

> Forest and, more specifically, those portions of the Crown forest designated as the Algoma Management Unit and the Wawa Management Unit pursuant to the provisions of the *Crown Forest Sustainability Act*, 1994 and the Regulations.
>
> And whereas the shareholders have effected the incorporation of Clergue specifically for the purpose of ensuring the continued supply of forest resources to their resource processing facilities in accordance with certain forest resource supply entitlements from the Ministry of Natural Resources...
>
> And whereas Clergue will facilitate on behalf of the shareholders and in conjunction with the MNR and involved evergreen contractors, the collection of information and forest related data, the forest management planning, the harvesting and delivery of forest resources and the renewal of maintenance of the Crown forest.
>
> And whereas the shareholders, in consideration of the issuance of certain sustainable forest licences to Clergue by the Minister of Natural Resources, hereby undertake, through Clergue, the stewardship of the forest resources within the Algoma M.U. and the Wawa M.U. with the resolve for the enhancement and good management of the forest ecosystem.
>
> And whereas Clergue has been advised by the Minister that it will be granted a sustainable forest licence, pursuant to the Act, for each of the Algoma M.U. and the Wawa M.U...

[9] Under the Crown Forest Sustainability Act, 1994, S.O. 1994, C.25, Clergue was issued the right to harvest timber in the Algoma Forest pursuant to Sustainable Forest Licence SFLN0.542257 by the Minister on December 10, 1997 for 20 years, subject to review with the Minister every five years.

[10] This SFL provided in part as follows:

> 2.2. The company shall pay area charges and forestry future charges in accordance with sections 32(1) and 51(5) of the *Crown Forest Sustainability Act.*
>
> 2.4 The Company shall pay the prices determined by the Minster under Section 31 of the *Crown Forest Sustainability Act* for forest resources harvested under this licence.
>
> 10.0 Forest Renewal Trust
>
> 10.1 The Company shall be invoiced by the Crown for the forest renewal charge to be paid by the licensee pursuant to the *Crown Forest Sustainability Act.* The Company shall pay the forest renewal charge to the Trust.
>
> 10.2 The amounts paid by the Trustee in its capacity as Trustee of the Forest Renewal Trust in respect of Eligible Silviculture Work are paid to or for the benefit of the Crown.
>
> 10.3 Subject to paragraph 15.1 herein, the specific feature of the Forest Renewal Trust Agreement whereby the share of the Trust Assets credited to the Management Unit Account for the Licence Area will only be used to reimburse the cost of Eligible Silviculture Work performed on the Licence Area will not be amended or revoked unless the Company and the Minister

so agree.

[11] On May 5, 2006, the Clergue SFL was amended. Under Article 2.2 of the Clergue SFL, the term of the licence commenced on April 1, 2002 and expires on March 31, 2022.

[12] In 1998, E.B. Eddy Forest Products Limited (one of the original shareholders to the Clergue Shareholder Agreement) sold the sawmill assets and its 32 common shares in the capital stock of Clergue to Domtar Inc. On March 13th, 2003, Domtar Inc. in turn sold the sawmill to Boniferro, and pursuant to the shareholder agreement abovementioned conveyed eight of its common share in the capital stock of Clergue to Boniferro.

[13] Thus, Boniferro became a shareholder in Clergue and entitled to and subject to the provisions of the Clergue SFL effective April 15th, 2003.

[14] Boniferro was issued a Forest Resource Processing Facility licence by the Minister commencing April 1, 2002 for a one-year renewable term expiring March 31, 2003. This licence has been renewed annually for five years by the Minister. The Forest Resource Processing Facility Licence granted to Boniferro the right to harvest timber from the Algoma Forest and to process that timber at its sawmill.

[15] Boniferro has also been granted by the Minister an approval to commence harvesting operations since April 1, 2003 which has been consistently renewed each year until April 1, 2006.

[16] The *Crown Forest Sustainability Act* and the Clergue Sustainable Forest Licence do not identify, name or describe the Residual Value Charge which the Respondent is imposing upon the Applicant. The Respondent asserts that the authority for the Residual Value Charge is found in Section 31 of the Act which provides as follows:

> **Prices**
>
> 31(1). The Minister may determine from time to time the prices at which forest resources may be harvested or used for a designated purpose under a Forest Resource Licence.

[17] The Respondent also relies on the provisions of the Clergue Sustainable Forest Licence, and in particular, Section 2.4 which provides as follows:

> 2.4 The Company shall pay the prices determined by the Minister under section 31 of the *Crown Forest SustainabilityAct* for forest resources harvested under this licence.

The Respondent says that as owner of the lands and trees it is entitled to determine the sale price for its property.

[18] The Respondent, in its website, asserts that,

> The Residual Value Charge ensures that the Crown, as the owner of the timber resource, shares in the financial rewards of strong end product markets.

[19] A more detailed description of the Residual Value Charge is set out in the website as follows;

> For example, when the estimated price that softwood lumber mills receive for their softwood products – known as the mill return – exceeds $C 369.49 per thousand board feet (Mfbm), the residual value charge is assessed on softwood timber to sawmills. As market prices rise for softwood lumber, the stumpage charge will increase in tandem each month. Conversely, as market prices fall, the residual value charge will decrease each month, reaching zero when the original threshold is met.
>
> The residual value charges for seven product types and seven species groups are published as a matrix (Exhibit 1) at the beginning of each month.
>
> In general, the residual value charge represents 29 per cent of the difference between the net mill sale price of a product, such as softwood lumber, and the base cost allowance for that product, which is the sum of the total production costs plus an allowance for profit and risk. The result is then expressed in a dollars per cubic metre charge.
>
> **Residual Value Charge Formula:**
>
> Representative Net Mill Price for Softwood Lumber ($/Mfbm)
>
> \- Base Cost Allowance ($/Mfbm)
>
> ---
>
> = Residual Value ($/Mfbm)
>
> x 29%
>
> ---
>
> = Crown portion of Residual Value ($Mfbm)
>
> ÷ Utilization Factor to ($/m3)
>
> ---
>
> = Residual Value Charge ($/m3)

[20] The Residual Value Charge is not calculated on the basis of the cost of delivery of any services by the Crown.

[21] The Residual Value Charge is not used by the Crown to fund any form of regulatory scheme such as is the case for the two other charges, the Forest Renewal Charge and the Forestry Futures Charge, which are provided for specifically in the Act, s. 49 and s. 51 respectively.

[22] The Residual Value Charge is paid into the consolidated revenue fund for the province of Ontario. In contrast, the Forest Renewal Charge is deposited in the Forest Renewal Trust Fund or a separate account in the Consolidated Revenue Fund and is used to cover the cost of renewing the harvested areas. The Forestry Futures charge is paid into a specifically designated trust fund called the Forest Futures Trust Fund. It is used to fund forest renewal and protection for situations and purposes not covered by the Forest Renewal Charge.

[23] In this case,

> The Crown does not contest that the purpose of the RVC is to raise revenue. (Respondent Factum, para. 34)

[24] The Applicant asserts that the calculation of the RVC targets the profits of the end product created by Boniferro through the harvesting and processing of the tree and does not relate to the value of the tree in the forest.

[25] In its responding materials, the Respondent, Her Majesty the Queen in Right of Ontario ("the Crown") states that it owns extensive tracks of forest lands in Ontario and owns the resources, including forest resources on those lands. Private companies, including the Applicant in this case, purchased timber from the Crown pursuant to licences granted under the *Crown Forest Sustainability Act*.

[26] The Crown points out that all of the timber at issue in this case is Crown timber harvested from Crown lands. Crown forest resources are sold only to persons who are licensed to harvest forest resources.

[27] The Crown points out that in this case the Sustainable Forest Licence was issued to Clergue Forest Management Inc. pursuant to the Act.

[28] The Crown further states,

> All licensees are required by the CFSA to pay the following charges:
>
> (a) The **Forest Renewal Charge** pursuant to section 49 of the Act, which provides the necessary funds for renewal of the areas of the forest which have been harvested. This charge is determined based on the projected amount of harvest, the projected costs of renewing the areas harvested and the amount of money that must be in the Forest Renewal Trust Fund to cover the renewal costs on a specified management unit. The Forest Renewal Charge is an amount per cubic metre of timber and is set annually.
>
> (b) The **Forestry Futures Charge** pursuant to subsection 51(5) of the Act. This charge provides funding for silvicultural expenses in Crown forests where timber has been killed or damaged by fire or natural causes and on land that is subject to a timber licence if the licence holder has become insolvent. It also funds intensive stand management and pest control in respect of timber in Crown forests, and such other purposes as may be specified by the Minister. The Minister has specified that Forest Resource Inventory activities may be funded from revenue generated from the Forestry Futures Charge. The Forestry Futures Charge is an amount per cubic metre of timber and is usually set annually.
>
> (c) The **Price** for timber. The Price is set pursuant to s. 31 of the CFSA, which states that the "Minister may determine from time to time the prices at which forest resources may be harvested or used for a designated purpose under a forest resource licence". The Price currently consists of two components:
>
> (i) The **minimum value component**, which is usually set annually and is an amount per cubic metre of timber. The

minimum value component ensures a minimum level of revenue from the sale of the timber. The amount varies between species or species group and the type of mill to which the timber is delivered.

(ii) The **residual value component**, which is an amount per cubic metre of timber that is determined on a monthly basis. Like the minimum value, the residual value is a component of the price for timber pursuant to section 31 of the Act.

[29] The Crown further states that, when used, the Residual Value Component allows the Crown, as owner of the forest resource, to share in the benefits of a strong market for forest products. As the market price for the representative products increases beyond the threshold amount set by the Minister, the Residual Value Component amount increases each month. Conversely, when the market price for the representative products decreases, the residual value amount decreases each month. When the market price for the representative products decreases below the threshold amount, the residual value amount falls to zero.

[30] The Crown further asserts that the sale of Crown timber is a significant source of revenue for Ontario. It states that from 2002/2003 through 2006/2007 the Consolidated Revenue Fund received approximately $108,000,000.00 from the Residual Value Charge imposed on its licensees.

[31] Crown data indicates that the total Residual Value Component paid by Clergue from 2002 to 2007 was $1,284,469.04.

[32] The Applicant points out that the RVC is typically posted monthly on the Minister's website within the first week of each month. The Applicant says the RVC is not known at the time that the tree is harvested. It says that the RVC is not known until the wood crosses the scales at the sawmill. Once a log is cut down, topped, slashed and transported or stored, Boniferro knows its costs incurred in harvesting that log as well as the other three components of the Crown charges. But until a log is on the scale or sometime after, depending on the time of month that the logs are scaled, Boniferro still does not know the RVC for that log.

[33] The Applicant asserts that the RVC is designed to and does reach forward into the profits of hardwood forestry companies. The Applicant says the RVC is tied to operator's profits or what the Minister deems to be operator's profits. The formula by which the Minister calculates the RVC bears this fact out, according to the Applicant.

[34] In addition, the Minister recently sent a questionnaire to the Applicant through the accounting firm of KPMG which was retained by the Minister to undertake "a cost and production survey of selected hardwood sawmills to review the existing stumpage system used to calculate the monthly Crown charges for graded hardwoods." KPMG requests that the survey be completed by each sawmill's accountant who prepares the mill's annual financial statements. The survey requests not only year-end information for the most recent and two prior fiscal years, but also sales information for lumber produced which contributed to the mill's costs. The survey specifically requests information from hardwood sawmills

about the direct and indirect manufacturing costs incurred in the production of lumber such as labour and benefits, energy and fuel, financing, depreciation and other direct and indirect costs.

The Issue

[35] The Applicant, Boniferro, seeks a declaration by this court that the Residual Value Charge is a tax imposed by the Respondent for which there is no lawful authority.

Is the Residual Value Charge a Price or a Tax

The Legislation

[36] It is important to consider the predecessor legislation to the current *Crown Forest Sustainability Act.*

[37] The previous legislation was the Crown Timber Act, R.S.O. 1990, c.C. 51. It was repealed by and replaced by the *Crown Forest Sustainability Act* on April 1st, 1995.

[38] That Act provided for a Forest Renewal Trust and a Forestry Futures Trust similar to those charges found in the current Act.

[39] Section 51 of the *Crown Timber Act* is worded in marked contrast to Section 31 of the *Crown Forest Sustainability Act.*

> **Determination of Crown Dues.**
>
> **51.** Unless otherwise provided in the Regulations, the Crown dues to be paid in respect of timber by a licensee or class of licensee are those Crown dues fixed or determined under the Regulations in force at the time the timber is measured, even if the timber is cut before the Regulations come into force.

[40] Section 53 of the *Crown Timber Act* provided as follows:

> **Regulations.**
>
> **53.** The Lieutenant Governor in Council may make Regulations,
>
> (d) fixing or determining that the Crown dues, including forest renewal charges, to be paid by a licensee or class of licensee in respect of any kind or class of timber... and ... such Regulations may provide for,
>
> (i) the fixing or determining of Crown dues by a formula...

[41] In the Regulations to the *Crown Timber Act*, Section 3 provided as follows:

> 3(1) A licensee shall pay Crown dues as the price for cutting Crown timber calculated according to the following formula:
>
> Crown Dues = a + b + c
>
> Where "a" is the Forest Renewal Charge
>
> "b" is the Minimum Stumpage Rate

"c" is the Residual Value Rate

4. The Residual Value Rate per cubic metre of timber is the rate set out in Schedule 1.1 determined by selecting...

[42] Schedule 1.1 clearly sets out that the Residual Value Rate per cubic metre of Grade 1 hardwood other than poplar and white birch for a sawmill is $8.00 per cubic metre of timber.

[43] Therefore, under the *Crown Timber Act*, the Residual Value Rate which is one of the three components of the Crown dues charged is identified in the Regulations. It is a fixed price not related in any way to the profits of the sawmill.

[44] In contrast, as stated previously, the current Act, the *Crown Forest Sustainability Act*, provides as follows:

> **31(1)** The Minister may determine from time to time the prices at which forest resources may be harvested or used for a designated purpose under a forest resource licence.

[45] Unlike the *Crown Timber Act*, where the Crown Dues are fixed and determinable under the Regulations, under the *Crown Forest Sustainability* Act, the "price" is left to the Minister to determine from time to time. There is no reference to or provision for the Residual Value Charge in either the *Crown Forest Sustainability Act* or the Regulations thereto.

[46] The *Crown Forest Sustainability Act* provides for the enforcement and collection of all Crown charges as defined, which include prices, charges, fees, penalties, costs, expenses, interest and fines imposed under this Act or under a Forest Resource Licence as follows:

> **Crown Charges**
>
> 40. (1) Crown charges in respect of forest resources authorized to be harvested or used for a designated purpose by a forest resource licence shall be paid by the licensee whether the resources are harvested or used by the licensee or by another person with or without the licensee's consent. 1994, c. 25, s. 40 (1).
>
> **Property in resources**
>
> (2) Upon payment of the charges referred to in subsection (1) by the holder of a forest resource licence, property in forest resources that have been harvested on the land to which the licence relates during the term of the licence vests in the licensee, whether the resources were harvested by the licensee or by another person with or without the licensee's consent. 1994, c. 25, s. 40 (2).
>
> **Seizure of resources**
>
> (3) The holder of a forest resource licence who has paid the charges referred to in subsection (1) is entitled to seize all forest resources that have been harvested during the term of the licence and that are in the possession of a person not entitled to them. 1994, c. 25, s. 40 (3).
>
> **Right of action**

(4) The holder of a forest resource licence who has paid the charges referred to in subsection (1) is entitled to bring an action against any person who, during the term of the licence, harvested, damaged or took possession of forest resources without the permission of the licensee. 1994, c. 25, s. 40 (4).

Unpaid Crown charges

41. If Crown charges have not been paid by the holder of a forest resource licence, the Minister may withhold any licence or approval requested by the licensee until the Crown charges are paid. 1994, c. 25, s. 41.

Approval for harvesting

44. (1) The holder of a forest resource licence that authorizes the harvesting of forest resources shall not begin to harvest forest resources in any year unless the Minister has approved in writing the harvesting in the area in which the harvesting is to occur. 1994, c. 25, s. 44 (1).

Crown charges

(2) The Minister may withhold approval under subsection (1) if the person is in default of payment of any Crown charges. 1994, c. 25, s. 44 (2).

Administrative Penalties

58. (1) A person who,

(b) fails to comply with a forest resource licence is liable to a penalty of not more than the greater of,

(i) $15,000, and

(ii) five times the value of any forest resources harvested in contravention of the licence;

Court action

(7) The Minister may bring an action in a court of competent jurisdiction to recover a penalty imposed under this section and the court shall,

(a) determine whether the person is liable to a penalty under subsection (1); and

(b) if the person is liable to a penalty, give judgment for the amount of the penalty imposed by the Minister or such other amount as the court considers just. 1994, c. 25, s. 58 (7).

Suspension or cancellation of forest resource licence

59. (1) The Minister may suspend or cancel a forest resource licence, in whole or in part, if,

(a) the licensee fails to comply with the licence;

Seizure of Forest Resources and Products

60. (1) An employee or agent of the Ministry may seize and detain forest resources or a product manufactured from forest resources if any of the following circumstances exist:

3. The employee or agent believes on reasonable grounds that Crown charges are owing in respect of the forest resources, the forest resources from which the product was manufactured, or any other

forest resources.

Lien for Crown charges

63. (1) Crown charges in respect of forest resources removed from a Crown forest under the authority of a forest resource licence are a lien and charge on the forest resources and on any products manufactured from the forest resources, in preference and priority to all other claims. 1994, c. 25, s. 63 (1).

Offences

64. (1) A person who,

(b) fails to comply with a forest resource licence is guilty of an offence and on conviction is liable to a fine of not more than $100,000;

[47] Boniferro has limited wood inventory to operate. On March 31, 2007, Boniferro's Approval expired. The Minister refused to renew Boniferro's Approval unless Boniferro entered into a payment plan with the Minister to pay the arrears of the Residual Value Charge as claimed by the Minister.

[48] On July 16th, 2007, as its wood inventory was about to run out, Boniferro signed a payment plan with the Minister to avoid closure of the sawmill. This payment plan requires that Boniferro pay all current Residual Value Charges on time for wood harvested from July 1, 2007 onwards, as well as two monthly payment of $1,220.55 and four monthly payments of $1,261.23 from July 1 to December 31st, 2007 for the interest on the outstanding Residual Value Charges. Commencing on January 1st, 2008, Boniferro is required to repay the Minister the outstanding Residual Value Charges (comprising both principal and interest) by December 2008 in graduated monthly instalments of $13,750.00 plus interest.

The Position of the Parties

[49] The Applicant says that the Residual Value Charge is a tax imposed on Boniferro for which there is no lawful authority, and therefore it is entitled to a refund of all Residual Value Charges paid in the past and that it should not be subjected to the Residual Value Charge in the future.

[50] The Crown says that this case is one of proprietary rights. It says that the government, as a property owner which includes a resource is dealing with its property as an owner. The Crown says that this is solely a case of an owner setting a price for the sale of its resources.

[51] It says that, as such, the price which it sets as property owner in selling its resources to a purchaser such as Boniferro are charges entirely distinct from a tax or a regulatory charge.

[52] In this regard, it is noted that Boniferro agreed to be bound by the Clergue Sustainable Forest Licence which was then in existence and pursuant to which the RVC was charged to Clergue and therefore its shareholders.

[53] The Applicant points out that the legislated remedies under the *Crown Forest Sustainability Act*, as set out above, empower the Crown to enforce and collect the RVC in ways far beyond the rights that a private owner would have and relies on this as a factor indicative of a tax characteristic of the RVC.

[54] The Crown concedes that as owner it cannot impose an unlawful charge, even if the purchaser is agreeable to paying same.

[55] Thus, the question in this case is to determine whether or not the RVC is in fact a tax, and if so, whether there is lawful authority for the Respondent to impose same on the Applicant.

Analysis

[56] Both parties to this Application rely on the Supreme Court of Canada decision in *Canadian Industrial Gas & Oil Ltd. v. Government of Saskatchewan* (1977), 80 DLR (3d) 449.

[57] In that case, the newly enacted legislation imposed a mineral income tax on the income received on oil produced in Saskatchewan in respect to producing properties. A royalty surcharge was enacted also and made applicable to production from Crown lands. By virtue of the provisions of the Regulations attached to the legislation, the calculation of the mineral income tax and the royalty surcharge was the same. The royalty surcharge applied both to Crown owned land, owned by the Crown prior to the enactment of the legislation, and to oil rights vested in the Crown under the expropriation provisions of the legislation.

[58] Justice Martland, for the majority of the court, noted,

> The practical consequences of the application of this legislation is that the Government of Saskatchewan will acquire the benefit of all increases in the value of oil produced in that province above the set basic wellhead price fixed by the Statute and Regulation. (p. 456)

[59] As in the case of Boniferro, the Respondent in the *Canadian Industrial Gas & Oil Ltd.* case, submitted that with respect to the royalty surcharge, it was not a tax but that it was a genuine royalty payable to the Crown, as the owner of mineral rights, by its lessees who have been authorized to extract minerals from Crown lands (pursuant to lease).

> To determine the validity of this contention, it is necessary to consider the nature of the legal relationship between the Crown and the persons from whom payment of the royalty surcharge is demanded.
>
> Some of these persons were the holders of petroleum and national gas leases from the owners of the freehold interest in such minerals. Their obligation to pay royalties depended upon the terms of the lease from the freehold owner. The effect of Part (iv) of Bill 42 was to expropriate the rights of the freehold owners in the petroleum and natural gas in their lands...
>
> With respect to lands not falling within the exemption, the owners were divested of their title, which was given, by the statute to the Crown. (p. 458)

[60] Justice Martland continued as follows:

> Another class of lessees upon whom the royalty surcharge is imposed consists of those who were the holders of Crown leases at the time the royalty surcharge was imposed. In respect of these, it was argued by counsel for the Respondents that the Crown leases themselves, samples of which were filed as exhibits, contemplate the imposition of such a royalty. These leases contain the following provision:
>
> > And also rendering and paying, therefore, unto the lessor any royalties at such rates and in such manner and at such times as are from time to time prescribed by the Order of the Lieutenant Governor in Council. (p. 459)

[61] Justice Martland, for the majority, stated as follows, at page 459:

> I do not accept this submission. In my opinion, the word "royalty" was used in the leases in its customary sense as meaning a share of the production obtained by the lessee... The Regulation which imposed the royalty surcharged imposed an obligation upon lessees, holding existing leases, to turn over to the Crown 100 percent of the proceeds of production beyond the basic wellhead price as fixed by the government.
>
> In my opinion, the royalty surcharge made applicable to these Crown leases was not a royalty for which provision was made in the lease agreement. It was imposed as a levy upon the share of production to which, under the lease, the lessee was entitled, and was a tax upon production.
>
> I agree with the reasons of my brother Dickson for concluding that the royalty surcharge is a tax imposed upon Crown lessees of the same nature as the mineral income tax imposed upon lessees holding leases from freehold owners. It is significant that the royalty surcharge is computed in the same manner as the mineral income tax and that the proceeds are both to be paid into the same fund (a consolidated revenue fund).

[62] Therefore, in that case, the lessees of the Crown were subject to leases that permitted "the lessor (to impose) any royalties at such rates and in such manner and at such times as are from time to time prescribed by the Order of the Lieutenant Governor in Council." The new legislation imposed upon those lessees, the obligation to pay what was named a royalty surcharge in the amount of 100 percent of the proceeds or production beyond the basic wellhead price as fixed by the government. That royalty surcharge was in fact a tax in the opinion of the Supreme Court of Canada.

[63] There are two distinctions of note in the Boniferro case. Firstly, the RVC is not equivalent to 100 percent of the proceeds of production beyond the threshold amount fixed by the government. Secondly, the new Saskatchewan legislation imposed the new royalty surcharge as an additional charge to the lessee under the existing lease. In the Boniferro case, the RVC was being charged at the time Boniferro assumed rights as a Clergue shareholder in the Clergue Sustainable Forest Licence.

[64] At page 482 of the decision, Justice Dickson sets out his analysis to determine whether the royalty surcharge is a tax, as follows:

> The answer to that question turns on whether the province, in imposing royalty surcharge, was acting qua lessor or qua taxing authority. In other

> words, was the relationship of the Legislature vis a vis the oil producer, that or lessor-lessee or was the true character of the relationship that of sovereign taxing authority-tax payer.

Justice Dickson noted, that in the case B&B Royalties Ltd. v. Minister of National Revenue, [1940] 4 DLR 369, "royalty" was defined as,

> An interest in production reserved by the original lessor by way of rent for the right or privilege of taking oil or gas out of a designated tract of land. (p.482)

He further noted that in *Ross v. National Revenue*, [1950] EXCR 411, "royalties" were described as,

> Periodical payments, either in kind or money, which depend upon and vary in amount according to the production and use of the mine or well and are payable for the right to explore for, bring into production and dispose of the oils or minerals yielded up. (p.482)

At page 483, Justice Dickson states that,

> In general terms, a royalty as applied to an oil and gas lease is a share, as provided in the lease, of the oil or gas produced, or the proceeds thereof, for the privilege of exploring for and recovering oil and gas. The conventional royalty is a flat percentage, frequently 12-1/2 percent, of oil and gas produced... A tax, on the other hand, is a compulsory contribution, imposed by the sovereign authority for public purposes or objects.

[65] Justice Dickson notes further that the royalty surcharge imposed touched persons who were not involved in existing contractual relationships with the Crown through leases, plus as a whole the legislation charged persons who did not stand in a contractual relationship with the Crown through pre-existing Crown leases. He noted,

> The obligation arises by legislative command, not by a process of negotiation between free wills, resulting in a meeting of mind. (p. 483)

[66] He emphasizes this point at page 484, stating,

> The only way the Crown could reach the persons holding freehold leases of expropriated oil and rights and obtain more than the royalty reserved in those leases would be by way of legislation amending the leases or by taxation. The obligation to pay the royalty surcharge arises ex lege and not ex contractu. Another distinguishing feature is that a conventional royalty is a percentage (normally fixed but which may, in the case of Crown leases, be varied by the lessor) of production. The royalty surcharge is the taking of everything in excess of a statutory figure.

[67] Thus, important to the reasoning, was firstly the fact that persons who were not involved as parties to pre-existing leases with the Crown were charged the royalty surcharge, and further, the royalty surcharge amounted to 100 percent of everything in excess of a statutory figure. Justice Dickson also found it important to note that the legislation which imposed a fine of $1,000.00 per day upon any person who causes production to be stopped without ministerial consent was foreign to any lessor-lessee relationship.

[68] Justice Dickson concludes his reasoning in finding the royalty surcharge to be a tax as follows, at page 484:

> Except as affecting lessees under pre-existing Crown leases, it is a levy compulsorily imposed on previously existing contractual rights by a public authority for public purposes. It is patent that the consensual agreement and mutuality ordinarily found in a lessor-lessee relationship is entirely absent in the relationship between the Crown and persons subjected to the royalty surcharge. Royalty surcharge is the same 100 percent levy as is imposed in other terms as mineral income tax. That it is a tax is not fatal. In object and purpose and mode of exaction, it is congruent with mineral income tax.

[69] In my view, the foregoing case does not conclusively resolve the issue in the Boniferro case. The RVC in Boniferro does not have some of the characteristics which the Supreme Court of Canada held to be those of a tax. For example, the RVC does not charge 100 percent share of the production benefits. It is to be noted that some taxes are not a full 100 percent share, for example, income tax, GST and PST. The Boniferro RVC does not affect non-Crown lands and the RVC in Boniferro is not the result of newly enacted legislation imposing a new charge upon a lessee, rather, Boniferro accepted the RVC as a charge when it acquired its interest in April of 2003 in the Clergue Sustainable Forest Licence.

[70] On the other hand, similar to the C.I.G.O.L. tax, the RVC funds are paid into the province's consolidated revenue fund and the legislation provides for significant remedies to the government for collection over and above a private lessor-lessee relationship.

[71] The court directs the inquiry into the nature of the RVC must consider the object, purpose and mode of exaction of the RVC. This court must determine the "pith and substance" of the RVC.

[72] In *Westbank First Nation v. British Columbia Hydro and Power Authority* (1999), 176 DLR (4th) 276, the Supreme Court of Canada states at page 290 that,

> In all cases, a court should identify the primary aspect of the impugned levy... Although in today's regulatory environment, many charges will have elements of taxation and elements of regulation, the central task for the court is to determine whether the levy's primary purpose is, in pith and substance:
>
> (1) to tax, i.e., to raise revenue for general purposes;
>
> (2) to finance or constitute a regulatory scheme, i.e., to be a regulatory charge or to be ancillary or adhesive to a regulatory scheme; or
>
> (3) to charge for services directly rendered, i.e., to be a user fee.

[73] On this analysis, the RVC does not finance nor constitute a regulatory scheme. In this regard, it is distinct from the Forest Renewal Trust and the Forestry Futures Trust. Indeed, the funds are not paid into or used for forestry programs, rather, they are paid into the province's consolidated revenue fund. The Respondent concedes that the RVC is used to raise revenue for general purposes.

[74] Further, there is no relationship between the quantum of the RVC and any services directly rendered by the Respondent.

[75] The *Westbank* decision held that a charge bears the hallmarks of taxation where it is enforceable by law through such means as cancellation of services, a lien on the property, distress, forfeiture or by court action. The RVC bears all of these characteristics.

[76] The Supreme Court of Canada in *C.I.G.O.L.* held that the appropriate criteria for determining whether a levy constituted a tax was set out by Duff J., as he then was, in *Lawson v. Interior Tree Fruit and Vegetable Committee*, [1931] 2 DLR 193 at pgs. 197-8. These criteria are,

1) Is the levy enforceable by law?

2) Is the levy imposed under the authority of the legislature?

3) Is the levy imposed by a public body?

4) Is the levy imposed for a public purpose?

[77] In *Eurig and Registrar of the Ontario Court (General Division)* (1998), 165 DLR (4TH) 1, the Supreme Court of Canada undertook the *Lawson* analysis to determine whether the probate fees levied pursuant to the *Administration of Justice Act,* R.S.O. 1990, C.A.6 was a fee or a tax. The Act provided that,

> 5. The Lieutenant Governor in Council may make regulations,
>
> a) requiring the payment of fees for any thing required or authorized under any Act to be done by any person in the administration of justice and prescribing the amounts thereof;
>
> b) providing for the payment of fees and allowances by Ontario in connection with services under any Act for the administration of justice and prescribing the amounts thereof;
>
> c) requiring the payment of fees in respect of proceedings in any court and prescribing the amounts thereof..

[78] Applying the *Eurig* analysis to the Boniferro case, I conclude that the RVC is enforceable by law. The sections of the *Crown Forest Sustainability Act* which I have quoted above provide broad enforcement measures, some of which have in fact been applied against Boniferro. The enforcement powers of the Respondent reach far beyond those of a property owner and are specifically provided for in the legislation. Furthermore, payment of the RVC is compulsory in the same sense as the GST, for example.

[79] I further find that the RVC is purported to be imposed under the authority of the legislature, and in particular, Section 31 of the *Crown Forest Sustainability Act.* The enforcement provisions of the Act relate to "Crown charges" which are all prices, charges, fees, penalties, costs, expenses, interest and fines imposed under this Act or under a Forest Resource Licence. The Forest Resource Licence is a licence granted under the Act. Although the licence itself contains Section 2.4, whereby,

> 2.4 The Company shall pay the prices determined by the Minister under Section 31 of the *Crown Forest Sustainability Act* for forest resources harvested under this licence. That section, in my view, does not stand alone as a term between a lessor and lessee, but rather, is in fact a term "imposed under the authority of the legislature".

I find that the true purported authority for the RVC is Section 31 of the Act, not the licence alone.

[80] The RVC clearly is levied by a public body.

[81] Furthermore, the RVC, unlike the other two trust provisions provided for in the *Crown Forest Sustainability Act*, is intended for a public purpose being entirely deposited into the general consolidated revenue fund for the province. Indeed, the Crown concedes this point.

[82] The court, in *Eurig*, also considered

> Another factor that generally distinguishes a fee from a tax is that a nexus must exist between the quantum charged and the cost of the service provided in order for a levy to be considered constitutionally valid. (p.11)

[83] There is no evidence whatsoever of any such nexus in relation to the RVC.

[84] Justice Major, for the court, stated at para. 22,

> The evidence in this appeal fails to disclose any correlation between the amount charged for grants of letters probate and the cost of providing that service. The Agreed Statement of Fact clearly shows that the procedures involved in granting letters probate do not vary with the value of the estate. Although the cost of granting letters probate bears no relation to the value of an estate, the probate levy varies directly with the value of the estate. The result is the absence of a nexus between the levy and the cost of the service which indicates that the levy is a tax and not a fee.

[85] On the basis of the foregoing analysis, I conclude that the Residual Value Charge is in fact a tax. It is in stark contrast to the Residual Value Rate which the Regulation to the *Crown Timber Act* authorized as one element of Crown charges and which was specifically identified in the Schedule 1.1 to the Regulation. It has no relationship to a regulatory scheme and bears no nexus to any cost of delivery of services by the Respondent. It clearly fits the criteria set out in the *Lawson* case for determination of whether a levy is a fee or a tax. The RVC was not arrived at by a process of negotiation between free wills resulting in a meeting of minds, rather it is an obligation imposed by the Respondent. As such, in my view, it is an obligation that arises at law and not pursuant to contract.

Is there Authority to Impose this Tax?

[86] Section 31 authorizes the Minister to determine "prices." The Concise Oxford English Dictionary (11th Ed.)defines

> "Price" to be the amount of money expected, required or given in payment for something.

That same dictionary defines

> "Tax" to be a compulsory contribution to state revenue, levied by the government on personal income, and business profits or added to the cost of some goods services, and transactions.

[87] Section 31 does not constitute an express delegation by the legislature of taxing authority. The *Crown Forest Sustainability Act* clearly does not authorize the imposition of a tax. In *Eurig*, Justice Major states the general principle of interpretation to be,

> If Parliament wants to give the Executive or some administrative agency the power to raise a tax by regulation, it must do so in a specific and unequivocal provision. (para. 40)

[88] In that same case, Justice Binnie stated the principle as follows:

> In short, the Ontario Legislature may delegate the power to prescribe an escalating ad valorem probate tax to the Lieutenant Governor in Council but it must do so in clear and unambiguous language. (p. 69.)

[89] The significant difference between the *Crown Timber Act* provisions and the *Crown Forest Sustainability Act* provisions is important. The *Crown Timber Act* specifically legislated the Residual Value Rate as an element of the "Crown Dues". While the *Crown Forest Sustainability Act* specifically provides for the Forest Renewal Charges and the Forest Futures Charge and the significant collection powers, it does not provide at all for the RVC.

[90] In my view, there is no legislative authority authorizing the Residual Value Charge tax. I find that the imposition of the RVC upon the Applicant is a tax for which there is no legislative authority.

Limitation Issue

[91] Having concluded that the Residual Value Charge is in fact a tax imposed without lawful authority, the issue arises as to what, if any, refund for past RVC payments this Applicant is entitled to. I think this Application can only deal with this Applicant's rights and the RVC payment it has made.

[92] A limitation issue was raised by the Respondent in its factum in the absence of specific pleadings or detailed evidence. The only evidence on this record relevant to this issue is, firstly, the Application herein was issued August 20th, 2007 and in para. 10 of the Applicant's affidavit, which states,

> Until we at Boniferro realized in early summer, 2007, that the RVC was an unauthorized tax rather than simply a component in the price of Crown timber, we had been disputing with the Minister the level at which the RVC was being charged.

[93] It is to be noted that the imposition of the RVC upon Boniferro could only have arisen first when it acquired shares in Clergue, namely on March 13th, 2003. The Applicant urges that I order a trial of this issue so that proper pleadings and an evidentiary basis can be established on the record. The Respondent relies on the decision of the Supreme Court of Canada in *Kingstreet Investments Ltd. et al v. Province of New Brunswick*, [2007] 1 SCR 3. In that case, the court confirmed the trial judge's decision that the subject user charge constituted an unconstitutional indirect tax. The principle issue in the case was whether money paid to a public authority pursuant to ultra vires legislation is recoverable. The court found that claims for repayment of that money to the taxpayers may be subject to an applicable limitation period. The court specifically considered, "the point at which time will begin to run must be determined." The court held that the cause of action was complete at the moment the province illegally received the payment in that case.

[94] On this analysis, therefore, the cause of action for Boniferro was complete at the moment it first made payment to the province of the Residual Value Charge. The Respondent urges that I apply the provisions of both the *Limitations Act*, 2002 and the *Limitations Act*, RSO 1990, Ch.L-15, Section 45(1)(g). The Crown submits that doing so results in this Applicant being entitled to the repayment of money paid from August 20th, 2005 to present and for payments made between August 20th, 2001 and December 31st, 2003. The Crown asserts that payments made prior to August 20th, 2001 and between January 1st, 2004 and August 20th, 2005 are statute barred. This is a curious result.

[95] On the basis of the *Kingstreet* decision, I find that the cause of action in this case was complete for Boniferro when it first paid the Residual Value Charge. This would have been some time after March 2003. The applicable limitation period would be six years under Section 45(1)(g) of the *Limitations Act* R.S.O. 1990 Ch.L-15, which would mean that this Application commenced in August 2007 was made within the limitation period. On the facts of this Application, Boniferro did not start making payments until March of 2003, and therefore, I find that it is entitled to a refund of all RVC charges paid by it.

[96] In order to facilitate the determination of the quantum of those monies and as requested by the Applicant, I order an accounting by the Respondent of all RVCs paid by the Applicant, Boniferro Mill Works ULC, since March 13th, 2003.

[97] In the result,

1. THIS COURT DOES HERBY DECLARE that the Residual Value Charge imposed upon the Applicant by the Respondent purportedly under the authority of the *Crown Forest Sustainability Act* is a tax for which there is no lawful authority to impose and collect, and

2. IT IS FURTHER ORDERED that the Applicant is entitled to an accounting by the Respondent of all RVCs paid by it since March 13th, 2003 and a refund of same together with interest thereon in accordance with the *Rules of Civil Procedure* and the *Courts of Justice Act*.

Costs

[98] If the parties are unable to agree upon costs, then the Applicant shall have 30 days from receipt of this decision to file submissions and the Respondent shall have 15 days from the date it receives the Applicant's submissions within which to respond.

J.

Tranmer, J.

Released:20080121

COURT FILE NO.: 24108/07
DATE: 20080121

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

BONIFERRO MILL WORKS ULC

APPLICANT

- and –

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

RESPONDENT

REASONS FOR ORDER

Released: 20080121