No. APL-2019-0166

To Be Argued By: John W. Caffry
Time Requested: 15 Minutes

STATE OF NEW YORK
COURT OF APPEALS

PROTECT THE ADIRONDACKS! INC.,

Respondent-Appellant,

-against-

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION and ADIRONDACK PARK AGENCY,

Appellants-Respondents.

BRIEF OF RESPONDENT-APPELLANT IN RESPONSE TO AMICUS CURIAE BRIEF OF EMPIRE STATE FOREST PRODUCTS ASSOCIATION, INC.

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Dated: February 24, 2021

Third Department No. 527256
Albany County Supreme Court
Index No. 2137-13

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGES**

NEW YORK STATE CONSTITUTION

COURT RULES

MISCELLANEOUS AUTHORITIES

INTRODUCTION

This brief is submitted pursuant to Rule 500.12(f) in response to the amicus curiae brief filed by Empire State Forest Products Association, Inc. ("ESFPA") in support of the Defendants'[1] appeal herein. Respondent-Appellant-Plaintiff Protect the Adirondacks! Inc. ("Plaintiff") will respond to the other three amicus curiae briefs filed in support of the Defendants' appeal in a separate combined brief.

Initially, it should be noted that ESFPA has no cognizable interest in this case. According to its January 26, 2021 motion papers herein, it is made up of loggers, lumber manufacturers, and the like. Because Article 14, § 1 of the Constitution states that "nor shall the timber [on the Forest Preserve] be sold, removed or destroyed", these entities can never ply their trades in the Forest Preserve. Indeed, as the ESFPA Brief[2] (pp. 17-21) itself shows, the forever wild clause was adopted for the express purpose of keeping them and their ilk out of the Forest Preserve. See also Plaintiff's Brief,[3] pp. 9-13. Regardless of the outcome of this appeal, their interests will not be affected.

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[1] Defendants-Appellants-Respondents New York State Department of Environmental Conservation ("DEC") and Adirondack Park Agency ("Defendants").

[2] Amicus Brief of ESFPA dated January 26, 2021 ("ESFPA Brief").

[3] Brief of Plaintiff-Respondent-Appellant dated September 22, 2020 ("Plaintiff's Brief").

The ESFPA Brief is based largely on evidence that is not in the Record, or is not suitable for judicial notice. All such evidence, and the arguments based on it, should not be considered by the Court.

The ESFPA Brief is devoted primarily to the definition of "timber" as that word is used in Article 14, § 1 of the New York State Constitution, the forever wild clause. It argues that timber is limited to large merchantable trees. By ESFPA's own admission, this argument is contrary to the settled law of the state, as established in Association for the Protection of the Adirondacks v. MacDonald, 253 N.Y. 234 (1930). None of ESFPA's arguments warrant overturning that precedent.

POINT I

THE NEW EVIDENCE PROFFERED BY ESFPA IS OUTSIDE THE RECORD AND SHOULD NOT BE CONSIDERED BY THIS COURT

On this appeal, the Court may only consider evidence that is in the Record. QBE Insurance Corp. v. Jinx-Proof Inc., 22 N.Y.3d 1105, 1108 (2014). The only exception is evidence which is found to be appropriate for the Court to take judicial notice of. See Affronti v. Crosson, 95 N.Y.2d 713, 718, 719-720 (2001). Arguments "based on pure speculation" and/or evidence which is not in the record, are beyond the review of this Court. QBE Insurance v. Jinx-Proof, 22 N.Y.3d at 1108. "Matter contained in the briefs, not properly presented by the record, is not to be

considered [and] points ... with no factual basis in the record [must] be rejected." Block v. Nelson, 71 A.D.2d 509, 511 (1st Dept. 1979).

As shown below, there is little or no testimony or other evidence in the Record that supports ESFPA's arguments. Instead, they are based largely on a 50 page Appendix which is mostly comprised of inadmissible non-record documents of various sorts. ESFPA's arguments have "no factual basis in the record [and must] be rejected." Id.

POINT II

FOR PURPOSES OF ARTICLE 14, § 1, TIMBER AND TREES ARE EQUIVALENT

ESFPA acknowledges that this Court, in Association for the Protection of the Adirondacks v. MacDonald, 253 N.Y. 234, 238 (1930), equated "trees" with "timber" for purposes of Article 14. ESFPA Brief, p. 5. Plaintiff completely agrees with ESFPA on that. See Plaintiff's Brief, Point II.B(5). In order to avoid the obvious conclusion that the settled law requires that trees less than 3" in diameter must be protected under Article 14, ESFPA asks this Court to overturn the 91 year-old precedent of Association v. MacDonald. ESFPA Brief, pp. 4-5. None of ESFPA's arguments provide a reason for the Court to do so.

ESFPA's primary argument seems to be that the only trees that qualify as "timber" are large trees with commercial value.

From its parochial viewpoint, this may make business sense, but with regard to the forever wild Forest Preserve, this is not correct. The framers of Article 14 intended to protect the trees on the Forest Preserve for a wide variety of scientific, ecological, recreational, spiritual, watershed protection, and wilderness preservation purposes, and not just for their future commercial value, which could never be realized. See Plaintiff's Brief, pp. 9-13, Point II.B.

When interpreting any provision of the State Constitution, the courts must "hav[e] in mind the purpose of the body which framed it and the people who adopted it." Matter of Fay, 291 N.Y. 198, 207 (1943), citing Association v. MacDonald, 253 N.Y. at 238. Here, one of the purposes of the framers of what is now Article 14, § 1, at the Constitutional Convention of 1894 was to "command that the timber, that is, the trees [on the Forest Preserve], shall not be sold, removed or destroyed." Association v. MacDonald, 253 N.Y. at 238.

The trial court herein made, and the Appellate Division affirmed, findings of fact that the delegates to the Constitutional Convention of 1894 equated trees with timber, and intended to protect trees of all sizes. These courts rejected the Defendants' argument that the delegates intended only to protect large merchantable timber. R.[4] xl, 5017. See

[4] References to pages of the Record on Appeal are preceded by "R.".

Plaintiff's Brief, pp. 9-13, Point II.B. Likewise, those courts both found that the historical usage of the word timber at the time included all trees. R. xl, 5017. Although it is ultimately up to this Court to interpret the law, these findings of fact are nonreviewable. See Plaintiff's Brief, Point II.A.

POINT III

FOR PURPOSES OF ARTICLE 14, § 1, TIMBER IS NOT LIMITED TO LARGE COMMERCIALLY VALUABLE TREES

ESFPA argues that the 1894 Constitutional Convention delegates were focused only on protecting large trees with commercial value to the lumber industry. ESFPA Brief, pp. 28-29. This theory ignores the fact that, as noted by the Appellate Division (R. 5016), before approving the proposed new conservation article of the Constitution (R. 621), the delegates voted down a proposed amendment thereto which would have allowed the sale of firewood to local residents. R. 613, 618. This practice would have involved trees of all types and sizes, which had no commercial value to the lumber industry, yet the amendment was not approved.

ESFPA's argument misses the point that, despite the focus of the 1894 delegates on the rapacious practices of the nineteenth-century forest products industry, the primary purpose of the adoption of the forever wild clause was not to save the timber for the sake of that industry, but to preserve the State's

watersheds. R. 590-595. Prohibiting ESFPA's forbears from removing or destroying timber, and instead conserving it, was a secondary purpose, and a means to that primary end.

> While there were many sound reasons for establishing an inviolable Forest Preserve, it is clear that the amendment's primary function was to protect the water supply on which the state, particularly *downstate*, was dependent. ... The conservation of timber ... [was] secondary to the repeated emphasis on the preservation of a vital watershed.

Frank Graham, Jr., *The Adirondack Park: A Political History* (1978), pp. 129-130 (emphasis in original).

The delegates' focus in their debates on the forest products industry was due to the fact that it was the primary threat to the watershed. It did not mean that they were only concerned about the sorts of trees that this industry was interested in. Plaintiff's expert historian Philip Terrie testified at trial that there were many important purposes behind the adoption of what is now Article 14. See Plaintiff's Brief, pp. 9-13, Point II.B. Among them, "the constitution writers of 1894 saw saving the forests as the best way to protect a commercially important watershed". Philip G. Terrie, *Forever Wild: A Cultural History of Wilderness in the Adirondacks* (1994), p. ix. If anything, over time, the importance of the "wilderness for its recreational, spiritual, and ecological attributes" has increased. Id. On the other hand, the secondary concern about protecting large timber for its own sake has all but disappeared.

Given the framers' primary purpose, and given that, as the Appellate Division found herein, trees of all sizes can serve important ecological functions in the forest, and trees under 3" in diameter can be over 100 years old (R. 5017), there is no reason to exclude these small trees from the protection of the Constitution. Indeed, DEC admitted at trial that there was no scientific basis for its practice of not counting such trees. R. 4086. Thus, ESFPA's argument, that the only trees that the delegates of 1894 cared about preserving were those of merchantable size, has no basis in the Record on Appeal, no basis in the Record of the Constitutional Convention of 1894, and is simply illogical.

ESFPA also relies on a variety of documents that are outside the Record (see Point I, supra), out-of-context, or irrelevant, to support its erroneous argument that timber only includes large trees that will produce commercially valuable logs. The irrelevancy of these sources is typified by the brief's citations to DEC's semi-annual "Stumpage Price Reports". ESFPA Brief, pp. 1-2. These documents report estimates of the "prices paid for standing timber during the previous six months."[5] Because the Forest Preserve's timber can not "be sold, removed or destroyed", nothing could be more irrelevant to this case than the concept of "stumpage". These current reports obviously can shed no light on

[5] www.dec.ny.gov/lands/5259.html (last accessed February 21, 2021).

the intentions, 127 years ago, of the framers of Article 14. See Matter of Fay, 291 N.Y. 198, 207 (1943).

Moreover, even if these reports were both relevant and appropriate for judicial notice (which is doubtful), such that the Court might consider them, they actually show that in the modern forest products industry, "timber" is not limited to large trees. In them, DEC does not set a lower limit on the size of trees that can be considered to be "timber" for all purposes. It merely lists the sizes of certain subsets of logs that are used for certain industrial purposes.

In those reports DEC also defines "cordwood" as "small diameter or low quality wood suitable for firewood, pulp or chips."[6] The Winter 2021 Stumpage Price Report[7] shows that the state's "total timber harvest production" includes both "logs", and "pulpwood & chips", i.e. "cordwood". Thus, for DEC, "timber" includes "cordwood" with a "small diameter", and is not limited to large logs, as ESFPA would have the Court believe.

ESFPA's other arguments are similarly specious. It relies on an assortment of public navigation cases to argue that log drives on rivers were once used to transport timber, but not seedlings and saplings. ESFPA Brief, pp. 6-8. None of those

[6] www.dec.ny.gov/lands/5259.html (last accessed February 21, 2021).

[7] www.dec.ny.gov/docs/lands_forests_pdf/stumpagewinter21.pdf (last accessed February 22, 2021).

cases defined timber. Nor did they discuss other ways that smaller trees or pieces of wood, which may or may not have been suitable for being floated individually, could have been transported, such as by boat or raft, or over land.

Part II of the Historical Background section of ESFPA's Brief presents a selectively curated photographic and artistic exhibit of nineteenth-century log drives. While they may be interesting to fans of Adirondack history and art, these images are not in the Record, and are not suitable subjects for judicial notice, so they should not be considered by this Court. See Point I, supra. Moreover, none of them provide a definition of timber, or measurements of the sizes of the trees depicted therein. What they do show is that trees of a wide variety of sizes, including some that appear to be quite small, were harvested in that era and floated down the rivers. Also, these pictures do not change the fact that several official State reports of that era routinely included in the term "timber" very small trees that were harvested for various industrial uses. See Plaintiff's Brief, Point II.B(2).

ESFPA then discusses the trial testimony herein of a DEC staff forester about modern commercial logging definitions of "timber". ESFPA Brief, Historical Background, Part III. Neither of the lower courts appeared to find this testimony to be relevant or credible, as neither mentioned it in their decision.

R. xxxi-lv, 5011-5020. Modern-day logging practices and definitions have no relevance to discerning the intentions of the delegates to the 1894 Constitutional Convention. Matter of Fay, 291 N.Y. at 207.

At page 16 of its Brief, ESFPA cites to a so-called "Timber Definition Table". This document is of unknown provenance, is not in the Record, is obviously hearsay, and should not be considered by the Court. See Point I, supra.

ESFPA devotes the entirety of Point I of the Argument section of its Brief to attacking the qualifications, credibility, and testimony of Plaintiff's expert historian, Dr. Philip Terrie. The trial court found that Dr. Terrie was qualified to offer the testimony that he did, and stated that it "largely credits such testimony on the issues of the history of the Adirondack Forest Preserve ... particularly with regard to pulp logging operations, as well as to the historical use of the terms 'tree' and 'timber' interchangeably". R. xl. The Appellate Division agreed with this determination, and in doing so also credited Dr. Terrie's testimony. R. 5017. Both of these courts relied upon his testimony in finding that "timber" includes small "trees" and is not limited to commercially marketable logs. R. xl, 5017. Their findings as to Dr. Terrie's credibility, and their factual findings as to the historic common understandings of the terms "trees" and "timber", are binding on

this Court, and ESFPA's attack on his testimony should be disregarded. See Plaintiff's Brief, Point II.A.

ESFPA wraps up its historical arguments with a discussion of various nineteenth-century statutes and State reports. ESFPA Brief, Point II. As shown by Dr. Terrie's testimony (R. xl, 5017), and by official State reports, literature, and a contemporaneous dictionary, in the 1890s the common legal and everyday usage of the term timber included trees of all sizes. See Plaintiff's Brief, Point II.B.

ESFPA's historical examples do not define the word timber. They only set varying lower limits on the sizes of the Forest Preserve timber that could be sold, before Article 14 put an end to that practice. They also show that even when the larger timber was allowed to be sold, the Legislature intended to preserve the smaller timber, and avoid the wholesale destruction of trees of all sizes.

ESFPA points to the use of phrases such as "marketable timber" and "merchantable timber" in those documents. ESFPA Brief, p. 28. Contrary to ESFPA's insinuation, these terms show that timber was not limited to trees that were merchantable or marketable. Instead, the use of those adjectives shows that there were two types of timber, that which was merchantable, and that which was not. Thus, non-merchantable trees were still timber.

POINT IV

THERE IS NO *DE MINIMUS* EXCEPTION TO ARTICLE 14, § 1

NYSFPA also appears to argue that the impact of the Class II Community Connector snowmobile trails on the Forest Preserve is somehow affected by its expansion since 1930. ESFPA Brief, pp. 3-4. This type of *de minimus* rationale was rejected in Association for the Protection of the Adirondacks v. MacDonald, 253 N.Y. 234, 236 (1930), and must be rejected here.

There were 1,941,403 acres in the Forest Preserve at that time. Id. This Court observed then that the "taking of four acres out of this vast acreage for this international sports' meet seems a very slight inroad upon the preserve ...". Id. Nevertheless, the project was still found to violate the Constitution. Id. at 241. "[I]t is clear that the application of the principle of *de minimus* was not to be applied in the forest preserve." Helms v. Reid, 90 M.2d 583, 593 (Sup. Ct., Hamilton Co. 1977)(interpreting Association v. MacDonald).

Even if a *de minimus* standard were to be considered, the Class II trails approved to date will destroy 37.1 acres of the Forest Preserve. R. 4832, 4838-4840; see also R. 544, 680-681, 2225, 2233, 3120, 3131, 3385-3386, 3399-3400, 3418. This is over 800% more acreage than was at issue in 1930, when the bobsleigh run was found to be unconstitutional. See Association v. MacDonald, 253 N.Y. at 236. The Adirondack Forest Preserve

currently contains approximately 2.5 million acres of land (R. 4159), only about 29% more than it did then. See id. The Class II trails are likewise unconstitutional.

CONCLUSION

For all of the foregoing reasons, the Constitution includes trees under 3" in diameter as protected timber under Article 14, § 1. The Appellate Division's finding that it does so should be affirmed.

Dated: February 24, 2021

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CERTIFICATION OF COMPLIANCE WITH RULE 500.13(c)(1)

John W. Caffry, an attorney for the respondent-appellant, hereby certifies as follows: the foregoing reply brief was prepared on a computer word-processing system. A monospaced typeface was used, as follows:

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