

26, 1930

CANADIAN
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No. 115 of 1929.

In the Privy Council.

APPELLANT'S CASE.

ON APPEAL

FROM THE SUPREME COURT OF BRITISH COLUMBIA.

BETWEEN

THE ATTORNEY-GENERAL OF BRITISH
COLUMBIA (Defendant) - - - - - *Appellant*

AND

10 THE McDONALD MURPHY LUMBER COMPANY
LIMITED (Plaintiff) - - - - - *Respondent.*

Case for the Appellant.

RECORD.

1. This is an appeal by special leave granted the 18th day of July 1929 from a judgment of the Supreme Court of British Columbia (The Chief Justice) dated the 23rd day of May 1929 dismissing the Appellant's motion to strike out the Respondent's action, and declaring p. 126 invalid and ultra vires certain sections of the Forest Act, being Chapter 93 of the Revised Statutes of British Columbia 1924, and making other declarations asked for by the Respondent.

2. The questions for decision in this appeal are—

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(A) Whether Section 58 and Sections 62 and 127 of the Forest Act in so far as they impose a tax on timber and provide for the collection of such tax are ultra vires the Provincial Legislature as being indirect taxation and contrary to the provisions of the British North America Act 1867.

(B) Whether in the Courts of British Columbia a subject may commence an action against the Attorney-General to obtain a declaration that an act of the legislature of British Columbia is

invalid or whether such action should be by way of petition of right and whether the fiat of the Lieutenant-Governor is necessary before such action can be brought.

3. Prior to the year 1887 the Crown in alienating timber lands in British Columbia reserved no royalty or other rights, but in that year it was enacted by the Lands Act 1887 (50 Vict. c. 17) that the grants of Crown timber lands should contain reservations of the timber thereon, and that thereafter the right to cut timber on such lands should be granted by lease or licence and subject to the payments of rents or royalties. Such payments have been from time to time increased and are now 10 governed by the Forest Act, Sections 53, 53A and 54.

4. The timber tax was imposed in substantially its present form by Crown Land Amendment Act 1903, Ch. 30, s. 9, and has stood unchallenged until this action. It was embodied in the Forest Act 1912, Ch. 17, s. 58, and has been re-enacted by other Forest Acts. The material sections of the present Act are :—

Section 58.—There shall be due and payable to His Majesty a tax upon all timber cut within the Province, save and except that upon which a royalty is reserved by this Act or the “ Timber Royalty Act,” or that upon which any royalty or tax is payable 20 to the Government of the Dominion which tax shall be in accordance with the following Schedules :—

SCHEDULE NO. 1.

Timber suitable for the manufacture of lumber and shingles, two dollars per thousand feet, board measure, on No. 1 grade ; one dollar and fifty cents per thousand feet, board measure, on No. 2 grade ; and one dollar per thousand feet, board measure, on No. 3 grade ; Provided that a rebate of all the tax over one cent per thousand feet, board measure, shall be allowed when the timber upon which it is due or payable is manufactured or 30 used in the Province.

Section 62.—(1) No person shall export or remove from the Province any timber in respect of which any royalty, tax or revenue is payable to His Majesty in right of the Province, unless a permit is obtained from an officer of the Forest Branch ratifying that the timber has been scaled, and all royalty, taxes and revenue so payable in respect thereof have been paid.

(2) Every contravention of the Provisions of this section shall render the offender liable to forfeit and pay to His Majesty the sum of one thousand dollars to be recovered with all costs 40 as between Solicitor and client, in an action brought in the name of His Majesty in any Court of competent jurisdiction.

10 (3) The Minister, or any person authorised by him, may do all things necessary to prevent a breach of the provisions of this section and to secure compliance therewith, and may for such purpose, take, seize and hold all timber which is, or is suspected to be in course of transit out of the Province in contravention of the provisions of this section, and may also take, seize and hold every boat which is towing any such timber; and if the Minister decides that it is not the intention of the holder, owner, or person in possession of the timber to use it in the Province, or to manufacture it or cause it to be manufactured into sawn lumber or other manufactured wood product in the Province, or to dispose of the timber to others who will use the same in the Province, or have the same so manufactured in the Province, the Minister may sell or cause to be sold such timber and boat by public auction and the proceeds of the sale shall be the property of His Majesty and shall form part of the Consolidated Revenue Fund. In case the boat escapes after having been so seized or in case its seizure is avoided by the removal of the boat outside the waters of the Province it may at any time afterwards be seized, if found in any of the waters of the Province, and sold as above provided.

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30 Section 127.—(1) Every owner of granted lands and every holder of a timber lease or timber licence on lands whereon any timber or wood is cut in respect of which any stumpage, royalty or tax is reserved or payable under this Act or the "Timber Royalty Act" or any contract, and every person dealing in any timber or wood cut from any such lands, and every person operating a mill or other industry which cuts or uses timber or wood upon or in respect of which any royalty or tax is by this Act or the "Timber Royalty Act" or any contract reserved or payable, shall keep correct books of account of all timber and wood cut for or received by him and shall render monthly statements thereof to the District Forester, and shall within five days after every transfer of ownership of any boom or timber which has been scaled prior to the transfer notify the District Forester of the transfer or if demanded shall furnish a true copy of the tallyman or scaler's daily work, duly sworn to which shall contain all such particulars as the Minister may require; and such books of account shall be open at all reasonable hours for the inspection of any officer of the Forest Branch; and the owner, lessee or licensee or person dealing in the timber or operating the mill or other industry as aforesaid shall pay monthly all such sums of money as are shown to be due to the Minister.

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(2) If, after inspection of such books of account it is found that in respect of any previous statement there is still an amount

of timber or wood not reported and which is subject to stumpage, royalty or tax, the owner, lessee, or licensee, or person dealing in the timber or operating the mill or other industry as aforesaid who is in arrear for the stumpage, royalty, or tax shall forthwith pay the arrears and for the purpose of the collection and recovery of the same shall be subject to all the provisions of this Act for the collection and recovery of stumpage royalty or tax. R.S. 1924, c. 93, s. 127 ; 1926-27, c. 23, s. 12.

5. The relevant provisions of the British North America Act 1867 are :— 10

Section 91.—It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons to make Laws for the Peace, Order and good Government of Canada, in relation to all matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces ; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all matters coming within the Classes of Subjects next hereinafter enumerated, that is to say :— 20

* * * * *

(2) The Regulation of Trade and Commerce,

(3) The raising of money by any Mode or System of Taxation

* * * * *

(29) Such classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

Section 92.—In each Province the Legislature may exclusively make Laws in relation to matters coming within the Classes of Subjects next hereinafter enumerated ; that is to say :— 30

* * * * *

(2) Direct Taxation within the Province in order to the Raising of a Revenue for Provincial Purposes.

* * * * *

(5) The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.

* * * * *

(9) Shop, Saloon, Tavern, Auctioneer, and other Licenses in order to the raising of a Revenue for Provincial Local or Municipal Purposes.

(10) Local Works and Undertakings other than such as are of the following classes :—

(A) Lines of Steam or other ships, Railways, Canals, Telegraphs and other works and undertakings, connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province.

(B) Lines of Steamships between the Province and any British or Foreign Country.

10 (C) Such works as, although wholly situate within the Province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the Provinces.

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(13) Property and Civil Rights in the Province.

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(16) Generally all matters of a merely local or private Nature in the Province.

Section 121.—All Articles of the Growth, Produce or Manufacture of any one of the Provinces shall, from and after the Union be admitted free into each of the other Provinces.

6. By the terms of Union of the Province of British Columbia
20 with the Dominion of Canada it is provided—

Section 7.—It is agreed that the existing Customs Tariff and excise duties shall continue in force in British Columbia until the railway from the Pacific Coast and the system of railways in Canada are connected unless the legislature of British Columbia should sooner decide to accept the tariff and excise laws of Canada.

7. The Respondent and its predecessors in title have been and are owners of certain timber lands, namely, Block 75, Cowichan Lake District, and Section I, Renfrew District, situate in the Esquimalt and Nanaimo Belt, British Columbia, granted prior to 1887, upon which no
30 royalty was reserved by the Province and no royalty or tax was payable to the Dominion of Canada. There are extensive lands of this category within the Province from which large quantities of timber are cut and substantial revenues accrue to the Crown in the right of the Province from the taxation set out above on timber cut from these lands.

8. The Respondent agreed to sell timber to buyers in the State of Washington, U.S.A., and having cut timber upon the said lands, tendered the statutory scaling fees, payable on all timber cut, to the Department of Lands, Forest Branch, but the said Department refused

p. 122,
ll. 19-24
p. 122,
ll. 39-45

to accept such tender unless the Respondent completed Form F.B. 38, being an application for an export permit and paid in respect thereof timber tax amounting to \$2,025.25. The Respondent refused to pay such tax, but demanded a permit on payment of the scaling and other fees only. Such timber was not intended to be used or manufactured in British Columbia, but to be exported.

p. 122,
ll. 44-6

9. The said Department of Lands thereupon took prompt and effective steps to prevent the logs being taken across the border.

p. 1

10. The Respondent thereupon on April 4th 1929 issued a writ out of the Supreme Court of British Columbia against the Appellant; the Respondent did not proceed by way of petition of right or obtain the fiat of the Lieutenant-Governor or of the Attorney-General before instituting the action. 10

p. 2 et seq.

11. By its statement of claim the Respondent having set forth the facts hereinbefore set out alleged that Section 58 of the Forest Act and Sections 62 and 127 of the said Act so far as they implemented the tax imposed by Section 58 were ultra vires and invalid on the grounds that—

p. 5, ll. 22-42

(A) the tax imposed was indirect and not direct taxation ;

(B) the tax was in its true nature a customs or impost tax 20
or excise tax ;

(C) that the tax was an interference with and an attempt to regulate trade and commerce ;

(D) that the tax was contrary to Section 121 of the British North America Act and Section 7 of the Terms of Union of the Province of British Columbia with the Dominion of Canada.

p. 6

It claimed declarations that Section 58 and Sections 62 and 127 were, as far as they implemented Section 58 of the said Act, ultra vires and invalid, that it was not bound to comply with the demand for a return on Form F.B. 38, and that it was entitled without let or hindrance to export the 30
said timber and other relief.

p. 8 et seq.

12. By his defence the Appellant denied all the allegations of the statement of claim and set up that the action was frivolous, vexatious and an abuse of the process of the Court, that the action would not lie without the Respondent having first obtained a fiat, and that the subject-matter of the action was properly the subject of a petition of right.

p. 12

13. By Notice of Motion dated 20th April 1929 the Appellant moved to strike out the Respondent's action upon the grounds in paragraph 12 hereof set out ; such motion was adjourned to the trial of the Respondent's action.

14. Such action and motion came on for hearing in the Supreme Court of British Columbia (Macdonald, C.J.) on the 1st, 2nd, 7th and 8th days of May 1929, evidence being called by the Respondent in the effort to show—

(A) that the tax was added to the price of timber and passed on to purchasers in the United States ;

(B) that the market price of timber in British Columbia was about \$3 to \$4 per thousand feet less than in the State of Washington, U.S.A. ;

10 (C) that the income from the tax was small.

15. In cross-examination the Respondent's witnesses admitted—

(A) That the price of logs was fixed in the United States by market conditions over which the British Columbian seller had no control.

(B) That the tax imposed in British Columbia did not affect such price.

(C) That the elimination of tax would result in the owner in British Columbia making a greater profit.

20 (D) That timber exported from British Columbia on which 50 cents royalty is paid fetch the same price as timber on which \$2 tax is paid.

16. By its reserved judgment dated May 23rd 1929 the Court ordered that the Appellant's motion should be dismissed, and declared that—

(A) Section 58 and the Schedule thereto of the Forest Act are ultra vires the Legislative Assembly of the Province of British Columbia.

30 (B) Sections 62 and 127 of the said Act in so far as they purport to implement any tax levied by the said Section 58 are ultra vires the said Legislature.

(C) The plaintiff is not liable to pay in respect of any timber cut from Section 1, Renfrew District, or Block 75, Cowichan Lake District, both on Vancouver Island, any tax under Section 58 of the said Forest Act.

(D) Any demand upon the plaintiff by the Forest Branch of the Department of Lands or other department or officer of the Province of British Columbia for any return in respect of timber cut from the said lands to implement the collection of any tax levied under Section 58 of the said Forest Act is ultra vires.

(E) The plaintiff is entitled to export or remove from the Province of British Columbia any timber cut from the said lands without let or hindrance from the Government of the said Province or any Department or officer thereof in respect of any claim to any tax or royalty under the said Forest Act.

17. In his reasons for judgment the learned Chief Justice, having discussed the case of the City of Halifax *vs.* J. P. Fairbanks, 1928, A.C. 117, proceeded—

p. 125,
ll. 12-20

“ If the meaning is that a tax may be placed in a category or bloc such as the Trade & Commerce Bloc, the Customs & Excise Bloc, The Personal Property Bloc, and so forth, which are separated by border lines not very clearly defined, I find no difficulty in assigning this tax to one of the Blocs upon which the Province must not trespass. I find that the nature and general tendency of the tax is to pass it on to the Purchaser, which is an indirect tax which is ultra vires the legislature of British Columbia.”

His Lordship added that the preliminary question whether the Respondent should have proceeded by way of petition of right was spoken to briefly and “ if Counsel desire to be heard further I shall fix a day.”

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18. Following the delivery of judgment, Counsel was further heard by the learned Judge upon the last-mentioned point, but no further order of the Court was made.

19. The Appellant contends that the judgment of the learned Chief Justice was erroneous. He submits that the tax is a direct tax upon the timber on the land payable on severance, whether the timber is retained by the owner or not, and payable by the owner as owner. He further submits that the preservation and maintenance of the lumber supply, which is an asset of great importance to the Province, is essentially a matter of Provincial concern, reserved by the British North America Act for the Provincial Legislature, and that the Forest Act and its scheme of royalties and tax are designed to preserve the timber and secure its proper utilisation. Nor is the character of the tax as a direct tax upon property within the Province changed by the fact that, in its function of encouraging manufacture within the Province, the Legislature chooses to remit taxation upon property used in designated manufacturing processes. It could not, it is submitted, be contended that the Provincial Legislature, if so minded, could not lawfully expropriate all timber or could not abolish private property in timber; it is part of the settled policy of the Legislature as governed by the Forest Act, itself a consolidation of other enactments, to preserve for the Crown as representing the people, part of the value of all timber payable in the case of the owner when he himself realises

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the timber by severing it from the soil, and it is submitted that such reservation, whether nominally effected by royalty or tax on timber cut, is within the powers of the Legislature.

20. The Appellant submits that the Forest Act must be considered not as standing alone, but as part of the Provincial scheme of taxation upon land and personal property, with which it is in fact interwoven; and that, when it is so considered, the nature of the tax imposed becomes abundantly clear: it is a tax upon timber as part of the land, payable on severance.

10 21. Between 1884 and 1903 various Assessment Acts of the Province provided that for the purpose of taxation the value of any land should include the value of all timber and underwood thereon; and land taxes were imposed by various Land Acts upon such basis.

22. In 1903 the Assessment Act (1903-4 Ch. 53) exempted from land tax all timber lands held on lease or licence and from personal property tax all timber cut on such lands, if, and only if, the rental, royalty and licence fees imposed as they then were by the Land Act had been paid, and further exempted from personal property tax, to which otherwise it would have been liable, timber in respect of which the tax now in question
20 had been paid; but both exemptions were expressly limited to the owners and did not extend to purchasers from them.

23. These exemptions were continued, and the present Taxation Act, R.S.B.C. Ch. 250⁴ provides, inter alia, by Sections 33, 34 and 41, that if an owner of timber land makes the prescribed return, accompanied by a certificate that the taxation imposed by the Forest Act has been paid in respect of all timber cut thereon, his land is taxed at 1½ per cent. of its value; otherwise it is taxed at 5 per cent. of its value. By Section 54 the owner of such lands is exempted from personal property tax upon sawlogs or shingle-bolts cut from such lands, again—if he, the owner—
30 has paid the taxation imposed by the Forest Act.

24. Further, Section 126 of the Forest Act, providing as it does for a lien on the land from which timber is cut for the amount of timber cut, emphasises the fact that the taxation is, in its true intent, taxation on timber land, payable upon the severance of the timber. *—tax due on*

25. If, however, it be considered that the taxation in question is not a direct tax upon timber as part of the land, payable on severance, the Appellant submits that it is a direct tax upon timber when by severance it is reduced into personal property; and hence the owner—and, be it noted, the owner alone—is exempted from personal property tax which
40 would otherwise be payable under the Taxation Act if he has paid the taxes imposed by the Forest Act.

26. It was argued on behalf of the Respondent that the tax was indirect because its nature and general tendency was "to pass it on to the purchaser." Apart from the general tendency to pass on the most direct taxes to the purchaser, it cannot be contended that this tax is passed on to consumers within the Province; for it is rebated practically wholly, in their favour; whilst persons without the legislative control of the Legislature imposing the tax cannot be taxed by the Province. Moreover, the purchasers who upon this argument would bear the taxes, are buyers in the United States; as to them the Respondent's own evidence is conclusive: it shows that the price they pay is not influenced by the tax 10 and that the effect of total remission of the tax would be to increase the seller's profits. This is further emphasised by the fact that timber of similar grade, upon which a royalty of 50 cents is reserved instead of a tax of \$2, fetches the same price on export.

27. Nor is the tax an attempt to regulate trade and commerce. The fact that an Act of a Provincial Legislature may have a repercussion on trade and commerce, e.g., a Minimum Wage Act—does not invalidate it, if, as here, it deals with matters of property and civil rights within the Province, nor is it an interference with trade and commerce, in the sense in which those words are used in the British North America Act, to foster 20 local industries by rebating taxation or rates in their favour; this rebate stands upon exactly the same footing as the provision in timber leases and licences of Crown lands that the timber cut shall be manufactured within the Province.

28. It is submitted that the argument based on Section 121 of the British North America Act is equally fallacious. That section is directed only to the imposition of a customs duty by one Province on goods entering it from another; it cannot limit the right of the Province, granted by the British North America Act, to impose direct taxation upon land and personal property. 30

29. The Appellant further contends that the action by one which concerns Crown property, namely, a tax due to the Crown and the right thereto, is not a proper matter for an action of law that such action does not lie against the Attorney-General and that the proper procedure was that laid down by the Crown Procedure Act, R.S.B.C., 1924 Ch. 63.

30. The Appellant submits that the said judgment is wrong and should be reversed and that judgment should be ordered to be entered for the Appellant for the following amongst other

REASONS.

- (1) BECAUSE the said tax is a tax upon timber as part of 40 the land and a direct tax.

- (2) BECAUSE such tax is imposed on the persons who are intended to pay it, namely, the owners of timber lands.
- (3) BECAUSE the said tax is not an indirect tax.
- (4) BECAUSE the said tax is, in the alternative, a direct tax upon timber when by severance from the land it becomes personal property.
- (5) BECAUSE it is neither the intent nor the general tendency of the said legislation to pass the said tax on to the purchaser.
- (6) BECAUSE the said tax is within the legislative competence of the Legislature of British Columbia.
- (7) BECAUSE the said tax is not an interference with trade and commerce.
- (8) BECAUSE the said action did not lie without a fiat, and because the subject-matter of the said action was properly the subject of a petition of right.
- (9) BECAUSE there was no statutory or common law right to bring the said action.

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GEOFFREY LAWRENCE.

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WILFRID BARTON.

No. 115 of 1929.

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(Defendant) - - - *Appellant*
AND
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LIMITED (Plaintiff)** - *Respondent.*

Case
FOR THE APPELLANT.

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