48, 1949

RECORD

In the Privy Council

No. 7 of 1949.

ON APPEAL FROM THE SUPREME COURT OF CANADA

BETWEEN:

THE ATTORNEY-GENERAL OF BRITISH COLUMBIA

Appellant

AND:

ESQUIMALT & NANAIMO RAILWAY COMPANY,
ALPINE TIMBER COMPANY LIMITED,
THE ATTORNEY-GENERAL OF CANADA

Respondents

CASE FOR THE APPELLANT

1. This is an appeal by special leave from a judgment of the Supreme Court of Canada.

2. The Lieutenant-Governor in Council of the Province of British Columbia submitted seven questions to the Court of Appeal of that Province under the provisions of the "Constitutional Questions Determination Act" R.S.B.C. 1936 Chapter 50. All of these, except question four, were answered favourably to the submissions made on behalf of the Attorney-General of the Province. In the Supreme Court all were answered adversely to his submissions, but for conflicting reasons. p. 1 p. 19-22

3. The questions submitted arise out of a report by the Honourable Gordon McGregor Sloan, Chief Justice of British Columbia as a Commissioner appointed under the Public Inquiries Act, R.S.B.C. 1936, Chapter 131, to inquire, inter alia, as to the "forest finance and revenue to the Crown from forest resources." Extract pp. 253-266

4. In the course of the report it was recommended that the Courts be asked: pp. 266, l. 13

(a) whether section 123 of the Forest Act is applicable to the timber lands on Vancouver Island of the Esquimalt

and Nanaimo Railway Company, known as the "Island Railway Belt;"

p. 266, l. 10-15 (b) whether it was within the competence of the province to enact a severance tax, equal in amount to the royalty paid upon timber cut from Crown lands, to be imposed upon timber cut from these lands after the sale thereof by the railway company.

p. 264, l. 31 5. The report also expressed the view that there was "no contract between the province and the company" relative to the lands in the Island Railway Belt and therefore that the imposition of a severance tax would not involve a breach of any contractual obligation.

p. 2, l. 21-p. 4 6. The questions submitted include not only questions as to the existence of a contract between the Province and the Railway Company or its contractors, and questions as to the validity of the proposed "severance tax" but also questions as to the validity of a proposed *land tax* on the land in the area.

p. 4, l. 5 7. Question seven relates to a forest fire protection fund and will be considered separately.

p. 424 8. This appeal is from the answers to the questions by the Supreme Court.

p. 2, l. 23 **9. Question One:**

"Was the said Commissioner right in his finding that there never was any contractual relationship between the provincial government and the contractors or the Railway Company in relation to the transfer of the Railway Belt to the Railway Company."

10. The occasion for this question is as follows:

(1) British Columbia came into Confederation in 1871. p. 192, l. 20 Section 11 of the terms of Union provided that the Dominion Government would undertake to begin the construction of a railway across Canada to connect the seaboard of British Columbia with the railway system of Canada within two years, and to secure completion of the railway within ten years.

p. 192, l. 29 (2) The Government of the Province agreed to convey to the Dominion Government, in trust, to be appropriated in such manner as the Dominion Government may deem advisable in the furtherance of the construction of the railroad,

a strip of land 20 miles in width on each side of the railroad throughout its entire length in British Columbia.

(3) In June, 1873, the Dominion Government designated Esquimalt on Vancouver Island as the terminus of the transcontinental railway (it was intended to cross to the Island by way of Seymour Narrows). The Dominion requested the Province to grant a 20 mile strip of land between Seymour Narrows and Esquimalt on Vancouver Island. The land was set aside but not then granted.

p. 101, l. 28-34 and p. 117, l. 1 and p. 193, l. 15-34

p. 101, l. 35-p. 102, l. 3 and p. 193, l. 33

p. 99, l. 11-21 and p. 100, l. 20 and p. 193, l. 35-p. 194, l. 25

(4) Later the terminus of the railroad was changed to Burrard Inlet on the mainland, but controversy continued between the two governments as to their respective rights and obligations, both in relation to the railroad on the mainland and as to the Island line.

p. 199, l. 11-14

(5) On August 20th, 1883, an agreement was reached between the two governments "settling all existing disputes and difficulties between them."

pp. 140-142

(6) In accordance with this agreement the Province was to grant the 40-mile strip on the Mainland in trust pursuant to Section 11 of the terms of Union and to grant a strip of land on Vancouver Island of approximately 1,900,000 acres along the proposed railway line between Nanaimo and Esquimalt to the Dominion in trust to be appropriated as the Dominion Government may deem advisable for the purpose of constructing and to aid in construction of the railway between these two points.

p. 140, l. 19 (139E, l. 27)

(7) It was also provided that the agreement was to be ratified by both Parliaments and that the Province would incorporate by act of legislature certain persons to be designated by the Dominion Government, for the construction of the Esquimalt-Nanaimo railway.

p. 140, l. 28 p. 139I, l. 12-19

(8) Concurrently with the above mentioned agreement of August 20th, 1883, an agreement was also entered into between the Dominion and Robert and James Dunsmuir (father and son) and their associates as contractors, providing for the construction of the road and by which the "Dunsmuir Group" were to be designated as the persons to be incorporated by the Provincial Act. This contract had attached a Draft Bill of the Province in form identical with the "Settlement Act" p. 150-157 hereinafter referred to. There was endorsed thereon:

pp. 142-148

pp. 139E-139L p. 148, l. 30

"I have read and on behalf of myself and my associates acquiesce in the various provisions of the Bill so far as they relate to the Island Railway."

Victoria, B.C., 20th Aug. 1883

"R. Dunsmuir"

p. 145, l. 24-p. 146 (9) This agreement between the Contractors and the Dominion provided fully for the consideration to be received by the Contractors, or their successors, from the Dominion, for the completion of the work. The agreement was placed in escrow pending passage of the necessary legislation by both Parliaments. In December, 1883, the Province passed the "Settlement Act" reciting the provisions of and ratifying its agreement with the Dominion.

pp. 150-157

p. 153, l. 4-
p. 154, l. 11 (10) The Act granted the lands in question to the Dominion in trust as above indicated and incorporated the persons to be designated by the Dominion as the Esquimalt and Nanaimo Railway Company.

(11) Section 22 of the Act reads as follows:

"The lands to be acquired by the company from the Dominion Government for the construction of the Railway shall not be subject to taxation, unless and until the same are used by the company for other than railroad purposes, or leased, occupied, sold, or alienated."

(12) The railroad was constructed by the company and in due course the lands were conveyed by the Dominion to it, pursuant to the agreement of August 20, 1883.

11. The subject for consideration in question one is directly related to Section 22 of the Settlement Act p. 156, l. 33:—Was there a contract between the Province and the Contractors, or between the Province and the Esquimalt and Nanaimo Railway Company that the lands of the Esquimalt and Nanaimo Railway belt would not be subject to taxation, as provided in the said Section?

p. 156, l. 33

12. In the Court of Appeal Mr. Justice O'Halloran reviewed at length the historical facts leading up to the passing of the Settlement Act and events subsequent thereto; and concluded that there was no evidence to support an implied contract or to justify the theory that Section 22 constituted an offer accepted by performance.

pp. 26-43

p. 44, l. 1-13

13. His Lordship indicated that the events leading up to the Settlement Act showed no contractual relationship, actual

or intended, between the Province and the Contractors, or their successors the Railway Company. In support of this view he relied strongly on the contracts which were actually made between the Dominion and the Province and between the Dominion and the Railway contractors. "The fact that the Province had a prior separate agreement with the Dominion on the same day (that is the same day as the Dominion contracted with the Dunsmuir Group—Aug. 20th, 1883), and that it did not join in the agreement between the Dominion and the contractors must have made it plain to the Contractors that the Province was not contracting with them and had no intention of contracting with them."

p. 36, l. 35-40 (pp. 140-142) (pp. 142-148)

14. As to events subsequent to the Settlement Act his Lordship assembled a formidable array to negative the recognition of a contract arising in any form by a statutory offer and acceptance by performance. Notwithstanding the numerous occasions since 1883 in which the relations of the Railway Company and the two governments have been in controversy, in the courts, in applications for disallowance of legislation affecting the Settlement Act, and in political conflicts "no one had ever suggested the existence of a contract between the Province and the Contractors." On the contrary, his Lordship found direct evidence in the statement of James Dunsmuir as president of the Company, that no contractual relation existed (see par. 16).

p. 27, l. 40-p. 37 p. 42, l. 23 p. 37, l. 26

15. Mr. Justice Bird found that the Act of the Legislature in May, 1883, was passed to confirm the acceptance by the Province of the proposals in the Trutch letter of May 5, 1883, (Trutch being the agent of the Dominion Government for the purpose of negotiating a settlement with the Province). The statute, therefore, between the two governments was clearly an acceptance of an offer by the Dominion. The Settlement Act of December was only a modification in some details of the May Act and his Lordship found it was "nothing more than the confirmation of an agreement made between the Dominion and the Province," and did not indicate any intended cotractual relations by the Province with anyone except the Dominion.

p. 89, l. 31 (pp. 129-135a) (pp. 124-125) p. 89, l. 34 p. 90, l. 11-12

16. Mr. Justice Bird, as well as Mr. Justice O'Halloran relied strongly on the statement made by Mr. James Dunsmuir in a petition signed by him as President of the Esquimalt and Nanaimo Railway Company in 1904. The Province about this time had passed the Vancouver Island Settlers Rights Act which seriously affected the Railway Company's title to some of the lands in the Railway Belt granted under the Settlement Act to the Dominion by the Province. The company, through its Presi-

p. 88, l. 21-38 pp. 214-216

p. 216-220 dent, petitioned the Governor in Council to disallow the Legislation. Paragraphs 20 and 21 read as follows:

p. 219 (20) The Esquimalt and Nanaimo Railway Company made their contract as aforesaid with the Dominion Government, and upon the due completion thereof received a grant of the said lands from the Dominion Government upon the same terms and conditions they were granted to the Dominion Government by the Provincial Government of British Columbia, by Chapter 14 of 1884.

p. 219 (21) The Esquimalt and Nanaimo Railway Company do not recognize the right of the Provincial Legislature to interfere with the land grant as the company did not receive the land from the Provincial Government, nor did they enter into any contract with the Provincial Government."

p. 147 17. Mr. James Dunsmuir with his father was one of the signers of the agreement of August 20, 1883.

18. Mr. Justice O'Halloran said:

p. 38, l. 10-19 "The above are categorical statements made officially by the E. & N. Railway Company twenty-one years after the event that no contract was made with the Province. Submissions of the Company's counsel advancing a diametrically contrary view forty-two years later can hardly hope to command acceptance. It verges on the improbable that Mr. James Dunsmuir with no doubt the best legal advice available should make such a statement unless it was amply supported in law and in fact. If there had been any contract between the Province and the contractors it would have been of primary importance at that time."

p. 73, l. 41-p. 74, l. 1 19. Mr. Justice Smith in a dissenting judgment refers to Section 27 of the Settlement Act (p. 157) which implements Clause 15 (2) of the Agreement of August 20, 1883 (p. 147, l. 3), between the Dunsmuir Group and the Dominion and transfers to the Company as by this Act incorporated the obligations and benefits of the said contract. His Lordship observed that it was p. 74, l. 28 manifest that the Contractors relied upon Sections 22 and 27 as part of the inducement offered to them to enter into the contract (with the Dominion) to construct the railway and con-p. 75, l. 2-5 cludes "there is no escape from the conclusion that the Province is contractually obligated to grant freedom from taxation to these railway lands—in accordance with the terms of Section 22."

20. It would seem that his Lordship finds the statute itself constitutes a contract with the Province. In this he is not supported by any of the learned judges in either Court.

21. In the Supreme Court of Canada all the learned Judges agreed that there was no contract between the Province and the Contractors. They differed, however, in their opinions as to the relations between the Province and the Railway Company.

22. Mr. Justice Locke speaking for himself and Mr. Justice Kerwin made a careful analysis of the historical facts. He found that there was not sufficient evidence to support a finding that there had been a contract between the contractors or promoters of the Railway Company and the Province prior to the Settlement Act. As to a "Parliamentary Contract" so-called, created by the Act itself, his Lordship pointed out that there was here no petition for incorporation by the promoters or any thing corresponding to a Parliamentary Contract as an incident to the passing of the Act. "Rather was the statute enacted by the Province in pursuance of its agreement with the Dominion." His Lordship considered, however, that the statute and particularly Section 22 "holding out the promised tax exemption" was one of the inducements offered to the Railway Company to build, equip, and work the railway which was accepted by the Railway Company by the performance of the work and that such acceptance by performance established a contract.

p. 440, l. 17
p. 443, l. 1-4
p. 444, l. 32-38

23. Mr. Justice Rand took somewhat the same view. He rejected the submission of a contract with the contractors; or a Parliamentary Contract. "What both the promoters and the Company assumed was that the tax exemption would be effective according to its terms and they were not concerned to provide collaterally against the consequences of a legislature repudiation."

p. 455, l. 22
p. 455, l. 30-34

24. His Lordship, however, found a contract arising out of performance. "I should say that a statutory benefit arising through the performance of conditions laid down in the statute as the quid pro quo of the benefit is a contractual right, and that upon performance by the Company here the engagement became binding upon the Crown."

p. 456, l. 8-12

25. Mr. Justice Kellock questioned the existence of a contract based on the theory that Section 22 constituted an offer to the Company, accepted by performance; because under Sections 9 and 20 of the Settlement Act, the execution of the works were imperative on the Company. From this "the question arises whether there existed alongside the statutory obligation a contractual one." However, his Lordship found a contract existed between the Province and the Dominion as trustee for the Company.

p. 469, l. 1-17

"The lands were granted to the Dominion in trust for
p. 467, l. 26-30 the company to be formed by incorporation under the same statute subject of course to the fulfillment by the Company of the conditions . . ." "The Company as beneficiary would
p. 468, l. 24-27 accordingly be entitled to sue the Province on the contract it being necessary only that the Dominion in any such contract be made a party."

26. Mr. Justice Estey's view was different from that of the
p. 473, l. 25-31 other learned Judges of the Supreme Court. He rejected the suggestion of a contract by the Province either with the con- 10
p. 473, l. 32- p. 474, l. 17 tractors or the Railway Company. He pointed out that Robert Dunsmuir and his son James were the active promoters and officers of the Company in 1883, and each had signed the contract with the Dominion in August, 1883, and that in 1904 when the Esquimalt and Nanaimo Company sought disallowance by the Dominion of The Settlers Rights Act which adversely affected the lands in question, James Dunsmuir as President of the Company signed a formal petition containing an express repudiation of any contract between the Province and the Railway Company. (This statement appears ante page 7 in the reference 20 to the opinions of O'Halloran and Bird J.J. paragraph 16.)

27. His Lordship also rejected the idea that the Dominion in its dealings with the Contractors, the Company or the Province, was a trustee either for the Company or the Province. "The
p. 476, l. 18 provisions of the Settlement Act were part of the terms of the settlement made between the two governments." While his Lordship found against any contract between the Province and the
p. 477, l. 12-28 Contractors or the Railway Company, he expressed an opinion that the terms of the trust under which the lands were granted to the Dominion placed the Province under an obligation not to 30 override Section 22. "Question one as framed is specifically restricted to a contract between the Province and the Dominion and in that restricted sense should be answered yes; but as it is plain the Province is concerned as to its contractual obligations with respect to Section 22 associated with this answer should be an intimation of the Province's obligation under the terms of the Trust." (It is to be observed that Question one was submitted at the request of and in the form desired by the Respondent Railway Company; and the question of any other form of obligation was not in issue nor was it argued.) 40

28 **Question Two:**

"If there was a contract would any of the legislation herein outlined if enacted be a derogation from the provisions of the contract?"

29. Mr. Justice O'Halloran dealt with the argument that the tax would take away from the Railway Company part of the sale value of the land by supporting the statement of Chief Justice Sloan: "The Railway Company assumed title to these lands on the terms set out in Section 22 of the Act and cannot now complain of the basis on which its title rests." p. 37, l. 6-24

30. Mr. Justice Bird stated in his Judgment: "I think the phrase 'shall not be subject to taxation' found in Section 22 does not extend to the enactment of legislation which authorizes the levy of a tax after the happening of an event whereby the exemption is determined." p. 91, l. 18

31. Mr. Justice Smith considered that the proposed tax would be contrary to the spirit of Section 22 and would be tantamount to a breach of faith on the part of the Government of the Province. p. 81, l. 41-p. 82, l. 6

32. In the Supreme Court none of the learned Judges specifically deal with the question except Mr. Justice Estey, who thought that because this tax was not of general application, but applied specifically to the lands in question and in fact had the effect of reducing the price and rent or other consideration to the Railway Company, it would be a violation of the obligations under the terms of the trust with respect to these lands. p. 478, l. 7-12

33. It was also submitted on behalf of the Attorney-General of the Province that once these lands were surveyed and listed for sale in the Lands Department of the Railway Company they were comparable to "goods on the shelf," in a merchant's store or warehouse, and were actually in use for other than Railway purposes within the meaning of Section 22. This submission was not accepted. p. 406, l. 19-33

34. **Question Three:**

"Was the said Commissioner right in his finding that 'there is no contract between the province and the Company,' which would be breached by the imposition of the tax recommended by the Commissioner?"

35. This question was submitted at the request of the Railway Company and was intended to relate to Ch. 33 of the Statutes of British Columbia, 1912, ratifying an agreement between the Province and the Esquimalt and Nanaimo Railway Company. pp. 237-239

36. The clear purpose of this Act was to enable the Company to lease property to its holding Company, the Canadian Pacific

Railway Company, without prejudice to Section 22 of the 1883 Act. It is submitted that it was not the purpose of the Act to change the operative effect of Section 22 or read into it any new contractual relation between the Railway Company and the province.

p. 446, l. 31-39

37. Mr. Justice Locke held that the words "such exemption shall remain in full force and virtue" are to be construed as meaning that the continuance of the exemption should not be affected by the leasing and cannot be construed as a covenant on the part of the Province not to exercise the power to repeal or amend the section, if that were "deemed" by the legislature to be required for the public good."

p. 458, l. 24-36

38. Mr. Justice Rand considered that the statutory exemption should continue as before. "I cannot view it (the Statute of 1912) as having added any new form or character to the exemption."

p. 478, l. 38-
p. 479, l. 1

39. Mr. Justice Estey stated: "The contract assured to the Railway Company that the Obligation of the Province thereafter under Section 22 remained precisely as if the lease had never been made. The answer to Queston Three is NO."

It is submitted that the conclusions stated and the answer are at variance.

40. **Question Four:**

"Would a tax imposed by the Province on timber as and when cut upon lands in the Island Railway Belt, the ownership of which is vested in a private individual or corporation, the tax being a fixed sum per thousand feet board measure in the timber cut, be ultra vires of the Province."

41. The answer to this question was unanimous by all the learned Judges below, that the severance tax indicated in Question Four was ultra vires as being an indirect tax.

42. **Questions Five and Six:**

"*Question 5*—Is it within the competence of the Legislature of British Columbia to enact a Statute for the imposition of a tax on land of the Island Railway Belt acquired in 1887 by the Esquimalt and Nanaimo Railway Company from Canada and containing provisions substantially as follows:—

(a) When land in the belt is used by the railway company for other than railroad purposes, or when it is leased, occupied, sold, or alienated, the owner thereof shall thereupon be taxed upon such land as and when merchantable timber is cut and severed from the land:

(b) The tax shall approximate the prevailing rates of royalty per thousand feet of merchantable timber:

(c) The owner shall be liable for payment of the tax.

(d) The tax until paid shall be a charge on the land."

"*Question Six*—Is it within the competence of the Legislature of British Columbia to enact a Statute for the imposition of a tax on land of the Island Railway Belt acquired in 1887 by the Esquimalt and Nanaimo Railway Company from Canada and containing provisions substantially as follows:—

(a) The tax shall apply only to land in the belt when used by the railway company for other than railroad purposes, or when leased, occupied, sold, or alienated:

(b) When land in the belt is used by the railway company for other than railroad purposes, or when it is leased, occupied, sold, or alienated, it shall thereupon be assessed at its fair market value:

(c) The owner of such land shall be taxed on the land in a percentage of the assessed value, and the tax shall be a charge on the land:

(d) The time for payment of the tax shall be fixed as follows:

(i) Within a specified limited time after the assessment, with a discount if paid within the specified time;

(ii) Or at the election of the taxpayer made within a specified time after assessment, by paying each year on account of the tax a sum that bears the same ratio to the total tax as the value of the trees cut during that year bears to the assessed value of the land."

43. It is proposed to deal with Question 6 first, leaving Question 5 to stand or fall by the same argument.

44. Justices O'Halloran and Bird found this to be a direct tax. The reasons given relative to Question 5 are here included as to 6.

45. Mr. Justice O'Halloran said:

p. 55, l. 26 "Whether the tax is payable at a fixed time each year, or by performance of statute labour, or when the land is sold, or when the crop is harvested and sold, is a matter of policy to be reflected in the provincial legislation."

His Lordship did not think a provision for collection and payment of the tax at a time least likely to impose hardship on the owners of the timber lands affected the validity of the tax. He added:

p. 55, l. 36 "Because land bears a tax which is measured by the reflected value of its products is no reason to say that the tax on the land is colourable on its products and is not in truth a tax on the land itself. Such a proposition pushed to its logical extreme would deny the economic or legal conception of any tax whatever upon land, except in respect to its soil and stones when put to no economic use."

Dealing further with "colourability" his Lordship said:

p. 59, l. 11 "It is not disputed the province is competent to impose a direct tax on the land for provincial purposes, or on timber land which derives its value from the standing timber thereon."

p. 59, l. 26 "That the tax on the land may be paid when the timber is cut makes it no less a tax on the land than if the tax were payable only when the land itself is sold."

p. 59, l. 35-p. 60, l. 12 46. His Lordship pointed out that the fact that the value of the land was measured largely by the amount of timber thereon did not change the nature of the tax, and cited in support: *Minister of Finance vs. The Royal Trust Company* (1920) 61 p. 60, l. 27-41 S.C.R. 127 and: reference re 1941 Alberta Statute—1943 S.C.R. 295 at 301.

47. Dealing with the suggestion that the tax was passed "backwards" to the railway company and therefore indirect his Lordship cited as disposing of the suggestion the cases of *Montreal* p. 60, l. 42-p. 64 *vs. Attorney-General for Canada* (1923) 92 L.J.P.C. 10 and *Halifax vs. Fairbanks* 1928—97 L.J.P.C. 11.

48. His Lordship laid emphasis on the fact that the tax p. 59, l. 20 under question 6 is not postponed till the timber is cut, but takes effect immediately and that time of payment is not linked compulsorily with time of cutting.

p. 93, l. 31 49. Mr. Justice Bird concurred in the reasons of Mr. Justice O'Halloran.

50. Mr. Justice Smith thought that the legislation was colourable, and that the real objective was to deprive the railway company of part of the profits made from the sale of the land. p. 79, l. 39-p. 80, l. 2

51. His Lordship thought that the rule laid down by the Privy Council in the Fairbanks case as to the effect of a tax on land had been modified by the decision in *Atlantic Smoke Shops vs. Conlon* 1943 A.C. 550:

> "So that it is by no means conclusive that a tax is direct simply because it is imposed on land." p. 81, l. 15

It is respectfully submitted that the decision in the Atlantic Smoke Shops case is not an authority for such a conclusion.

52. In the Supreme Court of Canada Mr. Justice Locke considered the tax was indirect. He thought that

> "what is intended is simply a tax on the timber when severed, and the fact that under the first alternative the land owner may compound the tax by paying a lump sum does not alter the true character of the proposed legislation." p. 450, l. 8-11

53. Mr. Justice Rand thought the tax was indirect in both aspects. It was intended that the tax should be borne in whole or in part by the Railway Company, and also to attach to the severed timber in the course of commercial production so as to be passed along to purchasers of the timber. He found in effect that the tax was really on the severed timber and was in reality an excise tax. p. 460, l. 7-29

54. Mr. Justice Estey found that "in substance it is a commodity and not a land tax." p. 481, l. 36

55. His Lordship distinguished the tax from those in the Montreal case and the Halifax case by saying:

> "In both of these cases a provincial tax upon the occupants' interest was held to be a direct tax. The difficulty is that this tax is not upon the occupants' interest but rather upon the specific commodity which will be prepared for and sold upon the market in the course of normal commercial transactions." p. 482, l. 4-8

With deference it is submitted that their Lordships of the Supreme Court have reached their conclusions by tracing the incidence of the tax from its primary and actual imposition on the land to the speculative probable ultimate incidence of this particular tax, in a way directly in conflict with the decision in *Halifax vs. Fairbanks,* 1928 A.C. 118—2 Cameron 477.

56. It is further respectfully submitted that the distinction made by Mr. Justice Estey deals with a factual distinction rather than with the principles common to both. In the present case the land tax falls on the essential parts of the land. In the Montreal case and the Halifax case the tax primarily was imposed on the interest in the land of the private person taxed, but in both cases, the actual incidence fell on the Crown's *interests* in the land.

57. It is submitted also that their Lordships entirely overlooked two decisions of the Supreme Court. In *Re Reference as to validity of Section* 31 *of the Municipal District Act,* 1941; 1943 S.C.R. 295; and *Home Oil Distributors vs. Attorney-General of British Columbia* 1940, S.C.R. 444 at 448 and 451-2.

58. **Question Seven:**

"Is the Esquimalt and Nanaimo Railway liable to the tax (so-called) for forest protection imposed by section 123 of the 'Forest Act,' being Chapter 102 of the 'Revised Statutes of British Columbia, 1936,' in connection with its timber lands in the Island Railway Belt acquired from Canada in 1887? In particular does the said tax (so-called) derogate from the provisions of Section 22 of the aforesaid Act of 1883?"

Note: The "Forest Act" Chap. 102, R.S.B.C. 1936, to which reference is made in question 7 above has been consolidated with the amendments thereto in the "Forest Act" Chap. 128, R.S.B.C. 1948, in which consolidation Section 123 as amended is renumbered *Section* 124. King's Printer's copies of the "Forest Act" R.S.B.C. 1948, Chap. 128, will be supplied as a separate document upon the hearing of this appeal.

p. 82, l. 9
p. 94, l. 8-24

59. In the Court of Appeal two of the learned Judges considered that the impost for forest protection purposes under Section 123 of the Forest Act was not a tax which derogated from the provisions of Section 22 of the Settlement Act.

60. Mr. Justice Smith said:

p. 82, l. 9

"The charges made under Section 123 of the Forest Act are not really taxes but are levies for particular purposes, each timber owner receiving value in fire protection for the money he pays."

61. Mr. Justice Bird:

p. 93, l. 42

"The forest protection fund as the name implies is raised for the sole purpose of financing measures found

necessary to furnish protection of timber lands in the public interest, as well as the private owners of timber land . . . I must conclude, therefore, that contributions so made by owners of lands is in the nature of a charge for services or as was said by Martin C.J.B.C. in *Re Natural Products Marketing Act* 52 S.C.R. 192 'in their essence they are not of the nature of taxes but are really service fees for special services'."

His Lordship pointed out that this language was quoted with approval by the Privy Council in *Shannon vs. Lower Mainland Dairy Products Board* (1938) A.C. 708.

62. In the Supreme Court Mr. Justice Locke was of the opinion that as these levies were made for a public purpose, were imposed by the Crown and the payment enforceable by action, they therefore have all the necessary elements of a tax. p. 451, l. 6-9

63. Mr. Justice Rand was of the same opinion and cited *Halifax, N.S. Car Works* 1914 A.C. 992 in support. He was of opinion that Shannon's case (cited above) was distinguishable because there the fund was used *exclusively* for and the only source of means by which the scheme could be carried out. Here he thought there is not that sole or exclusive characteristic: general taxation furnishes a substantial portion of the required money just as it did for the sewer for which the Company was taxed in the Nova Scotia Car Works case. In all these cases there is the immediate and special interests of the owner and the general interests of the public; in two there is both special and general taxation." p. 462, l. 27-30 p. 462, l. 32-37

64. Mr. Justice Estey viewed the question in a similar way and added:

"The amount realized is supplemented by a further sum of one million dollars annually from the consolidated revenue of the province. The latter emphasizes that the fire protection afforded to the timber area is in the interest of the public as well as to the owners of these areas." p. 482, l. 23-28

65. It is respectfully submitted that these judgments overlook two important facts:

1st. That the province itself is the largest owner of timber and its contribution of a million dollars to the fund was not in the way of "general taxation" but *its share* to a fund for the special benefit of all timber owners, both private and provincial.

2nd. That to label the service charge a tax because it is for the public benefit in the broad sense of the term would include *every* form of service charge as a tax because it must be assumed that every levy made by the province is in this sense for the public benefit. The Land Registry fees have been held not to be taxes but service charges. Registration of land titles however is for the public benefit.

66. It is submitted by the Appellant that the seven questions submitted by the Lieutenant-Governor to the Court of Appeal for British Columbia were answered correctly by that Court with the exception of Question Four, which should have been answered "no" for the following

REASONS

First: As to *Question One.* It should have been answered "yes"

(1) Because it has been found by the Court of Appeal and by all the Judges of the Supreme Court of Canada that there was no contract between the contractors and the province either before or at the time of the enactment of the Settlement Act.

(2) Because the negative answer to Question One by the Supreme Court on the ground that Section 22 of the Settlement Act was a statutory offer which became a contract by acceptance through performance has been negatived by two of the three Judges of the Court of Appeal and one of the Judges of the Supreme Court and has been questioned by one other.

(3) Because arising out of the negotiations during 1883, formal contracts in writing were entered into between the Dominion and the Contractors and between the Dominion and the Province. The probabilities are strong that if an agreement had been intended between the Province and the Railway Company or its promoters, this too would have been evidenced in writing.

(4) Because the Settlement Act was a public act and its provisions constituted public law, not private offers.

(5) Because the Settlement Act of 1883 by the Legislature, and the Federal Act of April 19th, 1884 were primarily intended to confirm the Settlement made between the two Governments. Once these enactments became effective, the rights and obligations of the Railroad Company became

operative by the agreement between its incorporators and the Dominion now freed from escrow, and to which the Railway Company then fell heir. The Railway Company, having its rights established by express contract with the Dominion, it followed in the words of Rand J.,

> "What both the promoters and the Company assumed was that the tax exemption would be effective according to its terms and they were not concerned to provide collaterally against the consequences of legislative repudiation."

(6) Because the Province's agreement was with the Dominion. The Dominion and the Dominion alone bargained with the Contractors and their successor, the Railway Company.

(7) Because the Settlement Act of December, 1883, and the Federal Act of April, 1884, as stated by their respective preambles were made

> "for the purpose of settling all existing disputes and difficulties between the two governments."

The provisions of both enactments were in furtherance of this agreement and countenanced none other.

(8) Because the basis of any contract is the intent of the parties. The proposition of Mr. Justice Rand

> "that a statutory benefit arising through the performance of conditions laid down in the statute as the quid pro quo of the benefit is a contractual right"

is too broadly stated. The basis of contractual relationship is intent. The facts here indicate an intent by the Province to deal only with the Dominion. The Railway Company's intent is indicated in the contract of its promoters with the Dominion. Complete confirmation is the statement of James Dunsmuir in 1904 quoted above, and the additional subsequent facts set out in the judgment of Estey J. The quid pro quo to the Railway Company is set out in paragraph 13 of its contract of August 20th, 1883, with the Dominion.

(9) Because both the Settlement Act, Section 9 and Section 3 of the agreement August 20th, 1883, with the Dominion each imposed an obligation on the Railway Company to perform, inconsistent with the theory of acceptance by performance of a statutory offer from the Province.

(10) Because there was here no private act or a petition by the incorporators to serve as the basis of a contract.

(11) Because by Section 10 of the Settlement Act, powers were conferred on the Railway Company to accept from the Government of Canada any lease, grant or conveyance of lands by way of subsidy or otherwise and to enter into contracts with the said Government in relation thereto. No powers were conferred in connection with and no mention was made or contemplated of any contract by the Railway Company with the Province.

(12) Because the two Governments dealt with each other at arms length as sovereign powers and neither was the agent of the other, or the agent of the Railway Company, and because the words "in trust" have the same meaning they have in relation to the lands on the Mainland referred to in the Settlement Act, and in Section 11 of the terms of Union.

(13) Because Mr. Robert Dunsmuir was at all material times a member of the legislature of the Province and any contract as claimed would have been in contravention of the "Constitution Act" 1871.

Second: As to *Question Two*: It should have been answered "no."

(1) Because the tax proposed is not inconsistent with the terms of Section 22 of the Settlement Act.

(2) Because the Railway Company has for some years used the lands for other than Railroad purposes.

Third: As to *Question Three*: It should have been answered "yes."

(1) Because the provisions of Chapter 33 of the Statutes of 1912 did not in intent or result indicate or create any contractual obligations between the Company and the Province changing the operative effect of Section 22 or adding thereto any new obligations.

Fourth: As to *Question Four*: It should have been answered "no" because the tax is direct.

Fifth: As to *Questions Five and Six*: These should have been answered "yes."

(1) Because in either case the tax proposed is a land tax and as such is a direct tax within the competence of the province.

(2) Because the tax is valid within the decisions of your Lordships' Board in the cases of *Montreal vs. Attorney-General of Canada* 1923—92 L.J.P.C. 10 and *Halifax vs. Fairbanks* 1928—97 L.J.P.C. 11.

(3) Because the proposed tax is not colourable.

(4) Because the nature of the tax as a land tax is not changed because the value of the land is largely determined by the value of the standing timber, or because payment is deferred to enable the person taxed to better meet his obligations.

(5) Because the inference drawn by their Lordships in the Supreme Court as to the purpose of the tax is incorrect.

(6) Because of the principles established by the Supreme Court in:

Re Reference Concerning the Municipal District Act 1941—1943 S.C.R. 295; and *Home Oil Distributors vs. Attorney-General of British Columbia* 1940 S.C.R. 444 at 448 and 451-2.

(7) Because the only intent to be inferred from the proposed legislation is the desire of the Government of the province to impose a direct tax on the lands in question for the raising of revenue for *provincial purposes.*

Sixth: As to *Question Seven*:

(1) Because the levy is a charge for services rendered and not a tax.

(2) Because it is not a tax within the meaning of Section 22 of the Settlement Act 1883. It was never intended that the Railway Company should not bear its fair share of a fund provided by all timber owners for the common protection of all timber lands from fire.

Seventh: As to all the questions, for the reasons given by the learned Judges of the Court of Appeal and the Supreme Court, in so far as they support the Appellant's case.

J. W. deB. FARRIS

JOHN L. FARRIS

of Counsel for the Attorney-General of British Columbia.

No. 7 of 1949

IN THE PRIVY COUNCIL

ON APPEAL FROM THE SUPREME COURT

OF CANADA

B E T W E E N

THE ATTORNEY-GENERAL OF BRITISH COLUMBIA Appellant

-and-

ESQUIMALT & NANAIMO RAILWAY CO.
ALPINE TIMBER COMPANY LIMITED and
THE ATTORNEY-GENERAL OF CANADA
Respondents

CASE FOR THE APPELLANT.

GARD LYELL & CO.,
47, Gresham Street,
E.C.2.