

48,1949

No. 7 of 1949.

In the Privy Council.

ON APPEAL FROM THE SUPREME  
COURT OF CANADA

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BETWEEN—THE ATTORNEY-GENERAL OF BRITISH  
COLUMBIA ... .. APPELLANT

AND

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

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CASE FOR THE RESPONDENT

ESQUIMALT & NANAIMO RAILWAY COMPANY.

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CASE FOR THE RESPONDENT  
ESQUIMALT & NANAIMO  
RAILWAY COMPANY

RECORD

1.—This is an Appeal by special leave from a Judgment of the Supreme Court of Canada dated 25th June, 1948, allowing an Appeal by the Respondents and dismissing a Cross-Appeal by the Appellant from a Judgment of the Court of Appeal for British Columbia dated 10th June, 1947. The Court of Appeal for British Columbia answered seven questions referred to it by an Order of the Lieutenant-Governor in Council dated 13th November, 1946, as amended by Order dated 15th January, 1947. This Order was issued under the authority of the Constitutional Questions Determination Act, Revised Statutes of British Columbia, 1936, Chapter 50.

The questions referred and the answers of the Court of Appeal are set out at pages 19 to 22 of the Record. The answers of the Supreme Court of Canada are set out at page 425 of the Record. A summary of the opinions in both Courts is given in paragraphs 70 to 76 of this Case.

p. 424

p. 19

p. 1

p. 18

RECORD

2.—The reference to the Court of Appeal arose out of a Report made by the Honourable Mr. Gordon McG. Sloan, Chief Justice of British Columbia, who, while Puisne Justice of the Court of Appeal had been appointed a sole Commissioner to inquire into the forest resources of the Province. The reference was only concerned with that part of the Commissioner's Report which related to this Respondent's lands on Vancouver Island. The part of the report dealing with this subject will be found in the Record commencing at p. 253.

3.—The lands in question were part of the original land grant made to this Respondent in consideration for the construction of a railway on Vancouver Island from Esquimalt to Nanaimo. The provincial statute incorporating this Respondent (1883, British Columbia Statutes, Chapter 14) provided for the land grant to this Respondent and for such land to be exempt from taxation. The tax exemption provision was in the following terms :

p. 150

“ 22. 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.”

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p. 153, l. 23  
p. 111, l. 12

The land grant ultimately acquired by this Respondent consisted of a tract of provincial Crown lands estimated to contain 1,900,000 acres, large areas of which were timbered.

p. 262, l. 33

4.—The Commissioner stated in the section of his report relating to the land grant, that two questions were before him for consideration :

“ First : The right of the Provincial Government to impose a fire protection tax upon unalienated timber lands remaining in the Railway Company ; and

“ Second : The right of the Province to impose a severance tax upon timber cut from these lands after the sale thereof by the Railway Company.”

p. 263, l. 1

5.—In referring to the first question before him, the Commissioner's view was that if the fire protection tax was “ in the strict legal sense ” a tax, it certainly fell within the exemption of Section 22, whereas if it was not a tax (although called one) but a service charge, then it did not come within that section. He thought that question must be determined by the Courts and for that reason did not wish to express any opinion on it. Accordingly the question thus raised by the Commissioner with respect to this tax was included in the reference as Question 7.

p. 263, l. 23

6.—In referring to the second question before him, the Commissioner stated : “ The question of imposing a severance tax on this timber must,

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I think, be approached from two avenues : First, is it just and equitable to impose the tax and, second, is this a matter within the legislative competence of the Province ? ” He assumed that “ the imposition of such a tax would tend to reduce the revenue of the Railway Company from the sale of its timber land because purchasers would likely pay less for taxable than non-taxable timber.”

RECORD

p. 263, l. 27

7.—In approaching the question of a severance tax from the first of these two avenues, the Commissioner pointed out that the railway line from Esquimalt to Nanaimo consisted of 82.9 miles which, together with rolling stock and equipment, cost the Company \$3,101,382, of which private capital contributed \$2,500,000. He said it appeared that from 1898 to July 31st, 1944, the Company disposed of 763,565 acres of timber land containing over 7,000,000,000 feet of timber, from which it realized \$14,814,792.69, “ or about six times the contractors’ investment in the railroad ” and that there remained in the possession of the Company at the time of his report, timber which at the conservative figure of \$2.00 per thousand board feet would be worth from \$10,000,000 to \$12,000,000. From these considerations he was “ unable to see how it would be unjust and inequitable to impose a severance tax on purchasers ” of the Company’s timber. Although not mentioned by the Commissioner, the \$2,500,000 originally contributed by private capital is a relatively small part of this Respondent’s present investment. The capital investment less Dominion subsidy amounted in 1946 to \$10,978,108.

p. 263, l. 39

p. 264, l. 5

p. 264, l. 18

p. 17, l. 4

8.—The Commissioner was of the view 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.” Dealing with the contention that the imposition of such a tax would be “ a breach of the contract between the Province and the Railway Company,” the Commissioner expressed the opinion that “ there is no contract between the Province and the Company.”

p. 262, l. 23

p. 264, l. 29

9.—The Commissioner reached the conclusion that “ it is in the public interest that a severance tax be imposed upon all timber cut upon lands of the Railway Company after the same are sold or otherwise alienated by it. I do not recommend that this tax apply to lands already sold by the Company. The amount of the tax should, I think, approximate prevailing rates of royalty.”

p. 266, l. 4

10.—In approaching the question of a severance tax from the second of the two avenues, the Commissioner concluded that he could not decide as a Commissioner the question as to the competence of the provincial legislature to impose such a tax and recommended that steps be taken to have that matter determined by the Courts.

p. 266, l. 10

11.—Questions 1, 2 and 3 referred to the Court of Appeal, appear to have been framed to test the correctness of the Commissioner’s findings

p. 2, ll. 23-34

RECORD  
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p. 2, l. 35 to  
p. 4, l. 4  
p. 4, l. 5

that “There never was any contractual relationship” and that “there is no contract” and to determine whether, if there was a contract, any of the alternative taxing enactments outlined in Questions 4, 5 and 6 would be a derogation of such contract. Questions 4, 5 and 6 appear to have been framed to test the constitutional validity of three alternative legislative schemes designed to carry out the Commissioner’s recommendation for the imposition of a severance tax. Question 7, as already mentioned, deals with the matter of the fire protection tax.

12.—This Respondent concedes at the outset that a document in the form of a contract between the Province on the one hand and the contractors or the Railway Company on the other hand and executed by both parties is not to be found. If such a document could be found there would, of course, be no problem. There is, however, abundant evidence in the legislation, the documents, the acts of the parties and the circumstances under which the railway was constructed to establish a contractual relationship. This will appear from the review that follows. 10

p. 192, l. 18 ;  
p. 258, l. 5  
p. 192, l. 31 ;  
p. 258, l. 18

13.—By Section 11 of the Terms of Union under which British Columbia on 20th July, 1871, was admitted into and became part of Canada, the Dominion Government undertook to secure the commencement simultaneously within two years from that date of the construction of a railway from the Pacific towards the Rocky Mountains, and from a point east of the Rocky Mountains to the Pacific to connect the seaboard of British Columbia with the railway system of Canada, such railway to be completed within ten years from the Union. The Government of British Columbia agreed to convey to the Dominion Government, in trust, to be appropriated in such manner as the Dominion Government might deem advisable in furtherance of the construction of the said railway, public lands along the line of railway throughout its entire length in British Columbia not exceeding 20 miles on each side of the railway. 20

p. 107C  
pp. 114 *et seq.*

14.—During the period between the signing of the Terms of Union in 1871 and the incorporation of the Canadian Pacific Railway Company in 1881, there was a serious and prolonged controversy between the Dominion and the Province as to the obligation undertaken by the Dominion under Section 11 of the Terms of Union. The Dominion took the position that it was not bound to secure the construction of the trans continental railway to Esquimalt, but only to the “seaboard” of British Columbia and that it had fulfilled this obligation when it arranged for the Canadian Pacific Railway Company to construct a railway to Port Moody on the mainland. The Province, on the other hand, took the position that the Dominion was bound to secure the construction of the trans-continental railway to Esquimalt on the Island and did not consider that the Dominion had fulfilled its obligation by having the Canadian Pacific Railway Company construct a railway to Port Moody on the mainland. 30 40

15.—Several unsuccessful attempts were made between 1874 and 1881 to settle the dispute between the Dominion and the Province. Thus in May, 1874, the Dominion submitted to the Province a proposal by which the Dominion would construct the portion of the Island Railway from Nanaimo to Esquimalt, Nanaimo being at a point on Vancouver Island about midway between Seymour Narrows and Esquimalt and about opposite Port Moody. This proposal was conditioned upon the Province agreeing to a further delay in the construction of the railway on the mainland. It was apparently unacceptable to the Province. The Dominion also, in 1875, offered to pay to the Province \$750,000 as compensation for its delay in securing the construction of the trans-continental railway, this money to be applied by the Province either to building the railway from Esquimalt to Nanaimo or to constructing such other local public works as the Province might think advantageous. The Province also declined this offer.

RECORD

p. 117, l. 27 ;  
p. 195, l. 27p. 118, l. 28 ;  
p. 198, l. 10

16.—In 1874 and again in 1881, the Province petitioned Her Majesty to settle the controversy and pursuant to those petitions Lord Carnarvon on the first occasion and Lord Kimberly on the second suggested terms of settlement. Their recommendations were not, however, adopted by the Dominion.

p. 107C, l. 41

p. 117, l. 35

p. 196, l. 6 ;

p. 259, l. 29

p. 202, l. 30

17.—By 1882 the Province had apparently decided to have the railway from Esquimalt to Seymour Narrows built independently of the Dominion. In that year the Legislature passed an Act known as "the Clement Bill" incorporating certain persons under the name of "The Vancouver Land and Railway Company" (1882 British Columbia Statutes, Chapter 15). Section 9 of that Act provided that the Company "shall" lay out, construct, etc., a railway from Esquimalt Harbour to Seymour Narrows. Section 17 required the Company to furnish security in the amount of \$250,000 for the completion of the Railway.

p. 108

p. 113A, l. 12

p. 109, l. 19

p. 110, l. 24

30 Section 18 provided that 1,900,000 acres of land between Seymour Narrows and Esquimalt be reserved for the Company and that upon completion of the railway such lands should be granted to the Company in fee simple. It is to be noted that by Section 21 of that Act the lands of the Company were to be "free from Provincial taxation until they are either leased, sold, occupied, or in any way alienated." The Province thus made known the consideration it was prepared to furnish to have the railway built.

p. 111, l. 12

p. 112, l. 8

40 In arranging with the Clement group for the construction of the railway independently of the Dominion, the Province incorporated the terms of the contract in a statute. It is significant that the terms of this statute were almost the same as the terms of the statute under which the railway was subsequently constructed by this Respondent.

18.—At the same session of the Legislature Mr. Dunsmuir and others sought the incorporation of the "Victoria, Esquimalt and Nanaimo

p. 113B, l. 1

p. 204, l. 30

- RECORD  
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- Railway Company ” to construct the railway on the Island with a request for a land grant similar to the one provided for by the Clement Bill. The petitioners asked for power to make any bargain with the Provincial and Dominion Governments or either of them as might be necessary. They did not, however, offer any security as a forfeiture in the event of failure. The Dunsmuir Bill was not passed by the Legislature.
- p. 113B, l. 29      19.—Mr. Clement and his associates were notified that the Province was prepared to set apart and reserve the necessary public lands and in due course they made the initial deposit of \$10,000. They failed, however, to furnish the total security of \$250,000. In the result the plan to have the railway constructed by the Clement group failed. 10
- p. 204, l. 30
- p. 119, l. 29  
p. 205, l. 26      20.—In February, 1883, the Province again turned to the Dominion with a request that the Dominion either construct and complete the Island Railway with all practical despatch or give the Province “such fair compensation for failure to build said Island Railway as will enable the Government of the Province to build it as a Provincial work and open the East Coast lands for settlement.” In reply, the Dominion made certain proposals which were set out in a letter dated 5th May, 1883, from Hon. J. W. Trutch, agent for the Dominion, to Hon. William Smithe, Premier of the Province. Substantially the same proposals were set out in a Minute of the Dominion Privy Council dated 9th May, 1883, which was forwarded to the Lieutenant-Governor of British Columbia. 20
- p. 124  
p. 135B
- p. 135B
- p. 129      21.—On 12th May, 1883, the provincial legislature passed a statute sometimes referred to as “the May Act.” The recital to that Act stated that the negotiations between the Dominion and the Province relating to the Island Railway had resulted in an Agreement and proceeded to set out what purported to be the terms of such agreement. The Act provided for the incorporation of a company under the name of “The Esquimalt and Nanaimo Railway Company ” and for the construction by that Company of a railway from Esquimalt to Nanaimo. The Act granted certain lands to the Dominion to be held by it in trust to be appropriated as it deemed advisable and authorized the Company to receive such lands from the Dominion. Section 22 provided that the subsidy lands were to be exempt from taxation. 30
- p. 132, l. 33
- p. 133, l. 1
- p. 131, l. 41  
p. 133, l. 16
- pp. 135D to  
136E      22.—The Dominion, however, objected to certain terms of the May Act and of the Agreement between the Dominion and the Province as set forth in the recital to that Act. In a letter from Mr. Trutch to the Provincial Premier dated 12th May, 1883, the Dominion took the position that the statement in the agreement as recited in the Provincial Statute that “the Government of Canada agrees to secure the construction of a Railway from Esquimalt to Nanaimo within three and one-half (3½) years from the date of incorporation of the Company ” was “not in conformity with the propositions of the Government of Canada to the Government of British Columbia so submitted by me by my letter of the 40
- p. 135D

5th instant to you." In drafting the May Act and the Agreement as recited, the Province had assumed, in accordance with its own view, that the Dominion by the Terms of Union was under an obligation to build the Island Railway. The Dominion would not recognize such an obligation. RECORD  
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p. 135G, l. 19

23.—On 15th May, 1883, Mr. Trutch again wrote to the Provincial Premier on the subject. He stated that he had been directed by the Prime Minister of Canada to communicate to him that "Parliament long ago refused to build the Island Railway and cannot be successfully asked now to change that policy. That the Dominion Government, however, offered to ask Parliament to vote three-quarters of a million dollars to subsidize a company to construct that railway, and to take satisfactory security from such company for the construction of that work, and that he regrets that that offer was not accepted." p. 135I, l. 20

24.—On 24th May, 1883, Hon. John A. Macdonald, the Prime Minister of Canada, telegraphed the Provincial Premier as follows :— p. 135K

"Dominion Government greatly regrets that your Act in effect makes Island Railway a Government work, although to enable Government to build it power to use agency of a Railway Company is given. We never agreed to that provision. Useless to ask Parliament to confirm your Act. We are quite ready to perform conditions telegraphed to Mr. Trutch and accepted by you, and meanwhile will proceed provisionally to carry out such arrangement, to be completed when your Act amended in conformity with agreement." p. 135L, l. 20

25.—On 23rd June, 1883, Sir Alexander Campbell, the Dominion Minister of Justice, was appointed to negotiate with the Province on various unsettled questions, including the Island Railway, and to communicate as well with Mr. Dunsmuir or other capitalists who were desirous of forming a company to construct the Railway "under the terms of the Provincial Act." p. 136F  
p. 208, l. 3  
p. 136F, l. 35

26.—On 2nd July, 1883, the Province received an offer for the construction of the Esquimalt and Nanaimo Railway from a Syndicate represented by a Mr. D. Oppenheimer. The Province appeared to take some interest in the offer but did not accept it. p. 137  
pp. 137-140

27.—On 6th August, 1883, Sir Alexander Campbell submitted to the Province for its suggestions and approval a draft of a contract between the Dominion and the Dunsmuir group for the construction of the Railway between Esquimalt and Nanaimo. He pointed out that p. 139B  
p. 139B, l. 11

"The obligations, so far as regards the Government of the Dominion, are confined, as you will see, to the payment, as the work progresses, of the assistance promised to the Railway by us, and the transfer, after the work is wholly completed, of the

RECORD

land grant which the Government of the Province has placed in our hands for that purpose. We assume no responsibility for non-completion, or delay in the progress of the work. The security which the Company will deposit with the Dominion Government will be held, however, by us in trust for this purpose.

“ We understand that with this contract (involving no other undertaking on our part than those I have mentioned), and the deposit of the security above referred to, the Government of the Province are satisfied that the terms of the Act concerning the Island Railway will have been completely performed on the 10 part of the Government of Canada.”

28.—It will thus be seen that the Dominion by defining so narrowly the limits of the obligations it was prepared to assume under the contract made it plain that it would be no part of its obligation to assure to the Company to be formed the tax exemption in respect of the subsidy lands. obviously this was to be a provincial obligation to such company.

p. 139C

p. 139D, l. 10

29.—By letter of 17th August, 1883, Sir Alexander Campbell pressed the Premier for a reply to his earlier letter requesting his suggestions and approval. The Province raised a point in connection with the disposal of the securities to be deposited with the Dominion by the Contractors, 20 but otherwise appears to have approved the provisions of the Construction Contract and the Dominion's definition of its obligations.

p. 129, l. 8  
p. 150, l. 8  
p. 130, l. 10  
p. 151, l. 13  
p. 132, l. 33  
p. 154, l. 17

30.—The Province amended the May Act including the recited Agreement between the Dominion and the Province, so as to meet the objections raised by the Dominion. The effect of certain of the changes was to make it clear that the Dominion in making some contribution towards the Island Railway was not recognizing any obligation to secure the construction of such railway but was recognizing an obligation to the Province for delays in the commencement and construction of the railway on the mainland ; and further, that the Dominion was not constructing 30 the railway on the Island or undertaking to secure its construction but was only prepared to grant \$750,000 for the purpose of facilitating such construction. This appears from the amendments made to the first paragraph of the recital in the May Act, to paragraph (e) of the Agreement, and to Section 8 of the Act.

The inference is clear that the Province, by accepting these changes, recognized that it was not to be the responsibility of the Dominion to construct or to secure the construction of the Island Railway. Presumably, the Province was prepared to accept that responsibility itself.

p. 140

31.—By 20th August, 1883, the Dominion and the Province had 40 reached agreement on all the unsettled questions, including the Island Railway. On that date a memorandum of the arrangements agreed upon was signed by Sir Alexander Campbell for the Dominion and by Hon.



William Smithe, for the Province. On the question of the Island Railway, the memorandum provided that the Provincial Government should invite the adoption by the Legislature of the amended May Act; that the Province would procure the assent of the Contractor to the new provisions added to clause (f) of the agreement recited in the Act; and that the Dominion Government should seek the sanction of Parliament to measures to enable it to give effect to its obligations under the amended Agreement with the Province. A copy of the Act signed by Sir Alexander Campbell and Mr. Smithe showing the amendments by red lines was annexed to the

10 Memorandum.

p. 140, l. 8

p. 139F, l. 27  
p. 140, l. 19

p. 140, l. 12

32.—Also, on 20th August, 1883, the Construction Contract was executed by Sir Alexander Campbell for the Dominion and by Mr. Dunsmuir and his associates. It is significant that this Contract thus executed was deposited as an escrow and placed in the hands of Hon. J. W. Trutch pending not only the sanction of the Dominion but also pending the passage by the Province of the revised May Act. The contractors were apparently not prepared to bind themselves to a contract with the Dominion until the undertaking of the Province, *inter alia*, to grant the Company the tax exemptions provided by Sections 21 and 22 of the Settlement Act had been

20 sanctioned.

p. 142

p. 148, l. 6

33.—It would also appear that on or about 20th August, 1883, the terms of the revised Bill to be enacted by the Legislature and the terms of the Agreement between the Dominion and the Province as recited in that Bill were finally settled. A draft of the Bill signed by Sir Alexander Campbell and Hon. William Smithe was deposited with Mr. Trutch. The draft Bill was also submitted to Mr. Dunsmuir and his associates and their acquiescence in it was obtained.

p. 139E

p. 148

p. 148, l. 30  
p. 139, l. 25  
p. 289, l. 2

34.—It is abundantly clear that on or about 20th August, 1883, the Province, the Dominion and the Dunsmuir group were in complete agreement as to the terms upon which the railway was to be constructed. It would, it is submitted, be contrary to business common sense to suggest that the Dunsmuir group, in acquiescing in the draft Bill, did not believe that the Province was to assume a binding obligation in respect of the tax exemption contained in Section 22. Likewise, it would be contrary to business common sense to suggest that the Province in holding out the inducement of such tax exemption did not intend to bind itself in respect of such tax exemption. The only reasonable inference is that a contractual relationship was intended.

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35.—It is significant that while many of the terms of the proposed statute were designed to enable the Province to implement its obligations under its agreement with the Dominion, other terms did not relate to that agreement at all, but would be of vital concern to the Company that was to construct the railway. The most important of these terms are

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**RECORD**  
 p. 154, l. 25 Sections 9, 21 and 22. Unlike most statutes incorporating companies, the proposed statute did not merely authorize the Company to construct the railway and the telegraph line. By Section 9 it required the Company to do so. The imperative word "shall" was used. Moreover, it required the Company not only to construct but also to "equip, maintain and  
 p. 156, l. 28 work" the railway and the telegraph line. Section 21 provided that the railway with its workshops, buildings, etc., was to be exempt from provincial and municipal taxation for ten years from the completion of  
 p. 156, l. 33 the railroad. Section 22 (set out in paragraph 3 hereof) which is the all-important provision for the purposes of this Reference, exempted the lands  
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 from taxation.

36.—It is important to note the extent of the obligation undertaken by the Company. By Section 27 of the Act the Company was to be bound by the Construction Contract which by paragraph 3 obligated the contractors to "maintain, and work continuously" both the railway and the telegraph line.

It would be strange indeed if the Company was to undertake an obligation to the Province of perpetual character without the contractual assurance of the Province that the tax exemption would be maintained according to its terms. It is not to be wondered at that the terms of the  
 20  
 draft Bill were submitted to the Dunsmuir group.

37.—The Agreement between the Dominion and the Province provided  
 p. 150, l. 24 by paragraph (b) that the Province was to grant the lands to the Dominion and by paragraph (e) that the Dominion, in turn, was to hand over such  
 p. 153, l. 23 lands to the contractors. Pursuant to the Agreement the Province by Section 3 of the Settlement Act granted the lands to the Dominion "in trust" to be appropriated as the Dominion might deem advisable. The  
 p. 161, l. 11 Dominion, in turn, by Section 3 of its Act authorized the Governor in  
 p. 146, l. 26 Council to grant the lands to the Company and by paragraph 15 of the Construction Contract agreed with the Contractors to convey the land to  
 30  
 them upon the completion of the railway.

38.—By the Construction Contract the Contractors undertook to  
 p. 147, l. 17 deposit with the Dominion \$250,000 as security for the construction of the  
 p. 151, l. 20 railway and telegraph line. It was provided by paragraph (e) of the Agreement between the Dominion and the Province that the Dominion should take the security, but the security was to be to the satisfaction of the Province and it was understood that no change in the security would  
 App., p. 36, be permitted by the Dominion without the acquiescence of the Province.  
 l 4 Thus when shortly after the Construction Contract had been executed the  
 p. 148A Contractors asked that they be permitted to make a change in the security  
 40  
 the matter was referred to the Province and its acquiescence obtained.

39.—Before the Bill was introduced in the Legislature the Premier, Hon. Mr. Smithe, pointed out to Sir Alexander Campbell that the members

of the Legislature would want to know the nature of the Construction Contract because, in his opinion it formed "a very material adjunct" to the Bill. RECORD

40.—The amended provincial statute which is known as "The Settlement Act" was duly passed by the Legislature and on 19th December, 1883, received royal assent. p. 150

41.—Section 8 of the Settlement Act provided that such persons as might be named by the Governor-General in Council were to be constituted a body corporate by the name of "The Esquimalt and Nanaimo Railway Company." Robert Dunsmuir and his associates were so named by Dominion Order in Council dated 12th April, 1884. p. 154, l. 17  
p. 217, l. 1

42.—The Dominion Act corresponding to the Settlement Act of the Province was assented to on 19th April, 1884 (1884 Statutes of Canada, Chapter 6). The Agreement between the Dominion and the Province was a recital to that Act and the Construction Contract was appended to it as a schedule. Both the recited Agreement and the Construction Contract were approved and ratified by the Act. p. 158  
p. 160, l. 40  
p. 161, l. 2

43.—The construction of the Railway was completed by this Respondent some time prior to 10th June, 1887, the date fixed by the contract for its completion and the land received by the Dominion from the Province in trust was on 21st April, 1887, granted by the Dominion to this Respondent. It is to be noted that according to the order of the Governor-General in Council making the grant the description of such lands was the result of agreement between the Dominion, the Province and the Railway Company and the exact boundaries of the lands granted to the Railway Company were "as settled and agreed upon by and between the Government of British Columbia and the said Company." p. 177, l. 18  
p. 174  
p. 177, l. 3

The fact that the Province had these direct dealings with the Railway Company lends force to the view expressed by Hon. Mr. Smithe in a letter to Mr. Trutch dated 16th November, 1885, that "the Provincial Government are the real principals in the matter of this Railway and these lands." p. 173, l. 4

44.—The Province had in 1873 reserved from sale a strip of land along the route of the proposed Island Railway. A part of this land was included in the lands ultimately conveyed by the Province to the Dominion in trust and in turn by the Dominion to this Respondent. By virtue of Section 23 of the Settlement Act and Section 7 (2) of the Dominion Act, persons who had settled on these lands after they had been reserved were entitled to be granted the surface rights to the land occupied by them up to 160 acres at the rate of \$1 per acre. A number of such grants were made by the Dominion prior to the grant to this Respondent in 1887 and others were made by this Respondent after that date. The settlers who had received p. 99  
p. 153, l. 23  
p. 174  
p. 156, l. 38  
p. 163, l. 6

RECORD

- p. 190  
p. 214
- such grants complained that they had been unfairly dealt with in being deprived of mineral rights. After investigating their grievances the Province passed the "Vancouver Island Settlers' Rights Act, 1904" (1904 British Columbia Statutes, Chapter 54) by virtue of which the Province undertook to issue to such settlers Crown grants of the fee simple of the lands occupied by them.
- p. 216  
p. 225
- This Respondent petitioned for the disallowance of that Act on the ground that it took away from this Respondent rights to some of the lands granted to it. The Minister of Justice expressed the view that the Provincial Act did not have the effect alleged by this Respondent and therefore declined to recommend disallowance. In the case of *McGregor v. Esquimalt and Nanaimo Railway Company* (1907) A. C. 462, the Judicial Committee held, however, that the provincial grants authorized by the 1904 Act did divest this Respondent of certain of its rights. The Province recognized that it was under an obligation to this Respondent to compensate it for what had in effect been a loss of part of the consideration for the construction and operation of the Island Railway. Accordingly, the Province entered into an agreement with this Respondent dated 21st October, 1909, whereby this Respondent was to receive 20,000 acres of unreserved and unoccupied Crown lands to be selected by this Respondent. This Agreement was ratified by a Provincial Act (1910 Statutes of British Columbia, Chapter 17). 10
- p. 233  
p. 231
- 45.—In 1912 this Respondent desired to lease its railway, but not its subsidy lands, to the Canadian Pacific Railway Company. Since this Respondent recognized that by reason of such lease there might be some risk of losing its tax exemption, it entered into an agreement with the Province dated 17th February, 1912, whereby the Province agreed that such lease would not affect the exemption from taxation afforded by Section 22. In return the Company undertook to pay 1½ cents per acre each year and to construct and continuously operate an extension of its main line. This agreement was incorporated in the "Esquimalt and Nanaimo Railway Company's Land Grant Tax Exemption Ratification Act," (1912 British Columbia Statutes, Chapter 33) assented to 27th February, 1912. Pursuant to this Agreement, \$478,611 had been paid to the Province up to 13th December, 1946. 20
- p. 238, l. 1  
p. 238, l. 13  
p. 237
- 46.—The right of settlers to obtain a grant in fee simple of their lands under the Vancouver Island Settlers' Rights Act of 1904 expired on 10th February, 1905. By an amendment to this Act passed in 1917 (1917 British Columbia Statutes, Chapter 71) the time was extended to 1st September, 1917. This Respondent petitioned for the disallowance of the amending Act on the ground that as in the case of the 1904 Act it derogated from its land grant. On this occasion the Minister of Justice, the Honourable Charles J. Doherty, stated in his report to His Excellency the Governor-General that "a valuable portion of the property which it was thus intended that the company should receive, and which the company 30
- p. 17, l. 10
- p. 216, l. 3  
p. 240, l. 22  
p. 240  
p. 247, l. 30
- 40

did receive, is taken away by the exercise of the legislative authority of one of the parties to the tripartite agreement ” and added that “ the Province should not be permitted substantially to diminish the consideration of the contract.” The Committee of the Privy Council concurred in the Minister’s report and the statute was accordingly disallowed.

RECORD  
p. 248, l. 2  
p. 249

47.—The review that has now been given discloses that there is abundant evidence to be found in the legislation, the documents, the acts of the parties and the circumstances under which the railway was constructed, to establish a contractual relationship between the Province and  
10 this Respondent.

48.—There can be no question that the Province held out the land grant and the tax exemptions as inducements to this Respondent to construct and equip the railway and the telegraph line within a stipulated time and to maintain and work them continuously. This Respondent relying upon those inducements constructed and equipped the railway and the telegraph line and has maintained and worked, and is bound to continue to maintain and work them in perpetuity. Those inducements could not be held out by the Dominion because the Province owned the lands and only the Province could maintain the tax exemptions. Moreover, the  
20 Dominion had made it clear in the negotiations leading to the revision of the May Act that it would not undertake to do more than pay the money consideration of \$750,000 and to hold the provincial land grant in trust until the work was completed.

It would be less than realistic to attribute either to the Province or to this Respondent an intention that the important undertakings given by each to the other were not to be contractually binding as between them. The inference of contractual relationship is surely irresistible. The statute itself is powerful evidence of contractual relationship. A legislative  
30 charter of this nature should be regarded as a parliamentary contract between the Province and this Respondent. The Premier, who conducted and concluded the negotiations on behalf of the Province, insisted that the Province was the real principal in the matter. The Dominion may well be regarded as having been an agent in the transaction and as having in that capacity assumed the trusteeship of the lands pending completion of the work. The contractual relationship between the Province and this Respondent may in another view be regarded as part of a broader tripartite agreement, to which the Dominion, the Province and this Respondent were all parties.

It is not without significance that the Province has for over sixty years  
40 honoured its tax exemption obligation.

49.—Question 2 in the Reference reads as follows :

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

p. 2, l. 28

## RECORD

p. 17, l. 12  
 p. 266, l. 8  
 p. 263, l. 15  
 p. 264, l. 11

50.—According to the agreed statement of facts, Questions 4, 5 and 6 are to be considered on the assumption that the tax would be on a scale equivalent to the tax recommended by the Commissioner. His recommendation was that the tax should approximate prevailing rates of royalty. These rates average \$1.10 per thousand feet. The value of the unsold timber was taken to be \$2.00 per thousand board feet. Thus the scale of taxes recommended would amount, at the time of the Commissioner's report, to approximately 55 per cent. of the value of this Respondent's timber.

51.—It is to be observed that the proposal was to impose the tax on this Respondent's unsold timber lands. There was no recommendation that the tax be imposed on other Crown granted timber lands.

p. 251  
 p. 252  
 p. 300, l. 10  
 p. 264, l. 11  
 p. 250, l. 13  
 p. 300, l. 20

52.—The effect of the Commissioner's recommendation is that the unsold timber lands of this Respondent amounting to about 200,000 acres should be singled out of the remaining 1,200,000 acres of Crown granted timber lands of the Province for special and extraordinary taxation. The proposed taxation would apply to between 5 and 6 billion feet of timber out of 27 billion feet of timber in the Province. Moreover, the special taxation would be over and above the taxes levied upon all Crown granted timber lands under Section 41 (1) of the Taxation Act (R.S.B.C. 1936, Chapter 282) amounting to  $1\frac{1}{2}$  per cent. of the assessed value.

p. 75, l. 21  
 p. 92, l. 35  
 p. 93, l. 15  
 p. 446, l. 10  
 p. 447, l. 28  
 p. 460, l. 37  
 p. 263, l. 27

53.—While the proposed taxes will nominally be imposed upon and be paid by the purchaser from the Railway Company, the approximate amount of such taxes will, in fact, be absorbed by this Respondent in the sale price of its timber lands. The Commissioner recognized that the tax would tend to reduce the revenue of this Respondent from the sale of its timber lands. There can be no doubt that legislation implementing his recommendation would be designed to impose taxation upon the Railway Company in respect of the subsidy lands still held by it. Plainly, this would be in derogation of Section 22.

30

54.—Applying a tax of \$1.10 per thousand board measure to the 5 to 6 billion feet of unsold timber of this Respondent would result in a tax of between \$5,500,000 and \$6,600,000. The consequence would be to reduce the value of the lands still held by the Company by approximately that amount. In the result, the Province would be depriving this Respondent of a large part of the consideration it received for constructing and equipping the railway and the telegraph line and for undertaking to maintain and work them continuously.

p. 156, l. 33

55.—It has been suggested that Section 22 should be construed as permitting taxation by the Province after the lands are sold by the Railway Company. This Respondent does not dispute the proposition that under Section 22 the lands, if sold by it, would be subject to provincial taxation

40

of general application. It is submitted, however, that the proposed tax which is not of general application will not have the effect of taxing the purchaser but will constitute taxation on this Respondent in respect of its land grant. Although the purchaser would make the actual payment of the tax to the Province, this Respondent would, in reality, be paying the tax when compelled in selling its lands to accept prices reduced by the approximate amount of the tax.

RECORD

56.—Question 3 in the Reference reads as follows :

10 “ 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 ? ” p. 2, l. 31

57.—The Respondent’s contention will be that there are two contracts between the Province and the Company which would be breached by the imposition of the tax recommended by the Commissioner. The first is the contract entered into when the railway was constructed, and the second is the contract entered into on 17th February 1912, prior to the leasing of the railway to the Canadian Pacific Railway Company.

20 58.—Questions 4, 5 and 6 set forth alternative forms of taxation proposed by the Province. In that connection attention is invited to the following statement contained in the Factum of the Attorney-General of British Columbia in the Court of Appeal : p. 2, l. 35 to  
p. 4, l. 4

“ 2. It will be noted that the questions as to a severance tax are put first, as to a tax on the timber when cut. In the alternative, the questions are directed to a tax on the land. The form of this tax also is put in the alternative. p. 324, l. 35

“ 3. I am advised that, subject to the answers given, the Government proposes to recommend to Parliament the enactment of the legislation in the form in the first of the three questions submitted.

30 “ 4. It is proposed that if legislation in this form is beyond provincial competence, a recommendation that a land tax as indicated in one of the alternatives will be made to Parliament. It will be to enact the first of these (question number five), if deemed valid, or, failing that, in the form of the second (question number six), if that alone is found to be within provincial competence.

“ 5. I am further instructed that the proposals for such legislation would also depend on the answer to questions one and two, for reasons which are obvious.

40 “ 6. I am instructed to ask your Lordships for an answer to the questions in respect of each of the proposed forms of taxation. The reason is that the case may go to the Supreme Court and the Privy Council where all of your Lordships answers might need to be considered.”

RECORD

p. 68, l. 25

Attention is also invited to the following passage in the Judgment of Smith J.A. in the Court of Appeal :

“ We were also informed that it was desirable that all questions be answered ; and that the Provincial Government had no intention of introducing legislation which would have the effect of violating solemn statutory obligations entered into in bygone years. This is what one would expect ; for it would be quite wrong to attribute to the Government any intention of acting otherwise than in the utmost good faith with all concerned.”

p. 17, l. 12  
p. 266, l. 8

59.—It is to be remembered that according to the agreed statement the three questions are to be considered on the assumption that the tax would be on a scale equivalent to the tax recommended by the Commissioner, that is to say, to approximate prevailing rates of royalty. 10

60.—Though the form and method of taxation outlined in each of the three questions is somewhat different, the effect in each case would be the same. The tax would not be demanded from the very person who it is intended or desired should pay it but would be demanded from one person in the expectation and intention that he should indemnify himself at the expense of another. Thus, it would be indirect taxation and *ultra vires* the Provincial Legislature. The taxation jurisdiction of the Legislature is limited by Head 2 of Section 92 of the British North America Act to “ Direct Taxation within the Province in order to the Raising of a Revenue for Provincial Purposes.” 20

p. 2, l. 35

p. 75, l. 21  
p. 92, l. 35  
p. 93, l. 15  
p. 446, l. 10  
p. 447, l. 28  
p. 460, l. 37

61.—In the case of the tax proposed by Question 4, it is to be observed that the tax would be “ on timber, as and when cut ” and would be at “ a fixed sum per thousand feet board measure.” It is abundantly clear that this tax would not be borne by the owner of the timber from whom it is demanded but would be demanded from him in the expectation and with the intention that he would indemnify himself at the expense of this Respondent. As already pointed out, the Railway Company’s selling price of its land would be reduced by the approximate amount of the tax. If such a tax were levied upon all timber in the Province as and when cut, it would be passed on by persons acquiring lands from this Respondent to the purchasers of the cut timber. When, however, the tax is levied only upon the timber as and when cut on lands in the railway belt, the owner of such timber cannot, in competition with other persons selling timber, pass the tax on to purchasers. 30

p. 2, l. 40

62.—The tax outlined in Question 5 would be the same as that outlined in Question 4 in that it would be payable “ as and when merchantable timber is cut.” As in the case of the tax proposed by Question 4, the person acquiring timber lands from the railway company would not himself bear the tax because he would pay approximately that much less for the lands and the burden of the tax would thus fall upon this Respondent 40



To the extent, if any, that the tax was not borne by this Respondent, it would be passed on to the purchasers of logs or manufactured lumber.

RECORD  
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63.—Though the tax is stated to be upon the land, it would in effect be upon the timber. There is a marked distinction between the tax proposed by Question 5 and an ordinary land tax. The amount of the annual tax proposed by this question would depend solely upon the quantity of timber cut each year and not upon the value of the land. It is a matter of common knowledge that the lands in question have no real value apart from the timber. Taking as an illustration a tract of land having 100,000,000 feet of standing timber, and assuming in the first year the owner cuts 10,000,000 feet, in the second year 20,000,000 feet, in the third year 30,000,000 feet and in the fourth year 40,000,000 feet—the tax would be increasing each year, while the tract of land purchased was diminishing in value. It will thus be seen that such annual tax has no relation to the value of the land.

p. 449, l. 18  
p. 481, l. 29

In the illustration given, the tax in the fourth year would be four times as large as in the first year, whereas the value of the land would be much less, since at the beginning of the fourth year only  $\frac{2}{5}$  of the timber would remain as against  $\frac{9}{10}$  at the end of the first year.

64.—By putting the label of a land tax upon what has been demonstrated to be in effect a tax on the timber, the Province cannot convert an indirect tax into a direct tax so as to bring its imposition within provincial jurisdiction.

65.—In the case of the legislation outlined in Question 6, it is apparent that an attempt would be made to relate the tax to the assessed value of the land and thereby to give it the appearance of a land tax. But when the effect of the legislation is examined, it becomes apparent that the tax proposed is similar to the taxes outlined in Questions 4 and 5.

p. 3, l. 17

66.—Although the total amount of the tax would be related to the assessed value of the land, the amount payable annually would again be related to the quantity of timber cut and not, as in the case of a land tax, to the assessed value.

67.—While the proposed legislation provides alternatives as to the time for payment, the person acquiring railway timber lands would, in all likelihood, because of the heavy amount of the tax and the risks of fire and other hazards to which the timber would be exposed, elect to relate the time for payment of his taxes to the cutting of the timber. Thus the effect of the taxation would be the same as the effect of the taxation proposed in Questions 4 and 5.

p. 449, l. 38  
p. 459, l. 21  
p. 481, l. 38

68.—Question 7 relates to the so-called fire protection tax imposed by Section 123 of the "Forest Act." (This section is now numbered 124

p. 3, l.

RECORD

in R. S. B. C. 1948, Chapter 128.) There are two branches to the question—the first, as to whether this Respondent is liable to the tax in connection with his timber lands and the second, as to whether such impost would derogate from the provisions of Section 22 of the Settlement Act. The answer to the first branch of the question would seem to depend upon whether Section 123 of the Forest Act imposes a tax or provides for a payment that cannot be classified as a tax. Section 123 describes the impost as “an annual tax.” It also provides that all moneys so payable may be recovered with costs by action at the suit of the Crown. The essence of taxation is that it is imposed by superior authority without the payer’s consent. It is clear that the “annual tax” imposed by the Forest Act is a tax and nothing else. The first branch of the question should, it is submitted, be answered in the negative because of the contractual exemption assured to this Respondent by the Province. 10

Since the section imposes a tax, its application to this Respondent would derogate from the provisions of Section 22 of the Settlement Act. The second branch of the question should therefore be answered in the affirmative.

69.—The questions referred to are now set out together with a summary of the opinions of the learned judges in the courts below. 20

70.—QUESTION 1.

“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’?”

*The Court of Appeal :*

p. 68, l. 12  
p. 90, l. 7

p. 74, l. 39

O’Halloran and Bird JJ.A. were of the opinion that no contractual relationship between the Province and the Contractors or the Railway Company had been created. Smith J.A. (dissenting) thought there was no escape from the conclusion that the Province was contractually obligated to grant freedom from taxation to the railway lands in accordance with Section 22. 30

*The Supreme Court of Canada :*

The five learned Judges were unanimous in allowing the Appeal on this question.

p. 443, l. 4

p. 444, l. 31

Locke J. (with whom Kerwin J. concurred) was of the opinion that there was no contract between the Province and the Contractors, but that there was an implied contract between the Province and the Railway Company. In his view, by holding out the tax exemption as an inducement 40

to the Company to construct the railway, the Province must be taken to have agreed with the Company that when the Company had constructed the railway it would be entitled to the exemption.

RECORD  
—

Rand J. was also of the opinion that there was no contract between the Province and the Contractors, but that there was an implied contract between the Province and the Railway Company. In his view when the Company performed the conditions laid down in the Settlement Act the Province became bound to grant to the Company the exemption in Section 22 of that Act.

p. 455, l. 22

p. 455, l. 40

10 Kellock J. was of the opinion that the subsidy lands with the exemption were the subject of a contractual obligation between the Province and the Dominion as to which the Dominion was a trustee for the Railway Company.

p. 468, l. 20

Estey J. was of the view that the exemption was a term of a trust created between the Province and the Dominion by which the Dominion acted as trustee for the Railway Company and that, although there was no contract between the Province and the Company, the Province in entering the trust arrangement with the Dominion for the Company's benefit placed itself under an obligation to the Company to maintain the tax exemption.

p. 477, l. 10

#### 71.—QUESTION 2.

20 “ If there was a contract, would any of the legislation herein outlined, if enacted, be a derogation from the provisions of the contract ? ”

#### *The Court of Appeal :*

O'Halloran and Bird J.J.A. were of the opinion that if there was a contract the proposed legislation would not derogate from it. Smith J.A. in dissenting was of the opinion that the proposed legislation would constitute a breach of the contract.

p. 44

p. 91

p. 82, l. 21

#### *The Supreme Court of Canada :*

30 The five learned Judges were unanimous in allowing the appeal on this question.

Locke J. (with whom Kerwin J. concurred) was of the view that the Province by the proposed legislation would take away from the Railway Company part of the consideration which the Company had received for assuming its various obligations including the construction and operation in perpetuity of the railway and telegraph lines. The other learned Judges reached the same conclusion.

p. 446, l. 14

p. 463, l. 5

p. 469, l. 19

p. 478, l. 22

#### 72.—QUESTION 3.

40 “ 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 ? ”

## RECORD

*The Court of Appeal :*

p. 47  
p. 90  
p. 82, l. 22

O'Halloran and Bird JJ.A. answered this question in the affirmative.  
Smith J. (dissenting) answered in the negative.

*The Supreme Court of Canada :*

The five learned Judges were unanimous in allowing the Appeal on this question.

p. 446, l. 28

p. 455, l. 22  
p. 469, l. 19  
p. 478, l. 28  
p. 451, l. 19  
p. 463, l. 6  
p. 469, l. 19  
p. 479, l. 1

Locke J. (with whom Kerwin J. concurred) was of opinion that the 1912 contract could not be construed as a covenant on the part of the Province not to exercise the power to repeal or amend Section 22. The other learned Judges came to a similar conclusion. All were agreed that the question should be answered in the negative. The answers they gave to Questions 1 and 2 required a negative answer to Question 3. 10

## 73.—QUESTION 4.

“ 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 ? ”

*The Court of Appeal :*

p. 52, l. 25  
p. 78, l. 27  
p. 93, l. 25

All three of the learned Judges agreed that the tax outlined in this question would be an indirect tax and therefore *ultra vires*. 20

*The Supreme Court of Canada :*

p. 448, l. 22  
p. 460, l. 7  
p. 469, l. 19  
p. 479, l. 9

All five of the learned Judges agreed that the Cross-Appeal of the Attorney-General of British Columbia as to this question should be dismissed. In their opinion the tax outlined in this question would be an indirect tax and therefore *ultra vires*.

## 74.—QUESTION 5.

“ Is it within the competence of the Legislature of British Columbia to enact a Statute for the imposition of a tax on the land of the Island Railway Belt acquired in 1887 by the Esquimalt and Nanaimo Railway Company from Canada and containing provisions substantially as follows : 30

“ (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.”

RECORD

*The Court of Appeal :*

O'Halloran and Bird J.J.A. were of the opinion that the tax outlined in this question would be a direct tax and therefore valid. p. 52, l. 37  
 p. 93, l. 31

Smith J. (dissenting) held that this tax would be indirect and thus invalid. p. 79, l. 39

*The Supreme Court of Canada :*

The five learned Judges were unanimous in allowing the Appeal on  
 10 this question.

Locke J. (with whom Kerwin J. concurred) was of the view that the burden of the tax outlined in this question would fall upon persons other than the owner of the property from whom it would be demanded. p. 448, l. 28

Rand J. (with whom Kellock J. concurred) considered that this would be a tax on the timber and that it would be beyond provincial competence. p. 458, l. 27  
 p. 469, l. 19

Estey J. did not think that in substance this tax would be materially different from that proposed by Question 4, except that it would create a charge on the land. This, in his view, would not make it a land tax.  
 20 His opinion also was that it would be *ultra vires*.

75.—QUESTION 6.

“ 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 :  
 30 “ (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 ;  
 40

“ (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.”

*The Court of Appeal :*

p. 64, l. 40  
p. 93, l. 31

O'Halloran and Bird JJ.A. took the view that the tax outlined in this question would be a direct tax and therefore valid.

p. 79, l. 39

Smith J. (dissenting) reached the conclusion that this tax would also be indirect and hence invalid.

10

*The Supreme Court of Canada :*

The five learned Judges were unanimous in allowing the Appeal on this question.

p. 449, l. 29

Locke J. (concurred in by Kerwin J.) thought that the tax outlined in this question was simply a tax on the timber when severed and the fact that under the first alternative the landowner may compound that tax by paying a lump sum does not alter the true character of the proposed legislation. He thought it would be indirect taxation for the same reasons that led him to that conclusion in regard to the taxation proposed in Questions 4 and 5.

20

p. 459, l. 31

Rand J. could see no real difference either between the second alternative and the tax as proposed in Question 5. The tax would depend in both cases on severance and only in relation to timber cut is it to be computed. He felt that the first alternative must be a substantial equivalent of the second.

p. 469, l. 19

Kellock J. agreed with the judgment of Rand J.

p. 481, l. 31

Estey J. thought that a tax as proposed in Question 6 would in reality be upon the timber and not the land, and would enter into the price as in Questions 4 and 5 and therefore subject to the same objection. He thought that under all the circumstances the second method of payment in sub-paragraph (d) (ii) would be usually adopted.

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76.—QUESTION 7.

“ 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 ? ”

*The Court of Appeal :*

RECORD

Smith and Bird J.J.A. thought that Section 123 of the Forest Act imposed a service charge, not a tax, and hence did not derogate from Section 22 of the Settlement Act. O'Halloran J.A. was of the view that it imposed a tax and therefore derogated from Section 22.

p. 82, l. 7  
p. 93, l. 37  
p. 66, l. 10

*The Supreme Court of Canada :*

The five learned Judges were unanimous in allowing the Appeal on this question. In their opinion the levy in Section 123 of the Forest Act is properly classified as a tax and the imposition of that tax would derogate from the provisions of Section 22 of the Settlement Act. Their answer to the first branch of the question was "no" and to the second branch "yes."

p. 450, l. 13  
p. 461, l. 1  
p. 469, l. 19  
p. 482, l. 10

77.—This Respondent respectfully submits that the answers given by the Supreme Court of Canada to all seven questions are correct and that this appeal should be dismissed for the following amongst other

p. 425

**REASONS.**

## AS TO QUESTION I :

1. BECAUSE abundant evidence establishing such contractual relationship is to be found in the legislation, the documents, the acts of the parties and the circumstances under which the railway was constructed.
2. BECAUSE the Province held out the land grant and the tax exemptions as inducements to this Respondent to construct and equip the railway and the telegraph line and to maintain and work them continuously.
3. BECAUSE this Respondent relying upon the assurance of the land grant and the tax exemptions constructed and equipped the railway and the telegraph line and has maintained and worked them continuously.
4. BECAUSE the Provincial offer of the land grant and the tax exemption was accepted by this Respondent by its performance of the work.
5. BECAUSE the legislative charter contained in the Settlement Act was a parliamentary contract between the Province and this Respondent.
6. BECAUSE the statute itself is powerful evidence of contractual relationship between the Province and this Respondent.

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7. BECAUSE the Dominion was agent for the Province in arranging for the work to be done by this Respondent.
8. BECAUSE this Respondent could enforce as against the Province the trust in respect of the land grant.
9. BECAUSE there was a tripartite agreement between the Dominion, the Province and this Respondent as part of which there was a contractual relationship between the Province and this Respondent.

AS TO QUESTION 2 :

- BECAUSE the effect of the proposed legislation would be : 10
- (a) substantially to reduce the value of this Respondent's timber lands
  - (b) to take away a material part of the consideration for which this Respondent entered into the contract with the Province
  - (c) to tax the timber lands of the Company in contravention of the tax exemption.

AS TO QUESTION 3 :

1. BECAUSE the effect of the tax recommended would be to impose a tax on the lands of this Respondent and so to constitute a breach of the contract entered into between the Province and this Respondent when the railway and the telegraph line were constructed. 20
2. BECAUSE the effect of the tax recommended would be to impose a tax on the lands of this Respondent and constitute a breach of the contract entered into between the Province and this Respondent when its railway was leased to the Canadian Pacific Railway Company.
3. BECAUSE of the reasons assigned under Questions 1 and 2.

AS TO QUESTION 4 :

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1. BECAUSE the tax would not be demanded from the person who it is intended or desired should pay it but would be demanded from one person in the expectation and intention that he should indemnify himself at the expense of another.
2. BECAUSE the tax imposed on timber would not be direct taxation within the meaning of Section 92 (2) of the British North America Act.



## AS TO QUESTION 5 :

- 10
1. BECAUSE the legislation while purporting to impose a tax on the land would in effect impose a tax on the timber.
  2. BECAUSE the tax would not be demanded from the person who it is intended or desired should pay it but would be demanded from one person in the expectation and intention that he should indemnify himself at the expense of another.
  3. BECAUSE such taxation would not be direct taxation within the meaning of Section 92 (2) of the British North America Act.
  4. BECAUSE the taxation proposed by this question is substantially the same as that proposed by Question 4.

## AS TO QUESTION 6 :

1. BECAUSE reasons 1, 2 and 3 given in respect of Question 5 are applicable *mutatis mutandis*, to the taxation proposed by this Question.
2. BECAUSE such taxation is substantially the same as that proposed by Questions 4 and 5.

## AS TO QUESTION 7 :

- 20
1. BECAUSE the levy provided by Section 123 of the Forest Act is a tax and this Respondent by virtue of Section 22 of the Settlement Act is not liable to taxation in respect of the lands referred to in the question.
  2. BECAUSE the application of the tax to such lands would derogate from the provisions of Section 22 of that Act.

## AS TO ALL QUESTIONS :

BECAUSE of the reasons of the Judges in the Courts below for giving answers favourable to this Respondent.

**In the Privy Council.**

**ON APPEAL**

FROM THE SUPREME COURT OF CANADA.

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BETWEEN  
THE ATTORNEY-GENERAL  
OF BRITISH COLUMBIA  
APPELLANT  
AND  
ESQUIMALT & NANAIMO  
RAILWAY COMPANY,  
ALPINE TIMBER COMPANY  
LIMITED,  
THE ATTORNEY-GENERAL  
OF CANADA ... .. RESPONDENTS.

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**CASE FOR THE RESPONDENT**  
ESQUIMALT & NANAIMO RAILWAY  
COMPANY.

---

BLAKE & REDDEN,  
17 Victoria Street, S.W.1,  
*Solicitors for the* ESQUIMALT & NANAIMO  
RAILWAY COMPANY.