48, 1949

No. 7 of 1949

In the Privy Council

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

Record of Proceedings

Solicitors for the Appellant, The Attorney-General of British Columbia,
GARD LYELL & CO.,
Leith House,
47 Gresham Street, London, E.C. 2.

Solicitors for the Respondent, Esquimalt & Nanaimo Railway Company,
BLAKE & REDDEN,
17 Victoria Street, London, S.W. 1.

Solicitors for the Respondent, Alpine Timber Company Limited,
BLAKE & REDDEN,
17 Victoria Street, London, S.W. 1.

Solicitors for the Respondent, The Attorney-General of Canada,
CHARLES RUSSELL & CO.,
37 Norfolk Street,
Strand, London, W.C. 2.

INDEX

INDEX—*continued*

INDEX *continued*

INDEX—*continued*

INDEX—*continued*

INDEX—*continued*

INDEX—*continued*

INDEX—*continued*

INDEX—*continued*

INDEX—*continued*

INDEX—*continued*

INDEX—*continued*

INDEX—*continued*

INDEX—*continued*

RECORD

Court of Appeal of British Columbia

No. 1
Copy of Order of Reference
Nov. 13, 1946

No. 1

COPY OF ORDER OF REFERENCE APPROVED NOVEMBER 13TH, 1946.

2699.

Approved and ordered this 13th day of November, A.D. 1946

C. A. BANKS,
Lieutenant-Governor.

AT THE EXECUTIVE COUNCIL CHAMBER, VICTORIA.

PRESENT:

The Honourable Mr. HART, in the Chair.
Mr. WISMER.
Mr. PEARSON.
Mr. KENNEY.
Mr. ANSCOMB.
Mr. PUTNAM.
Mr. MACDONALD.
Mr. EYRES.
Mr. WEIR.

To His Honour the Lieutenant-Governor in Council:

The undersigned has the honour to report that, under the provisions of the "Public Inquiries Act," the Honourable Gordon McG. Sloan, Chief Justice of British Columbia, was, by Commission dated the 31st day of December, 1943, appointed a Commissioner to inquire into and report upon all phases and aspects of the forest resources in the Province and the legislation relating thereto and the policy followed in its administration; and among matters specifically mentioned, to enquire into and report upon "Forest Finance and Revenue to the Crown from Forest Resources":

And further to report that the said Commissioner expressed the opinion that it should be determined by the Courts whether the tax (so-called) imposed under 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," acquired by grant from the Canadian Government, April 21st, 1887, under authority of an Act of the Canadian Parliament passed in 1884, and whether it is a tax in contravention of section 22 of the Provincial Act of 1883:

RECORD

Court of Appeal of British Columbia

No. 1
Copy of Order of Reference Nov. 13, 1946 (Contd.)

And further to report that the said Commissioner reported that in his opinion it is in the public interest that a severance tax be imposed upon all timber cut upon lands of the said railway company after the same is sold or otherwise alienated by it, and further reported that the said railway company called into question the competence of the Provincial Legislature to impose such a tax, and recommended that appropriate steps be taken by the Crown to have this matter determined by the Courts:

And to further report that the Commissioner made findings that there never was any contractual relationship between the Province and the contractors for the construction of the railway or the railway company in relation to the transfer of the railway belt to the railway company, and 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:

And to recommend that the Lieutenant-Governor in Council, by virtue of the authority conferred by the "Constitutional Questions Determination Act," being chapter 50 of the "Revised Statutes of British Columbia, 1936," refer the following questions to the Court for hearing and consideration:—

(The expression "land" wherever it occurs herein shall mean "timber land" as defined in the "Taxation Act.")

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"?

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

3. 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?

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?

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.*) The tax shall apply only to timber cut upon land in the belt when such land is 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, the owner thereof shall thereupon be taxed on timber cut upon such land as and when merchantable timber is cut and severed from the land:

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

(*d.*) The owner shall be liable for payment of the tax:

(*e.*) The tax until paid shall be a charge on the land.

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:

(*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 pay-

RECORD

Court of Appeal of British Columbia

No. 1
Copy of Order of Reference Nov. 13, 1946 (Contd.)

ing 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.

7. Is the Esquimalt and Nanaimo Railway Company 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?

Dated this 12th day of November, A.D. 1946.

G. S. WISMER,
Attorney-General.

Approved this 12th day of November, A.D. 1946.

JOHN HART,
Presiding Member of the Executive Council.

No. 2

AGREED STATEMENT OF FACTS.

It is agreed between Counsel for the parties as follows:

1. The documents in the "Printed Documents" are authentic.

2. The parties are free to produce on the argument any other documents considered by the Court to be relevant and authentic.

3. The record of sales or other disposition of the timber lands or timber of The Esquimalt and Nanaimo Railway Company's lands in the Railway Belt held under the Grant by the Dominion in 1887 is as follows:

Memorandum of "Timberland" Sales:

Year:	Acres:	Prices:	Timber Contents	
1887 to 1897	No Records			
1898	160	480.00	Not	Known
1899	88,393	441.965.00	"	"
1900	40	120.00	"	"
1902	3,636	14,892.00	"	"
1903	71	255.00	"	"
1904	20,026	100,130.00	"	"
To June 1905	34,344	257,580.00	"	"
Bal of 1905	2,156	10,780.00	"	"
1906	58,221.2	683,397.00	"	"
1907	13,777	250,025.00	"	"
	9,424	106,902.00	71,186,000	
1908	11,502	136,021.00	141,200,000	
	6,148	107,600.00	"	"

Year:	Acres:	Price:	Timber Contents			
1909	19,251	279,073.50	261,572,000			
	17,858	451,028.00		Not	Known	
1910	583	14,870.00	10,470,000			
	34,319	808,195.00		"	"	
1911	19,121	252,865.50	280,798,500			
	640	19,200.00		"	"	
1912	49,479	338,866.40	420,711,000			
	10,833	288,505.00		"	"	10
1913	80	1,200.00		"	"	
1914	—	—				
1915	731.9	9,204.00	8,296,000			
	60	900.00		"	"	
1916	2,639.3	44,011.50	59,421,000			
1917	1,138.7	25,689.00	23,043,000			
	620.1	7,441.20		"	"	
1918	675.92	19,548,20	11,412,000			
1919	13,178.36	281,771.00	192,555,625			
	5,452.20	84,679.50		"	"	20
1920	6,691.71	206,780.56	104,216,000			
	540	13,500.00		"	"	
1921	587.5	14,687.50	10,975,000			
1923	25,030.1	680,849.26	552,753,000			
	248.56	6,014.20		"	"	
1922	1,484.53	30,696.24	24,596,000			
1924	21,047.92	614,308.82	448,481,980			
1925	4,581.96	117,825.10	74,077,000			
1926	4,551.33	110,833.75	80,889,000			
1927	12,276.03	471,655.25	296,180,060			30
1928	7,908.4	433,075.55	250,630,600			
1929	7,131	195,759.50	108,783,000			
1930	2,175.87	94,637.80	59,026,230			
1931	3,363.93	111,075.90	62,471,000			
1932	2,492	87,407.50	48,332,000			
1933	3,527.47	71,339.50	64,876,250			
1934	8,767	204,158.51	145,845,000			
1935	8,757.61	204,460.50	132,342,300			
1936	15,415.67	274,973.54	175,057,760			
1937	26,283.02	610,993.50	386,620,000			40
1938	16,178.668	326,955.32	211,282,900			
1939	17,422.74	255,457.04	173,975,550			
1940	38,884.43	1,072,478.60	614,333,900			
1941	25,641.11	548,050.25	317,433,000			
1942	18,181.68	570,830.81	298,089,000			
1943	30,178.733	824,819.25	414,743,000			

Year:	Acres:	Prices:	Timber Contents
To July 31/44	29,657.58	1,111,712.75	487,300,000
	763,565.231	$14,302,531.30	7,023,974,655

SUMMARY: From 1887 to 1897—No Records.

	Acres	Price	Contents
Various sales included in general Statement timber contents not known	283,836.06	$ 3,547,886.90	Not Known
Sales from 1907 to 1944 as above	479,729.17	10,754,644.40	7,023,974,655
Sales of timber only which includes trespass, cutting outside lines, etc., from 1905 to 1944, acreage and contents not known	——	512,261.39	——
	763,565.23	$14,814,792.69	7,023,974,655

4. Since 1897 and prior thereto The Esquimalt and Nanaimo Railway Company has maintained a land office department at Victoria for the purpose of selling the said lands and timber of the Company and continues to hold the lands for sale, save such lands as are reserved or used for railway rights-of-way, stations and such like purposes, and outside of the actual rights-of-way used by the railway almost all of the said land has been held for sale or other alienation.

5. The following is a copy of the Railway Company's regulations for sale of its lands and published in 1914 in a booklet issued by the Railway Company describing the timber, agricultural and industrial resources of Vancouver Island.

(1) The lands offered by the Company will be sold or leased in accordance with the following classification:

(a) Agricultural lands, which include all lands that do not contain timber capable of being manufactured into lumber to a greater average extent than five thousand feet board measure per acre.

(b) Timber lands, which include all lands containing timber capable of being manufactured into lumber to a greater average extent than five thousand feet board measure per acre.

(c) Mineral lands, which include all lands supposed to contain minerals other than or in addition to coal and coal oil. These lands will be leased or dealt with under option. Locators of mineral claims on the unsold portions of the Land Grant may, on payment of $50 per claim, obtain an option for one year to purchase the surface rights and timber at the price of $5 per acre for the surface and $1 per 1,000 for all the timber in excess of 8,000 feet B.M. per acre. Minerals to be worked on royalty as specified in regulation (5) below. The Company does not, however, bind itself to grant options on, or sell, either the surface or timber of any land which it may decide is required for its own use or otherwise. Holders of options who intend to purchase must survey the land and file their field notes at the Company's land Office at Victoria within the period of their option.

(2) The sale of agricultural and timber lands as classified above will include the surface rights and all timber standing and growing thereon, and all mines and minerals therein and thereunder belonging to the Company, except coal, coal oil, iron and fire clay.

(3) Agricultural lands will be sold in tracts of not less than one hundred and sixty (160) acres or more than two thousand (2,000) acres, except where blocks of land have been cleared by the Company, and are offered in smaller parcels or in case of smaller areas lying between parcels of land actually surveyed or sold.

(4) Timber lands will be sold in blocks of any area not less than six hundred and forty (640) acres or more than two thousand (2,000) acres, with increases above that area in blocks of 160 acres or multiples thereof, except in the case of smaller areas lying between parcels and land actually surveyed or sold.

(5) Mineral lands will be leased at an annual rental; or sold. The following royalties being reserved on the ores mined upon the property:

(1st). Upon iron ore (and this is to be understood as material containing over 40% metallic iron and

manganese), one cent per unit of iron plus manganese on total contents, that is to say, should the ore contain 50% iron and manganese the royalty per ton would be 50 cents.

(2nd). A royalty upon lead contents of ores of one-tenth of a cent per pound of lead according to dry assay.

(3rd). A royalty upon copper contents of ores (as determined by wet assay) of three-tenths of a cent per pound of copper contents.

(6) The Company will insert in all agreements for sale and purchase and in all conveyances such reservations as may be necessary or expedient in order to reserve and except to the Company, its successors and assigns, full rights and powers of mining, winning, getting and carrying away all coal, coal oil, iron and fire clay, and to enter into and upon the lands so sold and any part thereof from time to time and to search and examine for such coal and fire clay so reserved, with full liberty of ingress, egress and regress, for all time to come as may reasonably be required for all or any such purposes, so far as under the terms of sale and purchase, such substances are or may be reserved and excepted.

(7) Any person desiring to purchase any area of agricultural or timber land as hereinbefore classified, shall file an application for the same on forms supplied by the Company, and shall give an approximate description of the location, boundaries and area of the land which he desires to purchase illustrated by rough sketch thereof on the back of such application.

(8) If the applicant is notified that the agricultural or timber land that he applies to purchase is for sale but is unsurveyed, he shall thereupon pay to the Company a deposit of ten per cent., of the purchase price of the said land for agricultural purposes and one-thirtieth in the case of timber lands, which amount will be forfeited to the Company unless the returns of such survey to be made by the purchaser are filed with the Land Agent of the Company as hereinafter provided, and shall pay the balance of the first instalment of the purchase price when filing the returns of the said survey, and he shall forthwith employ at his own expense a duly qualified Provincial Land Surveyor to survey the said land, and shall file with the Land Agent of the Company within sixty days from the date of the notification

to him that the land is available for purchase, proper returns of such survey, prepared in accordance with the Company's regulations regarding the same, and shall perform or cause to be performed at his expense all such other acts as may become necessary to obtain Registration of the usual form of conveyance when issued by the Company.

(9) Every parcel of agricultural land for which an application to purchase, and every parcel of mineral land for which an application to lease, is filed, shall be rectangular or square in shape, and six hundred and forty (640) acres shall measure eighty (80) chains by eighty (80) chains; three hundred and twenty (320) acres shall measure forty (40) chains by eighty (80) chains; one hundred and sixty (160) acres shall measure forty (40) chains by forty (40) chains; all lines bounding such parcels of agricultural or mineral land shall be run north and south and east and west astronomically.

(10) Every area of timber land for which an application to purchase is filed shall, except as otherwise provided by these regulations, be bounded by lines which shall be run north and south and east and west astronomically, and no jog in any such boundaries shall be less than twenty (20) chains in length.

(11) When any area of land for which an application is filed is bounded in whole or in part by any lake or river, or by any line previously surveyed, such lake, river or previously surveyed line may be adopted as one of the boundaries of the land to be purchased or leased.

(12) In completing survey of any parcel of agricultural or timber land for which application to purchase is filed, the surveyor must so locate and survey the boundaries of the same that no gore or broken parcels of land shall remain lying between the parcels being surveyed and the boundaries of any land previously surveyed.

(13) In making a survey of any area of land covered by an application, the surveyor shall tie in his survey to the boundary of some area previously surveyed so that the location and boundaries of the area to be purchased or leased may be accurately plotted on the map of the District.

(14) When forwarding the returns of his survey as herein provided or completing his application for land already surveyed, the purchaser shall at the same time pay

the balance of the first instalment on the lands purchased in accordance with the following terms of sale.

(a) AGRICULTURAL LANDS—Purchase price from $10.00 per acre for the land and an additional sum of $1.00 per thousand feet, board measure, for all timber on the land in excess of 5,000 feet per acre which is capable of being manufactured into lumber, ties, poles, or shingle bolts. The report of the Company's cruiser as to the quantity of lumber on the land applied for shall be accepted by and be binding on the Company and the purchasers. The purchase price will be payable one-third cash and the balance in two equal annual instalments with interest at six per cent. per annum on the deferred payments.

(15) The purchaser of any land having certified in his application that the land applied for is unoccupied, agrees that any squatters found upon the land purchased shall be removed by and at the expense of the purchaser.

(16) All improvements made upon the lands purchased shall be maintained thereon until the purchaser has completed his final payment for the land.

(17) All taxes, rates and assessments legally imposed upon the lands purchased or leased or agreed to be purchased or leased and upon the buildings and improvements thereon shall be paid by the purchaser.

(18) If the land is paid for in full at the time of purchase, a discount of ten per cent. on the amount paid in excess of the usual cash instalment will be allowed. No discount will be allowed for subsequent payments in advance of maturity, or on the price of townsite or suburban lots. Interest at six per cent. per annum will be charged on overdue instalments. The fee for each conveyance of land or suburban lots is $10.00, town lots $5.00, and purchasers shall be liable to have performed at their own expense any acts that may be demanded by the Registrar-General of Titles in connection with obtaining Registration of conveyances issued to them.

(19) Agents for the sale of the Company's lands, other than the Land Agent at Victoria, are not authorized to receive or receipt for any moneys, or to bind the Company by any act whatsoever. All payments on account of land must

be made to the undersigned, to whom all letters for further information should be addressed.

L. H. SOLLY,
Land Agent,
Esquimalt and Nanaimo Railway Company

Victoria, B.C.
July, 1914

6. A re-issue of the Regulations was made in July, 1929, in the following form: (The Regulations were for the general guidance of the Land Agent only and were subject to change by the Railway Company in any instance).

(1) The lands offered by the Company will be sold or leased in accordance with the following classifications:

(a) Agricultural lands, which include all lands that do not contain timber capable of being manufactured into lumber to a greater average extent than five thousand feet board measure per acre, and which are fit for cultivation.

(b) Timber lands, which include all lands containing timber capable of being manufactured into lumber to a greater average extent than five thousand feet board measure per acre.

(c) Mineral lands, which include all lands supposed to contain minerals other than or in addition to coal and coal oil. These lands may be leased or dealt with under option. Locators of Mineral claims on the unsold portions of the Land Grant may, upon filing with the Land Agent a statutory declaration that mineral has been discovered upon the claim, and upon the payment of $1.00, obtain an option for one year to purchase the surface rights and timber at the price of $5.00 per acre for the surface and $1.50 per 1,000 for the timber on the land in excess of 8,000 feet B.M. per acre, the timber to be used solely for mining purposes on the claim and not to be removed therefrom. Minerals to be worked on royalty as specified in regulation (3) below. The Company does not, however, bind itself to grant options on, or sell, either the surface or timber on any land which it may decide is required for its own use or otherwise. Holders of options who intend to purchase must survey the land and file their field notes at the Company's Land Office at Victoria within the period of their option.

(d) Land not falling within the foregoing descriptions of agricultural lands, timber lands or mineral lands.

(2) The sale of agricultural and timber lands as classified above will include the surface rights and all timber standing and growing thereon, but shall not include any coal, oil or fire clay, or any mines or minerals.

(3) Mineral lands may be leased at an annual rental; or sold. The following royalties being reserved on the ores mined upon the property:

(a) Upon iron ore (and this to be understood as material containing over 40% metallic iron and manganese), one cent per unit of iron plus manganese on total contents, that is to say, should the ore contain 50% iron and manganese the royalty per ton would be 50 cents. A minimum royalty of 25c per ton.

(b) One-tenth of one cent per pound upon the lead contents of lead ore.

(c) One-twentieth of one cent per pound upon the zinc contents for the first forty units; one tenth of one cent per pound upon the zinc contents in excess of forty units.

(d) One-tenth of one cent per pound upon copper contents up to and including two percent. of copper contents; upon the first one per cent. in excess of two per cent. of copper contents fifteen one-hundredths of one cent per pound; upon the first one per cent. in excess of three per cent. of copper contents, one-fifth of one cent per pound of copper contents; upon the first one per cent. in excess of three per cent. of copper contents, one-fifth of one cent per pound of copper contents; upon the first one per cent. in excess of four per cent. of copper contents one quarter of one cent per pound of copper contents; upon any copper contents exceeding five per cent. copper contents three-tenths of one cent per pound upon such excess.

(e) A royalty of two per cent. of the gross value of ores or concentrates not otherwise specified.

(4) The Company will insert in all agreements for sale and purchase and in all conveyances such reservations as may be necessary or expedient in order to reserve and except

to the Company, its successors and assigns, full rights and powers of mining, winning, getting and carrying away all coal, oil and fire clay, and all mines and minerals, and to enter into and upon the lands so sold and any part thereof from time to time, and to search and examine for such coal, oil and fire clay, mines and minerals so reserved, with full liberty of ingress, egress and regress, for all time to come as may reasonably be required for all or any such purposes, so far as under the terms of sale and purchase, such substances are or may be reserved and accepted.

(5) Any person desiring to purchase any area of agricultural or timber land as hereinbefore classified, shall file an application for the same on forms supplied by the Company, and shall give an approximate description of the location, boundaries and area of the land which he desires to purchase illustrated by a rough sketch thereof on the back of such application or a plan drawn to scale.

(6) If the applicant is notified that the agricultural or timber land that he applies to purchase is for sale but is unsurveyed, he shall thereupon pay to the Company a deposit of ten per cent. of the purchase price of the said land, which amount will be forfeited to the Company unless the returns of such survey to be made by the purchaser are filed with the Land Agent of the Company as hereinafter provided, and shall pay the balance of the first instalment of the purchase price when filing the returns of the said survey, and he shall forthwith employ at his own expense a duly qualified B. C. Land Surveyor to survey the said land, and shall file with the Land Agent of the Company within sixty days from the date of the notification to him that the land is available for purchase, proper returns of such survey, prepared in accordance with the Company's regulations regarding the same, and shall perform or cause to be performed at his expense all such other acts as may become necessary to obtain Registration of the usual form of conveyance when issued by the Company.

(7) Every parcel of agricultural land for which an application to purchase, and every parcel of mineral land for which an application to lease, is filed, shall be rectangular or square in shape; all lines bounding such parcels of agricultural land shall be run north and south and east and west astronomically; subject, however, to Clause 9.

(8) Every area of timber land for which an application to purchase is filed shall, except as otherwise provided by these regulations, be bounded by lines which shall be run

north and south and east and west astronomically, and no jog in any such boundaries shall be less than twenty (20) chains in length.

(9) When any area of land for which an application is filed is bounded in whole or in part by any lake or river, public road, or by any line previously surveyed, such lake, river, public road or previously surveyed line may be adopted as one of the boundaries of the land to be purchased or leased.

(10) In completing survey of any parcel of agricultural or timber land for which application to purchase is filed, the surveyor must so locate and survey the boundaries of the same that no gore or broken parcels of land shall remain lying between the parcels being surveyed and the boundaries of any land previously surveyed.

(11) In making a survey of any area of land covered by an application, the surveyor shall tie in his survey to the boundary of some area previously surveyed so that the location and boundaries of the area to be purchased or leased may be accurately plotted on the map of the District.

(12) When forwarding the returns of his survey as herein provided or completing his application for land already surveyed, the purchaser shall at the same time pay the balance of the first instalment on the lands purchased in accordance with the following terms of sale.

(a) AGRICULTURAL LANDS—Purchase price from $10.00 per acre upward for the land and additional sum of $1.00 per thousand feet, board measure, for all timber on the land in excess of 5,000 feet per acre which is capable of being manufactured into lumber, ties, poles or shingle bolts. The report of the Company's cruiser as to the quantity of timber on the land applied for shall be accepted by and be binding on the Company and the purchaser. The purchase price will be payable one-third cash and the balance in two equal annual instalments with interest at six per cent. per annum on the deferred payments.

No merchantable timber or poles, piles or mining timber shall be cut from the land without the written consent of the Company's land Agent.

(b) TIMBER LANDS. Purchase price, in three equal annual instalments, with interest at six per cent. per annum.

(13) The purchaser of any land having certified in his application that the land applied for is unoccupied, agrees that any squatters found upon the land purchased shall be removed by and at the expense of the purchaser.

(14) All improvements made upon the lands purchased shall be maintained thereon until the purchaser has completed his final payment for the land.

(14a) After payment of one-third of purchase price, the purchaser may arrange with the Company for the cutting of timber subject to payments being made as the timber is cut.

(15) All taxes, rates and assessments legally imposed upon the lands purchased or leased or agreed to be purchased or leased and upon the buildings and improvements thereon shall be paid by the purchaser.

(16) Interest at six per cent. per annum will be charged on overdue instalments. The fee for each conveyance of land or suburban lots is $10.00, town lots $5.00, and purchasers shall be liable to have performed at their own expense any acts that may be demanded by the Registrar-General of Titles in connection with obtaining Registration of conveyances issued to them.

(17) Agents for the sale of the Company's land, other than the Land Agent at Victoria, are not authorized to receive or receipt for any moneys, or to bind the Company by any act whatsoever. All payments on account of land must be made to the undersigned, to whom all letters for further information should be addressed.

NEWTON J. KER
Land Agent,
Esquimalt and Nanaimo Railway Company

Victoria, B.C.
July, 1929.

7. Filed herewith is a copy of the Form of Conveyance and a copy of the Agreement for Sale of Timberlands.

8. That lumbering is one of the main industries of the Province and is carried on generally throughout the Province and on lands other than those in the E. & N. Belt. That the timber cut upon lands in the E. & N. land Grant is sold mainly to sawmill operators in the Province, or to loggers who sell to sawmill operators in the Province. That at such sawmills the logs

are manufactured into lumber, which is sold for consumption in British Columbia or other parts of Canada, or is exported to other countries.

9. That the capital investment in the Esquimalt and Nanaimo Railway increased to $12,498,668.00, of which $1,520,560.00 was Dominion Government subsidy.

10. That the constructed mileage was increased from 78 (the original main line mileage from Esquimalt to Nanaimo) to 209.7 miles.

11. That $478,671.00 has been paid the Province pursuant to the agreement of 1912 confirmed by Chapter 33.

12. That 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.

13. The extensions of the railway were financed by advances made by the parent company, the Canadian Pacific Railway Company, secured by bonds issued by the Esquimalt and Nanaimo Railway Company delivered to the Canadian Pacific Railway Company, and held by that company. No bonds were sold to the public.

The Sloan Report will be produced.

DATED at Vancouver, B.C., the 13th day of December, 1946.

RECORD

Court of Appeal of British Columbia

No. 3
Minute of Executive Council
Jan. 15, 1947

No. 3

CERTIFIED COPY OF A MINUTE of the Honourable the Executive Council, approved by His Honour the Lieutenant-Governor on the 15th day of January, A.D. 1947.

69

To His Honour
The Lieutenant-Governor in Council:

The undersigned has the honour to recommend:—

THAT Order-in-Council No. 2699 approved on the 13th day of November, 1946, made under the provisions of the "Public Inquiries Act" be amended as follows:—

By striking out clause (a) and clause (b) of question number 6 (which appears in the Volume of Documents filed in the Reference as if it were question number 5) and by substituting the following as clause (a):—

"(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."

And by relettering clauses (c), (d) and (e) of question number 6 as clauses (b), (c) and (d).

AND FURTHER TO RECOMMEND THAT the questions referred to the Court for hearing and consideration by said Order-in-Council, No. 2699 be deemed to be the questions set forth in that Order-in-Council as hereby amended.

DATED this 14th day of January, A.D. 1947.

"G. S. WISMER,"
Attorney-General.

APPROVED this 14th day of January, A.D. 1947.

"JOHN HART,"
Presiding Member of the Executive Council.

B.C.L.S.
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VANCOUVER
JAN 18 1947
REGISTRY

No. 4

CERTIFICATE OF COURT OF APPEAL

THE LAW COURTS,
VANCOUVER, B.C.

To His Honour
The Lieutenant-General in Council,
Parliament Buildings,
Victoria, B.C.

Pursuant to the provisions of the "Constitutional Questions Determination Act" (chapter 50, R.S.B.C. 1936) the Court of Appeal hereby certifies its opinion upon the questions herein stated as referred to it by the Lieutenant-Governor in Council, and relating to the Esquimalt and Nanaimo Railway Company Land Grant from the Dominion of Canada on 21st April, 1887.

The Court hearing the said Reference Questions was constituted as follows:—

The Honourable Mr. Justice O'Halloran (Presiding);
The Honourable Mr. Justice Sidney Smith;
The Honourable Mr. Justice Bird.

Question 1—"(The expression 'land' wherever it occurs herein shall mean 'timber land' as defined in the 'Taxation Act.')" 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?"

Answer—The answer is in the affirmative; the Honourable Mr. Justice Sidney Smith dissenting.

Question 2—If there was a contract, would any of the legislation herein outlined, if enacted, be a derogation from the provisions of the contract?

Answer—The Honourable Mr. Justice O'Halloran would answer in the negative, subject to his answer to Reference Question 7. The Honourable Mr. Justice Sidney Smith would answer in the affirmative. The Honourable Mr. Justice Bird would answer in the negative.

RECORD

Court of Appeal of British Columbia

No. 4
Certificate of Court of Appeal
June 10, 1947
(Contd.)

Question 3—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?

Answer—The answer is in the affirmative; the Honourable Mr. Justice Smith dissenting.

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?

Answer—The answer is in the affirmative.

Question 5—(but numbered six in the Order in Council).—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.

Answer—The answer is in the affirmative; the Honourable Mr. Justice Sidney Smith dissenting.

Question 6—(but numbered 5 in the Order in Council).—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.

Answer—The answer is in the affirmative; the Honourable Mr. Justice Sidney Smith dissenting.

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?

Answer—The answer to the first part of the Question is in the affirmative; the Honourable Mr. Justice O'Halloran dissenting. The answer to the second part of the Question is in the negative; The Honourable Mr. Justice O'Halloran dissenting.

Attached hereto are the reasons given in support of the opinion of the Court.

On the 4th June, 1947, the Court announced that its opinion would be forwarded to Your Honour on Tuesday, the 10th June, 1947; and that such opinion would be announced in open Court on Thursday, the 12th June, 1947. By section 7 of the Constitutional Questions Determination Act, supra, the opinion of the Court "shall be deemed a judgment of the Court of Appeal;" and section 25 of the Court of Appeal Act (chapter 57, R.S.B.C. 1936 and amendments) requires that all judgments of the Court of Appeal shall be delivered in open Court.

RECORD

Court of Appeal of British Columbia

No. 4
Certificate of Court of Appeal
June 10, 1947
(Contd.)

Certified at the Law Courts, Vancouver, British Columbia, on Tuesday, the 10th June, 1947.

C. H. O'HALLORAN, J.A.
(Presiding.)
SIDNEY SMITH, J.A.
H. I. BIRD, J.A.

No. 5
Reasons for Opinion O'Halloran, J.A.
June 10,1947

No. 5

REASONS FOR OPINION OF THE HONOURABLE MR. JUSTICE O'HALLORAN

In this Reference the Lieutenant-Governor in Council seeks the opinion of the Court of Appeal upon whether the Province is legally competent to tax timber land (Questions 5 and 6), in the Esquimalt and Nanaimo Railway belt on Vancouver Island, or to tax the timber when severed from such lands (Question 4), if, in the words of section 22 of the Settlement Act of 1883 (C. 14 of the Provincial Statutes of 1884, assented to 19th December, 1883) the said lands,

> are used by the Company (viz., the E. & N. Railway Company) for other than railroad purposes, or leased, occupied, sold or alienated.

And, if the Province is so competent to any degree, the opinion of the Court is sought also upon whether the imposition of a tax in any form reflected in the Reference questions, would derogate from, or be in breach of, any contract between the Province and the E. & N. Railway Company (Questions 1, 2, and 3) in relation to the transfer of the railway belt to the E. & N. Railway Company. The Court's opinion is asked as well upon the liability of the E. & N. Railway Company to contribute to the Provincial forest protection fund (Question 7).

Purchasers of E. & N. Railway Company timberlands have not been subject to Provincial royalties in the timber cut thereon. Between 1897 and 1944, the E. & N. Railway Company sold 763,-565 acres of timberland containing 7,023,974,655 feet of timber, for which it received $14,814,972.69 (see para. 3—Agreed Statement of Facts).

After an extensive investigation into "The Forest Resources of British Columbia" under the Provincial "Public Inquiries Act," the sole Commissioner (the Honourable Gordon McGregor Sloan, the Chief Justice of British Columbia), in his comprehensive and historic report to the Provincial Government of December, 1945, cited an authorative estimate (Sloan Report, p. 180) that if purchasers of timber lands from the E. & N. Railway Company had been required to pay the prevailing royalties on timber cut therefrom during the ten years preceding 1946, the Crown Provincial would have received during that period an annual revenue of between $750,000.00 and $800,000.00 and would also receive substantial revenues from this source in the future.

Case p. 263

The learned Commissioner gave his considered view (Sloan Report, p. 184),

Case p. 266

> In my opinion 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.

Since Counsel for the E. & N. Railway Company before him questioned the legal competence of the Provincial Legislature to impose this taxation, the learned Commissioner recommended further that appropriate steps be taken by the Crown to have the matter determined in the Courts. The Reference Questions are now set out in their final form as amended during the hearing before this Court:—

> (The expression "land" wherever it occurs herein shall mean "timber land" as defined in the "Taxation Act.")
>
> 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?"
>
> 2. If there was a contract, would any of the legislation herein outlined, if enacted, be a derogation from the provisions of the contract?
>
> 3. 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

Court of Appeal of British Columbia

No. 5
Reasons for Opinion O'Halloran, J.A.
June 10,1947
(Contd.)

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?

5. (but numbered six in the Order in Council) 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.

6. (but numbered five in the Order in Council) 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.

7. Is the Esquimalt and Nanaimo Railway Company 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?

It will be noted that the Reference Questions do not mention "severance tax" as such. The learned Commissioner did not define the term "severance tax" as used in his recommendation quoted supra. In the absence of a definition, I conclude the term was employed in a wide and general sense, that is to say, it was not confined to any one specific or technical kind of tax to be known as a "severance tax," but was intended to embrace any and all kinds of taxes within the legal competence of the Province to impose, once the timberlands lose the exemption from taxation found in section 22 of the Settlement Act, 1883. This is reflected in the form of the Reference questions, which are framed flexibly enough to explore the various avenues of Provincial competence to tax the timberlands without invading the exemption from taxation in section 22 supra.

This is confirmed by the following excerpts from the letter written by the learned Commissioner to the Attorney-General of the Province on 22 November, 1946 (and filed as a part of the Reference material by Order dated 5 March, 1947):

> I have considered the form and scope of the questions submitted and wish to advise you that they are fully in accord with the recommendations contained in my report on the Forest Resources of British Columbia, and adequately place the constitutional and other questions involved before the Court for determination.
>
> I might mention that the term "severance tax" appearing in the Report was not used by me in any technical or

RECORD

Court of Appeal of British Columbia

No. 5
Reasons for Opinion O'Halloran, J.A.
June 10,1947
(Contd.)

narrow legal sense. Nor was its use intended to restrict the Government from seeking judicial determination of the constitutional competence of any form of taxation legislation within the spirit and intendment of my recommendations.

In other words, the learned Commissioner employed the term "severance tax" not to restrict the nature of the tax to be imposed, but to describe the time of its collection.

The submissions of Counsel for the Province supporting the competence of the taxes described in the Reference questions and denying the existence of any contract therein described, were opposed in this Court by Counsel for the E. & N. Railway Company and by Counsel for Alpine Timber Company Limited, a Company which in the past has purchased tax free timberland from the E. & N. Railway Company, and because of the locality in which it carries on its operations will likely require to purchase more timberlands from the E. & N. Railway Company in the future. Counsel for the Dominion adopted the submissions put forward on behalf of the E. & N. Railway Company and Alpine Timber Company Limited.

REFERENCE 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?

A skeleton statement of facts is now given to indicate the foundation for the Reference questions, and to point to the nature of the contract alleged to exist by Counsel opposing the submissions of the Province.

On 20 August, 1883, Robert and James Dunsmuir and associates (hereafter called "the contractors") agreed in writing with the Dominion Government (Doc. vol. p. 42) to incorporate the Esquimalt and Nanaimo Railway Company and to construct, maintain and work continuously a railway and telegraph line from Esquimalt to Nanaimo, in consideration, inter alia, of a cash subsidy of $750,000.00 and a land subsidy and grant of some 1,900,000 acres on Vancouver Island, which the Dominion was to receive from the Province, in compliance with the Terms of Union when the Province entered Confederation.

Case p. 142

By para. 15 of that agreement between the Dominion and the contractors (Doc. vol. p. 45) the Dominion and the contractors

Case p. 146

agreed that the subsidy lands and the timber, etc., rights therewith were "subject in every respect to the several clauses, provisions and stipulations referring to or affecting the same respectively," contained in a document there described as a "draft bill" to be passed by the Provincial Legislature. The contract issue raised in this first Reference question turns mainly upon section 22 of the said "draft bill" (which later became the Settlement Act of 1883), reading (Doc. vol. p. 54); Case p. 156

> 22. The lands to be acquired by the company (the E. & N. Ry.) 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, ocupied, sold, or alienated.* (The italics are mine.)

The contractors agreed with the Dominion that the said agreement and the "draft bill" were to be placed in the hands of the Dominion agent (The Hon. J. W. Trutch), to be held by him in escrow until the Dominion Parliament should ratify the agreement with the contractors and the Provincial Legislature should enact the "draft bill" (Doc. Vol. 45, 46, and 109). The Province passed the "draft bill," which became the Settlement Act (Doc. Vol. p. 47) assented to 19 December, 1883, ("An Act relating to the Island Railway, the Graving Dock and Railway Lands of the Province"—C. 14, of 47 Vic. Provincial Statutes of 1884). The Dominion passed a Settlement Act of similar name (Doc. Vol. p. 56) assented to 19 April, 1884, ratifying in para. 2 thereof (Doc. Vol. p. 59) the aforesaid agreement with the contractors. The railway was built, the cash subsidy paid and on 21 April, 1887, under the Great Seal of Canada the Dominion by Letters Patent granted unto the Esquimalt and Nanaimo Railway Company all the subsidy lands, (Doc. Vol. p. 70).

Case p. 146, 147, 208
Case p. 150
Case p. 158
Case p. 161
Case p. 174

Neither the agreement between the Dominion and the contractors on 20 August, 1883, nor the Dominion Settlement Act of 1884 mentioned in specific terms provincial taxation of the subsidy lands forming the E. & N. Railway belt. But specific mention thereof is found in section 22 of the Provincial Settlement Act of 1883, which was section 22 of the "draft bill" the contractors and the Dominion had before them in the course of their negotiations which led to the above agreement of 20 August, 1883. The learned Commissioner concluded (Sloan Report p. 179) that "there never was any contractual relationship between the Provincial Government and the contractors in relation to the transfer of the Railway Belt to the Railway company;" and again (Sloan Report p. 183) "there is no contract between the

Case p. 262
Case p. 264

Province and the Company." Counsel for the Province upheld that finding, but Counsel respectively for the E. & N. Railway Company and Alpine Timber Co. Ltd., with the general concurrence of Counsel for the Dominion, submitted that the holding out of the "draft bill" and enactment of the Settlement Act of 1883, and in particular section 22 thereof, was an offer by the Province to the contractors which the latter accepted when they agreed with the Dominion to build the railroad and actually constructed it.

That is to say, the "draft bill" and in particular section 22 thereof is put forward as an offer by the Province to the contractors substantially in this form, "if you will built the railway upon the Dominion terms of payment in money and land, we (the Province) will exempt those lands from taxation in the language of section 22." The question therefore is, did the Province at any time during the period 1883-1887, enter into a contract with the contractors or the E. & N. Railway Company in the terms of section 22 of the "draft bill"? That is the contract urged by Counsel supporting the contract theory. That is the contract to which the present Reference question relates. Section 22 exempts the lands from taxation while they are owned by the E. & N. Railway Company. But section 22 states specifically that exemption ceases to exist as and when the lands are used by the E. & N. Railway Company for other than railroad purposes, or are leased, occupied, sold or alienated.

This preliminary analysis invites reference to three things. The first is that we are not concerned with section 22 in its purely statutory status. It stands as a statutory provision in the same way as any other statutory provision, viz., until it is amended or repealed. But the contract argument aims to give it more lasting virtue, viz., that it reflects a contract between the Province and the contractors that it would not be amended or repealed except as a breach of contract with consequential remedies to the contractors. The second feature is that the only contract set up is in the terms of section 22. No one has argued in support of a contract that the Province would not tax the lands once they are sold by the E. & N. Railway Company or "used for other than railroad purposes." That appears very clearly from the factum of Counsel for the E. & N. Railway Company at pp. 2, 12, 15 and 17. It will be discussed further in Reference question two.

In the third place Counsel for the Province raised the point that the conduct of the E. & N. Railway Company in holding out the lands for sale over a period of years and selling these lands

during that period (see Agreed Statement of Facts) was and is in itself a use of the lands for other than railroad purposes. But since the taxation questions in this Reference (excepting question seven in another aspect) are directed only to taxation of timberlands which the E. & N. Railway Company may sell in the future, I find no occasion to attempt to decide that question in this Reference. For the purpose of this Reference Counsel for the Province upheld section 22 as a valid statutory enactment but submitted that neither its language nor its intent continued immunity from taxation to lands after they have been sold by the E. & N. Railway Company.

I have reached the conclusion that the submissions of Counsel for the Province must be upheld that there was no contract between the Province and the E. & N. Railway Company or the contractors in the terms of section 22 of the Settlement Act of 1883 or otherwise in relation to the transfer of the E. & N. Railway belt to the E. & N. Railway Company. Appreciation of the points now to be discussed is aided by an understanding of some British Columbia history. Although the Province formally entered Confederation on the 20 July, 1871, nevertheless because of unfulfilled promises by the Dominion, it is sometimes said that its entry did not become a practical reality until the passing of the Settlement Act of 1883.

The Sloan Report, pp. 173-179, The Year Book of British Columbia, 1897, at pp. 47-66, and copies of official documents in the Document Volume before the Court are helpful references. The latter at pp. 94-113 includes in relevant part a Report by His Honour Judge Eli Harrison to the Provincial Government on 4 January, 1901, relating to the Settlers' Rights question in the E. & N. Railway land belt. That Report sets out in chronological order many of the events with which we are immediately concerned. It was an official investigation some seventeen years after the Settlement Act, 1883, at a time when many of the chief actors were still living. It discloses no hint of any contract between the Province and the contractors concerning the present subject-matter.

Case p. 253-262

Case p. 190-214

The grant of the subsidy lands by the Province to the Dominion was in compliance with the agreement of the Province in the Terms of Union when the Province entered Confederation on 20 July, 1871. In my opinion, for reasons to be stated, the Provincial "draft bill" containing section 22 referred to in the agreement between the Dominion and the contractors on 20 August, 1883, was not an offer by the Province to the contractors, but was in historical truth an acceptance by the Province of the

RECORD

Court of Appeal of British Columbia

No. 5
Reasons for Opinion O'Halloran, J.A.
June 10, 1947 (Contd.)

offer the Dominion made to the Province on 5 May, 1883, and which acceptance the Dominion produced to the contractors on 20 August, 1883, to induce them to enter into the agreement with the Dominion of that date to build the railway, and as an assurance to the contractors that the Dominion could and would carry out the terms of the agreement it was then negotiating with them.

The "draft bill" has been put forward as if it had been produced by the Province to the contractors as an offer by the Province to them, that the Province would provide the subsidy lands tax free if the contractors would enter into the agreement with the Dominion. Much might be said in favour of this submission if there was any evidence to support it. It is founded upon a theory of what might have happened under different circumstances. But examination of the historical setting and the events which occurred brings to light no factual basis which supports the existence of a contract, and see Doc. Vol. pp. 98-106. The surrounding circumstances are unfavourable to the contract theory. Examination of subsequent events fails to support the existence of a contract. While, if a contract did exist, it is extremely unlikely it would come to light for the first time some sixty years after the important events took place, I shall take nothing for granted, and will examine all the relevant conditions and circumstances with some particularity.

Case p. 194-205

Case p. 258

Under section 11 of the Terms of Union (Sloan Report 176) the Dominion undertook "to secure the construction" of a railway from "the Pacific towards the Rocky Mountains," etc. (in 1873 Esquimalt was fixed as the Pacific terminus—see Doc. Vol. pp. 5, 6, 13, and 97), and British Columbia agreed (Doc. Vol. p. 7):

Case p. 99, 101, 118, 193, 102

> To convey to the Dominion Government, in trust, to be appropriated in such manner as the Dominion Government may deem advisable in furtherance of the construction of the said railway . . . public lands . . . not to exceed . . . twenty miles on each side of the said line . . .

Nothing was said there about the taxes upon such lands. So long as the lands would be held by the Dominion, section 125 of the B.N.A. Act, 1867, would exempt them automatically from provincial taxation. But if the builders of the railway were to accept these lands from the Dominion in whole or in part as a subsidy, it must be apparent some question regarding tax exemption would be bound to arise. These lands were to be appropriated in such manner as the Dominion might "deem advisable in the furtherance of the construction of the Railway." If

the Dominion had not thereby the power to stipulate the rate of taxation or the tax exemption these lands should enjoy when held by the builders of the railroad, it was at least clothed with a potent bargaining power to that end.

The Province continued ready and willing to give the land grant to the Dominion if the latter would secure the construction of the railroad. In 1882, apparently dissatisfied with the Dominion's delays (Doc. Vol. p. 106) the Province attempted to take advantage of a local project to build a railroad from Esquimalt to Seymour Narrows. By the "Vancouver Land and Railway Company Act," C. 15 of the Statutes of 1882, assented to 12 April, 1882 (the "Clement Bill") that Company was authorized to construct the railroad (Doc. Vol. pp. 24 and 106). The Company was required to deposit $250,000.00 security. As against such deposit and the completion of the railroad the Province made provision in the "Clement Bill" for a grant to the Company of 1,900,000 acres on Vancouver Island which were to be (Sec. 21, Doc. Vol. p. 28),

Case p. 204

Case p. 108, 204

Case p. 112

> free from Provincial taxation until they are either leased, sold, occupied, or in any way alienated.

The Vancouver Land and Railway Company failed to deposit the required security. The Province approached the Dominion again in February, 1883, (Doc. Vol. 10-14) for settlement of the three outstanding problems, viz., the Mainland Railway lands, the Graving Dock and the Island Railway. On 5 May, 1883, the Dominion submitted proposals to the Province for settlement of the three questions, (Doc. Vol. p. 17). In respect to the Island Railway, the Dominion proposed that if the Province would grant the Dominion portions of the lands described in the "Clement Bill" supra, (to which statute the Dominion referred specifically), and would procure the incorporation of certain persons to be designated by the Dominion to build the railway from Esquimalt to Nanaimo, the Dominion would appropriate the said lands and $750,000.00 cash to the company so incorporated to build the Railway. If the Province accepted, the Dominion stipulated that the acceptance should be ratified by the Provincial Legislature in full settlement of all British Columbia claims against the Dominion.

Case p. 114-120

Case p. 124

The Province accepted the Dominion offer within three days (Doc. Vol. p. 18) and passed an Act accordingly, assented to on 12 May, 1883, known as "An Act relating to the Island Railway, the Graving Dock and Railway Lands of the Province," C. 14 of the Statutes of 1883 (Doc. Vol. p. 30). It is important to note here that the enactment of this statute on 12 May as appears from

Case p. 125-127

Case p. 129

Case p. 129 RECORD

Court of Appeal of British Columbia

No. 5

Case p. 135 Reasons for Opinion O'Halloran, J.A. June 10,1947 (Contd.)

its opening lines (Doc. Vol. p. 30) was the acceptance of the Dominion's offer of 5 May, which specifically stipulated that the acceptance be ratified by the Provincial Legislature. In that statute was contained, inter alia, the grant of the Vancouver Island lands to the Dominion and also the exact equivalent of section 22 supra (Doc. Vol. p. 36) which amplified somewhat the tax exemption clause in the "Clement Bill" of 1882. It thus becomes clear that the exemption from taxation which was put forward in this Court as an offer by the Province to the contractors on 20 August, 1883, was instead, part of the acceptance by the Province on 12 May, 1883, of the Dominion's offer of settlement made 5 May, 1883.

It is true nothing was said in the Dominion's offer of 5 May, 1883, regarding exemption from taxation. But the implication is too strong to be disregarded that the Province had come to consider exemption from taxation as an expected and essential feature of the Land Grant. It was plainly so treated in the "Clement Bill" in 1882. It is evident from the terms of its offer of 5 May, 1883, that the Dominion was familiar with the provisions of the "Clement Bill." In its negotiations with the Province in May, 1883, the Dominion would naturally look for no less than the Province was willing to give the Vancouver Land and Railway Company in 1882. Any group considering a land subsidy as an inducement to built a railway would naturally expect some relief from taxation in respect to the subsidy lands until they were sold, or until a named period would expire. In any event, the exemption appeared in the Act of 12 May, 1883, not as an offer to any one, but clearly as part of the Province's acceptance of the Dominion's offer of 5 May, 1883.

The Dominion desired some changes in the terms of the acceptance of the Province as contained in the Act of 12 May, 1883. The Dominion did not wish to make the railway a Dominion government work, which it claimed was the effect of the Act of 12 May, 1883, and see the Harrison report (Doc. Vol. p. 109),

Case p. 208

> On the 23 June, 1883, (it) appointed Sir Alexander Campbell to personally communicate with the Provincial Government on various questions unsettled between the two governments, and to urge a speedy meeting of the Provincial Legislature to amend Chapter 14 of 1883 (viz., the Act of 12 May); and to communicate with Mr. Dunsmuir or other capitalists desirous of forming a Company to construct the railway.

It is to be noted that the Dominion agent was to communicate with Mr. Dunsmuir concerning construction of the railway. No-

where was it suggested that the Province was to communicate with Mr. Dunsmuir in that respect, although Mr. Dunsmuir was then a member of the Provincial Legislature (Doc. Vol. p. 107). It was the obligation of the Dominion under the Terms of Union and embodied in its offer to the Province of 5 May, 1883, that it would secure the construction of the railway. The Province since 1871 had been holding the Dominion firmly to that obligation, and it is inconsistent with the historical setting and the trend of events to suggest now, that the Province in 1883 suddenly embarked on a course of conduct which would have relieved the Dominion from that obligation.

The Province was able to agree to the changes in the Act of 12 May, 1883, imposed by the Dominion and they were embodied in the memorandum of agreement which the two Governments signed on 20 August, 1883 (Doc. Vol. pp. 38 and 109). Case p. 140, 208
The Provincial Act of 12 May, 1883, as amended in red lines by the Dominion representative and containing section 22 was then accepted as the final expression of the terms of the Settlement Agreement between the Dominion and the Province. That Settlement Agreement was to become operative when ratified by the Dominion Parliament and the Provincial legislature. Para. Case p. 140
4 thereof (Doc. Vol. p. 38) reads:

> 4. The contract shall be provisionally signed by Sir Alexander Campbell on behalf of the Minister of Railways and Canals, but is to be deposited with Mr. Trutch (the Dominion Agent) awaiting execution by delivery until the necessary legislative authority shall have been given as well by the Parliament of the Dominion as by the Legislature of British Columbia.

The "contract" mentioned therein in my view must necessarily refer to the agreement between the Dominion and the contractors of the 20 August, 1883, which a careful study of the surrounding circumstances satisfies me must have been signed subsequently and most probably later the same day by the Dominion representative and the contractors. The agreement between the Dominion and the Province indicates the Province knew the Dominion was subsequently entering into an agreement with the contractors and that before the Dominion entered into that subsequent agreement with the contractors it was essential that the Dominion should first settle finally its long standing differences with the Province.

Para. 4 above cited of the agreement between the Dominion and the Province, was the assurance by the Dominion to the Province, that in consideration of what the Province expressed

RECORD

Court of Appeal of British Columbia

No. 5
Reasons for Opinion O'Halloran, J.A.
June 10,1947
(Contd.)

itself willing to do in the proposed "Settlement Act" (that is, the Act of 12 May, 1883, plus the Dominion amendments to which the Province agreed on 20 August, 1883, to be introduced and passed in the Provincial Legislature), and which included section 22, the Dominion would secure the construction of the Railway as it was required to do under the Terms of Union, by entering into the agreement with its contractors. But as a condition essential and precedent to its doing so, the Dominion required the most complete assurance (short of legislative ratification not then immediately possible) from the Province that the latter would grant the Vancouver Island lands to the Dominion according to the terms contained in the Settlement Act, one of which terms was section 22. It is manifest the Dominion could not have entered into its agreement with the contractors of 20 August, 1883, until it had obtained final assurance from the Province that it would receive title to the subsidy lands from the Province in accordance with the terms of the "draft bill," of which section 22 was one.

With this background it is easier to understand para. 15 of the agreement between the Dominion and the contractors of 20 August, 1883, reading (Doc. Vol. p. 45):

Case p. 146

> 15. The land grant . . . shall be subject in every respect to the several clauses, provisions and stipulations referring to or affecting the same respectively, contained in the aforesaid Act (the Provincial Act of 12 May, 1883) . . . as the same may be amended by the Legislature of the said Province in accordance with a Draft Bill now prepared, which has been identified by Sir Alexander Campbell and the Honourable Mr. Smithe, and signed by them, and placed in the hands of the Honourable Joseph William Trutch . . .

That was the assurance by the Dominion to the contractors that it had the land grant and would give it to the contractors free from provincial taxation as stipulated in section 22. The Dominion not only referred to the draft bill in that respect but produced it to the contractors, to show its ability and good faith.

That is in harmony with the conditions then existing. The contractors knew that the building of the railway was the sole responsibility of the Dominion. Mr. Robert Dunsmuir was and Mr. Bryden had been a member of the Provincial Legislature (Doc. Vol. pp. 79, 101 and 107) (Mr. Dunsmuir 1882-1889 and Mr. Bryden 1875-1878). They knew that negotiations between the Province and the Dominion had been proceeding for ten years with no success. They knew the Province blamed the Dominion for the lack of success. It is not surprising in the

Case p. 186, 198, 206

circumstances that when the Dominion promised the contractors the land subsidy, if they should have said, "show us first that you have title to the subsidy lands and that you can give them to us free from Provincial taxation." The Dominion's answer would then be—"the Province has not only so assured us by a prior agreement with the Dominion made this day, but we have as part of that agreement the exact form of the statute which the Province will enact and which enables us to assure you unreservedly that if you will build the railroad the land grant will be available free from Provincial taxation as contained in section 22."

Placed in its proper background the "Draft Bill" to which para. 15 referred, is seen to be so closely interwoven in the pattern of the Dominion's obligation to the Province under the Terms of Union which crystallized in the Dominion offer of 5 May, 1883, that it could not be regarded by anyone at the time as an offer by the Province to the contractors. It was in truth and appeared as nothing more than the acceptance of the Dominion's offer of 5 May, 1883, put in the form it was at the special request of the Dominion, so that the Dominion could give its own contractors complete assurance that the Dominion could and would do what it was undertaking to do in its agreement with its contractors. As part of the Dominion's assurance to the contractors, the "Draft Bill" was deposited together with the said Dominion's agreement with the contractors in the custody of the Dominion agent to be held until the Parliament of the Dominion had ratified the settlement with the Province and the agreement with the contractors, and the Legislature of the Province had ratified the settlement with the Dominion.

It is of some importance to observe also that the acceptance of the Dominion's terms in the "Draft Bill" of 12 May, 1883, contained section 10 (carried forward as section 10 in the "Settlement Act") which reads (Doc. Vol. 33, 34 and 52); Case p. 133, 154

> The Company may accept and receive from the Government of Canada, any lease, grant or conveyance of lands, *by way of subsidy* or otherwise, in aid of the construction of the said railway, and may enter into any contract with the said government for or respecting the use, occupation, mortgage or sale of the said lands, or any part thereof, on such conditions as may be agreed upon between the Government and the Company.

That is to say, it was agreed between the Province and the Dominion that the E. & N. Railway Company, which the Province was incorporating in that same statute at the specific request of the Dominion, should make all its arrangements regarding "the

RECORD

Court of Appeal of British Columbia

No. 5
Reasons for Opinion O'Halloran, J.A.
June 10,1947
(Contd.)

use, occupation, mortgage or sale" of the subsidy lands with the Dominion and not with the Province. It is difficult to envision conditions regarding the "use or occupation" of the subsidy lands which would not include conditions regarding the amount of the taxation of the subsidy lands or their exemption from taxation. By para. 10 such matters were to be settled between the contractors and the Dominion, and not the Province. This would not be affected by the fact that the Dominion might first have to settle many of these matters with the Province.

The fact the Province did not sign an agreement with the contractors must speak volumes in itself. The contractors had their agreement in writing with the Dominion. But even that written agreement was not to become effective until it was ratified by Parliament. It is difficult to believe that the three prominent British Columbians (Robert Dunsmuir, James Dunsmuir and John Bryden), let alone their prominent American associates (the Messrs. Crocker and Leland Stanford of San Francisco and C. P. Huntingdon of New York), could have seriously thought in the current circumstances that they had an agreement with the Province in the absence of a similar form of agreement in writing to be ratified by the Provincial Legislature. The agreement between the Dominion and the contractors of 20 August, 1883, specifically provided (Doc. Vol. p. 46) that it would not become operative until ratified by Parliament and until the draft bill was ratified by the Legislature. It is significant that while that agreement was required to be ratified by Parliament it was not required to be ratified by the Provincial Legislature.

Case p. 148

When they entered into their agreement with the Dominion on 20 August, 1883, the contractors knew from the opening words of that agreement that the Dominion and the Province had composed their long standing differences. The Dominion and the Province had entered into a separate agreement on the same day, the 20th August, 1883 (Doc. Vol. p. 38), and that was clear from the whole tenor of the contractors' agreement with the Dominion. The fact that the Province had a prior separate agreement with the Dominion on the same day, 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.

Case p. 140

Section 27 of the "Draft Bill" carried on as section 27 of the Settlement Act 1883 (Doc. Vol. pp. 37 and 54) provided that the E. & N. Railway Company should be entitled to the full benefit of the agreement to be entered into between the contractors and

Case p. 135, 157

the Dominion, and that such agreement should be construed as if the E. & N. Railway Company had been a party thereto under its own seal. The agreement itself when entered into provided the contractors should assign the agreement to the E. & N. Railway Company immediately after the latter was incorporated (Doc. Vol. p. 45). Said section 27 is significant in that if there had been an agreement between the Province and the contractors this was the place for it to have been mentioned. The fact that it was not then mentioned particularly when viewed in the light of the language used in section 27 and weighed in the current circumstances, carries the strongest kind of an inference that no such contract could have existed. It points rather to the conclusion that the Province took particular pains to make it clear, without abruptly saying so, that there was no such agreement and could not be.

Case p. 147

There is no real evidence of any negotiations between the Province and the contractors except in one respect relating to Clause "F" of the Settlement Act which I will refer to later, but it does not affect the important point now being examined. With this one exception (Clause "F") those supporting the contract theory produce no letter, document or communication at the time, to support any negotiation, let alone an agreement with the Province. There is, however, a powerful statement by James Dunsmuir one of the 1883 contractors, that there was no contract with the Province. That is one of several incidents subsequent to the construction of the E. & N. Railway which will now be referred to.

In March, 1904, the E. & N. Railway Company petitioned the Governor-General in Council to disallow the Provincial "Vancouver Island Settlers' Rights Act, 1904," on the ground it was an interference with the aforesaid contract between the Dominion and the contractors of 20 August, 1883. In that petition signed by James Dunsmuir, as President of the E. & N. Railway Company (Doc. Vol. p. 114) and speaking not only upon behalf of the E. & N. Railway Company but obviously also on behalf of all his associates of 1883 (in that they were required under the Dominion agreement of 1883 to assign it to the E. & N. Railway Company—see para. 15 thereof. Doc. Vol. p. 45) appear these significant statements (Doc. Vol. p. 116):

Case p. 216

Case p. 147
Case p. 219

(20) The Esquimalt and Nanaimo Railway Company made their contract as aforesaid (viz., the Dominion agreement of 1883) 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

RECORD

Court of Appeal of British Columbia

No. 5
Reasons for Opinion O'Halloran, J.A.
June 10,1947
(Contd.)

Government by the Provincial Government of British Columbia by C. 14 of 1884 (My note—the Settlement Act of 1883).

(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.* (The italics are mine.)

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.

In 1895, the E. & N. Railway Company represented to the Dominion that of the subsidy lands granted to it by the Dominion some 86,346 acres had been previously alienated by the Province. As the result of discussions between the Province and the Dominion the former in 1896 granted the Dominion a further 86,346 acres which the latter then gave the E. & N. Railway Company (Doc. Vol. pp. 74—91). On the point of where those additional lands were to be located the President of Provincial Executive Council reported on 5 June, 1896 (Doc. Vol. p. 79), that subsequent to the passage of the Act of 12 May, 1883:

Case p. 179-189, 227 p. 186

> the late Honourable William Smithe, Premier, and the late Honourable Robert Dunsmuir, M.P.P., in conference on the subject of the construction of the proposed railway, and on the administration of the lands comprised within the limits of the railway belt, caused an estimate of the area of the alienated lands . . . to be made and its position . . . defined . . . it was then agreed upon verbally by Mr. Smithe and Mr. Dunsmuir . . . that the 50th parallel should be taken as the line to the northward of which the Government should have the right to dispose of lands . . . and the true position of the boundary of the Railway Belt to the south of that parallel to be determined at a future date.

The above is evidence of an arrangement between the Premier of the Province and Mr. Robert Dunsmuir, M.P.P., as to the northern boundary of the subsidy lands. But it took place after the Province had accepted the Dominion's offer of 5 May, 1883 (and cf. *MacKay v. Atty-Gen. for B.C.*, 1922, 1 A.C. 457). It was not then even hinted that the contractors were a party to any contract with the Province relating to the actual transfer of the subsidy lands.

In 1910 the E. & N. Railway Company claimed compensation from the Province in respect to lands the Province had granted out of the E. & N. Land belt to other parties under the 1904 Settlers' Rights Act. By agreement of 21 October, 1909, ratified on 10 March, 1910, by the "Vancouver Island Settlers' Rights Ratification Act," C. 17, Provincial statutes of 1910 (Doc. Vol. pp. 122, 127) the Province agreed to give the E. & N. Railway Company 20,000 acres on Vancouver Island as compensation. But in that agreement there is no hint of any agreement with the Province in 1883. By that agreement the Province was compensating the E. & N. Railway Company for lands of which it had divested the company as found in *McGregor v. E. & N. Railway Company* (1907) A.C. 462. In the *McGregor* case the Judicial Committee said the Province had the exclusive right to amend or repeal the Settlement Act of 1883 in whole or in part. There was no suggestion that any part of that statute was founded upon a contract between the Province and the E. & N. Railway Company.

Case p. 214, 231

Another incident points to the non-existence of any contract between the E. & N. Railway Company and the Province. In 1912 when it proposed to lease its railway to the Canadian Pacific Railway Company, the E. & N. Railway Company took the precaution of first obtaining an agreement with the Province that such lease should not affect the exemption from taxation granted by section 22 supra (Doc. Vol. p. 129). The Province agreed therein that "notwithstanding such lease and operation, such exemption shall remain in full force and virtue." That agreement was ratified by the Legislature in the "Esquimalt and Nanaimo Railway Company's Land Grant Tax Exemption Ratification Act," c. 33 of the Statutes of 1912 (Doc. Vol. p. 128). If there had been any previous agreement with the Province in relation to section 22 it is hard to believe it would not have been referred to in the 1912 agreement. If the exemption in section 22 required confirmation in view of the lease of the Railway to the Canadian Pacific Railway, it would seem that any previous agreement relating thereto would equally require confirmation. The 1912 arrangement was

Case p. 238

Case p. 237

RECORD

Court of Appeal of British Columbia

No. 5
Reasons for Opinion O'Halloran, J.A.
June 10,1947
(Contd.)

carried through upon the premise that there had been no agreement between the contractors and the Province in 1883-1887.

No doubt Robert Dunsmuir had direct negotiations with the Province in 1882 before his application to incorporate the "Victoria Esquimalt and Nanaimo Railway" was defeated in the Provincial Legislature in favour of the "Vancouver Land and Railway Company" ("The Clement Bill" supra, C. 15 of the Provincial Statutes of 1882) to build a railway from Esquimalt to Seymour Narrows. The latter Company failed by default in depositing the required security, (Doc. Vol. p. 106). But the 1882 situation changed entirely as the result of the negotiations the Province initiated with the Dominion on 10 February 1883 (Doc. Vol. p. 10) and the resultant offer made by the Dominion on 5 May, 1883, and accepted by the Province. Some point was made also that in a foot-note to the contractors' agreement with the Dominion, Robert Dunsmuir had written under date of 20 August, 1883, (Doc. Vol. 46):

Case p. 204

Case p. 114

Case p. 148

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

If Dunsmuir and his associates had a contract with the Province on the terms of any of the provisions of the "Draft Bill" there would have been no occasion for them to "acquiesce" in the "Draft Bill." That acquiescence so expressed points to the non-existence of a contract with the Province. In para. 15 of the agreement between the contractors and the Dominion reference was made to "a draft bill." Dunsmuir's signed statement of acquiescence conveys nothing more than that he and his associates thereby assured the Dominion they had read the draft bill referred to in para. 15 and "acquiesced" in it, that is to say, they submitted to its provisions as part of their acceptance of the Dominion's terms.

A point was made also that in the Letters Patent whereunder the Dominion granted the lands to the E. & N. Railway Company on 21 April, 1887, (Doc. Vol. pp. 70-73) reference is made to an agreement between the Dominion, the Province and the Company. But that (Doc. Vol. p. 72) is found to refer to the description under which the lands were to be granted by the Dominion in the Letters Patent. It was something consequential arising after the railway had been built, and relating only to the correct legal description of the lands. This situation arose because there does not appear to have been a formal grant or conveyance of the subsidy lands by the Province to the Dominion (at least none has been

Case p. 174-179

Case p. 177

produced or mentioned). The Dominion's title to the lands seems to rest upon section 3 of the Provincial Settlement Act of 1883 and the brief general description there set out. Again it refers to clause "F" of the Settlement Act, 1883, which was the one point upon which the Province had direct contact with the E. & N. Railway Company, first, in obtaining the company's assent to clause "F" in 1883, and secondly in administering the Settler lands as agent of the Dominion.

In para. 2 of the agreement between the Dominion and the Province on 20 August, 1883, (Doc. Vol. 38) it was stipulated that the Province would procure the assent of the contractors to clause "F" as it ultimately appeared in the Settlement Act of 1883. This related to certain lands to be open for settlers for four years and which the Dominion was to administer as agent for the Dominion. If the Dominion and the Province had intended that there was any other subject-matter in addition to clause "F" which the Province was to arrange directly with the contractors, one would expect it to have been stipulated also in the said agreement between the Dominion and the Province. If the said Dominion Grant of 1887 intended reference to any other agreement it must be regarded as a patent error, for there is no foundation in the terms of the Grant other than the two things mentioned which can relate to an agreement between the Province and the Company. If there had been such an agreement one must conclude it would have been ratified by the Provincial Legislature at the time, in accordance with the caution which was exercised in the ratification by Parliament of the Dominion's separate agreements with the Province and the contractors and the Legislature's ratification of the terms in which it accepted the Dominion's offer of 5 May, 1883.

Case p. 140

The Province granted the subsidy lands to the Dominion by the Settlement Act, 1883, subject to the rights of certain classes of settlers and squatters, see section 23 and clause "F" already referred to (Doc. Vol. pp. 48 and 54). In 1904 and again in 1917 the Province passed legislation giving title to such persons. On both occasions the E. & N. Railway Company applied to the Dominion for disallowance of that legislation (Doc. Vol. pp. 114-122 and 131-138). The E. & N. Railway Company's rights in this respect were largely founded on section 6 and 23 of the Settlement Act, 1883. It was at no time suggested by the E. & N. Railway Company that the subject-matter of these sections contained any contract between the Province and the contractors. It would have been a powerful argument on the Company's behalf if it could have set up such a contract. The fact that the company did not then do so (as already pointed out James Dunsmuir in 1904 denied

Case p. 151, 156

Case p. 216-226
Case p. 240-249

RECORD

Court of Appeal of British Columbia

No. 5
Reasons for Opinion
O'Halloran, J.A.
June 10, 1947
(Contd.)

categorically the existence of such a contract—Doc. Vol. p. 116) points most conclusively to the non-existence thereof.

In 1918 the then Misister of Justice, the Honourable Charles J. Doherty, in reviewing the application of the E. & N. Railway Company to disallow the 1917 Provincial Settlers' Rights legislation, said in his report to the Governor-General in Council (Doc. Vol. p. 135):

> It was urged, and in fact it was not denied that the Company had received its land grant in pursuance of the agreement of the Government of Canada founded upon legislation sanctioned by the Dominion, and the Province, which defined precisely the measure of the settlers' claims.

In the course of his report the Minister (Doc. Vol. 137) referred to the Settlement of 1883 as a "tripartite agreement." But examination of the context induces the conclusion that was a verbal slip. Some fourteen lines previously (Doc. Vol. p. 137) the Minister made it clear that the contract was with the Dominion and not with the Province; he said:

> . . . the Company is certainly justified to look not only to the Province, *but also to the Dominion with whom it contracted,* and from whom it received its grant . . . (The italics are mine.)

It is clear that up to 1918 in any event no one had ever suggested the existence of a contract between the Province and the contractors. There may have been a ground for setting up such a claim in regard to settlers' rights which does not exist in respect to taxation and section 22, for as already pointed out under the agreement between the Province and the Dominion of 20 August, 1883 (Doc. Vol. p. 38) the Province was to obtain the assent of the contractors to clause (F) as it appeared in the Settlement Act (Doc. Vol. p. 48) which related to settlement of lands and administration thereof by the Province. But at no time does it appear that the E. & N. Railway Company ever attempted to link itself by agreement with the Province even upon that foundation. Conversation between Premier Smithe and Robert Dunsmuir, M.P.P. in 1883 (see Doc. Vol. 79) in that respect were not sought to be magnified into the status of an agreement. As already noted, James Dunsmuir in 1904 categorically denied the existence of such a contract; furthermore the Harrison report in 1901 (supra) did not disclose the existence of such an agreement.

Some point was made that on 16 November, 1885, the Provincial Commissioner of Lands in the course of writing to the

Dominion special agent concerning the operation of Clause (2) (Doc. Vol. p. 38) respecting Settlers' Lands (Clause "F" supra) in the agreement of 1883 between the Province and the Dominion, described the Province (Doc. Vol. p. 68) as the "real principals in the matter of this railway and these lands." This was loose and inexact language. The whole record was against it. Moreover, in the immediately previous paragraph the Provincial Commissioner had conceded that under the agreement the Dominion were the real principals. The obligations of the Dominion under the Terms of Union were the obligations of a principal. The Dominion could not be the agent of the Province. For the Province could not be the principal for the doing of a thing which it had insisted all along was not its obligation, but the obligation of the Dominion.

Case p. 140

Case p. 173

In the historical setting of the events which occurred the contractors could not fail to realize that the Province could not assume responsibility for the construction of the railway, for that was the obligation of the Dominion under the Terms of Union, and the failure to carry out that obligation had been the cause of much bitterness and agitation in the Province. It would be plain to the contractors, moreover, that the Dominion was contracting with them as principal and not as agent or trustee for the Province.

It is not to be overlooked that the contractors were the group specifically selected by the Dominion and designated by it to build and operate the railway. In February, 1883, the Province implored the Dominion to build the railway or give the Province compensation for failure to do so (Doc. Vol. p. 14). On 5 May, 1883, the Dominion made proposals for settlement (Doc. Vol. p. 17) which the Province accepted three days later (Doc. Vol. p. 18). Para. 4 of those accepted proposals (Doc. Vol. p. 17) was

Case p. 119

Case p. 124-127

Case p. 124

> 4. The Government of British Columbia shall procure the incorporation, by Act of their Legislature, of certain persons to be designated by the Government of Canada for the construction of the railway from Esquimalt to Nanaimo.

The contractors came into the picture through the Dominion (Doc. Vol. pp. 42 and 114). There was no occasion for the Province to deal with the contractors. The contractors were the nominees and responsibility of the Dominion. The Province was dealing with the Dominion and the Dominion alone. The Province gave the Dominion what the latter wanted for its contractors. But the Province gave it to the Dominion and not to the contractors.

Case p. 142, 217

RECORD

Court of Appeal of British Columbia

No. 5
Reasons for Opinion O'Halloran, J.A.
June 10,1947
(Contd.)

This review of what occurred at the material times as reflected in the copies of the official documents produced for our study on this Reference leads me to the firm conclusion that the contract argument must fail. In my judgment no facts or circumstances have been disclosed to justify the legal inference that the Province had by plain implication entered into the alleged agreement with the contractors. (cf. *Canadian Pacific Railway Co. v. The King* —1931—A.C. at 430). In my judgment the documentary picture of the events as they occurred and which I have examined at some length, is destructive of that view which upholds the contract theory.

For the foregoing reasons I am of opinion the first Reference question ought to be answered in the affirmative.

REFERENCE 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?

In answer to Reference question One I have found there was no contract between the Province and the E. & N. Railway Company within the meaning of Reference question One. But this present Reference question may present two aspects. First, that the "contract" to which it refers is confined to the subject-matter of the first Reference question, viz., an agreement between the Province and the contractors in relation to the transfer of the Railway Belt to the E. & N. Railway Company; and secondly that the "contract" to which it refers may extend beyond the terms of Reference question One and include the agreement between the Province and the E. & N. Railway Company of 17 February, 1912 (Doc. Vol. p. 129).

Case p. 238

On the first aspect, if contrary to what I hold, there was such a contract, then for reasons given in answer to the first Reference question, that contract must be that the Province agreed with the contractors, that if the latter contracted with the Dominion to build the railway, the Province would exempt the subsidy lands from taxation so long as the said lands in the language of section 22 were not (Doc. Vol. p. 54) "used for other than railroad purposes or leased, occupied, sold or alienated."

Case p. 156

But none of the legislation herein outlined, if enacted (except that in Reference question Seven discussed later) would be in violation of such a contract. Any tax outlined in the Reference questions (except Reference question Seven) arises only if the timberlands cease to be owned by the E. & N. Railway Company,

or otherwise become taxable within the language of section 22. The Reference questions with the one exception of Reference question Seven, make clear beyond doubt that no tax is to apply while the ownership of the timberlands remains in the E. & N. Railway Company. The conclusion is therefore inevitable, that with the exception of that described in Reference question Seven, none of the outlined legislation if enacted can be in derogation of the provisions of the contract now assumed to exist for the purpose of answering this question.

Reference question Seven falls into another category. I am obliged to find later in answer to that question, that the Forest Protection Fund Tax is in its nature a tax and not a service-charge. Once it is found to be a tax, it is a tax upon lands owned by the E. & N. Railway Company and hence would be in derogation of the contract which is deemed to exist for the purpose of answering Reference question two.

Turning to the other aspect of the question as related to the agreement between the Province and the E. & N. Railway Company of 17 February, 1912: Before leasing its railway for operation to the Canadian Pacific Railway in 1912, the E. & N. Railway Company desired to be assured by the Province that such a step would not affect the exemption from taxation found in section 22 (Doc. Vol. 129). The Province then agreed that such a step

Case p. 238

> shall not affect the exemption from taxation enacted by the said Clause 22 of Chap. 14 of the Statutes 47, Victoria (The Settlement Act, 1883), and notwithstanding such lease and operation such exemption shall remain in full force and virtue.

That agreement was ratified by the Provincial Legislature by C. 33 of the Statutes of 1912—assented to 27 February, 1912, under the expressive title, the "Esquimalt and Nanaimo Railway Company's Land Grant Tax Exemption Ratification Act." That ratified a clear-cut agreement with the Province that the tax exemption should remain in full force and virtue. Whereas before that agreement the tax exemption depended on statute alone, after the agreement its status rested on the mutual agreement between the Province and the E. & N. Railway Company, ratified by statute that "it shall remain in full force and effect."

I must hold that any proposal which would impose a tax on lands of the E. & N. Railway Company while held by that Company, within the exemptions contained in section 22, would be in derogation of the aforesaid agreement of 17 February, 1912, as

ratified by the Legislature. But for reasons already stated, I must conclude that none of the taxes outlined in the Reference questions, with the exception of Question Seven, are in derogation of that agreement.

It must be emphasized that the contract or "contractual relationship" to which Reference questions one and two are directed, relates to taxation of timberlands while they are owned by the E. & N. Railway Company. Those questions do not relate to taxation of timberlands after the latter cease to be owned by the E. & N. Railway Company. The learned Commissioner found (Sloan Report p. 184) Case p. 265

> The Province never at any time agreed by contract or statute or otherwise to treat the E. & N. lands as tax free when sold to third persons.

But that finding was not questioned in this Court. As stated supra, prior to and during the examination of Reference question One, Counsel for the Province upheld section 22, but submitted that neither its language nor its intent continues immunity from taxation to the lands after they have been sold by the E. & N. Railway Company. Counsel for the E. & N. Railway Company and supporting Counsel did not contend section 22 exempts from taxation lands sold by the E. & N. Railway (see pp. 2, 12, 15 and 17 of factum of J. E. McMullen, K.C.). There was no division of opinion on the meaning of the language of section 22 in that respect. The sole difference was, Counsel for the Province said section 22 was not a contract with the Province, nor founded on a contract with the Province, while Counsel for the other parties said it was. No Counsel before this Court argued in support of a contract whose terms vary from the plain provisions and language of section 22.

However, Counsel for the E. & N. Railway Company and Counsel for Alpine Timber Company Limited supported by Counsel for the Dominion, urged strongly before this Court that the tax legislation outlined in the Reference questions, no matter what form it may take, and despite the fact that it will be imposed not on the E. & N. Railway Company itself, but upon the purchasers and successors in title of its timberlands (see para. of p. 14 of Agreed Statement of Facts), is nevertheless a derogation from the contract (which is assumed to exist for the purpose of answering this question). The argument is grounded upon the submission that the E. & N. Railway Company will not receive as good a price for its timberlands once such a tax is imposed. It is said such a tax will in effect take away from the E. & N. Railway

Company part of the consideration it received from the Dominion for the construction of the railway; that it will take away from the E. & N. Railway Company part of the sale value of the land; hence it is said the result will be the same as if the Province taxed the land while owned by the E. & N. Railway Company.

It seems to me, with respect, that a short but complete answer to that submission is found in the Sloan Report, p. 184:

> The Railway Company assumed title to these lands on the terms set out in said section 22 and cannot now complain of the basis on which its title rests.

The E. & N. Railway Company could not have failed to realize in 1883, that any land it sold must immediately, by virtue of section 22, lose its exemption from taxation, and hence become liable to provincial taxation. That must have been clear as well to any intending purchaser from 1887, onward. The consideration the E. & N. Railway received from the Dominion in the form of subsidy lands was made expressly subject to provincial taxation once the lands were sold. That was the plain agreement with the Dominion. If it had been acted upon from the start in 1887, I doubt if another word would have been heard about it, for section 22 was and is too plain in that respect. Instead of such a tax derogating from section 22, it is expressly authorized thereby.

For the foregoing reasons I am of opinion that the second Reference question ought to be answered in the negative, except insofar as it is affected by the answer I give to Reference Question Seven.

REFERENCE 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?*

I have found in answer to Reference Question One that there was no contract between the Province and the E. & N. Railway Company in relation to the transfer of the Railway Belt to the E. & N. Railway Company. I have found in answer to Reference Question Two, that even if there was a contract with the Province it would not be derogated from (or "breached") by any form of tax outlined in Reference Questions four, five, and six, (subject of course to the legal competence of the Province to impose such taxes), but would be derogated from by the form of tax outlined in Reference Question Seven.

RECORD

Court of Appeal of British Columbia

No. 5
Reasons for Opinion O'Halloran, J.A.
June 10,1947 (Contd.)

It follows this third Reference question has already been answered to this extent, viz., that there is no contract between the Province and the E. & N. Railway Company which would be breached by imposition of any tax recommended by the Commissioner which comes within the confines of Reference Questions four, five and six. But Reference Question three is directed to "the tax recommended by the Commissioner." Since it is made the subject of a separate question, it may convey the implication that it is not wholly or necessarily comprised in the taxes reflected in questions four, five and six. It is noted that in his factum at p. 15 Counsel for the E. & N. Railway Company seemed to think that this question was involved in Reference Question One.

That leads to the query—what was the "tax recommended by the Commissioner" within the meaning of this third question? The learned Commissioner recommended what he called a "severance tax," but did not define it, see supra (Sloan Report p. 184). This aspect has been touched on immediately prior to examination of Reference Question One. I repeat the conclusion there expressed that in the absence of a definition of "severance tax" by the learned Commissioner, and in view of the fact that it is not a term of art, it is to be accepted in a wide and general sense to embrace any and all kinds of taxes within the legal competence of the Province to impose, once the timberlands lose the exemption from taxation found in section 22 of the Settlement Act, 1883.

Case p. 266

Counsel for Alpine Timber Co. Ltd. in particular sought in this Court to attach a restricted meaning to the learned Commissioner's use of the term "a severance tax." He filed with this Court copies of Oregon and Washington Statutes relating to "yield taxes" upon severance of timber and also filed a copy of an extract from the submission of Counsel (H. W. Davey, K.C.) to the Sloan Commission in favour of "a severance tax, or sales tax, or a yield tax" upon grantees from the E. & N. Railway Company which could be made equal to the Royalties presently payable by holders of other Crown-granted timber. But since the learned Commissioner did not define the severance tax he recommended, I think it is but fair to conclude that he purposely refrained from doing so, and intended only to point to the economic desirability of some tax within the Provincial competence. It is true he mentioned (Sloan Report p. 184)

Case p. 266

> . . . a severance tax . . . upon all timber cut upon lands of the Railway Company, after the same are sold or otherwise alienated by the Railway Company.

That might appear as if it were a tax upon the severed timber (personalty) but not upon the land. It might appear also perhaps as if it might be "yield tax" or a "sale tax." But these inferences are weakened by the next sentence (Sloan Report p. 184):

> I do not recommend that this tax apply to lands already sold by the company,

which indicates the learned Commissioner was thinking in terms of a tax upon land, to be collected when the timber crop off the land was harvested, so as not to impose hardship upon holders of timberlands, who are faced with the necessity of holding their timberlands many years before the timber can be cut and sold to advantage.

In his letter to the Attorney-General of the Province on 22 November, 1946, quoted, supra, immediately before examination of Reference Question One, the learned Commissioner said:

> I might mention that the term "severance tax" appearing in the Report was not used by me in any technical or narrow legal sense. Nor was its use intended to restrict the Government from seeking judicial determination of the constitutional competence of any form of taxation legislation within the spirit and intendment of my recommendations.

When due weight is given the language of the recommendation in my judgment it is the proper conclusion that the learned Commissioner intended generally thereby either a tax on the severed timber itself, or a tax on the land before the timber is severed but payable after it is severed, and respectively envisioned by Reference Questions four (on timber as and when cut) and five and six (upon the land). I did not understand any Counsel in this Court to contend that "the tax recommended by the Commissioner," to which this Reference question refers, was not fully included in Reference Questions four, five, six and seven.

But even if the learned Commissioner's recommendation could be read in a restricted sense, I am of opinion that the scope of the Reference questions ought not to be so limited, in the absence of imperative language in any particular Reference question so limiting it. It is true that Reference Questions One and Three are directly based upon the Commissioner's findings. In these questions, the Court must answer whether "the Commissioner was right in his finding." But that does not apply to the remaining Reference questions. In my opinion the Court ought to reject an argument based upon the premise that the purpose and object of the taxation legislation outlined in the Reference

RECORD

Court of Appeal of British Columbia

No. 5
Reasons for Opinion O'Halloran, J.A.
June 10,1947
(Contd.)

questions is to be interpreted solely by the recommendations in the Sloan Report. This does not mean the recommendations in the Sloan Report are to be ignored. It means that the Sloan Report ought to be regarded as one only of many factors properly operating on the mind of the Government of the Province. To make it the dominating factor, unless a particular Reference question is thus expressly limited, is to impose a restriction which I do not think is in the public interest, and is one which could not have been intended. I find nothing in this view to conflict with what was said in *Atty. Gen. for B.C. v. Atty. Gen. for Canada* (1937) A.C. at 376.

There was something more than a faint suggestion that the learned Commissioner's recommendation of a "severance tax," could mean only a tax upon the timber as severed, and could not mean a tax upon the land payable when the timber is severed. That argument was used as a foundation to urge that it was an indirect tax (considered in Reference Question Four) and hence ultra vires of the Province. From that conclusion it was submitted in turn that the Reference questions five and six relating ex facie to a tax upon land payable as and when the timber is cut, and amounting to the equivalent of prevailing royalties, must be regarded in the background of the learned Commissioner's recommendation for a "severance tax," as a scheme planned by the Province to do indirectly what it cannot do directly.

I am unable to accept that construction of the learned Commissioner's recommendation. Not only did he not by restrictive definition so confine the meaning to be attached to the use of "a severance tax," but the language of his recommendation quoted supra indicates sufficiently that he did not exclude a tax upon land. Furthermore I find difficulty in appreciating an argument that "a severance tax" cannot be a tax upon land as it appears in the context of the learned Commissioner's recommendation. Neither in the recommendation of the Sloan Report, nor in the proposed Reference questions is there to be found any suggestion of severance of the timber before the land of which the timber forms a part, is leased, occupied, sold or alienated within the meaning of section 22: and see *Glenwood Lumber Co. v. Phillips* (1904) A.C. 405; *McPherson v. Temiskaming Lumber Co.* (1913) A.C. 145; *Kirk v. Ford* (1920) 3 W.W.R. 91 (Sask. C.A.), Lamont J. A. at 96-98, and section 2 of the "Sale of Goods Act" c 250, R.S.B.C. 1936.

Land which grows things acquires value and hence taxable value from the things it grows. Its taxable value is affected by

its potential and actual economic use; and see Doc. Vol. p. 139. Most things land grows are harvested annually. But timber may be harvested once perhaps in eighty or more years (on the British Columbia Coast). To overcome the hardship of annual tax payments over an eighty-year period, an equitable plan is sought to impose a tax on the land payable as and when the timber is cut and marketed. In the result the timberland owner may pay eighty years' taxes during the years in which he cuts and sells his timber crop, in the same way the potato or apple grower pays his land taxes out of the proceeds of the sale of his annual crop of potatoes or apples. The potato and apple growers pay their land taxes out of the monies they receive for their product after it is severed from the land and sold. Their land taxes could be described loosely as a severance tax instead of a land tax. But no one thinks of doing so when the crop is harvested annually. To my mind there is no real difference in principle whether the crop is harvested once a year or every five, twenty, fifty or more years. It is the land which produces the crop, but it is the crop which gives the land its economic value. One of the most important recommendations in the Sloan Report, as I read it, lies in what is called the "sustained yield" plan. Methods of cutting, fire-protection, and re-seeding are to be combined to place the forest industry on a crop basis. Instead of cutting out our forests once and for all as if they were coal or metal mines, economic reforestation is to be fostered to place our timber industry on a recurring crop basis.

For the foregoing reasons I am of the opinion the third Reference question ought to be answered in the affirmative.

REFERENCE 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 on board measure in the timber cut, be ultra vires of the Province?

Put shortly, is such a tax direct or indirect? The tax is on the timber as and when cut; it is to be a fixed sum per thousand feet board measure in the timber cut. It is not a tax on land. It does not arise until the timber is severed from the land and becomes personalty.

Whether the tax is indirect depends upon its tendency "to enter into and to affect the price of the product," per Duff, J., in *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction* (1931) S.C.R. 357, at 362. That tendency is not ascertained

RECORD

Court of Appeal of British Columbia

No. 5
Reasons for Opinion O'Halloran, J.A.
June 10,1947 (Contd.)

by the "results in isolated or merely particular instances" per Viscount Haldane in *Atty. Gen. of B.C. v. C.P.R.* (1927) 96 L.J. P.C. 149 at 151. That tendency as Lord Hobhouse said in *Bank of Toronto v. Lambe* (1887) 56 L.J.P.C. 87 at 89, is

> Referable to, and ascertainable by, the general tendencies of the tax, and the common understanding of men as to those tendencies.

And see *Halifax (City) v. James P. Fairbanks Estate* (1928) 97 L.J.P.C. 11 at 14-15, and *Turner's Dairy Ltd. et al v. Lower Mainland Dairy Products Board et al* (1941) 56 B.C. at 148-9 and as affirmed (1941) S.C.R. at 583.

The forest industry has been for many years one of the largest, if not the largest, industry in the Province. The great bulk of the timber cut upon timberlands is manufactured into lumber and a variety of other wood products in sawmills and in pulp and other mills and factories in the Province. The timber when cut becomes a commercial product which enters into the manufacture of an increasing variety of products. In the way the timber business has been carried on in this Province for a long time "the general tendencies" of any tax on timber as and when cut, measured by the "common understanding of men as to those tendencies" would be for the owner of the cut timber to pass on that tax in such a way that the tax would enter into and affect the price of the various manufactured products.

I see no escape from the conclusion that the tax in Reference Question Four is an indirect tax and see *Rex v. Caledonian Collieries Ltd.* (1928) 97 L.J.P.C. 94 and *Atlantic Smoke Shops Ltd. v. Conlon* (1943) 112 L.J.P.C. 68 at 71-2 and 73. It is a tax which necessarily enters into the cost of the cut timber and its products at each stage of subsequent handling and manufacture. It cannot be described as a tax whose incidence is by its nature such, that normally it is finally borne by the first payer because it is not susceptible of being passed on; and see *Atty.-Gen for B.C. v MacDonald Murphy Lumber Co.* (1930) A.C. at 364-5.

For the foregoing reasons I am of opinion that the Fourth Reference question ought to be answered in the affirmative.

REFERENCE QUESTION FIVE:

(Note.—This question is numbered six in the Order in Council.)

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.

This question on its face outlines a direct tax on land within Provincial competence but (*a*) the owners of such land shall not be taxed (that is, the tax shall not be imposed) until the merchantable timber shall be cut and severed from the land, and (*b*) the tax then imposed shall approximate the prevailing royalties on timber which is subject to royalties. It is stipulated that the owner of the land shall be liable for payment of the tax and also that the tax until paid shall be a charge on the land. Objections are taken to it (1) that it is colourable, in that it attempts to do indirectly what it is said cannot be done directly; (2) that it is an indirect tax in that although it falls first on the purchaser from the E. & N. Railway Company, it is passed backward and borne ultimately by the E. & N. Railway Company by absorption in its contract sale price; and (3) that it is an indirect tax because it is so excessive it is plain it must be paid by some one else than the owner of the timberland.

The first objection has two branches. First, it is said this ex facie land tax is a royalty in disguise. Secondly, it is said that what is really being planned under the guise of a land tax, is to impose a tax upon the timber as and when cut, as outlined in Reference Question Four, which is ultra vires as an indirect tax.

Considering first the royalty branch, the submission here is that the learned Commissioner has said in practical effect that although it is too late to make the E. & N. Railway Company timberlands subject to royalty, yet he recommends the same result should now be obtained by the backdoor method of imposing a tax equivalent to the prevailing royalties. It is submitted that with the learned Commissioner's report before it, the Province is now seeking to impose a tax which is a royalty in disguise. The prevailing tax on timberlands in the Province (except on that held

RECORD

Court of Appeal of British Columbia

No. 5
Reasons for Opinion O'Halloran, J.A.
June 10, 1947
(Contd.)

by the E. & N. Railway Company, which is exempt under section 22 supra) is one and a half per cent. of its assessed value ("Taxation Act," C. 282, R.S.B.C. 1936, section 41). That is contrasted with the tax recommended by the learned Commissioner to approximate prevailing royalties. It is said that the tax as outlined is so greatly different in amount that it has nothing in common with the "one and a half per cent. land tax"; that the rate is so high that it is deprived of all the indicia of a land tax in its accepted sense; that the rate and time and method of collection so closely resemble a royalty it is a rational conclusion, that in practical reality what is outlined in the form of a tax, is in essence a royalty which the Province is not now competent to reserve since it granted all the timber with the land to the Dominion in 1883.

When the Province granted the subsidy lands to the Dominion in the Provincial Settlement Act of 1883, that grant included all the standing timber on such lands; (see sec. 25 of the Settlement Act, 1883, Doc. Vol. p. 54; para. 15 of the 1883 agreement between the Dominion and the contractors, Doc. Vol. p. 45 and the Sloan Report pp. 86-89). Prior to 7 April, 1887, Provincial lands were crown-granted without any reservation of royalty of the timber thereon (Sloan Report, p. 88). The E. & N. Railway Company received title to the lands from the Dominion on 21 April, 1887, without any reservation of the timber thereon. Without attempting a comprehensive definition of the term "royalty" (and see section 109 of the B.N.A. Act, 1867 and also *Atty. Gen. of Ontario v. Mercer* (1883) 8 A.C. at 778; *Rex v. Atty. Gen. of B.C.* (1924) A.C. 213 and *Toronto City Corporation v. The King* (1932) A.C. at 103) it may be said in so far as it is required to be said here, that a royalty on timber in the current context is a reservation to the Crown of an interest in timber. It is a "reservation to and for the use of His Majesty upon and in respect of timber cut . . . subsequent to the seventh day of April, 1887" (section 56 (1) the Forest Act, C. 102, R.S.B.C. 1936).

Case p. 157
Case p. 146

It seems to me, with respect, that the fundamental distinction between a tax and a royalty is so clearly marked that there is no room for confusion between the two. A royalty retains an interest in the subject-matter, a tax does not. How can a tax be said to be colourable in that respect unless it is designed to retain an interest in the subject-matter? The tax in question does not even remotely tend to do so. Reference Question Five makes it plain that the full and complete ownership of land and standing timber thereon must vest in the purchaser from the E. & N. Railway Company before the tax can be imposed. That makes it clear not only that it is not a royalty, but that it cannot be mistaken for a royalty.

Moreover, section 61 (3) of the "Forest Act" C. 102, R.S.B.C. 1936 goes some distance to make it clear that a royalty is not to be considered as taxation.

But is it said that the tax is designed as a royalty to function colourably as a tax because it is recommended that the amount of the tax shall approximate the prevailing royalties. With respect, that similarity is too superficial to mislead anyone, when the fundamental distinction between royalty and tax is so clearly preserved. No one would be heard to say (for example) that because a black man pays the same amount of taxes to the Government as a white man, that he must therefore be a white man. Once a Crown grant to land has been given which includes the timber, it is obviously too late to reserve an interest by way of royalty in the timber. The Province does not attempt to do so. It says the tax outlined in this Reference question plainly expresses a desire to impose a tax and not a royalty. It says that once the complete ownership of land and timber passes to a purchaser from the E. & N. Railway Company, that no question of royalty can possibly arise in the mind of any rational person; such a person perhaps may regard the tax outlined as too high, but he cannot, as a rational person, regard it as a royalty. Whether or not the tax is too high is quite another question, depending on the valuation of the timberlands, and the rate of taxation thereon, which latter in turn is necessarily a matter of Provincial policy and administration.

Again 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 Provincial legislation. If the timber royalty system had not been introduced into British Columbia, I think there is little doubt that methods of taxing land bearing valuable timber would long since have been devised, to assure the Province on the one hand of the receipt of substantial financial benefits from timber lands, but providing for its collection and payment on the other hand, at times least likely to impose hardship upon the holders of valuable timberlands. 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 a colourable tax on its products, and that such a tax is not in truth a tax on the land itself. That would be a revolutionary proposition, which 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. This is not to say, however, that the product when

RECORD

Court of Appeal of British Columbia

No. 5
Reasons for Opinion O'Halloran, J.A.
June 10, 1947.
(Contd.)

severed from the land, may not in itself be subject to a tax which has no economic or legal relationship to a land tax.

The land tax in Reference Question Five may provide results in terms of revenue to the Province, equal to the financial benefits derived from a royalty system, and little difference may appear in the time and method of collection. But despite these similarities, there will remain apparent to all, the fundamental distinction that a royalty is a reservation of an interest to the Crown. In none of the forms of tax outlined is there the slightest indication of an attempt to do the impossible, viz., to reserve an interest to the Crown in the right of the Province, which was granted to the Dominion in 1883. If the Province is competent to impose a tax on land for Provincial purposes as it is, then the circumstance that the tax may procure the same financial results and benefit to the Province as a royalty cannot in itself affect the issue.

If the Province may by a land tax within its legal competence obtain the same financial benefits at similar times and by apparently similar methods of collection as under a royalty system, then it cannot be said to be doing indirectly what it cannot do directly. Both systems are within the competence of the Province. The fact that it has pursued one method does not destroy its power to pursue the other in its own time, should occasion arise so to do in the public interest. Here there is no ground to say the Province is attempting to reserve, acquire or confiscate an interest in the timber on the timber lands. It does not seek to inter-meddle with the taxpayers' entire ownership of the land and standing timber thereon, and cf. *In re Insurance Act of Canada* (1932) A.C. at 51. That being so, there is no ground to say the tax is a royalty in disguise. The Province is not attempting to do anything indirectly which it cannot do directly. On the contrary, it is doing directly what it has power to do, viz., impose a tax on land in the Province for Provincial purposes.

A great deal was said regarding what was called the discriminatory aspects of the legislation outlined in Reference questions five and six. But this argument failed to take into consideration that purchasers of E. & N. Railway Company timberlands, some of the choicest and most advantageously situated in the Province, have stood in a remarkably favoured position. They have not had to pay royalties on their cut timber. They have had that much more profit compared to other timberland holders who may feel they suffer from discrimination in that respect. The tax outlined tends to equalization and to eliminate discrimination in that respect in so far as future purchasers of E. & N. Railway Company timberlands are concerned. The Province and the

people of the Province are concerned with obtaining adequate financial returns from a great natural resource. The problem in the public interest has been how to obtain that financial return in the most practical way, whether by a system of royalties or by a system of taxation, or both combined, or by some other method within the competence of the Province. The aim has been and still is to prevent exploitation of a great public resource and conserve it for the public benefit, but to do so in a way which will not unduly hamper those engaged in the timber industry.

Counsel for the E. & N. Railway Company in particular laid considerable emphasis upon a submission which he introduced and treated as if it were a statement of fact, viz., that the taxes outlined in Reference questions five and six would amount to some fifty-five per cent. (55%) of the value of the timber (and see for example his factum p. 17). That was used skilfully as a foundation for arguments pointing to the existence of discrimination, inequality, indirection and colourability. For example, he contrasted the present one and one-half per cent. tax on timberland (section 41 (1) Taxation Act C. 282, R.S.B.C. 1936) with what he described as the proposed 55% tax. A contrast of that kind (if based on correct facts) may give a wide range of opportunity to put forward submissions which otherwise would be devoid of any support.

But there is no 55% tax outlined in the Reference questions. Even on a 1942 basis (Sloan Report p. 53) as will now be explained, the tax would not exceed six per cent. and because of increasing log prices would be substantially less in 1946 and 1947. The proposed legislation tends to equalization so that the amount payable in taxes by the future E. & N. purchaser when his timber is cut will bear an equitable comparison with the combined amount payable in taxes and royalty by other owners of Provincial timber land when this timber is cut.

The estimate of a 55% tax seems to have originated in this way: The average of prevailing royalties (which the tax is to approximate) was estimated at $1.10 per M. feet B.M. of timber cut. The E. & N. Railway Company's average stumpage on timber on lands sold was taken at $2.00 per M. feet and $1.10 is 55% of $2.00. But the underlying fallacy therein is that the purchaser from the E. & N. Railway Company will pay the proposed tax, not upon the two dollars per M. feet stumpage he pays the E. & N. Railway Company, but upon the amount he receives for his cut timber—his logs—when he sells them. In 1942 (Sloan Report p. 53) the "average log prices all species" was $17.80 per M. feet

(in 1938 it was $13.12; in 1932 it was $9.10; in 1929 it was $14.67). Hence the $1.10 estimated tax per M. must rationally be related not to the E. & N. Railway Company's two dollars average stumpage, but to the purchaser's average log-selling price, which in 1942 was $17.80. So related the tax appears as six per cent (as of 1942) and not fifty-five per cent. Furthermore, it is common knowledge log-selling prices are much higher today than in 1942. If the average log-selling price should increase to $30.00 per M. feet, the tax rate in terms of percentage thereon would drop to three and a half per cent.

Turning next to the second branch of the colourability objection: It is said that under the guise of a tax on land it is sought to impose in pith and substance not a tax on land, but a tax on timber as and when cut as proposed in Reference question four, which is ultra vires as an indirect tax. Various "pith and substance" decisions were cited, and *Attorney General for Ontario v. Reciprocal Insurers* (1924) 93 L.J.P.C. 137 (where the impugned legislation was ex facie valid) was invoked, particularly that passage wherein Duff, J., speaking for the Judicial Committee at p. 141, pointed to the distinction between a case where absolute jurisdiction is vested in the legislature in contrast with a case where the Legislature's jurisdiction is of a qualified character.

In the latter case the *Reciprocal Insurers* decision stressed that the Court may examine with some strictness the substance of the legislation for the purpose of determining "what it is the Legislature is really doing." Scrutinizing the legislation outlined in Reference question Five in its entirety accordingly, it is said it is not truly a tax on land, but a tax on timber cut as in Reference question Four, in that it is plain the whole purpose of the outlined tax is to tax the timber and that intention is shown by making the tax payable at the time the timber is cut. Hence it is said the tax bears none of the indicia of a land tax in the accepted sense, but on the contrary, carries all the indicia of a tax defined in Reference question Four on timber as and when cut.

It is not competent for the Province, under the guise, or the pretence, or in the form of an exercise of its own powers, to carry out an object which is beyond its powers (*Reference re Alberta Statutes* (1939) 108 L.J.P.C. 1, Lord Maugham L.C. at p. 6). But if the Province has power to do directly what is outlined in Reference question Five, its competence is not defeated because it may lack power to impose the tax in Reference question Four. The tax in Reference Question Four is a tax on timber after it is severed from the land and has acquired a legal existence of its own apart

from the land. The tax in Reference question Five is a tax on land. Because the standing timber on that land contributes to the real value of the land, and because the amount of the tax on the land is reflected by the value the standing timber gives to the land, cannot make it a tax on timber so long as the standing timber, like anything else growing on the land, is legally as much a part of the land as the soil in the land; and cf. *Glenwood Lumber Co. v. Phillips* (1904) A.C. 405; *McPherson v. Temiskaming Lumber Co.* (1913) A.C. 145 and *Kirk v. Ford* (1920) 3 W.W.R. 91 at 96-98.

It is not disputed the Province is competent to impose a direct tax on land for Provincial purposes. Nor can it be disputed that the Province is competent to impose a direct tax on timberland which derives its value from the standing timber thereon. In *Attorney-General for Ontario v. Reciprocal Insurers* (1924) 93 L.J.P.C. 137, supra, it was held that a colourable use of the Criminal Code could not serve to disguise the real object of the legislation, which was to dominate the exercise of the business of insurance. Parliament was attempting there to do something beyond its powers. That is not the case here. This is a direct tax on the land. The tax is imposed on the land, the owner of the land is liable for payment of the tax, and the tax until paid is to be a charge on the land. With deference, I am unable to conclude that the circumstance that the land shall be taxed as and when timber is cut and severed therefrom operates to change the nature of the tax. The tax remains a tax on the land. That the tax on the land is to 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. The whole texture of the legislation outlined in Reference question Five is so inextricably interwoven with a tax on land, that although the time of its imposition and the method of its collection are related to the time the timber is severed, nevertheless, in the view I must take, it is not in its true nature and character a tax on that severed timber, but a tax on the land from which it is severed.

That the tax is to be measured by the amount of the timber cut, is not in itself enough to change the nature of the tax. It is simply a basis for assessing the tax on the land. In *Minister of Finance (B.C.) v. The Royal Trust Co.* (1920) 61 S.C.R. 127, it was held that in computing the succession duty on property in the Province of a deceased person domiciled outside the Province, that all his property outside the Province could be taken into account. The amount of the tax on the property in the Province was substantially increased, because of the higher rate chargeable when the deceased's entire estate was taken into consideration.

RECORD

Court of Appeal of British Columbia

No. 5
Reasons for Opinion O'Halloran, J.A.
June 10,1947
(Contd.)

The trial Judge (1919—27 B.C. 271) and the majority of the Court of Appeal (ibid. 272) had held the tax was an attempt to impose taxation on property outside the Province, and that the Province could not do indirectly what it could not do directly. An appeal to the Judicial Committee was allowed (1922) I A.C. 87, upholding in principle what the Supreme Court of Canada had decided supra (see p. 93) but declaring that apt and effective words had not been used in the statute to achieve that legal object. The language of Martin J. A. in this Court was approved to the effect it was not a matter of indirect taxation at all, "but simply the fixing of a basis of domestic assessment in certain varying circumstances."

In *Bank of Toronto v. Lambe* (1887) 12 A.C. 575 the Province had imposed a tax on a number of banks and insurance companies, some of which were incorporated by Dominion statute. It was not a general tax, and it was imposed, not on profits nor on particular transactions, but upon paid up capital and places of business. It was upheld as a valid tax. In the present case the tax is to be assessed according to the prevailing royalties and by the amount of the timber which is cut off the land. It is to be noted that in the *Lambe* case the tax was held to be valid notwithstanding that the burden might fall in part on persons or property outside the Province, and see *Workmen's Compensation Board v. The C.P.R.* (The S.S. Princess Sophia case) 1920 A.C. at 190, where the accident fund was maintained by assessing the employer according to the pay-rolls.

In *Reference re* 1941 *Alberta Statutes* (1943) S.C.R. 295 at 301 it was held there was no solid ground upon which it could be affirmed that a direct tax upon land, or in relation to land, loses its character as a direct tax by reason of the fact that monies due in respect of it are declared to be a lien upon the crops grown upon the land both before and after severance. The tax is a land tax—a direct tax within the competence of the Province to enact. Its essential character is not lost because the tax is measured by the value of the timber after severance, or because its collection may be postponed until the timber is severed and sold. In *Atty. Gen. for B.C. v. McDonald Murphy Lumber Co.* (1930) A.C. 357 Lord Macmillan said at p. 365, that a tax levied on personal property, no less than a tax levied on real property, may be a direct tax where the taxpayer's personal property "is selected as the criterion of his ability to pay."

The second attack upon Reference question Five was, that it is indirect because it is alleged to be passed backward. It is

said it falls on the E. & N. Railway Company in practical effect although directed to the purchaser of the land. It is said that because of the tax the purchaser will have to pay, the price of E. & N. Railway timber lands will not be as high as they would be without the tax. John Stuart Mill's definition of an indirect tax was relied upon, that it is demanded from one person (the purchaser from the E. & N. Railway Company) in the expectation and intention that he shall indemnify himself at the expense of another (the E. & N. Railway Company), and see *Halifax (City) v. James P. Fairbanks Estate* (1928) 97 L.J.P.C. 11. That is to say the purchaser will pay the E. & N. Railway Company less because of the tax and hence the burden of the tax will fall on the E. & N. Railway Company.

I think there are at least two answers to that submission. One is, it is not correct to say that the tax is imposed on the purchaser "in the expectation and intention" that he shall "indemnify" himself at the expense of the vendor the E. & N. Railway Company. It is not a sales tax, or a tax that comes into being as part of the transaction of sale, or in the course of completing the transaction of sale. Moreover by para. 15 of the regulations issued by the E. & N. Railway Company respecting its land sales (see Agreed Statement of Facts p. 14) it is specifically stipulated that all rates and taxes shall be paid by the purchaser. The tax cannot come into being until after the purchase from the E. & N. Railway Company has been completed. The purchaser must not only obtain title to the land, but must also cut merchantable timber thereon before the tax can come into force. The purchaser does not first pay the tax and then indemnify himself against the vendor as is contemplated in the Mills formula. What loss in sales price (if any) the E. & N. Railway Company may bear is incurred before the tax becomes operative.

The point arose analogously in *Montreal (City) v. Atty. Gen. for Canada* (1923) 92 L.J.P.C. 10, applied in *Halifax (City) v. James P. Fairbanks Estate* (1928) 97 L.J.P.C. 11. The lessee of Dominion Crown lands was taxed on the value of the land under a provision of the Montreal City Charter that a lessee of Crown land should be assessed as if he were the actual owner. In the Court of King's Bench (appeal side) Cross J. was of opinion that if the lessee were thus taxable it would mean the Crown would have to accept less in rent and hence bear the burden of the tax. The Judicial Committee in allowing the appeal said at p. 15:

> If however, Municipal taxation is to be regarded as ultra vires, on the ground that the ultimate incidence of taxation,

RECORD

Court of Appeal of British Columbia

No. 5
Reasons for Opinion O'Halloran, J.A.
June 10,1947
(Contd.)

or some portion of it, may or will fall on the owner, it is difficult to see in what form such taxation could validly be imposed.

After remarking that there was no suggestion that the assessment in question was not fairly ascertained (p. 14) (nor does that point arise here), the Board held that the assessment in question must be regarded as assessed on the interest of the lessee and to reflect the benefit of his occupation to him during the period of his occupancy.

In the *City of Montreal* case the lands belonged to the Crown Dominion and were not taxable by the Province. But the interest of a lessee in those lands was taxable (*Smith v. Vermillion Hills Municipality* (1916) 86 L.J.P.C. 36). The *City of Montreal* case held that an assessment of that interest at the same value as if the lessee were the owner must be upheld and approved observations of Meredith C. J. to that effect in *Re Cochrane and Cowan (Town)* (1921) 50 O.L.R. at 173. This conclusion was reached despite what Cross J. said in the Court of King's Bench (appeal side) that the Crown would bear the burden of the tax, since it would receive less in rent. That reasoning seems to answer the point raised here regarding the burden of the tax being passed backward. It is to be emphasized as well that the assessed value of the lessee's taxable interest in the land was reached by a standard which made it approximate the value of the non-taxable land itself.

The second answer seems, if anything, to be more powerful, viz., that once we have a direct tax on land for Provincial purposes, which is of course within the legal competence of the Province, it cannot be attacked successfully on the ground that it may be passed on to someone else, or that it may be open to objections which might be fatal if it were not a tax on land. If it is a tax on land, then as Lord Macmillan said of an income tax in *Forbes v. Atty. Gen. for Manitoba* (1937) A.C. at 268 "there is an end of the matter."

That was so held in *Halifax (City) v. James P. Fairbanks Estate* (1928) 97 L.J.P.C. 11, applied in *Rattenbury v. Land Settlement Board* (1929) S.C.R. 52 at 72-3. Their Lordships observed that the distinction between direct and indirect taxes was well known before the passing of the B.N.A. Act 1867, and that land taxes were universally recognized among statesmen and economists as falling within the classification of direct taxes. It was said at p. 15:

When therefore the Act of Union allocated the power of direct taxation to the Province, it must surely have intended that the taxation of property and income should belong exclusively to the Provincial Legislatures, *and that, without regard to any theory as to the ultimate incidence of such taxation.* (The italics are mine.)

Viscount Cave, L.C., continued (p. 15)

To hold otherwise would be to suppose that the framers of the Act intended to impose on a Provincial Legislature the task of speculating as to the probable ultimate incidence of each particular tax which it might desire to impose, at the risk of having such a tax held invalid if the conclusion reached should afterwards be held to be wrong.

Their Lordships then considered what effect was to be given to the Mills formula, and in the following summations furnish the answer in my opinion at least to attacks upon the competency of the taxes outlined in Reference questions five and six (p. 15):

No doubt it (the Mills formula) is valuable as providing a logical basis for the distinction already established between direct and indirect taxes, and perhaps also as a guide for determining as to any new or unfamiliar tax which may be imposed, in which of the two categories it is to be placed; *but it cannot have the effect of disturbing the established classification of the old and well-known species of taxation and making it necessary to apply a new test to every particular member of those species.*

The imposition of taxes on *property* and income of death duties and of municipal and local rates, is according to the common understanding of the term, *direct taxation,* just as the exaction of a customs or excise duty on commodities or of a percentage duty on services would ordinarily be regarded as indirect taxation; and although new forms of taxation may from time to time be added to one category or the other in accordance with Mill's formula, *It would be wrong to use that formula as a ground for transferring* a tax universally recognized as belonging to one class to a different class of taxation. (The italics are mine.)

I have paid heed to the warning in *Atlantic Smoke Shops Limited v. Conlon* (1943) 112 L.J.P.C. at 73 that the foregoing observations in the *City of Halifax* case are not to be understood as relieving the Courts from the obligation of "examining the

RECORD

Court of Appeal of British Columbia

No. 5
Reasons for Opinion O'Halloran, J.A.
June 10,1947
(Contd.)

real nature and effect of the particular tax." The tax outlined in Reference question Five has been examined in the foregoing pages from several different approaches, and the conclusion reached for reasons stated, that it is, in its true nature a land tax. Once that appears conclusively, then, being a land tax, I take it, under the authority of the *City of Halifax* case that it matters not whether it may be passed backward or forward.

The *City of Halifax* case concerned a business tax upon a lessee assessed at fifty per cent of the value of the non-taxable property occupied. Reference questions five and six relate to taxes on land. The *Atlantic Smoke Shops* case did not concern a tax on land. It related (p. 72) to a tax on an expenditure, viz., the retail price of tobacco payable by the purchaser-consumer at the time of purchase. It was held to be a direct tax since the taxing authority had expressed a clear intention to levy it as "a peculiar contribution" upon the purchaser-consumer selected to pay it.

The third objection was grounded on the submission that the tax outlined in Reference question five is so excessive that it is plain it must be paid by some one else than the owner of the timberland. There are a number of answers. First, it is not excessive or discriminatory. It has been pointed out supra that it will not exceed from three to 6 percent of the Provincial average selling price of cut timber, and that the purchaser of E. & N. Railway timberlands will pay in taxes approximately what any other owner of Provincial timber land will pay in taxes and royalty. Secondly, it is in truth and substance a land tax, and hence under *Halifax (City) v. James P. Fairbanks Estate* (1928) 97 L.J.P.C. 11, supra, it makes no difference if the tax may eventually be borne by some one else and see also *Montreal (City) v. Atty. Gen. for Canada* (1923) 92 L.J.P.C. 10, supra. In the third place in Reference question five as outlined the E. & N. Railway Company purchasers have been selected as the parties to pay the tax. It is intended such persons shall make that "peculiar contribution" and see *Atlantic Smoke Shops Ltd. v. Conlon* (1943) 112 L.J.P.C. at 72.

For the foregoing reasons I am of opinion that Reference question five, in the terms herein considered, ought to be answered in the affirmative.

REFERENCE QUESTION SIX:

(It is to be noted that this question is numbered five in the Order in Council.)

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.

The tax outlined in this Reference question is a direct tax on land. It presents fewer points to attack than Reference question Five. It differs in three respects from the tax outlined in Reference question Five, viz., (*a*) the imposition of the tax is not postponed until merchantable timber is cut and severed from the land, but takes effect immediately the conditions arise which under section 22 of the Settlement Act 1883 destroy exemption from taxation; (*b*) it requires that the land shall be assessed at its fair market value, and that the tax rate shall be a percentage of the assessed value; and (*c*) the payment of the tax and also the time of payment are not linked compulsorily with the cutting of the timber. The taxpayer is to be given two options as

RECORD

Court of Appeal of British Columbia

No. 5
Reasons for Opinion O'Halloran, J.A.
June 10,1947
(Contd.)

to mode and time of payment, one of which the taxpayer may link to the value of trees cut during the year.

In no respect in my judgment can it be said that any provisions in the form of the tax outlined in Reference question Six change its essential character as a land tax. In my judgment it is legislation clearly within the legal competence of the Province for reasons which appear in the course of answering Reference question Five. I would answer Reference question Six in the affirmative.

REFERENCE QUESTION SEVEN:

Is the Esquimalt and Nanaimo Railway Company liable to the tax (so-called) for forest protection imposed by Section 123 *of the "Forest Act," being Chap.* 102 *of the "Revised Statutes of British Columbia* 1936," *in connection with its timberlands 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 of the aforesaid Act of* 1883?

The short question is whether the Forest Protection Fund to which this Reference Question relates, is a tax or a service charge.

In my opinion this impost in the form outlined contains all the elements of a tax enunciated by Duff, J., in *Lawson v. Interior Tree Fruit and Vegetable Committee* (1931) S.C.R. 357, at 363. It is to be enforceable by law. Under section 124 (6) of the "Forest Act" it is payable upon demand of the Crown, and the Crown shall have a lien therefor, upon the lands of the owner. Section 124 (6) also provides the money may be recovered by the Crown in any Court of competent jurisdiction. Compulsion is an essential feature of the impost and see *City of Halifax v. Nova Scotia Car Works Ltd.* (1914) A.C. 992 at 998.

It is imposed by a public body, viz., the Legislature. The impost is made for a public purpose—protection of the forests from fire (Section 120 (1) to which public service the Province itself contributes $400,000.00 annually from the Consolidated Revenue Fund (Section 123 (1). It has all the indicia of a tax for Provincial purposes. And see also *Lower Mainland Dairy Product Sales Adjustment Committee v. Crystal Dairy Ltd.* (1933) 102 L.J. P.C. 17; *Turner's Dairy Ltd. et al v. Lower Mainland Dairy Products Board et al* (1941) 56 B.C. at 148, as affirmed 1941 S.C.R. at 583, and the accident fund in *Workmen's Compensation Board v. C.P.R.* (1920) A.C. at 190.

Next is it a direct or an indirect tax. It is not as in the *Crystal Dairy case* supra a tax on a commercial commodity, nor is it imposed on the proceeds of particular transactions. It is an annual tax payable by the owner at the rate of three and one-third cents for each acre of land (section 123 (1)); it forms a lien upon the land and is recoverable at the suit of the Crown in any Court of competent jurisdiction (section 124 (6)). It is in its pith and substance a land tax for Provincial purposes; and see the *City of Halifax case* (1928) 97 L.J.P.C. 11, supra.

Once it is found to be a direct tax which is to be imposed on the timberlands owned by the E. & N. Railway Company, then it derogates from section 22 of the Settlement Act of 1883 and the E. & N. Railway Company is not liable thereto. The said timberlands are not liable therefor unless and until they are used by the Company for other than railroad purposes or leased, occupied, sold or alienated.

In accordance with the provisions of the Constitutional Questions Determination Act, C. 50, R.S.B.C. 1936, I hereby certify to His Honour the Lieutenant-Governor in Council that, in my opinion, for the reasons herein contained, (*a*) Reference questions One, Three, Four, Five and Six ought to be answered in the affirmative and I hereby so answer them; (*b*) Reference question Two ought to be answered in the negative, except in so far as it touches upon the subject-matter of Reference question Seven, and I hereby so answer it; and (*c*) In answer to Reference question Seven, my opinion is that the E. & N. Railway Company is not liable to the tax therein mentioned, and in particular that the said tax does derogate from the provisions of section 22 of the Settlement Act, 1883. In my opinion the said timberlands are not liable to the said tax unless and until they are used by the E. & N. Railway Company for other than railroad purposes, or are leased, occupied, sold or alienated.

C. H. O'HALLORAN, *J.A.*

Vancouver, B.C., 10 *June,* 1947.

RECORD

Court of Appeal of British Columbia

No. 6
Reasons for Opinion Sidney Smith, J.A.
June 10, 1947

No. 6

REASONS FOR OPINION OF THE HONOURABLE MR. JUSTICE SIDNEY SMITH

This case presents a footnote to the early history of this Province. Perhaps not very ancient history, as history goes; for the first date in the Record of Documents with which we were furnished is 13th January, 1849, when Her Majesty Queen Victoria granted Vancouver Island "together with all royalties of the seas, upon the coast and all mines Royal thereto belonging" to the Governor and Company of Adventurers of England trading into Hudson's Bay; while the last is 4th December, 1946, the date of a memorandum on taxation. Yet between these two dates the Province achieved the measure of its present development.

The matter comes before us by way of Reference from the Provincial Government under statutory powers. Certain questions were formulated for the opinion of the Court. As these questions will no doubt be set out elsewhere in the findings of the Court it will not be necessary to state them specifically in this judgment. The questions, seven in all, are based upon the findings of The Honourable Gordon McGregor Sloan, Chief Justice of British Columbia, who had been appointed by the Provincial Government sole Commissioner to enquire into all phases of the forest resources in British Columbia. We were informed by counsel that the learned Commissioner did not have the benefit of argument upon the matters now under consideration. 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 by-gone 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. The first three questions deal generally with the issue of "contract or no contract" between the Province and the Esquimalt and Nanaimo Railway Company (which may be conveniently referred to as the "Railway Company") with relation to a certain statutory provision that the unsold lands of the Railway Company in the Island Railway Belt should enjoy freedom from taxation as therein specified: The provision is as follows: and the issue between the opposing views rests upon its words:

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.

This is sec. 22 of what is known as the Settlement Act of 1883 and to appreciate its significance reference will later be made to the surrounding circumstances, then and now. For the moment it will be sufficient to notice that the section imports an element of duration in time. The lands are to be tax free until (so far as material here) they are sold. Question 4 deals with whether a tax on the timber in the Island Railway Belt, as and when cut, would be ultra vires, assuming the timberlands to be then privately owned. Questions 5 and 6 concern the competence of the Provincial Legislature to impose a tax on the timberlands, after sale thereof, payable in various ways and assessed in accordance with the amount of timber thereon. Question 7 has to do with a tax in the nature of a service charge. These questions were made the subject of well-balanced controversy; it will be convenient to consider them, thus grouped, in numerical sequence.

On 20 July, 1871, British Columbia was admitted into and became part of Canada on certain terms, known as the "Terms of Union." In clause 11 thereof the Dominion Government undertook to secure the construction of a railway from the Pacific towards the Rocky Mountains and from the East towards the Rocky Mountains to connect the seaboard of British Columbia with the railway system of Canada; and the Government of British Columbia agreed to convey to the Dominion Government, in trust to be appropriated in such manner as the Dominion might deem advisable in furtherance of the construction of the railway, an extent of public lands along the line of the railway, throughout its entire length in British Columbia, not to exceed twenty miles on each side of the said line, with a provision that the lands pre-empted in the belt should be made good from other lands. We are concerned only with that portion of the Railway situated on Vancouver Island.

By Dominion Order in Council dated 7th June, 1873, Esquimalt was fixed as the terminus of the Canadian Pacific Railway; and it was therein provided that a line of railway be located between the Harbour of Esquimalt and Seymour Narrows on Vancouver Island. On 1st July, 1873, the Province in accordance with clause 11 of the Terms of Union, reserved a strip of land 20 miles in width along the East Coast of Vancouver Island between Sey-

RECORD

Court of Appeal of British Columbia

No. 6
Reasons for Opinion Sidney Smith, J.A.
June 10, 1947
(Contd.)

mour Narrows and the Harbour of Esquimalt in furtherance of the construction of the said Railway. (The Island Railway Belt.)

But there were delays in the construction of this Island Railway: ten years passed and there was no sign of even a beginning, save only that the line of the projected railway had been practically located and steel rails had been landed at Esquimalt and Nanaimo. In 1882 the Legislature of the Province, in growing exasperation, passed an Act entitled "An Act to Incorporate 'The Vancouver Land and Railway Company.'" (I shall call this the 1882 Act.) The effect of the Act was to constitute the persons therein named (Clement et al) a railway company and to give the corporate body thus formed power to construct a railway on Vancouver Island from Esquimalt Harbour to Seymour Narrows. The Act contained certain requirements as to the furnishing of security and then went on to provide in sec. 18 that the Government should set apart and reserve to the company 1,900,000 acres, more or less, of public lands within the area therein defined; and that upon the completion of the said railway the Government should grant the said lands in fee simple to the said Company. It was furthermore provided that:

> . . . the lands of the Company shall also be free from Provincial taxation until they are either leased, sold, occupied or in any way alienated.

There can be no doubt that this Act, at any rate, upon acceptance by performance, represented a statutory contract between the Provincial Government and the Railway Company; a contract which included a provision that the lands to be granted should be exempt from taxation; a contract however which proved abortive, on account of failure to provide the stipulated security.

But a year later, on 12th May, 1883, a further statute was passed dealing with the construction of substantially the same railway. (I shall call this the May Act.) This Act was amended, reenacted and assented to on 19th December of the same year, and became known as the Settlement Act, and will be so referred to herein. The May Act recites that negotiations between the Governments of Canada and of British Columbia had been pending relative to the Island Railway and that the negotiations had resulted in an agreement to the effect set out in clauses (a) to (k) thereof. Sec. 3 of the Act granted to the Dominion Government the lands in the railway belt, by the identical description contained in the 1882 Act, to aid in the construction of a railway between Esquimalt and Nanaimo; to be held by the Dominion Government in trust, and to be appropriated as the Dominion Gov-

ernment might deem advisable; otherwise the lines on which the May Act proceeded were very much the same as those of the former Act. The essential difference betwen the two Acts was the intervention of the Dominion Government as a trustee during the construction of the railway—thus following out the express provisions of Article 11 of the Terms of Union in relation to this matter.

The agreement between the two Governments recited in the Act provided in clause (d) that the Government of British Columbia should procure the incorporation by Act of the Legislature of certain persons, designated by the Government of Canada, for the construction of the railway from Esquimalt to Nanaimo. (These were named by Order in Council of 12th April, 1884, and consisted of Robert Dunsmuir and his associates, the Contractors who subsequently built the railway.) It is apparent from the Record (top of p. 109) that at the time of the passing of the May Act no contract had been made for the construction of the railway. The Dominion Government declined to make the railway a government work, which they claimed the May Act virtually did, and on 23rd June, 1883, appointed Sir Alexander Campbell (then Minister of Justice) to personally communicate with the Provincial Government on various unsettled questions between the two Governments, and to communicate with Mr. Dunsmuir or other capitalists desirous of forming a company to construct the railway. It will be observed that the next item on p. 109 of the Record is a letter dated 17th August, 1883, at Victoria, from Sir Alexander Campbell to Hon. William Smithe, then both Premier of the Province and Commissioner of Lands. From this it is clear that Sir Alexander Campbell, following his appointment of the 23rd June, 1883, came to Victoria to deal with the unsettled questions between the two Governments and to endeavour to effect a contract for the construction of the railway. His mission was successful. In negotiations held at Victoria between Sir Alexander, representing the Dominion, and the Hon. William Smithe, representing the Province, an agreement was reached respecting the unsettled questions of the two Governments. At the same time a contract for the construction of the railway was also concluded between Her Majesty represented by the Minister of Railways (Dominion) and Mr. Dunsmuir and his associates, all of which was subject to legislative confirmation by both Governments. The memorandum of the aforesaid agreement (p. 38 of the Record) sets out the terms of settlement arrived at by the Government representatives. Attached to this memorandum was a draft bill amending the May

Case p. 208

Case p. 208

Case p. 140

Act (this draft bill was identical with the Act of 19th December, 1883, the Settlement Act, which was later passed). The amendments to the May Act that the Province particularly desired was one to clause (f) to provide for conveyances of land in the Grant to settlers during construction; and another to provide for an express undertaking by the Dominion that it would transfer the land Grant to the Company upon completion of the railway: there was no such provision in the May Act. The memorandum provided that the Province had to obtain the consent of the Contractors to the amendment to clause (f), and further provided that the construction contract was to be provisionally signed and deposited in escrow until statutory authority had been given by the Dominion Parliament and by the Provincial Legislature. The principal amendments sought by the Dominion were to clause (e) and to sec. 8 of the Act. It will be noted that in these amendments the Dominion was insisting upon eliminating from the aforesaid provisions words that contained or implied any undertaking by the Dominion to secure the construction of the railway. Clause (e) as redrawn contained an agreement by the Dominion with the Province to contribute $750,000,000 to the construction of the railway, to hand over the lands to the Contractors, and to take security for the construction of the railway to the satisfaction of the Province. Whether or not these amendments of the May Act have any direct bearing upon the question of the contract now in question, they are an important part of the negotiations that took place at Victoria, and therefore proper subject-matter for consideration.

It will now be convenient to deal with the position of the Contractors in their negotiations at Victoria. The Contractors had of course to decide whether they would enter into a contract to construct the railway upon the terms offered. The Contractors had before them the draft bill providing for the consideration the Contractors were to receive for the construction of the railway, namely, (1) a land grant by the Province to the Dominion in trust to be handed over to the Contractors upon the construction of the railway, with a provision that the lands so to be acquired by the Company would not be subject to taxation until sold by the Company; and (2) a payment of $750,000.00 from the Dominion. The other provisions of the draft bill relating to the lands are not material here. It must be particularly noted, however, that section 27 of the bill provided that the Railway Company would be bound by any contract for the construction of the railway which should be entered

into by and between the persons so to be incorporated, and Her Majesty, represented by the Minister of Railways and Canals; and that the Railway Company should be entitled to the full benefit of such contract, which should be construed and should operate in like manner as if the Company had been a party thereto in lieu of the Contractors. Furthermore, the Contractors had before them the drafted Construction Contract, dated 20th August, 1883, (the same date as the aforesaid memorandum) providing in clause 13 for the grant of a subsidy of $750,000.00 and for the grant of the lands. Clause 13 of this Construction Contract is in part as follows:

> 15. The Land Grant shall be made, and the land, in so far as the same shall be vested in Her Majesty and held by her for the purposes of the said Railway, or for the purposes of construction, or to aid in the construction of the same, shall be conveyed to the said Contractors, upon the completion of the whole work to the entire satisfaction of the Governor in Council; but so, nevertheless, that the said lands, and the coal oil, coal and other minerals and timber thereunder, therein or thereon, shall be subject in every respect to the several clauses, provisions and stipulations referring to or affecting the same respectively, contained in the aforesaid Act passed by the Legislature of the Province of British Columbia in the year 1883, entitled "An Act relating to the Island Railway, the Graving Dock and Railway Lands of the Province," as the same may be amended by the Legislature of the Province in accordance with a Draft Bill now prepared, which has been identified by Sir Alexander Campbell and the Honourable Mr. Smithe, and signed by them, and placed in the hands of the Honourable Joseph William Trutch, and particularly to Sections 23, 24, 25 and 26 of the said Act.

Consequently, when the Contractors appended their names to the Construction Contract on the 20th August, 1883, they had before them the undertaking of the Provincial authorities to enact the draft bill decreeing that the Company would have the full benefit of the construction contract, and they had in the Construction Contract a provision that the lands would be subject in every respect to the several clauses, provisions and stipulations referring to or affecting the land contained in the May Act as it was to be amended by the Legislature. Sec. 27 of the draft bill and clause 15 of the draft contract were complementary to each other, and made it abundantly clear to the Contractors that the lands when transferred to the Company

RECORD

Court of Appeal of British Columbia

No. 6
Reasons for Opinion Sidney Smith, J.A.
June 10, 1947
(Contd.)

would have the benefit of the provisions of sec. 22. It is evident from the text of the memorandum of 20th August, 1883, that the construction contract was definitely before the Provincial authorities at the time that the memorandum was prepared and signed; and it should be observed that at the foot of the contract there is this note signed by Mr. Robert Dunsmuir:

> 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 August, 1883.
>
> R. DUNSMUIR.

On the 19th December, 1883, the Provincial Legislature passed the draft bill which later became known as the Settlement Act, and it became law. It must have been common knowledge of the three interests concerned in the negotiations at Victoria, that the Dominion had not the competence to restrain the Province in the exercise of its power to tax the lands in the Railway Belt, after transfer to the Railway Company. This freedom from taxation could result, and could result only, from the pledge of the Province and the Legislature must have been aware of this when the Settlement Act was passed. It should be remembered, too, that the lands in the land Grant were Crown lands, and of course were never subject to taxation, and would not be so subject, while held by the Dominion. Sec. 22 could only apply to that period of time between the transfer to the Railway Company by the Dominion, and sale by the Railway Company. Sec. 22 in fact so states—"The lands to be acquired by the Company," &c. It is manifest therefore that the Contractors relied upon sections 22 and 27 as part of the inducement offered to them to enter into the contract to construct the railway.

I have outlined the matter, I hope with a sufficient statement of the circumstances, as plainly as I can, and paying due regard to various arguments advanced by both sides on the precise meanings of the various words used in the text. But, on the whole, it seems to me that the men of those days were more concerned with works than words; were more immediately interested in the construction of Railways than in the niceties of language, and that their intention is clear enough. And it seems to me further that when one examines the doings and documents just mentioned, together with the correspondence in the record, the equivalent Dominion Act respecting the Vancouver Island Railway of 19th April, 1884, and the grant of lands

from the Dominion to the Railway Company upon completion of construction and dated 21st April, 1887, 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 sec. 22. The arguments to the contrary are of course legitimate arguments to put forward, but the question for decision is whether on the true construction of the documents and the statutes, when interpreted in relation to the surrounding circumstances and their own subject-matter, it was the intention of the parties that this provision granting freedom from taxation should be binding upon the Province. To me there seems to be only one answer to this question: That it was so. If this is the correct answer, then it is clear that any legislative action contrary to the spirit of this section would be tantamount to a breach of faith on the part of the Government and of the people of this Province. And it would surely be contrary to the spirit of this section were the Government to announce, as is suggested, that as and when these timber lands were sold by the Railway Company the new owners would be taxed to the extent of 55% of the value of the timber growing thereon. That simply reduces the value (that is to say, the value to the Railway Company) of the timber lands still unsold by 55%. And if by 55%, why not by 95%? And if now, why not the year after the construction of the Railway had been completed? And if these two events had happened would not the value of the timber land consideration so solemnly granted to the Railway Company have disappeared into thin air? That a result so strange, and so inconsistent with the plain purpose of the section, could have been contemplated as within the terms of the arrangement made by those men who met together on the 20th August, 1883, is, or so it seems to me, quite unthinkable. And yet acceptance of the arguments raised by Government Counsel involves the view that this consummation was within the spirit and the language of the bargain then made. I do not believe it. The law proceeds on principles of practical common sense. Where is the common sense in such a view? The section grants exemption from taxation until the lands are (amongst other contingencies) sold. Then they may be taxed. But the taxation contemplated by the section, to which the lands are to become subject when sold, can only mean the ordinary taxation imposed alike on these and all surrounding comparable lands. As to this there could be no complaint by anyone. But here it is sought to give an altogether wider, if not an altogether different, meaning to the word taxation. It is sought to have it include the extraordinary levy herein contemplated, a levy which

RECORD

Court of Appeal of British Columbia

No. 6
Reasons for Opinion Sidney Smith, J.A.
June 10, 1947
(Contd.)

would fall on these yet unsold timber lands and on these timber lands alone.

In this regard I adopt with great respect the views of the Honourable Charles J. Doherty, then Minister of Justice, in his report of 21st May, 1918, recommending the disallowance of a Provincial Statute known as the "Vancouver Island Settlers' Rights Act 1904 Amendment Act 1917." It will be sufficient to say that the effect of this Act would have been to deprive the Railway Company of certain coal-bearing lands without any provision being made or suggested for the compensation of the Company for the loss which it would thereby suffer. The report says in part as follows:

> There can be no doubt about the intention of the enactment having regard to the sequence and history of the legislation. A large area of valuable land was transferred by the Province to the Dominion destined and appropriated by statutory arrangement and sanction as between the two Governments for the benefit of the Esquimalt and Nanaimo Railway Company, which undertook the burden of constructing and operating the railway. These lands were in turn transferred by the Dominion to the company upon the terms of its contract . . . the lands passed to the company, and the company is certainly justified to look not only to the Province but also to the Dominion with whom it contracted and from whom it received its grant, to see that its title is not impaired by legislative revision of the terms after performance of the contract by which the lands were earned. The identic legislation on the part of the Province and of the Dominion of 1883 evidences a matter of Dominion as well as of local policy which has its foundation in the terms upon which British Columbia entered the Union, by which, in consideration of the construction, equipment and undertaking to operate and maintain the railway, the Company received the statutory subsidies, including the lands in question, . . . the process by which, notwithstanding these solemn assurances, a valuable portion of the property which it was thus intended that the company should receive, and which the company did receive, is taken away by the exercise of the legislative authority of one of the parties to the tripartite agreement, cannot adequately be characterized in terms which do not describe an unjustifiable use of that authority, in conflict with statutory contractual arrangements to which the Government of Canada as well as the Province was a party . . . the undersigned,

. . . considers that both the proper execution of these powers and the obligation of honour and good faith . . . require that the Province should not be permitted substantially to diminish the consideration of the contract.

I have quoted the language of the learned Minister of Justice at length because I think it exactly sets out the situation as it exists today. Now, as then, there is suggestion of "legislative interference with vested rights or the obligations of contracts." Now, as then, notwitstanding "these solemn assurances" it is mooted that a valuable portion of the property of the Railway Company be taken away "by the exercise of the legislative authority of one of the parties to the tripartite agreement." As already stated, I think there can be no doubt that there was here a contract, either express or implied, or partly the one and partly the other, which formed the subject-matter of the "tripartite agreement" referred to by the learned Minister; and that one term at least of this contract was that the Railway Company should possess these lands free of taxation, as well in the spirit as in the letter; a term by which the Government of this Province was then, and is now, in honour bound.

The view I have formed derives very considerable encouragement from the circumstance that the Government of the Province appears to have been of the same opinion for over 60 years. A striking confirmation of this is furnished by certain legislation passed in 1912. In February of that year the Esquimalt and Nanaimo Railway Company's Land Grant Tax Exemption Ratification Act ratified and confirmed an agreement between the Province and the Railway Company. In this agreement the Provincial Legislature admitted the existence of the Railway Company's right to exemption from taxation and that "such exemption shall remain in full force and virtue." This admission was well-founded as resting upon an express provision of statute-law, to wit, sec. 22 aforesaid.

We were referred to one sentence in the record, and so far as I know the only sentence in the record, which throws the slightest doubt upon the existence of a contract binding upon the Provincial Government. It is made by James Dunsmuir as the then President of the Railway Company, in a petition dated the 21st March, 1904, and presented to the Governor-General in Council in support of the Railway Company's application for disallowance of the "Vancouver Island Settlers' Rights Act, 1904." In this sentence Mr. Dunsmuir says:

RECORD

Court of Appeal of British Columbia

No. 6
Reasons for Opinion
Sidney Smith, J.A.
June 10, 1947
(Contd.)

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.

The petition is the petition of the Esquimalt and Nanaimo Railway Company and Mr. James Dunsmuir signs as its President. What advice he sought and what enquiries he made to satisfy himself of the truth of the last clause of the statement we of course do not know. For my purpose, and for the reasons I have attempted to state, it will be sufficient to say that I think he was mistaken, and that such a contract did exist and exists to this day. If confirmation of this view is necessary it may be found in a letter dated 16th November, 1885, from the aforesaid the Hon. William Smithe (p. 68 of Record) stating that "the Provincial Government are the real principals in the matter of this Railway and these lands."

Case p. 173

The next main point dealt with in the questions is whether it is within the legislative competence of the Province to impose a tax on timber cut on the land of the Island Railway Belt after such timber had been transferred by the Railway Company to private ownership. It was contended by the Railway Company that the Province was without legislative competence in this regard principally because such would be indirect taxation within the Province. I agree with this submission.

It seems to me there can be no doubt that such taxation would be indirect taxation and so invalid under head 2 of sec. 92 of the B.N.A. Act. There are numerous authorities on this point but perhaps the present law is best expressed in the language of Viscount Haldane in A.G. for Manitoba vs. A.G. for Canada (1925) A.C. 561 at p. 566 as follows:

> As to the test to be applied in answering this question, there is now no room for doubt. By successive decisions of this Board the principle as laid down by Mill and other political economists has been judicially adopted as the test for determining whether a tax is or is not direct within the meaning of s. 92, head 2, of the British North America Act. The principle is that a direct tax is one that is demanded from the very person who it is intended or desired should pay it. An indirect tax is that which is demanded from one person in the expectation and with the intention that he shall indemnify himself at the expense of

another. Of such taxes excise and customs are given as examples.

It does not exclude the operation of the principle if, as here, by s. 5, the taxing Act merely expressly declares that the tax is to be a direct one on the person entering into the contract of sale, whether as principal or as broker or agent. For the question of the nature of the tax is one of substance, and does not turn only on the language used by the local Legislature which imposes it, but on the provisions of the Imperial statute of 1867.

Mill's definition has now stood good for half a century. It has been quoted on innumerable occasions up and down Privy Council decisions on direct vs. indirect taxation. One of the earliest of such authorities is the case of Brewers' and Malsters' Association of Ontario vs. Atty.-Gen. for Ontario (1897) A.C. 231 at p. 236 where Lord Herschell deals with the question in the same way as does Lord Haldane 28 years later. Later cases from British Columbia are: A.G. for British Columbia vs. McDonald Murphy Lumber Co. Ltd. (1930) A.C. 357 and A.G. for British Columbia vs. Kingcome Navigation Company Limited (1934) A.C. 45 at p. 51. Perhaps the latest case of all is Atlantic Smoke Shops Ltd. vs. Conlon (1943) A.C. 550 in which Viscount Simon reaffirms the same principle at p. 565.

I think in the case at bar there can be no doubt of the express intention, viz., that a tax should be imposed upon the purchaser with the intention that it should be deducted from the purchase price of the timber and by this indirect means be borne only by the vendor Railway Company. It is, therefore, a tax which would be imposed upon one person with the intention that it should be borne by another, hence indirect and ultra vires the Province. There are expressions in the various authorities upon which argument was founded that for one reason or another the present case does not fall within Mill's definition. These arguments were presented with great force; but there is no decision directly in point and using the best judgment I can in such a matter, I am not persuaded that they are of sufficient weight to take this case outside of the clear and definite language used by Mill and constantly repeated in all the authorities.

Questions 5 and 6 have to do with a suggested tax on the land to be measured by the amount of the timber growing thereon and payable in alternative ways. It is objected to upon the ground that this would be merely colourable legislation, in that the real objective is to deprive the Railway Company of

RECORD

Court of Appeal of British Columbia

No. 6
Reasons for Opinion Sidney Smith, J.A.
June 10, 1947
(Contd.)

part of the profits made from the sale of its lands. I think this objection must prevail.

Counsel for the Attorney-General of British Columbia dealt with these questions in a good deal of detail and strongly urged that the tax is on land and that a land tax is always a direct tax, quoting in support City of Montreal vs. A.G. for Canada (1923) A.C. 136 at p. 142 and Halifax v. Fairbanks (1928) A.C. 117. The passage chiefly relied upon as representing the high-water mark of this principle was from Lord Cave in the Fairbanks case at p. 124:

> The result of these observations, which are closely applicable to the present case, is that their Lordships have primarily to consider, not whether in the view of an economist the business tax imposed on an owner under s. 394 of the Halifax city charter would ultimately be borne by the owner or by some one else, but whether it is in its nature a direct tax within the meaning of s. 92, head 2, of the Act of Union. The framers of that Act evidently regarded taxes as divisible into two separate and distinct categories—namely, those that are direct and those which cannot be so described, and it is to taxation of the former character only that the powers of a Provincial government are made to extend. From this it is to be inferred that the distinction between direct and indirect taxes was well known before the passing of the Act; and it is undoubtedly the fact that before that date the classification was familiar to statesmen as well as to economists, and that certain taxes were then universally recognized as falling within one or the other category. Thus, taxes on property or income were everywhere treated as direct taxes; and John Stuart Mill himself, following Adam Smith, Ricardo and James Mill, said that a tax on rents falls wholly on the landlord and cannot be transferred to any one else. "It merely takes so much from the landlord and transfers it to the State" (Political Economy vol. ii., p. 416). On the other hand, duties of customs and excise were regarded by every one as typical instances of indirect taxation. When therefore the Act of Union allocated the power of direct taxation for Provincial purposes to the Province, it must surely have intended that the taxation, for these purposes, of property and income should belong exclusively to the Provincial legislatures, and that without regard to any theory as to the ultimate incidence of each particular tax which it might desire to impose, at the risk of having such tax held invalid

if the conclusion reached should afterwards be held to be wrong.

But that this does not always follow is shown in the pronouncement by Viscount Simon in Atlantic Smoke Shops vs. Conlon, supra, at p. 565:

> Their Lordships are of opinion that Lord Cave's reference in his judgment in the Fairbanks' case to "two separate and distinct categories" of taxes, "namely, those that are direct and those which cannot be so described" (1928) A.C. 124, should not be understood as relieving the courts from the obligation of examining the real nature and effect of the particular tax in the present instance, or as justifying the classification of the tax as indirect merely because it is in some sense associated with the purchase of an article.

So that it is by no means conclusive that a tax is direct simply because it is imposed on land. On the contrary, the Courts will examine the legislation under consideration and the history leading up to it. This is expressed as follows by Lord Maugham L.C. in A.G. for Alberta vs. A.G. for Canada (1939) A.C. 117 at p. 132:

> In their opinion, it was quite legitimate to look at the legislative history of Alberta as leading up to the measure in question, including the attempt to create a new economic era in the Province.

And again at page 133:

> Their Lordships agree with the opinion expressed by Kerwin J. (concurred in by Crocket J.) that there is no escape from the conclusion that, instead of being in any true sense taxation in order to the raising of a revenue for Provincial purposes, the Bill No. 1 is merely "part of a legislative plan to prevent the operation within the Province of those banking institutions which have been called into existence and given the necessary powers to conduct their business by the only proper authority, the Parliament of Canada." This is a sufficient ground for holding that the Bill is ultra vires.

I think there can be no doubt that when this suggested legislation is examined in the light of its historical background it is seen to be merely "part of a legislative plan" to prevent continued operation of sec. 22 within the spirit of the intention of the Government that framed it. In effect, the target aimed at by the proposed legislation would seem to be not to tax land,

RECORD

Court of Appeal of British Columbia

No. 6
Reasons for Opinion
Sidney Smith, J.A.
June 10, 1947
(Contd.)

but to deprive the Railway Company of part of its consideration for the building of the railway. This will not do. The bargain was made and is statutory. Without any doubt, the section can be amended or repealed by virtue of the Sovereign authority of the Legislature over matters within its competence, as is this; but in my view that cannot be done without a breach of faith.

The 7th Question can be disposed of very shortly. I am of opinion that the tax therein referred to does not derogate from the provisions of sec. 22 of the Settlement Act. The charges made under sec. 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. Fire protection is clearly valid as a Provincial object and charges levied by the Province for that purpose must also be admissible. As pointed out by Martin *J.A.* (later C.J.B.C.) in the comparable case of Re Reference Natural Products Marketing Act (1937) 52 B.C.R. 179 at p. 192 these "are really service fees paid for the special services."

I would therefore answer the questions as follows:

Question 1—No.
" 2—Yes.
" 3—No.
" 4—Yes.
" 5—No.
" 6—No.
" 7—1st part—yes.
" 2nd part—no.

In accordance with the provisions of the Constitutional Questions Determination Act, C. 50, R.S.B.C. 1936, I hereby certify to His Honour the Lieutenant-Governor in Council that, in my opinion, for the reasons herein contained, the questions referred to us should be answered as above noted.

SIDNEY SMITH, *J.A.*

Vancouver, B.C., 10th June, 1947.

849-je19

No. 7

REASONS FOR OPINION OF THE HONOURABLE MR. JUSTICE BIRD

The questions referred for the opinion of this Court by the Lieutenant-Governor in Council under Order of Reference dated November 12th, 1946, were amended on the hearing, and are now set out in amended form in the reasons of my brother O'Halloran. The questions relate (1) to the existence of a contract between the Province and the Railway Company to exempt from taxation lands and timber situate in the railway belt on Vancouver Island, being lands conveyed to the Dominion of Canada in trust, pursuant to the provisions of sec. 3 of the Settlement Act, 1883 (B.C. Statutes 1884, Cap. 14), and (2) to the competence of the Province, in view of that legislation, to impose taxation on such lands or timber.

Questions Nos. 1 and 3 can conveniently be considered together.

Determination of these questions requires examination of the legislation enacted in the years 1883 and 1884 by the Legislature of British Columbia and the Parliament of Canada, respectively; for if any such contractual relationship existed between the Government of British Columbia and the E. & N. Railway Company Limited or the contractors for construction of its line of railway on Vancouver Island, that relationship must have arisen out of the legislation then enacted.

Before one can hope to make an intelligent appreciation of the intent and effect of that legislation the various provisions of these statutes must be considered, in my judgment, in the light of the circumstances in which the legislation was enacted. Consequently it first becomes necessary to examine in the light of conditions then prevailing, the antecedent history of negotiations and exchanges between the Governments and others concerned, which culminated in the passing of the legislation.

When British Columbia entered Confederation in 1871 the responsible Ministers who then represented the Governments of Great Britain, of Canada and of British Columbia, appear to have recognized the necessity in the interest of all three governments that adequate means of transportation should be provided between British Columbia and the Eastern provinces, since no transcontinental transportation facilities then existed. Moreover, the Government of the Dominion of Canada appears to have acknowledged that the primary obligation to provide such trans-

RECORD

Court of Appeal of British Columbia

No. 7
Reasons for Opinion
Bird, J.A.
June 10, 1947
(Contd.)

portation facilities in the form of a transcontinental railway rested upon the Dominion Government (Sloan report pp. 173-6).

In consequence there was incorporated in the terms of the agreement whereby the former Colony of British Columbia became a Province of Canada, an undertaking by Canada "to secure the commencement . . . within two years from the date of the union, of the construction of a railway . . . to connect the seaboard of British Columbia with the railway system of Canada, and further to secure the completion of such railway within ten years from the date of the union"; and British Columbia thereby agreed to convey to Canada in trust an extensive area of land contiguous to the line of railway "in furtherance of the construction of the railway," hereafter referred to as the "railway lands," sec. 11 Terms of Union, Doc. Vol. 96.

Case p. 192

The historical record of events covering a period of thirteen years after British Columbia entered Confederation (Doc. Vol. pp. 93-113) discloses a continuing failure by Canada to implement the undertaking thereby given, despite frequent protests by British Columbia in regard to the delay. Nothing had been done in that respect prior to 1875 except to locate the line of the proposed railway on Vancouver Island, and to select Esquimalt as its terminus. Then in September 1875 the Dominion apparently sought to be relieved of its obligation to secure construction of the island railway by offering to pay the Province $750,000.00 as compensation for the delay, such sum to be applied by the Province to construction of the railway, or to other public works considered advantageous by the Province, and, upon acceptance of the offer, undertook to surrender any claim to lands on Vancouver Island which had been reserved by the Province for railway purposes. The fact that the Government of British Columbia rejected this offer and insisted upon the performance of the undertaking by the Dominion, in my opinion, furnishes a clear indication of the then current determination of the Government of British Columbia, not only to hold the Dominion to the bargain, but also to refrain from any direct participation in matters relating to the construction of the island railway. Subsequent to rejection of this proposal, and pursuant to demand by the Dominion, the Province enacted legislation to authorize a grant of the lands previously held in reserve for the purpose, to the Dominion in trust for railway construction. (Doc. Vol. p. 101.)

Case p. 190-214

Case p. 198

A change in this policy of the British Columbia government no doubt induced by the continued inaction of the Dominion, is to be inferred from the fact that in April 1882 British Columbia en-

acted legislation to incorporate Lewis M. Clement et al to undertake construction of a railway from Esquimalt to Seymour Narrows, which legislation contained provisions for a grant by the Province to the contractors of 1,900,000 acres of public lands, to be made upon completion of the line of railway; and for an exemption of such lands from taxation in the following terms:

> S. 21 . . . and the lands of the company shall also be free from provincial taxation until they are either leased, sold, occupied or in any way alienated.

The land grant legislation of 1875 was then repealed. However, Clement failed to furnish the necessary security to ensure construction of the railway, and this proposal was abandoned.

I think it is evident that the Government of British Columbia then reverted to its 1875 policy of refraining from direct participation in matters relating to construction of the railway, for in November, 1882, subsequent to the conclusion of the Clement episode, British Columbia once more called upon the government of Canada to implement its undertaking given by the Terms of Union. (Harrison Report—Doc. Vol. p. 106).

Case p. 204

On May 5th, 1883, Hon. J. W. Trutch, representing the Premier of Canada, submitted further proposals to the Government of British Columbia upon the stipulation that in event of approval "acceptance shall be ratified by Act of the Legislature as in full of all claims whatsoever of the Government of British Columbia against the Government of Canada." (Doc. Vol. pp. 17-19.)

Case p. 124-125

The Province advised Mr. Trutch of its acceptance of these proposals three days later and on May 12th assent was given in the Legislature to an Act in which Mr. Trutch's proposals were incorporated (Doc. Vol. pp. 30-37).

Case p. 129-136

However, this did not entirely resolve the matter for in June, 1883, apparently as the result of further exchanges between the two Governments, the Dominion appointed Sir Alexander Campbell "to personally communicate with the Provincial Government on various questions unsettled between the two Governments . . . and to communicate with Mr. Dunsmuir or other capitalists" relative to construction of the proposed railway.

The Mr. Dunsmuir there mentioned was no doubt the same Robert Dunsmuir who was then a member of the Provincial Legislature, and who, in 1882, had presented to the Legislature a private bill relating to construction of a railway such as was contemplated in the Clement Act. That bill was killed in the course

RECORD

Case p. 204

Court of Appeal of British Columbia

No. 7
Reasons for Opinion
Bird, J.A.
June 10, 1947
(Contd.)

of the same Session of the Legislature in which the Clement bill was passed. (Doc. Vol. p. 106.)

Some significance may well be attached to the fact that upon abandonment of the Clement project neither Dunsmuir nor the province appear to have moved to revive the proposal made in the Dunsmuir bill before mentioned, but instead Dunsmuir opened negotiations with the Dominion leading to a contract between the Dominion and the Dunsmuir interests for construction of the proposed railway.

The negotiations subsequently conducted by Sir Alexander Campbell appear from the record to have culminated on August 20th, 1883, in an arrangement between the two governments and further in the execution of a contract for construction of the E. & N. Railway, which purported to be made between R. Dunsmuir and associates and the Government of Canada. (Harrison report —Doc. Vol. p. 109.)

Case p. 208

By the terms of the arrangement first mentioned existing differences between the respective governments relating to railway matters appear to have been adjusted (vide Doc. Vol. pp. 109-111) by the Province agreeing, inter alia, (1) to amend the Act of May, 1883, in certain respects required by the Dominion; and further (2) "to procure the assent of the contractor for construction of the island railway to Clause F of the agreement recited in the amending bill"; (Doc. Vol. p. 38), Clause F being a provision whereby a limited right is reserved to actual settlers, to purchase 160 acre blocks of the railway lands at a price of $1.00 per acre.

Case p. 208-211

Case p. 140

The Dominion thereby arranged to contribute $750,000.00 towards the construction of a railway from Esquimalt to Nanaimo, and to transfer lands conveyed to it by British Columbia for that purpose to "the contractors who may build such railway." (Settlement Act, Doc. Vol. p. 48.) It was further arranged that each Government would enact legislation to carry out the terms of this arrangement and to facilitate early commencement of railway construction on Vancouver Island.

Case p. 151

The railway construction contract then executed was placed in escrow pending sanction being given by both Governments to the terms of the arrangement before mentioned and to the terms of the railway contract by the Dominion Government.

Again it is perhaps significant that the terms of the construction contract were not required to be ratified by the Province.

It is to be noted that the draft bill of the British Columbia Legislature mentioned in the railway contract was identical in form with the Provincial statute, to which assent was later given on December 19th, 1883; further, that the railway contract bears an endorsement over the signature of R. Dunsmuir which reads:

> 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.

Turning now to the legislation passed in 1883 and 1884 by the Governments of British Columbia and of Canada respectively: Each statute recites an agreement made between the two governments for the purpose of settling disputes and difficulties existing between them relative, inter alia, to construction of the island railway; and further recites and subsequently adopts the various terms agreed upon.

The provincial statute, known as the Settlement Act, constitutes certain persons to be designated by the Dominion, a body corporate by the name of Esquimalt & Nanaimo Railway Company; and confers powers, subject to conditions, upon that company to construct a line of railway from Esquimalt to Nanaimo. Anticipating subsequent transfer by the Dominion of the lands so conveyed in trust by British Columbia, provisions are also incorporated for protection of squatters upon the lands and the right of actual settlers to purchase blocks of land. The Act further provides tax exemptions like in effect to the tax exemption provisions found in the Clement bill of 1882.

The Dominion Act also approves and ratifies the railway construction contract, which is expressed to be made between Robert Dunsmuir et al and Her Majesty Queen Victoria, represented by the Minister of Railways and Canals. Authority is thereby given to grant in aid of construction of the railway a subsidy of $750,000.00 and the lands held by the Dominion in trust, in so far as such lands shall be vested in Her Majesty. It further contains like provisions to those found in the Provincial Act for protection of squatters and the rights of settlers.

I conclude from examination of the terms negotiated by Sir Alexander Campbell, as those terms are set out in the memorandum of arrangement dated August 20th, 1883, and in the legislation of 1883 and 1884, as well as from perusal of the available record of decisions and actions of the two governments, and of their respective representatives which preceded the enactment of the Settlement Bill of 1883 that throughout the period 1871

to 1883, with the single exception of the short-lived Clement episode, B.C. had adhered to the policy that the Province should stand upon sec. 11 of the Terms of Union and refrain from assuming any other contractual obligation in relation to railway construction. I find nothing either in the legislation before mentioned or in the record of negotiations which led to its enactment from which in my opinion a conclusion can reasonably be drawn that thereby the Province intended or in fact did contract with the railway company or the contractors for its construction either directly or through the Dominion Government or its representatives as agent of the Provincial government. I do not recall that the agency theory was advanced by counsel supporting the contract view, though the Court was asked to deal with the agency question by counsel for the Province. In any event, there is nothing in the record before us which in my opinion can be taken as supporting the proposition that in negotiating the terms of settlement or those of the construction contract the Dominion or its representatives acted as agents for the Province. I think it clearly appears that the Dominion and its representatives then acted solely for the account of the Dominion.

Nor does it appear from the record, in any event up to 1904, that the railway company considered that any such contract had been made. In that year the railway company addressed a petition to His Excellency the Governor-General in Council for disallowance of the "Vancouver Island Settlers' Rights Act, 1904," enacted in that year by the Provincial Government, alleging that the Act created "an interference with the contract made (in 1883) between the Esquimalt and Nanaimo Railway Company and the Dominion Government." The petition was signed on behalf of the railway company by its President, James Dunsmuir, who had been a party to the railway construction contract. The railway company then founded its objection to the legislation upon the ground expressed in paragraphs 20 and 21 of the petition that "the Esquimalt and Nanaimo Railway Company made their contract as aforesaid with the Dominion Government." "The Company did not receive the land from the Provincial Government; *nor did they enter into any contract with the Provincial government*" (my italics). But the railway company supported by certain of its successors in title to part of the timber lands and by the Attorney-General of Canada, now submits that a contract was made in 1883 between the province and the railway company, whereby the province agreed (inter alia) not to tax unsold lands. Counsel supporting this position rely principally upon the proposition that the provincial legislation of 1883 constitutes an offer

open to acceptance by any delegated persons or corporation who undertakes and completes the construction of the island railway, which offer, it is submitted, was accepted by the E. & N. RAILWAY COMPANY.

Counsel for the railway company bases his submission on a contract arising from the May Act of 1883, which he says constitutes an offer by the Province, the acceptance of which is found in the Settlement Act of 1883, whereby the E. & N. Railway Company is incorporated under sec. 8, and is bound to construct the railway by the terms of sec. 9 thereof. He relies particularly upon the use of the imperative "shall" in sec. 9 of the Act as imposing an obligation upon the new railway company as well as upon the exemption from taxation found in sec. 22; also upon the provisions of sections 23 to 26 inclusive, which latter sections, he contends, are addressed to the railway company. He directs attention to sec. 15 of the construction contract, whereby the lands are made subject to the provisions of the Settlement Act, and particularly sections 23 to 26 inclusive, and thereby include every provision of the draft bill. Counsel therefore urges that when the Settlement Act, including sec. 27 thereof, was later enacted a contract was created between the railway company and the province.

The submission of counsel for the timber owners is to the like effect, though he relies upon the Settlement Act of 1883 as constituting an offer which could be converted into a contract by performance of what he terms the condition, i.e., construction of the railway by persons named by the Dominion. He, too, finds support for this submission in the language of the statute and of the construction contract which is relied upon by counsel for the railway.

Counsel for the Attorney-General of Canada has adopted the arguments of other counsel on the same side.

It is to be observed that the May Act was passed to confirm the acceptance by the Province of the Dominion proposals made in the Trutch letter of May 5th, 1883. Therefore, as between the two governments the Act was clearly an acceptance of an offer by the Dominion. In the May Act, as well as in the Settlement Act of December 19th, 1883 (which amends the May Act) terms were incorporated which had been the subject of lengthy negotiation between representatives of the two governments. Since the Dominion had the primary obligation to secure construction of the railway, I think it was to be expected that the Dominion representatives, in the interest of their principal, must first endeavour to arrange terms with the Province which would be acceptable to a

RECORD

Court of Appeal of British Columbia

No. 7
Reasons for Opinion
Bird, J.A.
June 10, 1947
(Contd.)

prospective contractor; then to cause those terms to be clearly defined in the provincial draft bill, to the end that a prospective contractor could be assured of the ability of the Dominion to fulfill those terms. In my judgment it is apparent from examination of those statutes and of the construction contract, that this course was adopted.

If the legislation and the construction contract are considered in the light of these conditions, as I think the documents must be, then in my opinion the May Act, as well as the Settlement Act of 1883 are shown to be, as I think appears from the language of the legislation, nothing more than the confirmation of an agreement made between the Dominion and the Province.

I would therefore answer question 1 in the affirmative.

Question 3.—We are told by counsel for the Government of British Columbia that question 3 relates specifically to the effect of chapter 33 of the Statutes of British Columbia 1912 (Doc. Vol. p. 128); the question being directed to ascertaining whether a contract arising under that statute would be breached by the tax recommended by the Commissioner. The Commissioner's recommendation in my opinion is to be read as including any tax within the competence of the Provincial Legislature, whether upon timber alone, or lands upon which there is standing timber, all situate within the island railway belt. I conclude further that the question relates only to such a tax as is indicated in questions 4, 5 and 6. This statute recites that the railway company "desires to be assured that the leasing of its said railway . . . to the Canadian Pacific Railway will not affect the exemption of its lands," i.e., under sec. 22 of the Settlement Act 1883, and provides by sec. 1 "notwithstanding such lease . . . such exemption shall remain in force and virtue." Under sec. 2 the Company agrees to pay 1½c. per acre of railway lands remaining vested in the Company from time to time. In my judgment the effect of the statute is simply to preserve the exemption attaching to the railway lands under the terms of the Settlement Act, notwithstanding the lease of its railway to the Canadian Pacific Railway. No new right of exemption is granted thereby but the E. & N. Railway Company thereby agrees to pay 1½c. per acre as consideration for the promise of the Province to refrain from treating the proposed lease as a form of alienation of the lands destructive of the tax exemption under sec. 22 of the Settlement Act. Therefore I have reached the conclusion that although by the Act of 1912 the Province does ratify a contract then made between the E. & N. Railway Company and

Case p. 237

the Province, nevertheless a breach of that contract will not be created by the proposed legislation.

Question 2.—We were told on the hearing by counsel for the Province that notwithstanding an affirmative conclusion being reached in regard to Questions 1 and 3, or either of them, the Province desires an answer to Question 2. Since I have reached an affirmative conclusion on both of the questions first mentioned, for the purposes of Question 2 I must assume the existence of a contract such as counsel for the railway company and for parties on the same side have urged to exist by virtue of sec. 22 of the Act of 1883.

The language of sec. 22, as I read it, provides for a limited exemption from taxation which terminates with the happening of one of the events last mentioned therein. The legislation proposed in each of questions 4, 5 and 6 in my opinion contemplates the levy of a tax subsequent to the happening of any such event, although the proposed legislation will be enacted prior thereto.

I think that the phrase "shall not be subject to taxation" found in sec. 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, but must be read as creating an exemption from a direct levy which imposes liability for taxation.

Therefore I have reached the conclusion that even if a contract exists by virtue of sec. 22, a breach of that contract will not arise in consequence of enactment of legislation under any one of questions 4, 5 and 6 whereby the imposition of a tax is authorized.

Question 4.—This question assumes an alienation of timber lands by the railway company to another subsequent to the enactment of legislation whereby a tax is imposed upon timber cut from the lands for the payment of which the owner becomes liable immediately upon severance of the standing timber. It is therefore a tax proposed to be levied on personal property.

The answer to the question then depends upon whether the tax is found to be direct or indirect within the meaning of sec. 92, head (2) of the British North America Act. The test to be applied rests on the application of the principle that "a direct tax is one that is demanded from the very person who it is intended or desired should pay it. An indirect tax is that which is demanded from one person in the expectation and with the intention that he shall indemnify himself at the expense of another,"

per Viscount Haldane in *Attorney-General for Manitoba v. Attorney-General for Canada* (1925) A.C. 561 at 566. But the form alone of the legislation will not determine whether the tax is direct or indirect. The Court must "scrutinize the tax in its entirety" —*Great West Saddlery Co. v. The King* (1921) 2 A.C. 91 and 117 —for the purpose of ascertaining its "true nature and character" —*Citizens Insurance Co. v. Parsons* (1881) 7 A.C. 96.

Here counsel for the Province submits that the proposed tax will be imposed upon the very person who is intended to pay the tax, that is to say, the owner of the timber at the time of severance. He cites in support of that proposition *Atlantic Smoke Shops Limited v. Conlon* (1943) 112 L.J.P.C. 68 and particularly the language of Viscount Simon at p. 72, when referring to the *Kingcome* case:

> For fuel oil may be consumed for the purpose of manufacture and transport, and the tax on the consumption of fuel oil might, as one would suppose, be sometimes passed on in the price of the article manufactured or transported. Yet the Privy Council held that the tax was direct.

Counsel seeks to distinguish the proposed tax from that under consideration in *Attorney-General for British Columbia v. McDonald Murphy Lumber Company* (1930) A.C. 357 upon the ground that the proposed tax is not in the course of a commercial transaction. He says that when the commodity is used by the taxpayer for manufacturing purposes it is in the same category as the fuel oil in the *Kingcome* case. But the judgment in the *Kingcome* case, as well as that in the *Smoke Shop* case, I think rests on the conclusion that "the person who pays the tax is the person who actually bears it"; for in the *Smoke Shop* case at p. 73, referring to the tax under consideration in those decisions, the Lord Chancellor says:

> In both instances the circumstance which makes the tax direct is the same, namely, that the person who pays the tax is the person who actually bears it.

Then can it reasonably be said that the proposed tax which will be paid by the owner of the cut timber actually will be borne by him? I think it clearly appears from examination of Question 4 that the taxpayer actually will not bear it. In my opinion the tax will be borne either wholly by the E. & N. Railway Company or in part by that company and in part by the purchaser of the logs as in the *McDonald Murphy* case.

I conclude that the immediate effect of the enactment of the legislation referred to in the question will be to suspend the tax over all timber lands then owned by the railway company, which I think must inevitably result in a diminution in the current price of those lands in the open market; for lands growing timber which is subject to tax when cut, will not sell at as high a price as comparable lands having standing timber free from tax. The amount of that price reduction must no doubt be a matter of conjecture, but I think one may reasonably assume that the reduction will bear close relation to the amount of the tax subsequently to be levied. If that be so, it must necessarily follow that one who acquires title to such timber lands subsequent to enactment of the legislation and later cuts the standing timber will have received some compensation for the tax subsequently payable by way of a reduction in the purchase price of the timber lands. In those circumstances I think it may reasonably be said that the general tendency will be to pass the tax, or in any event a substantial part of it, backwards to the vendor of the timber lands. Then, since logs are a commodity of commerce, and the tax being imposed on the logs when severed from the land, I think there can be no doubt that if any balance of the tax remains for which the taxpayer is not compensated by the diminution in the selling price, it will enter into the determination of the price of the manufactured product.

I think it follows consequently that whether the general tendency is to pass the tax backward to the vendor of the timber or forward to a purchaser of the logs, nevertheless the tax is one which is demanded from one person, with the intention that another shall bear it, and is therefore indirect taxation.

I would answer Question 4 in the affirmative.

Questions 5 *and* 6—I would answer both questions 5 and 6 in the affirmative. I concur in the reasons given by my brother O'Halloran in answer to these questions, except the opinion therein expressed (at pp. 48-50) as the first answer found by him to the submission that the proposed tax is indirect because it is passed backwards to the E. & N. Railway Company.

Question 7—Sec. 123 of the Forest Act provides for the creation of a forest protection fund, to be raised by annual contributions required thereunder to be made by owners of lands classified as timber lands under the provisions of the Taxation Act as well as by annual contributions to be made by the Minister of Finance from the Consolidated Revenue Fund. The forest protection fund, as the name implies, is raised for the sole purpose

RECORD

Court of Appeal of British Columbia

No. 7
Reasons for Opinion
Bird, J.A.
June 10, 1947
(Contd.)

of financing measures found necessary to furnish protection of timber lands in the public interest as well as that of the private owner of timber lands. This I think appears from examination of the several sections found under the head of Part 11 of the Act, and particularly sec. 123, subsecs. 4 and 5, which provide for increased or reduced annual levies, depending upon whether the total levy made under sec. 123, subsec. 1 is or is not sufficient to cover expenditures made from the fund. I must conclude therefore that contributions so made by owners of timber lands, i.e., the tax (so-called) 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* (1937) 52 B.C.R. 179 at 192:

> In their essence they are not of that nature (taxes) but are really service fees paid for special services;

and cf. *Shannon v. Lower Mainland Dairy Products Board* (1938) A.C. 708 in which the quoted language of Martin C.J. is approved by the Judicial Committee:

> They are fees for services rendered by the Province or by its authorized instrumentalities under the powers given by sec. 92 (13) (16).

So considered, the tax so-called, in my opinion does not derogate from the provisions of sec. 22 of the Act of 1883, and imposes a liability upon the E. & N. Railway Company in connection with its timber lands.

In accordance with the provisions of the Constitutional Questions Determination Act, C. 50, R.S.B.C. 1936, I hereby certify to His Honour the Lieutenant-Governor in Council that, in my opinion, for the reasons herein expressed, the questions referred to us should be answered as above noted.

H. I. BIRD, *J.A.*

Vancouver, B.C., 10*th June,* 1947.

No. 8

COURT OF APPEAL

IN THE MATTER OF the Constitutional Questions Determination Act, Chapter 50, R.S.B.C. 1936.

AND

IN THE MATTER OF the Esquimalt and Nanaimo Railway Company.

CERTIFICATE

I HEREBY CERTIFY that Esquimalt and Nanaimo Railway Company and Alpine Timber Company Limited have deposited with me the sum of Five Hundred ($500.00) Dollars of lawful money of Canada as security that the said Esquimalt and Nanaimo Railway Company and Alpine Timber Company Limited will effectually prosecute their appeal to the Supreme Court of Canada from the Judgment of this Honourable Court pronounced on the 12th day of June, A.D. 1947, and will pay such costs and damages as may be awarded against the said Esquimalt and Nanaimo Railway Company and Alpine Timber Company Limited by the Supreme Court of Canada.

DATED at Vancouver, B.C. this 24th day of June, A.D. 1947.

A. L. RODWAY,
Dep. Registrar,
Court of Appeal,

B.C.L.S.
$1.00

VANCOUVER
JUN 24 1947
REGISTRY

Vancouver Registry
Seal
Court of Appeal
British Columbia

RECORD

Court of Appeal of British Columbia

No. 9
Order Approving Security
June 27, 1947

No. 9

COURT OF APPEAL

IN THE MATTER OF the Constitutional Questions Determination Act, Chapter 50, R.S.B.C. 1936,

AND

IN THE MATTER OF the Esquimalt and Nanaimo Railway Company.

CORAM:

THE HONOURABLE MR. JUSTICE ROBERTSON.

VANCOUVER, B.C., the 27th day of June, A.D. 1947.

UPON MOTION of Esquimalt and Nanaimo Railway Company, and Alpine Timber Company Limited, and Upon hearing J. A. Wright, Esquire, of Counsel for the said Esquimalt and Nanaimo Railway Company, and Ghent Davis, Esquire, of Counsel for the said Alpine Timber Company Limited, and no one appearing for the Attorney-General of British Columbia though duly served with Notice of this Motion, and Upon reading the Notice of Motion herein and the Certificate of the Registrar of this Honourable Court.

IT IS ORDERED that the sum of Five Hundred ($500.00) Dollars of lawful money of Canada deposited by the said Esquimalt and Nanaimo Railway Company and Alpine Timber Company Limited with the Registrar of this Honourable Court as security that the said Esquimalt and Nanaimo Railway Company and Alpine Timber Company Limited will effectually prosecute their appeal to the Supreme Court of Canada from the Judgment of this Honourable Court pronounced on the 12th day of June, A.D. 1947, and will pay such costs and damages as may be awarded against the said Esquimalt and Nanaimo Railway Company and Alpine Timber Company Limited by the Supreme Court of Canada, be allowed as proper security for the said Appeal.

HAROLD B. ROBERTSON
J.A.

ENTERED
JUL 7 1947
Order Book
Vol. 14
Fol. 224
Per S.C.G.

Approved
R. Stultz
for A/G of British Columbia

G.D.

Checked
R.W.

B.C.L.S.
60c

VANCOUVER
JUL 7 1947
REGISTRY

IN THE SUPREME COURT OF CANADA

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

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

Appellants

AND

THE ATTORNEY-GENERAL OF BRITISH COLUMBIA

Respondent

No. 10

AGREEMENT AS TO CONTENTS OF CASE

WE, the undersigned, solicitors for the Appellants and Respondent herein do hereby agree that the following shall constitute the printed Case on the appeal herein to the Supreme Court of Canada:

1. Contents of the volume of documents before the Court of Appeal for British Columbia on the reference.
2. Report of the Commissioner relating to the Forest Resources of British Columbia (to be filed separately).
3. Grant to the E. & N. Railway Company of 86,346 acres of land, dated October 4th, 1905.
4. Extract from Mulholland Report of 1937.
5. Extract from evidence of C. D. Orchard before Sloan Commission.
6. Extract from evidence of C. W. McBain before Sloan Commission.
7. Letter from Chief Justice Sloan to Attorney-General of B.C., dated November 22nd, 1946.
8. Extract from "7 Oregon Compiled Laws."

RECORD

In the Supreme Court of Canada

No. 10
Agreement as to Contents of Case
Aug. 30, 1947
(Contd.)

9. Extract from "Remington Revised Statutes of Washington."
10. Agreed statement of facts dated December 13th, 1946.
11. Minute of Executive Council of B.C., dated January 15th, 1947.
12. Certificate of Court of Appeal, dated June 10th, 1947.
13. Reasons for Opinion of The Honourable Mr. Justice O'Halloran.
14. Reasons for Opinion of The Honourable Mr. Justice Sidney Smith.
15. Reasons for Opinion of The Honourable Mr. Justice Bird.
16. Certificate of the Registrar as to the Deposit of Security.
17. Order approving security.
18. Agreement as to contents of Case.
19. Registrar's Certificate as to Case.

DATED at Vancouver, B.C., this 30th day of August, A.D. 1947.

"J. A. WRIGHT,"
Solicitor for Esquimalt & Nanaimo Railway Company.

"DAVIS, HOSSIE, LETT, MARSHALL & McLORG,"
Solicitors for Alpine Timber Company Limited.

"F. P. VARCOE,"
Solicitor for The Attorney-General of Canada.

"R. S. STULTZ,"
Solicitor for The Attorney-General of British Columbia.

EXHIBIT No. 1

Exhibit No. 1
Report
Committee
Executive
Council
June 30, 1873

REPORT OF COMMITTEE OF EXECUTIVE COUNCIL

30th June, 1873.

I HEREBY CERTIFY the following to be a true copy of the Order in Council dated 30th June, 1873.

A. Campbell Reddie,
Deputy Clerk, Executive Council.

COPY OF A REPORT of a Committee of the Honourable the Executive Council, approved by His Honour the Lieutenant-Governor on the 30th day of June, 1873.

On a Memorandum from the Hon. the Attorney General, dated the 30th day of June, 1873, recommending that for the present a bare reservation of the 20 mile belt lying between Esquimalt Harbour and Seymour Narrows be made to protect the Government of the Dominion until the questions raised by the Order in Council of the Privy Council of Canada, dated the 7th inst., with its covering despatch on the subject of the 10th instant, be more fully discussed and determined and that the conveyance in trust of the said land asked for by the Ottawa Government be for the present deferred, and that the enclosed notice of reservation be adopted and published in a "Gazette Extraordinary."

The Committee of Council advises that the recommendation be approved.

"A. De Cosmos,"
Prest. Council.

Approved in Council,
Joseph W. Trutch,
30th June, 1873.

EXHIBIT No. 2

Exhibit No. 2
Notice of Land
Reservation
July 1, 1873

NOTICE

WHEREAS by an Order in Council dated the 7th day of June, 1873, of the Honourable the Privy Council of Canada, it has been decided "that Esquimalt in Vancouver Island be fixed as the terminus of the Canadian Pacific Railway, and that a line of Railway be located between the Harbour of Esquimalt and Seymour Narrows on the said Island." And Whereas in accordance with the terms of the said Order in Council application has

RECORD

Court of Appeal of British Columbia

Exhibit No. 2
Notice of Land Reservation
July 1, 1873
(Contd.)

been made to His Excellency "the Lieut.-Governor of British Columbia for a reservation and for the conveyance to the Dominion Government in trust, according to the 11th paragraph of the terms of the Agreement of Union of a strip of land 20 miles in width along the Eastern Coast of Vancouver Island, between Seymour Narrows and the Harbour of Esquimalt," in furtherance of the construction of the said Railway. And whereas it has been deemed advisable that the land within the limits aforesaid should be reserved, prior to any conveyance aforesaid being made thereof. Public notice is therefore hereby given that from and after this date a strip of land 20 miles in width along the Eastern Coast of V. I. between Seymour Narrows and the Harbour of Esquimalt is hereby reserved.

By Commission,

"John Ash."

P.S.O.
1st July, 1873.

Exhibit No. 3
B.C. Gazette
Notice
July 5, 1873

EXHIBIT No. 3

THE BRITISH COLUMBIA GAZETTE

Victoria, July 5th, 1873.

Vol. XIII. No. 27.

NOTICE

WHEREAS by an Order-in-Council, dated the 7th day of June, 1873, of the Honourable the Privy Council of Canada, it has been decided "that Esquimalt, in Vancouver Island, be fixed as the terminus of the Canadian Pacific Railway, and that a line of railway be located between the harbour of Esquimalt and Seymour Narrows, on the said island."

AND WHEREAS in accordance with the terms of the said Order-in-Council, application has been made to His Excellency "the Lieutenant-Governor of British Columbia for a reservation and for the conveyance to the Dominion Government, in trust, according to the 11th paragraph of the terms of the agreement of Union, of a strip of land twenty miles in width along the eastern coast of Vancouver Island, between Seymour Narrows and the Harbour of Esquimalt, in furtherance of the construction of the said railway";

Exhibit No. 3
B.C. Gazette
Notice
July 5, 1873
(Contd.)

AND WHEREAS it has been deemed advisable that the land within the limits aforesaid should be reserved, prior to any conance aforesaid being made thereof.

PUBLIC NOTICE is therefore hereby given that from and after this date a strip of land twenty miles in width along the eastern coast of Vancouver Island between Seymour Narrows and the Harbour of Esquimalt, is hereby reserved.

By Command,

John Ash,
Provincial Secretary.

Provincial Secretary's Office,
July 1st, 1873.

EXHIBIT No. 4

Exhibit No. 4
Report
Committee
Executive
Council
July 23, 1873

REPORT OF COMMITTEE OF EXECUTIVE COUNCIL

23rd July, 1873.

I HEREBY CERTIFY the following to be a true copy of the Order in Council dated 23rd day of July, 1873.

A. Campbell Reddie,
Deputy Clerk, Executive Council.

CERTIFIED COPY OF A REPORT of a Committee of the Honourable the Executive Council, approved by His Honour the Lieutenant-Governor on the 23rd day of July, 1873.

The Committee of Council have had under consideration a Memorandum, of the 23rd July, 1873, from the Honourable the Attorney General, reporting upon a despatch, dated the 10th of June last, from the Honourable the Secretary of State for the Provinces to your Excellency, covering an Order of the Honourable the Privy Council of Canada, of the 7th of the same month, which states, that the Privy Council had decided as follows:—

"That Esquimalt in Vancouver Island be fixed as the terminus of the Canadian Pacific Railway, and that a line of Railway be located between the Harbour of Esquimalt and Seymour Narrows on the said Island."

In pursuance of this decision Your Excellency is requested to convey by Order in Council "to the Dominion Government in trust according to the 11th paragraph of the Terms of the Agree-

RECORD

Court of Appeal of British Columbia

Exhibit No. 4
Report
Committee
Executive
Council
July 23, 1873
(Contd.)

ment of Union, a strip of land 20 miles in width along the eastern coast of Vancouver Island between Seymour Narrows and the Harbour of Esquimalt."

Upon the Despatch and Order in Council the Honourable the Attorney General reports as follows:—

"The Agreement of Union is embodied in a Statute. Its language must therefore be measured by the ordinary and well known Rules of Interpretation as applied to Statutes. The language must not be construed too narrowly, but a fair and liberal construction and one in accordance with the spirit and true meaning of the Agreement—should be placed upon the wording of the "Terms." Allowing, however, the greatest latitude of interpretation and applying the broadest and most liberal construction to the Eleventh section of the Agreement, nothing appears which would seem to warrant the Dominion Government in claiming, or justify Your Excellency in granting, a conveyance of the 20 mile belt of land mentioned, until the line of Railway be defined.

It is admitted that the Dominion Government is entitled to the greatest consideration for the energy it has hitherto displayed in its desire to faithfully carry out the Railway provisions contained in the Agreement, hence the Government of this Province holding these views, and anxious to render all the assistance in its power to the Dominion Government, assumed the responsibility of reserving the belt of land mentioned almost immediately after the receipt of the Despatch, which is the subject of this report. It was, however, expressly understood that the Order in Council creating this Reserve should not operate as a conveyance of the lands within its limits, and that the Reserve itself should not be of a permanent character.

The Eleventh Section of the Terms of Union reads as follows:—

"The Government of the Dominion undertake to secure the commencement, . . . within two years from the date of the construction of a railway from the Pacific towards the Rocky Mountains," thence eastward, etc.

"The Government of British Columbia agree to convey to the Dominion Government, in trust, to be appropriated in such manner as the Dominion Government may deem advisable in furtherance of the construction of the said Railway an extent of public lands along the line of Railway throughout its entire length in British Columbia, not to exceed, however, 20 miles on each side

of said line . . . and provided further that until the commencement, within two years as aforesaid from the date of the Union, of the construction of the said Railway the Government of British Columbia shall not sell or alienate any further portion of the public lands of British Columbia in any other way, than under right of pre-emption requiring actual residence of the pre-empter on the land claimed by him."

Under this Agreement the Dominion Government undertook "to secure the commencement of the construction of a railway from the Pacific" eastward, on the 20th July, 1873, and the Province in consideration thereof agreed to convey to the Dominion Government "in furtherance of the construction of the said Railway" certain "public lands along the line of Railway" not exceeding in extent "20 miles on each side of said line."

As far as the Government of this Province has been informed no line of Railway has been surveyed between Esquimalt and Seymour Narrows. A conveyance cannot therefore be made of public lands "along a line of Railway" and "on each side of said line" where no such "line of railway" exists. The demand made is for a conveyance of a "strip of land 20 miles in width along the eastern coast of Vancouver Island," or in other words, in the absence of a Survey for a strip of the public lands along the Sea Coast, but not along any defined line of Railway.

It is respectfully submitted that had a "line of Railway" been defined by a location survey, the Government of the Province would have been notified thereof, and the language of the Despatch and of the Order of the Privy Council would have been materially different from that used in the present instance. Instead of asking for a conveyance of land along a Sea Coast, a demand would have been made for a conveyance of certain lands "along a line of Railway" adopted and laid out according to accompanying plan. Such a demand, it is humbly conceived, would have been in accordance with the spirit and language of the Eleventh Section.

The Term of two years mentioned in the first and second paragraphs of the Section was inserted by the framers of the Terms as a period amply sufficient to enable the Dominion Government to complete the preliminary surveys necessary to determine "the line of Railway"; and the Provincial Government agreed to withdraw all its public lands from sale for the like period, in order that the first opportunity should be afforded to the Dominion Government of acquiring within the two years,

RECORD

Court of Appeal of British Columbia

Exhibit No. 4
Report Committee Executive Council
July 23, 1873
(Contd.)

and before the work of construction should commence, the lands contiguous to its line of railway as defined from time to time.

The two years have expired, and as the claim for the Reserve mentioned is not established, it becomes the duty of this Government of British Columbia in the interests of the Province to respectfully press upon the Dominion Government the necessity of some immediate action being taken to render the valuable belt of land, containing an area of some 3,500 square miles of service to the Province.

The undersigned therefore suggests that, as no "line of Railway" has been defined, Your Excellency be respectfully recommended for the above reasons, to withhold the conveyance to the Dominion Government of the land mentioned in the Despatch; and that the Reserve of the said land be continued until a fair opportunity shall have been afforded to the Dominion Government to consider the subject, and inform the Government of this Province of its views thereon.

The Committee concur in the above Report of the Attorney General, and submit the same for Your Excellency's approval —and if sanctioned they suggest that a copy of this Order in Council be transmitted to His Excellency the Governor General.

"A. de Cosmos,"
Prest. Ex. Council.

Approved in Council,
Joseph W. Trutch,
25th July, 1873.

Exhibit No. 5
Report of Committee of P.C.
Sept. 3, 1873

EXIHIBIT No. 5

REPORT OF COMMITTEE OF PRIVY COUNCIL

3rd Sept., 1873.

2P/
R.B.

P.C. 3800

Certified a true copy of a Report of the Committee of the Privy Council, approved by His Excellency the Governor General on the 3rd September, 1873.

The Committee of the Privy Council have had under consideration a despatch from the Lieutenant Governor of British

Columbia of the 26th July, 1873, enclosing a minute of his Executive Council conveying the conclusion of the Government of British Columbia that it is not advisable to make at present the conveyance applied for in a despatch of the Under Secretary of State for the Provinces of the 10th of June.

Exhibit No. 5 Report of Committee of P.C. Sept. 3, 1873 (Contd.)

The Committee of the Privy Council have read with great attention the report of the Executive Council of British Columbia enclosed in the Lieutenant Governor's despatch and beg to submit that so long as the land which is referred to is not alienated from the Crown but held under reservation as stated in the Lieutenant Governor's despatch the object of the Government of the Dominion will be attained, that object being simply that when the Railway shall come to be constructed the land in question shall be at the disposition of the Government of the Dominion for the purposes laid down in the 11th Section of the Terms of Union with British Columbia.

Rudolph Boudreau,

Clerk of the Privy Council.

(Seal).

EXHIBIT No. 6

Exhibit No. 6 B.C. Act to Authorize Grant of Lands to Dominion for Rly Purposes April 22, 1875

(Clause 1 of Chap. 13, 1875 B.C.)

(38 Vic.) (No. 13)

AN ACT TO AUTHORIZE THE GRANT OF CERTAIN PUBLIC LANDS TO THE GOVERNMENT OF THE DOMINION OF CANADA, FOR RAILWAY PURPOSES.

(Assented to 22nd April, 1875.)

WHEREAS it is expedient to provide for the grant of public lands to the Dominion Government, required for a Railway, between the Town of Nanaimo and Esquimalt Harbour:

THEREFORE Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows—

1. From and after the passing of this Act there shall be and there is hereby granted to the Dominion Government, for the purpose of constructing, and to aid in the construction of a Railway between the Town of Nanaimo and Esquimalt Harbour, in trust to be appropriated in such manner

RECORD

Court of Appeal of British Columbia

Exhibit No. 6
B.C. Act to Authorize Grant of Lands to Dominion for Rly Purposes April 22, 1875 (Contd.)

as the Dominion Government may deem advisable, a similar extent of public lands along the line of Railway before mentioned (not to exceed 20 miles on each side of the said line) as may be appropriated for the same purpose by the Dominion from the public lands of the North-West Territories and the Province of Manitoba, as provided in the Order in Council, Section 11, admitting the Province of British Columbia into Confederation; such grant to be subject otherwise to all the conditions contained in the said 11th Section of the Terms of Union." 10

. . . . . .

Exhibit No. 7
Letter - Trutch to Walkem May 5, 1880

EXHIBIT No. 7

The Hon. J. W. Trutch, C.M.G. to the Hon. G. A. Walkem.

Victoria B.C., 5th May, 1880.

Sir,—

I have the honour to acknowledge the receipt of your letter of yesterday's date, covering a copy of an Order in Council of the same date, expressing the views of the Government of British Columbia in relation to the application of the Dominion Government, conveyed in my letter to you of the 14th ultimo for the conveyance by Act of the Legislature of the Lands provided under the "Terms and Conditions of Union" to be transferred by the Province of British Columbia to the Dominion in aid of the construction of the Canadian Pacific Railway, and more particularly preferring the request that the right be conceded to the Dominion, and included in the provisions of such Act, to obtain lands outside of the forty mile belt in lieu of worthless tracts of country within that limit, as also to supply the deficiency caused by the International Boundary on the Mainland. and the Coast Line on Vancouver Island respectively falling within the Railway Belt.

A copy of your letter, and the accompanying Order in Council, shall be immediately forwarded to the Right Honourable the Minister of the Interior.

The views of the Government of British Columbia expressed in that Order in Council appear to me to intimate plainly the definite refusal of the Provincial Government to concede for the present at least, the special requests preferred by me on behalf of the Dominion Government. If this is the conclusion of the

Provincial Government I can only deeply regret it. It would be unavailing, however, for me now to comment at any length on the conditions which, and especially the fourth condition stated in the Order in Council, appear to be stipulated for by the Provincial Government as requirements necessarily precedent to the request of the Dominion Government receiving a liberal consideration.

I deem it my duty, however, to point out at once that (1st) the two first of the conditions proposed are clearly impossible of fulfillment for years to come, that is to say, not until the Dominion Government could itself have acquired, as the results of actual survey, the information which the Provincial Government asks to be now furnished with: that (2nd) the third condition is already virtually fulfilled, by the recent statements in Parliament of the Right Honourable the Minister of the Interior defining the system on which the Dominion Railway Lands in the North West are now being dealt with, which system, modified only to suit the special topographical requirements of the country, is intended to be extended over British Columbia, and that (3rd) as to the proposition that the Dominion Government should acquaint the Provincial Government of the nature of the guarantees they are willing to give for the continuous and active prosecution of the construction of the Canadian Pacific Railway, I cannot think it possible that any more positive and material guarantee could possibly be obtained by the Province than that which will be afforded by the actual commencement this month of the section of one hundred and thirty miles of Railway on the Mainland now under contract: and that I am fully convinced that it is not only impracticable for the Dominion Government to offer any further assurance on this point, but most inexpedient that such a requirement should be suggested.

I have, etc.,

(Signed) Joseph W. Trutch.

Court of Appeal of British Columbia

EXHIBIT No. 7A

Exhibit No. 7A An Act to Authorize Grant of Public Lands to Gov't of Dominion of Canada for Rly Purposes May 8, 1880

CHAP. 11.

An Act to authorize the grant of certain Public Lands on the Mainland of British Columbia to the Government of the Dominion of Canada for Canadian Pacific Railway purposes.

[*8th May*, 1880.]

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:

Grant of lands to Dominion Government in aid of Canadian Pacific Railway line.

1. From and after the passing of this Act, there shall be, and there is hereby, granted to the Dominion Government for the purpose of constructing and to aid in the construction of the portion of the Canadian Pacific Railway Line located between Burrard Inlet and Yellow Head summit, in trust, to be appropriated in such manner as the Dominion Government may deem advisable, a similar extent of public lands along the line of railway before mentioned (not to exceed twenty miles on each side of the said line) as may be appropriated for the same purpose by the Dominion from the public lands of the North-West Territories and the Province of Manitoba, as provided in the Order in Council, section 11, admitting the Province of British Columbia into Confederation. The land intended to be hereby conveyed is more particularly described in a despatch to the Lieutenant-Governor from the Honourable the Secretary of State, dated the 31st day of May, 1878, as a tract of land lying along the line of said railway, beginning at English Bay or Burrard Inlet and following the Fraser River to Lytton; thence by the Valley of the River Thompson to Kamloops; thence up the Valley of the North Thompson, passing near to Lakes Albreda and Cranberry, to Tête Juane Cache; thence up the Valley of the Fraser River to the summit of the Head, or boundary between British Columbia and the North-West Territories, and is also defined on a plan accompanying a further despatch to the Lieutenant-Governor from the said Secretary of State, dated the 23rd day of September, 1878. The grant of the said land shall be subject otherwise to the conditions contained in the said 11th section of the Terms of Union.

Description of land granted.

Not to affect existing common and public highways.

2. This Act shall not affect or prejudice the rights of the public with respect to common and public highways existing at the date hereof within the limits of the lands hereby intended to be conveyed.

Short title.

3. This Act may be cited as "An Act to grant public lands on the Mainland to the Dominion in aid of the Canadian Pacific Railway, 1880."

EXHIBIT No. 7B

Obtained in Department of Transport

COPY of a Report of a Committee of the Honourable the PRIVY COUNCIL, approved by his Excellency, the GOVERNOR GENERAL in Council, on the 17th May, 1881, addressed to the Honourable, The Minister of Railways & Canals.

(Text follows on page 107C)

RECORD

In the Supreme Court of Canada

Exhibit No. 7B
Report of Committee of Privy Council May 17, 1881 (Contd.)

The Committee of the Privy Council have had under consideration the letter addressed by Mr. DeCosmos, on behalf of the Government of British Columbia, dated the 13th inst. to Sir John Macdonald, representing the importance of constructing the Esquimalt and Nanaimo Railway on the Island of Vancouver, and they have had also before them a copy of the Petition to the Queen which the Legislative Assembly of that Province directed on the 29th of March should be forwarded for presentation to Her Majesty.

On these papers the Committee humbly submit to Your Excellency as follows:

I. One of the terms upon which British Columbia, in the year 1871, entered into the Union of Her Majesty's North American Provinces was as follows:—

> "The Government of the Dominion undertake to secure the commencement simultaneously within two years from the date of the Union, of the construction of a railway from the Pacific towards the Rocky Mountains, and from such point as may be selected, east of the Rocky Mountains, towards the Pacific to connect the seaboard of British Columbia with the Railway system of Canada; and further to secure the completion of such Railway within ten years from the date of the Union."

II. On the 6th June, 1873, in view of the then probability of the Railway running by Bute Inlet, an Order in Council was passed declaring that Esquimalt should be the terminus of the Railway on the Pacific Coast, but the alignment on the Mainland was at that time wholly undetermined.

In May, 1873, the Government on increased information determined however to select Burrard Inlet as the objective point on the Pacific Coast to be reached by the Railway, and they cancelled the order relating to Esquimalt. Still further examinations were, however deemed necessary particularly with reference to the advantages of a still more northern route which should terminate at Port Simpson and to keep the whole question entirely free until additional exploratory surveys should be made; the Order in Council of June, 1873 was in April, 1879 revived and continued in force until October, 1879 when the selection of Burrard Inlet was finally made as the terminus on the Pacific Coast of the Canadian Pacific Railway rendering unnecessary the line between Nanaimo and Esquimalt as a condition of the Union with British Columbia.

In 1874 Her Majesty's Principal Secretary of State for the Colonies having had the matter submitted to him, had suggested, "to compensate British Columbia for past and probable future delays" what have since become known as "Lord Carnarvon's terms" which

provided amongst other things that "the Railway from Esquimalt to Nanaimo should be commenced as soon as possible and completed with all practicable despatch"—but this was not necessarily a part of the Canadian Pacific Railway and not essential to the fulfillment of the conditions of the Union with British Columbia.

These "terms" were the suggestions of the then Secretary of State for the Colonies made for the purpose of quieting the differences which had arisen between the Government of the Dominion and the Province of British Columbia growing out of the long delays in commencing works of construction, and which had formed the subject of continuous and acrimonious complaint on the part of that Province—Lord Carnarvon's suggestions were entitled to every respect, but although adopted by the Government of the day, they never received the sanction of the Parliament of the Dominion and never acquired the force of a national compact.

IV. On the contrary in the Session of 1875 with the view of seeking to give effect to these "terms" a Bill having been introduced by the Government into the Canadian House of Commons providing for the construction of the Esquimalt and Nanaimo Line, a step which would not have been necessary, it may be observed, had that Line formed necessarily a part of the Canadian Pacific Railway—the Bill though passed by the House of Commons was lost in the Senate and consequently Parliamentary sanction refused to the construction of what was regarded by the majority in the Senate as a Provincial work quite unnecessary to the fulfillment of the terms of Union with British Columbia.

V. The necessity of extended examination of the different possible routes for a line of Railway running across a Continent, and as to long distances through very difficult country, caused much time to be occupied in exploratory surveys—the difficulties attending the selection of the Pass through which to cross the Rocky Mountains—and of settling the best line from their summit to the Pacific Coast—and the selection of the terminus on that coast—all tended to prolong the period before works of construction could prudently be begun. The magnitude of these preliminary difficulties may be estimated when it is stated that the cost of the exploratory and preliminary surveys has reached the sum of three and a half millions ($3,500,000), but the absolute necessity of exhaustive examinations for the best line including all considerations of topography and soil, before embarking in the construction of so gigantic a work, will be admitted.

VI. Within the last year a Contract has been entered into and received the sanction of the Canadian Parliament for the construction of the whole Pacific Railway from the end of the existing system of Canadian Railways at Callender Station, near Lake Nipissing, about

RECORD

In the Supreme Court of Canada

Exhibit No. 7B
Report of Committee of Privy Council May 17, 1881 (Contd.)

250 miles from the capital of the Dominion to Burrard Inlet on "the Seaboard of British Columbia" involving an expenditure of about $53,000,000.00 in money and twenty-five millions of acres of land—. Contracts involving a sum of about $8,000,000.00 have been given out in British Columbia and work is being vigorously pressed in that Province and the Government itself has undertaken the construction of the section of the Railway extending from Yale to Burrard Inlet.

VII. Every guarantee has thus been afforded to the Province of British Columbia that the terms of the Union will be carried out at the earliest practicable day.

VIII. Parliament has not authorized the construction of the Nanaimo and Esquimalt Line, and in view of the large expenditure involved in the building of the Canadian Pacific from Callander Station to the Pacific Ocean at Burrard Inlet it is not probable that it would do so.

The Committee desire to observe that there exists in the adjacent waters of the Straits of Georgia, sheltered water communication, open all the year round, quite adequate to the needs of the population of the Island.

IX. As regards the prayer of the proposed petition to Her Majesty, "That the Province be permitted to regulate and collect its own tariff of Customs and excise until through communication by Railway be established through British Territory with the Eastern Provinces"—the Committee of the Privy Council desire to observe that this request involves a breach of the Terms of Union and the virtual severance of British Columbia from the Dominion.

X. It will be seen by official statements hereto annexed that an expenditure in the Province since it entered the Union has been made by the Dominion of $5,996,289 against which the receipts have been $4,173,238—(and this expenditure is entirely irrespective of disbursements on account of the Railway).

The Committee advise that a copy of this report be forwarded with the Petition to which it refers to Her Majesty's Principal Secretary of State for the Colonies.

Certified
"J. O. COTÉ,"
Clerk, P.C.

Statement of Payments in the Province of British Columbia from 1871 to 1880 inclusive, *with exception of payments made* on account of *Pacific Railway,* as prepared by the Financial Inspector.

Year 1871-2	$481,330
" 1872-3	637,544
" 1873-4	717,348
" 1874-5	741,909
" 1875-6	750,082
" 1876-7	681,736
" 1877-8	668,685
" 1878-9	682,344
" 1879-80	635,311
	$5,996,289

Statement of Receipts in the Province of *British Columbia* from *the year 1871 to 1880* inclusive as prepared by the Financial Inspector.

1871-2	$356,099
1872-3	381,711
1873-4	387,146
1874-5	455,914
1875-6	544,952
1876-7	456,976
1877-8	493,756
1878-9	579,144
1879-80	517,540
	$4,173,238

RECORD

Court of Appeal of British Columbia

Exhibit No. 8
Act to Incorporate "The Vancouver Land and Railway Company" April 21, 1882

EXHIBIT No. 8

(45 VICT.) RAILWAY. (CH. 15.)

(ESQUIMALT AND SEYMOUR NARROWS.)

CHAP. 15.

An Act to Incorporate "The Vancouver Land and Railway Company."

(*21st April, 1882.*)

Preamble.

WHEREAS a Petition has been presented praying for the incorporation of a Company for the purpose of constructing and working a Railway from Esquimalt Harbour to Seymour Narrows, and for a grant of public lands in aid thereof,

And whereas, it is expedient to grant the prayer of the said Petition:

Therefore, Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:—

Incorporation.

1. Lewis M. Clement, of San Francisco, Chief Engineer of the Atlantic and Pacific Railroad Company; Dennis Jordan, of San Francisco, Architect; A. J. Rhodes, of Candelaria, Nevada, Capitalist; William Raymond Clark, of Victoria, Auctioneer; John Herbert Turner, of Victoria, Merchant; Thomas Earle, of Victoria, Merchant, and such other persons and corporations, as shall in pursuance of this Act become shareholders, are hereby constituted a body corporate and politic, by the name of "The Vancouver Land and Railway Company" (hereinafter called the Company).

Capital Stock $4,000,000.

2. The Capital Stock of the Company shall be four million dollars, divided into four thousand shares of one thousand dollars each, which shall be applied first to the payment of all costs and expenses incurred in obtaining the passing of this Act, and the remainder for the purpose of the Company's undertaking.

Provisional Directors.

3. The persons named in the first section of this Act shall be and are hereby constituted Provisional Directors of the Company, of whom five shall form a quorum for the transaction of business; and they shall hold office until the first election of

Directors under this Act, and shall have power to open stock books and procure subscriptions of stock for the undertaking.

Head Office.

4. The office of the Company shall be at the City of Victoria.

First general meeting of shareholders.

5. The first general meeting of Shareholders shall be held upon two weeks' notice being given at such time as the Directors shall specify therein.

Annual meetings.

6. The subsequent annual general meetings of Shareholders shall be held as may be determined by the By-Laws of the Company.

Power to borrow money.

7. The Company shall be entitled to borrow money on mortgage or bond.

Tolls, how fixed and regulated.

8. Tolls shall be from time to time fixed and regulated by the By-Laws of the Company, or by the Directors, if thereunto authorized by the By-Laws or by the Shareholders at any general meeting, and may be demanded and received for all passengers and goods transported upon the Railway, and shall be paid to such persons and at such places near to the Railway, in such manner and under such regulations as the By-Laws direct.

Gives power to construct railway from Esquimalt to Seymour Narrows.

9. The Company shall lay out, construct, acquire, equip, maintain and work a continuous line of Railway, with double or single track of iron or steel, and uniform gauge of four feet eight and one-half inches, from a point on Esquimalt Harbour to a point on Seymour Narrows.

When survey to be commenced.

10. The survey of the said Railway shall be commenced within 60 days after the Government of British Columbia shall have notified the Company that the Government are prepared to set apart and reserve to the Company the lands hereinafter mentioned.

Ten miles between Esquimalt and Nanaimo to be completed by 1st July, 1883.

Twenty miles by July, 1884.

Thirty miles by July, 1885.

Balance by July, 1886.

11. Not less than ten miles of that portion of the said Railway between Esquimalt and Nanaimo shall be completely constructed, equipped, and in running order on or before the first day of July, 1883, and not less than twenty miles thereof on or before the first day of July, 1884, and not less than thirty miles thereof on or before the first day of July, 1885, and the balance of the said portion on or before the first day of July, 1886.

Fifty miles between Nanaimo and Seymour Narrows to be completed by July, 1888.

Balance by July, 1890.

12. Not less than fifty miles of that portion of the said Railway between Nanaimo and Seymour Narrows shall be completely constructed on or before the first day of July, 1888, and the balance of that portion of the said Railway shall be completely constructed and equipped on or before the first day of July, 1890.

Power to extend line to Victoria.

13. The Company shall have power to extend and continue the said Railway from Esquimalt Harbour to the City of Victoria.

Lands may be taken, purchased, &c., for railway purposes.

14. The Company may take, purchase, hold and occupy such lands as may be deemed necessary or convenient for the construction or maintenance of the Railway, and for the establishment of all proper sheds and warehouses, sidings, embankments, bridges, culverts, draws, and other works, and the approaches thereto, and also for the establishment of stations and other works, and the approaches thereto, at the ends and along the course of the line for the convenience of passengers, the reception of goods and the accommodation of the public.

The railway to be property of the company.

15. The Railway constructed under the terms hereof shall be the property of the Company.

Limits liability for damages done by trains on certain works being done.

16. The Company shall not at any time after such gates, hand rails, and other fences, as are referred to in Sections 61 and 68 of the Act referred to in the "Vancouver Island Railway Clauses Consolidation Act, 1863," as the principal Act, have been made, and during such time as the requirements of the said section shall be complied with, be liable for any damage which may be done by their trains or engines to cattle, horses, or other animals, unless wilfully done or occasioned by wilful negligence; and the said Section 61 shall be read as if the words "other than a public carriage way" were not inserted therein.

Company to deposit $10,000 within ten days after the passing of this Act until $250,000 security is furnished.

17. Within ten days or such further time not exceeding three weeks as the Lieutenant-Govrnor in Council may order after the passing of this Act, the Company shall deposit with some bank in Victoria the sum of ten thousand dollars to the credit of the Government of British Columbia, there to remain until the Company shall have given security to the satisfaction of the Government of British Columbia to the extent of two hundred and fifty thousand dollars, for the due completion of the said Railway in accordance with the terms of this Act: Provided that if the security aforesaid is not given within sixty days from the repeal by the Legislature of this Province of the "Esquimalt and Nanaimo Railway Act, 1875," the said sum of ten thousand dollars shall be forfeited to the Government of British Columbia and the provisions of the Act shall be null and void.

Forfeiture.

$250,000 security to be given to the Government of British Columbia.

The above mentioned security of $250,000 shall be given to the Government of British Columbia and shall remain deposited with the Government as security for the due commencement, construction, completion and equipment of the said Railway by the Company under the terms and conditions of this Act; and if, in

the opinion of the Lieutenant-Governor in Council, default be made by the Company in the due fulfillment of the several conditions of the Act respecting the commencement, construction, completion and equipment of the said Railway, the said securities may be absolutely forfeited and become the property of the Government, who may sell, dispose of and realize the same and apply and appropriate the proceeds thereof to the use of Her Majesty on behalf of the Province. The Government herein mentioned shall mean the Lieutenant-Governor in Council, or any member of the Executive Council duly authorized by Order in Council to act in the premises.

Forfeiture.

18. The Government of British Columbia, upon satisfactory security having been given as aforesaid, and in consideration of the completion and perpetual and efficient operation of the said Railway by the Company, shall set apart and reserve to the Company one million nine hundred thousand acres (more or less) of public lands comprised within the area described by the following boundaries, namely:—

Grant of 1,900,000 acres of Crown land to the Company.

Boundaries of land to be granted.

On the south by a straight line drawn from the head of Saanich Inlet to Muir Creek, on the Straits of Fuca:

On the west by a straight line drawn from Muir Creek, aforesaid, to Crown Mountain:

On the north by a straight line drawn from Crown Mountain to Seymour Narrows: and

On the east by the coast line of Vancouver Island to the point of commencement.

and including all coal, coal oil, ores, stones, clay, marble, slate, mines, minerals, and substances whatsoever, thereupon, therein, and thereunder, and the Company shall thereupon be entitled to take immediate possession of the said lands, and use, occupy, work, and enjoy the same, and grant leases thereof, and enter into agreements for the sale thereof, subject to the completion of the Company's title to the said lands in manner hereinafter provided. Upon the completion of the said Railway in accordance with the terms of this Act, the Government of British Columbia shall grant the absolute fee simple of and in the said lands to the said Company.

Right of company to enter and deal with same.

Fee simple to be granted on completion of railway.

19. All farming squatters who have made permanent improvements, and who have permanently resided for not less than two years previous to the passing of this Act, upon any of the lands to be granted in pursuance of this Act, shall be entitled to

Squatters may buy land on which they have resided for two years at $1 per acre on certain conditions.

RECORD

Court of Appeal of British Columbia

Exhibit No. 8
Act to Incorporate "The Vancouver Land and Railway Company" April 21, 1882 (Contd.)

purchase from the Company the lands upon which they have so resided, at the price of one dollar per acre; but all coal and other mines and minerals, in and under such lands, shall be reserved and granted to the Company.

Saves existing rights where titles are not completed.

20. The existing rights (if any) in any of the lands hereinbefore referred to of all persons and corporations whose titles have not been completed shall not be affected by this Act.

Certain exemptions from Provincial taxation.

21. The said Railway and all stations and station grounds, work-shops, buildings, yards and other property, rolling stock and appurtenances required and used for the construction and working thereof, and the capital stock of the Company shall be free from Provincial taxation up to the first day of July, 1890, and the lands of the Company shall also be free from Provincial taxation until they are either leased, sold, occupied, or in any way alienated.

The "Vancouver Island Land Clauses Consol. Act, 1863," to form part of this Act.

22. The "Vancouver Island Lands Clauses Consolidation Act, 1863," as modified by the provisions hereafter contained shall be read with and form part of this Act.

What sections of the said Act and the "Vancouver Island Railway Clauses Consol. Act, 1863," apply to the undertaking authorized by this Act.

23. All such parts of the "Vancouver Island Railway Clauses Consolidation Act, 1863," and the Act therein referred to as the Principal Act, which refers to the depositing of plans, sections, and books of reference, and to the construction of the Railway according to such plans and sections, or over the land referred to in the book of references, and Sections 6, 7, 8 and 11 of the "Vancouver Island Railway Clauses Consolidation Act, 1863," and Sections 7, 8, 9, 10, 11, 12, 13, 14, 15, 23, 25, 26, 27, 28, 29, 46, 47, 49, 50, 51, 54, 57, 59, 77, 81, 82, 94, 95, 107, 114, 159, 161, 163, 164, and 165 of the Act referred to in the "Vancouver Island Railway Clauses Consolidation Act, 1863," as the Principal Act, shall not apply to the undertaking authorized by this Act, but the remainder thereof shall apply.

Definition of terms.

24. The following expressions, wherever appearing in the clauses of the "Vancouver Island Lands Clauses Consolidation Act, 1863," and the "Vancouver Island Railway Clauses Consolidation Act, 1863," incorporated with this Act, shall in the construction and for the purposes of this Act have several meanings hereby assigned to them, that is to say:—

"Vancouver Island and its dependencies."

"Vancouver Island and its dependencies" shall mean the Province of British Columbia.

"Governor."

The "Governor" shall mean the Lieutenant-Governor or other officer for the time being administering the Government of the Province of British Columbia.

"Colonial Secretary."

The "Colonial Secretary" shall mean the Provincial Secretary.

"Treasury."

The "Treasury" shall mean the Treasury of the Province of British Columbia.

"Supreme Court of Civil Justice."

The "Supreme Court of Civil Justice" shall mean the Supreme Court of British Columbia or any Superior Court of the Province.

"Board of Trade," "Court of Petty or Quarter Sessions."

25. Whenever in any of the clauses referred to in this Act the Board of Trade is mentioned, or Court of Petty or Quarter Sessions is referred to, in lieu thereof there shall be read, the Chief Commissioner of Lands and Works, for the Board of Trade; and the Supreme Court of British Columbia or any Superior Court of the Province or any Judge of either of the said Courts for the Court of Petty or Quarter Sessions, as the case may be.

Short title.

26. This Act may be cited as the "Vancouver Land and Railway Company Act, 1882."

RECORD

In the Supreme Court of Canada

Exhibit No. 8A
Report of Committee of Executive Council
Nov. 14, 1882

EXHIBIT No. 8A

Sessional Papers, B.C., 1883 **P. 343**

Copy of a Report of a Committee of the Honourable the Executive Council, approved by His Honour the Lieutenant-Governor on the 14th November, 1882.

On a memorandum, dated 6th November, 1882, from the Chief Commissioner of Lands and Works, reporting upon the non-construction of the Railway upon Vancouver Island, the Minister remarks that prior to the last Session of the Legislative Assembly the Provincial Government has used every effort to induce the Dominion Government to make the necessary provision for its construction, but without success. That during the sitting of the Assembly two applications to incorporate companies, by Private Bill, to construct a Railway on the East Coast of Vancouver Island were introduced and considered, the first of which, known as the "Vancouver Land and Railway Company," offered to build and equip a four feet eight and one-half inch gauge railway between Esquimalt and Seymour Narrows, commencing the survey within sixty days after the Government of British Columbia had notified the Company that the Government were prepared to set apart and reserve to the Company 1,900,000 acres, more or less, of public lands on the East Coast of Vancouver Island, comprised within the following boundaries, namely:— On the South by a straight line drawn from the head of Saanich Inlet to Muir Creek on the Straits of Fuca; on the West by a straight line drawn from Muir Creek aforesaid to Crown Mountain; on the North by a straight line drawn from Crown Mountain to Seymour Narrows; and on the East by the coast line of Vancouver Island to the point of commencement. The Company were also to construct and equip not less than ten miles of that portion between Esquimalt and Nanaimo on or before 1st July, 1883; twenty miles by the 1st of July, 1884; thirty miles by the 1st July, 1885; the balance to Nanaimo by 1st July, 1886; fifty miles between Nanaimo and Seymour Narrows by the 1st July, 1888, and the balance by 1st July, 1890. As security for the proper fulfillment of the conditions of the Act, the promoters agreed to deposit ten thousand dollars ($10,000.00) to the credit of the Government of British Columbia, within ten days from the passing of the Act, as a guarantee that they would give security, to the satisfaction of the Government, to the extent of ($250,000) two hundred and fifty thousand dollars, for the due completion of the Railway in accordance with the terms of the Act; such security to be given within sixty days from the repeal, by the Legislature, of the "Esquimalt and Nanaimo Railway Act, 1875."

The second application for a Private Bill of Incorporation was from Mr. Robert Dunsmuir and others, as the "Victoria, Esquimalt and Nanaimo Railway Company," who asked for authority to construct a Railway of the gauge of the Canadian Pacific Railway, from the Indian Reserve near Victoria City to Esquimalt; thence to Nanaimo; thence to Comox; with power to extend to Seymour Narrows and Alberni. The Legislature suspended its Standing Orders to allow the introduction of this Bill. The petition upon which it was introduced, asked for power to make any bargain with the Provincial or Dominion Governments, or either of them, as might be necessary.

The Bill reported from the Private Bills Committee proposed that the Railway from Victoria to Nanaimo should be commenced not later than 1st July, 1883, and completed by 1st July, 1885; and the railway between Nanaimo and Comox completed on or before the 31st December, 1888, if final agreements respecting aid, by way of bonus, were concluded prior to 1st July, 1883. No security, of any description, was offered by the promoters as a forfeiture in the event of failure. The land grant was similar to the one mentioned in the "Vancouver Land and Railway Company's" Bill.

The last mentioned Bill passed the Legislature and was assented to on 21st April, 1882. The "Victoria, Esquimalt and Nanaimo Company" Bill, after amendment in Committee of the Whole, was reported to the House, but on the order being called for the House to resolve itself into a Committee of the Whole for further consideration of the Bill, a motion to give it a three months' hoist was carried.

The Company incorporated as the "Vancouver Land and Railway Company," were duly notified that the Government were prepared to set apart and reserve the necessary public lands, and in due course they made the necessary deposit of ten thousand dollars, but failed to give, within the time, mentioned in the Statute, the further security in bonds. Thus the efforts made to secure the commencement of the Railway this year failed.

The Minister considers that from the above recital it will be seen that, although the obligation to construct the Railway is purely a Federal one, and that the Provincial contribution originally asked consisted of a grant of land, in trust, twenty miles in width; yet the Province has evinced its desire to assist the Dominion to the utmost of its power, by granting a liberal charter and subsidizing a company with nearly two million acres of the most valuable lands on the East Coast of Vancouver Island.

RECORD

In the Supreme Court of Canada

Exhibit No. 8A
Report of Committee of Executive Council
Nov. 14, 1882
(Contd.)

The Minister recommends that the attention of the Dominion Government be called to this question, with the request that such steps, as may be necessary, be taken to secure the construction of the Railway from Esquimalt, as early as practicable, next spring; that the coming Session of Parliament may not be permitted to pass without the necessary provision being made to secure that end; and that the Government be respectfully requested to give such an assurance to the Provincial Government as early as possible, so as to enable them to place it before the Legislative Assembly at the opening of its approaching Session.

The Committee advise that the recommendation be approved and that a copy of this Minute be forwarded to the Dominion Government.

Certified,

(sgd.) W. J. ARMSTRONG,
PROVINCIAL SECRETARY,
and Clerk, Executive Council.

RECORD

Court of Appeal of British Columbia

Exhibit No. 9
Sessional Papers
B.C. 1883
Feb. 10, 1883

EXHIBIT No. 9

Sessional Papers, B.C., 1883: p. 453:

46. Vic. Island Railway, Graving Dock, and Railway Lands.

PAPERS

Relating to the Island Railway, the Graving Dock and Railway Lands.

By Command,
John Robson,
Provincial Secretary.

Provincial Secretary's Office.
7th May, 1883.

The Lieutenant Governor to the Secretary of State, Ottawa.

Victoria, 10th February, 1883.

Sir,—

I have the honour to enclose herewith a copy of a minute of my Executive Council dated today, with reference to the questions of the Island Railway, the Mainland Railway lands, the Esquimalt Graving Dock, &c.

The Hon. Mr. Trutch, who leaves today for Ottawa, carried a copy of the above minute. I have, &c.

(Signed) C. F. Cornwall, Lieutenant Governor.

Copy of a Report of a Committee of the Honourable the Executive Council approved by His Honour the Lieutenant Governor on the 10th February, 1883.

The Committee of Council having had under consideration the subject of the Dry Dock, the Railway Lands, and the Island Railway, beg leave to report as follows—

GRAVING DOCK.

That in the proposal formulated by the Legislature of British Columbia, when discussing the question of Union with Canada, and sent to Ottawa, it was asked that "The Dominion "shall guarantee interest at the rate of five per centum per annum "on such sum, not exceeding £100,000, as may be required for the "construction of a first-class Graving Dock at Esquimalt."

That in the Terms of Union (Section 12) it is provided that "The Dominion Government shall guarantee the interest for ten "years from the date of the completion of the works, at the rate "of five per centum per annum, on such sum, not exceeding

"£100,000 sterling, as may be required for the construction of "a first-class Graving Dock at Esquimalt."

That it is obvious, from the language employed above, that it was never intended that any portion of the cost of the Dock should fall upon the Province, but that the whole burden should be borne by the Dominion; and the above recited guarantee was agreed to because it was confidently believed that it would secure the completion of the work.

That the above provision was based on the assumption that work on the Canadian Pacific Railway would be commenced at Esquimalt within two years from the date of Union, and completed within ten years; and that to the failure on the part of the Dominion Government to meet these expectations must be attributed the fact that capitalists could not be induced to undertake the construction of the Graving Dock upon the conditions set forth in the Terms of Union.

That upon the failure of the Government of British Columbia to secure the construction of the Dock on these terms, an arrangement was made whereby Canada agreed to substitute a cash payment of $250,000 for the before mentioned guarantee, and the Imperial Government were induced to promise a like sum, contingent, however, upon the material alterations involving an increase in the cost of the work.

That the Legislature of British Columbia was led to believe that, with these joint contributions, it would be possible to carry on the work to completion without entailing any financial burden on the Province, and that, upon this assumption, construction was undertaken.

That it is now found that to complete the Dock, conformably with the conditions imposed by the Imperial Government, would involve an expenditure in all of about $800,000 or $300,000 in excess of the joint contributions of the Imperial and Dominion Governments, thus entailing upon the Province an expenditure altogether beyond the capacity of its present limited revenue.

RAILWAY LANDS.

The Committee beg to report on the subject of the Railway Lands of British Columbia:

That under the Terms of Union a similar extent of public lands, not exceeding 20 miles wide on each side of the Railway, as may be appropriated for the same purpose by the Dominion Government in the North-West Territories and the Province of

RECORD

Court of Appeal of British Columbia

Exhibit No. 9
Sessional Papers
B.C. 1883
Feb. 10, 1883
(Contd.)

Manitoba, should be given by the Province to the Dominion Government, and in estimating the extent of land, all lands which have been sold or pre-empted within such limits should be made good to the Dominion Government out of contiguous lands.

That the lands which have been alienated by the Provincial Government within the limits of the railway belt are estimated at 800,000 acres, and for which the Dominion Government is entitled to receive an equivalent out of contiguous lands.

That the lands beyond the boundary of the Province, and which, if the line of railway had been brought further north, would be within the railway belt are estimated to amount to 200,000 acres.

That on the 8th May, 1880, the Legislative Assembly of British Columbia passed an Act transferring to the Dominion Government the unsold and unappropriated land within the railway belt from Burrard Inlet to Tete Jaune Cache.

That the Committee by an Order in Council of the 4th May, 1880, stated that in the event of a railway work being actively prosecuted, the application of the Dominion Government through Mr. Trutch, contained in Mr. Trutch's letter of the 14th April, 1880, should receive a liberal consideration, and suggested that the lands which might be considered valueless for agricultural or economic purposes, should be defined, and that the Dominion Government should indicate the lands which might be desired in lieu of the valueless lands, and to state how the Dominion Government proposed to deal with them. That Mr. Trutch replied to this order by a letter dated 8th May, 1880, to which no reply appears to have been given.

It is admitted that a very considerable portion of the lands included in the railway belt and of the lands contiguous to those lands which have been dealt with by the Province, consist of impassable mountains and rocky lands useless for agricultural purposes. The Committee feel satisfied that a settlement of this question will conduce to the best interests of the Province and enable the country to be settled up.

ISLAND RAILWAY

On the question of the responsibility of the Dominion Government to build the Island Railway, the Committee beg respectfully to report as follows:—

That on the 7th June, 1873, an Order of His Excellency the Governor-General in Council was made fixing Esquimalt as the terminus of the Canadian Pacific Railway, and deciding that a line of railway be located between the Harbour of Esquimalt and Seymour Narrows.

That on the 10th June, 1873, a copy of the above order accompanied by a despatch to the Government of the Province, was forwarded by the Dominion Government, in which formal application was made for a conveyance, in furtherance of the construction of the said railway, of a strip of land twenty miles in width along the Eastern Coast of Vancouver Island between Seymour Narrows and Esquimalt Harbour.

That the Government of the Province responded to that application by reserving twenty mile belt of land between Esquimalt and Seymour Narrows.

That the Government of the Dominion expressed itself satisfied with the action of the Provincial Government as set forth in a Report of a Committee of the Privy Council dated 3rd September, 1873, in language as follows: "So long as the land which is referred to is not alienated from the Crown, but held under reservation, as stated in the Lieutenant-Governor's despatch, the object of the Government of the Dominion will be obtained, that object being simply that when the railway shall come to be constructed the land in question shall be at the disposition of the Government of the Dominion, for the purposes laid down in the 11th Section of the Terms of Union with British Columbia."

That on the 8th May, 1874, Mr. J. D. Edgar, representing the Government of Mr. Mackenzie, submitted to the Government of the Province a proposal to construct at once the portion of railway from Esquimalt to Nanaimo; that this proposition was connected with a request to modify the 11th Section of the Terms of Union to the extent of sanctioning delay in the commencement of the mainland portion of the railway, and it was not entertained by the Government of the Province.

That the default of the Dominion Government in that it had failed to carry out its railway obligations to the Province under the 11th Section of the Terms of Union, having become the subject of appeal to the Imperial Government and Lord Carnarvon having agreed, upon the consent of the Dominion and Provincial Governments, to arbitrate upon the matters in controversy between the two Governments, his Lordship wrote to the Earl of Dufferin, Governor-General of the Dominion, that upon a review of all the

RECORD

Court of Appeal of British Columbia

Exhibit No. 9
Sessional Papers
B.C. 1883
Feb. 10, 1883
(Contd.)

considerations bearing upon both sides of the cause, he had concluded, among other things, "that the Railway from Esquimalt to Nanaimo should be commenced as soon as possible, and completed with all practical despatch."

That the Dominion Government, on the 25th March, 1875, asked for a conveyance of public lands along the line of railway between Esquimalt and Nanaimo, and stated that it was "essential" to do so "prior to the commencement of any works of construction on the proposed railway from Esquimalt to Nanaimo which the Dominion Government have agreed to build under the arrangement made through Lord Carnarvon."

That the Legislature of the Province, in accordance with the request of the Dominion Government, did pass an Act, assented to on the 22nd April, 1875, conveying the lands along the line of railway from Esquimalt to Nanaimo to the Dominion Government for railway purposes.

That up to this period the correspondence shows that the line of railway from Esquimalt to Nanaimo was regarded by the Dominion Government as a section of the Canadian Pacific Railway. The Order in Council of 7th June, 1873, fixing Esquimalt as the terminus; Mr. Edgar's proposition on behalf of Mr. Mackenzie's Government, dated 8th May, 1874, to commence construction immediately of that portion of railway from Esquimalt to Nanaimo; and the request of the Dominion Government for a conveyance of land along the line of railway from Esquimalt to Nanaimo under "the conditions contained in the 11th Section of the Terms of Union" all show that it was so regarded.

That on the 20th September, 1875, in an Order of the Privy Council of Canada, the position is first taken, in so far as the correspondence between the Dominion and Provincial Governments indicates, that the Railway from Esquimalt to Nanaimo was offered to the Province as compensation for delays in the commencement of construction of the Canadian Pacific Railway, and not as a section of that railway which the Dominion was bound to build under the Terms of Union. In the above Order of the Privy Council, which was communicated to the Government of the Province under cover of a despatch dated 10th November, 1875, an offer was made by the Dominion Government to pay the Province the sum of $750,000 in lieu of the railway from Esquimalt to Nanaimo, and as compensation for "unavoidable delay in constructing the railway across the Continent."

That this offer was not accepted by the Provincial Government, and the obligation of the Dominion Government to build the railway from Esquimalt to Nanaimo was left unaffected.

That the question whether it was obligatory upon the Dominion to build the line in question as a portion of the main line, or as an independent railway given as compensation for delay in constructing the main line is for purposes of present consideration of little practical moment.

That the reserve, for purposes of Railway construction, placed upon the lands along the East Coast of Vancouver Island between Esquimalt and Seymour Narrows, at the instance of the Dominion Government in July, 1873, the conveyance to the Dominion Government by the Act of the Legislative Assembly of the Province in April, 1875, of a twenty mile belt of land for railway purposes along the coast from Esquimalt to Nanaimo which was also passed at the instance of the Dominion Government, and the revival, on the 22nd April, 1879, of the Order of the Privy Council of 7th June, 1873, which fixed Esquimalt as the Terminus of the Canadian Pacific Railway, must be taken as ample acknowledgment on the part of the Dominion of its obligation to build the line in question.

That the land on the East coast of Vancouver Island has been continuously withheld from settlement since July, 1873, up to the present time, and the development of that fertile tract of country, abounding in mineral wealth, has been retarded to an incalculable extent, and the commercial and industrial interests of an important section of the Province have been prejudicially affected to a serious degree.

The Committee therefore recommend as a basis of settlement between the Governments of the Dominion and the Province of the Railway and Railway Lands questions, that the Dominion Government be urgently requested to carry out its obligations to the Province by commencing at the earliest possible period the construction of the Island Railway and complete the same with all practical dispatch, or by giving to 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, and that the Dominion Government be earnestly requested to take over the Graving Dock at Esquimalt upon such terms as shall recoup and relieve the Province of all expense in respect thereof, and to complete and operate it as a Federal work, or as a joint Imperial and Dominion

RECORD

Court of Appeal of British Columbia

Exhibit No. 9
Sessional Papers
B.C. 1883
Feb. 10, 1883
(Contd.)

work. And the Committee further recommend that in lieu of any expensive and dilatory method of ascertaining the exact acreage of lands alienated within the Railway belt and otherwise rendered unavailable, there be set apart for the use of the Dominion a tract of land of 2,000,000 acres in extent, to be taken up in blocks of not less than 500,000 acres in such localities on the Mainland as may be agreed upon, the land to be taken up and defined within two years, and that it be one of the conditions that the Dominion Government in dealing with lands in the Province shall establish a land system equally as liberal, both as to mining and agricultural industries, as that in force in this Province at the present time, and that no delay take place in throwing open the land for settlement.

The Committee advise that the recommendations be approved and that a copy be forwarded to the Honourable the Secretary of State for Canada, and also that a copy be given to the Honourable J. W. Trutch, C.M.G., Agent of the Dominion Government in the Province.

Certified.

(Signed) John Robson,
Provincial Secretary and Clerk Executive Council.

Exhibit No. 10
Telegram
Smithe to
Macdonald
Mar. 17, 1873

EXHIBIT No. 10

Victoria, 17th Mar., 1883,

To Sir John A. Macdonald, Ottawa.

Government here anxious to get answer to Island Railway, Dock and Lands proposal before close of session. Members wish to leave. Telegraph reply as soon as possible.

(Signed) Wm. Smithe.

Exhibit No. 11
Telegram
Macdonald to
Smithe
Mar. 20, 1883

EXHIBIT No. 11

Ottawa, Mar. 20th, 1883.

To the Hon. Mr. Smithe, Premier.

Mr. Trutch will return with instructions for adjustment of arrangements. Had you not better adjourn your Legislature?

(Signed) John A. Macdonald.

EXHIBIT No. 12

21st March, 1883.

Sir John A. Macdonald, Ottawa.

When will Mr. Trutch leave? Our Legislature anxious to prorogue. Important that we should know whether our proposals are substantially accepted before taking responsibility of continuing House in session so long. Members already impatient.

(Signed) Wm. Smithe.

Exhibit No. 12
Telegram
Smithe to
Macdonald
Mar. 21, 1883

EXHIBIT No. 13

21st March, 1883.

Hon. J. W. Trutch, Ottawa.

When do you leave? Cannot keep House in session much longer without reasonable assurance that arrangement will be completed satisfactorily to the Province. If necessary reply in cipher.

(Signed) Wm. Smithe.

Exhibit No. 13
Telegram
Smithe to
Trutch
Mar. 21, 1883

EXHIBIT No. 14

Letter The Acting Secretary of State for Canada to the Lieutenant Governor.

Ottawa, 22nd March, 1883.

Sir,—

I have the honour to inform you that His Excellency the Governor General has had under his consideration in Council the Minute of your Executive Council enclosed in your despatch of the 10th February last, and that His Excellency's advisers have had an opportunity of communicating personally with the Dominion Agent, the Honourable J. W. Trutch, upon the various subjects mentioned in such Minute.

His Excellency is advised that Mr. Trutch, who has been fully informed of the views of this Government on those subjects, should at once return to British Columbia and enter into negotiations with the Administration there, for the adjustment of all the matters remaining unsettled between the two Governments, such adjustment to be subject to the approval of the Government of the Dominion.

I have, etc.,
(Signed) H. L. Langevin,
Acting Secretary of State.

Exhibit No. 14
Letter
Act. Sec'y of
State for
Canada to
Lieut.-
Governor
Mar. 22, 1883

RECORD

Court of Appeal of British Columbia

Exhibit No. 15
Telegram
Macdonald to
Smithe
Mar. 22, 1883

EXHIBIT No. 15

Ottawa, Ont., March 22, 1883.

To Hon. Wm. Smithe, Premier.

Trutch leaves next Tuesday. Canadian Government are prepared to submit to Parliament your propositions, with such modifications as may be settled on with Mr. Trutch and concurred in by us. Telegraph. Your Legislature must legislate first.

(Signed) John A. Macdonald.

Exhibit No. 16
Telegram
Trutch to
Smithe
Mar. 22, 1883

EXHIBIT No. 16

Ottawa, Ont., Mar. 22, 1883.

To Hon. W. Smithe.

I start positively 27th inst. fully empowered to treat with British Columbia Government. I am confident that on my conferring with you Island Railway, Graving Dock and Railway lands matter will be definitely settled on terms satisfactory to both Governments, so that necessary legislation may be affected forthwith both at Victoria and here. It is absolutely essential therefore, that your House be not prorogued until after I reach Victoria. Please acknowledge.

(Signed) J. W. Trutch.

Exhibit No. 17
Telegram
Smithe to
Macdonald
Mar. 23, 1883

EXHIBIT No. 17

23rd March, 1883.

Sir John A. Macdonald, Ottawa.

Your Telegram received. The House here has adjourned for a week: we regret the delay necessary, but will not prorogue until after Mr. Trutch arrives.

(Signed) Wm. Smithe.

Exhibit No. 18
Telegram
Smithe to
Trutch
Mar. 23, 1883

EXHIBIT No. 18

23rd March, 1883.

Hon. Mr. Trutch, Ottawa.

Your telegram received. We regret the delay but await your arrival.

(Signed) Wm. Smithe.

EXHIBIT No. 19

Victoria, 25th April, 1883.

Sir John A. Macdonald, Ottawa.

Government here anxiously awaiting ratification from your Government of terms of settlement agreed upon by your agent, Mr. Trutch, and this Government, and telegraphed by Mr. Trutch on the 18th inst. Legislature has been kept in session a lengthened period already, and cannot be kept much longer. Settlement most urgent.

(Signed) Wm. Smithe.

Exhibit No. 19
Telegram
Smithe to
Macdonald
April 25, 1883

EXHIBIT No. 20

Ottawa, Ont., 30th April, 1883.

To Hon. Wm. Smithe.

Sir Charles Tupper's illness has somewhat delayed matters. Will be attended to in a day or two.

(Signed) John A. Macdonald.

Exhibit No. 20
Telegram
Macdonald to
Smithe
April 30, 1883

EXHIBIT No. 21

Victoria, 1st May, 1883.

Sir John A. Macdonald, Ottawa.

Continued delay exceedingly embarrassing. House has been kept waiting several weeks, is now out of all patience. Adjourns from day to day without doing business.

(Signed) Wm. Smithe.

Exhibit No. 21
Telegram
Smithe to
Macdonald
May 1, 1883

EXHIBIT No. 22

Ottawa, Ont., 3rd May, 1883.

To Hon. Wm. Smithe.

Have wired Mr. Trutch in full. See him.

(Signed) John A. Macdonald.

Exhibit No. 22
Telegram
Macdonald to
Smithe
May 3, 1883

RECORD

Court of Appeal of British Columbia

Exhibit No. 23
Letter
Trutch to
Smithe
May 5. 1883

EXHIBIT No. 23

Letter The Hon. Mr. Trutch, C.M.G. to the Hon. W. Smithe.

Victoria, B.C., 5th May, 1883.

Sir,—

I received, last night, a telegram from the Premier of Canada, conveying the following propositions, to be submitted without prejudice, for the consideration of the Government of British Columbia—

1. The Government of British Columbia shall amend the Act (43 Victoria, Chapter 11) of 1880, granting certain lands, to the extent of twenty (20) miles on each side of the line of the Canadian Pacific Railway in British Columbia, on the Yellow Head Pass route, so that the same extent of land on each side of the line of the Railway through British Columbia wherever finally located, shall be conveyed to the Dominion Government, in lieu of the lands conveyed by the above Act.

2. The Government of British Columbia shall grant to the Government of Canada a portion of the lands set forth and described in the Act of British Columbia (45 Victoria, Chapter 15) entitled the "Vancouver Land and Railway Company," to be conveyed to the said Company for the purpose stated in the said Act, viz., the portion of the aforesaid lands commencing at the southern boundary thereof and extending to a line running east and west, half way between Comox and Seymour Narrows, and also a further portion of the lands conveyed by the said Act to the Vancouver Land and Railway Company, to the North of and contiguous to the portion just before specified, equal in extent to the lands within the limits thereof which may have been alienated from the Crown by Crown grants or pre-emption right, or otherwise.

3. The Government of British Columbia shall convey to the Government of Canada three and a half millions of acres of land of fair quality in the Peace River District of British Columbia, in one rectangular block adjoining the North West Territory of Canada.

4. The Government of British Columbia shall procure the incorporation, by Act of their Legislature, of certain persons to be designated by the Government of Canada, for the construction of the Railway from Esquimalt to Nanaimo.

The Government of Canada, on their part, shall—

1 Appropriate the lands on Vancouver Island, above provided to be conveyed to that Government and seven hundred and fifty thousand dollars to be paid as the work proceeds to the Company to be incorporated by the Act of the Legislature as above provided, such company giving satisfactory security for the completion of the Railway from Esquimalt to Nanaimo within three and a half years from the date of their incorporation.

2. The Government of Canada shall purchase from the Government of British Columbia the Esquimalt Graving Dock, paying for the same, with all the lands, approaches and appurtenances, belonging thereto, the sum of Two hundred and fifty thousand dollars, and shall complete and operate the same for their own benefit, receiving the Imperial appropriation therefor.

3. The Government of Canada shall, with all convenient speed, offer for sale the lands within the Railway Belt on the Mainland of British Columbia on liberal terms to actual settlers; —and

4. Shall give persons who have squatted on any of the said lands within the Railway belt on the Mainland prior to this date, and have made substantial improvements thereon, a prior right of purchasing the lands so improved at the rates charged to settlers generally.

The Government of Canada submit these proposals upon the further stipulation that should they be approved by the Government of British Columbia, such acceptance shall be ratified by Act of the Legislature of British Columbia as in full of all claims whatsoever of the Government of British Columbia against the Government of Canada.

I have, etc.,

(Signed) Joseph W. Trutch,
Agent of Canada for British Columbia.

EXHIBIT No. 24

Exhibit No. 24
Report of
Executive
Committee
May 7, 1883

COPY OF REPORT OF EXECUTIVE COMMITTEE

approved by his Honour the Lieutenant-Governor, May 7th, 1883.

The Committee of Council have had under consideration the letter dated 5th May, of the Honourable J. W. Trutch, C.M.G.,

RECORD

Court of Appeal of British Columbia

Exhibit No. 24
Report of Executive Committee
May 7, 1883
(Contd.)

Agent of the Dominion Government to the Honourable the Premier, conveying propositions from the Premier of Canada and submitted without prejudice for the consideration of the Government of British Columbia, upon the subject of the settlement of pending questions between the Governments of the Dominion and the Province relative to the opening of the railway lands of the Province to settlement, the construction of the Island Railway, and the Esquimalt Graving Dock, and report thereon as follows—

That whilst it is felt that the claims of British Columbia upon the Dominion of Canada for compensation for injury sustained in the past from the non-fulfilment of the Railway Clause of the Terms of Union, and from the locking up from settlement of the lands set apart for railway purposes within the Province, having not been adequately considered by the Dominion Government, it is nevertheless a matter of vital importance to the Province that the questions which have so long agitated the public mind, and have tended to embitter the relations existing between the two Governments should be settled, and that the Dominion and Province should unite in a common endeavour to open the country to settlement in the fullest manner possible; and it is deemed to be desirable, in order to attain those ends, to accept the settlement proposed in terms of the letter referred to from the Hon. J. W. Trutch to the Premier.

The Committee, however, wish it to be understood that certain matters of detail arranged verbally with the Agent of the Dominion, the Hon. Mr. Trutch, which are not embodied in the letter referred to are to be taken as part of the settlement. The assumption by the Dominion Government of all Graving Dock liabilities, and the commencement, within four months, of the construction of the Island Railway being, among other matters of importance, overlooked in the letter embodying the terms of the settlement. The employment of white labour exclusively upon the works at the Graving Dock is important, and the Committee recommend that the Dominion Government be asked to accept the stipulation that Chinese labour be excluded from the work in the future as heretofore.

The proposal with reference to the construction of the Island Railway is in language somewhat indefinite, but the Committee are of the opinion that the practical meaning is that the completion of the Island Railway within three and a half years is assured.

The stipulation contained in the last paragraph of Mr. Trutch's letter, that if the proposals be approved by the Government of British Columbia, their acceptance shall be ratified by

Exhibit No. 24
Report of Executive Committee
May 7, 1883
(Contd.)

Act of the Legislature of British Columbia as in full of all claims whatsoever of the Government of British Columbia against the Government of Canada, can only fairly mean in respect of the premises to date, and in that sense the Committee recommend its acceptance.

The Committee advise that the recommendations be approved and that a copy be forwarded to the Secretary of State for the Dominion of Canada, and the Hon. J. W. Trutch, C.M.G., Agent of the Dominion Government in the Province.

Certified,

(Signed) T. Elwyn,
Deputy Clerk of Executive Council.

EXHIBIT No. 25

Exhibit No. 25
Letter
Smithe to Trutch
May 8, 1883

The Hon. W. Smithe to the Hon. J. W. Trutch, C.M.G.

Victoria, 8th May, 1883.

Sir,—

Referring to your letter dated the 5th instant, upon the subject of our recent negotiations, I have the honour to enclose a copy of an Order in Council of yesterday's date, embodying the acceptance by the Government of the proposed arrangement for the construction of the Island Railway, the opening of the Railway lands to settlement, and the completion of the Dry Dock as a Federal work.

I have, etc.

(Signed) Wm. Smithe,
Premier.

EXHIBIT No. 26

Exhibit No. 26
Letter
Trutch to Smithe
May 11, 1883

The Hon. J. W. Trutch, C.M.G., to the Hon. Mr. Smithe.

Victoria, British Columbia, 11th May, 1883.

Dear Sir,—

I have just received the following telegram from Sir John A. Macdonald:—

"Dominion will pay $250,000, also money actually expended on construction of Dock since date of offer of Provincial Government to Government here."

RECORD

Court of Appeal of British Columbia

Exhibit No. 26
Letter
Trutch to
Smithe
May 11, 1883
(Contd.)

I have telegraphed to Sir John Macdonald full text of Bill relating to Island Railway, Graving Dock and Railway Lands, as it passed the second reading, and am about to telegraph the amendments thereto adopted in Committee, and to acquaint him that the Bill, so amended was read the third time and passed last night.

Yours faithfully,

(Signed) Joseph W. Trutch.

Exhibit No. 27
Letter
Trutch to
Smithe
May 11, 1883

EXHIBIT No. 27

The Hon. J. W. Trutch, C.M.G., to the Hon. Mr. Smithe.

Victoria, B.C., 11th May, 1883.

Sir,—

I have the honour to acknowledge the receipt of your letter of the 8th inst. enclosing a copy of an Order in Council of the 7th instant, embodying the acceptance by the Government of British Columbia of the proposed arrangement communicated to you by me, on behalf of the Dominion Government, by letter of the 5th instant, for the construction of the Island Railway, the opening of the Railway Lands to settlement, and the completion of the Dry Dock as a Federal Work.

A copy of this Order in Council will be forwarded to the Right Honourable Sir John A. Macdonald, Premier of Canada, by to-morrow's mail.

I have, etc.,

(Signed) Joseph W. Trutch.
Agent of Canada for British Columbia.

EXHIBIT No. 28

CHAP. 14.

An Act relating to the Island Railway, the Graving Dock, and Railway Lands of the Province.

(*12th May, 1883.*)

Preamble.

WHEREAS negotiations between the Governments of Canada and British Columbia have been recently pending, relative to the Island Railway, the Graving Dock, and the Railway Lands of the Province:

And whereas such negotiations have resulted in an agreement between the two Governments, to the effect hereinafter mentioned, that is to say:—

(a.) The Legislature of British Columbia shall amend the Act No. 11 of 1880, intituled, "An Act to authorize the grant of certain Public Lands on the Mainland of British Columbia to the Government of the Dominion of Canada for Canadian Pacific Railway purposes," so that the same extent of land on each side of the line of Railway through British Columbia, wherever finally settled, shall be granted to the Dominion Government in lieu of the lands conveyed by that Act.

(b.) The Government of British Columbia shall grant to the Government of Canada a portion of the lands set forth and described in the Act No. 15 of 1882, intituled "An Act to incorporate the Vancouver Land and Railway Company," namely, that portion of the said lands therein described, commencing at the Southern boundary thereof and extending to a line running East and West, half way between Comox and Seymour Narrows; and also a further portion of the lands conveyed by the said Act to the northward of and contiguous to that portion of the said lands last hereinbefore specified, equal in extent to the lands within the limits thereof which may have been alienated from the Crown by Crown grants, pre-emption, or otherwise.

RECORD

Court of Appeal of British Columbia

Exhibit No. 28
B.C. Act Relating to the Island Rly; Graving Dock and Rly Lands
May 12, 1883
(Contd.)

(c.) The Government of British Columbia shall convey to the Government of Canada three and one-half millions of acres of land in the Peace River district of British Columbia, in one rectangular block, East of the Rocky Mountains, and adjoining the North-West Territory of Canada.

(d.) The Government of British Columbia shall procure the incorporation, by Act of their Legislature, of certain persons, to be designated by the Government of Canada, for the construction of the Railway from Esquimalt to Nanaimo.

(e.) The Government of Canada agrees to secure the construction of a Railway from Esquimalt to Nanaimo within three and a half years from the date of the incorporation of the company as before mentioned; such construction to commence upon the passing of the Act relating to the incorporation of the company.

(f.) The lands on Vancouver Island to be so conveyed shall, except as to coal and other minerals, and also except as to timber lands as hereinafter mentioned, be open for four years from the passing of this Act to actual settlers, for agricultural purposes, at the rate of one dollar an acre, to the extent of 160 acres to each such actual settler; and in any grants to settlers the right to cut timber for railway purposes and rights of way for the railway, and stations, and workshops, shall be reserved.

(g.) The Government of Canada shall forthwith purchase, take over, complete, and shall, upon the completion thereof, operate as a Dominion work, the Dry Dock at Esquimalt; and shall be entitled to and have conveyed to them all the lands, approaches, and plant belonging thereto, together with the Imperial appropriation therefor, and shall forthwith pay to the Province as the price thereof the sum of $250,000, and shall further pay to the Province whatever amounts shall have been expended by the Provincial Government or which remain due, up to time of the passing of this Act, for work or material supplied by the Government of British Columbia since the 27th day of June, 1882.

(h.) The Government of Canada shall, with all convenient speed, offer for sale the lands within the Railway belt upon the Mainland, on liberal terms to actual settlers; and

(i.) Shall give persons who have squatted on any of the said lands within the Railway belt on the Mainland, prior to the passing of this Act, and who have made substantial improvements thereon, a prior right of purchasing the lands so improved, at the rates charged to settlers generally.

(k.) This agreement is to be taken by the Province in full of all claims up to this date by the Province against the Dominion, in respect of delays in the construction of the Canadian Pacific Railway, and in respect of the Esquimalt and Nanaimo Railway, and shall be taken by the Dominion Government in satisfaction of all claims for additional lands under the Terms of Union.

And whereas it is expedient that the said agreement should be ratified, and that provision should be made to carry out the terms thereof:

Therefore Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:—

Adopts the agreement above recited.

1. The hereinbefore recited agreement shall be and is hereby ratified and adopted.

Amends section 1 chap. 11 Act of 1880.

2. Section 1 of the Act of the Legislature of British Columbia, No. 11 of 1880, intituled "An Act to authorize the grant of certain public lands on the mainland of British Columbia to the Government of the Dominion of Canada for Canadian Pacific Railway purposes," is hereby amended so as to read as follows:—

Grant of lands to Dominion Government in aid of construction of the Canadian Pacific Railway.

From and after the passing of this Act, there shall be, and there is hereby granted to the Dominion Government for the purpose of constructing and to aid in the construction of the portion of the Canadian Pacific Railway on the mainland of British Columbia, in trust, to be appropriated as the Dominion Government may deem advisable, a similar extent of public lands along the line of the railway before mentioned, wherever it may be finally located (not to exceed twenty miles on each side of the said line) as may be appropriated for the same purpose by the Dominion from the public lands of the North-West Territories and the Province of Manitoba, as provided in the Order in Council, section 11, admitting the Province of British Columbia into Confederation; but nothing in this section contained shall prejudice the right of the Province to receive and be paid by the Dominion Government the sum of $100,000 per annum, in half-yearly payments in advance, in consideration of the lands so conveyed, as provided in Section 11 of the Terms of Union: Provided always that the line of Railway before referred to, shall be one continuous line of railway only, connecting the seaboard of British Columbia with the Canadian Pacific Railway, now under construction on the East of the Rocky Mountains.

Annual grant of $100,000 to the Province not to be prejudiced hereby.

Grant of Crown land on Vancouver Island in aid of the Esquimalt-Nanaimo Railway.

3. There is hereby granted to the Dominion Government, for the purpose of constructing, and to aid in the construction of a

Railway between Esquimalt and Nanaimo, and in trust to be appropriated as they may deem advisable (but save as is hereinafter excepted) all that piece or parcel of land situate in Vancouver Island, described as follows:—

Boundaries of land granted.

Bounded on the South by a straight line drawn from the head of Saanich Inlet to Muir Creek on the Straits of Fuca;

On the West by a straight line drawn from Muir Creek aforesaid to Crown Mountain;

On the North, by a straight line drawn from Crown Mountain to Seymour Narrows; and

On the East by the Coast line of Vancouver Island to the point of commencement; and including all coal, coal oil, ores, stones, clay, marble, slate, mines, minerals, and substances whatsoever thereupon, therein, and thereunder.

Certain land exempted from the grant.

4. There is excepted out of the tract of land granted by the preceding section all that portion thereof lying to the northward of a line running East and West half way between the mouth of the Courtenay River (Comox District) and Seymour Narrows.

Other lands to be given for those alienated out of the tract granted.

5. Provided always that the Government of Canada shall be entitled out of such excepted tract to lands equal in extent to those alienated up to the date of this Act by Crown grant, pre-emption, or otherwise, within the limits of the grant mentioned in section 3 of this Act.

Grant not to include lands alienated nor Indian Reserves.

6. The grant mentioned in section 3 of this Act shall not include any lands now held under Crown grant, lease, agreement for sale, or other alienation by the Crown, nor shall it include Indian reserves or settlements.

Grant of 3,500,000 acres of land in Peace River District to the Dominion Government.

7. There is hereby granted to the Dominion Government three and a half million acres of land in that portion of the Peace River District of British Columbia lying East of the Rocky Mountains and adjoining the North-West Territory of Canada, to be located by the Dominion in one rectangular block.

Incorporation of "The Esquimalt and Nanaimo Railway Company."

8. For the purpose of enabling the Government of Canada to construct the Railway between Esquimalt and Nanaimo, it is hereby enacted that such persons, hereinafter called the "company," as may be named by the Governor-General in Council, with all such other persons and corporations as shall become shareholders in the company, shall be and are hereby constituted a body corporate and politic by the name of "The Esquimalt and Nanaimo Railway Company."

Gives the said Company power to construct a line of railway from Esquimalt to Nanaimo.

9. The Company, and their agents and servants, shall lay out, construct, equip, maintain, and work a continuous double or single track steel railway of the gauge of the Canadian Pacific Railway, and also a telegraph line, with the proper appurtenances, from a point at or near the harbour of Esquimalt, in British Columbia, to a port or place at or near Nanaimo on the eastern coast of Vancouver Island, with power to extend the main line to Comox and Victoria, and to construct branches to settlements on the east coast, and also to extend the said railway by ferry communications to the mainland of British Columbia, and there to connect or amalgamate with any railway line in operation or course of construction. The company shall also have power and authority to build, own, and operate steam and other vessels in connection with the said railway, on and over the bays, gulfs, and inland waters of British Columbia.

Extension of line to Comox and Victoria.

Power to operate steam and ferry boats.

Power to receive grants of land, etc., from Government of Canada in aid of construction.

10. The company may accept and receive from the Government of Canada any lease, grant, or conveyance of lands, by way of subsidy or otherwise, in aid of the construction of the said railway, and may enter into any contract with the said Government for or respecting the use, occupation, mortgage, or sale of the said lands, or any part thereof, on such conditions as may be agreed upon between the Government and the company.

Capital Stock $3,000,000.

11. The capital stock of the company shall be three millions of dollars, and shall be divided into shares of one hundred dollars each, but may be increased from time to time by the vote of the majority in value of the shareholders present in person, or represented by proxy, at any meetings specially called for the purpose, to an amount not exceeding five million dollars.

Provisional Directors.

12. The persons to be named as aforesaid by the Governor-General in Council shall be and are hereby constituted a board of provisional directors of the company, and shall hold office as such until other directors shall be elected under the provisions of this Act, and shall have power to fill any vacancies that may occur in the said board; to open stock books at Victoria, British Columbia, or any other city in Canada; procure subscriptions, and receive payments on stock subscribed.

When first general meeting of shareholders to be held.

13. When and so soon as one-half of the capital stock shall have been subscribed, and one-tenth of the amount thereof paid into any chartered Bank, either at Victoria or San Francisco, or partly in each, the provisional directors may order a meeting of shareholders to be called at Victoria, British Columbia, at such

RECORD

Court of Appeal of British Columbia

Exhibit No. 28
B.C. Act Relating to the Island Rly; Graving Dock and Rly Lands
May 12, 1883
(Contd.)

Notice of meeting.

time as they think proper, giving at least three weeks' notice thereof in one or more newspapers published in the City of Victoria, and by a circular letter mailed to each shareholder, at which meeting the shareholders present in person, or by proxy, shall elect five directors qualified as hereinafter provided, who shall hold office until the first Wednesday in October in the year following their election.

Annual meetings of shareholders.

14. On the said first Wednesday in October, and on the same day in each year thereafter, at the City of Victoria, or at such other place as shall be fixed by the by-laws of the company, there shall be held a general meeting of the shareholders for receiving the report of the directors transacting the business of the company, general or special, and electing the directors thereof; and public notice of such annual meeting and election shall be published for one month before the day of meeting in one or more newspapers in the City of Victoria, and by circular letter mailed to each shareholder at least one month prior thereto. The election of directors shall be by ballot, and all shareholders may vote by proxy.

Election of Directors.

Quorum.

15. Three of the Directors shall form a quorum for the transaction of business, and the Board may employ one or more of their number as paid Director or Directors, provided that no person shall be elected Director unless he owns at least twenty-five shares of the stock of the Company on which calls have been paid.

Qualification of Directors.

Calls.

16. No call shall be made for more than ten per centum at any one time on the amount subscribed, nor shall more than fifty per centum of the stock be called up in any one year.

Consolidated Railway Act, 1879, of Canada, to apply.

17. The Consolidated Railway Act, eighteen hundred and seventy-nine (1879) of Canada, shall, so far as its provisions are applicable to the undertaking and are not inconsistent with or contrary to the provisions of this Act, apply to the said railway, and shall be read with and form part of this Act.

Interpretation.

18. The words "Superior Court," "Clerks of the Peace," "Registry Offices," "Clerk of Court," as used in the said Consolidated Railway Act, eighteen hundred and seventy-nine (1879), shall, for the purposes of this Act, be read and construed in the same sense and meaning as is provided by the Act passed by this Legislature thirty-eight (38) Victoria, chapter thirteen (13), section three (3).

Sections 5 and 6 of said Act to be read herewith.

19. Sections five (5) and six (6) of the said last mentioned Act shall be read with and form part of this Act.

20. The said railway line from Esquimalt to Nanaimo shall be commenced forthwith and completed within three and a half years from the passing of this Act.

Line to be completed in 3½ years.

21. The Railway, with its workshops, stations, and other necessary buildings and rolling stock, and also the capital stock of the Railroad Company, shall be exempt from Provincial and Municipal taxation until the expiration of ten years from the completion of the railroad.

Exemption from Provincial taxation for 10 years.

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.

The lands granted to be free from taxation until alienated by the Co.

23. The company shall be governed by sub-section (*f*) of the hereinbefore recited agreement, and shall also grant to each bona fide squatter who has continuously occupied, and improved any of the lands within the tract of land to be acquired by the company from the Dominion Government for a period of one year prior to the first day of January, 1883, the freehold of the surface rights of the said squatted land, to the extent of 160 acres to each squatter.

Provides for grant of 160 acres to squatters who have been in possession of land for one year.

Surface rights only to be granted.

24. The company shall at all times sell coals gotten from the lands that may be acquired by them from the Dominion Government to any Canadian Railway Company having the terminus of its Railway on the seaboard of British Columbia, and to the Imperial, Dominion, and Provincial authorities, at the same rates as may be charged to any Railway Company owning or operating any Railway in the United States, or to any foreign customer whatsoever.

Provision as to price of coals sold to Railway Companies.

25. All lands acquired by the company from the Dominion Government under this Act containing belts of timber fit for milling purposes shall be sold at a price to be hereafter fixed by the Government of the Dominion or by the company hereby incorporated.

Price of timber lands, how to be fixed.

26. The existing rights (if any) of any persons or corporations in any of the lands so to be acquired by the company shall not be affected by this Act.

Existing rights not to be affected.

27. The said Esquimalt and Nanaimo Railway Company shall be bound by any contract or agreement for the construction of the Railway from Esquimalt to Nanaimo which shall be entered into by and between the persons so to be incorporated as aforesaid,

Contracts, etc., entered into with the Dominion Government for construction of Esquimalt-Nanaimo Railway to be binding on the Company.

RECORD

Court of Appeal of British Columbia

Exhibit No. 28
B.C. Act Relating to the Island Rly; Graving Dock and Rly Lands
May 12, 1883
(Contd.)

and Her Majesty, represented by the Minister of Railways and Canals, and shall be entitled to the full benefit of such contract or agreement, which shall be construed and operate in like manner as if such company had been a party thereto in lieu of such persons, and the document had been duly executed by such company under their corporate seal.

Railways, etc., to be the property of the Company.

28. The Railways to be constructed by the company in pursuance of this Act shall be the property of the company.

RECORD

In the Supreme Court of Canada

EXHIBIT No. 28A

Sessional Papers, B.C., 1884 **P. 157**

Exhibit No. 28A
Letter, Sec'y of State to Lieut.-Gov. of B.C.
May 12, 1883

The Under Secretary of State to the Lieutenant-Governor

OTTAWA, 12th May, 1883

SIR,

I have the honour to transmit to you herewith, for the information and action thereon of your Government, a copy of an Order of His Excellency the Governor-General in Council upon your despatch of the 10th February last, respecting the basis of settlement between the Governments of the Dominion and of British Columbia, of the Railway Lands and other questions. I have, &c.,

(Signed) G. Powell,
Under Secretary of State.

EXHIBIT No. 28B

Exhibit No. 28B
Report of Committee of Privy Council
May 9, 1883

Sessional Papers, B.C., 1884 **P. 157**

Certified copy of a Report of a Committee of the Honourable the Privy Council, approved by His Excellency the Governor-General in Council on the 9th May, 1883.

The Committee of the Privy Council have had under consideration a despatch, dated 10th February, 1883, from the Lieutenant-Governor of British Columbia, setting forth that the British Columbia Government, as a basis of settlement between the Governments of the Dominion and the Province, of the Railway and the Railway Lands questions, urgently request:

1. That the Dominion Government commence, at the earliest possible period, the construction of the Island Railway, and complete the same with all practicable dispatch, or by giving to the Province such fair compensation for failure to build such Island Railway as will enable the Government of the Province to build it as a provincial work.

2. That the Dominion Government open the East Coast lands for settlement.

3. That the Dominion Government take over the Graving Dock at Esquimalt, upon such terms as shall recoup and relieve the Province of all expense in respect thereof, and to complete and operate it as a Federal work, or as a joint Imperial and Dominion work.

4. That the Provincial Government, in lieu of the lands within the railway belt alienated or otherwise rendered unavailable, set apart for the use of the Dominion Government a tract of land of 2,000,000 acres in extent, to be taken up in blocks of not less than

500,000 acres in such localities on the Mainland as may be agreed upon, the land to be taken up and defined within two years; upon condition that the Dominion Government in dealing with lands in the Province of British Columbia, shall establish a land system equally as liberal, both as to mining and agricultural industries, as that in force in the Province at the present time, and that there shall be no delay in throwing open the lands for settlement.

The Ministers of the Interior and Railways and Canals suggest, inasmuch as a final and satisfactory adjustment of all differences is desirable, that the following propositions be made (without prejudice) to the Government of British Columbia:—

1A. The Provincial Government shall amend the Act of 1880, granting the 40 miles land belt on the Yellow Head Pass route, so as to appropriate that belt along the line of railway wherever it may be finally located through British Columbia.

2A. The Provincial Government shall grant to the Dominion Government the lands in Vancouver Island specified in Mr. Dunsmuir's last proposal for the construction of the Esquimalt and Nanaimo Railway.

3A. The Provincial Government shall transfer to the Dominion Government 3,500,000 acres of land of fair quality, in the Peace River District, on the East side of the Rocky Mountains and adjoining the North-West Territories, in one rectangular block.

4A. That the British Columbia Government shall procure an Act of Incorporation for such parties as shall be designated by the Dominion Government for the construction of the Railway on Vancouver Island.

1B. That the Dominion Government shall appropriate the lands on Vancouver Island and a sum of $750,000, to be paid as the work proceeds, to a Company to be incorporated at their instance by the Legislature of British Columbia, and which Company shall give satisfactory security for the completion of the Railway from Esquimalt to Nanaimo within four years from the date of the Act of Incorporation.

2B. That the Dominion Government shall purchase from the Government of British Columbia the Esquimalt Graving Dock, with all its lands, approaches, and appurtenances, for the sum of $250,000, and shall complete and operate that work for their own benefit, receiving the appropriation of the Imperial Government therefor.

3B. That the Dominion Government shall, with all convenient speed, offer for sale the Railway Belt on the Mainland, on liberal terms to actual settlers.

RECORD

In the Supreme Court of Canada

Exhibit No. 28B Report of Committee of Privy Council May 9, 1883 (Contd.)

4B. That the Dominion Government shall give persons who have, prior to this date, squatted upon lands in the Railway Belt on the main line, and made improvements thereon, a prior right of purchasing the lands so improved, at the same rates as shall be charged to settlers generally.

The Ministers also recommend that the Government of British Columbia be required, in case this proposal is adopted, to obtain an Act of ratification from the Legislature of British Columbia, declaring it accepted in full of all claims of every description.

The Committee concur in the foregoing Report and the recommendations made therein, and they advise that a copy of this Minute, when approved, be sent to the Lieutenant-Governor of British Columbia, for the information and action thereon of his Government.

(Signed) John J. McGee.

EXHIBIT No. 28C

Exhibit No. 28C Telegram, Smithe to Macdonald May 12, 1883

Sessional Papers, B.C., 1884 **P. 158**

(TELEGRAM)

Victoria, 12th May, 1883

To Sir John A. Macdonald:

Mr. Trutch verbally requested me, today, to amend Settlement Bill; but, as the hour of prorogation was fixed and at hand, it was quite impossible to do so. We consider there is practically no difference between what you wish and what we have put in the Bill as to security to construct Island Railway.

(Signed) Wm. Smithe.

EXHIBIT No. 28D

Exhibit No. 28D Letter, Trutch to Smithe ~~May 12, 1983~~ May 12, 1883

Sessional Papers, B.C., 1884 **P. 158**

The Hon. J. W. Trutch, C.M.G., to the Hon. Mr. Smithe.

Victoria, B.C., 12th May, 1883

Sir,

With reference to my letter of yesterday, acknowledging the receipt of yours of the 8th instant, covering a copy of an Order in Council of the previous day's date, embodying the acceptance by the Government of British Columbia of the arrangements proposed by my letter of the 5th instant, on the part of the Government of Canada, for the construction of the Island Railway, the completion of the Dry Dock, and the settlement of the questions hitherto pending relative to the Railway Lands on the Mainland of this Province, which

propositions the Government of Canada stipulated, as stated in my letter before mentioned, should, if accepted by the Government of British Columbia, be ratified by Act of the Legislature of the Province, I have the honour to inform you that I telegraphed the full text of the Act relative to these proposed arrangements, passed by the Legislative Assembly on the 9th instant, to the Premier of Canada, who, in acknowledging receipt of the copy of the Act so transmitted by me, points out that, both as regards the statement in sub-section (e) thereof, that "The Government of Canada agrees to secure the construction of a Railway from Esquimalt to Nanaimo within three and a half (3½) years from the date of incorporation of the company" mentioned in the preceding sub-section, and that contained in sub-section (g), to the effect that the Government of Canada will, in addition to the sum of $250,000 therein mentioned as the price of the Esquimalt Dock, "further pay to the Province whatever amounts shall have been expended by the Provincial Government, or which remain due up to the time of the passing of this Act, for work or material supplied by the Government of British Columbia since the 27th of June, 1882," is 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 5th instant, to you.

It is therefore most desirable that the Act should be so amended as to conform strictly to the letter of the propositions above referred to, as, otherwise, the Government of Canada may find themselves unable to obtain the requisite legislation by the Parliament of Canada for carrying the proposed arrangements into effect.

I have, &c.,

(Signed) Joseph W. Trutch,
Agent of Canada for British Columbia.

EXHIBIT No. 28E

Sessional Papers, B.C., 1884 **P. 159**

The Hon. Mr. Smithe to the Hon. Mr. Trutch, C.M.G.

Victoria, B.C., 14th May, 1883.

Sir,

In your letter to me of the 12th inst., you advised me that you had telegraphed the full text of the Act relating to the Island Railway, the Graving Dock, and the Railway Lands of the Province to the Premier of Canada; and that in acknowledging receipt of the copy of the Act so transmitted, the Premier had pointed out that "the statement in subsection (e) thereof, that the Government of Canada agrees to secure the construction of a Railway from Esquimalt to Nanaimo within three and a half (3½) years from the date

RECORD

In the Supreme Court of Canada

Exhibit No. 28E
Letter, Smithe to Trutch
May 14, 1883
(Contd.)

of incorporation of the company mentioned in the preceding sub-section; and that contained in sub-section (g), to the effect that the Government of Canada will, in addition to the sum of $250,000 therein mentioned as the price of the Esquimalt Dock, further pay to the Province whatever amounts shall have been expended by the Provincial Government, or which remain due up to the time of the passing of this Act, for work or material supplied by the Government of British Columbia since the 27th of June, 1882, is not in conformity with the propositions of the Government of Canada to the Government of British Columbia, as submitted" by you, by your letter of the 5th instant, to me. In reply, I have the honour to say that when the Government of British Columbia opened negotiations with the Government of the Dominion upon the subject of the settlement of the questions relating to the Island Railway, the Graving Dock, and the Railway Lands, they did so in a perfectly candid and open manner by transmitting a copy of an Order in Council upon the subject to the Secretary of State for the Dominion, dated 10th February, 1883. A copy of the said Order in Council was also placed in your hands as Agent of the Dominion in the Province. That Order in Council embodied certain definite proposals, which included the construction of the Island Railway by the Dominion Government, and the taking over the Graving Dock to be completed and operated as a Federal work—the Province to be recouped and relieved of all expenses in respect thereof. The aforesaid Order in Council has not been acknowledged or answered by the Dominion Government otherwise than inferentially by certain telegrams from the Premier (Sir John A. Macdonald) and from yourself, and by verbal statements made by you in conferences held between the Provincial Government and you, as Agent of the Dominion after your return from Ottawa. On the 20th March, the Premier of Canada informed me, by telegram, that you would return "with instructions for adjustment of arrangements," and on the 22nd March you telegraphed that you were fully empowered to treat with the British Columbia Government," and that you were confident that, on your conferring with Government here, "Island Railway, Graving Dock, and Railway Lands matter" would "be definitely settled, on terms satisfactory to both Governments." After such statements, the Government here considered themselves justified in assuming that you were fully instructed, and that whatever arrangements were made with you, as their accredited Agent, would be accepted by the Dominion Government as binding upon them. Accordingly, the Government here considered the modifications of their proposals submitted by you, and arrived at an arrangement which they fairly thought was at least satisfactory to the Government whom you represented, and by whom you had been fully instructed. On the 22nd March, 1883, Sir John A. Macdonald telegraphed to me as follows: "Canadian Government

are prepared to submit to Parliament your propositions, with such modifications as may be settled on with Trutch and concurred in by us". When the modifications submitted by you had been accepted, the Government here were justified in assuming that the settlement arrived at was practically complete. They could not be expected to interpret the meaning of the telegram last quoted as being that the Canadian Government were prepared to submit to Parliament our propositions, with such modifications as might be settled on with you and further modified by the Dominion Government whom you represent.

In so far, therefore, as the statement contained in sub-section (g) of the Act referred to in your letter, is concerned, although it may not be in strict accordance with the terms of your letter to me of the 5th instant, which embodied the language of a telegram from the Premier of Canada, it must be, nevertheless, well understood by you to be thoroughly justified by the agreement arrived at between the Government here and yourself, as Agent of the Dominion; nay more, that it is within, rather than over, the limit of the agreement.

In respect of the statement in sub-section (e), relative to the Dominion Government agreeing to secure the construction of the Island Railway, the Provincial Government have proceeded throughout on the basis that the Dominion Government were under obligations to build the Island Railway; and in their despatch, dated 10th February, 1883, before referred to as still unanswered, the responsibility of the Dominion to construct that railway was set forth at some length. The time which elapsed between the date of the transmission of your telegram, embodying the agreement arrived at, and the date of the Premier's telegram to you, which you embodied in your letter of the 5th instant, made it quite impossible that the Legislative Assembly could be kept in session for an indefinite period longer, to await further negotiations upon what were looked upon as apparent differences consequent on the necessarily imperfect and unsatisfactory telegraphic correspondence which alone had taken place between the two Governments directly. The statement objected to in sub-section (e), before referred to, "that the Dominion Government agrees to secure the construction of the Island Railway", might have been altered to what you verbally requested, viz., that the Dominion Government agrees to obtain ample security for the construction of the Island Railway, if attention had been sooner called to the matter. There appears to be no practical difference between the two ways of expressing the responsibility of the Dominion Government under the agreement to effect the construction of the Island Railway. If the Dominion Government undertake to obtain ample security for the construction of the Island Railway, they undoubtedly will secure its construction. I may remark that your letter of the 12th instant did

RECORD

In the Supreme Court of Canada

Exhibit No. 28E
Letter, Smithe to Trutch
May 14, 1883
(Contd.)

not reach me until His Honour the Lieutenant-Governor was in the Chair of the House, for the purpose of proroguing the Legislative Assembly. The reasons of the Government for not giving effect to the slight alteration you verbally requested to be made to sub-section (e) of the Act hereinbefore referred to, I have already explained.

I have, &c.,

(Signed) Wm. Smithe,

Premier.

Exhibit No. 28F
Letter, Trutch to Smithe
May 15, 1883

EXHIBIT No. 28F

Sessional Papers, B.C., 1884 **P. 160**

The Hon. J. W. Trutch, C.M.G., to the Hon. Mr. Smithe.

Victoria, B.C., 15th May, 1883.

Sir,

I have the honour to acknowledge the receipt, this morning, of your letter of yesterday's date replying to mine of the 12th instant, in which I informed you that the Premier of Canada, to whom I telegraphed the full text of the Bill relating to Island Railway, Graving Dock, and Railway Lands on the Mainland, had pointed out that in certain respects, defined in my said letter, the provisions of the Bill did not conform to the propositions of the Government of Canada, communicated to you by my letter of the 5th instant, and that it was most desirable that the Bill should be amended so as to conform to the propositions of the Dominion Government, as otherwise that Government might find it impracticable to procure the requisite legislation by the Parliament of Canada to carry the proposed measures into effect.

Upon the remarks in your letter under reply I beg to observe—

1st. That the position I have occupied in negotiating on the part of the Government of Canada with your Government in the matters above mentioned, was clearly defined by Order in Council of the Government of Canada, and well understood by you to be such only as that any arrangements agreed to by me on conference with you in reference to the above matters, were agreed to only subject to the approval of that Government.

2nd. That the propositions of that Government were definitely conveyed to you by my letter of the 5th instant.

3rd. That I, on various occasions, called your attention to the fact that the Bill in question did not conform to those propositions in certain respects, and urged that it should be amended so as to

Exhibit No. 28F
Letter, Trutch to Smithe
May 15, 1883
(Contd.)

conform strictly thereto, and further urged that the Bill should not be even introduced into the House, and still less passed, until the acceptance of its provisions by the Government of Canada was communicated.

4th. That as soon as practicable after the Bill was printed, I telegraphed the full text thereof to the Premier of Canada, and subsequently also telegraphed the amendments thereof.

5th. That on receipt of his telegraphic message acknowledging the receipt of the Bill, and pointing out that its provisions, in certain respects, did not conform with the propositions of the Government of Canada, and should be amended, I immediately, namely, about 11 o'clock in the morning of the 12th instant, communicated to you orally the Premier of Canada's views in these respects, and urged compliance therewith. I further, without delay, upon your acquainting me that it was impracticable, in your opinion, to secure the amendment of the Bill as so suggested, renewed the expression of those views and representations, in substance, in my letter to you of that day's date, which letter was, however, as you state, only handed to you when the Lieutenant-Governor was already in the House.

I have now to further inform you that I telegraphed on Saturday last to the Premier of Canada that the Bill had been assented to without the amendments suggested, and have this morning received a message from him in reply directing me to communicate to you 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.

I have, &c.,

(Signed) Joseph W. Trutch,

Agent of Canada for British Columbia.

EXHIBIT No. 28G

Exhibit No. 28G
Report of Committee of Executive Council
May 15, 1883

Sessional Papers, B.C., 1884 **P. 161**

COPY of a Report of a Committee of the Honourable the Executive Council, approved by His Honour the Lieutenant-Governor on the 15th May, 1883.

On a memorandum of the Honourable the Provincial Secretary, dated the 15th day of May, 1883, with reference to a communication from the Hon. J. W. Trutch, to the effect that Sir John A. Macdonald

RECORD

In the Supreme Court of Canada

Exhibit No. 28G
Report of Committee of Executive Council May 15, 1883 (Contd.)

had stated that the recital of the agreement regarding the Island Railroad in the Act of Settlement was not in accordance with the proposal of the Dominion Government, report as follows:—

Concerning the Island Railroad:—The Committee of Council desire to point out that the intimation of the suggested amendment was not conveyed in such terms as to render the amendment imperative, and was mentioned as only a verbal alteration, nor was there sufficient time to allow of its being made.

That language of sub-section (e) is to be interpreted by reference to the letter of Mr. Trutch to Mr. Smithe of the 5th May, instant, a copy of which was before the Legislative Assembly at the time the Act was under consideration.

The Committee further consider that in respect of the Island Railway, the appropriation of the Island lands, the contribution of the sum of seven hundred and fifty thousand dollars, and the obtaining of security from the contractors for the construction of the railway will be treated by this Government as full performance of sub-section (e) of the Act referred to.

The Committee advise that the above Minute be approved, and that His Honour the Lieutenant-Governor be respectfully requested to telegraph the same to Sir John A. Macdonald.

Certified,

(signed) T. Elwyn,

Deputy Clerk Executive Council.

EXHIBIT No. 28H

Exhibit No. 28H
Telegram, Smithe to Macdonald May 23, 1883

Sessional Papers, B.C., 1884 **P. 162**

(TELEGRAM)

Victoria, 23rd May, 1883.

To Sir John A. Macdonald, Ottawa:

Did you receive our Minute of Council, telegraphed from here on 15th instant, upon subject of construction Island Railway? If so, does your Government, with the explanation therein made relative to language in sub-section (e) of our Bill, accept the measure? Please answer.

(signed) Wm. Smithe,

Premier.

RECORD

In the Supreme Court of Canada

EXHIBIT No. 28I

Sessional Papers, B.C., 1884 **P. 162**

Exhibit No. 28I
Telegram, Macdonald to Smithe
May 24, 1883

(TELEGRAM)

Ottawa, 24th May, 1883.

To Hon. W. Smithe, Premier.

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.

(signed) John A. Macdonald.

EXHIBIT No. 28J

Sessional Papers, B.C., 1884 **P. 162**

Exhibit No. 28J
Letter, Trutch to Smithe
May 25, 1883

The Hon. J. W. Trutch to the Hon. W. Smithe.

Victoria, May 25th, 1883.

Sir,

I have the honour to acquaint you that I yesterday received a telegram, dated the 23rd inst., from the Right Honourable Sir John A. Macdonald, Premier of Canada, by which I am directed to communicate to you that it is impossible to carry confirmation of the Provincial Act relating to Island Railway, Graving Dock, and Railway Lands on Mainland in the Parliament of Canada.

Parliament would readily grant the assistance stipulated in that Act to any solvent Railway Company giving ample security for the construction of the Island Railway, but would refuse to make that railway substantially a Government railway as the Provincial Act does.

Sir John Macdonald adds, that he will next week telegraph to me suggestions to overcome the difficulty which has occurred in carrying the proposed measure into effect.

I have, &c.,

(signed) Joseph W. Trutch,

Agent of Canada for British Columbia.

RECORD

In the Supreme Court of Canada

EXHIBIT No. 28K

Sessional Papers, B.C., 1884 **P. 162**

(TELEGRAM)

Victoria, June 8th, 1883.

Exhibit No. 28K Telegram, Smithe to Macdonald June 8, 1883

To Sir John A. Macdonald, Ottawa:

On 25th May, Hon. Mr. Trutch advised me by letter, that he had been directed by you to inform me that you would, following week, telegraph suggestions to overcome difficulty which has occurred in carrying proposed settlement into effect. Two weeks have now elapsed, and it is essential that we should know, without further delay, what suggestions you have to make.

(Signed) Wm. Smithe.

EXHIBIT No. 28L

Exhibit No. 28L Telegram, Macdonald to Smithe June 11, 1883

Sessional Papers, B.C., 1884 **P. 162**

(TELEGRAM)

Ottawa, June 11, 1883.

To Hon. Wm. Smithe.

Consider my telegram to you of 24th May supplied the suggestion made in message to Trutch of 23rd May.

(Signed) Jno. A. Macdonald.

EXHIBIT No. 28M

Exhibit No. 28M Telegram, Smithe to Macdonald June 12, 1883

Sessional Papers, B.C., 1884 **P. 163**

(TELEGRAM)

Victoria, 12th June, 1883.

To Sir John A. Macdonald, Ottawa:

In your telegram to me dated 24th May, you state that you are ready perform conditions telegraphed Mr. Trutch, and that meanwhile you will proceed provisionally carry out such arrangement, to be completed when our Act amended in conformity with agreement. In your telegram of yesterday, you say you consider that statement supplied to overcome difficulty which has occurred in carrying proposed measure into effect. Pray explain what you mean by "proceeding provisionally" and what you are doing, or intend to do, provisionally to carry out arrangement. Please answer at once.

(Signed) Wm. Smithe.

RECORD

Court of Appeal of British Columbia

EXHIBIT No. 29

Exhibit No. 29
Direction of the Lieut.-Gov. in Council
June 12, 1883

Direction of the Lieutenant-Governor in Council.

His Honour the Lieutenant-Governor in Council has been pleased to direct that the notice dated the 1st of July, 1873, reserving a strip of land twenty miles in width along the Eastern Coast of Vancouver Island between Seymour Narrows and the Harbour of Esquimalt for railway purposes, be and is hereby rescinded; and that all public lands lying within the following described boundaries be reserved from the date hereof, in furtherance of the construction of the Island Railway, viz.—

A tract bounded:

On the South by a straight line drawn from the head of Saanich Inlet to Muir Creek on the Straits of Fuca:

On the West by a straight line drawn from Muir Creek aforesaid to Crown Mountain:

On the North by a straight line drawn from Crown Mountain towards Seymour Narrows, to the 50th parallel of latitude; thence due east along said parallel of latitude to a point on the Coast opposite Cape Mudge; and

On the East by the Coast Line of Vancouver Island to the point of commencement.

By Command,

"Wm. Smithe,"

Chief Commissioner of Lands and Works.

Victoria, B.C., June 12th, 1883.

RECORD

In the Supreme Court of Canada

EXHIBIT No. 29A

Sessional Papers, B.C., 1884 **P. 163**

(TELEGRAM)

Ottawa, June 14, 1883.

To Hon. W. Smithe.

I meant that on amendment of Provincial Act Dominion Government would assume responsibility of organizing Railway Company and make provisional contract with it,—subject, of course, to ratification by Parliament here next session.

(Signed) Jno. A. Macdonald.

Exhibit No. 29A
Telegram, Macdonald to Smithe
June 14, 1883

EXHIBIT No. 29B

Sessional Papers, B.C., 1884 **P. 163**

The Hon. Mr. Smithe to the Hon. Mr. Trutch, C.M.G.

LANDS AND WORKS OFFICE

Victoria, B.C., June 14th, 1883.

Sir,

Referring to your letter upon the subject of the negotiations between the governments of the Dominion of Canada and the Province of British Columbia upon the subject of the Island Railway and Graving Dock, dated 15th May last, I have the honour to remark that, agreeably to your statement in the paragraph of your letter, marked 1, the Government have throughout understood "that the position you occupied in negotiating on the part of the Government of Canada with this Government, on the matters above-mentioned, was clearly defined by Order in Council of the Government of Canada," and they are the more astonished on that account that the Dominion Government should, at the last moment, have placed obstacles in the way of settlement, after months of unduly delayed negotiations.

I admit, as stated in paragraph 2, that the propositions of the Government of Canada were definitely conveyed to the Provincial Government by your letter to me of the 5th instant, and submitted, as it was stated they were, "without prejudice." They read much more like initial proposals inaugurating correspondence upon the subjects referred to, than an approval of a settlement arrived at after prolonged negotiations by you, as their Agent, under authority of an Order in Council, upon propositions made by this Government three months before.

With reference to paragraph 3, wherein you state that you on various occasions called attention to the fact that the Bill in question did not conform to the propositions contained in your letter of the 5th instant, in certain respects, and you urged that it should be

Exhibit No. 29B
Letter, Smithe to Trutch
June 14, 1883

RECORD

In the Supreme Court of Canada

Exhibit No. 29B
Letter, Smithe to Trutch June 14, 1883 (Contd.)

amended so as to conform strictly thereto, I can only say that, as I remember, the Bill was submitted to you and considered clause by clause, and that several modifications and amendments were made to meet suggestions offered by you, as representing the Dominion Government.

It was understood by the Government here, that the Bill eventually submitted to the House was assented to by you as expressing the spirit of the agreement, and that while you had drawn attention to the fact that sub-section (e) was not in the exact language of the Premier of Canada, you agreed with the Government that, practically, its meaning was the same.

It will be remembered by you, that it was not until after the Bill was before the House that you urged a modification of sub-section (g), to meet the view of the Premier of the Dominion of Canada, as telegraphed to you; and that an alteration relating to Dry Dock liabilities was made in the Bill at your urgent request, although you admitted that it was contrary to an express understanding you had upon the subject when you left Ottawa, and to the agreement you had arrived at with the Government here.

You certainly urged delay in legislation until the Bill should be reported upon to you by the Government at Ottawa; but in view of the fact that the House had been kept in session, awaiting the action of the Dominion Government, so long previously, and the fact that some Members had already left, and the certainty that others would go in a few days, it was not practicable to wait longer than we did, particularly as experience had taught us that it was uncertain when, or whether at all, the Government at Ottawa would report upon the measure.

The course pursued by the Dominion Government in delaying for weeks to take action on your telegram embodying the terms of the agreement arrived at between the Provincial Government and yourself, at a time when it was known that our Legislature was impatiently awaiting their action, is such as to need no comment now. There can be no doubt, however, that the time, then apparently so unnecessarily consumed, made it impossible to delay action on our part to effect consummation of agreement when, as it was thought, the practical acceptance of the arrangement by the Dominion Government was communicated to the Provincial Government by you in your letter of the 5th instant. The information contained in the closing paragraph of your last letter, that because the Canadian Parliament long ago refused to build the Island Railway it cannot be successfully asked now to change that policy is, to say the least, an extraordinary statement for the Dominion Government to withhold during the progress of the negotiations and to make at their close.

It cannot be that that bald statement is intended as answer to our Order in Council of 10th February last, upon the subject of the liability of the Dominion Government, in every moral and legal sense, to build the Island Railway. The statement, however, is made by the Premier of Canada, that, while Parliament could not be successfully asked to build the Island Railway, the Dominion Government had offered to ask Parliament to vote three-quarters of a million dollars to subsidize a company for the construction of the work, and that the offer was not accepted by the Provincial Government. So far from this statement being founded on fact, the offer communicated in your letter of the 5th instant, was accepted by Order in Council dated 7th May, copies of which were forwarded to the Secretary of State for the Dominion, and to yourself as Dominion Agent. The fact that it was well understood that a company was ready to undertake to build the road for the bonus offered and the lands, giving satisfactory security for the completion of the work, was accepted by the Government here as securing the construction of the road. This view was expressed in our Order in Council, and, as we understood, acquiesced in by you. The language used in sub-section (e) of our Bill was in full view of the terms of your letter of the 5th instant, embodying the language of Sir John A. Macdonald, and read in the light of our Order in Council of 7th May, was a full acceptance of the offer of the Dominion Government. The alternative proposition contained in our Order in Council of 10th February last, was that the Dominion Government should pay such fair compensation for delays in commencement of Railway construction in the Province as would enable the Province to build the Island Railway as a Provincial work. This was evidence that the Provincial Government was prepared to accept a bonus which would secure the construction of the road and allay all differences and hard feelings between the Dominion and the Province on account of past delinquencies on the part of Canada in respect to her Railway obligations to British Columbia. It is very much to be regretted that after the frank, candid, and conciliatory spirit in which the Provincial Government undertook to endeavour to arrange a settlement of the long-pending claims of the Province against the Dominion, that the strained meaning of one word should have been seized upon by the Premier of Canada as an excuse, for terminating the negotiations without effecting a settlement of the grievances complained of by the Province, thereby prolonging and intensifying the feeling of dissatisfaction and injury sustained by British Columbia at the hands of Canada through the non-fulfilment of the Terms of Union, or the modification thereof recommended by Lord Carnarvon.

I have to thank you for the promptitude and earnestness with which you have acted throughout, and beg you to believe that no

RECORD

In the Supreme Court of Canada

Exhibit No. 29C
Letter, Trutch to Smithe June 20, 1883

reflection whatever is intended to be cast upon your action in the matter of negotiations.

I have, &c.,

(Signed) Wm. Smithe,
Premier.

EXHIBIT No. 29C

Sessional Papers, B.C., 1884 **P. 165**

The Hon. J. W. Trutch, C.M.G., to the Hon. Mr. Smithe.

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

Sir,

I have the honour to acknowledge the receipt, to-day, of your letter bearing date the 14th instant, in reply to mine of the 15th ultimo, relative to the negotiations between the Government of Canada and that of British Columbia respecting the Island Railway, the Esquimalt Dock, and the Railway Lands on the Mainland.

A copy of your letter shall be at once forwarded to the Premier of Canada.

The only portion of your letter which I consider it advisable for me to comment upon on this occasion is that in which you observe, under negotiation between the Governments of Canada and British Columbia, that, as you remember, the Bill was submitted to me and considered clause by clause, and several modifications and amendments made thereto, to meet suggestions made by me as representing the Dominion Government; and that it was understood by the Government of British Columbia that the Bill eventually submitted to the House was assented to by me as expressing the spirit of the agreement, and that while I had drawn attention to the fact that sub-section (e) was not in the exact language of the Premier of Canada, I agreed with the Government that, practically, its meaning was the same.

Upon these remarks I feel it incumbent on me to observe at once that the statement in paragraph 3 of my letter to you of the 15th ultimo, to the effect that I had on several occasions protested against various clauses of the proposed Bill as submitted to me for consideration, was intended to apply specially to the objections which I urged against the wording of sub-section (e), by which it is provided that "The Government of Canada agrees to secure the construction of a Railway from Esquimalt to Nanaimo;" and I now beg to remind you that the protest so made by me was maintained also by Mr. Jackson, who was present to render me his professional assistance on the occasion referred to by you when the Bill was, as you state, submitted to me and considered clause by clause; and that far from the Bill having been assented to by me, I urged, with Mr. Jackson's

RECORD

In the Supreme Court of Canada

Exhibit No. 29C
Letter, Trutch to Smithe
June 20, 1883
(Contd.)

support, throughout the discussion that, whatever the spirit and practical meaning of the words above referred to might be held to be, they were clearly not in strict conformity with the terms of the proposition of the Government of Canada, as conveyed to you by my letter of the 5th May last, and that if they were retained in the Bill when passed, the requisite confirmation of the Act by the Parliament of Canada would certainly be endangered and probably prevented; and I then further advised that the Bill should not be passed at all, even if amended, as I urged, until the full text thereof had been telegraphed to the Government of Canada, and an assurance conveyed to you of the acceptance of its terms in all respects by that Government.

I have, &c.,

(Signed) JOSEPH W. TRUTCH,

Agent of Canada for British Columbia.

EXHIBIT No. 29D

Exhibit No. 29D
Telegram, Smithe to Macdonald
June 19, 1883

Sessional Papers, B.C., 1884 **P. 165**

(TELEGRAM)

Victoria, 19th June, 1883.

To Sir John A. Macdonald, Ottawa:

Will Dominion Government take over Graving Dock and pay to Province amount provided in our Settlement Act, if special session called and sub-section (e) of Act amended as you request?

(Signed) WM. SMITHE.

EXHIBIT No. 29E

Exhibit No. 29E
Telegram, Macdonald to Smithe
June 22, 1883

Sessional Papers, B.C., 1884 **P. 165**

(TELEGRAM)

OTTAWA, ONT., 22nd June, 1883.

To Hon. Wm. Smithe:

Dominion Government will take over Graving Dock according to arrangement. It has no money rate, therefore cannot pay over purchase money now, but will undertake procure, next session an Act of Parliament authorizing payment of two hundred and fifty thousand dollars, provided Province passes Amending Act.

(Signed) JNO. A. MACDONALD.

RECORD

In the Supreme Court of Canada

EXHIBIT No. 29F

Sessional Papers, B.C., 1884 **P. 166**

Exhibit No. 29F
Letter, Sec'y of State to Lieut.-Gov. of B.C.
June 28, 1883

The Secretary of State to the Lieutenant-Governor.

Ottawa, 28th June, 1883.

Sir,

I have the honour to transmit to you herewith, for the information of your Government, a copy of an Order of His Excellency the Governor-General in Council, upon the subject of the approaching visit to British Columbia of the Honourable Sir Alexander Campbell, Minister of Justice of Canada.

I have, &c.,

(Signed) J. A. Chapleau.

EXHIBIT No. 29G

Exhibit No. 29G
Report of Committee of Privy Council
June 23, 1883

Sessional Papers, B.C., 1884 **P. 166**

Certified Copy of a Report of a Committee of the Honourable The Privy Council, approved by His Excellency the Governor-General in Council on the 23rd June, 1883.

On a Report, dated 19th June, 1883, from the Right Honourable Sir John Macdonald, representing that experience has shewn the difficulty of carrying on any lengthened negotiation by letter or telegraph with a Province so distant from Ottawa as British Columbia, without danger of mutual misunderstanding, and stating that he is of opinion that it is expedient a member of the Government should proceed to British Columbia and personally communicate with the Provincial Government on the various questions now remaining unsettled between the Dominion and that Province.

The Right Honourable the Premier further represents that the Minister of Justice has kindly consented to visit Victoria for that purpose, and recommends that Sir Alexander Campbell be instructed to do so accordingly; and that he should, on his arrival in the Province, put himself in communication with the Government there, and urge the expediency of an early meeting of the Legislature in order, if possible, to amend the Act of last Session relating to the Island Railway. That Act is in several respects at variance with the arrangement previously made between the two Governments, and should be so altered as to carry out the terms of such arrangement.

2nd. That Sir Alexander Campbell should then communicate with Mr. Dunsmuir, or other capitalists who are understood to be desirous of forming a company to construct the Railway under the terms of the Provincial Act.

3rd. That he should also enter into negotiations for the conveyance to Canada of the land grant on the Mainland, and which the Province has undertaken to give, under the Terms of Union, in aid of the construction of the Canadian Pacific Railway. Sir John Macdonald further recommends that advantage be taken of Sir Alexander Campbell's visit, to obtain his examination into all matters of importance relating to the Indians of British Columbia; the organization of the Indian Department and Agencies there, and the best means of improving their condition both on the island and on the Mainland; and that he be instructed to report thereon for the information of Your Excellency.

The Right Honourable the Premier observes, that in all these subjects Sir Alexander Campbell will, of course, avail himself of the assistance and experience of the Honourable Mr. Trutch; and that with regard to all matters relating to the Indians, Dr. Powell, the Local Superintendent, will be available as well as Mr. Trutch.

Sir Alexander Campbell will, from time to time, report by letter, or telegraph, the progress of the negotiations; and any conclusions that may be arrived at will be subject to the approval of Your Excellency in Council.

The Committee concur in the Report of the Right Honourable the First Minister, and the recommendations therein set forth, and they respectfully submit the same for your Excellency's approval.

(Signed) Jno. J. McGee.

EXHIBIT No. 30

Exhibit No. 30
Letter
Oppenheimer
to Smithe
July 2, 1883

Victoria, July 2, 1883.

(Confidential)

Sir,—

I beg on behalf of a syndicate to make the following proposal:

1st. To construct, maintain, and operate the Esquimalt and Nanaimo Railway.

2nd. To complete, maintain, and operate the Graving Dock upon the terms agreed upon with the Imperial and Dominion Governments.

3rd. To pay to the Provincial Government the sum of $250,000 expended on the Dock.

In consideration of a grant from the Province to the Syndicate, of the land on Vancouver Island reserved for the Island Railway and the grant of 3,500,000 acres of land in Peace River District of British Columbia, adjoining the North-west Territory, and upon the further consideration, that the Island Railway shall be exempt from taxation for a period of ten years from its completion, and that the Dock shall be the property of the Syndicate and exempt from taxation forever:

The Syndicate I represent will be prepared to give the province such material guarantee as may be required for the due fulfillment of this proposal. In the event of the proposal above made being entertained by the Provincial Government, I shall be glad to have your immediate reply to that effect, to enable me to communicate accordingly with other members of the Syndicate, and to take the necessary steps in carrying out the object of this undertaking.

I have, etc.,

(Signed) D. Oppenheimer.

To Hon. Wm. Smithe, M.P.P.,
Chief Commissioner of Lands and Works and Premier.

EXHIBIT No. 31

Exhibit No. 31
Letter
Smithe to
Oppenheimer
July 7, 1883

Victoria, 7th July, 1883.

Sir,—

The Government have had under consideration the proposal contained in your letter of the 2nd instant, to construct, maintain

RECORD

Court of Appeal of British Columbia

Exhibit No. 31
Letter
Smithe to
Oppenheimer
July 7, 1883
(Contd.)

and operate the Esquimalt Nanaimo Railway, to construct, maintain and operate the Graving Dock, and to pay the sum of $250,000 expended thereon by the Province, in consideration of a grant of the Island Reserve lands and three and a half million acres of land in the Peace River district adjoining the North-west Territory. In reply, I have the honour to inform you that the Government will be glad to learn the names of your associates, with a view of determining the financial ability of the syndicate you represent to carry out the undertaking, and to learn also what material guarantee you would be prepared to give (1st) that you would enter into a contract for the construction of the Island Railway and Graving Dock, and (2nd) that you would complete the works in the event of the contract being awarded to you. Satisfactory evidence on the points named will ensure prompt attention at the hands of the Government.

I have, etc.,

(Signed) Wm. Smithe,
Chief Commissioner of Lands and Works.

To D. Oppenheimer, Esq., Victoria.

EXHIBIT No. 32

Exhibit No. 32
Letter
Oppenheimer
to Smithe
July 9, 1883

(Confidential) Victoria, 9th July, 1883.

Sir,—

I will thank you to grant me an interview to day at an early hour convenient to you. Please state place and hour.

I have, etc.,

(Signed) D. Oppenheimer.

To Hon. Wm. Smithe, M.P.P.,
Chief Commissioner of Lands and Works and Premier.
P.S. Bearer will wait your answer.

EXHIBIT No. 33

Exhibit No. 33
Letter
Oppenheimer
to Smithe
July 9, 1883

(Confidential) Victoria, 9th July, 1883.

Sir,—

With reference to our conversation of today, respecting your letter of the 7th inst. upon the subject of my proposal on behalf of a syndicate to construct, maintain and operate the Esquimalt

Exhibit No. 33
Letter
Oppenheimer
to Smithe
July 9, 1883
(Contd.)

and Nanaimo Railway, to construct, maintain and operate the Graving Dock, and to pay the sum of $250,000 expended thereon by the Province in consideration of a grant of the Island reserve lands, and three and a half million acres of land in the Peace River District adjoining the Northwest Territory, would you have the goodness to acquaint me if a deposit of $250,000 by my associates in this matter, and bearing a rate of interest to be agreed upon hereafter, would be considered by the Government a sufficient guarantee for the faithful performance of the contract above referred to.

I have, etc.,

(Signed) D. Oppenheimer.

To Hon. Mr. Smithe, M.P.P.,

Chief Commissioner of Lands and Works and Premier.

P.S. The bearer will wait for your answer.

EXHIBIT No. 34

Exhibit No. 34
Letter
Oppenheimer
to Smithe
July 9, 1883

(Confidential) Victoria, B.C., 9th July, 1883.

Sir,—

I should be obliged if you favour me with a reply today. I made arrangements to leave tomorrow morning to make immediate arrangements for the necessary cash deposit of security.

I have, etc.,

(Signed) D. Oppenheimer.

To Hon. Mr. Smithe, M.P.P.,
Chief Commissioner of Lands and Works and Premier.

EXHIBIT No. 35

Exhibit No. 35
Letter
Smithe to
Oppenheimer
July 10, 1883

(Confidential) Victoria, 10th July, 1883.

Sir,—

I have the honour to acknowledge receipt of yours of today and in reply to say, that the sum of two hundred and fifty ($250,000) thousand dollars which you propose to deposit as security for the due and faithful performance of obligations, which upon

RECORD

Court of Appeal of British Columbia

Exhibit No. 35
Letter
Smithe to
Oppenheimer
July 10, 1883
(Contd.)

certain outlined conditions you desire to assume, to construct, operate and maintain the Esquimalt-Nanaimo Railway and the Graving Dock—would appear to be reasonable and in fair proportion to the magnitude of the proposed undertaking. It must however, be understood that the Provincial Legislative Assembly would have to be consulted upon that point and upon the conditions generally. It is much too important a subject to be disposed of without the full sanction of Parliament.

I have, etc.,

(Signed) Wm. Smithe,

Chief Commissioner of Lands and Works.

D. Oppenheimer, Esq.,

Victoria.

EXHIBIT No. 35A

RECORD

In the Supreme Court of Canada

Exhibit No. 35A
Letter Campbell to Smithe Aug. 6, 1883

Sessional Papers, B.C., 1884 **P. 166**

Sir Alexander Campbell to the Hon. Mr. Smithe.

At Victoria, 6th August, 1883.

Dear Sir,

I enclose herewith a copy of the proposed contract (in draft) for the construction of the Railway between this place and Nanaimo. I will be much obliged if you will examine it, and make such suggestions as may occur to you. The Government of the Dominion are anxious that in all respects it should meet the just expectations of the Government of your Province. 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 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 part of the Government of Canada.

I propose, on obtaining the approval of the Local Government to the contract, to execute, it, and that Mr. Dunsmuir and his friends shall be invited to do so. (They would have in addition to make arrangements for the deposit with the Dominion Government of the $250,000 as security for its performance). Thus executed, the contract should, I think, be placed in the hands of Mr. Trutch, awaiting the change which your Legislature is to make in the Act relating to the Island Railway, by striking out any language under which Canada might be called upon to construct, or secure the construction, of the Railway, and substituting language involving an obligation simply to take security for such construction to the satisfaction of your Government.

RECORD

In the Supreme Court of Canada

Exhibit No. 35A Letter Campbell to Smithe Aug. 6, 1883 (Contd.)

The clause in the Island Railway Act relating to the sale to actual settlers for four years at a dollar an acre has, I understand, received the assent of Mr. Dunsmuir and his friends.

I shall be glad to have your approval of the contract and of the several stipulations made in this letter in regard to it.

Yours faithfully,

(Signed) A. Campbell.

Exhibit No. 35B Letter Campbell to Smithe Aug. 17, 1883

EXHIBIT No. 35B

Sessional Papers, B.C., 1884 **P. 168**

Sir Alexander Campbell to the Hon. Mr. Smithe.

Victoria, 17th August, 1883.

Dear Sir,

I had the pleasure, before leaving for Nanaimo and the Mainland to enclose you a copy of the proposed contract for the construction of the Island Railway, with the request that you would make any suggestions you thought desirable, and asking your approval of it.

I have not yet received a reply, and hope that you will find in the shortness of my stay a sufficient excuse for my troubling you with this note to beg that I may have a reply.

I would also like to know whether your Government would approve of the deposit of $250,000 by the contractors with the

Receiver-General of the Dominion, as security for the performance of the contract; and also whether you would see any objection to our agreeing that that money might, if deemed expedient by the Government, be exchanged for approved securities. Your concurrence in any change in this respect would be sought for at the time of its being made.

Yours faithfully,

(Signed) A. CAMPBELL.

Exhibit No. 35B
Letter Campbell to Smithe
Aug. 17, 1883
(Contd.)

Sessional Papers, B.C., 1884 EXHIBIT No. 35C **P. 168**

Exhibit No. 35C
Letter Smithe to Campbell
Aug. 18, 1883

The Hon. Mr. Smithe to Sir Alexander Campbell.

LAND AND WORKS DEPARTMENT

Victoria, B.C., 18th August, 1883.

Dear Sir,

Referring to the copy of a proposed contract for the construction of the Island Railway which you forwarded to me on the 7th instant, with the request that I would look over it and make any suggestions I might think necessary. I have carefully considered the proposed contract, and have made a few suggestions, which I would be glad of an opportunity to discuss with you with a view to a definite settlement of the matter. The deposit of $250,000. by the Contractor with the Receiver-General of the Dominion, as security for the performance of the contract, is deemed to be satisfactory, and there can be no objection to the exchange for approved securities, on the conditions and in the manner specified. In the event of the forfeiture of the security by the Contractors, it ought to be understood that it will be handed over to the Province by the Dominion Government.

Yours, &c.,

(Signed) WM. SMITHE.

Sessional Papers, B.C., 1884 EXHIBIT No. 35D **P. 169**

Exhibit No. 35D
Letter Campbell to Smithe
Aug. 18, 1883

Sir Alexander Campbell to the Hon. Mr. Smithe.

Victoria, 18th August, 1883.

Dear Sir,

I have your letter of this morning with reference to the contract for the construction of the Island Railway.

I cannot agree in the concluding paragraph, in which you say,—"In the event of the forfeiture of the security by the Contractors, it ought to be understood that it (the security) will be handed over to the Province by the Dominion Government." This must depend

RECORD

In the Supreme Court of Canada

Exhibit No. 35D Letter Campbell to Smithe Aug. 18, 1883 (Contd.)

upon the circumstances of the moment, and unless the Dominion should be released from all obligations in the matter, they would not hand over the security, but retain it for the purpose for which it was given.

Yours, &c.,

(Signed) A. Campbell.

EXHIBIT No. 35E

Exhibit No. 35E "Draft Bill" Aug., 1883

Obtained in Department of Transport

BILL

An Act relating to the Island Railway, the Graving Dock, and Railway Lands of the Province.

WHEREAS negotiations between the Governments of Canada and British Columbia have been recently pending, relative to delays in the commencement and construction of the Canadian Pacific Railway, and relative to the Island Railway, the Graving Dock, and the Railway Lands of the Province:

And whereas for the purpose of settling all existing disputes and difficulties between the two Governments, it hath been agreed as follows:—

(a) The Legislature of British Columbia shall be invited to amend the Act No. 11 of 1880, intituled "An Act to authorize the grant of certain Public Lands on the Mainland of British Columbia to the Government of the Dominion of Canada for Canadian Pacific Railway purposes," so that the same extent of land on each side of the line of Railway through British Columbia, wherever finally settled, shall be granted to the Dominion Government in lieu of the lands conveyed by that Act.

(b) The Government of British Columbia shall obtain the authority of the Legislature to grant to the Government of Canada a portion of the lands set forth and described in the Act No. 15 of 1882, intituled "An Act to incorporate the Vancouver Land and Railway Company," namely, that portion of the said lands therein described, commencing at the Southern Boundary thereof and extending to a line running East and West, half way between Comox and Seymour Narrows; and also a further portion of the lands conveyed by the said Act to the northward of and contiguous to that portion of the said lands last thereinbefore specified, equal in extent to the lands within the limits thereof which may have been alienated from the Crown by Crown grants, pre-emption, or otherwise.

RECORD

In the Supreme Court of Canada

Exhibit No. 35E "Draft Bill" Aug., 1883 (Contd.)

(c) The Government of British Columbia shall obtain the authority of the Legislature to convey to the Government of Canada three and one-half millions of acres of land in the Peace River district of British Columbia, in one rectangular block, East of the Rocky Mountains, and adjoining the North-West Territory of Canada.

(d) The Government of British Columbia shall procure the incorporation, by Act of their Legislature, of certain persons, to be designated by the Government of Canada, for the construction of the Railway from Esquimalt to Nanaimo.

(e) The Government of Canada shall, upon the adoption by the Legislature of British Columbia of the terms of this agreement, seek the sanction of Parliament to enable them to contribute to the construction of a Railway from Esquimalt to Nanaimo the sum of $750,000, and they agree to hand over to the contractors who may build such Railway the lands which are or may be placed in their hands for that purpose by British Columbia; and they agree to take security, to the satisfaction of the Government of that Province, for the construction and completion of such Railway on or before the 10th day of June, 1887; such construction to commence forthwith.

(f) The lands on Vancouver Island to be so conveyed shall, except as to coal and other minerals, and also except as to timber lands as hereinafter mentioned, be open for four years from the passing of this Act to actual settlers, for agricultural purposes, at the rate of one dollar an acre, to the extent of 160 acres to each such actual settler; and in any grants to settlers the right to cut timber for railway purposes and rights of way for the railway, and stations, and workshops, shall be reserved. In the meantime, and until the Railway from Esquimalt to Nanaimo shall have been completed, the Government of British Columbia shall be the agents of the Government of Canada for administering, for the purposes of settlement, the lands in this sub-section mentioned; and for such purposes the Government of British Columbia may make and issue, subject as aforesaid, pre-emption records to actual settlers, of the said lands. All moneys received by the Government of British Columbia in respect of such administration shall be paid, as received, into the Bank of British Columbia, to the credit of the Receiver-General of Canada; and such moneys, less expenses incurred (if any) shall, upon the completion of the railway to the satisfaction of the Dominion Government, be paid over to the railway contractors.

RECORD

In the Supreme Court of Canada

Exhibit No. 35E "Draft Bill" Aug., 1883 (Contd.)

(g) The Government of Canada shall forthwith take over and seek the authority of Parliament to purchase and complete, and shall, upon the completion thereof, operate as a Dominion work, the Dry Dock at Esquimalt; and shall be entitled to and have conveyed to them all the lands, approaches, and plant belonging thereto, together with the Imperial appropriation therefor, and shall pay to the Province as the price thereof the sum of $250,000, and shall further pay to the Province whatever amounts shall have been expended by the Provincial Government or which remain due, up to time of the passing of this Act, for work or material supplied by the Government of British Columbia since the 27th day of June, 1882.

(h) The Government of Canada shall, with all convenient speed, offer for sale the lands within the Railway belt upon the Mainland, on liberal terms to actual settlers; and

(i) Shall give persons who have squatted on any of the said lands within the Railway belt on the Mainland, prior to the passing of this Act, and who have made substantial improvements thereon, a prior right of purchasing the lands so improved, at the rates charged to settlers generally.

(k) This agreement is to be taken by the Province in full of all claims up to this date by the Province against the Dominion, in respect of delays in the commencement and construction of the Canadian Pacific Railway, and in respect of the non-construction of the Esquimalt and Nanaimo Railway, and shall be taken by the Dominion Government in satisfaction of all claims for additional lands under the Terms of Union, but shall not be binding unless and until the same shall have been ratified by the Parliament of Canada and the Legislature of British Columbia.

And whereas it is expedient that the said agreement should be ratified, and that provision should be made to carry out the terms thereof:

Therefore Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:—

1. The hereinbefore recited agreement shall be and is hereby ratified and adopted.

2. Section 1 of the Act of the Legislature of British Columbia, No. 11 of 1880, intituled "An Act to authorize the grant of certain public lands on the mainland of British Columbia to the Government of the Dominion of Canada for Canadian Pacific Railway purposes," is hereby amended so as to read as follows:—

From and after the passing of this Act there shall be, and there is hereby granted to the Dominion Government for the purpose of constructing and to aid in the construction of the portion of the Canadian Pacific Railway on the mainland of British Columbia, in trust, to be appropriated as the Dominion Government may deem advisable, the public lands along the line of the railway before mentioned, wherever it may be finally located, to a width of twenty miles on each side of the said line as provided in the Order in Council, section 11, admitting the Province of British Colubmia into Confederation; but nothing in this section contained shall prejudice the right of the Province to receive and be paid by the Dominion Government the sum of $100,000 per annum, in half-yearly payments in advance, in consideration of the lands so conveyed, as provided in Section 11 of the Terms of Union: Provided always that the line of Railway before referred to, shall be one continuous line of Railway only, connecting the seaboard of British Columbia with the Canadian Pacific Railway, now under construction on the East of the Rocky Mountains.

3. There is hereby granted to the Dominion Government, for the purpose of constructing, and to aid in the construction of a Railway between Esquimalt and Nanaimo, and in trust to be appropriated as they may deem advisable (but save as in hereinafter excepted) all that piece of parcel of land situate in Vancouver Island, described as follows:—

Bounded on the South by a straight line drawn from the head of Saanich Inlet to Muir Creek on the Straits of Fuca;

On the West by a straight line drawn from Muir Creek aforesaid to Crown Mountain;

On the North, by a straight line drawn from Crown Mountain to Seymour Narrows; and

On the East by the Coast line of Vancouver Island to the point of commencement; and including all coal, coal oil, ores, stones, clay, marble, slate, mines, minerals, and substances whatsoever thereupon, therein, and thereunder.

4. There is excepted out of the tract of land granted by the preceding section all that portion thereof lying to the northward of a line running East and West half way between the mouth of the Courtenay River (Comox District) and Seymour Narrows.

5. Provided always that the Government of Canada shall be entitled out of such excepted tract to lands equal in extent to those alienated up to the date of this Act by Crown grant, pre-emption, or

RECORD

In the Supreme Court of Canada

Exhibit No. 35E "Draft Bill" Aug., 1883 (Contd.)

otherwise, within the limits of the grant mentioned in section 3 of this Act.

6. The grant mentioned in section 3 of this Act shall not include any lands now held under Crown grant, lease, agreement for sale, or other alienation by the Crown, nor shall it include Indian reserves or settlements, nor Naval or Military reserves.

7. There is hereby granted to the Dominion Government three and a half million acres of land in that portion of the Peace River District of British Columbia lying East of the Rocky Mountains and adjoining the North West Territory of Canada, to be located by the Dominion in one rectangular block.

facilitating the construction of

8. For the purpose of ~~enabling the Government of Canada to~~ A.C. W.S. ~~construct~~ the Railway between Esquimalt and Nanaimo, it is hereby enacted that such persons, hereinafter called the "company", as may be named by the Governor-General in Council, with all such other persons and corporations as shall become shareholders in the company, shall be and are hereby constituted a body corporate and politic by the name of "The Esquimalt and Nanaimo Railway Company".

9. The company, and their agents and servants, shall lay out, construct, equip, maintain, and work a continuous double or single track steel railway of the gauge of the Canadian Pacific Railway, and also a telegraph line, with the proper appurtenances, from a point at or near the harbour of Esquimalt, in British Columbia, to a port or place at or near Nanaimo on the eastern coast of Vancouver Island, with power to extend the main line to Comox and Victoria, and to construct branches to settlements on the east coast, and also to extend the said railway by ferry communications to the mainland of British Columbia, and there to connect or amalgamate with any railway line in operation or course of construction. The company shall also have power and authority to build, own, and operate steam and other vessels in connections with the said railway, on and over the bays, gulfs, and inland waters of British Columbia.

10. The company may accept and receive from the Government of Canada any lease, grant, or conveyance of lands, by way of subsidy or otherwise, in aid of the construction of the said railway, and may enter into any contract with the said Gorvenment for or respecting the use, occupation, mortgage, or sale of the said lands, or any part thereof, on such conditions as may be agreed upon between the Government and the company.

11. The capital stock of the company shall be three millions of dollars, and shall be divided into shares of one hundred dollars each,

RECORD

In the Supreme Court of Canada

Exhibit No. 35E "Draft Bill" Aug., 1883 (Contd.)

but may be increased from time to time by the vote of the majority in value of the shareholders present in person, or represented by proxy, at any meetings specially called for the purpose, to an amount not exceeding five million dollars.

12. The persons to be named as aforesaid by the Governor-General in Council shall be and are hereby constituted a board of provisional directors of the company, and shall hold office as such until other directors shall be elected under the provisions of this Act, and shall have power to fill any vacancies that may occur in the said board; to open stock books at Victoria, British Columbia, or any other city in Canada; procure subscriptions, and receive payments on stock subscribed.

13. When and so soon as one-half of the capital stock shall have been subscribed, and one-tenth of the amount thereof paid into any chartered Bank, either at Victoria or San Francisco, or partly in each, the provisional directors may order a meeting of shareholders to be called at Victoria, British Columbia, at such time as they think proper, giving at least three weeks notice thereof in one or more newspapers published in the City of Victoria, and by a circular letter mailed to each shareholder, at which meeting the shareholders present in person, or by proxy, shall elect five directors qualified as hereinafter provided, who shall hold office until the first Wednesday in October in the year following their election.

14. On the said first Wednesday in October, and on the same day in each year thereafter, at the City of Victoria, or at such other place as shall be fixed by the by-laws of the company, there shall be held a general meeting of the shareholders for receiving the report of the directors transacting the business of the company, general or special, and electing the directors thereof; and public notice of such annual meeting and election shall be published for one month before the day or meeting in one or more newspapers in the City of Victoria, and by circular letter mailed to each shareholder at least one month prior thereto. The election of directors shall be by ballot, and all shareholders may vote by proxy.

15. Three of the Directors shall form a quorum for the transaction of business, and the Board may employ one or more of their number as paid Director or Directors, provided that no person shall be elected Director unless he owns at least twenty-five shares of the stock of the Company on which calls have been paid.

16. No call shall be made for more than ten per centum at any one time on the amount subscribed, nor shall more than fifty per centum of the stock be called up in any one year.

RECORD

In the Supreme Court of Canada

Exhibit No. 35E "Draft Bill" Aug., 1883 (Contd.)

17. The Consolidated Railway Act, eighteen hundred and seventy-nine (1879) of Canada, shall, so far as its provisions are applicable to the undertaking and are not inconsistent with or contrary to the provisions of this Act, apply to the said railway, and shall be read with and form part of this Act.

18. The words "Superior Court", "Clerks of the Peace", "Registry Offices", "Clerk of Court", as used in the said Consolidated Railway Act, eighteen hundred and seventy-nine (1879), shall, for the purposes of this Act, be read and construed in the same sense and meaning as is provided by the Act passed by this Legislature thirty-eight (38) Victoria, chapter thirteen (13), section three (3).

19. Sections five (5) and six (6) of the said last mentioned Act shall be read with and form part of this Act.

20. The said railway line from Esquimalt to Nanaimo shall be commenced forthwith and completed on or before the 10th day of June 1887.

21. The Railway, with its workshops, stations, and other necessary buildings and rolling stock, and also the capital stock of the Railroad Company, shall be exempt from Provincial and Municipal taxation until the expiration of ten years from the completion of the railroad.

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.

23. The company shall be governed by sub-section (f) of the hereinbefore recited agreement, and each bona fide squatter who has continuously occupied, and improved any of the lands within the tract of land to be acquired by the company from the Dominion Government for a period of one year prior to the first day of January, 1883, shall be entitled to a grant of the freehold of the surface rights of the said squatted land, to the extent of 160 acres to each squatter, at the rate of one dollar an acre.

24. The company shall at all times sell coals gotten from the lands that may be acquired by them from the Dominion Government to any Canadian Railway Company having the terminus of its Railway on the seaboard of British Columbia, and to the Imperial, Dominion, and Provincial authorities, at the same rates as may be charged to any Railway Company owning or operating any Railway in the United States, or to any foreign customer whatsoever.

25. All lands acquired by the company from the Dominion Government under this Act containing belts of timber fit for milling

purposes shall be sold at a price to be hereafter fixed by the Government of the Dominion or by the company hereby incorporated.

26. The existing rights (if any) of any persons or corporations in any of the lands so to be acquired by the company shall not be affected by this Act, nor shall it affect Military or Naval Reserves.

27. The said Esquimalt and Nanaimo Railway Company shall be bound by any contract or agreement for the construction of the Railway from Esquimalt to Nanaimo which shall be entered into by and between the persons so to be incorporated as aforesaid, and Her Majesty, represented by the Minister of Railways and Canals, and shall be entitled to the full benefit of such contract or agreement, which shall be construed and operate in like manner as if such company had been a party thereto in lieu of such persons, and the document had been duly executed by such company under their corporate seal.

28. The Railways to be constructed by the company in pursuance of this Act shall be the property of the company.

29. The Act of 1883, Chapter 14, intituled "An Act relating to the Island Railway, the Graving Dock, and the Railway Lands of the Province," is hereby repealed.

A. Campbell,
Wm. Smithe,

Victoria, B.C., 21st August, 1883.

I have read and on behalf of myself and my associates acquiesce in the various provisions of this Bill, sofar as they relate to the Island Railway and Lands.

Robt. Dunsmuir.

Victoria, B.C., 22 August, 1883.

RECORD

Court of Appeal of British Columbia

Exhibit No. 36
Memorandum of Arrangement between Dominion and Province Aug. 20, 1883

EXHIBIT No. 36

MEMORANDUM.

Of arrangement made at Victoria, on the twentieth day of August, 1883, relative to the various points remaining unsettled between the Government of the Dominion and that of the Province of British Columbia.

ISLAND RAILWAY

1. The Government of British Columbia will invite the adoption by the Legislature of the Province of certain amendments to the Act of 1883, entitled, "An Act relating to the Island Railway, the Graving Dock, and the Railway Lands of the Province," which amendments are indicated by red lines in the copy of the proposed new Bill hereto annexed, signed by Sir Alexander Campbell and Mr. Smithe.

2. The Government of British Columbia will procure the assent of the Contractor for the construction of the Island Railway to the provisions of Clause F. of the agreement recited in the amending Bill.

3. Upon the amending Bill becoming law in British Columbia, and the assent of the Contractor for the construction of the Railway to the provisions of Clause F. of the agreement recited in the Act being procured, the Government of the Dominion will seek the sanction of Parliament to measures to enable them to give effect to the stipulations on their part contained in the agreement recited in the amending Bill.

4. The contract shall be provisionally signed by Sir Alexander Campbell on behalf of the Minister of Railways and Canals,

but is to be deposited with Mr. Trutch, awaiting execution by delivery until the necessary Legislative authority shall have been given, as well by the Parliament of the Dominion as by the Legislature of British Columbia.

THE GRAVING DOCK.

The Government of the Dominion shall take over the Graving Dock forthwith, and, upon Parliamentary sanction being given, complete it with all convenient speed, and thereafter operate it as a Dominion work, acquiring the right to the Imperial subsidy, and paying the Province of British Columbia, on the sanction aforesaid being given, the sums mentioned in Clause G. of the agreement recited in the amending Bill, and they will in the meantime pay out of the subsidy voted by Parliament to aid in the construction of the Dock, such sums as the Government of British Columbia may be entitled to receive under the existing agreement in regard to the moneys advanced thereon by them since the 27th of June, 1882, and sums so paid to be taken as part of the moneys going to British Columbia on Graving Dock account under the present arrangement, should it receive Legislative sanction on both sides as before mentioned, failing which the status quo will be resumed.

RAILWAY BELT ON MAINLAND.

The Dominion Government will use every exertion to place their land in the Railway Belt on the mainland in the market at the earliest possible date, and for this purpose they will give all necessary instructions to their officers.

The Government of British Columbia, will, on their part, render all the aid in their power and place all the information which they have in their Lands Department at the disposal of the Dominion officers, the expenses to be borne by the Dominion Government. In the meantime the land shall be open for "entry" to bona fide settlers in such lots and at such prices as the Dominion Government may fix.

THE JUDICIARY.

The Order in Council fixing the residences of the Judges to be revoked—Mr. McCreight to be assigned to New Westminster, and Mr. Walkem to Kamloops. Legislative Authority to be sought for, for this change, if necessary.

A County Court judge shall be appointed by the Dominion Government for the District of Cariboo and Lillooet, at a salary

RECORD

Court of Appeal of British Columbia

Exhibit No. 36 Memorandum of Arrangement between Dominion and Province Aug. 20, 1883 (Contd.)

of twenty-four hundred dollars, and he shall receive from the Local Government the appointment of Stipendiary Magistrate at a salary of five hundred dollars, Legislative authority for this arrangement, if necessary, and for the payment of the Judge to be sought for.

The above includes all matters as to which there is any dispute or difference between the Government of the Dominion and the Government of British Columbia, and, when carried into effect, will constitute a full settlement of all existing claims on either side or by either Government.

(Signed) A. Campbell.
Wm. Smithe.

Exhibit No. 37 Contract for Construction of E. & N. Railway Aug. 20, 1883

EXHIBIT No. 37

Sessional Papers B.C. 1884. P. 183.

CONTRACT FOR THE CONSTRUCTION OF THE ESQUIMALT AND NANAIMO RAILWAY

ARTICLES OF AGREEMENT made and entered into this twentieth day of August, in the year of Our Lord one thousand eight hundred and eighty-three.

Between Robert Dunsmuir, James Dunsmuir and John Bryden, all of Nanaimo, in the Province of British Columbia; Charles Crocker, Charles F. Crocker, and Leland Stanford, all of the City of San Francisco, California, United States of America; and Collis P. Huntington, of the City of New York, United States of America, of the first part, and Her Majesty Queen Victoria, represented herein by the Minister of Railways and Canals, of the second part.

Whereas it has been agreed by and between the Governments of Canada and British Columbia, that the Government of British Columbia should procure the incorporation, by an Act of their

Legislature, of certain persons, to be designated by the Government of Canada, for the construction of a Railway from Esquimalt to Nanaimo; and that the Government of Canada should take security from such Company for the construction of such Railway.

And whereas the parties hereto of the first part are associated together for the purpose of construction, or contracting for the construction of, a Railway and Telegraph Line from Esquimalt to Nanaimo and are hereafter referred to as the said Contractors.

Now these presents witness, that in consideration of the covenants and agreements on the part of Her Majesty hereinafter contained the said Contractors covenant and agree with Her Majesty as follows:—

1. In this Contract the word "work" or "works" shall, unless the context requires a different meaning, mean the whole of the works, material, matter and things to be done, furnished and performed by the said Contractors under this Contract.

2. All covenants and agreements herein contained shall be binding on and extend to the executors, administrators and assigns of the said Contractors, and shall extend to and be binding upon the successors of Her Majesty; and wherever in this Contract Her Majesty is referred to, such reference shall include Her successors, and wherever the said Contractors are referred to, such reference shall include their executors, administrators and assigns.

3. That the said Contractors shall and will well, truly and faithfully lay out, make, build, construct, complete, equip, maintain, and work continuously a line of Railway, of a uniform gauge of 4 feet 8½ inches, from Esquimalt to Nanaimo, in Vancouver Island, British Columbia; the points and approximate route and course being shown on the map hereunto annexed, marked "B," and also construct, maintain, and work continuously a telegraph line throughout and along the said line of railway, and supply all such telegraph apparatus as may be required for the proper equipment of such Telegraph line, and perform all engineering services, whether in the field, or in preparing plans, or doing other office work, to the entire satisfaction of the Governor in Council.

4. That the said Contractors shall and will locate and construct the said line of Railway in as straight a course as practicable between Esquimalt and Nanaimo, with only such devia-

tions as may seem absolutely indispensable to avoid serious engineering obstacles, and as shall be allowed by the Governor in Council.

5. That the gradients and alignments shall be the best that the physical features of the country will admit of, without involving unusually or unnecessarily heavy works of construction, with respect to which the Governor in Council shall decide.

6. That the said Contractors shall and will furnish profiles, plans, and bills of quantities of the whole line of railway, in ten mile sections; and that before the work is commenced on any ten mile section, such profiles, plans, and bills of quantities shall be approved by the Governor in Council; and before any payments are made, the said Contractors will furnish such further returns as may be required to satisfy the Minister of Railways and Canals as to the relative value of the works executed with that remaining to be done.

7. That the Minister of Railways and Canals may keep and retain five per cent. of the subsidy, or of such part thereof as the said Contractors may be entitled to, for three months after the completion of the said Railway and Telegraph Line and the works appertaining thereto, and for a further period, until the said Minister of Railways and Canals is satisfied that all failures or defects in said line of Railway and Telegraph Line respectively, and the works appertaining thereto, that may have been discovered during the said period of three months or such further period, have been permanently made good; and that no lands shall be conveyed to the said Contractors until the road is fully completed and equipped.

8. That the said Contractors shall commence the works embraced in this Contract forthwith, and shall complete and equip the same by the 10th day of June, 1887, time being declared material and of the essence of the Contract; and in default of such completion and equipment as aforesaid on or before the last mentioned date, the said Contractors shall forfeit all right, claim or demand to the sum of money and percentage hereinbefore agreed to be retained by the Minister of Railways and Canals, and any and every part thereof, and also to any moneys whatever which may be at the time of the failure of the completion as aforesaid due or owing to the said Contractors, as also the land grant, and also to the moneys to be deposited as hereinafter mentioned.

9. That the said Contractors will, upon and after the completion and equipment of the said line of Railway and works apper-

taining thereto, truly and in good faith keep and maintain the same and the rolling stock required therefor in good and efficient working and running order; and shall continuously and in good faith operate the same, and also the said Telegraph Line, and will keep the said Telegraph Line and appurtenances in good running order.

10. That the said Contractors will build, construct, complete and equip the said line of Railway and works appertaining thereto, in all respects in accordance with the specifications hereto annexed, marked "A," and upon the line of location to be approved by the Governor in Council.

11. The character of the Railway and its equipments shall be in all respects equal to the general character of the Canadian Pacific Railway now under construction in British Columbia, and the equipments thereof.

12. And that the said line of Railway and Telegraph line, and all works appertaining thereto respectively, together with all franchises, rights, privileges, property, personal and real estate of every character appertaining thereto shall, upon the completion and equipment of the said line of Railway and works appertaining thereto, in so far as Her Majesty shall have power to grant the same respectively, but no further or otherwise, be the property of the said Contractors.

13. And Her Majesty, in consideration of the premises, hereby covenants and agrees to permit the admission, free of duty, of all steel rails, fish plates and other fastenings, spikes, bolts and nuts, wire, timber and all material for bridges to be used in the original construction of the Railway and of a Telegraph line in connection therewith, and all telegraphic apparatus required for the first equipment of such telegraph line; and to grant to the said Contractors a subsidy in money of $750,000 (Seven hundred and fifty thousand dollars), and in land all of the land situated in Vancouver Island (except such parts thereof as may have at any time heretofore been reserved for Naval or Military purposes, it having been intended that all of the lands so reserved should be excluded from the operation of the Act passed by the Legislature of the Province of British Columbia in the year 1883, entitled "An Act relating to the Island Railway, the Graving Dock and Railway Lands of the Province," in like manner as Indian reserves are excluded therefrom), which has been granted to Her Majesty by the Government of British Columbia by the aforesaid Act, in consideration of the construction of the said line

RECORD

Court of Appeal of British Columbia

Exhibit No. 37
Contract for Construction of E. & N. Railway
Aug. 20, 1883
(Contd.)

of Railway, in so far as such land shall be vested in Her Majesty and held by her for the purposes of the said Railway, or for the purpose of constructing or to aid in the construction of the same.

And also all coal, coal oil, ores, stones, clay, marble, slate, mines, minerals and substances whatsoever, in, on, or under the lands so agreed to be granted to the said Contractors as aforesaid, and the foreshore rights in respect of all such lands as aforesaid, which are hereby agreed to be granted to the said Contractors as aforesaid, and border on the sea, together with the privilege of mining under the foreshore and sea opposite any such land, and of winning and keeping for their own use all coal and minerals herein mentioned, under the foreshore or sea opposite any such lands, in so far as such coal, coal oil, ores, stones, clay, marble, slate, mines, minerals and substances whatsoever and foreshore rights are owned by the Dominion Government; for which subsidies the construction of the Railway and Telegraph line from Esquimalt to Nanaimo shall be completed, and the same shall be equipped, maintained and operated.

14. The said money subsidy will be paid to the said Contractors by instalments, on the completion of each ten miles of railway and telegraph line, such instalments to be proportionate to the value of the part of the lines completed and equipped in comparison with the whole of the works undertaken, the proportion to be established by the report of the Minister of Railways and Canals.

15. The Land Grant shall be made, and the land, in so far as the same shall be vested in Her Majesty and held by her for the purposes of the said Railway, or for the purposes of constructing, or to aid in the construction of the same, shall be conveyed to the said Contractors, upon the completion of the whole work to the entire satisfaction of the Governor in Council; but so, nevertheless, that the said lands, and the coal oil, coal and other minerals and timber thereunder, therein or thereon, shall be subject in every respect to the several clauses, provisions and stipulations referring to or affecting the same respectively, contained in the aforesaid Act passed by the Legislature of the Province of British Columbia in the year 1883, entitled "An Act relating to the Island Railway, the Graving Dock and Railway Lands of the Province," as the same may be amended by the Legislature of the said Province in accordance with a Draft Bill now prepared, which has been identified by Sir Alexander Campbell and the Honourable Mr. Smithe, and signed by them, and placed in the hands of the

Honourable Joseph William Trutch, and particularly to Sections 23, 24, 25 and 26 of the said Act.

And it is hereby further agreed by and between Her Majesty represented as aforesaid, and the said Contractors, that the said Contractors shall, within ten days after the execution hereof by Her Majesty, represented as aforesaid or by the said Minister on behalf of Her Majesty apply to the Government of Canada to be named by the Governor in Council as the persons to be incorporated under the name of the "Esquimalt and Nanaimo Railway Company," and that immediately after the said Contractors shall have been so incorporated, this Contract shall be assigned and transferred by them to the said Company, and such Company shall forthwith, by deed entered into by and between Her Majesty, represented as aforesaid, and the said Company, assume all the obligations and liabilities incurred by the said Contractors hereunder or in any way in relation to the premises.

The said Contractors shall, on the execution hereof, deposit with the Receiver General of Canada, the sum of $250,000 (two hundred and fifty thousand dollars) in cash, as a security for the construction of the Railway and Telegraph line hereby contracted for. The Government shall pay to the Contractors interest on the cash deposited at the rate of 4 per cent. per annum half-yearly, until default in the performance of the conditions hereof, or until the return of the deposit, and shall return the deposit to the said Contractors on the completion of the said Railway and Telegraph line, according to the terms hereof, with any interest accrued thereon; but if the said Railway and Telegraph line shall not be so completed, such deposit and all interest thereon, which shall not have been paid to the Contractors shall be forfeited to Her Majesty for the use of the Government of the Dominion of Canada.

In witness whereof the parties hereto have executed these presents the day and year first above written.

For the Minister of Railways and Canals,

(Signed) A. Campbell,
Minister of Justice.
" Robert Dunsmuir.
" John Bryden.
" James Dunsmuir.
" Charles Crocker.

RECORD

Court of Appeal of British Columbia

Exhibit No. 37
Contract for Construction of E. & N. Railway
Aug. 20, 1883
(Contd.)

(Signed) Charles F. Crocker.
" Leland Stanford.
(by Chas. Crocker, his Attorney in fact)
" Collis P. Huntington.
(by Chas. Crocker, his Attorney in fact)

Signed, Sealed and delivered by the within named Robert Dunsmuir, James Dunsmuir, John Bryden, Charles Crocker, Charles F. Crocker, Leland Stanford, and Collis P. Huntington and by Sir Alexander Campbell, for the Minister of Railways and Canals, as an Escrow, and placed in the hands of the Honourable Joseph William Trutch, until the sanction of Parliament shall have been obtained to the payment of the subsidy, and to the other stipulations on the part of the Dominion herein contained requiring its sanction, and until the Act passed by the Legislature of the Province of British Columbia in the year 1883 entitled "An Act relating to the Island Railway, the Graving Dock and Railway Lands of the Province," shall have been amended by the Legislature of the said Province in accordance with a Draft Bill now prepared, and which has been identified by Sir Alexander Campbell and the Honourable Mr. Smithe, and signed by them and deposited in the hands of the said Joseph William Trutch in the presence of

(Signed) H. G. Hopkirk.

NOTE.—"The Draft Bill now prepared" referred to in the third from the last line in the above document was identical in form with the Statute of December 19, 1883.

"A. CAMPBELL."
"WM. SMITHE."

"Victoria, B.C., 21st August, 1888."

"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 August, 1883."

"R. DUNSMUIR."

RECORD

In the Supreme Court of Canada

EXHIBIT No. 37A

Exhibit No. 37A Letter Campbell to Dunsmuir, Crocker and Associates Aug. 29, 1883

Obtained in Department of Transport

The Hon. Sir Alexander Campbell to Messrs. R. Dunsmuir, Chas. Crocker and Associates.

San Francisco,
29 August, 1883.

Gentlemen,

I have the honour to acknowledge the receipt of your letter of this morning, proposing to exchange the bonds of the Southern Pacific Railway Company of California for the two hundred and fifty thousand dollars ($250,000) recently deposited by Mr. Dunsmuir with the Receiver General of the Dominion of Canada as security for the performance of the contract into which you have entered with Her Majesty for the construction of the Railway on Vancouver Island.

In reply I beg to say that it was understood with the Local Government of British Columbia that no change in the security referred to would be made without their acquiescence; but I have today written to Mr. Smithe, the Premier, to enquire if the Government of the Island would agree to the proposed change, supposing that it was acquiesced in by the Government of the Dominion. I shall receive Mr. Smithe's reply at Ottawa within a month, and shall thereafter be prepared to advise the acceptance of your proposal, if, as mentioned to me by Mr. Crocker, you will put the bonds in for the purpose in question at 90.

I am,

Gentlemen,

Your obedt. Servant,

(*sd.*) A. Campbell.

EXHIBIT No. 37B

Exhibit No. 37B Letter Smithe to Campbell Sept. 19, 1883

Obtained in Department of Transport

The Hon. Wm. Smithe to the Hon. Sir A. Campbell.

LANDS & WORKS DEPARTMENT,
BRIITISH COLUMBIA.
Victoria,

19th Sept., 1883.

Dear Sir,

I have made enquiry as to the position of the Southern Pacific Railway Company's bonds which you advise me Messrs. Dunsmuir and Associates propose to exchange for the $250,000 deposited with

RECORD

In the Supreme Court of Canada

Exhibit No. 37B
Letter Smithe to Campbell
Sept. 19, 1883
(Contd.)

the Receiver General of Canada as security for the due performance of their contract for the construction of the Island Railway and I beg to inform you that provided they are put in at a price affording a good margin (say 90% of their enfaced value) and that in the event of them, at any time, falling below that price Messrs. Dunsmuir and Associates shall be required to deposit cash or additional bonds to make good the amount of security required under the contract, the Government of British Columbia will acquiesce in the exchange if the Minister of Finance of the Dominion agree to it.

Yours faithfully,
Wm. Smithe.

Exhibit No. 37C
Telegram Smithe to Campbell
Nov. 23, 1883

EXHIBIT No. 37C

Sessional Papers, B.C., 1884 **P. 171**

(TELEGRAM)

Victoria, 23rd November, 1883.

To Sir Alexander Campbell, Ottawa:

Would like you to forward permission to use copy of contract for construction of Island Railway. Members will require to know its nature, as it forms a very material adjunct to Settlement Bill.

(*Signed*) WM. SMITHE.

Exhibit No. 37D
Letter Trutch to Smithe
Nov. 27, 1883

EXHIBIT No. 37D

Sessional Papers, B.C., 1884 **P. 172**

Hon. Mr. Trutch, C.M.G., to Hon. Mr. Smithe,

Dominion Government Agent's Office,

Victoria, B.C., 27th November, 1883.

Sir,—I have the honour to hand you herewith at your request, copy of the agreement between the Honourable the Minister of Railways, represented by the Honourable Sir Alexander Campbell, Minister of Justice and Mr. Robert Dunsmuir and others, for the construction of a railway between Esquimalt and Nanaimo.

I have, &c.,

(*Signed*) Joseph W. Trutch.

EXHIBIT No. 38

Exhibit No. 38 Return to Address Legislative Assembly Dec. 8, 1883

RETURN:

To an Address of the Legislative Assembly, for copies of all unpublished correspondence during the year, referring to, or any offer or communication made to the Provincial Government, or any of its members, respecting the construction of the Island Railway or the Esquimalt Dock.

By Command,

Jno. Robson,
Provincial Secretary.

Provincial Secretary's Office,
8th December, 1883.

EXHIBIT No. 39

Exhibit No. 39 Sessional Papers B.C. 1884 Dec. 10, 1883

Sessional Papers. B.C. 1884 P. 195.

RETURN:

To an Order of the Legislative Assembly, for a Return showing the names of all persons who, during the present year, have made claim to land within the original Railway Reserve on Vancouver Island, the names of those whose claims have been recognized by the Honourable the Chief Commissioner of Lands and Works, and the nature, extent and locality of the claim so recognized.

By Command,

"Wm. Smithe,"
Chief Commissioner of Lands and Works.

Lands and Works Department,
10th December, 1883.

RECORD

Court of Appeal of British Columbia

Exhibit No. 40
B.C. Act Relating to the Island Rly; the Graving Dock and Rly Lands Dec. 19, 1883

EXHIBIT No. 40

CHAP. 14.

An Act relating to the Island Railway, the Graving Dock, and Railway Lands of the Province.

(*19th December,* 1883.)

Preamble.

WHEREAS negotiations between the Governments of Canada and British Columbia have been recently pending, relative to delays in the commencement and construction of the Canadian Pacific Railway, and relative to the Island Railway, the Graving Dock, and the Railway Lands of the Province:

And whereas for the purpose of settling all existing disputes and difficulties between the two Governments, it hath been agreed as follows:—

(a.) The Legislature of British Columbia shall be invited to amend the Act No. 11 of 1880, intituled "An Act to authorize the grant of certain Public Lands on the Mainland of British Columbia to the Government of the Dominion of Canada for Canadian Pacific Railway purposes," so that the same extent of land on each side of the line of Railway through British Columbia, wherever finally settled, shall be granted to the Dominion Government in lieu of the lands conveyed by that Act.

(b.) The Government of British Columbia shall obtain the authority of the Legislature to grant to the Government of Canada a portion of the lands set forth and described in the Act No. 15 of 1882, intituled "An Act to incorporate the Vancouver Land and Railway Company," namely, that portion of the said lands therein described, commencing at the Southern boundary thereof and extending to a line running East and West, half way between Comox and Seymour Narrows; and also a further portion of the lands conveyed by the said Act to the northward of and contiguous to that portion of the said lands last hereinbefore specified, equal in extent to the lands within the limits thereof which may have

been alienated from the Crown by Crown grants, pre-emption, or otherwise.

(c.) The Government of British Columbia shall obtain the authority of the Legislature to convey to the Government of Canada three and one-half millions of acres of land in the Peace River district of British Columbia, in one rectangular block, East of the Rocky Mountains, and adjoining the North-West Territory of Canada.

(d.) The Government of British Columbia shall procure the incorporation, by Act of their Legislature, of certain persons, to be designated by the Government of Canada, for the construction of the Railway from Esquimalt to Nanaimo.

(e.) The Government of Canada shall, upon the adoption by the Legislature of British Columbia of the terms of this agreement, seek the sanction of Parliament to enable them to contribute to the construction of a Railway from Esquimalt to Nanaimo the sum of $750,000, and they agree to hand over to the contractors who may build such Railway the lands which are or may be placed in their hands for that purpose by British Columbia; and they agree to take security, to the satisfaction of the Government of that Province, for the construction and completion of such Railway on or before the 10th day of June, 1887; such construction to commence forthwith.

(f.) The lands on Vancouver Island to be so conveyed shall, except as to coal and other minerals, and also except as to timber lands as hereinafter mentioned, be open for four years from the passing of this Act to actual settlers, for agricultural purposes, at the rate of one dollar an acre, to the extent of 160 acres to each such actual settler; and in any grants to settlers the right to cut timber for railway purposes and rights of way for the railway, and stations, and workshops, shall be reserved. In the meantime, and until the Railway from Esquimalt to Nanaimo shall have been completed, the Government of British Columbia shall be the agents of the Government of Canada for administering, for the purposes of settlement, the lands in this sub-section mentioned; and for such purposes the Government of British Columbia may make and issue, subject as aforesaid, pre-emption records to actual settlers, of the said lands. All moneys received by the Government of British Columbia in respect of such administration shall be paid, as received, into the Bank of British Columbia, to the credit of the Receiver-General of Canada; and such moneys, less expenses incurred (if any), shall, upon the completion of the railway to the

RECORD

Court of Appeal of British Columbia

Exhibit No. 40
B.C. Act Relating to the Island Rly; the Graving Dock and Rly Lands Dec. 19, 1883 (Contd.)

satisfaction of the Dominion Government, be paid over to the railway contractors.

(*g.*) The Government of Canada shall forthwith take over and seek the authority of Parliament to purchase and complete, and shall, upon the completion thereof, operate as a Dominion work, the Dry Dock at Esquimalt; and shall be entitled to and have conveyed to them all the lands, approaches, and plant belonging thereto, together with the Imperial appropriation therefor, and shall pay to the Province as the price thereof the sum of $250,000, and shall further pay to the Province whatever amounts shall have been expended by the Provincial Government or which remain due, up to time of the passing of this Act, for work or material supplied by the Government of British Columbia since the 27th day of June, 1882.

(*h.*) The Government of Canada shall, with all convenient speed, offer for sale the lands within the Railway belt upon the Mainland, on liberal terms to actual settlers; and

(*i.*) Shall give persons who have squatted on any of the said lands within the Railway belt on the Mainland, prior to the passing of this Act, and who have made substantial improvements thereon, a prior right of purchasing the lands so improved, at the rates charged to settlers generally.

(*k.*) This agreement is to be taken by the Province in full of all claims up to this date by the Province against the Dominion, in respect of delays in the commencement and construction of the Canadian Pacific Railway, and in respect of the non-construction of the Esquimalt and Nanaimo Railway, and shall be taken by the Dominion Government in satisfaction of all claims for additional lands under the Terms of Union, but shall not be binding unless and until the same shall have been ratified by the Parliament of Canada and the Legislature of British Columbia.

And whereas it is expedient that the said agreement should be ratified, and that provision should be made to carry out the terms thereof:

Therefore Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:—

Adopts the agreement above recited.

1. The hereinbefore recited agreement shall be and is hereby ratified and adopted.

Amends section 1 chap. 11 Act of 1880.

2. Section 1 of the Act of the Legislature of British Columbia, No. 11 of 1880, intituled "An Act to authorize the grant of certain

public lands on the mainland of British Columbia to the Government of the Dominion of Canada for Canadian Pacific Railway purposes," is hereby amended so as to read as follows:—

Grant of lands to Dominion Government in aid of construction of the Canadian Pacific Railway.

From and after the passing of this Act there shall be, and there is hereby granted to the Dominion Government for the purpose of constructing and to aid in the construction of the portion of the Canadian Pacific Railway on the mainland of British Columbia, in trust, to be appropriated as the Dominion Government may deem advisable, the public lands along the line of the railway before mentioned, wherever it may be finally located, to a width of twenty miles on each side of the said line as provided in the Order in Council, section 11, admitting the Province of British Columbia into Confederation; but nothing in this section contained shall prejudice the right of the Province to receive and be paid by the Dominion Government the sum of $100,000 per annum, in half-yearly payments in advance, in consideration of the lands so conveyed, as provided in Section 11 of the Terms of Union: Provided always that the line of Railway before referred to, shall be one continuous line of Railway only, connecting the seaboard of British Columbia with the Canadian Pacific Railway, now under construction on the East of the Rocky Mountains.

Annual grant of $100,000 to the Province not to be prejudiced hereby.

Grant of Crown land on Vancouver Island in aid of the Esquimalt-Nanaimo Railway.

3. There is hereby granted to the Dominion Government, for the purpose of constructing, and to aid in the construction of a Railway between Esquimalt and Nanaimo, and in trust to be appropriated as they may deem advisable (but save as is hereinafter excepted) all that piece or parcel of land situate in Vancouver Island, described as follows:—

Boundaries of land granted.

Bounded on the South by a straight line drawn from the head of Saanich Inlet to Muir Creek on the Straits of Fuca;

On the West by a straight line drawn from Muir Creek aforesaid to Crown Mountain;

On the North, by a straight line drawn from Crown Mountain to Seymour Narrows; and

On the East by the Coast line of Vancouver Island to the point of commencement; and including all coal, coal oil, ores, stones, clay, marble, slate, mines, minerals, and substances whatsoever thereupon, therein, and thereunder.

Certain land exempted from the grant.

4. There is excepted out of the tract of land granted by the preceding section all that portion thereof lying to the northward

RECORD

Court of Appeal of British Columbia

Exhibit No. 40
B.C. Act Relating to the Island Rly; the Graving Dock and Rly Lands Dec. 19, 1883 (Contd.)

of a line running East and West half way between the mouth of the Courtenay River (Comox District) and Seymour Narrows.

Other lands to be given for those alienated out of the tract granted.

5. Provided always that the Government of Canada shall be entitled out of such excepted tract to lands equal in extent to those alienated up to the date of this Act by Crown grant, pre-emption, or otherwise, within the limits of the grant mentioned in section 3 of this Act.

Grant not to include lands alienated nor Indian or Naval reserves.

6. The grant mentioned in section 3 of this Act shall not include any lands now held under Crown grant, lease, agreement for sale, or other alienation by the Crown, nor shall it include Indian reserves or settlements, nor Naval or Military reserves.

Grant of 3,500,000 acres of land in Peace River District to the Dominion Government.

7. There is hereby granted to the Dominion Government three and a half million acres of land in that portion of the Peace River District of British Columbia lying East of the Rocky Mountains and adjoining the North-West Territory of Canada, to be located by the Dominion in one rectangular block.

Incorporation of "The Esquimalt and Nanaimo Railway Company."

8. For the purpose of facilitating the construction of the Railway between Esquimalt and Nanaimo, it is hereby enacted that such persons, hereinafter called the "company," as may be named by the Governor-General in Council, with all such other persons and corporations as shall become shareholders in the company, shall be and are hereby constituted a body corporate and politic by the name of "The Esquimalt and Nanaimo Railway Company."

Gives the said Company power to construct a line of railway from Esquimalt to Nanaimo.

9. The company, and their agents and servants, shall lay out, construct, equip, maintain, and work a continuous double or single track steel railway of the gauge of the Canadian Pacific Railway, and also a telegraph line, with the proper appurtenances, from a point at or near the harbour of Esquimalt, in British Columbia, to a port or place at or near Nanaimo on the eastern coast of Vancouver Island, with power to extend the main line to Comox and Victoria, and to construct branches to settlements on the east coast, and also to extend the said railway by ferry communications to the mainland of British Columbia, and there to connect or amalgamate with any railway line in operation or course of construction. The company shall also have power and authority to build, own, and operate steam and other vessels in connection with the said railway, on and over the bays, gulfs, and inland waters of British Columbia.

Power to operate steam and ferry boats.

Power to receive grants of land, etc., from Government of Canada in aid of construction.

10. The company may accept and receive from the Government of Canada any lease, grant, or conveyance of lands, by way

of subsidy or otherwise, in aid of the construction of the said railway, and may enter into any contract with the said Government for or respecting the use, occupation, mortgage, or sale of the said lands, or any part thereof, on such conditions as may be agreed upon between the Government and the company.

Capital Stock $3,000,000.

11. The capital stock of the company shall be three millions of dollars, and shall be divided into shares of one hundred dollars each, but may be increased from time to time by the vote of the majority in value of the shareholders present in person, or represented by proxy, at any meetings, specially called for the purpose, to an amount not exceeding five million dollars.

Provisional Directors.

12. The persons to be named as aforesaid by the Governor-General in Council shall be and are hereby constituted a board of provisional directors of the company, and shall hold office as such until other directors shall be elected under the provisions of this Act, and shall have power to fill any vacancies that may occur in the said board; to open stock books at Victoria, British Columbia, or any other city in Canada; procure subscriptions, and receive payments on stock subscribed.

First general meeting of shareholders.

13. When and so soon as one-half of the capital stock shall have been subscribed, and one-tenth of the amount thereof paid into any chartered Bank, either at Victoria or San Francisco, or partly in each, the provisional directors may order a meeting of shareholders to be called at Victoria, British Columbia, at such time as they think proper, giving at least three weeks' notice thereof in one or more newspapers published in the City of Victoria, and by a circular letter mailed to each shareholder, at which meeting the shareholders present in person, or by proxy, shall elect five directors qualified as hereinafter provided, who shall hold office until the first Wednesday in October in the year following their election.

Notice of meeting.

Annual meetings of shareholders.

14. On the said first Wednesday in October, and on the same day in each year thereafter, at the City of Victoria, or at such other place as shall be fixed by the by-laws of the company, there shall be held a general meeting of the shareholders for receiving the report of the directors transacting the business of the company, general or special, and electing the directors thereof; and public notice of such annual meeting and election shall be published for one month before the day of meeting in one or more newspapers in the City of Victoria, and by circular letter mailed to each shareholder at least one month prior thereto. The election

RECORD

Court of Appeal of British Columbia

Exhibit No. 40 B.C. Act Relating to the Island Rly; the Graving Dock and Rly Lands Dec. 19, 1883 (Contd.)

Election of Directors.

of directors shall be by ballot, and all shareholders may vote by proxy.

Quorum.

15. Three of the Directors shall form a quorum for the transaction of business, and the Board may employ one or more of their number as paid Director or Directors, provided that no person shall be elected Director unless he owns at least twenty-five shares of the stock of the Company on which calls have been paid.

Qualification of Directors.

Calls.

16. No call shall be made for more than ten per centum at any one time on the amount subscribed, nor shall more than fifty per centum of the stock be called up in any one year.

Consolidated Railway Act, 1879, of Canada, to apply.

17. The Consolidated Railway Act, eighteen hundred and seventy-nine (1879) of Canada, shall, so far as its provisions are applicable to the undertaking and are not inconsistent with or contrary to the provisions of this Act, apply to the said railway, and shall be read with and form part of this Act.

Interpretation.

18. The words "Superior Court," "Clerks of the Peace," "Registry Offices," "Clerk of Court," as used in the said Consolidated Railway Act, eighteen hundred and seventy-nine (1879), shall, for the purposes of this Act, be read and construed in the same sense and meaning as is provided by the Act passed by this Legislature thirty-eight (38) Victoria, chapter thirteen (13), section three (3).

Sections 5 and 6 of said Act to be read herewith.

19. Sections five (5) and six (6) of the said last mentioned Act shall be read with and form part of this Act.

Commencement and completion of the line.

20. The said railway line from Esquimalt to Nanaimo shall be commenced forthwith and completed on or before the 10th day of June, 1887.

Exemption from Provincial taxation for 10 years.

21. The Railway, with its workshops, stations, and other necessary buildings and rolling stock, and also the capital stock of the Railroad Company, shall be exempt from Provincial and Municipal taxation until the expiration of ten years from the completion of the railroad.

The lands granted to be free from taxation until alienated by the company.

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.

Provides for grant of 160 acres to squatters who have been in possession of land for one year.

23. The company shall be governed by sub-section (*f*) of the hereinbefore recited agreement, and each bona fide squatter who has continuously occupied, and improved any of the lands within

the tract of land to be acquired by the company from the Dominion Government for a period of one year prior to the first day of January, 1883, shall be entitled to a grant of the freehold of the surface rights of the said squatted land, to the extent of 160 acres to each squatter, at the rate of one dollar an acre.

Surface rights only to be granted.

24. The company shall at all times sell coals gotten from the lands that may be acquired by them from the Dominion Government to any Canadian Railway Company having the terminus of its Railway on the seaboard of British Columbia, and to the Imperial, Dominion, and Provincial authorities, at the same rates as may be charged to any Railway Company owning or operating any Railway in the United States, or to any foreign customer whatsoever.

Provision as to price of coals sold to Railway Companies.

25. All lands acquired by the company from the Dominion Government under this Act containing belts of timber fit for milling purposes shall be sold at a price to be hereafter fixed by the Government of the Dominion or by the company hereby incorporated.

Price of timber lands, how to be fixed.

26. The existing rights (if any) of any persons or corporations in any of the lands so to be acquired by the company shall not be affected by this Act, nor shall it affect Military or Naval Reserves.

Existing rights not to be affected.

27. The said Esquimalt and Nanaimo Railway Company shall be bound by any contract or agreement for the construction of the Railway from Esquimalt to Nanaimo which shall be entered into by and between the persons so to be incorporated as aforesaid, and Her Majesty, represented by the Minister of Railways and Canals, and shall be entitled to the full benefit of such contract or agreement, which shall be construed and operate in like manner as if such company had been a party thereto in lieu of such persons, and the document had been duly executed by such company under their corporate seal.

Contracts, etc., entered into with the Dominion Government for construction of Esquimalt-Nanaimo Railway to be binding on the Company.

28. The Railways to be constructed by the company in pursuance of this Act shall be the property of the company.

Railways, etc., to be the property of the Company.

29. The Act of 1883, Chapter 14, entituled "An Act relating to the Island Railway, the Graving Dock, and the Railway Lands of the Province," is hereby repealed.

Repeals chap. 14 of Statutes, 1883.

RECORD

Court of Appeal of British Columbia

Exhibit No. 41
Dominion Act Respecting the Island Rly; the Graving Dock and Rly Lands
April 19, 1884

EXHIBIT No. 41

1884 Chap. 6

CHAPTER 6.

An Act respecting the Vancouver Island Railway, the Esquimalt Graving Dock, and certain Railway Lands of the Province of British Columbia, granted to the Dominion.

(*Assented to 19th April,* 1884.)

Preamble.

WHEREAS negotiations between the Governments of Canada and British Columbia have been recently pending, relative to delays in the commencement and construction of the Canadian Pacific Railway, and relative to the Vancouver Island Railway, the Esquimalt Graving Dock, and certain railway lands of the Province of British Columbia:

Recital of agreement as to—

And, whereas, for the purpose of settling all existing disputes and difficulties between the two Governments, it hath been agreed as follows:—

Lands on mainland of British Columbia.

(*a.*) The Legislature of British Columbia shall be invited to amend the Act number eleven, of one thousand eight hundred and eighty, intituled "*An Act to authorize the grant of certain public lands on the Mainland of British Columbia to the Government of the Dominion of Canada for Canadian Pacific Railway purposes,*" so that the same extent of land on each side of the line of railway through British Columbia, wherever finally settled, shall be granted to the Dominion Government in lieu of the lands conveyed by that Act:

Lands on Vancouver Island.

(*b.*) The Government of British Columbia shall obtain the authority of the Legislature to grant to the Government of Canada a portion of the lands set forth and described in the Act, number fifteen, of one thousand eight hundred and eighty-two, intituled "*An Act to incorporate the Vancouver Land and Railway Company,*" namely, that portion of the said lands therein described, commencing at the southern boundary thereof and extending to a line running east and west, half-way between Comox and Seymour Narrows; and also a further portion of the lands conveyed by the said Act to the northward of and contiguous to that portion of the said lands last hereinbefore specified, equal in extent to the lands within the limits thereof which may have been alienated from the Crown by crown grants, pre-emption or otherwise:

Lands in Peace River District.

(*c.*) The Government of British Columbia shall obtain the authority of the Legislature to convey to the Government of Can-

ada three and one-half millions of acres of land in the Peace River District of British Columbia, in one rectangular block, east of the Rocky Mountains and adjoining the North-West Territories of Canada:

Incorporation of railway company on Island.

(*d.*) The Government of British Columbia shall procure the incorporation, by Act of their Legislature, of certain persons, to be designated by the Government of Canada, for the construction of the railway from Esquimalt to Nanaimo:

Grant of land by Canada for railway from Esquimalt to Nanaimo.

(*e.*) The Government of Canada shall, upon the adoption by the Legislature of British Columbia of the terms of this agreement, seek the sanction of Parliament to enable them to contribute to the construction of a railway, from Esquimalt to Nanaimo, the sum of seven hundred and fifty thousand dollars, and they agree to hand over to the contractors who may build such railway the lands which are or may be placed in their hands for that purpose by British Columbia; and they agree to take security, to the satisfaction of the Government of that Province, for the construction and completion of such railway on or before the tenth day of June, one thousand eight hundred and eighty-seven,—such construction to commence forthwith:

Security for construction.

Administration of lands for such railway granted by British Columbia.

(*f.*) The lands on Vancouver Island to be so conveyed shall, except as to coal and other minerals, and also except as to timber lands as hereinafter mentioned, be open for four years from the passing of this Act to actual settlers, for agricultural purposes, at the rate of one dollar an acre, to the extent of one hundred and sixty acres to each such actual settler; and in any grants to settlers the right to cut timber for railway purposes and rights of way for the railway and stations and work-shops shall be reserved; in the meantime, and until the railway from Esquimalt to Nanaimo shall have been completed, the Government of British Columbia shall be the agents of the Government of Canada for administering, for the purposes of settlement, the lands in this sub-section mentioned; and for such purposes the Government of British Columbia may make and issue, subject as aforesaid, pre-emption records to actual settlers of the said lands: all moneys received by the Government of British Columbia in respect of such administration shall be paid, as received, into the Bank of British Columbia, to the credit of the Receiver-General of Canada; and such moneys, less expenses incurred, if any, shall, upon the completion of the railway to the satisfaction of the Dominion Government, be paid over to the railway contractors:

Provincial Government to act as agent for Government of Canada.

As to moneys received under such agency.

Purchase and completion by Canada of dry dock at Esquimalt.

(*g.*) The Government of Canada shall forthwith take over and seek the authority of Parliament to purchase and complete,

and shall, upon the completion thereof, operate as a Dominion work, the dry dock at Esquimalt; and shall be entitled to have conveyed to them all the lands, approaches and plant belonging thereto, together with the Imperial appropriation therefor, and shall pay to the Province as the price thereof the sum of two hundred and fifty thousand dollars, and shall further pay to the Province whatever amounts shall have been expended by the Provincial Government or which remain due up to the time of the passing of this Act, for work or material supplied by the Government of British Columbia since the twenty-seventh day of June, one thousand eight hundred and eighty-two.

Sale of railway lands on mainland.

(*h.*) The Government of Canada shall, with all convenient speed, offer for sale the lands within the railway belt upon the mainland, on liberal terms to actual settlers; and—

Provision as to squatters, &c.

(*i.*) Shall give persons who have squatted on any of the said lands, within the railway belt on the mainland, prior to the passing of this Act, and who have made substantial improvements thereon, a prior right of purchasing the lands so improved at the rates charged to settlers generally:

Agreement to be settlement in full of certain claims of British Columbia on Canada.

(*k.*) This agreement is to be taken by the Province in full of all claims up to this date by the Province against the Dominion, in respect of delays in the commencement and construction of the Canadian Pacific Railway, and in respect of the non-construction of the Esquimalt and Nanaimo Railway, and shall be taken by the Dominion Government in satisfaction of all claims for additional lands under the terms of Union, but shall not be binding unless and until the same shall have been ratified by the Parliament of Canada and the Legislature of British Columbia:.

Ratification of agreement by British Columbia.

And whereas the Legislature of British Columbia, has by an Act assented to on the nineteenth day of December, one thousand eight hundred and eighty-three, intituled "*An Act relating to the Island Railway, the Graving Dock and Railway Lands of the Province,*" adopted the terms of the said agreement, and it is expedient that it should be ratified by the Parliament of Canada, and that provision should be made to carry out the terms thereof according to their purport:

Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

And by Canada.

1. The hereinbefore recited agreement is hereby approved and ratified.

THE ESQUIMALT AND NANAIMO RAILWAY.

RECORD

Court of Appeal of British Columbia

Exhibit No. 41
Dominion Act Respecting the Island Rly; the Graving Dock and Rly Lands
April 19, 1884
(Contd.)

Agreement for construction of railway ratified.

2. The agreement, a copy of which, with specifications, is hereto appended as a schedule, for the construction, equipment, maintenance and working of a continuous line of railway of a uniform gauge of four feet, eight and one-half inches, from Esquimalt to Nanaimo in Vancouver Island, British Columbia, and also for the construction, equipment, maintenance and working of a telegraph line along the line of the said railway, is hereby approved and ratified, and the Governor in Council is authorized to carry out the provisions thereof according to their purport.

Subsidy of $750,000 and land towards construction of railway.

3. The Governor in council may grant to "The Esquimalt and Nanaimo Railway Company" mentioned in the said agreement, and incorporated by the Act of the Legislature of British Columbia lastly hereinbefore referred to, in aid of the construction of the said railway and telegraph line, a subsidy in money of seven hundred and fifty thousand dollars, and in land, all of the land situated on Vancouver Island which has been granted to Her Majesty by the Legislature of British Columbia by the Act last aforesaid, in aid of the construction of the said line of railway, in so far as such land shall be vested in Her Majesty and held by Her for the purposes of the said railway, or to aid in the construction of the same; and also all coal, coal oil, ores, stones, clay, marble, slate, mines, minerals and substances whatsoever in, on or under the lands so to be granted to the said company as aforesaid and the foreshore rights in respect of all such lands as aforesaid, which are to be granted to the said company as aforesaid, and which border on the sea, together with the privilege of mining under the foreshore and sea opposite any such land, and of mining and keeping for their own use all coal and minerals, herein mentioned, under the foreshore or sea opposite any such lands, in so far as such coal, coal oil, ores, stones, clay, marble, slate, mines, minerals and substances whatsoever, and foreshore rights are vested in Her Majesty as represented by the Dominion Government.

With certain rights connected with the lands.

Conditions of payment of subsidy to company.

4. The said money subsidy shall be paid to the said company by instalments, on the completion of each ten miles of railway and telegraph line, such instalments to be proportionate to the value of the part of the lines completed and equipped in comparison with the whole of the works undertaken, the proportion to be established by the report of the Minister of Railways and Canals.

Further conditions for plans, profiles and estimates.

5. The said company shall furnish profiles, plans and bills of quantities of the whole line of railway in ten mile sections, and

RECORD

Court of Appeal of British Columbia

Exhibit No. 41
Dominion Act Respecting the Island Rly; the Graving Dock and Rly Lands
April 19, 1884
(Contd.)

before the work is commenced on any ten mile section, such profiles, plans, and bills of quantities shall be approved by the Governor in Council; and before any payments are made the said company shall furnish such further returns as may be required to satisfy the Minister of Railways and Canals as to the relative value of the works executed, with that remaining to be done.

Percentage to be retained until completion and approval of work.

6. The Minister of Railways and Canals shall retain five per centum of the subsidy, or of such part thereof as the said company may be entitled to, for three months after the completion of the said railway and telegraph line and the works appertaining thereto, and for a further period until the said Minister is satisfied that all failures or defects in the said line of railway and telegraph line, respectively, and the works appertaining thereto, that may have been discovered during the said period of three months, or such further period, have been permanently made good, and no lands shall be conveyed to the said company until the road is fully completed and equipped.

Provision as to conveyance of land granted to company.

7. The land grant shall be made, and the land, in so far as the same shall be vested in Her Majesty and held by Her Majesty for the purposes of the said railway, or to aid in the construction of the same, shall be conveyed to the said company upon the completion of the whole work to the entire satisfaction of the Governor in Council, but so, nevertheless, that the said lands and coal oil, coal and other minerals and timber thereunder, therein or thereon, shall be subject in every respect to the following provisions:—

Subject to certain conditions.

Grants thereof to settlers.

1. The lands to be so conveyed shall, except as to coal and other minerals, and also except as to timber lands as hereinafter mentioned, be open for four years from the nineteenth day of December, in the year of our Lord, one thousand eight hundred and eighty-three, to actual settlers, for agricultural purposes, at the rate of one dollar an acre, to the extent of one hundred and sixty acres to each such actual settler; grants thereof shall be made under the Great Seal, and in any such grants the right to cut timber for railway purposes and rights of way for the railway and stations and workshops shall be reserved: in the meantime, until the railway from Esquimalt to Nanaimo shall have been completed, the Government of British Columbia shall be the agent of the Government of Canada, for administering, for the purposes of settlement, the lands in this sub-section mentioned; and for such purposes the Government of British Columbia may make and issue, subject as aforesaid, pre-emption records to actual settlers of the said lands; all moneys received by the Government of British Columbia in respect of such administration shall be paid, as re-

Government of British Columbia to act as agent in respect of such grants until completion of railway.

ceived, into the Bank of British Columbia, to the credit of the Receiver-General of Canada; and such moneys, less expenses incurred, if any, shall, upon the completion of the railway to the satisfaction of the Dominion Government, be paid over to the railway company:

Provision as to squatters.

2. Every *bona fide* squatter who has continuously occupied and improved any of the lands within the tract of land to be acquired by the company from the Dominion Government for a period of one year prior to the first day of January, one thousand eight hundred and eighty-three, shall be entitled to a grant of the freehold of the surface rights of the said squatted land, to the extent of one hundred and sixty acres at the rate of one dollar per acre.

As to sale of coal got from lands by company.

3. The said company shall, at all times, sell coals gotten from the lands that may be acquired by them from the Dominion Government to any Canadian railway company having the terminus of its railway on the seabord of British Columbia, and to the Imperial, Dominion and Provincial authorities, at the same rates as may be charged to any railway company owning or operating any railway in the United States, or to any foreign customer whatsoever:

Timbered lands.

4. All lands acquired by the said company from the Dominion Government under this Act, containing belts of timber fit for milling purposes, shall be sold at a price to be hereafter fixed by the Government of the Dominion, or by the said company:

Existing rights saved.

5. The existing rights, if any, of any persons or corporations in any of the lands so to be acquired by the company, shall not be affected by this Act.

Admission of certain articles for railway free of duty.

8. All steel rails, fish-plates and other fastenings, spikes, bolts and nuts, wire, timber and all material for bridges, to be used in the original construction of the said railway and of the telegraph line in connection therewith, and all telegraphic apparatus required for the first equipment of such telegraph line, shall be admitted into Canada free of duty.

Commencement and completion of railway and telegraph line.

9. The said company shall commence the works included in the annexed schedule, forthwith, and shall complete and equip the said railway and telegraph line by the tenth day of June, one thousand eight hundred and eighty seven; and in default of such completion and equipment, as aforesaid, on or before the last mentioned date, the said company shall forfeit all right, claim or demand to the sum of money and percentage retained by the Minister of Railways and Canals, and any and every part thereof,—

Forfeiture in case of default.

to any moneys whatever which may be, at the time of the failure of the completion, as aforesaid, due or owing from Her Majesty to the said company,—to the land grant and also to the moneys deposited as security for the construction of the said railway and telegraph line.

THE ESQUIMALT GRAVING DOCK

Purchase of and payment for the Esquimalt dry dock.

10. The Government of Canada may purchase and complete, and shall, upon the completion thereof, operate as a Dominion work, the dry dock at Esquimalt, and shall be entitled to and have conveyed by the Government of British Columbia to Her Majesty, for Canada, all the lands, approaches, and plant belonging thereto, together with the Imperial appropriation therefor, and shall pay to the Province of British Columbia as the price thereof the sum of two hundred and fifty thousand dollars, and shall further pay to the said Province whatever amounts shall have been expended by the Government of that Province, or which remain due by it up to the time of the passing of this Act, for work or material performed or supplied by the said Government in respect of the said dock and works since the twenty-seventh day of June, one thousand eight hundred and eighty-two.

THE CANADIAN PACIFIC RAILWAY BELT

Lands granted by British Columbia to Canada for the purposes of the Canadian Pacific Railway to be offered for sale.

11. The lands granted to Her Majesty, represented by the Government of Canada, in pursuance of the eleventh section of the Terms of Union, by the Act of the Legislature of the Province of British Columbia, number eleven of one thousand eight hundred and eighty, intituled *"An Act to authorize the grant of certain public lands on the mainland of British Columbia to the Government of the Dominion of Canada for Canadian Pacific Railway purposes,"* as amended by the Act of the said Legislature, assented to on the nineteenth day of December, one thousand eight hundred and eighty three, as aforesaid, intituled *"An Act relating to the Island Railway, the Graving Dock and Railway Lands of the Province,"* shall be placed upon the market at the earliest date possible, and shall be offered for sale on liberal terms to actual settlers:

And open for settlement.

2. The said lands shall be open for entry to *bona fide* settlers in such lots and at such prices as the Governor in Council may determine:

Rights of squatters thereon.

3. Every person who has squatted on any of the said lands prior to the 19th day of December, one thousand eight hundred

and eighty-three, aforesaid and who has made substantial improvements thereon, shall have a prior right of purchasing the lands so improved, at the rates charged to settlers generally:

Regulations by O.C.

4. The Governor in Council may, from time to time, regulate the manner in which and terms and conditions on which the said lands shall be surveyed, laid out, administered, dealt with and disposed of: Provided, that regulations respecting the sale, leasing or other disposition of such lands shall not come into force until they are published in the *Canada Gazette*:

Proviso.

Act of Canada 43 V., c. 27 repealed.

5. The Act forty-third Victoria, chapter twenty-seven, intituled *"An Act to repeal the Act extending 'The Dominion Lands Acts' to British Columbia, and to make other provision with respect to certain lands in that Province,"* is hereby repealed.

LANDS IN THE PEACE RIVER DISTRICT OF BRITISH COLUMBIA

To be in one block and to be Dominion lands under 46 V., c. 17.

12. The three and one-half million acres of lands in that portion of the Peace River District of British Columbia, lying east of the Rocky Mountains, and adjoining the North-West Territories of Canada, granted to Her Majesty, as represented by the Government of Canada, by the said Act assented to on the nineteenth day of December, one thousand eight hundred and eighty-three, as aforesaid, intituled *"An Act relating to the Island Railway, the Graving Dock and Railway Lands of the Province,"* and to be located by the said Government in one rectangular block, shall be held to be Dominion lands within the meaning of the *"Dominion Lands Act,* 1883."

PAYMENTS FROM CONSOLIDATED REVENUE FUND.

Payments out of Con. Rev. Fund.

13. All payments authorized by this Act shall be made out of any unappropriated moneys forming part of the *Consolidated Revenue Fund of Canada.*

CIVIL AND CRIMINAL JURISDICTION.

Jurisdiction in criminal cases.

14. Until the boundary line between British Columbia and the North-West Territories is finally settled and located, and such settlement and location is published in the *Canada Gazette,* the courts of the said Province shall have civil and criminal jurisdiction in and over all the territory west of the line laid down in

RECORD

Court of Appeal of British Columbia

Exhibit No. 41
Dominion Act Respecting the Island Rly; the Graving Dock and Rly Lands
April 19, 1884
(Contd.)

Trutch's map of eighteen hundred and seventy-one, as the eastern boundary of the Province, and the continuation of that line along the one hundred and twentieth meridian of west longitude until it reaches the northern boundary of the Province; and all offences committed in any part of the said territory may be stated in any warrant, indictment or other legal instrument or proceeding to have been committed in British Columbia.

Exhibit No. 42
B.C. Gazette Notice
May 8, 1884

EXHIBIT No. 42

THE BRITISH COLUMBIA GAZETTE.

Victoria, May 8th, 1884.

Vol. XXIV. No. 19.

PUBLIC NOTICE

Island Railway Lands.

Notice is hereby given that, on and after the 1st June next, all those lands which are reserved for railway purposes, on Vancouver Island, will be open to pre-emption by actual settlers, at the rate of one dollar per acre, as provided by the terms of the Settlement Act, 47 Victoria, Ch. 14.

Squatters who have occupied and improved any of the lands within this tract should make immediate application for a record of the same, upon printed forms for the purpose, which can be obtained from the Government Agent for the district.

Wm. Smithe,
Chief Commissioner of Lands and Works.

Lands and Works Department,
Victoria, B.C., 7th May, 1884.

RECORD

Court of Appeal of British Columbia

- Exhibit No. 42A Agreement between Government of B.C. and C.P.R. Feb. 23, 1885

EXHIBIT No. 42A

AGREEMENT BETWEEN THE GOVERNMENT OF BRITISH COLUMBIA AND THE CANADIAN PACIFIC RAILWAY COMPANY.

This Agreement made the 23rd day of February, A.D. 1885, between Her Majesty Queen Victoria, represented by the Hon. the Chief Commissioner of Lands and Works of the Province of British Columbia, of the one part, and the Canadian Pacific Railway Company, hereinafter referred to as the said Company, of the other part.

Whereas the Government of the Dominion of Canada have declared and adopted Port Moody as the Western Terminus of the Canadian Pacific Railway;

And whereas it is in the interest of the Province of British Columbia and of the Company that the main line should be extended westerly from Port Moody to English Bay and Coal Harbour, and that the terminus of the said railway should be at Coal Harbour and English Bay, and that terminal workshops and docks should be erected there;

And whereas negotiations relating to such extension have for some time been pending between the said Chief Commissioner and the said Company, which have resulted in the agreement hereinafter contained.

Now this agreement witnesseth that, for the considerations hereinafter expressed, the said Company hereby covenant and agree with Her Majesty, Her heirs and successors, in manner following, that is to say:—

1. The said Company shall extend the main line of the Canadian Pacific Railway to Coal Harbour and English Bay, and shall for ever hereafter maintain and equip such extension as part of the main line of the Canadian Pacific Railway and operate it accordingly.

2. Such extension shall be fully and completely made on or before the 31st day of December, 1886.

3. The terminus of the Canadian Pacific Railway shall be established in the immediate vicinity of Coal Harbour and English Bay, and upon land which is to be granted in pursuance of this agreement.

4. The Company shall erect and maintain the terminal workshops and the other terminal structures, works, docks, and equipment as are proper and suitable for the western terminus of the

RECORD

Court of Appeal of British Columbia

Exhibit No. 42A Agreement between Government of B.C. and C.P.R. Feb. 23, 1885 (Cont'd)

Canadian Pacific Railway in the immediate vicinity of Coal Harbour and English Bay, and such workshops, structures, works, docks and equipments shall be commenced forthwith and prosecuted to completion with reasonable diligence, and so as to provide facilities for the opening of traffic on the through line by the 31st day of December, 1886.

5. The survey of the line of extension shall be undertaken at once and prosecuted by the Company without delay, and the Company shall also proceed forthwith to survey the land hereby agreed to be granted, and complete the survey with dispatch, and furnish the Chief Commissioner with a plan of the survey and the field-notes, and such survey shall be made by a surveyor approved of by the Chief Commissioner.

6. In consideration of the premises, Her Majesty agrees to grant to such persons as the Company may appoint, in trust for the Company, the lands in the District of New Westminster delineated on the map or plan hereunto annexed by the colour pink, and containing by estimation six thousand acres, save and except as is hereinafter mentioned.

7. There shall be excepted out of such grant two and one-half acres of the land at Granville, and two and one-half acres of the land on the south side of False Creek, both plots to be selected by the Chief Commissioner at any time not later than two months after the survey aforesaid shall have been completed, and the map or plan and the field-notes delivered to the Chief Commissioner.

8. The grant shall, as to the land on the south side of False Creek, be subject for its unexpired term to a lease dated the 30th day of November, A.D. 1865, and entered into between the Honourable Joseph William Trutch, acting on behalf of Her Majesty's Government and the British Columbia and Vancouver Island Spar, Lumber and Saw-Mill Company, Limited, and also to an agreement intended to be entered into by the said Chief Commissioner for the partial renewal of such lease, the terms of which are embodied in a letter written by the said Chief Commissioner to Richard Alexander, Manager of the Hastings Saw-Mill Company, and dated the 23rd day of February, 1885.

9. The grant shall also be subject to such rights, if any, as may legally exist in favour of third parties.

10. The grant shall be made upon the Company entering into a bond to Her Majesty, with three sureties to be approved of by the Chief Commissioner of Lands and Works, in the sum of two hundred and fifty thousand dollars at least, conditioned for the due performance by the Company of all and singular the terms

and conditions herein contained, and by the Company agreed to be observed and performed.

11. And it is agreed that as to the mode of operating the said extended line, and as to tolls, fares and freights, the extension shall be considered as an original portion of the Canadian Pacific Railway.

12. No Chinese shall be employed in the construction of the extension of the main line from Port Moody to English Bay.

13. And it is lastly agreed that upon the Corporation of the City of New Westminster satisfactorily securing, on or before the 1st day of May, 1886, payment to the Company of $37,500, and providing a right of way and depot grounds, the Government will, on or before such date, undertake to pay to the Company the further sum of $37,500, and thereupon the Company shall proceed to construct a branch line of railway connecting the City of New Westminster with the Canadian Pacific Railway, and complete the same on or before the 31st day of December, 1886, and shall thereafter operate and maintain the same.

14. This agreement may be provisionally executed by Henry Beatty on behalf of the Company, and shall, within sixty days from the date hereof, be properly executed by the Company, otherwise it shall not be binding upon Her Majesty, and upon its execution by the Company it shall be transmitted to the said Chief Commissioner.

In witness whereof the parties hereto have hereunto set their hands and seals on the day and year first above written.

SIGNED and SEALED by the within named Wm. Smithe in the presence of:

W. S. GORE,
S. Genl.

WM. SMITH,
C.C. of L. & W.
(L.S.)

THE CANADIAN PACIFIC RAILWAY CO.,

(Signed) per GEO. STEPHEN, *President.*

(Signed) C. DRINKWATER,
Secretary.

C.P.R.CO.
SEAL.

RECORD

Court of Appeal of British Columbia

Exhibit No. 43
Incomplete Conveyance from E. & N. Rly Co.
(Undated)

EXHIBIT No. 43

INCOMPLETE CONVEYANCE FROM E. & N. RAILWAY CO.

THIS INDENTURE made this day of , A.D. One thousand eight hundred and eighty , between the Esquimalt and Nanaimo Railway Company of the one part, and of the other part.

WITNESSETH, that in consideration of the sum of dollars paid by the said to the Company, the receipt of which said sum of dollars, the said Company do hereby acknowledge and of and from the same and every part thereof, do hereby acquit and release the said , his heirs, executors and administrators they the said Company do hereby grant and convey unto the said his heirs, and assigns, all that piece or parcel of land situate in the District of Vancouver Island, in the Province of British Columbia, and upon the official map of the said District known and numbered as and which said piece or parcel of land is said to contain acres, more or less, and is more particularly shown upon the plan or tracing hereunto annexed and thereon coloured red.

TO HAVE AND TO HOLD the said land unto and to the use of the said his heirs and assigns forever, subject nevertheless to the reservations hereinafter mentioned, that is to say:

Saving and reserving to the said Company, their successors and assigns, and their agents, servants, contractors and workmen, the right to enter into and upon the said land and cut and carry away any timber therefrom for railway purposes without paying compensation therefor.

And saving and reserving also to the said company, their successors and assigns, rights of way for their railway through the said lands, and the right for themselves, their agents, servants, contractors and workmen to enter upon and take such parts of the said land as may be required for the stations and workshops of the said company without paying compensation therefor.

And saving and reserving to the said company, their successors and assigns, all coal, coal oil, ores, mines and minerals whatsoever in, on or under the land hereby granted or expressed so to be, with full liberty of ingress, egress and regress at all times for the said company, their successors and assigns, and their servants,

agents and workmen in, to and upon the said land, and either with or without railways, horses or other cattle, carts and waggons and other carriages, for the purpose of searching for, working, getting and carrying away the said coal, coal oil, ores, mines and minerals, and with full liberty, also for the said company, their successors and assigns, and their servants, agents and workmen, to sink, drive, make and use pits, shafts, drifts, adits, courses and water courses, and to erect and set up fire and other engines, machinery and works, and to open roads, in, upon, under and over the said land or any part or parts thereof for the purpose of more conveniently working and carrying away the said mines and minerals, and also to appropriate and use any part of the surface of the said land for depositing, placing and heaping thereon the minerals, waste, rubbish and other substances which may be gotten from the said mines and minerals, the company, their successors or assigns, paying reasonable compensation for such of the surface of the said lands as may be taken, damaged or destroyed by such searching, working, getting and carrying away.

In witness whereof the common seal of the said Company has been hereunto affixed by order of the Board of Directors.

Sealed by order of the Board of Directors at a meeting held the day of , 188 .

President.

.....

Secretary.

RECORD

Court of Appeal of British Columbia

Exhibit No. 44
Letter
Trutch to
Chief Comm.
of Lands and
Works
~~Oct. 21, 1985~~
Oct. 21, 1885

EXHIBIT No. 44

Sessional Papers, B.C., 1886. P. 407.

The Honourable Mr. Trutch to the Chief Commissioner of Lands and Works.

Victoria, B.C., 21st October, 1885.

Sir,—

With reference to the applications from actual settlers within the Island Railway belt—in respect of lands pre-empted by them under the provisions of the Act of British Columbia relating to the "Island Railway, the Graving Dock and Railway Lands of the Province"—which I have received under cover of your several letters requesting that patents for the same may be issued by the Dominion Government, and which have been transmitted by me for the consideration of the Honourable the Minister of the Interior, I have now the honour to acquaint you that, by letter of recent date, the Minister of the Interior states that before the patents applied for can be issued by him, it is necessary that the originals of all documents forming the basis of title to the land for which patent is to be issued, must be on record in his office, including the original application for such patents which were made to the Government of British Columbia as agents, in this matter, of the Government of Canada; and he directs me to request you to transmit to him, through me, the original applications referred to. I beg accordingly to prefer such request.

The Minister of the Interior further states that the official plans and field notes of the surveys upon which such patents are to be based, should also be on record in his department before the

Exhibit No. 44
Letter
Trutch to
Chief Comm.
of Lands and
Works
Oct. 21, 1885
(Contd.)

patents can properly be prepared; but that, as the survey of the lands on Vancouver Island for which patents have been applied for were made by the Government of British Columbia, it is, of course, proper that the originals of the plans and field notes of these surveys should remain of record in your office, and that it will be sufficient fulfillment of the requirements of his office in this particular that certified copies of these plans and field notes be deposited herein.

I am consequently directed to request that you will permit the requisite copies of the plans and field notes in question to be made from the originals in your office, by draughtsmen in the employ of the Dominion Government, and that you will be good enough to authorize the Surveyor-General of the Province to verify and certify such copies of the originals.

The Minister, moreover, points out that in respect of certain of the lands for which patents have been applied for and have been recommended by you to be issued—in fact in every instance except one the recommendation is that the whole of a particular section of land, consisting (according to the Provincial system of survey and allotment of lands in the districts in which these lands are situated) of 100 acres, and the east or west part, as the case may be, of an adjoining section containing 60 acres, should be patented to the applicant; and that whilst there would appear to be no difficulty in regard to the whole sections applied for, the East or West part of a section—being 60 acres thereof—is an indefinite part of a section, and until definitely described cannot be patented, and that a re-survey of these fractional parts of sections must be made, in order that such definite description may be supplied and patent issued accordingly, which surveys I am instructed to have made at once.

I have, &c.

(Signed) Joseph W. Trutch,
Dominion Government Agent.

EXHIBIT No. 45

Exhibit No. 45
Letter
Chief Comm.
of Lands and
Works to
Trutch
Nov. 16, 1885

The Chief Commissioner of Lands and Works to the Honourable Mr. Trutch.

Victoria, B.C., Nov. 16th, 1885.

Sir,—

I have the honour to acknowledge receipt of your letter of the 21st ultimo, in which you advise me that the Honourable the

RECORD

Court of Appeal of British Columbia

Exhibit No. 45
Letter
Chief Comm. of Lands and Works to Trutch
Nov. 16, 1885
(Contd.)

Minister of the Interior states that the patents for Island Lands, which have been applied for, cannot be issued until the originals of all documents forming the basis of title, including the original applications for patents, shall have been placed on record in his office, and in which you request that the original applications referred to may be transmitted to him through you.

You inform me additionally that the Minister of the Interior further states that the official field notes of the surveys upon which such patents are to be based should also be of record in his department, but that it will be of sufficient fulfilment of the requirements of his office in this particular that certified copies of these plans and field notes be deposited therein.

You moreover advise me that the Minister states that the patents recommended by me to be issued in every instance except one, cannot be made out because fractional parts of sections are called for, being in addition to a whole section the east or west 60 acres of an adjoining section, and that a re-survey of these fractional parts of sections must be made, and that you are instructed to have them made at once.

In reply I beg to say that I regret exceedingly that so many unnecessary obstacles have been placed in the way of the issue of patents for Island Railway lands by the Department of the Interior at Ottawa. It is nearly a year since the first applications for patents were forwarded from this office, with an accompanying certificate that all the law required had been done to entitle the applicant to an immediate patent, and up to date not one single patent has been issued, but I am advised at this late day that the description of the lands for which patents have been applied is not sufficiently definite to enable them to be issued.

It is, to say the least, strange that if the description given was found to be defective, this department was not notified of the fact, and asked to supply the additional data claimed to be necessary, which it could easily have done. The description of the plats given has been such as has been sufficient upon which to enable patents for Provincial Crown Lands to be issued by this department ever since it was first established, and with all due deference I would call the Minister's attention to the survey laws of the Province under which these surveys have been made, a perusal of which, I think will clearly show him that the eastern or western sixty acres of a 100 acre section, measuring 50 chains east and west by 20 chains north and south, could only be one thing, a block on the eastern or western end, as the case might be, measuring 30

chains due east and west by 20 chains due north and south. I have no objection, of course, to the Minister of the Interior having surveys made, at the expense of the Dominion Government of Island Railway lands, provided he does not interfere and conflict with the administration of these lands by the Provincial Government during railway construction, as is required by the Settlement Act. I would, however, call attention to the fact that the surveys of these lands have all hitherto been made under the authority of this department; that some of them were made during the first years of the colony's history, and although they have always been recognized as official surveys, the lines have been proved in some instances to be somewhat out in their bearing. These surveyed districts have been more or less settled over twenty years, and each settler has got his patent, based on the survey as it actually exists on the ground. The applications for patents which have been sent to the Department of the Interior are for lands in some cases in the heart of old settlements, contiguous to and surrounded by old settlers' claims, the fee of which has in each case been granted by the Crown, and has passed in some instances to third parties, and been registered in the Provincial Land Registry Office. It will be readily seen that a surveyor in no way connected with, or responsible to, this department, who might be sent at the instance of the Minister of the Interior to survey the fractions of sections referred to, might run arbitrary lines not conforming to the Provincial official survey, and upon his survey patents might issue from the Dominion Government which would conflict with patents heretofore issued by the Provincial Government for contiguous land, or rather for land which should be contiguous but which would be over-lapped by the survey made by the Dominion Government surveyor.

In such cases confusion and disputes between neighbours and litigation would ensue, and all because the Dominion Minister, under a misapprehension, I presume, proceeds without any authority whatever to take into his hands the administration of lands to which the Settlement Act says shall, until the completion of the railway, be left in the hands of the Provincial Government, who are familiar with all the circumstances bearing upon the situation, and therefore in a position to smooth out difficulties and facilitate settlement, which is certainly better than to create difficulties and complications such as are likely to ensue upon the course proposed by the Minister.

With reference to the Honourable the Minister's request to be permitted to have copies made by draughtsmen in the employ

RECORD

Court of Appeal of British Columbia

Exhibit No. 45
Letter
Chief Comm.
of Lands and
Works to
Trutch
Nov. 16, 1885
(Contd.)

of the Dominion Government of the Official plans and field notes of the survey of lands embraced within the Island Railway Grant, I shall be willing at any time to allow copies to be so made, as the Minister desires it, and I shall be glad to authorize the Surveyor General to verify and certify such copies when made. I would remark, however, that if certified copies of plans and field notes which are important data, are sufficient for the requirements of the Minister's Department, surely certified copies of applications for patents might be considered sufficient also, particularly as these papers are now part of the records of this office, duly registered and placed on file. If the Dominion Government had intimated at the outset that the originals of these papers would be required to be sent to Ottawa, we might have done so, and had certified copies registered and filed away in this office. It is obvious, however, that to withdraw original papers now which have been registered as originals, and to substitute copies therefor would be to falsify the record, and the Honourable the Minister will at once recognize that it is of the most vital importance in an office like this that the records should be kept inviolate.

I shall be glad to let any one sent by you from your office make copies of any maps, plans, field notes, papers or entries on the official records connected with the Island Railway lands; and it occurs to me that if my certificate as Chief Commissioner of the correctness of an applicant's claim for patent be not sufficient, that you may obtain from the Minister any further evidence necessary in this way without incurring the unnecessary expense of sending a surveyor to re-survey fractional parts of sections for which patents have been applied for in various districts within the Island Railway Belt.

I submit that the parties operating in the same field, at the same time, independently of each other, without the least concerted action, and both claiming to act with authority are bound to come into collision.

The Minister of the Interior would appear to think that as principals in the matter, the Dominion Government are at liberty to dispense with the service of their agents, and assume direct and sole control and management of the Island Railway and Island Railway lands. It will be well, however, possibly to remember that the Provincial Government are not agents in the ordinary sense. They are acting as such in pursuance of an agreement negotiated and entered into after the most careful and serious consideration, on a basis calculated to bring about an extensive settlement of Island Railway lands. That agreement was ratified

by concurrent Acts of Parliament of Canada, and of the Legislature of this Province, and cannot be lightly set aside, evaded or over-ridden.

There is another view also in which it might be well for the Minister to look at this question. The Provincial Government are the real principals in the matter of this railway and these lands. The lands are Provincial lands placed in the hands of the Dominion Government in trust to be applied to one purpose only, which is to secure for the Province the construction of the Island Railway. Even the money subsidy to be paid by the Dominion to the railway contractors was a debt due by the Dominion to the Province; so that in every way the Provincial Government are the real principals in this case, and are entitled upon the equities of the matter to be consulted and considered. If, however, the equitable view be not sufficient for the Honourable the Minister then the legal statutory provision embodied in Clause (f) of the settlement agreement, which confers upon the Provincial Government authority to administer Island Railway lands, surely will be, particularly when it is remembered that that arrangement was made at the time because it was admittedly in the interest of the settlement of these lands that it should be. The Provincial Government feel that they are not in a position to abandon the trust which has been placed in their hands. They cannot give up the administration of these lands, and they hope that the Dominion Government will not thwart their efforts to carry out the spirit of that portion of the Settlement Act which provides for the colonization of the agricultural lands within the Island Railway Belt during Railway construction.

I have, &c.

(Signed) Wm. Smithe.

Chief Commissioner of Lands and Works.

RECORD

In the Supreme Court of Canada

Exhibit No. 45A
Letter Smithe to Trutch Nov. 13, 1885

EXHIBIT No. 45A

Obtained in Department of Interior

Hon. W. Smithe to the Hon. J. W. Trutch, C.M.G.

LANDS AND WORKS DEPARTMENT,
BRITISH COLUMBIA.
VICTORIA, B.C.

November 13th, 1885.

Sir: I have the honour to acknowledge the receipt of your letter of the 23rd ultimo advising me that you have been informed by the Department of the Interior that the Honble the Minister does not think he is authorized by the Statute to delegate to the Esquimalt and Nanaimo Railway Coy. the making of the surveys suggested in my letter of the 2nd July last.

In reply I beg to say that I was quite aware that the Statute did not provide the Minister himself with authority to make surveys of Island Railway Lands and of course he could not under the provisions of the Statute delegate to the Railway Company an authority he did not himself possess. I was of the opinion, however, that all three parties to the Island Railway agreement—the Dominion Government, the Provincial Government and the Railway Company—consenting an arrangement, which appeared to me to be so clearly in the interest of the settlement of the Railway Lands on the Island, might be made, independent of strictly statutory authority. If, however the Provincial Government must continue to administer the lands until the completion of the railway, in accordance with the provisions of the Statute.

I have the honour to be
Sir
Your Obedient Servant,

(*Sd.*) Wm. Smithe,
Chief Com. L. & W.

The Honourable,
J. W. Trutch, C.M.G.,
Dominion Gov't. Agent,
Victoria, B.C.

EXHIBIT No. 45B

RECORD

In the Supreme Court of Canada

Exhibit No. 45B
Letter Lieut.-Gov. of B.C. to Hon. Sec'y of State Mar. 15, 1886

Obtained in Department of Transport

Government House,

Victoria, 15th March, 1886.

Sir,

I have the honour to forward a copy of an Order in Council dated March 15th with reference to a telegram received from the Honble Sir Alexander Campbell on the 25th Feby: stating that a Bill will be introduced into the Dominion Parliament authorizing assent to the alignment of the Nanaimo and Esquimalt Railway as it exists provided that my Government concur. I have this day telegraphed to you as follows:

Provincial Government concur in legislation authorizing assent to alignment Nanaimo Railway as it exists.

I have &c.

(*Sgd.*) Clement Y. Cornwall,
Lieut. Governor.

The Honble
The Secy. of State
Ottawa

RECORD

In the Supreme Court of Canada

EXHIBIT No. 45C

Obtained in Department of Transport

Exhibit No. 45C Report of Committee of Executive Council Mar. 15, 1886

Copy of a Report of a Committee of the Honourable the Executive Council approved by His Honor the Lieutenant Governor on the 15th day of March, 1886.

The Committee of Council have had under consideration a telegram from the Honourable Sir Alexander Campbell dated 25th February 1886, which states that a bill will be introduced into the Dominion Parliament authorizing assent to the alignment of the Esquimalt & Nanaimo Railway, as it exists, provided that the British Columbia Government concurs a detailed Report from Mr. Brophy, C.E., on the alignment in question, and also a copy of a letter from the Honble J. W. Trutch, C.M.G., Dominion Government Agent in British Columbia, forwarding said report to the Engineer in Chief of Government Railways and strongly recommending, for reasons therein set forth, that the alignment as it exists be concurred in.

The Committee agree with the views expressed by Mr. Trutch and advise therefore that His Honor the Lieutenant Governor be respectfully requested to forward the following telegram and also a copy of this minute to the Hon. the Secretary of State for Canada.

"Provincial Government concur in legislation authorizing assent to alignment Nanaimo Railway as it exists."

Certified

(*Sgd.*) Jno. Robson,
Clerk, Ex. Council.

EXHIBIT No. 45D

Exhibit No. 45D Letter Hon. Sec'y of State to Lieut.-Gov. of B.C. Mar. 27, 1886

Obtained in Department of Transport

Department of State,
Ottawa, 27th March, 1886.

To His Honor
The Lt. Govr. of British Columbia,
Victoria, B.C.

Sir,

I have the honour to ackge the receipt of your despatch of the 15th inst. transmitting a certified copy of a Report of your Ex. Council dated the 15th inst. in reference to the alignment of the Esquimalt & Nanaimo Railway as it exists.

I have &c.,
(*Sgd.*) G. Powell,
M.S.S.

EXHIBIT No. 45E

RECORD

In the Supreme Court of Canada

Exhibit No. 45E
Act Respecting the Rly from Esquimalt to Nanaimo
June 2, 1886

STATUTES OF CANADA, 49 VICT. CHAP. 15

An Act respecting the Railway from Esquimalt to Nanaimo, in British Columbia.

(Assented to 2nd June, 1886.)

WHEREAS by the articles of agreement between certain persons therein named and Her Majesty, therein represented by the Minister of Railways and Canals, and the specification thereunto annexed which are recited in the Act passed in the forty-seventh year of Her Majesty's reign, and chaptered six, it is provided that the gradients and alignments of the railway from Esquimalt to Nanaimo therein mentioned as to be constructed by the parties of the first part, or a company to be formed by their incorporation, shall be the best that the physical features of the country will admit without involving unusually or unnecessarily heavy works of construction, with respect to which the Governor in Council shall decide; and whereas the company formed as aforesaid, having carried the works of construction of the said railway far forward towards completion, have represented that in order to avoid such unusually heavy work, they have been compelled by the physical features of the country in many places, to adopt sharper curves than those mentioned in the said specification, and have prayed that the same be allowed by Parliament and the said Act amended accordingly; and inasmuch as it appears by the reports of the Engineer of the Department of Railways and Canals, who has inspected the said works, that the gradients of the said railway are as required by the said specification, and the work satisfactorily performed and that although sharper curves have been introduced than are admissible under the said specification, the railway is of a more durable and substantial character than if built where flatter curves could have been obtained, and that the allegations of the said company as to the difficulties arising from the physical features of the country appear to be true, it is expedient to grant their prayer: Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

1. The Governor in Council may, with the consent of the Lieutenant-Governor of the Province of British Columbia in Council, accept curves in the said railway not being of less radius than five hundred and seventy-three feet, as satisfying the requirements of the said Act forty-seventh Victoria, chapter six, which shall be construed and have effect as if that radius had been mentioned as the least allowed by paragraph two of the specification A in the schedule to the said Act, instead of a radius of eight hundred feet.

RECORD

Court of Appeal of British Columbia

Exhibit No. 46
Grant to
E. & N. Rly
April 21, 1887

EXHIBIT No. 46

GRANT dated 21st April, 1887, to E. & N. Ry.

SEAL.
John J. McGee

CANADA.

DEPUTY GOVERNOR

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland, QUEEN, Defender of the Faith, &c., &c., &c.

TO ALL TO WHOM THESE PRESENTS SHALL COME— GREETING:

WHEREAS by an act of the Legislature of British Columbia passed in the forty-seventh year of Our reign, Chapter 14, and intituled an "Act relating to the Island Railway, the Graving Dock, and Railway Lands of the Province" after reciting as is therein recited there was by section Three of the said Act granted to the Dominion Government for the purpose of constructing and to aid in the construction of a railway between Esquimalt and Nanaimo, and in trust to be appropriated as they may deem advisable, but save as is therein excepted, all that piece or parcel of land situated in Vancouver Island described as follows: Bounded on the South by a straight line drawn from the head of Saanich Inlet to Muir Creek on the Straits of Fuca; on the West by a straight line drawn from Muir Creek aforesaid to Crown Mountain, on the north by a straight line drawn from Crown Mountain to Seymour Narrows, and on the east by the Coast line of Vancouver Island to the point of commencement, and including all coal, coal oil, ores, stones, clay, marble, slate, mines, minerals and substances whatsoever thereupon, therein and thereunder.

AND WHEREAS by Section Four of the said Act there was excepted out of the tract of land granted by the said Section Three all that portion thereof, lying to the northward of a line running East and West half way between the mouth of the Courtenay River (Comox District) and Seymour Narrows.

AND WHEREAS by Section Five of the said Act, it was provided that the Government of Canada should be entitled out of such excepted tract to lands equal in extent to those alienated up to the date of the said Act by Crown Grant, Pre-emption or otherwise within the limits of the grant mentioned in the said Section Three.

AND WHEREAS by Section Six of the said Act it was provided that the Grant mentioned in Section Three of the said Act should not include any lands then held under Crown Grant, Lease, Agreement for Sale or other alienation by the Crown nor should it include Indian Reserves or settlements or Naval or Military Reserves.

AND WHEREAS by Section Twenty-three of the said Act it was provided that the Company which might acquire the said lands from the Dominion Government for the construction of the railway should be governed by sub-section (f) of the agreement in the said Act recited and that each bona fide squatter who had continuously occupied and improved any of the lands within the tract of land to be acquired by the Company from the Dominion Government for a period of one year prior to the first day of January, 1883, should be entitled to a grant of the freehold of the surface rights of the said squatted lands to the extent of one hundred and sixty acres to each squatter at the rate of one dollar an acre.

AND WHEREAS by sub-section (f) of the Agreement in the said Act recited it is provided that the said lands should, except as to coal, and other minerals, and also except as to timber lands, as thereinafter mentioned be open for four years from the passing of the said Act to actual settlers for agricultural purposes, at the rate of One dollar an acre to the extent of 160 acres to each such actual settler, and that in any grants to settlers the right to cut timber for Railway purposes and rights of way for the Railway and Stations and workshops should be reserved.

AND WHEREAS by Section Twenty-four of the said Act it was enacted that the Company should at all times sell coals gotten from the lands that might be acquired by them from the Dominion Government to any Canadian Railway Company having the terminus of its Railway on the sea-board of British Columbia, and to the Imperial, Dominion and Provincial authorities, at the same rates as might be charged to any Railway Company owning or operating any Railway in the United States, or to any foreign customer whatsoever.

AND WHEREAS by Section Twenty-five of the said Act it was provided that all lands acquired by the Company from the Dominion Government under the said Act containing belts of timber fit for milling purposes should be sold at a price to be thereafter fixed by the Government of the Dominion or by the Company.

RECORD

Court of Appeal of British Columbia

Exhibit No. 46
Grant to
E. & N. Rly
April 21, 1887
(Contd.)

AND WHEREAS by Section Twenty-six of the said Act it was provided that the existing rights, if any, of any persons or corporations in any of the lands so to be acquired by the Company should not be affected by the said Act nor should it affect Military or Naval Reserves.

AND WHEREAS by an Act of the Parliament of Canada passed in the forty-seventh year of Our Reign, Chapter Six and intituled "An Act respecting the Vancouver Island Railway, the Esquimalt Graving Dock and certain railway lands of the Province of British Columbia granted to the Dominion" after reciting as is therein recited it is amongst other things in effect enacted that the Governor-in-Council may grant to the Esquimalt and Nanaimo Railway Company in aid of the construction of a railway from Esquimalt to Nanaimo, British Columbia, and of a telegraph line of the said railway, besides the subsidy in money mentioned in the said Act. All of the land situated on Vancouver Island which has been granted to us, by the Legislature of British Columbia by the Act hereinbefore in part recited in aid of the construction of the said line of railway in so far as such land shall be vested in us, and held by us for the purposes of the said railway or to aid in the construction of the same; and also all coal, coal oil, ores, stones, clay, marble, slate, mines, minerals and substances whatsoever in, on or under, the lands so to be granted to the said Company as aforesaid, and the foreshore rights in respect of all such lands as aforesaid, which are to be granted to the said Company as aforesaid. and which border on the sea, together with the privilege of mining under the foreshore and sea opposite any such land and of mining and keeping for their own use all coal and minerals herein mentioned, under the foreshore or sea opposite any such lands, in so far as such coal, coal oil, ores, stones, clay, marble, slates, mines, minerals and substances whatsoever and foreshore rights are vested in Us, as represented by the Government of Canada.

AND FURTHER that no lands shall be conveyed to the said Company until the road is fully completed and equipped.

AND FURTHER that the land grant shall be made and the land in so far as the same shall be vested in Us and held by Us for the purposes of the said railway or to aid in the construction of the same shall be conveyed to the said Company upon the completion of the whole work to the entire satisfaction of the Governor-in-Council but so nevertheless that the said lands and the coal oil, coal and other minerals and timber thereunder therein or there-

on shall be subject in every respect to certain provisions set out in the Seventh Section of the said Act.

AND WHEREAS it has been agreed by and between the Government of Canada, the Government of British Columbia and the said Company that the Grant of the said lands to the said Company shall be by the description hereinafter contained, that the exact boundaries of the lands covered by such grant shall be as settled and agreed upon by and between the Government of British Columbia and the said Company and further that it shall not be necessary for settlers under Sub-section (f) of the agreement recited in the said Act of the Legislature of British Columbia to pay the price of lands pre-empted by them in full before the expiry of four years from the passing of the said Act and that the terms of payment by such settlers for their land shall be those provided by the laws affecting Crown Lands in British Columbia, and that the Company shall grant them their conveyances upon demand when such price shall have been paid in full.

AND WHEREAS the whole work undertaken by the said Company has been completed to the entire satisfaction of Our Governor-in-Council, and Our Governor-in-Council has recommended that the land grant provided for by the said Act should now be made subject however to the stipulations and conditions hereinafter mentioned, and We deem it expedient that such grant shall so be made.

NOW KNOW YE, that We do by these presents in consideration of the premises and under and by virtue of the said acts of the Parliament of Canada and of the Legislature of British Columbia hereinbefore in part recited and by virtue of every other power us in that behalf enabling and by and with the advice of Our Privy Council for Canada Grant, Assign and Convey unto the Esquimalt and Nanaimo Railway Company and its successors and assigns All and singular the land situated on Vancouver Islnd which has been granted to Us by the Act of the Legislature of the Province of British Columbia passed in the Forty-seventh year of Our Reign, Chaptered Fourteen and intituled "An Act relating to the Island Railway, the Graving Dock, and Railway lands of the Province" in aid of the construction of the said line of Railway in so far as such lands are vested in Us and held by Us for the purposes of the said Railway or to aid in the construction of the same, and also all coal, coal oil, ores, stones, clay, marble, slate, mines, minerals and substances whatsoever in, on or under such lands, and the foreshore rights in respect of such of the said lands as border on the sea together with the privilege

RECORD

Court of Appeal of British Columbia

Exhibit No. 46
Grant to
E. & N. Rly
April 21, 1887
(Contd.)

of mining under the foreshore and sea opposite any such land, and of mining and keeping for its and their own use all coal and minerals herein mentioned, under the foreshore or sea opposite any such lands in so far as such coal, coal oil, ores, stones, clay, marble, slate, mines, minerals and substances and foreshore rights are vested in Us as represented by the Government of Canada, and also the full benefit and advantage of the rights and privileges granted to Us by Section Five of the said Act of the Legislature of British Columbia.

To HAVE AND TO HOLD the said lands, coal, coal oil, ores, stones, clay, marble, slate, mines, minerals and substances and the said foreshore rights and privileges of mining and the said rights and privileges in the said Section Five of the said Act of the Legislature of British Columbia referred to unto and to the use of the said Company its successors and assigns, forever subject: Subject nevertheless to the several stipulations and conditions affecting the same hereinbefore recited and which are contained in the Acts of the Parliament of Canada and of the Legislature of British Columbia hereinbefore in part recited, as such stipulations are modified by terms hereinbefore recited of the agreement so made as aforesaid by and between the Government of Canada, the Government of British Columbia and the said Company.

GIVEN UNDER the Great Seal of Canada.

WITNESS, John Joseph McGee, Esquire, Deputy to Our Right Trusty and Entirely Beloved Cousin the Most Honourable Henry Charles Keith Petty Fitzmaurice, Marquess of Landsdowne, in the County of Somerset, Earl of Wycombe, of Chipping Wycombe in the County of Bucks, Viscount Calne and Clanstone in the County of Wilts, and Lord Wycombe Baron of Chipping Wycombe in the County of Bucks, in the Peerage of Great Britain, Earl of Kerry and Earl of Shelburne, Viscount Clanmaurice and Fitzmaurice, Baron of Kerry, Luxnaw and Dunherron, in the peerage of Ireland, Knight, Grand Cross of Our Most Distinguished Order of St. Michael and Saint George, Governor General of Canada and Vice-Admiral of the same, &c., &c., &c.

AT OTTAWA, this twenty first day of April, in the year of Our Lord One thousand eight hundred and eighty-seven and in the fiftieth day of Our Reign. BY COMMAND.

G. Powell,
Under Secretary of State.

A. M. Burgess,
Deputy of the Minister of the Interior.

Exhibit No. 46
Grant to E. & N. Rly
April 21, 1887
(Contd.)

I HEREBY CERTIFY that this paper writing contained in seven sheets of paper is a true and correct copy of the documents registered in my office the 26th day of May, 1887, and now in my custody.

As WITNESS my hand and seal of Office at Victoria, Province of British Columbia, this 19th day of April, 1917.

"J. C. Gwynn"
Registrar General of Titles.

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10 EXHIBIT No. 47

Exhibit No. 47
Extract Report of Committee of Privy Council July 30, 1895

Extract from a Report of the Committee of the Honourable the Privy Council, approved by His Excellency on the 30th July, 1895.

On a report, dated 11th July, 1895, from the Minister of the Interior, stating that by Section 3 of Chapter 14 of the Statutes of British Columbia, 1883, there was granted to the Dominion Government for the purpose of constructing, and to aid in the construction, of a railway between Esquimalt and Nanaimo, a tract of land therein described. Sections 4 and 5 of the Act re-
20 ferred to are as follows—

> "4. There is excepted out of the tract of land granted by the preceding section all that portion thereof lying to the northward of a line running east and west half way between the mouth of the Courtenay River (Comox District) and Seymour Narrows."
>
> "5. Provided, always, that the Government of Canada shall be entitled out of such excepted tracts to lands equal in extent to those alienated up to the date of this Act by Crown grant, pre-emption, or otherwise, within the limits of the
30 grant mentioned in section 3 of this Act."

Paragraph (b) of the preamble to the Act in question sets forth that the lands to which the Government of Canada shall be entitled under section 5 above quoted shall be to the northward of and contiguous to the tract mentioned in Section 3.

The Minister observes that by the Act, 47 Victoria, Chapter 6, the Parliament of Canada made provision for the construction of the railway between Esquimalt and Nanaimo by a Company (hereinafter referred to as "the Company") and for the grant to such Company of "all the land situated on Vancouver

Island which has been granted to Her Majesty by the Legislature of British Columbia by the Act last aforesaid, in aid of the construction of the said line of railway, in so far as such land shall be vested in Her Majesty and held by Her for the purposes of the said railway, or to aid in the construction of the same."

On the completion of the railway a patent was issued to the Company by the Government of Canada for the land on Vancouver Island which formed the subject of the Provincial Act of 1883. That patent specifically included "the full benefit and advantage of the rights and privileges granted to us by section 5" of the Act in question.

The Minister submits herewith a copy of a letter from the Secretary of the Esquimalt and Nanaimo Railway Company, setting forth that the Company, find, upon enquiry, that 86,346 acres of land within the limits of the tract conveyed to Canada as aforesaid had, prior to the date of such conveyance been alienated by Crown Grant, pre-emption, or otherwise. They represent that they have, therefore, selected and caused to be surveyed a like area of land within the tract set apart for that purpose and they request that application be made by the Government of Canada to the Government of British Columbia for a conveyance of this area, as shown upon the plan herewith in order that it may be transferred to them.

The Minister further represents that the Minister of Justice, to whom the matter has been referred, states that the evident intention of the agreement between the two Governments was that the lands to be granted to the Government of Canada pursuant to Section 5 of the Provincial Act, in lieu of lands which had been alienated, were to be used like the rest of the grant in aid of the construction of the railway, and that in his opinion the provisions relating to the land subsidy in the agreement with the contractors, as well as the authority to make the land grant to the Company given by the Governor in Council by section 3 of the Dominion Act, must be taken to extend as well to these lands as to those actually granted by the Provincial Act itself.

The Minister of Justice advises, therefore, that it is the duty of the Government of Canada to apply to the Government of British Columbia for a transfer or grant of lands in substitution for those so alienated as aforesaid, and to convey such lands to the Company when they are transferred.

The Minister recommends that application be made to the Lieutenant Governor of British Columbia and that when the

Exhibit No. 47
Extract
Report of
Committee of
Privy Council
July 30, 1895
(Contd.)

lands which are the subject of that application have been handed over to the Government of Canada they be conveyed to the Esquimalt and Nanaimo Railway Company, in the same manner as those which have already passed to the Company under patent from the Government of Canada.

The Committee advise that a certified copy of this Minute, if approved, be forwarded to the Lieutenant Governor of British Columbia.

(Signed) Joseph Pope,
Assistant Clerk of Privy Council.

His Honour the Lieutenant Governor
of the Province of British Columbia.

EXHIBIT No. 48

Exhibit No. 48
Letter
Acting Sec'y
of State to
Lieut.-Gov.
of B.C.
Aug. 13, 1895

(Letter No. 3, 987, File No. 4, 481).

Department of the Secretary of State,
Ottawa, 13th August, 1895.

Sir,—

His Excellency the Governor General has had under his consideration in Council a report from the Honourable the Minister of the Interior, bearing date the 11th of July 1895, in connection with the construction of a railway between Esquimalt and Nanaimo, and submitting in such connection a letter from the Secretary of the Esquimalt and Nanaimo Railway Company.

The Minister having recited the facts in the case and having recommended for the reasons and on the grounds set forth in his report above mentioned, that an application should be made to Your Honour for a grant of certain lands and that when the lands which are the subject of such application have been handed over to the Government of Canada they be conveyed to the said Railway Company, in the same manner as those which have already passed to that Company under patent from this Government, His Excellency in Council was pleased to make an order in the premises upon the 30th ultimo, a certified copy of which is herewith transmitted for Your Honour's information.

I have, etc.

(Signed) C. P. Pelletier,
Acting Under Secretary of State.

His Honour
The Lieutenant Governor of British Columbia.

RECORD

Court of Appeal of British Columbia

Exhibit No. 49
Letter
Sec'y E. & N. Rly
to Minister Rlys and Canals
Dec. 13, 1895

EXHIBIT No. 49

Esquimalt and Nanaimo Railway Company
Victoria, B.C., Dec. 13, 1895.

To the Honourable,
The Minister of Railways and Canals,
Ottawa.

Sir,—

I am instructed by the Esquimalt and Nanaimo Railway Company to write you with reference to the lands to be granted to the Government of Canada under Section 5 of 47 Vic., Cap. 14, Provincial Statutes, and intituled "An Act relating to the Island Railway, the Graving Dock, and Railway Lands of the Province."

By this section the Government of Canada is entitled out of the lands excepted by Section 4 of the said Act to lands equal in extent to those alienated up to date of the said Act (19th December, 1883), by Crown Grant, Pre-emption, or otherwise, within the limits of the grant mentioned in Section 3 of the said Act.

By paragraph (b) of the Agreement, confirmed by section 1 of the said Act, it sets forth that the lands to be so acquired shall be to the northward of and contiguous to that portion of the land to be granted as therein set forth.

By Act of the Dominion Parliament, 47 Victoria, Cap. 6, Sec. 3, power is given to the Governor in Council, to grant to the Esquimalt and Nanaimo Railway Company, inter alia, all of the land situated on Vancouver Island which had been granted to Her Majesty by the Legislature of British Columbia by 47 Vic. Cap. 14, in aid of the construction of the said line of railway, in so far as such land shall be vested in Her Majesty and held by her for the purposes of the said railway, etc.

The Company upon enquiry, find that 86,346 acres of land had been alienated by Crown grant, pre-emption, or otherwise, within the limits of the grant mentioned in Sec. 3 of 47 Vic. Cap. 14 (Provincial) and the Company therefore have had surveyed out of the excepted lands a quantity equal to that alienated, as shown upon the plan forwarded herewith and enclosed within the red lines.

The Company have the honour to request that you will cause application to be made to the Provincial Government for a con-

veyance of the said lands to the Dominion Government under Section 5 of 47 Victoria, Chap. 14 (Provincial) in order that they may be transferred to the Esquimalt and Nanaimo Railway Company.

I have, etc.

(Signed) Chas. E. Pooley,
Secretary.

Exhibit No. 49
Letter
Sec'y E. & N. Rly
to Minister Rlys and Canals
Dec. 13, 1895
(Contd.)

EXHIBIT No. 50

Exhibit No. 50
Letter
Sec'y E. & N. Rly to Chief Comm. Lands and Works
Feb. 19, 1896

Victoria, B.C., 19th Feb., 1896.

The Honourable,
The Chief Commissioner of Lands and Works,
Victoria.

Sir,—

I have the honour, by direction of the Esquimalt and Nanaimo Railway Company, to forward you a plan of the land surveyed by the Company north of the line running east and west half way between the mouth of the Courtenay River (Comox) District, and Seymour Narrows, which the Company desire the Government to convey to them under Section 5 of Chapter 14, of 1884, known as an Act relating to the Island Railway, etc.

On the said plan the land claimed by the Company under Section 5 is surrounded by a red band, and contains about 86,346 acres, the amount of land equal in extent to that alienated up to the date of the passage of the said Act by Crown grant, pre-emption, or otherwise, within the limits of the grant mentioned in Section 3 of the said Act.

As the Company are desirous of dealing with some of this land, I have the honour to request that you will cause a grant thereof to be issued to the Company at an early date.

I have, etc.

(Signed) Chas. E. Pooley,
Secretary E. & N. Railway Co.

RECORD

Court of Appeal of British Columbia

EXHIBIT No. 51

Victoria, B.C., February 20, 1896.

Exhibit No. 51 Letter Chief Comm. Lands and Works to Sec'y E. & N. Feb. 20, 1896

Sir,—

I have the honour to acknowledge the receipt of your letter of the 19th inst. forwarding plan of the land surveyed by the Esquimalt and Nanaimo Railway Company north of the line running east and west half way between the mouth of the Courtenay River and Seymour Narrows, which the Company desire the Government to convey to them under Section 5 of Chapter 14, of 1884, known as an Act relating to the Island Railway, etc., and asking that a grant of this land be issued to the Company at an early date.

I have, etc.

(Signed) Geo. B. Martin,
Chief Commissioner of Lands and Works.

Hon. C. E. Pooley,
Secretary E. & N. Railway Company,
Victoria, B.C.

Exhibit No. 52 Sessional Papers B.C. 1896 April 16, 1896

EXHIBIT No. 52

Sessional Papers of B.C. 1896. P. 1053.

RETURN:

To an Address presented to His Honour the Lieutenant Governor, praying him to cause to be sent down to the House a Return showing copies of the applications made to the Provincial Government by the Dominion Government on 13th August, 1895, and the Esquimalt and Nanaimo Railway Company on February 19th, 1896, or any applications made by the said parties at any other time, for grants or concessions of land in lieu of land alienated up to 19th December, 1883, within the Island Railway Belt, or for any other purpose, and copies of all correspondence in connection therewith.

Geo. B. Martin,
Chief Commissioner of Lands and Works.

Lands and Works Department,
16th April, 1896.

RECORD

Court of Appeal of British Columbia

Exhibit No. 53
Letter
Private Sec'y of Lieut.-Governor to Sec'y of State for Canada with Minute of Executive Council
June 25, 1896

EXHIBIT No. 53

With P.C., No. 1568 J—1896: Ref. 409, 311 and 426, 115 on 82,810 (3).

GOVERNMENT HOUSE.

Victoria, 25th June, 1896.

Sir,—

In the absence of His Honour the Lieutenant-Governor, I beg to transmit, herewith, a certified copy of an approved Minute, dated the 3rd instant, embodying a recommendation that a grant of certain lands on Vancouver Island, be made to the Federal Government on behalf of the Esquimalt and Nanaimo Railway Company.

I have, etc.,

Mallcott Richardson,
Private Secretary.

The Honourable The Secretary of State for Canada,
Ottawa, Ont.

Copy of a Report of a Committee of the Honourable the Executive Council, approved by His Honour the Lieutenant-Governor on the 5th day of June, 1896.

On a Memorandum from the Honourable the Chief Commissioner of Lands and Works, dated 3rd of June, 1896, referring to a communication from the Acting Under Secretary of State for the Dominion, dated 13th August, 1895, enclosing an extract from a Report of the Committee of the Honourable the Privy Council, approved by His Excellency on the 30th July, 1895, covering a report from the Honourable the Minister of the Interior bearing date 11th July, 1895, on the subject of an application from the Esquimalt and Nanaimo Railway Company for a conveyance of 86,346 acres of land (the location of which is more particularly indicated by a map which accompanies the application) under Section 5 of 47 Vic., Chap. 14, Provincial Statutes; and paragraph (b) of the Agreement confirmed by Section 1 of the said Act.

The Minister reports that 86,346 acres correctly represents the quantity of land which has been alienated by the Province within the limits of the grant mentioned in Section 3 of the Act cited and that the Dominion Government are entitled to a grant or conveyance of that quantity of land, but that they are not entitled to select the block extending to the northward of the 50th

RECORD

Court of Appeal of British Columbia

Exhibit No. 53 Letter Private Sec'y of Lieut.-Governor to Sec'y of State for Canada with Minute of Executive Council June 25, 1896 (Contd.)

parallel of latitude and in the manner indicated by the map above referred to for the following reasons:—

1st. The block of land asked for by the Railway Company does not extend back from the coast the full width of the railway belt as contemplated by the Act, but covers a greater extent of coast frontage than is consistent with the word "contiguous" in paragraph (b) of the agreement before referred to.

2nd. Subsequent to the passage of the Act, 46 Vic., Chap. 14 (12th May, 1883) the late Honourable William Smithe, Premier, and the late Honourable Robert Dunsmuir, M.P.P., in conference on the subject of the construction of the proposed railway, and on the administration of the lands comprised within the limits of the railway belt, caused an estimate of the area of the alienated lands referred to in paragraph (b) of the agreement embodied in said Act to be made, and its position north of and contiguous to the half-way line between the mouth of Courtenay River and Seymour Narrows to be defined approximately upon the large map of Vancouver Island which hangs on the wall of the Lands and Works office. This half-way line was found to be considerably to the south of the 50th parallel. It was then arranged and agreed upon verbally by Mr. Smithe and Mr. Dunsmuir that in order to avoid delay and the retarding of settlement the 50th parallel should be taken as a line to the northward of which the Government should have the right to dispose of lands on behalf of the Province, and the true position of the boundary of the railway belt to the south of that parallel to be determined at a future date. In furtherance of that understanding, His Honour the Lieutenant-Governor in Council directed that the notice of the 1st July, 1873, reserving a strip of land 20 miles in width along the eastern coast of Vancouver Island for railway purposes be rescinded, and further directed the establishment of another reservation of land in aid of the construction of the Island Railway. Notice of this later reservation was published in the British Columbia Gazette and dated 12th June, 1883, and a copy is annexed to the Minute.

By reference to this notice it will be seen that the northern boundary of this reserved belt is defined as "a straight line drawn from Crown Mountain towards Seymour Narrows to the 50th parallel of latitude; thence due east along said parallel of latitude to a point on the coast opposite Cape Mudge." Subsequently an engineer was employed to define and mark on the ground the position of the 50th parallel, and all lands north of it which come within the scope of this Minute have been disposed of

Exhibit No. 53
Letter
Private Sec'y of Lieut.-Governor to Sec'y of State for Canada with Minute of Executive Council June 25, 1896 (Contd.)

and alienated by the Province and are not available for railway purposes.

That the Esquimalt and Nanaimo Railway Company acquiesced in this disposition of these lands is evident from the fact that they never filed any protest against sales being made to persons who published notices of their desire to purchase or lease as required by the Land Laws at that time.

The Minister recommends that a grant be made to the Dominion Government of 86,346 acres of land to the northward of and adjacent to the half-way line before referred to and extending back from the coast to the western boundary of the Railway Reservation, and as more particularly indicated upon the map accompanying this Minute and thereon coloured green, and that a copy of this Minute, if approved, be transmitted to the Secretary of State.

The Committee advise approval.

James Baker,
Clerk, Executive Council.

EXHIBIT No. 54

Exhibit No. 54
Extract Rept. Comm. of Privy Council Nov. 30, 1896

EXTRACT FROM A REPORT OF THE COMMITTEE OF THE HONOURABLE THE PRIVY COUNCIL, approved by His Excellency on the 30th November, 1896. P.C. No. 1568 J.

Despatch and 8 Enclosures.

The Committee of the Privy Council have had under consideration a communication, hereto attached, dated 25th June, 1896, from the Private Secretary of the Lieutenant-Governor of British Columbia, transmitting a Minute of the Executive Council of that Province, relating to the lands on Vancouver Island, for a grant of which application has been made by the British Columbia Government, at the instance and on behalf of the Esquimalt and Nanaimo Railway Company.

The Acting Minister of the Interior, to whom the matter was referred, submits the following report thereon:—

The Order in Council of the 30th July, 1895, recites the facts with regard to the Railway Company's application for a grant of 86.346 acres to take the place of the lands which had been alienated from the Crown prior to the date of the transfer made by

RECORD

Court of Appeal of British Columbia

Exhibit No. 54
Extract Rept. Comm. of Privy Council Nov. 30, 1896 (Contd.)

the Province of British Columbia to the Dominion of Canada by the Provincial Act, 46 Victoria, Chap. 14. Under authority of that Order in Council, application was made to the Lieutenant-Governor of British Columbia, to have the 86,346 acres mentioned placed at the disposal of the Dominion Government for the purpose of being conveyed to the Railway Company. It appears from the Minute of the Executive Council of British Columbia, dated 5th June, 1896, that the Provincial authorities admit that the Dominion Government are entitled to a grant or conveyance of the area mentioned for the purpose of completing the Railway Company's grant, but submit that the Company are not entitled to select the block which has been applied for, as shewn approximately hatched in red on the annexed plan, marked A. Instead of that block the Provincial Government submit that, for the reasons set forth in the Minute of the Executive Council, the grant to the company should consist of the block shewn hatched green on the same plan.

Although the application of the company does not specifically make reference to the mineral rights in the tract of 86,346 acres applied for, it is apparently understood so far as they are concerned, that the grant is not to be confined to the surface rights. In this connection the Acting Minister of the Interior submits a copy of a question which was asked by Mr. W. W. B. McInnes, M.P., in the House of Commons during last Session, with regard to the claims of certain settlers within the tract of land already conveyed to the company. These settlers evidently are under the impression that they have been deprived of rights guaranteed to them by Subsection 5 of Section 7 of an Act passed by the Parliament of Canada in the 47th year of Her Majesty's Reign, intituled "An Act respecting the Vancouver Island Railway." Appended to Mr. McInnes's question is a copy of the reply which was made thereto on behalf of the Government.

The Acting Minister of the Interior understands from Mr. McInnes that the settlers referred to include those who were the holders of pre-emption records prior to the date of the Provincial legislation of 1883, and that the Province, in dealing with the claims of such settlers, granted the surface rights only, and Mr. McInnes contends that if the Company are to receive the mineral rights in the tract of 86,346 acres for which they are now applying, it would be but right that the settlers in question should now be granted the mineral rights as well as the surface rights contained within their respective holdings.

If it be the fact, as alleged by Mr. McInnes, that the grants made by the Province to the pre-emptors referred to did not include the right to the minerals, and that such right has passed to the Company, his contention in the premises would appear to be well founded, at least to the extent that the Railway Company cannot be entitled to the mineral rights in the tract of 86,346 acres, which has been patented to the settlers, and also in the 86,346 acres for which they have applied by way of compensation.

The Acting Minister of the Interior is, therefore, of the opinion that, in pursuance of the trust imposed upon the Dominion Government by the terms of the respective Acts of the Province of British Columbia, and of the Dominion of Canada, in relation to the Esquimalt and Nanaimo Railway Company's land, it would be desirable that the Dominion Government should ascertain the nature of the title granted by the Province to the pre-emptors in question, and also the views of the Government of British Columbia upon Mr. McInnes's proposition.

The Acting Minister of the Interior, having this object in view, recommends that a copy of the Order in Council hereon be transmitted to the Lieutenant-Governor of British Columbia, with the request that it be brought to the attention of his Executive Council, and that they be invited to send to the Dominion Government, at as early a date as possible, a statement of their conclusions in the premises.

The Acting Minister of the Interior adds that in the meantime, he has communicated to the Railway Company the reply of the Provincial Government, and has asked the Company to state whether they accept the proposition of the Province. He has also informed the Company of the contentions of Mr. McInnes on behalf of the pre-emptors, and that the views of the Provincial Government are being asked in this relation.

The Committee, approving of the report of the Acting Minister of the Interior, submit the same for Your Excellency's approval.

John J. McGee,
Clerk of Privy Council.

To the Honourable The Minister of the Interior.

RECORD

Court of Appeal of British Columbia

Exhibit No. 55
Report of Commissioner E. Harrison, J.
Jan. 4, 1901

EXHIBIT No. 55

REPORT BY E. HARRISON, *J.*, COMMISSIONER.

(Part only.)

Victoria, January 4th, 1901.

To The Honourable Sir Henry Gustave Joly de Lotbiniere, K.C.M.G., Lieutenant Governor of the Province of British Columbia.

Your Honour—I have the honour, in pursuance of the commission dated the 12th day of October, 1900, appointing me to inquire into the grievances of the settlers within the tract of land granted to the Esquimalt and Nanaimo Railway Company, to report as follows—

The Commission was opened at Nanaimo on the 24th day of October, 1900.

At the request of some of those who appeared, the taking of their evidence was adjourned until the 8th day of November, 1900.

A circular letter was then sent by registered post to each person who was known to have claimed as a settler, and to those who were known to claim through prior settlers calling attention to the adjournment, and the time and place of holding the next sitting.

Sittings, of which public notice was given, were also held at the Court House, Cumberland (Comox District) and at the Court House, Duncan (Cowichan District).

No claimant appeared before me who had settled on land prior to the railway reserve of the 30th June, 1873. Every person who appeared before me had either received a grant under "An Act relating to the Island Railway, the Graving Dock and Railway Lands of the Province," Chapter 14 (19th Dec.), 1883-4—Commonly called the "Settlement Act" either from the Dominion or from the Esquimalt and Nanaimo Railway Company, or had purchased or was devisee of land which had previously been so granted. Certain of the settlers on the Island Railway Belt who took possession of lands included in that Belt, and who are referred to in section 23 of the Settlement Act as squatters, claim that, in lieu of the grants to them, under that Act, of the surface rights to the land they were in possession of, they should have received, and should yet receive grants from the Crown without any reservation, except of the precious metals, grants as some of

them put it, the same as other people received of lands outside the Belt, or of lands inside which were pre-empted before the reservation.

They lay particular stress on the fact that coal in particular, was excluded from the grants they received.

Another claim advanced is, that if the right to the minerals (if any) under their lands cannot be granted to them they should have "something in lieu of them."

Others complain that the railway was built through their lands without compensation for the right of way.

Another complaint is that they have been told and believe that the Esquimalt and Nanaimo Railway Company obtained not only a grant of the coal and other minerals under the land squatted on, but also obtained from the Government of Canada, under the head of "Lands in lieu of lands pre-empted or otherwise alienated within the Railway Belt," the same quantity of additional lands, with coal rights, as that squatted on, thus, in that respect, doubling what the Company ought to receive.

This complaint may be disposed of at once, as it has in fact no foundation whatever.

Like claims are set up by persons who were not the original squatters, but who purchased the improvements, or whatever right or interest the original squatters had; in some cases before the Settlement Act was passed, and in others after its passage; in some cases after the original squatter obtained a grant under that Act, and in cases, also where they themselves have obtained a grant under that Act. These persons contend that their claims should stand on the same footing as if they were original squatters.

Another position taken in one case is that, though at present he has no grievance or complaint, still if any one who squatted on the belt after the reservation should get a grant of anything other than the surface rights, or receive anything additional to, or in lieu of, the grant under the Settlement Act, all should be treated alike, and he "should receive what the others get."

To understand the position of affairs, and the nature of these claims, and what, if any, ground there may be for them, it is necessary to go into the history of the railway belt from the time the lands on Vancouver Island were reserved for railway purposes, and to examine the different provisions of the law from time to time governing the disposal and acquisition of Crown Lands on

RECORD

Court of Appeal of British Columbia

Exhibit No. 55
Report of Commissioner E. Harrison, J.
Jan. 4, 1901
(Contd.)

Vancouver Island; to ascertain how and to what extent Crown lands could be acquired, and in what manner, and to what extent they could be granted, and as the claims are advanced in respect of, and in consequence of, entry on and possession of Crown lands when under reservation, it becomes necessary to inquire into the facts and circumstances attendant on and surrounding the entry on and taking possession of these lands; and as the complaints are against grants issued to them of the surface rights, which the Legislature authorized to be granted to them under the Settlement Act, it is also necessary to inquire into the circumstances under which those grants were made, and issued to and received by the grantees.

RAILWAY BELT AND RESERVATION OF CROWN LANDS ON VANCOUVER ISLAND FOR RAILWAY PURPOSES:

Vide. B.C. Papers in connection with the construction of the C.P.R. 1880? B.C. Sessional Papers, 1879, et ann seq.

On the 20th July, 1871, British Columbia was admitted into and became part of Canada on certain Terms and Conditions.

Section 11 of the Term of Union is as follows—

"11. The Government of the Dominion undertake to secure the commencement simultaneously, within two years from the date of Union, of the construction of a railway from the Pacific towards the Rocky Mountains, and from such point as may be selected east of the Rocky Mountains towards the Pacific to connect the sea board of British Columbia with the railway system of Canada; and further, to secure the completion of such railway within ten years from the date of the Union.

"And the Government of British Columbia agrees to convey to the Dominion Government, in trust, to be appropriated in such a manner as the Dominion Government may deem advisable in furtherance of the construction of the said railway, a similar extent of public lands along the line of railway throughout its entire length in British Columbia, not to exceed, however twenty miles on each side of the said line, as may be appropriated for the same purpose by the Dominion Government from the public lands in the Northwest Territories and the Province of Manitoba; Provided that the quantity of land which may be held under pre-emption right, or by Crown Grant, within the limits of the tract of land in British Columbia to be so conveyed to the Dominion

Government shall be made good to the Dominion from contiguous public lands, and provided, further, that until the commencement, within two years as aforesaid from the date of the Union, of the construction of the said railway, the Government of British Columbia shall not sell or alienate any further portions of the public lands in British Columbia in any other way than under right of pre-emption, requiring actual residence of the pre-emptor on the land claimed by him.

"In consideration of the land to be so conveyed in aid of the construction of the said railway, the Dominion Government agree to pay to British Columbia from the date of the Union the sum of one hundred thousand dollars per annum in half yearly payments in advance."

Immediately upon Union all lands of the Province were withdrawn from sale or alienation. On the 7th day of June, 1873, by Order of the Governor-General in Council, on a Memorandum of the Chief Engineer of the Canadian Pacific Railway, Esquimalt, on Vancouver Island, was fixed as the terminus of the Canadian Pacific Railway; and it was decided that a line of railway be located between the Harbour of Esquimalt and Seymour Narrows, on the said Island, and that application immediately be made to the Lieutenant-Governor of British Columbia for the conveyance to the Dominion Government, in trust, according to the 11th paragraph of the Terms of Agreement of Union, of a strip of land twenty miles in width along the eastern coast of Vancouver Island, between Seymour Narrows and the Harbour of Esquimalt, and it was intimated that an Order of the Lieutenant-Governor of British Columbia in Council, appropriating this tract of land in furtherance of the construction of the said railway, would be necessary in order to operate as a sufficient conveyance and reservation of the said land to and for the Dominion Government.

On the 10th day of June, 1873, application was made to the British Columbia Government for such conveyance.

On the 30th day of June, 1873, the Lieutenant-Governor in Council reserved the twenty mile Belt lying between Esquimalt Harbour and Seymour Narrows, and the conveyance in trust of the said land asked for by the Dominion Government was deferred, and the following notice of reservation was adopted and ordered to be published in a Gazette Extraordinary—

"Whereas, by an Order in Council, dated the 7th day of June, 1873, of the Honourable the Privy Council of Canada,

RECORD

Court of Appeal of British Columbia

Exhibit No. 55
Report of Commissioner E. Harrison, J.
Jan. 4, 1901
(Contd.)

it has been decided "that Esquimalt in Vancouver Island, be fixed as the terminus of the Canadian Pacific Railway, and that a line of railway be located between the Harbour of Esquimalt and Seymour Narrows, on the said Island."

AND WHEREAS in accordance with the terms of the said Order in Council, application has been made to His Honour the Lieutenant-Governor of British Columbia for a reservation and for a conveyance to the Dominion Government in trust according to the eleventh paragraph of the Terms of Agreement of Union, of a strip of land twenty miles in width along the eastern coast of Vancouver Island, between Seymour Narrows and the Harbour of Esquimalt in furtherance of the construction of the said railway.

AND WHEREAS it has been deemed advisable that the lands within the limits aforesaid should be reserved prior to any conveyance aforesaid being made thereof:

"Public notice is, therefore, hereby given that from and after this date a strip of land twenty miles in width along the eastern coast of Vancouver Island, between Seymour Narrows and the Harbour of Esquimalt is hereby reserved."

Official notification of this reserve was published in the Government (British Columbia) Gazette on the 1st day of July, 1873. In the usual course of business the Queen's Printer would forward copies of this Gazette to the different Government Agents and Land Recorders.

On the 30th June, 1873, Mr. T. L. Fawcett, Land Recorder at Nanaimo, was informed by letter, by the Chief Commissioner of Lands and Works of the reservation, and instructed that no more pre-emptions would be granted in that belt.

By report of the Dominion Privy Council, approved by the Governor-General on the 3rd day of September, 1873, it was submitted—

"that so long as the land referred to is not alienated from the Crown, but held under reservation, the object of the Government of the Dominion will be obtained, that object being simply that when the railway shall come to be constructed the land in question shall be at the disposition of the Government of the Dominion for the purposes laid down in the eleventh section of the Terms of Union with British Columbia."

On the 22nd day of September, 1873, the Provincial Government urged that the boundaries of the land on Vancouver Island proposed to be claimed by the Government of the Dominion in trust, to aid in the construction of the railway under the Terms of Union, might be at once defined, and that a competent person in this Province might be appointed to dispose of said lands on such terms as would admit of settlement, and authorized the Honourable Amor De Cosmos, President of the Executive Council and Premier of the Ministry, to confer with the Government of Canada on this subject.

On the 8th day of October, 1873, the Provincial Government were informed that "the subject of the occupation of lands reserved by the Dominion Government" would receive due consideration.

On the 22nd day of November, 1873, the Government of British Columbia, after stating that the non-fulfilment by the Dominion Government of the Terms of Union had caused a strong feeling of anxiety and discouragement to exist throughout the Province, asked the Dominion Government for a decided expression of its policy with regard to the fulfilment of the eleventh article of the Terms of Union, and that the decision arrived at be communicated at the earliest moment possible.

On the 9th day of February, 1874, the Legislature of British Columbia protested against the infraction of the eleventh Article of the Terms of Union, as the construction of the railway had not been commenced.

In 1874, proposals were made on behalf of the Dominion Government, inter alia—

> "To commence the construction from Esquimalt to Nanaimo immediately, and push that portion of the railway on to completion with the utmost vigour, and in the shortest practicable time"

provided British Columbia would agree to a relaxation of the Terms of Union.

On the 11th day of June, 1874, the Government of British Columbia appointed a special agent and delegate to proceed to London and present and support a memorial and remonstrance on behalf of British Columbia, regarding the non-fulfilment of Clause 11 of the Terms of Union, by the Dominion Government.

In Section 19 of such Memorial or Petition, it was, inter alia, stated that, immediately upon union with Canada all the lands of

RECORD

Court of Appeal of British Columbia

Exhibit No. 55
Report of Commissioner E. Harrison, J.
Jan. 4, 1901
(Contd.)

the Province were withdrawn from sale or alienation, and that the Provincial Government had agreed to reserve, and had ever since reserved, the Belt on Vancouver Island, "a tract of most valuable land, abounding in vast mineral wealth, and easy of access from the sea."

On the 17th day of November, 1874, the decision of the Earl of Carnarvon on the controversy between the Dominion of Canada and the Province of British Columbia respecting the Canadian Pacific Railway was rendered, deciding, inter alia, that the railway from Esquimalt to Nanaimo should be commenced as soon as possible and completed with all practicable dispatch.

On the 31st day of March, 1875, at the then session of the British Columbia Legislature, Mr. Robson, Member for Nanaimo, asked the following question (Journals, 1875, p. 26).

"The Premier of Canada, having stated from his place in Parliament that the British Columbia Government have power under the 11th section of the Act of Union to allow persons to go upon the land reserved on Vancouver Island for railway purposes, and having intimated that the Dominion Government would be disposed favourably to regard the exercise of such power, is it the intention of the Government to permit pre-emption upon the said lands?"

The Honourable Mr. Beaven, Chief Commissioner of Lands and Works, replied as follows:

"No official information has been received by the Government on the subject referred to, but application was made to the Dominion Government on behalf of the Province for the purpose of securing the settlement of the lands reserved for railway purposes on the east coast of Vancouver Island, without jeopardizing the rights of British Columbia to railway construction; but no such arrangement has been consummated. The Government do not intend at present to issue any certificates of pre-emption for lands in the reservation referred to."

On the 25th day of March, 1875, the Dominion Privy Council reported on a memorandum, dated 25th March, 1875, from the Honourable the Minister of Public Works reporting for the consideration of Council that, prior to the commencement of any works of construction on the proposed railway from Esquimalt to Nanaimo, which the Dominion Government have agreed to build under the arrangement made through Lord Carnarvon at the instance of British Columbia, it is essential that the Province of British Columbia should convey, by legislation to the Dominion Government in trust, to be appropriated in such manner as the Do-

minion Government may deem advisable, a similar extent of public lands along the line of railway before mentioned (not to exceed twenty miles on each side of said line) as may be appropriated for the same purpose by the Dominion from the public lands of the North West Territories and the Province of Manitoba, as provided in the Order in Council, section 00, admitting the Province of British Columbia into Confederation, and that it was desirable that the British Columbia Government should be at once notified that it will be necessary, during the present session of the Legislature of that Province, to pass an Act so to appropriate and set apart lands to this extent, and for this purpose; the grant to be subject, otherwise, to all the conditions contained in the said eleventh Section of the Terms of Union.

The Committee of Council concurred in the above report of the Minister of Public Works, and recommended that the British Columbia Government be notified accordingly, and an Act of the Legislature of British Columbia was passed, intituled, "An Act to authorize the Grant of certain Public Lands to the Government of the Dominion of Canada for Railway Purposes" (Assented to the 22nd day of April, 1875)—reciting that,—

"Whereas it is expedient to provide for the grant of public lands to the Dominion Government required for a railway between the Town of Nanaimo and Esquimalt Harbour" and enacting by section 1:—

"From and after the passing of this Act there shall be and there is hereby granted to the Dominion Government for the purpose of constructing, and to aid in the construction, of a railway between the Town of Nanaimo and Esquimalt Harbour, in trust, to be appropriated in such manner as the Dominion Government may deem advisable, a similar extent of lands along the line of railway before mentioned (not to exceed twenty miles on each side of the said line) as may be appropriated for the same purpose by the Dominion from the public lands of the North West Territories and the Province of Manitoba, as provided in the Order in Council, Section 11, admitting the Province of British Columbia into Confederation; such grant to be subject otherwise to all the conditions contained in the said eleventh section of the Terms of Union."

And by Section 2:—

"All and every the provisions of the Railway Act, 1868, passed by the Parliament of Canada in the thirty-first year of the reign of Her Majesty, and being Chapter 68, including

any Acts amending the same, in so far as the provisions therein contained are applicable to the said railway or any section thereof, and are not inconsistent with or repugnant to the provisions of this Act, shall, mutatis mutandis, be considered as forming part of this Act, and are hereby incorporated herewith."

The line of railway between Esquimalt and Nanaimo was subsequently practically located and steel rails landed at those two places.

On the 20th day of September, 1875, the Dominion Government offered $750,000 to the Province as compensation for any delays which might take place in the construction of the Canadian Pacific Railway, such $750,000 to be applied by the Province to building a railway from Esquimalt to Nanaimo or to such other local public works as the people of the Province might think advantageous, and undertook to surrender any claims to lands which might have been reserved for railway purposes.

The Provincial Government unhesitatingly but respectfully declined this proposal, and strongly pressed upon the Dominion Government the absolute necessity of the Railway Agreement being carried out according to the terms thereof.

On the 21st day of January, 1876, the Legislature of British Columbia again protested and strongly urged that Lord Carnarvon's settlement be carried out, and on the 2nd day of February, 1875, petitioned Her Majesty.

On the 15th day of May, 1876, Mr. Ash moved, seconded by Mr. Bryden—

> "That in the event of the lands reserved for railway purposes on the east coast of Vancouver Island reverting to the Province, it is the opinion of this House that the claims of bona fide agricultural settlers should be respected."

The Motion was withdrawn by leave of the House.

On the 9th day of June, 1876, the Dominion Government concurred in a memorandum reporting that they had withdrawn from sale or settlement certain lands in Manitoba and the North West and that the line of the Canadian Pacific Railway had been defined and located through part of British Columbia and requesting that the lands in British Columbia along this line from Tete Jaune Cache to a point near the confluence of the Stewart and Chilcoot rivers be forthwith conveyed, and that at present an Order in Council of British Columbia appropriating the land will

suffice, but suggesting that an Act be passed by the Legislature of British Columbia conveying the said lands to Her Majesty for the purposes of the Government of Canada, and to be appropriated in such manner as the Dominion Government might deem advisable in furtherance of the construction of the said railway, and further recommending that, in order to give due information to the public, and to prevent squatters, or the pre-emption of any portion of the land so conveyed, the Lieutenant Governor should be invited to give public notice of the passing of such Order in Council and of the conveyance of the said lands.

On the 23rd day of May, 1878, the Dominion Government cancelled the Order in Council of the 7th day of June, 1873, designating Esquimalt as the terminus of the Canadian Pacific Railway and requiring the conveyance of the Island Railway Belt.

On the 29th day of August, 1878, the Legislature again petitioned Her Majesty.

On the 22nd day of April, 1879, the following Order in Council was passed by the Dominion Government annulling the Order in Council of the 23rd day of May, 1878, and reviving the Order in Council of the 7th day of June, 1873.

"On a Memorandum dated the 16th day of April, 1879, from the Honourable the Minister of Public Works representing that on a memorandum from the Chief Engineer of the Canadian Pacific Railway, dated the 23rd day of May, 1873, an Order in Council was passed on the 7th day of June, 1873, fixing Esquimalt on Vancouver Island, as the terminus of the railway in British Columbia. That subsequently, on the 25th day of March, 1875, an Order in Council was passed authorizing the Dominion Government to notify the Government of British Columbia that it would be necessary that the Legislature of that Province, then in session, should pass an Act setting apart such extent of public lands along the line of railway in Vancouver Island in the manner set forth by the eleventh paragraph of the Terms of Agreement of the Union, and recommending that the Order in Council of the 23rd day of May, 1878, be annulled, and that of June the 7th, 1873, be revived, and that a copy of the Minister's Report to Council be furnished to the Honourable the Secretary of State for transmission to the Government of British Columbia for their information."

On the 14th day of May, 1879, the Provincial Government requested the Dominion Government to inform them whether a

RECORD

Court of Appeal of British Columbia

Exhibit No. 55
Report of Commissioner E. Harrison, J. Jan. 4, 1901 (Contd.)

former reserve made at the instance of the Dominion Government along the Fraser and Thompson rivers to Tete Jaune Cache should be cancelled or retained.

In June, 1879, the Provincial Government were informed that the object of the Order in Council of the 22nd day of April, 1879, was simply to rescind the Order in Council of the 23rd day of May, 1878, so as to leave the General Government free to adopt whichever route might appear, in the public interest, the most eligible, and that it was not proposed to release the reservation of land on either route.

On the 1st day of April, 1880, the Dominion Government requested the Provincial Government to grant them lands outside the forty mile belt in lieu of lands within that limit which should be found to be valueless, and to supply the deficiency caused by the International boundary on the Mainland and the coast line of Vancouver Island, respectively, falling within the forty mile belt.

In reply, the Dominion Government were requested—

1st. To define the lands which they might consider valueless for agriculture or other economic purposes.

2nd. To indicate the lands which they might desire to secure in lieu thereof.

3rd. To state how they proposed to deal with such lands if ceded to them, the Committee, deeming it essential that this should be done in order to prevent as far as possible an extension of the serious injury and loss already sustained by the Province by the withdrawal from settlement, since June, 1873, by special request of the Dominion, of a valuable tract of 3,200 square miles of land on Vancouver Island for railway purposes.

4th. To inform the Provincial Government of the nature of the guarantees that they were willing to give that railway work on the mainland would be continuously and actively prosecuted, and that, within an early definite period the promise to construct the Island section of the trunk line would be fulfilled.

In October, 1880, the following letter and estimate were sent by the Honourable George A. Walkem to the Honourable Amor De Cosmos, who was conducting negotiations with the Dominion Government relative to railway matters—

"Lands and Works Department,
Victoria, B.C., Oct. 29, 1880.

"Hon. Amor De Cosmos, M.P.,
Ottawa.

Sir,—

I enclose you a statement, carefully gathered from the records of the Department, of the lands available for railway purposes within the Mainland and Island Belts. The statement is comprehensive enough to need no explanation. Coal croppings have been found as far south as Shoal Harbour and discoveries of coal have recently been made in several localities south of Nanaimo. The lands containing these prospects have been applied for, but of course cannot be dealt with by the local Government, as they were ceded to the Dominion by Statute of 1875.

For seven years back, intending settlers have been turned aside from the eastern coast of the Island on account of the lands being locked up for railway purposes.

This state of things, either in the interests of the Dominion or of any railway company, must be very damaging, as both must depend upon settlement of the lands for revenue.

I feel assured, from the active interest and able advocacy you have displayed in dealing with this subject, that you will exert every influence within your reach to have the Island section commenced as soon as possible.

When a time limit of ten years for the construction of the whole line is fixed, why should this portion of it be left untouched for a longer period? The line already established on the Mainland cannot be prejudiced by any arrangements for securing speedy construction of the further section referred to.

I have telegraphed in a condensed form the substance of the enclosed figures, so that you might have them for immediate use.

I have, etc.,

(Signed) George A. Walkem,
Chief Commissioner of Lands and Works.

"ESTIMATE (closely approximate) of areas of public lands which have been disposed of within the Railway Belt between Esquimalt and Nanaimo, area of coal deposits, etc.

VANCOUVER ISLAND.

	Acres.	Acres.
Total area of Railway Belt, square miles, 1,100		704,000
Sold or pre-empted	126,500	
Indian Reserves, surveyed	13,590	

RECORD

Court of Appeal of British Columbia

Exhibit No. 55
Report of Commissioner E. Harrison, J.
Jan. 4, 1901
(Contd.)

Government Reserves, surveyed	1,200	
Newcastle Townsite (surveyed into lots, 126 acres)	724	
Sold	42	
	682	
Timber leases	3,316	
Coal lands sold	10.034	
		155,322
Available for railway purposes		548,678

"The coal deposits within the Railway Belt extend—

1st. From near Cape Mudge to North West Bay, and have a productive area of about 300 square miles.

2nd. From Departure Bay to the north end of North Saanich and, including the adjacent islands, is estimated to have a productive area of 160 square miles, half of which may be said to appertain to Vancouver Island.

(Signed) W. S. Gore,
Surveyor General.

On the 26th day of January, 1881, in the Provincial Legislature Dr. Ash, presented a petition from the residents of Comox which was read, received and ordered to be laid on the table.

On the 3rd day of March, 1881, on motion of Dr. Ash, seconded by Mr. Abrams, it was resolved that—

> "In the opinion of this House, the petition of the residents of the Electoral District of Comox, respecting the withdrawal of the existing reserve of the twenty miles of land lying between Nanaimo and Seymour Narrows, deserves the favourable consideration of the Government."

The Legislature of British Columbia again petitioned Her Majesty, and Lord Kimberley, in August, 1881, expressed the opinion that—

1st. The construction of a light line of railway from Nanaimo to Esquimalt.

2nd. The extension, without delay, of the line on the Mainland to Port Moody, and

3rd. The grant of a reasonable compensation in money for failure to complete the work within the term of ten years, as specified in the conditions of Union, would offer a fair basis for a settlement of the whole matter.

On the 21st day of March, 1882, it was moved by Mr. Smithe, seconded by Mr. Harris, (B.C. Journals 1882 p. 23).

"That this House being very strongly of opinion that the rights of settlers upon lands within the railway reserve in the Province should be recognized."

"Be it therefore Resolved, That a respectful address be presented to His Honour the Lieutenant Governor, praying that he will be pleased to communicate with the Dominion Government with a view to provide for a recognition of the settlers rights on railway lands in this Province, and to arrange the terms upon which the title to said lands shall be acquired by the said settlers.

"And be it further Resolved, That the title of squatters upon lands within any railway reserve in the Province to the lands upon which they have squatted shall be secured to them before the said reserved railway lands shall be transferred to the Dominion Government, or to any railway syndicate."

The Honourable Mr. Walkem, Chief Commissioner of Lands and Works, moved in amendment, seconded by Mr. McGillivray, that all the words after "being" in the first line be struck out, and the following substituted therefor—

"Of the opinion that the rights of bona fide settlers who have settled upon and cultivated land within the railway reserve in this Province, and who would have been entitled to pre-empt the said lands had they not been reserved, should be recognized.

"Be it therefore Resolved, That a respectful address be presented to His Honour the Lieutenant Governor, praying that he will be pleased to communicate with the Dominion Government with a view to provide for recognition of such settlers' rights and to arrange the terms upon which the title to said lands shall be acquired by them."

The debate on this motion and amendment was adjourned to the next sitting of the House, and subsequently the motion was withdrawn.

In April, 1882, the Legislature of British Columbia, by Chapter 15 "An Act to incorporate the Vancouver Land and Railway Company" incorporated Lewis M. Clement and others, to build a railway from Esquimalt to Seymour Narrows.

By Section 17, the Company were to give security for the construction, completion and equipment of the railway.

RECORD

Court of Appeal of British Columbia

Exhibit No. 55
Report of Commissioner E. Harrison, J.
Jan. 4, 1901
(Contd.)

By Section 18, the Government of British Columbia, provided security were given, were to set aside and reserve to the Company, and upon completion of the railway were to grant to the Company, 1,900,000 acres, more or less, of public lands on Vancouver Island, within boundaries extending from the head of Saanich Inlet to Seymour Narrows, and including all coal, minerals and substances whatsoever thereupon and thereunder.

By Section 19, special provision was made as to farming squatters.

By Section 20, the existing rights with regard to the lands referred to, of all persons and corporations whose titles had not been completed, were not to be affected.

On the 21st day of April, 1882, Chapter 13 of 1875 "An Act Conveying the Railway Belt on Vancouver Island" was repealed, and on the same day all public lands on Vancouver Island bounded on the south by a straight line drawn from the head of Saanich Inlet to Muir Creek, on the Straits of Fuca, on the west by a straight line drawn from Muir Creek, aforesaid to Crown Mountain; on the north by a straight line drawn from Crown Mountain to Seymour Narrows; and on the east by the coast line of Vancouver Island to the point of commencement, were reserved for the purpose of enabling the Government of British Columbia to carry out the Clement's Bill and on the next day official notification of this reserve was published in the Government Gazette.

The original reservation of 1873, was, however, not rescinded.

In November, 1882, the British Columbia Executive reported that, prior to the last session of the Legislature, the Government had been unable to induce the Dominion Government to provide for the construction of the railway on Vancouver Island.

That during the session two applications to incorporate companies by Private Bill to construct a railway on the east coast of Vancouver Island had been made; one by the Vancouver Land and Railway Company (the Clement's Bill); the other by R. Dunsmuir and others, as the Victoria, Esquimalt and Nanaimo Railway Company, asking for a land grant similar to the one in the Clement's Bill; that the Clement's Bill had failed through failure to give security; and that the Victoria, Esquimalt and Nanaimo Bill had been killed in the House; and that the attention of the Dominion Government be called to the question, with the request to take such steps as might be necessary to secure the construction of the railway from Esquimalt next spring, and to

give such an assurance as early as possible, so as to enable the Provincial Government to place it before the Legislature at the opening of the approaching session.

Between April, 1882, and February, 1883, certain settlers who had pre-empted lands in the Island Railway Belt before the reservation, but who had not proved up and obtained their Crown Grants, and certain persons who had taken possession of Crown Lands in that belt after the reservation of 1873, and the conveyance to the Dominion Government of the 21st April, 1875 (referred to in the Clement's Bill as "squatters"), petitioned the Governor General to take into consideration their previous requests, that an official intimation that the settlers or squatters would be secured their promised rights, and that they would be able to obtain the land on the same terms and conditions as similar lands outside the railway reserve had, in previous years been conveyed to pre-emptors.

This petition was also signed by some who already held other lands, and wished to increase the size of their estates and claimed additional land without living on it, and whose "possession" of it was a mere figure of speech.

It was also signed by some who had squatted after the passage of the Clement's Bill and by some who had purchased after the Clement's Bill—the improvements of some prior squatter. This Petition was signed by 121 persons, including 24 in Cowichan District.

On the 10th day of February, 1883, the Provincial Executive reported with reference to the Island railway, among other things—

"That the land on the east coast of Vancouver Island had been continuously withheld from settlement since July, 1873, up to the present time, and the development of that fertile tract of country, abounding in mineral wealth, had been retarded to an incalculable extent."

And they recommended as a basis of settlement of the railway and railway land questions that the Dominion be urgently requested . . . "to commence to construct the Island railway and to complete it with all practicable dispatch, or by giving such compensation for failure to build it as would enable the Provincial Government to build it as a Provincial work and open the east coast lands for settlement."

RECORD

Court of Appeal of British Columbia

Exhibit No. 55
Report of Commissioner E. Harrison, J.
Jan. 4, 1901
(Contd.)

A copy of this Report was given to the Agent of the Dominion Government, and a copy was sent to the Dominion Secretary of State. On the 26th day of February, 1883, in the Provincial Legislature (B.C. Journals, 1883, p. 14) Mr. Raybould, member for Nanaimo, asked the Leader of the Government—

"If they are aware that a petition has been forwarded to the Dominion Government by the settlers in Cedar, Cranberry, Wellington, Mountain, Comox and Cowichan Districts, and if it is the intention of the Provincial Government to respect the 'squatters' rights if it is found that the Island Railway lands have reverted to the Province?"

The Honourable Mr. Smithe replied—

"The Government are aware that such a petition was forwarded. The lands are reserved for railway purposes to the Federal Government, against whom a claim exists for keeping the lands so long from settlement without building the Island Railway. In the event of those lands reverting to the Province it will be the aim of the Government to deal equitably with all bona fide settlers."

On the 15th day of March, 1883 (B.C. Journals, 1883, p. 34), Mr. Dunsmuir asked the Leader of the Government:

"Is it the intention of the Government to lift the reserve off the lands on the east coast of Vancouver Island with a view to opening more lands for settlement."

The Honourable Mr. Smithe replied—

"In view of the negotiations now pending between the Provincial and Dominion Governments for the construction of the Island railway by the Dominion, the Government do not feel at liberty at present to deal with the lands on the east coast of the Island. It is hoped, however, that construction of the railway and setlement of the lands will proceed simultaneously and the efforts of the Government will be directed to that end."

In the same session, on the 7th day of May, 1883, (Journals, 1883, p. 75), "An Act Relating to the Island Railway, the Graving Dock and Railway Lands of the Province." was introduced by the Honourable Mr. Smithe, Leader of the Government, after negotiations between the Provincial Government and the Agent of the Dominion Government in the Province.

This Bill passed its second reading on the 9th day of May, 1883, and its third reading on the 10th day of May, 1883, and was assented to on the 12th day of May, 1883.

This Act, after reciting therein the supposed effect of what had been agreed on, granted to the Dominion part of the lands mentioned in the Clement's Bill, including all coal, etc., and minerals and substances whatsoever thereupon and thereunder.

Section (f) of the recitals stated that the lands to be so conveyed, except as to the coal and other minerals, and also except as to timber lands, should be open for four years from the passing of the Act to actual settlers for agricultural purposes to the extent of 160 acres to each actual settler.

By section 25, the price of timber lands was to be fixed by the Dominion Government or the Company.

By section 23, the Company were to be bound by section (f) and were also to grant to each bona fide squatter who had continuously occupied and improved any of the lands within the tract to be acquired from the Dominion Government, for a period of one year prior to the 1st day of January, 1883, the freehold of the surface rights of the squatted land to the extent of 160 acres to each squatter.

On the 12th day of June, 1883, the Lieutenant-Governor in Council rescinded the reservation of the 30th June, 1873, and reserved all public lands lying within the following boundaries in furtherance of the construction of the Island railway—"A tract of land bounded on the south by a straight line drawn from the head of Saanich Inlet to Muir Creek, on the Straits of Fuca, on the west by a straight line drawn from Muir Creek aforesaid to Crown Mountain; on the north by a straight line drawn from Crown Mountain towards Seymour Narrows to the 50th parallel of latitude; thence due east along the said parallel of latitude to a point on the coast opposite Cape Mudge; and on the east by the coast line of Vancouver Island to the point of commencement.

This last reservation in effect excluded part of the lands included in the original reservation of 1873, and which had been also reserved to carry out the Clement's Bill.

In the meantime, on the 9th day of May, 1883, the Dominion Government had, on consideration of the despatch of the Provincial Government of the 10th day of February, 1883, recommended certain propositions as a final adjustment of all differences between the two Governments, proposing, among other things, that the Dominion Government should appropriate lands on Vancouver Island and the sum of $750,000 to a company to be incorporated at their instance by the Legislature of British Columbia, and

RECORD

Court of Appeal of British Columbia

Exhibit No. 55
Report of Commissioner E. Harrison, J. Jan. 4, 1901 (Contd.)

which Company should give satisfactory security for the completion of the railway from Esquimalt to Nanaimo.

The Dominion Government declined to make the railway a Government work, which they claimed Chapter 13 of the Statutes of 1883 virtually did; and on the 23rd day of June, 1883, appointed Sir Alexander Campbell to personally communicate with the Provincial Government on various questions unsettled between the two Governments, and to urge a speedy meeting of the Provincial Legislature to amend Chapter 13 of 1883; and to communicate with Mr. Dunsmuir, or other capitalists desirous of forming a Company to construct the railway.

On the 17th day of August, 1883, Sir Alexander Campbell wrote the following letter—

At Victoria, 17th August, 1883.

Dear Mr. Smithe—

I should be glad to have a reply to my inquiry about the treatment to be accorded to bona fide settlers anterior to the setting aside of the railway belt between this place and Nanaimo. As I mentioned to you, I promised to send a reply to the persons who waited on me. I should be glad to carry out this promise before leaving.

Yours faithfully,

(Signed) A. Campbell.

To this letter Mr. Smithe replied—

Victoria, B.C., 17 Aug., 1883.

Dear Sir,—

Concerning your inquiry about the treatment to be accorded to bona fide settlers anterior to the setting aside of the railway belt between Esquimalt and Nanaimo, I have no reason to believe that there can be any such settlers, as the right to pre-empt existed before and at the time the railway reservation was established. Persons desiring to settle at the time would have preferred pre-empting to squatting upon the land.

Yours, etc.

(Signed) Wm. Smithe.

On the 20th day of August, 1883, a memorandum of the arrangement made between the two Governments was signed by the representative of each Government, and on the same day a contract for the construction of the railway was executed by Mr. Dunsmuir

and his associates and Sir Alexander Campbell and placed in escrow pending sanction by both Legislatures, the Government of British Columbia agreeing to obtain the assent of the contractor to the purchase by settlers of surface rights at one dollar per acre: The Government of Canada agreeing to grant to the contractor all the lands on Vancouver Island granted to the Dominion Government by Chap. 13 of 1883, and all coal, minerals and substances in or under such lands, and also the foreshore rights, with the right to the coal and other minerals under the foreshore, in so far as such coal, minerals and substances and foreshore rights were owned by the Dominion Government.

On the 5th and 7th days of December, 1883, petitions were presented to the Legislature of British Columbia then in Session (Sessional Papers 1884, pp. 5 to 11) from residents of Nanaimo and Comox protesting against the Settlement Act, and submitting for the consideration of the Legislature their objections, among other things—

"That the Settlement Bill virtually creates a monopoly inasmuch as it makes no stipulation that the Dominion Government shall transfer the railway reserve to the Railway Company under provisions that shall secure to the public the right to purchase agricultural, timber and coal lands at any fixed price, or in any definite quantity, or that the regulations provided for the purchase of coal lands from the Dominion Government in other parts of the Dominion have not been made to apply to the Vancouver Island Railway Reserve."

These petitions were signed by fifty-four of the claimants who had signed the petition to the Governor-General before referred to, and were read, received and laid on the table, and ordered to be printed.

On the 7th day of December, 1883 (B.C. Journals 1884, p. 11) orders were granted for Returns showing the names of all persons who, during the present year, had made claim to land within the original reserve on Vancouver Island, the names of those whose claims had been recognized by the Chief Commissioner of Lands and Works, and the nature, extent and locality of the claims so recognized; and the Return was presented on the 10th day of December, 1883.

On the 12th day of December, 1883, the Honourable the Chief Commissioner of Lands and Works was asked by Mr. Grant—

"What acreage of land is held by pre-emption right, or by Crown Grant, within the limits of the tract of land on Vancouver

RECORD

Court of Appeal of British Columbia

Exhibit No. 55
Report of Commissioner E. Harrison, J.
Jan. 4, 1901
(Contd.)

Island known as the Railway Reserve, and what number of acres are so reserved?"

The Leader of the Government was also asked—

"What steps, if any, were taken by the Government to make the value of the Vancouver Island Railway Reserve and the land in Peace River known to capitalists in Canada, Europe and the United States, before concluding the present arrangement with the Dominion Government?"

On the 12th day of December, 1883, Mr. Dingwall asked—

"Is the Comox Valley, or any part of the District, open to settlement there; if so, on what terms?"

The Honourable the Chief Commissioner of Lands and Works replied—

"No part of the Comox District is open for settlement any more than it has been during the last ten years. Settlers can, of course, hold Crown lands by occupation, pending the settlement of the Island railway question. Intending settlers are advised to that effect by the Immigration Agent.

"Provision is made in the Settlement Bill now before the House for the sale of the land within the Railway Belt at one dollar per acre, by the Provincial Government acting as agents of the Dominion Government."

By Chapter 14 of 1883-4 "An Act relating to the Island Railway, the Graving Dock and the Railway Lands of the Province" commonly known as the Settlement Act, which was introduced on the 7th day of December, 1883, read a third time on the 18th, and assented to on the 19th day of December, 1883, the Legislature of British Columbia, after reciting that negotiations between the two Governments had been pending relative to delays in the commencement and construction of the Canadian Pacific Railway, and relative to the Island Railway . . . and railway lands of the Province, and that it had been agreed—

(a) To amend the grant to the Dominion Government of the lands on the Mainland for Canadian Pacific Railway purposes, so that the same extent of British Columbia lands on each side of the line wherever finally settled should be granted to the Dominion Government in lieu of the lands conveyed by Chapter 11 of 1880.

(b) That the Government of British Columbia should obtain authority of the Legislature to grant to the Govern-

ment of Canada that portion of the lands set forth and described in Act No. 15 of 1882 (The Clement's Bill) extending from the south boundary thereof to a line running east and west half way between Comox and Seymour Narrows, and also a further portion of the lands conveyed by the said Act to the northward of and contiguous to that portion of the said lands last specified, and equal in extent to the lands within the limits thereof which might have been alienated from the Crown by Crown grant, pre-emption or otherwise.

(c) The Government of British Columbia was to obtain authority to convey three and a half millions of acres of land in Peace River District to the Dominion Government;

(d) The Government of British Columbia were to procure the incorporation by Act of their Legislature, of certain persons to be designated by the Government of Canada for the construction of the railway.

(e) The Government of Canada upon the adoption by the Legislature of British Columbia of the Agreement, were to seek the sanction of Parliament to contribute $750,000 to the construction of a railway from Esquimalt to Nanaimo, and they agreed to hand over to the contractors who might build such railway the lands which were or might be placed in their hands for that purpose by British Columbia.

(f) The lands on Vancouver Island to be so conveyed, except as to coal and other minerals, and except as to timber lands, were to be open for four years after the passing of this Statute to actual settlers for agricultural purposes at the rate of $1.00 per acre to the extent of 160 acres to each settler, and in any grants to settlers the right to cut timber for railway purposes, and right of way for the railway, and stations and workshops were to be reserved:

Sub-section (f) also provided that until the railway should be completed the Provincial Government should be the agents of the Government of Canada for administering, for the purposes of settlement, the lands so conveyed, and might issue records to actual settlers.

The moneys received by them were, however, to be paid over to the credit of the Dominion Government and such moneys less expenses, on completion of the railway to the satisfaction of the Dominion Government, were to be paid over to the railway contractors.

RECORD

Court of Appeal of British Columbia

Exhibit No. 55
Report of Commissioner E. Harrison, J.
Jan. 4, 1901
(Contd.)

(g) . . . .
(h) . . . .
(i) . . . .
(j) . . . .

(k.) This agreement was to be taken by the Province in full of all claims up to that date by the Province against the Dominion in respect of delays in the commencement and construction of the Canadian Pacific Railway, and in respect of the non-construction of the Esquimalt and Nanaimo Railway, and was to be taken by the Dominion Government in satisfaction for additional lands under the Terms of Union, but should not be binding unless and until the same should be ratified by both Legislatures. And the Act further recited that the said agreement should be ratified and provision should be made to carry out its terms.

By the Act it was then enacted—

Sec. 1. That the thereinbefore recited agreement should be, and the same was thereby, adopted.

Sec. 3. Granted to the Dominion for the purpose of constructing, and to aid in the construction, of the railway, and in trust to be appropriated as they might deem advisable, but save as thereinafter excepted, all that tract of land on Vancouver Island bounded on the south by a straight line drawn from the head of Saanich Inlet to Muir Creek, on the Straits of Fuca; on the west by a straight line drawn from Muir Creek aforesaid to Crown Mountain; on the north by a straight line drawn from Crown Mountain to Seymour Narrows; and on the east by the coast line of Vancouver Island. And including all coal, minerals and substances whatsoever thereupon, therein and thereunder.

Sec. 4. Excepted from the grant that portion thereof lying to the northward of a line running east and west half way between the mouth of the Courtenay River (Comox District) and Seymour Narrows:

Sec. 5 provided that the Government of Canada should be entitled, out of the excepted tract, to lands equal in extent to those alienated up to the date of the Act by Crown grant, pre-emption or otherwise within the limits of the grant.

Sec. 6 enacted that the grant should not include any lands then held under Crown grant, lease agreement for sale or any other alienation by the Crown, nor Indian Reserves or settlements, or naval or military reserves.

Sec. 26 enacted that the existing rights of any persons or corporations in any of the lands to be acquired by the company incorporated by the Act should not be affected by the Act.

Sec. 23 provided that the company should be governed by sub-section (f) of the before recited agreement, and that each bona fide squatter who had continuously occupied and improved any of the lands within the tract to be acquired by the company from the Dominion Government for a period of one year prior to the first day of January, 1883, should be entitled to a grant of the freehold of the surface rights of the said squatted land, to the extent of 160 acres to each squatter, at the rate of $1.00 per acre.

Sec. 7 granted to the Dominion Government three and a half million acres of land in the Peace River District.

By Chapter 6, 1884, of the Dominion Statutes, "An Act respecting the Vancouver Island Railway, the Esquimalt Graving Dock and certain Railway lands of the Province of British Columbia granted to the Dominion," the agreement before recited and the agreement with the contractors to build the railway were approved of and ratified by the Dominion Legislature.

By Section 3 and 7, the Governor in Council was empowered to grant a subsidy of $750,000, and the lands and minerals granted to the Dominion Government by the Provincial statutes, and also the foreshore rights and the coal and other minerals under the foreshore or sea opposite any such land in so far as such foreshore rights and coal and minerals were vested in Her Majesty as represented by the Dominion Government, on completion of the work to the satisfaction of the Governor in Council, but subject nevertheless to the same provisions as to grants of surface righs to settlers and squatters as are contained in the Provincial statutes; and

By Section 7, provision in the same terms as in the Provincial statutes was made for the administration of the land by the Provincial Government, as agent for the Dominion Government.

By Sub-section (4) of Section 7, the price of timber lands was to be fixed by the Dominion Government or the Railway Company; and

By Sub-section (5) of the same section, the existing rights of any persons or corporations in any of the lands to be acquired by the Company were not to be affected.

On the third reading of this Act, Mr. Gordon, member for Nanaimo, called attention to the fact that a number of persons had squatted on the lands and claimed mineral rights.

RECORD

Court of Appeal of British Columbia

Exhibit No. 55
Report of Commissioner E. Harrison, J.
Jan. 4, 1901
(Contd.)

ACQUISITION OF CROWN LANDS AND CROWN MINERAL LANDS ON VANCOUVER ISLAND

The Island of Vancouver, "together with all royalties of the seas upon the coast and all mines Royal thereto belonging," was granted by Her Majesty on the 13th January, 1849, 12 Victoria, to the Governor and Company of Adventurers of England trading into Hudson's Bay, "to the intent that the said Governor and Company should establish a settlement of resident colonists and should dispose of the land there as might be necessary for the purposes of colonization."

The Company sold lands, reserving all minerals, but licensed their grantees to mine for coal, should they think proper to do so, under the lands acquired by them from the Company, upon paying a royalty of two shillings and sixpence per ton.

Several thousand acres of land were sold by the Company on these terms.

The grant of the Company was subsequently surrendered, and the Crown lands were administered by the Governor of Vancouver Island, and subsequently the Crown lands were placed at the disposal of the Legislature.

Exhibit No. 56
B.C. Act to Secure Certain Pioneer Settlers within E. & N. Rly Belt
Feb. 10, 1904

EXHIBIT No. 56

CHAPTER 54.

An Act to secure to certain Pioneer Settlers within the Esquimalt and Nanaimo Railway Land Belt their surface and under-surface rights.

(10th February, 1904).

WHEREAS certain persons who settled upon lands within the belt reserved for railway purposes on Vancouver Island by Order in Council dated June 30th, 1873, prior to the passing of Chapter 14 of 47 Victoria, have been unable to obtain titles in fee simple to the lands occupied by them:

AND WHEREAS said reserve was made in order to carry out the provisions of Section 11 of the Terms of Union, which section expressly enacts that the Government of British Columbia shall not within the time mentioned in said section sell or alienate any further portion of the public lands of British Columbia in any

other way than under right of pre-emption, requiring actual residence of the pre-empter on the land claimed by him:—

AND WHEREAS said Section 11 of the Terms of Union further provides that lands in lieu of the lands so alienated by Crown Grant or right of pre-emption shall be reserved in contiguous lands.

AND WHEREAS the Order in Council of June 30th, 1873, reserving said lands, and as continued by Order in Council dated July 25th, 1873, was assented to by the Government of Canada by Order in Council dated 3rd September, 1873:—

AND WHEREAS by Sections 4, 5 and 6 of Chapter 14 of 47 Victoria, the Legislature of British Columbia did comply with the said Section 11 of the Terms of Union by withholding from or excepting out of the grant to Canada for railway purposes all those lands alienated up to the passing of the said Act, and did provide by said Sections 4 and 5 lands in lieu of the lands so excepted out of the grant to be conveyed for railway purposes:

AND WHEREAS certain of the settlers within the Esquimalt and Nanaimo Railway Land Belt were evicted in 1895 at the instance of the Esquimalt and Nanaimo Railway Company on decision of the Courts that the land was not open for settlement:

AND WHEREAS all of said settlers are entitled to peaceable and absolute possession of said land occupied by them and title thereto in fee simple, in accordance with the Statutes of British Columbia at the time existing governing the disposal of public lands:

THEREFORE, HIS MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia enacts as follows:—

1. This Act may be cited as the "Vancouver Island Settlers' Rights Act, 1904."

2. In this Act, unless the context otherwise requires,

(a) "Railway Land Belt" shall mean the lands described by Section 3 of Chapter 14, of 47 Victoria, being "An Act relating to the Island Railway, the Graving Dock and Railway Lands of the Province."

(b) "Settler" shall mean a person who, prior to the passing of the said Act, occupied or improved lands situate

RECORD

Court of Appeal of British Columbia

Exhibit No. 56
B.C. Act to Secure Certain Pioneer Settlers within E. & N. Rly Belt
Feb. 10, 1904
(Contd.)

within the said railway land belt, with the bona fide intention of living thereon.

3. Upon application being made to the Lieutenant-Governor in Council, within twelve months from the coming into force of this Act, showing that any settler occupied or improved land within said railway land belt prior to the enactment of Chapter 14 of 47 Victoria, with the bona fide intention of living on the said land, accompanied by reasonable proof of such occupation or improvement and intention, a Crown grant of the fee simple in such land shall be issued to him or his legal representative free of charge and in accordance with the provisions of the Land Act in force at the time when said land was first so occupied or improved by said settler.

4. The rights granted to the settler under this Act shall be asserted by and defended at the expense of the Crown.

5. Chapter 26 of the Statutes of 1903, being the "Vancouver Island Settlers' Rights Act, 1903," is hereby repealed: Provided, however, that all applications made by settlers for Crown Grants under the said Act shall be deemed to have been made under this Act.

Exhibit No. 57
Petition of E. & N. Rly Co.
Mar. 21, 1904

EXHIBIT No. 57

PETITION OF E. & N. RAILWAY COMPANY BRITISH COLUMBIA

4 EDWARD VII., 1903-4.

To His Excellency the Governor General in Council, Ottawa.

The Humble Petition of the Esquimault and Nanaimo Railway Company showeth unto your Excellency as follows:—

(1) On the 19th day of December, 1883, the Legislative Assembly of British Columbia passed a Statute, No. 14 of the Provincial Statutes of 1884, intituled "An Act relating to the Island Railway, Graving Dock, and Railway Lands of the Province."

(2) By Section 3 of the said Act, there was granted to the Dominion Government certain lands for the purpose of constructing and to aid in the construction of a railway between Esquimault and Nanaimo.

(3) By section 8 it was enacted that such persons hereinafter called "The Company" as may be named by the Governor-General in Council, &c., shall be and are hereby constituted a body corporate and politic by the name of "The Esquimalt and Nanaimo Railway Company."

(4) By Order-in-Council dated the 12th April, 1884, His Excellency the Governor was pleased to name Robert Dunsmuir, John Bryden, James Dunsmuir, Charles Crocker, Charles E. Crocker, Leland Stanford and Collis P. Huntington, &c., as a body corporate and politic by the name of "The Esquimault and Nanaimo Railway Company" for the purposes of the construction of the railway between Esquimault and Nanaimo in accordance with the provisions of the aforesaid Section 8. (See Canada Gazette, 19th April, 1884.)

(5) On the 20th day of April, 1883, an agreement was entered into between Robert Dunsmuir, James Dunsmuir, John Bryden, Charles Crocker, Charles F. Crocker, Leland Stanford and Collis P. Huntington of the first part, and Her Majesty Queen Victoria, represented by the Minister of Railways and Canals, of the second part (section 4) for the purpose of building a line of railway between Esquimalt and Nanaimo, and (16) the land grant to be made, and the land in so far as the same shall be vested in Her Majesty and held by Her Majesty for the purposes of the said railway, or for the purposes of constructing or to aid in the construction of the same, shall be conveyed to the contractors upon the completion of the whole work to the entire satisfaction of the Governor in Council, &c., as set forth in said Section and Sections 23, 24, 25 and 26 of the Act of 19th December, 1883, are particularly referred to.

(6) The said agreement was approved and ratified by Act of Parliament of the Dominion of Canada, Chapter 6, of 1884.

(7) And by Section 7 of the said Act the land was to be granted to the said Company subject to the exception therein set forth, inter alia, subsection 2, every bona fide squatter who has continuously occupied and improved any of the lands within the tract of land to be acquired by the company from the Dominion Government for a period of one year prior to the first day of January, 1883, shall be entitled to a grant of the freehold of the surface rights of the said squatted land to the extent of 160 acres at the rate of one dollar per acre.

(8) The Esquimalt and Nanaimo Railway Company completed the whole work to the entire satisfaction of the Governor in Council as is witnessed by the Deed under the Great Seal of Canada, dated the 21st day of April, 1887, which granted, assigned and conveyed unto the Esquimalt and Nanaimo Railway Company the lands mentioned in the said Act of the Provincial Legislature, Chapter 14, 1884, and of the Dominion Parliament,

Chapter 6, 1884, subject to the terms and provisions affecting the same set forth in the said Acts.

(9) Since the conveyanee of the lands aforesaid to the said Company, the said Company have administered the said lands according to the terms and conditions set forth in the said Act, Cap. 14, 1884.

(10) The squatters mentioned in Section 23 of the Act of 1884, C. 14, and Dominion Statutes, subsection 2 of Section 7 of C. 6 of 1884, became dissatisfied and claimed more extensive rights than those accorded to them by the Statutes aforesaid, and the Dominion Government on the 10th August, 1897, issued a commission to Mr. T. G. Rothwell to investigate the claims set up by the settlers upon the tract of land which was conveyed to the Government of the Dominion of Canada by the Province of British Columbia and by the Dominion of Canada to Esquimalt and Nanaimo Railway as hereinbefore set out.

Mr. Rothwell in his report (which is published in the Annual Report of the Department of the Interior, 1898) at folio 459, states—"The settlers mentioned are those who are referred to as bona fide squatters in Section 23 of the Provincial Act, c. 14, 1884, and in subsection 2 of Section 7 of the Dominion Act, c. 6 of 1884," and states at folio 460 "that when I have completed this task I feel satisfied that I will have established the conclusion I have arrived at, that although these settlers, generally speaking, have now no legal right to the coal and other minerals under their lands, they or those claiming from them have a just claim for redress at the hands of the Province in which they live, and a claim which that Province cannot honourably refuse to recognize and settle," and at folio 469, "I repeat, therefore, that I consider it the duty of the Government of British Columbia to take such action as will promptly and satisfactorily remove the injustice."

(11) On the 12th day of October, 1900, the Provincial Government issued a commission to Mr. Eli Harrison, a Judge of the County Court of British Columbia, who, after a very exhaustive enquiry, reported to the Provincial Government that the "squatters" could not now acquire the coal or minerals, if any, under the lands squatted on, as such coal and minerals had been conveyed to others. Mr. Harrison's report is published at folio 337 of the Sessional Papers, B.C. 1903.

(12) In the year 1903, the Local Legislature passed an Act, No. 26, intituled "Vancouver Island Settlers' Rights Act, 1903."

(13) In the year 1904, the Local Legislature passed an Act, Chap. 42, intituled "Vancouver Island Settlers' Rights Act, 1904." This Act by Section 5, repeals Cap. 26 aforesaid.

(14) By Subsection A of Section 2, "Railway Land Belt" shall mean the lands described by Section 3 of Chapter 14, of 47 Victoria, being "An Act relating to the Island Railway, the Graving Dock and Railway Lands of the Province."

(15) By Subsection B of Section 2, a "settler" is described as a person, who prior to the passing of the said Act, occupied or improved lands situate within the said railway land belt, with the bona fide intention of living thereon.

(16) Section 3, of the said Act, is as follows:—

"Upon application being made to the Lieutenant-Governor in Council, within twelve months from the coming into force of this Act, showing that any settler occupied or improved land within the said railway land belt prior to the enactment of Chapter 14 of 47 Victoria, with the bona fide intention of living on the said land, accompanied by reasonable proof of such occupation or improvement and intention, a Crown grant of the fee simple in such land shall be issued to him or his legal representative free of charge and in accordance with the provisions of the Land Act in force at the time when said land was first so occupied or improved by said settler."

(17) Section 4 provides that "The rights granted to the settler under this Act shall be asserted by and be defended at the Crown expense."

(18) The definition of "settler" as set forth in Chapter 42 of 1904, does away with the definition of the term "squatter" as set out in Chapter 14 of 1884, aforesaid, though he is one and the same person.

(19) Section 3 of the said Act gives to the squatter of Section 23, of Chapter 14, under the title of settler, all the coal and mineral under the lands squatted on.

(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.

(21) The Esquimalt and Nanaimo Railway Company do not recognize the right of the Provincial Legislature to interfere with

RECORD

Court of Appeal of British Columbia

Exhibit No. 57
Petition of E. & N. Rly Co.
Mar. 21, 1904
(Contd.)

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.

(22) The granting of the minerals under the lands of the squatters as mentioned in Section 23 of C. 14 of 1884, will be a great injury to the property of the Esquimalt and Nanaimo Railway Company, and an interference with the contract made between the Esquimalt and Nanaimo Railway Company and the Dominion Government.

Dated the day of March, A.D., 1904.

The Esquimalt and Nanaimo Railway Company therefore humbly pray your Excellency in Council to disallow the said Act No. 42 of 1904, known as the "Vancouver Island Settlers' Rights Act, 1904," passed by the Provincial Legislature of the Province of British Columbia.

(Signed) James Dunsmuir,
President of the Esquimalt & Nanaimo Railway Company.

(Seal)
Monday, 21st March, 1904.

(Sgd) Chas. E. Pooley,
Secretary Esquimalt Nanaimo Railway Company.

(Approved by Order in Council, 19th February, 1904.)

Exhibit No. 58
Recommendation Minister of Justice to Gov.-Gen. in Council
April 5, 1904

EXHIBIT No. 58

Department of Justice, Canada,
Ottawa, April 5, 1904.

To His Excellency the Governor-General in Council:

On reference to the undersigned of a copy of a petition of the Esquimalt and Nanaimo Railway Company praying Your Excellency in Council to disallow Act No. 42 of the British Columbia Legislature, 1904, known as the Vancouver Island Settlers' Rights Act, 1904, the undersigned has the honour to recommend that a copy of the petition be transmitted to the Lieutenant-Governor of British Columbia, with a request that he submit for the consideration of Your Excellency's Government the observations of his Ministers thereon.

Humbly submitted.

C. Fitzpatrick,
Minister of Justice.

EXHIBIT No. 59

THE GOVERNMENT OF THE PROVINCE OF BRITISH COLUMBIA

Exhibit No. 59
Report of Committee of Executive Council
May 26, 1904

COPY OF A REPORT of a Commitee of the Honourable the Executive Council, approved by His Honour the Lieutenant-Governor on the 26th day of May, 1904.

To His Honour the Lieutenant-Governor in Council:

The Committee of the Executive Council have had under consideration the petition of the Esquimalt and Nanaimo Railway Company, and beg respectfully to report as follows:—

The whole of the land claimed by the settlers as against the Esquimalt and Nanaimo Railway Company was acquired before December 19, 1883, being the date of the passage of what is commonly called the Settlement Act. By the Land Act of 1875, 38 Victoria, Chapter 5, Section 3, "any person being the head of a family . . . and a British subject," after complying with the provisions of the section, might "record any tract of unoccupied, unsurveyed and unreserved lands of the Crown, not being an Indian settlement." The section then prescribes the acreage and other matters. By Section 9 of that Act it is provided that upon compliance by the applicant of the provisions hereinbefore contained, the Commissioner "shall record the land so sought to be recorded," &c.

It would appear, then, that the settler, upon complying with the provisions of Sections 3 to 9, obtained an absolute right to have the land recorded in his favour. It was not an act of grace on the part of the Crown, but was put even more forcibly than the right of the miner to record his claim without inquiry into the conditions precedent to his making his record, which right has never been questioned in the history of the Province.

This was the condition of affairs at the date of the Settlement Act. The Settlement Act did not interfere with the rights of the settler in any way, but on the contrary, carefully preserved them, and all other rights however acquired. The Legislature went even further than the preservation of the rights actually acquired, because it preserved so far as the surface rights were concerned, the rights of any one who had "squatted" that is, located without any colour of right, upon the land, the right to obtain a grant of the surface.

A number of persons, antecedent to December 19, 1883, did all those things necessary to entitle them to a record of the land

under the "Land Act, 1875," but were refused the right to perfect their title by the officer declining to make the record in favor of the applicant, and declining also to give him the certificate required by Section 9 of the said Act. Three of those persons have attempted unsuccessfully to assert their rights as against the Railway Company.

The Legislature by the Settlement Act did not convey to the Dominion, under which Government the Esquimalt and Nanaimo Railway Company claim, any lands in the railway belt as to which any other person had a lawful claim, and perhaps the only way in which the rights of the settlers could be asserted is not by an action brought by themselves against the Esquimalt and Nanaimo Railway Company, but by an action brought either by the Attorney General on behalf of the Province, or by giving the settlers a provincial title and allowing them to contest the matter themselves. This latter course was the one which commended itself to Your Honour's advisers, hence the passage of the Vancouver Island Settlers' Rights Act, 1904, Chapter 64.

In making this report, the committee do not overlook one of the difficulties which may arise in the course of the litigation, viz.—that the settler was bound to make his record upon "unoccupied, unsurveyed and unreserved land of the Crown"; and in the British Columbia Gazette of July 5, 1873, a reserve was placed upon a strip of land 20 miles in width along the east coast of Vancouver Island between Seymour Narrows and Harbour of Esquimal. That reserve, by its recitals, is apparently founded upon incorrect premises. It is founded upon the suggestion that Esquimalt in Vancouver Island was, by an Order of the Privy Council of Canada, fixed as the terminus of the Canadian Pacific Railway, and that a line of railway was to be located between the Harbour of Esquimalt and Seymour Narrows. It was founded, further, upon the 11th paragraph of the Terms of Union, and the Terms of Union distinctly preserved to settlers the right of pre-emption, and provided, as did the Settlement Act, that lands be given in lieu of those which might have been pre-empted before the transfer took place.

The committee is, therefore, of opinion that those persons who had made application to pre-empt lands antecedent to December 19, 1883, and who in good faith had occupied and improved lands with a bona fide intention of living thereon, were entitled to receive grants from the Crown, and for that reason recommended the Bill to the Legislature.

Mr. Rothwell, in his report, cited in the petition of the Esquimalt and Nanaimo Railway Company to His Excellency, arrived at the conclusion that these settlers had not been fairly treated, the same conclusion having been arrived at by Your Honour's advisers, the only difference between Your Honour's Ministers and Mr. Rothwell being the mode of redress.

In conclusion, the committee submit that the Act in question is fairly within the powers of the Legislature, as dealing with property and civil rights, and in this connection they refer with some degree of confidence to the opinion of Sir Oliver Mowat, stated in Lefroy's Legislative Power in Canada, at page 201, where he says:—

"I repudiate the notion of the petitioners that it is the office of the Dominion Government to sit in judgment on the right and Justice of an Act of the Ontario Legislature relating to property and civil rights. That is a question for the exclusive judgment of the Provincial Legislature."

The committee further beg to refer to the report of the Honourable David Mills, then Minister of Justice, and afterwards a Judge of the Supreme Court of Canada, having reference to British Columbia legislation of the year 1901 (Chapter 45), "An Act respecting certain Land Grants," wherein after reciting that the gravamen of the objection was that royalties were imposed upon the timber standing upon the lands granted to the Kaslo and Slocan Railway Company and the Nelson and Fort Sheppard Railway Company by way of subsidy in aid of the railway, and that whereby the value of the timber of the railway companies was impaired, namely that there was an interference with vested rights. The Minister remarks as follows:—

"The undersigned does not deem it necessary to consider in detail the remarks of the Attorney General. He does not acquiesce in all of them, but the undersigned bases his refusal to recommend disallowance upon the fact that the application proceeds upon grounds affecting the substance of the Act with regard to matters undoubtedly within the legislative authority of the Province and not affecting any matter of Dominion policy. It is alleged that the Statute affects pending litigation and rights existing under previous legislation and grants from the Province. The undersigned considers that such legislation is objectionable in principle and not justified unless in very exceptional circumstances, but Your Excellency's Government is not in anywise responsible for the principle of the legislation, and as has already been stated in this report with regard to the Ontario Statute, the

RECORD

Court of Appeal of British Columbia

Exhibit No. 59
Report of Committee of Executive Council
May 26, 1904
(Contd.)

proper remedy in such cases lies with the Legislature or its constitutional judges."

It may be said after all this Act is only an Act to provide a means for conferring a title in certain proper cases where justice requires title to be conferred, and not from or out of any property of the railway company, but out of lands reserved out of the grant made by the Settlement Act, and in any event lands still vested in the Crown in right of the province.

The Committee, therefore, respectfully submit that no good ground exists for the exercise of His Excellency of the power of disallowance in respect of the Act in question.

The Committee advise that a copy of this report, if approved, be forwarded to the Honourable the Secretary of State for Canada.

Dated this 21st day of May, A.D., 1904.

(Signed) A. Campbell Reddie,
Deputy Clerk, Executive Council.

(Approved by Order-in-Council, 21 June, 1904.)

Exhibit No. 60
Letter
Lieut.-Gov. of B.C. to Sec'y of State
May 27, 1904

EXHIBIT No. 60

The Government of the Province of British Columbia,
At Government House,
Victoria, May 27, 1904.

Sir,—

In reply to Mr. Pope's communication of the 25th ultimo and to his subsequent telegraphic message of the 26th instant, with reference to the petition of the Esquimalt and Nanaimo Railway Company to the Governor-General in Council for the disallowance of Chaper 54 of the Statutes 1903-4 intituled "The Vancouver Island Settlers' Rights Act, 1904," I have the honour to transmit to you herewith, for the information of His Excellency's Government, copy of a report, approved by me, embodying the observations of my Ministers in regard to the petition in question.

I have the honour to be, Sir,

Your obedient servant,

H. G. Joly De Lotbiniere,
Lieutenant-Governor.

The Honourable the Secretary of State,
Ottawa, Canada.

EXHIBIT No. 61

REPORT, MINISTER OF JUSTICE TO GOVERNOR-GENERAL IN COUNCIL

Exhibit No. 61
Report, Minister of Justice to Gov.-Gen. in Council
June 14, 1904

Department of Justice
Ottawa, June 14, 1904.

To His Excellency the Governor-General in Council:

The undersigned has the honour to submit herewith his report upon Chapter 54 of the Statutes of the Province of British Columbia, of 3 and 4 Edward VII., entitled "An Act to secure to certain pioneer settlers within the Esquimalt and Nanaimo Railway land belt their surface and under-surface rights."

A petition has been presented to Your Excellency in Council by the Esquimalt and Nanaimo Railway Company praying for the disallowance of this Act on the ground that it is an interference with the company's rights in the lands contained in the railway belt as assignee of the Dominion Government. A copy of the petition is annexed to this report. This petition was communicated to the Lieutenant-Governor of British Columbia with a request that His Honour would furnish Your Excellency's Government with the observations of his Ministers thereon, and there also is annexed to this report a copy of a letter from the Lieutenant-Governor to the Secretary of State, dated May 27th, 1904, and of the approved report therein referred to embodying the views of the British Columbia Government with regard to the petition.

It is unnecessary that the undersigned should enter minutely into the history of the railway belt in question. It will be sufficient for present purposes to state that it was set apart in pursuance of the Terms of Union with British Columbia to be appropriated in furtherance of the construction of the proposed railway to connect British Columbia with the Eastern Provinces; that by the Provincial Act, 47 Victoria, Chapter 14, known as the Settlement Act, it was granted to the Dominion Government for the purpose of constructing and to aid in the construction of a railway between Esquimalt and Nanaimo, subject to certain exceptions, and that the Esquimalt and Nanaimo Railway Company, the petitioners, are the assignee and successors in title of the Dominion Government, as set forth in the petition.

Under these circumstances, if the British Columbia Act would have the effect, as the railway company apparently fears, of divesting the company of its title under the grant from the Government of Canada in respect of any of the lands in the belt, the undersigned would feel it to be his duty to recommend that Your Excellence should exercise his power of disallowance in order to

RECORD

Court of Appeal of British Columbia

Exhibit No. 61
Report, Minister of Justice to Gov.-Gen. in Council
June 14, 1904
(Contd.)

prevent the consummation of such an injustice. The undersigned, however, is satisfied that the Act can have no such effect. Although it recites that under the circumstances set forth in the preamble, the settlers referred to therein are entitled to peaceable and absolute possession of the lands occupied by them and to a title thereto in fee simple in accordance with the Statutes of British Columbia existing at the time of their settlement; it does not proceed to meet or to declare by way of enactment that the lands are or shall be vested in them as of that estate, but enacts only that upon the application of the settlers and upon their establishing certain facts, Crown grants of the fee simple shall be issued to them free of charge in accordance with the provisions of the Land Act in force at the time when the land was first occupied or improved, and that the rights granted to the settler under the Act shall be asserted by and be defended at the expense of the Crown. Now a Crown grant issued pursuant to such an Act can, in the opinion of the undersigned, convey to the grantee, such title only as the Province has in the lands which it purports to grant. In so far as it purports to grant lands or coal or other minerals which under the Settlement Act were granted to Canada, and under grant from Canada have passed to the company, it will be inoperative, but it is possible that some of the lands occupied as set forth in the recitals to the Act is covered by exceptions from the grant to Canada, or remains the property of the Province, and so far as that is the case the Act may have effective operation.

Taking the view thus explained as to the effect of the Act, and being of opinion that such legislation is not ultra vires of the Legislature, the undersigned does not think that Your Excellency would be warranted in disallowing the Act merely because the railway company may be put to some trouble and expense in the assertion and defence of its title.

Humbly submitted,

C. Fitzpatrick,
Minister of Justice.

RECORD

Court of Appeal of British Columbia

Exhibit No. 62.
Grant to
E. & N. Rly
Oct. 4, 1905

EXHIBIT No. 62

Great Seal
of
Canada

CROWN GRANT DATED 4th OCTOBER, 1905.

CANADA.

H. E. Taschereau,
Deputy Governor.

EDWARD THE SEVENTH, by the Grace of God of the United Kingdom of Great Britain and Ireland, and the British Dominion beyond the Seas, King, Defender of Faith, Emperor of India. To all to whom these presents shall come:

GREETING:

WHEREAS by the Act of the Legislature of British Columbia passed in the Forty-seventh year of the Reign of Her late Majesty, Queen Victoria, chaptered fourteen and intituled "An Act Relating to the Island Railway, the Graving Dock and Railway Lands of the Province," a certain tract or parcel of land situate in Vancouver Island was, subject to certain exceptions and to certain provisions in the said Act set forth, granted to the Dominion Government for the purpose of constructing and to aid in the construction of a railway between Esquimalt and Nanaimo in the said Province, such grant including all coal, coal oil, ores, stones, clay, marble, slate, mines, minerals and substances whatsoever, upon in or under the said lands.

AND WHEREAS by Section five of the said Act it was provided that the Government of Canada should be entitled out of a portion of the said tract of land excepted from the said Grant, to lands equal in extent to those alienated up to the date of the said Act by Crown Grant, pre-emption or otherwise within the limits of the said tract, such alienated land being also excepted from the Grant.

AND WHEREAS by an Act of Parliament of Canada passed in the said year of Her said late Majesty's reign, chaptered six and intituled "An Act Respecting the Vancouver Island Railway, and Esquimalt Graving Dock, and certain Railway Lands of the Province of British Columbia, granted to the Dominion," it was provided that the Governor in Council might grant to the Esquimalt and Nanaimo Railway Company hereinafter called the said Company in aid of the construction of a railway from Esquimalt to Nanaimo aforesaid, and of a telegraph line of the said

RECORD

Court of Appeal of British Columbia

Exhibit No. 62
Grant to
E. & N. Rly
Oct. 4, 1905
(Contd.)

railway, the land so granted to the Dominion Government as aforesaid in so far as such lands should be vested in Her said Majesty and held by her for the purposes of the said railway, or to aid in the construction of the said railway, and also all coal, coal oil, ores, stones, clay, marble, slate, mines, minerals and substances whatsoever in, on or under the said lands, and certain foreshore rights in respect of the said lands as border on the sea in so far as such coal, coal oil, ores, stones, clay, marble, slate, mines, minerals and substances and foreshore rights were vested in Her said Majesty.

AND WHEREAS it is further provided by the said last mentioned Act that no lands should be conveyed to the said Company until the Railway was fully completed and equipped, and that the said Grant should be made upon the completion of the whole work to the entire satisfaction of the Governor in Council, but so nevertheless that the said lands, and the coal, coal oil, and other minerals and timber thereunder, therein or thereon should be subject in every respect to certain provisions . . . . set out in the seventh section of the said last mentioned Act.

AND WHEREAS certain other terms and provisions respecting the said Grant were agreed upon between the Government of Canada and the Government of British Columbia and the said Company.

AND WHEREAS the whole work undertaken by the said Company having been completed to the entire satisfaction of our Governor in Council, Her late Majesty, Queen Victoria, did by her certain Letters Patent under the Great Seal of Canada bearing date the twenty-first day of April in the year of Our Lord one thousand eight hundred and eighty-seven, grant unto the said Company, its successors and assigns, all and singular the said lands which had been so granted to Her said Majesty as aforesaid by the said Act of the Legislature of the Province of British Columbia, in aid of the construction of the said line of railway in so far as such lands were vested in Her Majesty and held by her for the purposes of the said Railway or to aid in the construction of the same, and also such coal and other minerals and foreshore rights as aforesaid in so far as such coal and other minerals and foreshore rights were vested in Her Majesty as represented by the Government of Canada, and also the full benefit and advantage of the rights and privileges granted to Her Majesty by said Section five of the said Act of the Legislature of British Columbia, To Have and To Hold the same unto and to the use of the said Company, its successors and assigns, forever, subject nevertheless, to the several stipulations and conditions

effecting the same in Her Majesty's said Letters Patent thereinbefore recited and which are contained in the Acts of the Parliament of Canada and of the Legislature of British Columbia thereinbefore in part recited as such stipulations were modified by terms thereinbefore recited of the agreement so made as aforesaid by and between the Government of Canada, the Government of British Columbia and the said Company.

AND WHEREAS the area of lands within the said tract which had been alienated as aforesaid by the said Province up to the nineteenth day of December in the year of Our Lord One thousand eight hundred and eighty-three has been ascertained to be eighty-six thousand three hundred and forty-six (86,346) acres.

AND WHEREAS pursuant to said Section five of the said Act of the Legislature of British Columbia the Government of the said Province has transferred to the Government of Canada out of the portion of said tract so excepted as aforesaid from the said grant, the lands hereinafter mentioned and intended to be hereby granted, including all coal, coal oil, ores, stones, clay, marble, slate, mines, minerals and substances whatsoever thereupon, therein and thereunder.

AND WHEREAS our Governor in Council has accepted the said transfer in satisfaction of the claims of the Government of Canada under said section five of the said Act of the Legislature of British Columbia, and has authorized the issue to the said Company of a grant of the said lands, coal and other minerals and of foreshore rights in respect of the said lands similar to those granted by Her late Majesty's Letters Patent hereinbefore recited, such grant to be subject to the like stipulations and conditions as is the grant made by the said Letters Patent.

NOW KNOW YE that We do by these presents in consideration of the premises and under and by virtue of the said Acts of the Parliament of Canada and of the Legislature of British Columbia hereinbefore in part recited, and under and by virtue of every other power us in that behalf enabling, and by and with the advice of Our Privy Council, for Canada, grant, convey, and assure unto the said Company, its successors and assigns, all and singular that parcel or tract of land situated on Vancouver Island, in the Province of British Columbia, in our Dominion of Canada, and particularly described as follows:—Commencing at a point on the eastern shore of Vancouver Island where it is intersected by the fiftieth parallel of North Latitude, thence

RECORD

Court of Appeal of British Columbia

Exhibit No. 62
Grant to
E. & N. Rly
Oct. 4, 1905
(Contd.)

due west along the said fiftieth parallel twenty and one-fifth (20 1/5) miles, thence due south six and thirty-five hundredths (35/100) miles, more or less, to a line running east and west half way between the mouth of Courtenay River and Seymour Narrows, thence due east to a point on the eastern shore of Vancouver Island on Oyster Bay, thence north westerly following the shore line of Vancouver Island to the point of commencement, containing eighty-seven thousand one hundred and fourteen (87,114) acres, more or less, and more particularly indicated upon the map which accompanied the said Minute and therein margined by a yellow tint, excepting thereout those portions of Lots forty-eight (48) and one hundred and ten (110), Sayward District, which are situated to the south of the Fiftieth Parallel and which, together contains seven hundred and sixty-eight (768) acres, leaving a net area of eighty-six thousand three hundred and forty-six (86,346) acres in aid of the construction of the said line of railway in so far as such lands are vested in Us and held by Us for the purposes of the said Railway or to aid in the construction of the same, and also all coal, coal oil, ores, stones, clay, marble, slate, mines, minerals and substances whatsoever in on or under such lands and the foreshore rights in respect of the said lands as border on the sea together with the privilege of mining under the foreshore and sea opposite any such lands and of mining and keeping for its and their own use all such coal and minerals as aforesaid under the foreshore or sea opposite any such lands so far as such coal, coal oil, ores, stones, clay, marble, slate, mines, minerals and substances and foreshore rights and privileges of mining are vested in Us as represented by the Government of Canada:

TO HAVE AND TO HOLD the said lands, coal, coal oil, ores, stones, clay, marble, slate, mines, minerals and substances and the said foreshore rights and privileges of mining, unto and to the use of the said Company, its successors and assigns, forever, subject nevertheless to the several stipulations and conditions affecting the same contained in the said Acts of the Parliament of Canada and of the Legislature of British Columbia hereinbefore in part recited as such stipulations and conditions are modified by the terms of the agreement so made as aforesaid by and between the Government of Canada, the Government of British Columbia, and the said Company, it being the intention of these presents that the stipulations and conditions affecting the grant made by the said Letters Patent of Her late Majesty should apply to and affect the Grant made by these presents so far as the same are capable of application thereto.

Fiat No. 114538.
Grant No. 68. GIVEN under the Great Seal of Canada.

WITNESS the Right Honourable Sir Henry Elzear Taschereau, Knight, Deputy of Our Right Trusty and Right Well Beloved Cousin the Right Honourable Sir Albert Henry George, Earl Grey, Viscount Howick, Baron Grey of Howick, in the County of Northumberland in the Peerage of the United Kingdom and a Baronet Knight, Grand Cross of Our Most Distinguished Order of Saint Michael and Saint George, &c., Governor-General of Canada,
At Ottawa, this fourth day of October, in the year of Our Lord one thousand nine hundred and five in the fifth year of Our Reign.

Joseph Pope,
Under Secretary of State.

W. W. Cory,
Deputy of the Minister of the Interior.

Recorded in the Department of the Interior the 4th Oct., 1905, Liber 221, Folio 99.

I HEREBY CERTIFY that the paper writing comprised in this and the five preceding sheets of paper is a true copy of an original document deposited in my office at Victoria, B.C., under Number 822 O.S.

Dated this seventeenth day of September, 1917.

N. Gwynn,
Registrar General of Titles.

EXHIBIT No. 63

(Chap. 17, B.C., 1910).

AN ACT TO RATIFY AN AGREEMENT BETWEEN HIS MAJESTY THE KING AND THE ESQUIMALT AND NANAIMO RAILWAY COMPANY, BEARING DATE THE 21st DAY OF OCTOBER, 1909.

(10th March, 1910.)

WHEREAS the Esquimalt & Nanaimo Railway Company (hereinafter referred to as "the Company" have claimed compensation in respect of the lands granted under the provisions of the "Vancouver Island Settlers' Rights Act, 1904."

RECORD

Court of Appeal of British Columbia

Exhibit No. 63
B.C. Act to Ratify Agreement Between the King and the E. & N. Rly Co.
Oct. 21, 1909
(Contd.)

AND WHEREAS the amount of such compensation has been settled between His Majesty the King in the right of His Province of British Columbia, and the Company by an Agreement dated the twenty-first day of October, 1909, a copy of which forms the schedule to this Act:

AND WHEREAS it is expedient to ratify the said Agreement and to make provision for the issuance of the Crown Grants in such Agreement referred to:

THEREFORE HIS MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:—

1. This Act may be cited as the "Vancouver Island Settlers' Rights Agreement Ratification Act."

2. The Agreement, a copy of which forms the Schedule to this Act, is hereby ratified and confirmed, and declared to be legal and binding upon His Majesty the King and the Company.

3. From time to time, upon the application of the Company and upon compliance by them with the terms of the said Agreement, Crown Grants shall issue to the Company of the twenty thousand (20,000) acres of land at the times and in the manner referred to in the said Agreement. The said Crown Grants, when issued, shall be so worded as to convey and shall be deemed to convey to the Company, their successors and assigns, the lands referred to in the said Agreement and all timber, coal, coal oil, stone, clay, marble, slate, mines, ores (except gold and silver) minerals and substances whatsoever thereupon, therein and thereunder.

4. The said lands when so granted shall not be subject to taxation for the period of ten (10) years from the date of the issuance of such Crown Grants as aforesaid.

5. The reservation of the foreshore and coal referred to in paragraph 11 of said Agreement is ratified and confirmed.

6. Subject to existing rights, upon the application of the Company, Crown Grants shall from time to time be issued to them of the foreshore mentioned in paragraph 12 of the said Agreement, and the coal under the sea opposite such foreshore. The said grants shall be issued to the Company free from any expense by way of purchase money or otherwise, and shall vest absolutely in the Company the said foreshore and the said coal under the sea opposite such foreshore.

7. No licenses to prospect for coal, save as aforesaid shall hereafter be issued to persons other than the Company in respect of any of the said coal lands.

SCHEDULE.

This Indenture of Agreement, made this twenty-first day of October, in the year of Our Lord one thousand nine hundred and nine:

BETWEEN:

HIS MAJESTY THE KING in the right of His Province of British Columbia, herein represented and acting by the Honourable Frederick John Fulton, Chief Commissioner of Lands of the said Province (hereinafter referred to as "the Province"), of the First Part,

and

THE ESQUIMALT & NANAIMO RAILWAY COMPANY (hereinafter called "the Company") of the Second Part:

WHEREAS it has been agreed by the parties hereto that the Company shall receive grants of land in lieu of the lands that have been granted under the provisions of the "Vancouver Island Settlers' Rights Act, 1904," and shall discontinue all actions and other proceedings arising out of said grants, and shall also make to such grantees deeds quit-claiming all the estate, right, title and claim of the Company in or to said lands:

NOW THEREFORE THIS INDENTURE WITNESSETH that the parties hereto agree with each other as follows:—

(1) The Company, or its assigns, may within the period of three (3) years from the date of the confirmation of this Agreement by an Act of the Legislature, as hereinafter set out, select and locate twenty thousand acres of unoccupied and unreserved Crown Lands, situate on Vancouver Island.

(2) The said lands shall be selected and located by the Company in rectangular blocks, where any block is in whole or in part bounded by any lake, river, or salt water, or by lands previously acquired or surveyed, such lake, river, or salt water, or such acquired or surveyed lands may be adopted as the boundary of such block. No blocks shall contain less than six hundred and forty (640) acres but the Company may include within the limits of any block selected by them a greater quantity of land so long as the said block does not contain more than twenty thousand (20,000) acres and so long as the land comprised therein is located in a rectangular shape, with no boundary lines less than eighty (80) chains in length.

RECORD

Court of Appeal of British Columbia

Exhibit No. 63
B.C. Act to Ratify Agreement Between the King and the E. & N. Rly Co.
Oct. 21, 1909
(Contd.)

(3) As soon as the Company have selected a block of land under this Agreement, they shall place on one or more conspicuous places on the land, as the nature of the case may require, a post not less than four (4) feet above the ground, upon which post shall be inscribed a statement of the quantity of land selected and of the courses and distances of the boundary lines of the said location.

(4) The Company shall also, within a reasonable time after such selection, cause the said block or blocks so selected to be surveyed, and shall return the field notes and plans or survey to the Department of Lands.

(5) Upon the completion of said surveys and deposit of the plans and field notes as aforesaid, the Company shall cause an advertisement to be published in the British Columbia Gazette and in some newspaper circulating in the district, containing a notice that the Company will, within thirty (30) days from date of the said publication, apply for a Crown Grant of said lands under the provisions of this Agreement and any Statute which may hereafter be passed confirming the same.

(6) During the said period of thirty (30) days, but not afterwards, any person having or claiming any right to any of the lands so selected may protest against the issuance of said Crown Grant to the Company, and in case any such protest is filed the Chief Commissioner of Lands shall adjudicate upon the same, and shall decide whether or not the lands, or any part thereof, so selected by the Company were at the time of such selection unoccupied or unalienated Crown Lands or lands not then held under lease, license, pre-emption, or application to purchase under the "Land Act."

(7) At the expiration of said thirty (30) days, if no protest is filed, or within such period after said thirty days as the said Commissioner shall, after adjudication upon any protest which may have been filed, decide that the lands so selected by the Company are unalienated and unoccupied within the meaning of the last preceding section of this Agreement, a Crown Grant of such lands shall issue to the Company, or its assigns, free of all charges; and the said Crown Grant shall be so worded as to convey and shall be deemed to convey to the Company and its assigns the said lands and all timber, coal, coal oil, stone, clay, marble, slate, mines, ores, (except gold and silver) minerals and substances whatsoever thereupon, therein and thereunder.

(8) Notwithstanding the foregoing provisions, the Company may at their option select lands already held or claimed by other

persons under the provisions of any statute in that behalf, upon arranging for the surrender to the Company of the rights of such other persons in such lands or any of them, and any lands so selected shall be deemed to have been acquired by the Company under the provisions of this Agreement, and the grant to the Company of said lands shall convey all the rights and title mentioned in Section 7 hereof.

(9) All lands granted to the Company under this Agreement shall not be subject to taxation for a period of ten years from the date of issuance of said Crown Grants as aforesaid:

(10) In case a protest shall be filed against any selection made by the Company, and the Commissioner upon hearing of said protest shall adjudicate that the lands so selected, or any part thereof, have been alienated prior to the said selection by the said Company, or are not open to location under the terms of Section 6 aforesaid, then the Company may from time to time, within a reasonable period not exceeding one (1) year of such adjudication, select from other lands of the character described in Section 6 aforesaid a sufficient quantity to make up such deficiency, and so on from time to time until the full amount of twenty thousand acres shall have been selected by the Company, and, if necessary, the said period of three years shall be extended for a reasonable time in order to enable the Company to make and complete its selection aforesaid.

(11) It is further agreed that, in addition to the lands mentioned in the preceding sections of this Agreement, the Province shall forthwith reserve the foreshore and all coal under the sea opposite the foreshore in Nelson and Newcastle Districts, as shown on the plan attached hereto and thereon coloured red, subject to any existing rights therein.

(12) The Province shall, in due course, upon application by the Company, grant to the Company such parts of the foreshore and the coal underlying the sea opposite such foreshore as are now the property of the Crown, not, however, extending more than one (1) mile from such foreshore, and shall, as and when any existing rights to any parts of the said foreshore or to the coal under the sea opposite such foreshore fall in, issue grants to the Company of such parts of the said foreshore and the said coal under the sea opposite the said foreshore, such grants not to extend more than one (1) mile from the foreshore as aforesaid. The said grants shall be issued to the Company free from any expense by way of

RECORD

Court of Appeal of British Columbia

Exhibit No. 63
B.C. Act to Ratify Agreement Between the King and the E. & N. Rly Co.
Oct. 21, 1909
(Contd.)

purchase money or otherwise, and the lands and coal so granted are to be considered a part of the consideration for this Agreement.

(13) For the consideration aforesaid, the Company shall forthwith after the execution of this Agreement discontinue, without cost, all actions or other proceedings with regard to lands which have been granted by the Crown purporting to act under the "Vancouver Island Settlers' Rights Act, 1904," which are particularly mentioned in the Schedule hereunto annexed; and the Company further agrees that it will not commence any actions or other proceedings in regard to the title to any of such lands mentioned in said Schedule; and the Company further agrees to execute a Quit Claim Deed to the persons mentioned in the said Schedule in respect of each of the parcels of land therein described, the said Quit Claim Deed to contain a release on the part of the Company of all its rights in the said lands.

(14) The Province hereby undertakes to have this Agreement ratified by the Legislature of the Province of British Columbia.

IN WITNESS WHEREOF the said Frederick John Fulton has hereunto set his hand and seal, and the Common Seal of the Company has been affixed the day and year first above written.

Signed and Sealed by His Majesty the King, in right of His Province of British Columbia, herein represented and acting by the Honourable Frederick John Fulton, Chief Commissioner of Lands for said Province, in the presence of:

Fred J. Fulton.

W. J. Bowser.

The Common Seal of the Esquimalt & Nanaimo Railway Company was hereunto affixed in the presence of:

Esquimalt & Nanaimo Railway Company

W. F. Salsbury, Secretary.

R. Marpole, Vice-President.

(Seal)

RECORD

Court of Appeal of British Columbia

Exhibit No. 64
B.C. Act to Ratify Agreement Between the King and the E. & N. Rly Co.
Feb. 27, 1912

EXHIBIT No. 64

COAT OF ARMS

CHAPTER 33.

An Act to ratify an Agreement between His Majesty the King and the Esquimalt and Nanaimo Railway Company, bearing Date the Seventeenth Day of February, 1912.

(*27th February*, 1912.)

WHEREAS an Agreement, a copy of which forms the Schedule to this Act, has been entered into between His Majesty the King and the Esquimalt and Nanaimo Railway Company, and it is expedient to ratify the said Agreement:

Therefore, His Majesty, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:—

1. This Act may be cited as the "Esquimalt and Nanaimo Railway Company's Land Grant Tax Exemption Ratification Act."

2. The Agreement, a copy of which forms the Schedule to this Act, is hereby ratified and confirmed and declared to be legal and binding upon His Majesty the King, the Esquimalt and Nanaimo Railway Company, and the Canadian Pacific Railway Company, who are hereby authorized and empowered to do whatever is necessary to give full effect to the said Agreement, the provisions of which are to be taken as if they had been expressly enacted hereby and formed an integral part of this Act.

SCHEDULE.

THIS INDENTURE OF AGREEMENT, made the seventeenth day of February, 1912, Between,

HIS MAJESTY THE KING in the right of the Province of British Columbia, herein represented and acting by Richard McBride, Minister of Mines of the said Province (hereinafter referred to as "the Province"), of the first part;

and

THE ESQUIMALT AND NANAIMO RAILWAY COMPANY (hereinafter called "the Company") of the second part.

RECORD

Court of Appeal of British Columbia

Exhibit No. 64
B.C. Act to Ratify Agreement Between the King and the E. & N. Rly Co.
Feb. 27, 1912
(Contd.)

Whereas the Company, pursuant to power in that behalf enacted by the Parliament of Canada, desires to lease its railway and all branches and extensions thereof heretofore or hereafter constructed to the Canadian Pacific Railway Company:

And whereas it was enacted by the Act of the Legislature of the Province of British Columbia, chapter 14 of the Statutes 47 Victoria, in clause 22 thereof, that the lands described in clause 3 of the said Act, acquired by the Company from the Dominion Government for the construction of the railway of the Company from Esquimalt to Nanaimo, should not be subject to taxation unless and until the same are used by the Company for other than railway purposes or leased, occupied, sold, or alienated:

And whereas the leasing to and the operation of the said railways of the Company by the Canadian Pacific Railway Company will be of mutual benefit to the Company and the Province, but before entering into such lease the Company desires to be assured that the leasing of its said railways to and the operation of them by the Canadian Pacific Railway Company will not affect the exemption from taxation of its land hereinabove recited, and the Company has agreed to pay to the Province annually in respect of the said lands the sum hereinafter mentioned:

And whereas it has been agreed as hereinafter contained:

Now, therefore, this Indenture witnesseth that the parties hereto agree with each other as follows:—

1. The Province agrees that the leasing of the railway of the Company from Esquimalt to Nanaimo and all branches and extensions thereof heretofore or hereafter constructed to and the operation thereof by the Canadian Pacific Railway Company shall not affect the exemption from taxation enacted by the said clause 22 of chapter 14 of the Statutes 47 Victoria, and notwithstanding such lease and operation such exemption shall remain in full force and virtue.

2. The Company agrees to pay to the Province annually, on the thirtieth day of June in each and every year hereafter, the sum of one and one-half cents in respect of each acre of the lands described in section 3 of the said Act of the Legislature of the Province of British Columbia, being chapter 14 of the Statutes 47 Victoria, which shall on the date such payment is to be made be then vested in the Company and be exempt from taxation under and by virtue of the exemption contained in said clause 22 of the said Act, except such lands as are actually occupied by the railway of the Company for railway purposes. Each such annual payment

shall be accompanied by a certificate under the corporate seal of the Company, showing the number of acres of the said lands then vested in the Company and exempt from taxation as aforesaid. The first payment shall be made one year from the date upon which the Act ratifying this Agreement comes into force.

3. The Company shall, on or before the thirty-first day of December, 1915, construct, complete, and thereafter continuously operate an extension of its main line northward from its present northerly terminus to a point at or near the Village of Courtenay.

4. The Province hereby undertakes to have this Agreement ratified by the Legislature of the Province of British Columbia.

In witness whereof the said Richard McBride has hereunto set his hand and seal, and the common seal of the Company has been affixed the day and year first above written.

Signed and sealed by His Majesty the King in right of his Province of British Columbia, herein represented and acting by Richard McBride, Minister of Mines for said Province, in the presence of—
W. J. BOWSER,
Attorney-General.

RICHARD McBRIDE,
Minister of Mines.
[SEAL.]

The common seal of the Esquimalt and Nanaimo Railway Company was hereunto affixed in the presence of—
W. F. SALSBURY,
Secretary.

ESQUIMALT AND NANAIMO RAILWAY COMPANY.
[SEAL.]

R. MARPOLE,
Vice-President.

RECORD

Court of Appeal of British Columbia

Exhibit No. 65
Report
Minister of
Justice to
Gov.-Gen. in
Council
May 21, 1918

EXHIBIT No. 65

REPORT, MINISTER OF JUSTICE TO THE GOVERNOR-GENERAL IN COUNCIL

Ottawa, 21st May, 1918.

TO HIS EXCELLENCY
THE GOVERNOR GENERAL IN COUNCIL:

The undersigned has had under consideration a statute of the legislature of British Columbia, chapter 71 of 7 & 8 George V (1917), assented to on 19th May 1917, and received by the Secretary of State for Canada on 31st May intituled "An Act to amend the Vancouver Island Settlers' Rights Act, 1904." This is a very short Act, consisting of two sections, which are here reproduced as follows:

"1. This Act may be cited as the 'Vancouver Island Settlers' "Rights Act, 1904, Amendment Act, 1917.'

"2. Section 3 of the 'Vancouver Island Settlers' Rights Act, "1904,' being chapter 54 of the Statutes of 1904 is hereby amended "by striking out the words 'within twelve months from the coming "into force of this Act,' in the second and third lines of said "section, and inserting in lieu thereof the words 'on or before "the first day of September, 1917.' "

It will be observed that this amendment, upon the face of it, merely extends to the first day of September 1917, a time which had been limited by the Vancouver Island Settlers' Rights Act, 1904, and by reference to the latter Act it will be perceived that the time so limited had expired on 10th February 1905. But involved in this very simple legislative expedient is an invasion of valuable proprietory rights which has occasioned an application for disallowance based upon irresistible grounds.

The Act of 1904 recites an intention to make provision for persons who had settled upon lands within the belt reserved for railway purposes on Vancouver Island by Order-in-Council of 30th June 1873, for the purpose of implementing Section 11 of the Terms of Union upon which British Columbia entered the Confederation, and that the said settlers are entitled to peaceable and absolute possession of the land occupied by them and title thereto in fee simple in accordance with the statutes of British Columbia at the time existing governing the disposal of public lands; and it proceeds to enact that upon application on behalf of any settler to the Lieutenant Governor in Council within twelve months from the coming into force of the Act, which was assented to on 10th February 1904, showing that the settler had occupied or improved land within the Railway Belt prior to the enactment of the Settlement Act of 1883, Cap. 14 of 47 Vic. with

the bona fide intention of living on the said land, accompanied by reasonable proof, a grant of the fee simple in such land should be issued to him or his legal representative, free of charge, and in accordance with the provisions of the land Act in force at the time when said land was first occupied or improved by the settlers; and moreover that the rights granted to the settlers under the said Act should be asserted by and defended at the expense of the Crown.

Application for the disallowance of the Act of 1904 was made to His Excellency the Governor General in Council upon petition of the Esquimalt and Nanaimo Railway Company setting forth, as the fact was, that the lands within the Railway Belt were granted to the Dominion Government for the purposes of constructing and to aid in the construction of a railway between Esquimalt and Nanaimo; that the Dominion had contracted by statutory authority for the construction of the railway upon terms that these lands in so far as they might be vested in Her late Majesty, or held by Her Majesty for the purposes of constructing or to aid in the construction of the railway, should be conveyed to the contractors upon completion of the work to the satisfaction of the Governor in Council; and that it was moreover agreed by the contract that the land was to be granted to the Company subject to the stipulation, proviso or exception, inter alia, that every bona fide squatter who had previously occupied or improved any of the said lands for a period of one year prior to the 1st day of January 1883, should be entitled to a grant of the freehold of the surface rights of the said squatted land to the extent of 160 acres and at the rate of $1.00 per acre; that the Esquimalt and Nanaimo Railway Company completed the work to the satisfaction of the Governor General in Council and received from the Dominion a grant of the lands, subject to the statutory terms and provisions. Upon these and other allegations which will appear upon reference to the papers herewith the Esquimalt and Nanaimo Railway Company submitted that the Act should be disallowed as affecting an unjust confiscation of the Company's rights in the property. No question was suggested as to the rights which by the legislation of 1883 the squatters were recognized to possess, and by which the title of the Company was affected, but it appeared that the squatters were not satisfied with the provision made for them, and that they had agitated claims which had been the subject of investigation, with the result that they were found entitled to further consideration by the provincial authorities. These facts were set up by the Government of British Columbia in reply to the petition presented by

RECORD

Court of Appeal of British Columbia

Exhibit No. 65
Report
Minister of
Justice to
Gov.-Gen. in
Council
May 21, 1918
(Contd.)

the Company, and the Government endeavoured to justify the legislation by the submission of an argument intended to show that certain settlers who had, previously to the Settlement Act of 1883, recorded tracts of unoccupied, unsurveyed and unreserved Crown Lands had acquired a right by the legislation then in force to obtain title to the lands so recorded; that this right continued irrespective of the provisions of the Settlement Act, or was not affected by these provisions, and that the legislature did not thereby convey to the Dominion any lands within the Railway Belt to which the settlers had lawful claim; it was suggested that the alleged right of these settlers, although, in the absence of further legislation, incapable of vindication at their own suit, could be asserted by action brought either by the Attorney General on behalf of the province, or by the settlers themselves with the aid of a provincial legislative grant, and it was the latter course as stated by the provincial reply which commended itself to the advisers of the Lieutenant Governor.

It may be observed here, without inquiring further into the merit of this argument, that, whatever weight the argument may possess as to settlers of the description to which it applies, the settlers who are benefited by the Act of 1904 are defined to mean those persons "who prior to the passing of the said Act (chapter "14 of 47 Vic.) occupied or improved lands situated within the "said Railway Belt with the bona fide intention of living thereon," and that the settlers of this description are not distinguishable from those who are otherwise named squatters.

By the report of the Minister of Justice upon the application for the disallowance of the legislation of 1904, approved by His Excellency in Council on 21st June of that year, the Minister stated that it was unnecessary to enter minutely into the history of the Railway Belt; that it was sufficient to state that it was set apart in pursuance of the Terms of Union with British Columbia to be appropriated in furtherance of the construction of the proposed railway to connect British Columbia with the Eastern Provinces; that by the Settlement Act of 1883 the Railway Belt was granted to the Dominion Government for the purpose of construction and to aid in the construction of the Esquimalt and Nanaimo Railway; that the Dominion in turn had granted the property to the Company, and that under these circumstances if the Act would have the effect apprehended by the Railway Company of divesting the Company of its title granted by the Government of Canada, in respect of any of the lands in the Belt, the Minister would feel it to be his duty to recommend

disallowance in order to prevent the consummation of such an injustice. The Minister considered, however, that the Act could not have this effect for reasons which he stated; but unfortunately it transpired ultimately by the judgment of the Judicial Committee of the Privy Council in the case of McGregor v. Esquimalt and Nanaimo Railway Company, 1907 Appeal Cases, 462, that the provincial grants authorized by the statute did operate to convey the fee simple, notwithstanding the previous transfers or conveyances as between the governments and as between the Dominion and the respondent Company. In the meantime the Esquimalt and Nanaimo Railway Company which had been constructed and was being worked under provincial powers, was by Dominion statute of 1905 declared to be a work for the general advantage of Canada, and the provincial powers of legislation with regard to the Company were thereby transferred, but this circumstance was, upon ordinary principles, held not to affect the consideration of rights in the pending case. Subsequently, in view of the result of the litigation the company succeeded in obtaining from the Government of British Columbia an agreement of indemnity or for compensation in respect of the lands of which the company had been thus deprived, and this arrangement is evidenced by Provincial statute, chapter 17 of 1910, which does not however extend to provide any compensation for the loss to which the Company is subjected by the operation of the present statute.

The Esquimalt and Nanaimo Railway Company, the Canadian Collieries (Dunsmuir) Limited and the National Trust Company Limited, have now submitted a joint petition for disallowance of the statute, chapter 71 of 1917, copy of the petition submitted herewith, and these companies represent that the legislation constitutes an undue interference with the policy of the Dominion in respect of the disposition whereby in the general public interest the Railway Belt was made available to the Esquimalt and Nanaimo Railway Company in consideration of the building of the railway, abrogating pro tanto the agreement between the Dominion and the Province of 1883, and derogating from the grant made by the Dominion to the Railway Company in pursuance of the general arrangement, and moreover divesting the Railway Company and the Canadian Collieries, claiming under the company, as well as the bondholders represented by the Trust Company of a very valuable portion of their assets or security; the lands in question being coal-bearing lands of great value, either as ascertained or in prospect.

RECORD

Court of Appeal of British Columbia

Exhibit No. 65
Report
Minister of
Justice to
Gov.-Gen. in
Council
May 21, 1918
(Contd.)

Upon reference of the petition for the consideration of the local government, the Attorney General of the Province submitted in reply a memorandum, a copy herewith in which he urges that the amending Act involves no principle not sanctioned by the Act of 1904, and that, since the latter Act was permitted to remain in operation, Your Excellency's Government for the sake of consistency should reject the Petitioners' claim. The Attorney General however, relies principally upon the fact, which the petitioners may indeed admit without affecting their case, that the settlers had claims which were entitled to be considered and that this fact was recognized not only locally but by the Government of the Dominion which issued a Commission in 1897 to enquire into the matter. The Commissioners' report is quoted, finding that although the settlers, speaking generally had no legal claim to the coal and other minerals under their lands, they had a just claim for redress at the hands of the Province, which it was the duty of the Province to accommodate. Upon these findings the Attorney General contends, remarkably enough, that the legislation is in keeping with the policy of the Dominion, because the Dominion caused the claims of the settlers to be investigated, and in execution of the duty and obligations of the Province, because it was found that the Province should compensate the settlers. He urges moreover that the Act is intra vires of the Province, which is not denied, and that disallowance would involve a serious interference with provincial rights.

The petitioners having expressed a desire that counsel should be heard on their behalf, an appointment was made, in exception to the ordinary procedure for consideration of applications for disallowance, and the Attorney General was notified as well as the petitioners. The argument was heard before the Prime Minister, the undersigned and the Minister of Public Works, counsel representing the three petitioning companies, and also in opposition, the Granby Consolidated Mining, Smelting and Power Company Limited, which is understood to claims under grants issued by the Province pursuant to the authority of the Act under consideration. The Attorney General of British Columbia was not represented, but presumably the Granby Company was notified by the Attorney General, and represented views with which he was in accord. At the hearing the matter was very fully discussed, and the principal argument presented in support of the legislation on behalf of the Granby Company which was the only interest appearing to uphold the legislation was that the settlers' claims had been of long standing, antedating in their origin the legislation under which the title passed from the Province to the

Dominion, and from the Dominion to the Esquimalt and Nanaimo Railway Company that the quieting of these claims was eminently a proper matter for disposition by the Local legislature, and that your Excellency's Government ought not to review the conclusions reached and provincially sanctioned for the settlement of these claims.

On the other hand it was urged, and in fact it was not denied, that the Company had received its land grant in pursuance of the agreement of the Government of Canada founded upon legislation sanctioned by the Dominion, and the Province, which defined precisely the measure of the settlers' claims; that large pecuniary interests were involved, and that the companies were not in anywise responsible for the settlers' claims, or affected by them, otherwise than in so far as the Act in question, or the exercise of the powers conferred by the Act, might operate to transfer the title or diminish the area of the Company's coal-bearing lands.

It will be observed that although after the effect of the statute of 1904 had been judicially declared an agreement was reached between the Railway Company and the Province as evidenced by the statute of 1910, to afford the company a measure of compensation for the loss which it had suffered through the operation of the Act, no provision is now made or suggested to compensate for the loss which the petitioners suffer by reason of the further grants issued under the authority of the present legislation and indeed it is urged on their behalf that it is impossible in the present state of development of the property to realize the loss to which they are subjected by reason of the granting of their lands and mineral rights by the province under the authority of the statute.

In these circumstances the question which presents itself for Your Excellency's consideration is whether it is compatible with a proper fulfilment of the duty charged upon Your Excellency in relation to the power of disallowances that the Act now in question should be permitted to remain in operation.

It will be perceived by review of the reports of the Ministers of Justice from the Union to the present time that there has been great reluctance to interfere with provincial legislation, and that notwithstanding a considerable number of cases in which disallowance was sought upon established grounds, perhaps not more than a single statute has been actually disallowed by reason merely of the injustice of its provisions. Cases are not lacking, however, in which disallowance has been avoided by reason of

RECORD

Court of Appeal of British Columbia

Exhibit No. 65
Report Minister of Justice to Gov.-Gen. in Council
May 21, 1918
(Contd.)

amendments undertaken by the local authorities, upon the suggestion of the Ministers of Justice, to remedy the complaints against the original Acts, and certainly the constitutional propriety and duty of reviewing provincial legislation upon its merits when it is the subject of serious complaint has been maintained by every succeeding Minister of Justice from the time of the Union, save only the immediate predecessor of the undersigned, who suggested in effect that the power has become obsolete. In the opinion of the undersigned the power is unquestionable and remains in full vigour. Indeed the very careful consideration which the Ministers have been accustomed to give to applications presented from time to time for disallowance depending upon reasons of inequality or hardship is inconsistent with any other view. But although the Governor in Council exercises constitutionally a power of review and control, he is certainly not responsible for the policy, wisdom or expediency of provincial legislation, and therefore he should not disallow merely because an Act is in his judgment ill-advised, untimely or defective; or because its project lacks either in principle or detail that degree of equity and consideration of the existing situation which in the opinion of the Governor in Council should have commended itself to the legislature. Indeed it must be realized in the exercise of the power of disallowance that legislative judgment upon provincial matters is committed to the legislatures and not to your Excellency in Council, and that the former therefore have a reasonable and just degree of freedom to work out their measures of legislation in the manner which the legislatures deem requisite or advisable or best adapted reasonably to provide for the situation in hand. On the other side it cannot be denied that there are principles governing the exercise of legislative power, other than the mere respect and deference due to the expression of the will of the local constituent assembly, which must be considered in the exercise of the prerogative of disallowance. It may be difficult, and it is not now necessary to define these principles for purposes of general application; certainly although legislative interference with vested rights or the obligations of contracts, except for public purposes, and upon due indemnity, are processes of legislation which do not appear just or desirable, nevertheless it would, in the opinion of the undersigned, be formulating too broad a rule to affirm that local legislation affected by these qualities should in all cases be displaced by means of the prerogative.

The present case is, however, of very exceptional character, and it must fall within any just limitation of the rule. There can be no doubt about the intention of the enactment having regard to

the sequence and history of the legislation. A large area of valuable land was transferred by the Province to the Dominion destined and appropriated by statutory arrangement and sanction as between the two Governments for the benefit of the Esquimalt and Nanaimo Railway Company, which undertook the burden of constructing and operating the railway. These lands were in turn transferred by the Dominion to the company upon the terms of its contract. The stipulation as to title were precise and definite, and the situation, claims or rights of settlers and squatters were particularly considered and provided for. The settlers were accorded the right to obtain grants of 160 acres for a period of four years upon payment of $1.00 per acre and squatters who had been on the land for the purpose of improving it for at least one year were entitled to receive the surface rights only of 160 acres each upon payment of the like price. Subject to these conditions the lands passed to the company, and the company is certainly justified to look not only to the Province but also to the Dominion with whom it contracted and from whom it received its grant, to see that its title is not impaired by legislative revision of the terms after performance of the contract by which the lands were earned. The identic legislation on the part of the Province and of the Dominion of 1883 evidences a matter of Dominion as well as of local policy which has its foundation in the terms upon which British Columbia entered the Union, by which, in consideration of the construction, equipment and undertaking to operate and maintain the railway, the Company received the statutory subsidies, including the lands in question, subject to the special accommodation of the claims of the settlers and squatters, for which provision was expressly made; and the process by which, notwithstanding these solemn assurances, a valuable portion of the property which it was thus intended that the company should receive, and which the company did receive, is taken away by the exercise of the legislative authority of one of the parties to the tripartite agreement, cannot adequately be characterized in terms which do not describe an unjustifiable use of that authority, in conflict with statutory contractual arrangements to which the Government of Canada as well as the Province was a party. The Railway Company, the Collieries Company, as assignees of some of these lands, and the landholders who have loaned their money to assist in the operation of the mines upon security of a statutory title, the most conclusive which the law knows, submit their case for the consideration of Your Excellency in Council; they invoke the powers conferred by the Constitutional Act; and the undersigned, in agreement with his predecessor of 1904, considers that both the proper execution of these powers and the obligation of

RECORD

Court of Appeal of British Columbia

Exhibit No. 65
Report Minister of Justice to Gov.-Gen. in Council
May 21, 1918
(Contd.)

honour and good faith in the administration of the transaction on the part of Your Excellency in Council, require that the Province should not be permitted substantially to diminish the consideration of the contract.

Upon the submission of the Attorney General that disallowance would involve a serious interference with provincial rights, the undersigned observes that provincial rights are conferred and limited by the British North America Acts, and while the Provinces have the right to legislate upon the subjects committed to their legislative authority, the power to disallow any such legislation is conferred by the same constitutional instrument upon the Governor General in Council, and incident to the power is the duty to execute it in proper cases. This power, and the corresponding duty, are conferred for the benefit of the Provinces as well as for that of the Dominion at large. The system sanctioned by the Act of 1867, as interpreted by the highest judicial authority, "provides for the federated provinces a carefully balanced "constitution, under which no one of the parts can pass laws for "itself, except under the control of the whole acting through the "Governor General." The mere execution of the power of disallowance does not therefore conflict with provincial rights, although doubtless the responsibility for the exercise of the power which rests with Your Excellency in Council ought to be so regulated as not to be made effective except in those cases in which, as in the present case, the propriety of exercising the power is demonstrated.

The undersigned recommends therefore that the said statute, Chapter 71 of 1917, intituled "An Act to amend the Vancouver Settlers' Rights Act, 1904, be disallowed, and that a copy of this report, if approved, be transferred to the Lieutenant Governor of British Columbia, for the information of his Government, also that copies be transmitted to the Petitioners, the Esquimalt and Nanaimo Railway Company, Canadian Collieries Limited, and the National Trust Company Limited.

Humbly submitted,

(Sgd.) Chas. J. Doherty,
Minister of Justice.

RECORD

Court of Appeal of British Columbia

Exhibit No. 66
Order of the Gov.-Gen. in Council, P.C. 1334
May 30, 1918

EXHIBIT No. 66

ORDER OF THE GOVERNOR GENERAL IN COUNCIL, P.C. 1334.

Certified copy of a Report of the Committee of the Privy Council, approved by His Excellency the Governor General on the 30th May, 1918.

The Committee of the Privy Council have had under consideration the annexed report from the Minister of Justice, dated 21st May, 1918, recommending for the reasons therein stated that the statute of the legislature of British Columbia, Chapter 71 of 7-8 George V (1917) assented to on the 19th day of May, 1917, and received by the Secretary of State for Canada on the 31st day of May, 1917, intituled "An Act to amend the Vancouver Island Settlers' Rights Act, 1904," be disallowed.

The Committee concur in the view of the Minister of Justice as set out in the said report and advise that the said Act be disallowed accordingly.

The Committee, on the recommendation of the Minister of Justice, further advise that a copy hereof and of the accompanying report, if approved, be transmitted to the Lieutenant Governor of British Columbia for the information of his Government, also that copies be transmitted to the petitioners, the Esquimalt and Nanaimo Railway Company, Canadian Collieries Limited, and the National Trust Company Limited.

All of which is respectfully submitted for approval.

(Sgd.) Rodolphe Boudreau
Clerk of the Privy Council.

RECORD

Court of Appeal of British Columbia

Exhibit No. 67
Extract from Mulholland Report, 1937, Page 41

EXHIBIT No. 67

EXTRACT FROM MULHOLLAND REPORT, 1937, PAGE 41

MERCHANTABLE TIMBER IN OWNERSHIP CLASSES

(In thousand feet board-measure.)

Status	Accessible	Per Cent.	Inaccessible	Per Cent.	Total	Per Cent.
Unalienated Crown timber	44,803,900	41	100,655,800	70	145,459,700	57
Timber licences and leases	50,902,400	46	31,124,800	21	82,027,200	32
Crown-granted and Indian reserves	14,031,900	13	12,980,400	9	27,012,300	11
Totals	109,738,200	100	144,761,000	100	254,499,200	100

Exhibit No. 68
Extract from Evidence of C. D. Orchard Before Sloan Commission April 3, 1944

EXHIBIT No. 68

EXTRACT FROM EVIDENCE OF C.D. ORCHARD BEFORE SLOAN COMMISSION

P. 1192

Q. Now, I want to come again to the E. & N. Railway grant. Have you a copy of the 1938 Report—the E. & N. Railway lands? A. No, not here, but I have some of the significant figures from it.

Q. As we heard from Mr. Barclay, the grant—the railway grant to the E. & N. Railway Company in 1884, was it? A. Yes 1887 actually given.

Q. 1887; pursuant to the Act of 1884? A. Yes.

Q. Carried some two million—over two million acres, didn't it? A. Yes, that's right.

Q. Now, at the present time, how many acres of productive timber land is still owned by the E. & N. Railway? A. Well, we made a study of the area in 1938, and my latest figures are from that report.

Q. Yes. A. On that date the E. & N., we believed, had 988,950 acres, still in their control, in their ownership, of which —would you like—

Q. What was the area still controlled, again? A. 988,950 acres.

Q. Yes. A. Would you like the various classifications of that land?

Q. Yes, I would, please. A. There were 337,825 acres of timber.

Q. THE COMMISSIONER: The figure again? A. 337,-825.

Q. Of what? A. Mature timber. Merchantable timber. Timber of merchantable size. Of young growth—

Q. MR. DAVEY: Just before you leave that: that is, what percentage of the total area of merchantable timber in that belt? A. Well, I have not got that. It approximates fifty percent, just about exactly. There are 670,000 of timber in the belt.

Q. Yes; I have it as 49 per cent. A. Yes, it would be very close to fifty per cent. Of young growth—

Q. Before—yes? A. Go ahead.

Q. Perhaps before we come down to young growth, how much timber in the E. & N. Railway Belt—what is the area of the merchantable timber in the E. & N. Railway Belt, held by owners other than the E. & N. Railway Company? A. Well, there is in various Crown grants which include Indian Reserves and such land as the Reeve of North Cowichan was speaking of this morning, 327,885 acres, and a small acreage of vacant Crown land—4,865 acres, making a total of timbered lands in 1938 of 670,575 acres.

Q. And 336,000 acres of merchantable timber land held by owners other than the E. & N. Railway Company in the E. & N. Railway Belt includes also Grantees? A. That would include all the privately owned timber, purchased from the E. & N. Railway Belt.

RECORD

Court of Appeal of British Columbia

Exhibit No. 69
Extract from Evidence of C. W. McBain Before Sloan Commission
May 11, 1944

EXHIBIT No. 69

EXTRACT FROM EVIDENCE OF C. W. McBAIN BEFORE SLOAN COMMISSION

P. 1616

MR. McMULLEN: I will call Mr. McBain.

CLARKE WHITFIELD McBAIN, duly sworn, examined by Mr. McMullen, testifies:

Q. Mr. BcBain, you are the Land Agent of the Esquimalt & Nanaimo Railway Company? A. Yes, sir.

Q. How long have you occupied that position? A. Since 1936.

Q. Now you have prepared a statement, which I will show you, showing the totals of E. & N. Crown Grants, in statement A, that is already in, showing 337,825 acres alleged by the 1938 report as then being still owned by the Railway Company, and also the 327,885 acres presumably held by purchasers from the Railway Company, and with these figures or totals, you have subtracted the sales since the beginning of 1938, down to March 1944; is that it? A. April the 4th.

Q. April 4th, 1944? A. Yes.

Q. Now will you state the effect of that statement. The list of sales already put in by my learned friend Mr. Davey, showed a total of 187,084 acres sold from the beginning of 1937 to April 4th, 1944. Now omitting the sales for 1937, which should be included in this calculation, and taking the sales from 1938 to 1944, that would amount to how much? A. 160,802 acres in round figures.

THE COMMISSIONER: You are going to make this document an Exhibit are you?

MR. McMULLEN: Yes, your lordship.

(Document referred to put in and marked exhibit 143.)

Q. Now there were some of those lands that carried no timber at all, and some of them were inaccessible. Would you state the figures of the accessible timber and inaccessible. A. I have deducted from the 160,802 acres that are taken, 11,433 acres, and acres that had thickets on them 15,353 acres.

Q. Which we treat as land that carried no timber of commercial value. A. Yes. And taken from the 160,802, that reduces it to 133,967 in round figures.

Q. Deducting that from the 337,325, that leaves 202,858. A. Yes, at April 4th, 1944.

EXHIBIT No. 70

EXCERPT FROM THE REPORT OF THE COMMISSIONER RELATING TO THE FOREST RESOURCES OF BRITISH COLUMBIA

(Sloan Report)

E. & N. LANDS

In order to understand the questions raised before me relating to the timber lands of the Esquimalt and Nanaimo Railway Company (now controlled by the Canadian Pacific Railway Company), it is necessary to review shortly the history of that undertaking in which is involved, in part at least, the terms under which this Province became part of Canada.

British Columbia was isolated from the Confederacy of 1867 by Ruperts Land, then owned by the Hudson's Bay Company. This area, a practically unknown wilderness, stretching for a distance of 1,200 miles between the Rocky Mountains and Ontario and broken only by one small settlement, Red River, was without railways or roads. Fur brigades traversing this vastness by a series of waterways and overland trails took many months to travel from the East to posts in this Province.

Ordinary travellers wishing to go East from here went by sea to San Francisco and thence by United States railways. Telegraphic communication was also routed through the United States.

The population of British Columbia at this period of its history totalled approximately 40,000 people. Of this number there were about 25,000 Indians, 9,000 whites, and 1,500 Chinese. Over 50 per cent. of this population lived on Vancouver Island.

It is manifest from the resolutions of the Quebec Conference of 1864 and from the inclusion of appropriate provisions in the "British North America Act" of 1867 it was the policy of the Imperial as well as the Canadian authorities that British Columbia should join in the Union of the Provinces. Steps could not be taken, however, to attain this objective until such time as Ruperts Land had been incorporated with the Confederation. This was effected in 1868.

Earl Granville, Secretary for the Colonies, in a dispatch to the newly-appointed Governor Musgrave, dated August 14th, 1869, stated he had been aware that the Imperial Government had

previously declined to entertain the question of British Columbia's entry into Confederation until Ruperts Land had been annexed to Canada, but now that that had been accomplished (and I quote his dispatch)—

> "The question therefore presents itself whether a single colony should be excluded from the great body politic which was thus forming itself; on this question the Colony itself does not appear to be unanimous, but, as far as I can judge from the dispatches which have reached me, I should conjecture that the prevailing opinion is in favour of union. I have no hesitation in stating that such is also the opinion of Her Majesty's Government. . . . They anticipate that the interest of other Provinces of British North America will be more advanced by enabling the wealth, credit, and intelligence as a whole to be brought to bear on every part than by encouraging it in the contracted policy of taking care of itself, possibly at the expense of its neighbour. Most especially as it is true in the case of internal transit, it is evident that the establishment of a British land communication between the Atlantic and the Pacific is far more feasible by the operations of a single government responsible for the progress of both shores of the Continent than by a bargain negotiated between separate—perhaps in some respects rival—governments and legislatures. Her Majesty's Government are aware that the distance between Ottawa and Victoria presents a real difficulty in the way of immediate union; but that difficulty will not be without its advantages if it renders easy communication indispensable and forces onward the operations which are to complete it."

Governor Musgrave, pursuant to this dispatch, framed the terms of the proposed union between British Columbia and Canada and laid them before the Legislative Council of 1870 for consideration. His draft Terms of Union were adopted, after prolonged debate, with slight alteration.

The provision of the proposed Terms of Union relevant to this discussion is as follows:—

> "8. Inasmuch as no real Union can subsist between this Colony and Canada without the speedy establishment of communication across the Rocky Mountains by Coach Road and Railway, the Dominion shall, within three years from the date of Union, construct and open for traffic such Coach Road from some point on the line of the Main Trunk Road of this

Colony to Fort Garry, of similar character to the said Main Trunk Road; and shall further engage to use all means in her power to complete such Railway communication at the earliest practicable date, and that surveys to determine the proper line for such Railway shall be at once commenced; and that a sum of not less than One Million Dollars shall be expended in every year, from and after three years from the date of Union, in actually constructing the initial sections of such Railway from the seaboard of British Columbia, to connect with the Railway system of Canada."

On May 10th, 1870, a delegation of three left this Province for Ottawa, by way of San Francisco, to discuss the proposed union with the Dominion Government.

Long before this time Canadian statesmen as well as Imperial authorities had been giving considerable thought to the question of building a transcontinental railway. From the Imperial point of view a railway for transporting goods from Great Britain to China and the Far East was of decided interest. The North-west Passage was to be by rail. Far-sighted Canadians were thinking in terms of a union extending from sea to sea to "round off" Confederation.

When our little delegation reached Ottawa, hoping for a wagon-road, they were therefore agreeably surprised to find waiting for them "a fully matured proposal for a railway" running from the head of the Great Lakes to the Pacific Coast.

For reasons unknown to me, except perhaps that the oratory of Edward Blake, Anglin, and others who were critical of the Terms of Union has lingered down the years, a number of our citizens in Eastern Canada—and some here in the West who ought to be better informed—have been labouring under the fallacious impression that British Columbia demanded a railway as the price of its entry into the Union. In truth, the facts do not support any such assumption.

Without labouring the subject, I would refer to the following statement of Senator Miller in a speech to the Senate on April 3rd, 1871:—(1)

"A railway across the Continent on British soil was as much an Imperial as a Dominion necessity. There is no doubt

(1) Parliamentary Debates, p. 797.

that England so regarded it. The leading minds of the Empire had unmistakably given their opinion on the high national character of the work."

R. E. Gosnell in "The Story of Confederation" says, at page 95. when speaking of Sir John A. Macdonald:—

"He had inside knowledge of what might lead to annexation to the United States, and there was more danger in the situation than people imagined then or now. Again, at that very time a group of capitalists associated with the Northern Pacific had planned to extend that railway through Manitoba and through the Middle West and British Columbia to and into Alaska (purchased by the United States from Russia in 1867). Sir John realized the danger of such an enterprise in view of the long-dreamed-of Canadian trans-Atlantic railway, and he lost no time in the 'rounding-out of Confederation' in order to forestall any inroads from the United States. The best circumstantial proof of that is that when the delegates from British Columbia arrived at Ottawa, notwithstanding that a railway was considered by them as out of the question, and they had been authorized to ask simply for a wagon-road, much to their surprise they were met by a fully matured proposal for a railway. No wonder the people of British Columbia rejoiced at the unexpected boon to be conferred upon them."

Sir Charles Tupper was Dominion Minister of Railways at the time the Federal Government was discussing terms with the delegation from British Columbia.

He speaks to us from the past with the voice of one who was fully acquainted with the situation, and in his book, "Recollections of Sixty Years in Canada," the following passages appear:—

"The motives that impelled Sir John A. Macdonald and his colleagues at Ottawa to 'round off' Confederation by adding the Province of British Columbia to the Union after the North-west Territories had been acquired from the Hudson's Bay Company were based on national as well as Imperial considerations.

"What would have been the fate of British Columbia if it had remained isolated from Eastern Canada by an unexplored 'sea of mountains' and vast uninhabited prairies?

"There is no question that it would have inevitably resulted in the absorption of the Crown Colony on the Pacific Coast by the United States. Social and economic forces were working in that direction from the date of the discovery of gold in 1856. Thousands of adventurous American citizens flocked to British Columbia, and between the two countries there was a good deal of intercommunication by land and sea. Sir James Douglas, an ex-Governor, a prominent figure in the early days of the colony, was opposed to Confederation.

"Until his eleventh-hour conversion, ex-Governor Seymour entertained similar views. The appointment of Anthony Musgrave, a pro-Union man, in 1869, came at a psychological moment when the Imperial authorities in London were giving their ardent support to the cause dearest to the hearts of Canadian statesmen.

"The *offer* of the Dominion Government to build a railway from the head of the Great Lakes to the Pacific Coast was the chief *inducement* that settled the political destiny of British Columbia. . . . As Minister of Railways at the time, I had something to do with the preliminary negotiations and the carrying-out of the work.

"The Government of Canada, having been successful in acquiring the North-west Territory, felt that the completion of Federation, both for national and Imperial consideration, involved the addition of British Columbia. Sir John A. Macdonald's views in regard to the wisdom of this step were shared just as strongly by every one of his colleagues. They realized that a federation, to be effective for a young nation, must represent a union extending from sea to sea.

"It would have been impossible to retain British Columbia as a Crown Colony if overtures in favour of the Union had not been made by the Dominion. How could it have been expected to remain British when it had no community of interest with the rest of Canada from which its people were separated by two ranges of mountains and the vast prairie? Under the existing circumstances it had no means of advancement except by throwing in its lot with the great nation to the south, with which it had constant communication both by land and sea.

"We all felt that we were bound to make the hazard of incurring the large outlay for a transcontinental railway if

Confederation from coast to coast was to be made a reality, and if the sovereignity of Britain was to be retained. Accordingly, negotiations towards the admission of British Columbia were started in real earnest about the end of 1869."

The proposed Terms of Union drawn by Governor Musgrave were amended to meet this offer of the Dominion Government, and for section 8 thereof, which I quoted above, a new section was substituted, reading as follows:—

"11. The Government of the Dominion undertakes to secure the commencement simultaneously, within two years from the date of the Union, of the construction of a railway from the Pacific towards the Rocky Mountains, and from such point as may be selected, east of the Rocky Mountains, towards the Pacific, to connect the seaboard of British Columbia with the railway system of Canada; and, further, to secure the completion of such railway within ten years from the date of the Union.

"And the Government of British Columbia agree 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 said railway, a similar extent of public lands along the line of railway throughout its entire length in British Columbia, not to exceed, however, twenty (20) miles on each side of said line, as may be appropriated for the same purpose by the Dominion Government from the public lands of the North-west Territories and the Province of Manitoba: Provided that the quantity of land which may be held under pre-emption right or by Crown grant within the limits of the tract of land in British Columbia to be so conveyed to the Dominion Government shall be made good to the Dominion from contiguous public lands; and provided further that until the commencement, within two years, as aforesaid, from the date of the Union, of the construction of the said railway, the Government of British Columbia shall not sell or alienate any further portions of the public lands of British Columbia in any other way than under right of pre-emption, requiring actual residence of the pre-emptor on the land claimed by him. In consideration of the land to be so conveyed in aid of the construction of the said railway, the Dominion Government agree to pay to British Columbia, from the date of the Union, the sum of 100,000 dollars per annum, in half-yearly payments in advance."

The British Columbia delegates readily consented to this proposal. Two of them were from Vancouver Island and one from the Cariboo, and a strip of land 40 miles wide on the Mainland in a region concerning which little was known did not seem of much consequence in those days.

On the 20th of July, 1871, British Columbia, pursuant to the final and agreed Terms of Union, became part of the Dominion of Canada.

On the 7th day of June, 1873, by Order of the Governor-General in Council, Esquimalt was fixed as the terminus of the transcontinental railway, and a line of railway was to be located between the Harbour of Esquimalt and Seymour Narrows.

On the 15th day of June, 1873, the Dominion Government requested the British Columbia Government to convey to it, in trust, a strip of land 20 miles in width along the eastern coast of Vancouver Island between Esquimalt and Seymour Narrows in furtherance of the construction of the said railway and pursuant to section 11 of the Terms of Union.

On the 30th day of June, 1873, the Provincial Government, while not acceding to this request, did reserve this area and expressed a willingness to convey the land once the boundaries thereof could be ascertained.

The two-year period for commencing the construction of the railway expired in 1873 without any steps being taken by the Dominion to implement their agreement and a considerable public opinion was aroused critical of the delay. In consequence, in 1874, a delegate was sent from here to London to lay the matter before the Imperial Government.

This journey resulted in the appointment of Lord Carnarvon as mediator, and on the 17th day of November, 1874, he rendered his verdict, stating in effect that a railway should be commenced without delay and completed with all practicable dispatch between Esquimalt and Nanaimo.

In the early part of 1875 the Dominion Government notified the Provincial Government that before it undertook the construction of this railway from Esquimalt to Nanaimo a strip of land 20 miles wide *on each side of the line* must be conveyed to it in trust.

The Provincial Government agreed to this demand, and an Act was passed in April, 1875, implementing this agreement, intituled "An Act to authorize the Grant of certain Public Lands to the Government of Canada for Railway Purposes."

The line was thereupon located and steel rails landed at Nanaimo and Esquimalt.

A few months later—in September of 1875—the Dominion Government, for reasons not entirely clear, offered $750,000 to the Province as compensation for the delay in commencing the work on the transcontinental railway, such sum to be applied by the Province to the building of the Esquimalt and Nanaimo link, or to such other public works as the Government might consider advantageous, and, in addition, agreed to surrender its claim to the Island Railway lands.

The British Columbia Government refused this offer, and there the matter rested until 1876 when the Legislature strongly urged that Lord Carnarvon's settlement be effectuated. A further memorial was addressed to the Imperial authorities.

In 1878, no construction having been commenced in the interim, the Dominion Government cancelled the Order in Council of June, 1873, designating Esquimalt as the terminus of the transcontinental railway and its request for a conveyance of the Island Railway Belt.

In April of 1879 the Dominion Government annulled the Order in Council of 1878 and revived the original Order in Council of June, 1873, probably because the Provincial Government had inquired if the Dominion Government also wished it to cancel the Mainland reserved areas as well.

In 1880 the Dominion Government requested a conveyance of additional lands in lieu of lands on the Mainland and Island belts believed valueless for agricultural or other economic uses, and to supply the deficiencies in the 40-mile strips caused by the International Boundary on the Mainland and the indentations of the coast-line of Vancouver Island. Notwithstanding the fact that said section 11 did not contain any undertaking on the part of the Province to convey lands in lieu of lands in the Railway Belt not suitable for agricultural purposes, 3,500,000 acres in the Peace River Block were, in 1883, conveyed to the Dominion Government. These lands were returned to the Province in 1930 consequent upon a recommendation of a Royal Commission appointed to inquire into this matter.

In February, 1883, the Provincial Government sent the following note to the Dominion Government:

> "That the land on the east coast of Vancouver Island had been continuously withheld from settlement since July, 1873, up to the present time, and the development of that fertile tract of country, abounding in mineral wealth had been retarded to an incalculable extent."

And they recommended as a basis of settlement of the railway and railway land questions that the Dominion be urgently requested:

> "... to commence to construct the Island railway and to complete it with all practicable dispatch, or by giving such compensation for failure to build it as would enable the Provincial Government to build it as a Provincial work and open the east coast lands for settlement."

Later in 1883 the Dominion Government communicated its desire to the Provincial Government to reach a final adjustment of (*inter alia*) the Island Railway matter.

It suggested that the Provincial Legislature incorporate a company of persons to be designated by the Government of Canada for the purpose of constructing the railway from Esquimalt to Nanaimo, and that it would convey the Island Railway land to this corporation and contribute thereto the sum of $750,000 in aid of the construction of the said railway, such construction to be completed on or before the 10th day of June, 1887.

The Provincial Government consented to this proposal and the agreement between the two Governments was embodied in two Acts passed in 1883 and 1884, both intituled "An Act relating to the Island Railway, the Graving Dock, and Railway Lands of the Province."

It was by these Acts that the boundaries of the Railway Belt were described,[1] the lieu lands were transferred to the Dominion, and other outstanding disputes and difficulties arising out of the Terms of Union were finally resolved.

In 1884 the Dominion Parliament also passed an Act implementing the agreement with the British Columbia Government. By this Act the Dominion Government was authorized to convey to the Esquimalt and Nanaimo Railway Company the Island Railway Belt, upon completion of the railway to the satisfaction of the Dominion Government, and to pay to that company the sum of $750,000 as a subsidy in aid of the construction of the said railway.

(1) See map on page 181.

The British Columbia Government by the Acts of 1883-84 constituted the persons to be named by the Governor-General in Council, and such other persons who might become shareholders therein, as a body corporate by the name of "The Esquimalt and Nanaimo Railway Company."

The Governor-General in Council named Robert Dunsmuir, James Dunsmuir, and John Bryden of Nanaimo, and other American associates, as members of the company.

On the 20th of August, 1883, Robert Dunsmuir and his associates entered into a contract with the Dominion Government for the construction of the said railway, and the Dominion Government in consideration thereof agreed to convey and assign the Railway lands to the said contractors, who in turn agreed to assign and transfer the liabilities and benefits under the said contract to The Esquimalt and Nanaimo Railway Company. The Railway Company completed the construction of the line to the satisfaction of the Dominion Government, and on the 21st of April, 1887, the Dominion, by deed, granted and conveyed the Island Railway Belt to the Company.

Neither the Agreement of 1883 between the contractors and the Dominion Government nor the Dominion Statute of 1884 contain any reference to Provincial taxation of the Island Railway lands. 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 Provincial Acts of 1883-84 do, however, contain the following relevant provision:—

> "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."

Two questions are now before me 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.

Before the first question can be answered it must be determined if the fire protection tax is, in the strict legal sense, a tax, or a fee or charge for a service rendered by the Crown. If a tax, then certainly it falls within the exemption of section 22 quoted above. If not a tax (although called one) but a charge for a service, then it does not come within that section. It seems to me this question must be determined by the Courts, and, in consequence, I do not wish to express any opinion on the matter.

The question of the imposition of a severance tax on timber cut by purchasers of E. &. N. lands presents a problem of some nicety. At the present time E. & N. land now in the hands of private owners is assessed and pays a land tax, and, if timber land, a fire protection tax. The Crown, however, receives no revenue from the timber cut on these alienated areas.

The Deputy Minister of Forests estimates that if the timber cut thereon paid the prevailing royalty rates, averaging $1.10 per M., the crown would have received therefrom during the last ten years a revenue of between $750,000 and $800,000 a year, and would receive substantial revenues from this source in the future. The average of $1.10 per M. includes royalty on hemlock at 60 cents, and as Douglas fir is the predominant species in the Belt this estimate of revenue is probably conservative.

The question of imposing a severance tax on this timber must, 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?

In considering the first question I assume 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.

In relation to this branch of the subject the historical background I have sketched in is of importance.

It will be remembered that the Island land grant, containing approximately 3,000 square miles, was conveyed by the Province to the Dominion, and by the Dominion to the Railway Company, as an aid in the construction of the line from Esquimalt to Nanaimo. Included in this area were and are large stands of the finest timber remaining on this continent.

The line from Esquimalt to Nanaimo, consisting of 82.9 miles of railway, together with rolling-stock and equipment, cost the

company $3,101,382. Private capital contributed $2,500,000, and the Dominion subsidy of $750,000 made up the balance of the required fund.

From 1887 to 1897 no records of the sale of timber lands were kept by the Railway Company, but it appears that from 1898 to July 31st, 1944, the Company disposed of 763,565 acres of timber land containing over 7 billion feet of timber, and realized therefrom the sum of $14,814,792.69, or about six times the contractors' investment in the railroad from Esquimalt to Nanaimo. Operation and maintenance costs have been met from operating revenue.

There is remaining in the possession of the Company areas of unalienated timber lands estimated to contain between 5 and 6 billion feet board-measure, which at the conservative figure of $2 per M. would be worth from $10,000,000 to $12,000,000.

The cost of the Alberni and Courtenay extensions have been financed by bond issues and a further grant from the Dominion Government of $770,560.

From the foregoing I am unable to see how it would be unjust and inequitable to impose a severance tax on purchasers of E. & N. timber, even assuming it to be a fact that the Railway Company would not receive quite as high a price for its stumpage on future sales as it has in the past. A return from the sale of timber land alone of approximately $25,000,000 when compared with the original investment of $2,500,000 would appear to most people a reasonably adequate subsidy for the construction of 82 miles of railway. What other amounts have accrued or will accrue to the Company from the mineral wealth of the Belt and from the sale of land, other than timber land, were not disclosed to me.

It has been said that to impose such a tax would be a "breach of the contract between the Province and the Railway Company." There are two obvious answers to that argument. In the first place there is no contract between the Province and the Company. If, on the other hand, the Acts of 1883-84 are assumed to create such a relationship, then the terms of section 22 must govern. That section, it will be recalled, only exempted the Railway lands from taxation until "the same are used for other than railroad purposes, *or leased, occupied, sold or alienated.*"

Counsel for the Railway Company frankly conceded in his argument before me that once the Company had parted with the land any Provincial tax thereon could not be said to be "a breach

of the contract."[1] He went on to say, however, that the imposition of such a tax on only one class of Crown grantees would be discriminatory and that it should be applied to all such tenures. With deference, I do not agree with this contention. There is a marked distinction between the grant of the Island Railway Belt and an ordinary Crown grant in which no royalties were reserved to the Crown. In effect, the Crown has said to the Railway Company by section 22: "Your lands will not be taxed while in your ownership. We do not bind ourselves not to tax these after you have sold them to private individuals." On the other hand, it has said in effect to Crown grantees of royalty-free lands: "We grant you these lands without reserving any interest therein to ourselves. Having parted with possession on those terms we will not impose a royalty on these lands at any future date, whether in your possession or in the possession of any successors of yours to the title thereof. Any attempt to do so would be a clear breach of our contract with you and a violation of the public conscience."

Therein, as I see it, lies the basic distinction between these two classes of Crown grants. Counsel for the Railway Company, as I understood him, also contended that as the tax would be passed back to and borne by the Railway Company it was therefore in effect a form of indirect taxation and, in consequence, *ultra vires* the Provincial Legislature. That is not a matter upon which I wish to express an opinion as Commissioner.

A further alternative contention was advanced that if the severance tax was not an indirect tax in the strict legal sense of the term and the Province had the power to impose it, nevertheless the Act would be subject to disallowance by the Dominion Government because the tax in its incidence would fall upon the Railway Company in derogation of its grant, notwithstanding the fact that it could not be described as a breach of the original contract. I have some difficulty in following this argument. It seems to include two inconsistent submissions. However that may be, in my opinion the simple answer to that question is found in the quoted section 22 and in the basic distinction I made between the Island Railway grant and an ordinary Crown grant.

The Province never at any time agreed by contract or statute or otherwise to treat the E. & N. lands as tax free when sold to third persons. The Railway Company assumed title to these lands on the terms set out in said section 22 and cannot now complain of the basis on which its title rests.

Then, too, if the Railway Company had received a Crown grant of the Railway Belt direct from the Province on April 21st,

(1) Pp. 501, 503, 510, 512, transcript of argument.

RECORD

Court of Appeal of British Columbia

Exhibit No. 70
Excerpt Report Commissioner Relating to Forest Resources British Columbia Dec., 1945 (Contd.)

1887, instead of from the Dominion Government, these lands would have been subject to royalty because granted subsequent to April 7th, 1887.

To sum up, then, in my opinion 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.

As I previously made mention, counsel for the Railway Company called into question the competence of the Provincial Legislature to impose such a tax. I cannot decide that question as a Commissioner, and therefore recommend that appropriate steps be taken by the Crown to have this matter determined by the Courts. If it is decided that the imposition of a severance tax on timber cut by purchasers of E. & N. timber land is *ultra vires* the Province that ends the matter. If the decision is that the tax is *intra vires,* then, as I have said, in my view it ought, in the public interest, to be imposed on future alienations.

RECORD

Court of Appeal of British Columbia

Exhibit No. 71
Letter
Chief Justice
Sloan to
Att.-Gen. of
B.C.
Nov. 22 1946

EXHIBIT No. 71

COAT OF ARMS

PROVINCE OF BRITISH COLUMBIA
COURT OF APPEAL
THE CHIEF JUSTICE'S CHAMBERS
LAW COURTS

VANCOUVER, B.C.,
22nd November, 1946.

Honourable Gordon S. Wismer, K.C.,
Attorney-General of British Columbia,
Parliament Buildings,
Victoria, B.C.

Dear Mr. Attorney:

I am in receipt of your communication of the 14th inst., enclosing copy of Order-in-Council 2699 relating to the questions referred to the Court of Appeal in connection with (inter alia) the right of the Province to impose taxation on purchasers of timber land from the Esquimalt & Nanaimo Railway Company.

I have considered the form and scope of the questions submitted and wish to advise you that they are fully in accord with the recommendations contained in my report on the Forest Resources of British Columbia, and adequately place the constitutional and other questions involved before the Court for determination.

I might mention that the term "severance tax" appearing in the Report was not used by me in any technical or narrow legal sense. Nor was its use intended to restrict the Government from seeking judicial determination of the constitutional competence of any form of taxation legislation within the spirit and intendment of my recommendations.

Yours very truly,

"GORDON McG. SLOAN."

B.C.L.S.
10c

VANCOUVER
MAR 14 1947
REGISTRY

RECORD

Court of Appeal of British Columbia

Exhibit No. 72
Memo. from B.C. Taxation Dept.
Dec. 4, 1946

EXHIBIT No. 72

MEMORANDUM FROM TAXATION DEPARTMENT

VALUATION FOR TAXATION PURPOSES OF LOGGED-OVER ESQUIMALT AND NANAIMO RAILWAY TIMBER-LANDS.

Generally the administrative policy of the Surveyor of Taxes on completion of logging of Esquimalt and Nanaimo timber-land has been to classify that land as wild land taxable at 3 per cent. Wild land is defined in the "Taxation Act" as land on which improvements are less than $2.50 an acre, but this value does not affect the value of the land itself in its actual economic use which the Assessor will use as a criterion in establishing a valuation.

The Provincial Assessor, in establishing the assessed value of the land itself, is guided by the minimum price fixed by the "Land Act" (R.S.B.C. 1936, chapter 144, section 47), which provides a minimum price on first-class land of $5 per acre and $2.50 per acre for second-class land.

The Assessor considers the nature of the land, its accessibility, its potential use for agriculture purposes, or its limited use as a timber-site. Log scale remaining on the land up to the maximum allowed for wild land of less than 8,000 feet per acre, at which point the land is classified as timber-land, is considered also in determining the value per acre. If the land is completely logged, has poor accessibility, and has no present use except as forest-site, the Assessor will probably establish a minimum price of $2.50 an acre.

In a few limited cases the Surveyor of Taxes, on application of the owners and after a review of the land, has decided at his discretion that $2.50 an acre was inequitable and a minimum value of $1 per acre has been established. In most cases, however, the minimum price of $2.50 for second-class land or $5 for first-class land has been applied. If the timber-stand, although less than 8,000 feet per acre, is of some consequence, some value has been added to the $2.50 or $5.00 an acre for the timber values. Further, if there are improvements on the land, although less than $2.50 an acre, this value has also been added into the value for assessment purposes.

The over-all result has been an assessed value as wild land on logged-off timber-land in the Esquimalt and Nanaimo Belt with a modal value of between $2.50 and $5 per acre and a few in-

dividual parcels valued as low as $1 and a few other parcels valued at $10 per acre.

It can be inferred from the assessment of most logged-over lands in the Esquimalt and Nanaimo Belt at the minimums provided by the "Land Act" that it has a low economic value as timber reproduction land and has been given a low assessed value for taxation as wild land, with the intent of providing a small and equitable burden.

Exhibit No. 72
Memo. from B.C. Taxation Dept.
Dec. 4, 1946
(Contd.)

Surveyor of Taxes Office,
December 4th, 1946.

EXHIBIT No. 73

Exhibit No. 73
Extract, 7 Oregon Compiled Laws

7 OREGON COMPILED LAWS s. 107-121 et seq., L 1929. Ch. 138, s. 8. p. 107

s. 107-121

Exemption of reforestation lands from ad valorem tax:
Exceptions: Amount of forest fee in lieu of taxes.

Lands classified by the commission as reforestation lands shall not, while so classified, be subject to ad valorem property tax, except as to such taxes which shall have heretobefore become a lien against such premises or any portion thereof, and, in lieu of future ad valorem property taxes during the period of such classification, said premises shall be subject only to an annual forest fee of 5 cents per acre on lands west of the summit of the Cascade Mountains and $2\frac{1}{2}$ cents per acre on lands east of the summit of the Cascade Mountains, and, in addition thereto, so long as such lands shall remain in private ownership, and irrespective of any subsequent classification, to a yield tax on all forest crops harvested from such land, as in this act provided.

s. 107-123

Forest Products: Yield Tax: Record and Report of Production: Payment of tax.

All forest crops harvested from lands classified as reforestation lands hereunder shall be subject to a yield tax of 12.5 per cent. of the value, as determined by the board, of each and every unit thereof, and in the harvesting of forest crops on such lands it shall be the duty of the owner thereof to keep an exact record of the number and kind of units of all forest products harvested

from each legal subdivision of not more than 160 acres each, and within 15 days after the thirty-first day of December of each year to report, under oath, to said board and to the tax collector of the county wherein the lands are situated the number and kinds of units of all forest products harvested from such lands during the preceding six months, which said reports shall be made on forms prepared and approved by said board, and the report to the said tax collector shall be accompanied by the owners remittance, in legal tender, of the yield tax due hereunder.

s. 107-124

Permit to harvest: Unit value: Filing and Inspection Determination by board: Hearing: Appeal: Bond by Appellant.

It shall be unlawful for any person to harvest or cause to be harvested any forest crop, or to remove or cause to be removed any forest growth, from privately owned lands which have theretofore been classified as reforestation lands, without first having obtained a written permit so to do from the board, which said permit shall set forth the unit value, by units of proper measurement, of the respective kinds of forest crops on said premises; said unit value to be determined by the board, from all evidence it commands, to be the true unit market value of such respective products, immediately prior to harvesting. Said unit values shall be filed and be open to public inspection. If the owner of the land to whom such permit is isued shall feel aggrieved at the unit value or values so fixed by the board, he shall, upon written application to the board, be granted a hearing before the board. At such hearing, all available evidence on forest crop values in the locality concerned and such other evidence as shall be deemed pertinent shall be considered by the board, and thereupon the board shall, in keeping with the evidence adduced, make an order reaffirming or revising the unit values theretobefore fixed by it, in whole or in part, as the case may be. Nothing herein contained, however, shall prevent or prohibit the owner from appealing, within 30 days, from the action of the board to the circuit court of the district in which the land is located, and, in the event of such appeal, the owner shall before undertaking to harvest any forest crops from such premises, furnish a good and sufficient bond in such an amount as the court shall deem adequate and proper, indemnifying the board and the tax collecting officers hereunder against any loss of taxes pending an adjudication of the issues in the courts of this state. Before issuing any permit for harvesting any forest crop the board shall determine whether there is full assurance that the yield tax herein provided will be paid when due, and, in the event there is any doubt as

to the financial responsibility of the permittee, the board shall require of said permittee a good and sufficient bond in such an amount as the board shall deem adequate and proper, indemnifying the state against any loss of yield tax revenue.

s. 107-125

Penalty for failure to obtain permit or pay tax: Lien of tax: Action: Provisional remedies: Attachment: Affidavit and undertaking dispensed with.

Any person or owner harvesting forest crops from lands which have theretofore been classified as reforestation lands who shall have failed first to obtain a permit from the board, or shall have failed to make his remittance of yield taxes due hereunder within said 15-day period, shall be subject to a penalty of an additional yield tax of 10 per cent. of the fixed value of said products, and the amount of such yield tax shall be a first lien against the said forest crops and a debt due and owing to the county from the owner of said lands at the time said forest crops are harvested, and the tax collector of the county wherein such lands are situated, shall, in addition to the remedies provided by statute for the collection of taxes against real and personal property, maintain an action against such owner for the collection thereof with the aforesaid penalty and with interest thereon from said 15-day period at the rate of 10 per cent. per annum until paid; said action to be maintained in the name of the county in which said taxes are due and owing, and at the time of the commencement of said action for the collection of said taxes, penalty and interest, said county shall have the benefit of any and all laws of this state pertaining to provisional remedies against real and personal property of said party against whom said taxes have been levied, without the necessity of filing an affidavit or undertaking as otherwise provided by statute, and it shall be the duty of the county clerk of the county wherein said action shall be commenced immediately to issue a writ of attachment upon application therefor by the plaintiff. The said writ shall be directed to the sheriff of as many counties as the district attorney may direct.

s. 107-126

Criminal penalty: Separate offenses.

In addition to the penalties hereinbefore provided, any and all persons harvesting forest products from reforestation lands hereunder classified without first having obtained a permit in writing so to do from the said board shall, upon conviction there-

RECORD

Court of Appeal of British Columbia

Exhibit No. 73
Extract, 7 Oregon Compiled Laws (Contd.)

for, be deemed guilty of a misdemeanor, and fined not more than $1,000.00 or imprisoned in the county jail for a period of not more than six months, or be punished by both such fine and imprisonment, as to the court shall seem proper. Each day's harvesting of such forest products without such a permit shall constitute a separate and distinct violation of this act.

(Note: The board referred to in above statutes is State Board of Forestry.)

Exhibit No. 74
Extract
Remington
Rev. Stat.
Wash.

EXHIBIT No. 74

REMINGTON REVISED STATUTES OF WASHINGTON

S. 11219-9 et seq., L. 1931

s. 11219-9

Harvest of crop: Notice to board: Bond: Cash deposit.

The owner or owners of lands classified and taxed as reforestation lands under this act, desiring to harvest any forest crop, or to remove or cause to be removed any forest growth therefrom shall in writing notify the board of such desire, and the board shall thereupon issue a permit authorizing the cutting and removal of such forest crop. The permit shall describe by legal subdivisions, or fractions thereof, areas on which cutting will be permitted. Before any forest growth is cut or removed from such lands the permittee shall file with the county treasurer of the county in which such lands are situated a good and sufficient surety company bond payable to the county in form prescribed by the board, and which before filing shall be approved by the judge of the superior court of such county, or make a cash deposit with such treasurer, in lieu of such bond, in such amount as the board shall fix, the bond to be conditioned to pay to the county in question the yield tax to which the county will be entitled upon the cutting of the forest growth from such lands. In case a cash deposit is made in lieu of the bond the same shall be applied in payment of the yield tax provided in section 11219-10 of this act, but such deposit shall not relieve an owner from payment of any additional amounts due for said yield tax nor of right of refund of any sum deposited in excess of the amount due on said tax. In event collection is made on the bond, either with or without suit, the amount collected shall be applied in payment of the yield tax due.

s. 11219-10

Report by owner of cutting: Report omitted or erroneous: Determination of stumpage and rates: Notice of rates fixed and assessment thereon: Rates applicable: Actions to determine excess tax and recover same.

Whenever the whole or any part of the forest crop shall be cut upon any lands classified and assessed as reforestation lands under the provisions of this act, the owner of such lands shall, on or before the first day of January of each year, report under oath to the State Forest Board and the Assessor of the county in which such lands are located, the amount of such timber or other forest crop cut during the preceding twelve months, in units of measure in conformity with the usage for which the cutting was made, together with a description, by government legal subdivisions, of the lands upon which the same are cut. If no such report of cutting is made, or if the assessor or the board shall believe the report to be inaccurate, incorrect or mistaken, either the Assessor or the board may by such methods as shall be deemed advisable, determine the amount of timber or other forest product cut during such period. If both the Assessor and the board make separate determinations of the amount of such cutting, the determination of the board shall be accepted and used as a basis for computation of the yield tax. As soon as the report is filed, if the Assessor and the board are satisfied with the accuracy of the report, or if dissatisfied, as soon as the Assessor or the board shall have determined the amount of timber or forest crop cut, as herein provided, the board shall determine the full current stumpage rates for the timber or forest crop cut, and shall notify the Assessor of the county in which the lands are situated of the rates so fixed by it, and the Assessor shall thereupon compute, and there shall become due and payable from the owner, a yield tax equal to twelve and one-half per cent. (12½) of the market value of the timber or forest crop so cut, based upon the full current stumpage rates so fixed by the board: *Provided,* wherever within a period of twelve years following the classification of any lands as reforestation lands, any forest material shall be cut on such lands, the owner thereof shall be required to pay a yield tax of one per cent. (1%) for each year that has expired from the date of such classification until such cutting: *Provided, further,* that no yield tax need be paid on any forest material cut for domestic use of the owner of such lands, or on materials necessarily used in harvesting the forest crop.

RECORD

Court of Appeal of British Columbia

Exhibit No. 74
Extract
Remington
Rev. Stat.
Wash.
(Contd.)

Whenever the owner is dissatisfied with either the determination of the amount cut as made by the Assessor or the board, or with the full current stumpage rates as fixed by the board, and shall pay the tax based thereon under protest, such owner may maintain an action in the superior court of the county in which the lands are located for recovery of the amount of the tax paid in excess of what the owner alleges the tax would be if based upon a cutting or stumpage rate which the owner alleges to be correct. In any such action the county involved, the County Assessor of the county, and the board, shall be joined as parties defendant, but in case a recovery is allowed, judgment shall be entered against the county only. In such action the court shall determine, in accordance with the issues, the true and correct amount of timber and forest crop which has been cut, and if an issue in the case, the true and correct full current stumpage rates, and shall enter judgment accordingly, either dismissing the action, or allowing recovery, based upon its determination of the amount of timber or forest crop cut and if in issue, the full current stumpage rate.

s. 11219-12

Yield Tax: Determination: Delinquency: Lien: Foreclosure: Action to Collect: Purchaser liable: Distribution of tax.

Upon receipt of a report of cutting or upon determination of the amount cut as provided in this act or as required in an agreement entered into under the provisions of this act, the county assessor shall assess and tax against the owner of such lands the amount of yield tax due on account of such cutting; and shall forthwith transmit to the county treasurer a record of such tax; and the county treasurer shall thereupon enter the amount of such yield tax on his records against such lands and their owner; and such yield tax shall thereupon become a lieu against such lands and also against the forest material cut thereon and against any other real or personal property owned by such owner, which shall become delinquent unless paid on or before the fifteenth day of March following the date when such report is made, or should have been made. The lien of such tax shall be superior and paramount to all other liens, taxes, assessments and encumbrances, and if not paid before the same becomes delinquent, may be collected by seizure and sale of such forest material, or any other personal property of such owner, in the same manner as personal property is seized and sold for delinquent taxes under the general tax laws; and the lien or said tax against the lands from which such forest materials are cut

or any other real property of such owner, may be foreclosed and said lands sold, in the same manner as liens for taxes are foreclosed and land sold for delinquent taxes under the general tax laws of the state. Said tax, if not otherwise collected, may be collected by means of an action instituted in the superior court of the county in which are situated the lands from which such forest materials are cut, against such owner by the prosecuting attorney in behalf of the county, in which the lands are situated from which such forest materials are cut. Any person, firm, or corporation buying any forest material on which the yield tax herein provided has not been paid shall be liable for the payment of said tax and the amount thereof may be collected from such person, firm or corporation by seizure and sale of any real or personal property belonging to such person, firm or corporation in the same manner in which real or personal property, respectively is seized and sold for delinquent taxes under the general tax laws of the state; and said tax, if not otherwise collected, may be collected by means of an action instituted in the superior court of the county in which are situated the lands from which such forest materials are cut, against such person, firm or corporation, by the prosecuting attorney in behalf of the county in which the lands are situated from which such forest materials are cut. All taxes collected under the provisions of this act or any agreement made in pursuance thereof, shall be paid to the county treasurer of the county in which the lands are situated from which such forest materials are cut, and shall be paid into the same fund and distributed by the county treasurer in the same proportions as the general taxes on other property in the same taxing district, are paid and distributed in the year in which such payment or collection is made.

s. 11219-14

Rules and regulations

The state forest board and the state tax commission, respectively, shall have power to make such rules and regulations as they shall deem necessary or advisable in the exercise of the powers and performance of the duties imposed upon them by this act.

s. 11219-15

Penalty.

Violation of any of the provisions of this act shall constitute a gross misdemeanor.

RECORD

In the Supreme Court of Canada

Exhibit No. 75
Letter,
Solicitor of
E. & N. Rly.
Co. to Sen.
J. W. deB.
Farris, K.C.
May 15, 1948

EXHIBIT No. 75

COPY

CANADIAN PACIFIC RAILWAY COMPANY

May 15, 1948

7768

Senator J. W. deB. Farris, K.C.,
Standard Bank Building,
Vancouver, B.C.

Dear Sir:—

Re: Esquimalt & Nanaimo Railway Company et al vs. Attorney-General of B.C. (E. & N. Reference).

On the 11th instant, I received a telegram from Messrs. Ewart, Scott, Kelley & Howard my Ottawa Agents, stating that the Judges were asking for the record of the Court of first instance, including the exhibits. On the 12th instant, I replied as follows:—

> "Re E. & N. Reference. There were no exhibits filed by Attorney-General of British Columbia in Court of Appeal which was Court of first instance stop All documents filed sent to Registrar with my letter December 17th stop Court was merely supplied with Volume of Documents to which reference is made in Item One of Agreed Statement of Facts, and Item One of Agreement as to Contents of Case. See Case pages five and Ninety-seven stop Everything in Volume of Documents was incorporated in Case but if Judges wish to have copy of Volume of Documents, please wire me."

My letter of December 17th, 1947 to the Registrar mentions that the only documents which were filed in the Court of Appeal were the letter of the Honourable the Chief Justice to the Attorney-General of B.C., dated November 22nd, 1946, and a certified copy of a Minute of the Executive Council dated the 15th day of January 1947. These two documents were forwarded to the Registrar.

In reply to my telegram of the 12th instant, my Ottawa Agents requested the Volume of Documents. This was sent to them by airmail on the 12th instant, and I have been advised that it has been received and submitted to the Court.

On the 14th instant, I received another telegram from my Ottawa Agents stating that Mr. Justice Kellock wished to see the original documents marked Exhibits 36 and 37 in the Case Book, and that they presume these documents can be borrowed from the B.C. Government. Upon receipt of this telegram, as you were not in your office, I spoke to Mr. John Farris who agreed to telephone Colonel Pepler the Deputy Attorney-General in Victoria to see if the documents could be located. I should be glad if you will let me know what reply you receive from Colonel Pepler.

If the Documents are located I would like to have an opportunity to see them before they are forwarded to the Registrar.

I am sending a copy of this letter to my Ottawa Agents to be handed to the Registrar of the Supreme Court of Canada for his information.

Yours truly,

J. A. WRIGHT.

JAW

RECORD

In the Supreme Court of Canada

Exhibit No. 76
Letter, Deputy Att'y-Gen. of B.C. to John Farris, Esq.
May 15, 1948

EXHIBIT No. 76

ATTORNEY-GENERAL

May 15th, 1948.

John Farris, Esq.,
Barrister and Solicitor,
Standard Bank Building,
Vancouver, B.C.

Dear Sir:

re: E. & N. Reference

As requested, I have had a search made for the original of the two documents filed as exhibits in this case, being Memorandum of Agreement made at Victoria relative to points remaining unsettled between the Dominion and the Province dated August 20th 1883, and Contract for Construction of the E. & N. Railway of the same date, and have had no success in locating these originals. There are plenty of copies but the originals seem to have either disappeared or have been mislaid and cannot be found. I have tried through all the various departments in the government which might have these documents in safekeeping without success, and the only explanation I can think of is that they may have been put in as exhibits in some previous litigation, such as that on the Settlers' Rights, and may be filed in some Court, or have possibly been destroyed.

Yours faithfully,

E. PEPLER,
Deputy Attorney-General.

Exhibit No. 77

Exhibit No. 77
Letter,
John Farris,
Esq.
to Solicitor
E. & N. Rly.
Co.
May 17, 1948

EXHIBIT No. 77

COPY

May 17th, 1948.

Mr. J. A. Wright,
c/o Legal Department,
Canadian Pacific Railway Co.,
Vancouver, B.C.

Dear Sir:

re: E. & N. Reference

As I informed you, I requested the Attorney-General's Department in Victoria to make a search for the original documents filed as Exhibits 36 and 37 in the above matter.

I am today in receipt of a letter from the Deputy Attorney-General which I am enclosing herewith. You will note that the originals cannot be found. I presume that you will so inform the Registrar of the Supreme Court of Canada.

Yours truly,

JOHN L. FARRIS.

JLF:NL
Encl.

RECORD

In the Supreme Court of Canada

Exhibit No. 78
Letter, Solicitor E. & N. Rly. Co. to Sen. J. W. deB. Farris, K.C.
May 19, 1948

EXHIBIT No. 78

CANADIAN PACIFIC RAILWAY COMPANY

May 19th, 1948
Vancouver, B.C.

-7768

Senator J. W. deB. Farris, K.C.,
Messrs. Farris & Co.,
Standard Bank Building,
Vancouver, B.C.

Dear Sir:— 10

Re: Esquimalt & Nanaimo Railway Company et-al vs. Attorney-General of B.C. (E. & N. Reference).

Referring to Mr. John Farris' letter to me of the 17th instant, enclosing letter from the Deputy Attorney-General of the 15th instant, advising that the original of Exhibit 36 and Exhibit 37 printed in the Appeal Case in the Supreme Court of Canada at pages 140 to 148 have not been located in Victoria.

As you know, the Exhibits as printed for the Supreme Court are exact copies of what was set forth in the Volume of Documents which you prepared, and which was filed in the Court 20 of Appeal for British Columbia.

I expect that what Mr. Justice Kellock is interested in is the material printed on page 148 of the Appeal Case, following the signature "H. G. Hopkirk". I understand that on the hearing before the Supreme Court you informed the Court that the following:

> NOTE.—"The Draft Bill now prepared" referred to in the third from the last line in the above document was identical in form with the Statute of December 19, 1883."

was inserted by you when you were printing the Volume of 30 Documents, so that the Bill would not have to be printed, and therefore, the balance of the page starting with Mr. Campbell's signature must have been on the Bill you were using as source material.

I am instructed that the following extract from your Factum in the Court of Appeal for British Columbia was also handed to the Judges of the Supreme Court during the hearing;

> "The draft Bill was signed by A. Campbell on behalf of the Dominion and Wm. Smith on behalf of the Province, August 21st, 1883, and on August 20th R. Dunsmuir endorsed the document as follows:
>
> > 'I have read and on behalf of myself and my associates acquiesce in the various provisions of this bill so far as they relate to the Island Railway and Lands.'
>
> It is to be noted the word is *'acquiesce'* which is the appropriate word as to Sections 23 to 26 but *not* for Section 22."

The Bill which we located in the Department of Transport at Ottawa shortly before the Supreme Court hearing, photostats of which were handed to the Judges during the hearing, was printed in the Appendix of Additional Documents at pages 28 to 35 inclusive. At page 35 the following is set forth:

A. Campbell,
Wm. Smithe,

VICTORIA, B.C. 21st August, 1883.

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

Robt. Dunsmuir.

VICTORIA, B.C. 22 August, 1883.

You will note there are some differences in the language, in the dates, and in the signature of Mr. Dunsmuir as set out in the Appendix of Additional Documents, the Factum filed by you in the Court of Appeal, and the Volume of Documents used in the Court of Appeal which became part of the Case in the Supreme Court. So that no avenue will be overlooked in attempting to meet Mr. Justice Kellock's request, I would appreciate it if you would inform me as soon as possible whether you can locate the Bill or Bills you used as source material in preparation of the Volume of Documents and your Court of Appeal Factum.

Yours truly,

J. A. WRIGHT.

JAW

RECORD

In the Supreme Court of Canada

Exhibit No. 79
Telegram, Ottawa Agents for E. & N. Rly. Co. and for Att'y-Gen. of B.C. to Solicitor for E. & N. Rly. Co.
May 22, 1948

EXHIBIT No. 79

Ottawa, Ont.
May 22, 1948.

J. A. Wright,
Solicitor, Province of British Columbia
Canadian Pacific Railway Company Law Dept.
Vancouver, B.C.

Re E. & N. Reference. Your letters 17th and 19th received and contents delivered to Judge Kellock. In Pepler's letter to John Farris he stated that while originals cannot be found there are copies in existence stop Judge now asks that copies referred to by Pepler be forwarded.

EWART SCOTT KELLEY & HOWARD

832A

EXHIBIT No. 80

COPY

CANADIAN PACIFIC RAILWAY COMPANY

May 22nd, 1948

-7768

Honourable J. W. deB. Farris, K.C.,
Messrs. Farris & Co.,
Standard Bank Building,
Vancouver, B.C.

Dear Sir:—

re: E. & N. Reference.

Enclosed herewith is a copy of a telegram which I received this morning from my Ottawa Agents. I endeavoured to get you on the telephone but found your office closed. Will you kindly arrange to have the copies of the documents sent to me to be forwarded to the Registrar of the Supreme Court.

Yours truly,

J. A. WRIGHT.

JAW
Enclo.

RECORD

In the Supreme Court of Canada

Exhibit No. 81
Letter, Ass't Deputy Att.-Gen. for B.C. to Sen. J. W. deB. Farris, K.C.
May 27, 1948

EXHIBIT No. 81

ATTORNEY-GENERAL

VICTORIA
27 May, 1948

C-76-4

Senator J. W. deB. Farris, K.C.,
1508 Standard Building,
Vancouver, B.C.

Dear Sir:

The Deputy Attorney-General has asked me to answer your letter to him of May 25th in which you refer to a letter you have received from the C.P.R. solicitor under date of May 19th.

The final question which Mr. Wright asks is as to the source of the material upon which Page 148 of the Appeal Book is based. As you are aware the appeal case is in itself based upon the volume of documents which the Attorney General filed in the Court of Appeal. The volume of documents was in turn based upon a collection of documents which we obtained from you and which I am enclosing herewith.

The matter referred to by Mr. Wright occurs at Page 35 of the enclosed volume and I find that the relevant document which starts at page 31, was taken from the Sessional Papers of 1884 starting at Page 183. You will note that that part of the document following the signature "H. G. Hopkirk" which occurs at Page 35 of the volume of documents and at Page 186 of the Sessional Papers, 1884, and which reads:

> "This is the Specification marked 'A' referred to in the contract hereto annexed, dated this 30th August, 1883,
>
> (Signed) A. Campbell, M. of J.
> For the Minister of Railways and Canals."

was not copied into the volume of documents to be used for the Court of Appeal.

The original bill of 1883 referred to in the certificate of H. G. Hopkirk referred to above is not in the Provincial Library.

Yours truly,

H. ALLAN MacLEAN.
Ass't Deputy Attorney-General.

Encl.

Exhibit No. 82 Telegram, Ottawa Agents for E. & N. Rly. Co. and for Att'y-Gen. of B.C. to Deputy Att'y-Gen. for B.C. June 1, 1948

EXHIBIT No. 82

Canadian Pacific

Ottawa, Canada

June 1, 1948

Eric Pepler, K.C.
Deputy Attorney General,
Parliament Buildings,
Victoria, B.C.

Re E & N Reference Supreme Court is asking for copies of
10 exhibits thirty-six and thirty-seven referred to your letter to John Farris dated May fifteenth stop Please forward

EWART, SCOTT, KELLEY & HOWARD

RECORD

In the Supreme Court of Canada

Exhibit No. 83
Letter,
Ottawa Agents
for E. & N.
Rly. Co. and
Att'y-Gen. of
B.C. to
Solicitor for
E. & N. Rly.
Co.
June 1, 1948

EXHIBIT No. 83

EWART SCOTT KELLEY & HOWARD

Blackburn Bldg., Ottawa

1st June, 1948

J. A. Wright, Esq.,
Solicitor Province of British Columbia,
Canadian Pacific Railway Company,
Law Department,
Vancouver, B.C.

re: *E. & N. Reference*

Dear Sir:

We duly received your letter of 27th instant and note the contents.

The Registrar communicated with us by telephone again today to know whether the copies of the exhibits are forthcoming. As we are also agents for the Attorney General of British Columbia in this matter we wired the Deputy Attorney General and enclose a copy of my telegram herewith.

If there is any means whereby you can expedite the forwarding of the copies by the Deputy Attorney General we presume you will take such action.

Yours very truly,

EWART SCOTT KELLEY & HOWARD

/B

EXHIBIT No. 84

Exhibit No. 84 Letter, Messrs. Farris & Co. to Solicitor for E. & N. Rly. Co. June 2, 1948

June 2nd, 1948.

Mr. J. A. Wright,
The Law Department,
Canadian Pacific Railway,
Vancouver, B.C.

re: *E & N Reference*

Dear Sir:

In reply to your letters of May 19th and May 22nd we enclose herewith copy of a letter that we have received from the Attorney-General's Department together with the volume of documents therein referred to.

We would appreciate it if you would make sure that this volume of documents is returned to us after it has served its purpose in the Supreme Court of Canada.

Yours truly,

FARRIS McALPINE STULTZ BULL & FARRIS

Per:

R. S. STULTZ.

JLF:NL
Encl.

RECORD

In the Supreme Court of Canada

Exhibit No. 85
Letter,
Solicitor for
E. & N. Rly.
Co. to Messrs.
Farris & Co.
June 10, 1948

EXHIBIT No. 85

CANADIAN PACIFIC RAILWAY COMPANY
Vancouver, B.C.

June 10th, 1948.

Messrs. Farris, McAlpine, Stultz, Bull & Farris,
Barristers, etc.
Suite 1508 Standard Building,
Vancouver, B.C.

Dear Sirs:

re: *E. & N. Reference*

I acknowledge receipt of your letter of the 2nd instant, enclosing letter from Mr. Maclean, Assistant Deputy Attorney-General, to Senator Farris, of the 27th ultimo, also the volume of documents therein referred to.

My understanding is that this volume of documents, entitled "In the Matter of Chapter 71 of the Statutes of British Columbia for 1917", was prepared for use in connection with the petition for disallowance of that statute, which was dealt with by the Report appearing at p. 240 of the Appeal Case in the Supreme Court of Canada. This volume of documents has Senator Farris' name written on the outside cover and I would take it from notations appearing in it that it was used for printing the volume of "Printed Documents" filed by the Attorney-General in the Court of Appeal in the present reference and referred to at p. 5 l. 4 and p. 97 l. 20 of the Appeal Case in the Supreme Court.

I notice that there is pinned to page 35 of the volume of documents you sent me a slip of paper upon which the following is written by hand in ink:

Note:

"The Draft Bill now prepared" referred to in the 3rd from the last line in the above document was identical in form with the Statute of Dec. 19th 1883.
It was signed

"A. Campbell"
"Wm. Smith".

Victoria, B.C. 21st August, 1888."

"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. 20 Aug. 1883. "R. Dunsmuir"

Underneath the slip of paper containing the above note there is written in red ink on page 35 "Insert note here". Notations in red pencil on the printed page 35 indicate that the specifications were to be omitted in the printing for the Court of Appeal.

I would gather that the inquiry from the Supreme Court of Canada is intended to ascertain the source of the endorsement of R. Dunsmuir as it appears in the hand-written note pinned to page 35 mentioned above, also the source of the endorsement of R. Dunsmuir as quoted in your Factum in the Court of Appeal.

I would be obliged if you would let me hear from you at your early convenience so that the inquiry coming from the Supreme Court may be fully answered as soon as possible.

I sent off to our Ottawa agents on the 3rd instant to be transmitted to the Registrar of the Supreme Court your letter of the 2nd instant, together with the letter dated 27th May from the Assistant Deputy Attorney-General to Senator Farris and the volume of documents accompanying your letter of the 2nd instant, and I am today forwarding to our agents copy of this letter.

Yours truly,

J. A. WRIGHT.

JAW

RECORD

In the Supreme Court of Canada

Exhibit No. 86
Letter, Messrs. Farris & Co. to Solicitor for E. & N. Rly. Co.
June 10, 1948

EXHIBIT No. 86

June 10, 1948

J. A. Wright, Esq.,
Solicitor,
C.P. Rly,
Vancouver, B.C.

re: *E. & N. Taxation Reference*

Dear Sir:—

We acknowledge receipt of your letter of today.

Your enquiry can only be answered by Senator Farris who is at present absent from the City. We expect that he will return about the 20th when your letter will at once be brought to his attention.

Yours truly,

FARRIS McALPINE STULTZ BULL & FARRIS

per R. S. Stultz.

RS/EA

EXHIBIT No. 87

(COPY)

EWART SCOTT KELLEY & HOWARD
Blackburn Bldg., Ottawa.

15th June, 1948

J. A. Wright, Esq.,
Solicitor Province of British
Columbia,
Canadian Pacific Railway Company,
Vancouver, B.C.

Dear Sir:—

re: *E. & N. Reference*

We beg to acknowledge receipt of your letters of 10th and 11th instants. The copy of your letter to Farris & Co. and copy of the reply thereto have been delivered to the Registrar of the Supreme Court, and turned over by him to Mr. Justice Kellock. We expect to know shortly whether anything further is still required by the Court.

Several days ago we received direct from the Deputy Attorney General of British Columbia, a photostatic copy of the Sessional papers for delivery to the Court and these were also handed to the Registrar.

Yours truly,

EWART SCOTT KELLEY & HOWARD.

RECORD

In the Supreme Court of Canada

Exhibit No. 88
Letter, Messrs. Farris & Co. to Solicitor for E. & N. Rly. Co.
Feb. 3, 1949

EXHIBIT No. 88

February 3rd, 1949

J. A. Wright, Esq.,
Law Department,
Canadian Pacific Railway,
Vancouver, B.C.

Dear Sir:

re: *Esquimalt & Nanaimo Reference*

This is in answer to your letter of June 10th, 1948. Our Mr. John Farris attended the Assistant Deputy Attorney-General in Victoria on Tuesday, and discussed the contents of your letter and preceding correspondence with him.

We regret to say that there is no information available additional to that contained in the correspondence preceding your letter. For convenience we have made a copy of the correspondence passing in this connection, which we enclose herewith. We think that the copies we are enclosing comprise all that you would wish to include in the Record for the Privy Council.

Yours truly,

FARRIS STULTZ BULL & FARRIS

per: A. D. Pool

ADP:NL
Encl.

In the Supreme Court of Canada

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

ESQUIMALT & NANAIMO RAILWAY COMPANY,

ALPINE TIMBER COMPANY LIMITED,
THE ATTORNEY-GENERAL OF CANADA,

Appellants,

AND:

THE ATTORNEY-GENERAL OF BRITISH COLUMBIA,

Respondent.

No. 11

CERTIFICATE OF SOLICITOR

I, James Arthur Wright, hereby certify that I have personally compared the annexed print of the case in appeal to the Supreme Court with the originals and that the same is a true and correct reproduction of such originals.

DATED at Vancouver, B.C., this 2nd day of October, A.D. 1947.

J. A. WRIGHT,

A Solicitor for the Appellant Esquimalt and Nanaimo Railway Company.

In the Supreme Court of Canada

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

ESQUIMALT & NANAIMO RAILWAY COMPANY,

ALPINE TIMBER COMPANY LIMITED,

THE ATTORNEY-GENERAL OF CANADA,

Appellants,

AND:

THE ATTORNEY-GENERAL OF BRITISH COLUMBIA,

Respondent.

No. 12

CERTIFICATE OF REGISTRAR

I, the undersigned Registrar of the Court of Appeal for British Columbia, DO HEREBY CERTIFY that the annexed case on pages 1 to 275 inclusive, together with the Report of the Commissioner relating to The Forest Resources of British Columbia, is the case stated by the parties pursuant to Section 68 of the Supreme Court Act and the Rules of the Supreme Court of Canada in the appeal herein to the Supreme Court of Canada.

AND I DO FURTHER CERTIFY that Esquimalt and Nanaimo Railway Company and Alpine Timber Company Limited, two of the appellants herein, have given proper security to the satisfaction of a Judge of the Court of Appeal for British Columbia, as required by Section 70 of the Supreme Court Act, being the sum of Five hundred ($500.00) Dollars of lawful money of Canada, deposited with the Registrar of the said Court of Appeal, a copy of the Certificate of the Registrar as to the deposit of security, and a copy of the Order of the Honourable Mr.

RECORD

In the Supreme Court of Canada

No. 12
Certificate of Registrar
(Contd.)
Oct. 8, 1947

Justice Robertson approving the said security being found at pages 95 and 96 respectively of the said case.

AND I DO FURTHER CERTIFY that the said case contains the Reasons for the Opinions of all the members of the Court of Appeal for British Columbia who were present at the hearing in the said Court of Appeal.

IN TESTIMONY WHEREOF I have hereunto subscribed my hand, and affixed the seal of the said Court of Appeal of British Columbia at Vancouver, B.C., this 8th day of October, A.D. 1947.

10

"J. F. MATHER,"
Registrar.

B.C.L.S.
$1.00

Vancouver
Oct 8 1947
Registry

SEAL
Court of Appeal
British Columbia

No. 13

In the Supreme Court of Canada

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

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

— and —

THE ATTORNEY-GENERAL OF BRITISH COLUMBIA,
Respondent.

FACTUM OF THE APPELLANT
ESQUIMALT & NANAIMO RAILWAY COMPANY

PART I.

1. This is an appeal from the judgment of the Court of Appeal for British Columbia dated 10th June, 1947 (Case p. 19) answering seven questions referred to that Court by Order of the Lieutenant-Governor in Council dated 13th November, 1946, (Case p. 1). The reference was made pursuant to the Constitutional Questions Determination Act, R.S.B.C. 1936, Chapter 50. The questions and answers are set out at pages 19 to 22 of the Case.

2. The appeal of this Appellant is in respect of the answers made to Questions 1, 2, 3, 5, 6 and 7. The answers of O'Halloran J.A. and Bird J.A. to Questions 1, 2, 3, 5 and 6 are against the contentions of this Appellant, whereas the answers of Smith J.A. to those questions are acceptable to this Appellant. In the case of Question 7, Smith J.A. and Bird J.A. found against this Appellant, whereas O'Halloran J.A. found in its favour. In the case of Question 4, the answers of the three members of the Court are unanimously in favour of the position taken by this Appellant.

3. It would seem appropriate at the outset to mention the circumstances that gave rise to the reference to the Court of Appeal.

RECORD

In the Supreme Court of Canada

No. 13
Factum of the Appellant Esquimalt & Nanaimo Rly Co.
(Cont'd)

4. By order of the Lieutenant-Governor in Council of British Columbia dated 31st December, 1943, made pursuant to the Public Inquiries Act, R.S.B.C. 1936, Chapter 131, the Honourable Mr. Justice Sloan, then Puisne Justice of the Court of Appeal for British Columbia (now Chief Justice of that Court) was appointed a sole Commissioner to inquire into the forest resources of the Province. The matters referred to the Commissioner were very broad in scope as will be observed from his Commission set out at pages Q 7 and Q 8 of his printed report, but the reference to the Court of Appeal was only concerned with his findings in respect of this Appellant's lands on Vancouver Island. The part of his report relating to this subject will be found on pages Q 173 to Q 184 of the printed report and in the Case commencing at page 253.

5. Before referring to the findings of the Commissioner, mention should be made of the provincial statute incorporating this Appellant, 1883 British Columbia Statutes, Chapter 14 (Case p. 150). This statute provided for a land grant by way of subsidy to this Appellant for the construction of a railway on Vancouver Island between Esquimalt and Nanaimo. It also provided exemption from taxation of the subsidy lands after their acquisition by this Appellant in the following terms:

> "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." (p. 156 l. 33)

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

6. The Commissioner stated in the section of his report relating to the subsidy lands, 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. 262 l. 33)

7. In referring to the first question 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 were 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 (p. 263 l. 1). Accordingly the question thus raised by the Commissioner with respect to this tax was included in the reference in the question numbered 7.

8. In referring to the second question, the Commissioner stated—"The question of imposing a severance tax on this timber must, 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?" (p. 263 l. 23). 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" (p. 263 l. 27).

9. In approaching the question from the first of his two avenues of approach, the Commissioner pointed out (p. 263 l. 39) 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 billion 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 M. 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 E. & N. timber (p. 264 l. 18).

In connection with the matters thus referred to by the Commissioner it should perhaps be pointed out that the $2,500,000 originally contributed by private capital is a relatively small part of the railway company's present investment. The capital investment less Dominion subsidy now amounts to $10,978,108 (p. 17 l. 4).

10. 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 was of the view that there was no contract between the Province and the Company (p. 264 l. 29). He also expressed his view on that question in these terms— "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" (p. 262 l. 23). He went on to express the view that even if there was a contractual relationship, Section 22 would not preclude taxation after sale by the Railway Company of the subsidy lands (p. 264 l. 33).

The Commissioner thought there was a distinction between the grant of the Island Railway Belt and "an ordinary Crown grant" which in this Appellant's respectful submission is unsound (p. 265 l. 4). There is no distinction between a Crown grant for money consideration and a Crown grant for building a railway.

11. 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

RECORD

In the Supreme Court of Canada

No. 13
Factum of the Appellant Esquimalt & Nanaimo Rly Co.
(Cont'd)

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).

12. The effect of the proposed tax requires some examination. It should be pointed out in the first instance that such tax would only apply to about one-sixth in acreage of Crown granted timber lands in the Province and to between one-fifth and one-sixth in quantity of the timber standing on such lands.

13. The total area of Crown granted timber lands, excluding the railway grant, amounted, according to the Commissioner, to 529,940 acres (Q 91 of Report). Adding that acreage to 670,000 acres of merchantable timber included in the railway grant (p. 251 l. 14) gives a total of 1,199,940 or in round figures 1,200,000 acres of Crown granted timber lands in the province. From a report made in 1938 it appeared that at that time this Appellant still owned 337,825 acres of merchantable timber (p. 251). Between 1938 and 4th April, 1944, this Appellant disposed of 133,967 acres of timber lands, leaving 203,858 acres still unsold (p. 252). It is this latter acreage, amounting to one-sixth of the total, which would be affected by the proposed tax.

14. A report prepared by the Provincial Department of Lands published in 1937 and referred to at Q 29 of the Commissioner's report showed that the merchantable timber on Crown granted land including Indian Reserves was approximately 27,000,000,000 feet (p. 250 l. 13). The quantity on Indian Reserves was not segregated but would be a small part of the total. The Commissioner assumed that the unsold timber of the Railway Company would amount to between 5 and 6 billion feet (p. 264 l. 11)—that is to say, between one-fifth and one-sixth in quantity of the total timber on all Crown granted timber lands.

15. It should be pointed out in the next instance that a severance tax on a scale approximating prevailing royalties, as recommended by the Commissioner, would be an impost of exceptional severity. As of the time of the Commissioner's Report, the prevailing royalty rates averaged $1.10 per thousand feet board measure (p. 263 l. 15) and according to such report the timber on the unsold lands of the railway company had a value of $2 per thousand feet (p. 264 l. 11). On that basis the proposed tax would amount to 55% of the value of such timber to this Appellant. Applying a tax of $1.10 per M. to the 5 to 6 billion feet of the unsold timber of the Railway Company, would result in a tax of between $5,500,000 and $6,600,000. This tax would be over and above the tax to which all Crown granted lands are now subject under the Taxation Act of British Columbia (R.S.B.C. 1936 c. 282 s. 41 (1)). That Act imposes a tax on timber lands in the amount of 1½% of the assessed value and on wild land in the amount of 3% of the assessed value.

16. It will thus be seen that to single out the unsold timber lands of the

railway company for taxation in the amount proposed would result in an impost discriminatory in character and exceptional in severity.

17. In dealing with the proposed severance tax from his second avenue of approach, 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).

18. Questions 1, 2 and 3 referred to the Court of Appeal appear to have been framed to test the correctness of the Commissioner's view with regard to whether the proposed tax would be in breach of contract. Questions 4, 5 and 6 appear to have been framed to test the validity of three proposed methods designed to carry out the Commissioner's recommendation on the matter of the severance tax.

19. A brief review of the history of events leading to the construction of the railway on Vancouver Island would appear to be helpful at this stage.

20. 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 (p. 192 l. 18; p. 258 l. 5). 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 (p. 192 l. 31; p. 258 l. 18).

21. By order of the Governor-General in Council dated 7th June, 1873, Esquimalt was fixed as the terminus of the railway and a line of railway was to be located between the Harbour of Esquimalt and Seymour Narrows (p. 259 l. 9). At that time it was contemplated that the transcontinental railway would follow a northern route by way of Tete Jaune Cache reaching the coast at Seymour Narrows, then crossing by bridge to Vancouver Island and continuing down the Island from Seymour Narrows to Esquimalt.

22. With that plan in mind the Province by Order in Council dated 30th June, 1873, reserved from sale a strip of land 20 miles in width along the eastern coast of Vancouver Island from Seymour Narrows to Esquimalt (Case p. 99). Public notice of the reservation was given on 1st July, 1873, (Case p. 99).

23. The two-year period for commencing the construction of the trans-

RECORD

In the Supreme Court of Canada

No. 13
Factum of the Appellant Esquimalt & Nanaimo Rly Co.
(Cont'd)

continental railway pursuant to Section 11 of the Terms of Union expired in 1873 without any steps being taken by the Dominion to implement its agreement (p. 259 l. 23).

24. In May of 1874 the Dominion submitted to the Province a proposal to construct at once the portion of railway from Esquimalt to Nanaimo (p. 117 l. 30). Nanaimo lay about midway between Esquimalt and Seymour Narrows and opposite Port Moody. It was apparently contemplated at this time that the transcontinental railway would take a southern route to Port Moody on the mainland. This proposal was conditioned upon the Province agreeing to further delay in the construction of the railway on the mainland. Such proposal was apparently unacceptable to the Province (p. 117 l. 27; p. 195 l. 27).

25. At the instance of the Province, Lord Carnarvon was appointed by the Imperial Government as mediator in the controversy between the Dominion and the Province respecting the transcontinental railway. On 17th November, 1874, Lord Carnarvon made a report recommending inter alia that the railway from Esquimalt to Nanaimo be commenced as soon as possible and completed with all practical despatch (p. 117 l. 35; p. 196 l. 6; p. 259 l. 29).

26. On March 19th, 1875, a bill was introduced in the Parliament of Canada to authorize the construction of a railway between Esquimalt and Nanaimo. The bill, however, was defeated in the Senate on 6th April, 1875, the result being that the Carnarvon recommendation was not carried out (Howay's History of British Columbia, Vol. 2, pp. 370-371).

27. At the request of the Dominion Government the Province by Chapter 13 of the Statutes of British Columbia 1875 conveyed to the Dominion in aid of the construction of a railway between Nanaimo and Esquimalt Harbour public lands to a maximum width of 20 miles on each side of the railway (p. 105 l. 31; p. 196 l. 34). Subsequently steel rails were landed at Esquimalt and Nanaimo but the project did not proceed further at this time (p. 198 l. 7).

28. On 20th September, 1875, the Dominion Government offered $750,000 to the Province as compensation for any delays which might take place in the construction of the transcontinental railway, such $750,000 to be applied by the Province to building the railway from Esquimalt to Nanaimo, or to such other local public works as the Province might think advantageous. The Dominion by the same offer undertook to surrender any claims to land which might have been reserved for railway purposes. This offer was declined by the Province (p. 198 l. 10; p. 118 l. 28). It would seem at this time that the Dominion did not consider that the Terms of Union obligated it to construct a railway on Vancouver Island. It would also seem that the offer to construct the railway from Nanaimo to Esquimalt in 1874 was made as compensation for delay rather than as a recognition of any obligation under the Terms of Union to build a railway on the Island.

29. The proposal made by the Dominion Government in 1874 (referred

to in paragraph 24 hereof) would indicate that at that time the transcontinental railway might be built along a southern route to Port Moody. But a memorandum concurred in by the Dominion Government on 9th June, 1876, would indicate that the northern route through Tete Jaune Cache was still under consideration (p. 198 l. 33). Apparently there was a further change in plans because on 23rd May, 1878, the Dominion Government cancelled the Order in Council of 7th June, 1873, by which Esquimalt had been designated as the terminus of the railway (p. 199 l. 11). Again, the Province petitioned Her Majesty and on 22nd April, 1879, the Dominion Government annulled the Order in Council of 23rd May, 1878, and revived the Order in Council of 7th June, 1873. The object of the Order in Council of 22nd April, 1879, according to the Dominion Government, was to leave it free to adopt whichever route might appear in the public interest "the most eligible" (p. 200 l. 7).

30. On 31st May, 1878, the Dominion had requested the Province to convey to it a tract of land on the mainland,—

> "beginning at English Bay or Burrard Inlet and following the Fraser River to Lytton; thence by the Valley of the River Thompson to Kamloops; thence up the Valley of the North Thompson, passing near to Lakes Albreda and Cranberry to Tete Jaune Cache; thence up the Valley of the Fraser River to the summit of Yellow Head, or boundary between British Columbia and the Northwest Territories, . . . "

31. On 8th May, 1880, the Province acceded to this request and made the grant, thus establishing that the transcontinental railway would terminate either at English Bay or Burrard Inlet, thereby adopting the southern route (p. 166D.).

32. The Pacific terminus of the transcontinental railway was finally fixed by the Parliament of Canada at Port Moody on Burrard Inlet by the Dominion Statutes of 1881 incorporating the Canadian Pacific Railway Company (44 Victoria Chapter 1). The contract for the construction of the Canadian Pacific Railway, scheduled to that Act, is dated 21st October, 1880.

33. The Province again petitioned Her Majesty and in August 1881 Lord Kimberley expressed the opinion that, inter alia, the construction of a railway from Nanaimo to Esquimalt, and the grant of a reasonable compensation in money for failure to complete the transcontinental railway within ten years, as specified in the Terms of Union, would offer a fair basis for a settlement of the whole matter (p. 202 l. 30).

34. 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" (B.C. Statutes of 1882, Chapter 15—Case p. 108). Section 9 of that Act provided that the Company "shall" lay out, construct, etc. a railway from Esquimalt Harbour to Seymour Narrows (p. 109 l. 19). Section 17

required the Company to furnish security in the amount of $250,000 for the completion of the railway (p. 110 l. 24). 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 be granted to the Company in fee simple (p. 111 l. 12). The block of lands thus reserved was considerably larger in area than the block of lands granted to the Dominion in 1875.

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" (p. 112 l. 8).

35. To enable the Province to carry out its obligations under the Clement Bill, the Legislature by Chapter 16 of the Statutes of British Columbia 1882 (assented to on the same date as the Clement Bill, namely, 21st April, 1882) repealed the land grant to the Dominion contained in Chapter 13 of the Statutes of 1875 (p. 204 l. 13). For some reason the reservation of land made in 1873 was not actually rescinded until a later date.

36. Mr. Clement and his associates were not without competition. At the same session of the Legislature Mr. Dunsmuir and others sought the incorporation of a company to construct the railway on the Island with a request for the same land grant as was provided by the Clement Bill. The Dunsmuir Bill was rejected by the House (p. 204 l. 30).

37. Evidently Mr. Clement and his associates failed to furnish the required security and consequently the railway was not constructed pursuant to the terms of the Clement Bill (p. 204 l. 36).

38. In February 1883 the Province again turned to the Dominion with a request that the Dominion either construct the Island Railway and complete the same with all practical despatch or give the Province such compensation for failure to construct the railway as would enable the Province to build it as a Provincial work (p. 119 l. 29; p. 205 l. 26). As a result, the Dominion made certain proposals which were set out in a letter dated May 5th, 1883, from Hon. J. W. Trutch, agent for the Dominion, to Hon. William Smithe, Premier of the Province (p. 124). This resulted in the passage of a Provincial Statute assented to on 12th May, 1883, sometimes referred to as "the May Act" (p. 129). The Act recited that the negotiations between the Dominion and the Province relating to the Island Railway had resulted in an agreement, the terms of which were set out in the recital. 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 the railway from Esquimalt to Nanaimo (p. 132 l. 33; p. 133 l. 1). It also made provision in section 22 for exempting the subsidy lands from taxation (p. 135 l. 9).

39. On 12th June, 1883, the reservation of lands made in 1873 for the Dominion was rescinded and at the same time notice was given of the reservation of lands referred to in the May Act (p. 136).

40. The Dominion was apparently not satisfied with the agreement as recited in the May Act, claiming that it virtually made the railway a Dominion Government work. Accordingly, on 23rd June, 1883, Sir Alexander Campbell was appointed to negotiate with the Province on various unsettled questions and to communicate as well with Mr. Dunsmuir or other capitalists desirous of forming a company to construct the railway (p. 208 l. 3).

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

42. By 20th August, 1883, the differences between the Dominion and the Provincial Governments were finally settled and a memorandum of the arrangements was signed by Sir Alexander Campbell, Minister of Justice, for the Dominion, and Hon. Mr. Smithe, for the Province (p. 140). The same day a contract for the construction of the Esquimalt & Nanaimo Railway was executed by Sir Alexander Campbell for the Dominion and by Mr. Dunsmuir and his associates (p. 142). This latter contract was signed, sealed and delivered as an escrow and placed in the hands of the Hon. Mr. Trutch until sanctioned by the Dominion Parliament and until a new Act (amending the May Act) was enacted by the Provincial Legislature (p. 148 l. 6). By the same date, 20th August, 1883, the May Act had been revised so as to meet the objections raised by the Dominion. The construction contract contained a note signed by Mr. Dunsmuir for himself and his associates expressing their acquiescence in the various provisions of the bill "so far as they relate to the Island Railway" (p. 148 l. 30).

43. The revised Act, commonly known as the Settlement Act, was passed by the provincial legislature and was assented to on 19th December, 1883, (p. 150). Like the May Act, the Settlement Act provided that such persons as might be named by the Governor-General in Council should be constituted a body corporate by the name of "The Esquimalt and Nanaimo Railway Company" (p. 154 l. 17). Section 9 provided that the Company "shall" lay out, construct, etc. the railway. Section 22 already quoted in paragraph 5 of the Factum made provision for exemption of the subsidy lands from taxation.

44. By Dominion Order in Council dated 12th April, 1884, Robert Dunsmuir and his associates were named as the persons to constitute "The Esquimalt and Nanaimo Railway Company" under section 8 of the Settlement Act (p. 217 l. 1). On 19th April, 1884, the Dominion Act corresponding to the Settlement Act of the Province was assented to (1884—Statutes of Canada, Chapter 6—Case p. 158). This Act ratified the agreement between the Dominion and the Province and also the construction contract.

45. Both the construction contract (p. 144 l. 29) and the Settlement Act (p. 156 l. 25) provided that the railway from Esquimalt to Nanaimo should

RECORD

In the Supreme Court of Canada

No. 13
Factum of the Appellant Esquimalt & Nanaimo Rly Co.
(Cont'd)

be commenced forthwith and completed by 10th June, 1887. The railway was in fact completed to the entire satisfaction of the Governor-in-Council by 21st April, 1887, (p. 177 l. 18) and on that day the Dominion conveyed to the Railway Company the lands reserved for that purpose by the Settlement Act (p. 174).

46. It would appear that a number of settlers had occupied or improved land within the railway belt prior to the enactment of the Settlement Act and had been unable to obtain a clear title to their land because of the reservation for the Dominion. In order to assist these settlers the Province passed the Vancouver Island Settlers' Rights Act, assented to 10th February, 1904, (p. 214) by virtue of which the Province undertook to issue a Crown grant of the fee simple of the land so occupied or improved to each such settler. The Railway Company petitioned for the disallowance of this Act on the ground that it took away from the railway rights to some of the lands granted to it (p. 216). The Minister of Justice expressed the view that the Provincial Act did not have the effect claimed by the Railway Company and therefore declined to recommend disallowance (p. 225). In the case of *McGregor v. Esquimalt & Nanaimo Railway Company (1907) A.C. 462* the Privy Council held, however, that the Provincial grants authorized by the Act of 1904 did have the effect of divesting the Railway Company of certain of its lands. As a result of this decision, the Province entered into an agreement with the Appellant to convey to the Appellant 20,000 additional acres to compensate it for the grants made to settlers under the 1904 Act. This agreement was confirmed by the Vancouver Island Settlers' Rights Agreement Ratification Act, assented to 10th March, 1910 (p. 231).

47. In 1912 this Appellant desired to lease its railway (but not the subsidy lands) to the Canadian Pacific Railway Company. Since this Appellant recognized that by reason of such lease there might be some risk of its losing the exemption from taxation provided by section 22 of the Settlement Act, this Appellant 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 and the Company undertook to pay 1½c. per acre each year in return for this concession of the Province. This agreement was incorporated in the "Esquimalt and Nanaimo Railway Company's Land Grant Tax Exemption Ratification Act", assented to 27th February, 1912 (p. 237). According to the Agreed Statement of Facts dated 13th December, 1946, $478,611 has been paid the Province pursuant to the foregoing agreement (p. 17 l. 10).

48. 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 (p. 216 l. 3). By an amendment to this Act passed in 1917 the time was extended to 1st September, 1917, (p. 240 l. 22). The Railway Company petitioned for the disallowance of the amending Act on the ground that it derogated from the grant to the Railway Company. On this occasion the Minister of Justice, Hon. Charles J. Doherty expressed the view that "a

valuable portion of the property which it was intended that the Company should receive, and which the Company did receive, is taken away by the exercise of the legislative authority of one of the parties to the tripartite agreement" (p. 247 l. 30) and on the basis of his recommendation the statute was disallowed (p. 249).

49. An outline has now been given of the circumstances that led to the reference to the Court of Appeal and of the history of events in respect of the construction of this Appellant's railway, the land subsidy and the taxation exemption assured to this Appellant by the Province.

50. The result of the reference to the Court of Appeal may be briefly stated as follows. In the first three questions the Court was asked to determine whether or not a contractual relationship had been established, and if so whether the proposed taxation would derogate from it. O'Halloran, J.A. and Bird, J.A. were of opinion that no contractual relationship between the Province and the contractors or the Railway Company had been created, and that even if a contract had been created, the proposed taxation would not derogate either from it or from the contract entered into by the Province with the Company in 1912. Smith, J.A. in dissenting, was of opinion that a contractual relationship had been created, and that the proposed taxation would be in breach of a term of the contract which the Province was in honour bound to observe. All three of the learned judges agreed that the tax outlined in question four would be an indirect tax and therefore ultra vires. O'Halloran, J.A. and Bird, J.A. considered that the taxes outlined in reference questions five and six would be direct taxation and thus valid if enacted by the Province, whereas Smith, J.A. took the opposite view. In the case of Question 7, the majority of the Court consisting of Smith, J.A. and Bird, J.A. considered 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., in dissenting expressed the view that Section 123 imposed a tax which would derogate from Section 22.

PART II

51. This Appellant submits that the judgment below is erroneous in the following respects:

(*a*) O'Halloran, J.A. and Bird, J.A. erred in their answers to Question 1. That question should have been answered, as it was by Smith, J.A., in the negative.

RECORD

In the Supreme Court of Canada

No. 13
Factum of the Appellant Esquimalt & Nanaimo Rly Co.
(Cont'd)

(*b*) O'Halloran, J.A. and Bird, J.A. erred in their answers to Question 2. That question should have been answered, as it was by Smith, J.A., in the affirmative.

(*c*) O'Halloran, J.A. and Bird, J.A. erred in their answers to Question 3. That question should have been answered, as it was by Smith, J.A., in the negative.

(*d*) O'Halloran, J.A. and Bird, J.A. erred in their answers to Questions 5 and 6. Those questions should have been answered, as they were by Smith, J.A., in the negative.

(*e*) Smith, J.A. and Bird, J.A. erred in their answers to Question 7. The first part of that question should have been answered, as it was by O'Halloran, J.A., in the negative. The second part of the question should have been answered, as it was by O'Halloran, J.A., in the affirmative.

The Attorney-General of British Columbia has complained by way of cross appeal of the answer of the Court of Appeal to Question 4. On that issue this Appellant submits that the answer of the Court of Appeal is right.

PART III

52. *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'?"

(Answered in the affirmative, Smith, J.A., dissenting.)

53. In the circumstances giving rise to the reference this question must be regarded as raising the point whether the Province was a party to a contractual relationship with the contractors or this Appellant in respect of, inter alia, the taxation exemption in favour of this Appellant provided by Section 22 of The Settlement Act.

54. This Appellant concedes at the outset that a formal written agreement set out in a single document executed by both parties and containing all the terms of a contract between them is not to be found. Needless to say, if such a document could be found, there would be no problem. A contract can, of course, exist without such a document.

The elementary principle is set out in the following passage in Leake on Contracts (Eighth Edition, 1931) at p. 9:

"Contracts created by agreement are sometimes distinguished as EXPRESS and IMPLIED, according to the manner in which the agreement is made. An EXPRESS contract is proved by words, written or spoken, expressing an agreement of the parties; an IMPLIED contract is proved by circumstantial evidence of the agreement. Contracts may also be of a mixed character in respect of the mode of making them, that is to say, partly expressed in words and partly implied from acts and circumstances. 'The only difference between an express and an implied contract is in the mode of proof. An express contract is proved by direct evidence, an implied contract by circumstantial evidence. Whether the contract be proved by evidence direct or circumstantial, the legal consequences resulting must be the same'."

Applying that principle, it is submitted that there is abundant evidence to be derived from the legislation, the documents and from acts and circumstances to prove a contractual relationship.

55. Once the contractual relationship has been proved, it is perfectly clear that exemption of this Appellant's lands from taxation was a term of such contract. There is no difficulty in determining what that term was. It is to be found in the express words of Section 22 of The Settlement Act.

56. The contractual relationship resulted from negotiations, which commenced in February 1883, and in which the Province, the Dominion and the contractors all participated.

It will be remembered that in February 1883 the Province called upon the Dominion either to construct the Island Railway or to pay such compensation as would enable the Province to construct it (para. 38 of Factum). In reply, the Dominion offered to appropriate $750,000 to the project. The Province expressed its disappointment, but declared that since the matter was of such vital importance, it was prepared to accept the Dominion's proposal and to "unite in a common endeavour" with the Dominion to get this railway built (p. 126, l. 9).

The May Act was then passed (p. 129) reciting the agreement between the Province and the Dominion. The Dominion objected to that Act on the ground that certain of its terms made it appear as though the Dominion was undertaking "to secure the construction" of the railway. The Dominion was apparently not prepared to assume such an obligation and therefore appointed Sir Alexander Campbell who was instructed to conduct further negotiations with the Province and to communicate with Mr. Dunsmuir (p. 208 l. 3).

57. By 20th August, 1883, the Province, the Dominion and the Dunsmuir group had reached agreement. On that date a memorandum of the agreement between the Dominion and the Province was executed (p. 140), the construction contract between the Dunsmuir group and the Dominion was executed (p. 142), and the May Act, which had been amended to the satisfaction of the Dominion, received the approval of the Dunsmuir group (p. 148 l. 30). No doubt all three parties realized that the obligations of the Province under the

draft bill, both to the Dunsmuir group and to the Dominion, would not be binding upon the Province until sanctioned by the Legislature, and likewise that the obligations of the Dominion, both to the Dunsmuir group and to the Province, would not be binding upon the Dominion until sanctioned by Parliament. It was, therefore, agreed that the construction contract should be held in escrow until the Settlement Act and the corresponding Dominion Act had become law.

Thus, while it is apparent that the three parties reached agreement on 20th August, 1883, the respective contractual relationships were not made binding upon them until assent was given to the Dominion Statute on 19th April, 1884 (p. 158).

58. It is submitted that the effect of the agreement relating to the construction of the Island Railway which was reached on 20th August, 1883, was as follows: The Dunsmuir group agreed to construct the Island Railway in consideration for payment to it of a subsidy consisting of land contributed by the Province and of a money grant of $750,000 contributed by the Dominion and tax exemptions contributed by both the Province and the Dominion. The Province exempted from taxation the land grant (p. 156 l. 32) and for a term of years the railway (p. 156 l. 28). The Dominion exempted from custom duties the material required in the original construction of the railway (p. 145 l. 25). It is true that the Dominion and the Dunsmuir group were the only parties to the formal written construction contract, but it is clear from the circumstances under which that contract was executed and from the acts of the parties and the circumstances, both prior to its execution and later, that the Province also entered into a contractual relationship with this Appellant.

59. In determining whether a contractual relationship is created, the intention of the parties is always of paramount importance.

On the occasion of the execution of the construction contract, the draft of the Settlement Act was put before the Dunsmuir group. That draft contained the terms of obligations the Province was prepared to assume. So far as such obligations were to benefit the contractors and the Railway Company and were of a character that could only be discharged by the Province—Section 22 being unquestionably within that category—the only sound and practical view of the matter is that the Province intended such obligations to vest the co-relative rights in the contractors and the Railway Company, thus creating a contractual relationship. The Dominion was powerless to assume the obligations defined in Sections 21 and 22—only the Province could assume those obligations.

It would be nothing short of fantastic to suggest that the Dunsmuir group, in giving approval to the draft bill, did not believe the Province was assuming a binding obligation in respect of the tax exemption contained in Section 22. Likewise, it would be nothing short of fantastic to suggest that the Province, in enacting the Settlement Act, did not intend to bind itself in respect of such

tax exemption. Such an obligation could only be binding on the footing of a contractual relationship.

60. It can scarcely be questioned that the major inducement to the Dunsmuir group to undertake the construction of the railway was the grant of the tax-free land. This alone without the addition of the Dominion's $750,000 had apparently been considered sufficient compensation by both the Clement group and the Dunsmuir group in 1882 when they offered to undertake the construction of the railway for the Province (p. 108; p. 204 l. 30). The fact that the actual grant of the subsidy land to the Company was to be made by the Dominion is not of importance. The Dominion was to hold the lands as trustee (p. 153 l. 23) under an obligation to convey to the Company upon completion of the railway (p. 151 l. 17). The Province was to administer the land until conveyance to the Company (p. 151 l. 31). Nor is it of fundamental importance that a formal agreement between the Province and the Dunsmuir group was not drawn up and executed. It should be noted that during 1882, when the Clement group undertook the construction of the Island Railway for the Province, no formal agreement appears to have been executed. The agreement between them was to be found in the terms of the Clement Act (p. 108).

The substance of the transaction is of far greater importance than the form in which it was carried through. With all respect to O'Halloran, J.A. and Bird, J.A., it is submitted that they were too much concerned with form and not sufficiently concerned with substance.

61. The terms of the Settlement Act support the submission of this Appellant that the Province was a principal party in the arrangements made with the contractors for the construction of the Island Railway. As was pointed out in paragraph 40 of this Factum, the Dominion in June 1883 insisted that a number of amendments be made to the May Act. Attention is now invited to certain of these amendments.

(1) The first paragraph of the preamble to the May Act was in these terms:

"WHEREAS negotiations between the Governments of Canada and British Columbia have been recently pending, relative to the Island Railway, the Graving Dock, and the Railway Lands of the Province:"

The corresponding paragraph of the Settlement Act was as follows:

"WHEREAS negotiations between the Governments of Canada and British Columbia have been recently pending, relative to delays in the commencement and construction of the Canadian Pacific Railway, and relative to the Island Railway, the Graving Dock, and the Railway Lands of the Province:"

(The part added is indicated by the underlining.)

By this amendment the Province recognized that the Dominion was entering into the agreement with it because of the Dominion's delay in commencing and constructing the Canadian Pacific Railway, i.e. the railway on the main-

RECORD

In the Supreme Court of Canada

No. 13
Factum of the Appellant Esquimalt & Nanaimo Rly Co.
(Cont'd)

land. The clear inference is that the Province was finally prepared to concede that the Dominion was not in default in connection with the Island Railway or, in other words, that the Dominion was not bound by the Terms of Union to do more than construct a railway to the seaboard of British Columbia.

(2) Para. (e) of the agreement between the Dominion and the Province recited in the preamble of the May Act was in these terms:

> "(e) The Government of Canada agrees to secure the construction of a Railway from Esquimalt to Nanaimo within three and a half years from the date of the incorporation of the company as before mentioned; such construction to commence upon the passing of the Act relating to the incorporation of the company."

The corresponding paragraph of the Settlement Act was as follows:

> "(e) The Government of Canada shall, upon the adoption of the Legislature of British Columbia of the terms of this agreement, seek the sanction of Parliament to enable them to contribute to the construction of a Railway from Esquimalt to Nanaimo the sum of $750,000, and they agree to hand over to the contractors who may build such Railway the lands which are or may be placed in their hands for that purpose by British Columbia; and they agree to take security, to the satisfaction of the Government of that Province, for the construction and completion of such Railway on or before the 10th day of June, 1887; such construction to commence forthwith."

(The important change to which the present argument is addressed is indicated by the underlining.)

(3) Section 8 of the May Act was in these terms:

> "8. For the purpose of enabling the Government of Canada to construct the Railway between Esquimalt and Nanaimo, it is hereby enacted that such persons, hereinafter called the "company", as may be named by the Governor-General in Council, with all such other persons and corporations as shall become shareholders in the company, shall be and are hereby constituted a body corporate and politic by the name of "The Esquimalt and Nanaimo Railway Company".

The corresponding section of the Settlement Act was as follows:

> "8. For the purpose of facilitating the construction of the Railway between Esquimalt and Nanaimo, it is hereby enacted that such persons, hereinafter called the "company", as may be named by the Governor-General in Council, with all such other persons and corporations as shall

become shareholders in the company, shall be and are hereby constituted a body corporate and politic by the name of "The Esquimalt and Nanaimo Railway Company".

(The change is indicated by the underlining.)

By these amendments to paragraph (e) and Section 8, the Province recognized that the Dominion was not agreeing "to secure the construction of" or "to construct" the Island Railway, but was agreeing merely to contribute to the construction of the Island Railway by making a grant of $750,000 for that purpose. Regardless of the fact that the Province had previously insisted that the Dominion must assume sole responsibility for the construction of the Island Railway and, indeed, in 1875 had refused to accept $750,000 from the Dominion (para. 28 of Factum), the Province by passing the Settlement Act, must be considered as having reversed its position. In any event, the Province, whatever its views may have been as to the effect of Section 11 of the Terms of Union, agreed in 1883 to settle its claims against the Dominion in return for the Dominion's contribution of $750,000 to the construction of the Island Railway.

62. Had the Province been convinced that the Dominion was bound to take full responsibility for the construction of the Island Railway, it is unlikely that it would have given the consideration it did to the proposal of the Oppenheimer Syndicate in July, 1883. It will be recalled that by that proposal, the Island Railway would have been entirely a Provincial undertaking (para. 41 of Factum).

63. It is submitted that the view held by the Dominion that Section 11 of the Terms of Union did not obligate it to build the Island Railway, to which the Province gave its assent by the Settlement Act, was the correct view. By Section 11 the Dominion undertook to construct a railway which would "connect the sea board of British Columbia with the railway system of Canada" (p. 192 l. 26). It is true that for several years after 1871 the Dominion apparently planned to discharge this obligation by constructing a railway along a northern route which would bring it to Vancouver Island at Seymour Narrows and from there to a terminus at Esquimalt (para. 21 of Factum). But when definite arrangements were made with the Canadian Pacific Railway Company in 1881 for the construction of a railway to the seaboard, the southern route was chosen and Port Moody was selected as the terminus instead of Esquimalt (para. 32 of Factum). In the preamble to an agreement with the Dominion dated 23rd February, 1885 (p. 166A. l. 11) the Province expressly recognized that the Dominion had "declared and adopted Port Moody as the Western Terminus of the Canadian Pacific Railway;". The Canadian Pacific Railway Company line connected the seaboard of British Columbia with the railway system of Canada as Section 11 of the Terms of Union required. It is quite clear from the Dominion's subsequent dealings with the Province that it took this view but considered that it was under some obligation to the Province

RECORD

In the Supreme Court of Canada

No. 13
Factum of the Appellant Esquimalt & Nanaimo Rly Co.
(Cont'd)

by reason of its failure to build the railway on the mainland within the ten years prescribed by Section 11. It is also apparent that the Province recognized the position taken by the Dominion since in the very next year (1882) the Province entered into negotiations with the Clement and Dunsmuir groups independently of the Dominion. While in the May Act, the Province attempted to revert to its earlier position, it clearly acquiesced in the Dominion's view by agreeing to the amendments made to the May Act (para. 61 of Factum).

64. The view of the majority of the Court of Appeal was that the Settlement Act constituted an acceptance by the Province of an offer made by the Dominion. It is respectfully submitted that the proper view is that the Settlement Act constituted a ratification by the Province of its agreement reached with the Dominion on 20th August, 1883, and also a ratification by the Province of its agreement reached with the Dunsmuir group on the same date.

The Settlement Act contained terms which had nothing to do with the rights and obligations created by virtue of the agreement between the Province and the Dominion.

In the first place, certain of its provisions deal with obligations of the Company towards the Province. Section 23 provides that the Company is to be governed by paragraph (f) of the agreement between the Dominion and the Province (p. 156 l. 38). The Province had previously agreed with the Dominion that it would procure the assent of the Dunsmuir group to this term (p. 140 l. 26). Section 23 also required the Company to grant the surface rights to squatters at $1 per acre. Section 24 fixed a limit on the price which the Company could charge for coal sold to the Province, etc. Section 26 obligated the Company to observe existing rights (if any) in the subsidy lands. In the second place, certain of its provisions deal with rights of the Company conferred upon it by the Province. Section 21 granted the railway with its workshops, buildings, etc., freedom from Provincial taxation for ten years after the completion of the Railway. Section 22, which is the all-important one for the purposes of this Reference, made the subsidy lands free from taxation. Finally, it should be noted that unlike most statutes incorporating a company, the Settlement Act does not merely authorize the Company to construct a railway, but by Section 9 provided that the Company "shall" construct a railway. The use of the imperative would indicate that the contractors who were to be incorporated had already agreed to the project.

65. The construction contract which purported to contain the terms of an agreement between the contractors and the Dominion was placed in escrow pending ratification not only by the Dominion, but also by the Province. The inference from this is perfectly plain. The contractors were not prepared to bind themselves in a contract with the Dominion unless the undertaking of the Province, inter alia, to grant the Company the tax exemptions set out in Sections 21 and 22 of the Settlement Act were sanctioned by the Legislature.

The construction contract provided for the building and continuous opera-

tion of the railway so urgently desired by the Province (p. 143 l. 27; p. 144 l. 41). Although it was in form a contract between the contractors and the Dominion, yet it contained provisions which were of concern to the Province and the contractors, but not to the Dominion. Thus Section 15 provided that the subsidy lands when conveyed to the Company would be subject to the provisions and stipulations of the Provincial Settlement Act (p. 146 l. 26). Sections 23 to 26 inclusive of that Act are referred to particularly, those being the sections which defined certain of the Company's obligations. But Section 15 of the construction contract applies equally to Sections 21 and 22 of the Settlement Act, the sections which defined the Company's rights to taxation exemptions. In effect, therefore, by executing the construction contract the contractors confirmed certain terms of their agreement with the Province, as well as their agreement with the Dominion. The Province confirmed such terms by the enactment of the Settlement Act.

66. The events of 1883 and 1884 point clearly to the fact that, as stated in the report of the Executive Committee on 7th May, 1883, the Dominion and the Province joined in a "common endeavour" (p. 126 l. 19) in settling their long standing differences relative to the Island Railway. The two governments acted together in having the railway constructed and negotiated jointly with the contractors. The terms of the agreements reached by the Dominion with the Province and with the contractors were set out fully in written documents. The terms of the agreement reached between the Province and the contractors—or at least the terms which are of importance on this Reference—were set out in the draft Settlement Act and were confirmed by the contractors in the construction contract and by the Province by the passage of that Act.

To arrive at the conclusion that the Province and this Appellant were not bound by a contractual relationship in relation to the freedom of the subsidy lands from taxation would do violence to the spirit in which the agreements of 20th August, 1883, were reached.

67. There is considerable evidence to support the view that the Dominion assumed the role of agent for the Province in securing the construction of the railway by this Appellant for the Province.

It is to be remembered that the May Act provided (Section 8, p. 132) that a company was to be incorporated "for the purpose of enabling the Government of Canada to construct the Railway". Later, the Dominion claimed that the May Act virtually made the railway a Dominion work and this was not satisfactory to the Dominion (p. 208 l. 3). The Settlement Act contained significant changes—inter alia, that the Company incorporated by the province was "For the purpose of facilitating the construction of the Railway" (p. 154 l. 17).

This, in itself, indicates that the Dominion was not content as between it and the Province to assume the role of principal in constructing the railway for the Province.

RECORD

In the Supreme Court of Canada

No. 13
Factum of the Appellant Esquimalt & Nanaimo Ry Co.
(Cont'd)

The Province stipulated that the Dominion was to hand over to the contractors the subsidy lands placed in the hands of the Dominion for that purpose and that the Dominion was to take security "to the satisfaction" of the Province for the construction and completion of the railway on or before 10th June, 1887 (p. 151 l. 17). In the agency view, these were stipulations the Province as principal was imposing upon the Dominion as its agent in the contractual dealings with the other principal to the transaction—that is, the company which was to build the railway.

It is not without significance that the Province and this Appellant had direct dealings with respect to certain matters. The exact boundaries of the subsidy 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. 7). The description of the lands conveyed to the Railway Company was the result of agreement between the Dominion, the Province and the Railway Company (p. 177 l. 3).

Indeed, in connection with a controversy which arose during the course of the construction of the railway, the Province insisted that it was the real principal in the matter of the railway and the subsidy lands. This view was put in a letter from the Hon. Mr. Smithe to the Hon. Mr. Trutch dated 16th November, 1885, as follows (p. 173 l. 4):

> "There is another view also in which it might be well for the Minister to look at this question. The Provincial Government are the real principals in the matter of this railway and these lands. The lands are Provincial lands placed in the hands of the Dominion Government in trust to be applied to one purpose only, which is to secure for the Province the construction of the Island Railway. Even the money subsidy to be paid by the Dominion to the railway contractors was a debt due by the Dominion to the Province; so that in every way the Provincial Government are the real principals in this case, and are entitled upon the equities of the matter to be consulted and considered."

Although Hon. Mr. Smithe recognized on this occasion that the Province had agreed to act as agent for the Dominion in administering the lands held by the Dominion pending completion of the railway, nevertheless he pointed out that in doing so, the Province was not an agent in "the ordinary sense" but for that purpose only (p. 172 l. 38).

68. It makes no difference in the legal result whether the proper view is that the contractual relationship was created by the agreement reached on 20th August, 1883, as ratified by the Provincial and Dominion legislation (as has already been submitted) or resulted from an offer by the Province that became a contract upon acceptance by the Railway Company performing the works on the terms of that offer. There is a good deal to be said for the latter view.

The Settlement Act may well be regarded as an offer by the Province of the terms upon which it was prepared to have the railway constructed. In that view, the performance of the work by the Railway Company pursuant to the Settlement Act constituted an acceptance of the offer and thereby established a contractual relationship between the Railway Company and the Province.

69. That there was a contractual relationship between the Province and the contractors or the Railway Company finds support in subsequent events.

70. Reference has already been made in paragraph 67 to the insistence of the Province in November, 1885, that the "Provincial Government are the real principals in the matter of this railway and these lands" (p. 173 l. 5).

71. In the grant by the Dominion to the Railway Company dated 21st April, 1887, the following recital appears (p. 177 l. 3):

> "And whereas it has been agreed by and between the Government of Canada, the Government of British Columbia and the said Company that the grant of the said lands to the said Company shall be by the description hereinafter contained . . ."

The habendum in such grant contains the following (p. 178 l. 15):

> "Subject nevertheless to the several stipulations and conditions affecting the same hereinbefore recited and which are contained in the Acts of the Parliament of Canada and of the Legislature of British Columbia hereinbefore in part recited, as such stipulations are modified by terms hereinbefore recited of the agreement so made as aforesaid by and between the Government of Canada, the Government of British Columbia and the said Company."

(The significant parts are indicated by the underlining.)

72. Reference has been made in paragraph 46 of this Factum to the judgment of the Privy Council in *McGregor v. Esquimalt & Nanaimo Railway Company (1907) A.C. 462*, which held, contrary to the view of the Minister of Justice, that the Provincial grants authorized by the Vancouver Island Settlers' Rights Act 1904 had the effect of vesting the lands in the settlers. The land grant had been acquired by the Railway Company as part of the consideration. But the 1904 Act had the effect of taking away part of that consideration. After the judgment of the Privy Council, the Province recognized its obligation to compensate the Railway Company and accordingly entered into an agreement with the Railway Company dated 21st October, 1909, whereby the Company was to receive 20,000 acres of unoccupied and unreserved Crown lands to be selected by it (p. 233). This agreement was ratified by Act of the Legislature (Statutes of British Columbia 1910, Chapter 17; Case p. 231).

RECORD

In the Supreme Court of Canada

No. 13
Factum of the Appellant Esquimalt & Nanaimo Rly Co.
(Cont'd)

73. Reference has already been made in paragraph 48 of this Factum to a Statute of the Province enacted in 1917 (7 & 8 Geo. V. Chapter 71) entitled "An Act to Amend the Vancouver Island Settlers' Rights Act 1904". That Act was designed to extend the time for filing of claims by settlers under the 1904 Act. The Railway Company applied to the Governor-General in Council for disallowance of the Act and pursuant to a report of the Minister of Justice, the Act was disallowed (pp. 240—249).

In his report the Minister of Justice said (p. 247 l. 15):

> "Subject to these conditions the lands passed to the company, and the company is certainly justified to look not only to the Province but also to the Dominion with whom it contracted and from whom it received its grant, to see that its title is not impaired by legislative revision of the terms after performance of the contract by which the lands were earned. . . . and the process by which, notwithstanding these solemn assurances, a valuable portion of the property which it was thus intended that the company should receive, and which the company did receive, is taken away by the exercise of the legislative authority of one of the parties to the tripartite agreement, cannot adequately be characterized in terms which do not describe an unjustifiable use of that authority, in conflict with statutory contractual arrangements to which the Government of Canada as well as the Province was a party."

The Minister went on to say (p. 247 l. 43):

> ". . . and the undersigned, in agreement with his predecessor of 1904, considers that both the proper execution of these powers and the obligation of honour and good faith in the administration of the transaction on the part of Your Excellency in Council, require that the Province should not be permitted substantially to diminish the consideration of the contract."

74. There is strong authority to support the view that The Settlement Act, by itself, should be regarded as "a parliamentary contract". This principle was expressed by Lord Macnaghten in *Davis & Sons v. Taff Vale Railway Co. (1895) A.C. 542, at p. 559,* as follows:

> "Ever since it has become the practice for promoters of undertakings of a public nature to apply to Parliament for exceptional powers and privileges, the Acts of Parliament by which those powers and privileges are granted have been regarded as parliamentary contracts, as bargains between the promoters on the one hand and Parliament on the other—Parliament acting on behalf of the public as well as on behalf of the persons specially affected. Those powers and privileges are only conceded on the footing that the concession is for the benefit of the public who are likely to use the railway as well as for the benefit of the promoters."

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The Settlement Act conferred exceptional powers and privileges upon the contractors and the Company incorporated under it. That Act, therefore, should be regarded as a bargain between the contractors on the one hand, and the Legislature on the other. The Province no less than the contractors or the Company is bound to observe the terms of that bargain. See also—

Aiton v. Stephen (1876) 1 A.C. 456 at p. 462;

Countess of Rothes v. Kirkcaldy (1882) 7 A.C. 694 at 707.

It is to be remembered that so far as the construction of the railway was concerned, the Settlement Act is not permissive in character, but provides that the Company "shall" construct the railway.

75. In all the circumstances, the answer of the majority of the Court of Appeal to Question 1 to the effect that the Commissioner was right in 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" results, it is respectfully submitted, from an unrealistic interpretation of the substance of the transaction.

76. *Question 2.*

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

(Answered in the negative, Smith, J.A. dissenting.)

77. It is to be assumed that any of the taxes covered by this reference would, if imposed, be equivalent to prevailing royalties (p. 17 l. 12).

78. The proposed taxation must be viewed in the light of the Commissioner's report and as an implementation of it. The effect of the Commissioner's recommendation is that unsold timber lands of the Company amounting to about 200,000 acres should be singled out of the total of 1,200,000 acres of Crown granted timber lands of the Province for special and extraordinary taxation (p. 266 l. 4 and paragraph 13 of this Factum). It is also to be remembered that the proposed taxation would apply to between five and six billion feet of timber out of twenty-seven billion feet of timber in the Province (p. 250 l. 13; p. 264 l. 11; and paragraph 14 of this Factum). As pointed out in paragraph 15 of this Factum, the scale of taxes recommended would amount, at the time of the Commissioner's report, to approximately 55% of the value of the timber owned by the Railway Company. This 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, Chap. 282 amounting to 1½% of the assessed value.

O'Halloran, J.A., calculated that the tax would only amount to about 6% (p. 57 l. 24). The learned judge fell into the error of comparing the amount of the tax with the market price of logs in the Vancouver market, instead of

RECORD

In the Supreme Court of Canada

No. 13
Factum of the Appellant Esquimalt & Nanaimo Rly Co.
(Cont'd)

comparing it with the value of the timber to the Railway Company. Such market price must necessarily cover, in addition to the price paid to the Railway Company, the heavy expenditures incurred in building roads and logging railways, purchasing trucks and other equipment and the cost of labour in falling, bucking and handling the logs and transporting them to Vancouver. Those expenditures are of no concern to the Railway Company. Its only concern is with the price it receives from its timber lands. That price would be reduced by approximately 55%.

79. While the proposed taxes will nominally be imposed upon and be paid by the purchaser from the Railway Company, such taxes will, in fact, be absorbed by the Company in the sale price of its timber lands. The Commissioner recognized that the proposed taxation would have that effect (p. 263 l. 27).

The view of Smith, J.A., as to the effect of the tax is expressed in the following passage of his judgment (p. 75 l. 16):

> "And it would surely be contrary to the spirit of this section were the Government to announce, as is suggested, that as and when these timber lands were sold by the Railway Company the new owners would be taxed to the extent of 55% of the value of the timber growing thereon. That simply reduces the value (that is to say, the value to the Railway Company) of the timber lands still unsold by 55%. And if by 55%, why not by 95%?"

Again at page 75, line 45, he referred to the proposed taxation as "the extraordinary levy herein contemplated, a levy which would fall on these yet unsold timber lands and on these timber lands alone."

Bird, J.A., expressed his view as to the effect of the tax in these words (p. 93, l. 16):

> ". . . I think it may reasonably be said that the general tendency will be to pass the tax, or in any event a substantial part of it, backwards to the vendor of the timber lands."

80. In the light of the Commissioner's view that the tax would tend to reduce the revenue of the Railway Company 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. This would be a plain violation of Section 22.

It is clear from the Commissioner's report and from Questions 4, 5 and 6 that the proposed taxes would be made applicable only to lands sold by the Railway Company after the imposition of tax (p. 266, l. 4; p. 20 l. 7). The result would be that *A* who buys lands from the Railway Company the day

before the tax is imposed, would be liable to the tax imposed by the Taxation Act of only 1½% per annum of the assessed value of his land, whereas ***B,*** who buys lands from the Railway Company after the tax is imposed, would not only pay such annual tax of 1½%, but would also be liable to pay $1.10 per thousand feet, which would be approximately 55% of the value of the timber. It is obvious that the Railway Company would not receive the same price from ***B*** as from ***A.*** The fact that the tax would be imposed nominally upon the purchaser cannot save it.

81. As has been pointed out in paragraph 15 of the Factum, the taxation on the scale proposed would yield to the Province between $5,500,000. and $6,600,000. The consequence of such taxation would be to reduce the value of the subsidy lands still held by the Company by such an amount. In the result the Province would be depriving the Railway Company of a large part of the consideration it received for constructing the railway. The effect would not be materially different to confiscation without compensation of lands still owned by the Railway Company to the value of between $5,500,000. and $6,600,000. This would be a much more serious impairment of the consideration for the Railway Company's contract than was caused by the Statute of 1904, for which the Province compensated this Appellant. It would also be much more serious than the loss which would have been caused to this Appellant by the Statute of 1917, if it had not been disallowed.

82. It was a term of the contract between the Province and the Company, which is assumed for the purpose of this question, that the Railway Company should receive a land subsidy free from tax in payment for the construction by the Company of the railway. It is now proposed to impose a tax on the lands still held by the Company which would have the effect of reducing the value of the timber on them by 55%. If it would not be a breach of the contract to impose a tax of 55%, it would equally not be a breach of the contract, as pointed out by Smith, J.A., on page 75, line 22, to impose a tax of 95%. Likewise, if it would not be a breach of the contract to impose at this time a tax of 55% or 95%, it would not have been a breach of the contract to have imposed a tax of 95% the day after the contract was made. Such a proposition is nothing short of preposterous.

83. It has been suggested that Section 22 must be construed as permitting taxation by the Province after the subsidy lands are sold by the Railway Company. This Appellant does not dispute the proposition that under Section 22 the subsidy lands, if sold by the Railway Company, would be subject to provincial taxation of general application. This Appellant submits, however, that the proposed tax, which is not of general application, will not have the effect of taxing the purchaser but will constitute taxation of this Appellant in respect of its subsidy lands. Although the purchaser would make the actual payment of the tax to the Province, the Railway Company would, in reality, be paying the tax when compelled to accept reduced prices in selling its lands.

This Appellant respectfully adopts the view so clearly expressed in the

RECORD

In the Supreme Court of Canada

No. 13
Factum of the Appellant Esquimalt & Nanaimo Rly Co.
(Cont'd)

following passage from the judgment of Smith, J.A. (p. 75 l. 36):

"The section grants exemption from taxation until the lands are (amongst other contingencies) sold. Then they may be taxed. But the taxation contemplated by the section, to which the lands are to become subject when sold, can only mean the ordinary taxation imposed alike on these and all surrounding comparable lands. As to this there could be no complaint by anyone. But here it is sought to give an altogether wider, if not an altogether different, meaning to the word taxation. It is sought to have it include the extraordinary levy herein contemplated, a levy which would fall on these yet unsold timber lands and on these timber lands alone."

84. To single out subsidy lands for taxation not imposed upon all Crown granted lands on a scale as severe as that proposed with the intention that the tax will, in the result, be paid by the Railway Company, would be a distinct violation of Section 22.

85. *Question 3.*

"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?"

(Answered in the affirmative, Smith J. A. dissenting.)

86. In making the statement that "there is no contract between the Province and the Company" (p. 264 1. 32) it is apparent from the context that the Commissioner was directing his mind to the transactions that occurred in 1883 and 1884. The question as to whether a contractual relationship was then established is raised by Question 1 in the Reference.

The Commissioner does not appear to have made reference in his report to the contract between the Province and this Appellant dated 17th February, 1912, to which reference has already been made in paragraph 47 of this Factum. The Lieutenant-Governor in Council no doubt had this contract in mind in raising Question 3.

87. It will be remembered that this contract was made when this Appellant was contemplating a lease of its railway (but not its subsidy lands) to the Canadian Pacific Railway Company (p. 237). It was apparently recognized that if this Appellant leased its railway to the Canadian Pacific there might be some risk of its losing its right to the exemption from taxation conferred by Section 22 of the Settlement Act. In order to be assured that the lands would be protected from taxation after the lease, this Appellant entered into this contract with the Province.

By the contract the Province agreed that the leasing of the railway "shall not affect the exemption from taxation enacted" by Section 22 of The Settle-

ment Act, and that notwithstanding such lease "such exemption shall remain in full force and virtue" (p. 238 l. 25).

As consideration for such contract the Company agreed to pay 1½c per acre per annum in respect of the unsold subsidy lands and agreed to extend its line to Courtenay (p. 238 l. 33; p. 239 l. 5). Since the contract and down to June, 1944, the Company has paid to the Province pursuant thereto a total of $478,671 (p. 17 l. 10). These payments will continue so long as the Railway Company holds any of the lands in the land grant. The line of railway was extended to Courtenay as agreed.

88. There can be no question that this is a contract between the Province and the Company whereby the Province has agreed to exempt the subsidy lands from taxation in accordance with the provisions of Section 22 of The Settlement Act. The only question is whether this contract would be breached by the imposition of the tax recommended by the Commissioner.

Upon this latter question the submissions already advanced in respect of Question 2 are applicable and need not be repeated.

89. *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 coporation, the tax being a fixed sum per thousand feet board measure in the timber cut, be ultra vires of the Province?"

(Answered in the affirmative by all members of the Court.)

90. It is submitted that the answer made to this question is correct. Such a tax would be plainly indirect taxation and beyond provincial competence.

91. In construing the expression "direct taxation" in Head 2 of Section 92 of the British North America Act, John Stuart Mill's definition has long been accepted. He defined a direct tax as "one which is demanded from the very persons who it is intended or desired should pay it", and indirect taxes as "those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another" (*Bank of Toronto v. Lambe (1887) 12 A.C. 575 at 582*) .

Security Export Company v. Hetherington, 1923 S.C.R. 539 at p. 559.

Attorney-General for Manitoba v. Attorney-General for Canada, 1925 A.C. 561 at 566 and 568.

Attorney-General for British Columbia v. C.P.R. 1927 A.C. 934 at 938.

The King v. Caledonian Collieries, 1927 S.C.R. 257 at 258, 1928 A.C. 358.

Attorney-General for British Columbia v. McDonald Murphy Lumber Company Limited, 1930 A.C. 357 at 364.

RECORD

In the Supreme Court of Canada

No. 13
Factum of the Appellant Esquimalt & Nanaimo Rly Co.
(Cont'd)

Lawson v. Interior Tree Fruit and Vegetable Committee of Direction, 1931 S.C.R. 357.
Charlottetown v. Foundation Maritime Limited, 1932 S.C.R. 589.
Lower Mainland Dairy Products v. Crystal Dairy Limited, 1933 A.C. 168 at 176.

92. It is to be observed that the proposed tax would be "on timber as and when cut" and would be at "a fixed sum per thousand feet board measure". The tax would be on a scale equivalent to the tax recommended by the Commissioner—that is to say, would approximate prevailing rates of royalty (p. 17 l. 12; p. 266 l. 8). There can be no doubt that this tax will not be borne by the person from whom it is demanded but will be demanded from the owner in the expectation and intention that he will indemnify himself at the expense of the Railway Company. For the reasons already given in respect of Question 2, the Railway Company's selling price of its subsidy lands would be reduced by the tax contemplated by this question. If such a tax were levied upon all timber in the Province as and when cut, it would in all likelihood be passed on to the purchasers of the timber, but when the tax is levied only upon the timber as and when cut upon lands in the Railway Belt, the owner of such timber cannot, in competition with other lumbering interests, pass the tax on to purchasers.

93. *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:

(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."

(Answered in the affirmative, Smith J. A. dissenting).

94. In considering this question as well as Questions 4 and 6, the attention of the Court is invited to the following statement contained in the Factum of the Attorney-General of British Columbia in the Court of Appeal:

"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.

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.

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.
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."

With respect to the foregoing, reference is made to the following passage in the judgment of Smith J.A.:

> "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 by-gone 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. 68 l. 25)

95. The real purpose of this question would appear to be to ask the Court whether, if the form of taxation outlined in Question 4 is ultra vires, the Legislature may validly impose the same tax in the form of the Legislation outlined in Question 5. It has been agreed that 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 (p. 17 l. 12) — that is to say, to approximate prevailing rates of royalty (p. 266 l. 8). The tax proposed in Question 4 was to be upon the timber as and when cut at a fixed sum per thousand feet board measure. The tax proposed by Question 5 would be demanded from the owner, that is, the purchaser from the Railway Company, but as in the case of the tax outlined in Question 4 would for the same reasons fall upon the Railway Company. The tax outlined in Question 5 would also be the same as that outlined in Question 4 in that it would be payable "as and when merchantable timber is cut."

96. Though the tax is stated to be upon the land, it would be in effect 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. Assuming 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.

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 2/5 of the timber would remain as against 9/10 at the end of the first year.

97. While the tax outlined in Question 5 might appear on its face to be a tax on land, the true nature and character of the proposed enactment and its pith and substance must be examined to determine its validity.

Attorney-General for Ontario v. Reciprocal Insurers 1924 A.C. 328. As put by Duff J. (as he then was), in that case in delivering the judgment of the Judicial Committee at page 337:

" . . . It is the result of this investigation, not the form alone, which the statute may have assumed under the hand of the draughtsman, that will determine within which of the categories of subject matters mentioned in ss. 91 and 92 the legislation falls; and for this purpose the legislation must be 'scrutinized in its entirety': (*Great West Saddlery Company Limited v. The King (1921) 2 A.C. 91, 117*)".

Considered in the light of that test it is clear that in pith and substance the proposed tax is not a land tax at all but is a tax on the timber which would be demanded from the owner in the expectation and intention that he would indemnify himself at the expense of the Railway Company. It is not a tax demanded from the very person who it is intended or desired should pay it. It is thus an indirect tax that is beyond the competence of the Provincial Legislature.

98. *In Attorney-General for Alberta v. Attorney-General for Canada (1939 A.C. 117)* Lord Maugham at p. 132 in delivering the judgment of the Judicial Committee approved the principle that it was quite legitimate to look at the legislative history leading up to the enactment in question in order to determine its validity. That principle may usefully be applied in the present case.

In view of the statements made in the Factum of the Attorney-General for British Columbia before the Court of Appeal (quoted in paragraph 94 of this Factum), Question 5 should be considered in the light of the Commissioner's recommendation to the Government that "a severance tax be imposed upon all timber cut upon lands of the Railway Company after the same are sold" and as though the legislation implementing this recommendation and as outlined in Question 4 had actually been enacted and held invalid. In such circumstances the Court would, it is respectfully submitted, scrutinize the legislation outlined in question 5 in order to determine whether

under the guise of the taxation there proposed the Legislature was attempting to impose what was in essence the same taxation as had already been held invalid.

99. Reference is also made to the following passage from the judgment delivered by Lord Maugham in the Alberta Case (1939 A.C. 117 at 130):

"The next step in a case of difficulty will be to examine the effect of the legislation: *Union Colliery Co. of British Columbia Ltd. v. Bryden* ((1899) A.C. 580). For that purpose the Court must take into account any public general knowledge of which the Court would take judicial notice, and may in proper case require to be informed by evidence as to what the effect of the legislation will be. Clearly, the Acts passed by the Provincial Legislature may be considered, for it is often impossible to determine the effect of the Act under examination without taking into account any other Act operating, or intended to operate, or recently operating in the Province.

A closely similar matter may also call for consideration, namely, the object or purpose of the Act in question. The language of S. 92(2), 'Direct taxation within the province *In order to the raising of a revenue* for provincial purposes' is sufficient in the present case to establish this proposition. The principle, however, has a wider application. It is not competent either for the Dominion or a Province under the guise, or the pretence, or in the form of an exercise of its own powers, to carry out an object which is beyond its powers and a trespass on the exclusive powers of the other: *Attorney-General for Ontario v. Reciprocal Insurers* (*(1924) A.C. 328, 342); in re The Insurance Act of Canada* (*(1932) A.C. 41).*"

In the present case it is quite clear what the effect of the legislation proposed in this question would be. The Commissioner has pointed out that the imposition of such a tax would tend to reduce the revenue of the Railway Company from the sale of its timber land as purchasers would likely pay less for taxable than non-taxable timber (p. 263 l. 27). If it is beyond the power of the Province to impose the tax outlined in Question 4, it is equally beyond its power to impose a similar tax under the guise or pretence or in the form of the legislation outlined in Question 5.

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

101. *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:—

RECORD

In the Supreme Court of Canada

No. 13
Factum of the Appellant Esquimalt & Nanaimo Ry Co.
(Cont'd)

(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."

(Answered in the affirmative, Smith J. A. dissenting.)

102. It is to be remembered that this question, like Questions 4 and 5, is to be considered on the assumption that the tax would be on a scale equivalent to the tax recommended by the Commissioner (p. 17 l. 12; p. 266 l. 8).

103. It is apparent that by the legislation outlined in this question an attempt would be made to relate the taxation 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 outlined in this question is examined, it at once becomes apparent that the tax proposed is similar to the taxes outlined in Questions 4 and 5.

104. As pointed out above, the amount of tax would be the same as that proposed in Question 4 and in Question 5. 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 as in Questions 4 and 5, and not, as in the case of a land tax, to the assessed value.

It is true that the proposed legislation would provide alternatives as to the time for payment, but the taxpayer would in all likelihood, because of the heavy amount of the tax, elect to relate the time for payment of his taxes to the cutting of the timber. The result and the effect would in reality be the same as the taxation proposed in Questions 4 and 5.

105. For the reasons submitted under Questions 4 and 5, this tax is likewise invalid and it would seem unnecessary to repeat those reasons. Again applying the principle expressed by Lord Maugham in the Alberta case (paragraph 99 of this Factum), the legislation outlined in this question

may well be considered as though the legislation outlined in Question 4 had first been enacted and held invalid and as though the legislation outlined in Question 5 had subsequently been enacted and also held invalid. If it is beyond the power of the Province to impose the tax as outlined in Questions 4 and 5, it is equally beyond its power to impose a similar tax under the guise or pretence or in the form of the legislation outlined in Question 6.

106. *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 first part answered in the affirmative, O'Halloran J. A. dissenting and the second part answered in the negative, O'Halloran J. A. dissenting.)

107. The answer to this question would seem to depend upon whether Section 123 of the Forest Act imposes a tax or a service charge. If it imposes a tax, it would seem obvious that its application to this Appellant would derogate from Section 22 of the Settlement Act.

108. Section 123(1) of the Forest Act, as amended in 1946, reads as follows:

"(1) From the owner of logged, unimproved, and timber land there shall be payable and paid to the Crown, on the first day of April in each year, an annual tax at the rate of six cents for each acre; and from the holder of every timber lease, pulp lease, timber licence, pulp licence, timber berth, or resin licence six cents for each acre comprised in the lease, licence, or berth, payable annually upon the anniversary of the issue of the lease or licence or upon the annual renewal date of the licence or berth, as the case may be, and all such payments shall be placed to the credit of a fund in the Treasury to be known as the 'Forest Protection Fund'. All moneys payable as aforesaid may be recovered with costs by action at the suit of the Crown. To the amounts received by the Crown under this subsection and paid into the said fund, there shall be added the annual sum of one million dollars to be paid by the Minister of Finance from the Consolidated Revenue Fund in equal instalments in the months of April, July, October and January."

109. It is submitted that the tax thus imposed is "taxation" within the meaning of Section 22 and that the Railway Company is, therefore, exempt from such taxation.

110. In *City of Halifax v. Nova Scotia Car Works (1914) A.C. 992* Lord Sumner at p. 998 stated:

"All rates and taxes are supposed to be expended for the benefit of those who pay them, and some really are so, but the essence of taxation is that it is imposed by superior authority without the taxpayer's consent, except in so far as representative government operates by the consent of the governed. Compulsion is an essential feature of the charge in question. The respondents might have drained their factory for themselves; they might think that it needed no drainage; they might object to the municipal scheme as defective; but the city sewers would be laid and the respondents would have to pay just the same. There is not enough here to differentiate this charge from 'taxation'."

In *Lawson v. Interior Tree Fruit & Vegetable Committee (1931) S.C.R. 357* The Produce Marketing Act of British Columbia dealt with in that case gave power to a committee to impose levies on produce marketed for the purpose of defraying expenses. Duff J. (as he then was) in delivering the judgments of himself, Rinfret J. (as he then was) and Lamont J., said (at p. 363) he had no doubt that the levies thus imposed were "taxes" (p. 363) and were ultra vires as being indirect taxation.

In *Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy (1933) A.C. 168* it was held that a levy authorized by provincial legislation and made by a committee upon farmers selling fluid milk assessed according to the quantity sold was a tax. The expenses of the committee were met by a further levy. It was held that this levy likewise was a tax.

In *Morris Leventhal v. David Jones (1930) A.C. 259* a yearly rate to be collected by a municipal council and to be applied by the State towards the construction of a bridge across Sydney Harbour was held to be a land tax

All of which is respectfully submitted.

C. F. H. CARSON,
J. E. McMULLEN,

Of Counsel for the Esquimalt and Nanaimo Railway Company.

No. 14

In the Supreme Court of Canada

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

ESQUIMALT & NANAIMO RAILWAY COMPANY,

ALPINE TIMBER COMPANY LIMITED,

10 THE ATTORNEY-GENERAL OF CANADA,

Appellants,

AND:

THE ATTORNEY-GENERAL OF BRITISH COLUMBIA,

Respondent.

Factum for Appellant

Alpine Timber Company Limited

PART I

STATEMENT OF FACTS

20 This Appeal arises out of an opinion expressed by the Court of Appeal for the Province of British Columbia on a matter referred to them by Order in Council 2699 dated 13th November, 1946. The opinion given on this reference, which has the effect of a judgment of the Court of Appeal, was pronounced in open Court on 12th June, 1947.

RECORD

In the Supreme Court of Canada

No. 14
Factum of Appellant, Alpine Timber Co. Ltd.
(Cont'd)

The opinion of the Court of Appeal was sought by the Government of the Province of British Columbia as a result of certain findings contained in the Report of the Honourable Gordon McG. Sloan, now Chief Justice of British Columbia, after an enquiry held by him, shortly called the "Forest Inquiry", which had been directed by Provincial Order in Council on the 31st of December, 1943. The Commissioner filed his Report in December of 1945.

The Inquiry covered a wide field, as appears from the Order in Council directing it (Sloan Report page 7), but we are only concerned here with the Commissioner's findings in respect of the E. & N. lands. These are to be found on pages Q173 to Q184, both inclusive, of the Report, and are quoted in the Appeal Case.

Case 253 to 266

In this portion of his Report the Commissioner recommended that the Province ascertain by reference to the Courts whether it be within the competence of the Provincial Legislature to impose on the purchasers of E. & N. lands a severance tax in an amount equal to the royalty from time to time payable to the Crown in respect of timber cut from Crown lands.

Case 16, l. 36
Case 52, l. 12

The matter is of considerable importance to the industrial life of the Province, because lumbering is a big industry in British Columbia and there is a large area on which the original stand of timber still remains to be cut. Of some 1,200,000 acres of Crown granted timber lands in the Province at the time of the Inquiry, 530,000 acres were privately owned under grants in fee direct from the Crown, and 470,000 acres through purchase from the Railway Company, leaving 200,000 acres still owned by the E. & N. It is this 200,000 acres as yet unlogged and still owned by the E. & N., upon the future purchasers of which the Commissioner proposed that the Legislature, if found competent to do so, should impose a tax in the same amount per thousand feet Board Measure as the royalty which the Crown would have obtained from the purchaser if the land had still been the property of the Crown and not the property of the E. & N. when sold to the purchaser.

Case 252, l. 40

The Province of British Columbia entered Confederation in 1871 under the Terms of Union which will be found on P. 4667 of Volume 4 of the Revised Statutes of British Columbia, 1936, and P. 4495 of Volume 5 of the Revised Statutes of the Dominion, 1927. At that time and for years afterwards no distinction was drawn between the price of agricultural and timber lands. Before Confederation such lands had been offered to the public at 4s 2d per acre. After Confederation the 4s 2d was converted at the

then rate of exchange to $1.00, at which price such lands continued to be offered to all comers until 1884 when it was raised to $2.50, except in the case of pre-emptions. It may as well be noted, too, that not only the timber but the minerals, if any, except gold and silver, were also included at this price.

All grants of timber lands made by the Crown prior to April 7th, 1887, were grants in fee without reservation of any royalty. Commencing on that date a royalty of 25 cents per thousand feet Board Measure was reserved to the Crown. This was raised in the following year to 50 cents. Timber lands granted prior to 1st March, 1914, continued to bear the rate of royalty which was in force at the date of the grant. Timber cut from timber lands granted since that date is subject to such rates of royalty as may from time to time be in force under Provincial Legislation. The rates are now set out in Sections 57 and 59 of the "Forest Act", which were amended in 1946 to effect an increase. In practice it was found that these rates averaged at the time of the Inquiry $1.10 per M. in respect of timber cut from lands in the E. & N. Belt. (Sloan Report, Page Q180). At the rates as increased in 1946, this average is about $1.25.

Case 203, l. 20

By Section 11 of the Terms of Union, the Dominion Government undertook in 1871 to commence within two years construction of a railway "to connect the seaboard of British Columbia with the railway system of Canada" in return for which the Provincial Government agreed to convey to the Dominion in trust, to be appropriated in such manner as the Dominion Government might deem advisable in the furtherance of the construction of that railway, such extent of public lands along the line of the railway throughout its entire length in British Columbia (not exceeding, however, twenty miles on each side of the line), as might be appropriated for the same purpose by the Dominion Government from the public lands of the Northwest Territories and Manitoba. It is well known, of course, that the Dominion Government actually appropriated alternate sections in each township within a belt lying twenty miles on either side of the railway in the Northwest Territories, excepting out of each township two sections for school purposes and one section and three-quarters for the Hudson's Bay Company. Actually, therefore, the extent of lands which the Province, under the Terms of Union, was required to convey was something less than would have been contained in a solid strip twenty miles in width.

Case 192, l. 20
258, l. 8

The railway was not commenced within the two year period, but on the 7th of June, 1873, Canada passed an Order in Council fixing Esquimalt as the terminus of the Canadian Pacific Railway,

Case 99, l. 35

and it was decided to locate a line of railway between Esquimalt and Seymour Narrows. At that time it was thought that the transcontinental railway would be built by way of Tête Juane Cache striking the Coast at Seymour Narrows, thence crossing to Vancouver Island by bridge and continuing down the Island from Seymour Narrows to Esquimalt.

In consequence of the action taken by the Dominion Government, the Provincial Government on June 30, 1873, placed under reserve a strip of land twenty miles in width along the Eastern Coast of Vancouver Island from Seymour Narrows to Esquimalt.

Case 100, l. 4

Case 117, l. 30

Construction was not commenced, but in May of 1874 the Dominion Government proposed to the Province that the Dominion would construct at once a railway from Esquimalt to Nanaimo which lay about midway between Esquimalt and Seymour Narrows and opposite Port Moody which ultimately became the terminus of the transcontinental C.P.R. This proposal was not acceptable as it was conditioned upon the Province agreeing to further delay in the construction of the railway on the Mainland.

Case 117, l. 33
195, l. 27
118, l. 32

Case 118, l. 2

In November, 1874, Lord Carnarvon recommended that the railway be built from Esquimalt to Nanaimo with all practical dispatch, and on the 25th of March, 1875, the Dominion Government asked the Provincial Government for a conveyance of public lands along the line of such a railway with the result that the Province, by its Statute of 22nd of April, 1875, granted to the Dominion the lands within a belt from Esquimalt to Nanaimo of the maximum width of forty miles, as expressed in the Terms of Union. A start appears to have been made on the construction of the railway, and steel was landed at Esquimalt and Nanaimo, but the project was not proceeded with.

Case 196, l. 34-43; 197, l. 1-16

Case 105, l. 35
106, l. 1-10

Case 198, l. 7

Case 118, l. 35
198, l. 10

In September of 1875 the Dominion Government offered to pay to the Provincial Government $750,000 as compensation for any delays which might take place in the construction of the C.P.R., the amount to be applied by the Province to build the railway from Esquimalt to Nanaimo, or to other public works as the Province might think fit, and the Dominion offered to forego any claims to lands reserved for railway purposes on the Island. This offer was not accepted by the Province.

Case 198, l. 18

In 1876 the Dominion still anticipated that the main line of the railway on the Mainland would pass through Tête Jaune Cache, that is, the Northern route, but by 1878 the Southern route seems to have been practically decided upon as the Dominion Government on May 23rd of that year cancelled the Order in Council

of the 7th of June, 1873, by which Esquimalt had been fixed as the terminus of the railway. This caused the Province to petition Her Majesty again and in April, 1879, the Dominion reversed its position and restored the old Order of 7th June, 1873, thus, as the Dominion said, leaving it free to adopt either the Northern or the Southern route for the railway on the Mainland. The decision to adopt the Southern route must have been taken quite early, as the Dominion requested the Province on the 31st of May, 1878, to convey to the Dominion a tract of land on the Mainland—

Case 199, l. 11

Case 199, l. 17

Case 200, l. 7

> ". . . beginning at English Bay or Burrard Inlet and following the Fraser River to Lytton; thence by the Valley of the River Thompson to Kamloops; thence up the Valley of the North Thompson, passing near to Lakes Albreda and Cranberry to Tête Jaune Cache; thence up the Valley of the Fraser River to the summit of Yellow Head, or boundary between British Columbia and the North-West Territories . . . "

Case 166D, l. 28

On September 23rd in that year a Plan of the lands requested was submitted, but it was not until the 8th of May, 1880, that the Province acceded to the request and made the grant. (Statutes of British Columbia 1880, Chapter 11). On February 15th, 1881, the Dominion ratified its agreement with the Canadian Pacific Railway. Paragraph 1 of the agreement refers to the railway from Kamloops to Port Moody as being "now in course of construction", while paragraph 6 fixed the date for completion from Kamloops to Yale as June 30th, 1885, and from Yale to Port Moody May 1st, 1891.

Case 166D

Negotiations had taken place in 1880 with regard to a grant of additional lands on the Mainland, and in 1881 the Province again petitioned Her Majesty to bring pressure to bear upon the Dominion to build the Island Railway. Lord Kimberley expressed the opinion, in August of that year, that the railway from Esquimalt to Nanaimo should be constructed, while the main line of the C.P.R. should be extended to Port Moody with a money grant to the Province as compensation for the delay. The Dominion apparently took no action on Lord Kimberley's suggestion, with the result that the Province decided itself to build or procure the building of the railway from Esquimalt to Nanaimo.

Case 202, l. 30

On the 21st of April, 1882, by Chapter 16 the Province repealed the grant of 1875 to the Dominion. A fresh reserve was, however, placed upon a solid block of land considerably larger in extent that that which had been covered by the grant. (B.C. Gazette 1882, p. 129). The westerly boundary of this block of land ran to Crown Mountain and thence to Seymour Narrows.

Case 204, l. 14

Curiously enough, the original reservation of 1873 was not rescinded until June 12th, 1883, when the area as defined in the Statute of 21st April, 1882, was placed under reserve.

Case 136, l. 15

Having repealed the grant to the Dominion, the Province then apparently entertained a proposal by Mr. Clement and his associates to build the railway from Esquimalt to Nanaimo, and accordingly a Statute was passed, called the "Clement Act" which received the assent 21st April, 1882. Mr. Dunsmuir and his associates apparently were in competition with Mr. Clement, because at the same Session of the Legislature an effort was made to put through a private Bill in similar terms, empowering Mr. Dunsmuir and associates to build the railway for a similar grant of land. That Bill, however, failed.

Case 108

Case 204, l. 33-36

Mr. Clement and his associates apparently were unable, however, to furnish the security required by the Statute, and nothing, therefore, came of that attempt by the Province to procure the construction of the railway.

The Clement negotiations having failed, the Province again approached the Dominion Government in November, 1882, in an endeavour to have the Dominion start construction of the railway in the Spring of 1883. On the 10th of February, 1883, the Province offered the Dominion the alternatives of building the Island Railway or giving the Province such compensation for failure to build it as would enable the Province to go ahead on its own. Negotiations were carried out in April and early May, 1883, and the terms proposed by the Dominion were expressed in a letter from Mr. Trutch to Mr. Smithe of May 5th, 1883. Then followed the passage of a Provincial Statute which received the Royal assent on the 12th of May, 1883. This May Act set out the terms of the settlement between the two Governments as understood by the Province and went on to provide for the incorporation of The Esquimalt and Nanaimo Railway Company, and prescribe the terms upon which that company should build the railway from Esquimalt to Nanaimo.

Case 205, l. 35

Case 124-5

The Dominion, however, was not satisfied with this Bill, and declined to build the railway as a Government work. Sir Alexander Campbell was appointed to communicate with the Province and procure amendments to the May Act and negotiate with Mr. Dunsmuir and others who might be willing to undertake the construction of the railway.

Case 208, l. 3

Case 208, l. 10

Even after the passage of the Act in May, 1883, the Province still considered itself in a position to make its own arrangements

about the building of the railway, and in fact, in July of 1883, entertained a proposal by Mr. Oppenheimer to do so. Case 137-140

The negotiations with Sir Alexander Campbell resulted in the settlement between the Province and the Dominion of the form which the Statute of the Province should finally take, and of the terms under which Mr. Dunsmuir and his associates were prepared to undertake the construction of the railway, in particular of Clause (f) of the "Settlement Act" to which the Province undertook to obtain Mr. Dunsmuir's consent. An agreement was at the same time drawn up between Mr. Dunsmuir and his associates on the one hand and the Minister of Railways and Canals on the other, dated 20th August, 1883, to which was attached a copy of the May Act with the amendments written into it which were ultimately adopted in the Settlement Act which received the assent on the 19th of December, 1883. The agreement with the Contractors was placed in escrow, pending the passage both of the amended Provincial Act and of the Statute of the Dominion which became Chapter 6 of the Statutes of 1884 and received the assent on the 19th April that year. Case 140, l. 15 Case 148, l. 30 Case 140, l. 26 Case 142, l. 15 Case 150 Case 158

By a Dominion Order in Council of 12th April, 1884, Mr. Dunsmuir and his associates were named as the persons to be incorporated as "The Esquimalt and Nanaimo Railway Company" under the Settlement Act. Case 217

This Company did in fact commence and complete the construction of the railway before June 10th, 1887, the date fixed by the Provincial Statute and by the Agreement with the Dominion. Accordingly the Dominion paid the subsidy of $750,000 to the Railway Company and conveyed to the Company on April 21st, 1887, the lands which are referred to in the Settlement Act and which were thereby deemed to have been granted to the Dominion in trust for this purpose, though no actual conveyance to the Dominion had ever been executed. Case 174

While the railway was under construction and subsequently the Provincial Government gave certain grants to settlers within the Belt, and in 1904 passed the "Vancouver Island Settlers' Rights Act" which gave settlers twelve months from the passage of the Act to apply for Crown Grants of the lands on which they were living within the area. The Railway petitioned for the disallowance of this Statute, but the Province resisted and the petition was denied. As a result of litigation which went to the Privy Council, it was established that, contrary to the view taken by the Minister of Justice, the Statute had materially affected the rights of the Railway Company, and the Province, Case 214 Case 216, l. 21 Case 221 Case 225 Case 226, l. 2

RECORD

In the Supreme Court of Canada

No. 14
Factum of Appellant, Alpine Timber Co. Ltd. (Cont'd)

Case 231-3

recognizing this fact, caused to be conveyed to the Railway Company 20,000 additional acres in 1910, in compensation for the lands which were lost by operation of the Statute.

In 1912 the E. & N. leased its railway to the C.P.R., and for greater certainty that the exemption from taxation which the Company's lands enjoyed under the terms of the Settlement Act would not be affected, an agreement was made with the Province and ratified by Statute of that year. Under this

Case 237

Statute the Province confirmed to the E. & N. the continued exemption of its lands from taxation while the Railway Company on its part agreed to make annual payments of 1½ cents an acre

Case 17, l. 10

to the Province, which it still continues to pay.

In 1917 the Province revived the Vancouver Island Settlers' Rights question by passing another Statute. Again the Company

Case 240

Case 248

petitioned for its disallowance, this time with success. On the recommendation of the Minister of Justice the Statute was

Case 249

disallowed.

PART II

POINTS IN RESPECT OF WHICH APPELLANT ALLEGES ERROR

1. Questions 1, 3, 5 and 6 should have been answered in the negative.

2. Question 2 should have been answered in the affirmative.

3. There is no error in the answer made by the Court to Question 4.

PART III

ARGUMENT

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'?"

Answered in the affirmative by O'Halloran and Bird, JJ.A.

Answered in the negative by Sidney Smith, J.A.

It is submitted that this question should have been answered in the negative, and that the answer given by Mr. Justice Sidney Smith is the correct answer.

There was in fact a contract between the Government of the Province of British Columbia and the Railway Company. The Settlement Act constituted an offer on the part of the Province extended to that group of persons who should be named by the Dominion Government and open to them for acceptance by performance of the relevant terms set out in the Statute.

An offer can be accepted by performance just as effectively as by written document, and once an offer has been accepted by performance a contract is created which is just as binding in its effect as if it had been in writing under the seals of the parties. In **Carlill v. Carbolic Smoke Ball Company**, 1893, 1 Q.B. 256, 62 L.J.Q.B. 275, Lindley, L.J., says at pages 262 and 263:

"I, however, think that the true view, in a case of this kind, is that the person who makes the offer shews by his language

and from the nature of the transaction that he does not expect and does not require notice of the acceptance apart from notice of the performance."

Bowen, L.J., says at page 265:

"The first observation which arises is that the document itself is not a contract at all, it is only an offer made to the public."

and A. L. Smith, L.J., says at page 274:

". . . this was an offer intended to be acted upon, and, when acted upon and the conditions performed, constituted a promise to pay."

This case was followed in Canada by **British Traders Insurance Company Limited v. Queen Insurance Company of America,** 1928 S.C.R. 9. The Chief Justice in delivering the judgment of the Court said:

"Viewing the letters as amounting only to an offer by the appellant Company to undertake re-insurance, to the extent stipulated, of further risks to be assumed by the respondent Company, the principle of *Carlill v. Carbolic Smoke Ball Company,* cited by Mr. Davis, applies; performance of the condition completes the contract and notification of acceptance is, in such cases, dispensed with. Under the circumstances, the nature of the appellant's undertaking implies that its obligation was to arise immediately upon the respondent becoming committed to liability."

It has been argued for the Province, and O'Halloran and Bird, JJ.A., have accepted the view, that the Settlement Act constituted a contract only between the Province and the Dominion. There is no question but that the Settlement Act did embody the settlement arrived at between the Province and the Dominion, but it did not constitute by itself a contract between the Province and the Dominion. The Settlement Act recited what the Province understood to be the terms of an agreement between the Province and the Dominion. These terms were reduced to a memorandum and recited in the preamble to the Statute. Section 1 of the Act ratified that agreement, but neither this Statute nor any Statute which the Province of British Columbia might pass could bind the Dominion. The Dominion did not become bound until the Statute, Chapter 6 of 1884, was passed by Parliament. That Statute recited the agreement in the same terms, and ratified it.

Case 140, l.12

Case 150

From the time of the passage of the Settlement Act on December 19th, 1883, until the passage of the Dominion Act on April 19th,

1884, there was no contract in existence between the Dominion and the Province. During that period the Settlement Act stood as an offer by the Province to settle with the Dominion on the terms therein stated, and the Dominion Act when passed constituted the acceptance of that offer by the Dominion. Once accepted, of course, the contract came into being and bound both parties.

The Settlement Act not only contained an offer to the Dominion, but it contained as well an offer to those individuals who should be named by the Dominion Government to incorporate them into the E. & N. Railway Company and to extend to them certain privileges and rights subject to certain terms and conditions, all as set out in the Statute, but if, and only if, they should commence forthwith and complete before June 10th, 1887, the construction of the railway from Esquimalt to Nanaimo.

That offer by the Provincial Government did not require acceptance in writing. It only required acceptance by performance. It was never intended that the offer should be accepted in writing, any more than the Carbolic Smoke Ball Company intended Mrs. Carlill to write them a letter. The form the acceptance was to take was stated in the Statute itself—commencement and completion of the railway in accordance with the conditions laid down in the Statute.

A third contract came into being in connection with this railway. This was the contract between Mr. Dunsmuir and his associates on the one hand and Her Majesty in the right of the Dominion on the other, commonly called the "Construction Agreement". Such an agreement was no doubt considered essential because it was necessary that the Dominion become bound to do three things: 1) pay the subsidy of $750,000; 2) transfer the subsidy lands; and 3) grant exemption from duty for the rails and material which the contractor had necessarily to import for use in the construction of the railway and telegraph line. This exemption was covered by Section 13 of the Agreement. Case 145, l. 24 Case 145, l. 24

Here again no agreement was created by the document which bears date the 20th of August, 1883, over the signatures of the Minister of Justice and the seven associated contractors. That document constituted an offer on the part of the Contractors, irrevocable so far as they were concerned, but which could become binding upon them only upon the fulfillment of two conditions: first, the passage of the Settlement Act and, second, the passage of the Dominion Act. The document was placed in escrow until those two conditions should have been fulfilled, and Case 148

as the Settlement Act was passed at an earlier date than the Dominion Act, the contract came into being on the 19th of April, 1884, when the Dominion Statute was passed. From and after that date the Contractors became bound to accept the offer extended to them by the Province by commencing and completing the construction of the railway.

It was not until the Dominion had determined to pass the Statute that the Contractors were named so as to make them eligible to accept the Provincial offer. They were so named in the Order in Council of April 12th, 1884. While the Order in Council antedates the assent to the Statute by seven days, the Order in Council was only made after the Statute had been passed by Parliament so as to require only the Royal assent to make it law.

O'Halloran, J.A., posed to himself the question of whether there was a contract between the Province and the Contractors or the Railway Company, and then proceeded to examine the facts. By the time he had recited those facts which appeared to him to be relevant to the inquiry, he has lost sight of the true question: "Was there or was there not a contract?" and directed himself to the inquiry as to whether there was in existence a document bearing the signatures of the Contractors and of a Minister of the Crown Provincial. In other words, he diverted himself from the search for a contract in law and embarked upon a search for a contract in writing signed by both parties, and failing to find such a document he concluded, wrongly, that no contract in fact existed. He said after referring to the foot-note to the Contractors' Agreement:

Case 40, l. 21

> "If Dunsmuir and his associates had a contract with the Province on the terms of any of the provisions of the 'Draft Bill' there would have been no occasion for them to 'acquiesce' in the 'Draft Bill.' That acquiescence so expressed points to the non-existence of a contract with the Province."

This clearly indicates that at this point in his reasoning his search was directed solely to the determination of whether there was or was not in writing a contract between the Province and the Contractors. He overlooked entirely the effect of the Statute passed in the following December.

Bird, J.A., misunderstood the argument of Counsel for the Railway Company, and saw nothing in the Settlement Act but a confirmation of an agreement between the Dominion and the

Province. He even terms the Settlement Act "the acceptance of an offer by the Dominion", which, of course, it was not—the Provincial Act was the offer, not the acceptance; what had gone before were merely negotiations between the representatives of the respective Governments, both of which could act only by Statute. The earlier Statute necessarily became the offer and the later became the acceptance. Case 89, l. 35

Sidney Smith, J.A., takes the correct view when he says: Case 75, l. 2
"... 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 sec. 22."

In other words, the Settlement Act did two things—it made to the Dominion an offer which was open to statutory acceptance, and it made as well an offer to a group of individuals which was open to acceptance by performance. The terms of this offer to the Dominion had been carefully revised and settled with a Minister of the Crown Dominion so as to make as certain as such things can be made that the offer would ultimately be accepted by the Dominion.

The Province had made one mistake already in that year by passing the May Act, in which it embodied what were stated to be the terms of agreement with the Dominion, but which amounted in law to nothing but an offer by the Province to settle its difficulties with the Dominion on those terms. The fact that the Dominion did not pass a Statute accepting the May Act, but instead reopened negotiations is cogent proof of the fact that no Statute passed by the Province could constitute a contract with the Dominion until the Dominion had itself passed a Statute in correlative terms. In other words, the May Act was an offer made by the Province, which failed to become a contract for want of acceptance by the Dominion.

The Settlement Act contained a second offer by the Province to the Dominion, which did in fact become a contract by the passage of the Dominion Statute of 1884. The Settlement Act was only converted into a contract with the Dominion because its terms had first been carefully revised and settled with a responsible Minister of the Crown Dominion. It is not to be wondered at, therefore, that the Province and the Dominion went to some pains to ensure that the offer which the Settlement Act made to the Contractors and the terms and conditions of performance by the Contractors should be definitely and clearly settled to the satisfaction of all parties before either Government went to the trouble of passing another Statute.

The Province, therefore, sought and obtained the approval of Mr. Dunsmuir and his associates to Clause (f) which was radically changed from the Clause (f) in the May Act. The Dominion reduced to writing all those points upon which it required to be assured by the Contractors, and at the same time the Contractors themselves made certain that all those provisions for their benefit should be clearly established before they entered into any bargain with the Dominion to accept the proposition offered by the Province. In other words, all three parties, warned by the abortive negotiations of May, 1883, and the Province doubly warned by the failure of the Clement Act in 1882, made certain that all terms of the ultimate contract were clearly and definitely laid down and established in form and substance satisfactory to the other parties before going any further.

To that end, the Dominion and the Contractors entered into
Case 142 the Construction Agreement of August 20th, 1883, the Dominion
Case 140 and the Province entered into the Memorandum of Settlement of the same date, and the May Act was overwritten in red ink with the amendments which it must contain to make it acceptable both to the Dominion and to the Contractors, and then the sensible precaution was taken of putting all these documents in escrow until the Legislature and Parliament should both have had the
Case 148 opportunity of acting upon them.

Let us examine the Settlement Act in detail, to see whether it bears the construction here placed upon it.

The Act commences by reciting negotiations between the Dominion and the Province with regard to the Island Railway among other things. It recites that "it hath been agreed as
Case 150, l. 15 follows" and then set out paragraphs lettered (a) to (k) inclusive. The preamble ends with a third recital:

Case 152, l. 32-35 "And whereas it is expedient that the said agreement should be ratified, and that provision should be made to carry out the terms thereof:".

Case 152, l. 38 Section 1 then ratifies and adopts the agreement.

Section 2 amends Chapter 11 of the Provincial Statutes of
Case 166D 1880. This had to do with the grant of lands on the Mainland, and clearly shows that as early as 1878 the Dominion had adopted the view that its obligations under Section 11 of the Terms of Union were fulfilled by building a railway to touch the seaboard of British Columbia at Burrard Inlet.

Section 3 contains the grant of lands on Vancouver Island, and limited their application to the railway from Esquimalt to Nanaimo. This fact is significant when one remembers that the grants of land on the Mainland were all in aid generally of the construction of the C.P.R., and shows that the distinction was clearly understood by both parties between the short line of rail from Esquimalt to Nanaimo on the one hand and the transcontinental railway on the other.

Section 4 contains an exception from the grant, and Sections 5 and 6 are related thereto.

Section 7 contains a further grant of land on the Mainland.

Up to this point the Statute deals with purely Dominion-Provincial matters. The Statute might have stopped at that point without detracting one whit from its force as a settlement between the Dominion and the Province. A Statute could then have been passed by the Dominion Parliament in similar terms and the contract between the Dominion and the Province would have been complete.

From there on, however, the Statute deals with the E. & N. Railway. There is nothing from Section 8 to the end of the Statute which required any action on the part of the Dominion. All these Sections could just as well as not have been embodied in a separate Statute, and had they been, the confusion which now prevails would not have arisen.

Commencing with Section 8 we have the incorporation of a company, not, as is usual in such Statutes, of named persons but only of such persons as might later be named by the Governor General in Council. The Act then goes on to provide that the Company

Case 154, l. 25-39

" . . . shall lay out, construct, equip, maintain, and work a continuous double or single track steel railway of the gauge of the Canadian Pacific Railway, and also a telegraph line, with the proper appurtenances, from a point at or near the harbour of Esquimalt, in British Columbia, to a port or place at or near Nanaimo on the eastern coast of Vancouver Island, with power to extend the main line to Comox and Victoria, and to construct branches to settlements on the east coast, and also to extend the said railway by ferry communications to the mainland of British Columbia, and there to connect or amalgamate with any railway line in operation or course of construction. The company shall also have power and authority to build, own, and operate steam and other vessels

in connection with the said railway, on and over the bays, gulfs, and inland waters of British Columbia."

Section 10 then gives the Company power to accept from the Dominion the subsidy of lands.

Sections 11 to 19 inclusive deal with the capitalization, constitution and internal management of the Company.

Section 20 requires commencement forthwith and completion before the 10th of June, 1887. Had the Company failed to comply with this section, there would have been no contract between the Province and these named persons, any more than there had been in 1882 between the Province and Mr. Clement and his associates. They would have failed to fulfill a condition precedent, by the fulfillment of which alone they could become entitled to build, own and operate this railway.

Sections 21 and 22 provide for exemption from taxation.

Sections 23 and 24 impose further conditions upon the Company.

Section 25 provides that the price of the subsidy lands was to be fixed either by the Dominion Government or by the Railway Company, and makes it clear that the Province at any rate was to have no hand in the fixing of such prices.

Section 26 saved existing rights, while Section 27 acted as a statutory assignment to the Company of the construction agreement.

There is nothing in any of these Sections 8 to 29 which required the confirmation of a Dominion Statute. This portion of the Act dealt only with the relationship between the Contractors and the Province and dealt with them only after they had been named by the Governor General in Council. Once they had been named, however, they had then only to perform in accordance with the terms laid down in the Statute.

This Act differs from the Clement Act in that it was only passed for the benefit of those named by the Dominion. The Clement Act in 1882 was passed for the benefit of Mr. Clement and his associates named by the Province. The Dominion was not concerned in that proposal. The Province at that time was prepared to go ahead on its own and by the passage of the Clement Act stated the terms upon which Mr. Clement and his

associates could proceed to construct the Island Railway. Can there be any doubt that if Mr. Clement and his associates had been prepared to build the railway on those terms, and had furnished the security and commenced and completed the railway within the 3½ years, the Province would have been contractually bound to "The Vancouver Land and Railway Company" under the terms of that Statute? Can there then be any question that Mr. Dunsmuir and his associates by their performance created a contractual relationship between the Province and "The Esquimalt and Nanaimo Railway Company"?

Mr. Dunsmuir and his associates did in fact comply with all the conditions of the Settlement Act. They were in due course named by the Governor General in Council; they commenced the railway forthwith and they built it within the time limited. No further proof of full compliance is needed than the fact of payment by the Dominion of the subsidy of $750,000 and the conveyance from the Dominion to the E. & N. of the Railway Belt on April 21st, 1887. Case 217 Case 174 177, l. 18

By their performance they came into possession of $750,000 in cash and 1,900,000 acres of subsidy lands, which, at the then going price, were worth possibly as much as $1,900,000, a subsidy in total value, therefore, of not over $2,650,000.

It is apparent from the history of this period that the railway from Esquimalt to Nanaimo was finally constructed quite independently of the construction of the transcontinental railway, and as a result of an agreement entirely separate from the Terms of Union.

When the Terms of Union were agreed upon it was apparently assumed by both Governments that the railway to be constructed would have its terminus on Vancouver Island, and the Dominion by Order in Council fixed Esquimalt as the terminus of that railway. When it was found, however, that the geographical difficulties in the way of building the main line to a terminus at Seymour Narrows were insuperable, Burrard Inlet was selected as the terminus. It was then apparently realized by the Dominion that the construction of a line of railway to a terminus on Burrard Inlet or English Bay would constitute compliance with the Terms of Union which only required construction to the "seaboard of British Columbia". This conclusion was reached early in 1874, as is evidenced by the representations made by Mr. Edgar in that year. The Province, however, did not accept that Case 99, l. 35 Case 192, l. 26 Case 117 118, l. 21; 195

RECORD

In the Supreme Court of Canada

Case 166D

No. 14
Factum of Appellant, Alpine Timber Co. Ltd.
(Cont'd)

view, and the proposal then made was refused. In 1878, however, the Dominion again took this position in despatches which resulted in the Provincial Statute, Chapter 11 of 1880.

Early in 1882 it was undoubtedly realized by the Provincial Government that the Dominion had determined to treat Port Moody as the terminus on the "seaboard of British Columbia", and on the 21st of April in that year the Province cancelled the land grant of 1875 and passed the Clement Act, indicating clearly that the Province at last considered the Dominion's decision as final and felt that the Province must itself arrange for the construction of the Island Railway. While negotiations were from time to time carried on with the Dominion after this date due to the failure of the Clement proposal, the Province as late as July of 1883 still considered the possibility of going ahead on its own, as witness the negotiations with Mr. Oppenheimer.

Case 137-140

The agreement which was finally made confirmed the position taken by the Dominion that the obligation of Canada was to contribute $750,000 to the construction of the Island Railway, not to build it. This is apparent from sub-clause (e) of the Settlement Act. A similar clause in the May Act recited that Canada

Case 151, l. 13

Case 130, l. 10-11

> "agrees to secure the construction of a railway from Esquimalt to Nanaimo."

It was to this wording, among other things, that the Dominion took exception, and it was only after its modification to that contained in the Settlement Act that the Dominion was prepared to accept the settlement. The $750,000 referred to in the Settlement Act had been offered to the Province originally as far back as September, 1875. Now finally the grant was accepted upon terms that the Dominion should pay the money to the Railway Company as the work progressed. It seems clear, therefore, that the E. & N. Railway was constructed as a separate undertaking, apart altogether from the Terms of Union. The Dominion recognized that it was in default in the construction of the Mainland line, and finally satisfied the Province for this default by payment of the $750,000.

Case 118, l. 28
198, l. 10; 211, l. 17

It may be of assistance to examine into the views held and expressed on this question in the years which have passed since 1883.

The earliest expression of opinion is that found in the letter dated November 16th, 1885, from Hon. William Smithe, Chief

Case 169, l. 35

Commissioner of Lands and Works for the Province, to Hon. Mr. Trutch, the Dominion Government Agent, in which he says:

Case 173, l. 5-14

" . . . The Provincial Government are the real principals in the matter of this railway and these lands. The lands are Provincial lands placed in the hands of the Dominion Government in trust to be applied to one purpose only, which is to secure for the Province the construction of the Island Railway. Even the money subsidy to be paid by the Dominion to the railway contractors was a debt due by the Dominion to the Province; so that in every way the Provincial Government are the real principals in this case, and are entitled upon the equities of the matter to be consulted and considered . . . "

Case 178, l. 15-23

In the grant from the Dominion to the Railway Company on April 21st, 1887, the following words occur in the habendum:

" . . . Subject nevertheless to the several stipulations and conditions affecting the same hereinbefore recited and which are contained in the Acts of the Parliament of Canada and of the Legislature of British Columbia hereinbefore in part recited, as such stipulations are modified by terms hereinbefore recited of the agreement so made as aforesaid by and between the Government of Canada, the Government of British Columbia and the said Company."

Case 230, l. 33-40

Similar wording is again used in the grant of 1905.

Much has been made of the statement contained in the Railway Company's petition of 21st March, 1904, which bore the signature of James Dunsmuir, President of the Railway Company, in which he said:

Case 220, l. 2-3

" . . . nor did they (the Company) enter into any contract with the Provincial Government."

Mr. Dunsmuir in making that statement obviously fell into the same error as that which led O'Halloran J.A. to find that there was no contract. Mr. Dunsmuir had in mind, of course, the contract in writing of 20th August, 1883, between himself and his associates and the Minister of Railways and Canals which was later ratified by the Dominion Act of April, 1884, and naturally fell into the error of concluding that in the absence of a similar document there was no contract with the Provincial Government. In this he was simply mistaken. He was not directing his mind to the question of a contract in law, but the question of a written document signed by the parties.

The true view was taken by the Minister of Justice in 1918, when he said:

Case 243, l. 33-38

" . . . the Railway Belt was made available to the Esquimalt and Nanaimo Railway Company in consideration of the building of the railway, abrogating pro tanto the agreement between the Dominion and the Province of 1883, and derogating from the grant made by the Dominion to the Railway Company in pursuance of the general arrangement, . . . "

and again when he said:

Case 247, l. 29-37

" . . . and the process by which, notwithstanding these solemn assurances, a valuable portion of the property which it was thus intended that the company should receive, and which the company did receive, is taken away by the exercise of the legislative authority of one of the parties to the tripartite agreement, cannot adequately be characterized in terms which do not describe an unjustifiable use of that authority, in conflict with statutory contractual arrangements to which the Government of Canada as well as the Province was a party."

Case 238, l. 25-32

The wording of the Statute of 1912 has already been referred to above, wherein the Provincial Government confirmed the continuing exemption of the Company's lands from taxation under Clause 22 of the Settlement Act.

It is submitted, therefore, that from and after the completion of the railway in 1887 a contractual relationship existed between the Province and the Railway Company in the terms of the Provincial Statute of December, 1883.

QUESTION 2

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

The question should be answered in the affirmative.

It is admittedly the intention to impose upon these lands, or the timber thereon, a tax equivalent in its burden to the royalties imposed upon lands and timber still the property of the Crown. This amounted, at the time the Report was made, to an average of $1.10 per M. The Commissioner found that the average value of the standing timber at the time of the Report was about $2.00, so that the proposal made by the Commissioner was to levy upon this timber a tax to the extent of 55% of its value. Case 17, l. 12-14 Case 263, l. 15-20 Case 264, l. 14

O'Halloran, J.A., challenges this percentage by relating the average royalty, not to the average stumpage, but to "the purchaser's average log-selling price, which in 1942 was $17.80". He carried the argument further by assuming an increase in the average log-selling price of $30.00. This increase, of course, gave him a much reduced percentage factor. Case 58, l. 4 Case 58, l. 8

This argument does not take into account the cost of felling the tree and preparing and carrying it to market. The argument is no sounder than if the average royalty per thousand were to be related to the average selling price of a thousand feet of logs when made into newsprint or paper worth say, $200 or into a suite of furniture worth $500. It is only the value of the tree as it stands in the forest to which the royalty may be compared.

This is not an ordinary land tax but a tax additional to the timber land tax of 1½% to which all Crown-granted timber lands in the Province are subject anyway. (R.S.B.C. 1936, Chapter 282, s.41 (1) (d). It is to be imposed only upon the 200,000 acres of timber lands still owned by the Railway Company. As Mr. Justice Sidney Smith said in his Reasons: Case 81, l. 41

> "In effect, the target aimed at by the proposed legislation would seem to be not to tax land but to deprive the Railway Company of part of its consideration for the building of the railway."

Such a tax upon the purchaser, whether it be applied upon the timber or the land, must necessarily affect the value of the land. That land was part of the subsidy granted to Mr. Dunsmuir and his associates in consideration of their constructing the

railway. The land at that time had a market value of not over $1,900,000—undoubtedly less than that amount because all land in the area stood open to purchase by anyone at the price of $1.00 per acre and not all of this area would be of equal value. The fact that it still remained in the hands of the Province, although available for purchase for many years, indicates that it still had no greater value than $1.00 an acre, probably less.

The imposition of such a tax upon the purchaser must, of course, inevitably reduce the value of the lands in the hands of the Railway Company.

If A owns two houses, each of the market value of $10,000, the title to one of which is clear, the title to the other being encumbered by a mortgage of $5,500 which must be assumed by the purchaser it is not sensible to suggest that A would receive from the sale of each house the same amount of money. In the one case he would receive $10,000, in the other only $4,500.

This tax is nothing but the imposition of a statutory mortgage in favour of the Crown. It must automatically affect the price which the Railway Company will receive for its lands. That this would be the effect was clearly appreciated by the Commissioner

Case 263, l. 27 because he said:

> " . . . I assume 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."

Case 264, l. 20 and again:

> " . . . assuming it to be a fact that the Railway Company would not receive quite as high a price for its stumpage on future sales as it has in the past."

Since the Railway Company would receive less from the sale of its land by reason of the imposition of such a tax, there can surely be no doubt that the imposition of that tax affects the contract existing between the Province and the Railway Company. The situation is no different in its effect than if the

Province had collected a tax of 1% per annum for 55 years. It makes no practical difference to the Railway Company whether it be called a tax of 1% for 55 years or a tax of 55% for one year, and it is respectfully submitted that there is no difference in legal effect. Either would constitute a breach of the agreement contained in Section 22.

Sidney Smith, J.A., put this point very clearly when he said:

" . . . it is clear that any legislative action contrary to the spirit of this section would be tantamount to a breach of faith on the part of the Government and of the people of this Province. And it would surely be contrary to the spirit of this section were the Government to announce, as is suggested, that as and when these timber lands were sold by the Railway Company the new owners would be taxed to the extent of 55% of the value of the timber growing thereon. That simply reduces the value (that is to say, the value to the Railway Company) of the timber lands still unsold by 55%. And if by 55%, why not by 95%? And if now, why not the year after the construction of the Railway had been completed? And if these two events had happened would not the value of the timber land consideration so solemnly granted to the Railway Company have disappeared into thin air? That a result so strange, and so inconsistent with the plain purpose of the section, could have been contemplated as within the terms of the arrangement made by those men who met together on the 20th August, 1883, is, or so it seems to me, quite unthinkable . . . The section grants exemption from taxation until the lands are (amongst other contingencies) sold. Then they may be taxed. But the taxation contemplated by the section, to which the lands are to become subject when sold, can only mean the ordinary taxation imposed alike on these and all surrounding comparable lands. As to this there could be no complaint by anyone. But here it is sought to give an altogether wider, if not an altogether different, meaning to the word taxation. It is sought to have it include the extraordinary levy herein contemplated, a levy which would fall on these yet unsold timber lands and on these timber lands alone."

Case 75, l. 13-31

Case 75, l. 36-45

Case 76, l. 1 and 2

This question therefore should be answered in the affirmative.

RECORD

In the Supreme Court of Canada

No. 14
Factum of Appellant, Alpine Timber Co. Ltd.
(Cont'd)

QUESTION 3

"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?"

This question should, for convenience, be divided into Parts 1 and 2, Part 1 dealing with the existence of a contract, Part 2 with the effect of the proposed legislation upon it.

Part 1 should be answered in the negative, Part 2 in the affirmative, and the question as a whole in the negative.

Part 1

All that has been said with regard to Question 1 is equally applicable to Part 1 of this Question 3. There should, however, be added a reference to the Provincial Statute of 1912.

Case 237

In that year the Railway Company proposed to lease its railway to the Canadian Pacific. There arose in the minds of the advisors of the Railway Company the question of whether this lease might possibly have the effect of releasing the Province from its obligation to maintain the lands of the Railway Company tax free under Section 22 of the Settlement Act. It was considered the course of wisdom, therefore, to have the matter clarified by a further agreement with the Province affirming the continued exemption of these lands, and accordingly an agreement was made dated the 17th of February, 1912, and scheduled to the Provincial Act which became law on the 27th of that month.

Under that agreement, after reciting the problem, the Province agreed that the lease in contemplation "shall not affect

Case 238, l. 28

the exemption from taxation enacted by the said Clause 22 . . . ". In consideration the Company agreed, by Section 2, to pay to the

Case 17, l. 10

Province 1½c per acre per annum thereafter, and such payments have been and are still being made.

It is surely apparent from both the existence and the terms of this agreement that the Province in 1912 accepted the position that it was contractually bound to the Railway Company in the terms of Section 22 and further agreed to continue so to be bound so long as there was any necessity for its operation.

This Statute, therefore, clearly confirms the existence of a contract between the Province and the Railway Company and is an additional factor to be taken into account in considering the answer to Question 1 as well.

10 Part 2

All that has been said with regard to Question 2 is equally applicable here. The proposed tax would be a breach of the contract and a direct violation of Section 1 of the Agreement of 1912.

It is submitted, therefore, that this question should be answered in the negative.

QUESTION 4

"Would a tax imposed by the Province on timber, as and when cut upon lands in the Island Railway Belt, the owner-
20 ship 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?"

This question was correctly answered by all three Justices of Appeal.

Such a tax would unquestionably be an indirect tax beyond the competence of the Provincial Legislature.

The tax referred to in this question is the severance tax recommended by the Commissioner. Case 262, l. 37
264, l. 18
266, l. 4-9

RECORD

In the Supreme Court of Canada

No. 14
Factum of Appellant, Alpine Timber Co. Ltd.
(Cont'd)

Case 269, l. 35
Case 273, l. 33

Such a tax would be similar in its effect to the yield tax in force in the States of Oregon and Washington. The rate in both these States is only 12½% of the value of the timber.

Such a tax would undoubtedly be ultra vires the Province, because in all likelihood it would be passed by the purchaser backward to the Railway Company in the form of reduction in the price of land. The Commissioner foresaw that it would be passed backward in the form of reduction in the price of the land, because he said that he assumed that its imposition would tend to reduce
Case 263, l. 27 the revenue of the Railway Company from the sale of its timber land because purchasers would pay less, and again, that the
Case 264, l. 20 Railway Company would not receive quite as high a price for its stumpage on future sales, and he went on to say that he was unable to see how it would be "unjust and inequitable" to impose such a tax. He justified this view on the ground that it has now turned out after the passage of some 60 years that the Railway Company will probably receive some $25,000,000 from the sale of its timber lands. This he considered to be a "reason-
Case 264, l. 18-25 ably adequate subsidy for the construction of 82 miles of railway".

The deciding factor is whether or not the tax is imposed upon the very person who it is intended should bear it, or whether it is in its nature a tax "which is susceptible of being passed on".

Here we have in the Commissioner's Report the clearly expressed intention that this tax should be passed backward to the Railway Company and that while it would be imposed upon the purchasers of timber lands it should in fact be borne by the Railway Company. There is no need, therefore, to look further for evidence that the tax is indirect.

The test to be applied in determination of the nature of such a tax is perhaps best expressed in the language of Viscount Haldane in **A-G for Manitoba v. A-G for Canada,** 1925 A.C. 561, (Grain Futures case) at page 566:

> "As to the test to be applied in answering this question, there is now no room for doubt. By successive decisions of this Board the principle as laid down by Mill and other political economists has been judicially adopted as the test for determining whether a tax is or is not direct within the meaning of

s.92, head 2, of the British North America Act. The principle is that a direct tax is one that is demanded from the very person who it is intended or desired should pay it. An indirect tax is that which is demanded from one person in the expectation and with the intention that he shall indemnify himself at the expense of another. Of such taxes excise and customs are given as examples."

and again at page 568:

"Turning to the only remaining question, whether the tax is in substance indirect, and bearing in mind that by s. 5 the liability is expressed as if it were to be a personal one, it is impossible to doubt that the tax was imposed in a form which contemplated that some one else than the person on whom it was imposed should pay it. The amount will, in the end, become a charge against the amount of the price which is to come to the seller in the world market, and be paid by some one else than the persons primarily taxed. The class of those taxed obviously includes an indefinite number who would naturally indemnify themselves out of the property of the owners for whom they were acting."

Mill's definition has been the standard for half a century. See the **Brewers and Maltsters case,** 1897 A.C. 231, at page 236, where Lord Herschell said:

"Their Lordships pointed out that the question was not what was direct or indirect taxation according to the classification of political economists, but in what sense the words were employed by the Legislature in the British North America Act. At the same time they took the definition of John Stuart Mill as seeming to them to embody with sufficient accuracy the common understanding of the most obvious indicia of direct and indirect taxation which were likely to have been present to the minds of those who passed the Federation Act.

The definition referred to is in the following terms: 'A direct tax is one which is demanded from the very person who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and

intention that he shall indemnify himself at the expense of another such as the excise or customs.'

In the present case, as in *Lambe's Case,* their Lordships think the tax is demanded from the very person whom the Legislature intended or desired should pay it. They do not think there was either an expectation or intention that he should indemnify himself at the expense of some other person. No such transfer of the burden would in ordinary course take place or can have been contemplated as the natural result of the legislation in the case of a tax like the present one, a uniform fee trifling in amount imposed alike upon all brewers and distillers without any relation to the quantity of goods which they sell. It cannot have been intended by the imposition of such a burden to tax the customer or consumer."

In **The Security Export Company v. Hetherington,** 1923, S.C.R. 539, Duff, J., as he then was, said at page 559:

"For the purpose of applying the definition of Mill in order to decide questions arising under item (2) of section 92, one must assume that the legislature imposing the tax contemplates the normal effect of such a tax imposed in the existing circumstances, and the question one must ask oneself is whether, in view of the normal effect and tendency of a given tax, it may be affirmed that the tax is demanded from the very persons who are ultimately to bear the burden of it."

For a later pronouncement on the same point see **A-G for British Columbia v. Kingcome Navigation Company Limited,** 1934 A.C. 45, where Lord Thankerton said at page 51:

"In their Lordships' opinion this contention is inconsistent with the decisions of this Board, which go back to the year 1878, and have settled that the test to be applied in determining what is 'direct taxation' within the meaning of s. 92, head 2, of the Act of 1867 is to be found in Mill's definition of direct and indirect taxes."

and at page 57:

" . . . as Mill expresses it, it is not intended as a peculiar contribution upon the particular party selected to pay the tax."

A tax on lumber has already been held by the Privy Council to be an indirect tax, in **A-G for B.C. v. McDonald Murphy Lumber Company, Limited,** 1930 A.C. 357. Lord MacMillan, in delivering the judgment of their Lordships, after holding that the tax in that particular case was an excise tax, went on to deal with the question as to whether or not it was a direct or indirect tax. He then said at pages 364 and 365:

"Without reviewing afresh the niceties of discrimination between direct and indirect taxation it is enough to point out that an export tax is normally collected on merchantable goods in course of transit in pursuance of commercial transactions. Whether the tax is ultimately borne by the exporting seller at home or by the importing buyer abroad depends on the terms of the contract between them. It may be borne by the one or by the other. It was said in the present case that the conditions of the competitive market in the United States compelled the exporter of timber from British Columbia to that country to bear the whole burden of the tax himself. That, however, is a matter of the exigencies of a particular market, and is really irrelevant in determining the inherent character of the tax. While it is no doubt true that a tax levied on personal property, no less than a tax levied on real property, may be a direct tax where the taxpayer's personal property is selected as the criterion of his ability to pay, a tax which, like the tax here in question, is levied on a commercial commodity on the occasion of its exportation in pursuance of trading transactions, cannot be described as a tax whose incidence is, by its nature, such that normally it is finally borne by the first payer, and is not susceptible of being passed on. On the contrary, the existence of an export tax is invariably an element in the fixing of prices, and the question whether it is to be born by seller or purchaser in whole or in part is determined by the bargain made. The present tax thus exhibits the leading characteristic of an indirect tax as defined by authoritative decisions.

"Their Lordships are accordingly of opinion, without entering upon other topics which were discussed at the hearing, that the timber tax in question is an export tax falling within the category of duties of customs and excise, and as such, as well as by reason of its inherent nature as an indirect tax, could not competently be imposed by the Provincial legislature."

It is submitted, therefore, that by any test the proposed tax is indirect, and the answer made by the Court of Appeal is therefore the right answer and should not be disturbed.

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."

Case 2, l. 40
3, l. 1-16

Case 52, l. 40
53, l. 1-12

This question has been modified from the form in which it appeared in the original Order in Council and in the amended form is quoted in the Judgment of O'Halloran, J.A.

This question was answered in the affirmative by O'Halloran and Bird, JJ.A., and in the negative by Sidney Smith, J.A.

It is submitted that the answer of Sidney Smith, J.A., is the correct answer, and that the question should have been answered as he answered it, in the negative.

The tax here proposed is expressed to be a tax on land, and Counsel for the Province urged most strongly upon the Court of

Appeal that, being expressed as a tax upon land, it was not open to the Courts to consider its incidental effect, and that even though it might be quite obvious that the tax would be passed on to someone other than the party assessed, the Courts are precluded from considering that aspect of the matter, but must hold it to be a direct tax because taxes upon land are recognized as direct taxes. He cited as authority for this proposition **City of Montreal v. Attorney-General for Canada,** 1923 A.C. 136. The facts of that case, however, differed widely from those with which we have now to deal. There the proposed taxation was upon the interest of tenants of the Crown, and the only question was whether or not the ordinary 1% tax which was levied upon private owners might be levied upon tenants of the Crown in respect of their interest. It is to be noted in the first place that the tax was but 1% of the value of the property, and in the next place that the tax proposed was to fall upon persons who otherwise would pay no tax at all. The result of the imposition of the tax, therefore, was to cause Crown tenants to pay the 1% tax the same as tenants of private owners and private owners themselves. Here those whom it is proposed to tax already pay the 1½% timber land tax just the same as other private owners. The proposal is not to equalize, but to impose an additional burden, and a very, very heavy one, upon these particular owners.

Counsel for the Province also relied upon the case of **City of Halifax v. Estate of J. P. Fairbanks et al,** 1928 A.C. 117. That case, however, is no authority for the proposition advanced. As in the *Montreal* case the question there was merely whether the Fairbanks Estate was liable to Business Tax the same as the owners of other property, or whether they escaped Business Tax by reason of the fact that the tenant of their property chanced to be the Crown. Their Lordships held that they did not escape, and that the tax imposed was a land tax which it was within the competence of the Provincial Government to impose, and the comment was made that taxes on property and income were everywhere treated as direct taxes. Their Lordships, however, guarded themselves against any categorical statement that all land taxes are direct by saying, at page 125:

> "What then is the effect to be given to Mill's formula above quoted? No doubt it is valuable as providing a logical basis for the distinction already established between direct and indirect taxes, and perhaps also as a guide for determining as to any new or unfamiliar tax which may be imposed in which of the two categories it is to be placed; but it cannot have the effect of disturbing the established classification of

the old and well known species of taxation, and making it necessary to apply a new test to every particular member of those species."

Here we have the very thing in respect of which a reservation was made—a "new and unfamiliar tax". Certainly a tax of 55% superimposed upon the ordinary timber land tax of 1½% may fairly be said to fall within the term of "new or unfamiliar".

In every case the Courts must examine the pith and substance of the proposed legislation and endeavour to determine its true nature and character. This has been made abundantly clear, if indeed it were necessary to say anything further on the subject, in the judgment of the Privy Council in **Board of Trustees of the Lethbridge Northern Irrigation District v. Independent Order of Foresters,** 1940 A.C. 513. In delivering the judgment of their Lordships, Viscount Caldecote, L.C., says at page 529:

> "In applying these principles, as their Lordships propose to do, to the present case, an inquary must first be made as to the 'true nature and character of the enactments in question' (*Citizens Insurance Co. of Canada v. Parsons*), or, to use Lord Watson's words in delivering the judgment of the Judicial Committee in *Union Colliery Company of British Columbia v. Bryden,* as to their 'pith and substance'. Their Lordships now address themselves to that inquiry."

and at page 533:

> "In other words, the Act, c. 11, is an attempt to do by indirect means something which their Lordships are satisfied the Provincial Parliament cannot do. This Board has never allowed such colourable devices to defeat the provisions of ss. 91 and 92. Reference may be made to Lord Halsbury's statement in delivering the decision of the Judicial Committee in *Madden v. Nelson and Fort Sheppard Ry*: 'It is a very familiar principle that you cannot do that indirectly which you are prohibited from doing directly'. The substance and not the form of the enactment in question must be regarded. Their Lordships cannot come to any other conclusion than that under colour of an Act relating to the class of subject described in head 14 of s. 92, the Provincial Parliament has passed legislation which is beyond their powers."

In **A-G for Canada v. A-G for Ontario,** 1937 A.C. 355, (Unemployment Insurance case) at page 367 Lord Atkin in delivering the judgment said:

"It is not necessary that it should be a colourable device, or a pretence. If on the true view of the legislation it is found that in reality in pith and substance the legislation invades civil rights within the Province, or in respect of other classes of subjects otherwise encroaches upon the provincial field, the legislation will be invalid. To hold otherwise would afford the Dominion an easy passage into the Provincial domain."

In **Union Colliery Company of British Columbia Limited v. Bryden,** 1899 A.C. 580, at page 587 Lord Watson said:

"Their Lordships see no reason to doubt that, by virtue of s. 91, sub-s. 25, the legislature of the Dominion is invested with exclusive authority in all matters which directly concern the rights, privileges, and disabilities of the class of Chinamen who are resident in the provinces of Canada. They are also of opinion that the whole pith and substance of the enactments of s. 4 of the Coal Mines Regulation Act, in so far as objected to by the appellant company, consists in establishing a statutory prohibition which affects aliens or naturalized subjects, and therefore trench upon the exclusive authority of the Parliament of Canada."

The Bryden case has been the subject of comment in the Privy Council on two later occasions. In **Cunningham v. Tomey Homma,** 1903 A.C. 151, the Lord Chancellor said at page 157:

"That case depended upon totally different grounds. This Board, dealing with the particular facts of that case, came to the conclusion that the regulations there impeached were not really aimed at the regulation of coal mines at all, but were in truth devised to deprive the Chinese, naturalized or not, of the ordinary rights of the inhabitants of British Columbia and, in effect, to prohibit their continued residence in that province, since it prohibited their earning their living in that province."

and again in **Brooks-Bidlake and Whittall Limited v. A-G for B.C.,** 1923 A.C. 450, Viscount Cave said at page 457:

"In *Union Colliery Co. v. Bryden* this Board held that a section in a statute of British Columbia which prohibited the employment of Chinamen in coal mines underground was beyond the powers of the Provincial Legislature; but this was on the ground that the enactment was not really applicable to coal mines only—still less to coal mines belonging to the Province—but was in truth devised to prevent Chinamen from earning their living in the Province."

In **Gallagher v. Lynn,** 1937 A.C. 863, Lord Atkin said at page 870:

"It is well established that you are to look at the 'true nature and character of the legislation': *Russell v. The Queen* 'the pith and substance of the legislation.' If, on the view of the statute as a whole, you find that the substance of the legislation is within the express powers, then it is not invalidated if incidentally it affects matters which are outside the authorized field. The legislation must not under the guise of dealing with one matter in fact encroach upon the forbidden field."

In **A-G for Alberta v. A-G for Canada,** 1939 A.C. 117, (Alberta Bank Tax case) Lord Maugham, L.C., made it clear that not only would the Courts examine the particular legislation then under consideration, but the whole history which led up to the passage of such legislation. He says at page 132:

"In their opinion, it was quite legitimate to look at the legislative history of Alberta as leading up to the measure in question, including the attempt to create a new economic era in the Province."

and again at page 133:

"Their Lordships agree with the opinion expressed by Kerwin J. (concurred in by Crocket J.) that there is no escape from the conclusion that, instead of being in any true sense taxation in order to the raising of a revenue for Provincial purposes, the Bill No. 1 is merely 'part of a legislative plan to prevent the operation within the Province of those banking institutions which have been called into existence and given the necessary powers to conduct their business by the only proper authority, the Parliament of Canada.' This is a sufficient ground for holding that the Bill is ultra vires.

He went further to point out that the Courts might even hear evidence as to what the effect of such legislation would be and take into account any general public knowledge on the subject. He says at page 130:

> "The next step in a case of difficulty will be to examine the effect of the legislation: *Union Colliery Co. of British Columbia, Ld. v. Bryden.* For that purpose the Court must take into account any public general knowledge of which the Court would take judicial notice, and may in a proper case require to be informed by evidence as to what the effect of the legislation will be."

The latest pronouncement on this point is that of the Supreme Court of Canada in **Lower Mainland Dairy Products Board v. Turner's Dairy Limited,** 1941 S.C.R. 573, where Taschereau J. said at page 583:

> "In certain cases, in order to avoid confusion extraneous evidence is required to facilitate the analysis of legislative enactments, and thus disclose their aims which otherwise would remain obscure or even completely concealed. The true purposes and effect of legislation, when revealed to the courts, are indeed very precious elements which must be considered in order to discover its real substance. If it were held that such evidence may not be allowed and that only the form of an Act may be considered, then colourable devices could be used by legislative bodies to deal with matters beyond their powers."

In **A-G for Ontario v. Reciprocal Insurers,** 1924 A.C. 328, Mr. Justice Duff, as he then was, in delivering the judgment of the Privy Council had said at page 337:

> "It has been formally laid down in judgments of this Board, that in such inquiry the Courts must ascertain the 'true nature and character' of the enactment: *Citizens' Insurance Co. v. Parsons;* its 'pith and substance': *Union Colliery Co. v. Bryden;* and it is the result of this investigation, not the form alone, which the statute may have assumed under the hand of the draughtsman, that will determine within which of the categories of subject matters mentioned in ss. 91 and 92 the legislation falls; and for this purpose the legislation must be 'scrutinised in its entirety': *Great West Saddlery Co. v. The King.* Of course, where there is an absolute jurisdiction vested in a Legislature, the laws promulgated by it must take effect according to the proper construction of the

language in which they are expressed. But where the law-making authority is of a limited or qualified character, obviously it may be necessary to examine with some strictness the substance of the legislation for the purpose of determining what it is that the Legislature is really doing."

and at pages 339 and 340:

"But, on behalf of the Dominion, it is argued that, although such be the true character of the legislation, the jurisdiction of Parliament, in relation to the criminal law, is unlimited, in the sense, that in execution of its powers over that subject matter, the Dominion has authority to declare any act a crime, either in itself or by reference to the manner or the conditions in which the act is done, and consequently that s. 508C, being by its terms limited to the creation of criminal offences, falls within the jurisdiction of the Dominion.

The power which this argument attributes to the Dominion is, of course, a far-reaching one. Indeed, the claim now advanced is nothing less than this, that the Parliament of Canada can assume exclusive control over the exercise of any class of civil rights within the Provinces, in respect of which exclusive jurisdiction is given to the Provinces under s. 92, by the device of declaring those persons to be guilty of a criminal offense who in the exercise of such rights do not observe the conditions imposed by the Dominion. Obviously the principle contended for ascribes to the Dominion the power, in execution of its authority under s. 91, head 27, to promulgate and to enforce regulations controlling such matters as, for example, the solemnization of marriage, the practice of the learned professions and other occupations, municipal institutions, the operation of local works and undertakings, the incorporation of companies with exclusively Provincial objects—and superseding Provincial authority in relation thereto. Indeed, it would be difficult to assign limits to the measure in which, by a procedure strictly analogous to that followed in this instance, the Dominion might dictate the working of Provincial institutions, and circumscribe or supersede the legislative and administrative authority of the Provinces.

Such a procedure cannot, their Lordships think, be justified, consistently with the governing principles of the Canadian Constitution, as enunciated and established by the judgments of this Board."

It has long been well established that neither the Legislature of the Province nor the Parliament of the Dominion may invade the field reserved to the other by s. 92 through the use of any colourable device or subterfuge.

In **Angers v. The Queen Insurance Company**, 22 L.C.J. 307, Dorion C.J. said at page 311:

> "It is an evasion of the Act from which the local legislature derives its powers. The local legislature, no more than private individuals, cannot act as it were, in fraud of the law, to use a technical term; that is, to do by indirect means what it cannot effect directly."

In **Gibson v. McDonald**, 7 O.R. 401, O'Connor J. said at page 419:

> "The Provincial Legislature has, then, no power or authority to authorize or make such appointments. It is true that the Ontario Act does not purport directly to make or authorize such appointments, but it attempts to do so indirectly, by assuming to clothe the Judge of a County Court, who has been duly appointed for that county, with the powers and authority of a Judge of the County Court in other counties, which are not included in his commission as united counties. But the Legislature cannot do indirectly that which it is precluded from and has no power to do directly."

This principle was laid down by the Privy Council nearly half a century ago in **Madden v. Nelson and Fort Sheppard Railway Company**, 1899 A.C. 626, where the Lord Chancellor said at page 627:

> "But their Lordships are not disposed to yield to that suggestion, even if it were true to say that this statute was only an indirect mode of causing the construction to be made, because it is a very familiar principle that you cannot do that indirectly which you are prohibited from doing directly."

In **Great West Saddlery Company Limited v. The King**, 1921 2 A.C. 91, Viscount Haldane said at page 121:

> "It is sufficient to observe once more that in such matters what cannot be done directly can no more be effected by indirect methods."

and again at page 120:

> "Even then it would have been requisite to see, as was pointed out by Lord Herschell, in delivering the judgment of the Judicial Committee in the *Brewers and Maltsters Case,* that the Provincial Legislature was not, under the guise of imposing such direct taxation in the form of which he was speaking as being within their power, really doing something else, such as imposing indirect taxation. As to any inquiry in the future whether this or anything analogous has been in substance, attempted, their Lordships hold themselves unfettered."

In **City of Montreal v. A-G for Canada,** 1923 A.C. 136, at page 140 Lord Parmoor in delivering the judgment of their Lordships said:

> "It is alleged, however, by the respondent, the Attorney-General for Canada, that although the appellant is making no claim to tax property of the Crown, occupied by the Crown, or by persons occupying as holders of an official position under the Crown, yet in effect the city is seeking indirectly to tax such property and that such taxation is ultra vires of the Provincial Legislature. Their Lordships agree in the proposition that it would be ultra vires to attempt to impose indirectly taxation which cannot be imposed directly."

Recently in the case of **Lower Mainland Dairy Products Board v. Turner's Dairy Limited,** 1941 S.C.R. 573, Duff C.J. said at page 577:

> "The impugned orders are obnoxious to this principle in the purpose disclosed by the orders themselves and the evidence adduced to accomplish indirectly what the King in Council has adjudged they cannot lawfully do directly, namely, by exacting monetary contributions from milk producers by a method constituting indirect taxation."

and referring to the *Crystal Dairy Case* (1933 A.C. 168) Taschereau J. said at page 582:

> "I do not think that this Clearing House which has been created alters the situation which arose under the Act of 1929, in any substantial manner. It came to life for the sole purpose of evading the legal consequences of the judgment of the Judicial Committee in the Crystal case, and of doing indirectly all that has been declared ultra vires."

In **A-G for Quebec v. The Queen Insurance Company**, 3 A.C. 1090, the Master of the Rolls said at page 1099:

> "The result therefore is this, that it is not in substance a License Act at all. It is nothing more or less than a simple Stamp Act on policies, with provisions referring to a license, because, it must be presumed, the framers of the statute thought it was necessary, in order to cover the kind of tax in question with legal sanction, that it should be made in the shape of the price paid for a license."

In the Grain Futures case, **A-G for Manitoba v. A-G for Canada,** 1925 A.C. 561, Lord Haldane said at page 566:

> "It does not exclude the operation of the principle if, as here, by s. 5, the taxing Act merely expressly declares that the tax is to be a direct one on the person entering into the contract of sale, whether as principal or as broker or agent. For the question of the nature of the tax is one of substance, and does not turn only on the language used by the local Legislature which imposes it, but on the provisions of the Imperial statute of 1867."

The same principle applies to the Dominion Government. In re **"The Board of Commerce Act 1919,"** 1922 1 A.C. 191, where Viscount Haldane said at page 199:

> "It is quite another thing, first to attempt to interfere with a class of subject committed exclusively to the Provincial Legislature, and then to justify this by enacting ancillary provisions, designated as new phases of Dominion criminal law which require a title to so interfere as basis of their application."

In re **The Insurance Act of Canada,** 1932 A.C. 41, at page 51 Viscount Dunedin said:

> "Their Lordships consider that although the question was studiously kept open in the *Reciprocal Insurers' case,* it was really decided by what was then laid down. The case decided that a colourable use of the Criminal Code could not serve to disguise the real object of the legislation, which was to

dominate the exercise of the business of insurance. And in the same way it was decided that to try by a false definition to pray in aid s. 95 of the British North America Act, 1867, which deals with immigration, in order to control the business of insurance, was equally unavailing. What has got to be considered is whether this is in a true sense of the word alien legislation, and that is what Lord Haldane meant by 'properly framed legislation.' Their Lordships have no doubt that the Dominion Parliament might pass an Act forbidding aliens to enter Canada or forbidding them so to enter to engage in any business without a license, and further they might furnish rules for their conduct while in Canada, requiring them, *e.g.*, to report at stated intervals. But the sections here are not of that sort, they do not deal with the position of an alien as such; but under the guise of legislation as to aliens they seek to intermeddle with the conduct of insurance business, a business which by the first branch of the 1916 case has been declared to be exclusively subject to Provincial law. Their Lordships have, therefore, no hesitation in declaring that this is not 'properly framed' alien legislation."

and again at page 52 he said:

"This is not properly framed law as to immigration, but an attempt to saddle British immigrants with a different code as to the conduct of insurance business from the code which has been settled to be the only valid code, *i.e.*, the Provincial Code."

See also **A-G for Ontario v. Reciprocal Insurers,** 1924 A.C. 328, quoted ante.

and **A-G for B.C. v. A-G for Canada,** 1937 A.C. 368, (Reference 498A of the Criminal Code) where Lord Atkin said at page 375:

"The only limitation on the plenary power of the Dominion to determine what shall or shall not be criminal is the condition that Parliament shall not in the guise of enacting criminal legislation in truth and in substance encroach on any of the classes of subjects enumerated in s. 92. It is no objection that it does in fact affect them."

When the legislation proposed by this Question 5 is examined in the light of all the facts of which this Court may take notice, and

particularly in the light of the Sloan Report, the conclusion is irresistible that this is an attempt to do indirectly what may not be done directly—an attempt to impose under the guise of a direct tax on land a tax which the Legislature is forbidden by law to impose. It is but a colourable device designed for the express purpose of evading the jurisdictional restrictions and contractual obligations of the Provincial Government.

It is submitted, therefore, that the legislation proposed by this Question 5 must be examined in the light not only of the other questions which are submitted to the Court on this reference but in the light of the Sloan Report and general public knowledge of the whole matter. From this consideration there can be drawn only one conclusion, namely, that the tax proposed by this Question 5 is merely an attempt to extract from the E. & N. a portion of the purchase price of its timber lands—an attempt in effect to reserve to the Crown at this date a very substantial interest in those lands which were alienated by the Crown sixty odd years ago without the reservation of any interest at all.

This question should be answered in the negative.

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.

(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."

Answered in the affirmative by O'Halloran and Bird, JJ.A., and in the negative by Sidney Smith, J.A.

It is submitted that the answer of Mr. Justice Sidney Smith is the correct one, and that the question should have been answered in the negative.

All that has been said in respect of Question 5 is equally applicable to this Question 6. This is but another expression of the same intention, to recover from the Railway Company or its successors a substantial part of that interest in the 200,000 acres of timber lands which the Crown granted in fee in 1883. The amount of tax to be recovered by the method suggested in this Question 6 is intended to be the equivalent of royalties, just the same as the tax proposed under Question 5 and Question 4.

Case 17, l. 12-14

This is but another device for recovering a tax which it is beyond the power of the Province to impose.

It is submitted therefore, that this tax is ultra vires the Province, and the question should therefore be answered in the negative.

All of which is respectfully submitted.

D. N. HOSSIE,
of Counsel for the Appellant,
Alpine Timber Company Limited.

Vancouver, B.C.

No. 15

RECORD

In the Supreme Court of Canada

No. 15
Factum of the Appellant, Attorney-General of Canada

In the Supreme Court of Canada

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

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

AND

THE ATTORNEY-GENERAL OF BRITISH COLUMBIA,
RESPONDENT.

FACTUM OF THE ATTORNEY-GENERAL OF CANADA

PART ONE

STATEMENT OF FACTS

1. This is an appeal from part of the judgment of the Court of Appeal for British Columbia dated the 10th day of June 1947 (Case pp. 19-22) which answers certain questions referred to that Court by Order of the Lieutenant-Governor in Council dated the 13th day of November 1946 (Case pp. 1-4) made pursuant to the Constitutional Questions Determination Act, 1936 R.S.B.C. Ch. 50.

2. The opinion of the Court of Appeal was sought by the Government of the Province of British Columbia following certain findings contained in a Report of the Honourable Gordon McG. Sloan after an enquiry held by him called shortly the "Forest Inquiry", which had been directed by Provincial Order in Council on the 31st day of December 1943. The Commissioner filed his report in December of 1945.

3. Ths appeal is limited to the answers made by the British Columbia Court of Appeal to questions 1, 2, 3, 5, and 6 set out in the said Order of the Lieutenant-Governor in Council dated the 13th day of November 1946.

4. The questions referred to the Court were as follows:

"(The expression 'land' wherever it occurs herein shall mean 'timber land' as defined in the "Taxation Act").

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'?

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

3. 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?

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?

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*) The tax shall apply only to timber cut upon land in the belt when such land is 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, the owner thereof shall thereupon be taxed on timber cut upon such land as and when merchantable timber is cut and severed from the land:

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

(*d*) The owner shall be liable for payment of the tax:

(*e*) The tax until paid shall be a charge on the land.

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:

(*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.

7. Is the Esquimalt and Nanaimo Railway Company 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?"

5. The following negotiations leading up to the construction of the Esquimalt and Nanaimo Railway are relevant:—

(*a*) As a term of the Union the Dominion Government undertook in 1871 to build a railway "to connect the seaboard of British Columbia with the railway system of Canada". (Case p. 192 l. 20, p. 258 ll. 9-17). Subsequent to that time discussions were carried on between the Dominion and the Province regarding the construction of a railway on Vancouver Island as complementary to, but not part of, the trans-continental railway (C.P.R.), and to this end the Province, by its Statute of 22nd April 1875, granted to the

Dominion the lands within a belt from Esquimalt to Nanaimo of the maximum width of 40 miles (Case p. 105 l. 35). A start was made in the construction of this railway (Case p. 198, l. 7) but negotiations between the Dominion and the Province broke down and by its Statute of the 21st of April 1882 the Province repealed the grant of 1875 (Case p. 204 l. 14).

(*b*) The Province then on its own account entered into an agreement with Mr. Clement and his associates to build the railway from Esquimalt to Nanaimo, and accordingly passed a Statute now known as the "Clement Act" assented to on 21st of April 1882 (Case p. 108). This attempt by the Province to procure the construction of the railway, however, failed owing to the fact that Mr. Clement was unable to deposit the required security (Case p. 70 l. 28).

(*c*) Negotiations between the Province and Dominion were renewed and on the 12th day of May 1883 the Province enacted a Statute (called the "May Act") (Case p. 129) which set out the terms of settlement between the two Governments as understood by the Province, and provided for the incorporation of a Railway Company to be composed of contractors to be named by the Dominion and prescribed the terms upon which such company should build the railway from Esquimalt to Nanaimo.

(*d*) This Act however was not acceptable as it turned out and on the 19th of December 1883 the Province enacted 47 Vict. Ch. 14, hereinafter referred to as the "Settlement Act" (Case p. 150) incorporating therein certain revisions and amendments. By sec. 3 of the said Act, the Province conveyed to the Dominion in trust a large tract of provincial Crown lands, large areas of which were timbered, for conveyance to the Esquimalt and Nanaimo Railway Company, which was to be incorporated in trust by the Province, in consideration for the construction of a railway from Esquimalt to Nanaimo. The Act contained the following provision regarding the taxation of the land grant:

> "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."
> (Case p. 156 ll. 33-37)

(*e*) The Dominion had, on the 20th August 1883, executed an agreement with Mr. Dunsmuir and associates (Case p. 142 l. 15) as Contractors, which agreement had been

placed in escrow pending the passage both of the amended provincial Act and the Statute of the Dominion, which latter became Chapter 6 of the Statutes of 1884 (Case p. 158). By the terms of the agreement the Dominion paid a subsidy of $750,000.00 to the Railway Company and conveyed to the Company (Case p. 174) on April 21st 1887 the lands which were referred to in the Settlement Act (Case p. 174) and which had thereby been deemed to have been granted to the Dominion in trust for this purpose though no actual conveyance to the Dominion had ever been executed.

6. In 1912 the E. and N. Railway Company leased its railway to the C.P.R. and at that time secured from the Province the passage of a Statute perpetuating the exemption from taxation which the Company's lands enjoyed under the terms of the Settlement Act. In consideration, for such continued exemption, the Railway Company on its part agreed to make annual payments of 1½ cents an acre to the Province which payments the Railway Company had made annually ever since (Case p 17 l 10).

7. The Commissioner in his report recommended the imposition of a tax upon timber severed from lands in the Esquimalt & Nanaimo Railway Belt on Vancouver Island, or a tax on purchasers of timber lands owned by the railway company, where such lands, in the words of Section 22, "are used by the Company for other than railroad purposes, or leased, occupied, sold, or alienated", the tax to be equivalent to the royalty to which the Crown would be entitled on timber severed from Crown granted lands, and to apply only to the unsold timber lands of the Railway Company.

8. The Commissioner found as a fact 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" (Case p. 262 ll. 23-26),

and second,

> "It has been said that to impose such a tax would be a 'breach of contract between the Province and the Railway Company'. There are two obvious answers to that argument. In the first place, there is no contract between the Province and the Company". (Case p. 264 ll. 29-32)

9. Other findings of the Commissioner may be summarized as follows:

(1) the Railway Belt was conveyed by the Province to the Dominion and by the Dominion to the Railway Company to subsidize the construction of the said railway (Case p. 263 ll. 33-40),

(2) from 1898 to July 31, 1944, the Company had sold about seven billion feet of timber for sums amounting to about six times the contractors' investment, (Case p. 264 ll. 4-10),

(3) the Company remains in possession of about six billion feet (Case p. 264 l. 12),

(4) consequently, a severance tax, being neither unjust nor inequitable, the Company having received a more than adequate subsidy for the construction of 82 miles of railway from the sale of timber land alone (Case p. 264 ll. 18-26), should, in the public interest, be imposed upon all timber cut upon the lands of the Railway Company after the same are sold or otherwise alienated by it (such tax not to apply to lands already sold by the Company), and should be equivalent to the approximate prevailing rates of royalty (Case p. 266 ll. 4-9).

10. According to a report prepared by the Provincial Department of Lands in 1937, entitled "Forest Resources in British Columbia", the timber on Crown-granted land in the Province is approximately 27 billion feet (Case 250 l. 17). According to the Sloan Report the unsold timber of the Railway Company is between five and six billion feet (Case p. 264 ll 11-13) or about one-sixth in quantity of timber on Crown-granted land. Thus the Commissioner recommends that about one-sixth of these Crown-granted lands should now be specially taxed on a scale approximate to the prevailing royalty which is stated to average $1.10 per thousand feet (Case p. 263 l. 20) and which was increased in 1946 to approximately $1.25 per thousand feet.

(For a more complete statement of the facts, the Attorney-General refers to the factums of the Esquimalt & Nanaimo Railway Company and the Alpine Timber Company Limited.)

PART TWO

OBJECTIONS TO JUDGMENT APPEALED FROM

11. The Attorney-General of Canada submits (1) that O'Halloran, J. A., and Bird, J. A., were in error in the answers made by them to questions 1, 3, 5 and 6, and that all the said questions

should have been answered in the negative in agreement with Sidney Smith, J.A.; (2) that O'Halloran, J.A., and Bird, J.A., were in error in the answers made by them to question 2, and that the said question should have been answered in the affirmative in agreement with Sidney Smith, J.A.

(There is no error, the Attorney-General submits, in the answer made by the Court to question 4.)

PART THREE

ARGUMENT

10 12. *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'?

(Answered in the affirmative, Smith, J. A., dissenting.)

13. The Court of Appeal found that there was no contractual relationship between the Provincial Government (that is the Province) and the contractors (that is the Railway Company) 20 because no documentary evidence of a contract could in fact be produced. The Attorney-General of Canada says that a contractual relationship nevertheless existed between the above parties and points to the circumstances surrounding the incorporation of the Railway Company and the transfer to such Company of the Railway Belt.

14. The Attorney-General submits that the question is to be answered in the negative for the following reasons:

The provincial government, being charged with the administration of provincial Crown lands, was in a position analogous 30 to that of a private land holder. If such a land holder, desiring to develop and open up his holdings, entered into an arrangement with a contractor pursuant to which they procured the enactment of a local Act obliging the contractor, on the one hand, to construct and operate a railway and the land holder, on the other, to subsidize the project by granting some of his lands to the contractor, there would be little doubt, under the decisions, that a

contractual relationship would be established between the land holder and the contractor.

Halsbury, Vol. 31 at p. 558 says: "The view has often been expressed that private acts are contracts made by Parliament on behalf of every person interested . . ."

Craies on Statute Law (4th Ed.) says at p. 490: "It seems correct to describe those parts of an Act which affect particular persons as contracts between them and the promoters of the Act whether the clauses were inserted, as is often the case, by mutual agreement, or were forced upon the promoters by the Legislature. If this view is adopted, we must simply ascertain what is the actual contract, as contained in the four corners of the Act . . ."

The leading cases respecting the Kirkcaldy Waterworks and Taff Vale Railway hereinafter mentioned are cited as authorities for this proposition.

In the leading case of *Davis & Sons Limited* v. *The Taff Vale Railway Company* (1895) A.C. 542, a local Act established a code of tolls to be charged by two companies that interchanged traffic at certain points. The action was by one of the railways against a shipper to recover tolls higher than the code prescribed. The plaintiff railway contended that the code merely imposed contractual obligations between two railways. Lord Watson said upon this point at p. 552:

> "In cases where the provisions of a local and personal Act directly impose mutual obligations upon two persons or companies, such provisions may, in my opinion, be fairly considered as having this analogy to contract, that they must, as between those parties, be construed in precisely the same way as if they had been matter, not of enactment, but of private agreement. It was in that sense that in *Countess of Rothes* v. *Kirkcaldy Waterworks Commissioners* I ventured to observe that 'such statutory provisions as those of sect. 43 occurring in a local and personal Act, must be regarded as a contract between the parties, whether made by their mutual agreement, or forced upon them by the Legislature.' For all purposes of construction, I thought that the provisions which the House had to interpret might be legitimately viewed in that light. But it did not occur to me then, nor am I now of opinion, that the analogy of contract, for it it nothing more, could, in an English case especially, be carried further."

The case of the *Countess of Rothes* v. *Kirkcaldy Waterworks Commissioners,* A.C. 694 is significant. A local Act provided that the Commissioners should make good to the claimant damages resulting from any "flood" of water from their works. The flood in respect of which damages were claimed was alleged by the Commissioners to be one which would have damaged the claimant's property whether or not the works had been constructed and they submitted that this was not the kind of "flood" in respect of which damages were payable by the statute. Lord Watson said with reference to this submission at pages 707-708:

> "Last of all, it is contended by the respondents that to give the word "flood" its ordinary meaning would lead to results so unreasonable, that the legislature cannot be supposed to have used it in that general sense. The argument might be of some weight, if your Lordships were in a position to hold that it has a foundation in fact. But such statutory provisions as those of sect. 43, occurring in a local and personal Act, must be regarded as a contract between the parties, whether made by their mutual agreement, or forced upon them by the legislature; and, viewing them as a contract, I am quite unable to say that the advantages which the appellants obtain under sect. 43, according to their construction of it, as well as under the other clauses of the Act, constitute an excessive and unreasonable consideration for the benefits which the commissioners have derived from their being able to acquire by compulsion the appellants' right and interest in the water now taken from the Drumain reservoir to Kirkcaldy, and for the interference with the natural flow of the Lothrie Burn occasioned by the use made of the Ballo reservoir."

It is to be observed that the claimant had in effect given consideration for the protection provided by the clause.

In the case of *Corbett* v. *South Eastern Railway* (1906) 2 Ch. 12, it was held that a provision in a local Act requiring the railway to maintain a station near the property of B. unless otherwise agreed between the company and B. prevented a railway from removing the station to another site. As between the railway and B. the provision seems to have been regarded as a "statutory contract".

In the case of the *Attorney General* v. *The North Eastern Railway Company* (1915) 1 Ch. 905, a local Act relating to the operation of a railway and a canal by two companies contained certain provisions respecting the character and operation of the

works. It was proposed to alter a swing bridge into a fixed bridge by agreement between the two companies. The Attorney General brought an action on behalf of certain members of the public to restrain the companies from making the alteration. It was held that some of the provisions were for the benefit of the public and therefore did not constitute a mere contract between the companies.

In their contractual aspect the provisions had the effect "to give the protected person or body a right to sue for the enforcement without invoking the Attorney General," per Phillimore, L.J., at 917. In other words, the provision is simply statutory so far as the public is concerned and enforceable by action of the Attorney General and contractual *inter partes* and so actionable by one of the parties against the other.

In the case of *Aiton* v. *Stephen* (1875-6) 1 A.C. 456, a local Act authorized the proprietor of the harbour to levy five shillings for each fishing boat beached, this being the rate chargeable by immemorial custom. It was held that the proprietor was bound to permit the beaching of the vessels on payment of the toll. With reference to his claim that he could refuse permission, Lord O'Hagan said: "I am clearly of opinion that he should not be permitted to set up a claim which is equally discredited by . . . consensual legislation and his own deliberate conduct for so many years."—p. 463.

The Attorney General submits that the provincial government *qua* landowner entered into an arrangement with the railway for valuable consideration on either side, which arrangement took the form of a local Act, namely, the Settlement Act which established under the authorities a contractual relationship between them. The fact that the provincial lands were to be transferred to the Dominion Government to hold in trust does not alter the fundamental nature of the arrangement made, nor is that arrangement altered by the fact that the Dominion Government gave certain independent undertakings, namely, to provide a cash subsidy to the railway and to assume certain obligations toward the province in relation to the construction of the railway on the mainland.

15. That the parties regarded the Act as being of a contractual nature and binding them as such is indicated by the concluding paragraph of the agreement of August 20, 1883. Note the reference to "a draft bill now prepared," lines 18 and 19 on p. 148 of the case. Following this are the following endorsements:

"NOTE.—'The Draft Bill now prepared' referred to in the third from the last line in the above document was identical in form with the Statute of December 19, 1883."

"A. Campbell"
"Wm. Smithe"

Victoria, B.C. 21st August, 1888.

"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 August, 1883.

R. Dunsmuir."

In addition, there is a copy of the Bill on file signed by A. Campbell and Wm. Smithe on 21st August, 1883, and an endorsement on the same copy as follows:

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

Victoria, B.C.
22 August, 1883

Robt. Dunsmuir."

The words underlined are additional to the endorsement contained at page 148 above referred to.

16. In addition, the Attorney General of Canada adopts the argument contained in the factum of the appellant, the Esquimalt and Nanaimo Railway Company, on this question.

17. In 1918 the "Vancouver Island Settlers' Rights Act, 1904, Amendment Act, 1917", was disallowed by the Governor in Council. It appears from the Report to Council of Charles J. Doherty, the then Minister of Justice, dated 21st of May, 1918 (Case p. 240) that the Statute was treated as a breach of the contract between the Province and the Railway Company. The Minister of Justice said in part (Case p. 247 ll. 29-37):

". . . . and the process by which notwithstanding this solemn assurance, a valuable portion of the property which it was thus intended that the Company should receive, and which the Company did receive, is taken away by the exercise of the legislative authority of one of the parties to the tripartite agreement, cannot adequately be characterized in terms

which do not describe the unjustifiable use of that authority, in conflict with the statutory contractual arrangements to which the Government of Canada as well as the Province was a party".

18. The existence of a contract between the Province and the Railway Company is further supported by reference to a letter dated November 16, 1885, written by the Honourable William Smithe, the then Premier of British Columbia, who had represented the Province in the negotiations which culminated in the agreement of August 20, 1883, to Mr. Trutch, Dominion Government Agent (Case p. 173), wherein Mr. Smithe stated that the Provincial Government constituted the real principal in the matter of the railway and the lands and that the $750,000 contributed by the Dominion to the Railway Company as subsidy for the construction thereof was a debt due the Province.

19. The Attorney-General submits, therefore, that the Province is contractually bound to the Railway Company and that question 1 should have been answered in the negative.

20. *QUESTION* 2

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

(Answered in the negative, Smith, J.A., dissenting.)

21. "The legislation herein outlined" (in questions 4, 5 and 6) provides for a tax (1) on timber when severed from the land (dealt with in question 4 and found by the Court of Appeal to be ultra vires the Province, being an indirect tax) and (2) on the land itself to be borne by the owner, i.e. the purchaser from the Railway Company, and assessable either in proportion to the amount of timber severed from such land or at "its fair market value". "Land", for the purposes of the proposed legislation is expressed to mean "timber land" as defined by the "Taxation Act". Hence the imposition of the tax on land referred to in Questions 5 and 6 means the timber land comprised in the Railway Belt, and can have no reference to any other land in the Belt.

22. The rate of the proposed tax would equal the prevailing royalty reserved to the Crown on timber lands granted by it. This royalty is stated to average $1.10 per thousand feet (Case p. 263 l. 20) which was increased in 1946 to approximately $1.25 per thousand feet. The present price of timber in the Railway Belt

may be stated conservatively as $2.00 per thousand feet (Case p. 264 l. 14); thus the tax to be borne by the land on the Commissioner's recommendation is equal to 55% of the price presently chargeable, or 62½% of such price taking into account the 1946 increase. The Attorney-General contends that a tax of this nature will inevitably result in a diminution in the value of the timber lands sold by the Railway Company. This was in fact admitted by Commissioner Sloan when he said (Case p. 263 l. 27):

> ". . . . I assume 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"

and again (Case 264 l 20):

> ". . . . assuming it to be a fact that the Railway Company would not receive quite as high a price for its stumpage on future sales as it has in the past".

In other words, the Commissioner admits that the Railway Company would be forced to bear this tax or part of it on any sale of its lands.

23. The lands comprised in the Railway Belt were conveyed by the Province, through the Dominion to the Railway Company as consideration for the building of the railway, and were specifically exempted from taxation by sec. 22 of the Settlement Act. The Province seeks by this proposed legislation, in effect, to recover part of such consideration. This point was put very clearly by Sidney Smith, J.A. when he said (Case 75 ll. 13-31):

> ". . . it is clear that any legislative action contrary to the spirit of this section (22) would be tantamount to a breach of faith on the part of the Government and of the people of this Province. And it would surely be contrary to the spirit of this section were the Government to announce, as is suggested, that as and when these timber lands were sold by the Railway Company the new owners would be taxed to the extent of 55% of the value of the timber growing thereon. That simply reduces the value (that is to say, the value to the Railway Company) of the timber lands still unsold by 55%. And if by 55%, why not by 95%? And if now, why not the year after the construction of the Railway had been completed? And if these two events had happened would not the value of the timber land consideration so solemnly granted to the Railway Company have disappeared into thin air? That a result so strange, and so inconsistent with the

plain purpose of the section, could have been contemplated as within the terms of the arrangement made by those men who met together on the 20th August, 1883, is, or so it seems to me, quite unthinkable . . ."

24. Clearly such legislation constitutes a derogation from the provisions of the contract entered into between the Province and the Railway Company and evidenced by the Settlement Act.

25. It may be added that such proposed tax would be in derogation also from the provisions of the Agreement of 1912 between the E. and N. Railway Company and the Provincial Government whereby the tax exemption provided by Section 22 was perpetuated to cover the lease by the E. and N. to the C.P.R. (Case p. 237)

26. The Attorney-General of Canada submits that this question should have been answered in the affirmative.

27. *QUESTION* 3

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?

(Answered in the affirmative, Smith, J. A., dissenting.)

28. The question appears to be meaningless since if the Commissioner is right that "there is no contract" then there can be no breach of contract. Or, it is superfluous, being merely a repetition of questions (1) and (2). However, the submissions of the Attorney-General in regard to question 1 apply equally to the answer to this question. Reference, however, may also be made to the Agreement in 1912 between the Railway Company and the Province formulated in order to implement the lease by the Railway Company of the railway to the C.P.R., whereby the Province, in consideration for the payment of 1½ cents per acre per annum in respect of the unsold lands in the railway to Courtenay agreed that the contemplated lease "shall not affect the exemption from taxation enacted by the said clause 22 . . ." (Case p. 238 l. 28). The Attorney-General contends therefore that the Provincial Statute incorporating the terms of the said Agreement, assented to on the 27th of February 1912 clearly confirms the existence of a contract between the Province and the Railway Company which would be breached by the imposition of

the tax recommended by the Commissioner, and therefore that this question should be answered in the negative

29. *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*) The tax shall apply only to timber cut upon land in the belt when such land is 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, the owner thereof shall thereupon be taxed on timber cut upon such land as and when merchantable timber is cut and severed from the land.

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

(*d*) The owner shall be liable for payment of the tax:

(*e*) The tax until paid shall be a charge on the land.

(Answered in the affirmative, Smith, J. A., dissenting.)

30. It is noted that the owner is liable for the payment of this tax, the owner being the purchaser of land comprised in the railway belt from the Railway Company.

31. Counsel for the Province contended, and his contention was upheld by the Court of Appeal, that the proposed tax was a tax on land and was thus competent to the Province. However, from the mere stating of a fact that a tax is on land, it does not necessarily follow that it is on land when, as the Attorney-General of Canada contends, the tax is not in respect of the land but of the timber. It is always open to the Court to examine the nature and substance of a tax. *Attorney General for Manitoba* v. *Attorney General for Canada,* 1925 A.C. 561 at p. 566 and p. 568; *Citizens Insurance Co.* v. *Parsons,* 1882 7 A.C. 96.

32. And the Court may determine the pith and substance of any enactment *Union Colliery* v. *Bryden,* 1899 A.C. 580; *Attorney*

RECORD

In the Supreme Court of Canada

No. 15
Factum of the Appellant, Attorney-General of Canada (Cont'd)

General for Ontario v. *Reciprocal Insurance,* 1924, A.C. 328 at p. 337; *Re Insurance Act of Canada,* 1932 A.C. 41 at p. 49.

33. The tax proposed in this question would be in proportion to the amount of timber severed from the land—"as and when merchantable timber is cut and severed from the land". Thus over a period of several years if large quantities of timber are severed from the land, a proportionately high tax will be paid. But it is clear that the land at the end of any such given period will have diminished in value to the extent of the timber severed therefrom. As a direct consequence of this, the tax realizable on such land will then have decreased in proportion to the merchantable timber removed therefrom. Hence such a tax is not a tax on land as stated in the proposed legislation, but is in reality a tax on the timber severed therefrom; hence it is indirect and *ultra vires* the Province to enact (see Cases cited in question 4). The Province cannot invoke a colourable device to achieve its object, *i.e.* tax timber in the guise of taxing land; nor can the Province do indirectly that which it cannot do directly, *i.e.* impose an indirect tax in the guise of a direct tax. *Board of Trustees of the Lethbridge Northern Irrigation District* v. *Independent Order of Foresters,* 1940 A.C. 513 at p. 533; *Cunningham* v. *Tomey Homma,* 1903, A.C. 151 at p. 157; *Brooks-Bidlake and Whittall Ltd.* v. *Attorney General for British Columbia,* 1923 A.C. 450 at p. 457; *Gallagher* v. *Lynn,* 1937 A.C. 863 at p. 870; *Great West Saddlery Ltd.* v. *The King,* 1921 2 A.C. 91 at p. 121.

34. The Court may, in endeavouring to reach a conclusion regarding the true nature and character of any legislation, in order to ascertain whether such legislation is colourable, examine the said legislation in its entirety and also the whole history which led up to the passage thereof. *Attorney-General for Alberta* v. *Attorney-General for Canada,* 1939 A.C. 117 at p. 130, 132 and 133; *Lower Mainland Dairy Products Board* v. *Turner's Dairy Ltd.,* 1941 S.C.R. 573 at p. 583.

35. It is submitted that this question should be answered in the negative.

36. *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;

(*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.

(Answered in the affirmative, Smith, J.A., dissenting.)

37. The proposed tax is not dependent upon the severance of timber from the land, but merely on the alienation of the land by the Railway Company. The tax is imposed on the purchaser from the Railway Company with the expectation and the intention that it will be borne by the Railway Company and hence is an indirect tax. Thus the submissions made by the Attorney-General in regard to question 5 apply equally to this question. The tax proposed in question 6 is merely another colourable device used by the Province in an attempt to do indirectly that which it is prohibited by law from doing directly.

38. The Attorney-General of Canada submits that this question should be answered in the negative.

PART FOUR

POINTS IN ISSUE ON THE CROSS-APPEAL

39. The Attorney-General of Canada, on behalf of His Majesty, submits that there is no error in the answer made by the Court to question 4.

RECORD

In the Supreme Court of Canada

No. 15
Factum of the Appellant, Attorney-General of Canada
(Cont'd)

PART FIVE

ARGUMENT ON THE CROSS APPEAL

40. *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?

(Answered in the affirmative by all members of the Court.)

41. In *Attorney-General for British Columbia* v. *Kingcome Navigation Company Limited,* 1934 A.C. 45, John Stuart Mill's definition of direct and indirect taxes is quoted at p. 53 as follows:

> "Taxes are either direct or indirect. A direct tax is one which is demanded from the very persons who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another; such are the excise or customs. The producer or importer of a commodity is called upon to pay a tax upon it, not with the intention to levy a peculiar contribution upon him, but to tax through him the consumers of the commodity, from whom it is supposed that he will recover the amount by means of an advance in price."

42. Commenting on the above definition Lord Thankerton said at page 57:

> "As has already been pointed out the ultimate incidence of the tax, in the sense of the political economist, is to be disregarded, but where the tax is imposed in respect of a transaction, the taxing authority is indifferent as to which of the parties to the transaction ultimately bears the burden, and, as Mill expresses it, it is not intended as a peculiar contribution upon the particular party selected to pay the tax. Similarly, where the tax is imposed in respect of some dealing with commodities, such as their import or sale, or production for sale, the tax is not a peculiar contribution upon the one of the parties to the trading in the particular commodity who is selected as the taxpayer."

43. The proposed tax on timber which would ultimately be converted into a manufactured article could not be said to be

intended as a "peculiar contribution upon the particular party selected to pay the tax". Such tax would undoubtedly be indirect by reason of the fact that it would, by the purchaser of such timber, be passed forward to the ultimate consumer or backward to the Railway Company in the form of a reduction in the price of land, or both. Being indirect, such a tax is *ultra vires* a Provincial Legislature. *Attorney-General for Manitoba* v. *Attorney-General for Canada,* 1925 A.C. 561 at p. 566 and 568 (Grain Futures Case); *Brewers and Maltsters' Association of Ontario* v. *Attorney-General for Ontario,* 1897 A.C. 231 at p. 236; *The Security Export Co.* v. *Hetherington,* 1923 S.C.R. 539, particularly Duff, J. at p. 559; *Attorney-General for British Columbia* v. *Canadian Pacific Railway,* 1927 A.C. 934; *The King* v. *Caledonian Collieries Ltd.,* 1927 S.C.R. 257 at p. 258 and 1928 A.C. 358 at pp. 361 and 362; *Attorney-General for British Columbia* v. *McDonald Murphy Lumber Co.,* 1930 A.C. 357 at pp. 364 and 365; *Lawson* v. *Interior Tree, Fruit and Vegetable Committee of Direction,* 1931 S.C.R. 357 at p. 362; *Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy Limited,* 1933 A.C. 168 at p. 176.

F. P. VARCOE

A. H. LAIDLAW

RECORD

In the Supreme Court of Canada

No. 16
Factum of Respondent Attorney-General of British Columbia

No. 16

In the Supreme Court of Canada

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

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

Appellants,

AND

THE ATTORNEY-GENERAL OF BRITISH COLUMBIA,

Respondent.

FACTUM OF RESPONDENT

PART I.

STATEMENT OF THE FACTS

1. This is an appeal from the Court of Appeal for British Columbia answering questions submitted by the Lieutenant-Governor in Council under the provisions of the "Constitutional Questions Determination Act," chapter 50 of the "Revised Statutes of British Columbia, 1936." The Appellants have appealed from the answers to all the questions except Question Four. The Respondent cross-appeals as to this question.

2. The questions as submitted in the original Order in Council were subsequently amended and answered as amended. The questions as amended and answered appear Case, pp. 19-22.

3. All the questions were answered in accordance with the submissions of the Respondent with the exception of Question Four. The Court were unanimous in answering that the legislation as proposed in Question Four would be ultra vires. Answering the other questions Mr. Justice Smith dissented from the answers to Questions One to Three and Five to Six inclusive and Mr. Justice O'Halloran dissented in his answer to Question Seven.

PART II.

POINTS IN ISSUE

It is submitted that the answers to Questions One to Three and Five to Seven as answered by a majority of the members of the Court of Appeal are right; and that their Lordships were in error in answering that the tax as indicated in Question Four would be ultra vires of the Legislature.

PART III.

ARGUMENT—MAIN APPEAL

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?

1. INTRODUCTORY REMARKS.

1. The Commissioner referred to is the Honourable Gordon McG. Sloan, Chief Justice of British Columbia, sitting as a Commissioner under the provisions of the "Public Inquiries Act" of the Province as referred to in the preamble of the Order in Council of November 13th, 1946 (Case, p. 1).

2. The finding of the learned Commissioner appears in his report at page 179. Section 22 therein referred to is in the Provincial Statute of December 19th, 1883. See Case, p. 150 at p. 156. This Statute brought an end to a twelve-year controversy between the Province and Dominion about the construction of the Canadian Pacific Railway to the Coast in British Columbia which, according to the terms of Union in 1871, the Dominion Government undertook to construct within ten years on the terms and conditions set out in section 11 of the Terms of Union. The same clause also provided that the Province would convey the lands afterwards known as the Railway Belt to the Dominion "In trust, "to be appropriated in such manner as the Dominion Government "may deem advisable in furtherance of the construction of the "Railway."

Case, p. 192.

The importance of the question has relation to proposals appearing in later questions for the taxing of these lands.

There is no suggestion that there was any express contract between the Province and the contractors or the E. & N. Railway Company. If any contract existed it must be implied and arises out of the Statute of December 19th, 1883, either standing alone or along with what had gone before and the subsequent action of the Railway Company in completing the Railway.

(NOTE.—There were two Statutes in 1883 each numbered chapter 14. The December one will be referred to hereafter as the "Settlement Act.")

II. BRIEF OUTLINE OF PRIOR HISTORICAL FACTS.

Case, p. 192. 1. Terms of Union: 1871. See section 11.

Case, p. 117. 2. June 7th, 1973: Federal Order in Council fixing Esquimalt as terminus of the Canadian Pacific Railway; and formal application by Dominion for a 20-mile strip of land between Seymour Narrows and Esquimalt. (It was evidently intended at that time to connect the Mainland and Vancouver Island by a bridge at Seymour Narrows.)

Case, pp. 117, 196. 3. 1874: Lord Carnarvon was appointed by Imperial Government to arbitrate the complaint of the Province that the Dominion was not carrying out its obligation to construct the railway. His decision inter alia was that the railway from Nanaimo to Esquimalt should be commenced as soon as possible.

Case, p. 118. 4. March 25th, 1875: Dominion Government asked for a conveyance of the lands as essential to do so prior to commencement of construction from Nanaimo to Esquimalt.

Case, p. 118. Case, p. 204. 5. April 25th, 1875: Legislature passed an Act conveying the lands to the Dominion. (This Act was repealed April, 1882, and the lands put under reserve. This because of the continued failure of the Dominion to construct the railway.)

Case, p. 118. 6. September, 1875, by Federal Order in Council the Dominion for the *first* time indicated that the construction of the E. & N. Railway was offered as compensation for delay in constructing the C.P.R. on Mainland. (Prior to this date the Dominion had regarded the E. & N. line as a section of the C.P.R. to be constructed under section 11 of the Terms of Union.)

Case, p. 199. 7. May 23rd, 1878: Federal Order in Council cancelled the Order in Council of June 7th, 1873, designating Esquimalt as the C.P.R. terminus.

8. April 22nd, 1879: The above Order in Council of May 23rd, 1878, was cancelled by Order in Council and so reviving the Order of June 7th, 1873, designating Esquimalt as the terminus. Case, pp. 119, 199.

9. October 29th, 1880: The Provincial Commissioner of Lands wrote the Dominion complaining that for seven years settlers had been turned aside from the Eastern Coast of Vancouver Island on account of the lands being locked up for railway purposes and generally complaining of Ottawa's delay. (See also Case, p. 119, l. 22, and p. 205, l. 29.) Case, p. 201.

10. April 21st, 1882: The Statute of April 22nd, 1875 (Case, p. 105), transferring the railway lands to the Dominion was repealed and the land placed under reserve. Case, p. 204.

11. On the same date was passed an Act to incorporate "The Vancouver Land & Railway Co." This was the "Clement Bill." Louis M. Clement of San Francisco was the chief promoter. This Act empowered the company to construct the railway from Esquimalt to Nanaimo and indicated that the government had lost patience with the Dominion's delays. Case, p. 109.

The Act required the company to begin construction within sixty days. It required a deposit within ten days of $10,000 and security to be given in the amount of $250,000 within sixty days. The Act provided for a land grant to the company of 1,900,000 acres. Section 21 provided that "the lands of the company shall "be free from Provincial taxation until they are either leased, "sold, occupied or in any way alienated." This is the first appearance of this provision. There are no records to show how it came to be made. Case, p. 109. Case, p. 112.

The company was unable to meet the terms of the Act and did not proceed.

12. February 10th, 1883, negotiations with the Dominion resumed. On this date a Provincial Order in Council was forwarded to the Secretary of State, Ottawa. This document fully recites the negotiations after the Terms of Union and the grievances of the Province to date. Case, pp. 116-20.

Its concluding recommendation is that as a basis of settlement "the Dominion government be earnestly requested to carry out its "obligations to the Province by commencing at the earliest pos- "sible period the construction of the Island Railway . . . and to "complete and *operate it as a federal work.*" Proposals were also made as to the two million acres to be conveyed by the Province Case, p. 118.

Case, p. 123. to the Dominion. In reply Ottawa sent the Hon. J. W. Trutch to Victoria to negotiate a settlement and the Legislature adjourned pending his arrival.

13. May 5th, 1883: Trutch advised Premier of British Columbia that he had been advised by Premier of Canada setting out terms of settlement. Inter alia they were:—

Case, p. 124.

(1) The Province to grant to Canada a portion of the lands described in the Act 45 Vict. Ch. 15 (The Clement Act).

(2) Province to incorporate a company comprised of persons to be designated by Canada.

(3) Canada to appropriate the said lands and $750,000 to the said company on such company giving satisfactory security to complete the railway within three and one-half years.

Case, p. 125.

(4) B.C. to ratify arrangement by Act as in full of all claims of B.C. against Canada.

14. May 7th, 1883: The Province by Order in Council accepted the above proposals.

Case, p. 132.

15. May 12th, 1883: Legislature enacted Statute reciting and ratifying terms of agreement with Canada and incorporating The Esquimalt & Nanaimo Railway Company *"for the purpose of "enabling the Government of Canada to construct the railway "between Esquimalt and Nanaimo."*

Case, p. 129.
Case, p. 135.

The Act provided for the grant of lands by the Province to the Dominion and section 22 appeared as it did in the December Act.

16. August 20th, 1883: Further memorandum of agreement between Canada and the Province "as to various points remaining "unsettled between the government of the Dominion and that of "the Province." Apparently the Dominion was not satisfied with

Case, p. 208.
Case, p. 140.

the May 12th Statute and declined to make the railway *a Government work*. Sir Alexander Campbell was sent from Ottawa to Victoria and a new agreement was made and amendments to the existing Statute were drafted. The draft Bill so prepared was

Case, p. 150.

enacted without change in the Settlement Act of December 19th, 1883. The material differences in the two acts are:—

(1) Slight changes in the preambles. (See Case, p. 129, 150.)

(2) Some changes in par. (*c*), Case, pp. 130, 151, and substantial additions to par. (*f*).

(3) Section 8 is changed from "For purpose of enabling "Government of Canada to construct the Railway, etc.," to read: "For the purpose of facilitating the construc- "tion of the railway, etc."

17. August 20th, 1883: Agreement between the Dominion and the contractors. "This agreement obligated the contractors "to build the road in consideration whereof the Dominion agreed "to grant them $750,000 and the lands in question." Case, p. 142. Case, p. 145.

An important provision is in clause 15 providing that the lands conveyed shall be *subject to* all the provisions relating thereto in the Act of May 12th, 1883, and as the same may be amended by the draft Bill which has been prepared and which is now identified by the signatures of Sir Alexander Campbell and the Honourable Wm. Smithe. Case, p. 146.

It is to be further noted that on the Bill so identified there is also the memorandum "I have read and on behalf of myself and "associates acquiesce in the various provisions of the Bill so far "as they relate to the Island Railway." Case, p. 148.

Signed by "R. Dunsmuir."

18. On December 19th, 1883, the draft Bill now known as the "Settlement Act" became law.

19. In due course the railway was completed, the lands passed to the Dominion, and by the Dominion were conveyed to the Railway Company.

20. For fuller details of the historical events see the following documents:—

(1) The Sloan Report, pp. 173-182.

(2) The Harrison Report, Case, pp. 190-213.

(3) Judgment, O'Halloran, *J.A.*, Case, pp. 26-46.

(4) Various documents set out as exhibits in the Case. See Case, index, pages II to V.

III. What Is the Contract, When and How Was It Made?

The first difficulty in meeting the contention of the Appellants that there was a contract is to put one's finger on the contract contended for. It has not been made clear either in the Facta below or in the judgment of Mr. Justice Smith. So far

as one can ascertain it appears that an implied contract is alleged to arise in one of the following ways:—

First: That there was an implied contract indicated by the historical facts and arising out of the relations of the parties, their actions, the other contracts executed, and the legislation enacted by the Settlement Act in 1883.

Second: That the Dominion Government was the agent of the Province so that any contract between the Railway Company and the Dominion was in reality a contract between the Railway Company and the Province. (It is not believed any such contention has been seriously advanced, unless it be in the Judgment of Smith, *J.A.*)

Third: That the Settlement Act of 1883, section 22, was an offer by the Province intended to be an offer to make a contract to be accepted by performance and that the offer was accepted by the Railway Company by the construction of the railway.

IV. ARGUMENTS AND REASONS SUBMITTED IN REPLY TO THE SUBMISSIONS ADVANCED BY THE APPELLANTS THAT THERE WAS A CONTRACT BETWEEN THE PROVINCE AND THE CONTRACTORS AND THE RAILWAY COMPANY IN THE TERMS OF SECTION 22 OF THE DECEMBER 19TH, 1883, ACT.

1. The historical facts: It is submitted these facts make it clear that the construction of the railway was the obligation of the Federal Government and that the contractors were brought in by the Dominion as the Federal Government's method of meeting its long delayed obligations. The only express contract with the contractors was made by the Dominion. Right on the threshold of the case it is most significant that express contracts were made between the Dominion and the Province and between the Dominion and the contractors. If any contract were intended between the contractors and the Province why was it not made at the same time?

The changes made in the "Settlement Act" from the provisions in the May enactment were made only because the Dominion did not wish to construct the railway as a Federal work and so insisted on turning the undertaking over to its creature, the E. & N. Railway Company, whose shareholders were made up entirely of its nominees. Nothing in these Acts or in the changes can implicate the Province in any contractual relation with the contractors but on the contrary.

Case, p. 208.

2. His Lordship Mr. Justice Smith refers to the "Clement" Statute and finds there can be no doubt that this Act at any rate would, upon acceptance by performance, represent a statutory contract between the Province and the promoters. Case, p. 70.

It is submitted that it is not quite so clear of doubt as stated that there would have been a contract even under the Clement Act. The Statute was a public one. To convert a public Statute into a private contract would require clear and express language to that effect.

3. His Lordship compares the Clement Act with the Settlement Act in 1883 and considers "that the essential difference "between the two Acts was the interventon of the Dominion "Government as a trustee during the construction of the railway "—thus following out the express provisions of Article 11 of the "Terms of Union." Apparently the conclusion His Lordship draws is that this difference has not changed the nature of the Acts and that there are the same possibilities of a contract by offer and performance under the latter Act. It is submitted that the two enactments are fundamentally different.

(1) The Clement Act recites and follows a petition from the promoters who are thus brought into direct relationship with the Legislature. In contrast the Settlement Act recites differences between the two Governments and that the agreement (in the Statute) is made "for the "purpose of settling all existing disputes and difficulties "between the two governments" and after reciting the terms of agreements proceeds: "Therefore Her Majesty "by and with the advice and consent of the Legislature "enacts as follows, etc." One act is the outcome of direct dealings between the promoters and the Government; the other is the outcome of disputes and settlements between the two Governments as *principals*. The Railway Company is only an incident. Case, p. 150.

(2) In the Clement Statute there were direct requirements by the Province calling on the promoters to put up $10,000 cash to be followed by security of $250,000. In the Settlement Act the obligation of providing for security for performance was on the Dominion.

(3) The intervention of the Dominion as a party in the Settlement Act is of much greater importance than considered by Mr. Justice Smith. In the first place it is not mere intervention. The Dominion was always vis-à-vis the Province in these matters. They were the two principals from 1871 to 1883.

RECORD

In the Supreme Court of Canada

No. 16
Factum of Respondent Attorney-General of British Columbia (Cont'd)

Case, p. 192.
Case, p. 193.

Then too the words "in trust" need more consideration. They first appear in section 11 of the Terms of Union. Section 11 also provides: "In consideration of "the lands to be conveyed in aid of the construction of "the railway the Dominion Government agree to pay to "British Columbia the sum of $100,000 per annum." The Dominion therefore had a beneficial interest in these lands provided it carried out its contract. The only trust imposed was that in the result the Dominion would build, or cause to be built, the railway. The obligation to transfer the lands to the Railway Company was entirely between the Dominion and the Railway Company. It was no concern of the Province what was done with the lands *provided the railway was built.* See Settlement Act, 1883, Act, clauses 2 and 3. Clause 3 provides: "There is hereby granted to the Dominion "Government for the purpose of constructing and to "aid in the construction of The Esquimalt & Nanaimo "Railway and in trust *as they may deem advisable* all "that land, etc." (See also observations at Case, p. 119, ll. 9-21.) It is true that clause (*e*) in the agreement as ratified by the Act provides that the Dominion agrees to hand over the lands to the contractors who may build the railway and to take security for its construction. This, however, was by way of reassurance to the Province that the road would at last be built. It did not absolve the Dominion from its obligations if the railway company had fallen down. Section 2 actually granted the lands to the Dominion and the construction of the road continued to *be the sole obligation of the Dominion* in relation to the Province.

Case, p. 153.
Case, p. 150.

4. Mr. Justice Smith referring to the changes in the two 1883 enactments, and particularly clause (*e*) says: "It will be noted "that in these amendments the Dominion was insisting upon "eliminating from the aforesaid provision words that contained "or implied an undertaking by the Dominion to secure the con-"struction of the railway."

It is submitted that for the reasons in the immediately preceding heading this conclusion is wrong. This was considered by His Honour Judge Harrison in his report in 1901. (See also Lord Carnarvon's Report Case, pp. 117-8.) His Honour found "The Dominion Government declined to make the railway *a "'government work.'"* The Dominion Government did not refuse to acknowledge their obligation to build the railway.

Case, p. 208.

5. Mr. Justice Smith infers that because there was this definite arrangement between the two Governments and because the contractors were aware of them and of the draft Bill (initialed by Dunsmuir) that therefore in some way this involved the Province in a contract with the contractors.

It is submitted that the inference is to the contrary. The contractors knew what they were doing. They knew what express contracts had been made. They had their charter, the Railway Company was assigned by Statute the rights and obligations of the contractors in the Dominion agreement. With these things they were satisfied.

6. Mr. Justice Smith concludes that based on all the facts and correspondence "It was *the intention of the parties* that this "provision granting freedom from taxation should be binding "upon the Province" in a contractual sense. In support of this conclusion he rather cryptically remarks: "The men of those "days were more concerned with *works* than *words;* they were "more immediately interested in the construction of railways "than in the niceties of language, and their intention is clear "enough." With deference it is submitted that though it is true that faith without works is dead, it does not follow that works can be a substitute for words in the formation of a contract. The Dunsmuirs and their hard headed associates of those days were men of affairs and at least of practical education and experience. They made sure of their contract with the Dominion in words clear and explicit before venturing into the realm of works. It is respectfully submitted that there is nothing in the record to justify framing for them a contract they did not trouble to secure for themselves. The practical intentions of the parties proved to be workable as they stood unadorned with subsequently conceived niceties.

Case, p. 75.

Case, p. 74.

7. Mr. Justice Smith refers to the petition of the E. & N. Railway, March 21st, 1904. It is submitted that His Lordship has not given proper weight to this incident. The facts are that in 1904 the Legislature of British Columbia passed "the Vancouver Island Settlers Rights Amendment Act," the effect of which was to provide for the transfer of a part of the E. & N. lands granted by the Dominion to the Railway to certain "settlers" and all the coal and mineral rights therein. The E. & N. Railway by formal petition signed by James Dunsmuir, as president, asked the Dominion Government to disallow this legislation.

Case, p. 77.

Case, pp. 218-9.

Particular attention is called to paragraphs 20 and 21 of this petition. *These paragraphs are a complete repudiation of the*

Case, pp. 219-20.

contentions of the Appellants that there was a contract between the Railway and the Province.

Case, p. 142. Mr. Justice Smith concludes that James Dunsmuir was wrong. It is to be noted that James Dunsmuir, along with his father, Robert Dunsmuir, was one of the principals in the agreement of August 20th, 1883.

Case, p. 74, l. 38. Mr. Justice Smith finds a contract indicated by the intentions of the parties. It is hard to believe that if such intention existed it would not be known and shared in by Mr. James Dunsmuir.

8. His Lordship offsets the statement of James Dunsmuir solemnly made in a petition to His Majesty by a reference to a statement by Hon. William Smithe in a letter of November 16th, 1885 (see Case, p. 173). 10

Case, p. 78.

It is respectfully submitted that this observation by Chief Commissioner of Lands Smithe is not in point. The Minister was writing to the Hon. Mr. Trutch, Federal representative, complaining that the Dominion Minister was interfering with the administration of the railway lands, contrary to the provisions of the agreement between the two Governments (clause (*f*) recited in the Settlement Act 1883 (see Case, p. 151)). This clause provided that the lands should be administered by the Province as agents for the Dominion. The Provincial Minister, at page 173 of the Case, was contending that inasmuch as these lands were conveyed to the Dominion "in trust" to be applied for one purpose only that therefore the Province was the real principal. This observation had nothing to do with the question of any contract with the E. & N. Railway Company or the promoters. Furthermore it did not purport to be a statement of fact but was used argumentatively to support the Province's right to administer the lands on the ground that until the railway was built the beneficial interest still remained in the Province. Whether his statement was right or wrong it could not mean that the Dominion was the agent for the Province in its dealings with the contractors in connection with its obligations arising under the Terms of Union. 20 30

Case, p. 171.

With all deference *it is submitted with emphasis that Mr. James Dunsmuir's statement as president in the Company's petition is conclusive against the Company's present contention.*

9. Consideration of section 15 of the agreement between the Dominion and the contractors, and section 27 of the Settlement Act, 1883:— 40

Mr. Justice Smith quotes clause 15 of the construction agreement which expressly provides that the lands when conveyed to the Railway Company by the Dominion shall *be subject* in every way to the clauses, provisions, and stipulations in the May Act, 1883, as the same may be amended by the draft Bill identified by signatures of Smith and Campbell. Case, p. 73.

It is then pointed out that section 27 of the draft Bill provides that the E. & N. Railway Company shall be entitled to the full benefit of the construction contract and that the construction contract in turn is subject to the provisions of the Statute, including section 22. There are several answers:—

(1) The words used in the construction agreement are "sub-"ject to." These are not apt words to transfer a *benefit.*

(2) The Dominion had no jurisdiction to do more than convey the lands using the words "subject to" in their strict sense. Any *benefits* pertaining to the lands in virtue of the settlement Statute could not be conferred by the Dominion.

(3) The sections specially referred to are 23, 24, 25, and 26 of the Act. These sections are all restrictive of the grant.

(4) Not only are the words "subject to" not apt to confer the benefits of section 22 but there was no occasion to deal with 22. All the provisions of the Statute applied in any event. The only purpose of the "subject to" provision was to safeguard the Dominion from agreeing to do more in its transfer than its title under the Act would permit.

(5) As to section 27 of the Settlement Act, it is difficult to see what this has to do with any contract between the contractors and the Province. The only purpose of this section is to put the new company in the place of the contractors who were its incorporators. Case, p. 157.

(6) It is to be noted that section 10 of the Settlement Act confers power on the newly incorporated company "to "accept and receive from the Government of Canada "any lease, grant or conveyance . . . and may enter into "any contract with the said Government for or respect-"ing the use, occupation, mortgage or sale of the said "lands." No power is given the company to make any contracts with the Province. "Expressio unius est exclusio alterius":— Case, p. 154.

Whelan vs. Ryan, 20 S.C.R. at 75.

Re Oxfords Prov. Elections, 32 O.L.R. 8.

Virgo vs. Toronto, 22 S.C.R. at 466.

If a contract with the Province was intended, surely an express provision giving the company power to so contract would have been included.

QUESTION TWO: If there was a contract would any of the legislation herein outlined be a derogation from the provisions of the contract?

This question arises only if it is found in answer to Question One that there was a contract between the Province and the E. & N. Railway Company.

In answering this question it is to be assumed that the tax may be at the rate as recommended in the Sloan Report, namely, to "approximate the prevailing rates of royalty" (Sloan Report, p. 184).

In considering this question the subject falls under two headings:—

I. Are the Railway Belt Lands as presently owned by the E. & N. Railway Company now being used by the company "for "other than railroad purposes" so that they are now liable for taxation in accordance with section 22 of the Settlement Act?

1. It is submitted that on the facts as established the company has been actively using the lands for other than railway purposes.

2. The facts admitted disclose that the Railway Company for years has set the lands aside for sale.

(1) The lands have not been used or required to be used to finance the construction or operation of the railway. (See Sloan Report, p. 183.)

(2) "Since 1897 the E. & N. Railway Company has main- "tained a land office department at Victoria for the pur- "pose of selling the said lands and timber of the com- "pany and continues to hold the lands for sale save such "lands as are reserved or used for railway rights of way, "stations and such like purposes or outside of the actual "rights of way used by the railway almost all of the said

"land has been held for sale or other alienation" (Agreed Statement of Facts, Case, p. 7).

(3) At pages 5 and 6 of Case is a record of timber lands already sold.

(4) Pages 7 to 16 contain a copy of the company's regulations published in booklet form describing its lands held for sale and prescribing conditions of sale, etc. Substantial areas of these lands have been cruised and/or surveyed.

3. It is submitted that the lands as held by the Railway Company are comparable to goods on the shelf or in the warehouse of a merchant. They have been set aside and allocated for sale. A land department in charge of a land agent has been set up and the lands are the goods affirmatively being used for sale. Nothing remains free from taxation except (in the words of the Agreed Statement of Facts) "such as are reserved or used for "railway rights of way, stations and such like purposes." In the further language of the Agreed Statement "outside of the actual "rights of way almost all of the said land *has been held* for sale "or other alienation." It is submitted such holding for sale or other alienation in the way it is being held constitutes an affirmative *user* for other than railway purposes.

4. In this connection and to interpret the words "used by "the company for other than railway purposes" it is fitting to contrast them with the words used in section 11 of the Terms of Union. The words there are "in furtherance of the construction "of the said railway." This language was used in subsequent communications between the two Governments. Case, p. 192.

In the Provincial Statute of 1875 granting the lands to the Dominion the words are "For the purpose of constructing and to "aid in the construction of a railway between Nanaimo and "Esquimalt." In a memorandum by the Province, dated February 10th, 1883, the same expression is used as in section 11 of the Terms of Union (Case, p. 114).

The Act of December 19th, 1883, section (3), provides: Case p. 150. "There is hereby granted to the Dominion Government for the "purpose of construction and to aid in the construction of a rail-"way between Esquimalt and Nanaimo in trust to be appropri-"ated as they may deem advisable . . . all that piece or parcel of "land situate in Vancouver Island." It is to be noted that sec-"tions 3 and 22 are entirely different.

Section 3 grants the land in trust to be appropriated as the Dominion may deem advisable for the purpose of constructing or to aid in the construction of the railway.

The exemption in section 22 is much narrower in its application. It deals not with the appropriation of the lands but with the conditions of exemption from taxation. It assumes that the lands have hereafter been granted to the Railway Company and in that event they are exempt from taxation until used for other than railway purposes. The counterpart is that so long as used for railway purposes they shall not be taxable. The real intention of the Act is that if the land is actively kept out of use for railway purposes for the purpose of sale it should be taxable. (See section 25 of the Settlement Act, Case, p. 135.)

It is to be noted that these lands were not required or used to finance the construction of the railway or its operation since construction. (See Sloan Report, p. 183.) The lands have been held for sale or for lease to increase the dividends of the Railway Company.

It is submitted that the words "Railway purposes" mean exactly what they say—*that is, to be used for the purposes of the railway.* The right of way of the railway land used or set aside for stations, sidings and such like are uses for railway purposes. So is timber cut for ties, bridges, and other construction purposes of the company or land set aside for such purposes. See section (*f*) in the preamble to Act, December 19th, 1883 (Case, p. 150).

When these lands were turned over to a land department organized for the commercial sale or leasing of the lands and timber, it is submitted that they were not being used for railroad purposes, but for other purposes and, consequently, were no longer within the taxation exemption provision of section 22.

It follows that if the lands are presently liable for taxation and have been for years there can be no complaint with the now proposed tax, even if it fell on the Railway Company.

II. In the alternative on the assumption that the lands presently held by the Railway Company are still exempt under section 22, it is submitted that: the Railway Company took the grant knowing the limitations of section 22 and that the exemption from taxation ended with alienation, and that consequently any tax as proposed would be outside of and subsequent to the contractual statutory exemption and could not be in derogation thereof.

1. The high percentage rate of the tax pictured by the Appellants is disputed. Reliance is placed on the findings of Mr. Justice O'Halloran (Case, p. 57, l. 25, to p. 38, l. 10). From the facts therein stated the tax imposed on the log operators—logs in the one case and on the log operators' lands in the other two cases—is at a rate equalling only 6 per cent. of the selling price in 1942 and 3½ per cent. of estimated present selling price.

2. It is submitted that in granting these lands under section 3 of the Settlement Act for the purpose of constructing the railroad the company was free to use the lands as it wished; but *the taxation exemption was, under section* 22, *another matter*. It was not contemplated under section 22 that the lands would never be used for railroad purposes but be held out of production free of taxes for sixty years to the end that long after the road was built and paid for the shareholders of the company might be rewarded by increased dividends out of the vast capital accretions made possible only by tax exemption. The company has had the full benefit of the grant and has profited from the exemption to the fullest extent and far beyond the spirit of the bargain. When the exemption is over and the harvest reaped it does not lie in the mouth of the company to say, no matter how much we have fattened by the long exemption we have enjoyed, no matter how great are the public needs for taxes, you must not tax our purchasers in a way that may slightly reduce our sale profits.

One of the outstanding benefits conferred on the company has been the right to hold the lands freed of taxation until this great capital accretion was realized. The company has not been singled out for unfair treatment. The principle of the tax could apply to no other company only because none other has received such benefits. It is true the proposed tax may reduce the company's return, but what is left is far beyond the original grant and, as taxes go, is only a small contribution to the needs of the state. In a sense all taxation is the taking of another's property, but it is legitimate taking for public purposes and not in derogation of existing rights. A mill owner and operator buys timber lands from the Government for the operation of his mill. Later he is compelled to pay an excess profits tax of 100 per cent. This is an appropriation by the state of the returns from property acquired from the state. It is not, however, a derogation of the grant. The property was purchased with this potential liability.

Under section 125 of the B.N.A. Act the lands were not subject to taxation in the hands of the Dominion. So long as the lands were held by the Dominion, public interests would not suffer, as the Dominion was under the same obligation to serve

public interests as the Province. (See also clause (*h*) of the agreement between the Dominion and the Province Case, p. 152.) In the case of a privately owned railway company, however, the situation was different. There is nothing in the record to indicate that the Railway Company was to receive these lands free of taxation and not to be used in the actual construction or operation of the road, but to be held by the company indefinitely for no purpose or use except for the future enrichment of the company and thereafter to be entitled to object to a tax on its purchasers which might indirectly affect its sale profits.

Counsel for the Appellant Railway relies on the opinions of the Hon. Mr. Fitzpatrick and the Hon. Mr. Doherty when Ministers of Justice in relation to disallowance of the "Settlers Rights Act" of the Legislature.

It is submitted that these ex parte opinions have no binding authority.

It is further submitted that they are not applicable to the present controversy.

Case, p. 225, l. 28.

Mr. Fitzpatrick in his opinion stated:—

"Under these circumstances, if the British Columbia "Act would have the effect, as the railway company appar- "ently fears, of divesting the company of its title under the "grant from the Government of Canada in respect of any of "the lands in the belt, the undersigned would feel it to be his "duty to recommend that Your Excellency should exercise "his power of disallowance in order to prevent the consum- "mation of such an injustice."

In the case of the second "Settlers Rights Act" in 1917 Mr. Doherty states:—

Case, p. 243, l. 25.

"The Esquimalt and Nanaimo Railway Company, the "Canadian Collieries (Dunsmuir) Limited, and the National "Trust Company Limited, have now submitted a joint peti- "tion for disallowance of the statute, chapter 71 of 19.7, "copy of the petition submitted herewith, and these com- "panies represent that the legislation constitutes an undue "interference with the policy of the Dominion in respect of "the disposition whereby in the general public interest the "Railway Belt was made available to the Esquimalt and "Nanaimo Railway Company in consideration of the build- "ing of the railway, abrogating pro tanto the agreement

"between the Dominion and the Province of 1883, and dero-
"gating from the grant made by the Dominion to the Rail-
"way Company in pursuance of the general arrangement
"and moreover divesting the Railway Company and the
"Canadian Collieries, claiming under the company, as well
"as the bondholders represented by the Trust Company of a
"very valuable portion of their assets or security; the lands
"in question being coal-bearing lands of great value."

It is submitted there is a basic difference in principle between a direct taking away of a part of the lands included in the original grant, as was done in the Settlers Rights Acts, and the imposition of taxes after the period of exemption has passed, which can only indirectly affect the original grantee.

It is true the company may receive less for the lands if the special tax is imposed on their purchasers, but this fact is not comparable in principle or in degree with the confiscation in the 1917 Act. The Province simply says to the company:—

"Assuming that you took the lands and made the con-
"tract to construct the railway relying on the provisions of
"section 22, you must be held to have relied on the section
"exactly as it reads and with no reservation not therein con-
"tained. For sixty-two years you have held these lands out
"of public use freed of taxation. During this long time the
"rest of the Province has grown and the lands and the timber
"have been greatly enhanced in value. If the lands had been
"subject to taxation on their value as timber lands from the
"beginning you would have sold them long ago. You have
"had the full benefit of this exemption from taxation. You
"cannot complain if the tax now legally imposed incidentally
"and in a small degree affects the vast capital accretion made
"possible by this tax exemption. This is not confiscation, it
"is not in derogation of contract, it is only a measure of
"justice."

QUESTION THREE: Was the Commissioner right in finding that "there is no contract between the Province and the com-"pany" which would be breached by the imposition of the tax recommended by the Commissioner?

This question as worded may seem to overlap Question One. It was inserted at the request of the Appellant Company and was intended to relate to the effect of chapter 33 of the Statutes of British Columbia, 1912, ratifying an agreement between the Province and the E. & N. Railway Company. It is submitted that

this Statute sets up no contract which would be breached by any of the proposed enactments.

1. The submission of the Appellants must be that even assuming there had been previously no contract between the Province and the E. & N. Railway Company regarding section 22 of the Settlement Act, such a contract had crept in by the back door in the 1912 Statute.

2. The clear purpose of this Act was to enable the company to lease the property to its parent company, the Canadian Pacific Railway, without prejudice to the provisions of section 22 of the 1883 Act. This consent did not involve the Province in any contract to perpetuate the provisions of section 22. The words "such "exemption (under section 22) shall remain in full force and "virtue" only mean that the force and virtue of the provision shall not be affected by the lease. Any other interpretation would be violence to the clear purpose of the Act.

3. The second section in the agreement in which the company agrees to pay 1½ cents an acre taxes on the land is not made conditional on or in consideration of any agreement by the Province not to abrogate section 22 of the 1883 Act. The reference in the section to the lands exempt by virtue of section 22 is only to identify the lands upon which the tax is to be paid. If there is any further significance in the provision, it is that the 1½-cent tax is only to continue so long as the exemption applies.

QUESTION FIVE: 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.

It is proposed to argue QUESTION SIX first.

An examination of the enactment proposed in this question shows it to be a direct assessment and tax on land.

INDIRECT TAX ARGUMENT

The main argument against the enactment set out in Question Six is that the tax is indirect.

This contention is put on two grounds:—

First: That although the tax is on land it is not a direct tax within Mill's definition because it was not intended that the burden of the tax would be borne by the person taxed but retroactively on the Railway Company from whom the timber land had been purchased.

The answers are as follows:—

1. The tax is on the land and land taxes are deemed always to be direct. Taxes which are within the category of land taxes and as such direct are not open to judicial speculation to the end that they be declared indirect.

The law on this matter has been definitely settled by two decisions of the Privy Council.

City of Montreal vs. Attorney General for Canada, 1923 A.C. 137; 2 Cameron 312.

In this case the Legislature had given the city authority to tax the occupiers of Crown land as if they were the actual owners. Objection was raised against the tax on two grounds:—

(*a*) That in substance it was the land of the Crown which was being taxed in contravention of section 125 of the B.N.A. Act.

(*b*) That the tax was indirect. "A tenant taxed as owner "will obtain an indemnity from the Crown in the form "of the rent paid or otherwise." (See argument Newcombe, K.C., 2 Cameron 313, foot of page.) The Judicial Committee held:—

> "The ultimate incidence of taxation imposed on "tenants, as the occupants of lands, is a matter on which "economic experts have expressed different opinions. If, "however, municipal taxation is to be regarded as ultra "vires, on the ground that the ultimate incidence of tax-"ation, or some portion of it, may or will fall on the "owner, it is difficult to see in what form such taxation "could be validly imposed. The question to be deter-"mined is the simpler one, whether the taxation, which "is impeached, is assessed on the interest of the occupant, "and imposed on that interest."

Halifax vs. Fairbanks, 1928 A.C. 118; 2 Cameron 477

In this case the conditions were reversed from the Montreal one. The land was privately owned and occupied by the Crown. The city charter provided for a business tax on every occupier of real property for the purpose of any trade or business. The charter further provided that any property let to the Crown or other person exempt from taxation was deemed for business pur-

poses to be in the occupation of the owner and to be assessed according to the purposes for which it was occupied.

It was argued that the tax was an indirect tax according to Mill's definition and that "the tax was imposed on the landlord "in respect of the user by the tenant and that gave rise to the "inference that it was intended that it should be passed on to "the tenant in the form of rent or otherwise." (Rand, K.C., 2 Cameron 479.)

The Privy Council held:—

"The real and substantial question to be decided is "whether the tax is a direct tax falling within section 92 (2) "of the B.N.A. Act or is an indirect tax."

(See 2 Cameron 480.)

"The result of these observations, which are closely "applicable to the present case, is that their Lordships have "primarily to consider, not whether in the view of an econo-"mist the business tax imposed on an owner under s. 394 of "the Halifax city charter would ultimately be borne by the "owner or by some one else, but whether it is in its nature a "direct tax within the meaning of s. 92 head 2, of the Act "of Union. The framers of that Act evidently regarded "taxes as divisible into two separate and distinct categories "—namely, those that are direct and those which cannot be "so described, and it is to taxation of the former character "only that the powers of a Provincial government are made "to extend. From this it is to be inferred that the distinction "between direct and indirect taxes was well known before "the passing of the Act; and it is undoubtedly the fact that "before that date the classification was familiar to statesmen "as well as to economists, and that certain taxes were then "universally recognized as falling within one or the other "category. Thus, taxes on property or income were every-"where treated as direct taxes; and John Stuart Mill him-"self, following Adam Smith, Ricardo and James Mill, said "that a tax on rents falls wholly on the landlord and cannot "be transferred to any one else. 'It merely takes so much "'from the landlord and transfers it to the State' (Political "Economy, vol. ii, p. 416). On the other hand, duties of "customs and excise were regarded by every one as typical "instances of indirect taxation. When therefore the Act of "Union allocated the power of direct taxation for Provincial "purposes to the Province, it must surely have intended that

"the taxation, for those purposes, of property and income "should belong exclusively to the Provincial legislatures, "and that without regard to any theory as to the ultimate "incidence of such taxation. To hold otherwise would be to "suppose that the framers of the Act intended to impose on "a Provincial legislature the task of speculating as to the "probable ultimate incidence of each particular tax which "it might desire to impose, as the risk of having such tax "held invalid if the conclusion reached should afterwards be "held to be wrong.

"What then is the effect to be given to Mill's formula "above quoted. No doubt it is valuable as providing a logi- "cal basis for the distinction already established between "direct and indirect taxes, and perhaps also as a guide for "determining as to any new or unfamiliar tax which may be "imposed in which of the two categories it is to be placed; "but it cannot have the effect of disturbing the established "classification of the old and well known species of taxation, "and making it necessary to apply a new test to every par- "ticular member of those species. The imposition of taxes "on property and income, of death duties and of municipal "and local rates is, according to the common understanding "of the term, direct taxation, just as the exaction of a cus- "toms or excise duty on commodities or of a percentage duty "on services would ordinarily be regarded as indirect taxa- "tion; and although new forms of taxation may from time to "time be added to one category or the other in accordance "with Mill's formula, it would be wrong to use that formula "as a ground for transferring a tax universally recognized "as belonging to one class to a different class of taxation."

Their Lordships also cited the Montreal Case above referred to "as directly in point and to support the contention of the City."

See also *Rattenbury vs. Land Settlement Board,* 1929 S.C.R 52 at p. 72.

In this connection there is another case to be considered:— *Atlantic Smoke Shops Ltd. vs. Conlon,* 1943 112 L.J.P.C. 68.

The Provincial Act imposed a tobacco tax purchased for consumption. The argument was made that the tax was an *excise tax* that excise taxes were always indirect and therefore following *Halifax vs. Fairbanks* this tax was indirect.

Lord Simon refused to carry the principle this far because excise was a word of vague and somewhat ambiguous meaning and because it was clear that this tax was well within Mill's definition of a direct tax. The only limitation put on Fairbanks case was: "It should not be understood as relieving the Courts "from the obligation of examining the real nature and effect of "the particular tax in the present instance or as justifying the "classification of the tax as indirect merely because it is in some "sense associated with the purchase of an article." It is submitted that in no way does this judgment overrule the decision in the Halifax Case or in the Montreal Case, which is practically identical with the present one.

Second: It is contended by the Appellants that the enactment is *colourable* and is actually indirect in the guise of a direct tax. The answers to this contention are as follows:—

1. The argument of the Appellants is really a repetition of that already advanced and answered.

2. It is submitted that the term *colourable* is misapplied. Colourability relates to a *sham transaction* and not to the indirect consequence of an actual transaction. The tax on the land is not a sham, it is actually on the land. There is less sham about it than in the Halifax Case or the Montreal one—both of these were obvious attempts to get around section 125 of the B.N.A. Act.

3. It is submitted that legislation expressly and effectively imposing a tax on land for the purpose of raising revenue for Provincial purposes cannot be impaired or its character altered because of any alleged behind the scene motive as to the effect of the tax.

It is submitted that this principle was fully considered and decided by this Court in the case of *Home Oil Distributors Ltd. vs. Attorney-General for British Columbia,* 1940 S.C.R. 444. This case is particularly relied on by the Respondent as decisive of this part of the appeal.

4. It is urged against the tax that "You cannot do indirectly "what you cannot do directly." But it is also true that "what "you can do directly is not defeated by what you cannot do "indirectly."

There is no colourability or sham about the tax being on the land. The enactment imposes this directly and so imposed any indirect consequences are immaterial.

The following cases are submitted to illustrate the distinction:—

Union Collieries vs. Bryden, 1899 A.C. 581; 1 Cameron 564.

In this case the "Coal-mines Regulation Act" provided: "No "boy under the age of twelve years and no woman or girl of any "age shall be employed in a coal mine." The Act was amended by inserting after the word "age" the words "and no Chinamen."

The Privy Council held that these words had no real effect as a regulation for the safety of the mines but were in relation to Chinamen who are aliens or naturalized.

> "The leading feature of the enactment consisted in this "—that they have and can have no application except to "Chinamen, who are aliens or naturalized subjects, and they "establish no rule or regulation except that these aliens shall "not work or be allowed to work underground in coal mines."

It was held that the "pith and substance" of the Act was not in relation to regulation of coal mines but aliens. In the case at Bar the pith and substance of the legislation is a tax on land "in order to the raising of revenue for provincial purposes" (section 92 (2) of the B.N.A. Act). The tax was "in relation" to no other class of subject. There is no pretense or colourability about this fact. The colour, if any, is only as to the indirect results which may or may not follow.

It is to be noted that section 92 provides that the Legislature may exclusively make laws *in relation* to matters coming within *Insurers Case,* 1924 A.C. 338, and 2 Cameron at 341, Duff. *J.,* the classes of subjects hereinafter enumerated. In the *Reciprocal* writing the decision of the Judicial Committee interpreted Bryden's case as saying "its pith and substance being ascertained "*in relation* to the subject of aliens and naturalizations."

In the present Statute the legislation is "in relation to a "land tax in order to raising of a revenue for provincial pur- "poses." About that fact there is neither sham nor colourability. Once this is established the Montreal Case is full authority for the directness of the tax. See also *Gallagher vs. Lynn,* 1937 A.C. 863, at p. 870:—

> "It is well established that you are to look at the 'true "'nature and character of the legislation'; Russell v. The "Queen (I) 'the pith and substance of the legislation.' If, "on the view of the statute as a whole, you find that the sub-

"stance of the legislation is within the express powers, then "it is not invalidated if incidentally it affects matters which "are outside the authorized field. The legislation must not "under the guise of dealing with one matter in fact encroach "upon forbidden field."

Lower Mainland Dairy Products Board vs. Turner's Dairy Ltd. 1941 S.C.R. 573.

Prior to this case the Privy Council had held in the Crystal Dairy Case, 1933 A.C. 168; 2 Cameron 181, that an Act of the Legislature of British Columbia attempting to equalize the sale price of milk between farmers selling on the fluid market and on the lower priced manufacturers' market was ultra vires. The amount compulsorily taken from farmers selling on the higher priced market was used to pay the others in order to equalize their returns. This was held to be an indirect tax.

In Turner's case the attempt was made to accomplish the same end by setting up an incorporated company called "The Milk Distributors Agency Ltd." The regulations of the Milk Board provided that all milk must be sold to the agency and by it resold to all consumers. Each farmer was to receive a price based on the average price received by the agency from all milk sold both on the fluid and manufacturers' market. The agency was proved to be purely fictitious. It had not capital or equipment. It received no milk and delivered none. It made no profits. The business went on as before, except that under colour of a fictitious purchase and resale the agency appropriated the returns for the purpose of equalizing the price to each farmer. The Supreme Court held that the scheme was fictitious and that behind the pretense the facts were that an equalizing indirect tax was imposed similarly to what was done in the Crystal Dairy case. Turner's case illustrates the point in issue. There no real transaction of purchase and resale existed. Let us suppose, however, that the Milk Board had set up a real agency with capital, organization, equipment, trucks, and dairies to actually carry on a legitimate business at a profit, but with a uniform settling rate to all the farmers. Entirely different considerations would apply. Instead of a sham transaction there would have been reality. It is true the desired result of equalization would have been attained, but not by means of a camouflaged indirect tax. It would have been by means of an actual purchase and resale. The motives of the Milk Board would have been the same in each case, but the motive was immaterial if the method was real and within Provincial competence.

5. It is further submitted that there is no evidence of intent in the record justifying the claim that the legislation is invalid.

(*a*) The intent is to impose a tax on land "in order to the "raising of a revenue for provincial purposes." (See section 92 (2), B.N.A. Act.)

(*b*) It is submitted that once this intent is apparent and manifested in the Act the various possible motives behind this intent are immaterial.

(*c*) As to the Sloan Report it is submitted it cannot be used to determine the possible motives of a Legislature which may not yet be in existence and which has not passed on the enactment. Even if the Act had already been enacted, who can say what motives were behind the vote of each member or successfully assert "that under the guise or "pretense or in the form of an exercise of its own powers "the legislature is attempting to carry out an object "beyond its powers."

It was pointed out in the Alberta Bank Tax Act Case "It must be remembered that the object or the "purpose of the Act in so far as it does not plainly "appear from its terms and its probable effect is that of "an incorporeal entity, namely, the Legislature and "generally speaking the speeches of individuals would "have little evidential weight." (1939 A.C. Plaxton, p. 407.)

If the legislation would be valid if the Sloan Report did not exist, can it be said that its existence forever ties the hand of the Provincial Parliament?

The undersigned as Counsel for the Attorney-General of the Province observe that there are opinions expressed in this report with which on consideration Counsel are not in agreement. It may be that the Attorney-General will be influenced by the opinion of Counsel rather than by that of the learned Commissioner and yet deem the legislation proper and justified as direct taxation for Provincial purposes.

Montreal Trust Co. vs. Abitibi Power Co., 1943 A.C. 536; 112 L.J.P.C. 49.

"This Board must have cogent grounds before it arising "from the nature of the impugned legislation before it can impute "to a provincial legislature some other object than that which is "seen on the face of the enactment itself."

Home Oil Distributors Ltd. vs. Attorney-General of British Columbia, 1940 S.C.R. 444.

Crocket, *J.*, at p. 448.

Davis, *J.*, at p. 451-2.

Attorney-General for Manitoba vs. Attorney General for Canada, 1925 A.C. at 566; 2 Cameron at p. 385.

"For the question of the nature of the tax is one of substance "and does not turn only on the language used by the legislature "which imposes it but on the provisions of the Imperial Statute "of 1867."

Question Five

It is submitted that the principles applicable to the legislation under Question Six are also applicable here.

In addition, reference is made to the following case: Re *Reference as to the Validity of Section* 31 *of the "Municipal District Amendment Act,* 1941," *Alberta,* 1943 S.C.R. 295.

The fact that the amount of the tax is measured by the value of the timber cut does not affect the nature of the tax or make it any less a land tax. By way of comparison a Provincial Succession Duty is imposed on the testator's property within the jurisdiction and is valid even though the rate of the tax is determined by the total value of the testator's property, including his property outside the Province. See Provincial Succession Duty Act, R.S.B.C., chapter 270, section 2 (defining net value) and section 6. *The Minister of Finance of British Columbia vs. The Royal Trust Company,* 61 S.C.R. 128 (this case was overruled in the Privy Council but on other grounds). It is to be noted that Chief Justice Hunter had held below that this tax was an attempt to impose taxation on outside property and that the Province could not do indirectly what it could not do directly. (See 1919, I W.W.R. 1101. See also *Re Renfrew,* 29 L.R. 565.)

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?

In answer to the reasons of Mr. Justice O'Halloran it is submitted the definition of tax given by Mr. Justice Duff in Lawson's case (1931 S.C.R. at 363) is not conclusive on the question. The levies in Lawson's case were to be applied for the general administration of a public marketing board. In the case at Bar the charge is for a specific fire fighting service. There is a compulsory co-operative fire fighting scheme organized to be carried out by the Province on behalf of all timber holders and each is required to contribute in proportion to his timber land holdings. Instead of a burden in the sense that taxes are regarded as a burden this levy is directly for the benefit of the persons assessed.

In any event if there is conflict between the two decisions it is submitted that the judgment in Shannon's case, as cited by Bird, *J.A.*, must prevail.

The Appellants cited below the case of:—

Morris Leventhal vs. Jones, 1930, 99 L.J.P.C. 161.

The Appellants leased business property in Sydney, N.S.W., to the Respondents who covenanted to pay all taxes except landlord's property tax for a land tax. The Appellants agreed to pay the existing land tax or any future one. A Provincial Statute thereafter enacted provided for erection of high level bridge across Sydney Harbour two-thirds of cost to be borne by state and one-third out of proceeds of a rate leviable yearly of one-half pence on the pound of value of land within City of Sydney.

It was held that this was a land tax payable by the lessors. The contention that statutory imposts for a specific purpose is not taxation was rejected.

This case illustrates the distinction between a tax for a specific *purpose* and a charge for a specific *service,* imposed on those receiving the service. The Sydney Bridge tax was for a specific public purpose but there was no special service confined to the contributors in proportion to the service rendered. The bridge was for the general benefit of the public. The money was earmarked as to its use. The fire imposition is clearly distinguishable. It is for the public benefit in the sense that land registry fees are a public benefit but is a charge for a specific service rendered to the person charged.

PART IV.

CROSS-APPEAL.

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?

This question was answered in the affirmative and from this answer the Attorney-General of British Columbia appeals by way of cross-appeal.

Before the Commission, Mr. McMullen argued that a tax in this form is indirect.

It is submitted that the Privy Coucil has now definitely affirmed its position in *Toronto vs. Lambe* that the question whether a tax is direct or indirect is to be determined by Mill's definition. (See *Atlantic Smoke Shops vs. Conlon,* 112 L.J.P.C. 71.) It is the intention and expectation of the Legislature as indicated by the substance of the legislation which determines if the tax is direct or indirect.

It is submitted that the tax in question comes within the decision in the *Kingcombe Navigation Case* as interpreted by Lord Simon in the *Atlantic Smoke Shops Case,* 112 L.J.P.C. at p. 72.

> "For fuel oil may be consumed for purpose of manufacture and transport and the tax on the consumption of fuel oil might, as one would suppose, be sometimes passed on in the price of the article manufactured or transported. Yet the Privy Council held the tax was direct."

It is submitted that the tax imposed on the owner of the timber at the time of severance is imposed on the very person who is intended to pay the tax. The tax is distinguishable from the *McDonald and Murphy Case,* 1930 A.C. 357, Plaxton 43. There the tax was an export tax and was imposed on an article while "in the course" of a commercial transaction, Here the tax is not in the course of commercial transaction and when used by the taxpayer for manufacturing purposes it is in the same category as the tax in the Kingcombe case as indicated above by Lord Simon.

Lord Simon referring to the judgment in the Kingcombe case said that Lord Thankerton pointed out that the customs or excise duties on commodities ordinarily regarded as indirect taxation referred to in the judgments in the cases of *Halifax vs. Fairbanks* and *B.C. vs. McDonald & Murphy Lumber Co.* are duties which are imposed in respect of commercial dealings in such commodities in such form that they would necessarily fall within Mill's definition of indirect taxes. In the McDonald and Murphy case Lord McMillan said:—

> "While it is no doubt true that a tax levied on personal "property, no less than a tax levied on real property, may be "a direct tax where the taxpayer's personal property is "selected as the criterion of his ability to pay, a tax which, "like the tax here in question, is levied on a commercial "commodity on the occasion of its exportation in pursuance "of trading transactions, cannot be described as a tax whose "incidence is, by its nature, such that normally it is finally "borne by the first payer, and is not susceptible of being "passed on. On the contrary, the existence of an export tax "is invariably an element in the fixing of prices, and the "question whether it is to be borne by seller or purchaser in "whole or in part is determined by the bargain made. The "present tax thus exhibits the leading characteristic of an "indirect tax as defined by authoritative decisions."

In the first fuel oil case (*Attorney-General of British Columbia vs. Canadian Pacific Railway Company*: 2 Cameron p. 441; 1927 A.C. 934) the tax was on the first purchaser of the fuel oil after its manufacture. It was clear from the wording of the Act (in using words "first purchaser") that other purchases were contemplated and that in consequence the tax would be expected and intended to be passed on.

Furthermore, there is no tendency to pass this tax on to the ultimate consumer if, as is contended by the Railway Company but disputed by the Respondent, the tax is really borne by that company and not by the purchaser of the timber. It has been decided that in such case the tax is direct: *City of Montreal vs. Attorney-General for Canada,* 2 Plaxton 312, 1923 Appeal Cases 136.

It is submitted that if the tendency of this tax is that it will fall on the owner of the land, this is inconsistent with the suggestion that it will fall on the purchaser from the person taxed. It

cannot fall forwards and backwards at the same time. If the incidence of the tax falls on the owner of the land without affecting its validity, that is the determining factor.

Respectfully submitted.

J. W. DE B. FARRIS,

JOHN L. FARRIS,

Counsel for the Attorney-General of British Columbia.

RECORD

In the Supreme Court of Canada

No. 17
Formal Judgment
June 25, 1948

No. 17

IN THE SUPREME COURT OF CANADA

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

FRIDAY THE 25th DAY OF JUNE, A.D., 1948

PRESENT:

The Honourable Mr. Justice Kerwin
The Honourable Mr. Justice Rand
The Honourable Mr. Justice Kellock
The Honourable Mr. Justice Estey
The Honourable Mr. Justice Locke

BETWEEN:

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

and

THE ATTORNEY-GENERAL OF BRITISH COLUMBIA
Respondent

THE APPEAL of the above-named appellants from the Judgment of the Court of Appeal for British Columbia so far as it relates to the answers to all questions before the Court except Question 4, and the cross-appeal of the above-named respondent from the said judgment of the said Court so far as it relates to Question 4, pronounced in the above cause on the 10th day of June in the year of our Lord 1947 answering certain questions referred to the said Court pursuant to the provisions of the "Constitutional Questions Determination Act" (R.S.B.C. 1936 Chapter 50) by order in Council 2699, approved the 13th day of November, 1946, amended by Order-in-Council 69 approved the 15th day of January, 1947, having come on to be heard before this Court on the 9th, 10th, 11th, 12th, 13th and 16th days of February, in the year of our Lord 1948, in the presence of counsel as well for the appellants as the respondent, whereupon and upon hearing what was alleged by counsel aforesaid, this Court was pleased to direct that the said appeal should stand over for judgment, and the same coming on this day for judgment,

THIS COURT DID ORDER AND ADJUDGE that the said appeal should be and the same was allowed; that the said cross-appeal should be and the same was dismissed; AND that the said judgment of the Court of Appeal for the Province of British Columbia, except insofar as it relates to the answer to Question 4, should be and the same was reversed and set aside.

AND THIS COURT DID FURTHER ORDER AND ADJUDGE that the answers to the questions should be as follows:

QUESTION 1. The Commissioner was right in his finding that there never was any contractual relationship between the Provincial Government and the contractors in relation to the transfer of the Railway belt to the railway company and the answer to the first part of the question is, therefore, yes. The Commissioner was not right in his finding that there never was any contractual relationship between the Provincial Government and the railway company in relation to the transfer of the railway belt to the railway company and the answer to the second part of the question is, therefore, no,

Question 2, Yes,

Question 3, No,

Question 4, Yes,

Question 5, No,

Question 6, No,

Question 7, As to the first part thereof, no; as to the second part thereof, yes.

Paul Leduc,
Registrar.

RECORD

In the Supreme Court of Canada

No. 18
Reasons for Judgment
Locke, J.
June 25, 1948

No. 18

Esquimalt & Nanaimo Railway Company
and
Alpine Timber Co. Ltd.
and
Attorney-General of Canada
v.
Attorney-General of British Columbia

Judgment of
The Honourable
Mr. Justice Locke
and
The Honourable
Mr. Justice Kerwin

CORAM:

KERWIN, RAND, KELLOCK, ESTEY and LOCKE, J.J.

The judgment of Kerwin and Locke, J.J. was delivered by Locke, J.:—

There are two matters to be determined in answering Question 1 and the first of these is as to whether the Commissioner was right in finding that there never was any contractual relationship between the Provincial Government and the contractors. It is common ground that the expression "Provincial Government" is intended to mean His Majesty in right of the Province of British Columbia and that the question is as to whether there is a contract to exempt the lands in question from taxation in the manner provided by sec. 22 of the Settlement Act.

It is conceded that there was no written agreement between the contractors and the Province: if there was an oral agreement made on or prior to August 20th, 1883, no witness is available to prove it since the then Premier, Mr. Smithe, and Mr. Robert Dunsmuir and his associates are long since dead, and the existence of such a contract if there was one must, therefore, be a matter either of inference from the known facts, or the legal result of the actions of the parties so far as they are now capable of proof.

By the terms of Union the Colony of British Columbia became part of the Dominion of Canada on July 20th, 1871, and by sec. 11 the Government of the Dominion undertook to secure the commencement simultaneously, within two years from the date of Union, of the construction of a railway from the Pacific towards the Rocky Mountains, and from such point as might be selected, east of the Rocky Mountains, towards the Pacific, to

connect the sea board of British Columbia with the railway system of Canada, and to secure the completion of such railway within ten years from the date of the Union: on its part the Government of British Columbia agreed to convey to the Dominion, in trust, to be appropriated in such manner as the Dominion Government might deem advisable "in furtherance of the construction of the said railway, a similar extent of public lands along the line of railway, throughout its entire length in British Columbia, (not to exceed, however, twenty miles on each side of the said line) as may be appropriated for the same purpose by the Dominion Government from the public lands in the Northwest Territories and the Province of Manitoba." The section further provided that the quantity of land which might be held under pre-emption right or by Crown grant within the limits of the tract of land in British Columbia to be so conveyed to the Dominion should be made good to the Dominion from contiguous public lands. In consideration of the land to be so conveyed in aid of the construction of the railway, the Dominion agreed to pay to British Columbia from the date of the Union the sum of $100,000. per annum. In addition to other obligations assumed by Canada, it was to guarantee the interest for ten years from the date of the completion of the works on such sum not exceeding £100,000 sterling, as might be required for the construction of a first class graving-dock at Esquimalt.

The failure of the Dominion to commence the construction of the railway and to complete it within the times limited by sec. 11 gave rise to great dissatisfaction in the new Province. With the merits of the various disputes which arose between the Dominion and the Province in consequence, all of which were composed by the Settlement Act (Cap. 14, Statutes of B.C. 1884), we are not here concerned. While the Dominion had by Order-in-Council passed on June 7th, 1873, fixed Esquimalt as the terminus of the proposed railway and asked for the conveyance of a strip of land twenty miles in width along the east coast of Vancouver Island between Seymour Narrows and the Harbour of Esquimalt, in furtherance of the construction of the railway, and this request had been extended in March, 1875, by a request that the belt of land to be conveyed should be twenty miles on each side of the proposed railway on Vancouver Island, and while the Province had by cap. 13 of the Statutes of 1875 granted to the Dominion Government, in trust, to be appropriated in such manner as it might deem advisable an area of public lands not to exceed twenty miles on each side of the proposed line between Esquimalt and Nanaimo, the Province had considered itself at liberty to rescind the land grant and, by cap. 16 of the Statutes of 1882, the Act of 1875 which authorized the grant was repealed.

While all matters in dispute were settled by the Act of December, 1883, the attitude adopted on behalf of the Dominion and of the Province, respectively is of importance in considering the question to be determined. The position taken by the Dominion is summarized in a report of a Committee of the Privy Council approved by the Governor General in Council on May 17th, 1881, and addressed to the Minister of Railways and Canals, which, stated shortly, was that while it had originally been contemplated that the railway should run by Bute Inlet and an Order-in-Council had been passed declaring that Esquimalt should be the terminus on the Pacific coast, further information had disclosed that this was inadvisable and that it had been determined in October, 1879, that the Western terminus of the road should be on Burrard Inlet, which was a compliance with the terms of sec. 11. As to the terms proposed by Lord Carnarvon, then Secretary of State for the Colonies, made for the purpose of ending the differences which had arisen between the Dominion and the Province and which recommended that the railway from Esquimalt to Nanaimo should be commenced as soon as possible and completed with all practicable despatch, the Government of Canada took the attitude that while entitled to every respect they had never received the sanction of the Parliament of the Dominion and that, on the contrary, a bill to give effect to these terms having been introduced by the Government into the House of Commons, providing for the construction of the Esquimalt and Nanaimo line, though passed by the House was lost in the Senate and, in the words of the report, "consequently Parliamentary sanction refused to the construction of what was regarded by the majority in the Senate as a Provincial work quite unnecessary to the fulfillment of the terms of Union with British Columbia." The report further recited that a contract had been entered into and received the sanction of Parliament for the construction of the railway from the end of the existing system near Lake Nipissing to Burrard Inlet (this referring to the contract made by the Dominion and the persons who became the incorporators of the Canadian Pacific Railway Company, which forms a schedule to cap. 1, Statutes of Canada 1881), that Parliament had not authorized the construction of the Esquimalt and Nanaimo line and that, in view of the large expenditure involved in the building of the Canadian Pacific Railway, it was not probable that it would do so.

The position taken by the Province was as stated in an Order-in-Council passed on February 10th, 1883, a copy of which was forwarded by the Lientenant-Governor to the Secretary of State on that date. Briefly this was that the Province, upon being advised in 1873 that an Order-in-Council had been passed by the

Dominion fixing Esquimalt as the terminus of the Canadian Pacific Railway and deciding that a line of railway should be located between the Harbour of Esquimalt and Seymour Narrows, had first reserved a belt of land twenty miles in width between these two places and thereafter, on the request of the Dominion, conveyed these lands to it for railway purposes, that communications passing between the Province and the Dominion showed that both parties understood that the eleventh section of the Terms of Union required the construction of the road on the Island as a section of the Canadian Pacific Railway and that the Dominion had defaulted in complying with its obligations. The Order-in-Council recited that the reservation of the railway belt on the Island and the withholding of these lands from development or settlement had caused great injury to the commercial and industrial interests of the Province, and the Committee recommended as a basis of settlement between the Governments of the railway and railway lands questions

> "that the Dominion Government be urgently requested to carry out its obligation to the Province by commencing at the earliest possible period the construction of the Island Railway and complete the same with all practicable despatch, or by giving to 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".

While the negotiations between the Dominion and the Province which followed resulted in a settlement, it is of importance to note that at the session of the Provincial Legislature in 1882 an Act to incorporate the Vancouver Land and Railway Company had been passed in pursuance of a petition presented by Lewis M. Clement et al, praying for the incorporation of a company for the purpose of constructing and working a railway from Esquimalt Harbour and for a grant of public lands in aid thereof, and that the Act of 1875 which authorized the land grant to the Dominion was repealed. The Act, cap. 15 Statutes of 1882, (hereinafter referred to as the Clement Act) constituted the applicants a body corporate by the above name, and by sec. 9 the company was required to lay out, construct, acquire, equip, maintain and work a continuous line of railway from a point on Esquimalt Harbour to a point on Seymour Narrows: the survey was to be commenced within sixty days after the Government should have notified the company that it was prepared to set apart and reserve to the company the lands referred to, and it was provided that not less than ten miles of the portion of the railway between Esquimalt and Nanaimo should be completely constructed,

equipped and in running order on or before July 1st, 1883, and the entire railroad was to be constructed and equipped on or before the 1st day of July, 1890. Sec. 17 required the company to give security to the satisfaction of the Government of the Province to the extent of $250,000. for the due construction of the railway in accordance with the terms of the Act, and provided that if this was not given within sixty days from the repeal by the Legislature of the Esquimalt and Nanaimo Railway Act 1875, which had authorized the grant of the railway belt on the Island to Canada, a sum of $10,000. required to be deposited should be forfeited and the provisions of the Act should be "null and void." Sec. 18 provided that upon satisfactory security having been given and "in consideration of the completion and perpetual and efficient operation of the said railway by the company" the Government would set apart and reserve to the company 1,900,000 acres of public land lying on both sides of the proposed line between Esquimalt and Seymour Narrows, and upon completion of the railway, in accordance with the terms of the Act should grant the fee simple in the said lands to the company. Sec. 21 provided a limited exemption from taxation for the railway and its properties and the capital stock of the company, and that "the lands of the company shall also be free from provincial taxation until they are either leased, sold, occupied or in any way alienated." Nothing resulted, however, from this legislation: the company did not provide the security stipulated for and its rights under the statute lapsed and the Province was again at liberty to resume its negotiations with the Dominion.

When on February 10th, 1883, the Lieutenant-Governor sent to the Secretary of State the copy of the report of the Provincial Executive Council the Dominion Government sent Mr. Trutch to Victoria to negotiate with the Province in an endeavour to settle all matters in dispute. Negotiations were carried on between Mr. Smithe, the Premier of the Province, and Mr. Trutch on behalf of the Dominion. Sir John A. Macdonald had advised the Premier that the Dominion Government was prepared to submit to Parliament the proposals of the Province, with such modifications as might be settled on with Mr. Trutch and concurred in by the Dominion Government, and stipulated that the Provincial Legislature should legislate first. On May 5th, 1883, Mr. Trutch wrote to the Premier making certain proposals on behalf of the Dominion, these including the suggestion that the Province should grant to the Dominion a portion of the lands described in the Clement Act and procure the incorporation by Act of the Legislature "of certain persons to be designated by the Government of Canada for the construction of the railway from Esquimalt to Nanaimo, and offering inter alia, on behalf of

the Dominion to appropriate these lands and the sum of $750,000. to be paid as the work proceeded to the proposed company, provided it gave satisfactory security for the completion of the railway within three and a half years from the date of its incorporation.

On May 7th, 1883, an Order-in-Council of the Provincial Executive Committee, which had considered these proposals, after reciting the desirability that the long-standing dispute should be settled and that the Dominion and the Province should unite in a common endeavour to open the country to settlement, recommended their acceptance.

On May 9th, 1883, a Dominion Order-in-Council, after reciting the proposals made by the Lieutenant-Governor on behalf of the Province in his communication of February 10th, 1883, authorized the making of counter proposals without prejudice, which included the following:

> "The Provincial Government shall grant to the Dominion Government the lands in Vancouver Island specified in Mr. Dunsmuir's last proposal for the construction of the Esquimalt and Nanaimo Railway.
>
> That the British Columbia Government shall procure an Act of Incorporation for such parties as shall be designated by the Dominion Government for the construction of the Railway on Vancouver Island.
>
> That the Dominion Government shall appropriate the lands on Vancouver Island and a sum of $750,000. to be paid as the work proceeds, to a Company to be incorporated at their instance by the Legislature of British Columbia, and which Company shall give satisfactory security for the completion of the Railway from Esquimalt to Nanaimo within four years from the date of the Act of Incorporation".

While these matters were taking place the Provincial Legislature was in session at Victoria and on May 12th, 1883, passed an Act relating to the Island Railway, the Graving Dock and Railway Lands of the Province: cap. 14, Statutes of B.C. 1883, hereinafter referred to as the May Act. The text of this statute had been submitted in advance to Mr. Trutch and by him transmitted to the Prime Minister, and on the day the Act was passed the former wrote to the Premier pointing out that certain provisions of the Act, in particular one which recited that "the Government of Canada agrees to secure the construction of a rail-

way from Esquimalt to Nanaimo," were not in conformity with the proposals made in the letter of May 5th. The Premier took the attitude that the Act was in accordance with the arrangements made between Mr. Trutch and himself; the latter said that any position he had taken in the negotiations was expressed to be subject to the approval of the Government of Canada and, by a letter of May 15th, informed the Premier that he had received a message from the Prime Minister directing him to communicate to the Premier that "Parliament long ago refused to build the Island Railway and cannot successfully be asked now to change that policy" and that the Dominion Government had offered to ask Parliament to vote $750,000. "to subsidize a company to construct that railway and to take satisfactory security from such company for the construction of that work," and regretted the offer had not been accepted. On May 23rd the Premier telegraphed to the Prime Minister regarding the matter and on the following day the latter replied:

> "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".

Negotiations were continued between the two Governments during the latter part of May and in June of 1883, and by an Order-in-Council of June 23rd the Dominion authorized the Minister of Justice, Sir Alexander Campbell, to proceed to Victoria in an endeavour to bring the matter to a conclusion. The instructions to the Minister included the following:—

> "That Sir Alexander Campbell should then communicate with Mr. Dunsmuir or other capitalists who are understood to be desirous of forming a company to construct the railway under the terms of the Provincial Act."

On the arrival of Sir Alexander Campbell he apparently carried on negotiations not only with the Provincial Government, in regard to the amendment to the May Act upon which the Dominion insisted, but also with Mr. Dunsmuir and his associates. In these negotiations the Dominion maintained the position it had taken in the Order-in-Council of May 17th, 1881, regarding the obligations of Canada in respect to the Island Railway. In a

letter addressed by Sir Alexander Campbell to the Premier on August 6th, 1883, a copy of a proposed contract for the construction of the railway between the Dominion and Dunsmuir et als was submitted for the consideration of the Provincial Government. What part, if any, the Province had taken in these negotiations is not known. The letter, after stating that a copy of the proposed contract (in draft) for the construction of the railway was enclosed and the suggestions of the Premier invited, said in part:—

> "The Government of the Dominion are anxious that in all respects it should meet the just expectations of the Government of your Province. 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 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 part of the Government of Canada."

After stating that he proposed on obtaining the approval of the local Government to the contract to execute it and that Mr. Dunsmuir and his friends would be invited to do so, the letter said that after having it executed the writer thought the contract should be placed in the hands of Mr. Trutch "awaiting the change which your Legislature is to make in the Act relating to the Island Railway, by striking out any language under which Canada might be called upon to construct or secure the construction of the railway, and substituting language involving an obligation simply to take security for such construction to the satisfaction of your Government. The clause in the Island Railway Act relating to the sale to actual settlers for four years at a dollar an acre has, I understand, received the assent of Mr. Dunsmuir and his friends." An August 17th Sir Alexander Campbell again addressed the Premier, noting that he had had no reply to the above quoted letter and asking whether the Provin-

cial Government would have any objection to the $250,000. to be deposited by the contractors being invested in approved securities. On the day following the Premier answered, saying that he had carefully considered the proposed contract and had a few suggestions to make and suggested an interview to discuss them: as to the cash deposit being exchanged for approved securities he saw no objection but added that "in the event of the forfeiture of the security by the contractors it ought to be understood that it would be handed over to the Province by the Dominion Government." In a reply written on the same date Sir Alexander Campbell declined to agree to this latter proposal saying that the disposition of the security in case of default "must depend upon the circumstances of the moment, and unless the Dominion should be released from all obligations in the matter they would not hand over the security but retain it for the purpose for which it was given."

On August 20th, 1883, a memorandum of agreement was signed by Sir Alexander Campbell and Mr. Smithe providing, inter alia, that the Government of British Columbia would invite the adoption by the Legislature of certain amendements to the May Act, such amendments being indicated by red lines in the copy of the proposed new Bill annexed to the memorandum and that the said Government "will procure the assent of the contractors for the construction of the Island Railway to the provisions of clause (f) of the agreement recited in the amending Bill". That clause provided that the lands on Vancouver Island to be conveyed to the Dominion should with certain exceptions be open for four years from the passing of the Act to actual settlers, for agricultural purposes, at the rate of one dollar an acre, to the extent of 160 acres to each such actual settler, and that in any grants to settlers the right to cut timber for railway purposes and rights of way for the railway, and stations, and workshops should be reserved: in the meantime and until the railway should be completed the Government of British Columbia was to be the agent of the Government of Canada for the purpose of administering these lands, for the purposes of settlement, and provision was made for the making of pre-emption records by the Government of the Province and for the deposit of all moneys received by the Province in respect of such administration into the Bank of British Columbia, to the credit of the Receiver General of Canada, and that such moneys, less expenses, should upon completion of the railway be paid over to the railway contractors. The memorandum further stipulated that upon the amending Bill becoming law in British Columbia and the assent of the contractor for the construction of the railway to the provisions of clause (f) above referred to being obtained, the Government of

the Dominion would seek the sanction of Parliament to enable them to give effect to the stipulations on their part contained in the agreement recited in the amending Bill. On the same day Sir Alexander Campbell, acting on behalf of the Minister of Railways and Canals of Canada, signed a contract for the construction of the Esquimalt and Nanaimo Railway with Robert Dunsmuir and his associates.

In view of the letter of the Premier of August 18th, it may be assumed that the terms of this contract were approved by the representatives of the Province. While the Dominion was the contracting party, its representatives had made it abundantly clear in the correspondence that Canada assumed no responsibility for the non-completion or delay in the progress of the work and considered its part in the matter as being restricted to the payment of the $750,000. as the work progressed and the transfer after it was completed of the land grant which the Province had placed in its hands for that purpose. While of importance to the Dominion as a whole, in that the development and progress of the Province would contribute to the welfare of the country as a whole, the Island Railway was after all primarily a matter of Provincial concern: with the exception of the money contribution and the granting of foreshore rights it was the Province which was contributing the consideration for the building of the road. As might be expected under these circumstances, the contract imposed upon the contractors not merely the obligation to build and equip the line from Esquimalt to Nanaimo but also to maintain and "work continuously" the said line and a telegraph line throughout and along the railway line (sec. 3) and (by sec. 9) a covenant that they would "in good faith keep and maintain the same and the rolling stock required therefor in good and efficient working and running order; and shall continuously and in good faith operate the same, and also the said telegraph line, and will keep the said telegraph line and appurtenances in good running order." The Bill referred to in the memorandum of agreement signed on the same date by the representatives of the Province and the Dominion, which was to amend the May Act, contained in sec. 27 a provision that the Esquimalt and Nanaimo Railway Company

> "shall be bound by any contract or agreement for the construction of the railway from Esquimalt to Nanaimo which shall be entered into by and between the persons so to be incorporated as aforesaid and Her Majesty represented by the Minister of Railways and Canals, and shall be entitled to the full benefit of such contract or agreement which shall be construed and operate in like manner as if such company

had been a party thereto in lieu of such persons, and the document had been duly executed by such company under their corporate seal".

The necessity for this is apparent: the subsidies were to be given to ensure not merely the construction of the railway and telegraph lines but also their operation in perpetuity. It was apparently considered necessary to obtain the covenant of the contractors as well as that of the company to be formed and in addition to impose the obligation to operate in the statute of incorporation which, by sec. 9, required the company to "lay out, construct, keep, maintain and work the railway and telegraph lines." The contract also referred to the agreement between the two Governments whereby the Province would procure the incorporation "of certain persons to be designated by the Government of Canada" for the construction of the road and the Dominion agreed to grant to the contractors a subsidy of $750,000. and the lands it was to receive from the Province "for which subsidies the construction of the railway and telegraph line from Esquimalt to Nanaimo shall be completed and the same shall be equipped, maintained and operated."

That Mr. Dunsmuir must have been a party to the negotiations which resulted in the agreement between the Dominion and the Province of August 20th is, I think, apparent. The terms of the proposed Settlement Act were, of course, of vital importance to the contractors and the reference to the draft Bill identified by the signatures of Sir Alexander Campbell and the Honourable Mr. Smithe in clause 15 of the contract made with them makes it evident that Mr. Dunsmuir was satisfied with the terms of the proposed Act prior to the signing of the memorandum on behalf of the two Governments on August 20th. That memorandum had required the Province to obtain the approval of the contractors to the very material change made in clause (f) of the May Act, and it was apparently in consequence of this that by a memorandum dated at Victoria on August 22nd, 1883, Robert Dunsmuir wrote on a copy of the draft which had been signed by Messrs. Campbell and Smithe the following:—

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

By the terms of these documents neither the memorandum signed on behalf of the two Governments nor the contract with Dunsmuir et als were to become binding until both the Legislature of the Province and the Dominion Parliament had acted and meanwhile the documents were held in escrow. In due course

the Settlement Act was passed by the Legislature in December 1883 and the agreement with the contractors authorized by Parliament by cap. 6 of the Statutes of 1884, and by an Order-in-Council of April 12th, 1884, Mr. Dunsmuir and his associates were named as the persons to be incorporated as the Esquimalt and Nanaimo Railway Company.

While the agreement for the construction of the railway required that the lands should be conveyed to the contractors, the statute passed by the Legislature, as has been shown, provided that the Esquimalt and Nanaimo Railway Company should be entitled to the full benefit of that contract, and all parties understood that it was to the company that the conveyance would be made and this was done upon the completion of the road in 1887. While it appears to me to be obvious from the events above recited that Robert Dunsmuir, acting on his own behalf and on behalf of his associates, was a party to the negotiations which resulted in the two agreements of August 20th, 1883, the passing of the Settlement Act and of the Dominion Act of 1884 and the construction of the railway and while it may perhaps be assumed that the Provincial Premier assured him that his Government would pass the Settlement Act, I am unable to find sufficient evidence of an agreement between these contractors and the Province of British Columbia that the lands to be granted would be subject to the tax exemption embodied in sec. 22 of the Settlement Act. These negotiations took place nearly sixty-five years ago and there is no living witness to testify what took place between the contractors and the Government. I think the proper inference to be drawn from the facts as disclosed by the documents is that Dunsmuir and his associates, having the covenant of the Dominion that the subsidies would be given and the Dominion having agreed with the Province that the Legislature would be asked to pass the Settlement Act and Parliament asked to ratify the agreement with the Province and authorize the granting of these subsidies, would be most unlikely to ask the Province to contract with him and his associates for the tax exemption. Being assured on August 20th, 1883, that the two Governments proposed to take these steps and being safeguarded by the arrangement that the agreement for the construction of the road would not become binding until the two Governments had legislated, it would, I think, be assumed by Mr. Dunsmuir that the statutory exemption from taxation contained in sec. 22 of the Provincial Act, which undoubtedly was a material part of the consideration to be received from the Province in exchange for the covenant to build, maintain and operate the railway and telegraph line, would protect the company to be formed as amply as if the same terms had been included in a formal agreement

with the Province. While the contractors should be assumed to have known that the Interpretation Act (cap. 2 Consolidated Acts 1877) by sec. 7 (31) provided that every Act shall be so construed as to reserve to the Legislature the power of repealing it or amending it or of revoking or modifying any power, privilege or advantage thereby vested in or granted to any person or party whenever the Legislature should deem such modification required for the public good, it would not, I think, occur to these business men nor their advisers that where an exemption such as this was granted as part of the consideration for the construction and operation of the Island Railway such power would be exercised.

I conclude, therefore, that the answer to the first part of the first question is that the Commissioner was right in finding that there was no contract between the Province and the contractors to exempt these lands from taxation in the terms of sec. 22.

As to the second part of the first question: if there was a contract between the Province and the Esquimalt and Nanaimo Railway Company it is either evidenced by the statute itself or must be implied by reason of what occurred between the parties after the passing of the Order-in-Council of April 12th, 1884, which presumably was communicated to the Provincial authorities then or shortly thereafter.

There is, in my opinion, much to be said for the view that the contract is evidenced by the statute. In form it differs materially from that commonly adopted for the incorporation of companies to carry out business enterprises. A comparison with statutes of this nature in British Columbia, both before and after the passing of the Clement Act, such as caps. 2 and 3 of the Statutes of 1878, cap. 25 of the Statutes of 1881, cap. 33 of the Statutes of 1883 and cap. 31 of the Statutes of 1884, shows that in the case of companies applying for powers to carry out various enterprises the language used to grant such powers is permissive while in the Clement Act, the May Act and the Settlement Act the sections authorizing the construction and operation of the railway and telegraph lines are mandatory in form. In the case of the Settlement Act the language used is:—

> "The company and their agents and servants shall lay out, construct, equip, maintain and work"

the railway and telegraph lines from Esquimalt to Nanaimo and sec. 27, as has been noted, provided that the company shall be bound by the covenants in the construction contract which obligated the contractors to maintain and work continuously the

said lines. The word "shall" was by the Interpretation Act, cap. 2, Consolidated Statutes of 1877, sec. 6 (and by cap. 1, R.S.B.C. 1936, sec. 23 (1) to be construed as imperative "unless it be otherwise provided and there be something in the context or other provisions thereof indicating a different meaning or calling for a different construction." There is nothing in the context to suggest that any other meaning should be assigned to the word in secs. 9 and 27: on the contrary, it is clear that that is what was intended, since otherwise the railway company might have simply built the line for the purpose of obtaining the valuable subsidies and discontinued operation if it proved unprofitable. It will be seen that the same language was employed in these sections in the May Act and that a similar obligation was imposed by sec. 9 of the Clement Act and it appears to me not improbable that the draftsmen considered the Act incorporating the Canadian Pacific Railway Company (cap. 1, Statutes of 1881) and the contract forming a schedule to that Act which authorized large grants of money and lands in consideration of the completion and perpetual and efficient operation of the railway in settling the form of the legislation. The Settlement Act not only bound the railway company by the covenants of the contractors in this respect but also imposed upon them a statutory duty to build, equip, maintain and operate the line. The agreement between the Province and the Dominion confirmed by the statute obligated the Dominion to hand the lands over to the contractors and paragraph 15 of the construction contract determined the time when this should be done. While sec. 18 of the Clement Act provided that the Province, in consideration of the completion and perpetual and efficient operation of the railway, should set apart the lands described and convey them to the company on the completion of the railway and sec. 21 provided the exemption from taxation, the plan adopted in both the May Act and the Settlement Act was that the land should be conveyed to the Dominion in trust and turned over to the company upon the completion of the road: in the result the only difference was that the lands which constituted the main consideration to be received by the railway company were conveyed by a trustee rather than directly from the Province. The obligation of the Province to exempt the lands from taxation upon the terms of sec. 22 was not to arise unless and until the lands were conveyed by the Dominion to the Railway Company and this, it was contemplated, would be some years hence: no question of taxation was involved so long as the lands remained vested in the Dominion. I think the obligation imposed by sec. 22 was no less an obligation of the Crown than that cast upon it by the section of the Vancouver Island Settlers' Rights Act, 1904, considered by the Judicial Committee in *McGregor v. Esquimalt and Nanaimo Railway Company,* 1907 A.C. 462, and

referred to by Sir Henri Elzéar Taschereau at 467, and that the right to enforce performance of this duty became vested in the railway company. As I see the matter, the statutory obligation of the Province to exempt the lands from taxation upon the terms of sec. 22 continues in perpetuity in the same manner as the obligations of the railway company under secs. 9 and 27, subject of necessity to the right of the Province to repeal the exempting section, a power expressly reserved by sec. 7 (31) of the Interpretation Act, (cap. 2 Consolidated Acts 1877: sec. 23 (8) cap. 1, R.S.B.C. 1936).

While the Settlement Act, with the exception of the preamble and the first seven sections, relates entirely to the obligations and powers of the railway company, and the status of certain of the assets to be acquired by it in regard to taxation it is not declared to be a private Act and is, therefore, to be deemed a public Act (sec. 7 (37) cap. 2 Consolidated Acts 1877: sec. 23 (7), cap. 1, R.S.B.C. 1936). Unlike private Acts incorporating other companies for the purpose of carrying on business enterprises, it was not passed pursuant to a petition filed by the promoters asking for formation of the company with specified powers but pursuant to the arrangements hereinbefore described. In *Davis v. Taff Vale Railway Company,* 1895 A.C. 542, Lord Macnaghten at p. 559 said in part:—

> "Ever since it has become the practice of promoters of undertakings of a public nature to apply to Parliament for exceptional powers and privileges, the Acts of Parliament by which those powers and privileges are granted have been regarded as parliamentary contracts, as bargains between the promoters on the one hand and Parliament on the other —Parliament acting on behalf of the public as well as on behalf of the persons specially affected. Those powers and privileges are only conceded on the footing that the concession is for the benefit of the public who are likely to use the railway as well as for the benefit of the promoters."

It may be noted that the expression here used "parliamentary contract" is stated in the Third Edition of Lindley on Partnerships and Companies, p. 155 (published in 1878) to have been the name by which the contract signed by the subscribers when petitioning for incorporation was commonly called. The signing of such a contract by the subscribers, whereby each covenanted to pay a sum set opposite his name either as a part of the estimated expense of the undertaking or of the capital it was proposed to raise, was apparently a pre-requisite of incorporation. In the same case Lord Watson said, p. 552, in part:—

"In cases where the provisions of a local and personal Act directly impose mutual obligations upon two persons or companies, such provisions may, in my opinion, be fairly considered as having this analogy to contract, that they must, as between those parties, be construed in precisely the same way as if they had been matter, not of enactment, but of private agreement. It was in that sense that in *Countess of Rothes v. Kirkcaldy Waterworks Commissioners,* 7 A.C. at p. 707, I ventured to observe that 'such statutory provisions as those of sect. 43 occurring in a local and personal Act,' must be regarded as a contract between the parties, whether made by their mutual agreement, or forced upon them by the Legislature.' For all purposes of construction, I thought that the provisions which the House had to interpret might be legitimately viewed in that light. But it did not occur to me then, nor am I now of opinion, that the analogy of contract, for it is nothing more, could, in an English case especially, be carried further.

The provisions of a Railway Act, even when they impose mutual obligations differ from private stipulations in this essential respect that they derive their existence and their force, not from the agreement of parties, but from the will of the Legislature."

In an early case, *Sir John Brett v. Cumberland* (1688) 3 Bulstrode, 164, where Queen Elizabeth had by letters patent made a lease of certain mills in which there was a clause binding the grantee and his assigns to repair the mills and leave them in a proper state of repair at the end of the term, the successor in title of the grantee was held liable in an action of covenant though his predecessors had not signed the instrument of grant. In *Lyme Regis v. Henley* (1834) 2 Cl. and F. 331, where the King had granted to the Mayor and Burgesses of Lyme Regis the borough so called and also the pierquay or cob, with all liberties and profits belonging to the same and willed that they and their successors should repair, maintain and support the buildings, banks, seashore, etc. it was held that having accepted the letters patent the defendants were liable to repair. Park, J. deciding the matter, considering that the decision in Sir John Brett v. Cumberland was decisive of the matter, said in part (p 351):

"So in the charter in question, the words are in show the words of the King only, but the corporation having accepted the charter and enjoyed the benefits of it, as is averred in the declaration, they are as strongly bound as if they had covenanted expressly by an indenture".

In *Atkinson v. Newcastle Waterworks,* 1877 L.R. 2 Ex. D 441, 448, Lord Cairns dealing with the question as to when the breach of a public statutory duty might be the basis of an action for damages by an individual said:—

> "I cannot but think that that must, to a great extent, depend on the purview of the legislature in the particular statute, and the language which they have there employed, and more especially when, as here, the Act with which the Court have to deal is not an Act of public and general policy, but is rather in the nature of a private legislative bargain with a body of undertakers as to the manner in which they will keep up certain public works".

It will be noted that the language above quoted is referred to and adopted in *Johnston and Toronto Type Foundry Company v. Consumers' Gas Company,* 1898 A.C. 447, 455. In *Milnes v. Mayor, &c., of Huddersfield* (1886) 11 A.C. 511, the Earl of Selborne said (p. 523):—

> "It is true that this is a case of statutory obligation, not properly of contract; although Lord Eldon and other great judges regarded Acts of Parliament of this class, giving powers to promoters or undertakers who solicit them, and who are to receive remuneration in money for what under those powers they supply, as parliamentary contracts with the public, or at least with that portion of the public which might be directly interested in them."

In *La Ville de St. Jean v. Molleur* (1908) 40 S.C.R. 629, Idington, J. referred to, without expressly approving, the finding of the Supreme Court of the United States in *Trustees of Dartmouth College v. Woodward,* 4 Wheat. 518: in that case the college had been incorporated in the days when what became later the State of New Hampshire belonged to the British Crown and the attempted interference of that State occurred after it had become subject to the constitution of the United States and was thereby prohibited from enacting any "law impairing the obligation of contract:" Chief Justice Marshall there said (p. 643):—

> "This is plainly a contract to which the donors, the trustees and the Crown (to whose rights and obligations New Hampshire succeeds) were the original parties".

In the present case we are, however, dealing with a public statute even though in large part it deals with the incorporation and powers of a company, a matter commonly dealt with by pri-

vate Act. There was here no petition for incorporation nor anything corresponding to the parliamentary contract referred to by Lindley: rather was the statute enacted by the Province in pursuance of its agreement with the Dominion. I have been unable to find any evidence to support a contention that there was an agreement between the Province and the contractors, in advance of the incorporation, that the lands to be received by the company would be entitled to the exemption provided by sec. 22 and in my opinion, the Act cannot be regarded as a contract between the company and the Crown.

This does not, however, dispose of the matter. It is common ground that following the incorporation of the railway company it proceeded forthwith to construct the railway and telegraph lines and thus became entitled to and received the lands which had been conveyed by the Province to the Dominion in trust for that express purpose. It is clear beyond question that the railway company did this relying upon the exemption held out to it by the Province in sec. 22 of the Act. In *Plimmer v. Mayor, &c., of Wellington* (1884) 9 A.C. 699, the predecessor in title of the appellant had in the year 1848 erected a wharf on the bed and foreshore of Wellington Harbour for the purpose of a wharf and store, this being done by permission of the Crown: in 1855, in order to carry on his business of a wharfinger, he erected a jetty extending to a considerable distance from the shore: in 1856, at the request and for the benefit of the Government, he incurred large expenditures for the extension of his jetty and the erection of a warehouse, and in subsequent years the Crown used, paid for, and, with the consent of the lessor, improved the said land and works: it was held that while the lessor must be deemed to have occupied the ground from 1848 under a revocable license to use it for the purposes of a wharfinger, that by virtue of the transactions of 1856 such license ceased to be revocable at the will of the Government and that the lessor had acquired an indefinite or perpetual right to the jetty for these purposes. Sir Arthur Hobhouse, after saying that the law relating to cases of this kind might be taken as stated by Lord Kingsdown in *Ramsden v. Dyson,* L.R. 1 H.L. 129, said in part (p. 712):—

> "This is a case in which the landowner has, for his own purposes, requested the tenant to make the improvements. The Government were engaged in the important work of introducing immigrants into the colony. For some reason, not now apparent, they were not prepared to make landing-places of their own, and in fact they did not do so until the year 1863. So they applied to John Plimmer to make his

landing-place more commodious by a substantial extension of his jetty and the erection of a warehouse for baggage. Is it to be said that, when he had incurred the expense of doing the work asked for, the Government could turn round and revoke his licence at their will? Could they in July, 1856, have deprived him summarily of the use of the jetty? It would be in a high degree unjust that they should do so, and that the parties should have intended such a result is, in the absence of evidence, incredible."

and at p. 714:—

"In this case their Lordships feel no great difficulty. In their view, the licence given by the Government to John Plimmer which was indefinite in point of duration but was revocable at will, became irrevocable by the transactions of 1856, because those transactions were sufficient to create in his mind a reasonable expectation that his occupation would not be disturbed; and because they and the subsequent dealings of the parties cannot be reasonably explained on any other supposition. Nothing was done to limit the use of the jetty in point of duration. The consequence is that Plimmer acquired an indefinite, that is practically a perpetual, right to the jetty for the purposes of the original licence, and if the ground was afterwards wanted for public purposes, it could only be taken from him by the legislature."

The decision, it appears to me, was based on the contract to be implied from the circumstances binding the Crown to permit Plimmer and his successors to occupy the lands in perpetuity. It was interpreted in this way in the judgment of Lord Russell of Killowen in *Canadian Pacific Railway v. The King,* 1931 A.C. 414, at 428. I think the principle that was applied in Plimmer's case is applicable in the present case: here the Province by holding out the promised tax exemption as one of the inducements offered to the railway company to build, equip and work the railway and telegraph lines must, in my view, be held to have agreed with it that upon the performance of this work and the consequent conveyance of the lands by the Dominion they would be entitled to the exemption provided by sec. 22.

On the second branch of the first question, I am of the opinion that the Commissioner was in error in finding that there was no contract between the Province and the Esquimalt and Nanaimo Railway Company to exempt these lands from taxation in the terms of sec. 22.

The tax suggested in the report of the Commissioner is there described as a "severance tax" to be imposed upon all timber cut upon lands of the Railway Company after the same are sold or otherwise alienated by it, to be in an amount approximating prevailing rates of royalty, and not to apply to lands already sold by the company, and the taxes referred to in Questions 4, 5 and 6 are, as I understand it, alternative proposals for carrying this recommendation into effect. In British Columbia all grants of timber lands made by the Crown prior to April 7th, 1887, were grants in fee without reservation of any royalty. The lands with which we are now concerned were part of the grant made by the Province to the Dominion by sec. 2 of the Settlement Act of 1884, and accordingly, whether in the hands of the railway company or of purchasers from the company, have been treated as exempt from liability for royalty. It appears that from 1887 to 1897 no records of the sale of timber land were kept by the railway company but from April 1898 to July 31st, 1944, it disposed of 763,565 acres of land containing 7,000,000,000 feet of timber. As of April 4th, 1944, there remained unsold 203,858 acres. Of the lands in the railway belt sold theretofore by the company there remained in 1938 some 336,000 acres of merchantable timber held by owners other than the company and these lands would be free of the proposed tax as well as all other Crown granted timber lands in the Province. As to Crown grants of timber lands made after that date, royalties of increasing amounts have been reserved to the Crown and at the rate fixed by the Forest Act in 1946 averaged $1.10 per thousand feet board measure while the average value of standing timber at that time was $2.00 per thousand.

The wording of sec. 22 is that 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." There are, in my opinion, two agreements in existence between the Province and the Esquimalt and Nanaimo Railway Company and the first of these obligated the Province to exempt the lands from taxation in the manner provided by the section. The agreement made between the principals on May 17th, 1912, which was ratified by the Esquimalt and Nanaimo Railway Company's Land Grant Tax Exemption Ratification Act, provided that the leasing of the railway and the operation thereof by the Canadian Pacific Railway Company shall not affect the exemption from taxation enacted by the said clause 22 of cap. 14 of the Statute 47 Vict. and notwithstanding such lease and operation such exemption shall remain in full force and virtue."

It, of course, cannot be suggested that either the contract between the railway company and the Crown or sec. 22 relieve these lands when they are used by the company for other than railroad purposes or leased, occupied, sold or alienated, from taxes levied generally upon other owners of Crown granted timber lands. However, that is not what is proposed here. While all other Crown granted timber lands and all such lands in the railway belt alienated by the company up to the present time are to remain exempt from the tax, the remaining fractional portion of the original grant will be affected by it. It is, of course, true that the suggested taxes will be paid directly by the purchasers from the railway company or their successors but it is nonetheless true that the money or substantially all of it will be taken from the coffers of the company. The proposal is that legislation imposing the tax in one of the various forms suggested will be enacted now, with the inevitable result that the value of the remaining stands of timber in the hands of the company will be reduced by approximately the amount of the taxes which the purchasers will be required to pay in exactly the same manner as if the Crown now imposed a lien or encumbrance upon the lands in the amount of the taxes to be paid. Thus while the railway company remains bound by the covenant given by the contractors to operate the railway and telegraph lines in perpetuity by reason of sec. 27 of the Settlement Act and under the obligation to so operate these lines imposed by sec. 9 of that Act, part of the consideration which it received for assuming that and other obligations will be taken away by the Province.

As to the 1912 agreement I think otherwise: the purpose of the agreement was to ensure to the railway company that the leasing of its lines to the Canadian Pacific Railway Company should not affect the exemption provided by sec. 22. The words "and notwithstanding such lease and operation 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" (*The Interpretation Act,* cap. 1, R.S.B.C. 1936, sec. 23 (a).)

The tax referred to in Question 4 is one to be imposed on timber as and when cut upon lands in the Island railway belt and the learned judges of the Court of Appeal are unanimous that such a tax would be ultra vires the Province as being indirect taxation. I agree with Mr. Justice Bird that such a tax would be borne either wholly by the Esquimalt and Nanaimo Railway

Company, or in part by that company and in part by the purchaser of the logs. It is, of course, obvious that as between the railway company and other owners of land in respect of which Crown grants were issued prior to April 5th, 1887, and which are free both of royalty or of the proposed tax, the former will realize from its timber a lesser amount and that this amount will presumably approximate the amount of the tax to which the railway lands are subject. As between these two owners the railway company is in effect selling timber lands subject to encumbrance while the other owner sells free of encumbrance. In practice the amount of merchantable timber upon the lands offered by the railway company would be ascertained by a cruise and the amount which would become payable as tax, or an amount estimated at the time of sale to be sufficient to pay the taxes as they become due, would be deducted from the market value of the standing timber. Despite the fact that in this manner the railway company will pay, if not all, at least much the greater part of the amount of the tax to become due, I think it would be found in practice that when the logs were thereafter sold, part at least of the tax and in any event if the tax levied was in excess of the amount estimated at the time of the purchase of the timber, the excess would be added to the price of the logs and be passed on to the purchaser. John Stuart Mill distinguished direct and indirect taxes by saying that the former is one which is demanded from the very persons who, it is intended or desired, should pay it, while the latter are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another. It appears to me to be perfectly clear that this tax would not be borne by the person who would pay it, since he would by the reduction in the purchase price have indemnified himself either wholly or in part at the expense of the railway company if he bought from them directly or, if not, at the expense of the person from whom he purchased the lands and that if not already thus fully indemnified at least the balance of the taxes would be added to the sale price of the logs and enter into the cost of products manufactured by them and thus be indirect.

I do not overlook that part of the judgment of Lord Hobhouse in *Bank of Toronto v. Lambe* (1887) 12 A.C. 575, 582, where it was said:—

> "The Legislature cannot possibly have meant to give the power of taxation, valid or invalid, according to its actual results in particular cases".

These remarks formed part of the passage from the judgment in *Lambe's case* quoted by Lord Warrington of Clyffe in

The King v. Caledonian Collieries Ltd. 1928, A.C. 358, 361. In *Brewers and Maltsters' Association of Ontario v. Atty. Gen. for Ontario,* 1897 A.C. 231, Lord Herschell, referring to the judgment in Lambe's case said (p. 236):—

> "Their Lordships pointed out that the question was not what was direct or indirect taxation according to the classification of political economists, but in what sense the words were employed by the Legislature in the British North America Act. At the same time they took the definition of John Stuart Mill as seeming to them to embody with sufficient accuracy the common understanding of the most obvious indicia of direct and indirect taxation which were likely to have been present to the minds of those who passed the Federation Act."

He then proceeds:—

> "In the present case, as in Lambe's Case, their Lordships think the tax is demanded from the very person whom the Legislature intended or desired should pay it. They do not think there was either an expectation or intention that he should indemnify himself at the expense of some other person."

If legislation imposing a tax of the nature referred to in Question 4 is imposed by the Legislature, I have no doubt that it will be with the intention that the burden of it will fall if not entirely upon the railway company then partly upon it and partly upon the purchaser of the logs and subsequent users of the product and, therefore, it would be indirect taxation.

The tax proposed in Question 5 differs from that in Question 4 since it would be upon the land when used by the railway company for other than railroad purposes or when leased or otherwise disposed of whereupon "the owner thereof shall thereupon be taxed upon such land as and when merchantable timber is cut and severed from the land."

Assuming the legislation were to impose the tax in this form, the fact that it was stated to be upon the land would not be decisive of the matter for the question of the nature of the tax is one of substance, and does not turn only on the language used by the local Legislature which imposes it, but on the provisions of the Imperial Statute of 1867 (*Atty. Gen. for Manitoba v. Atty. Gen. for Canada,* 1925 A.C. 561, Viscount Haldane at 566). The ground for the decision in *Union Colliery v. Bryden,* 1899 A.C. 577, was that the regulations there impeached were not really aimed at the regulation of coal mines at all, but were in truth devised to

deprive the Chinese, naturalized or not, of the ordinary rights of the inhabitants of British Columbia and, in effect, to prohibit their continued residence in that Province since it prohibited their earning their living in that Province (*Cunningham v. Tomey Homma,* 1903 A.C. 151, 157). Here, as was said by Lord Herschell in delivering the judgment of the Judicial Committee in the *Brewers and Maltsters Case,* supra, it is necessary to ascertain whether the Provincial Legislature under the guise of imposing direct taxation is in reality imposing indirect taxation. In considering whether what is intended is in reality a tax upon the land, it is of some importance to note that the tax is only payable when merchantable timber is cut and severed from the land and that the amount of it is to approximate the prevailing rates of royalty per thousand feet of merchantable timber. The amount of the tax bears no relation to the value of the land and would vary from year to year, depending upon the quantity of timber cut and if the timber was never cut no tax would ever become payable. The land itself, apart from the value of the merchantable timber, is largely worthless: it is a matter of common knowledge that the value of these timber lands depends almost entirely upon the merchantable timber which they contain and, in my opinion, while stated to be upon the land it is upon such timber that it is intended to levy the tax. Whether in respect to the merchantable timber upon the land when purchased from the railway company or such as may become merchantable thereafter, I am of opinion that the burden of the tax will fall upon persons other than the owner of the property from whom it will be demanded.

The tax proposed by Question 6 differs in this respect that when the land is used by the railway company for other than railroad purposes or when it is leased or otherwise alienated it is to be assessed at its fair market value and the owner taxed in a percentage of such value. This tax would be paid at the option of the taxpayer, either within a limited time after the assessment with a discount if paid within such time, or 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. I have no doubt that a calculation could be made under the first of these options which would produce a fair estimate of the present worth of the tax that might become payable under the second of these alternatives but, in view of the various dangers to which standing timber in British Columbia is subject, it seems to me highly improbable that purchasers would adopt any but the second of these optional methods. The destruction of the timber by fire would, of course, mean that, though the assessment had been made, if the owner had elected

to pay the tax as and when the timber was cut, no tax would ever become payable in respect of that timber. The tax suggested in Question 5 would be at approximately the prevailing rates of royalty: that proposed in Question 6 would be "in a percentage of the assessed value" and under the second option the tax to be paid per thousand feet board measure as the timber is cut would presumably approximate such rates. I think this indicates clearly 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 that tax by paying a lump sum does not alter the true character of the proposed legislation. I think this is indirect taxation for the same reasons that lead me to that conclusion in regard to the tax proposed in Questions 4 and 5.

The Forest Act, cap. 102, R.S.B.C. 1936, by sec. 123 as amended by cap. 29, Statutes of 1946, provides that from the owner of logged, unimproved and timber land there shall be payable and paid to the Crown on the 1st day of April in each year an annual tax at the rate of .06 cts for each acre, and all such payments are to be placed to the credit of the fund in the Treasury to be known as the Forest Protection Fund. Large contributions are made to this fund by the Province and its purpose, as the name implies, is the protection of forest lands in the Province from the various dangers to which they are subject. Question 7 asks whether the railway company is liable "to the tax (so-called)" imposed by this section in connection with the lands in question: the second part of the question asks whether these levies derogate from the provisions of sec. 22 of the Settlement Act.

Since the Esquimalt and Nanaimo Railway Company is the owner of timber land it is subject to these levies unless relieved of them by the contract made between the Province and the company when the road was constructed, or by reason of sec. 22 of the Settlement Act. The agreement is not in writing but as I am of the opinion that in this respect it obligated the Province to exempt the lands from taxes in the manner defined by sec. 22, the question to be decided is the meaning of that word in the section. The word is to be interpreted in its natural and ordinary sense and, this being so, I am of the opinion that these levies are properly classified as taxes. The Oxford English Dictionary defines a tax as being a compulsory contribution to the support of the Government levied on persons, property, income, commodities or transactions. In *Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy Limited,* 1933 A.C. 168, 175, the Judicial Committee held that the levies there under consideration were taxes being compulsorily imposed by a public

authority for public purposes and being enforceable by law. The forest lands of British Columbia, whether in the hands of the Crown or of private owners, are one of the most valuable assets of the Province, giving employment to great numbers of persons and yielding large annual revenues for Provincial purposes. These levies are, therefore, in my opinion, made for a public purpose; they are imposed by the Crown and the payment of them is enforceable by action. I consider, therefore, that all the necessary elements of a tax are present and that the levies fall within the meaning of that term, as used in sec. 22.

To impose this tax upon the lands in question unless and until the same are used by the company for other than railroad purposes or leased, occupied, sold or alienated would, in my opinion, be contrary to the provisions of sec. 22 of the Settlement Act.

I would, therefore, answer the questions as follows:

1. As to the first part thereof: yes.
   As to the second part thereof: no.
2. Yes.
3. No.
4. Yes.
5. No.
6. No.
7. As to the first part thereof: no.
   As to the second part thereof: yes.

RECORD

In the Supreme Court of Canada

No. 19
Reasons for Judgment
Rand, J.
June 25, 1948

No. 19

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

vs.

THE ATTORNEY-GENERAL OF BRITISH COLUMBIA

CORAM:

KERWIN, RAND, KELLOCK, ESTEY and LOCKE, JJ.

RAND, J.

The events leading up to the provincial legislation of December, 1883 have been set forth in the judgments of the Court of Appeal in great detail and I shall do no more than to state the general interpretation which I give to them. Nor would it be profitable to examine the constitutional position from which in substance O'Halloran and Bird, JJ.A. proceeded, i.e. that the construction of the island railway was an obligation of the Dominion under the terms of union: even with that as an initial assumption, the conclusions to which the questions invite us, are not, in the view I take of the settlement as a whole, materially affected.

It is evident that at the beginning the Dominion had provisionally fixed the terminus of the transcontinental railway on Vancouver Island. There was delay admittedly in proceeding with the work and it is clear that in 1875 an island terminus had become doubtful, if not ruled out. In that year to settle all matters of complaint on the main project and to assist the Province in constructing the island railway as a local work, the Dominion offered the sum of $750,000.00, an offer which the Province rejected. Somewhat later the terminus appears still to have been undecided, but this had disappeared when the controversy reached an acute stage in the early '80's.

At that time the Dominion had clearly settled upon the southern route through the Kicking Horse Pass as against the Yellowhead Pass in the north, with the terminus on the mainland at Port Moody: and as the Dominion then viewed the situation, the railway on the island had become a purely provincial matter. But it was recognized that, besides the general delay,

the withdrawal from settlement of the railway belt lands between Esquimalt and Nanaimo, made on the request of the Dominion, had retarded the development of the island. Of this legitimate complaint on the part of the Province the Dominion was prepared to negotiate a settlement. In 1882, the Province, concluding probably that with a terminus at Port Moody, there would be difficulty in challenging fulfillment of the constitutional obligation, passed an act authorizing the construction of the Esquimalt line by a private company.

In that situation good sense as well as good faith had become necessary on both sides. The Canadian Pacific Railway Company had been organized to carry through the railway program and with that formidable work under weigh, it was desirable both that the new constitutional relations be not exacerbated by minor controversies and that the immediate construction of the island line be arranged. So it was then that early in 1883 the Dominion intimated what it would do to clean up the entire matter. Following this and purporting to be a legislative compliance with the terms proposed, a provincial statute was passed in May of that year. But its language was taken to mean the construction of the line on the responsibility of the Dominion, and this the latter refused to accept. Negotiations continued and on August 20th, 1883 the two governments finally agreed upon modifications which were enacted by the Province in December, 1883. Later, in April, 1884, corresponding legislation was passed by the Dominion.

The settlement so far as it is material here was this: the Dominion was to facilitate the construction of the island railway by a cash subsidy of $750,000.00 and by exemption from customs duties of certain materials to be imported for the purposes of the railway; it was to be the party to contract for its construction; and it was to name the incorporators of the company to be formed. The Province, on its part, would provide for the incorporation of the company; and transfer to the Dominion approximately 1,900,000 acres of land, on a considerable portion of which were valuable stands of timber, which it is recited in the preamble to the statute the Dominion would "hand over" to the company.

Following the legislative confirmation, the railway was built, the construction contract fully performed, the money paid over and the lands conveyed to the company.

The provincial statute by sec. 22 provided:—

"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."

and on this section the questions raised in large measure depend.

What, then, is the effect of, or the nature of any interest or right of the company under, that section? It is contended by the Province that the provision is legislation merely, i.e. the voluntary act of the legislature, conferring from day to day or year to year a benefit which in no sense is or was intended to or does imply or constitute a contractual right in the company to the exemption according to its terms which would in whole or part be affected or destroyed by the repeal or amendment of the section; that any "right" arising is simply the present effect from time to time of the legislation, a benefit not different from what might be conferred by a general statute passed long after the railway had been established, a privilege existing and intended to exist solely in the indulgence of the legislature.

The answer to that is put in several ways. It is argued that the construction contract provided that the subsidy lands were to carry with them all of the benefits of the provincial legislation including sec. 22, and that in making the contract the Dominion was acting on behalf of itself and the Province; that the Province, having stood by and allowed the Dominion to contract for the transfer of the lands with the benefit of sec. 22, cannot now be heard to say that the company has not a contractual right to the continuance of the tax exemption; that the Dominion in its agreement with the Province was acting as trustee for the promoters in relation to those features with which the provincial legislation dealt; that in the negotiations of August, 1883 when the construction contract, the statement of agreement between the Province and the Dominion, and the draft bill incorporating those changes, were completed, it was in fact, by implication or otherwise, agreed between the promoters and the Province that the tax exemption would continue according to its terms once the railway was constructed and in operation; and finally, as the acceptance of the necessary implication of the provincial legislation itself, i.e. that upon performance by the company of the undertaking envisaged, certain provisions of the legislation including sec. 22, constituting inducements held out to the company, would become binding contractually upon the Province.

The construction contract stipulates in paragraph 15 that the lands shall be conveyed to the company "subject in every

respect to the several clauses, provisions and stipulations . . . contained in the aforesaid Act . . . as they may be amended . . . in accordance with the draft bill now prepared . . . particularly to secs. 23, 24, 25 and 26 of the said Act." The question is whether the words "subject to" are appropriate to the benefit of sec. 22; and considering the language of the Dominion Act of 1884, secs. 3 and 7, and that of the conveyance of the land to the company in 1887, I cannot think they are or that the paragraph was intended to incorporate the provision of sec. 22 as an obligation assumed by the Dominion.

There is next the question whether, apart from the legislation, a contract arose between the two governments and that in any respect or to any extent the Dominion was acting for or representing the promoters. I find myself unable to treat the negotiations as intended to effect obligations between them beyond the legislation contemplated. The fact that the memorandum stipulated for legislative confirmation by both indicates the real intention. What were being framed were political arrangements to be embodied in statutes; and the word "agreement" as used in the memorandum meant simply consensus looking to obligation on another level than that of contract.

Nor am I able to infer the intention of the promoters and the Province to create a binding obligation distinct from the effect of the legislation and much less that any such contract should thereafter co-exist with the legislation. The approval of the bill containing the exemption clause by Dunsmuir on behalf of his associates would seem to put the matter beyond doubt. At the highest, any such arrangement would require legislative sanction, in which event it could scarcely be taken that the confirmation was to bind the Province apart from and in addition to the legislation. 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 collatorally against the consequences of a legislative repudiation.

Is the act, then, of the provincial legislature of such form and matter as had they existed analogously between private persons would have given rise to contractual rights? It is conceded that sec. 22 was held out as an inducement to the company: tax exemption was to be part of the provincial contribution to the work. The legislative intent or implication from the language used can only be that if the company should fulfil the conditions of the statute, the exemption would be maintained according to its terms. Any other interpretation would be a fraud on those com-

mitting themselves in part on the strength of it. If the legislation had provided that the land grant should be made direct by the Province, could it have been said that the acceptance of incorporation, with the obligations of the construction contract ipso facto imposed upon the company, and the construction of the railway, did not draw to the company by fulfillment of the conditions of the legislative promise, a contractual right to receive the lands so held out? 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.

Since the Crown, as the symbolic embodiment of the supreme power of the state can, in its executive capacity, enter into a contract with a subject, is there any obstacle to its entering a similar contract on a higher level? If, as it is established, a "statutory" contract may arise between private persons: *Workmen's Compensation Board vs. Canadian Pacific Ry. Co.* (1920) A.C. 184; what is there in the nature of things to exclude the Crown, in its legislative capacity, from binding itself in either capacity to the same form of obligation? That the terms of a charter constitute a contract between the state and the corporation created was held in the United States in the case of *Dartmouth College vs. Woodward,* 4 Wheaton 518 in which at p. 627 Chief Justice Marshall uses this language:—

> "It can require no argument to prove, that the circumstances of this case constitute a contract. An application is made to the crown for a charter to incorporate a religious and literary institution. In the application, it is stated that large contributions have been made for the object, which will be conferred on the corporation, as soon as it shall be created. The charter is granted, and on its faith the property is conveyed. Surely in this transaction every ingredient of a complete and legitimate contract is to be found."

Having found a contract, he then proceeded to consider whether it was protected by the constitution of the United States and if so whether it had been impaired by certain legislation of the State of New Hampshire; and holding for the corporation in each respect, declared the State legislation ultra vires.

No such constitutional difficulties arise here; undoubtedly the legislature could amend or repeal sec. 22 and thus modify or destroy the right of exemption: but equally so could it affect a

contract made by the Crown in its purely executive capacity. The existence of that legislative power is not incompatible with a relation which both the legislature and the company intended to bring about; and I am unable to make any distinction in principle between the creation of contractual rights arising from incorporation by charter and by legislation. In each case it is the sovereign power acting with the same intent.

The language of Lord Macnaghten in *Davis & Sons vs. Taff Vale Railway Company* (1895) A.C. 542 at p. 559, is most pertinent to the case before us:—

> "Ever since it has become the practice for promoters of undertakings of a public nature to apply to Parliament for exceptional powers and privileges, the Acts of Parliament by which those powers and privileges are granted have been regarded as parliamentary contracts, as bargains between the promoters on the one hand and Parliament on the other —Parliament acting on behalf of the public as well as on behalf of the persons specially affected. Those powers and privileges are only conceded on the footing that the concession is for the benefit of the public who are likely to use the railway as well as for the benefit of the promoters."

If it is to be deemed a parliamentary contract when the benefit is to the members of the public as represented by the legislature, on what ground are we to treat the correlative benefit to the promoters as being in another category? Sec. 22 restricts executive action in relation to statutory taxation; and it is within the language of Lord Macnaghten that sec. 22 should be intended by the legislature to bind the Crown: that the legislature should be taken for that purpose to be representing the Crown or any instrumentality to which taxing powers are given.

But it is said that this conclusion is negatived by clause 31 of section 7 of the *Interpretation Act,* chapter 2 of the Consolidated Statutes, 1877:—

> "Every act shall be construed as to reserve to the legislature the power of repealing or amending it, and of revoking, restricting, or modifying any power, privilege, or advantage thereby vested in or granted to any person or party whenever such repeal, amendment, revocation, restriction, or modification is deemed by the legislature to be required for the public good."

In 1888 the Act was revised, and a new clause in the same language was preceded by general words in section 8 as follows:—

"In construing this or any act of the legislature of British Columbia, unless it is otherwise provided, or there be something in the context or other provisions thereof indicating a different meaning or calling for a different construction:—"

The present provision is to the same effect.

It is difficult to assess the significance or effect of such a clause. It seems to have been introduced into the legislation of this country in 1849 in the *Interpretation Act* of the Province of Canada. In relation to the present matter, the power would exist as fully without the reservation as with it. But what is reserved is a legislative, not a contractual, power, and I am unable to attribute any greater effect by reason of its being express than as constitutionally implied. Its exercise may modify a statutory contract, but that operation is not contractual.

So far, moreover, as it may be relevant in interpretation. only the present form is to be considered. Except in the case of temporary statutes all legislation is looked upon as perpetual and once repealed it is as if it had never existed: *Surtees* v. *Ellison* 9 B. & C. 752. As under section 22 the exemption is to continue for a specified period, a stronger case could scarcely be imagined of "something in the context indicating a different "meaning or calling for a different construction".

It was argued that the contract between the parties entered into in 1912 when the railway, without the lands, was leased to the Canadian Pacific Railway Company, is to be interpreted as binding the Province to a continuance of the exemption even though no such obligation existed before; but I cannot so construe it. What the parties had in mind was an existing and binding statutory exemption: the railway company desired to avoid any question of affecting the conditions on which the exemption rested; and as a consideration for the settlement of all doubts it was agreed that the company should pay a specified annual tax and that the exemption should continue as before. I cannot view it as having added any new form or characteristic to the exemption.

The proposed taxes must next be considered. It will be observed that the legislation would be enacted while the lands are still in the ownership of the railway company and still exempt under sec. 22 although a change of ownership or use would be necessary to its effectiveness. Under question 5 the tax which it is agreed would be the equivalent of what is known as a royalty

payable by certain grantees and lessees of the Crown lands on each 1,000 square feet board measure of timber cut, would arise only at the moment of severance of the trees. But that is not simply fixing the time for payment; the tax is conditioned on severance and if there are no merchantable trees there can be no severance and no tax. That the tax, so potential and contingent, should, when it emerges in esse be charged on the land, is, as to its nature, irrelevant: and I cannot view it other than a tax imposed on personal property at its initial stage of being worked into merchantable lumber.

As envisaged by question 6, the tax is declared to apply only to land and is based on the fair market value of the land. For payment, alternative modes are proposed:

> "(1) Within a specified limited time after the assessment with a discount if paid within the specified time;
>
> "(2) 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 that year bears to the assessed value of the land."

I agree with Mr. Farris that the first mode must be interpreted as a substantial equivalent of the second in which the obvious risks of the latter both to the Province and to the owner are commuted in terms of money. The discount must be sufficient to induce a business judgment to accept it as fairly related to the chances of loss and benefit; and there is no more difficulty in estimating such a sum for taxes than for purchase money. In each case timber is the substance of the value; but in the case of the tax, the attention may be more specifically centered on the future fact of severed timber.

I can see no real difference either between the second alternative and the tax as proposed in question 5. The tax depends in both cases on severance and only in relation to timber cut is it to be computed. If growing timber is destroyed, the original tax is so far reduced. Taking the assessment of the "fair market value of the land" to mean the value of standing timber at the time of assessment, the discount in the first alternative takes speculative account and the second actual account of capital losses from time to time to be written off the assessed value; and in the result the tax is intended to attach solely to severed timber in the course of commercial production of marketable lumber and the same situation as in question 5 confronts us.

This brings us to 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?"

Since in every case supposed, the tax is on severed timber, it is in reality an excise tax which, in its general tendency, is indirect; "Customs and excise duties are, in their essence, trading taxes and may be said to be more concerned with the commodity in respect of which the taxation is imposed than with the particular person from whom the tax is exacted;" *Attorney-General of British Columbia vs. Kingcome* (1934) A.C. 45 at p. 59; "The word—(excise)—is usually (though by no means always) employed to indicate a duty imposed on home-manufactured articles in the course of manufacture before they reach the consumer. So regarded an excise duty is plainly indirect.": *Atlantic Smoke Shop Ltd. vs. Conlon* (1943) A.C. 550 at p. 565.

I do not think this conclusion is at all affected by what I agree with the judges below would be the fact, that the tax would influence the price at which the lands could be sold: that would make it indirect in both aspects. Since the legislation would be sui generis, the incidence of the tax on the company cannot be brought within any general tendency rule except the general and indeed the only tendency of the special case. But the fact that a tax, in its nature and classification, is indirect is not taken out of that category by the further fact that in some part at least its incidence may already have been shifted from the person who actually pays it: *Rex vs. Caledonian Collieries* (1928) A.C. 358.

I think it clear, too, that the purchaser of the land or timber is not the person intended or desired to pay the tax and that it is the intention and expectation that it will be passed on to another by him; but regardless of actual intention, where the general tendency of the tax, with or without a like effect in special circumstances, is judicially found, the imputation of the appropriate intent or expectation necessarily follows.

As I have already intimated, I think the imposition of the proposed taxes would affect the price or the value of the use of the lands in the hands of the company; I cannot but take that to be the real object of the legislation; there would thus be an encumbrance imposed during what would otherwise be the period of and would so far derogate from the exemption.

The seventh question is whether the company is liable to the so-called tax for forest protection imposed by sec. 123 of the *Forest Act,* and if so, whether the liability derogates from the provisions of sec. 22.

The Forest Act enables the establishment of a comprehensive service for the conservation and development of what in British Columbia is a great natural resource. Its scope reaches to all means and measures to prevent damage and destruction by fire and by insects. Although the immediate beneficiaries are the owners or persons interested in forest lands, the interest of the public in the preservation of this vast wealth, the fullest utilization of which is of the highest public importance, is of paramount concern, and the administration provided is the only practicable method by which effective protection can be secured.

Sec. 123 as amended in 1946 provides for the creation of a forest protection fund to be raised by an annual tax of six cents for each acre from the owner of logged, unimproved and timber land as well as from the holders of timber or pulp leases, timber, pulp or resin licenses, or timber berths. To the fund there is contributed annually by the Province the sum of $1,000,000. Provision is made for the assessment of any deficiency in administration expenses and as well for the reduction of the assessment and contribution in the event of an accumulated surplus. The expenditure of these moneys is confined to the purposes of forest protection under Part II of the statute.

In *Shannon vs. Lower Mainland Products Board* (1938) A.C. 708 a somewhat similar situation of private and public benefit existed. Under the legislation there considered, the moneys were collected as license fees and they seem to have been the only funds available to a local scheme: sec. 14, authorizing general expenses to be paid from the Consolidated Revenue Fund specifically excepts "the expenses of administering" such a scheme. The benefit to the licensee lay in the results of the regulation of his business, and the public interest in its indirect effects. The Judicial Committee held that,

> "The impugned provisions can also, in their Lordships' opinion, be supported on the ground accepted by Martin C.J. in his judgment on the reference . . . namely, that they are fees for services rendered by the Province, or by its authorized instrumentalities, under the powers given by section 92 (13) and (16)."

In *City of Halifax vs. Nova Scotia Car Works* (1914) A.C. 992, the car works company was entitled to an exemption from

all "taxation", and the question was whether or not "taxation" included a capital levy on a frontage basis for a part of the cost of a sewer laid as a local improvement along a street adjacent to the company's lands. The balance of the cost as well as maintenance was borne by general taxation. Although the owner of such lands was the direct beneficiary, the public at large was afforded health protection as well as general convenience, to say nothing of esthetic returns. Lord Sumner at page 998 uses this language:—

> "All rates and taxes are supposed to be expended for the benefit of those who pay them, and some are really so, but the essence of taxation is that it is imposed by superior authority without the taxpayer's consent, except insofar as a representative government operates by the consent of the government. Compulsion is an essential feature of the charge in question. The respondents might have drained their factory for themselves; they might think that it needed no drainage; they might object to the municipal scheme as defective; but the city sewers would be laid and the respondents would have to pay just the same; there is not enough here to differentiate this charge from taxation."

The option to use or not to use the sewer would, in the circumstances, be quite illusory: practically the company must make use of it and necessarily receive its benefit. The same compulsion was present in the *Shannon case* 1938 A.C. 708; the producer or dealer, continuing in his business, was compelled to accept the benefit of the regulations and to pay the licence fees. The distinction between them is, I think, the fact that in Shannon the fund, raised by licence fees, was exclusively for and the only source of means by which the schemes could be carried out. In that sense, it was analogous to a fee for registration.

Here, 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 all three cases, there is the immediate and special interest of the owner and the general interest of the public: in two there is both special and general taxation. The compulsion, the public purpose, and the individual liability, are present in all. The language of sec. 123, "an annual tax" indicates the ordinary and I think the proper conception of what is being prescribed. The analogy of the present situation to that of payment for such a service as that of registering a deed, must, I think, be rejected. The public interest is too clearly the paramount object of the legislation, and the imposts carry too fully the indicia of taxation,

to permit us to distinguish them from the generality of fiscal provisions.

I would, therefore, answer the questions as follows:

1. To the first part of the question, Yes; to the second, No.

2. Yes.

3. No.

4. Yes.

5. No.

6. No.

10 7. To the first part of the question, No; to the second, that the tax applied to the company would derogate from the provisions of sec. 22.

RECORD

In the Supreme Court of Canada

No. 20
Reasons for Judgment
Kellock, J.
June 25, 1948

No. 20

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

vs.

THE ATTORNEY-GENERAL OF BRITISH COLUMBIA

CORAM:

KERWIN, RAND, KELLOCK, ESTEY and LOCKE, JJ.

KELLOCK, J.

In the Dominion Order-in-Council of June 23, 1883, forwarded to the provincial government on the 28th of that month, the following occurs:

> "2nd. That Sir Alexander Campbell should then communicate with Mr. Dunsmuir and other capitalists who are understood to be desirous of forming a company to construct the railway *under the terms of the Provincial Act.*"

The "Provincial Act" was of course the May Act and the immediately preceding paragraph of the order refers to the necessity of amending it. So far as the exemption from taxation covered by section 22 of the Settlement Act is concerned, that provision was already in the May Act and it was on those terms that the contractors were willing to execute the contract under which the railway was to be built. Both governments therefore knew that it was on the basis that the lands should "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," that the contractors were willing to undertake the works.

On August 6, 1883, the Dominion Minister of Justice, Sir Alexander Campbell, sent to the provincial Prime Minister, Mr. Smithe, a copy of the proposed contract between the Dominion and the contractors. The letter, which accompanied it, contains this sentence:

> "I propose, on obtaining the approval of the Local Government to the contract, to execute it, and that Mr. Dunsmuir and his friends shall be *invited* to do so."

The letter concludes:

> "I shall be glad to have your approval of the contract and of the several stipulations made in this letter in regard to it."

The contract was the subject of further correspondence between the representatives of the two governments and was ultimately settled by August 20, 1883. By the inter-governmental memorandum of arrangement executed that day, it was provided that the contract should be "provisionally signed by Sir Alexander Campbell on behalf of the Minister of Railway and Canals, but is to be deposited with Mr. Trutch, awaiting execution by delivery until the necessary Legislative authority shall have been given, as well by the Parliament of the Dominion as by the Legislature of British Columbia."

The memorandum also contains the following provision:

> "2. The Government of British Columbia will procure the assent of the Contractor for the construction of the Island Railway to the provisions of Clause F recited in in the amending Bill."

The amendments were underlined in red in a copy of the proposed bill which was annexed to the memorandum. The bill by clause (f) of the recital, as it was therein amended, together with section 23, enlarged the burdens to which the subsidy lands were made subject by the *May Act* but the amendments did not otherwise affect the interest in the lands which would come to the company on the completion of the works. In my opinion this circumstance, viz., that the contractors' assent was required to be obtained to the change, confirms the accuracy of the statement in the Order-in-Council of June 23, 1883, that it was understood by all concerned then and subsequently that the contractors were willing to undertake the works only upon the "terms of the Provincial Act" as it was ultimately settled.

The existence of the understanding to which I have referred is made even more clear by the terms of the testimonium of the construction contract:

> ". . . and placed in the hands of the Honourable Joseph William Trutch, until the Act passed by the Legislature of The Province of British Columbia in the year 1883 (the May Act) shall have been amended by the Legislature of the Province in accordance with a Draft Bill now prepared, and which has been identified by Sir Alexander Campbell and the Honourable Mr. Smithe, and signed by them and deposited in the hands of the said Joseph William Trutch . . ."

as well as by the endorsement on the draft bill produced from the files of the Department of Transport signed by Dunsmuir, which reads:

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

The above is the only copy of the draft bill and endorsement which is produced. The note on page 148 of the printed case herein purporting to reproduce an endorsement differently worded is not proved. The case was copied from the case used in the court below which in turn was based upon a compilation of documents headed "In the Matter of Chapter 71 of the Statutes of British Columbia for 1917." That compilation does not contain either the draft bill or the alleged endorsement but there is pinned to page 35 a note in the handwriting of some unknown person, the "note" reproduced in lines 24 to 35 on page 148 of the case in this appeal. Where it came from and whether accurate or not is not shown. The note on page 148 is itself not a true copy of the manuscript note as it omits the words "It was signed" immediately before the signature "A. Campbell". I therefore take the endorsement on the bill produced from the Department of Transport as the one to be considered.

Under the arrangement made, the entire scheme was not to become operative until the legislation had been passed by both jurisdictions. The Dominion Act was last in point of time, receiving the Royal Assent on April 19, 1884. Previously on the 12th of that month by an Order-in-Council of the Dominion, Dunsmuir and his associates were named as the persons to be incorporated under section 8 of the Provincial Act, and therefore upon the passing of the Dominion Act the appellant company came into being.

The exemption provided for by section 22 was with respect to the lands "to be" acquired by the company. This event, under the terms of the construction contract, would not take place until after the completion of the works to the satisfaction of the Governor-General. The exemption, therefore, inapplicable while the lands were held by the Dominion, could be operative only thereafter when the company had received its conveyance, from which time the lands should "not be subject to taxation, unless and until . . ." The period thereby delimited has not yet elapsed as to that part of the lands still retained by the appellant company.

I do not think that section 7 (31) of C.A. 1877, cap. 2, has the effect of reading into section 22 some such words as "unless and until the legislature otherwise determines" at the beginning thereof. In my opinion it does nothing more than provide that the legislature may do what it might do without such a provision, namely, deal by legislation with civil rights in the province.

There is set forth in the preamble of both the Dominion and provincial legislation terms of an agreement. For convenience I refer to the agreement as contained in the provincial statute. By clause (b) of the agreement as recited in the provincial Act the provincial government was to obtain the authority of the legislature to grant to the Government of Canada certain defined lands on the Island of Vancouver. By clause (e) the Dominion Government was obliged, upon the passing of the provincial statute, to seek the sanction of Parliament to enable the Dominion to contribute to the construction of the railway the sum of $750,000.00 and the Dominion Government agreed "to hand over to the contractors who may build such railway the lands which are or may be placed in their hands *for that purpose* by British Columbia." By Clause (f) the Island lands to be thus conveyed, subject to certain reservations as to coal and other minerals and timber, were to be opened for settlement as therein specified.

By section 3 the lands referred to in clause (b) of the recital were granted to the Dominion for the purpose of constructing and to aid in the construction of the railway and "*in trust* to be appropriated as they may deem advisable." This language followed that of section 3 of the *May Act* but the *May Act* did not contain the undertaking in clause (e) of the *Settlement Act* above referred to, for the handing over of the lands to the builders of the railway, the lands being placed in the hands of the Dominion "for that purpose". Accordingly, in my opinion, clause (e) and section 3 are to be read together, with the result that the lands were granted to the Dominion in trust for the company to be formed by incorporation under the same statute, subject of course to the fulfilment by the company of the conditions which would entitle it to a conveyance.

Section 8 makes provision for this incorporation and by section 10 the company thus incorporated is empowered to accept from the Government of Canada any conveyance of lands by way of subsidy or otherwise in aid of construction of the railway and to enter into any contract with that government for or respecting the use, occupation, mortgage, or sale of said lands, or any part thereof, upon such conditions as may be agreed upon between the government and the company.

By section 21 the railway with its workshops, stations, and other necessary buildings and rolling stock, as well as the capital stock of the company, was to be exempt from provincial and municipal taxation for a period of ten years after completion and by section 22 the lands "to be acquired" by the company from the Dominion for the construction of the railway were to be exempted as already mentioned.

The subject matter of these provisions was not specifically mentioned in the recited agreement but the statutory recital concludes as follows:

> "And whereas it is expedient that the said agreement "should be ratified and that provision should be made to "*carry out the terms* thereof."

In my opinion provisions necessary to carry out the terms of an agreement form part thereof. Accordingly, it was the lands, subject to the burdens set out in the statute and with the benefit of the statutory immunity, of which, by section 3 the Dominion was constituted trustee for the appellant.

It is quite clear to my mind from all relevant writings that all concerned understood that there were three things to be received by the appellant company in return for the execution of its obligations under the construction contract, viz., (1) the cash subsidy of $750,000.00; (2) the conveyance of the lands; and (3) the exemption from taxation provided by sections 21 and 22. I think all were equally, in the minds of all parties, the inducement upon which the contractors agreed to execute the works.

In my opinion the lands together with the immunity from taxation were the subject of a contractual obligation between the province and the Dominion as to which the latter was a trustee for the company upon fulfilment of the terms by the company which would entitle it to a conveyance. The company as beneficiary would accordingly be entitled to sue the province on the contract, it being necessary only that the Dominion should, in any such action, be made a party; *Vandepitte v. Preferred Accident Insurance Corp.,* 1933 A.C. 70 at 79; *Harmer v. Armstrong,* (1934) 1 Ch. 65. That the agreement recited in the provincial Act was contractual is, I think, clearly established by the decision of the *Privy Council in Attorney-General of British Columbia vs. Attorney-General of Canada,* 14 A.C. 295. In speaking of Article 11 of the Terms of Union, Lord Watson said at p. 304:

> "... it merely embodies the terms of a commercial transaction, by which the one Government undertook to make a railway, and the other to give a subsidy by assigning part of its territorial revenues."

In my opinion if that be so of Article 11, it is equally so of the agreement by which the difficulties which had arisen between the two governments under that Article were composed. See also *Burrard v. Rex,* 1911 A.C., 87 at 95.

It was also argued that a contract was brought about on the basis of the provincial statute being itself an offer accepted by the company by performance of the works thereby called for. Apart from any question arising from the form of the statute, I would have thought that such a contract had been made out; *La Ville de St. Jean v. Molleur,* 40 S.C.A. 629; *Cunningham v. New Westminster,* 14 D.L.R., 918. The statutes in question in these authorities were, however, permissive. It is to be observed that in the present case, sections 9 and 20 of the statute, which provide for the execution of the works are imperative and the question arises as to whether there existed alongside the statutory obligation, a contractual one; *Great Western Railway v. The Queen,* 1 E. & B. 874; *Reg. v. The Great Western Railway,* 62 L.J.Q.B. 572; and *Reg. v. The York and North Midland Rly. Co.,* 1 E. & B. 858; Statutes of British Columbia, 35 Vict., cap. 1, section 6 (2).. In view of the conclusion to which I have come, however, it is not necessary to deal with this phase of the matter.

I would, therefore, allow the appeal as to the first question. With respect to the other questions I agree with the reasoning and conclusions of my brother Rand and have nothing to add.

RECORD

In the Supreme Court of Canada

No. 21
Reasons for Judgment
Estey, J.
June 25, 1948

No. 21

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

- v -

THE ATTORNEY-GENERAL OF BRITISH COLUMBIA

BEFORE:

KERWIN, RAND, KELLOCK, ESTEY and LOCKE, JJ.

ESTEY, J.:

The seven questions submitted by the Lieutenant-Governor in Council arise out of a report made by The Honourable The Chief Justice of British Columbia, as Commissioner appointed under the Public Inquiries Act, 1936 R.S.B.C., c. 131, to inquire *inter alia* as to "forest finance and revenue to the Crown from forest resources."

In the course of the report it was recommended that the Courts be asked (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;" (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.

The report 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.

The Lieutenant-Governor in Council, under the provisions of the Constitutional Questions Determination Act, 1936 R.S.B.C., c. 50, by Order in Council dated the 13th November, 1946, submitted the seven questions to the Court of Appeal in British Columbia for its opinion. This appeal is from the answers given by that Court.

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?' "

Between the governments of the Dominion of Canada and British Columbia in 1883 there were several matters in dispute, including the construction of the Island Railway and the delay in respect to that of the Canadian Pacific Railway. The two governments, commencing in February of that year, sought by correspondence and interviews to effect a settlement and in August The Honourable Mr. A. Campbell, Minister of Justice in the Dominion Government, went to British Columbia where on August 20, 1883, an agreement was concluded upon the matters in dispute, including the construction of the Island Railway.

It is perfectly clear that certain parties (hereinafter referred to as the Dunsmuir group) were familiar with these negotiations at least so far as the construction of the Island Railway was concerned, and on the same date agreed upon terms under which they would, and in fact, did, construct that railway. The three parties, Dominion, province and the Dunsmuir group, embodied their agreements on August 20, 1883, in the following documents:

(1) The memorandum of agreement signed by Messrs. Campbell and Smithe on behalf of the respective governments.

(2) The amendments to the May Act.

(3) The construction contract signed by A. Campbell, Minister of Justice for the Minister of Railways and Canals in the Government of the Dominion of Canada, and by four parties, of whom Robert Dunsmuir was the first, under the terms of which Robert Dunsmuir and his associates agreed to construct the said Island Railway and telegraph line from Esquimalt to Nanaimo.

(4) Mr. Dunsmuir, on behalf of himself and his associates,
"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 and lands."

"Robert Dunsmuir".

(This latter document, numbered four, may not have been prepared or signed until the following day.)

The agreements would not be binding on any of the parties thereto until the Legislature of British Columbia enacted the May Act as amended ratifying the agreement between the Domin-

ion and the province, which it did on December 19, 1883, by an Act entitled "An Act relating to the Island Railway, the Graving Dock, and Railway Lands of the Province," (hereinafter referred to as the Settlement Act), and the Dominion would ratify that agreement, which it did April 19, 1884, by an Act (1884 S. of C., c. 6) entitled "An Act respecting the Vancouver Island Railway, the Esquimalt Graving Dock, and certain Railway Lands of the Province of British Columbia, granted to the Dominion," (hereinafter referred to as the Dominion Act). The construction contract, numbered three above, was held as agreed in escrow by The Honourable Mr. Joseph W. Trutch. With the passage of the Dominion Act, April 19, 1884, the agreement, and the construction contract became binding upon the parties.

Section 22 of the Settlement Act was identical with that of the May Act and read:

> "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."

It is around this particular sec. 22 that this controversy centres.

The Settlement Act provided that appellant company incorporated by that Act should be bound by the contract between the persons to be incorporated and Her Majesty, represented by the Minister of Railways and Canals. The appellant railway contends that there was a contract between the Province of British Columbia and the Esquimalt and Nanaimo Railway Company of which this sec. 22 is a term, while the respondent denies that any such contract ever existed, but rather it was enacted as a term of the agreement between the Dominion and the province.

The foregoing documents numbered one to four were the only documents prepared on August 20, 1883, embodying the terms of the settlement of all matters then in dispute, including some matters other than the Island Railway, between the two governments, and the construction contract. The appellant railway is therefore confronted with the fact that there is no agreement in writing between the province and the contractors, which, having regard to the fact that the other agreements were reduced to writing, would in all probability have been in writing if in fact it was made. The appellant railway, however, insists that such a

contract under all circumstances should be implied. Its contention is that "the contractual relationship resulted from negotiations which commenced in February 1883 and in which the province, the Dominion and the contractors all participated." Between the period February 1883 and August 20, 1883, there were interviews and correspondence between the two governments. As early as May 5, 1883, the Government of Canada, relative to the construction of the Island Railway, offered substantially what was agreed upon on August 20, 1883. The province accepted the terms and enacted the May Act. Immediately the Dominion objected to certain of its provisions, in particular statements that the Government of Canada "agrees to secure the construction" of the Island Railway. This was amended as agreed on August 20, 1883, (when all the amendments thereto were agreed upon) and enacted as the Settlement Act to the effect that the Government of Canada would seek the sanction of Parliament to enable them to contribute to the construction of the Island Railway. There were other somewhat similar amendments. The Government of Canada had consistently refused to accede to the contention of the province that the construction of this Island Railway was a Dominion responsibility. These amendments were consistent with that view and equally consistent with the settlement made on August 20, 1883, under which both governments contributed and the Dominion contracted for the construction thereof. These changes do not support the view that there was a contract relative to the construction of the Island Railway between the province and the contractors. In fact throughout these negotiations in 1883 there is no suggestion of a contract between the province and the contractors, while almost from the outset a contract for the construction of the Island Railway is contemplated between the Dominion and the contractors.

Moreover, in 1904 and again 1917 when the appellant railway asked the Dominion Government to disallow certain provincial legislation then enacted relative to these lands, it did not suggest that the province in passing the legislation had violated any agreement made between the appellant railway and the province. On the contrary, in their petition to the Dominion Government dated March 21, 1904, it is stated as follows:

> "(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.

(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."

The statements in these paragraphs have a special significance because this petition is signed by James Dunsmuir, who with Robert Dunsmuir, was among those who signed the construction contract of August 20, 1883. Mr. Dunsmuir would be in a position to know if in fact a contract was made on that date with the province and he and his associates in 1904 would appreciate how much of an asset such a contract would have been in their contention that the province in enacting the legislation they were then asking to be disallowed, had acted contrary to its obligations. If such a contract had existed it would no doubt have been urged at that time.

The petition presented to the Dominion Government in 1917 was not made a part of the record before this Court, perhaps because a formal hearing then took place before the Prime Minister, the Minister of Justice and the Minister of Public Works, when counsel appeared on behalf of the appellant railway. It may be noted, however, that in the report of the Minister of Justice in 1918 to His Excellency recommending disallowance of the provincial legislation the following is included:

> "On the other hand it was urged, and in fact it was not denied, that the Company had received its land grant in pursuance of the agreement of the Government of Canada founded upon legislation sanctioned by the Dominion, and the Province, . . ."

These submissions made in 1904 and 1917 without any reference to the existence of a contract between the province and the contractors go far to support the contention that such a contract never did exist.

Sec. 22, as well as certain other sections of the Settlement Act, would undoubtedly be among the important items which induced the contractors to undertake the construction of the railway. These were embodied in the terms of their construction contract with the Dominion, and the Dominion had placed itself in a position to carry out the terms of its contract by concluding an agreement with the province. Other sections of the Settlement Act were referred to in which existing rights of persons or corporations as well as reservations for military and naval pur-

poses were protected, and further provisions relative to the price of coal. These were matters which, under the circumstances, would be present to the minds of the parties and their inclusion does not point to the existence of a contract, such as is suggested, between the province and the contractors.

The document numbered four above may not have been prepared or signed before August 21, 1883. By its terms Robert Dunsmuir does not suggest the existence of any agreement between himself and the province. On the contrary, the word "acquiesce" is used. Under the circumstances, it may well be that those representing the Dominion deemed it desirable that Mr. Dunsmuir should signify his acquiescence in the terms of the Settlement Act; more particularly because sec. 15 of the construction contract provided that when conveyed to the company that the said lands would "be subject in every respect to the several clauses, provisions and stipulations referring to or affecting the same respectively, contained" in the Settlement Act.

In support of their contention the appellants refer to certain statements subsequently made. In the grant of these lands April 21, 1887, from the Dominion to the appellant railway reference is made to an agreement between the two governments and the company; also that in the recommendation by the Minister of Justice in 1918 for a disallowance of certain provincial legislation in respect to these lands he spoke of the province "as one of the parties to the tripartite agreement." These statements when read in relation to the other portions of the respective documents do not warrant a conclusion that a contract between the province and the appellant railway was made.

Nor can the appellants' contention be supported that the Dominion throughout acted as agent for the province in the negotiation and execution of the construction contract. The fact that the security given by the company had to be satisfactory to the province was pressed as indicating the existence of an agency relationship. The vital concern of the province in the completion of the Island Railway and the quantum of its contribution made it but natural that the Dominion would agree that the security taken should be satisfactory to the province. It may be noted that when the province contended: "In the event of the forfeiture of the security by the contractors, it ought to be understood that it will be handed over to the Province by the Dominion Government;" the latter replied: ". . . they would not hand over the security, but retain it for the purpose for which it was given." Such a provision does not suggest that the Dominion was an agent.

The appellants referred to a communication dated the 16th November, 1885, from The Honourable Mr. Smithe to The Honourable Mr. Trutch dealing with questions arising out of the delay in the issue of patents to the settlers. It is a long letter in which he acknowledges the Dominion to be the principal in this matter. Further on, in setting forth a contention rather than stating a fact, he says that the provincial government are the real principals. Such a statement does not point to the existence of agency in fact.

In effecting the settlement of the various disputes the respective governments were acting as principals. As part of that settlement the lands were transferred in trust to the Dominion. The latter as trustee appointed the province to act as agent for administering the lands for the purposes of settlement until the Island Railway would be completed. These are the only relationships existing between the parties as evidenced by the written documents.

The provisions of the Settlement Act were part of the terms of the settlement made between the two governments. The tax exemption in sec. 22, as well as the other provisions of the Settlement Act, were provided for in the settlement agreement in order that the Dominion might hold out these subsidy lands tax exempt to the Dunsmuir group as part of the consideration under which they might undertake to build the railway. It was in pursuance of that understanding of the agreement that the province transferred the lands in trust subject to those terms to the Dominion for that purpose; as stated in the Settlement Act "for the purpose of constructing, and to aid in the construction of a Railway between Esquimalt and Nanaimo, and in trust . . ." The construction contract provided that these lands should be conveyed by the Dominion to the contractors (Dunsmuir group) "upon the completion of the whole work to the entire satisfaction of the Governor in Council; . . . subject in every respect to the several clauses, . . . contained in the aforesaid Act," (Settlement Act). When the Dominion and the province by the enactment respectively of the Dominion and Settlement Acts ratified the settlement made between them, and the Dominion had ratified the construction contract, they had completed what Lord Watson referred to in *Attorney-General of British Columbia* v. *Attorney-General of Canada,* 14 App. Cas. 295 at p. 303, as a "statutory arrangement."

Upon the completion of the railway the lands were conveyed to the company by a grant dated April 21, 1887, "subject nevertheless to the several stipulations and conditions affecting the same hereinbefore recited and which are contained in the Acts

of the Parliament of Canada (Dominion Act) and of the Legislature of British Columbia . . ." (Settlement Act). The position of the respondent is therefore analogous to that described in *City of Halifax v. Nova Scotia Car Works,* (1914) A.C. 992, where at p. 996 Lord Sumner states:

> "They have performed the whole consideration on their side by establishing their works, and the consideration moving to them has been earned and ought not to be thereafter restricted."

If the province had been contracting with the Dunsmuir group for the construction of the railway a trust would not have been necessary. In order that both governments might make their respective contributions and but one government make the contract for the construction of the Island Railway, the governments with respect to these lands created a trust. The covenant of the province with the Dominion to exempt these lands when conveyed upon the completion of the railway was a term of that trust. The contractual obligations of the province with respect to the exemption provided in sec. 22 are no different from its position had it contracted direct with the railway, except as to questions of enforcement not here in issue.

Question One as framed is specifically restricted to a contract between the province and the contractors or the railway company, and in that restricted sense should be answered no; but as it is plain the province is concerned as to its contractual obligations with respect to sec. 22, associated with this answer should be an intimation of the province's obligations under the terms of the trust.

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?"

The respondent supports a negative answer on two bases, one that the exemption from taxation terminates with alienation on the part of the appellant railway and as this tax is imposed only after that alienation, it is not a derogation of the exemption provided for in sec. 22; two, that the lands are not used for railway purposes within the meaning of sec. 22.

The appellant railway acknowledges the right of the province upon alienation of these lands to impose a tax of general application. Its opposition to the present tax is founded upon the

basis that the tax proposed is not of general application but imposed upon these lands only and while imposed upon the purchaser it can only have the effect of reducing the purchase price realized by the company in competition with other timber limits not subject to the tax and therefore in effect the tax is passed backward and paid by the company.

Quite apart from whether such a tax may ultimately be determined as direct or indirect, if the imposition thereof upon these lands only and therefore not a tax of general application had in fact the effect of reducing the price, rent or other consideration to the appellant that would be a violation of the obligations under the terms of the trust with respect to these lands.

The contention that these lands were transferred for the purpose of financing the railway rather than as consideration for the construction thereof is not tenable. They were transferred in fact as part of the consideration for the railway and subject to the provisions of sec. 22. This section contemplates that so long as the lands remain the property of the appellant company and remain idle or are used for railway purposes only the exemption will obtain, but the exemption is terminated if these lands be otherwise used or alienated.

The answer to Question Two is yes.

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?"

In 1912 the appellant railway desired to lease the Island Railway to the Canadian Pacific Railway Company. In view of the provisions of sec. 22 of the Settlement Act it was concerned as to what the effect of such a lease might have upon the exemption therein provided for. They interviewed the Government of the Province, as a result of which an agreement was made under date of February 17, 1912, and subsequently ratified by an enactment of the legislature of the province. This agreement provided that "notwithstanding such lease and operation such exemption shall remain in full force and virtue."

This contract assured to the appellant railway that the obligation of the province thereafter under sec. 22 remained precisely as if the lease had never been made.

The answer to Question Three is no.

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?"

This question contemplates a sale of the standing timber by the appellant to a purchaser who will cut and market same. The entire operation contemplated is commercial in character. A tax so imposed would in the ordinary course of business enter into the cost of the purchaser's operations and into the computation of his sale price, and as a part thereof would be passed on from vendor to purchaser. It was suggested in the particular circumstances of this case that it could not be passed on but that it must be assumed by the railway because the price to the purchaser from the railway is fixed in open competition. We need not, however, consider the effect of such a contention. It may be true in particular cases. It is not, however, the facts and circumstances in particular cases that determine whether a tax is direct or indirect, but rather the incidence or effect of such a tax in the normal or ordinary transactions of business.

"It is the nature and general tendency of the tax and not its incidence in particular or special cases which must determine its classification and validity; . . ." Viscount Cave, L.C., in *City of Halifax* v. *Fairbanks' Estate,* (1928) A.C. 117 at p. 126;

City of Charlottetown v. *Foundation Maritime Ltd.,* (1932) S.C.R. 589.

Bank of Toronto v. *Lambe,* 12 App. Cas. 575.

Rex v. *Caledonian Collieries,* (1928) A.C. 358.

Attorney-General for British Columbia v. *McDonald Murphy Lumber Co.,* (1930) A.C. 357.

The answer to Question Four is yes.

Question Five:

"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:

(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."

This question as phrased describes the tax "a tax on the land of the Island Railway Belt acquired in 1887." It is, however, a tax imposed only "as and when merchantable timber is cut and severed from the land." It is payable by the purchaser from the appellant of the standing timber and "shall approximate the prevailing rates of royalty per thousand feet of merchantable timber." It is then stated "the tax until paid shall be a charge on the land." In substance this tax does not materially differ from that in question four except that it creates a charge on the land. This of itself does not make the tax a land tax. In *Attorney-General for Manitoba* v. *Attorney-General for Canada,* (1925) A.C. 561, it was expressly stated in the enacting statute that "the tax imposed by this Act shall be a direct tax." This was a tax upon every contract of sale of grain for future delivery with specified exemptions, and notwithstanding the express statutory provision to the contrary, was held to be an indirect tax. Viscount Haldane at p. 566 stated:

> "For the question of the nature of the tax is one of substance, and does not turn only on the language used by the local Legislature which imposes it, but on the Imperial statute of 1867."

The real nature and general tendency of this tax is evidenced by its imposition only when the standing timber has been sold by the railway and the purchaser has cut and severed it from the land. There is here contemplated a series of commercial transactions in the normal course of which the purchaser of this standing timber would seek to recoup himself for the amount of the tax in the price he realizes from the timber. It is therefore a tax which comes within the description of an indirect tax as defined in the authorities.

The answer to this question should be no.

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."

It is here proposed the owner shall pay a tax computed on a percentage of the assessed value of the land. It is imposed as at the time of the alienation and in that sense has no relation to the actual cutting and severing of the timber. The land, however, has no value apart from the timber and a purchaser thereof contemplates the cutting and marketing of the timber. Therefore, an assessment at its fair market value is really a tax founded upon the fair market value of the timber and a tax so imposed is in reality upon the timber and not the land and would enter into the price, as in Questions Four and Five, and therefore subject to the same objection. In substance it is a commodity and not a land tax. This view is emphasized by the alternative method of payment. The cutting and marketing of the timber is subject to several hazards, including that of fire, and the annual operations are determined by market conditions. Under all the circumstances, the alternative method of payment in d (ii) would be usually adopted.

Mr. Farris pressed that this was a direct tax within the meaning of *City of Montreal* v. *Attorney-General for Canada,* (1923) A.C. 136; and *City of Halifax v. Fairbanks' Estate,* (1928) A.C. 117. In both of these cases a provincial tax upon the occupant's interest was held to be a valid direct tax. The difficulty is that this tax is not upon the occupant's interest, but rather upon the specific commodity which will be prepared for and sold upon the market in the course of normal commercial transactions.

The answer to this question is no.

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?"

The legislature in enacting this section described the levy as an annual tax. It is compulsorily imposed by the province upon the owner of certain lands and enforceable by law. It is therefore a tax within the meaning of *Lawson* v. *Interior Tree Fruit and Vegetable Committee of Direction,* (1931) S.C.R. 357. The amount realized is supplemented by a further sum of one million dollars annually from the consolidated revenue of the province. The latter emphasizes what is perfectly clear, that fire protection afforded to the timber area is in the interest of the public as well as the owners of those areas. The fact that the proceeds are used for the specific purpose of fire protection does not affect the character of the imposition of a tax. As stated by Lord Thankerton:

> "The fact that the moneys so recovered are distributed as a bonus among the traders in the manufactured products market does not, in their Lordships' opinion, affect the taxation character of the levies made." *Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy Ltd.,* (1933) A.C. 168 at p. 175; Plaxton 181 at p. 188.

The circumstances of this case bring it within the principle of *City of Halifax* v. *Nova Scotia Car Works Ltd.,* (1914) A.C. 992, where an exemption from taxation included exemption of an improvement tax.

The answer to the first part of this question is no; to the second part yes.

The answers to the foregoing questions are :

(1) The answer to this question as framed is no; and if the contractual position of the province be treated as a second part, the answer to this part is yes.
(2) Yes.
(3) No.
(4) Yes.
(5) No.
(6) No.
(7) As to the first part, no; as to the second part, yes.

L.S.

No. 22

AT THE COURT AT BUCKINGHAM PALACE
THE 29TH DAY OF MARCH, 1949

PRESENT

THE KING'S MOST EXCELLENT MAJESTY

LORD PRESIDENT	SIR ALAN LASCELLES
LORD PRIVY SEAL	MR. HALL

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 18th day of March 1949 in the words following, viz. :—

" WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of the Attorney-General of British Columbia in the matter of an Appeal from the Supreme Court of Canada between the Petitioner Appellant and (1) Esquimalt and Nanaimo Railway Company (2) Alpine Timber Company Limited (3) the Attorney-General of Canada Respondents setting forth (amongst other matters): that pursuant to an Order-in-Council of the Lieutenant-Governor of the Province of British Columbia dated the 31st December 1943 a Commission was issued under the Great Seal of the Province whereby the Chief Justice of the Province was appointed a Commissioner pursuant to the powers contained in the Public Inquiries Act being Chapter

In the Privy Council

No. 22
Order-in-Council granting Special leave to appeal to His Majesty in Council, 29th March, 1949 (Cont'd)

131 of the Revised Statutes of British Columbia 1936 to enquire into and report upon all phases and aspects of the forest resources in the Province and the legislation relating thereto (including amendments thereof) and that among the matters specifically referred to in the Commission were " Forest finance and revenue to the Crown from forest resources " : that in December 1945 the Commissioner submitted his Report wherein he dealt exhaustively with the forest resources of the Province : that he expressed the opinion that it should be left to the determination of the Courts whether the Fire Forest Protection Tax (so-called) imposed under section 123 of the Forest Act being Chapter 102 of the Revised Statutes of British Columbia 1936 applies to timber lands of the Respondents Esquimalt and Nanaimo Railway Company situate on Vancouver Island and whether the said tax is a tax in contravention of section 22 of the Provincial Act of 1883 being Chapter 14 (47 Victoria) 1884 of the Statutes of the Province : that the Commissioner further reported that in his opinion it would be in the public interest if a severance tax were imposed upon all timber cut upon lands of the Respondents the Esquimalt and Nanaimo Railway Company after the same be sold or otherwise alienated by those Respondents : that he found that there never was between the Province of British Columbia and the contractors for the building of the railway or the Respondents the Esquimalt and Nanaimo Railway Company any contractual relationship relating to the transfer of the Island Railway Belt to those Respondents and that there was no contract between the Province and those Respondents which would be broken by the imposition of the said tax but that those Respondents contended that there was such contractual relationship and further questioned the competence of the Provincial Legislature to impose such tax which it was contended was indirect taxation not falling under Head 2 of section 92 of the British North America Act 1867 : that the Commissioner accordingly recommended that this matter should be determined by the Courts : that under the provisions of the Constitutional Questions Determination Act (being Chapter 50 of the Revised Statutes of British Columbia 1936) certain questions were by Order-in-Council dated the 13th November 1946 submitted to the Court of Appeal for British Columbia which questions as subsequently amended were considered by the Court and all the Respondents and the Petitioner were represented by Counsel who put forward argument upon the hearing : that on the 10th June 1947 there was issued a Certificate of the Court containing the answers to the reference questions : that the Respondents Esquimalt and Nanaimo Railway Company appealed to the

In the Privy Council

No. 22
Order-in-Council granting Special leave to appeal to His Majesty in Council, 29th March, 1949 (Cont'd)

Supreme Court of Canada from the answers of the Court of Appeal for British Columbia to the reference questions numbered 1, 2, 3, 5, 6 and 7 : that the Respondents Alpine Timber Company Limited and the Attorney-General of Canada similarly appealed in respect of the answers to the reference questions numbered 1, 2, 3, 5 and 6 : that the Petitioner similarly cross-appealed in respect of the answer to the reference question numbered 4 : that Judgment was delivered on the 25th June 1948 reversing the Judgment of the Court of Appeal for British Columbia except in so far as such Judgment related to the answer to the reference question numbered 4 : that although there was ultimate unanimity among the Judges of the Supreme Court four separate Judgments were delivered and the Judges arrived at their conclusions by widely different reasoning : that the reference questions necessitate the consideration and determination of difficult and important questions of law and involve questions of considerable constitutional importance : And humbly praying Your Majesty in Council to grant the Petitioner special leave to appeal from the Judgment of the Supreme Court dated the 25th June 1948 and for such further or other Order as to Your Majesty in Council may appear fit :

" THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof (Counsel for the Respondents consenting thereto) Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioner to enter and prosecute his Appeal against the Judgment of the Supreme Court of Canada dated the 25th day of June 1948 :

" And Their Lordships do further report to Your Majesty that the authenticated copy under seal of the Record produced by the Petitioner upon the hearing of the Petition ought to be accepted (subject to any objection that may be taken thereto by the Respondents) as the Record proper to be laid before Your Majesty on the hearing of the Appeal."

HIS MAJESTY having taken the said Report into consideration was pleased by and with the advice of His Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor-General or Officer administering the Government of the Dominion of Canada for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

E. C. E. LEADBITTER.