Privy Council Appeal No. 7 of 1949

Attorney-General of British Columbia - - - - *Appellant*

v.

Esquimalt and Nanaimo Railway Company and others - *Respondents*

FROM

THE SUPREME COURT OF CANADA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 2ND NOVEMBER, 1949

Present at the Hearing:

VISCOUNT SIMON
LORD GREENE
LORD OAKSEY
LORD MORTON OF HENRYTON
THE CHIEF JUSTICE OF CANADA
(THE RIGHT HON. T. RINFRET)

[*Delivered by* LORD GREENE]

The events leading up to the present controversy are so fully and clearly stated in the judgments of the Canadian courts that their Lordships need not give more than a brief outline of them.

In the year 1883 an outstanding question between the Province of British Columbia and the Dominion of Canada with regard to the construction of a railway on Vancouver Island, originally contemplated as part of the C.P.R. trans-continental route, was finally put to rest by means of an agreed scheme. Three parties were involved in this—the Provincial Government, the Dominion Government and a group of financiers (called "the contractors") who were prepared to arrange for the construction of the Railway. The scheme as it was finally put into operation involved the following main steps. A belt of land on the island through which the railway was to run, belonging to the Crown in right of the Province (known as the "Island Railway Belt") was to be vested in the Crown in right of the Dominion. A company was to be incorporated for the purpose of constructing and operating the Railway, and the Island Railway Belt was to be transferred to it by the Dominion as soon as the construction was satisfactorily completed. In addition the company was to receive from the Dominion a sum of cash by way of further subsidy.

For the purpose of carrying the scheme into effect a number of what, for convenience, may be called "constituent documents" came into existence. They were shortly as follows:—

(1) the draft of a Bill to be introduced into the Provincial legislature the form of which was finally signed as agreed by representatives of the Provincial and Dominion Government under date the 21st August, 1883, and was endorsed by Robert Dunsmuir, the leader of

the group of contractors, with their acquiescence in its terms on the 22nd August, 1883. The draft bill recited an agreement between the Province and the Dominion for the purpose of settling existing disputes between them. It was passed by the Provincial legislature and assented to on the 19th December, 1883. It is known as the "Settlement Act". Sections 8 and 22 provided 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.'"
>
> "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."

(2) A contract between the contractors and the Dominion Government dated the 20th August, 1883, for the construction of the Railway. By clause 13 of this contract the Government agreed to grant to the contractors by way of subsidy the cash and belt of land above-mentioned. By clause 15 the land was to be granted subject in every respect to the provisions of the Settlement Act (then in the form of the Draft Bill).

(3) A Dominion Act (assented to on the 19th April, 1884) which recited the above-mentioned Agreement between the Province and the Dominion and also the passing of the Settlement Act by the Provincial legislature.

(4) Nomination (made by Dominion Order-in-Council on the 12th and gazetted on the 19th April, 1884) of the persons to be incorporated as provided by section 8 of the Settlement Act whereby the Railway Company was brought into existence as a corporate entity.

(5) Conveyance dated the 21st April, 1887, of the Island Railway Belt by the Dominion to the Railway Company upon completion of the Railway, subject, among other things, to the Dominion Act (No. 3 above) and the Settlement Act.

In addition to these constituent documents reference was made on behalf of the parties to a large number of documents, correspondence, Orders-in-Council, reports, etc. Their Lordships have carefully considered them but as in their opinion they lend no effective support to the case presented on behalf of the respondents they do not propose to make further reference to them.

The belt of land thus acquired by the Railway Company comprised valuable timber land and formed an important subsidy. Granted as it was, it was not subject to the payment of any royalty such as was ordinarily payable (subsequently, at any rate, to the year 1887) under Crown leases and licences relating to timber lands. Moreover the tax exemption granted by section 22 of the Settlement Act so long as the conditions there mentioned continued to exist and so long as the section should remain in force constituted a privilege of considerable value to the Railway Company. Among the taxes comprised in the exemption is the Provincial Land Tax which is imposed on land in the Province including timber land.

On the 31st December, 1943, the Hon. Mr. Justice Sloan, afterwards Chief Justice of the Province, was appointed by the Lieutenant-Governor as Commissioner to enquire into a number of matters relating to the Forest Resources of the Province. In the year 1945 the Commissioner issued his Report which among other things dealt with the Island Railway Belt. He pointed out that the Province was receiving no revenue from the timber cut upon these lands and discussed the possibility of imposing

(1) a " severance tax " upon such timber cut from such of the land as was sold by the Railway Company (2) a " Fire Protection tax " upon unalienated land. In relation to a " severance tax " he referred to certain considerations which had been placed before him on behalf of the Railway Company in the following terms:—

> " (Page 179.) 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.
>
> " (Page 183.) 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 1882-84 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 '." The tax contemplated by the Commissioner was not to go outside this.

Consequent upon the raising of these matters by the Commissioner in his Report a Reference was made to the Court of Appeal of the Province under the relevant provincial statute. It submitted seven questions. All of them except question 4 were answered by the majority of the Court of Appeal favourably to the submission made on behalf of the Province. On appeal to the Supreme Court all were answered adversely to those submissions and the Attorney-General of the Province now appeals. The appeal is resisted by the Railway Company, Alpine Timber Company Limited (a past purchaser of land from the Railway Company) and the Attorney-General of Canada.

These seven questions fall under three heads. The first three raise and involve in different forms the question of an alleged contract between the Province and the contractors or the Railway Company and the effect of such alleged contract in relation to different forms of proposed taxation having regard particularly to section 22 of the Settlement Act. Questions 4, 5 and 6 are not concerned with the alleged contract but raise the question whether the forms of taxation therein proposed are *intra vires* the Provincial legislature. Question 7 raises a separate question which does not fall within either of these two heads.

Questions 1, 2 and 3 are as follows:—

> 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 '? "
>
> 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? "
>
> 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? "

It will be seen that if the answer to question 1 is in the affirmative questions 2 and 3 do not arise.

The nature and object of the contention that a contractual relationship came into existence between the Province (i.e. the Crown in right of the Province) and the contractors and the Railway Company (either as successors to the contractors or independently in their own right) whereby the Railway Company became contractually entitled to have and keep the benefit of the tax exemption contained in section 22 is clearly explained in the following extract from the judgment of O'Halloran J.A. in the Court of Appeal:—

> " . . . 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."

In the Court of Appeal O'Halloran J.A. came to the conclusion that there was no contractual relationship between the Province and the contractors or the Railway Company. Their Lordships agree with this conclusion and with the reasoning upon which it is based. Bird J.A. was of the same opinion as O'Halloran J.A. Smith J.A. dissented. In the Supreme Court all members agreed that there was no contract between the Province and the contractors. But they all took the view that a contract (or its practical equivalent) between the Province and the Railway Company had been established.

Having regard to the concurrent decisions in the Canadian courts that there was no contractual relationship between the Province and the contractors their Lordships do not propose to do more than make some general observations on that topic. Some of them are not without relevance, in their Lordships' view, to the matter of the alleged contract between the Province and the Railway Company.

Their Lordships think it right to state clearly that they must not be understood as expressing an opinion as to any moral right to complain of the proposed taxation which the Railway Company may conceive itself to have. No such matter is raised or indeed could be raised by any of the questions referred which are concerned solely with the legal position. Not only must moral and political considerations be rigidly excluded but the dividing line between rights and liabilities created by legislation and those created by contract must not be blurred.

Besides involving an offer and an acceptance (either of which may in appropriate cases be expressed in words or by conduct) and the presence of consideration a contract can only come into existence if an intention to contract is present. That negotiations took place, that there were three parties who took part in them viz. the Dominion Government, the Provincial Government and the Contractors, that the negotiations resulted in a definite arrangement under which each party was to play and did play its appointed part—all these matters are beyond dispute. Agreements were entered into in contractual form between the Province and the Dominion and between the Dominion and the Contractors. But there was no such agreement between the Province and the Contractors and the whole case under this head rests on the contention that such an agreement ought to be inferred from the documents and the acts of the parties. That the enactment of the Settlement Act and in particular of section 22 thereof was an essential part of the arrangement is again obvious. The whole arrangement would have broken down if the Provincial legislature had refused to enact that section. But much more than this would be needed before the existence of a contractual obligation to procure its enactment could be inferred. Even more difficult to infer in their Lordships' opinion would be any intention of a contractual nature that the section when enacted should remain for all time upon the Statute Book. If a promise that it should be put upon the Statute Book be assumed it was a promise by the Crown that there should be enacted something which in its very nature as legislation was susceptible of repeal or amendment by the legislature. The difficulties in the way of extending such a promise so as to include an undertaking by the executive which would be broken if it were thought desirable in the public interest to introduce amending legislation on some subsequent occasion appear to their Lordships to be, for constitutional reasons alone, insurmountable.

But, it is asked, would business men have been content with an arrangement which on a vital matter gave them security of so precarious a nature? It appears to their Lordships that one answer to this criticism would be that if business men had desired to have a binding contractual promise of the kind suggested—a promise indeed of a character which (to say

the least) no government would be likely to give with alacrity—they would have obtained a written contract to that effect and not left it to be merely inferred. Moreover the lack of security must not in their Lordships' view be exaggerated. To have on the Statute Book a section in the terms of section 22 was in itself an important practical safeguard. What the contractors wanted and what from the business point of view they were entitled to ask for was the enactment of the Settlement Act containing section 22. This they obtained. But they obtained it not by virtue of any contractual right binding on the Province but as a mere business matter of fact. Their Lordships find no reason for inferring in addition any contractual right to call for what they in fact obtained, still less a contractual right of such a nature as would give them in law a right to complain of breach of contract if legislation diminishing or taking away the tax exemption conferred by section 22 were to be passed at a later date.

This view is confirmed by the fact that in the case of the Dominion a written contract (the construction contract of 20th August, 1883) was entered into with the contractors. This alone makes it impossible in their Lordships' opinion to imply a contract between the contractors and the Province, a contract not contained in any writing and of which there is no affirmative evidence. This written contract with the Dominion is one on which alone the contractors might be expected to have relied without requiring it to be supplemented by a further contract with the Province.

As in their Lordships' opinion no such contractual relationship as is suggested ever came into existence as between the Province and the contractors it follows that no such relationship could be claimed by the Railway Company to exist for its benefit by reason of its succession to the rights of the contractors.

The Supreme Court however thought that a contract (or what in practice was its equivalent) between the Province and the Railway Company in its own right and not as successor to the contractors ought to be inferred. Kerwin and Locke JJ. with whom Rand J. was in substantial agreement thought that the Province, by holding out the promised tax exemption as an inducement to the Railway Company, must be taken to have agreed that it should enjoy the exemption as a matter of contractual right once the railway was constructed. On this view section 22 is to be regarded as an offer. In the words of Rand J. " 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 . . . upon performance by the company here, the engagement became binding upon the Crown." Their Lordships are unable to accept the conclusions of these learned judges. They cannot agree that a section of an Act of Parliament is to be regarded as an offer by the executive; and there can be no question of an offer by the legislature which no one suggests could become a party to the supposed contract. Legislation and contract are entirely different methods of creating rights and liabilities and it is essential to keep them distinct. Parliament could no doubt enact that a section of a statute should have the force of an offer by the Crown capable of being accepted by a subject. But here it has not done so and it is impossible to place such a construction on the simple language of section 22. The Railway Company no doubt did rely on section 22: but the only inference which in their Lordships' opinion can be drawn is that it relied on the section as an existing and valuable piece of legislation and not as an offer capable of being accepted so as to bring into existence a contract binding on the Crown.

Kellock J. although inclined to take the same view as the majority did not express a concluded opinion upon it since he found for the existence of a contractual relationship by another route. " In my opinion " he said " 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." Apart from the improbability that the Dominion would have taken upon itself

the duties of a trustee towards a subject, their Lordships are unable to find grounds in the facts of the case for holding that any such relationship was ever contemplated. Reliance was placed upon section 3 of the Settlement Act which grants the land " 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." Their Lordships are unable to construe this reference to a trust as intended to constitute the Dominion a trustee for the Railway Company. The " trust ", if indeed the word is used here in any strict sense, means in their opinion no more than that the Dominion is to be under a trust obligation towards the Province by which it would be bound to appropriate the land for the purposes indicated. Section 11 of the Terms of Union of 1871 under which British Columbia was admitted to the Dominion uses the same word " trust " in relation to the land which was to be conveyed to the Dominion thereunder " in trust to be appropriated . . . in furtherance of the construction " of a railway to connect the sea-board of British Columbia with the railway system of Canada.

Estey J. also found for a trust enforceable by the Railway Company. He said:—

> " 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 section 22 are no different from its position had it contracted direct with the railway, except as to questions of enforcement not here in issue."

Their Lordships are unable to find any sufficient ground for introducing so complicated a conception into what appears to them, once the respective attitudes taken up by the Province and the Dominion are appreciated, a simple and intelligible scheme.

An attempt was made in argument to establish a contractual relationship between the Province and the contractors by suggesting that in entering into the construction agreement the Dominion was acting as agent for the Province. Their Lordships do not find a trace of evidence which could support such a proposition.

Their Lordships do not leave the question of contractual relationship without referring to an alternative argument that such a relationship was affirmed or brought into existence in the year 1912. In that year an Act was passed by the Provincial legislature for the purpose of ratifying an agreement (scheduled to the Act) which had been entered into by the Crown in right of the Province and the Railway Company. The scheduled agreement refers to section 22 of the Settlement Act and recites that the Company wished to lease its railway to the Canadian Pacific Railway Company but wished to be assured that such leasing and the operation of the Railway by the Canadian Pacific Railway should not affect the exemption from taxation given by the section. It then provided (clause 1) that the leasing and operation " shall not affect the exemption . . . and notwithstanding such lease and operation such exemption shall remain in full force and virtue ". By clause 2 the Company agreed to pay to the Province an annual sum of 1½ cents per acre of land not used for railway purposes which on the date of payment should be exempt from taxation. By clause 3 the Company agreed to construct and operate an extension of its main line therein described. Their Lordships cannot ascribe to this agreement or to the Act which ratified it any operation beyond that expressed by the language used. The situation was a simple one. The proposed leasing to the Canadian Pacific Railway would, by the express terms of section 22 of the Settlement Act, have put an end to the exemption granted by that

section. The Railway Company was successful in getting the Province to agree that the exemption should be continued notwithstanding the leasing. On its side the Railway Company agreed to give consideration for this concession which took the form of an annual payment in respect of lands enjoying the exemption and an undertaking to construct and operate the extension. An Act of Parliament was necessary before the tax exemption could be preserved notwithstanding the leasing. In their Lordships' opinion this was the only effect of the events relied on. They merely had the effect of preserving the existing exemption and did not otherwise extend its operation or alter its character.

Their Lordships now turn to questions 4, 5 and 6. The various forms of tax described in them are not identical with, or confined to, the form of tax recommended by the Commissioner and loosely called by him a "severance tax". Their validity must be determined by reference to the language of the questions themselves and not to expressions used by the Commissioner in his report. The questions are as follows:—

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?"

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

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

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

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

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

Question 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.'"

Their Lordships do not propose to consider questions 4 and 5. The Supreme Court held that the imposition of the taxes there described would be *ultra vires* of the Provincial legislature and counsel for the appellant

did not seek to disturb this finding provided he were to be successful with regard to question 6. As the Board considers that he is so entitled to succeed, the answers of the Supreme Court to questions 4 and 5 will stand.

The Court of Appeal by a majority (Sidney Smith J.A. dissenting) answered question 6 in the affirmative, holding that the tax there described was a direct tax. In the Supreme Court this decision was reversed.

The appellant claims that this tax is what it is described in the question to be, namely a land tax, and that it falls within the category of direct taxation. On behalf of the respondents it is contended that in pith and substance the tax is not a land tax at all but a timber tax and therefore indirect and that in any case, whatever label be attached to the tax, it is in its nature indirect as tending to be passed to persons other than the assessee. Their Lordships have been assisted by very careful and full arguments and a number of authorities have been referred to in which particular taxes were examined in order to see whether they fell within the category of direct or that of indirect taxation. The principles upon which such a question falls to be decided are not, however, in doubt and their Lordships do not find it necessary to refer to more than a few of the authorities cited. The answer to the question whether the tax is or is not a direct tax is to be found in their opinion primarily by an examination of the nature and effect of the tax as collected from the language describing it.

The tax is described as a " tax on land of the Island Railway Belt ". The provisions proposed are described as being " substantially as follows ". Certain of these provisions are susceptible of more than one meaning and there has been acute controversy as to how they should be interpreted. The first example of this is to be found in paragraph (*a*) in its application to land " when used " by the Railway Company for other than railroad purposes. This, it was suggested, must mean that if the Railway Company determined to cut the timber and sell it the subject-matter of assessments could only be the sites of the individual trees cut and this, it was argued, shewed that the tax was in reality a tax on the timber. But their Lordships are of opinion that this involves too narrow a construction of the word " used ". The expression " used by the Railway Company " is obviously taken from section 22 of the Settlement Act. It must in their Lordships' opinion be interpreted in a reasonable way and would apply to any area which the Railway Company might take practical steps to lay out and dedicate to some user other than a railway user and not merely to individual spots in the area (such as the site of a tree) on which actual operations had been put into execution.

Another example is to be found in the first option in paragraph (*d*), the option to pay the amount of the assessment under " discount ". This, it is said, must be interpreted as referring only to a commercial discount based on the present value of money payable in the future. This option therefore, it is said, is a mere sham since no one would choose it, the reason being that such a " discount " would take no account of the risks (*e.g.* that of fire) which, if they eventuated, would result in no tax being paid at all by a person who had chosen the second option. Counsel for the appellant repudiated on behalf of his clients any intention that the first option should be other than a real option and he maintained that the " discount " referred to would take into account the risks in question so as to give to the owner a real and not a sham option. While their Lordships might find it difficult to rest on a mere assurance of this kind they think it legitimate and proper to interpret an ambiguous word such as " discount " in a sense which will give reality to the option. In construing questions of this nature which do not purport to give more than an outline of the proposed legislation the method applicable in construing a statute must not, in their Lordships' opinion, be too rigidly applied. In the completed legislation many sections of an explanatory or machinery nature would be included. Ambiguities would be cleared up, gaps would be filled and it may often be necessary in construing what is no more than a

" projet de loi " to assume a reasonable intention in that regard on the part of the legislature. Still more, their Lordships think, an intention must not, in the absence of clear words, be ascribed to a responsible legislature of enacting a provision which would be a deliberate and unworthy sham. They therefore construe the word " discount " as including a proper allowance for risks so as to give to the first option a business reality. In the Supreme Court none of the learned judges (except possibly Estey J.) appears to have regarded the first option as a sham, although they thought it most probable that the second option would be preferred. Rand J. (with whom Kellock J. agreed) went further. He said:—

> " I agree . . . 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."

Their Lordships are in agreement with this statement and respectfully adopt it.

The next point to be noted is that the *land* is to be assessed at its fair market value. It is clear therefore that the subject-matter of the assessment is, *ex facie*, the land and not the timber standing upon it. It is said however that this too is a sham on the ground that the only value in the land is due to the fact that it has the timber on it; that the fair market value of the land is the same thing as the fair market value of the timber; and that accordingly the direction to assess the land is mere camouflage to hide the real intention which is to assess the timber.

For the sake of the argument their Lordships are prepared to assume that the timber lands in the Belt have at present no substantial value beyond the value of the timber although such a view ignores the possibility of development of parts at any rate for other purposes, including replanting. Locke J. described the lands as " largely worthless ". Estey J. went further and declared that the land " has no value apart from the timber ". But the assessments or some of them may take place in the distant future when parts of the land itself may have acquired a value of their own irrespective of the timber. Their Lordships think that such a possibility cannot be ignored. But however this may be, the argument appears to their Lordships to confuse the subject-matter of taxation with that element comprised in the subject matter which gives to it its value for assessment purposes. It simply is not the case that a tax on land is the same thing as a tax on timber, however minute or even non-existent may be the difference in value of the land and of the timber. The importance of this distinction between the land and the timber will appear later and their Lordships are in agreement with what was said by O'Halloran J.A. on this topic in the following passage:—

> " 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."

Under paragraph (*c*) it is the owner of the land who is to be taxed, the tax is to be a percentage of the assessed value, and the tax is charged on the land. Now it is possible that the ownership of the land and the ownership of the timber may come into different hands: nevertheless it will be the owner of the land and not the owner of the timber who will be liable to the Crown for the tax. The fact that the tax is to be a charge on the land is in their Lordships' opinion of great significance. There is no charge on the cut timber. If a landowner cuts the timber on part of his assessed land and makes default in payment of the tax the Crown will be entitled to enforce its charge not against the timber already cut but against his land, even though the only land of any value is the remainder of the assessed land with the timber trees which stand upon it and are part of it. This appears to their Lordships to point clearly to

the view that the proposed tax is in truth a tax on the land and not a tax on timber. In relation to the amount of the tax it was argued that what in reality was being aimed at was to compel the payment of a sum arrived at in the same manner as a royalty and that the valuation required would have to be conducted in the manner required for the fixing of a royalty i.e. a valuation of the timber made on what is called a " cruise ". Reliance was placed on paragraph 12 of the Statement of Facts agreed between counsel on the 13th December, 1946 which says " 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 ". Their Lordships, however, are of opinion that this argument is based on a misconception both of the description of the tax contained in question 6 and also of the paragraph in the agreed Statement of Facts. That paragraph, they were informed, was agreed merely for the purpose of indicating that the tax might be at least as high as the amount which might have been obtained in the case of a royalty, not that it would necessarily be so. The argument might perhaps have had some substance in the case of question 5 which states that the tax there is to " approximate the prevailing rates of royalty ". No such phrase appears in question 6 where the only statement as to the amount of the tax is that it is to be " a percentage of the assessed value " of the land. It would be for the legislature to fix that percentage which might, of course, but need not, be so calculated as to produce an amount roughly equivalent to what a royalty, had it been payable, might be estimated to have produced. This is far from leading to or supporting the conclusion that the proposal is merely a concealed method of exacting the equivalent of a royalty or that the assessment would be made upon a valuation of the trees only conducted in the same manner as a valuation for royalty purposes.

Paragraph (*d*) is expressed in language appropriate for a machinery section as distinct from the charging section which is paragraph (*c*). On its face it only deals with the time for payment. Their Lordships have already dealt with the meaning of the first option contained in sub-paragraph (i). Had they thought that this option was a sham and intended to be such it might well have affected their view as to the real nature of the tax. But interpreting it as they do as a real option honestly given they find that paragraph (*d*) does nothing more than fix two alternative times for payment of the tax. It would, their Lordships consider, be contrary to sound principles of construction to interpret such an option as doing more than what it purports to do i.e. to give to the taxpayer the right to choose when he will pay a tax the nature of which has already been fixed and declared. It is natural that the legislature in imposing a tax of this nature should give the assessee the opportunity to defer payment until such time as he could provide himself with the necessary money by reaping the produce of his land. This is what sub-paragraph (ii) purports to do and nothing more. The granting of such an opportunity must in its nature be related to the progressive realisation of the value of the timber by cutting: it could not be defined otherwise and their Lordships do not think it right to interpret language, which of necessity had to be used for that purpose, as establishing or helping to establish the proposition that the tax is really a tax on timber and not on land.

A subsidiary argument was raised in connection with sub-paragraph (ii). It was said that the phrase " the value of the trees cut " must mean their market value at the time of cutting and that if the value of timber were to fall it might result that all the timber on a piece of land might be cut without a sum sufficient to discharge the whole of the assessment on that piece being obtained. Although the phrase in question is susceptible of this meaning their Lordships are disposed to think that " the value " referred to is intended to refer to the value at the time of the assessment so that the result suggested would never arise. But in any case the suggested construction does not, in their Lordships' opinion, give any substantial support to the proposition for which it is used, namely that the tax is in reality a tax on timber, for the reason that, if the price of timber fell sufficiently, no tax would be payable after

all the timber had been cut. Even if that is what the sub-paragraph means when read by itself it does not appear to their Lordships to follow that the balance of the tax would never have to be paid. The tax is assessed on the owner of the land and it is quite consistent with the language of the question that machinery should be provided for recovering from the owner any amount remaining unpaid after all the timber had been cut. Moreover, it may be added that if instead of falling the price of timber were to rise then, on the construction suggested, the tax might be wholly satisfied before the whole of the timber was cut, leaving the owner of the land free to realise the value of the uncut timber without incurring any further tax liability.

The conclusion therefore at which their Lordships have arrived is that the tax is in reality a tax on land and not a timber tax. The existing land tax imposed by Provincial legislation is imposed on both timber-bearing lands and non-timber-bearing lands. The proposed tax, it is argued, is really of a different nature since it is an extraordinary tax in the matter of amount, discriminatory because it is only exigible in the case of the Railway lands and calculated (and indeed intended) to deprive the Railway Company of a large part of the benefit originally granted to it by reducing the value of its land. None of these considerations, even if they be regarded as correct, appear to their Lordships to be relevant to the only matter raised by question 6, namely that of *ultra vires*. If the tax is a land tax the fact that it specifically affects the Company detrimentally cannot make it in "pith and substance" something else viz. a camouflaged timber tax, however relevant the detriment to the Company might have been to the argument (already disposed of) based on the alleged contractual relationship.

There is, indeed, one difference between the proposed tax and the ordinary land tax which must be noted and examined, in order to see how far the analogy is affected. The existing land-tax of the Province is, as their Lordships understand, an annual tax in the nature of a royalty whereas what is here proposed is a special impost to be discharged once for all, either as a single discounted sum or by way of a series of instalments. But it does not seem that this distinction assists the respondents in their contention that the tax is in reality a tax on timber.

It is argued however that the tax, whatever name be given to it, is an indirect tax because the natural tendency for the person who is to be assessed to it will be to pass it to others and thus indemnify himself against it. This operation of passing, it is said, would take one or other or both of two forms—a "passing back" to the Railway Company by means of a lowering of the purchase price and a "passing on" to purchasers of the cut timber. It is probably true of many forms of tax which are indisputably direct that the assessee will desire, if he can, to pass the burden of the tax onto the shoulders of another. But this is only an economic tendency. The assessee's efforts may be conscious or unconscious, successful or unsuccessful; they may be defeated in whole or in part by other economic forces. This type of tendency appears to their Lordships to be something fundamentally different from the "passing on" which is regarded as the hall-mark of an indirect tax. Moreover in all the cases where various forms of tax have been discussed not one instance has been found of what in the present case is described as "passing back". Their Lordships are not prepared to hold that this tendency in the present case produces or helps to produce an indirect quality in the tax. Moreover, the tax is assessed after and not before a sale and may not become payable for a considerable time thereafter. Whatever is "passed back" in the form of economic consequence by way of reduction of purchase price, it cannot be the *tax*. Mill's well known formula is that a direct tax is one which is demanded from the very persons who it is intended and desired should pay it while 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. In the *City of Halifax* v. *Estate of J. P. Fairbanks* (1928 A.C. 117) Lord Cave in delivering the judgment of the Board used expressions which if not correctly

understood might appear to lay down too rigid a test for the classification of taxes; but, as is pointed out by Lord Simon L.C. in the judgment of the Board in the later case of *Atlantic Smoke Shops Ltd.* v. *Conlon* (1943 A.C. 550), those expressions "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." In the latter case a somewhat complicated method of taxing the consumption of tobacco was adopted. It was held to be a direct tax because it was imposed on the actual consumer on the occasion of a purchase by him. A similar result from the revenue point of view could no doubt have been secured by imposing the tax on the manufacturer or on the vendor. But such a tax would have been an indirect tax since the operation of passing the burden of the tax to the consumer in the shape of an increase of price would have been in practice almost automatic. This case, in their Lordships' view, affords a good example of the caution with which the "pith and substance" principle ought to be applied. The object of that principle is to discover what the tax really is; it must not be used for the purpose of holding that what is really a direct tax is an indirect tax on the ground that an equivalent result could have been obtained by using the technique of indirect taxation. The use of the word "camouflage" in the argument of the respondents appears to their Lordships to be due to a misapplication of the principle.

Question 7 was as follows:—

> 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?"

It is agreed that the relevant section is 124 and not 123. The Court of Appeal by a majority (O'Halloran J.A. dissenting) held that the levy in question was a service charge and not a tax and did not derogate from the provisions of section 22. The Supreme Court unanimously reversed this decision. Their Lordships agree with the Supreme Court.

The question is a short one. The exemption conferred by section 22 is given in the words "The lands . . . shall not be subject to taxation". There is no context to give to the word "taxation" any special meaning and the question therefore comes to this: "Is the impost charged by section 124 of the Forest Act 'taxation' within the ordinary significance of that word?" The Forest Act contains an elaborate code relating to the control and administration of forestry and forest lands. These lands form an important part of the national wealth of the Province and their proper administration including in particular protection against fire is a matter of high public concern, as well as one of particular interest to individuals. Part XI of the Act consisting of sections 95 to 127 deals with what is described as "Forest Protection". It contains detailed regulations with regard to the kindling of fires, precautions against fires, fire fighting, compulsory assistance and similar matters. Section 124 provides that from the owners of 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". These payments are to be placed to the credit of a fund "in the Treasury to be known as the 'Forest Protection Fund'" and are made recoverable by action at the suit of the Crown. An annual sum of $1,650,000 is to be added out of the Consolidated Revenue Fund. Advances may be made out of the Consolidated Revenue Fund to meet charges incurred before the full collection of the tax or to cover deficiencies. In the case of a deficiency or a surplus there is power to increase or decrease the levy as the case may be. The Forest Protection Fund is applicable for a variety of purposes connected with the protection of Forest lands including the main-

tenance and equipment of a fire-prevention and protection force, the construction of trails, look-out stations etc. and the payment of expenditure incurred by any person in fighting fires. The Legislature has thus thought it proper to divide the expense of what is a public service of the greatest importance to the Province as a whole between the general body of tax payers and those individuals who have a special interest in having their property protected. The levy has what are undoubtedly characteristics of taxation in that it is imposed compulsorily by the State and is recoverable at the suit of the Crown. It is suggested however that there are two circumstances which are sufficient to turn the levy into what is called a "service charge". They are, first, that the levy is upon a defined class of interested individuals and, secondly, that the Fund raised does not fall into the general mass of the proceeds of taxation but is applicable for a special and limited purpose. Neither of these considerations appears to their Lordships to have the weight which it is desired to attach to them. The Fund is made up partly of the levy and partly by contributions from the taxes paid by the general body of tax payers. This is no doubt a reasonable apportionment of the burden, for to impose the cost of services which are of general interest to the community as well as a particular interest to a class of individual exclusively on one or the other might well have seemed oppressive. The fact that in the circumstances the persons particularly interested are singled out and charged with a special contribution appears to their Lordships to be a natural arrangement. Nor is the fact that the levy is applicable for a special purpose of any real significance. Imposts of that character are common methods of taxation—taxation for the Road Fund in this country was a well known example. The objects of the legislature in adopting such a form of tax may be various. But if it finds it convenient to do so the impost, if in other respects it has the character of a tax, does not thereby change its character.

In the result their Lordships will humbly advise His Majesty that save as regards the answers of the Supreme Court to Questions 4, 5 and 7 this appeal should be allowed. There will be no order as to costs.

66554) Wt. 8084—42 110 11/49 D.L.

In the Privy Council

ATTORNEY-GENERAL OF BRITISH COLUMBIA

v.

ESQUIMALT AND NANAIMO RAILWAY COMPANY AND OTHERS

[DELIVERED BY LORD GREENE]

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