

26, 1930

No. 115 of 1929.

In the Privy Council.

On Appeal from the Supreme Court of
British Columbia

BETWEEN

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

AND

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

Case for the Respondent

RECORD.
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1. This is an Appeal from the judgment of the Chief Justice of the Supreme Court of British Columbia dated the 23rd day of May, 1929, whereby it was declared that Section 58 of the Forest Act of that Province is ultra vires and certain consequential declarations were made. p. 126

2. The Appeal concerns the validity of Section 58 of the Forest Act, (R.S.B.C., 1924, Chap. 93), in toto, and Sections 62 and 127 in so far as they purport to implement Section 58.

20 3. The said Sections read as follows:—

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

RESPONDENT'S CASE.

SCHEDULE No. 1.

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

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SCHEDULE No. 2.

Timber.	Lengths, not over.	Diameters, not over.	Rate, per Lineal Foot.	All Piles or Poles 12 in. or over in Diameter shall be scaled, graded No. 1, and taxed at Rates as under.		The following rebate of tax shall be allowed when the timber upon which it is due or payable is used in the Province.
	Feet	Inches	\$ cts.	Lengths not over	p. M. B. M.	
Piles, poles, and crib-timber.	40	11	01	40	\$2 00	All the tax over one two-hundredths of one cent per lineal foot, or one cent per thousand feet, board measure.
	50	11	01¼	50	2 25	
	60	11	01½	60	2 50	
	70	11	01¾	70	2 75	
	80	11	02	80	3 00	
	over 80	11	02½	over 80	4 00	

Provided that the Lieutenant-Governor in Council may allow such rebate of the tax on piles, poles, and crib-timber not used in the Province as may be deemed advisable.

SCHEDULE No. 3.

- Railway-tiesFifty cents per cord.
- Mining-props and laggingFifty cents per cord.
- Pulp-woodFifty cents per cord.
- CordwoodTwenty-five cents per cord.

Provided that a rebate of all the tax over one cent per cord shall be allowed when the railway-ties, mining-props, lagging, or cordwood upon which it is due or payable are used in the Province.

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SCHEDULE No. 4.

Shingle or other bolts of cedar, fir or spruce—

-----One Dollar per cord.

Provided that a rebate of all the tax over one cent per cord shall be allowed when the shingle or other bolts upon which it is due or payable are manufactured or used in the Province. 1923, c. 17, s. 58.

- 10 **62** (1) No person shall export or remove from the Province any timber in respect of which any royalty, tax, or revenue is payable to His Majesty in right of the Province, unless a permit is obtained from an officer of the Forest Branch certifying that the timber has been scaled, and all royalty, taxes, and revenue so payable in respect thereof have been paid. Export of unscaled timber or timber on which royalty is unpaid prohibited.
- 20 (2) Every contravention of the provisions of this section shall render the offender liable to forfeit and pay to His Majesty the sum of one thousand dollars, to be recovered, with all costs as between solicitor and client, in an action brought in the name of His Majesty in any Court of competent jurisdiction. Penalty.
- 30 (3) The Minister, or any person authorized by him, may do all things necessary to prevent a breach of the provisions of this section and to secure compliance therewith, and may for such purpose take, seize, and hold all timber which is, or is suspected to be, in course of transit out of the Province in contravention of the provisions of this section, and may also take, seize, and hold every boat which is towing any such timber; and if the Minister decides that it is not the intention of the holder, owner, or person in possession of the timber to use it in the Province, or to manufacture it or cause it to be manufactured into sawn lumber or other manufactured wood product in the Province, or to dispose of the timber to others who will use the same in the Province, or have the same so manufactured in the Province, the Minister may sell or cause to be sold such timber and boat by public auction, and the proceeds of the sale shall be the property of His Majesty, and shall form part of the Consolidated Revenue Fund. In case the boat escapes after having been so seized, or in case its seizure is avoided by the removal of the boat outside the waters Seizure.
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of the Province, it may at any time afterwards be seized, if found in any of the waters of the Province, and sold as above provided. 1923, c. 17, s. 62.

Accounts
and returns
of timber

127 (1) Every owner of granted lands and every holder of a timber lease or timber licence on lands whereon any timber or wood is cut in respect of which any stumpage, royalty, or tax is reserved or payable under this Act or the "Timber Royalty Act" or any contract, and every person dealing in any timber or wood cut from any such lands, and every person operating a mill or other industry which cuts or uses timber or wood upon or in respect of which any royalty or tax is by this Act or the "Timber Royalty Act" or any contract reserved or payable, shall keep correct books of account of all timber and wood cut for or received by him, and shall render monthly statements thereof to the District Forester, and shall within five days after every transfer of ownership of any boom or timber which has been scaled prior to the transfer notify the District Forester of the transfer, or, if demanded, shall furnish a true copy of the tallyman or scaler's daily work, duly sworn to, which shall contain all such particulars as the Minister may require; and such books of account shall be open at all reasonable hours for the inspection of any officer of the Forest Branch; and the owner, lessee, or licensee, or person dealing in the timber or operating the mill or other industry as aforesaid, shall pay monthly all such sums of money, as are shown to be due, to the Minister. 10 20

Payment of
arrears.

(2) If, after inspection of such books of account, it is found that in respect of any previous statement there is still an amount of timber or wood not reported, and which is subject to stumpage, royalty, or tax, the owner, lessee, or licensee, or person dealing in the timber or operating the mill or other industry as aforesaid, who is in arrear for the stumpage, royalty, or tax, shall forthwith pay the arrears, and for the purpose of the collection and recovery of the same shall be subject to all the provisions of this Act for the collection and recovery of stumpage, royalty, or tax. 1923, c. 17, s. 127. 30

p. 165
p. 166

4. Large areas in the Province of British Columbia are in timber and the Crown has from time to time alienated portions 40

of these timber areas. In respect of all timber alienated subsequent to April 7th, 1887, certain royalties have been reserved and restrictions imposed. (See R.S.B.C., 1924, C. 93). In grants prior to that date, however, no reservation was made as to timber nor was any royalty reserved thereon. Though considerable timber has been cut from lands granted prior to that date there still remains standing much timber upon such lands and the interests affected by the legislation in question in this action are considerable.

p. 130
p. 133
p. 141

p. 160, 1. 17
p. 161, 1. 42
p. 162
p. 165, 1. 28
1. 36

p. 166
p. 169
p. 171

- 10 5. The legislation which now takes the form of Section 58 was first passed in 1903 and received the Royal assent on the 12th day of December in that year, since which date with slight modifications and amplifications it has continuously been in force. The Plaintiff is in the business of logging and owns or has the right to cut the timber upon the lands in question herein, namely Section 1 and Block 75. Section 1 was granted in 1884 to a private individual, predecessor in title to the plaintiff. Block 75 was granted in the same year by Provincial statute to the Government of the Dominion in connection with the building of a
- 20 railway through the area in question. The government of the Dominion conveyed Block 75 to the Esquimalt & Nanaimo Railway Company by deed dated 21st April, 1887. It is submitted however that the date of grant is the date of the Provincial statute and not that of the Dominion conveyance and therefore timber cut from both parcels is subject to no tax other than that attempted to be imposed by Section 58.

p. 17, 1. 44

p. 18, 1. 3

p. 34

p. 133

p. 152, 1. 32

p. 133, 1. 12

p. 141, 1. 9

p. 165, 1. 33

p. 141

p. 135

- 30 6. The Plaintiff in the ordinary course of its business sells its logs both locally and for export. The particular logs in question were sold under contract to Henry McCleary Timber Company, a manufacturer in the State of Washington.

p. 18, 1. 11

p. 21, 1. 12

p. 153

p. 48, 1. 15

p. 49, 1. 25

7. When the logs were ready for delivery the Plaintiff arranged a vessel to tow them to destination and, in company with the master, made application to the Customs officials of the Dominion Government for clearance of the vessel and logs. The Plaintiff's documents were in order but the vessel was refused clearance because an export permit by the Provincial Government was not produced.

p. 22, 1. 22

p. 72, 1. 7

- 40 8. The Plaintiff then made application to the proper officers of the Forest Branch of the Provincial Government for the export permit required by the Customs authorities in respect of these logs. These officers, however, purporting to act under the authority of Section 58, demanded of the Plaintiff a return in

p. 22, 1. 26

p. 23

p. 69

p. 71

p. 22, 1. 46

p. 23, 1. 6
 1. 27
 1. 45
 p. 24, 1. 9
 p. 145

respect of these logs upon departmental form F.B. No. 38 and the payment of the tax of \$2,025.24.

p. 23, 1. 28
 p. 152

9. The Plaintiff refused to make the return demanded and tendered to the officers in the usual manner a sum sufficient to cover all charges due in respect of these logs other than the tax under Section 58.

p. 24
 p. 24, 1. 35
 p. 25, 1. 4

10. The officers refused to permit the export of these logs until the return had been made and the tax demanded had been paid, and threatened to invoke the power conferred upon them by Section 62 of the Act. These were the only reasons for refusing the permission as the Plaintiff's documents were otherwise in good order. The Plaintiff then made application again to the Customs Officers of the Dominion both at Vancouver and Nanaimo for permission to export these logs and clear the vessel which was to tow them to their destination. This application was in order with the exception of the production of the export permit of the Provincial Government, in the absence of which the Customs Officers, acting upon standing instructions from the Department of Customs, refused clearance to the vessel and logs.

p. 25, 1. 13
 p. 22, 1. 33
 p. 22, 1. 15
 p. 71, 1. 42
 p. 72
 p. 86, 1. 18

p. 22, 1. 16
 p. 86

11. The instructions issued to Customs Officers by the Department of Customs were the result of an arrangement made by the government of the Province with the government of the Dominion for the purpose of assisting the Province in the enforcement and collection of this tax.

12. As a result of the action of the Provincial officials the Plaintiff was unable to deliver the logs in fulfilment of its contract and they remained tied up in the booming ground. The Plaintiff then immediately brought this action for a declaration that it was entitled to export without interference from the Provincial authorities.

p. 26
 p. 35, 1. 35
 p. 67, 1. 35
 p. 163
 p. 99
 p. 123, 1. 3

p. 42
 p. 44, 1. 35
 p. 45

13. Prior to the passage in 1903 of the legislation in question and continuously to the present time saw-logs have been an article of commerce and bought and sold as a commodity for use both locally and abroad in the manufacture of lumber for building and construction purposes. The unit of measurement in use is one thousand feet board measure (expressed as "M. ft. B.M."). The unit of measurement in use in the United States is expressed in the same manner but differs in fact from that in use in British Columbia.

p. 36, 1. 12
 p. 36, 1. 43

14. In the purchase and sale of logs the Loggers' Association publishes from time to time a price list which is not binding upon

its members but serves as an indication of the average market price which should be obtained for logs.

15. Transactions in saw-logs both for local consumption and for export are carried on by the owners themselves and by middlemen or brokers in the ordinary course of business. The price at which standing timber upon lands granted prior to April 7th, 1887, was bought and sold, in and about the time of the passage of this legislation, was from 10 to 66 cents per thousand feet in British Columbia and in Washington. The price of saw-logs at that time was approximately \$4.50 to \$7.00 according to grade. This tax therefore greatly exceeded the actual value of the timber itself.
16. The particular saw-logs in question herein are of special quality suitable for use in the manufacture of automobile bodies, which are manufactured in the State of Washington.
17. The provisions of the Forest Act relating to the collection of this tax, whereby monthly returns are required, have rarely been invoked by the Government and then not regularly. The practice has never been to collect the tax in all cases and make rebates as provided by the statute. For a time one cent per thousand was collected upon timber not exported but this practice was abandoned by the Government at the end of 1914, since when the tax has only been collected upon the logs when exported.
18. The tax has always been described by the Government as an export tax or duty and collected as such, but it has been productive of little revenue.
19. The Government of the United States takes the view that this tax is an embargo, prohibition or restriction upon export, and has accordingly applied an import tax in retaliation.
20. The vendors of logs which are *prima facie* subject to this tax pass the tax on to the purchaser in the ordinary course of business.

p. 17, l. 41
p. 51
p. 87, l. 41
p. 97
p. 110, l. 8
p. 123, l. 2
p. 48, l. 1
p. 94, l. 27
p. 95, l. 6
p. 112, l. 5
p. 98
p. 85
p. 99
p. 96, l. 43
p. 112, l. 42

p. 42, l. 29
p. 50, l. 40
p. 60, l. 40
p. 71, l. 8

p. 19, l. 18
p. 78, l. 14
p. 108, l. 28
p. 109, l. 1
p. 115, l. 28

p. 163, l. 1
l. 4

p. 39, l. 43
p. 50, l. 5
p. 153
p. 151
p. 63

pp. 30-32
p. 53
p. 73, l. 17
p. 76, l. 35
p. 124, l. 22
p. 79, l. 31
p. 155
p. 154
p. 157
p. 158

21. The respondent submits that the appeal should be dismissed for the following, amongst other

REASONS

1. Because the tax is contrary to and in violation of the provisions of Sections 121, 122, 123 and 124 of the British North America Act, and of Section 7 of the Terms of Union of British Columbia with Canada.
2. Because the tax is an export or customs tax or duty.
3. Because the tax is an indirect tax.
4. Because the tax is not a direct tax for the raising of a revenue for provincial purposes.
5. Because the tax is an interference with and an attempt to regulate commerce.
6. Because the tax is ultra vires of the British Columbia legislature.

E. P. DAVIS.

D. N. HOSSIE.

No. 115 of 1925

In the Privy Council

*On Appeal from the Supreme Court of
British Columbia.*

BETWEEN

THE ATTORNEY GENERAL OF THE
PROVINCE OF B. C. - (*Defendant*
Appellan)

AND

McDONALD-MURPHY LUMBER
COMPANY, LIMITED - (*Plaintiff*
Respondent)

CASE FOR THE RESPONDENT

LINKLATERS & PAINES,
2, Bond Court,
Walbrook, E.C. 4.

Solicitors for the Respondent