

No. 37 of 1933

In the Privy Council

ON APPEAL FROM THE COURT OF APPEAL
FOR BRITISH COLUMBIA

BETWEEN :

THE ATTORNEY-GENERAL OF THE PROVINCE
OF BRITISH COLUMBIA SUING ON BEHALF OF
HIS MAJESTY THE KING IN THE RIGHT OF
THE PROVINCE OF BRITISH COLUMBIA,

(Plaintiff) Appellant,

AND:

KINGCOME NAVIGATION COMPANY LIMITED,

(Defendant) Respondent.

RECORD OF PROCEEDINGS

MESSRS. ROBERTSON, DOUGLAS & SYMES,
Solicitors for (Plaintiff) Appellant

H. B. ROBERTSON, Esq., K.C.,
Counsel

MESSRS. CHAS. RUSSELL & Co.,
37 Norfolk St.,
Strand W. C. 2,
London Agents.

MESSRS. LAWSON & CLARK,
Solicitors for (Defendant) Respondent.

E. C. MAYERS, Esq., K.C.,
Counsel

MESSRS. WHITE & LEONARD,
Bank Chambers
Ludgate Circus, E.C. 4
London Agents.

In the Privy Council

No 32 of 1933

ON APPEAL FROM THE COURT OF APPEAL
FOR BRITISH COLUMBIA

BETWEEN:

THE ATTORNEY-GENERAL OF THE PROVINCE
OF BRITISH COLUMBIA SUING ON BEHALF OF
HIS MAJESTY THE KING IN THE RIGHT OF
THE PROVINCE OF BRITISH COLUMBIA,

(Plaintiff) Appellant,

AND:

KINGCOME NAVIGATION COMPANY LIMITED,

(Defendant) Respondent.

RECORD OF PROCEEDINGS

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In the Supreme Court of British Columbia

*In the
Supreme Court
of British
Columbia*

No. 1
Endorsement
on Writ
Nov. 25, 1932

BETWEEN:

**THE ATTORNEY-GENERAL OF THE PROVINCE
OF BRITISH COLUMBIA SUING ON BEHALF OF
HIS MAJESTY THE KING IN THE RIGHT OF
THE PROVINCE OF BRITISH COLUMBIA,**

Plaintiff,

AND:

10 KINGCOME NAVIGATION COMPANY LIMITED,

Defendant.

No. 1

ENDORSEMENT ON WRIT

The Plaintiff's claim is to recover from the Defendant the amount of the tax imposed by the Fuel-oil Tax Act upon the Defendant for fuel-oil consumed by the Defendant since the 1st day of June, 1932, and for an account of all fuel-oil consumed by the Defendant.

Dated November 25th, 1932.

RECORD

No. 2

*In the
Supreme Court
of British
Columbia*

STATEMENT OF CLAIM

Writ issued 25th November 1932.

No. 2
Statement of
Claim
Nov. 25, 1932

1. The Attorney-General of the Province of British Columbia sues on behalf of His Majesty the King in the right of the Province of British Columbia.

2. The Defendant is a company incorporated under the Companies Act of the Province of British Columbia and having its registered office at 1318 Standard Bank Building, 510 Hastings Street West, Vancouver, B. C. 10

3. Section 2 of the Fuel-oil Tax Act, Statutes of British Columbia, 1930, Chapter 71, enacted that every person who consumed any fuel-oil in the Province of British Columbia should pay to the Minister of Finance a tax in respect of that fuel-oil at the rate of one-half cent a gallon.

4. Section 10 of the said Fuel-oil Tax Act provided that the said Act should come into force on a day to be named by the Lieutenant-Governor by proclamation.

5. By a proclamation of His Honour the Lieutenant-Governor, dated the 1st day of June, 1932, the 1st day of June, 1932, was named as the day upon which the said Fuel-oil Tax Act, as amended by the Fuel-oil Tax Act Amendment Act 1932, should come into force. 20

6. Between the 1st day of June, 1932, and the 1st day of November, 1932, the Defendant consumed at least 780,000 gallons of fuel-oil and in respect thereof there is a debt due to the Crown in the right of the Province in the sum of \$3,900.00 at least, being at the rate of one-half cent a gallon on the said fuel-oil so consumed.

7. The Defendant has not paid to the Crown in the right of the Province or to the Minister of Finance of the said Province, the tax or any part of the tax owing in respect of the fuel-oil so consumed, and the whole amount of the said tax is due and owing. 30

THE PLAINTIFF THEREFORE CLAIMS:

(a) Judgment for the said sum of \$3,900.00.

(b) Judgment for such further sum as may be found due by the Defendant for fuel-oil consumed by it from the 1st day of June, 1932, upon the Defendant discharging the onus

placed upon it by subsection (2) of Section 4 of the said Fuel-oil Tax Act.

(c) For an account.

Place of trial—Vancouver, B.C.

“HAROLD B. ROBERTSON,”
Counsel for the Plaintiff.

FILED AND DELIVERED this 25th day of November, 1932, by A. H. Douglas of the firm of Robertson, Douglas & Symes, whose place of business and address for service is at 640 Pender Street West, Vancouver, B. C., Solicitor for the Plaintiff.

To the above-named Defendant.

No. 3

AMENDED DEFENCE.

Amended pursuant to Consent Order herein filed as provided for in Marginal Rule 762a (1) and dated 28th December, 1932.

1. The Defendant admits the allegations of fact contained in paragraph 2 of the Statement of Claim.
- 20 2. The Defendant admits the allegations of fact contained in paragraph 3 of the Statement of Claim.
3. The Defendant admits the allegations of fact contained in paragraph 4 of the Statement of Claim.
4. The Defendant admits the allegations of fact contained in paragraph 5 of the Statement of Claim.
5. In answer to paragraph 6 of the Statement of Claim the Defendant admits having consumed between the dates mentioned 494,935 gallons of fuel-oil but denies having consumed between the said dates any quantity of fuel-oil greater than the said last mentioned amount. The Defendant, however, denies that there is a debt due to the Crown in the right of the Province in the sum of \$3,900.00, or any sum.
- 30 6. The Defendant says that the Fuel-oil Tax Act, Chapter 71, Statutes of British Columbia, 1930, is ultra vires the Legislature of the Province of British Columbia.
7. In the alternative, the Defendant says that Section 2 of the said Act is ultra vires the Legislature of the Province of British Columbia.
8. The said statute, or alternatively Section 2 of the said statute, imposes an excise tax.

RECORD

In the
Supreme Court
of British
Columbia

No. 2
Statement of
Claim
Nov. 25, 1932

No. 3
Amended
Defence
Dec. 28, 1932

RECORD
 In the
 Supreme Court
 of British
 Columbia
 No. 3
 Amended
 Defence
 Dec. 28, 1932

9. The said statute, or alternatively Section 2 of the said statute, imposes a tax that is not a direct tax within the meaning of the British North America Act.

10. The said statute, or alternatively Section 2 of the said statute, imposes an import duty.

11. The said statute constitutes a regulation of trade and commerce.

11(a). The tax imposed by the said statute was not imposed in order to the raising of a revenue for Provincial purposes.

11(b). The said statute constitutes an infraction of Sections 121, 122 and 123 of the "British North America Act." 10

12. No crude petroleum, from which fuel-oil is produced, is produced within the Province of British Columbia. All fuel-oil used within the Province is either imported thereinto or produced from crude petroleum so imported: coal for fuel is produced within the Province of British Columbia and competes with fuel-oil.

13. The Defendant admits that it has not paid to the Crown in the right of the Province, or to the Minister of Finance of the said Province any of the monies alleged in the Statement of Claim 20 to be due from the Defendant.

14. The Defendant says that no monies are due or payable by the Defendant to the Plaintiff in respect of fuel-oil under or by virtue of the said Act or otherwise.

DATED at Vancouver, B. C., this 28th day of December, 1932.

LAWSON & CLARK,

Solicitors for the Defendant.

To: The Plaintiff and to
 A. H. Douglas, Esq.,
 Solicitor for the Plaintiff.

30

This Amended Defence is delivered by Messrs Lawson & Clark, Solicitors for the Defendant, whose place of business and address for service is 1318 Standard Bank Building, 510 Hastings Street West, Vancouver, B. C.

JOINDER OF ISSUE

The Plaintiff joins issue on the Statement of Defence herein.

“HAROLD B. ROBERTSON,”

Counsel for the Plaintiff.

RECORD

*In the
Supreme Court
of British
Columbia*

No. 4

Joinder of
Issue

Dec. 15, 1932

FILED AND DELIVERED this 15th day of December, 1932, by A. H. Douglas, Solicitor for the Plaintiff, whose place of business and address for service is at the office of Robertson Douglas & Symes, 640 Pender Street West, Vancouver, B. C.

- 10 To the Defendant,
and to its Solicitors,
Messrs. Lawson & Clark.

RECORD

A 1749/1932

*In the
Supreme Court
of British
Columbia*

In the Supreme Court of British Columbia

No. 5
Proceedings at
Trial
Jan. 11, 1933

BETWEEN :

THE ATTORNEY-GENERAL OF THE PROVINCE
OF BRITISH COLUMBIA SUING ON BEHALF OF
HIS MAJESTY THE KING IN THE RIGHT OF
THE PROVINCE OF BRITISH COLUMBIA,

Plaintiff,

AND:

KINGCOME NAVIGATION COMPANY LIMITED,

10

Defendant.

(Before the HONOURABLE THE CHIEF JUSTICE).

Vancouver, B. C., January 11th, 1933.

No. 5

PROCEEDINGS AT TRIAL

H. B. ROBERTSON, ESQ., K. C.
and BRUCE ROBERTSON, ESQ., appearing for the Plaintiff.

E. C. MAYERS, ESQ., K. C.,
J. K. MACRAE, ESQ., K. C.,
and G. S. CLARK, ESQ., appearing for the Defendant. 20

Mr. Robertson: The action is one by the Attorney-General to recover moneys under the Fuel-oil Tax Act. There is no dispute as to the fact the Defendant has consumed certain oil, and, if the tax is a valid one, there is some \$2400.00 odd owing to the Crown. The real question, of course, is the validity of the Act. In paragraph 5 of the Amended statement of defence they admit the consumption of 494,535 gallons of fuel-oil; and in paragraph 13 that they have not paid anything to the Crown. That is the Crown's case, and under the Constitutional Questions Determination Act where the validity of a Provincial Statute is attacked, one must give notice to the Minister of Justice, and I put in the notice which was served on the Deputy Minister of Justice, 30

January 3rd, 1933, and a telegram from the Deputy Minister of Justice advising us that the Minister does not desire to be heard at this stage of these proceedings.

(NOTICE MARKED EXHIBIT No. 1).
(TELEGRAM MARKED EXHIBIT No. 2).

That is the Plaintiff's case, my lord.

DEFENCE

Mr. Mayers: There is a small matter of evidence I would like leave to call. Mr. Grant.

10

No. 6

DIRECT EXAMINATION OF ARNOLD DAVID GRANT
ARNOLD DAVID GRANT, a witness on behalf of the Defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. MAYERS:

Q. Where do you live? A. At Ioco, B. C.

Q. What is your occupation? A. Superintendent of the Imperial Oil Refinery.

Q. Superintendent for the Imperial Oil Company Limited at its Refinery, or its plant at Ioco? A. Imperial Oils Refinery
20 Limited.

Q. And how long have you filled that position? A. Two years as superintendent and five and a half years as assistant.

Q. What is the proper term for the raw material of which fuel-oil is a product? A. Crude petroleum.

Q. Or crude oil? A. Or crude oil, as it is generally termed in the industry.

Q. Petroleum is a term which covers both the raw material and the refined product, is it? A. Petroleum in its general usage in the oil industry at least it covers a complete line, it might be
30 anything from gas through to liquid—a solvent.

Q. That is, refined and unrefined? A. Yes.

Q. Is there anything in the nature of crude oil commercially produced in this Province? A. Not in commercial quantities that I have heard of, in fact, I am certain of it.

Q. That is, you are certain there is no crude oil produced in British Columbia? A. No crude oil produced in British Columbia.

Q. For commercial purposes? A. For commercial purposes.

40 Q. Where does the Province get its crude oil? A. I speak purely of our own company's operations. We have obtained crude oil from Mexico, Colombia and Peru—

RECORD

*In the
Supreme Court
of British
Columbia*

Defendant's
Evidence

No. 6

A. D. Grant
Direct

Examination

RECORD
 In the
 Supreme Court
 of British
 Columbia
 Defendant's
 Evidence
 No. 6
 A. D. Grant
 Direct
 Examination
 (Cont'd)

The Court: From foreign countries? A. From foreign countries and southern California.

Mr. Mayers. Q. Foreign countries? A. Yes, entirely foreign countries.

Q. How is the fuel-oil which is used in this Province produced? A. We import the crude oil, distil it, take off the maximum yield of the most desirable or most valuable products and the fuel-oil is the residue left in the process of manufacturing.

Q. So that all the fuel oil consumed in British Columbia is a product of refinement, is it? A. I would say so, yes. 10

Q. Is there any crude oil produced in Canada for commercial purposes? A. Oh, there must be some. We have some small crude production.

Q. In what Province is that produced? A. So far as I know commercial crude is found only in Alberta and Ontario. There have been some rumours of small, in fact it is an actual fact there have been some small wells found in Nova Scotia, but I don't think they have ever entered commercial production.

Q. The fuel-oil which is used in this Province is refined in the Province, is it? A. Yes, there may at times have been some small imports, but I don't think there have been any great imports into the Province as fuel-oil. 20

The Court: Q. You would say it is negligible, commercially speaking? A. Yes.

Mr. Mayers: Q. By the way, the information you have given us, would that be the same in the years 1930 and 1932? A. The situation has not changed appreciably in the last two years, no.

Q. Or the last three years? A. Or the last three years, other than the general decline in business the situation remains the same to-day as it was then. 30

Q. So what you have told us applies equally well to 1930 and 1932? A. Yes.

Q. How many gallons of fuel-oil go to the barrel? A. 35 Imperial gallons.

Mr. Mayers: Thank you.

No. 7

CROSS-EXAMINATION OF ARNOLD DAVID GRANT

CROSS-EXAMINATION BY MR. ROBERTSON:

No. 7
 A. D. Grant
 Cross
 Examination

Q. Did I understand you to say that all the fuel-oil which is consumed in British Columbia is distilled from crude oil which is imported into British Columbia? A. So far as my information goes I think it is, yes. I might correct that to this extent. There may be a small border area in close proximity to Calgary that insofar as our transactions go is adjacent to Calgary but the business in there is negligible in any event, and I have no knowledge of just what they do. 40

The Court: Q. You are now talking about British Columbia adjacent to Alberta? A. Yes. There might be a small area in there, but not being a marketing man, I do not know the exact extent.

Mr. Robertson: Q. To make it clear, your statement applies to all of British Columbia, but you say there might be some on the boundary of Alberta? A. Yes.

Q. For some years they have been drilling for oil in the Flathead country in British Columbia? A. They have drilled, I think, every place in the Canadian Northwest where geologists told them there might be reasonable possibilities.

Q. But you do understand they have been drilling for oil for years in the Flathead country? A. I understand so.

Q. That is in British Columbia? A. The Peace River area.

Q. In British Columbia? A. In British Columbia. And I understand they have done some drilling either in British Columbia or closer to the border in the Crow's Nest.

Q. But the Flathead country is in British Columbia? A. Yes.

The Court: Q. Do you know the oil area south of Pincher Creek and near the border of British Columbia. It is an old, old prospect? A. Of that I would not be able to say.

Q. Has that been developed? A. I really don't know. I am a refinery man, and my knowledge of production has been merely what I have gathered from publicity and talks in the business.

Q. I thought possibly you might have that.

Mr. Robertson: Q. You say this situation has practically been the same since 1929? A. Yes.

Q. Excepting for a small decline owing to the depression? A. There has been quite a considerable decline.

Q. Now, the oil which you import is called crude oil? A. Crude oil.

Q. That is what you call it? A. Yes.

Q. And that is what it is called in all official returns? A. Yes.

The Court: Q. And known to the trade as such? A. And known to the oil trade as crude oil or crude petroleum.

Mr. Robertson: Q. And from that, after you bring it into British Columbia, you refine it and take out, I suppose, gasoline? A. That is only one of the many other products.

Q. There are many other products and the residue is called fuel-oil? A. Yes.

Q. And that is what you sell as fuel-oil? A. Yes.

Q. And that is what is covered by this Tax, fuel-oil? A. I

RECORD

*In the
Supreme Court
of British
Columbia*

Defendant's
Evidence

No. 7

A. D. Grant
Cross

Examination
(Cont'd)

RECORD
 In the
 Supreme Court
 of British
 Columbia
 Defendant's
 Evidence
 No. 8
 A. Bennett
 Direct
 Examination

presume so. That is how we have interpreted it.

Mr. Robertson: That is all, thank you.

Mr. Mayers: Thank you.

(Witness aside).

Mr. Mayers: Bennett.

No. 8

DIRECT EXAMINATION OF ARTHUR BENNETT

ARTHUR BENNETT, a witness called on behalf of the Defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. MAYERS:

10

Q. Where do you live? A. In Vancouver.

Q. And your occupation? A. I am the assistant manager for the Union Oil Company.

Q. How long have you filled that position? A. Five years.

Q. What is the price per barrel for fuel-oil? A. \$1.35.

Mr Robertson: My lord, I want to raise an objection. I cannot possibly see how the price of fuel-oil can have any bearing on the construction of this Act.

The Court: It may appear later on.

Mr. Robertson: My friend may be able to show you lord- 20
 ship. I want to take objection at this stage.

The Court: Q. \$1.35 a barrel? A. Yes.

Mr. Mayers: Q. Would you perform an arithmetical sum for me. If there are 35 gallons in a barrel, and a barrel costs \$1.35 and there is a tax of a half of one cent per gallon, what is that percentage?

The Court: Q. You see, Mr. Bennett, you cannot be compelled, I might tell you, you do not need to do counsel's problems, but I presume you are prepared? A. I was not; but what was the question. 30

The Court: Have you got it?

Mr. Mayers: It is 13 per cent.

Q. Would you just verify that, witness. Would you like a piece of paper and a pencil? A. No, I have one here.

The Court: Have we got all the elements?

Mr. Mayers: 35 gallons to the barrel, and \$1.35 per barrel and a tax of a half of one cent per gallon? A. Yes, that is right.

Q. 13 per cent is right. Now, is there any coal produced in British Columbia? A. Yes, sir.

Q. To what extent? 40

The Court: I suppose I could take judicial notice of that.

Mr. Mayers: If your lordship can, I am satisfied.

The Court: However, there is coal produced in British Columbia.

Mr. Mayers: And could your lordship take judicial notice of the fact the production is very considerable.

Q. That is right, is it not, witness? A. Yes, so far as I have seen. I have seen some produced.

The Court: Q. Name some of the areas? A. Cumberland, Nanaimo, Coalmont—

Q. Say Vancouver Island? A. Yes, and Coalmont.

Q. What do you call that area? A. Nicola, the Similkameen, the Crow's Nest Pass.

10 Q. Ingenika, do you know that place? A. No.

Q. You ought to, however.

Mr. Mayers: Q. It is unquestioned, is it not, that coal is produced very extensively in this Province? A. Yes.

Q. Is there any use of oil as fuel as to which coal cannot be substituted? A. I don't know any that it could not be.

Q. What is it that induces the relative use of coal and fuel-oil? A. Why is one used instead of the other, you mean?

Q. Yes? A. The oil is used because it is more convenient.

20 The Court: Q. Is what? A. Using oil is more convenient than using coal.

Mr. Mayers: Q. Well, the whole thing comes down to price, I take it?

Mr. Robertson: Now, my lord, I want it clearly understood my objection goes to all this class of evidence.

The Court: No, I think you must object to specific questions.

Mr. Robertson: I object to this one.

The Court: What is the question again?

Mr. Mayers: Q. What is it that determines the relative use of coal and fuel-oil?

30 The Court: In British Columbia?

Mr. Mayers: In British Columbia.

Mr. Robertson: I object.

The Court: Why?

Mr. Robertson: I don't see how it is going to assist your lordship in considering the validity of this Act.

Mr. Mayers: That is something I will have to try to explain to his lordship.

40 The Court: Having regard to the pleadings, there is a question of direct and indirect taxation and excise, is it not necessary for me in order to determine the issue raised here to really know something about that?

Mr. Robertson: My position is, in my opinion this evidence is not of any assistance to your lordship, and I do not want it going in without my objection.

The Court: The answer to that by Mr. Mayers I presume is that the only thing for me to do is to wait and see.

RECORD

In the
Supreme Court
of British
Columbia

Defendant's
Evidence

No. 8

A. Bennett
Direct

Examination
(Cont'd)

RECORD

*In the
Supreme Court
of British
Columbia*

Defendant's
Evidence

No. 8

A. Bennett

Direct

Examination

(Cont'd)

Mr. Robertson: In the meantime I must take my objection.

The Court: Oh, well, it is down.

Mr. Mayers: Just answer. A. You asked me?

Q. In the ultimate result, what is it that determines the relative use of coal and fuel-oil? A. The fuel-oil is cheaper because it is more convenient, that is to say, the greater inconvenience of using coal costs extra money.

Q. So in the ultimate result it is the relative price, is it not?

A. Yes, I would say so.

Mr. Mayers: Thank you.

10

No. 9

CROSS-EXAMINATION OF ARTHUR BENNETT

CROSS-EXAMINATION BY MR. ROBERTSON:

Q. Now, you say that the oil is cheaper because it is more convenient? A. Yes.

Q. How do you arrive at that? A. The handling of the residue from coal is very expensive.

Q. This cross-examination, my lord, is subject to my objection, of course.

The Court: Oh, yes.

20

Mr. Robertson: Q. Just tell me just how you get at it that the oil is cheaper than coal? A. Take, for instance, handling oil versus coal on a boat, you do away with all the coal passers. You do away with the men handling the ashes and that sort of thing, and cut down your expense that way considerably.

Q. Is that on what you base your statement. Have you really made a study of this very question? A. Oh, yes.

The Court: He is manager of the Union Oil.

Mr. Robertson: Q. Yes. Tell us everything on which you base your statement that oil is cheaper than coal?

30

The Court: The grounds, that is one; are there others? A. Yes, I can give you other instances. Take coal, say in the logging industry, you can handle oil much cheaper than you can coal. You can put it on the spot where you want it at less expense.

Mr. Robertson: Q. How much. What is the difference. A. The exact difference?

Q. Yes? A. I couldn't give the exact difference. I go more or less on the opinions of the managers of these concerns.

The Court: No, Mr. Bennett, that is not an answer to Mr. Robertson. He is asking you these questions, and you say it is cheaper, for instance, that it requires less men? A. Yes, that is it.

Q. Something of that sort. We are not in the business. Why do you say it is cheaper. I think Mr. Robertson and Mr. Mayers and myself know, but we are talking to Mr. Stenographer. You may assume we know nothing about it. A. It takes less men to handle oil than coal.

Q. Take your payroll. Would it make any difference in the number of men employed at a camp? A. A great deal depending on the size of the camp which you have, but no matter how large the camp is, you save man power right from the start.

Mr. Robertson: Q. But you are not in a position to say how much cheaper it is? A. No, it depends a lot on conditions.

Q. It might even be more expensive in some cases? A. Only in the case where you had your coal right on the ground where you happened to be, and it was a terrific job to get the oil
10 in there, but everything else being equal, the oil would be cheaper.

Q. All right. Of course, you know, there are large deposits of coal in the Province of Alberta? A. Yes.

Q. And it is true, is it not, that large amounts of coal are brought from that Province into British Columbia? A. I understand there is coal brought in.

Q. You understand large amounts? A. I couldn't say how much.

Q. You see advertisements all around the City for Alberta coal? A. Yes.

20 Q. You really do not know how much British Columbia coal is consumed in this Province? A. No.

Q. And you cannot tell how much Alberta coal is brought into this Province? A. No.

Q. But you know it is greatly advertised in this City? A. I have seen advertisements.

Q. And you know that English coal is brought into this Province? A. I have seen it in the papers and also that Scottish coal was.

The Court: Q. What? A. I have seen in the papers
30 there is going to be coal brought in from Scotland.

Mr. Robertson: Q. Crude oil is brought into Canada free of duty? A. Yes.

Q. And that has been so for five years? A. Yes.

Q. And is to-day the case? A. Yes.

The Court: Q. Can you assign any reason for that? Would you venture an opinion? A. I would venture the opinion that it was raw material.

Mr. Mayers: I am going to venture a submission on that point by and by, my lord. That is all, witness.

40 (Witness aside).

Mr. Mayers: That is my evidence.

The Court: Just at the moment, Mr. Mayers, if it is, and I presume there is some importance to be attached to the existence of coal in British Columbia, and the extent of it, that is all the evidence I have to rely on, is it?

RECORD
In the
Supreme Court
of British
Columbia
Defendant's
Evidence
No. 9
A. Bennett
Cross
Examination
(Cont'd)

RECORD
 In the
 Supreme Court
 of British
 Columbia
 Proceedings at
 Trial

Mr. Mayers: That is all that is necessary for my purpose, my lord, the fact it is extensively produced in British Columbia, the exact quantity of coal or the exact conditions under which it is produced—

The Court: No, no, but I mean the area, and that sort of thing.

Mr. Mayers: I think I have proved enough, my lord, to show the extensive production of coal in this Province, and that is all I am concerned with. Now, my lord, this is unfortunately going to lead to a somewhat extensive argument, and I would suggest that I should dictate what I want to say to the stenographer, and my friend can dictate what he wants to say. There is very little use to ask your lordship to sit down and listen when you can read it more conveniently in your own room. 10

The Court: What do you say, Mr. Robertson? I think we should be obliged to Mr. Mayers for introducing the matter.

Mr. Robertson: I accept his suggestion.

The Court: It does save the time of everybody.

Mr. Robertson: I understand he is going to have his argument written. 20

The Court: It is equivalent to a written argument.

Mr. Robertson: Yes, and then I will put in my reply.

Mr. Mayers: Of course, if your lordship wants to hear us on any little point—

The Court: Yes, something which perhaps would intervene were I listening to you, but from my experience of both you gentlemen, I do not think you will omit anything.

Mr. Robertson: Thank you, my lord.

Mr. Mayers: That may or may not be a compliment.

The Court: I do like to be ambiguous. It gives one a chance 30 to recover.

I hereby certify the foregoing to be a true and accurate report of the said proceedings.

“W. E. G. JOHNSON,”

Deputy Official Stenographer.

REASONS FOR JUDGMENT OF THE HONOURABLE
THE CHIEF JUSTICE

RECORD

*In the
Supreme Court
of British
Columbia*

No. 10
Reasons for
Judgment
Chief Justice
Feb. 7, 1933

The question raised in this action is whether what is locally known as The Fuel-oil Tax Act, being Chap. 71 of the Statutes of B. C. of 1930 and particularly sections 2, 5 (1) and 6 thereof, is invalid as being an attempt, in the first place, to impose indirect taxation in contravention of head 2 of section 92 of the B. N. A. Act 1867 which only conferred powers of direct taxation upon the

10 Provinces of Canada and, in the second place, to impose Excise taxation and in the third place as being an interference with trade and commerce allotted exclusively to the Federal Parliament. Fuel-oil, the commercial, consumable commodity dealt with by the Legislature in the Act in question, is manufactured from crude petroleum which is imported free of duty into the Province from foreign ports and is kept for sale and is sold within the Province—By Section 5 ss. 1 I take it that the producers of fuel-oil pay the small license fee which would be added to the price and passed on to the consumer who in turn is taxed upon consumption

20 pursuant to section 2. No crude petroleum is produced in British Columbia except in negligible quantities. Coal is found in large areas in the Province. Coal mining is and has been one of the most important permanent industries of the Province both in external and internal trade. The consumption of refined oil manufactured from the crude in Vancouver comes into direct and effective competition with the consumption of coal and tends to leave the trade in that commodity in a somewhat mutilated condition. Sections 2, 5 (1) and 6 are as follows:

30 “2. For the raising of a revenue for Provincial purposes, every person who consumes any fuel-oil in the Province shall pay to the Minister of Finance a tax in respect of that fuel-oil at the rate of $\frac{1}{2}$ c. a gallon.

“5. (1) Upon the expiration of 30 days after the commencement of this Act, no person shall keep for sale or sell fuel-oil in the Province unless he is the holder of a license issued pursuant to this section in respect of each place of business at which fuel-oil is so kept for sale or sold by him.

40 “(2) The manner of application and the forms of application and of the license shall be as prescribed in the regulations. A license fee of \$1.00 shall be payable in respect of each license.

“6. (1) Every collector, constable and every person authorized in writing by the Minister of Finance to exercise

RECORD

In the
Supreme Court
of British
Columbia

No. 10
Reasons for
Judgment
Chief Justice
Feb. 7, 1933
(Cont'd)

“the powers of inspection under this section may without
“warrant enter upon any premises on which he has cause to
“believe that any fuel-oil is kept or had in possession and may
“inspect the premises and all fuel-oil found thereon, and may
“interrogate any person who is found on the premises or who
“owns, occupies, or has charge of the premises.”

The question as to what taxation it is competent for the provincial legislature to impose is a legal one—*Rex v. Caledonia Collieries Ltd.* 97 L. J. P. C. p 95 quoting Lord Hobhouse in *Bank of Toronto v. Lambe*. At the time of Confederation there was a well-recognized Classification. Taxes on property and income were classified as direct while duties of customs and excise were classified as indirect taxes. If a new form of taxation arises a formula of economists may be used but not for the purpose of placing a tax hitherto recognized as belonging to one class into a different class. 10

Customs and Excise are duties imposed on commodities partly for the purpose of raising a revenue, but more truly for the purpose of regulating Trade and Commerce. The Provincial Legislature has no power to impose them. *Attorney-General of B. C. vs. Attorney-General of Canada* (1922) 64 S. C. R. at pp. 381, 384 and 387 and in the same case in the Privy Council (1924) 93 L. J. P. C. p. 132. Reference is also made to the Act of Union passed in 1840 being 3 and 4 Vict. Cap. 35— s. XLIII—I have also been referred to *Attorney-General for New South Wales v. Collector of Customs* (1908) 5 Commonwealth L. R. p. 818. I am not unmindful of the Special War Revenue Act (1915) 10 & 11 Geo. V. Cap. 71 in which the tax is called an excise particularly section 2, subsection 2 and subsection 7 and the Customs Tariff Act (R.S.C.) 1927, Cap. 44, schedule (A) item 267(a). From this it will be gathered that crude oil imported into and refined in Canada shall be free from import or excise duties. 20 30

The Defendant submits that a Provincial Legislature cannot by the employment of a subterfuge, encroach on the domain reserved to the Dominion by attempting to levy a form of revenue which differs in its real nature from the semblance which the Provincial Legislature has sought to give to it; and that the actual incidence of the tax is of no legal significance once it is possible to assign the legislation in question to a particular type of revenue which has long been familiar to legislatures and courts. 30

Lawson v. Interior Tree Fruit & Vegetables Committee of Direction (1931) S.C.R. p. 362. *The City of Halifax v. Fairbanks* (1926) S.C.R. at page 368. *The Attorney-General of B.C. v. Macdonald Murphy Company* (1930) 99 L.J.P.C. p. 115. The question

of direct and indirect taxation has been dealt with judicially on many occasions, the latest pronouncement on the subject to which I have been referred is *The Attorney-General for B.C. v. Macdonald Murphy Co. supra* which also supports the proposition just mentioned that if the offending provisions are in their true character an Excise Act then the provincial legislature may not enact it. Excise is an inland duty or impost levied upon the manufacture, sale or consumption of commodities within the country and has for its essence the intention that ultimately it is to be borne by the consumer and thus that it enters into the price of the commodity and affects its relative use in competition with other commodities, as for instance, coal, which not only is susceptible of but in practical reality is being put to the same use.

It is immaterial at what stage between the producer and the consumer the imposition is levied since the line of incidence extends to the consumer.

It has been strongly pressed upon me that what the legislature has done is to impose a duty of one-half per cent per gallon on all fuel-oil consumed in the Province which includes the fuel-oil produced from the crude petroleum imported to be refined as specified in the Customs Tariff Act thus conflicting with the policy of the Dominion in this behalf. *Attorney-General for Canada v. Attorney-General of Ontario* (1898) 67 L.J.P.C. at page 94; *Toronto Electric Com. v. Snider* (1925) 94 L.J.P.C. p. 123—*Attorney-General for Quebec v. Queen Insurance Co.* (1878) 3 A. C. 1090. In short the Act strikes at the use, enjoyment or consumption of this commodity, the levying of imposition upon which is the very essence of an Excise tax.

For these reasons in my opinion the Province is under a constitutional disability to impose it. The action is dismissed with costs.

“AULAY MORRISON,”

7th February, 1933.

C. J.

RECORD
 In the
 Supreme Court
 of British
 Columbia
 No. 10
 Reasons for
 Judgment
 Chief Justice
 Feb. 7, 1933
 (Cont'd)

No. 11
JUDGMENT

RECORD
In the
Supreme Court
of British
Columbia
No. 11
Judgment
The Honour-
able the
Chief Justice
Jan. 11, 1933

BEFORE THE HONOUR-
ABLE THE CHIEF
JUSTICE

} WEDNESDAY the 11th day
of January, 1933.

This action having come on for trial on this date in the presence of H. B. Robertson, Esquire, K. C., and A. B. Robertson, Esquire, of counsel for the plaintiff, and E. C. Mayers, Esquire, K. C., J. K. Macrae, Esquire, K. C., and G. S. Clark, Esquire, of counsel for the defendant, UPON HEARING evidence on behalf of both parties hereto and UPON HEARING what was alleged by counsel aforesaid; 10

THIS COURT DOTH HEREBY ORDER AND ADJUDGE that this action be and the same is hereby dismissed.

AND THIS COURT DOTH HEREBY FURTHER ORDER AND ADJUDGE that the plaintiff do pay to the defendant the costs of this action forthwith after taxation thereof.

BY THE COURT,
"H. BROWN,"
Dep. District Registrar. 20

SEAL of the
Supreme Court
Vancouver
Registry. "H. B. R."

"A. M." C. J.
"J. F. M." D. R.

Checked
"S. V. L."

Entered
Feb. 9, 1933
Order Book Vol. 85 Fol. 14
Per "L. J. B."

B. C. L. S.
\$1.10
Vancouver
Feb. 9, 1933.
Registry

NOTICE OF APPEAL

TAKE NOTICE that the Plaintiff intends to appeal and does hereby appeal to the Court of Appeal for British Columbia from the judgment of the Honourable the Chief Justice pronounced on the 7th day of February, 1933, whereby the Plaintiff's action was dismissed with costs and judgment given for the Defendant.

RECORD
 In the
 Supreme Court
 of British
 Columbia
 No. 12
 Notice of
 Appeal
 Feb. 9, 1933

AND FURTHER TAKE NOTICE that the Court of Appeal will be moved at the Law courts, Bastion Square, Victoria, B. C., at its present sittings, for an Order reversing the said judgment and entering judgment for the Plaintiff, upon the following grounds:

1. The said judgment was wrong in law.
2. The learned Judge should have held that the Fuel-oil Tax Act was *intra vires* of the Province of British Columbia.
3. The learned Judge was wrong in holding that the tax imposed by the said Act was an excise tax.
4. The learned Judge was wrong in finding as a fact that refined oil and coal came into direct and effective competition and tended to leave the trade in that commodity in a somewhat mutilated condition.

DATED at Vancouver, B. C., this 9th day of February, 1933.

"A. H. DOUGLAS,"

Solicitor for the Plaintiff.

To the above-named Defendant,
 and to its Solicitors,
 Messrs. Lawson & Clark.

RECORD

No. 13

Court of Appeal

No. 13

Reasons for
Judgment
Chief Justice
Mar. 7, 1933

REASONS FOR JUDGMENT OF THE HONOURABLE
THE CHIEF JUSTICE

This is an appeal raising a question involving the jurisdiction of the Dominion Parliament and that of the local Legislature. We have been informed by counsel that the Minister of Justice was notified of this appeal who replied that he did not wish to be heard at this stage. A large number of authorities were cited on both sides a few only of which I shall refer to.

The facts are shortly these. Crude oil is permitted by the 10
Dominion Government to be imported into this Province free of
customs duty and to be refined here—one product of which is
known as fuel-oil, on which the Dominion has imposed no duties
of excise. The Province has passed an Act (1930, Chapter 71)
imposing a tax on the ultimate consumer of fuel-oil and it justifies
that tax by submitting that it does not invade the jurisdiction of
Dominion Parliament; that it is not an excise tax and that it does
not interfere with trade and commerce but that it deals with pro-
perty and civil rights—a question assigned to the Province by the 20
British North America Act and is direct taxation. It was con-
tended by counsel for the Attorney General that excise duties have
never been imposed except upon the manufacturer or producer of
the article; that it has never been imposed upon the consumer and
that the tax imposed by the Province is therefore not an excise
tax but one imposed upon property which is found within the
Province—and therefore direct taxation. Counsel have very ably
presented their arguments pro and con. The history of excise
legislation has been traced from the time of Charles II down to
the present time and the several cases referred to have been shown
to relate to duties of excise on the consumer as well as upon the 30
producer. I think, on the whole case before us, the tax is a duty
of excise and is not within the competence of the Province. Apart
from that I think, it also offends against the powers of the
Dominion with regard to the regulation of trade and commerce.
The Dominion Parliament allows crude oil in free and permits
the refiner to sell his fuel oil free of excise duty. This is done,
I take it, to regulate trade and commerce of the country and a
tax imposed by the Province is one which shackles it. In view
of my opinion that the tax is an excise tax it is hardly necessary
to consider whether it is affected by the practice in the past of 40
recognizing the personal property tax as a direct tax and whether

competent of the Provincial Legislature. The question of whether the personal property tax was *intra vires* or *ultra vires* has never been brought before the Courts and that tax is therefore a very frail foundation upon which to found an argument but in addition to that the Privy Council has referred to the distinction between them.

10 It was suggested that the case of *Halifax v. Fairbanks' Estate* (1928) L.J.P.C., at page 14, is inconsistent with the decision of the same Court in *Lambe's* case (56 L.J.P.C., 89) and in the case of *Attorney-General v. The Canadian Pacific Railway and Union Steamship Company*. I do not, however, read the Halifax case in that way. It seems to me that what the Privy Council meant was that in a case of this kind it is helpful to consider the state of the law at the time of Confederation, but has not intended to exclude the application of *Lambe's* case. This, however, is a matter which the Judicial Committee will doubtless decide for itself should this case reach that tribunal.

The appeal, I think, must be dismissed.

“J. A. MACDONALD,”

20 Vancouver, B.C.

C. J.

7th March, 1933.

RECORD
 Court of Appeal
 No. 13
 Reasons for
 Judgment
 Chief Justice
 Mar. 7, 1933
 (Cont'd)

RECORD

No. 14

*Court of Appeal*REASONS FOR JUDGMENT OF THE HONOURABLE
MR. JUSTICE MARTINNo. 14
Reasons for
Judgment
Martin, J.A.
Mar. 7, 1933

Vancouver, B.C., 7th March, 1933

In this appeal wherein some difficult questions in the very debatable land of Provincial powers of taxation are raised, the solution of which, we were informed by counsel, is of an urgent nature in connexion with the public revenue, I do not think it is necessary or desirable to say more than to adopt the following language of Lord Justice Romer in the very recent taxation case of *Hennell v. Inland Revenue Commissioners* (1933) 102 L.J.K.B. 69, wherein he said at p. 73:—

“During the argument of this case I have felt, and I still feel, considerable doubt, but upon the whole I have come to the conclusion that this appeal should be dismissed.”

That language embodies my view of the like disposition of this case.

“ARCHER MARTIN,”

J.A.

REASONS FOR JUDGMENT

THE HONOURABLE MR. JUSTICE A. E. McPHILLIPS.

No. 15
Reasons for
Judgment
McPhillips,
J.A.
Mar. 7, 1933

10 The constitutionality of the following statute law of the Legislature of British Columbia is called in question in this appeal—being sections 2, 5 (1) and 6, the Act being the “Fuel-oil Tax Act 1930” (C. 71 Statutes of B. C. 1930). In the Supreme Court of British Columbia by a judgment of the Chief Justice of that Court (Morrison, C. J.) the legislation was held to be *ultra vires* of the constitutional powers conferred upon the Parliament of the Province under the British North America Act (1867) Imperial (30 & 31 Vict., C. 3). The argument addressed to this Court centered around the principal section of the Act—viz: Section 2 of Chap. 71 of the Statutes of British Columbia which reads as follows:—

“2. For the raising of a revenue for Provincial purposes every person who consumes any fuel-oil in the Province shall pay to the Minister of Finance a tax in respect of that fuel-oil at the rate of one-half cent a gallon.”

20 The learned Chief Justice of the Court below concluded his reasons for holding as he did in the following words:

“In short the Act strikes at the use, enjoyment or consumption of this commodity, the levying of imposition upon which is the very essence of an Excise Act. For these reasons in my opinion the Province is under a constitutional disability to impose it. The action is dismissed with costs.”

30 It may be stated at the outset that the power to pass an Excise Act by the Parliament of Canada is not one of the exclusive legislative powers conferred by the B. N. A. Act but of course Sec. 91 (3) is very broad in its terms—

“3. The raising of money by any mode or system of taxation.”

Whilst the Legislature of the Province is in more restricted lines, namely, Sec. 92, (2)—

“In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated that is to say:—

“(2) Direct taxation within the Province in order to the raising of a revenue for Provincial purposes.”

RECORD
 Court of Appeal
 No. 15
 Reasons for
 Judgment
 McPhillips,
 J.A.
 Mar. 7, 1933
 (Cont'd)

Then it must always be borne in mind that as regards the powers of the Parliament of Canada—that the concluding paragraph of Section 91 reads as follows:

“And any matter coming within any of the classes of
 “subjects enumerated in this section (92) shall not be deemed
 “to come within the class of matters of a local or private
 “nature comprised in the enumeration of the classes of sub-
 “jects by this Act (B. N. A. Act) assigned exclusively to the
 “Legislatures of the Provinces. Further under sec. 92 there
 “is specifically enacted by sec. 91 (16) “Generally all matters 10
 “of a merely local or private nature.”

Then there is sec. 92 (13) “Property and civil rights in the Province.”

The conception of the framers of the Act was not to give the Parliament of Canada such a controlling power as would paralyze the Legislatures of the Provinces—that is that the Legislatures of the Provinces would be within the Provinces supreme in respect of “matters of a local or private nature.” Therefore the question of “local or private nature” becomes a most important enquiry when considering the impugned legislation and so far held to 20
 be *ultra vires*. The fuel-oil of course is property—personal property—and it cannot, with great respect to all contrary opinion, be looked upon as being in any other category. The property is locally held and within the purview of Act here being considered is personally consumed and the tax is imposed (sec. 2, Cap. 71—1930 B. C.) upon “every person who consumes any fuel-oil in the Province.” It is not capable of being said that property within the province is not taxable—in fact that was not contended for at this Bar but that it was an invasion of the exclusive domain of the Parliament of Canada—in the following respects—(1) an 30
 indirect tax (2) An Excise tax (3) Affects—Trade and Commerce. However, in the main the attack on the legislation revolved around the submission that it was legislation in the way of an Excise Act. Approaching the matter at that point of view I fail to see that there is any authority of any authoritative nature which would preclude the Legislature of a Province of Canada imposing taxation which could be termed an Excise Act—which of course I do not view it to be. In England of course the Parliament is 40
 supreme and we cannot expect to get any authority in the English Courts that will be of aid or assistance in the matter—as in England there can never be what we have here—conflict between the powers of the Dominion and the Provinces as to the respective powers of the Dominion Parliament and the Parliaments of the Provinces. Turning to *Wharton's Law Lexicon* 13th Ed. 1925, we

have this stated "Excise (fr. acciis Dut.; excisum, Lat.) the name
 "given to the duties or taxes laid on certain articles produced
 "and consumed at home amongst which spirits have always been
 "the most important but exclusive of these the duties on the
 "licenses of auctioneers, brewers, etc. and on the licenses to keep
 "dogs, kill game, etc. are included in the excise duties." Now
 what is the position of matters in the Province of British Colum-
 bia to-day—it is a very large producer of coal is taxed—a large
 producer of lumber and lumber is taxed—then let us come pre-
 10 cise to Fuel-oil—this is produced in Canada, it is true not in as
 great volume as in the United States of America, but Canada
 admits of the entry of crude oil into Canada without duty from
 which Fuel-oil is produced. In Ontario there are oil wells in
 operation for nearly a century and still operating and there are
 large oil wells in the Province of Alberta—the Turner Valley—
 and fuel-oil is produced from these wells and there are many
 other oil fields in various portions of the Dominion of Canada
 that will in the early future be in operation. Is it to be said
 that this property when in the Province and consumed in the
 20 Province shall be free from taxation in the Province? I cannot
 follow the reasoning advanced in the matter. It would seem
 to be the negation of all powers or authority in the Province to
 tax any personal property. We are of course familiar with all of
 the cases that have gone to the Privy Council and the Supreme
 Court of Canada upon the question of whether the tax is a direct
 or indirect tax. Here Fuel-oil is no different in my view for taxa-
 tion purposes than any other personal property of any person
 resident in the Province such as furniture, motor cars, etc. All
 of which property is capable of being sold—for instance the
 30 stock-in-trade of the merchant actually being sold yet all this pro-
 perty, in truth all personal property, is subject to taxation and
 has been the subject of taxation by the Provinces. It is true no
 matter what may be one's individual opinion the Court must
 bow to the decision of the ultimate Court of Appeal and loyally
 obey it. In *Attorney-General of B. C. v. C. P. R.* (1927) 96
 L. J. P. C. 149 their lordships of the Privy Council decided, as
 set forth in the headnote, that—

40 "The British Columbia Fuel-oil Tax Act, 1923, is *ultra*
 "vires the Legislature of the Province, inasmuch as it does
 "not impose direct taxation within the meaning of section 92,
 "sub-section 2 of the British North America Act, 1867.

"The Act of 1923 provided that every person who should
 "purchase within the Province fuel-oil, sold for the first time
 "after its manufacture in or importation into the Province,
 "should pay a tax thereon, and the vendor was to collect the

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“tax and pay it over to the Government:—Held, that the tax
 “so provided for was not a direct tax and was invalid, apply-
 “ing the test laid down as to what was a direct and what
 “an indirect tax in *Att.-Gen. for Manitoba v. Att.-Gen. for*
 “*Canada* (1925) (94 L. J. P. C. 146; (1925) A. C. 561.

“Decision of the Supreme Court of Canada (1927)
 “S. C. R. 185 affirmed.

Cases referred to:

“*Att.-Gen. for Manitoba v. Att.-Gen. for Canada* (1925)
 “(94 L. J. P. C. 146; (1925) A. C. 561). 10

“*Atty.-Gen. for Quebec v. Reed* (1884) 54 L. J. P. C.
 “12; 10 App. Cas. 141).

“*Bank of Toronto v. Lambe* (1887) (56 L. J. P. C. 87;
 “12 App. Cas. 575).

“*Brewers and Malsters Association of Ontario v. Att.-*
 “*Gen. for Ontario* (1897) (66 L. J. P. C. 34; (1897) A. C.
 “231).”

It might be said though that the present case has entirely different
 features. The taxation imposed here is not such as it was there—
 as against: 20

“every person who should purchase within the Province
 “fuel-oil sold for the first time after its manufacture in or
 “importation into the Province—should pay a tax thereon
 “and the vendor was to collect the tax and pay it over to the
 “Government.”

Here the tax is only imposed upon the taxpayer “who consumes
 any fuel-oil in the Province.” No question of indirect taxation
 it would seem to me is open—the only persons who are capable
 of being taxed are the consumers—they are persons certain—the
 actual consumers—and what they have consumed is personal pro- 30
 perty which in its *genus* can be nothing other than personal pro-
 perty. The present case is not one, I submit, which can be de-
 finitely stated to be controlled by the decision last referred to.
 It was laid down by the Board (in the *Attorney-General for*
Manitoba v. Attorney-General for Canada (1925) A. C. 561
 (Lord Haldane)—

“That a direct tax is one that is demanded from the very
 “person who it is intended or desired should pay it. An in-
 “direct tax is that which is demanded from one person in 40
 “the expectation and with the intention that he should in-
 “demnify himself at the expense of another. Of such taxes
 “excise and customs are given as examples.”

In *Attorney-General of Manitoba v. Manitoba License Holders Association* (1902) A. C. 73 we have the head-note reading:—

RECORD
Court of Appeal

10 “The Manitoba Liquor Act of 1900 for the suppression
“of the liquor traffic in that province is within the powers of
“the provincial legislature, its subject being and having been
“dealt with as a matter of a merely local nature in the pro-
“vince within the meaning of British North America Act,
“1867, s. 92, sub-s. 16, notwithstanding that in its practical
“working it must interfere with Dominion revenue and in-
“directly at least with business operations outside the pro-
“vince.

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(Cont'd)

“*Attorney-General for Ontario v. Attorney-General for
“the Dominion* (1896) A. C. 348, followed.”

20 Where the tax is fixed upon the actual consumer of the Fuel-
oil—and that is the only person capable of being taxed—I fail
to see how it is possible of being said that the tax is capable of
being passed on—the taxation can only be imposed when the fuel-
oil has been consumed and whoever consumes it is the only person
who can be taxed. I can readily understand why possibly the
Legislature in its wisdom did not think it fair or just to impose
this taxation on this species of property save only after consump-
tion. This will be borne into one's mind the more clearly when
large consumers of Fuel-oil have to keep very heavy stocks of
Fuel-oil on hand—such as Railway Companies—Steamship Com-
panies—large industrial concerns, etc., and moneys would only
come inconsequent on consumption in their business operations—
therefore the law making authority has said by legislation you will
only be taxed *as you consume the Fuel-oil*. This is a most con-
siderate action upon the part of the Legislature.

30 I would again refer to the question so strongly urged at this
Bar and the burden of the argument—that the Act here to be
dealt with was an Excise Act—and that, as such, was *ultra vires*
of the provincial Legislature. I do not agree that it is in its na-
ture an Excise Act nor would I agree that if it could be called
an Excise Act that perforce then it was beyond scope of provin-
cial legislation. In *Bank of Toronto vs. Lambe* (1887) 12 A. C.
575 at pp. 581, 582, 583—Lord Hobhouse who delivered the judg-
ment of their lordships of the Privy Council considered the
governing principle as to what may be said to be a direct tax—and
40 I think it well to quote what Lord Hobhouse said:

“First, is the tax a direct tax? For the argument of
“this question the opinions of a great many writers on politic-
“al economy have been cited, and it is quite proper, or rather

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“necessary, to have careful regard to such opinions, as has
 “been said in previous cases before this Board. But it must
 “not be forgotten that the question is a legal one, viz., what
 “the words mean, as used in this statute; whereas the econo-
 “mists are always seeking to trace the effect of taxation
 “throughout the community, and are apt to use the words
 “‘direct’, and ‘indirect’, according as they find that the
 “burden of a tax abides more or less with the person who first
 “pays it. This distinction is illustrated very clearly by the
 “quotations from a very able and clear thinker, the late Mr. 10
 “Fawcett, who, after giving his tests of direct and indirect
 “taxation, makes remarks to the effect that a tax may be made
 “direct or indirect by the position of the taxpayers or by
 “private bargains about its payment. Doubtless, such re-
 “marks have their value in an economical discussion. Prob-
 “ably it is true of every indirect tax that some persons are
 “both the first and the final payers of it; and of every direct
 “tax that it affects persons other than the first payers; and
 “the excellence of an economist’s definition will be measured
 “by the accuracy with which it contemplates and embraces 20
 “every incident of the thing defined. But that very excel-
 “lence impairs its value for the purposes of the lawyer. The
 “legislature cannot possibly have meant to give a power of
 “taxation valid or invalid according to its actual results in
 “particular cases. It must have contemplated some tangible
 “dividing line referable to and ascertainable by the general
 “tendencies of the tax and the common understanding of men
 “as to those tendencies.

“After some consideration Mr. Kerr chose the definition
 “of John Stuart Mill as the one he would prefer to abide by. 30
 “That definition is 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 him-
 “ ‘at the expense of another; such are the excise or cus-
 “ ‘toms.

“ ‘The producer or importer of a commodity is called
 “ ‘upon to pay a tax on it, not with the intention to levy 40
 “ ‘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.’

"It is said that Mill adds a term—that to be strictly di-
 "rect a tax must be general; and this condition was much
 "pressed at the bar. Their lordships have not thought it
 "necessary to examine Mill's works for the purpose of ascer-
 "taining precisely what he does say on this point; nor would
 "they presume to say whether for economical purposes such
 "a condition is sound or unsound; but they have no hesita-
 "tion in rejecting it for legal purposes. It would deny the
 "character of a direct tax to the income tax of this country,
 10 "which is always spoken of as such, and is generally looked
 "upon as a direct tax of the most obvious kind; and it would
 "run counter to the common understanding of men on this
 "subject, which is one main clue to the meaning of the legis-
 "lature.

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"Their lordships then take Mill's definition above quoted
 "as a fair basis for testing the character of the tax in ques-
 "tion, not only because it is chosen by the Appellant's counsel,
 "not only because it is that of an eminent writer, nor with
 "the intention that it should be considered a binding legal
 20 "definition, but because it seems to them to embody with
 "sufficient accuracy for this purpose an understanding of the
 "most obvious indicia of direct and indirect taxation, which
 "is a common understanding, and is likely to have been pre-
 "sent to the minds of those who passed the Federation Act."

It will be observed that the contention made that the submission,
 p. 582, "that to be strictly direct a tax must be general" was re-
 jected and further on, at p. 582, Lord Hobhouse said:—

"It would deny the character of a direct tax to the in-
 "come tax . . . generally looked upon as a direct tax of the
 30 "most obvious kind . . ."

In the result in the Lambe case taxes imposed by the Quebec
 Legislature on certain commercial corporations carrying on busi-
 ness in the province was held to be legislation *intra vires* of the
 provincial legislature—being direct Taxation. What is the posi-
 tion of matters here? The consumer is the one directly taxed—
 there is no difficulty in determining who the consumer is and once
 consumed the article or commodity of course is gone—and the
 consumer is the very person who it is intended or desired should
 pay it—and once consumed there can be no trafficking with the
 40 article or commodity: therefore it is utterly impossible in the con-
 struction of the Act before us to bring the language into play de-
 fining Indirect Taxes at p. 582.

"Indirect taxes are those which are demanded from one
 "person in the expectation and intention that he shall indem-

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“nify himself at the expense of another: such are the excise
 “or customs.”

Here we have the consumers of the commodity taxed and not until the commodity is consumed does the tax take effect, i.e., the incidence occurs, the tax attaches—upon the person consuming and falls upon no other, no opportunity or possibility for any recoupment by the consumer “at the expense of another.”

In passing it might be said that the Income tax, which is admitted legal taxation on the part of the Provincial Legislatures, is in principle the same as the present tax under consideration— the taxpayer pays on income which in effect he has consumed— he has destroyed his personal proprietorship of the money—he received the money and paid it away—in the expense of living for himself and family. Here we have the fuel-oil and its consumption. Once consumed nothing remains. There can be no possible indemnification. I would refer to what Lord Moulton said in *Cotton v. The King* (1914) A. C. 176 at p. 190—

“The language of this provision of the British North
 “America Act, 1867, marks an important stage in the history
 “of the fiscal legislation of the British Empire. Until that
 “date the division of taxation into direct and indirect belong-
 “ed solely to the province of political economy so far as the
 “taxation in Great Britain or Ireland or in any of our
 “colonies is concerned; and although all the authors of stan-
 “dard treatises on the subject recognized the existence of
 “the two types of taxation, there cannot be said to have exist-
 “ed any recognized definition of either class which was uni-
 “versally accepted. Each individual writer gave his own des-
 “cription of the characteristics of the two classes, and any
 “difference in the descriptions so given by different writers
 “would necessarily lead to differences in the delimitation of
 “the two classes, so that one authority might hold a tax to be
 “direct which another would class as indirect. But so long
 “as the terms were only used in connection with the theoretic-
 “al treatment of the subject this state of things gave rise to
 “no serious inconvenience. The British North America Act
 “changed this entirely. ‘Direct taxation’ is employed in
 “that statute as defining the sphere of provincial legislation,
 “and it became from that moment essential that the Courts
 “should for the purposes of that statute ascertain and define
 “the meaning of the phrase as used in such legislation.”

No indefiniteness here exists as to who is to pay—always the consumer. There can be no passing on of a tax upon property which has been consumed. Looked at in its reality no tax is imposed

on Fuel-oil existent—the tax is upon Fuel-oil non-existent consumed by the taxpayer. Once the Fuel-oil is within the Province it cannot be said that any magic attaches to it or that it is immune from provincial taxation, being property it must be subject to the incidence of taxation and the taxation here imposed—under the Act being considered—is direct taxation—being property consumed—the Legislature so enacts and in *Bank of Toronto v. Lambe* (1887) 12 A. C. 575, at pp. 581, 582 Lord Hobhouse said:—

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- 10 “Their lordships . . . hold as regards direct taxation
 “within the Province to raise revenue for provincial purposes
 “that subject falls within the jurisdiction of the Provincial
 “Legislatures.”

The imposition in my opinion is in its nature a direct tax upon property—and being that how can it be said to trench upon the “regulation of trade and commerce?”

- 20 In *Citizens Insurance Company of Canada v. Parsons* (1881) 7 A. C. 96 it is shewn that there may be cases where the statute law relates to property and civil rights and it cannot be held to be an attempt on the part of the Legislature of the Province to affect trade and commerce— and I would refer to a decision of this Court of *Little v. Atty.-Gen. for B. C.* (1922) 31 B. C. R. 84, at pp. 86, 97 and 98. I would refer to what Lord Atkinson said in delivering the judgment of their lordships of the Privy Council in *City of Montreal v. Montreal Street Railway* (1912) A. C. 333 at pp. 343, 344—

- 30 “It has no doubt been many times decided by this Board
 “that the two sections 91 and 92 are not mutually exclusive,
 “that the provisions may overlap, and that where the legisla-
 “tion of the Dominion Parliament comes into conflict with
 “that of a provincial Legislature over a field of jurisdiction
 “common to both the former must prevail; but, on the other
 “hand, it was laid down in *Attorney-General of Ontario v.*
 “*Attorney-General of the Dominion* (1896) A. C. 348— (1)
 “that the exception contained in s. 91, near its end, was not
 “meant to derogate from the legislative authority given to
 “provincial Legislatures by the 16th sub-section of s. 92, save
 “to the extent of enabling the Parliament of Canada to deal
 “with matters, local or private, in those cases where such
 “legislation is necessarily incidental to the exercise of the
 40 “power conferred upon that Parliament under the heads
 “enumerated in s. 91; (2) that to those matters which are not
 “specified amongst the enumerated subjects of legislation in
 “s. 91 the exception at its end has no application, and that in
 “legislating with respect to matters not so enumerated the

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“Dominion Parliament has no authority to encroach upon
 “any class of subjects which is exclusively assigned to the
 “provincial Legislature by s. 92; (3) that these enactments,
 “ss. 91 and 92, indicate that the exercise of legislative power
 “by the Parliament of Canada in regard to all matters not
 “enumerated in s. 91 ought to be strictly confined to such
 “matters as are unquestionably of Canadian interest and im-
 “portance, and ought not to trench upon provincial legisla-
 “tion with respect to any classes of subjects enumerated in
 “s. 92; (4) that to attach any other construction to the gener- 10
 “al powers which, in supplement of its enumerated powers,
 “are conferred upon the Parliament of Canada by s. 91 would
 “not only be contrary to the intendment of the Act, but would
 “practically destroy the autonomy of the provinces; and,
 “lastly, that if the Parliament of Canada had authority to
 “make laws applicable to the whole Dominion in relation to
 “matters which in each province are substantially of local or
 “private interest, upon the assumption that these matters also
 “concern the peace, order, and good government of the
 “Dominion, there is hardly a subject upon which it might not 20
 “legislate to the exclusion of provincial legislation. The same
 “considerations appear to their lordships to apply to two of
 “the matters enumerated in s. 91, namely, the regulation of
 “trade and commerce.”

We have Lord Haldane in delivering the judgment of their lordships of the Privy Council in *Workmen's Compensation Board v. C. P. R.* (1920) A. C. 184 at p. 190—

“It is not in dispute that the persons employed by the
 “respondent company with reference to whose dependents 30
 “the present question is raised, come within the conditions
 “under which the enactment purported to be applicable to
 “them. Nor can it be successfully contended that the Pro-
 “vince had not a general power to impose direct taxation in
 “this form on the respondents, if for provincial purposes. In
 “*Bank of Toronto v. Lambe* (12 App. Cas. 575) it was decid-
 “ed by the Judicial Committee that a Province could impose
 “direct taxes in aid of its general revenue on a number of
 “banks and insurance companies carrying on business within
 “the Province, and none the less that some of them were,
 “like the respondents, incorporated by Dominion statute. 40
 “The tax in that case was not a general one, and it was im-
 “posed, not on profits nor on particular transactions, but on
 “paid-up capital and places of business. The tax was held
 “to be valid, notwithstanding that the burden might fall in
 “part on persons or property outside the province.”

In *Atty.-Gen. for B. C. v. McDonald Murphy Lumber Co.* (1930) A. C. 357 at p 365 Lord MacMillan, in delivering the judgment of their lordships, said:—

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10 “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.”

20 There, as stated, it was held to be an “indirect tax” but in the present case in accordance with the language of Lord MacMillan I think it is well indicated, it is a direct tax—note “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 . . . ”

Here in effect it is a tax on personal property but it is levied only upon that property consumed, i.e., Fuel-oil and being consumed in the language of Lord MacMillan “is not susceptible of being passed on.” In my opinion the Act to be considered here is plainly a tax upon personal property and is a direct tax. The manner and form of the imposition of the tax matters not if it be clear, as I think it is upon the frame of the statute—the imposition of a tax upon personal property of the taxpayer—property which he has consumed—the intention of the Legislature is plain that it is a direct tax upon the person having and consuming Fuel-oil—the consumption having taken place. All these questions of nicety, as to whether it is direct or indirect taxation, are at an end as in the language of Lord MacMillan, already quoted, the Fuel-oil so taxed and consumed “is not susceptible of being passed on.” I am of the opinion that the Act is *intra vires* legislation of the Legislature of the Province of British Columbia and being of that opinion I would allow the appeal.

“A. E. McPHILLIPS, J. A.”

7th March, 1933.

REASONS FOR JUDGMENT OF THE HONOURABLE
MR. JUSTICE M. A. MACDONALD

I have given full consideration to the arguments submitted (and the cases and statutes cited) and have reached a firm conclusion that this is an Excise tax. An appeal is about to be taken to the Judicial Committee for the final determination of the questions involved and because of the limited time at my disposal—and to avoid delay—I will briefly outline my views. The submission is that the “Fuel-oil Tax Act” (1930 B. C. Stats. Cap. 71) is *ultra vires* of the Provincial Legislature. Section 2 reads as follows:—

“For the raising of a revenue for provincial purposes
“every person who consumes any fuel-oil in the Province
“shall pay the Minister of Finance a tax in respect of that
“fuel-oil at the rate of one-half cent a gallon.”

One must scrutinize the whole Act to determine its true character. Section 5 prevents any one from keeping fuel-oil for sale without a license (subject to cancellation for infraction of the Act) for each place of business where so kept. Powers of inspection and interrogation are given by section 6 (1) and by 6 (2), failure to produce for inspection or to permit inspection, of books and records or of receptacles or tanks containing fuel-oil, exposes the offender to a penalty. By Section 7 (1) all who consume fuel-oil, sell it, or keep it for sale must keep books and records and make such returns as may be prescribed by regulations. By ss. 2, making false or deceptive entries is an offence. These sections indicate that while section 2 imposes the tax on the “person who consumes” the dealer and distributor are brought within the purview of the Act. It would be illegal to tax the dealer; he could pass it on to the purchaser. He is however affected by the legislation.

An attempt to tax fuel-oil by former legislation (B. C. Stats. 1923, Cap. 71) was unsuccessful. It is now hoped that pitfalls then encountered may be avoided. The Act is so framed that the wholesaler, retailer or distributor, as the commodity passes on the way to the consumer, pay no tax. When sold by the retailer to the householder or consumer the submission is— it still remains untaxed. But when burnt the person using it for heating pur-

poses must pay a tax on every gallon consumed. It is suggested therefore that as the impost cannot be passed on it is a direct tax.

This tax, it is urged, is not imposed on a commercial commodity but, as in the case of income tax, is levied on the person and his liability to pay is measured by the amount he consumes as income tax is measured by the amount one earns. We must however "ascertain the real nature of the tax" (*Attorney-General B. C. vs Macdonald* (1930) A. C. 357 at 363) and base conclusions, not on form but on substance.

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- 10 Fuel-oil is a product of crude oil; the latter not produced in commercial quantities in this Province. It is imported from foreign countries (some produced in Alberta and Ontario) free of duty, distilled here in Refineries, other more valuable products (including gasoline) extracted leaving fuel-oil as a residue arising in the process of manufacturing. It is therefore a product refined in the province although at times limited amounts may be imported. Coal, a competitive product, is extensively produced in British Columbia and the free use of oil as a fluid limits the production and use of coal. It was submitted by respondent that
20 the primary purpose of the Act is to protect the coal industry. I would suggest that is an important secondary consideration, the primary purpose being to obtain much-needed revenue.

- The Act is defended under Sec. 92 (2) of the B. N. A. Act (direct taxation) sub-sec. 13 (property and civil rights) and sub-sec. 16 (as a matter of a merely local or private nature in the province) and attacked on the ground that it is an excise tax embodied in a statute framed purposely with a facade to conceal its real character. In *Attorney-General for B. C. v. C. P. R.* 1927 S. C. R. 185 at 187 the late Chief Justice of Canada, referring
30 to section 6 of the former Fuel-oil Tax Act, already referred to, (B. C. Stat. 1923, Cap. 71) said—

"Had section 6 been the only provision imposing the tax
"it would *probably* be difficult for the respondent to main-
"tain its inapplicability to the Fuel-oil in its possession from
"time to time, or successfully to challenge its validity."

- This is not a final opinion; nor was it necessary for the decision of the case. It is only dealt with in the judgment of Viscount Haldane in delivering the judgment of the Judicial Committee on appeal (1927 A. C. 934 at 937) by saying that section 6 "has to
40 be read with reference to section 3." No opinion therefore is expressed on the effect of section 6 standing alone.

The authority to impose an excise tax is found in Section 122 and 91 (3) of the B. N. A. Act "the raising of money by any mode

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or system of taxation." Custom duties may be levied with the dual purpose of regulating trade and commerce, by protecting native industries and of raising revenue by indirect taxation; while an excise tax, although affecting trade, is imposed primarily for revenue purposes. It is under the control of the Inland Revenue Department of the Government. There is therefore a distinction between an excise tax and a customs duty. They have this feature in common that both are restrictive of trade but not equally in manner or degree. It is said that an excise Tax is "a duty charged on home goods (as distinguished from customs duties on imported or exported goods) either in the process of their manufacture or before their sale to the home consumers" (Oxford Dictionary, vol. 3 p. 379). This definition is not sufficiently comprehensive for the lawyer. It is a tax on a commodity paid by the consumer and its essential character is not changed by delay in collecting it or by any conditions relating to time or manner of payment. It was submitted that an "Excise Tax" as used in 1867, did not include a tax on the consumer and that a search of English statutes from 1660 to 1867 supports this view. True it was usually a tax on goods but paid by the consumer or the purchaser of the commodity. In statutes of Canada 1920, cap. 71, sec. 2 (3) it is provided that

"The Excise taxes imposed by the preceding subsections shall be paid by the purchaser to the vendor at the time of sale and delivery for consumption or use, etc."

It would make no difference if, as a matter of policy, it was made payable after consumption.

The Dominion Parliament could place an Excise tax on this fuel-oil. It chose to exempt from taxation "oil for illuminating or heating purposes" in the Special Tax Revenue Act of 1915 as amended by Cap. 71 in 1920 thus asserting the right to tax. If the present Act is *intra vires*, as contended, a levy may be made by the provinces on sugar, boots, beer and countless commodities manufactured in the province payable after consumption or use and the only difference between this and Dominion excise imposts on the same commodities would be in the method of collection. While usually the result of a judicial decision should not be considered as decisive yet in determining division of authority under the B. N. A. Act this consideration should at least be kept in mind to avoid confusion.

Further, the provinces in levying taxes on commodities subject to similar imposts (or customs duties) by the Dominion Parliament might seriously interfere, as submitted, with the commercial policy of the Federal Parliament in domestic and foreign affairs (e.g. in framing treaties). It is a principle that when a

right is inferred it involves all necessary protection in the exercise of that right. True the same submission might be made in respect to a personal property tax (usually regarded as within local authority) where the taxpayers personal property is subjected to a tax using it as a criterion of his ability to pay but not in the same way or to the same degree. If, however, it is *intra vires* of the Provincial Legislature by an Act to gauge the ability of a consumer to pay a tax by the amount of fuel-oil he consumes and to apply this method of taxation to all commodities manufactured
 10 in the province where the raw material is imported from abroad it would impair the free exercise of the right of the Dominion parliament to regulate trade and commerce and to pursue consistent commercial policies.

Our judgment however may rest in the view that this is an "Excise tax" none the less so because of the wording of section 2. It is a tax on the person in respect to a commodity as all taxes are. Properties do not pay taxes of any kind; individuals pay the levy. It is an over-refinement therefore to say that where a tax is imposed on the consumer, rather than on the thing consumed, different results follow. When a duty is imposed on goods it means,
 20 if fully expressed, that a duty is levied on the person in respect to the importation of goods "just as a property tax is usually, though not necessarily, a tax on persons in respect of their property." (*Attorney-General N. S. W. vs Collector of Customs* (1908) 5 Commonwealth L. R. 818 at 854; referred to in *Attorney-General for B. C. vs Attorney-General for Canada* (1924) 93 L. J. P. C. 129 at 132). Indeed it is not at all clear that by section 2 the tax may not be directly imposed on the commodity before consumption having regard to a free translation of the words
 30 "who consumes." It was found necessary by sections 3, 6 and 7 to replace restrictions on those who sell or keep fuel-oil for sale to the extent that a license must be obtained and records kept showing the difficulty, in fact the impossibility, of keeping in separate compartments, so to speak, the person and the commodity. These provisions are characteristic of all Excise Acts.

The case of *Halifax City v. Fairbanks Estate* (1928) 97 L. J. P. C. 11 is conclusive. There a business tax payable by every person occupying real property, although the taxpayer might seek to pass it on to others, was held to be a direct tax because before Confederation certain taxes were then universally
 40 recognized as falling within one or the other category. A tax on commodities produced and consumed in the country were known as Excise taxes long before Confederation and must be assigned to Federal jurisdiction without regard to any theory as to the ultimate incidence of the tax. This is of course a tax on a

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commodity produced and consumed in this country. In vol. 1 *Stephens Commentaries on the Laws of England* 17th Ed. the author at p. 272 says:—

“Excise Duties, which are also controlled by the Commissioners of customs and Excise, are those duties which are imposed by Parliament upon commodities produced and consumed in this country. They are directly opposite in their nature to the customs duties; for they are an inland imposition, paid sometimes on the consumption of the commodity, frequently upon the retail sale. Inasmuch as this duty is peculiarly liable to evasion, the officers of the revenue have a power to enter and search the places of business of such as deal in exciseable commodities, at any hour of the day, and, in the presence of a constable, of the night also.” 10

As stated, they are paid “sometimes on the consumption of the commodity.” One may trace legislation since the reign of Charles II to the present day and find that excise duties were imposed on consumable commodities. As we approach the Confederation period we find an Act of the year 1867 (30 Vict. Cap. 5) amending a similar act of an earlier date imposing a duty of excise on dogs. A license had to be obtained and an annual duty of five shillings was payable by the owner. Section 4 provides that— 20

“the said duties and licences shall be excise duties.”

This tax is not imposed on dealers but on the owners. I refer also to 32 & 33 Victoria, Cap. 14, secs. 16 to 18 under Part V under the heading “As to assessed taxes and excise licenses.” Duties, through licenses, were imposed on male servants, carriages, horses, mules, armorial bearings &c., to be paid by the owner, proprietor or employer. Licenses had to be procured and by section 18— 30

“Such duties and licenses shall be excise duties and licenses and shall be under the management of the Commissioner of Inland Revenue.”

Regardless of the history or setting of the particular statutes referred to we have before Confederation a long series of acts showing that a definite meaning was assigned to the word “Excise” and “fuel-oil” if then used could readily be added to the list. Turning to Dominion Statutes we find (Statutes of Canada 1867, Chap. 8) an “Inland Revenue Act.” Certain individuals were prevented from carrying on any business subject to excise without a license. An exception was made by sec. 3, ss. 3 and 4 in respect to utensils used for brewing beer for family use; also as to growers of tobacco on the owner’s land and the manufacture of it for private use and not for sale, indicating a liability to such 40

a tax if not exempted. An excise tax, therefore, could be imposed on these utensils and appliances in the hands of the user or consumer. In fact by the Dominion Inland Revenue Act of 1868, Cap. 50 an Excise tax, similar in nature to the tax under review, was imposed on refined Petroleum. (Sec. 7). It follows that on the principle enunciated in *Halifax City vs. Fairbanks Estate, supra* this Act is *ultra vires* and the appeal should be dismissed.

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10 Victoria, B. C.
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No. 17

JUDGMENT OF COURT OF APPEAL

BETWEEN:

THE ATTORNEY-GENERAL of the Province of
 British Columbia suing on behalf of His Majesty the
 King in the right of the Province of British Colum-
 bia,

Plaintiff (Appellant),

AND

KINGCOME NAVIGATION COMPANY LIMITED, 10
 Defendant (Respondent).

CORAM:

THE HONOURABLE THE CHIEF JUSTICE,
 THE HONOURABLE MR. JUSTICE MARTIN,
 THE HONOURABLE MR. JUSTICE McPHILLIPS,
 THE HONOURABLE MR. JUSTICE M. A. MACDONALD.

Vancouver, B.C., the 7th day of March, 1933.

This appeal from the judgment of the Chief Justice of the
 Supreme Court dated the 7th day of February, 1933, coming on
 for hearing at Victoria, B.C., on Friday, the 17th day of Feb- 20
 ruary, 1933, and Monday the 20th day of February, 1933, and
 Tuesday the 21st day of February, 1933, UPON READING the
 Appeal Book herein and UPON HEARING Mr. H. B. Robert-
 son, K.C., of counsel for the Plaintiff (Appellant) and Mr. E. C.
 Mayers, K.C., Mr. J. K. Macrae, K.C., and Mr. G. S. Clark of
 counsel for the Defendant (Respondent) and the Court being
 pleased to reserve judgment until this date;

THIS COURT DOTH ORDER AND ADJUDGE that the
 said appeal be and the same is hereby dismissed;

AND THIS COURT DOTH FURTHER ORDER AND 30
 ADJUDGE that the costs of the Defendant (Respondent) be paid
 by the Plaintiff (Appellant) forthwith after taxation thereof.

"H.B.R."

BY THE COURT.

"O.B."

"D.R."

"J.A.M."

"C.J."

"B. H. TYRWHITT DRAKE,"

Registrar.

Seal of
 Court of Appeal
 Entered Vol. 5, Fol. 31
 Date March 11th, 1933,
 By "P.S.G."

B.C.L.S.
 \$1.10
 Filed Mar. 9th, 1933,
 Victoria Registry.

No. 18

CONDITIONAL ORDER FOR LEAVE TO APPEAL

CORAM:

THE HONOURABLE THE CHIEF JUSTICE OF BRITISH
COLUMBIA

THE HONOURABLE MR. JUSTICE McPHILLIPS

THE HONOURABLE MR. JUSTICE M. A. MACDONALD

Vancouver, B. C., the 14th day of March, 1933.

UPON MOTION of the Plaintiff (Appellant) for leave to
 10 appeal to the Judicial Committee of the Privy Council from the
 judgment of this Honourable Court delivered on the 7th day of
 March, 1933, dismissing the appeal herein, coming on this day for
 hearing before this Honourable Court at the City of Vancouver:
 and UPON READING the Notice of Motion dated the 13th day
 of March, 1933, and the Appeal Book herein: and UPON HEAR-
 ING Mr. A. Bruce Robertson of Counsel for the Plaintiff (Appel-
 lant) and Mr. G. S. Clark of Counsel for the Defendant (Respon-
 dent):

THIS COURT DOTH ORDER that subject to the perform-
 20 ance by the said Plaintiff (Appellant) of the conditions herein-
 after mentioned and subject to the final order of this Court upon
 the due performance thereof, leave to appeal to His Majesty in
 His Privy Council against the said judgment of this Honourable
 Court be granted to the Plaintiff (Appellant):

AND THIS COURT DOTH FURTHER ORDER that the
 said Plaintiff (Appellant) do within one month from the date
 hereof, provide security to the satisfaction of the Registrar of this
 Honourable Court in the sum of Five Hundred Pounds sterling
 (£500:0:0) for the due prosecution of the said appeal, and the
 30 payment of all such costs as may become payable to the Defend-
 ant (Respondent) in the event of the Plaintiff (Appellant) not
 obtaining an order granting final leave to appeal, or of the appeal
 being dismissed for want of prosecution and for the payment of
 such costs as may be awarded by His Majesty, His Heirs and
 Successors, or by the Judicial Committee of the Privy Council to
 the said Defendant (Respondent) on such appeal.

AND THIS COURT DOTH FURTHER ORDER that the
 Plaintiff (Appellant) do within four months from the date of this
 order in due course take out all necessary appointments for

RECORD
 Court of Appeal
 No. 18
 Conditional
 Order for
 Leave to
 Appeal
 Mar. 24, 1933

RECORD
Court of Appeal
No. 18
Conditional
Order for
Leave to
Appeal
Mar. 24, 1933
(Cont'd)

settling the transcript record on such appeal to enable the Registrar to certify that the transcript record has been settled and that the provisions of this Order on the part of the Plaintiff (Appellant) have been complied with.

AND THIS COURT DOTH FURTHER ORDER that the cost of the transcript record on appeal, and of all necessary certificates and of all costs of and occasioned by the said appeal, shall abide the decision of the Privy Council with respect to the costs of appeal.

AND THIS COURT DOTH FURTHER ORDER that the said Plaintiff (Appellant) be at liberty within the said period of four months from the date of this Order to apply ex parte for a final order for leave to appeal as aforesaid on the production of a certificate under the hand of the Registrar of due compliance on its part with the terms of this order. 10

AND THIS COURT DOTH FURTHER ORDER that all parties may be at liberty to apply to this Court wheresoever the same may be sitting.

BY THE COURT

“B. H. TYRWHITT DRAKE,” 20
Registrar.

Approved
“G. S. C.”

“J. F. M.”
R.

“J. A. M.”
C. J.

Seal of
Court of Appeal

Entered Vol. 5, Fol. 38.
Date March 24th, 1933
By “J. S. G.”

30

REGISTRAR'S CERTIFICATE AS TO SECURITY

RECORD
 Court of Appeal
 No. 19
 Registrar's
 Certificate as
 to Security
 Mar. 28, 1933

I HEREBY CERTIFY that the above-named Plaintiff (Appellant) has duly complied on his part with the terms of the Order of this Honourable Court dated herein the 14th day of March 1933, in that:

- (a) The said Plaintiff (Appellant) has provided security to my satisfaction in the sum of Five Hundred Pounds Sterling for the due prosecution of his appeal to His Majesty in His Privy Council from the judgment herein of this Honourable Court dated the 7th day of March, 1933, and for the payment of all such costs as may become payable to the Defendant (Respondent) in the event of the Plaintiff (Appellant) not obtaining an order granting final leave to appeal or of the appeal being dismissed for want of prosecution, and for the payment of such costs as may be awarded by His Majesty, His Heirs and Successors, or by the Judicial Committee of the Privy Council to the said Defendant (Respondent) on such appeal, by paying into Court the equivalent of the said sum of Five Hundred Pounds Sterling; and
- (b) The said Plaintiff (Appellant) has taken out all appointments necessary for settling the transcript record on such appeal and to enable me to certify that the transcript record has been settled.

DATED at Victoria, B. C., this 28th day of March, 1933.

"B. H. TYRWHITT DRAKE,"
 Registrar

B.C.L.S.
 \$1.00

(SEAL)

Victoria Registry
 30 Mar. 28, 1933.

Court of Appeal
 Seal

RECORD

Court of Appeal

No. 20
 Final Order
 for Leave to
 Appeal
 Mar. 30, 1933

COURT OF APPEAL

No. 20

FINAL ORDER FOR LEAVE TO APPEAL

CORAM:

THE HONOURABLE THE CHIEF JUSTICE OF
 BRITISH COLUMBIA,
 THE HONOURABLE MR. JUSTICE McPHILLIPS,
 THE HONOURABLE MR. JUSTICE M. A. MAC-
 DONALD

Vancouver, B.C., the 30th day of March, 1933. 10

UPON THE APPLICATION ex parte of the Plaintiff (Appellant) pursuant to the Order granting conditional leave to appeal made herein the 14th day of March, 1933; UPON HEARING Mr. A. B. Robertson of Counsel for the Plaintiff (Appellant); AND UPON READING the said Order and the Certificate of the Registrar dated herein the 28th day of March, 1933, certifying that the Plaintiff (Appellant) has duly complied on his part with the terms of the said order;

THIS COURT DOTH ORDER that final leave to appeal to His Majesty in His Privy Council against the judgment of this Honourable Court delivered the 7th day of March, 1933, be and the same is hereby granted to the said Plaintiff (Appellant). 20

By the Court,

“B. H. TYRWHITT DRAKE,”
 Registrar.

B. C. L. S.
 \$1.10

Victoria Registry
 Mar. 31, 1933

“J. A. M.,” C.J.
 “J. F. M.,” R.

Court of Appeal
 (Seal)

Entered Vol. 5, Fol. 42,
 Date March 31st, 1923,
 By “J. S. G.”

30

FUEL-OIL TAX ACT
(Statutes of British Columbia 1930, Chap. 71,
as amended by 1932, Chap. 51).

Appendix

Fuel-oil
Tax Act

**AN ACT TO PROVIDE FOR THE IMPOSITION AND
COLLECTION OF A TAX ON FUEL-OIL**
(Assented to 25th March, 1930)

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

- | | | |
|----|-----------------------------|--|
| 10 | Short title | 1. This Act may be cited as the "Fuel-oil Tax Act." |
| | Tax on fuel-oil | 2. For the raising of a revenue for Provincial purposes every person who consumes any fuel-oil in the Province shall pay to the Minister of Finance a tax in respect of that fuel-oil at the rate of one-half cent a gallon. |
| | Collection of tax | 3. The tax imposed by this act shall be paid and collected at such times and in such manner as the regulations may prescribe. |
| 20 | Recovery of tax by action | 4. The amount of any tax imposed by this act may be recovered by action in any Court as for a debt due to the Crown in right of the Province, and the Court may make an order as to the costs of the action in favour of or against the Crown.

(2) In every action for the recovery of any tax imposed by this act, the burden of proving the quantity of fuel-oil consumed by the Defendant, and of proving that the tax has been paid in respect of the fuel-oil in question, shall be upon the Defendant. (1932, Chap. 51, s. 2) |
| 30 | Vendor's licences | 5. (1) Upon the expiration of thirty days after the commencement of this act, no person shall keep for sale or sell fuel-oil in the Province unless he is the holder of a licence issued pursuant to this section in respect of each place of business at which fuel-oil is so kept for sale or sold by him.

(2) The manner of application and the forms of application and of the licence shall be as prescribed in the regulations. A licence fee of one dollar shall be payable in respect of each licence. |
| | Application and licence fee | |
| 40 | Cancellation of licence | (3) The Minister of Finance may, without holding any formal or other hearing, cancel any licence |

Appendix
 Fuel-oil
 Tax Act
 (Cont'd)

Powers of
 inspection

issued pursuant to this section if the licensee is convicted of any offence against this act, and may during the period of twelve months next succeeding the cancellation of that licence refuse to issue any new licence to the person so convicted.

6. (1) Every collector, constable, and every person authorized in writing by the Minister of Finance to exercise the powers of inspection under this section may without warrant enter upon any premises on which he has cause to believe that any fuel-oil is kept or had in possession, and may inspect the premises and all fuel-oil found thereon, and may interrogate any person who is found on the premises or who owns, occupies, or has charge of the premises. 10

(2) Every person interrogated under this section who refuses or fails to answer any question put to him respecting the fuel-oil kept or had on the premises, or who refuses or fails to produce for inspection or to permit inspection of any book, record, or document, or any barrel, tank, or receptacle in his possession or under his control which he is required to produce for inspection or of which he is required to permit inspection, shall be guilty of an offence against this act. 20

Returns

7. (1) Every person who consumes any fuel-oil in the Province and every person who keeps for sale or sells fuel-oil in the Province shall keep such books and records and shall make and furnish such returns as are prescribed in the regulations.

(2) Every person who refuses or fails to keep any book or record or to make and furnish any return prescribed by the regulations, or who withholds any entry or information required by the regulations to be made or entered in any book, record, or return, or who makes any false or deceptive entry or statement in any such book, record, or return shall be guilty of an offence against this act. 30

Offences

8. (1) Every person who violates any provision of this act or the regulations shall be guilty of an offence against this act.

Penalties

(2) Every person guilty of an offence against this act shall be liable, on summary conviction, to a fine not exceeding five hundred dollars, and each day's continuance of the act or default out of which the offence arises shall constitute a separate offence; but 40

nothing contained in this section nor the enforcement of any penalty thereunder shall suspend or affect any remedy for the recovery of any tax or amount payable under this act.

Appendix
Fuel-oil
Tax Act
(Cont'd)

10 8A. Where a railway company within the meaning of Part XI. of the "Taxation Act" is liable to assessment and taxation on its railway under subsection (1) of section 112 of that act, the tax imposed on it under this act in respect of the fuel-oil consumed in the operation of its railway locomotives shall be deemed to be an alternative tax to the tax on its railway. The tax under this act in respect of the fuel-oil so consumed shall be levied and collected from the railway company pursuant to the provisions of this act and the regulations; and in case the tax on its railway proves to be greater in amount than the total tax under this act so levied and collected for the corresponding period, the amounts of tax so levied and collected under this act during that period shall be considered to be in part payment of the tax on its railway, or, in case the total tax levied and collected under this act in respect of the fuel-oil so consumed proves to be greater in amount than the tax on its railway for the corresponding period, no tax shall be payable by the railway company on its railway under subsection (1) of section 112 of the "Taxation Act." (1932, ch. 51, s. 3).

20

Regulations

30 9. (1) For the purpose of carrying into effect the provisions of this act according to their true intent, the Lieutenant-Governor in Council may make such regulations as are considered necessary or advisable.

(2) Without thereby limiting the generality of the provisions contained in subsection (1), the power of the Lieutenant-Governor in Council to make regulations shall extend to:—

(a) Prescribing that any person by whom any tax is payable under this act shall, without any notice or demand, pay the same at such times and places and in such manner as are stated in the regulations:

40 (b) Determining, in the case of any fluid or substance used, or intended for use as fuel whether or not a fluid or substance is fuel-oil within the meaning of this act.

Appendix
 Fuel-oil
 Tax Act
 (Cont'd)

9A. In the case of locomotive or stationary engines used in the forest in connection with logging operations, if the conditions under which they are operated are such as in the opinion of the Chief Forester require the use of fuel-oil therein in the interest of the protection of forests from fire, the Minister of Finance, on the recommendation of the Chief Forester, may by permit in writing, and subject to such conditions as are specified in the permit, exempt from the tax imposed by this act all fuel-oil consumed in those locomotive or stationary engines during the period of the close season in any year as defined by or under section 94 of the "Forest Act." (1932, ch. 51, s. 3). 10

Commence-
 ment

10. This act shall come into force on a day to be named by the Lieutenant-Governor by his Proclamation.

Repeal

11. The "Fuel-oil Tax Act," being chapter 251 of the "Revised Statutes of British Columbia, 1924," is repealed.

(Note: The Statute 1932, ch. 51, was assented to on 13th April, 1932).