RETURN

Of correspondence between the Provincial and Dominion Governments and papers respecting the Assessment Act.

By Command.

THEODORE DAVIE,

Attorney-General.

Attorney-General's Office,
16th April, 1891.

OTTAWA, 9th February, 1889.

SIR,—I have the honour, by direction of the Minister of Justice, to enclose herewith a copy of a communication he has this day received from Mr. Clark, Solicitor of the Canadian Pacific Railway Company, having reference to the provisions of the British Columbia Assessment Act passed at the last session of its Legislature.

Would you be kind enough to favour the Minister of Justice with any observation which you may deem proper to make in reference to Mr. Clark's letter, and state, if you are able to do so, what alterations you will be able to make to the Act, so as to modify as much as possible the alleged excessive taxes which Mr. Clark complains of.

I am, &c.,
(Signed) ROBT. SEDGEWICK,
Deputy Minister of Justice.

The Attorney-General,
Victoria, B.C.

[ENCLOSURES.]

THE CANADIAN PACIFIC RAILWAY COMPANY,
OFFICE OF THE SOLICITOR,
MONTREAL, 8th February, 1889.

SIR,—I have the honour, on behalf the Canadian Pacific Railway Company, to call your attention to a statute passed by the Legislature of British Columbia, entitled "An Act to assess, levy, and collect taxes on Property and Income" (51 Victoria, chapter 36), assented to on the 28th April, 1888, and to point out some features of it which, it is submitted, call for its disallowance by His Excellency the Governor-General.

The object of this Act is to raise a revenue for Provincial purposes, and it is proposed to collect under it from the Canadian Pacific Railway Company about $63,000, or about one-twelfth of the whole sum (789,836) which is by the Act next preceding the one in question (page 115) estimated as the expenditure of the Province for the current year.

This $63,000 is claimed as a year's taxes due in respect of the right of way, stations, &c., of the said Company, and is nearly $50,000 more than was paid for the previous year for the same property under the law as it stood before the passing of the Act in question.

The principal feature of this new Act to which the Canadian Pacific Railway Company desires to call your attention is the principle on which it proposes to assess a railway, a principle altogether different from that which has hitherto prevailed in the different Provinces, and one which, it is submitted, is extremely unjust, and is to the disadvantage of the Dominion as a whole.

If this Act be permitted to go into operation as it has been officially interpreted by Mr. Bodwell, a Judge appointed by the Provincial Government to give effect to it, and from whom there is no appeal, it will establish a precedent which might be followed to such an extent as gradually to confiscate a property and destroy an undertaking which extends across Canada from the Pacific Ocean to the Atlantic.

This Judge declares, in effect, that according to the Act in question the portion of this property lying within British Columbia must be valued as real estate, not at what that portion would be worth as real estate by itself, but at what it may be worth because it is part of a railway which extends beyond the limits of the Province, and because the Company which owns it may work that portion which lies outside so profitably as to give the portion inside that Province a value as a connection with that outside portion which it has not as a separate property ; in other words, that the owners of this railway must pay a tax to British Columbia solely because of its transactions outside of British Columbia.

If a Province could create, and should create, a corporation having for its object the carrying on of some business beyond the limits of that Province, it might be argued that it would not be unjust or unconstitutional, under the British North America Act, to make such a corporation pay tribute to that Province, measured in some way by its transactions beyond the Province ; but it cannot be argued that a corporation created by the Dominion Legislature and authorized to carry on business across several Provinces should pay tribute to any one Province on account, and solely on account, of what it does outside that Province.

This, however, is the demand of the Province under Mr. Bodwell's administration of the law sought to be established by this new Act.

Section 31 of the Act in question reads as follows :—

"The land occupied and claimed as the right of way for railroads by railway companies or corporations, and all the substructures and superstructures which support the same, shall be assessed in the district in which the terminus or head office of the railway company is situated as a whole and as a real estate ; and all real estate situate in the Province occupied by any railway company as such right of way shall be deemed to be the property of such railway company for the purpose of taxation."

Section 9 provides that the Lieutenant-Governor in Council may from time to time appoint an assessor or collector in each district for the purposes of the Act.

Section 52 provides that he may from time to time appoint one or more person or persons in any district to be a Court of Appeal in respect of the assessment of property, and

Section 58 provides for the proceedings for the trial of complaints against the assessment before this Court of Revision.

Section 61 enacts that the assessment roll as finally passed by the Court shall be valid and bind all parties concerned, notwithstanding any defect or error committed with regard to such roll.

Section 65, and some following sections, provide for the mode of collecting taxes, including the liability of all property owned by the person taxed, and for the sale of this property in default of payment.

On the 20th October, 1888, a notice of assessment for the year was served on the Company claiming on account of 10,840 acres (apparently the quantity of land occupied by right of way, stations, etc.), the amount of $81,033, or if paid before 30th June, $60,775 ; and on account of personal property assessed at a value of $645,000, a tax of $3,225, or if paid before 30th June, $2,150.

This assessment was complained of in the manner prescribed by the Act, and the appeal carried to Mr. Bodwell, who had been appointed as aforesaid by the Lieutenant-Governor, Judge of the Court of Revision and Appeal for New Westminster District.

This Judge declined to enlarge the hearing so that a witness proposed to be called by the Canadian Pacific Railway Company—Mr. Cambie—could give evidence concerning the value of the land so occupied for roadway, stations, etc. ; but Mr. Abbott, the Superintendent of the Railway at Vancouver, had given evidence that the road in British Columbia as a whole was not a paying one, and that it had been operated at a loss of $35,000 for the last year.

The railway was nevertheless assessed at a value of $25,000 per mile for the whole distance through British Columbia.

A copy of the judgment of Mr. Bodwell is appended hereto, and attention is particularly called to the following language :—"No doubt if the railway were offered for sale the question of profits would form an element in the estimation of its value, but if that is considered it

must also be borne in mind that this division is only part of a great system operated by one corporation, to carry out whose policy it may be necessary to manage some portions of the line at a loss. It is difficult to believe that this comparatively small loss could not be turned into actual gain if this road, *having the connections which it possesses*, were in the hands of an independent corporation."

Thus this Court of Revision declares the meaning of the Act to be that the railway which exists within the limits of the Province must be assessed, not at its value when considered as existing entirely within those limits, but at a value which it would bear when considered as part of a large system which extends beyond the limits of the Province; if so, the legislation relates to a work which extends beyond the limits of the Province, and to an undertaking which connects that Province with other Provinces of the Dominion, and is therefore *ultra vires* under section 92 of the "British North America Act," sub-section (10A.)

It is submitted that if the legislation did not mean what this Judge says was meant, the language ought to be altered so as to leave no doubt on that point.

Even if it were admitted that as a rule there is no limit to the amount of taxes which the Legislature of a Province may, under the "British North America Act," impose on corporations doing business within its boundaries but created by some other legislature; in other words, that such corporations may be taxed by such a legislature till they are crushed out of the Province. Still there is generally one chance of self-preservation open to them, they may cease to do business there, they may either pay the tax or withdraw.

But this option is not open to the Canadian Pacific Railway Company. Its road was constructed on the agreement with the Dominion that it should be operated across British Columbia for all time, and this compact is part of the public law of Canada; it is therefore submitted that even if the Act in question were clearly within the legislative authority of British Columbia it ought not to be allowed to go into operation, on the ground that it is contrary to the policy of the Dominion.

Another feature of the Act in question worthy of notice is that it does not provide for the hearing of any dispute which may arise between the Provincial Government on the one hand and the party to pay the tax on the other, except by nominees of that Government holding office during pleasure. There is no appeal from the Judge of the Court of Revision appointed as aforesaid.

It has been the general rule in Canada that disputes concerning the assessment of railways could be carried to Judges nominated by the Dominion Government and holding office for life.

Of course it is possible that the Provincial Legislature does not mean what the Judge appointed by the Provincial Government declares it to mean, but this gives the Canadian Pacific Railway Company no relief. And in this connection it is submitted that this Act should either provide for an appeal from the Judge named by the Lieutenant-Governor, or should be so amended as not to admit of the interpretation which Mr. Bodwell puts upon it.

I have, &c.,

(Signed) GEO. M. CLARK,
Solicitor C.P.R.

The Honourable Sir J. S. D. Thompson, K.C.M.G.,
Minister of Justice, Ottawa.

COURT OF REVISION AND APPEAL.

Canadian Pacific Railway Company v. *Booth.*

The Canadian Pacific Railway Company appeal against the assessment for Provincial taxes on their property in this Province.

The Assessor has valued the right of way, road-bed, rails, bridges, station-houses, water-tanks, and all other property connected with the railway, excepting rolling stock, at the rate of $25,000 per mile, for the whole length of the line in British Columbia.

Mr. Jackson, who appeared for the Railway Company, contended that this is not the proper basis upon which the assessment ought to be levied. In the written statement of his reasons, which he was good enough to furnish me, Mr. Jackson says:—

"I cannot see on what basis the appraisement is to be made in the case of a railway, unless the whole of the property is to be arrived at by estimating the land at the same value as the average value of land in the locality, as rated on the assessment roll, and by estimating the value of superstructures to be an amount not exceeding the cost of construction of similar works at the present time, after making a reasonable allowance for depreciation."

Mr. Jackson also contended that the Act did not justify an assessment of any more of the right of way than that actually occupied by the Company as a road bed.

As to the first point raised by Mr. Jackson, I cannot adopt his view, having regard to the recent legislation upon the subject. It may be very fairly inferred from the Act of 1887 that it was the intention of that Statute that the land occupied by the Company and the structures erected by them, such as station-houses, bridges, &c., should be assessed separately from each other, and at the value which they possessed, considered simply as land and structures of that character respectively.

In the former Statute there was only one section upon the subject, and it required a return from the Company shewing—

1. The value of the land occupied by them, according to the average value of the land in the vicinity:

2. The value of their station-houses, bridges, ties, water-tanks, &c.

This section has been repealed by the Act of 1888, and in its place we have sections 18 and 31 of the latter Statute. The first of these sections requires a return shewing—

1. The quantity of land occupied by the Company as a right of way:

2. The number of miles of track, including station-houses, bridges, &c.

This section intended to supply the assessors with the information necessary to form the data upon which his appraisement is to be based. It strikes me as a very significant fact that here all reference to the value of these separate items is omitted. It is certainly necessary, in order to form an intelligent valuation, to know how much land the Company actually occupy with their road, as well as the number of miles of track, but it does not necessarily follow from this fact that the land is to be assessed as land, and the other items according to their individual character simply. If the section stood alone some difficulty might occur; but it is followed by section 31, which directs the mode of assessment and relates to that matter only. I cannot read the latter section as meaning that the Assessor is to consider the work as so many acres of land and so many miles of ties, station-houses, water-tanks, &c., but I think it requires that these different parts, as constituting one whole, are to be considered together, and their value as a whole—that is to say, as a railway—is to be estimated. This, I am convinced, was the intention of the Legislature, and the language of the Act conveys the idea to my mind with sufficient clearness and precision.

I also think that sections 18 and 31, when read together, require the assessment to be made upon the whole quantity of land claimed by the Company as right of way.

I have next to consider the evidence as to the value. The Assessor has appraised the road at a certain sum per mile. This method of assessing railways seems to be adopted frequently in the United States, and has been sanctioned by the highest courts in that country. (*See* Railroad Co. *v.* Peniston, 18 Wallace, 5; and 1 C. & L. Ry. *v.* Kilner, 69 Ind., 71.)

The plan adopted in this instance seems, therefore, to be a fair and just one, but I regret that I have so little evidence as to the correctness of the valuation. The Company have only been able to give me their statement as exhibited to the Government under section 18 of the Act, corroborated by the evidence of Mr. Green and Mr. Abbott. This is of very little assistance, since I think that the basis of valuation is not what the Act requires. In any event, I should not be disposed to allow the amount claimed by them for depreciation of wooden structures, viz.: 50 per cent. west of Donald, and 33¾ per cent. east of that point. All the witnesses agree that all necessary repairs are made from time to time, so that for practical purposes these structures are nearly as good as new, and a very small percentage only ought to be allowed for depreciation.

Mr. McLellan, who was examined, swears that the road is worth $25,000 per mile cash down. He is a railroad contractor of considerable experience, an entirely disinterested witness, and went over the road for the express purpose of making a valuation. *In the absence of any evidence to the contrary,* I am bound to adopt his opinion as to the value of the line.

Some evidence was given on the part of the Company to shew that the road was not a paying one, and Mr. Abbott swears to a loss of $35,000 on running expenses. No doubt, if the railway were offered for sale, the question of profits would form an element in the estimation of its value; but if that is considered it must also be borne in mind that this division is only part of a great system operated by one corporation, to carry out whose policy it may be necessary to manage some portions of the line at a loss. It is difficult to believe that this comparatively small loss could not be turned into actual gain if this road, *having the connections which it possesses*, were in the hands of an independent corporation.

In my opinion, therefore, the Assessor was justified in valuing it as a going concern in a good state of repair, and in the view which I take of the Statute and the evidence adduced, I can see no reason for interfering with his assessment.

I confirm the roll accordingly.

(Signed) ERNEST V. BODWELL,
Judge of the Court of Revision and Appeal for New Westminster District.

December 31st, 1888.

VICTORIA, B.C., March 6th, 1889.

Robt. Sedgewick, Esq., Q.C.,
Deputy Minister of Justice, Ottawa.

SIR,—Referring to your letter of 9th February last, addressed to the Honourable the Provincial Attorney-General, enclosing copy of a letter dated 8th February, 1889, from Mr. Geo. M. Clark, Solicitor of the Canadian Pacific Railway Company, to the Hon. the Minister of Justice, regarding the assessment, under the Provincial Assessment Act, of certain property of the Canadian Pacific Railway Company in British Columbia, and the decision of Mr. Bodwell in relation to that matter, and asking the Attorney-General to favour the Minister of Justice with any observations which he might deem proper to make in reference to Mr. Clark's letter, and also to state what alterations he (the Attorney-General) would be able to make to the Act, so as to modify as much as possible, the alleged excessive taxes of which Mr. Clark complains. I have now the honour, by direction, to enclose for the information of the Hon. the Minister of Justice, copy of a letter from Mr. Bodwell to the Hon. the Attorney-General, reporting on Mr. Clark's communication above referred to.

It is admitted that Mr. Bodwell's letter effectually disposes of Mr. Clark's remarks, both as to the alleged refusal to adjourn the Court, and the extraordinary constructions Mr. Clark places upon the Statute in question and Mr. Bodwell's decision.

As to the proportion which the amount of assessment bears to the estimated expenditure of the Province, Mr. Clark's remarks are not thought to require an answer.

The Provincial Executive are quite willing to provide an appeal from the decision of the Court of Revision; and this—I am instructed to say—would undoubtedly have been conceded to the Company, on their application, without the necessity of their solicitor applying to the Minister of Justice, and his drawing the attention of the Provincial Government to the matter under what, apparently from the correspondence, is only short of a threat of disallowance of the Statute.

It may be observed that pending the present correspondence a communication has been received from Mr. Abbott, the Superintendent of the Pacific Division of the Canadian Pacific Railway, on this very subject, dated the 27th February, in which, after stating fully his views, he proposes an interview in reference to the matter with the Provincial Government; and the Attorney-General suggests that it may be well asked whether the Minister of Justice would wish the Provincial Government to conclude the question with Mr. Abbott or the Minister of Justice.

As it is, this question need not be considered, as Mr. Abbott will be informed that an appeal will be provided.

I have, &c.,
(Signed) P. Æ. IRVING,
Deputy Attorney-General.

[ENCLOSURE.]

VICTORIA, B. C., 22nd February, 1889.

SIR,—I have the honour to acknowledge the receipt of a copy of a communication addressed to the Honourable the Minister of Justice by Geo. M. Clark, Esq., Solicitor for the Canadian Pacific Railway Company, dated at Montreal the 8th day of February, 1889, upon the subject of the appeal of the said Company against their assessment in this Province for the year 1888.

In compliance with your request that I should report to you upon that portion of the matters referred to, which came before me as a Judge of the Court of Revision and Appeal for the District of New Westminster, I have the honour to state:—

1. It is necessary, in the first place, to correct the impression calculated to be produced by a very misleading statement contained in Mr. Clark's letter, where it is said:—

"This Judge declined to enlarge the hearing so that a witness proposed to be called by the Canadian Pacific Railway Company—Mr. Cambie—could give evidence concerning the value of the land so occupied for roadway, stations, &c."

In accordance with the provisions of the Act a notice was inserted in the Vancouver World and Daily News-Advertiser newspapers on the 23rd November, 1888, stating that the Court of Revision and Appeal for New Westminster District would hold its first sitting at Vancouver on the 12th day of December, 1888. This notice was continued in the newspapers above mentioned from the 23rd of November until the day fixed for the sitting of the Court.

When the Court was opened on the 12th day of December the Company's appeal was the first on the list. After such evidence as he was then prepared to adduce had been taken, Mr. Jackson, the Company's counsel, asked for an adjournment in order to produce Mr. Cambie.

The Lieutenant-Governor in Council had fixed the 23rd day of December, 1888, as the limit of time within which the roll was to be finally revised and completed. I accordingly adjourned the further hearing of the appeal until the 21st day of December, 1888, which was as long a time as I could grant consistently with the other duties I was required to perform under the Act.

Subsequently an Order in Council was made further enlarging the time for completing the roll to the 31st day of December, 1888.

This was done expressly for the benefit of the Company, as every other appeal before the Court had, prior to the date of the second Order in Council, been disposed of by me, and I was then ready, except as to the Company's appeal, to certify the roll.

At the adjourned hearing of the appeal on the 21st of December, 1888, no one appeared for the Company at the time and place appointed. Mr. Booth, on behalf of the Government, requested me then to close the hearing. Being convinced, however, that the non-attendance of the Company's counsel was the result of an accident, I declined to accede to Mr. Booth's demand, but enlarged the hearing until the 27th of December, and directed that notice of the time and place of this second adjournment should be given to Mr. Jackson.

On the 27th of December Mr. Jackson appeared. He stated that Mr. Cambie had not yet returned, and applied for a further enlargement. Mr. Jackson could not say when Mr. Cambie was expected, nor did he ask for an adjournment to any definite date. For all that appeared before me, if I had granted the request, the effect would have been to postpone indefinitely the completion of the roll and the collection of the taxes for the then current year. Apart altogether from the question whether such a course would have left the validity of the whole assessment open to discussion, it is perfectly plain I had no power to extend the time beyond the date fixed by the second Order in Council. I did not, however, close the hearing that day, but further adjourned it until the 28th in order that every opportunity of arranging these difficulties might be given.

On the 28th, when the parties came before me, the position of matters was still unchanged. As I had then but one working day in which to certify the roll and complete my report to the Provincial Treasurer, I stated that I should close the hearing, which was done after Mr. Jackson had summed up the grounds on which the Company rested their appeal.

From the above statement it will be seen that every possible indulgence which the Court could grant was allowed to the Company in order that they might procure the attendance of Mr. Cambie, or any other engineer whom they might desire to call.

2. Mr. Clark further states the effect of my judgment on the appeal in question, as follows:—

"This Judge declares, in effect, that according to the Act in question the portion of this property lying within British Columbia must be valued as real estate, not at what that portion would be worth as real estate by itself, but at what it may be worth because it is part of a railway which extends beyond the limits of the Province, and because the Company which owns it may work that portion which lies outside so profitably as to give the portion inside that Province a value as a connection with that outside portion which it has not as a separate property; in other words, that the owners of this railway must pay a tax to British Columbia solely because of its transactions outside of British Columbia."

This is an entirely erroneous view of the decision which I have given, and I respectfully submit that there is not to be found in the written reasons which I had the honour to return to your Government any language which, when fairly read, supports such a construction. Mr. Clark quotes from a certain paragraph—not really necessary to my decision, but inserted in order that I might not appear to have passed without consideration any argument pressed upon me by the Company's counsel—a sentence which, he says, conveys the above idea, and treats it as the basis adopted by me for the construction of the Assessment Act.

The language referred to is taken by Mr. Clark altogether apart from its connection, and even then it can only be made to support his view by a very clever distortion of its plain meaning. I shall refer to this more at length further on, but in the meantime I wish to review shortly the points actually taken before me, and the conclusions at which I arrived.

If you refer to Mr. Jackson's written brief and my judgment you will observe that he founded his appeal before me on two grounds:

1. That the Act of 1888 had in reality made no change in the mode of assessment as laid down in the Act of 1887; and Mr. Johnson having decided that under the former Act the land was to be valued as land at the average value per acre of adjoining real estate, and the other works at their cost of construction, less depreciation, the Assessor ought still to follow the same course.

2. That the Company were only bound to pay taxes on that portion of the right of way actually occupied by them as a road-bed.

As to the second point, I did not think it capable of a serious contention, but with reference to the first ground I stated the reasons, which need not be here repeated, why I thought a change had been made by the Legislature; and that under the present Act the assessment was not to be made on the land, considered as land simply, and on the structures as such, but on the whole when taken together and valued at what they thus constituted, viz.: a railway.

I next proceeded to consider whether the method of valuation, *i. e.*, fixing it at a lump sum per mile was a fair mode. As I pointed out in my judgment this plan is not infrequently adopted in the United States. It has not been considered inequitable in actions which have come before the highest courts in that country, and there being nothing before me to show that it worked an injustice in the present case, I could see no reason for deciding that the Assessor had made his valuation in an incorrect manner.

After that my judgment contains a review of the evidence. There was produced before me on the part of the Company a valuation made on what I considered was an incorrect system under the Act, while on the part of the Government I had the testimony of a witness whose competency was not questioned, and whose veracity was unimpeached. He swore positively that the road was worth $25,000 per mile cash down, and I felt bound under the circumstances to accept his statement as correct.

Having thus arrived at a conclusion upon all that it was necessary for me to decide, I refer in my written reasons to an argument of Mr. Jackson, based upon the effect of certain evidence given by one of the Company's witnesses. A portion of my statement upon this subject is quoted by Mr. Clark in his letter as an epitome of my whole decision; although, perhaps, from lack of information as to what had occurred before me he has failed entirely to place upon the language the meaning which I intended it to bear.

In the course of his examination of Mr. Abbott, Mr. Jackson had brought out the fact that during the year there was a loss in operating this division of the road. When summing up Mr. Jackson contended that this evidence was conclusive to show that the Assessor was not justified in valuing the railway as a going concern, but should have assessed it as one which was not paying, and, in fact, unable to make running expenses. The portion of my judgment referred to is intended to express what I believe to be a correct deduction, viz.: That no such conclusion results as a logical consequence from the premises laid down by Mr. Jackson.

The fact that one portion of a large system operated under one management is run at a loss does not, in my opinion, finally establish the proposition that it is impossible to operate that portion of the road at a gain. Although this end of the line may be quite capable of being managed so as to produce a profit, it may yet be more in keeping with the general policy of the corporation to conduct it in a different manner. I did not feel, therefore, that I was justified on that evidence alone in coming to a decision that the Assessor had acted improperly when, finding within his jurisdiction a railroad in a good state of repair and being constantly operated, he valued it as a going concern, and not as an insolvent undertaking, breaking down beneath the weight of its expenses.

Mr. Clark has only quoted a portion of my judgment on this point. The following is the whole paragraph :—

"Some evidence was given on the part of the Company to show that the road was not a paying one, and Mr. Abbott swears to a loss of over $35,000 on running expenses. No doubt if the railway were offered for sale the question of profits would form an element in the estimation of its value, but if that is considered it must also be borne in mind that this division is only part of a great system operated by one corporation, to carry out whose policy it may be necessary to manage some portions of the line at a loss. It is difficult to believe that this comparatively small loss could not be turned into an actual gain, if this road having the connections which it possesses were in the hands of an independent corporation.

"In my opinion, therefore, the Assessor was justified in valuing it as a going concern, in a good state of repair, and in the view which I take of the statute, and the evidence adduced, I can see no reason for interfering with his assessment."

I submit that the above language, although it may be inartistic in construction, is quite capable of the meaning which I wished it to convey, and that it has not been fairly quoted or interpreted by Mr. Clark. I certainly did not intend to pronounce upon the grave constitutional question which he has been pleased to credit me with deciding. It was not raised or argued before me in any manner. It did not occur to my mind then, nor do I now see, why the point must of necessity be considered in construing the Act; and I certainly was not aware until I read the very ingenious misinterpretation of my words in Mr. Clark's letter that I had even attempted to express any opinion upon it.

I have, &c.,
(Signed) ERNEST V. BODWELL.

To the Honourable
The Attorney-General, Victoria.

VICTORIA, B. C.:
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