PAPERS

Relating to the Report of the Minister of Justice on certain Acts of British Columbia passed during the Session of 1903-4.

By Command.

FRED. J. FULTON,
Provincial Secretary.

Provincial Secretary's Office,
14th February, 1905.

Petition of Esquimalt Railway Company Re Vancouver Island Settlers' Rights Act, 1904.

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To His Excellency the Governor-General in Council, Ottawa:

The humble petition of the Esquimalt and Nanaimo Railway Company showeth unto your Excellency as follows:—

1. On the 19th day of December, 1883, the Legislative Assembly of British Columbia passed a Statute, No. 14 of Provincial Statutes of 1884, intituled "An Act relating to the Island Railway, the Graving Dock, and Railway Lands in the Province."

2. By section 3 of the said Act, there was granted to the Dominion Government certain lands for the purpose of constructing, and to aid in the construction of a railway between Esquimalt and Nanaimo.

3. By section 8 it was enacted that such persons, hereinafter called the "Company," as may be named by the Governor-General in Council, etc., shall be and are hereby constituted a body corporate and politic by the name of "The Esquimalt and Nanaimo Railway Company."

4. By Order in Council dated the 12th April, 1884, His Excellency the Governor was pleased to name Robert Dunsmuir, John Bryden, James Dunsmuir, Charles Crocker, Charles F. Crocker, Leland Stanford and Collis P. Huntington, etc., as a body corporate and politic by the name of "The Esquimalt and Nanaimo Railway Company," for the purposes of the construction of the railway between Esquimalt and Nanaimo in accordance with the provisions of aforesaid section 8 (*See* Canada Gazette 19th April, 1884).

5. On the 20th day of April, 1883, an agreement was entered into between Robert Dunsmuir, James Dunsmuir, John Bryden, Charles Crocker, Charles F. Crocker, Leland Stanford, and Collis P. Huntington, of the first part, and Her Majesty Queen Victoria, represented by the Minister of Railways and Canals, of the second part (section 4), for the purpose of building a line of railway between Esquimalt and Nanaimo, and (15) the land grant to be made and the land, in so far as the same shall be vested in Her Majesty and held by Her Majesty for the purposes of the said railway, or the purposes of constructing or to aid in the construction of the same, shall be conveyed to the contractors upon the completion of the whole work to the entire satisfaction of the Governor in Council, etc., as set forth in said section, and sections 23, 24, 25 and 26 of the Act of 19th December, 1883, are particulrrly referred to.

6. The said agreement was approved and ratified by Act of Parliament of the Dominion of Canada, Cap. 6 of 1884.

7. And by section 7 of the said Act the land was to be granted to the said Company, subject to the exception therein set forth, *inter alia* sub-section 2, every bonâ fide squatter who has continuously occupied and improved any of the lands within the tract of land to be acquired by the Company from the Dominion Government, for a period of one year prior to the first day of January, 1883, shall be entitled to a grant of the freehold of the surface rights of the said squatted land to the extent of 160 acres at the rate of one dollar per acre.

8. The Esquimalt and Nanaimo Railway Company completed the whole work to the entire satisfaction of the Governor in Council, as is witnessed by the deed under the Great Seal of Canada dated the 21st day of April, 1887, which granted, assigned and conveyed unto the Esquimalt and Nanaimo Railway Company the lands mentioned in the said Act of the Provincial Legislature, Chap. 14, 1884, and of the Dominion Parliament Chap. 6, 1884, subject to the terms and provisions affecting the same set forth in the said Acts.

9. Since the conveyance of the lands aforesaid to the said Company, the said Company have administered the said lands according to the terms and conditions set forth in the said Act, Chap. 14, 1884.

10. The squatters mentioned in section 23 of the Act of 1884, c. 14, and Dominion Statutes, sub-section 2 of section 7 of c. 1884, became dissatisfied and claimed more extensive rights than these accorded to them by the Statutes aforesaid, and the Dominion Government on the 10th August, 1897, issued a commission to Mr. T. G. Rothwell to investigate the claims set up by the settlers upon the tract of land which was conveyed to the Government of the Dominion of Canada by the Province of British Columbia, and by the Dominion of Canada to the Esquimalt and Nanaimo Railway as hereinbefore set out.

Mr. Rothwell in his report (which is published in the annual report of the Department of the Interior, 1898), at folio 459, states, "The settlers mentioned are those who are referred to as bonâ fide squatters in section 23 of the Provincial Act, c. 14, 1884, and in sub-section 2 of section 7 of the Dominion Act, c. 6 of 1884," and states at folio 460, "When I have completed this task I feel satisfied that I will have established the conclusion I have arrived at, that although these settlers, speaking generally, have now no legal right to the coal and other minerals under their lands, they, or those claiming from them, have a just claim for redress at the hands of the Province in which they live, and a claim which that Province cannot honourably refuse to recognise and settle." And at folio 469, "I repeat, therefore, that I consider it the duty of the Government of British Columbia to take such action as will promptly and satisfactorily remove the injustice."

11. On the 12th day of October, 1900, the Provincial Government issued a Commission to Mr. Eli Harrison, a Judge of the County Court of British Columbia, who, after a very exhaustive enquiry, reported to the Provincial Government that the "squatters" could not now acquire the coal or minerals, if any, under the lands squatted on, as such coal and minerals had been conveyed to others. Mr. Harrison's report is published at folio 337 of the Sessional Papers, B. C., 1901.

12. In the year 1903 the Local Legislature passed an Act, No. 26, intituled "Vancouver Island Settlers' Rights Act, 1903."

13. In the year 1904 the Local Legislature passed an Act, chap. 42, intituled "Vancouver Island Settlers' Rights Act, 1904." This Act, by section 5, repeals chap. 26 aforesaid.

14. By sub-section (*a*) of section 2, "Railway Land Belt" shall mean the lands described by section 3, of chapter 14 of 47 Victoria, being "An Act relating to the Island Railway, the Graving Dock, and Railway Lands of the Province."

15. By sub-section (*b*) of section 2, a "settler" is described as a person who, prior to the passing of the said Act, occupied or improved lands situate within the said railway land belt with the bonâ fide intention of living thereon.

16. Section 3 of the said Act is as follows:—"Upon application being made to the Lieutenant-Governor in Council, within twelve months from the coming into "force of this Act, showing that any settler occupied or improved land within said railway land belt prior to the enactment of chapter 14 of 47 Victoria, with the bonâ fide intention of living on the said land, accompanied by reasonable proof of such occupation or improvement and intention, a Crown grant of the fee simple in such land shall be issued to him or his legal representative free of charge and in accordance with the provisions of the Land Act in force at the time when said land was first so occupied or improved by said settler."

17. Section 4 provides that "The rights granted to the settler under this Act shall be asserted by and be defended at the Crown expense."

18. The definition of "settler," as set forth in chap. 42 of 1904, does away with the definition of the term "squatter," as set out in chap. 14 of 1884, aforesaid, though he is one and the same person.

19. Section 3 of the said Act gives to the squatter of section 23 of chap. 14, under the title of settler, all the coal and mineral under the lands squatted on.

20. The Esquimalt and Nanaimo Railway Company made their contract as aforesaid with the Dominion Government, and upon the due completion thereof received a grant of the said lands from the Dominion Government, upon the same terms and conditions they were granted to the Dominion Government by the Provincial Government of British Columbia by chap. 14 of 1884.

21. The Esquimalt and Nanaimo Railway Company do not recognise the right of the Provincial Legislature to interfere with the land grant, as the Company did not receive the land from the Provincial Government, nor did they enter into any contract with the Provincial Government.

22. The granting of the minerals under the lands of the squatters, as mentioned in section 23 of c. 14 of 1884, will be a great injury to the property of the Esquimalt and Nanaimo Railway Company and an interference with the contract made between the Esquimalt and Nanaimo Railway Company and Dominion Government.

Dated the day of March, A. D. 1904.

The Esquimalt and Nanaimo Railway Company therefore humbly pray Your Excellency in Council to disallow the said Act, No. 42 of 1904, known as the "Vancouver Island Settlers' Rights Act, 1904," passed by the Provincial Legislature of the Province of British Columbia.

[Seal.] (Signed) James Dunsmuir,
President of the Esquimalt and Nanaimo Railway.

Monday, 21st March, 1904.

(Signed) Chas. E. Pooley,
Secretary Esquimalt and Nanaimo Railway Company.

Copy of a Report of a Committee of the Executive Council, approved by His Honour the Lieutenant-Governor on the 26th May, 1904.

To His Honour the Lieutenant-Governor in Council:

The Committee of the Executive Council have had under consideration the Petition of the Esquimalt and Nanaimo Railway Company, and beg respectfully to report as follows:—

The whole of the land claimed by the settlers as against the Esquimalt and Nanaimo Railway Company was acquired before the 19th December, 1883, being the date of the passage of what is commonly called the Settlement Act. By the Land Act of 1875, 38 Victoria, chapter 5, sec. 3, "any person being the head of a family * * * and a British subject," after complying with the provisions of the section, might "record any tract of unoccupied, unsurveyed and unreserved lands of the Crown, not being an Indian settlement." The section then prescribes the acreage and other matters. By section 9 of that Act, it is provided that, upon compliance by the applicant of the provisions hereinbefore contained, the Commissioner "shall" record the land so sought to be recorded, etc.

It would appear, then, that the settler, upon complying with the provisions of sections 3 to 9, obtained an absolute right to have the land recorded in his favour. It was not an act of grace on the part of the Crown, but was put even more forcibly than the right of the miner to record his claim without any enquiry into the conditions precedent to his making his record, which right has never been questioned in the history of the Province.

This was the condition of affairs at the date of the Settlement Act. The Settlement Act did not interfere with the rights of the settler in any way, but, on the contrary, carefully preserved them, and all other rights howsoever acquired. The Legislature went even further than the preservation of the rights actually acquired, because it preserved, so far as the surface rights were concerned, the rights of anyone who had "squatted," that is, located without any colour of right, upon the land, the right to obtain a grant of the surface.

A number of persons, antecedent to the 19th of December, 1883, did all those things necessary to entitle them to a record of the land under the "Land Act, 1875," but were refused the right to perfect their title by the officer declining to make the record in favour of the applicant, and declining also to give him the certificate required by sec. 9 of the said Act. Three of those persons have attempted unsuccessfully to assert their rights as against the Railway Company.

The Legislature by the Settlement Act did not convey to the Dominion, under which Government the Esquimalt and Nanaimo Railway Company claim, any lands in the Railway Belt as to which any other person had a lawful claim; and perhaps the only way in which the rights of the settlers could be asserted is not by an action brought by themselves against the Esquimalt and Nanaimo Railway Company, but by an action brought either by the Attorney-General, on behalf of the Provice, or by giving the settlers a Provincial title and allowing them to contest the matter themselves. This latter course was the one which commended itself to Your Honour's advisers, hence the passage of the "Vancouver Island Settlers' Rights Act, 1904," chapter 54.

In making this Report, the Committee do not overlook one of the difficulties which may arise in the course of the litigation, viz.: That the settler was bound to make his record upon "unoccupied, unsurveyed and unreserved land of the Crown"; and in the British Columbia Gazette of the 5th July, 1873, a reserve was placed upon a strip of land 20 miles in width along the east coast of Vancouver Island between Seymour Narrows and the harbour of Esquimalt. That reserve, by its recitals, is apparently founded upon incorrect premises. It is founded upon the suggeston that Esquimalt in Vancouver Island was, by an Order of the Privy Council of Canada, fixed as the terminus of the Canadian Pacific Railway, and that a line of railway was to be located between the Harbour of Esquimalt and Seymour Narrows. It was founded, further, upon the 11th paragraph of the Terms of Union, and the Terms of Union distinctly preserved to settlers the right of pre-emption, and provided, as did the Settlement Act, that lands be given in lieu of those which might have been pre-empted before the transfer took place.

The Committee is, therefore, of opinion that those persons who had made application to pre-empt lands antecedent to the 19th December, 1883, and who in good faith had occupied and improved lands with a bonâ fide intention of living thereon, were entitled to receive grants from the Crown, and for that reason recommended the Bill to the Legislature.

Mr. Rothwell, in his report, cited in the petition of the Esquimalt and Nanaimo Railway Company to His Excellency, arrived at the conclusion that these settlers had not been fairly treated, the same conclusion having been arrived at by Your Honour's advisers, the only difference between Your Honour's Ministers and Mr. Rothwell being the mode of redress.

In conclusion, the Committee submit that the Act in question is fairly within the powers of the Legislature, as dealing with property and civil rights, and in this connection they refer with some degree of confidence to the opinion of Sir Oliver Mowat, stated in Lefroy's Legislative Power of Canada, at page 201, where he says:—

"I repudiate the notion of the petitioners that it is the office of the Dominion Government to sit in judgment on the right and justice of an Act of the Ontario Legislature relating to property and civil rights. That is a question for the exclusive judgment of the Provincial Legislature."

The Committee further beg to refer to the report of the Honourable David Mills, then Minister of Justice, and afterwards a Judge of the Supreme Court of Canada, having reference to British Columbia legislation of the year 1901 (chapter 45, "An Act respecting certain Land Grants,") wherein, after reciting that the gravamen of the objection was that royalties were imposed upon the timber standing upon the lands granted to the Kaslo and Slocan Railway Company and the Nelson and Fort Sheppard Railway Company, by way of subsidy in aid of the railways, and that thereby the value of the timber of the railway companies was impaired, namely, that there was an interference with vested rights,

The Minister remarks as follows:—

"The undersigned does not deem it necessary to consider in detail the remarks of the Attorney-General. He does not acquiesce in all of them, but the undersigned bases his refusal to recommend disallowance upon the fact that the application proceeds upon grounds affecting the substance of the Act, with regard to matters undoubtedly within the legislative authority of the Province and not affecting any matter of Dominion policy. It is alleged that the Statute affects pending litigation and rights existing under previous legislation and grants from the Province. The undersigned considers that such legislation is objectionable in principle and not justified unless in very exceptional circumstances, but Your Excellency's Government is not in anywise responsible for the principle of the legislation, and as has already been stated in this Report with regard to an Ontario Statute, the proper remedy in such cases lies with the Legislature or its constitutional Judges."

It may be said that, after all, this Act is only an Act to provide a means for conferring a title in certain proper cases where justice requires title to be conferred, and not from or out of any property of the railway company, but out of lands reserved out of the grant made by the Settlement Act, and in any event lands still vested in the Crown in the right of the Province.

The Committee, therefore, respectfully submit that no good ground exists for the exercise by His Excellency of the power of disallowance in respect of the Act in question.

The Committee advise that a copy of this Report, if approved, be forwarded to the Honourable the Secretary of State of Canada.

Dated this 21st day of May, A.D. 1904.

Richard McBride,
Presiding Member of the Executive Council.

Approved 26th May, A.D. 1904.
Henri G. Joly de Lotbinière,
Lieutenant-Governor.

Copy of a Report of a Committee of the Honourable the Executive Council, approved by His Honour the Lieutenant-Governor on the 26th day of January, 1905.

To His Honour the Lieutenant-Governor in Council:

The undersigned has the honour to refer to Your Honour's letter of the 17th of January, 1905, to the Provincial Secretary, enclosing Report of the Minister of Justice to His Excellency the Governor-General for the years 1903-04, being the "Provincial Elections Act," and the "Coal Mines Regulation Act Amendment Act."

With regard to chapter 17, the provisions objected to are those contained in section 6, which provides that no Chinaman, Japanese or Indian shall have his name placed upon the Register of Voters. That section interpreted, as the Minister points out, includes not only alien Chinese, but also persons of the Chinese race who, acting in conformity with the Dominion Naturalisation Act, become British subjects. The position that Your Honour's Ministers and the Legislature have assumed upon this subject is one of grave objection to anyone of the class of persons mentioned in the section, being placed upon the voters' list.

The undersigned observes that the Minister expresses the hope "that this matter will be further considered by the Provincial Legislature and such amendments made as may be necessary to remove the objections herein stated."

With respect to this, in view of the opinion that the undersigned has already expressed and with the knowledge that Your Honour's Ministers have of the feeling throughout the Province, and also the views of the majority of the Members of the Legislature, perhaps the whole of them, Your Honour's Ministers cannot recommend, nor take the responsibility of adopting, the suggestion of the Minister of Justice that the matter should be further considered by the Legislature. The only way in which Your Honour's Ministers would feel justified in testing the views of the Legislature would be by bringing down the Report of the Minister of Justice and asking for an expression of opinion, but the undersigned is quite certain as to what the result would be, and hence it seems hardly proper to subject the views of the Minister of Justice to such a severe test. The general concensus of opinion throughout the Province is very strongly in support of the view that these persons should not be permitted to be on the voters' list. As the Minister of Justice points out, disallowance would not change the law upon the subject, and that the Province has the undoubted right to prohibit any person or set of persons from being placed upon the voters' list has been determined by the Privy Council in the case of Cunningham *v.* Tomey Homma, reported in Appeal Cases, 1903, page 151.

Chapter 39 is an Act to amend the "Coal Mines Regulation Act," and is intended for the purpose of interpreting the words "Chinamen" and "Chinese" when used in connection with the Act. The words "Chinaman" and "Chinese" in the Province of British Columbia have been used very largely to express the idea of race rather than nationality, and it was for the purpose of obviating any doubt upon this subject that this short Act was passed.

The question of whether section 82, rule 34, is within the powers of the Provincial Legislature is one of the matters which are now pending before the Judicial Committee of the Privy Council, therefore the undersigned hopes that the Act will not be disallowed but that all

questions as to its constitutionality may be left to be determined by the judicial tribunal at present seised of the whole question.

The Minister of Justice will in due course be served with a copy of the proceedings, and will have an opportunity, if desired, of appearing before the Privy Council, or of instructing counsel in the matter.

Dated the 19th day of January, A. D. 1905.

(Signed) CHARLES WILSON,
Attorney-General.

Approved this 19th day of January, A. D. 1905.

(Signed) RICHARD MCBRIDE,
For Presiding Member, Executive Council.

Copy of a Report of a Committee of the Honourable the Executive Council, approved by His Honour the Lieutenant-Governor on the 26th day of January, 1905.

To His Honour the Lieutenant-Governor in Council:

The undersigned has the honour to refer to the letter of His Honour the Lieutenant-Governor to the Provincial Secretary, dated 1st December, 1904, enclosing a copy of the Report of the Minister of Justice upon Chapter 15 of the Statutes of British Columbia for 1903-1904, being the Supreme Court Act.

The absence of the undersigned attending the Judicial Committee of the Privy Council, is the cause of the delay in the matter receiving the attention which it deserves.

The Act in question is an Act respecting the constitution, practice and procedure of the Supreme Court of British Columbia, and is a consolidation and revision of all the Statutes on the subject up to the time when it was passed. It was not treated as a controversial measure in the House, and with one or two exceptions was practically assented to by all the Members of the Legislature who took any interest in the subject.

The provision objected to is one contained in section 5, to the effect that persons appointed to the position of Judges of the Supreme Court shall be Barristers of not less than ten years' standing, five of which shall have been spent in actual practice at the Bar of this Province.

It is submitted, with the utmost confidence, that the provision is a reasonable one. It was part of the Statute law of British Columbia from 1878 to 1899, when it was repealed for party purposes. It appears in the Revised Statutes of Ontario, 1897, chapter 51, sec. 3, sub-s. (6), except that ten years' actual practice at the Bar of Ontario is required, instead of five as in the section under discussion.

The undersigned regrets that he cannot assent to the proposition of the Minister of Justice that the section is *ultra vires* of the Province. Even if it were, it is submitted that that is no reason for the disallowance of the measure, but that it should be left to its operation and the determination of the Courts. If, however, the Minister of Justice proposes to recommend the disallowance of the Act, as being contrary to the policy of the Dominion Government, then that is a reason of a paramount character, and the undersigned has nothing further to say on the subject.

In any event the Act is one of so great importance to this Province, and its disallowance now and re-enactment next Session would possibly create so much trouble and perhaps litigation, with consequent expense, there seems to be no course left to Your Honour's Ministers, in view of the threat of disallowance, but to assent to the terms on which the Act will be allowed, namely, a promise to repeal the section at the next Session of the Legislature.

Dated the 19th day of January, A. D., 1905.

(Signed) CHARLES WILSON,
Attorney-General.

Approved the 19th day of January, A. D. 1905.

(Signed) F. CARTER-COTTON,
Presiding Member of the Executive Council.

VICTORIA, B. C.
Printed by RICHARD WOLFENDEN, I.S.O., V.D., Printer to the King's Most Excellent Majesty.
1905.