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PACIFIC LOGGING COMPANY LIMITED

v.

ATTORNEY-GENERAL OF BRITISH COLUMBIA

Supreme Court of British Columbia (No. 167/1971)

Before: MR. JUSTICE P.D. SEATON

Victoria, November 17, 1971

Mr. R.B. Hutchison for the Appellant
Mr. K.C. Murphy for the Respondent

Reasons for Judgment

In 1969 the plaintiff purchased from the Esquimalt and Nanaimo Railway Company those parts of the Railway Belt Lands not previously alienated. The plaintiff seeks a declaration that certain of such lands owned by it comprising the beds of navigable lakes on Vancouver Island are not assessable. Counsel expect that they will have no difficulty in determining the question of navigability. The lands with which we are here concerned are those forming the beds of navigable waters. It is the plaintiffs contention that such land is within the exemption provided by section 24(c) of the *Taxation Act*, R.S.B.C. 1960, c. 376, as amended:

> "Land comprised in any public road, way, highway, or public square or park used exclusively for public purposes:"

It would seem reasonable to conclude that the surface of a navigable lake is a public road, way or highway, for the reasons outlined by Clement, J. in *Fort George Lumber Co.* v. *Grand Trunk Pacific Railway* (1915) 9 W.W.R. 17 @ 20. If that is so, the narrow issue here is whether or not the subjacent land is "comprised in" such road, way or highway.

The *Taxation Act* provides that property is liable to taxation (s. 4(1)), that property includes land (s. 2) and that land includes land covered by water (s. 2). These provisions would indicate a legislative intent that the water and the underlying land may be treated separately for taxation purposes. The property in and the right to the use of the water in the lakes is vested in the Crown in the right of the Province by section 3 of the *Water Act*, R.S.B.C. 1960, c. 405, as amended. The constitutional validity of that Act is not questioned in these proceedings.

It is clear that a public navigable waterway is a public highway in the sense that all persons may pass over it and an obstruction of the way by the owner of the submerged land may be a public nuisance (*Stephens & Mathias* v. *MacMillan & MacMillan* (1954) 2 D.L.R. 135). But the same might be said of an owner of land abutting on a highway. Nuisance has been defined with reference to highways as any wrongful act or omission upon or near a highway, whereby the public are prevented from freely, safely, and conveniently passing along the highway. (Pratt and Mackenzie on the Law of Highways (18th ed.) p. 107, quoted with approval in *Jacobs* v. *London County Council* 1950 A.C. 361 at 375.) This burden on subjacent land falls equally on adjacent land and it has not been suggested that adjacent land is thereby comprised in the highway.

The concept that the river bed might be owned beneficially subject only to the rights of the public was dealt with by Parker, J. in *Fitzhardinge (Lord)* v. *Purcell* (1908) 2 Ch. 139 at 167:

> "It is true that no grant by the Crown of part of the bed of the sea or the bed of a tidal navigable river can or ever could operate to extinguish or curtail the public right of navigation and rights ancillary thereto, except possibly in connection with such rights as anchorage when there is some consideration moving from the grantee to the public. It is also true that no such grant can, since Magna Charta, operate to the detriment of the public right of fishing. But, subject to this, there seems no good reason to suppose that the Crown's ownership of the bed of the sea and the beds of tidal navigable rivers is not a beneficial ownership capable of being granted to a subject in the same way that the Crown's ownership of the foreshore is a beneficial ownership capable of being so granted. This beneficial ownership of the Crown, or the Crown's grantee, can only, I think, be considered to be limited by well-known and clearly defined rights on the part of the public."

The ownership of the land is subject to servitudes arising from the public rights of navigation (*Capital City Canning & Packing Co.* v. *Anglo-British Columbia Packing Co.* (1905) 2 W.L.R. 59, 11 B.C.R. 333), but this would amount to an incumbrance upon the land as opposed to the land becoming part of the highway.

The plaintiff submits that in many areas the lake bed serves no purpose other than to hold up the water and is, therefore, comprised in the public way. In other areas the lake bed is used for other purposes, such as submarine telephone cables, and it is conceded that such areas are assessable. It is my view that the distinction between the two is not that the one is comprised in a highway and the other not, rather that the lake bed in the one case is unused and in the other it is occupied. But assessability here is not contingent on occupation, as in *B.C. Telephone Co. Ltd.* v. *Corporation of the District of West Vancouver* (B.C.C.A. April 5, 1955, unreported. Whether the lake bed is used or unused, the water may provide a highway without the bed being comprised therein.

I conclude that the beds of navigable waters are not land comprised in a public road, way or highway, and are not exempt from taxation by virtue of section 24(c).