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*Oct. 2, 3, 4.
*Nov. 20.

HIS MAJESTY THE KING, ON THE PROSECUTION OF THE PIONEER GOLD MINES OF BRITISH COLUMBIA LIMITED.. } APPELLANT;

AND

THE MINISTER OF FINANCE.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Taxation—Income tax—Taxation of mining companies—Allowance for depletion—Acquisition costs—Determination of—Appeal taken under s. 6 (4) of Income Tax Act, B.C. 1932 c. 53—Finality of decision of Lieutenant-Governor in Council—Mandamus—Taxation Act, R.S.B.C. 1924, c. 254, s. 44, ss. 4, as amended.

In 1924, the Pioneer Gold Mines Limited gave an option to one Sloan for its mining property for $100,000. In 1928, the Pioneer Gold Mines of B.C. Limited was incorporated with a capital stock of $2,500,000 divided into 2,500,000 shares of $1 each. On March 30, 1928, Sloan assigned to the new company his option for 1,600,000 shares in that company. The *Income Tax Act* of British Columbia (Statutes of 1932, c. 53, s. 6) enables the Commissioner of Income Tax to make certain deductions from a mine owner's income on account of depletion of the mines, thus involving the fixing of the costs to the taxpayer of the acquisition of the mines. The Commissioner of Income Tax fixed the acquisition costs to the new company at $100,000. The new company appealed to the Lieutenant-Governor in Council under section 44, subsection 4, of the *Taxation Act* (R.S.B.C., 1924, c. 254) as amended, from the decision of the Minister of Finance, under clause (*p*) of subs. 1 and and clause (*a*) of subs. 3 of section 44, fixing the acquisition costs "at too low figure of $100,000 instead of $2,500,000 for the purpose of assessment of the company's income for the year ending March 31, 1931." The appeal was disposed of by an Order in Council, increasing the amount from $100,000 to $200,000. The new company, being still dissatisfied, obtained a writ of *mandamus* from D. A. McDonald, J., commanding the Minister of Finance to ascertain and take into consideration the acquisition costs to the new company of the properties acquired by it under the above agreement of March 30, 1928. Subsection 4 of section 6 of the *Income Tax Act* provides that "an appeal from any decision of the Minister (of Finance) * * * may be taken to the Lieutenant-Governor in Council, who after hearing the parties interested, may either confirm or amend the decision of the Minister and the decision of the Lieutenant-Governor in Council shall be final." The Court of Appeal reversed the judgment of McDonald, J.

Held, affirming the judgment appealed from (48 B.C. Rep. 412), that *mandamus* did not lie in this case. Under section 6 (4) of the *Income Tax Act,* the decision by the Minister of Finance was appealable; a competent appeal was taken from it; the appeal was considered by the Lieutenant-Governor in Council in the exercise of his statutory jurisdiction and powers, who pronounced a decision upon the matters

*PRESENT:—Duff, C.J. and Rinfret, Cannon, Crockett and Hughes, JJ.

in dispute which the Act declares to be final. Such decision was binding upon the Minister of Finance as well as upon the appellant company; and a *mandamus* requiring him to reconsider questions settled by the Order in Council would have been a *mandamus* requiring him several months after he became *functus officio,* to commit a breach of the law and to perform an act which, by force of the statute, must necessarily be inoperative.

APPEAL from a judgment of the Court of Appeal for British Columbia (1), reversing the judgment of D. A. McDonald J. granting an order absolute for *mandamus.*

The material facts of the case and the questions of issue are fully stated in the above head note and in the judgments now reported.

J. A. Clark K.C. for the appellant.

C. W. Craig K.C. and *E. Pepler* for the respondent.

The judgment of Duff C.J. and Rinfret J. was delivered by

DUFF C.J.—Thanks to the complete and accurate statement of the facts contained in the judgment of my brother Hughes, I shall be able to state, without undue length, the grounds on which I think this appeal should be decided. On the 22nd of January, 1932, the appellant served notice of appeal to the Lieutenant-Governor in Council under section 44, subsection 4, of the *Taxation Act,* from the decision or determination of the Minister of Finance under clause (*p*) of subsection 1, and clause (*a*) of subsection 3 of section 6 (as the section is now numbered) of the *Taxation Act,* which notice is in these terms:

Pioneer Gold Mines of B.C. Limited (N.P.L.), a body corporate, having its head office at 605 Rogers building, Vancouver, B.C. hereby appeals to the Lieutenant-Governor in Council under section 44, subsection 4 of the *Taxation Act,* from the decision or determination of the Minister of Finance under clause (*p*) of subsection 1, and clause (*a*) of subsection 3 of section 44 of the *Taxation Act, fixing the cost to this company of its mine and mining property at the too low figure of $100,000 instead of $2,500,000* for the purpose of assessment of the company's income for the year ending 31st March, 1931, as set out in notice of assessment by the assessor of Vancouver district mailed 30th December, 1931, and *failing to make a sufficient allowance for depletion or exhaustion of the mine* to be deducted from the income from the mine *for the year ending* 31st March, 1931.

The above mentioned appeal to be heard at such time and place as the Lieutenant-Governor in Council shall appoint.

Dated at Vancouver, B.C., this 22nd day of January, 1932.

(1) (1934) 48 B.C. Rep. 412; [1934] 2 W.W.R. 501.

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A second notice of appeal was served on the 9th August, 1932, by which, for the figure of $2,500,000 in the notice of January, there was substituted that of $2,378,120.09.

The appeal was disposed of by an order in council dated the 28th July, 1933, by increasing the amount determined as the total cost of the mine from $100,000 to $200,000, and increasing the allowance for depletion or exhaustion accordingly. The order in council is as follows:

Approved and ordered this 28th day of July, A.D. 1933.

In the matter of an appeal by Pioneer Gold Mines of B.C. Limited (non personal liability) to the Lieutenant-Governor in Council under section 44(4) of the *Taxation Act*.

The undersigned has the honour to report

That an assessment for income tax was made against the above mentioned company under the *Taxation Act* in respect of the income of the company for its fiscal year ending the 31st day of March, 1931, in the sum of $3,556.23, and notice of assessment thereof was mailed to the company on the 30th day of December, 1931.

And that in arriving at the said assessment the undersigned as Minister of Finance allowed the company the sum of $14,665.87 for depletion or exhaustion of the mine pursuant to clause (*p*) of subsection (1) of section 44 of the *Taxation Act*, and that this sum was based on a total cost of the mine of $100,000 as determined by the Minister of Finance pursuant to subsection (3) of said section 44.

And that, with the exception of this sum of $14,665.87, the total cost so determined by the Minister had already been allowed as a deduction from the income of preceding years, and accordingly no further allowance by way of depletion remained to be made during the balance of the anticipated life of the mine subsequent to the company's fiscal year ended March 31, 1931.

And that the company appealed to the Lieutenant-Governor in Council from the decision of the Minister of Finance by notice of appeal dated the 22nd day of January, 1932, on the grounds that the cost to the company of its mine and mining property was fixed at the too low figure of $100,000 instead of $2,500,000, and that a sufficient allowance for depletion or exhaustion of the mine was not made in the said assessment.

And that on the 9th day of August, 1932, the company filed a further notice of appeal to the Lieutenant-Governor in Council from the decision of the Minister as aforesaid on the same grounds as set forth in the previous notice except that it was stated therein the cost to the company for the purposes of the said assessment should have been fixed at $2,378,120.09 instead of $100,000.

And that the appeal came on for hearing on various days and dates in the months of April and May, 1933, and that the case for the company was fully presented by J. A. Clark, Esq., K.C., counsel on behalf of the company and the case for the Government by the departmental solicitor and the Commissioner of Income Tax, and the appeal was stood over for decision.

The undersigned has therefore the honour to recommend:—

1. That under the authority of subsection (4) of section 44 of the *Taxation Act* the appeal of the company be allowed in part, and that

the *total cost of the mine* as determined by the Minister at $100,000, be increased to the sum of $200,000, of which, after deducting the sum of $85,334.13 already allowed as a deduction from income of preceding years, a balance of $114,665.87 remains to be allowed as a deduction from the income derived from the mine during ensuing years, commencing with the fiscal year of the company which ended on the 31st day of March, 1931.

And that, having regard to the anticipated life of the mine as indicated by the total ore reserves and annual ore extraction disclosed in the return filed by the company for the said fiscal year, and to the allowance of $14,665.87 made in assessing the income for the year ended March 31st, 1931, be approved, and that subject as aforesaid the said assessment be confirmed.

2. That a certified copy of this minute, if approved and ordered, be forwarded to the company and the Commissioner of Income Tax.

Dated this 28th day of July, A.D. 1933.

J. W. Jones
Minister of Finance.

Approved this 28th day of July, A.D. 1933.

R. H. Pooley
Presiding member of the
Executive Council.

The statute, section 6 (1, o), authorized the Minister, in determining expenses in the production of income to make an allowance for depletion or exhaustion of a mine; an allowance to be deducted from the income of the mine in any year in the discretion of the Minister. The Minister must have regard to the anticipated life of the mine and the "total cost of the mine" as determined by him. By section 6 (3a), in determining this last mentioned cost, the Minister shall take into consideration (*inter alia*) "acquisition costs incurred prior to April 1, 1928."

The appeal taken by the company from the Minister to the Lieutenant-Governor in Council was authorized by section 44 (4) of the *Taxation Act*, which invests the Lieutenant-Governor in Council with jurisdiction upon such an appeal, after hearing the parties interested, either to confirm or amend the decision of the Minister; and the statute declares that "the decision of the Lieutenant-Governor in Council shall be final."

It was argued on behalf of the appellants that this right of appeal does not extend to a determination of acquisition costs under subsection 3a, but relates only to an allowance for depletion under subsection 1o. No doubt the appeal is given from the allowance by the Minister for depletion or exhaustion, but the appeal is given in the most general

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terms, and seems clearly to include every appeal intended to assert a complaint against the action of the Minister in respect of the allowance upon any ground on which he may have acted; including his determination of acquisition costs and other matters, which is only a step in the process of fixing the allowance. The order fixing the allowance is the definite order. I have no doubt that the right of appeal is comprehensive in its nature; that, given a determination by the Minister of an allowance for depletion or exhaustion, then the complainant has a right to present his complaint by way of appeal in respect of any matter of fact or law which he may conceive to have affected the decision of the Minister adversely to his interests, or by reason of which he may desire to contend that the decision of the Minister was erroneous.

The appellants, by their appeal, it will be observed, complained that the Minister had fixed " the cost to this company of its mine and mining property at the too low figure of $100,000 instead of $2,500,000 " (amended to read $2,378,120.09); and that he had failed to make sufficient allowance for the depletion or exhaustion of the mine.

The notice of motion originating the proceedings claimed a writ of mandamus; and the judgment of the judge of first instance, which the appellants now ask be restored, ordered the issue of such a writ directed to the Minister of Finance, requiring him " to ascertain and take into consideration the acquisition costs of the Pioneer Gold Mines, Ltd. of the properties acquired by them under an indenture " of 30th March, 1928.

The bringing of the appeal invests the Lieutenant-Governor in Council with jurisdiction to deal with the allowance complained of, and necessarily to review all matters that the statute requires to be considered for the purpose of reaching a determination upon that subject. The decision of the Lieutenant-Governor upon such matters, whether they be matters of fact or matters of law, is final. One may suppose, of course, that there might be cases in which the Lieutenant-Governor in Council, in passing upon the matters arising upon the appeal, had so radically violated the conditions of his jurisdiction as to require a court to hold that his determination was a determination *ultra vires*. It is also, of course, conceivable that an appeal might be

taken in respect of something which is not, under the statutory provisions, an appealable matter at all.

In the present case it could not seriously be, and in fact is not, disputed that an allowance was fixed by the Minister of Finance, who professed, in doing so, to exercise his powers under subsection 1o. There was, therefore, an appealable matter.

Nor can I perceive any ground for affirming that the Lieutenant-Governor in Council violated any fundamental condition of his jurisdiction. His position, in exercising such a statutory authority to pass upon disputed questions affecting the rights and property of individuals, was discussed in *Wilson* v. *Esquimault Nanaimo Railway Co.* (1). In that case the Judicial Committee of the Privy Council had to consider the function of the Lieutenant-Governor of British Columbia who had been invested with statutory authority to issue Crown grants of property, which the Board had previously held to be vested in the Railway Company, upon " reasonable proof " of certain facts. It was held that his function was in that case judicial, but that he was not bound to follow the rules regulating proceedings in a court of justice, or the rules of evidence, and that, if there was before him something which he might properly regard as proof of the necessary facts, it was within his discretion to determine whether or not such proof constituted " reasonable proof " within the meaning of the statute.

The Board there proceeded upon principles laid down in *Arlidge's* case (2). The judgment of Lord Haldane in that case contains a passage which explicitly points out that when Parliament entrusts a government department (such, for example, as the Local Government Board) with judicial duties, Parliament must be taken, in the absence of any declaration to the contrary, to have intended it to follow the procedure which is its own, and may be necessary if it is to be capable of doing its work efficiently.

The Minister, as the head of the Board, it was said, is directly responsible to Parliament like other Ministers. He is responsible, not only for what he himself does, but for all that is done in his department. The volume of work

(1) [1922] 1 A.C. 202, at 211, 214.
(2) [1915] A.C. 120

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entrusted to him is very great and he cannot do the great bulk of it himself. He is expected to obtain his materials vicariously through his officials, and he has discharged his duty if he sees that they obtain these materials for him properly.

An observation somewhat to the same effect is to be found in *Wilson's* case (1). The passage in Lord Haldane's judgment in full is as follows:

> My Lords, when the duty of deciding an appeal is imposed, those whose duty it is to decide it must act judicially. They must deal with the question referred to them without bias, and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must be come to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice. But it does not follow that the procedure of every such tribunal must be the same. In the case of a Court of law tradition in this country has prescribed certain principles to which in the main the procedure must conform. But what the procedure is to be in detail must depend on the nature of the tribunal. In modern times it has become increasingly common for Parliament to give an appeal in matters which really pertain to administration, rather than to the exercise of the judicial functions of an ordinary Court, to authorities whose functions are administrative and not in the ordinary sense judicial. Such a body as the Local Government Board has the duty of enforcing obligations on the individual which are imposed in the interests of the community. Its character is that of an organization with executive functions. In this it resembles other great departments of the State. When, therefore, Parliament entrusts it with judicial duties, Parliament must be taken, in the absence of any declaration to the contrary, to have intended it to follow the procedure which is its own, and is necessary if it is to be capable of doing its work efficiently. I agree with the view expressed in an analogous case by my noble and learned friend Lord Loreburn. In *Board of Education* v. *Rice* (2) he laid down that, in disposing of a question which was the subject of an appeal to it, the Board of Education was under a duty to act in good faith, and to listen fairly to both sides, inasmuch as that was a duty which lay on every one who decided anything. But he went on to say that he did not think it was bound to treat such a question as though it were a trial. * * * It could, he thought, obtain information in any way it thought best, always giving a fair opportunity to those who were parties in the controversy to correct or contradict any relevant statement prejudicial to their view. If the Board failed in this duty, its order might be the subject of certiorari and it must itself be the subject of mandamus.
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> My Lords, I concur in this view of the position of an administrative body to which the decision of a question in dispute between parties has been entrusted. The result of its inquiry must, as I have said, be taken, in the absence of directions in the statute to the contrary, to be intended to be reached by its ordinary procedure. In the case of the Local Government Board it is not doubtful what this procedure is. The Minister at the head of the Board is directly responsible to Parliament

(1) [1911] A.C. 179.

(2) [1922] 1 A.C. 202, 213, 214.

like other Ministers. He is responsible not only for what he himself does but for all that is done in his department. The volume of work entrusted to him is very great and he cannot do the great bulk of it himself. He is expected to obtain his materials vicariously through his officials, and he has discharged his duty if he sees that they obtain these materials for him properly. To try to extend his duty beyond this and to insist that he and other members of the Board should do everything personally would be to impair his efficiency. Unlike a judge in a Court he is not only at liberty but is compelled to rely on the assistance of his staff. When, therefore, the Board is directed to dispose of an appeal, that does not mean that any particular official of the Board is to dispose of it. This point is not, in my opinion, touched by s. 5 of 33 and 34 Vict., c. 70, the Act constituting the Local Government Board to which I have already referred. Provided the work is done judicially and fairly in the sense indicated by Lord Loreburn, the only authority that can review what has been done is the Parliament to which the Minister in charge is responsible.

Now, the materials in the appeal book, including the Order in Council in which the determination of the Lieutenant-Governor in Council is expressed, abundantly show that the Lieutenant-Governor in Council did apply himself to the matters which it was his duty to consider in the circumstances by virtue of the provisions of subsections 1o and 3a; and, moreover, that the appellants were given the fullest opportunity to present their views. He determined in the most explicit way "the total cost of the mine" as required by subsection 1o, already quoted, and "having regard," as the statute required, to the amount so ascertained, and the anticipated life of the mine, he fixed the allowance. I can find no evidence that he disregarded any statutory rule or statutory direction, or that there was any substantial departure from the mandatory provisions to which he was subject.

It was argued before us with a great deal of vigour—and this is the sole ground of complaint—that he erred in holding that the shares allotted by the appellants to the members of the syndicate had no value for certain reasons which were advanced. It does not appear that he did so, but, even if he did, and if, in doing so, he was wrong, that was not a matter going to his jurisdiction. It was simply a mistaken ruling and, apparently, a mistake of fact. It is desirable, however, to point out that, in substance, he passed upon this matter.

The issue with which the parties were practically concerned was the deduction to be allowed in respect of income by way of allowance for depletion or exhaustion. The

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duty of the Lieutenant-Governor in Council was, in fixing this, to have regard to the " total cost of the mine " to the appellants; and in ascertaining this cost to take into consideration (*inter alia*) the " acquisition costs incurred prior to the 1st April, 1928." The Lieutenant-Governor in Council had before him the agreement of April, 1930, the various documents and, no doubt, other facts affecting the value of any rights acquired under that agreement; the transfer of which was the consideration for the purchase of the shares (1,600,000) allotted to the promoters. The appellants contended that the value of these rights was the amount of the total nominal share capital, $2,500,000. Later they argued that the value of the shares was fixed by the agreement at $1,600,000. Plainly, the Lieutenant-Governor in Council was not bound to take this view. He was entitled to hold that the actual value of the shares ought to be measured by the value of the rights transferred. He may have been satisfied that no title to any of the property passed under the agreement. He may have had facts before him leading him to the conclusion that the agreements, purporting to be transferred, were not, *strictissimi juris,* enforceable. In any event, even from the point of view of the appellants, which is that it was his duty to value the shares, he was entitled to hold that this value did not exceed $200,000 (less the sums still owing under the agreements), the amount he fixed as the value of " the mine " for the purpose in hand. There is not the slightest ground for imputing to him any departure in point of substance from the directions of the statute. As regards all these matters his decision is not open to review.

The Lieutenant-Governor in Council having in July, in the exercise of his statutory jurisdiction, passed upon the matters which it was his duty to decide under the statute, it is quite obvious that the Minister of Finance became *functus officio.* The determination of the Lieutenant-Governor in Council, let me repeat, is, by the most explicit terms of the statute, final. It is binding upon the Minister of Finance as well as upon the appellants. The Minister would, after the decision, have been committing a breach of the law if he had attempted to exercise his powers in respect of allowance for depletion or exhaustion otherwise than in conformity with that decision. A mandamus requiring him to reconsider questions which had been

settled by the Order in Council would, therefore, have been a mandamus requiring him to commit a breach of the law; to perform an act which, by force of the statute, must necessarily be inoperative.

In this view, no question arises as to the legality or propriety of the acts of the Minister of Finance. It is sufficient for the purposes of this appeal that there was an appealable decision by the Minister; that a competent appeal was taken from it; that the appeal was considered by the Lieutenant-Governor in Council in the exercise of his statutory jurisdiction and powers, and that he pronounced a decision upon the matters in dispute which the statute declares to be final.

The appeal should be dismissed with costs.

The judgment of Cannon, Crocket and Hughes JJ. was delivered by

HUGHES J.—This is an appeal from the Court of Appeal of British Columbia which allowed an appeal, Mr. Justice McQuarrie dissenting, from a judgment of Mr. Justice D. A. McDonald ordering the issue of a writ of mandamus directed to the Minister of Finance of British Columbia commanding the Minister to ascertain and take into consideration the acquisition costs to Pioneer Gold Mines of B.C. Limited of the properties acquired by the company under an indenture of agreement dated March 30, 1928, between one David Sloan and the company as provided by the *Income Tax Act,* section 6, chapter 53, Statutes of British Columbia, 1932.

The relevant portions of section 6 are as follows:—

6. (1) In ascertaining the net income for the purposes of taxation, no deduction by way of expenses shall be made for:—

(*a*) not material;

(*b*) not material;

(*c*) not material;

nor shall the following be allowed in any case as expenses incurred in the production of income:—

(*d*) to (*n*) not material.

(*o*) Any allowance for depletion or exhaustion of a mine, except such proportional amount as may in the discretion of the Minister be allowed to be deducted from the income from the mine in any year, having regard to the anticipated life of the mine and to the total cost of the mine as determined by the Minister pursuant to the provisions of subsection (3) * * *

(2) Not material.

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(3) In determining the cost to any taxpayer of any mine in respect of which he claims an allowance for depletion or exhaustion under clause (*o*) of subsection (1), upon which cost any such allowance is to be computed, the Minister shall take into consideration the following expenditures, whether incurred by the taxpayer or by any predecessor in title to the mine:—

(*a*) Acquisition costs incurred prior to the first day of April, 1928, together with all expenditures subsequent to the date of acquisition for exploration and development costs and any other expenses which the Minister may consider as directly related to and forming part of the costs of the mine, subject, in the case of any mine which was in active production prior to the first day of January, 1915, to a deduction therefrom of an amount to be determined by the Minister as representing the amount of depletion or exhaustion (if any) actually sustained prior to the first day of January, 1915 * * *

(4) An appeal from any decision of the Minister under clause * * * (*o*)* * * of subsection (1) may be taken to the Lieutenant-Governor in Council, who, after hearing the parties interested, may either confirm or amend the decision of the Minister, and the decision of the Lieutenant-Governor in Council shall be final.

By an agreement in writing dated July 16, 1924, a company known as Pioneer Gold Mines Limited granted to David Sloan or his assignee the right to take possession of, use, work, mine and develop mining property in the Lillooet mining division in the province of British Columbia certain claims known as the Pioneer group together with buildings, plant, machinery and equipment during the performance by the purchaser of the conditions and stipulations in the agreement. The purchaser agreed to provide and deposit to his credit $16,000 or such lesser amount as should be sufficient to finance and pay for certain mining work and development described in the agreement at the following times: $4,000 on or before August 1, 1924; $4,000 on or before the first days of September, October and November, 1924. The agreement further provided that the proceeds of ore shipped or milled on the property should be deposited and 85 per centum credited to the purchaser's trust account and 15 per centum credited to the company for rent or use of its property. The purchaser was also given an option to purchase the property up to August 1, 1929, for $100,000 less any amounts paid to the company through the 15 per centum allowance on the proceeds of ore taken from the property. This agreement was referred to on the argument and may hereafter be referred to as the option. Sloan and his associates duly deposited $8,000, being two sums of $4,000 each, and also deposited $45,000

to the credit of the vendor, representing 15 per centum allowances on the proceeds of ore taken out. The remaining 85 per centum of the proceeds, amounting to $255,000, was put back by Sloan and his associates in improvements.

In the year 1927, Victor Spencer purchased for $40,000 a quarter interest in the agreement, subject to the payment by the syndicate of the option price. The money paid by Victor Spencer went to those members of the syndicate who had sold the quarter interest to him. On March 29, 1928, a private company was incorporated under the name of Pioneer Gold Mines of B.C. Limited, and on March 30, 1928, Sloan, on behalf of himself and all the other members of the syndicate, entered into an agreement with the new company whereby Sloan granted, assigned and transferred to the company the option and all his rights and interests to the mineral claims and property and the buildings, plant, machinery and stock in trade used in connection with the said mining business and operations. The agreement recited that the assignor had agreed to assign the option "and other premises" to the company, but the agreement in fact transferred to the company only the option and the interests of Sloan in the mineral claims and real and personal property therein described. The consideration was set out as $1,600,000 to be satisfied by the allotment to the assignor and his nominees of 1,600,000 shares of $1 each of the capital stock of the company. On the same day Sloan transferred two mining claims and shortly thereafter five additional mining claims to the company. Previous to the above assignment and transfers from Sloan, commencing on March 30, 1928, the new company had not any assets.

On May 20, 1928, an agreement for sale of 50,000 shares of the capital stock of the new company was entered into with Stobie, Furlong & Company. The consideration was $75,000. To effect this sale, the new company was converted from a private company into a public company.

In the years 1929 and 1930, the new company, which I shall hereafter refer to as the Company, was assessed on a basis of acquisition costs of $100,000. I merely mention this to give the history. I do not consider that these assessments are important in considering the present appeal as the appellant's evidence was that these assessments were

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the subject of an arrangement or agreement. In 1931, the appellant was again assessed on a basis of $100,000 for acquisition costs.

On January 22, 1932, the appellant company served a notice of appeal to the Lieutenant-Governor in Council under section 44, subsection 4, of the *Taxation Act*, R.S.B.C. 1924, chapter 254, as amended, from the decision of the Minister of Finance under clause (*p*) of subsection 1 and clause (*a*) of subsection 3 of section 44, fixing the acquisition costs

at too low figure of $100,000 instead of $2,500,000 for the purpose of assessment of the company's income for the year ending March 31, 1931.

The relevant portions of section 44 of the former *Taxation Act*, being R.S.B.C. 1924, chapter 254, as amended by the 1925 statutes of British Columbia, chapter 54, section 8, as amended by 1928 statutes of British Columbia, chapter 47, section 6, are:—

44. (1) The net income of every person shall be ascertained for the purpose of taxation by deducting from his gross income the exemptions provided in section 42, and all expenses incurred in the production of that part of his income which is liable to taxation and the income tax thereof payable to the Crown in right of the Dominion; but no deduction by way of expenses shall be made for

(*a*) not material.

(*b*) not material.

(*c*) not material.

and the following shall not in any case be allowed as expenses incurred in the production of income.

(*d*) (*e*) (*f*) (*g*) (*h*) (*i*) (*j*) (*k*) (*m*) (*n*) (*o*) not material.

(*p*) Any allowance for depletion or exhaustion of a mine except such proportional amount as may in the discretion of the Minister be allowed to be deducted from the income from the mine in any year, having regard to the anticipated life of the mine and to the total cost of the mine as determined by the Minister pursuant to the provisions of subsection (3).

(2) not material.

(3) In determining the cost to any taxpayer of any mine in respect of which he claims an allowance for depletion or exhaustion under clause (*p*) of subsection (1), upon which cost any such allowance is to be computed, the Minister shall take into consideration the following expenditures, whether incurred by the taxpayer or by any predecessor in title to the mine:—

(*a*) Acquisition costs incurred prior to the first day of April, 1928, together with all expenditures subsequent to the date of acquisition for exploration and development costs and any other expenses which the Minister may consider as directly related to and forming part of the cost of the mine, subject, in the case of any mine which was in active production prior to the first day of January, 1915, to a deduction therefrom of an amount to be determined by the Minister as representing the amount

of depletion or exhaustion, (if any) actually sustained prior to the first day of January, 1915 * * *

(4) An appeal from any decision of the Minister under clause (*n*) (*o*) (*p*) * * * of subsection 1 may be taken to the Lieutenant-Governor in Council, who, after hearing the parties interested, may either confirm or amend the decision of the Minister, and the decision of the Lieutenant-Governor in Council shall be final.

Notwithstanding the appeal, the company urged the Minister in conference and in correspondence to change his decision. On June 21, 1932, the company secretary wrote at length setting out a history of the dealings with the property from the year 1915. On July 27, 1932, the secretary again wrote the Minister referring to the sale of shares made to Stobie, Furlong & Company and urged that the net acquisition costs were $2,378,129.09, and that the company had nothing whatever to do with the amount that the property had cost Sloan and his associates. On July 27, 1932, the Minister wrote the secretary that he had thoroughly investigated the matter. On July 28, the Minister again wrote the secretary stating that 1,600,000 shares were issued to members of the syndicate and that the shares only represented declarations of interest and that the syndicate members had merely changed into shares their interests in an agreement to purchase the property for $100,000. On August 9, 1932, the company served a new notice of appeal to the Lieutenant-Governor in Council substituting a figure of $2,378,120.09 for the sum of $2,500,000 set out in the notice of appeal of January 22, 1932. Early in October, 1932, the secretary and Victor Spencer interviewed the Minister at Victoria and submitted to the Minister that the shares were issued as consideration not only for the eight claims set out in the option but also for fourteen additional claims, and that the value of the property at the time it was transferred to the company had increased to the value of $2,378,129.09 by reason of the development work and money spent on it.

On January 10, February 9 and May 16, 1933, the appeal to the Lieutenant-Governor in Council was heard. While the appeal was pending there were some conferences and some correspondence between the Attorney-General and the solicitor of the company concerning the possibility of a submission to the courts of the matters at issue under the provisions of section 3 of the *Constitutional Questions De-*

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termination Act, chapter 46, R.S.B.C. 1924. Nothing definite, however, resulted from these negotiations.

The company continued its interviews and correspondence with the Minister in the month of June, 1933.

On July 28, 1933, an order in council was passed whereby the appeal of the company was allowed in part and " the total cost of the mine as determined by the Minister at $100,000 " was increased to the sum of $200,000.

Months afterwards, namely, on November 13, 1933, the company applied to Mr. Justice D. A. McDonald of the Supreme Court of British Columbia and secured a peremptory writ of mandamus directed to the Minister of Finance commanding him forthwith to ascertain and take into consideration the acquisition costs to the company of the properties acquired by it under the agreement of March 30, 1928, as provided by the *Income Tax Act,* section 6, chapter 53, statutes of British Columbia, 1932. The Minister was cross-examined on an affidavit made by him and filed on the mandamus motion. In the course of his cross-examination, the Minister testified that he took into consideration the section of the Act which stated that he must consider acquisition costs only, that no cash consideration had been given for the shares, that there was simply the transfer of the interests of a syndicate into 1,600,000 shares and that to justify his conclusions he had had interviews with three representatives of the company and all his departmental chiefs. The Minister further testified that he always listened and gave every possible consideration to the requests and arguments of the company. On November 14, 1933, the Minister made answer to the writ, and in his answer stated that he had in accordance with the instructions and command in the writ ascertained from the evidence before him that, although the consideration expressed in the agreement for the transfer to the Company was $1,600,000, the agreement stated that the consideration was to be paid and satisfied by the allotment of 1,600,000 fully paid ordinary shares of the capital stock of the Company of $1 each; that he had ascertained that the Company on the 30th day of March, 1928, the date of the agreement, had no assets whatever and its shares were therefore of no actual value before the acquisition of the rights of Sloan in the option and in the properties and had no market value prior to such acquisition and that, therefore, there were no

acquisition costs to the Company, in that transaction, in money or money's worth. He further stated that, on the appeal taken from his decision as Minister, it was decided by the Lieutenant-Governor in Council on July 28, 1933, that his decision fixing the acquisition costs at $100,000 should be amended by increasing the amount to $200,000 and that in compliance with the writ, he determined the acquisition costs at the said sum of $200,000. He further stated that if, in deference to what he believed to be the reasons of Mr. Justice D. A. McDonald for granting the writ, the basis for determining the acquisition costs were not a matter for his personal judgment, and that if he were legally bound to rule that the acquisition costs consisted of the value which the shares acquired after the Company had received title to the properties, he would find that the acquisition costs were $1,600,000.

In *The King* v. *The Board of Education* (1), it was held by the Court of Appeal that a local education authority had no power under the *Education Act,* 1902, to differentiate, in the matter of teachers equally qualified and teaching the same subjects, between the salaries paid in provided and non-provided schools as such. The Board of Education had decided that there had been no failure by the local education authority to maintain, and keep efficient, a school. The Court of Appeal held that the decision of the Board must be quashed on the ground that it did not answer the question submitted, and that a mandamus must be isssued directing the Board to determine the question according to law. The decision of the Court or Appeal affirming the decision of the Divisional Court that mandamus should issue, was affirmed in the House of Lords, sub. nom. *Board of Education and Rice* (2). The following statement is from the judgment of Lord Loreburn, Lord Chancellor, page 182:

> Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon departments or officers of State the duty of deciding or determining questions of various kinds. In the present instance, as in many others, what comes for determination is sometimes a matter to be settled by discretion, involving no law. It will, I suppose, usually be of an administrative kind; but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing

(1) [1910] 2 K.B. 165.

(2) [1911] A.C. 179.

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either they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who who decides anything * * * The board is in the nature of the arbitral tribunal, and a Court of law has no jurisdiction to hear appeals from the determination either upon law or upon fact. But if the Court is satisfied either that the Board have not acted judicially in the way I have described, or have not determined the question which they are required by the Act to determine, then there is a remedy by mandamus and certiorari.

In determining the acquisition costs in the case at bar, the Minister was bound to give the company full opportunity of presenting their arguments and to listen to them with a proper feeling of responsibility and conscientiously to apply his mind to the determination of the acquisition costs as required by the statute; but he was entitled to supplement the material before him vicariously through the officials of his department. *Wilson* v. *Esquimault and Nanaimo Railway Company* (1). There are of course, many cases to the effect that mandamus will not lie if, as in *The King* v. *Port of London Authority* (2), there is as convenient, beneficial and effectual a remedy by way of appeal; but, as Lord Wright points out in his opinion in the *Mayor, Alderman and Councillors of Stepney and John Walker and Sons Limited* (3), the Court will weigh the character and competence of the alternative remedy, to ascertain if it is sufficient and convenient in the true legal sense of the words.

Now it was argued by the appellant (*a*) that there was not any right of appeal from the decision of the Minister on the statute before us and that the alleged appeal to the Lieutenant-Governor in Council was therefore a nullity, and (*b*) that, if there was an appeal, the remedy of appeal was not a sufficient remedy since by the scheme of the Act the acquisition costs had to be first determined by the Minister, that this was a condition precedent to a valid appeal, that the Minister had not applied his mind or exercised his discretion on the proper questions and that he had not, therefore, determined the acquisition costs as required by the Act.

These points may be considered in the above order.

(*a*) Subsection 4 of section 44 of the 1928 Act expressly provided in the widest terms for an appeal from any decision of the Minister under clause (*p*) of subsection 1,

(1) [1922] 1 A.C. 202. (2) [1919] 1 K.B. 176.
(3) [1934] A.C. 365, at 400.

and subsection 4 of section 6 of the 1932 Act, if that is relevant, expressly provided in the widest terms for an appeal from any decision of the Minister under clause (*o*) of subsection 1. *Merrill Ring, Wilson Ltd.*, v. *Workman's Compensation Board* (1).

(*b*) It was argued by the appellant that there had been no pretence on the part of the Minister to determine the acquisition costs and that the Minister had deliberately refused to do so. The record, however, does not support these contentions. Some of the statements of the Minister on his cross-examination on the affidavit filed by him and on the return to the writ are not easy to reconcile, but it is clear that he fairly listened to the representatives of the company, examined the records and correspondence, consulted his principal departmental officers and bona fide came to the conclusion that acquisition costs of $1,600,000 were not established by the issue of 1,600,000 shares of a par value of $1 each any more than acquisition costs of $5,000,000 or $50,000 would have been established by the issue of 5,000,000 or 50,000 shares, respectively, of a par value of $1 each. In all cases, the shares would have reflected the value of the rights and interests assigned by Sloan to the company.

The case book shows that many claims were transferred to the company after the assignment from Sloan and before the sale to Stobie, Furlong & Company, which was an isolated sale at $1.50 per share. Clearly, the Minister was not bound to accept that figure. The record, as a whole, shows that the points in issue were constantly impressed upon the Minister by the company in conferences and correspondence and it is difficult to think that he did not apply his mind to the consideration required by the statute, particularly when, in point of fact, the representatives of the company were very properly tireless in urging these considerations upon him, and the Minister was always patient in listening to them. An examination of one letter alone, namely the letter from A. E. Bull to the Minister dated June 21, will disclose the most complete exposition of the points at issue. The following is a short quotation from that letter:

> While I have given you a history of the property before the incorporation of the company, the facts and figures therein mentioned do not

(1) (1933) 102 L.J. P.C. 185 at 189.

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affect the question being dealt with, which is under sec. 44, ss. 3, clause (*a*) of the *Taxation Act* the "acquisition cost" of the property to the company (the present tax bearer), prior to the 1st of April, 1928, and this acquisition cost is clearly the value of the shares at the time issued for the property, which was $2,400,000 and, as you know, the share capital of the company is a liability of the company and has to be returned to the shareholders and not encroached upon for dividends or profits, and is a real consideration and has to remain intact until the ultimate winding up of the company. The cost to some of the vendors who sold to the company four years before incorporation has nothing whatever to do with the acquistion cost to the company in March, 1928.

The Minister quite properly found that the shares reflected the value of the rights and interests transferred by Sloan. He then proceeded to determine the value of those rights and interests and, after consultations with departmental officers, he fixed the value at $100,000 and determined that the acquisition costs were that sum.

But there was an appeal by the statute to the Lieutenant-Governor in Council. This appeal was actually taken by the Company and the decision of the Minister was varied to $200,000, and there is no doubt whatever that the Lieutenant-Governor in Council acted judicially. *Wilson* v. *Esquimault & Nanaimo Railway Company* (1). The statute provided that this appeal should be final. The effect of the mandamus order was to direct the Minister, several months after he became *functus officio,* to act in disregard of the appeal from his decision, which appeal, I repeat, the statute declared to be final.

The appeal, therefore, should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *J. A. Clark.*

Solicitors for the respondent: *Lucas & Lucas.*

(1) [1922] 1 A.C. 202.