MACMILLAN, BLOEDEL AND POWELL RIVER LIMITED
MACMILLAN, BLOEDEL AND POWELL RIVER INDUSTRIES LIMITED
and
MACMILLAN, BLOEDEL AND POWELL RIVER INDUSTRIES (ALBERNI) LIMITED

v.

ASSESSMENT DISTRICTS OF ALBERNI, COWICHAN, COMOX, GULF ISLANDS, LILLOOET, NANAIMO, VICTORIA, PRINCE RUPERT, and VANCOUVER

Supreme Court of British Columbia (No. X706/61)

Before: MR. JUSTICE J.O. WILSON

Vancouver, September 15, 21 and 25 and October 18, 1961

Lloyd G. McKenzie, Q.C. and Paul V. Gadban for the Provincial Assessors of the respective jurisdictions
C.W. Brazier, Q.C. and D.S.D. Hossie for the appellant companies

Case Stated by Assessment Appeal Board

1. The lands forming the subject of this appeal are Crown-granted lands owned by the appellants, all of which have been classified under the *Taxation Act*, chapter 379, R.S.B.C. 1960, as tree-farm land pursuant to section 38 of the said Act. The said lands are situate principally on Vancouver Island, but numerous parcels are located on the coastal mainland as well as on the Queen Charlotte Islands. These tree-farms are designated as Tree-farms Nos. 3, 4, 13, 14, 19, and 21.

With the exception of Tree-farm No. 21, the appellants complained against the method of determining the assessed value of all the tree-farm lands, and in particular the present value placed on future timber cuts from Tree-farms Nos. 3 and 19.

2. The assessments of these lands were placed on the respective rolls by the Provincial Assessors pursuant to the *Taxation Act* aforesaid, but were derived from values calculated by the timberland appraiser in the Department of Finance of the Province of British Columbia in accordance with methods he considered proper.

3. The timberland appraiser calculated the average stumpage values in each tree-farm according to the appraisal zone or zones in which that tree-farm was situate. In areas other than the Esquimalt and Nanaimo Railway Company Land Belt, the appraiser used the upset stumpage prices for sale of Crown timber determined by the Forest Service.

4. The stump age value used by the timberland appraiser with regard to those areas of the tree-farms concerned lying within the Esquimalt and Nanaimo Railway Company Land Belt was the price at which the Esquimalt and Nanaimo Railway Company sold timber during 1960, which, in the case of Douglas fir, was $20 per thousand f.b.m., which included the 25-per-cent tax payable under the *Esquimalt and Nanaimo Railway Land Belt Tax Act*, chapter 133, R.S.B.C. 1960.

5. The Board found that the tax provided to be paid by the *Esquimalt and Nanaimo Railway Land Belt Tax Act* aforesaid was part of the purchase price, and therefore part of the value of the timber sold by the Esquimalt and Nanaimo Railway Company. The Board also found that the 10-per-cent discount allowed by the said Act for payment of such tax within three months after the date of the assessment thereof could not, on the evidence, be taken into consideration so as to reduce the value of the Esquimalt and Nanaimo Railway Company timber.

6. With respect to Tree-farm No. 3, the timberland appraiser used only the stump age value based upon the prices for which the Esquimalt and Nanaimo Railway Company sold its timber, and did not include the upset stumpage prices at which Crown timber was sold in the Esquimalt and Nanaimo Railway Company Land Belt. The majority of such Crown sales were in the vicinity of this tree-farm.

7. With regard to Tree-farm No. 4, the timberland appraiser considered the upset stumpage prices for which Crown timber was sold in the appraisal zones in which this tree-farm lies, but was not aware of and did not include in his calculations the price fixed by the appellant for five stumpage contracts entered into by the appellant with local loggers in respect of part of the tree-farm lying within the Gulf Islands, the evidence as to which appears on page 273 of the transcript, starting at line 19.

8. By its decision delivered June 15, 1961, the Board found that in arriving at the relevant stumpage value to be applied to the assessment of all the tree-farms concerned, all sales including upset prices, as well as other sales, should be included to arrive at the weighted arithmetic mean average value of timber within the areas under consideration.

9. In respect of Tree-farms Nos. 3, 4, and 19, the timberland appraiser used as the basis of assessment the appellant's cutting plans, which had been submitted with the working plans for each of these tree-farms at the time of certification thereof. As stated in his evidence (e.g., at page 134 of the transcript), the timberland appraiser regarded these cutting plans as the best evidence of the appellants' own intention with regard to these three tree-farms. The timberland appraiser then applied the stumpage values already determined for these tree-farms to the cutting plans.

His method of deriving a present value of the future annual harvests as laid out in the cutting plans was as follows:-

> (i) Each cutting plan was divided into perpetual and, where necessary, terminating annuities at a capitalization rate of 12 per cent commencing at specified points in time, and in the case of the terminating annuities, ending at specified points in time. This procedure was outlined in graphical form for Tree-farm No. 19 in Exhibit 15 filed before the Board, and was explained by the timberland appraiser in his evidence before the Board (see pages 133 to 143, inclusive, of the transcript).
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> (ii) The accumulated values of such annuities were then discounted back to the date of assessment to provide in total the present value of each tree-farm.

10. In the case of Tree-farm No. 19, the appellants did not attain the proposed cut as set out in the cutting plan during the years 1957 to 1960, inclusive. The timber land appraiser, therefore, followed the method outlined by him under cross-examination before the Board (see pages 210 to 213, inclusive, of the transcript) to deal with this situation.

11. Since the cutting plan originally submitted for Tree-farm No. 19 included lands not yet acquired, but which the appellants hoped to acquire from the Esquimalt and Nanaimo Railway Company, the timberland appraiser deducted the volume of timber anticipated to be cut from these lands. However, the appellant complained that the timberland appraiser did not remove from the cutting plan the effect of the withdrawal of the acreage of these lands from which this

timber was to be cut, although the appraiser contended that it had been removed, but the Board found that he did.

The evidence in this regard is to be found in the transcript at pages 85 to 87, inclusive, pages 135 and 136, pages 218 and 219, pages 223 to 228, inclusive, pages 253 to 255, inclusive, pages 269 and 270, pages 275 and 276, pages 341 to 344, inclusive, pages 347 and 348, pages 351 and 352 and 354, and pages 358 and 359.

12. The appellants further contended that although the timberland appraiser eliminated from the cutting plan for Tree-farm No. 19 the volume of timber to be cut from Tree-farm No. 3, he did not take into consideration the specific periods of time in which this timber would have the most effect on the proposed future cuts.

13. The appellants contended that the timberland appraiser did not give consideration to the fact that a proportion of the proposed harvest of timber in Phase 2 of the cutting plan for Tree-farm No. 19 is to be derived from "thinnings," and the evidence in respect of "thinning" appears in the transcript at pages 345 and 346, 348 and 349 (Mr. Ainscough for the appellants) and pages 350, 354 and 355, and 361 to 363, inclusive (Mr. Malcolm for the respondents).

14. The appellants submitted that the Hanzlick formula should have been applied in the assessment of Tree-farms Nos. 3, 4, and 19 rather than the cutting plans, and the evidence in regard to this formula appears in the transcript at pages 83,86 to 90, inclusive, 256 and 257, 258 to 266, inclusive (Mr. Ainscough for the appellants), and pages 134 and 135, 142 and 143, 191 to 194, inclusive, 197 to 203, inclusive, 205 to 210, inclusive, 216 and 217 (Mr. Malcolm for the respondents).

15. In respect of Tree-farms Nos. 13, 14, and 21, the cutting plans used by the timberland appraiser in compiling his assessments were based on the sustained-yield capacity of those tree-farms. In these instances the stumpage values already determined were applied to the sustained-yield capacity, and after deduction of forestry costs the result was capitalized at 12 per cent.

16. In its decision the Board held that the amendment to section 39 of the *Taxation Act*, enacted by section 7 of the *Taxation Act Amendment Act, 1961*, chapter 61, was in force on December 31, 1960, and applied to the assessments under appeal, and that in determining the present value of future annual or periodical harvests, consideration need not be given to the annual allowable cut based upon the estimated sustained annual growth of the forest trees. The Board also found that the appraiser estimated the present value of the future cut in a manner in accordance with the Statute.

Section 39 of the *Taxation Act*, chapter 376, R.S.B.C. 1960, reads as follows:

> Notwithstanding the provisions of section 31, the assessed value of tree-farm land, exclusive of any improvements thereon, shall be ascertained only by giving consideration to present use, revenue or rental value of the land from the sustained annual growth and annual or periodic cut of the forest trees.

Section 7 of the *Taxation Act Amendment Act, 1961*, chapter 61, reads:

> Notwithstanding the provisions of section 31, the assessed value of tree-farm lands, exclusive of any improvements thereon, shall be ascertained only by giving consideration to the *present use of the land and to the present value of the anticipated revenue from present and future annual or periodic harvests of the forest trees*.

Section 8 of this amending Act reads:

Sections 2, 3, and 7 shall be deemed to have come into force on the thirty-first day of December, 1960, and are retroactive to the extent necessary to give full force and effect to the provisions thereof from that date.

Wherefore the following questions are humbly submitted for the opinion of this Honourable Court:

"1. Was the Board correct in finding that section 39 of the *Taxation Act*, chapter 376, R.S.B.C. 1960, as amended by the *Taxation Act Amendment Act, 1961*, chapter 61, was in effect on December 31, 1960?

"2. Was the Board correct in finding that the provisions of section 39 of the said *Taxation Act* as amended apply to the present assessments?

"3. If the answers to Questions 1 and 2 are "no," then what is the true interpretation of section 39 as un-amended?

"4. Was the Board correct in finding that the stumpage values to be used in the assessment of these lands is to be the weighted arithmetic mean average value of timber within the areas under consideration of all sales including upset prices as well as other sales?

"5. Would the inclusion of the bid prices of Crown timber sales in this arithmetic mean be contrary to law?

"6. Should the private sales from these lands be the governing factor or taken into consideration in determining the stumpage values to be applied for assessment purposes?

"7. Was the Board correct in law in finding that the 10-per-cent discount on the tax prescribed by the *Esquimalt and Nanaimo Railway Belt Land Tax Act*, chapter 133, R.S.B.C. 1960, should not be taken into consideration in arriving at the value of Esquimalt and Nanaimo Railway Company timber for assessment purposes?

"8. Was the appraiser's method of excluding the Esquimalt and Nanaimo Railway Company holdings not yet acquired from Phase 2 of the cutting plan correct in law?

"9. Was the Board correct in finding that the method used by the appraiser could be described as 'an estimate of the present value of the anticipated revenue "from the future annual or periodic harvests of the forest trees"'?

"10. If Question 9 is answered in the affirmative, was this method wrong in law?

"11. Does the method of assessment used by the appraiser amount to double taxation and, if so, is it contrary to law?

"12. Is the valuation of that part of the future cuts represented by thinnings on the basis of the weighted arithmetic mean average current value as prescribed by the Board contrary to law?

"13. Should the Board have found that the Hanzlick formula was the only correct method to be used in assessing Tree-farms Nos. 3, 4, and 19?

"14. Was the Board correct in finding that 'in determining the present value of future annual or periodic harvests consideration need not be given to the annual allowable cut based upon the estimated sustained annual growth of the forest trees'?

"15. Does the method used by the appraiser in assessing these lands involve the application by the appraiser of the 'value to the owner' concept?

"16. If Question 15 is answered in the affirmative, is this concept wrong in law?"

Reasons for Judgment (1) September 15, 1962.

I have before me a case stated to this Court by the Assessment Appeal Board pursuant to section 51 of the *Assessment Equalization Act*, chapter 15, R.S.B.C, 1960. The first two questions are these:

"1. Was the Board correct in finding that section 39 of the *Taxation Act*, chapter 376, R.S.B.C. 1960, as amended by the *Taxation Act Amendment Act, 1961*, chapter 61, was in effect on December 31, 1960?

"2. Was the Board correct in finding that the provisions of section 39 of the said *Taxation Act* as amended apply to the present assessments?"

The first question requires the consideration of sections 7 and 8 of the *Taxation Act Amendment Act, 1961*, chapter 61, which read thus:-

Section 7: Notwithstanding the provisions of section 31, the assessed value of tree-farm lands, exclusive of any improvements thereon, shall be ascertained only by giving consideration to the present use of the land and to the present value of the anticipated revenue from present and future annual or periodic harvests of the forest trees.

Section 8: Sections 2, 3, and 7 shall be deemed to have come into force on the thirty-first day of December, 1960, and are retroactive to the extent necessary to give full force and effect to the provisions thereof from that date.

The decision of the Assessment Appeal Board on the first question was that section 7 was, by virtue of section 8, in effect on December 31, 1960. Following this finding it decided the questions of valuation which were before it in accordance with section 7 rather than as it would have decided the matter had the Board not held that section 7 governed.

Since the assessments were required to be made and notified to the taxpayer on or before December 31, 1960, then, if section 7 did not take effect until after that date, the Board has proceeded on a wrong basis in holding section 7 to be applicable. The contention of the taxpayer is that section 7 did not, under section 8, come into effect until January 1, 1961.

Admittedly it was not in effect before December 31, 1960, and any assessments made before that date on the basis of section 7 were wrongly made and could not be sustained by the Board on the basis of their conformity with section 7.

Just one day is involved here, December 31, 1960, a Saturday. This is the only day on which these assessments could legally have been made and notified to the taxpayers concerned.

The first question is: "Was section 7 in effect on December 31, 1960?" If it was not, then the Board proceeded on a wrong basis.

But if section 7 was in effect on December 31, 1960, then the second question arises: "Were the assessments made and notified on that one day, or, more properly perhaps, has it been shown that they were not?"

I repeat section 8:-

> Sections 2, 3, and 7 shall be deemed to have come into force on the thirty-first day of December, 1960, and are retroactive to the extent necessary to give full force and effect to the provisions thereof from that date.

This states unequivocally that section 7 came into effect on December 31, 1960. Section 7 of the *Interpretation Act*, chapter 199, R.S.B.C. 1960, says this:

> 7. Where an Act or any Order in Council, order, warrant, scheme, letters patent, rule, regulation, or by-law made, granted, or issued under a power conferred by any Act is expressed to come into operation on a particular day, the same shall be construed as coming into operation immediately on the expiration of the previous day.

This makes it perfectly clear that if consideration of that part of section 8 of the *Taxation Act Amendment Act, 1961*. which follows the figures 1960 in the section is disregarded, section 7 was in effect on December 31, 1960. Do the words which follow derogate from this prima facie effect?

Section 43 of the *Interpretation Act* reads thus:

> 43. Where in an Act, Order in Council, or any regulation made pursuant to any Act any period of time dating from a given day, act, or event is prescribed or allowed for any purpose, the time shall, unless the contrary intention appears, be reckoned exclusive of such day or of the day of such act or event.

In the first place it is argued that section 43 applying to "a period of time dating from a given day, act, or event" is not applicable to a situation such as I have before me. I think this is probably correct. No period of time is here allowed for a purpose. But, apart from legislation, if section 8 did not say that section 7 came into force on December 31, 1960, and only said that it was retroactive from that date, I would unhesitatingly hold that it did not come into effect until January 1, 1961. "From" can be inclusive or exclusive of the day named (see *Pugh* v. *Duke of Leeds* 2 Cowper 715, 98 E.R. 1323, and *Lister* v. *Garland* 15 Ves. Jr. 248, 33 E.R. 748). If there is doubt about the scope of retroactive legislation, an interpretation limiting the scope is to be preferred. See remark of Duff, J., in *Kent* v. *The King* (1924) S.C.R. 388 at page 397. Further, a reasonable interpretation would exclude December 31, 1960, as it seems unreasonable to suppose that the Legislature would want to bring a provision into effect for only on last day in a calendar year. Nevertheless, I think that this is just what the Legislature has done. I have an apparent contradiction between a phrase which says that a provision shall be effective on a certain date and a following phrase which says it shall be effective from a certain date. But I think this apparent paradox is illusory. The combined effect of the two phrases is to say that section 7 shall be in effect on December 31, 1960, and thereafter. The first phrase is effective to make the Statute apply on December 31, 1960. The second phrase is effective to make it apply thereafter, and, while this is a clumsy way of expressing an intent, I think I would, despite my knowledge that, retroactive legislation is to be construed strictly, be wrong if I essayed to interpret section 8 differently.

Therefore, section 7 was in effect on December 31, 1960, but on no other day in 1960. Were the assessments made and notified on that one day, the deadline for those acts? They could not legally be made or notified either before or after that day. No suggestion is made that the acts I have spoken of were done after that day. Were they done before that day? If they were, the Board was wrong in applying section 7-law which did not exist before that day.

Question 2, already cited, is certainly broad enough to include a consideration of this matter.

The assessment rolls, which must (vide sections 74 and 75 of the *Taxation Act*) be dated and show the dates of notification, were produced by the respondent on appeal. I accept Mr. Brazier's uncontradicted statement that they were physically present at the place of hearing. At page 64 of the transcript this appears:

MR. McKENZIE: I have a large number of Assessors here, Mr. Chairman, and Mr. Brazier is willing to waive that formality. If they might be excused for this case.

CHAIRMAN: As far as MacMillan and Bloedel is concerned.

This can be interpreted in two ways:

(1) That the putting of the rolls in evidence was waived, so that the rolls were not before the Board.

(2) That only the formality of proving by sworn evidence that these were the assessment rolls was waived and they were before the Board.

I do not know which of these is correct, and only the Board can tell me. Therefore, I think the stated case is incomplete, and I ask the Board to supplement its statement of facts by telling me whether the assessment rolls were before them (*vide* section 51 of the *Assessment Equalization Act*, chapter 58, R.S.B.C. 1960, which allows me to cause a stated case to be sent back for amendment).

I can only give an answer to Question 2 when I hear from the Board and, if the rolls were before the Board, have seen them.

No other evidence adduced before the Board relating to the dates of assessment and notification has been put before me.

Court Hearing Extract September 20, 1961.

THE COURT: The first thing I want to deal with is Mr. Brazier's attempt to reopen the question I dealt with in the written reasons given last week, that is as it were the impossibility as argued by him that these assessment rolls could have been completed on December 31st, 1960. I did rule against that proposition before but I am prepared to reconsider that question, and the reason now advanced by Mr. Brazier in his statement, which I accept, and I am sure his learned friend accepts it, that there was an Order in Council in effect on that date which required that Government offices be closed on Saturdays. In spite of the fact it may seem very unlikely that these rolls were completed on Saturday, the 31st of December, when most of our citizens are engaged in more convivial tasks than completing assessment rolls, I cannot say that entitles me to decide in the face of the affidavits or statutory declarations, whichever they are, made by these Assessors that the work was not done on that date but on another date. The mere fact that it may seem improbable is not a reason for rejecting sworn affidavits, and there is no reason why an Assessor cannot complete an assessment roll at home, and he can complete it by the mere act of signing it, so I am against Mr. Brazier on that point.

Now I still think, despite what Mr. McKenzie said, that if an assessment roll were completed before December 31st, 1960, and it has been shown that one of these rolls was completed on December 30th, 1960, then the assessment must be supported on the basis of the Act as it was then and not on the basis of the retroactive legislation which was dated back to December 31st, 1960, and not effective before then.

If an assessment roll was completed after December 31st, 1960, it appears to offend against section 75 of the *Taxation Act* and the assessment may be illegal, but this question is not before me in the stated case.

The matter may be cured by section 80, but offhand I do not think so. The same reasoning applies to the assessment notices and the proposition that if the assessment notices were sent out not before but after the completement of the assessment rolls, then section 74 of the *Taxation Act* seems not to have been complied with.

Again I am not at all sure that section 80 will cure that, but the question is not before me on the stated case.

Now I deal with the one particular case Mr. Brazier drew to my attention in which there is no evidence at all of the date of completion of the original assessment roll, but in which the Statute permitted an amended assessment roll to be prepared after December 31st, 1960, and in which it is shown that since the notices were mailed out, I think on January 13th, the assessment roll, if the assessment complied with the Act, would have been completed after that date. The amended assessment roll was the only one before the Assessment Appeal Board and properly so, and the original assessment roll was not before the Assessment Appeal Board, but I cannot see that there is anything there that I can resolve in Mr. Brazier's favour.

Now are there any other things that need to be cleared up?

MR. BRAZIER: I don't think so, my lord.

THE COURT: We are in this horrible position of being partially under one Act and partially under another.

MR. BRAZIER: I wonder if the Registrar has all the exhibits?

THE COURT: I think so. Do you want the reporter any longer?

MR. BRAZIER: I think not, my lord.

Reasons for Judgment (2) September 25, 1961.

I am dealing with Question No. 4 in the stated case, which I cite:

> "4. Was the Board correct in finding that the stump age values to be used in the assessment of these lands is to be the weighted arithmetic mean average value of timber within the areas under consideration of all sales including upset prices as well as other sales? "

An argument has arisen as to the powers and duties of the Assessment Appeal Board under sections 46 and 47 of the *Assessment Equalization Act*, chapter 18, R.S.B.C. 1960, or under any other applicable legislation.

In the first place I reject Mr. McKenzie's argument that the Board can do anything that a Court of Revision could do. The Board is a statutory creation not to be credited with any powers which are not expressly, or by the most compelling implication, entrusted to it. The mere fact that it may (section 45 (9)) hear evidence is far from sufficient to attribute to it a general power of review. Its powers of review are contained in sections 46 and 47, which I now cite:

> 46. (1) The amount of the assessment of real property appealed against may be varied by the Board where, in the opinion of the Board, either
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> (a) the value at which an individual parcel under consideration is assessed does not bear a fair and just relation to the value at which other land and improvements are assessed in the municipal corporation or rural area in which it is situate; or
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> (b) the assessed values of such land and improvements are in excess of the assessed value as properly determined under section 37.
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> (2) Where upon appeal the Board finds the assessed values of land and improvements in a municipal corporation or rural area to be in excess of assessed value as determined

> under section 37, it may order a reassessment by the Commissioner in the municipal corporation or rural area, or a portion thereof, and the reassessment, when approved by the Board, shall, subject to section 51, be binding on the municipal corporation or rural area.
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> 47. Upon an appeal, on any ground with respect to a parcel, from the decision of the Court of Revision, the Board may reopen the whole question of the assessment on that parcel, so that omissions from or errors in the assessment roll may be corrected, and the accurate amount for which the assessment on that parcel should be made and the person who should be assessed therefor may be placed upon the roll by the Board.

Therefore, it may, under section 46 (1) (a), reject a discriminatory assessment. Under this heading, if an appellant considers an assessment discriminatory and appeals against it and the result of the Board's acceptance of his argument is to increase the assessment, it may well be that the appellant is saddled with a higher valuation than before.

Under section 46 (1) (b), the Board can, in effect, reduce an assessment that is too high because not properly made under the terms of section 37. It clearly cannot reject an assessment that is too low by reason of non-observance of the provisions of section 37. Therefore, dealing only with section 46 (1) (b), if the Board makes a finding which has the effect of increasing the assessment, it is not complying with section 46 (1) (b).

It is said that the effect of the ruling made by the Board has been to increase the assessment. If this is to be justified, it must be justified by section 46 (1) (a). I think it can be. If a taxpayer bases his argument on discrimination and the result of the acceptance of his argument is to increase the assessment, I do not see what he has to complain of.

But here the tangle of difficulties is further complicated by the fact that the Board, in its finding, did not accept the appellant's argument as to what method of assessment would be non-discriminatory, but applied a new method, not adopted by the Assessor and not asked for by the appellant.

Can the Board do this? I certainly think it should have this power, but that is beside the question. Is the Board restricted on an appeal merely to saying that the method of assessment (speaking always of discrimination) is right or wrong, or may it go further, say the method is wrong and discriminatory and substitute a new method not asked for by the appellant, a method which has the effect of increasing the assessment.

Certainly the Board, when it finds a method discriminatory and wrong, must tell the Assessor what is right. Otherwise, he cannot correct his roll. Is it, in its choice of right and wrong, restricted to the approval of the assessment or the acceptance of the appellants' argument, holus bolus?

I think not. I think that if by the evidence an alternative method of assessment is revealed which is not discriminatory and is appropriate to the circumstances, the Board is entitled to adopt it, and the appellant must accept the consequences of his protest against and demonstration of discrimination.

Crown counsel maintains that the subject I have discussed does not arise under Question No. 4. He says that the matters I have previously discussed here go to jurisdiction and that the question of jurisdiction did not arise before the Board. Counsel for the taxpayer agrees that the question is jurisdictional.

Question No. 4 requires a "yes" or "no" answer. How can I say "yes" to the question if I think the Board was wrong in terms of the applicable legislation? How can I say "no" if I think the Board was right? I think the question brings into issue all considerations, jurisdictional or other, and in

saying this I do not concede that the question of whether or not the Board properly applied section 46 is jurisdictional.

I reject Crown counsel's argument that section 47 has any relevance to this situation. Section 47 is, I think, somewhat equivalent to the slip rule in the Supreme Court Rules and is not meant to enlarge the specific powers of review given to the Board by section 46, save by providing for the correction of omissions and what might be called mechanical errors. In this connection I refer to *Cavin* v. *Ottawa* (1932) 3 D.L.R. 42.

In the result, Question No. 4 is not yet answered, but I hope the approach to it is less dim. It is certainly not yet fully illuminated.

In regard to the possibility that the findings of the Board, if based on discrimination, may result in an increase in the assessment, I am comforted by the statement that this, in fact, never happens, that the Board directs that, for the present year, the assessment shall stand.

Reasons for Judgment (3) October 18, 1961.

This is a case stated to this Court by the Assessment Appeal Board, a statutory body, given jurisdiction to decide appeals from assessments of lands for taxation purposes made by Municipal or Provincial Assessors. The present case relates to the Board's decisions in respect of appeals from the valuation by Provincial Assessors for taxation purposes of tree-farm lands. The questions asked by the Board are particular, but before dealing with them one by one, considerable general discussion is necessary.

The problem is the valuation for taxation purposes of a tree-farm, a statutory invention or creation. A tree-farm is assessed on a different basis than are other timberlands. An owner of timberlands must comply with certain Governmental requirements before his timberlands are admitted into the category of tree-farms. The inducement is the fact that the rate of taxation on the farms is less than that on other timberlands.

Before going into the special basis of taxation of tree-farms, it is necessary to deal with section 46 of the *Assessment Equalization Act*, which governs the Board in all appeals from Assessors. I cite this section as amended in 1961 before this appeal came on for hearing:

> 46. (1) The amount of the assessment of real property appealed against may be varied by the Board where, in the opinion of the Board, either
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> (a) the value at which an individual parcel under consideration is assessed does not bear a fair and just relation to the value at which other land and improvements are assessed in the municipal corporation or rural area in which it is situate; or
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> (b) The assessed values of such land and improvements are in excess of the assessed value as properly determined under section 37.
>
> (2) Where upon appeal the Board finds the assessed values of land and improvements in a municipal corporation or rural area to be in excess of assessed value as determined under section 37, it may order a reassessment by the Commissioner in the municipal corporation or rural area, or a portion thereof, and the reassessment, when approved by the Board, shall, subject to section 51, be binding on the municipal corporation or rural area.

Subsection (1) (b) requires proper conformity in respect of assessment with section 37. Without pursuing the implications of this requirement, I can say, in agreement with counsel, that this eventually means valuation on the basis set out in section 39 of the *Taxation Act*, chapter 376,

R.S.B.C. 1960, or on the basis set out in the amended section 39 created by the Statutes of 1961.

> 1960:
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> 39. Notwithstanding the provisions of section 31, the assessed value of tree-farm land, exclusive of any improvements thereon, shall be ascertained only by giving consideration to present use, revenue or rental value of the land from the sustained annual growth and annual or periodic cut of the forest trees.
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> 1961:
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> 39. Notwithstanding the provisions of section 31, the assessed value of tree-farm land, exclusive of any improvements thereon, shall be ascertained only by giving consideration to the present use of the land and to the present value of the anticipated revenue from present and future annual or periodic harvests of the forest trees.

I cannot see that the amendment of 1961 changed the picture. "Rental value," eliminated in 1961, was never a practicable criterion. "Sustained yield," also eliminated in 1961, does not affect the Assessor's decision because "sustained yield" may always be relevant to the harvest value spoken of in section 39 as promulgated in 1961, and the elimination of these words would not, for instance, per se justify the rejection of the Hanzlick formula. Thus what I have said earlier as to the retroactive effect of the new section 39 does not affect my judgment, and I deal with all assessments before me on the same basis.

Section 46, subsection (1) (h), says in eventual effect that a valuation which offends against section 39 of the *Taxation Act* cannot be sustained.

Section 46, subsection (1) (a), says that a valuation which does not conform with valuations of similar lands cannot be sustained.

A contradiction could arise here. Assuming that valuations of similar lands did not conform to the formula set out in section 39 of the *Taxation Act*, could the Assessor then be required to value the lands of the appellant on the same wrongful basis? I do not have to decide this question because I do not find that assessments of similar lands were made on a wrong basis. But I still must decide

> (a) whether or not the appellant's tree-farms were valued on a wrong basis;
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> (b) if they were valued on a right basis, then, accepting that other tree-farms were also valued on a right but different basis, has there been discrimination, which means, of course, unjust discrimination, not a mere difference in method of assessment.

Thus I apply section 46, as it were, upside down, first deciding whether or not the assessments conform to section 39 of the *Taxation Act* (subsection (2) of section 46), and next, if they do, deciding whether they are discriminatory when compared with other proper assessments (subsection (1) of section 46).

In making the decisions involved, I must always keep in mind that I am not to decide questions of fact but only questions of law. See the judgments of the Court of Appeal in *Vancouver* v. *Richmond* (1959) 27 D.L.R. (2d) 548; Lett, C.J.S.C.B.C., in *Re Royalite Oil Co. Ltd.* (1957) 23 W.W.R. 328.

The first thing to decide is whether or not the assessments, as varied by Assessment Appeal Board, accord with section 39 of the *Taxation Act*.

The Assessors and the Board (except in one notable instance, which I shall discuss later) took what were thought to be the present-day values of timber and on that basis decided the value of the harvest in future years. The adoption of present timber values seems to me sound because I do not see how the Board could have found any other basis of evaluation on the evidence before it. In 50 years, timber may, by reason of the invention or discovery of substitutes, have little or no value; on the other hand, it may, if no such substitutes have been found, have, from scarcity, greatly gained in value. There was no evidence before the Board to support any sort of prophecy of future value; therefore, I think the use of present value was correct. But, in one instance, the Board departed from this formula. Thinnings have no present value. But the Assessor, on no evidence other than the opinion of Mr. Malcolm, the Crown appraiser, that they would have a future value, said that this one class of timber was to be assessed not on present value, but on the basis of an unsupported prediction. I do not think that the Board may, in the absence of satisfactory evidence, be allowed to blow hot and cold in this way, and I think its own formula of present value must be applied throughout, so that thinnings, which have no present value, should not be a factor in the assessment.

This brings me next to the consideration of another problem-whether or not the assessments should be based, as they were, on the cutting plans filed by the company or on the application of the Hanzlick formula.

The company, applying in 1956 for certification of its forest lands as a tree-farm, might, I think, be impelled to present to the Government as favourable a picture of production as possible: a picture which would show that a tree-farm management scheme of perpetual production would result in a high yield of timber. The incentive for the appellant to do this was the lower rate of taxation imposed on tree-farms as compared to that imposed on other forest lands. The appeal to the Government of a plan projecting a high yield is obvious: it must, if implemented, benefit the Government and the Province through payrolls, taxation, and its other general contribution to the economy of the Province.

Therefore, an applicant might well overstate its case: prophesy a perhaps unattainable volume of production in order to be certified.

On the other hand, a sagacious applicant, having in mind the incidence of tree-farm taxation, and having faith in the merits of its claims for certification, might minimize its estimated production in the hope that this would protect it in respect of tree-farm taxation.

If there was by the applicant an underestimate of the potential of the tree-farm, it seems clear that Provincial taxing authorities would not be bound by it. They would not only be entitled, but they would be required, to make a true assessment in terms of the Statute. The prophecies contained in the application for certification might well be considered with other evidence in making the assessment, but they could have no higher value than could other similar evidence.

So much for understatement. Overstatement must obviously fall into the same category. The Assessor cannot say to the appellant that he is hoist by his own petard. I am not in that realm of litigation where admissions are binding. The taxpayer may quite honestly undervalue or overvalue his property when applying for certification, but he is not to be bound in perpetuity by those valuations, if they are unfavourable to him, any more than the Government is bound by them if they help him. The Assessor must each year value the property on evidence, and it is clearly open to a taxpayer or an Assessor to argue that any estimate of production made by the taxpayer for the purpose of obtaining certification is a wrong basis for taxation.

The fact that the estimate derives from the taxpayer gives it no sanctity; it is the duty of the Assessor to find the correct basis of valuation on the evidence before him.

But he may prefer the taxpayer's estimates on the basis that the taxpayer has the most familiarity with the property and is best able to prophesy the yield from it. This is what the Assessors and the Board appear to have done.

As against this, the Assessor may prefer other evidence tending to show that the Hanzlick formula, one of general application to Pacific Coast forest lands, is a better basis for valuation. I would, if I were an Assessor, certainly first seek to find refuge in such a formula if I thought it capable of general application.

The decision made by the Assessor between the application of the Hanzlick formula and the acceptance of the taxpayer's own estimates of production as a basis for valuation is clearly a decision of fact, unless it can be shown that the basis of valuation adopted by the Assessor defies the Statute. I am not empowered to select the best system of evaluation, but only to say whether or not the system adopted by the Assessor, on the basis of the evidence before him, offended against the Statute.

I do not think that it is inconsistent with the Statute. I would, if the choice lay with me, prefer the Hanzlick formula because of its capabilities of general application. But where the evidence left the Assessor a legitimate choice, it is not for me to criticize his choice.

This approval, without exposition, of the method of valuation is, of course, insufficient. Furthermore, an exploration of the method of assessment is necessary to consideration of my second problem-uniformity or discrimination. I therefore proceed to explain the basis of valuation.

Tree-farm No. 19, the principal subject of this litigation, is largely situated in an area of Vancouver Island which also includes the timber holdings of the Esquimalt and Nanaimo Railway Company. In this area private ownership of timber, whether by the E. & N. or by such companies as the appellant, is predominant. Crown holdings are much less and, since they are largely the product of reversions of undesirable or cut-over lands through tax sales, generally of lesser value.

Timber sales in the area in 1959 by the E. & N. totalled 84 MM; timber sales by the Crown totalled 16 MM.

The Assessor took as his guide to assessment of the present value only timber sales by the E. & N. These sales, I must make clear, were not at auction prices. The E. & N. sets a price at which it will sell to anyone, and no later bidding up of prices by auction is permitted.

The Board, having had brought before it evidence of prices at other sales of timber in the area ("other" meaning not Crown or E. & N.) and also evidence of sales of Crown timber at upset (appraised) prices where there was no bidding and also at auction prices, where there was bidding which realized higher sums than the upset or appraiser prices, decided to accept, in respect of Tree-farm No. 19, not just the formula of the Assessor based only on E. & N. sales, but all sales, including upset prices as well as other sales.

The Board talks of sales as a guide to values. Another basis of valuation might be proper appraisal. When talking of E. & N. prices, the Board appears to reject E. & N. upset prices as appraisals but, in almost the same breath, to accept them as sales values, presumably because sales were made at the appraised prices. In respect of Crown lands it accepts the appraisals, based on a system of which it approves, as correct, thus approving the upset prices which are the product of the Crown appraisals. But, again in the same breath, it also accepts evidence of Crown auction prices as a basis of value. I suppose that the real basis throughout is sales prices, at upset and auction figures in respect of Crown timber, at upset prices only in respect of E. & N. timber. If this is so, the Board's apparent rejection of E. & N. appraisals (i.e., upset prices) becomes unrealistic, because the rejected upset price is the same thing as the accepted sales price. Thus the Board eventually accepts what it has first seemed to reject.

In other areas the Assessors have considered only Crown sales at upset prices, rejecting evidence of Crown sales at auction prices (see evidence of Malcolm, Crown valuator, and see judgment in Crown Zellerbach case).

But there is some confusion. If sales prices are the guide, it seems that precedent appraisals are irrelevant. If appraisals are the guide, then sales prices are irrelevant. The Board appears to have given its blessing to Crown upset sales prices because of its approval of the system of appraisal which creates those prices. At the same time, while explicitly rejecting the E. & N. appraisals as not proven to be sound, the Board, in its valuation, gives exactly the same weight to them, as sales prices, as it does to the Crown upset prices. Then, at the same time, having conferred its blessing on the Crown system of appraisal, which creates the upset price, it also takes into consideration the Crown auction realizations, which, in so far as they are sometimes greater, do not support the Crown upset price and the appraisal on which it is based.

So it seems that the Board has finally considered only sales, not appraisals, and that its attempt to distinguish between E. & N. and Crown appraisals is, with respect, meaningless, since it does not affect the end decision.

Therefore, the Board has accepted as the basis of valuation prices paid for all timber, whether the timber was sold at an upset price or by auction.

In other areas it has adopted sales at Crown upset prices, unrelated to auction realizations, as its basis of valuation.

The appellant here has managed to get itself into a predicament of appealing against its success before the Board on its own appeal to that Board in this way. It argued that private timber sales in the relevant area were also a guide to value, and that Crown upset prices (not auction prices) were also factors. It objected to the Assessor's acceptance of E. & N. sales prices as the only guide. The Board accepted this argument with this qualification-that Crown auction prices as well as Crown upset prices came into the picture, a procedure to which the taxpayer objects.

The Board's finding cannot, I think, be rejected on any other basis than that of discrimination offending against section 46 (1) (a).

The incidence of legislation is, in effect, often discriminatory. What is offensive is not mere discrimination, as, say, between the rights of a minor and an adult, but unjust discrimination. Difference, per se, does not constitute discrimination. Therefore, a scheme of assessment which may properly be applicable to Parcel A may be unworkable in respect of Parcel B, and the use, in respect of Parcel B, of another scheme will not necessarily involve unjust discrimination.

Applying that general rule to the situation here I say:

> (1) That the Assessor and the Board were right when they considered, in respect of timberlands in the E. & N. area, not just Crown sales but also E. & N. sales. This did not involve any discrimination in favour of persons who held timber in areas where E. & N. prices were irrelevant.
>
> (2) That if there was discrimination, it arose from the fact that, in the E. & N. area, the Board considered Crown auction prices as well as Crown upset prices, a thing which it did not consider in other areas.

The difficulty here arises from the fact that E. & N. upset prices are also invariably E. & N. sales prices, since no system of bidding exists. In respect of Crown timber, a system of bidding does exist, and auction sales prices are not, as in the case of the E. & N., necessarily upset prices.

The quest here is for uniformity (*vide* section 46 (1) (a). I think that if any Crown upset prices are generally accepted elsewhere (and they are, according to the evidence of Mr. Malcolm), then, if Crown auction realizations are also to be accepted in the area under consideration, the evidence should show a clear reason for this apparent discrimination. The evidence does not show this. Therefore, Crown upset prices should here, as elsewhere, be one of the factors of valuation and Crown auction realizations should not, not because such a consideration is necessarily wrong, but because it offends against the requisite of uniformity propounded in section 46 (1) (a).

If I properly apprehend the judgment of the Board, private sales realizations were also considered. They were not considered elsewhere. Their acceptance does not offend against section 39. Does it offend against the requirement for uniformity stipulated in section 46 (1) (a)? I think not. The decision here was one of fact, and there was evidence to support it.

In its application for certification, the taxpayer had predicted the cutting of certain mature timber in years precedent to 1960. It did not, in effect, cut this timber. I do not mean by this that it cut no mature timber. I refer only to the discrepancy between its prediction and the actual cut. The Assessor arbitrarily decided that this timber should be moved into the category of timber which would be cut within the five years following 1960. The sooner the timber is to be cut, the higher the incidence of taxation. I say that this assignment cannot be justified on the evidence. All mature timber is to be cut by 1995, according to the cutting plan relied on by the Assessors and the Board. Therefore, when the timber was not cut before 1960, the proper category in which to place it was that of timber which would be cut up to 1995. From this category it may, of course, be removed by later events or amended cutting plans.

In regard to the question of whether or not the valuations include any element of value attached by the Assessor to E. & N. lands which the taxpayer, in its cutting plans, predicted it would acquire, but did not in fact acquire, I confess, with reluctance, that I am in the same state of obfuscation admitted by the Board and compelled, therefore, to accept the Board's finding that the appellant has not discharged the burden of proving wrong was done. This finding should leave the matter open for review in another year.

I now deal with the questions *seriatim*.

Questions 1 and 2 have already been dealt with.

In respect of Question 3, the answer is in my reasons for judgment.

Question 4. Yes, save that Crown upset prices alone and not Crown auction realizations are to be considered.

Question 5 . Yes.

I have been told by counsel that I need not answer Question 6.

Question 7 . Yes.

Question 8. Yes.

Question 9. Yes.

Question 10. No.

Question 11. No, save as my reasons for judgment regarding mature timber may find otherwise.

Question 12. Yes.

Question 13. No.

Question 14. I think the answer to this is "no." I do not see why this may not be considered along with other factors in calculating the future revenue from harvests.

Question 15. No.