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**CROWN ZELLERBACH CANADA LIMITED**
**and**
**CROWN ZELLERBACH BUILDING MATERIALS LIMITED**

**v.**

**ASSESSMENT DISTRICTS OF COMOX, COWICHAN & NANAIMO**

British Columbia Court of Appeal

Before: MR. JUSTICE H.W. DAVEY, MR. JUSTICE F.A. SHEPPARD and MR. JUSTICE J.O. WILSON

April 29, 1963

Arthur J.F. Johnson and D.S.D. Hossie for the appellant companies
W.R. McIntyre and J.D. Edgar for the Provincial Assessors of the respondent jurisdictions

**Reasons for Judgment of Mr. Justice Wilson** April 29, 1963.

This appeal relates to the assessment for taxation purposes for the year 1962 of large tracts of timberland, as defined in section 2 of *Taxation Act*, chapter 376, R.S.B.C. 1960, owned by the respondents and situate in Taxation Zone "D" on Vancouver Island. The disputed assessments were appealed to the Court of Revision and thence to the Assessment Appeal Board. That Board, at the request of the present respondents, stated a case to the Supreme Court. The present appeal by the Assessors attacks the correctness of the answers given by the learned Supreme Court Judge to these questions:

4. Q.-Was the Board correct in finding that the former policy of the Assessors in allowing a discount in determining assessed value of timberlands, known as the "wholesale concept," resulted in assessment on the basis of value to the particular owner, but in reverse? A.-No.

5. Q.-Was the Board correct in finding that the method of allowing a discount on a regional basis adopted in the 1962 taxation-year is a correct method to adopt in determining the value of the appellants' lands for assessment purposes? A.-No.

6. Q.-If the answer to Question 5 is in the affirmative. was the Board right in finding the exclusion of the timberlands still owned by the Esquimalt and Nanaimo Railway Company from the calculation of the discount allowed in respect of Taxation Department Zone "D" of the Vancouver Forest District for the taxation-year 1962 to be correct? A.-Not answered.

In the stated case and in the argument we are asked to choose between two elements of assessment, the "wholesale discount" never used in Zone "D" and the "regional discount" first used in Zone "D" for the 1962 assessment now under review. The Assessment Appeal Board upheld the Assessors who used regional discount; Ruttan, J., disagreed and applied wholesale discount. A comparison of the two systems will be necessary, but we are not required to accept either.

Before embarking on the main dispute it becomes necessary to decide what may be put before us by the litigants in support of their arguments. The learned trial Judge has referred to evidence. He has also corrected, as he says, a misreading of the Assessors' own statement of their valuation procedure without, as he says, referring the matter back to the Board in accordance with subsection (6) of section 51 of the *Assessment Equalization Act*.

As to the references by the learned trial Judge to evidence given before the Board, we have before us section 51 of the *Assessment Equalization Act*, and I cite subsections (1) and (5) of that section:

> 51. (1) At any stage of the proceedings, the Board may submit in the form of a stated case for the opinion of the Supreme Court a question of law arising in connection with the appeal, and shall reserve its decision until the opinion of the Court has been given, when it shall decide the appeal in accordance with the opinion.
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> (5) Where a case is stated, the secretary of the Board shall forthwith file the case, together with a certified copy of the evidence dealing with the question of law taken in the appeal, in the Supreme Court Registry, and it shall be brought on for hearing before the Judge in Chambers and decided within one month from the date upon which the case is filed.

As my brother Davey has pointed out, the evidence to be attached to the stated case is only that part of the total evidence which deals with the question of law taken in the appeal. This would require a selection to be made by the Board, No such selection was made, and the whole of the evidence was filed. No objection to this was taken by either counsel. In these circumstances, I can only think that the Board decided that all the evidence dealt with questions of law taken in the appeal and was, therefore, to be attached to the stated case. As I have said, this has not been objected to.

The learned trial Judge was restricted to the consideration of questions of law. Why, then, the attachment to the stated case of a certified copy of the evidence or of part of the evidence? Because, I must conclude, he was entitled to look at the evidence when the decision of a question of law made this necessary, for otherwise the attachment of all or a part of the transcript would be purposeless. An instance in which the evidence might be resorted to is this: where a conclusion reached by the Board and stated in the case was disputed, not on the basis that there was not sufficient evidence to support it, but on the basis that there was no evidence to support it. This is a question of law. In this connection I refer to *R.* v. *McDonnell* (1934) 63 C.C.C. 150, where Harvey, C.J.A., at page 151 said this:

> Our Rule 2 of the Rules as to Cases Stated provides that a copy of the evidence is to be submitted with the stated case but it is to be observed that, by the section of the Codes. the Court of Appeal has nothing to do with the deciding of the facts which, as found, are to be set forth in the stated case. It may happen, however, that the ground of objection is that there is no legal evidence to support a finding of fact, which is a legal question, and in such case it is necessary to have the evidence before the Court of Appeal. Whether, however, there is *sufficient* evidence is a question of fact and cannot be stated.

This is the only significance I attach to the fact that the evidence is required to be filed along with the stated case and. indeed, the fact that only questions of law may be stated makes such a construction unavoidable.

The respondent asked us to look at the evidence, basing his argument on section 51, which I have cited. We are only entitled to do so if the requirement I have already stated is complied with. We may not, for instance, do so if a question of mixed fact and law is involved (see *R.* v. *McLeod* 97 C.C.C. 366 (B.C.C.A.) ), but only if a question solely of law is involved.

Both litigants have referred freely in their factums to the evidence. While the basis on which they did so was, with respect, never made clear, I am going to assume that they did so and that we may do so for one purpose only, not to decide any question of fact, or to balance the evidence, but to decide, not whether there is sufficient evidence, but whether there is any evidence to justify a finding of the Board that, in law, the use of the wholesale discount theory spoken of in Question 4 or of the regional discount theory spoken of in Question 5 results in compliance with section 37 of the *Assessment Equalization Act*, by a legal finding of actual value. Questions 4 and 5 pose a Question of law, the Question really being this: "Does the assessment for 1962 comply with the law?" No other matter is open to us; to say that one method is fairer than the other is irrelevant unless, in the first place, the assessment complies with section 37, and unless the unfairness alleged is discriminatory so that there was a duty cast on the Board by sections 46 and 47 of the *Assessment Equalization Act* to reject or change the assessment. That proposition does not appear to have been litigated before the Board, but, to make sure, I asked counsel for the respondents at the hearing whether he relied on any statutory provision bearing on discrimination, and he answered "no." Therefore, we need not consider discrimination, which is the only matter which would bring in the element of fairness.

I now cite those parts of section 37 of the *Assessment Equalization Act* which must be the basis of our consideration of Questions 4 and 5.

> 37. (1) The Assessor shall determine the actual value of land and improvements. In determining the actual value, the Assessor may give consideration to present use, location, original cost, cost of replacement, revenue or rental value, and the price that such land and improvements might reasonably be expected to bring if offered for sale in the open market by a solvent owner. and any other circumstances affecting the value; and without limiting the application of the foregoing considerations, where any industry, commercial undertaking, public utility enterprise, or other operation is carried on, the land and improvements so used shall be valued as the property of a going concern.
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> (3) The assessed value of land and improvements for the purposes of real property taxation under the *Public Schools Act* shall be fifty per centum of the actual value of land and fifty per centum of the actual value of improvements as determined under subsection (1). (Taxation for school purposes in respect of land and improvements under the *Public Schools Act* is. in effect, on fifty per centum of the actual value of land and thirty-seven and one-half per centum of the actual value of improvements. )

It is clear that the actual value is the foundation of the assessment process and is synonymous with assessed value in all cases of taxation except where, as in the present case, the assessment is reduced, for purposes of school taxation, to 50 per cent of the actual value. This latter mechanical process makes no difference to the main rule or principle involved in assessment, which still requires that the assessment shall represent the actual value.

I now cite from the stated case:

> 9. The Assessors assessed all the lands of the appellants in Taxation Department Zone "D" of Vancouver Forest District for the year 1962 pursuant to section 31 of the *Taxation Act*, being chapter 376 of the *Revised Statutes of British Columbia, 1960*, on the basis of volumes of timber on the said lands which are not disputed by the appellants and on the basis of determining the assessed value at 50 per cent of the actual value derived from the weighted average stumpage prices of all sales of timber and timberlands sold in the said Zone "D" during the year ending July 31, 1961. Such assessments were reduced by a regional discount of 8 per cent of the actual value, to which further reference is made hereafter.
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> 12. In the taxation-years 1956 to 1961, inclusive, the Assessors allowed in respect of Crown-granted timberlands elsewhere in the Province, other than said Zone "D," a

discount from the actual value of parcels of land determined by the application of the weighted average stumpage prices for the particular zone and taxation-year. This discount was based on the estimated term of years over which the total Crown-granted timber outside of the said Zone "D " of an owner of timberlands would be harvested. This discount was based essentially on what is known as the Rothery principle of valuing timberlands for assessment purposes and is sometimes known as the "wholesale concept." The rate of discount is determined primarily by the estimated term of the harvesting period. The longer the harvesting period is, the greater the discount. The discount in principle is allowed to give weight, in determining the present value of standing timber, to the risks and costs of holding timber unharvested over a long term of years and to the fact that future income has a present value less than its actual value at the time it is earned in the future. The discount was allowed in the 1961 taxation-year (save in Zone "D") on the basis of individual owners' holdings of Crown-granted timber; for example, an individual owner holding timber which would not be fully harvested for 40 years was allowed a greater rate of discount than an owner holding timber which would be fully harvested, say, in 20 years.

13. The "wholesale concept" discount was not allowed in respect of timberlands in Zone "D" in 1961 or any previous year for the reason given by the Assessors that in determining the weighted average stumpage prices in the said Zone "D " for assessment purposes, the 25-per-cent E. & N. severance tax was not in 1961 and in prior years added to the actual sale prices of E. & N. lands, and that the policy of the Assessors in the 1961 assessment-year and prior years in not adding the 25-percent E. & N. severance tax to determine weighted average stumpage prices for the said Zone "D" was equivalent to or in lieu of allowing a "wholesale concept" discount in the said Zone "D." This matter is referred to in Exhibit 7 filed at the hearing before the Board on June 5th and 6th of 1962.

14. In 1962 the Assessors changed the "wholesale concept" discount or "owner discount" in respect of all assessments of Crown-granted timberlands in the Province of British Columbia and adopted to a regional discount basis under which the rate of discount allowed is based not on the estimated term of harvesting of an individual owner's timber, but the estimated term of harvesting all assessable timber which does not include Crown-owned timber or unalienated timberlands of the Esquimalt and Nanaimo Railway Company which are not assessable in the zone. Thus the discount allowed in each zone has been extended to and is the same for all owners of Crown granted timberlands in the zone regardless of the extent of any owner's holding, or any owner's particular plans for harvest of his timber crop. This aspect is referred to in part of the circular letter from the Surveyor of Taxes dated December 18, 1961, forming part of Exhibit 6 filed at the hearing before the Board on the 5th and 6th of June, 1962.

I am going to disregard here any confusion which might result from the use by the Board of the term "present value" and take it that the Board was, in accordance with its duty, making an honest attempt to assess actual value.

The terms of the stated case leave it uncertain just how the Assessors applied subsection (3) of section 37 of the *Assessment Equalization Act*, and I refer particularly to paragraph 9 of the stated case, already cited. I can best demonstrate my uncertainty in this manner:

(1) If the Assessor found the actual value to be 100 and discounted this by 8 per cent, he would have a remaining present value (to use the Board's phrase) of 92. If, then, following subsection (3) of section 37, he halved this, the result would be 46.

(2) If, on the other hand, he first applied subsection (3) of section 37 to actual value, he would have of his 100 actual value a remainder of 50. If, then, as stated at the end of paragraph 9 of the stated case, he reduced this figure by a discount of 8 per cent of the

> actual value of 100, which would give a figure of 8, he would have a remainder or assessed value of 42; 46 is right; 42 is wrong.

Counsel for the respondents asked, as an alternative to judgment in his favour, that the case be referred back to the Board for restatement. I do not think this is necessary because I think we can provide the Board with proper guidance on the basis of what is properly before us.

For instance, I think we can tell the Board, in respect of the relation of the 50 per cent spoken of in subsection (3) of section 37 of the *Assessment Equalization Act* to the 8-per-cent discount allowed, that if the Board applied the second method in my demonstration it was wrong, but if it applied the first method it was right, all this, of course, being predicated on the idea that any discount of 8 per cent or otherwise can be allowed.

In respect to the more fundamental matter of principle involved in answering Questions 4 and 5, I think we can decide whether the result arrived at by the Board was a legal estimation of actual value, disregarding, in doing so, the words used by the Board in discussing "present" value.

It is clear from the material before us that every proper element of value was considered and applied up to the moment discounts were considered. Therefore, I do not propose to explore the assessment process prior to the allowance of the discounts.

Having gone this far, I now say that the next problem before us is not whether the so-called wholesale concept formerly employed by the Assessors in granting a discount in other areas as contrasted with the regional method of allowing a discount used in the 1962 assessment of lands in Zone "D" is correct, but whether any discount at all may be allowed. There have been references to departmental policy. Departmental policy has nothing to do with the matter: departmental officials are not empowered to grant discounts to taxpayers in disregard of the law. The sole test is whether the result conforms to the law, and particularly to the formula set out in section 37 of the *Assessment Equalization Act*.

Any assessment based on value to the owner is, in principle, wrong. But the Legislature can, if it sees fit, disregard this principle and make value to the owner a rule of assessment. To a certain and limited extent this may or may not have been done in connection with tree-farms, a subject I considered in an unreported decision (*Re MacMillan & Bloedel*, Vancouver Registry, X706/21). Public policy may make it advisable, in order to continue industrial employment and other public benefits, to make special taxation provisions for continuance of operation. In the case of tree-farms, the deferral of realization is due to restrictions imposed by law. In order to secure the advantages to our economy of sustained yield, the Government makes a contract with the taxpayer. One of the conditions of that contract is that the tree-farm shall be so managed that there will be a perpetual yield or harvest. In tree-farm assessment this restriction on use and deferral of realization is recognized. It is appurtenant to the ownership of the land as a tree-farm, not just by the particular owner, but by any owner.

But, whether or not the tree-farm legislation involves a departure from the rule against value to a particular owner, the principle still stands, and I will not lightly accept an interpretation which involves a departure from so well established and sound a principle, because a departure from it may open up fields in which values become inestimable save on the basis of the intentions, wishes, or even the pecuniosity of the taxpayer.

Section 37 has been considered by the Courts of British Columbia in various cases. In no case has it been interpreted as permitting the consideration of value to a particular owner, as distinguished from any owner. I first refer to the decision of this Court in the appeals of Shell Oil and Standard Oil (1962) 38 W.W.R. 675. There a property had appurtenant to it a licence which created a special value. It was held by the Court that this was a value, not just to a present owner, but to any owner. and therefore acceptable. The values here sought to be attributed to the property are not those of any owner, since another owner might use the property for quite

different purposes, say, as a long-term investment, or as a property for quick realization by sales of small tracts.

The judgment of Ruttan, J., in *Re Crown Zellerbach Canada Ltd. et al.* (1959) 16 D.L.R. 144, I interpret as stating, in other words, the same rule.

The only words in section 37 (1) which might be interpreted as allowing a consideration of value to the present, as distinguished from any owner, were considered by Ruttan, J., in the Crown Zellerbach case already referred to. I cite and adopt these words at page 151:

> And so in applying an objective standard to the factors listed in section 37 (1) of the Act the Assessor is not confined to accepting "present use" as the best or only one to which the property can be put. He may well decide that a water lot used as a dumping ground would be better developed as a yacht anchorage. But he must concede that "present use" does not mean "present value to the present owner." I adopt with respect the words of my brother Wilson in the case of *Re C.P.R. & Assessor of Pt. Coquitlam* (1957), 77 C.R.T.C. 95 at p. 100:
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> "'Present use' here must mean present, proper and practicable use, so that the speculator shall not escape proper taxation nor the developer be penalized.
>
> "'Valued as the property of a going concern' does not mean 'as the property of *the* going concern' and in the present case adds nothing not already included under the factor 'present use.'"
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> It may be objected that under the catch-all phrase "any other circumstances affecting the value," which appears in both section 37 (1) of our Act and in the relevant section of the Ontario Assessment Act, so subjective a factor as profits may be admitted for consideration by the Assessor. This was the situation in *Toronto* v. *Ontario Jockey Club* (1950) 3 D.L.R. 730, O.R. 571, where evidence was held admissible under the authority of this clause as to the carrying on of a race track at a profit, and the extent of those profits.
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> But in that case it was held that the Board needed this information to ascertain what was the actual value of the land with buildings upon it, when used for the purpose of a race track, which was the only purpose for which the property had been used for many years and was the proper basis on which the assessment should have proceeded.

I conclude that special value to a present owner is not a proper basis of assessment under section 37. I have not referred to cases rejecting in principle the value to the owner concept because I consider the principle so well accepted as not to require exposition. I am only concerned to decide whether it has been rejected by the Legislature in section 37 (1). It has not.

This being true, does either discount theory assess value to any owner, as opposed to value to the present owner?

It does not do so if it is based on the owner's statements of his own intentions as to how long he will hold the timber, which need not necessarily be the intentions of another owner. Any deferral of realization of the value of the timber with attendant costs is entirely a matter of choice by the owner, and the construction of factories to use the timber-making deferral of realization necessary to him is again purely a matter of his own choice. This brings me to a consideration of the "wholesale" concept involved in Question 4.

In effect the respondent is saying, "It is more advantageous and profitable for me to hold this timber for a long term of years than it is to sell it now. Therefore, you ought to assess it for less than it would fetch now." I cannot accept this proposition.

The tracts assessed are large, and it is argued that such large tracts will sell for less on a stump age basis than will the smaller tracts of whose sale prices there are historical records. Mr. Malcolm, the timberland appraiser, says there is no evidence that this is true. Accepting, for the sake of argument, that it is true, this is still a situation created entirely by the owner. He can sell any part of any tract at his choice. He does not choose to do so because it would be unprofitable for him to do so. Therefore, again, he is saying that because it is more profitable for him to hold these large tracts for a long term of years as units rather than to subdivide them and sell them piecemeal now, he should pay on the basis of a lower assessment. This proposition is equally unacceptable.

This paradox: cannot be conjured away by the regional discount method of passing on to the small holder by an averaging system part of the benefits which its acceptance would confer on the respondents. The wholesale and the regional discount theories are therefore indistinguishable in principle and unacceptable in law if they are based on the owner's plans of realization, because neither has any bearing on actual or market value.

The evidence of Mr. Coleman for the respondents results in effect in an acceptance of the idea that the wholesale theory involves adoption of value to the owner.

In regard to Mr. Malcolm's evidence, it must at once be said that taken literally it cannot be held and does not purport to support either discount system as a factor in the assessment of actual value. He says the discount theory is not required by Statute at all, but is a matter of policy. I cite these words:-

> A.-We do consider, of course, in applying appropriate stumpage value to each property the nature of the timber thereon, the accessibility, logging chance, and the various factors which affect the timber value. We do not simply put one timber value on Douglas fir, for example, all over the Province. We have the Province broken down into appraisal zones, and we derive current stumpage value in each appraisal zone on the basis of all available sales during the year ending July 31st. For 1962 attachment, the year in question, for sales evidence for the 12 months ending July 31st, 1961. That is as close as we can get sales evidence to the assessment year-and still provide the Assessor with the information so that the assessments can be got out by December 31st. We do in the various appraisal zones allow, as a matter of policy, a discount to the current stumpage values on the basis of the plentifulness of timber in these various zones; the more plentiful the timber, generally speaking, the more of a discount is allowed because generally the increase in the supply of a commodity the lower the unit frame. This is not required by Statute at all: the Statute specifies that the Assessor shall determine actual value, and this is interpreted to mean current market value. The assessment is a one-year assessment and not applied to discount of this current market value based on sales evidence at all. As a matter of fact we do decide. . . strictly as a matter of policy.

Mr. Malcolm is here legislating-deciding a policy. As I have already said, he has no power to do so.

Furthermore, the plenitude of timber in any area, spoken of by Mr. Malcolm, is a factor which must obviously be known to and appreciated by a purchaser and thus entirely allowed for in the historical market prices.

Next Mr. Malcolm says:

> This is applied throughout the Province, zone by zone, to all owners in each zone. We don't single out individual owners with very large tracts of timber and give them a good discount while denying it to other small owners. We apply it to all owners in each zone, which is a change in policy to the previous year when the discount was applied on an ownership basis because using the principle that if all timber in a zone were put on the

> market at once there would be a depression in market price, and surely this depression in market price would apply to all owners, large and small. And we feel that it is the part of greater equity that these discounts should be applied to all owners, large and small.

With all respect to Mr. Malcolm, I must say this. These timberlands are assessed as real property. If "the principle that if all timber in a zone were put on the market at once there would be a depression in market price" is applicable in the assessment of timberlands, it is applicable to all real property, and in the assessment of all real property there must be envisaged a state of affairs where all property of a certain class is to be offered for forced sale, at the same time creating a glut on the market and forcing values down. Again, with respect I say that this idea need only be stated to be rejected.

I have said that taken literally the unequivocal wording of Mr. Malcolm's evidence does not support, and does not purport to support, either discount system as a factor of actual value. This is probably enough to dispose of the matter since his valuations are those used by the Assessors. But I think it right to go further and say if Mr. Malcolm had asserted, as he has not, that the result of the application of either discount system resulted in a finding of actual value, he would be wrong, and the Assessors, the Courts of Revision, and the Board have been wrong in applying the discount systems.

Mr. Stafford, for the respondent, citing the report of the Surveyor of Taxes, said this:

> The principle of allowing discounts to recognized carrying charges involved in holding timber for varying periods of time prior to harvest is continued. This principle is now being applied on a regional basis of timber appraisal zones to ensure equitable valuation of the property involved in the holdings.

We are not concerned with equitable valuation, but with actual values.

If the regional system described by the witnesses involves any consideration of values to individual owners based on their chosen cutting plans, then it is objectionable and cannot be made acceptable by arriving at an average. I do not, myself, see how it can be applied without considering cutting plans.

Mr. Malcolm has sought to justify the regional discount system by resorting to historical records of utilization which convince him that all the timber will be used in an average period of 10 years, and that, therefore, market prices must be discounted to allow for the carrying charges involved in holding the timber unsold for 10 years.

Assuming, only for the purpose of argument, that this is correct, then it is a factor of value which must be apparent not just to Mr. Malcolm but to any purchaser and must, in the mind of such purchaser, already have resulted in a discount in the price he would pay. Therefore, the regional discount must already have been recognized by the purchaser, and the purchase prices must reflect it.

I must here state that my references to evidence made only for the purpose of determining whether or not there was any evidence to justify the allowance of discounts have resulted in my finding that there is no such evidence.

In the result the questions must be answered as follows:

> 4. Yes, the "wholesale concept" resulted in assessment on the basis of value to the particular owner. I do not think the words "in reverse" are necessary.
>
> 5. No.

6. Since it involves only the application of the rejected discount systems, this question need not be answered.

The appeal should be allowed to the extent indicated by the answers given above.

**Reasons for Judgment of Mr. Justice Davey** April 29, 1963.

The Provincial Assessors' appeal against certain answers made by Ruttan, J., to questions concerning the assessment of respondents' timberlands posed by a case stated by the Assessment Equalization Board under section 51 of the *Assessment Equalization Act*, chapter 18, R.S.B.C. 1960.

The effect of the answers below was to support respondents' contention that the wholesale discount method of assessing its timberlands was legal and the regional discount method, which was used. was not.

At the outset the system of assessment and appeals therefrom should be explained. The Provincial Assessors are charged by the *Taxation Act*, chapter 376, R.S.B.C. 1960, with the duty of assessing, *inter alia*, real property in unorganized areas; by section 31 the assessed value of land is determined under the provisions of the *Assessment Equalization Act*. The taxpayer may appeal against the assessment to the Court of Revision; the Assessor and the taxpayer may then appeal upon any ground from the Court of Revision to the Assessment Equalization Board under the provisions of the *Assessment Equalization Act*.

Section 50 (2) of the *Assessment Equalization Act* declares that the decision of that Board shall be final and conclusive, subject only to an appeal by way of stated case upon any question of law to a Judge of the Supreme Court of British Columbia. An appeal from the Supreme Court of British Columbia lies to this Court.

Section 51 (5) requires the secretary of the Board to file the stated case in the Supreme Court Registry together with a certified copy of the evidence dealing with the question of law. In this case a transcript of all the evidence before the Board and all exhibits were filed.

It is desirable at this stage to determine what use may be made of the evidence the Board is required to return with a stated case. The questions raised must be of law only, and the facts found by the Board ought to be stated in the case;. see cases cited on the form of a stated case by Masten, J.A., in *Re City of Hamilton and Birge* (1924) 55 O.L.R. 448 at page 451. In my opinion section 51 (5) of the *Assessment Equalization Act* does not require a transcript of all the evidence to be filed, but only that part of the evidence "dealing with the question of law raised in the appeal." Where the question of law is whether there is any evidence to support a primary finding of fact, the purpose of the transcript is obvious, but it is not so apparent where the question of law assumes other forms and must be decided on the facts found by the Board. But since the Act requires a transcript of the evidence dealing with the question of law to be filed, it must be for some purpose, and the only one that I can see, keeping in mind that the Court has no jurisdiction to find facts, is that the transcript may be examined to interpret and explain the statement of facts contained in and the questions of law raised by the stated case. However, I do not find that explanation entirely satisfactory, for surely if any doubt should arise about the meaning of the stated case, it ought to be sent back to the Board for clarification. But on occasion that may not be done, as it was not done here, and resort to the transcript for explanation or interpretation may be helpful. Unsatisfactory as that interpretation of section 51 (5) may be, it seems to be the only one that is tenable, and I propose to act upon it and refer to the transcript to interpret and explain the stated case, but, not for the purpose of making findings of fact.

The questions and answers that we are concerned with in this appeal are as follows:

"4. Was the Board correct in finding that the former policy of the Assessors in allowing a discount in determining assessed value of timberlands, known as the 'wholesale concept,' resulted in assessment on the basis of value to the particular owner, but in reverse?"

Answered "no."

I agree that the words "but in reverse" add nothing to the question.

"5. Was the Board correct in finding that the method of allowing a discount on a regional basis adopted in the 1962 taxation-year is a correct method to adopt in determining the value of the appellant's lands for assessment purposes?"

Answered "no."

"6. If the answer to Question 5 is in the affirmative, was the Board right in finding the exclusion of the timberlands still owned by the Esquimalt and Nanaimo Railway Company from the calculation of the discount allowed in respect of Taxation Department Zone 'D' of the Vancouver Forest District for the taxation year 1962 to be correct?"

Not answered.

At the risk of stating the obvious, I am impelled by the course of this appeal to state those three questions must be construed as meaning was the Board correct or right in law in holding as it did.

The following statement of the facts contained in the stated case outlines the facts found by the Board upon which these questions must be answered:

1. The lands forming the subject of these appeals are Crown-granted lands owned by the appellants situate in Taxation Department Zone "D" of the Vancouver Forest District.

2. (a) . . .

(b) The appellants complain against the method of determining the assessed value of all their lands in the said Taxation Zone "D" (including the aforesaid blocks mentioned in paragraph 2 (a) hereof) for assessment purposes in the year 1962.

9. The Assessors assessed all the lands of the appellants in Taxation Department Zone "D". of Vancouver Forest District for the year 1962 pursuant to section 31 of the *Taxation Act*, being chapter 376 of the *Revised Statutes of British Columbia, 1960*, on the basis of volumes of timber on the said lands which are not disputed by the appellants and on the basis of determining the assessed value at 50 per cent of the actual value derived from the weighted average stumpage prices of all sales of timber and timberlands sold in the said Zone "D" during the year ending July 31, 1961. Such assessments were reduced by a regional discount of 8 per cent of the actual value, to which further reference is made hereafter.

10. The appellants do not object to or dispute the principle of determining actual value of their lands on the basis of weighted average stumpage prices calculated by taking into account all sales of timber and timberlands including Crown timber in said Taxation Zone "D" and timberlands owned by the Esquimalt and Nanaimo Railway Company. The Assessors, in determining weighted average stumpage prices for the year 1962 in respect of said Taxation Zone "D", added to the actual amounts received by the Esquimalt and Nanaimo Railway Company on the sale of its timberlands a sum equivalent to 25 per cent thereof, being the amount of tax payable pursuant to section 3 of the *Esquimalt and Nanaimo Railway Belt Land Tax Act*, being chapter 133, *Revised*

*Statute of British Columbia*, 1960. In the 1961 and previous taxation-years the Assessors did not make such addition in assessing timberland as defined by section 2 of the *Taxation Act* of such sum. In the 1962 taxation year the Assessors made such addition to the E. & N. sale prices on the basis that the actual value of the lands sold by the E. & N. is not only the price paid by a purchaser to the company therefor, but such price plus the assessed amount of the 25-per-cent tax since the total of the purchase price plus the 25-per-cent tax represents the true price the purchaser is prepared to pay to acquire the lands purchased by him or it from the E. & N.

12. In the taxation-years 1956 to 1961, inclusive, the Assessors allowed in respect of Crown-granted timberlands elsewhere in the Province, other than said Zone "D," a discount from the actual value of parcels of land determined by the application of the weighted average stumpage prices for the particular zone and taxation year. This discount was based on the estimated term of years over which the total Crown-granted timber outside of the said Zone "D" of an owner of timberlands would be harvested. This discount was based essentially on what is known as the Rothery principle of valuing timberlands for assessment purposes and is sometimes known as the "wholesale concept." The rate of discount is determined primarily by the estimated term of the harvesting period. The longer the harvesting period is, the greater the discount. The discount in principle is allowed to give weight, in determining the present value of standing timber, to the risks and costs of holding timber unharvested over a long term of years and to the fact that future income has a present value less than its actual value at the time it is earned in the future. The discount was allowed in the 1961 taxation-year (save in Zone "D") on the basis of individual owners' holdings of Crown-granted timber; for example, an individual owner holding timber which would not be fully harvested for 40 years was allowed a greater rate of discount than an owner holding timber which would be fully harvested, say, in 20 years.

13. The "wholesale concept" discount was not allowed in respect of timberlands in Zone "D" in 1961 or any previous year for the reason given by the Assessors that in determining the weighted average stumpage prices in the said Zone "D" for assessment purposes, the 25-per-cent E. & N. severance tax was not, in 1961 and in prior years, added to the actual sale prices of E. & N. lands, and that the policy of the Assessors in the 1961 assessment-year and prior years in not adding the 25-percent E. & N. severance tax to determine weighted average stumpage prices for the said Zone "D" was equivalent to or in lieu of allowing a "wholesale concept" discount in the said Zone "D." This matter is referred to in Exhibit 7 filed at the hearing before the Board on June 5th and 6th of 1962.

14. In 1962 the Assessors changed the "wholesale concept" discount or "owner discount" in respect of all assessments of Crown-granted timberlands in the Province of British Columbia and adopted to a regional discount basis under which the rate of discount allowed is based not on the estimated term of harvesting of an individual owner's timber, but the estimated term of harvesting all assessable timber which does not include Crown-owned timber or unalienated timberlands of the Esquimalt and Nanaimo Railway Company which are not assessable in the zone. Thus the discount allowed in each zone has been extended to and is the same for all owners of Crown-granted timberlands in the zone regardless of the extent of any owner's holding, or any owner's particular plans for harvest of his timber crop. This aspect is referred to in part of the circular letter from the Surveyor of Taxes dated December 18, 1961, forming part of Exhibit 6 filed at the hearing before the Board on the 5th and 6th of June, 1962.

15. In determining the rate of discount allowed in respect of Crown-granted timberland in Taxation Zone "D," the Assessors excluded from the calculation of the estimated term of harvesting timber in Taxation Zone "D" not only timber held by the Crown (as they did also in all other zones), but also timberlands owned by the E. &.N. in the said Zone "D"

> on the ground that such lands are not assessable. The rate of discount in the said Zone "D" allowed in 1962 was 8 per cent. The discount allowed in all zones in the Province other than Zone "D" is shown by Exhibit 6 as quoted aforesaid.

The basis and method of assessment are defined by section 31 (1) of the *Assessment Equalization Act*:-

> 37. (1) The Assessor shall determine the actual value of land and improvements. In determining the actual value, the Assessor may give consideration to present use, location, original cost, cost of replacement, revenue or rental value, and the price that such land and improvements might reasonably be expected to bring if offered for sale in the open market by a solvent owner, and any other circumstances affecting the value; and without limiting the application of the foregoing considerations, where any industry, commercial undertaking, public utility enterprise, or other operation is carried on, the land and improvements so used shall be valued as the property of a going concern.

The statutory duty of the Assessor is to find the "actual value" of the taxable property, but section 37 permits him to use several different methods and to consider many different elements in finding actual value. I do not think that the use of any specifically mentioned method of finding actual value, or the inclusion or exclusion of any enumerated element, provided there is evidence to support the reasoning, can be said to raise a question of law appealable to the Courts on a stated case, for those matters lie in the judgment of the Assessor and the Assessment Equalization Board (*Reg.* v. *Penticton Sawmills Ltd.* (1953) 11 W.W.R. (N.S.) 351 at pages 353,356).

In this appeal the stated case shows that the Assessors and the Board used exchange value as the method of valuation and derived that from the weighted average stumpage prices paid on all relevant sales up to July 31, 1961. But I should add that the transcript shows, although the facts stated in the case do not, that each parcel of timberland now under review was examined and the application of the weighted average prices to the volumes and species of timber thereon was modified to fit the individual logging chance; also, since the taxable unit is timberland, and the value of the timber is only one component of value, although the principal one, the value of the bare land was added to the value of the timber to get the actual value of the timberland. I express no opinion on the accuracy of the testimony, since facts are beyond our jurisdiction, and merely look at this evidence to understand the method of assessment described in the case. Looked at in the light of that evidence, there seems so far to be no error in law in the method of assessment.

Having reached that stage, appellants take the position that the stated case shows that the Assessors and the Board held that the value so reached was the actual value of the timberlands. They point, *inter alia*, to the words in paragraph 9 of the stated case, "*actual value* derived from the weighted average stumpage prices. . ."; the last sentence in paragraph 9, "Such assessments were reduced by a regional discount of 8 per cent of *the actual value*. . ."; the words "The appellants (the present respondents) do not object to or dispute the principle of determining actual value of their land on the basis of weighted average stumpage prices. . ," used in paragraph 10; and the form of Question 5, in which it is asked whether the regional discount is a correct method to adopt in determining the value of appellants' lands for assessment purposes [*my emphasis and interpolation*]. Appellants submit that the Board has drawn a distinction between actual value and assessable value, and has found that the Assessors have as a matter of policy deducted the regional discount from actual value in order to arrive at assessed value. By section 37 (3) of the *Assessment Equalization Act*, the assessed value of lands and improvements for the purpose of taxation under the *Public Schools Act* shall be 50 per cent of the actual value determined under section 37 (1).

Respondents' counsel contends that what the Board meant by "actual value" in the stated case was purported actual value, because the whole purpose for which they sought the stated case was to determine whether the "wholesale discount" or the "regional discount" was the proper

method in law to be employed to find the actual value of respondents' timberlands. He submits that whether "actual value" has been found may be a question of law or a question of fact, depending upon the circumstances in which the question is raised, and that in this case the question raised is one of law, because the respondents attack the methods used, not the facts found; that to interpret the words "actual value" used in the stated case as meaning a finding of fact would deny respondents the opportunity of supporting the wholesale discount method and attacking the regional discount method as bad in law, which was the purpose of the stated case.

The material in the appeal book shows that respondents unsuccessfully sought to have the Board amend the stated case. They also objected before Ruttan, J., to the form of the case, but did not ask that it be remitted to the Board for amendment, nor did their counsel do so before us until the close of his argument in support of the judgment below.

Ruttan, J., fully appreciated the difficulties created by respondents' objections to the form of the case and considered whether of his own motion he should remit it for amendment. He stated in his reasons: "But I think it fair to find that where this phrase 'actual value' is employed, the Board intended to be implied the additional words "as determined by the Assessors.'" That is, I think, true, but in my respectful opinion it is no answer to appellants' contention, because the reasons of the Board included in the appeal book make it clear that they upheld what they understood to be the actual value found by the Assessors, and dismissed the appeal accordingly. In concluding their reasons on this branch of the appeal the Board stated: "If any discount is to be considered as a matter of policy, then a regional basis is much fairer." That in my opinion implies a discount from actual value in order to arrive at assessable value.

The learned Judge then proceeded to examine the evidence contained in the transcript, and from it concluded that the Board had in the stated case erroneously interpreted what the Assessors had done, and decided on the evidence that the Assessors had in point of fact applied the regional discount of 8 per cent in order to arrive at actual value. He said:

> In correcting what appears to me misreading of the Assessors' own statement of their valuation procedure, I do not find it necessary to refer the statement back to the Board for amendment in accordance with subsection (6) of section 51 of the Act. The issues propounded remain the same and the appellants (the present respondents) are not embarrassed or prejudiced in their appeal. [*My interpolation.*]

With deference, I must disagree in several respects. In the first place, my understanding of the evidence is the same as the Board's-namely, that the Assessors found actual value and then discounted it to get assessable value. But that is really beside the point, because neither this Court nor the Court below has any right to make findings of fact on the evidence before the Board; that was the function of the Board, and its findings of fact are set out in the stated case as the foundation for the questions of law that are asked, and we must accept those findings as the case does not raise any question of absence of evidence to support them.

Nor am I able to agree that the issues propounded remain the same and that the present respondents are not embarrassed or prejudiced in their appeal. The effect of the evidence of Malcolm, an appraiser employed by the Department of Finance, and the principal witness for appellants, discussed by the learned Judge, was not properly before him. The question that was before him was whether the Board was correct in law in rejecting on the facts found by it the wholesale discount method and adopting the regional discount method. If the Board held in fact that the value before discount was the actual value of the timberlands, then the stated case and this appeal become meaningless for the respondents, because by Statute the assessable value of the lands is their actual value, less 50 per cent for purposes of taxation under the *Public Schools Act*, and there is no room for discount either wholesale or regional. That drives respondents back to the position they took before us, that on the proper interpretation of the stated case the Board meant "purported actual value."

In my respectful opinion the case ought to have been remitted to the Board for amendment to remove any uncertainty about its meaning. But respondents did not ask for that until the last moment before us. If the result of this appeal would determine the assessed value of respondents' timber in future years, I would, even at this late date, send the case back for amendment; but as it affects only the current assessment, I think we ought to get on with the appeal and dispose of the question as best we can; accordingly I will endeavour to ascertain what the case means from the material now before us.

Keeping in mind that respondents made known to the Board their objections to and the anticipated difficulties in the stated case and the Board refused to amend, the passage in the actual decision of the Board about regional discounts being the fairer, and the evidence before the Board that regional discounts were not required by Statute but were allowed as a matter of policy, I conclude that the Board meant what it appears to say in the stated case-namely, that the regional discounts were deducted as a matter of policy from the actual value of the timberlands. Viewed in that light, the fifth question must be answered in the negative, because the Assessors must assess the timberlands at actual value, or one-half thereof for purposes of the *Public Schools Act*; having found the actual value of the property, they had no legal right to make other deductions for wholesale or regional discounts before computing the assessed value. While the fifth question ought to be answered in the negative, the result does not assist the respondents because it increases, not reduces, respondents' assessment.

But this approach is dependent upon my interpretation of the stated case, and since that interpretation may be wrong, I prefer to examine the appeal upon respondents' interpretation, by which I reach the same result.

Dealing first with the fourth question, in paragraph 12 of the stated case the Board states the basis of the wholesale concept or Rothery principle of valuing timberlands as follows:

> The rate of discount is determined primarily by the estimated term of the harvesting period. The longer the harvesting period is, the greater the discount. The discount in principle is allowed to give weight, in determining the present value of standing timber, to the risks and costs of holding timber unharvested over a long term of years and to the fact that future income has a present value less than its actual value at the time it is earned in the future.

The wholesale rate of discount was fixed for each individual owner and was determined not on elements or characteristics of the industry throughout the region that might be said to influence market value, but on considerations peculiar to each owner, such as the quantity of his timber and his rate of cut. With deference to the learned Judge below, I consider that the fixing of a rate of wholesale discount for each owner upon a personal basis, even though the Assessors may modify the result to conform to what they think is reasonable, is a violation of the fundamental principle that assessments shall not be based upon the value of the property to its particular owner (see *Sun Life Assurance Co. of Canada* v. *Montreal* (1950) 2 D.L.R. 785 at pages 802 and 803; *Re Appeals of Shell Oil Co. of Canada and Standard Oil Co. of B.C.* (1962) 38 W.W.R. 695 at page 699).

Respondents submit that there is no evidence that their experience or method of utilization in this respect is different from that of the industry generally, and consequently there is no reason for holding that their rate of discount would be based upon considerations peculiar to them. The absence of such evidence, in my opinion, is irrelevant; the point is that such a discount is determined in the main by the policies adopted by each owner and the characteristics of his particular operation, and not by policies or characteristics that are general in the industry. If those policies prove to be common to most of the industry, that is mere coincidence and cannot make good assessments based on the quantity of timber owned by each taxpayer and the rate he cuts it. The result by coincidence might be right, but the principles and methods of assessment employed would be wrong.

I turn now to the fifth question. In paragraph 14 the Board explains the concept underlying the regional discount method and refers to the circular letter from the Surveyor of Taxes dated December 18, 1961, part of Exhibit 6, in which the following is stated:

> The principle of allowing discounts to recognize carrying charges involved in holding timber for varying periods of time prior to harvest is continuing. This principle is now being applied on a regional basis by timber appraisal zones to ensure equitable valuations of the properties of all timber holders.

The regional discount of 8 per cent was allowed to all timber-owners, large and small, throughout Zone "D," regardless of the quantity of their timber and their methods and plans of exploitation.

In some parts of Malcolm's evidence it would appear that he treated the regional discount as being based upon the relative supply of timber in private hands and the current demand measured by the rate of cut and therefore as an element in current market prices. But since he concedes that current prices upon which he based his appraisals of actual value reflect those influences, it is difficult to see the logic of that explanation. His other explanation that the department allowed the regional discount as a matter of policy runs into the serious objection that it is contrary to law.

The regional discount method was said to have been adopted in order to avoid the objection to the wholesale discount and to determine the amount of the discount upon considerations common to the industry in the area in a way that might be said to reflect actual value. It is difficult to understand the economic basis upon which regional discount method rests. As I have already mentioned, the Surveyor of Taxes in his memorandum of December 18, 1961 (*supra*), states that the purpose is to recognize the carrying charges involved in holding timber for varying periods of time until harvest.

The respondents put the economic basis of the wholesale discount theory in a slightly different way. They contended that it is a method of arriving at the present worth of the value of the future harvest; that the longer the harvest is postponed, the greater the carrying charges and the lesser the present worth of the future value of the expected crop. Also, for that reason among others, they submit that timberlands bearing billions of feet of timber, as do respondents' lands, cannot be sold en bloc for as high stumpage as smaller parcels capable of being logged in a few years.

Malcolm said that the regional discount method would determine the average time that owners throughout the region would take to harvest their timber. He was asked on cross-examination whether it was correct to state that in ascertaining the market value of standing timber, one is really engaged in determining the present value of the income which may be produced by the harvest over a period of years. He replied that was one method which might be used, but it was not the one that he used; he used the market approach, not the income approach. He also said that market price is fixed in part by purchasers who consider anticipated income, expense, and risk in making their offers.

The appellants do not deny that respondents' timberlands would not sell en bloc for as high stumpage as smaller blocks of timber. But Malcolm, on cross examination, said that in his examination of prices paid for timber, he could see no difference between the stumpage paid for small blocks and large blocks. However, he was not dealing with any blocks comparable to the magnitude of respondents' holdings en bloc.

I have referred to Malcolm's evidence, not for the purpose of making findings of fact, but to understand on what economic or practical basis the regional discount method rests, and having done so, I am quite unable to see its practical, economic or legal validity where the method of assessment adopted is the price the property would bring in a presently available market.

We start from the fact that there are several methods of determining the actual value of timberland open to an Assessor under section 37 (1) of the *Assessment Equalization Act*, and various indicia of value that an Assessor may resort to in order to make a particular assessment. Under appropriate circumstances, especially where there is no present market for the property by which market value can be ascertained, an Assessor may resort to future revenue. In that case it would be proper to determine the present value of the future revenue, as in fact an Assessor is required to do under section 39 of the *Taxation Act* in assessing tree-farms.

But in the present case there is a market for the timber, and the Assessors chose, as they were in law entitled to do, to base their assessments upon current market prices of the timberlands. That being so, I am unable to see what relevancy in fact the wholesale or regional discount theory of future carrying charges or the present value of future revenue has to do with assessments based on current market values. The fallacy of applying regional discounts to allow for estimated carrying charges until harvest or to arrive at the present worth of future revenue is made apparent by the fact that the regional discount is allowed on all holdings, large or small, regardless of the length of time until harvest or whether the timber is held for immediate sale, speculation, or present or future logging. This universal application of the regional discount denies the basis upon which it was put by the Surveyor of Taxes, and the basis of the wholesale discount method, which the regional discount method replaces.

Since neither wholesale discount nor regional discount has any relation to actual values based upon current market prices, I can only conclude that Malcolm was correct in stating that the department allowed those discounts as a matter of policy. In doing so it acted, as I have said, contrary to law because it has no authority to allow non-statutory discounts from actual value.

Before closing these reasons, I think I ought to refer to respondents' argument that their timberlands could not be sold en bloc at the stump age prices commanded by relatively small blocks of timber. That is not directly raised in the stated case, and I do not think it could be, for it seems to be largely a matter of fact, not of law. But it is advanced as an argument to support the wholesale discount method. In addition to what I have already said, and other objections mentioned by my brother Wilson, that argument must fail because the Assessors, as they are required to do under section 37 (6) of the *Taxation Act*, assessed respondents' timber, not en bloc, but by each lot, block, and section, parcel by parcel. That being so, I am unable to appreciate the force of the reasoning by which it is argued that because respondents necessarily own many blocks of timber to provide the raw material for their mills, the timber ought to be valued en bloc, and not parcel by parcel as the *Taxation Act* requires, and that the aggregate assessed value of the individual parcels ought to be reduced, because if all the timber was sold en bloc, it would bring less than the total price fetched if sold parcel by parcel. To support that submission, respondents relied to some extent on the phrase "present use," and the provision "where any industry, commercial undertaking, . . . or other operation is carried on, the land and improvement so used shall be valued as the property of a going concern," contained in section 37 (1) of the *Assessment Equalization Act*. I find it unnecessary to determine the full meaning of that language. It is sufficient to say that the present use of the lands assessed was for timber, and pursuant to section 37 (1) of the *Taxation Act* the lands were assessed as timberlands. I do not think the words "present use" require a more detailed examination of the respondents' cutting programme or policy of exploitation. Nor am I able to see bow the assessment of the timberlands, block by block, as required by the *Taxation Act*, upon the basis of current market value, offends against the direction to value the timberlands as the property of a going concern. In particular, I do not consider that provision of section 37 (1) requires Assessors to assess the timber reserves, not being a tree-farm, of a conversion plant upon the basis of the present worth of the future crop, when there is a present market for them and they have an ascertainable market value, and the Assessors choose to assess the timber reserves upon the basis of that market value.

r would allow the appeal in part and answer the fourth question "yes," and the fifth question "no." The sixth does not require an answer.

**Reasons for Judgment of Mr. Justice Sheppard** April 29, 1963.

There are two appeals before this Court which arise out of the assessments of timberlands of Crown Zellerbach Canada Limited and Crown Zellerbach Building Materials Limited, Taxation Zone "D," Vancouver Island. There is an appeal by Crown Zellerbach from a supplementary assessment for the year 1961 made by the Assessors on the 11th of October, 1961, on eight parcels pursuant to section 76 of the *Taxation Act*, chapter 376, R.S.B.C. 1960, and a second appeal by the Assessors from the method of determining the assessed value of all the lands of Crown Zellerbach in Taxation Zone "D," Vancouver Island, for the assessment in the year 1962.

In respect of both assessments, Crown Zellerbach commenced proceedings by separate appeals to the Court of Revision, and from the decision of the Court of Revision appealed to the Assessment Appeal Board. The Board, at the request of Crown Zellerbach, submitted a stated case for the opinion of the Supreme Court in respect of

(a) the supplementary assessment for the year 1961; and

(b) the method of determining the assessed value in the assessment for the year 1962.

The stated case came on before Ruttan, J., who issued his written reasons on the 14th of December, 1962. From those reasons Crown Zellerbach has appealed as to the 1961 supplementary assessment and the Assessors have appealed on Questions 4, 5, and 6 of the 1962 assessment.

The question relating to the 1961 supplementary assessment, on which Crown Zellerbach has appealed, reads as follows:

> "Was the Board correct in finding valid the supplementary assessments on timberlands of the appellants made by the Assessors in 1961 under section 76 of the *Taxation Act*, being chapter 376 of the *Revised Statutes of British Columbia, 1960*?"

The facts are that in 1961 Crown Zellerbach appealed to the Board in respect of the main assessment roll for that year and the Board on the 15th of June, 1961, held (a) "that the volume of timber on the lands in question as estimated by the Assessors is certainly less than the actual quantity in existence," and on the 28th of July, 1961, held (b) "that in no case shall the assessment upon a parcel be higher than the original assessment fixed for 1961 taxation-year."

The Board therefore refused to increase the assessed value on the main assessment roll 1961 so as to include the value of all the timber actually on the lands. The supplementary assessment for 1961, according to the stated case, paragraph 6, arose as follows:

> 6. Later in 1961, in accordance with the provisions of section 76 of the *Taxation Act* after delivery of the Board's findings, dated July 28. 1961, the respondents levied supplementary assessments on the said Blocks 140, 145, 1100, 137, 138, 139, 1098, and 1099 for 1961, notices for which were mailed on the 11th day of October, 1961. The supplementary assessments thus made were in the case of each of the aforesaid blocks in an amount equal to the difference between the original 1961 Main Roll assessment confirmed by the Board in its findings dated July 28, 1961, and the increased assessment indicated by the calculations made in accordance with the Board's findings dated the 15th day of June 1961.

Crown Zellerbach now contends that, in order to come within section 76 of the *Taxation Act*, the Assessors must demonstrate that they found the property was assessed for less than it was liable to assessment after the main 1961 assessment roll or rolls was or were completed, and that was not demonstrated.

On the stated case, the jurisdiction of the Court is restricted to "a question of law": *Assessment Equalization Act*, R.S.B.C. 1960, chapter 18, section 5 (1). It would be a question of law whether or not the facts as stated bring the Assessors within section 76; *The Tp. of Tisdale* v. *Hollinger Consolidated Gold Mines Ltd.* (1933) S.C.R. 321, Cannon, J., at page 323; *Loblaw Groceterias Co. Ltd.* v. *The City of Toronto* (1936) S.C.R. 249, Davis, J., at page 254.

The stated case does not state expressly when the Assessors found out that the property had been assessed for less than it was liable to assessment; by inference that could have been after the Board findings of the 15th of June, 1961, and after the completion of the assessment roll for that year. The date when the Assessors so found out is a question of fact, and this Court has no jurisdiction to try that issue of fact. In the absence of such a finding of fact, the question submitted is merely academic and such a question this Court generally will not entertain: Manning on Assessment and Rating (4th edition), page 287; *Re Canada Co. and Tp. of Colchester North* (1916) 38 O.L.R. 183 at page 186; *Re City of Hamilton and Birge* (1924) 55 O.L.R. 448 at page 450; *Loblaw Groceterias Co. Ltd.* v. *City of Toronto* (*supra*) at page 255.

However, the purpose of this question may here be attained by the construction of section 76 of the *Taxation Act*. Section 76 reads as follows:

> 76. Where, subsequent to the completion of any assessment roll, the Assessor finds that any property or other basis of assessment was liable or has become liable to assessment for the current year or any previous year, but has not been assessed on the roll or on any previous assessment roll, he shall assess the same on a supplementary roll, or further supplementary roll, for the current year, to be prepared by him from time to time; or where, subsequent to the completion of any assessment roll, the Assessor finds that any property or other basis of assessment has been assessed for less than the amount for which it was liable to assessment, he shall assess the same on a supplementary roll, or further supplementary roll, subject to the conditions of assessment governing the roll on which the same should have been assessed.

The meaning of section 76 is to be ascertained by placing the emphasis on the words "subsequent to the completion of any assessment." Those words so modify "finds" as to require that the Assessor find all the following objects to have occurred subsequent to the completion of the assessment roll in question. The consequence is that in order to come within the first part of section 76, the Assessor must find at the designated time-that is, subsequent to the completion of the assessment roll in question-( 1) that there is the liability to assessment of the property or basis for assessment, and (2) the absence from the roll. Similarly, to come within the latter part of section 76, the Assessor must learn subsequent to the completion of the assessment roll in question, (1) not only the amount for which the property was liable to assessment, (2) but also that there has been an assessment for a lesser amount. Crown Zellerbach has appealed on alleged error in the 1961 supplementary assessment but has not obtained the finding of fact to take the assessment outside section 76. The appeal therefore fails.

Crown Zellerbach further contends that the main assessment roll for 1961 having been completed and again affirmed by the Board on appeal on the 15th of June and 28th July, 1961, thereby became binding and conclusive so as to preclude the supplementary assessment being made thereafter in October of 1961. It appears from the stated case that the Assessor made the supplementary assessment in October, 1961, whereas the Board before that, by its findings of the 15th of June and 28th of July, 1961, had affirmed the main assessment roll, which assessment roll was obviously completed before the findings of the Board. Crown Zellerbach argues (1) that the assessment roll as completed by the Assessor is "valid and binding upon all persons" by virtue of section 80 of the *Taxation Act*, and (2) that after the findings of the Board of the 15th of June and the 28th of July, 1961, the main assessment roll was "final and conclusive" by virtue of section 50 (2) of the *Assessment Equalization Act*. Presumably the contention is that the assessed value for 1961 is that stated in the main assessment roll for that area, and therefore

the Assessor is precluded from saying under section 76 of the *Taxation Act* that the lands have been "assessed for less than the amount for which it was liable to assessment." That contention should not succeed.

While section 80 of the *Taxation Act* provides that the assessment roll as completed and certified by the Assessor is valid and binding, on the other hand section 76 of the *Taxation Act* expressly provides that "subsequent to the completion of any assessment roll" the Assessor shall make a supplementary assessment in the events specified. Therefore, section 76 expressly provides that the supplementary assessment roll may be made after section 80 declares the main assessment roll to be valid and binding. Under these circumstances, section 80 should be construed as the general provision to which section 76 is a particular provision and an exception thereto; by such construction any conflict is precluded. Similarly, section 50 (2) of the *Assessment Equalization Act* is to be construed the general provision declaring the main assessment roll to be "final and conclusive," to which section 76 of the *Taxation Act* is to be read as the exception. In the result. the conclusiveness of the main assessment roll under section 80 of the *Taxation Act* or under section 50 of the *Assessment Equalization Act* does not preclude the supplementary assessment under section 76 of the *Taxation Act*. The appeal of Crown Zellerbach against the supplementary assessment therefore fails.

In the second appeal the Assessors have appealed to this Court from the findings of the learned trial Judge on Questions 4, 5, and 6 of the stated case, which read as follows:

> "4. Was the Board correct in finding that the former policy of the Assessors in allowing a discount in determining assessed value of timberlands, known as the 'wholesale concept,' resulted in assessment on the basis of value to the particular owner, but in reverse?
>
> "5. Was the Board correct in finding that the method of allowing a discount on a regional basis adopted in the 1962 taxation-year is a correct method to adopt in determining the value of the appellants' lands for assessment purposes?
>
> "6. If the answer to Question 5 is in the affirmative, was the Board right in finding the exclusion of the timberlands still owned by the Esquimalt and Nanaimo Railway Company from the calculation of the discount allowed in respect of Taxation Department Zone 'D' of the Vancouver Forest District for the taxation-year 1962 to be correct?

Questions 4 and 5 raise the issue as to whether the wholesale concept or the regional basis should be adopted in computing the assessed value. On these questions the Board affirmed the assessment; on appeal therefrom the learned trial Judge held that the wholesale concept was the proper method. From that finding of the learned trial Judge the Assessors have appealed. In both methods-namely, in the wholesale concept and in the regional basis-the Assessor computes the weighted average stumpage on sales for the year in question, and the actual timber on a particular parcel at such weighted average stumpage would produce the amount which the reasonable purchaser would expect to receive from the actual timber. However, that amount would be realized not immediately, but over the future operations, and hence raises the problem of finding the present value of this money to be realized in the future depending upon the number of years over which the operations are to be taken to continue. The difference between the wholesale concept and the regional basis is in the number of years over which the operations on each particular parcel are deemed to continue. Under the wholesale concept the Assessor takes the total timber on the parcel over the owner's actual production in that year as denoting the number of years that the operations will continue. Under the regional basis the Assessor takes the total timber of the district over the average annual production of the district as denoting the number of years that a reasonable purchaser would expect the operations on a parcel in that district to continue and a discount allowed on that basis-according to a table (Exhibit 6). The valuation to be made on assessment is defined by section 37 (1) of the *Assessment Equalization Act* (*supra*), which reads as follows:

> 37. (1) The Assessor shall determine the actual value of land and improvements. In determining the actual value, the Assessor may give consideration to present use, location, original cost, cost of replacement, revenue or rental value, and the price that such land and improvements might reasonably be expected to bring if offered for sale in the open market by a solvent owner, and any other circumstances affecting the value; and without limiting the application of the foregoing considerations, where any industry, commercial undertaking, public utility enterprise, or other operation is carried on, the land and improvements so used shall be valued as the property of a going concern.

Under the stated case the Court is restricted to a question of law (section 51 (1), *Assessment Equalization Act*), and that would restrict the opinion of the Court to

(1) the construction of section 37 (1). In *The Tp. of Tisdale* v. *Hollinger Consolidated Gold Mines Ltd.* (*supra*), Cannon, J., delivering the judgment of the Court, said at page 323:

> The construction of a statutory enactment is a question of law, while the question of whether the particular matter or thing is of such a nature or kind as to fall within the legal definition of its term is a question of fact.

and in *Loblaw Groceterias Co. Ltd.* v. *The City of Toronto* (*supra*) the facts found brought the valuation within the section. Davis, J., at page 254 said:

> . . . we are bound to determine upon the proper construction of the amendment whether or not, upon the facts stated, the land and building are caught by the increased rate of assessment.

(2) any error in principle, as, for example, in considering a fact excluded by authority: *R.* v. *Penticton Sawmills Ltd.* (1954) 11 W.W.R. (N.S.) 351 (B.C.C.A.) per Sloan, C.J.B.C., at page 356:

> We are not, however, in this appeal, troubled with the actual assessment in terms of quantum, but whether or not the assessor erred in principle in adopting as a guide to values the upset price of timber sales, subject, of course, to his adjustment of his assessments as differing circumstances demanded.

It would appear that the wholesale concept is in error in that it is based on the value of the parcel to the actual owner, whereas section 37 (1) requires the valuation be made on the exchange value or the value to the prudent purchaser. In *Sun Life Assurance Co. of Canada* v. *The City of Montreal* (1950) S.C.R.220, Taschereau, J., said at page 241:

> In *Grierson* v. *City of Edmonton* (1917) 58 S.C.R. 13, Sir Charles Fitzpatrick, C.J., with whom all the Members of this Court concurred, said:
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> > "Speaking generally, the intrinsic value of a piece of property must necessarily be the price which it will command in the open market."

Rand, J., at page 249:

> The error of the assessment made lies in the fact that actual value has been virtually identified with value to the owner. That is clear from the influence on the percentage applied to construction cost of the special features as owner interests. Although the rule in expropriation would take their peculiar value to the owner into account as the assessor has done, that rule has no place in assessment: *Montreal Island* v. *Laval des Rapides* (*supra*) at p. 307. For the purposes here, those values must be subjected to the competitive test.

and Estey, J., at page 252:

> Actual value must be, except where there is a market in which the exchange value may be ascertained, a matter of judgment exercised after determining every item that affects the value of the particular immovable under consideration. *The Bishop of Victoria* v. *City of Victoria* (1933) 4 D.L.R. 524; *Massachusetts General Hospital* v. *Belmont* (1919) 233 Mass. 190 at 191.

and in the Privy Council (1952) 2 D.L.R. 81, Lord Porter, at page 88, said, as to the assessed value:

> In *Lord Advocate* v. *Earl of Home* (1891) 28 Sc. L.R. 289 at p. 293, Lord M'Laren said: "It means exchangeable value-the price which the subject will bring when exposed to the test of competition."
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> This method of approach is often referred to as the "willing buyer and willing seller" principle. . .

In *Canadian National Railway Co. et al.* v. *Vancouver (City)* (1950) 2 W.W.R. 337, O'Halloran, J.A., at page 341, emphasized the importance of obtaining the assessment value by objective test; that is, the value to the reasonable purchaser rather than by subjective test, the value to the actual owner. In *Re Assessment Equalization: Re Appeals of Shell Oil Company of Canada Limited and Standard Oil Company of British Columbia* (1962) 38 W.W.R. (N.S.) 695, Wilson, J.A., in construing section 37 (1) of the *Assessment Equalization Act*, the section here in question, said at page 699:

> It is argued that the valuation involves attributing to the properties value to the owner, a concept. which is only valid in expropriation cases (see *Montreal (City)* v. *Sun Life Assurance Co.* (1950) 2 D.L.R. 785, (1951) W.N. 575, affirming (1950) S.C.R. 220). The fallacy in the argument is this--that the special value considered here is not just value to the one owner at the time of assessment, it is a value to any owner at any time.

and said at page 700:

> In *C.N.R.* v. *Vancouver (City)* (1950) 2 W.W.R. 337, 67 C.R.T.C. 270, the "value to the owner" concept was very properly rejected, and I have not accepted it here. "Value to the owner," in so far as it has been held in opprobrium, means value to one owner, not just to any owner, and the value here is a value to any owner.

Hence the wholesale concept is based on an error in principle; that is. the value to the particular owner. That is stated in Question 4 to have "resulted in assessment on the basis of value to the particular owner, but in reverse," which probably means that under this method the owner could reduce his taxes by reducing his output below that of the reasonable purchaser. The regional basis contains no error in law. The method of ascertaining the actual value is stated in *Montreal* v. *Sun Life Assurance Co. of Canada* (*supra*) where Lord Porter at page 88, in quoting *Lord Advocate* v. *Earl of Home,* said, "This method of approach is often referred to as the 'willing buyer and willing seller' principle": the principle to be applied is there expressly stated. But what would be considered by such "willing buyer and willing seller" is a question of fact, or, as stated in *Sun Life Assurance Co. of Canada* v. *The City of Montreal* (*supra*) by Estey, J., at page 252, "a matter of judgment exercised after determining every item that affects the value of the particular immovable under consideration." Being a matter of judgment, the amount of the actual value and what the willing buyer and seller would consider in estimating the value are questions of fact which are initially for the Assessor, and on appeal for the Court of Revision and the Assessment Appeal Board, but not being questions of law are not issues for the learned trial Judge or for this Court on a stated case where the jurisdiction is restricted to a question of law.

Crown Zellerbach contends that the reasonable buyer would discount future receipts to find their present value; hence the Assessor, in allowing a discount of 8 per cent or other rate according to Exhibit 6, was repeating the discount previously made by the reasonable purchaser and was in error. What the reasonable buyer would consider and the weight thereof by discount or otherwise are questions of fact, and not questions of law for this Court. To find error or correct this alleged error, the Court would have to try issues of fact, which it may not do on the stated case.

Crown Zellerbach also contends that the Assessor in finding the actual value may not consider the average stumpage realized in the district in the assessment-year. That is not open to argument after *R.* v. *Penticton Sawmills Ltd.* (*supra*). Whether the reasonable buyer would consider the average stumpage in the district and the weight to be attached thereto are essentially questions of fact and not for this Court on a stated case. It follows that there is no error of law, and the Assessors were acting within their powers, as were the Court of Revision and the Assessment Appeal Board, in accepting the regional basis.

As to Question 6, Crown Zellerbach contends that in computing the average rate of production in a year the Assessor wrongfully excluded the timberlands held by the E. & N. Railway Company and by the Crown. Those were excluded for the reason that such lands were not liable for taxes and were not used by those owners to produce timber. However, the Assessor did take into consideration in computing the average rate of production such timber lands when purchased from the E. & N. Railway Company or from the Crown, as the timberlands at that time became liable to tax, and the purchaser, as a reasonable man, might be taken, in fixing his price; to have had regard to the present value of the future moneys to be realized from production. The number of years over which production may be expected is essentially a question of fact. The issue is the amount of the "actual value," and that is a question of fact. It was so held in *Dreifus* v. *Royds* (1922) 64 S.C.R. 346 at page 349; *R. ex rel Inter-City Gas Ltd.* v. *Municipal Assessment Equalization and Appeal Board* (1959) 30 W.W.R. (N.S.) 167; and in *Re The Western Life Assurance Co. and The City of Toronto* (1940) O.W.N. 176, Robertson, C.J.O., at page 178 said:

> The initial difficulty in the way of this Court giving effect to this contention is that the question is primarily a question of fact, and it is not within this Court's province to decide it under section 85 of *The Assessment Act*.

and see *R.* v. *Penticton Sawmills, Ltd.* (*supra*).

In this issue there is no question of law for this Court. It does not depend upon the construction of the section (37 (1), nor is there a matter of principle.

In conclusion. the appeal of Crown Zellerbach on the supplementary assessment for 1961 is dismissed; the answers to Questions 4, 5, and 6 relating to the 1962 assessment should be in the affirmative; and the appeal of the Assessors from the finding of the learned trial Judge thereon is allowed.