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MacMILLAN BLOEDEL

v.

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

Supreme Court of British Columbia (No. X314/67)

Before: MR. JUSTICE P.D. SEATON

Vancouver, June 29, Aug. 28, 29, 30, 31, and September 1, 1967

L.G. McKenzie, Q.C. and K.C. Murphy for the appellant assessors
C.W. Brazier, Q.C.

Reasons for Judgment (1) (Oral) June 29, 1967.

I suggested to counsel that they were not obliged to stay. As this progresses, that invitation remains. I will not be offended if you find it is getting too lengthy and leave.

The respondent raised two preliminary objections: Firstly, that no question of law is raised, and, secondly, that the form of the ,case is objectionable.

I have been tempted to reserve my decision so as to examine more closely the practice applicable on a stated case under the *Assessment Equalization Act* as a decision on the form of stated cases would probably be very useful. I would hope that counsel might consider appealing this decision so as to get an authoritative ruling on the matter of the form to be adopted.

I understand that there are other cases awaiting a decision in this one. I cannot ignore the possibility or probability that this case still has a long course to follow, and should be started on that course as soon as possible. With this in mind, I think I am obliged to deal with the matter now. I note that the Court of Revision in this case sat in March of 1966, and I should not wish to add to the delay that has been experienced in the past. For these reasons I will not reserve, but will deal with the matter now. I will go into some detail and will probably err on the side of prolixity, for three reasons: Firstly, I think it is of sufficient importance to warrant that course being followed; secondly, I have already expressed the hope that there might be consideration given to an appeal; and, thirdly, it would be unfair to the Board to remit the case without spelling out clearly the grounds on which it is remitted.

The first objection is that no question of law is raised. Section 51 (2) of the *Assessment Equalization Act* allows appeal on a question of law only. The principles one is to apply in determining whether an issue is of fact or law or mixed fact and law have been stated many times. There are also many examples of the application of those principles. Under these circumstances the task should be relatively easy, but I find that that is not the case. I have read most of the decisions under this legislation and find that in some, questions of a similar nature to those posed here have been answered, and in others they have been rejected as not relating to

law alone. This indicates the difficulty inherent in this question, and it also indicates that the same question may well raise a question of law alone or a question of mixed fact and law.

The distinction was discussed by Mr. Justice Sheppard in *Crown Zellerbach Canada Limited* v. *Assessment Districts of Comox, Cowichan, and Nanaimo*, which is Case 36 in British Columbia Stated Cases at page 184:-

> 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
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> > (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."
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> > (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 is conceivable that some of the questions in this stated case could relate to the construction of the relevant section of the Act or to an error in principle.

While the form of the questions here is so general as to prevent one knowing the precise point to be argued, I would infer from the submissions of counsel on the preliminary point that issue is taken with the method of finding actual value. Under most circumstances that would certainly be a question of fact.

I read from the judgment of Mr. Justice Sheppard in *Vancouver* v. *Richmond*, Case 14 of British Columbia Stated Cases at page 58:-

> It therefore follows that in the circumstances of this case the" actual value" is a question of fact and not one of law to be determined from the Statute. That conclusion is supported by authority. In *Dreifus* v. *Royds* (1922) 64 S.C.R. 346, the Chief Justice, in construing a comparable section, said at pages 348 and 349:
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> "I am of the opinion that in a question of this kind as to the 'actual value' of lands for purposes of assessment this Court would not and should not interfere with the finding of fact as to such 'actual value' if there was any evidence to sustain that finding. The Board is constituted of men of experience on questions of this character. They have the great advantage of visiting and viewing the lands in question, and of seeing and hearing the witnesses who may be called to speak to its value. Unless, therefore, the Board misdirected themselves on the proper principles which should govern them in determining this 'actual value,' or obviously reached their conclusions as to such value by adopting and following some wrong or improper principle, this Court would not and should not interfere with their findings."

> In *Re Coniagas Mines Ltd. and Town of Cobalt* (1910) 20 O.L.R. 322, Moss, C.J.O., at page 325 said: ". . . and the question of the value is simply a question of fact. . ." Further, the "actual value" being here a question of fact is within the jurisdiction of the Assessment Appeal Board under Part VIII of the Statute, but on the other hand is outside the jurisdiction of the learned Judge of first instance who, acting under a stated case, is by section 51 (1) limited to "a question of law arising in connection with the appeal." Hence the assessment by the Board at $600 per acre not being a question of law was not subject to review by the learned Judge, and that assessment should be taken to stand unvaried.

Each of the questions here is preceded by the words "Did the Board err in law?", and it is suggested that this poses the issue as an issue of law. A somewhat similar device was used in the *District of West Vancouver* v. *Park Royal Shopping Centre*, Case No. 35 of the Stated Cases of British Columbia, page 154. Notwithstanding that method of phrasing the questions, it was decided that the preliminary objection that they were questions of fact should succeed. In the instant case the questions are less detailed, and, therefore, less revealing on this issue, and I think the case must be distinguished on that ground. The question put in *Pacific Western Airlines Limited* v. *The Corporation of the Township of Richmond*, Case 42, British Columbia Stated Cases, page 210, is somewhat similar, but, again, the question was more specific than we have here, and the Court was able to conclude whether or not the question was one of law.

In *Whitehouse* v. *Burnaby*, No. 37 of the Stated Cases of British Columbia, page 188, this question was dealt with in argument generally. I think that is the method that will have to be employed here, because I am unable to say that no question of law is raised.

One of the difficulties that has already been referred to is that the questions are so general that the issues are not made clear. I will deal with that matter on the second objection raised by the appellant. I would expect that the stated case should sufficiently identify the question so that one can determine whether it is a question of law or not.

The first question is as follows: "Did the Board err in law in finding that the assessed value of the forest lands of the appellants had not been determined in accordance with section 37 of the *Assessment Equalization Act*, pursuant to section 31 of the *Taxation Act*?"

It may well be that this raises a question of the construction of section 37 of the *Assessment Equalization Act* or section 31 of the *Taxation Act*. It may also be that this raises a question of error in principle of law. I would doubt that any of the other questions posed raises an issue of law.

As I find that the first question may raise an issue of law, and that on that account the matter must go ahead, I think that it would be best not to eliminate individual questions at this stage. This issue, I think, can best be determined after hearing the argument of the appellant as to the error of law alleged. The first objection, therefore, does not succeed.

The second objection is to the form of the case, and I think I should discuss that, as I intend remitting it. Merely to remit the case without any indication of its shortcomings would be less than fair to the Board. Paragraphs 6, 7, 8, and 9 recite evidence; for example, paragraphs 6 and 7 commence "The timber land appraiser's evidence was. . ." A similar approach is used in all the paragraphs mentioned, although paragraph 8 is somewhat less offensive, as it concludes "The Board upheld this view."

I think the point is well taken that evidence should not appear, as it does, in these paragraphs. If that were the only complaint, I would be inclined to ignore those portions of the case rather than remit it.

The timber-land appraiser's method of appraisal did not win the acceptance of the Board, and therefore I think that it has no place in what is entitled "The facts are as follows." While the contentions as to the rejected methods of assessment are put forth in detail, the findings on which the Board reached its conclusion are rather briefly set out in an excerpt from the Reasons for Judgment in paragraph 16. Paragraphs 12, 13, 14, and 15 are largely devoted to citing rejected contentions. These hardly constitute facts or conclusions of the Board.

It would appear to me that the difficulty experienced in preparing the facts in this stated case arises from the same source as my difficulty in determining whether there is a question of law raised. The questions are so vague and so general that the Board is unable to say which facts relate to the questions raised. Counsel for the appellant said that the predicament was that the case was extremely involved and complicated. It seems to me that in that case the form is even more important, and it should help to isolate the questions of law to be dealt with.

No exception is taken by the respondent to the first five paragraphs, which recite the background and the facts. Nor is exception taken to the reference in the case to pages in the transcript. The form of a stated case is difficult, particularly where, as here, one is dealing in a complex field. Nevertheless, I think that evidence should not be set out. I think that what was said in *Rex* v. *Moroz* 83 C.C.C. 239 at pages 263 and 264 has application:

> The requirement that the facts of the case shall be set forth is not met by a mere recital of the evidence, as in this case. What is contemplated is that the case shall set out the facts as found by the Magistrate: *R.* v. *Thomas* (1942) 1 D.L.R. 208, 77 Can. C.C. 94. See also Tremeear's Criminal Code, 5th ed., pp. 659-6; Crankshaw's Criminal Code, 6th ed., p. 920, note 11, p. 921, note 19; Seager's Magistrates' Manual, 2nd ed., p. 127; Stone's Justices' Manual, 59th ed., p. 115, note (r); 3 C.E.D. (Ont.), p. 261; *R.* v. *Marion* (1922) 42 Can. C.C. 347, 35 Que. K.B. 503; *R.* v. *Gray* (1903) 68 J.P. 40; 5 Encyclodaedia of Court Forms and Precedents in Civil Proceedings, p. 80; *R.* v. *DuBois* (1919) 30 B.C.R. 394.

This point is very clearly stated in *R.* v. *Gaines* (1908) 43 N.S.R. 253 at pages 256 and 257, as follows:

> In stating a case under the statute the facts of the. case and the grounds on which the proceeding is questioned must be set forth. This means the findings or conclusions of the magistrate upon the whole evidence, and not merely the evidence. The case before us says the evidence disclosed so and so, and there was evidence that, etc., and it was testified, etc. This is not enough. Boulton, on the Law and Practice of a Case Stated, at page 66, says: "Care should be taken to state facts, and not merely evidence from which facts are to be inferred." The facts should be stated simply and clearly, and not merely the evidence from which the facts are to be inferred. In *Bishop* v. *Toler* (1895) 65 L.J.M.C. 4, Lord Russell, C.J., said:
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> "I wish to add that the form in which this case is presented to the court is not the correct form. The learned magistrate has apparently dictated to his clerk a copy of the notes of evidence, and then at the end has stated his conclusion upon the issue involved. This is not the correct form in which to present a case. The magistrate is bound to state, not the evidence given before him, but the facts which he finds to have been proved before him."

This whole matter is very neatly summed up in Seager's Magistrates' Manual, 2nd ed., page 127, as follows:

> It is improper to send up the whole body of the evidence, and ask the court to say whether it justifies a conviction. The essential facts as found by the justice, and the effect of the evidence given, or extracts from it. which he justice has found to be true, should be given: *R.* v. *Cohon*, 6 Can. Cr. Cas. 386; so the forwarding of the whole of the depositions, and

> asking the court whether there is any legal evidence to sustain a conviction, is not the proper course: the justice must certify his findings of fact, and then specify the points of law in question: *R.* v. *Giles*, C.L.J. 33: *R.* v. *Letang*, 2 Can. Cr. Cas. 505.
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> The Appellate Court has to take the facts to have been proved as the justice has found and stated them to be, and decide the points of law in the light of those facts and those only: *R.* v. *Cohon*, *supra*.
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> The proper course is to submit a point or points of law and not to seek the opinion of the Court upon the evidence generally as to its sufficiency to support the conviction: *R.* v. *Brennan*, 6 Cox CC. 381.

In a case such as this, I think the Board should set out the method employed in reaching its conclusion where the method is challenged as contrary to the Statute. I do not see any useful purpose in setting out the methods that were contended for and rejected.

I would think that a little greater latitude should be given in a stated case under this Statute than under some other circumstances. In *North and Southwestern Junction Railway Co.* v. *the Assessment Committee of the Brendford Union and Overseers of the Poor for the Parish of Acton* (1888) 13 A.C. 592 at page 594, Lord Halsbury said:

> All he can remit to any court to assist him is a question of law and he must in that case affirmatively find the facts upon which the question of law depends.

I would suggest that in a case such as this one the Board should go further and set out the principles it applied, but not the principles it rejected.

It was next objected that 14 volumes of evidence and argument were tendered pursuant to section 51 (5) of the *Assessment Equalization Act*, which requires that a copy of the evidence dealing with the question of law shall be filed.

Again, on this issue, I think the real difficulty is that the questions are so vague that one cannot determine what evidence relates to the question propounded. It may be that the whole of the evidence relates to the question of law raised, but I doubt that that is the case. Until the questions are clarified, I would be unable to say that the Board was wrong in forwarding the whole of the evidence, although I think the restricted use of such evidence should be kept in mind in determining what evidence shall be filed. This matter was dealt with in the Crown Zellerbach case in the Court of Appeal previously referred to. Mr. Justice Wilson (now Chief Justice Wilson) said, at page 167, with reference to the use of evidence:-

> 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 *Rex* v. *McDonnell* (1934) 63 C.C.C. 150, where Harvey, C.J.A., at page 151, said this:
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>> "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 Code, the Court of Appeal has nothing to do with 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."

Mr. Justice Davey (now Chief Justice of British Columbia) in the same case, at page 173, dealt with the use of evidence:-

> It is desirable at this stage to determine what use may be made of the evidence the Board is required to return with a staled 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 (If 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 question of law raised by the stated case.

It may be that with this in mind the Board will find that somewhat less than 14 volumes is needed in this case, but I think it would be inappropriate for me, before hearing argument, to decide that the present filing is excessive. I would hope that the Board will be able to frame the questions so as to isolate the questions of law to be dealt with. Question 1 I have already read.

In West Vancouver and Park Royal Shopping Centre, Mr. Justice Brown referred to an initial question "as a sort of skeletal basis of appeal to be fleshed out by the specific questions." The first question here might be appropriate on that basis, but it is not "fleshed out" by the succeeding questions. If it were I should still think that it is putting a question in relation to the Assessor's determination and their view of it, whereas a question of law should relate to the Board's determination.

Question 3 is as follows: "Did the Board err in law in finding that the previous cases cited in argument are wholly distinguishable on principle from the present case?"

The case does not reveal "the previous cases cited in argument," and I would doubt that it should. It might be useful if the case cited the principle applied in this case, and then asked whether or not that principle was in accord with the sections in question.

Questions 2 and 4 would seem to relate to issues of fact. That is a matter that can be dealt with on the hearing.

Question 5 is, "Did the Board err in law in finding that forest lands are subject to school taxation?" Earlier in paragraph 18 this is recited to be an inadvertent error. I would hope that the Board could correct an inadvertent error in another way, and a less cumbersome way.

In *Transmountain Oil Pipeline Company* v. *Hope* in British Columbia Stated Cases, No. 46, page 237, Mr. Justice Davey (now Chief Justice of British Columbia) said:

> The questions raised by the stated case appear to be matters of fact and of mixed fact and law, and the case itself does not explicitly state the question of law on which the opinion of the Court is sought; it will not be helpful to recite the questions. In my respectful opinion, it, would have been better in the first instance to have remitted the case back to the Board to have the questions properly propounded and to state clearly the points of law to be decided. But that was not done, and in my opinion, the appeal having reached us in its present form, we ought to decide the questions of law that emerge from the reasons of the Board, which form part of the case, as was done by the Ontario Divisional Court in *Re Canada Co. and Township of Colchester North* (1916) 38

O.L.R. 183. But I express the hope of Meredith, C.J.C.P., in that case that the form of the case may not be adopted as a guide in the future.

I think I would not be fair to the parties or the Courts to disregard the suggestion just quoted. I conclude that the stated case here does not explicitly state the question of law on which the opinion of the Court is sought, and therefore I remit the case to the Board, pursuant to section 51, subsection (6), of the *Assessment Equalization Act*. I would express the hope that the Board will find it is possible to state the questions more specifically. Counsel for the appellant indicated that the primary issue was whether or not it was appropriate to make a blanket 10-percent reduction. If that is the issue, it might be useful if the questions were posed in that form. If it is suggested that certain principles were applied that should not have been applied, it would be useful if those principles were spelled out and questioned.

While I appreciate the very difficult task imposed on the Board by the form of appeal authorized by this Act, I feel obliged to ask that an attempt be made to revise it in accordance with the various authorities I have cited.

I have already advised counsel that 1 would be agreeable to the matter being heard during long vacation, so that the time lost as a result of this order will be minimal.

Reasons for Judgment (2) September 28, 1967.

This appeal by way of stated case from the Assessment Appeal Board first came before me on June 28, 1967. At that time the respondent objected to the form of the stated case, and I remitted it for amendment. After further hearings before the Board, the case was wholly restated and this hearing was resumed on August 28, 1967. On the second day of the resumed hearing, counsel for the appellant indicated that he found a number of objectionable features to the case as restated. He declined to apply to have the case remitted for further amendment but did suggest that this might be necessary as the matter progressed.

That great difficulty has been experienced by the Board and counsel in the preparation of this case is not unique. Indeed, it seems to be normal. A stated case in many instances is an appropriate method of appeal, but there are other cases in which it creates difficulties. If section 51 (2) of the *Assessment Equalization Act* offered an alternative mode of appeal (by notice of appeal and the filing of the transcript and reasons of the Board), much less difficulty would be experienced by the Board, counsel, and the Court. There would not appear to be any useful purpose in requiring the appeal to be by way of stated case. Having conceded that the Board has a difficult, if not impossible, task assigned it in the preparation of the stated case, and recognizing that in the instant case the Board and counsel have attacked this task thoroughly and ably, I must conclude that the Act has been substantially complied with.

I intend briefly stating the complaints of counsel for the appellant so that they are on record. Several of the criticisms were of a minor nature and might have been avoided if the Board had submitted a draft of the case to counsel and invited further observations.

The first objection is to paragraph 8. That paragraph suggests that the rating factor was applied after the 50-per-cent statutory reduction from actual value. Counsel agreed that that was not the procedure employed and prepared a revised paragraph 8.

The second objection was that paragraph 6 of the stated case might imply that the holder of a timber lease or licence has an obligation to log. That is not the case, and I think that one could only fall into error if paragraph 6 were read alone. The reading of the balance of the stated case makes it abundantly clear that freedom of action is one of the valuable attributes of forest lands.

In paragraph 10 new language is added to the Board's reasons for judgment. When the reasons are read in conjunction with paragraph 10, it would seem that the additions are minor and are probably less cogent than the deletions.

Paragraph 12 of the stated case summarizes the distinctions between forest lands and timber sales and omits to refer to one of the distinctions--namely, the impact of taxation. This factor is referred to in the reasons for judgment and in paragraph 23 of the stated case. The failure to refer to it in each paragraph does not seem to me to be of consequence.

In paragraph 13 of the stated case the Board has changed the wording from the reasons for judgment's "no other indicia of value" to "no other information was available." Probably the reasons for judgment were a more accurate statement of the position, but I think the distinction between the two is of little consequence. I do not think the Act restricts the Board to reciting its reasons for judgment in an appeal by stated case.

There were a number of other observations by counsel for the appellant as to failings in the stated case, most of which do not deal directly with the issues under appeal. Counsel was concerned that any statement in the reasons for judgment with which the appellant disagreed could be challenged so as to avoid it becoming binding on Courts of Revision. These statements in most cases were obiter and turned on the evidence. For those reasons they would not be binding on the Board or Courts of Revision in future cases.

By error the Board referred to school taxes being applicable, but I do not think it necessary to appeal in order to correct an obvious error acknowledged by the Board when that error does not affect the result.

There were a number of questions put, and it is objected that some of the questions proposed by the appellant were not included. I have not seen the notice of appeal, but would think that any question raised in the notice of appeal should appear in the stated case to ensure that the appellant is able to attack the decision on the points of his choice. In my view the questions put in this case are so broad as to encompass any of the proposed questions, and I think the case need not be remitted to change the form of the questions.

The respondent objected that the issues were of fact, not law. That question was not capable of being dealt with at the outset and was argued in the appeal generally. For the same reason it is not dealt with independently in these reasons.

The assessments in question relate to 319 timber licences and timber leases. They are "forest land" within the meaning of that term assigned by section 2 of the *Taxation Act*, R.S.B.C. 1960:-

> "forest land" means any land included in a timber lease or timber licence issued under any Act of the Legislature or the *Lands Act* of Canada, or any regulations thereunder, for which a stumpage, as defined in the *Forest Act*, has not been reserved or not made payable to the Crown in right of the Province, which is so held for the specific purpose of cutting and removing timber therefrom, or as an investment for the accruing value of the timber thereon, and for no other purpose while so held, and which has been classified as forest land for taxation purposes under this Act by the Assessor after he has received from the lessee or licensee all certificates required by or under this Act;

The nature of this tenure is dealt with in paragraph 6 of the stated case as follows:

> 6. The holder of Forest Lands purchases the timber for a fixed price. The lessee enjoys a tenure of twenty-one years and the licensee a varying tenure depending on the terms of the licence, Within the allotted terms the holder has the right to determine the most profitable time for cutting, having regard for his own requirements. The holder must observe all requirements of the *Forest Act* and must log the timber in accordance with the

> directions of the Forest Service. In addition, the holder pays a real property tax on the timber for general purposes as well as the forest protection tax. He also pays an annual rental and royalty when timber is scaled. This is allowed for in the assessment. He assumes all the risks for loss due to fire, windstorm, infestation and any damage which occurs during the transport of logs to the mill or point of sale, which may be some considerable distance from the timber source. When Forest Land has been completely cut there is no residual quota right remaining to the holder and the land reverts to the Crown.

It should be noted that there is no obligation to cut at any time or at all.

The method of assessment employed by the Assessors is indicated in revised paragraph 8 of the stated case as follows:

> 8. The Assessors purported to determine the actual value of all Forest Lands of the Companies for 1966 pursuant to sections 31 and 35 of the *Taxation Act* and section 37 of the *Assessment Equalization Act* on the basis of the weighted average stumpage prices of all Crown timber sales and available cutting permit prices within the relevant appraisal zones for the year ending July 31st, 1965, less allowance for royalty subject to local allowances known as "ratings" to show variation above or below the normal base of 100 for variations in accessibility, topography, timber volume per acre and timber quality on each separate lease and licence multiplied by the volumes of timber on such lands. Fifty per cent of the resulting value was, in general, used as the basic assessment.

It might be noted that this was a market approach but in relation to Crown timber sales and cutting permits as distinct from forest lands. The Board found that this was the only sound basis from which to commence the assessment process.
In their reasons for judgment at page 14 they say:

> The essential facts are that the only basis from which to commence the valuation of forest lands is from the actual sales of Crown timber and cutting permits, In the stated case this is expressed somewhat differently, but I think the distinction of no consequence to this decision.

The Assessment Appeal Board allowed the appeal and reduced the assessment by a basic adjustment of 10 per cent. The essence of their decision is found on page 14 of the reasons as follows:

> . . . Forest Lands are an entirely different type of tenure from either Crown Timber Sales or the Cutting Permits and of necessity all those differences which affect value must be recognized in an assessment. The degree of recognition must of necessity be somewhat arbitrary. The impact of real property taxation can be closely calculated, The factor of risk is less easily determined. This risk includes all those inherent in the mere holding of forest land as well as that involved in operation and tram port to the eventual market, whether it be by sale or to the mill owned by the holder. After the most careful and lengthy analysis in the light of nearly 1,500 pages of transcript and argument, the Board is of the opinion that there should be a basic adjustment of 10 per cent to give reasonable recognition to those factors affecting value which have been referred to. This may be found most unsatisfactory to all concerned. The right to hold timber and to cut at such time as suits the owner is undoubtedly of value. The holder of forest land must be presumed to accept the risks of loss through acts of God and the market. On the other hand he does not have the advantage of the limited risks in his operation or the sliding scale provisions granted in a Crown Timber Sale. These two factors combined with the liability for taxation impose an additional burden on the holder of forest land which reduces its capital value when compared to Crown Stumpage.

The Board used the terms "timber sales," "cutting permits," and" cutting rights" as though they were synonymous. As the distinctions are not relevant, I shall do the same.

As the first question is a general one embracing the issues raised in the others, I will deal with it last.

The second question relates to the question of the 10-per-cent adjustment. It is suggested that it constitutes a discount analogous to the wholesale discount and regional discount which have been held to be unacceptable.

Question 2 puts the matter this way:

> "2. Did the decision of the Board violate the principles of law laid down in the decisions in the cases of *Regina* v. *Penticton Sawmills Ltd.* and *Crown Zellerbach (Canada) Ltd.* v. *Provincial Assessors, Districts of Comox, Cowichan, and Nanaimo*?"

I think that the decision in *Regina* v. *Penticton Sawmills Limited* (1954) 11 W.W.R. (N.S.) 351 goes no further than finding that the method of valuation employed by the Assessor in that case was within the methods anticipated by section 30 of the *Taxation Act,* R.S.B.C. 1948. That section now appears as section 37 (1) of the *Assessment Equalization Act*, R.S.B.C. 1960, with changes which are not significant here. I do not think that decision precludes the Board from arriving at actual value by other methods. The decision was referred to by Sheppard, J.A. (*per curiam*), in *City of Vancouver* v. *The Corporation of the Township of Richmond*, Case 14, British Columbia Stated Cases, 53, at page 58:

> It is to be observed that section 37 (1) in designating the items which may be considered, uses language that is permissive and not mandatory, and it is therefore open to the Assessor or others concerned in fixing the value, to consider one or all of those designated items, but it is not obligatory to do so. That was stated in *R.* v. *Penticton Sawmills Ltd.* (1954) 11 W.W.R. (N.S.) 351, where Chief Justice Sloan, in construing an equivalent section, said at page 353:
>
>> It seems to me that section 30. in its present form, clothes the Assessor with a very wide and flexible discretion as to the methods he may pursue in his determination of ' actual value.'"

It is suggested by the appellant that *Penticton Sawmills* and other cases require that the assessment relate to the particular land. This conclusion is validly drawn from the reasons of 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. If the upset price was a mere arbitrary figure with no relation to reality, some criticism might be directed against its use even as a guide. but it is a price arrived at only after a prolonged and careful study of all physical and other factors.

It is the submission of the appellant that a blanket reduction of 10 per cent to these 319 parcels makes no allowance for the differences between them. I do not think this criticism is valid when one examines the whole of the procedure employed.

All of the differences between the various parcels arc taken into account by the Assessor prior to the application of the 10-per-cent adjustment. He has taken into consideration variations in accessibility, topography, timber volume per acre, timber quality, and all other factors except the nature of the tenure. In my respectful opinion the application of the to-per-cent adjustment does

not result in a value which fails to take into account differing circumstances. Indeed, had the Board failed to make an adjustment as between forest lands and other holdings, it would have been in breach of the prohibitions referred to in *Regina* v. *Penticton Sawmills* (*supra*). The 10-per-cent adjustment is a recognition that the method of holding the land is a differing circumstance. All other factors having already been taken into account, an adjustment on a percentage basis is the only appropriate method of allowing for this circumstance which these parcels have in common. If each of the 319 parcels were considered separately and different adjustments arrived at, I would think that the value of the individual parcels could not be said to bear a fair and just relation to the value of other parcels as is required by section 46 (1) (a), *Assessment Equalization Act*, R.S.B.C. 1960, amended 1961 S.B.C.

I do not think it can be concluded that the adjustment was arrived at arbitrarily. On the contrary, the Board heard extensive evidence and appears to have considered a difficult matter most carefully and conscientiously. The question of arbitrariness was dealt with by Lett, C.J.S.C., in *Royalite Oil Company Limited* v. *Kamloops Assessment District*, Case 10, British Columbia Stated Cases, 34, at page 40:-

> While it is not open to Assessors or to the Board to make an arbitrary determination of actual value, nor to make determinations contrary to the evidence placed before or available to them, yet the provisions of section 37 (1) of the *Assessment Equalization Act* would appear to give a wider and more flexible discretion to Assessors in the. matter of determining actual value than the provisions of some other Statutes considered by the Courts in assessment cases.

After referring to *Regina* v. *Penticton Sawmills Ltd.*, the learned Chief Justice continued:-

> Having declined to make a deduction for alleged economic obsolescence and recognizing that the assessment on a basis of replacement cost did not take into account "revenue value" or "all other circumstances affecting the value," and in an effort to value the land and improvements so used "as the property of a going concern," the Board adjusted the assessment by making an allowance of 10 per cent. How the allowance of 10 per cent is made up and what percentage allowances the Board may have given to the various "other factors" which resulted in a total allowance of 10 per cent is not disclosed in the Board's decision, and I see no reason why it should be. I think there is evidence which justified the Board in making some allowance. The Board was not bound to accept the 45-per-cent allowance suggested by the appellant for economic obsolescence.

I, therefore, conclude that the decision of the Board did not violate the principles of law laid down in the case of *Regina* v. *Penticton Sawmills Ltd.* (*supra*).

The second arm of the second question deals with *Crown Zellerbach (Canada) Limited* v. *Provincial Assessors, Districts of Comox, Cowichan, and Nanaimo*, Case 36 in the British Columbia Stated Cases, the decision of the British Columbia Court of Appeal also being reported at (1963) 42 W.W.R. (N.S.) 480 and the Supreme Court of Canada at (1963) 45 W.W.R. (N.S.) 442. It appears to me that a significant difference between the Crown Zellerbach method of assessment and the method employed in the instant case is that in Crown Zellerbach a reduction was made after studying the market of the very type of holding being assessed. The method employed was a direct study of timber lands. Once their market price has been established, it is apparent that any discount amounts to a discount below actual value without any justification because the market place has taken all factors into account. In the case of forest lands there is no adequate market to obtain market value. The market value of cutting rights was obtained and an adjustment made to take into account the differences between cutting rights and forest lands. This is quite distinct from determining the actual value of the very thing under review and then taking a discount therefrom. Wilson, J.A. (now C.J.S.C.), made this clear at page 169:-

> 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.

He summed up the discount question at page 173 as follows:

> 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.

Davey, J.A. (now C.J.B.G.), dealt with discounts generally at page 180 as follows:

> 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 timber lands. 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 bas 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.

In my respectful opinion none of the reasoning in Crown Zellerbach has application to the adjustment made in this case. If in the present case there were sufficient data and the Assessor had found a market price of forest lands, there would have been no justification for tampering with that figure.

The discounts were also found to be offensive as having in them a value to owner. In my view the l0-per-cent adjustment is not analogous and does not represent a value to owner concept in any sense. I think, with the Board, that the ,Crown Zellerbach case is distinguishable "on principle and on fact."

It has been suggested that the reasoning employed by the Board here is equally applicable to timber lands; that is, lands held in fee. That matter is not before me and was not before the Board.

I, therefore, conclude that the decision of the Board did not violate the principles of law laid down in *Crown Zellerbach (Canada) Limited* v. *Provincial Assessors, Districts of Comox, Cowichan, and Nanaimo.*

Question 3 reads as follows:

> "3. Did the Board err in law in finding that the limited market evidence of private sale transactions involved factors not related to the actual value of the timber purchased and in disregarding after examination the declared values of such sales while accepting as the starting point to determine value, the evidence contained in Crown timber sales which were found to have an inherent element of value to the owner and cutting permits as a monopoly value?"

While the question tends to shift from subject to subject, the argument indicated that the appellant is challenging the Board's rejection of evidence of private sale transactions. The matter was dealt with in paragraph 10 of the stated case as follows:-

> 10. The Board found that the few sales introduced into evidence could not be used because, without exception, there were factors which entered into the minds of both vendors and purchasers in all sales which were unrelated to the actual value of timber as such including, amongst other factors, the acquisition of special rights and privileges and competitive advantages.

In its reasons for judgment the Board dealt with several sales specifically and said on the subject generally:-

> Detailed analysis of the particulars of the sales referred to extensively by both parties leads the Board to the inevitable conclusion that they must be disregarded.

The Crown tendered evidence of three private transactions and objects vehemently to the rejection of that evidence. They did not base the assessment thereon but claim that these sales are useful as a check to see whether or not they were "in the ball park" (a term used by the Provincial timber appraiser which seems appropriate).
The Klacklahama sale and the Robson Bite sale were made at approximately double the Assessor's actual value. The Seattle Cedar sale was made at about 4 per cent less than the Assessor's actual value. The respondent submitted the Three Valley sale at about half of the Assessor's actual value.

Whether I would have accepted this evidence as useful is beside the point. It did not impress the Board, and the weight to be assigned the evidence is for the Board, not for me. Had the decision of fact been mine, I should have been inclined to conclude that no useful pattern emerged from these sales in relation to actual value as determined by the Assessor. Alternately, one might conclude that the number of sales is too small to be indicative of a market value. It was strenuously pressed that the amount of timber involved was very large. It would occur to me that in determining whether or not a pattern emerges from sales, the quantity of sales as opposed to the quantity of timber involved in such sales would be of the greatest consequence. The Crown relied on *MacMillan, Bloedel* in Case 27, British Columbia Stated Cases, 111. That case turns on the matter of discrimination and section 46 (1) (a) of the *Assessment Equalization Act*. There can be no challenge here on the question of uniformity. The decision is not useful to the problems with which I am concerned.

In my view there was evidence on which the Board could find that the limited market evidence of private sale transactions should be disregarded. The weight to be given this evidence is for the Board. They determine that it deserved no weight and that is for them.

See *City of Vancouver* v. *The Corporation of the Township of Richmond*, Case 14, British Columbia Stated Cases, 53, at page 58, Sheppard, J.A., *per curiam*:

> It was further contended for the Township of Richmond that the Court of Revision in finding the "actual value" had taken as determinative the estimated market value and the original cost of the lands in question and had used the assessed value of the adjoining lands merely as a "check," and therefore the Board was in error in considering the

> assessed value of the adjoining lands not as a mere check, but as determinative of the value of the lands in question in place of the market value or original cost. These two tribunals, the Court of Revision on the one hand and the Board on the other, have differed over the importance of various parts of the evidence about the value of adjoining lands and hence have differed over the weight of evidence. The weight of evidence is a question of fact and is not a question of law (Phipson. 9th Edition. p. 11), therefore is not within the jurisdiction on stated case under section 51 (1).

The second part of the third question is raised collaterally as the starting point therein referred to was accepted and utilized by the Assessors. One of the distinctions between forest lands and cutting permits was the element of value to the owner in cutting permits. That value to owner is to be excluded is not questioned.

Wilson, J.A. (now C.J.S.C.), said in *Crown Zellerbach* (*supra*) at page 171:-

> 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.

No authority has been cited to indicate that the Board must wholly disregard evidence where value to the owner is involved but can be calculated and deleted. Paragraph 13 of the stated case indicates the procedure followed:

> 13. The Board found that. while no other information was available on which to commence the assessment, the very terms of permitted bidding on Crown timber sales introduced factors of value to the particular owner not normally found in open transactions on the free market. This factor was likewise reflected in the adjustment directed by the Board.

This indicates that the Board recognized and excluded the objectionable value in making the adjustment.

The balance of this question covers the same ground as Question 5, and I therefore do not deal with it here. Question 3 is answered in the negative.

Question 4 reads as follows:

> "4. Does the Board's decision constitute an error in law in view of the provisions of section 46 (1), subsection (a) and subsection (b)?"

That section reads as follows:-

> 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
>
> (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
>
> (b) the assessed values of such land and improvements are in excess of the assessed value as properly determined under section 37.

Nothing has been brought to my attention indicating discrimination within the first provision (a), and I therefore turn to the second provision. The appellant alleges that there was no evidence indicating that the assessed values were in excess of the assessed values as properly

determined under section 37 and that the Board had no jurisdiction under those circumstances to vary the assessment. In my view there is evidence on which the Board could conclude that the assessments were in excess of the assessed value as properly determined under section 37. For example, in the evidence of a Mr. Alexander, described in the reasons for judgment as "an expert professional timber appraiser of long standing":

> Q.-In your opinion, Mr. Alexander, is it proper to use the average stumpage rate stipulated in Crown timber sale cutting contracts in the relevant locality in order to value the Crown leases and licences which are the subject of these appeals on a comparative market basis?
>
> A.-No. Such a valuation will result in a value which is in excess of the true market value, or fair market value or actual market value, because the rights and obligations of a purchaser in a timber sale contract are far different to what they are in the purchase for cash of a lease or licence. Part of this comes from the fact that there is a risk of physical destruction which the buyer assumes on a lease or a licence. The market risk for which there is no cushion provided under a lease or licence; the payment of taxes. But probably the single biggest item is the cost of money through the period of time in which he has got his capital tied up.
>
> Q.-And when you say "he" - the purchaser of the lease or licence.
>
> A.-As a consequence they are not directly comparable.

The Chairman of the Board put to him:-

> If a buyer buys timber or a vendor is going to sell, there is the down-turning risk or possibility of increased value-they are all built into the price.

to which Mr. Alexander pointed up the problem:

> They are all built into the cash price. Our problem is the going from a cutting contract price to a cash price.

A Mr. McCrimmon was called by the respondent and testified at length on this issue. Toward the end he was questioned by the Chairman as follows:

> THE CHAIRMAN: . . . Earlier in your evidence, Mr. McCrimmon, you said that you were of the opinion that it was not proper to base the assessment of timber licences and leases on Crown timber sales and that there should be some adjustment because of certain risks which you said were attendant to the holding of leases and licences. Now the question that I would like to ask is how much should that adjustment in your opinion be?
>
> A.-I believe the intent of my statement was to say that it was not right to apply market information obtained from Crown timber sales data directly to th~ valuation of other real property without adjustments recognizing the risks, the capital cost and the taxes.

The Board found that taking Crown timber sales as the basis one must make an adjustment to allow for the distinctions between forest lands and Crown timber sales. The matter is summed up in paragraph 23 of the stated case as follows:

> 23. The Board found that the holder of forest lands does not enjoy the limited risks in this type of operation or the sliding scale provisions applicable to Crown timber sales. These two factors, combined with the liability for taxation, impose an additional burden on the holder of forest lands which reduces their capital value when compared to that reflected by Crown stumpage sales.

It is apparent that the Board accepted Mr. Alexander's thesis that forest lands were less valuable than cutting rights but rejected his formula to calculate the difference.

While I might have come to the conclusion that the distinctions should result in a higher assessment, an equal assessment or, as the Board determined, a lower assessment, this is a question for the Board and not for me. The Board concluded within section 46 (1) (b) of the *Assessment Equalization Act* that the assessed values of such land were in excess of the assessed value as properly determined under section 37. They reached that conclusion without error in law, and the answer to Question 4 must, therefore, be in the negative.

Question 5 is as follows:

> "5. Did the Board err in law in finding that on the evidence the 'only' basis from which to commence the valuation of forest lands is from the many actual sales of Crown timber and cutting permits in the light of section 37 of the *Assessment Equalization Act*?"

The statement of facts in paragraph 11 of the stated case dealt with this subject as follows:

> 11. As a result the Board found that the timber land appraiser, who is the adviser to the Provincial Assessors in all timber matters, had <u>no other sound basis</u> from which to commence the assessment process than to use Crown timber sales and cutting permits. . . .
> *[My emphasis (underlining) added.]*

I find it necessary to look to the reasons for judgment to understand this question and find at page 14:

> The essential facts are that <u>the only basis</u> from which to commence the valuation of forest lands is from the actual sales of Crown timber and cutting permits.
> *[My emphasis (underlining) added.]*

The same problem is dealt with elsewhere in the reasons for judgment. For example, at page 4:

> It is unfortunate, in determining the timber values, the appraiser had <u>no alternative</u> but to use Crown timber sales. . . *[My emphasis (underlining) added.]*

and

> The only thoroughly reliable volume of evidence is found in Crown stumpage and cutting permit sales.

and at page 7:

> While the Board is fully aware that no other indicia of value than Crown timber sales and cutting permits could possibly be used as a starting point. . .

Section 37 of the *Assessment Equalization Act*, R.S.B.C. 1960, chapter 18, embodies the approaches that might lawfully be taken, and if the Board purported to restrict that section, it would be wrong. In my view they decided that on the evidence before them it was the best approach and the only good approach. It does not follow that on other evidence dealing with forest lands a different approach would be acceptable. In my view this was a question of fact determined on the weight of the evidence and it is, therefore, (1) not binding on the Board or Courts of Revision in future cases, and (2) not a question of law with which I can deal.

Question 6 is as follows:

> "6. At the express request of counsel for the Assessors, the Board states the following question: 'Was there any evidence that a difference in tenure between timber sales on the one hand and timber leases and licences on the other hand affected the actual value of timber licences and leases under appeals?'"

This deals with the same argument as that raised in Question 4, and I have given examples of the evidence in dealing with that question. I think the same reasoning applies and that the answer to this question must be in the negative.

Question 1 is an all-embracing question, as follows:

> "1. Did the Board err in law in finding that the assessed value of forest lands of the companies had not been properly determined by the Assessors in accordance with section 37 of the *Assessment Equalization Act* pursuant to section 31 of the *Taxation Act* and applying a reduction of 10 per cent in the basic assessed values?"

This encompasses several questions as to actual value, the determination of which is a question of fact. See *Dreifus* v. *Royds* (1922) 64 S.C.R. 346; *R. ex rel. Inter-City Gas Ltd.* v. *Municipal Assessment Equalization and Appeal Board* (1959) 30 W.W.R. (N.S.) 167; *Re The Western Life Assurance Co. and The City of Toronto* (1940) O.W.N. 176; and *Regina* v. *Penticton Sawmills Limited* (*supra*). I conclude that the Assessment Appeal Board did not err in a matter of principle or in the construction of the relevant sections and that there was evidence on which they could reach the conclusions they did reach. It follows that the first question must be answered in the negative.

The appeal is dismissed with costs.

Reasons for Judgment (3) (Addendum) October 23, 1967.

In reasons for judgment dated September 26, 1967, I concluded that Question 6 raised issues of law dealt with on' previous questions. I had concluded that there was evidence on which the Board could reach the conclusions at which it arrived. The way the sixth question was posed, it should have been answered in the affirmative. It is now answered in that manner.