The following version is for informational purposes only

CITY OF PENTICTON

v.

KETTLE RIVER AND PRINCETON ASSESSMENT DISTRICTS

Supreme Court of British Columbia (X158/70)

Before: MR. JUSTICE J.S. AIKINS

Vancouver, April 10, 13, 14, 1970

W.J. Wallace, Q.C. and H.J. Hamilton for the Applicant
G.S. Cumming, Q.C. for the Respondent

Reasons for Judgment

This is an application by the City of Penticton, on originating notice under Order 54a, rule 5, for a declaration "that for the purpose of computing of the apportionment of the budget as between The Corporation of the City of Penticton and the remainder of School District No. 15, pursuant to the provisions of section 184 of the *Public Schools Act*, the Provincial Assessor, the Kettle River and Princeton Assessment Districts, must assess the value of all land and improvements in that part of School District No. 15 situated outside The Corporation of the City of Penticton." The originating notice is addressed to the Provincial Assessor, the Kettle River and Princeton Assessment Districts, and to the Attorney-General for the Province of British Columbia.

Whether the city is entitled to the declaration sought depends upon the effect to be given to provisions of the *Taxation Act* (R.S.B.C. 1960, chap. 376), the *Assessment Equalization Act* (R.S.B.C. 1960, chap. 18), and the *Public Schools Act* (R.S.B.C. 1960, chap. 319), all as amended since 1960.

The applicant's notice poses two questions of interpretation:

> "1. Does section 73A of the *Taxation Act* enacted by the Statutes of British Columbia, 1969, chapter 39, section 4, abrogate the effect of the judgment of this Honourable Court pronounced by Mr. Justice McIntyre on the 3rd day of February 1969 in Vancouver Registry X672/68, being an appeal by the applicant herein to this Honourable Court pursuant to the provisions of section 51 (2) of the *Assessment Equalization Act*?
>
> "2. Is the Provincial Assessor, the Kettle River and Princeton Assessment Districts, required for the purposes of the *Public Schools Act* to assess, include on the assessment roll, and send out assessment notices for the property owned by the city and other nontaxable owners situate within the said assessment district?"

I think it convenient at the outset to give a general explanation of the problem which has led the city to bring this application. The City of Penticton lies within School District No. 15, together with a rural area which does not lie within the boundaries of any municipality. The City of Penticton and the rural area within School District No. 15 are required to provide the money needed each

year for the operating expenses of schools in the district (other than operating expenses toward which a basic grant is payable by the Minister of Finance) and to provide for the capital expenses of the district schools. Section 184 of the *Public Schools Act* provides for the apportionment of the annual school budget of a school district between its constituent parts. Subsection (a) of section 184 deals with basic grants payable by the Minister of Finance and is not material. I cite section 184, less subparagraph (a):

> 184. In each calendar year the apportionment of the budget as between the constituent parts of a school district shall be determined in the following manner:-
>
> > (a) . . .
> >
> > (b) For other operating expenses and for capital expenses, the respective shares shall bear the same ratio to the total of such expenses as the assessed value of the land and improvements in each constituent part of the school district bears to the total of the assessed values of land and improvements in the school district;
>
> and for this purpose and for the computation of grants to be made under this Division, where assessed values are required, the assessed values used shall consist of the value of all land and seventy-five per centum of the value of improvements for the year, as defined in, and as certified to the Department under, the *Assessment Equalization Act*.

Section 24 (b) of the *Taxation Act* provides that land and improvements thereon owned by a municipal corporation are exempt from taxation. The City of Penticton owns land outside its corporate limits but within the rural area of School District No. 15. It will be appreciated that if the city-owned land in the rural area of the school district is assessed (although not taxable), the assessed value of land in the rural area of the school district is increased thereby, increasing the proportion of the annual budget for operating and capital expenses to be raised by the taxation of assessed and taxable land and improvements .in the rural area and decreasing the proportion of the annual budget which must be raised by taxes on assessed and taxable land and improvements in the city. Conversely, if the land belonging to the city in the rural area of the school district is not assessed, the proportionate part of the annual budget which must be borne by the rural area is decreased and the proportion of the budget to be borne by the city is increased. The ratepayers in the City of Penticton stand to gain and the ratepayers in the rural area of School District No. 15 stand to lose if the Provincial Assessor must assess the land owned by the city in the rural area; hence this application by the city for a declaration which would require the Provincial Assessor to assess the city's wholly tax-exempt land in the rural area of the school district.

The judgment of Mr. Justice McIntyre referred to in the first question posed by the originating notice was given in *Re Assessment Equalization Act*, *re City of Penticton* (1969) 67 W.W.R. 331. For the sake of brevity I will call this the Penticton case. The Penticton case came up by way of stated case from the Assessment Appeal Board. The question in the stated case reads:

> Was the Board correct in confirming that the Provincial Assessor is not required to assess, send out assessment notices for, or include on the assessment roll the property owned by the City and other non-taxable owners situate within the said assessment district?

My learned brother held that the Board was wrong. The Board in reaching an incorrect conclusion proceeded on this reasoning: assessment is defined in the *Assessment Equalization Act* as "a valuation of real property for taxation purposes," land wholly exempt from taxation cannot be valued for a taxation purpose, therefore, the Assessor was under no obligation to assess.

It is necessary in the present matter to set out the reasoning, with which I respectfully agree, which led my learned brother to hold that the Board was wrong. My brother pointed out that there

is a difference between assessment and taxation and cited a short passage, pointing out the distinction, from the judgment of Tysoe, J.A., in *MacMillan, Bloedel & Powell River Ltd.* v. *Atty.-Gen. of B.C.*, an unreported decision of our Court of Appeal. The citation is at page 332 of the Penticton case and I need not reproduce it here.

McIntyre, J., then said:

It does not follow that because land is exempt from taxation it is therefore exempt from assessment. The *Assessment Equalization Act* and the *Taxation Act* require the assessment of all lands whether taxable or not. Sec. 74 of the *Taxation Act* requires the inclusion in the notice of assessment of a statement of the value of land and improvements exempt from taxation, and sec. 38 of the *Assessment Equalization Act* imposes the same requirement for the assessment roll itself, Sec. 8 of the *Assessment Equalization Act* refers to all lands and sec. 24 of the *Taxation Act* which creates the exemption from taxation does not exempt the land from assessment. To enable the assessor to comply with these sections he must of course assess all land whether it be taxable or not.

My learned brother, however, found a stronger reason for his conclusion. It is based on the taxing formula in section 184 of the *Public Schools Act*. I cite from the judgment at page 333:

> More significant however, in my view, is sec. 184 of the *Public Schools Act*. It sets out the formula to be used in sharing costs between the provincial government and the constituent parts of each school district and it provides: . . .

McIntyre, J., then cited the latter part of section 184, beginning with the words "and for this purpose. . ." which I have already reproduced in my citation of section 184 (*supra*). The judgment then continues:

> This (meaning the latter part of section 184 of the *Public Schools Act*) is a reference to sec. 53 of the *Assessment Equalization Act*. It requires the commissioner to certify in each year to the deputy minister of education the assessed value of all land. Subsec. (3) of sec. 53 provides that the assessed values so certified shall be used in computing school grants and school cost apportionment. In making his certification under sec. 53 the commissioner must rely on the assessment roll which, under sec. 38 .of the *Assessment Equalization Act*, must include a statement of the value of all tax-exempt land. In order to apply the formula set out in sec. 184 of the *Public Schools Act* the value of all land must be known. It can become known only through the assessment roll certified by the commissioner under sec. 53 of the *Assessment Equalization Act*. It is therefore clear that all lands, whether tax exempt or not, must be assessed and the value of all lands included on the assessment roll.

Mr. Justice McIntyre's judgment was handed down on the 3rd of January 1969. By section 4 of chapter 39 of the Statutes of British Columbia, 1969 (assented to 2nd April, 1969) the *Taxation Act* was amended by inserting section 73A after section 73. The new section reads:

> 73A. Notwithstanding the provisions of this or any other Act where land and improvements are totally exempt from taxation, the Assessor shall not be required, in respect of those totally exempt lands and improvements,
>
> > (a) to assess such land and improvements; or
> >
> > (b) to prepare an annual assessment roll; or
> >
> > (c) to give an assessment notice.

Section 4 of the amending Act also provides that section 73A is retroactive and is to be deemed to be in force on, from, and after the 31st of December, 1967.

It is plain enough that the Legislature must have intended to alter the law as settled in the Penticton case. The wording of section 73A is somewhat unusual in this respect, the section does not say that the Assessor shall not assess but says that he "shall not be required," in respect of totally exempt lands and improvements, to do the things, including assessing, set out in subparagraphs (a), (b), and (c). The meaning, in my view, is straightforward. The section does not preclude the Assessor from assessing totally exempt lands and improvements if for some reason in his discretion he decided that it was advisable to do so, but makes it entirely plain that he cannot be required to assess in respect of totally exempt lands and improvements. It may well be that the Assessor has a discretion and perhaps, pursuant to a change in policy laid down by a superior, he might assess totally exempt lands. The point of significance, however, is that on the wording of the section an Assessor cannot be required to assess totally exempt lands. It follows, in my view, that a Court cannot properly either directly order an Assessor to assess totally exempt lands or indirectly require him to do so by making a declaration such as is sought in the present application.

At first blush it would appear that there is conflict between the provisions of section 73A and section 74 (1) (f) of the *Taxation Act*. By section 74 (1) (f) of the *Taxation Act*, the assessment notice, which an Assessor must send out, must show the value of land and improvements exempt from taxation. The apparent conflict, in my view, is. resolved by the *non obstante* clause prefacing section 73A. This clause is drawn in plain language, it must be given effect and the sensible effect, it seems to me, is this: that if an Assessor not being required to assess totally exempt lands and improvements has lawfully not done so then he is relieved of the duty imposed by section 74 (1) (f) of showing in the notice he must send out the value of land and improvements exempt from taxation because he, quite properly, has no valuations for such lands and improvements, and consequently cannot show the values.

My attention has been directed to section 38 (1) and (2) of the *Assessment Equalization Act*. Under the provisions of these subsections, municipal and rural area Assessors are bound to show on the assessment roll, by subparagraph (f) of subsection (2), the value of land and improvements exempt for the purposes of levying school rates, and by subsection (g) of subsection (2) the valuation of land and improvements exempt for all purposes other than for levying school rates. There is no conflict here because subsection (2) of section 38 of the *Assessment Equalization Act* is not speaking of land and improvements which are totally exempt from taxation, and section 73A is confined to totally exempt land and improvements.

Thus far it would appear plain that a Provincial Assessor may make up an assessment roll which does not include land and improvements which are totally exempt from taxation and that such an assessment roll would be a lawful roll in the sense that it is in accordance with statutory requirements. However, Mr. Wallace, for the applicant city, says that while such an assessment roll may be a proper assessment roll, prepared in accordance with statutory requirements for the purposes of the *Taxation Act*, such an assessment roll cannot be a proper assessment roll for the taxation purposes of the *Public Schools Act*. The argument runs this way: that under section 184 of the *Public Schools Act* the proportion of the burden of school taxation to be borne by the constituent parts of a school district must be determined by use of assessed values and, in the words of the latter part of section 184, "the assessed values used shall consist of the value of all land and seventy-five per centum of the value of improvements for the year, as defined in, and as certified to the Department under, the *Assessment Equalization Act*." The next step is this: the words just cited from section 184 bring in section 53 of the *Assessment Equalization Act*. Section 53 (1) provides that the Commissioner shall annually certify to the Deputy Minister of Education:

> (a) . . . the assessed value of all land and seventy-five per centum of the assessed value of all improvements, as shown upon the completed assessment roll on the thirty-first day

of December in the preceding year for each municipal corporation or portion thereof and each rural area within a school district;

Subsection (b), dealing with further certification, need not be reproduced; it uses the same wording as subsection (a), viz.: "assessed value of all land and. . .all improvements".

Subsection (3) of section 53 of the *Assessment Equalization Act* provides that the assessed values certified under subsection (1) are the values to be used in apportioning school costs between the constituent parts of school districts under the *Public Schools Act*.

The argument and disposition of this application turn largely on the words used in section 53 (1), "all land" and "all improvements." These are the words to which I have added emphasis in the above citation. The argument for the city takes this form. First it is said that the combined effect of section 53 of the *Assessment Equalization Act* and section 184 of the *Public Schools Act* is an imperative statutory direction that the distribution of school costs between constituent parts of a school district must be computed on the basis of assessed value of all land and all improvements. The final step in the argument is that, because the assessed value of all land and assessed value of all improvements is, by statute, the essential foundation for the distribution of school expenses between the constituent parts of a school district, it follows that Provincial Assessors must assess all land and all improvements, whether taxable or tax exempt.

The point to be decided now emerges with some clarity. It is, I think, this: clearly the assessor is not bound to assess totally exempt lands and improvements under the *Taxation Act*. However, must he nevertheless do so, despite the *non obstante* clause in section 73A, for the purposes of the *Assessment Equalization Act* and the *Public Schools Act* because of the wording used in those Acts? When I speak of the wording used in those Acts I refer to the words "the assessed value of all land and. . . of all improvements" used in section 53 (1) (a) and (b) of the *Assessment Equalization Act*, and the similar wording used in the latter part of section 184 of the *Public Schools Act*, "the assessed values used shall consist of the value of all land, etc."

The question to be resolved may be put in this way: Having in mind that, because of section 73A, a Provincial Assessor does not have to assess and include in his assessment roll land and improvements which are totally exempt from taxation, what meaning should be given to the words "assessed value of all land and . . . improvements" in the *Assessment Equalization Act*? I think the meaning of these words to be this: the assessed value of all land and the assessed value of all improvements which by Statute must be assessed and therefore appear on assessment rolls. The words cannot, in my opinion, sensibly be taken as meaning the assessed value of all land and improvements, including land and improvements which have no assessed value, because the Assessor quite properly, being under no duty to assess them, has not done so. The point may be put slightly differently; where the statutes speak of the assessed value of all land and assessed value of all improvements, the statutes must be speaking of all land that has been assessed arid all improvements that have been assessed, according to statutory provisions requiring assessment, and not of land and improvements which have no assessed value because they are not required by statute to be assessed. It would impute an absurdity to suggest that the words "assessed value of all land and. . . all improvements" be construed so as to include the assessed value of land and improvements which by statute do not have to be assessed and properly have not been assessed. The words "assessed value of all land and. . . all improvements" in section 53 of the *Assessment Equalization Act* cannot properly be construed as a direction that all land and improvements, exempt or taxable, must be assessed. The words of section 53, just cited, together with section 184, do no more than provide that assessments, made pursuant to other statutory provisions, are to be used in working out the distribution of school expenses between the constituent parts of school districts. One must look elsewhere to see what, by statute, must be assessed and what may not be assessed. For what Provincial Assessors must assess and may not assess, one must go to the *Taxation Act*.

It is argued for the applicant that the judgment in the Penticton case, resting, as it does, partly on section 184 of the *Public Schools Act*, is determinative of the question of whether or not all land, taxable or tax exempt, is to be assessed and included in assessment rolls prepared by Provincial Assessors. What distinguishes the present application from the Penticton case is that, when that case was decided, section 73A had not been enacted and under section 74 (1) (f) of the *Taxation Act* it was apparent that a Provincial Assessor was charged with valuing land and improvements exempt from taxation, and had no discretion in the matter. This is not now the case.

It was suggested in Mr. Wallace's argument that the Provincial Assessor plays a dual role. The sense of this was that for the purposes of the *Taxation Act* a Provincial Assessor may well be proceeding quite properly in not assessing totally tax-exempt land and improvements, but that, nevertheless, for the purposes of the *Assessment Equalization Act* and the *Public Schools Act* a Provincial Assessor is still under a duty to assess totally exempt lands and improvements and add such assessments to his assessment roll. Put slightly differently, the submission is this: that Provincial assessors have one duty under the *Taxation Act* but they also have a duty under the *Assessment Equalization Act* and under the *Public Schools Act* to assess totally exempt lands and improvements so as to provide the necessary data for the distribution of school costs under those Acts. As to these submissions, I think it enough to say that in my view, under the *Taxation Act*, a Provincial Assessor is required to make and certify by declaration only one assessment roll and that he cannot be required to include in that assessment roll assessments of land and improvements totally exempt from taxation. It seems to me plain that the scheme of the legislation, as to land outside municipalities, is that a Provincial Assessor is required to make only one assessment roll, verified by declaration, and that it is that roll which eventually finds its way to the Commissioner who, in turn, proceeding under section 53 (1) of the *Assessment Equalization Act*, certifies those things that he is bound to certify under subparagraphs (a) and (b) to the Deputy Minister of Education and that it is the assessed values so certified which, under subsection (3) of section 53, are to be used in apportioning school costs under the *Public Schools Act*.
In any event, and aside from what I have already said, in my view the *non obstante* clause in section 73A, which refers to "any other Act," is sufficient to make it clear that a duty to assess totally exempt lands and improvements should not be inferred from provisions of the *Assessment Equalization Act* and the *Public Schools Act*.

For these reasons I hold that a Provincial Assessor is not under any statutory duty to assess land and improvements which are totally exempt from taxation, either under the *Taxation Act*, the *Assessment Equalization Act*, or the *Public Schools Act*.

I now go back to the originating notice and the two questions posed. The first question must be answered in the affirmative. Put simply, the Legislature has altered the law as settled in the Penticton case. The second question must be answered in the negative. The motion for a declaration must be dismissed.

I should not, however, leave this matter without noticing an argument upon which counsel for the Attorney-General placed considerable reliance. Section 56 of the *Assessment Equalization Act* provides that the Lieutenant-Governor in Council may make regulations. By Order in Council 1059, approved the 9th of April, 1969, existing regulations under the *Assessment Equalization Act* were amended. I need not cite the amending regulations in full. Suffice it to say that the amendments purport to define assessed value of all land and improvements used in section 8A of the *Assessment Equalization Act* and assessed. value of all land and 75 per cent of the assessed value of all improvements where used in section 53 of the same Act as the assessed value of all land and improvements which may be taxed.

It was argued by Mr. Wallace for the applicant that the regulations are *ultra vires*. I simply say that I do not find it necessary to express an opinion on this point because I am satisfied, on construing section 73A in relation to the other statutory provisions which I have discussed, that the questions should be answered and the motion disposed of as I have already stated.

I summarize the result. The answer to the first question posed in the originating notice is "yes." The answer to the second question posed is "no." The motion for a declaration as set out in the originating notice is dismissed.

Counsel did not speak to costs. This application involved complicated issues of some public importance. I am much inclined to the view that it would be reasonable and fair that each side bear its own costs. If counsel agree, the order should be drawn to reflect this disposition of the issue. If counsel do not agree, they may speak to costs at their convenience.