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CORPORATION OF THE DISTRICT OF SAANICH

v.

RACQUET CLUB OF VICTORIA HOLDINGS LIMITED

ASSESSMENT COMMISSIONER

v.

RACQUET CLUB OF VICTORIA HOLDINGS LIMITED

Supreme Court of British Columbia (No. 000230) Victoria Registry

Before: MR. JUSTICE E.D. FULTON

Victoria, March 2, 1978

D.A. Farquhar and P. Gibson for the municipality
R.B. Hutchison for the Assessment Commissioner
E.H.A. Emery for the Respondent

Reasons for Judgment March 29, 1978

There are two separate proceedings here, both being appeals by way of stated case from the same decision of the Assessment Appeal Board ("the Board") with respect to improvements situated on property in the District of Saanich owned by Racquet Club of Victoria Holdings Ltd., the respondent in both cases ("the respondent"). Although the interest of the appellant The Corporation of The District of Saanich ("the Municipality") is of more immediacy in the financial or revenue sense than is that of the appellant the Assessment Commissioner of the Province of British Columbia ("the Commissioner") there is no difference in principle of law as between the two appeals, so both were heard together. The hearing before me was concerned solely with a preliminary objection to jurisdiction based on four separate grounds, the import of which will become more apparent after a brief statement of some of the facts.

The decision of the Board, delivered on 20 December, 1977, was with respect to an appeal by the municipality from an assessment of (*inter alia*) the improvements in question, which appeal was heard by the Board consisting of the chairman, Mr. W.M. Anderson, and the two then members Mr. J.Y. Gardner and Mr. H.C.K. Housser. Mr. Housser's term expired at the end of 1977, before the applications for these stated cases were made, and his appointment was not renewed. At the beginning of 1978 Mr. M.J. O'Connor was appointed to the vacancy thus arising. Also after the giving of the decision under appeal and before the applications for the stated cases, the chairman and Mr. Gardner left the country on holiday. In anticipation of this and other appeals, and in order to provide for the ongoing administration of the Board's affairs, Mr. O'Connor was appointed acting chairman in Mr. Anderson's absence.

The facts of what was done in connection with the preparation and submission of these stated cases, as established by the evidence are as follows. Written notice of the request to the Board to state a case was given by the Commissioner by hand-delivering a copy of his Application for Stated Case to the Board's address for service, on 6 January, 1978, as appears from the affidavit of service of Shelley Bryce filed herein. Written notice of its request was given by the municipality

by delivery of a copy of its Application for Stated Case, on 19 January, 1978, to the acting chairman, as evidenced by admission of delivery endorsed by Mr. O'Connor on the application on file. Mr. O'Connor has however signed as "Member of the Assessment Appeal Board". It is common ground that in so far as the time limits for such delivery are concerned, and apart from the question of the sufficiency of delivery itself - which is challenged - what was done was done within time.

Written notice of the Commissioner's request to the Board to state a case was given to the respondent by service of a copy of the Commissioner's Application for Stated Case on the solicitor for the respondent on 9 January, 1978, as is evidenced by the admission of service endorsed on the application on file by that solicitor, on 9 January, 1978. Written notice of the municipality's Request for a Stated Case was given to the respondent by mailing a copy of the municipality's application to the solicitor for the respondent, which copy was received by that solicitor's office on February 8, 1978, as is evidenced by the affidavit of Mr. Emery sworn herein and filed on 1 March, 1978. The notices are not challenged on the basis that they were not delivered within the time limited: it is the failure to give an opportunity to the respondent for prior approval of the form of case which is challenged.

In response to the requests to the Board, cases were stated and submitted to this Court

(a) in respect of the application therefor by the Commissioner, on January 27, 1978,

(b) in respect of the application therefor by the municipality, on February 8, 1978.

At the conclusion of the statement of facts and questions in each case the following words and signature appear:

"ASSESSMENT APPEAL BOARD
(sgd) *Michael J. O'Connor*
Acting Chairman"

Again, it is common ground that the time limitation for statement and submission of the cases was complied with in each case, but the submissions as a whole are challenged with respect to both content and execution.
The two stated cases coming on for hearing before me on the basis of the pleadings and steps outlined above, preliminary objection was taken to my jurisdiction to deal with them on four grounds, as follows:

1. The Board was not properly served with notice of either request to state a case;

2. Neither of the stated cases was signed by the Board;

3. Neither case was submitted to the respondent for approval prior to being sent to the Board for approval and filing;

(With respect to each of these three grounds, the respondent relies on the rules made by the Board which, it submits, govern the requirements and procedures in connection with these matters.)

4. In any event, neither stated case as submitted correctly or adequately sets out the issues involved.

With respect to the first three grounds, and particularly ground 2, it is further submitted that the effect of the deficiencies is fatal, in that in the result no case was in fact submitted to this Court within the 21 days after receiving the Notice of Request from the respective appellants, as

required by the *Assessment Act*, S.B.C. 1974, ch. 6 ("the Act"), and that therefore the Court is without jurisdiction in the whole matter.

It is appropriate to set out here the relevant provisions of the Act governing the procedures to be followed in stating a case for the consideration of this Court, and setting out the requirements to be observed by those concerned in that regard, in the circumstances of these two appeals. They are found in sec. 67 of the Act, as amended by S.B.C. 1977, ch. 30, as follows:

> "67 (1) . . .
>
> (2) A person affected by a decision of the board on appeal, including a municipal corporation on the resolution of its Council, the Minister of Finance, the commissioner, or an assessor acting with the consent of the commissioner, may require the board to submit a case for the opinion of the Supreme Court on a question of law only by
>
> (a) delivering to the board, within 21 days after his receipt of the decision, a written request to state a case, and
>
> (b) delivering, within 21 days after his receipt of the decision, to all persons affected by the decision, a written notice of his request to the board to state a case to the Supreme Court.
>
> (2a) The board shall, within 21 days after receiving the notice under subsection (2), submit the case in writing to the Supreme Court.,
>
> . . .
>
> (4) 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 during the appeal, in the Supreme Court Registry, and it shall be brought on for hearing before the Judge in Chambers within one month from the date upon which the stated case is filed.
>
> (5) The court shall hear and determine the question and within 2 months give its opinion and cause it to be remitted to the board, but the court may send a case back to the board for amendment, in which event the board shall amend and return the case accordingly for the opinion of the court."

It will be seen that the Act itself contains not only the provision for appeal by way of stated case from a decision of the Board, but its own rules of procedure by which those appeals are to be prepared and brought forward, the whole providing a simple and direct method of getting appeals from the Board's decisions before this Court. The question at first blush would seem to be quite simply: did the respective appellants comply with these rules? However, counsel for the respondent relies in addition on the rules of the Board, as taking the requirements considerably beyond the code of procedure set out in the Act, so it is necessary further to set out the relevant rules and to consider not only their effect per se but also their efficacy in the light of the section of the Act giving the Board the power to make such rules.

The rule-making power of the Board is conferred by sec. 54 (c) of the Act, as follows:

> "54. The board
>
> . . .
>
> (c) may make rules, not inconsistent with this Act, for its own government and for conducting hearings and proceedings before it."

Pursuant to this power the Board purported to make rules governing the procedures to be followed in the preparation and submission of appeals by way of stated case. These are Rules 35 ff of the Board's "RULES OF PRACTICE AND PROCEDURE. . ." and provide as follows, so far as relevant here:

> STATED CASES
>
> 35. Where the board orders a case be stated for the opinion of the Supreme Court, the appellant shall draft the case and submit it to the respondent for approval before sending it to the board for approval and filing.
>
> 36. A party requesting the board to state a case shall prepare the same for approval and filing as set out in No. 35.
>
> APPEAL
>
> 37. An appeal lies from a decision of the board to the Supreme Court of British Columbia upon any question of law raised before the board under Section 67 of the *Assessment Act*.
>
> 38. The rules under the *Summary Convictions Act*, R.S.B.C. 1960, ch. 373, as amended, governing appeals by way of stated case to the Supreme Court of British Columbia apply to appeals from a decision of the board upon any question of law, and a reference to the word "justice" shall be deemed to be a reference to the board.

The Board, then, has by its Rule 36 set out one specific procedural requirement to be followed by persons requesting a stated case, and by its Rule 38 has provided that the *Summary Convictions Act* shall govern appeals by way of stated case generally. If those rules are operative, they have the effect of requiring an appellant, in addition to complying with the procedural requirement of Rule 36, to comply with the procedural requirements of the *Summary Convictions Act* (which are found in sec. 85 (2) thereof) in the preparation and submission of such appeals. Since the first three grounds of objection raised by the respondent are that the appellants have failed to comply with the Board's Rule 36 and with sec. 85 (2) of the *Summary Convictions Act* - and on the face of it there is such failure in one or more respects - the first question is: are those rules operative and binding on the appellants so that they have lost their right to have the cases heard by this Court if they have not complied with them?

In my view, this question must be answered in the negative. As seen, by sec. 54 of the Act, the power of the Board to make rules is limited to making such rules only as are "for its own government and for conducting hearings and proceedings before it", *and* as are not inconsistent with the *Assessment Act*.

I am not ruling at the moment on the question whether rules governing what the parties must do in the course of carrying out the procedures by which a stated case is prepared and submitted to this Court are in fact within the areas of the Board's own government or for conducting hearings and proceedings before it, although on the face of it I should be inclined to hold that they are not. It is not necessary to rule on this point because in any event it is clear that such rules must not be inconsistent with the *Assessment Act*: in my view the Board's purported rules in this area are inconsistent with that Act.

To deal first with the Board's Rule 36: this has the effect of imposing upon an appellant the obligation, before he can require the Board to state a case, of drafting the case and submitting it to the respondent for approval. This rule is no doubt enacted in order to ensure that the parties are in agreement upon the case before it is submitted by the Board to the Court. But this is not the scheme of the Act: by sec. 67 (2) (a) and (b) an appellant may "require" the Board to submit a

case by delivering written application within 21 days after the receipt of the decision appealed from (which was done here) and the only obligation on him with regard to notice to the respondent is to deliver to him, within the same period, written notice of that request. This also was done in each of the cases before me. The Legislature has set out in the clearest terms what must be done by way of notice to the other party when one party is requiring a case to be stated: this has the effect that, the appellant having complied with that provision and with the provision of subsection (2) (a), the Board is then required to submit the case. In my view the Board cannot impose a different requirement on an appellant. At the very least, such a requirement cannot have the effect of depriving an appellant who has complied with the requirement set out in the Act, of his right to have the case stated and submitted to the Court. One very good reason, amongst others, is that the rule in question, requiring the appellant to obtain the approval of the respondent before submitting the draft case with his application to the Board, would enable the respondent, by delaying tactics, to defeat the appellant by prolonging the matter beyond the 21 days limited for delivery of the application to the Board.

It should be emphasized at once in this respect that the Board did not refuse or fail to state a case by reason of non-compliance with its rule or for any other reason. A case has been stated and filed in each appeal, and it is the respondent who raises this and other objections. It should also be noted that it is proper and desirable that the parties should agree on the statement of a case before it is sent to the Board - this is the usual practice. In at least one of these appeals it appears that some effort to have prior discussion was made, but absence of the solicitor and the limits of time operating together had the result that this was not done. However it is formally conceded that written notice of the request for a stated case was delivered to the respondent within the 21 days as required by sec. 67 (2) (b) of the Act, in each case. And it should further be noted in this context that if the parties are not in agreement on the case as submitted, and if it is established that the case has not been fully or correctly stated, there is a means to take care of that situation provided by sec. 67 (5) of the Act, which empowers the Court to send a case back to the Board for amendment.

With respect to Rule 38, purportedly bringing into effect the rules of the *Summary Convictions Act* as governing appeals by way of stated case under the *Assessment Act*, I am of the same view as to its lack of effect as I am with respect to Rule 36. There are substantial discrepancies between the provisions of sec. 85 of the former Act governing the procedures to be followed and the provisions of sec. 67 of the *Assessment Act* which, as seen, are themselves a full and binding code of procedure for the launching of appeals under that Act.

I will not here set out in full the provisions of sec. 85 - they are lengthy, and the discrepancies as compared to sec. 67 of the *Assessment Act* are manifest on a perusal of the two sets of provisions. Suffice it to say that the time limits within which the application for the stated case must be made, and within which the case must be stated after receipt of the application, respectively, are quite different as between the two Acts, as are the methods of and responsibility for filing the case with this Court. And in the *Summary Convictions Act* provision there is a requirement that, before the case shall be stated, the appellant shall have entered into a recognizance to prosecute his appeal without delay. Rule 38, in purporting to bring the *Summary Convictions Act* provisions into effect, does not use the expression "mutatis mutandis" or "so far as may be applicable" or any other like expression indicating that those rules are to be adapted or modified in their application: it simply purports to make them apply without restriction. They are obviously inapplicable inasmuch as they are in part inappropriate to appeals under the *Assessment Act* and are in part directly in conflict and therefore inconsistent with that Act. The Board cannot bring them into effect under its rule-making power so as to supersede the clear and complete code provided in the *Assessment Act* from which that Board derives its powers.

I hold accordingly that it is beyond the powers of the Board to enact Rules 36 and 38 and thus impose on the appellants requirements differing from those of the *Assessment Act* as to the steps and procedures to be followed to require the statement of a case, and hold further that compliance by the appellants with the time, notice and delivery provisions of sec. 67 (2) (a) and

(b) of the *Assessment Act* is sufficient. This disposes of ground 3 of the objection, and, in part, of grounds 1 and 2.

Next are the questions of whether the delivery of the respective requests to state the case in the manner outlined above was in either or both cases delivery "to the Board" as required by sec. 67 (2) (a) of the *Assessment Act*, and whether the signing of the cases by the acting chairman on behalf of the Board was sufficient compliance with sec. 67 (2a).

Counsel for the respondent submits that delivery to the Board's office of the request to state a case, and acceptance of that delivery by the acting chairman, is not sufficient. He submits that the request must be served on each member of the Board, relying on the requirements of the *Summary Convictions Act* and on cases such as *Westmore* v. *Paine* (1891) 1 Q.B. 482, and authorities referred to therein. In so far as the provision of the *Summary Convictions Act* requiring "service" is concerned, and in so far as "service" and "delivery" may be two different things, this point is already taken care of by the finding that the *Summary Convictions Act* provision cannot be made to supersede the *Assessment Act* provision, so the question is: is delivery as made and accepted by the acting chairman good delivery to the Board as required by sec. 67 (2) (a) of the Act set out above?

In my opinion, it is. It is true that the cases referred to have held that delivery (or service) must be upon all the Justices who have taken part in the hearing resulting in the decision under appeal, but in my view the situations are not similar. Those cases, both here and in England, were dealing with the preparation and submission of stated cases under *Summary Convictions Act* rules (in England, under the Summary Jurisdiction Act and Rules, which are similar in principle to the rules in sec. 85 (2) of our *Summary Convictions Act*). I have held already that the Board cannot by its own rules supplant the procedural code in the *Assessment Act* by a code found in the *Summary Convictions Act* which is inconsistent. I must therefore look at the provisions of the *Assessment Act* to see what they state and what is to be inferred from them in the circumstances here, and then see whether the cases cited to me are in fact applicable in the light of those circumstances and inferences.

The first set of facts which emerges from such a consideration relates to the constitution of the Board and the conduct of its affairs. The Board consists of three members appointed by the Lieutenant Governor in Council, one of those members being appointed as chairman (Act, sec. 41 (1) and (4)). The chairman is the chief executive officer of the Board, and it is specifically provided that in his absence another member may act in his place (sec. 42 (1) and (2)). It is thus clearly contemplated that with respect to certain matters the Board shall act through its chairman, and when he acts in that capacity his act is that of the Board. In my view, included among such acts are the delivery and communication of decisions - not the making of the decision, which must be done by the members, but the signing and transmission of that decision. It follows further, in my view, that when the Act says that an appellant may require a case to be stated by "delivering to the Board" a written notice of his request to state it, the delivery may be effected - and accepted - by delivery to the chairman, who accepts on behalf of the Board and as the act of the Board.

It is not without significance that in this case the decision of the Board itself, which is under appeal, is signed by the chairman alone, and no objection is taken on that score. I understand this to be the usual practice. The decision arrived at by the three members who sat is the decision of the Board and the document recording that decision is signed by the chairman alone on behalf of and as the act of the Board. I conclude that where delivery is to be made "to the Board" it may be made by delivery in the normal way by mailing or delivery to the address of the Board, and may be accepted by the chairman on behalf of the Board. That delivery as made here - in one case by mailing and in the other case by delivery - is sufficient seems inescapable in the light of the provision of sec. 25 (13) (a) of the *Interpretation Act*, enacted by S.B.C. 1976, ch. 23, which provides that

> "'Deliver', with reference to a notice or other document, includes mail to or leave with a person. . ."

So "delivering to the Board" may be effected by mailing to the Board, or leaving with someone who accepts on behalf of the Board, as was done here.

The case of *Westmore* v. *Paine* (*supra*) is in my view not only distinguishable as being decided under the Summary Jurisdiction Rules, it is inapplicable as it went off on different grounds from those here. There the appellant had elected to serve personally, but he served two only of the five Justices whose decision was being appealed. It was held that this was not sufficient, but there the panel did not have a person specifically designated as chairman and chief executive officer who could act on behalf of the Board as the chairman can do here. And I can see no validity in the objection that Mr. O'Connor who accepted delivery, did not sit on the original hearing: the document was not delivered to him, nor did he accept it, in the capacity as one who had heard the case but rather in his capacity as acting chairman of the Board. And the material on file contains ample evidence that not only was he properly designated acting chairman in the absence of the chairman, but was specifically authorized to accept service and sign and submit this case on behalf of the Board in the absence of the chairman. The fact that in the case of the one notice he accepted as "member" I would hold to be irrelevant, as the evidence is clear that he was authorized both to act as chairman and to accept service or delivery. In addition, I would hold that if there was any defect in service or delivery, it was cured in that a case was in fact stated and submitted to this Court as requested in the notices - although this reason must be subject to reservation as to the adequacy of the signature of the case itself. For all these reasons I hold that the objection to the adequacy of service or delivery fails.

Next as to the signature of the case itself: much of what has been said already applies here also. Thus most of the cases cited to me where it was held that the case as stated and submitted was defective as not being signed by all members who took part in the decision appealed from, were decided under the summary convictions (or jurisdiction) rules applicable to appeals from decisions of Justices. In *Westmore* v. *Paine* where, as seen, the case was stated and signed by only two of the five Justices who had heard the matter, it could not be suggested - for it certainly was not the case - that those two Justices had authority to sign for the panel or for any of the other three Justices. But here the case was stated and signed by the acting chairman as the act of the Board, and he had been specifically authorized to do so.

It is true that in *Re Celebrity Enterprises Ltd.* (1976) 4 W.W.R. 502, Mr. Justice Bouck of this Court held that the signature of a stated case by the chairman of the Liquor Control Board of British Columbia was not sufficient, and that the case must be signed by all the members of the Board who took part in the initial hearing. However, Bouck, J. was there dealing with a different Act - the *Government Liquor Act* as amended by S.B.C. 1973 ch. 37, sec. 10 of which specifically makes the rules of the *Summary Convictions Act* applicable to appeals from the Liquor Control Board by way of stated case. Once again, therefore, the provisions applicable to a situation where there is an appeal from a panel of Justices were involved and were under consideration there, and the Justices who form the panel do not have a person designated as their chairman and chief executive officer, in a position to act for and on behalf of the panel as does this Board. And I note in passing that Bouck, J. did not consider the failure to have all members of that Board sign the case was a fatal defect, for he remitted the case to the Board for amendment and re-submission notwithstanding the fact that by the time he made that order the period limited for the statement and signing of the case had gone by.

Once again it is, I consider, very relevant that the decision itself being appealed from is signed by the chairman alone, as the act of the Board, and no objection is taken to this procedure. If it is proper for the chairman so to sign and promulgate a decision on behalf of the Board - as in my view it is and as seems to be accepted - so it must be proper for him to sign and submit a case as the act of the Board. By sec. (2a) of sec. 67 it is the Board which is required to submit the case in writing, and in my view when the chairman so signs it on behalf of the Board, he properly does so

as the act of the Board. And if it is proper for the chairman to do so, it is also proper for the acting chairman duly so appointed and specifically thereunto authorized, to do so.

Of considerable significance in this respect is the decision in *Victory Memorial Gardens* v. *The Corporation of The District of Surrey*, a decision of the late Mr. Justice Brown of this Court (November, 1967, Vancouver Registry No. X897/67, Case 57 in British Columbia Stated Cases, page 299). There, an appeal by way of stated case had been taken from a decision of the Assessment Appeal Board constituted under the then *Assessment Equalization Act*, R.S.B.C. 1960, ch. 18. Sec. 51 of that Act, which was in very much the same terms as sec. 67 of the current *Assessment Act*, provided that an appellant might, by correspondence addressed to the Board within 21 days after receipt of its decision, require the Board to submit a case to this Court. By sec. 51 (3) the section went on to provide that

> "Within 21 days after the receipt of the requirement, the Board shall submit in writing a stated case for the opinion of the presiding Judge."

As is evident, this provision is on all fours with the provision of sec. 67 (2a) of the present Act.

In that proceeding, as appears from the reasons for judgment, the stated case had been signed as follows: "K.M. Beckett, Chairman". Counsel for the respondent there took the same objection as is taken here, that the case had not been signed by "the Board" , reinforced by the argument that the hearing before the Board had been held before two other members, and that Mr. Beckett had not taken part therein, exactly as is the situation here with regard to Mr. O'Connor. Brown, J., giving effect to the objection, did so on the basis that

> ". . . the procedure is statutory, and there is nothing in the material before me to show that 'K. M. Beckett' is the Chairman (of the Board) or that he had authority to sign for the Board, especially as the reasons show he did not take part in the hearing."

It would appear clearly to follow that if the material had shown that Mr. Beckett was chairman and that he had authority to sign for the Board, the decision would have been otherwise. The fact that the procedure is statutory has already been alluded to: the statute says that "the Board" shall submit the case, and here I have abundant evidence that Mr. O'Connor had been appointed acting chairman, as is specifically authorized by the Statute, and that he had been expressly authorized to accept service of documents in respect of this case and to sign the stated case on behalf of and as the act of the Board. I find accordingly that the case was in fact submitted in writing to this Court by the Board as is required by subsection (2a) of sec. 67 of the Act.

It should be noted here also that the fact that there might be some possibility of error in the case, being signed by a person - even though duly authorized - who did not take part in the hearing is taken care of by the provision for remission of the case to the Board for amendment. In summary again it is my opinion that where the *Assessment Act* has, as in my view it has, provided a clear and complete code of procedure for getting cases speedily stated and submitted to this Court, then where appellants have complied with those procedures and the Board, by the act of its duly authorized officer, has so stated and submitted the case, the rights of those appellants to have their cases heard are not to be defeated by reference to procedures not contemplated by the Act or to possibilities of error that the provisions of the Act have in fact been designed to meet. With respect to ground 2, as with respect to grounds 1 and 3, the preliminary objection accordingly fails.

This leaves ground 4 - that the cases are in fact improperly or incompletely set out. By agreement counsel reserved on this point until after I should have dealt with the first three grounds of objection. I am therefore unable to deal with this matter at this stage.

I would hope that the parties will be able to agree on the errors or omissions, if any, in the case and as to how they should be cured by re-statement. If so, I am prepared to order, pursuant to

sec. 67 (5) of the Act, that the case be sent back to the Board for amendment in accordance with the agreed re-statement. If the parties are unable to agree on whether, and if so how, the case should be amended, they may follow one of two courses as advised, as follows. If counsel are of opinion that I am seized of this matter - that is, including this ground of objection as well as the others - they may make written submissions thereon to me, which should be filed not later than 12 April next. If however they are of opinion, as I am, that I am not seized of this ground of objection, as it was not argued at all before me - and indeed it seems to me not so much a ground of preliminary objection as are the other three grounds which go to jurisdiction, but rather a matter of substantive motion to cure a non-fatal defect, as contemplated by the Act - they can bring the matter on before another Chambers Judge in Victoria at a sitting to be arranged.

I ask counsel to advise me, by way of memo to be filed with the Registrar and forwarded, as to what course it is intended to follow. Counsel for the respondent, who raises the question, should have carriage of the matter. After hearing from counsel and considering the submissions (if any are made to me) I will deal with the matter of costs of the hearing of the preliminary objection to date. Counsel may include submissions on this matter if they wish.

September 14, 1978

MEMORANDUM

To: The Registrar,
Supreme Court, Victoria, B.C.

1. I refer to my Reasons for Judgment in this matter, dated 29 March, 1978, and particularly to a passage appearing in the first paragraph on page 11 thereof, at lines 12 to 17. (See page 678 lines 20-24.)

2. At that point I was dealing with the question of whether the Board could, as it purported to do by its Rule 38, bring into effect certain provisions of the *Summary Convictions Act* and thus in effect override the provisions of the *Assessment Act* as to the procedures to be followed in stating a case for consideration by this Court. In the passage in question I pointed out that in purporting to bring the *Summary Convictions Act* provisions into effect the rule". . . does not use the expression 'mutatis mutandis' or 'so far as may be applicable' or any other like expression. . ."

3. My attention has since been drawn to the provisions contained in section 39A of the *Interpretation Act* as enacted by S.B.C. 1936 ch. 23, sec. 14. That provision, with the marginal note, is as follows:

"Mutatis mutandis

39A. Where an enactment provides that another enactment applies, it applies with the necessary changes and so far as it is applicable."

4. I did not have this provision in mind in preparing my decision; a reference to my notes indicates that it was not discussed by or with counsel in the course of their submissions. It is apparent that that passage in my Reasons for Judgment is inappropriate and of no effect.

5. I have concluded, however, that my decision would have been the same even had that provision been in mind. The decision, in effect, was that the Board, which is empowered to make such rules only as are not inconsistent with the *Assessment Act*, cannot make a rule bringing into effect the *Summary Convictions Act* procedural requirements which are inconsistent with those contained in the *Assessment Act* itself. My conclusion in that regard would not have been altered by a consideration of section 39A of the

Interpretation Act, for my view then would have been, as it is now, that that provision has no bearing on the situation. However, I regret that the fact that I did not have this provision in mind led me to make an inept observation in my Reasons for Judgment.

6. Will you please advise counsel accordingly, by copy of this memo.

(Signed) E. D. Fulton

SUPREME COURT OF BRITISH COLUMBIA

(No. 000167 AND 000230 VICTORIA REGISTRY)

Before MR. JUSTICE A. B. MACFARLANE Victoria, June 8, 1978

D. A. Farquhar for the municipality.
P. W. Klassen for the Assessment Commissioner.
E. H. A Emery and M. A. de Rosenroll for the respondent.

Reasons for Judgment June 19, 1978

The Racquet Club of Victoria Holdings Ltd. (Racquet Club) is a private sports and recreational complex, which on appeal to the Assessment Appeal Board (Board) was successful in having its assessment on improvements reduced to "a nominal amount of $100 for the year 1977." The prior assessment, based on the 1974 value plus additions, had been $515,810. The reason given by the Board for such reduction was that the assessors had failed to make any allowance for economic obsolescence and, particularly, for the impact upon the facilities of the Racquet Club of competition from publicly-owned recreational complexes, which did not have to pay taxes and which were supported from the public purse.

These two appeals, by way of stated case, brought pursuant to section 67 (2) of the *Assessment Act*, are based upon the same facts, and each appellant raises two questions (the others having been abandoned), namely:

> Did we err in failing to hold that the subject improvements should be assessed on the same value as the subject improvements had been assessed for the year 1974 and 1975 after additions as is provided in section 24 (6) (a) of the *Assessment Act*, chapter 6, S.B.C. 1974 as amended?
>
> Did the evidence before us constitute any evidence of nominal value of the subject improvements?

Counsel agree that if an affirmative answer is given to the first question the other need not be answered.

Turning then to deal with the first question: Section 24 is found in Part III of the *Assessment Act* under the heading of valuation. Subsection (1) reads:

> (1) Land and improvements shall be assessed at their actual value.

Subsection 6 provides, in part:

> (6) Notwithstanding subsection (1) or anything to the contrary in this Act,
>
> (a) except as provided in paragraphs (b) . . . land and improvements shall be assessed at the same value and on the same basis at which the land and improvements were assessed for the calendar year 1974;

(b) where a change in the value of land and improvements occurs by reason of

(i) a change in the physical characteristics of the land and improvements, or both; or

(ii) new construction or new development thereto, thereon, or therein; or

(iii) a change in the zoning or reclassification of land and improvements

that is not included in the assessment roll for the calendar year 1974, the land and improvements shall be assessed at the same value and on the same basis as if those changes in value had occurred and had been taken into account in the preparation of the assessment roll for the calendar year 1974. . .

The purpose of that legislation, assented to November 26, 1974, stated in broad terms, was to freeze assessed values for subsequent years at those for the calendar year 1974 - *Re Village Rentals Limited* (B.C.C.A.) unreported, May 25, 1976. The" freeze" could be lifted if the taxpayer brought itself within section 24 (6) (b). Counsel agree that the only basis upon which the Board could have reduced the Racquet Club assessment was if it had been satisfied that there had been "*new development thereto, thereon or therein*."

Two decisions of our Court of Appeal have considered and construed that exception - *British Columbia Forest Products Limited and Crown Zellerbach Canada Limited* v. *The Assessors of the Assessment Areas of Cowichan et al.* (the timber cruise case), a *per curiam* judgment with reasons by Robertson, J.A., December 16, 1977 (unreported), and *City of Prince Rupert et al.* v. *Canadian Cellulose Company Limited et al.*[1] (the CanCel case), in which Carrothers, J.A. wrote the majority judgment, Hinkson, J. A. concurring, and in which Craig, J.A. dissented. Robertson, J .A. and Carrothers, J.A. agreed that "new development" must not be read as if the words were "a new development," and that effect must be given to the words "thereto, thereon or therein." Carrothers, J.A. said that the words "new development" must not be equated to a happening, an occurrence or an event, which is in keeping with the tenor of the judgment of Robertson, J.A. However, the two learned justices of appeal seem to disagree on the question whether "new development" must necessarily involve observable physical change. Robertson, J.A. had this to say at page 14 of his judgment:

No one going on the land after as well as before the filing of the report would be able to see on the later occasion that the land had been newly developed.

Further, I think that "development" takes some colour from its neighbour "construction", which must be something physical.

Craig, J.A. agreed with that view of the matter, and dissented in the CanCel case.

Carrothers, J.A. , at page 13 of his judgment in the CanCel case, said that "new development. . . may have physical qualities or characteristics, but not necessarily so." At page 14 he went on to say:

It is to be noted that Robertson, J.A. does not go so far as to say that "new development" must have physical substance; he uses his reference to the colour of "construction" to emphasize that a fresh timber cruise produces nothing but an opinion: the number of merchantable trees actually standing on the land all along is not altered by a later count. The conclusion that I draw from what Robertson, J.A. said, when it is considered in relation to a situation such as we have here, is that, in order that something may be "new

[1] (Handed down April 25, 1978, but unreported.)

> development", it must be of such a nature that it can be said to apply something to, or place something on or in, the land; a timber cruise could do none of those things. In my view we must have what I would describe as incontrovertible factual substance.
>
> We have the examples of subdivision and consolidation of title where "new development" would not have a physical presence or influence "thereto, thereon or therein" though they would have incontrovertible factual substance in the registered plans and certificates of title.
>
> In this case we have, at the time of the assessment for 1976, not hypothesis, opinion or conjecture but rather an enforceable governmental order with an actual impact on the value of certain improvements, which impact can be ascertained, quantified and applied. Surely it is "new development thereto" of incontrovertible factual substance - probative evidentiary value - though not having a physical characteristic or presence other than the paper that the order was written on.

The reference by Carrothers, J.A. to "hypothesis, opinion or conjecture" was, I think, prompted by his earlier reference to "the classic statement" of Rinfret, C.J. in *Sun Life Assurance Co. of Canada* v. *The City of Montreal*, [1950] S.C.R. 220 at 224 where the learned Chief Justice, in discussing the factors which ought and ought not to be taken into account by an assessor, said ". . . there is no room for hypothesis as regards the future of the property."

In the "timber cruise" case a new timber cruise had revealed a greater potential than had before been estimated. Relying upon that new estimate as a new development the assessor increased the assessment. Robertson, J.A. observed that the cruise report may have been "a new development" for the purpose of ascertaining the actual value of the land, but it could not be said to be "new development to, on or in the land." Similarly, evidence that competition from new publicly-owned recreational facilities had resulted in loss of membership and loss of profit by the Racquet Club perhaps was "a new development" for the purpose of ascertaining the actual value of the improvements, but it was not new development *to, on* or *in* the improvements. The freeze imposed by the statute did not permit an annual reassessment of actual value, but rather fixed actual value at the 1974 level, subject to the exceptions contained in the Act. It is not then every new development which will remove a property from the freeze, but only such that is *on, in* or *to* the land or improvements. Such new development would seem to involve a *direct* change to the asset which is to be assessed, rather than something which has an indirect effect upon value. That, I think, was the essence of the reasoning of Carrothers, J.A. in the CanCel case. He spoke of an impact which could be ascertained, quantified and applied, a matter of incontrovertible factual substance. The pollution branch had ordered CanCel to make changes to its sulphite plant within about 4 ½ years or shut it down. As a direct result of that order the CanCel directors decided to modify the sulphite mill to the manufacture of bleached kraft pulp instead of sulphite pulp, a decision which would involve a drastic change to the physical qualities of the plant. Much of the sulphite plant was rendered redundant, and had to be dismantled, removed and sold as scrap. The physical changes were not made during the year in which the assessment was made but it was a certainty, by reason of the order and the directors' decision, that such changes to the plant would follow within months. There was a direct link, therefore, between the order, the decision, and a physical reduction in plant size. The order and the decision concerned new development to the improvements, which were to be assessed.

Counsel for the respondent, upon the basis of what was said in the CanCel case, contends that the impact of competition from publicly-owned recreational facilities (such as the Oak Bay Recreation Centre, which the appellants concede has been constructed since 1974) upon the profitability of the Racquet Club has directly affected the value of the improvements, and that such impact ought to be considered as new development to such improvements. I am unable to agree with that contention. It may have constituted a new circumstance, but not new development. The CanCel case involved unusual circumstances, which are not applicable here. The external impact in CanCel was directed at and to the improvement in question. Physical

changes to the improvements had been decided upon; new development to the plant had been initiated. Although the impact of competition upon the Racquet Club had caused a loss of profit and, as the Board described it, economic obsolescence, that is not to say that physical changes have been initiated and would most certainly follow, as was the case at the CanCel plant.

The error which the Board made here was to proceed to reassess the actual value of the improvements of the Racquet Club, on the basis of economic obsolescence as if a freeze on such reassessments did not exist. In any event the Board either failed to consider whether the impact of competition was "new development to" the improvements, or in error equated "a new development" affecting the actual value of the improvements, with the effect of a new development to them.

The purpose of the *Assessment Act*, 1974 was to fix actual values in that year, and to maintain those assessments subject only to very limited exceptions, until the new assessment structure had settled into place, and had stabilized. In that context it was not every new circumstance or development affecting the value of property which would result in a reassessment. In general terms, the Legislature seemed to intend that 1974 values be maintained unless the physical characteristics of the property changed, additions by way of new construction were made, the property was redeveloped or utilized in a different way, or was rezoned or reclassified. All of those criteria involved a direct and readily recognizable change in the character or use of the property. Changes in value brought about by external influences, such as the effect of competition, economic recession and recovery, business trends, supply and demand, and other economic and social pressures do not appear to have been factors which the Legislature contemplated as being a basis for exception to the general rule that, for assessment purposes, values should be maintained at the 1974 level.

The freeze was still in effect in 1977 and the Racquet Club did not fall within any of the exceptions. The legislation has now changed; the freeze is being lifted. Economic obsolescence may now be a factor in assessing actual value and, undoubtedly, the Racquet Club and other such organizations will be seeking a change in current assessments on that, as well as many other, grounds. Such relief, as was here sought and obtained with respect to the 1977 taxation year, was not available as it did not come within the exceptions which then applied.

The first question asked by the Board was:

> Did we err in failing to hold that the subject improvements should be assessed on the same value as the subject improvements had been assessed for the year 1974 and 1975 after additions as is provided in section 24 (6) (a) of the *Assessment Act,* chapter 6, S.B.C. 1974 as amended?

The answer is yes.

The appeals are allowed, and it follows that the original 1977 assessment for improvements in the amount of $515,810 will be restored.

Costs may be spoken to.