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RAYONIER CANADA (B.C.) LIMITED
and
MacMILLAN BLOEDEL INDUSTRIES LIMITED

v.

ASSESSMENT AREAS OF VANCOUVER
and BURNABY-NEW WESTMINSTER

Supreme Court of British Columbia (A790412)

Before: MR. JUSTICE E.D. FULTON

Vancouver, April 26, 1979

B.I. Cohen for the Appellants
P.W. Klassen for the Respondents

Reasons for Judgment June 13, 1979

This matter comes forward by way of case stated by the Assessment Appeal Board ("the Board") under sec. 67 of the *Assessment Act*, S.B.C. 1974, ch. 6 and amendments. There are three assessments involved, each of which raises the same issue both as to the merits and as to jurisdiction. The Stated Case reproduces an agreed statement of facts covering all three assessments, which was filed with the Board at its hearing on 12th October, 1978.

A summary of the agreed facts is necessary to elucidate the issues in both fields.

The appellant Rayonier Canada (B. C.) Limited ("Rayonier") operates a sawmill at the foot of Heather Street in the City of Vancouver adjacent to the Fraser River. The appellant MacMillan Bloedel Industries Limited ("MacMillan Bloedel") operates a sawmill also located in the City of Vancouver adjacent to the Fraser River, and a sawmill on Lulu Island in the City of New Westminster adjacent to the same river. With respect to two of the mills involved, then, the question for determination, being whether there is an entitlement to exemption from taxation, involves the interpretation and application of clause (e) of sec. 396 of the *Vancouver Charter*, S.B.C. 1953, ch. 55 and amendments, and with respect to the third mill involves the interpretation and application of sub-clause (p) of sec. 327 (1) of the *Municipal Act*, R.S.B.C. 1960, ch. 255 and amendments. These provisions are in identical terms, which will be set out in full later. At this point it is sufficient to note that they provide for exemption from taxation of machines used to control or abate pollution, the exemption being total or partial depending upon whether the machine is used exclusively, or only partially, but primarily, for such purpose.

Prior to 1975, at each of these sawmills there was in use a machine called a hydraulic barker. A barker is used to remove bark from logs prior to the logs being processed into lumber, chips, etc. A hydraulic barker removes bark by means of high pressure water jets which are directed at the logs being put through the barker; as well, the jets remove sand, dirt and stones which otherwise might cause damage to saws and other equipment. It is agreed that the bark is removed for considerations of a purely commercial nature, having to do with the grade of the lumber and the avoidance of such damage, and that a barker is an integral and necessary part of the production process in the sawmills in question.

The water used by hydraulic barkers results in a high volume of effluent, which contains bark residues, oils and toxic chemicals. The effluent from all three hydraulic barkers referred to did not meet the standards of the Pollution Control Board for effluent discharged into the respective areas of the Fraser River affected. Both respondents were required to take steps to meet those standards. Studies were made of various alternatives such as the use of settling tanks, lagoons and clarifiers, but it was found that factors of availability of space, cost, etc., rendered such methods impractical. The only acceptable solution was determined in each case to be the installation and use of a mechanical barker in place of the hydraulic barker. Such mechanical barkers were installed at each mill in 1975.

A mechanical barker removes the bark by the process of tearing and grinding the bark from the log without the use of water. This produces a dry bark waste which does not cause pollution. As a result of the installation of these mechanical barkers all three mills were able to operate in conformity with the pollution standards set by the Pollution Control Board.

Accordingly both appellants made application for an exemption from tax in respect of the newly installed barkers, pursuant to the exemption provisions referred to above. The applications were made to the British Columbia Assessment Authority in each case, but in each case the assessment of improvements for 1976 reflected no exemption or allowance with respect to these machines. The companies appealed to the appropriate Court of Revision.

The Court of Revision dealing with the appeals in respect of the two Vancouver sawmills ordered a reduction in the respective assessments to reflect a 25 per cent exemption for the mechanical barkers; the Court dealing with the New Westminster sawmill confirmed the assessment. Appeals in both Vancouver cases were taken by the Assessment Authority to the Assessment Appeal Board which, in December 1976, held that the mechanical barkers in question were primarily but not exclusively used for pollution control and ordered an adjustment in the assessments to reflect a 50 per cent, rather than a 25 per cent exemption.

The Assessment Authority appealed the Board's decision in respect of both Vancouver sawmills to this Court by Stated Case, and on March 17, 1977 Legg J. held in both cases that the Board had erred in law in holding that it could determine the portion of the assessed value of the barker attributable to pollution control and exempt such portion under sec. 396 (e) of the *Vancouver Charter*, and held further that only the Court of Revision had jurisdiction to make such determination (Victoria Registry Nos. 1393/76 and 1394/76, reasons for judgment filed in the Vancouver Registry March 17,1977). It is to be noted that Legg, J. did not upset, or question, the findings in the Court of Revision or by the Board that the mechanical barkers were used primarily, although not exclusively, for pollution control and therefore qualified for an exemption: his finding and decision were confined to the question of whether the Board had jurisdiction to review and vary the finding of the Court of Revision and itself determine the portion of the assessed value attributable to pollution control, and exempt such portion. It is also to be noted at once that the legislation (the *Assessment Act*) was amended later in 1977 for the express purpose of giving the Board this power - I will consider this amendment further in connection with the preliminary objection.

No exemptions were granted in respect of the barkers in any of the three mills in the 1977 assessments: both companies appealed to the Court of Revision but the appeals were not pressed pending the outcome of the Stated Case referred to. All assessments were confirmed in Court of Revision. In 1977 MacMillan Bloedel installed a new mechanical barker in its Vancouver sawmill.

The appeals before me are exclusively with reference to the assessments made for 1978. Again, no exemptions were reflected in the respective assessment rolls for that year for any of the barkers. Both companies appealed to the appropriate Courts of Revision, with the following results:

(a) Rayonier's Vancouver mill - the assessment was confirmed.

(b) (i) MacMillan Bloedel's Vancouver mill - the new mechanical barker installed in 1977 was added to the 1978 roll and a percentage exemption was granted, but with no explanation as to the percentage amount or its application as between the two barkers;

(ii) MacMillan Bloedel's New Westminster Mill - a 50 per cent exemption was granted in accordance with the formula in the Board's decision of 1976.

Appeals were taken from these decisions by Rayonier and the appropriate Assessment Authority respectively to the Board. They were heard together on 12th October, 1978, and by judgment dated 21st December, 1978 the Board disallowed the Rayonier appeal and allowed the appeals by the Assessment Authority. The Board held in effect that the mechanical barkers in question are not used exclusively or primarily for the purpose of pollution control or abatement.

The precise question raised in the Stated Case is as follows:

> "Did the Board err in its interpretation of sec. 396 (e) of the *Vancouver Charter* and sec. 327 (1) (p) of the *Municipal Act* by disallowing the appeal of Rayonier Canada (B.C.) Limited on the ground that the subject mechanical barker was not exempt from taxation and further in that the exemptions allowed by the Courts of Revision with respect to the subject mechanical barkers owned by MacMillan Bloedel Industries Limited were improper and therefore disallowed?"

The provision which the Board had before it for consideration is found, in each case, in a section of the legislation which provides an exemption from taxation for property of the classes or kinds enumerated therein. The class of machine in question here is described and dealt with as follows:

> "Any improvement or land used exclusively for the control or abatement of water, land, or air pollution, including sewage-treatment plants, effluent reservoirs and lagoons, deodorizing equipment, dust and particulate-matter eliminators; provided, however, that where the improvement or land is not being used exclusively for the purpose of pollution control or abatement but is primarily so used, the Assessment Commissioner may, in his discretion, determine the portion of the assessed value of the improvement or land attributable to such control or abatement, and such portion is exempt."

Counsel for the respondent Assessment Authority has taken a preliminary objection to the jurisdiction of this Court to deal with the matter. The objection is based not on the contention that what is involved is a question of fact and not of law, but rather on the contention that what the Court is being asked to do is to review an act or omission of the Assessment Commissioner, and that there is no legislative provision or scheme which enables this Court to do that.

In support counsel submits that the most that has ever been found with respect to entitlement is that the machines in question are primarily, but not exclusively, used for pollution control or abatement, since what was awarded in the earlier appeals was only a partial exemption: if the use were exclusive, the exemption would have been total. In such circumstances the portion of the assessed value attributable to pollution control or abatement is to be determined in the discretion of the Assessment Commissioner and such portion is exempt. There are, says counsel, two important aspects of this situation which emerge from a consideration of those circumstances: first, we are dealing with an exemption from taxation, not from assessment; and second, the official whose act or omission is being complained of is not the assessor - or an assessor - but the Assessment Commissioner. According to this submission, this makes it clear that what is being dealt with is taxation, not assessment, and it is the assessment function alone which is dealt with by the *Assessment Act* and in respect of which the system of appeal - from assessor to Court of Revision, to Assessment Appeal Board, to this Court - is provided: no such system is provided with respect to the taxation function or with respect to acts or omissions of the

Assessment Commissioner. In the absence of such a system, he submits, this Court has no jurisdiction. It is true, counsel admits, that such a system of review was followed in respect of the earlier appeals, culminating in the disposition of the Stated Case by Legg, J.; but, he says, there have been changes in the legislation since then which have the result that what was done then is not conclusive of this question of jurisdiction at the present time. In short, the determination of an exemption or partial exemption from taxation is, according to this submission, not part of the assessment function; there is nothing in the *Assessment Act* which enables an assessor to determine an exemption, and therefore there is no power in this Court to review what was done or not done.

In my view this objection should not, and cannot, succeed. In my opinion the provisions of the *Assessment Act*, looked at in the light of complementary provisions in the *Assessment Authority of British Columbia Act*, make it clear that the scheme of assessments, including the system of review thereof by way of appeal, contemplates and intends that both processes shall deal with or take into account exemptions from taxation when relevant. I do not agree that the changes in legislation since the decision referred to have the effect contended for: but on one thing I do agree, and that is that the question in the case stated before me, including the matter of jurisdiction, is to be looked at entirely in the light of the legislation as it was in 1978, and not earlier.

In this connection, I observe that I was not quite correct in saying earlier that the clauses in the *Vancouver Charter* and the *Municipal Act* are identical. The clause in the *Vancouver Charter* was amended in 1977 by striking out "Assessment Commissioner" and substituting "commissioner appointed under the *Assessment Authority of British Columbia Act"*. However, at the same time the definition of "Assessment Commissioner" in the *Municipal Act* was amended to provide that the Assessment Commissioner referred to there is the Assessment Commissioner appointed under the *Assessment Authority of British Columbia Act*. The reference in both cases is thus to the same official, and the change is immaterial in this context.

First, as to the position and function of Assessment Commissioner: by sec. 14 of the Act appointing this official (the *Assessment Authority of British Columbia Act*) it is provided that he shall:

> "(a) perform the duties and exercise the powers conferred upon him under this or any other Act;
>
> . . .
>
> (e) give directions respecting the preparation and completion of assessment rolls; and
>
> (f) have and may exercise all of the powers of an assessor."

It is obvious, then, that his functions are in important respects equated to those of an assessor and that his decisions - whichever way they go - will be reflected in the assessment rolls. And it is significant that the applications for exemption were made, in the first instance, to the British Columbia Assessment Authority, of which he is, in effect, the executive officer.

Looking next at the scheme of the *Assessment Act* as gathered from its provisions in this context, it is significant that in sec. 24, which deals with what an assessor shall take into account in determining values for the purpose of assessment, subsection (5) directs that:

> ". . . Where land and improvements are exempt from taxation, unless ordered by the Commissioner, the Assessor need not, in respect of those exempt lands and improvements,
>
> (a) assess the land and improvements; or

(b) prepare an annual assessment roll."

This makes it clear that, in making his assessments and compiling his rolls, the assessor shall have in mind the question of whether properties are or are not exempt from taxation, either in whole or in part. From which it follows, in my view, that if wholly exempt, then in the absence of such order the property need not be assessed or included in the roll; if partly exempt only, then it should be assessed accordingly to reflect that exemption and included accordingly in the roll.

Counsel drew to my attention that by Order in Council 3418 of November 10, 1977, published as B.C. Reg. 497/77, it was ordered, pursuant to the *Assessment Authority of British Columbia Act*, that an assessment roll for 1978 and thereafter shall show (amongst other things) "the total assessed value of exemptions from taxation" for general and for school and hospital purposes. This in my view in fact strengthens the case against the preliminary objection. It is directed that an assessment roll shall show the assessed value of exemptions *from taxation*: here, no exemptions for the machines in question were allowed or reflected in the assessments or the rolls: if the exemptions should have been allowed, then clearly the roll is in error in that it is also in contravention of this regulation as well, because it does not correctly show the assessed value of exemptions from taxation.

Next are the provisions in the *Assessment Act* respecting appeals to the Court of Revision, and the powers of that Court. Sec. 33 (1) provides that where a person is of opinion that an error or omission exists in the completed assessment roll in. that

> "(e) an exemption has been improperly allowed or disallowed"

he may

> ". . . come before, or notify, the Court of Revision and make his complaint of the error or omission. . . ."

"An exemption" in my opinion clearly includes an exemption from taxation: this point is referred to again in connection with the amendment to sec. 62.

Sec. 37 (1)(a), (b), and (c), with respect to the powers of the Court of Revision, in my view clinch the point that it is intended that an omission or failure to allow or record an exemption in compiling the roll and/or in making an assessment (which may be "complained" about) may be looked into and rectified by the Court of Revision.

The powers of the Court include the power

> "(a) . . . to try all complaints. . . *in accordance with this Act*,"
> (emphasis added)

> "(b) to investigate the assessment roll and the various assessments therein made, . . . and, . . . to adjudicate upon the assessments and complaints;"

(I note in this respect that the assessment finally appearing shall reflect "actual value": but this does not, in my view, alter the fact that the roll itself should reflect the exemption so that the tax may be applied to the assessed value less that portion found to be entitled to the exemption.)

> "(c) to direct such amendments to be made in the assessment roll as may be necessary to give effect to its decision;"

Then there are the powers of the Assessment Appeal Board set out in sec. 62. By subsection (1) (c) that Board is given

> "All the powers of the Court of Revision and, without restricting the generality of the foregoing, the Board may determine, and make an order accordingly,
>
> . . .
>
> (c) whether or not an exemption has been properly allowed or disallowed,"

As noted, clause (c) was included in the 1977 amendment to rectify the situation found by Legg, J. - that the Board did not have power to deal with or determine the amount of the exemption from taxation in question. That "an exemption" is intended to and does include exemption from taxation is settled by this fact.

Finally, there is the power given to the Board in sec. 62 (2),

> "(2) Where, upon the appeal, the Board finds that the assessed value of land and improvements in a municipality or rural area is in excess of assessed value as determined under section 24, it may order a reassessment by the commissioner in the municipality or rural area, . . ."

Here it is made clear that, by its order, the Board may direct the Commissioner to make a reassessment. Earlier in the same section the Board is given power "without restricting the generality of the foregoing" to determine whether an exemption has been properly allowed or disallowed, and to make an order accordingly: in my view it is equally clear that the order would and should be directed to the Commissioner. The cycle, and the intent, is thus complete and clear in that the order of the Board then issues to the Commissioner - which, by definition in the *Assessment Act*, means the Assessment Commissioner appointed under the *Assessment Authority of British Columbia Act*, the official who, by the exemption provision under consideration here is the one who should have dealt with the fixing of the exemption in the first place. Again, that official has all the powers of an assessor.

Accordingly I hold that the system of appeal and review provided by the *Assessment Act* applies in the situation before me, and the preliminary objection is dismissed.

As to the question itself, what is involved is an interpretation of the provision in the *Vancouver Charter* and the *Municipal Act* set out above. As noted, if the machines in question are used exclusively for the purpose of pollution control or abatement, they are totally exempt from taxation; if not exclusively, but primarily so used, it is for the Assessment Commissioner to determine the portion of the assessed value thereof attributable to such pollution control function, and that portion is exempt. It appears to me to be clear that the process of interpreting and applying this provision involves mixed questions of law and fact. As I appreciate the governing principle here, the interpretation of the legal effect of a statutory provision in given circumstances is in general a matter of law; the application of that finding to the particular circumstances is frequently a determination of fact.

So here, in my view, looking at the wording of this provision the first question is whether the machines are being used for the purpose of pollution control or abatement at all. This as I see it is a question of law, since it involves the interpretation and legal effect to be given to the words "used for the purpose of". If it is found that the machines are being so used, then the question of whether they are being so used exclusively or only partially but primarily for that purpose, is a question of fact; so too, if they are only partially so used, the question of what portion of the assessed value is to be attributed to such use is also a question of fact.

I note that the Board in the instant cases has found that the machines do not qualify at all for exemption, as they are not being used at all for pollution control or abatement. From what it said there, and from the whole tenor of its reasons, it is clear that the Board was giving a legal

interpretation: it decided as a matter of law that the purpose or intent of the user should be entirely excluded from consideration. It is accordingly open to me to review on stated case whether or not the Board was correct in its interpretation as a matter of law. I note further that the Board itself, in the earlier cases, had determined as facts that the machines were primarily so used, and that 50 per cent of the value arrived at in accordance with the formula the Board devised was so attributable and should be exempt. These findings of fact were not disturbed in the instant cases: what has happened is that the Board has, as it candidly points out, reversed its position on the meaning and application of the words as a matter of law.

This point - whether the Board's finding in the area I have discussed is a question of law rather than of fact - was not raised or challenged before me; however the problem exists and I have felt it appropriate to deal with it and to outline the limits of the area which it is open to me to review.

On the question of the interpretation of the words "used for the purpose of pollution control or abatement" it is agreed that a barker, whether hydraulic or mechanical, is a necessary and integral part of the equipment of a sawmill used for the production of lumber and chips. It is also agreed that the mechanical barker is not itself designed or intended by those who manufacture it, nor does it include any parts designed or intended, for the control of pollution. It is manufactured simply as a machine which will remove bark from logs - part of the commercial process of manufacturing lumber. The pollution which formerly existed is controlled or prevented by the fact that the mechanical barker produces dry bark waste, not a pollutant. On this basis it is submitted for the respondents that the purpose and use is exclusively commercial, and that the motive or intention of the appellants in substituting these machines for the hydraulic barker is, in law, irrelevant. It is argued that account might be taken of the motive or purpose of the appellants only if the tax was imposed on the user, but here the tax - and the exemption, if applicable - is on the equipment.

On the other hand, it is also agreed that the appellants purchased and installed these machines solely in order to eliminate the pollution problem created by the use of the hydraulic barkers, and for no other purpose. It is agreed that the appellants are not better off in the commercial sense, nor is the operation of the mill improved, in so far as cost of operation, efficiency, etc. are concerned, by using mechanical instead of hydraulic barkers. In fact the appellants are in a sense worse off for they have incurred the capital cost of purchasing and installing these machines although they had already purchased and were still using machines which performed the commercial function perfectly adequately. Counsel for the appellants argues accordingly that the companies had not the slightest need for, and derived no benefit from, the mechanical barkers in the context of their commercial purposes, and the purpose for which the mechanical barkers were installed and used instead of the hydraulic barkers is, if not exclusively then certainly primarily, for the purpose of preventing pollution and thus complying with the pollution control requirements and objectives which they were ordered to do.

A number of dictionary definitions of the word "purpose" were cited to me: but with respect, in my view, these can be used equally to assist the appellants or respondents depending upon whether it be held that the application of the word is confined to that for which the machine was originally designed or whether it can and should be extended to include objects and results for the achievement of which the machine is in fact installed and used. Counsel for the appellants cited *Newcastle City Council* v. *Royal Newcastle Hospital* (1959) A.C. 249. But there the issue was whether land left vacant could be said to be being used: Lord Denning, giving the judgment of the Privy Council, said that if the result - i.e., a belt of land surrounding the hospital which would be free from traffic, exhaust fumes, noise, etc. - was intended, then the land could be said to be being used for that purpose. The case is helpful, but it is not, in my view, decisive, because there the wording of the statute made it clear that it was the purpose of the user which was important. Here, as I see it, the statute is open to two interpretations, the one to be adopted depending upon whether the words "used for the purpose of" necessarily exclude the purpose of the owner or user. In my view they do not.

In arriving at the meaning of particular words, one is entitled to have regard to the intent of the legislation as gathered from the provision as a whole. To me it is obvious that the intent with respect to improvements is to provide an incentive in connection with pollution control, by way of tax relief to persons who incur the expense of installing equipment with the primary object of the control or abatement of pollution. (In this regard I must respectfully disagree with the conclusion of the Board.) It is clear that the Legislature did not intend that when the use of equipment is primarily for a commercial purpose - a purpose primarily or solely for the benefit of the user - and pollution control is only an incidental result, any tax benefit should follow, but it is equally clear, as I see it, that the Legislature did intend that when the main object and result is the achievement of this desirable social objective then the taxpayer should be relieved: he should not be required to pay the full cost of acquiring the equipment and to pay the full tax thereon as well. It was recognized that both results could well flow - i.e., a commercial benefit as well as a pollution control benefit, but it is clear from the terms of the provision that the relief is not to be excluded merely because a commercial benefit results, so long as the pollution control benefit remains the primary object and result. Hence the use of the words "not . . . exclusively but. . . primarily so used". In my view the intent is clear, and this conclusion is not affected by the fact that the exemption from tax is expressed in terms which refer to the equipment and not directly to the owner or user thereof: the same person pays. Machines do not pay tax, it is the owner who pays, and if the machine is exempt, the user pays less.

In my view, in considering the implication or meaning of the expression "used for the purpose of" it is important to bear in mind that in this context those words are employed with reference to "improvement or land" - in this context, a mechanical barker. A machine is an inanimate object, and cannot itself be said to have a purpose at all. It can have a use, or be used for a purpose - and these are the precise words employed: "used for the purpose of pollution control. . .". This expression connotes intent, which must be the intent of some person. It is also significant that the Legislature did not employ the word "designed": had the expression been "designed" or "manufactured for the purpose of pollution control" then it would be difficult to bring these machines within the ambit or intent of the clause. But since the words are "used for the purpose of pollution control" to me it is clear that the object for or intent with which they are installed and used is contemplated. Here, the mechanical barkers would not be used at all if pollution control were not an object - the hydraulic barkers would be in continued use instead. Since "used for the purpose of" connotes the intent of a person, and since there is nothing in the clause which makes the intent referable exclusively to the purpose of the designer or manufacturer, or which suggests that it should be so referable, it follows that it is the purpose of the user which should be looked at.

Here the user had in mind the purpose or object of control of pollution. It is true that this is not the sole purpose or intent of using barkers - a commercial purpose is also involved, and the mechanical barker also serves that purpose. But, as already indicated, this does not make the machines ineligible, so that the question is: were they primarily so used? This question the Board has previously answered in the affirmative and has devised a formula by which 50 per cent of the difference between the assessed value of these machines and the depreciated value of the hydraulic barkers is attributable to such use, and so exempt. Inasmuch as the barkers - as are all machines - are depreciable, and eventually require replacement or renewal in any event, this seems a fair and equitable arrangement - and being in the area of fact, is in any event not subject to revision by me.

In making my finding on this question of law, I am cognizant of the principle that a taxpayer seeking the benefit of an exemption provision faces the onus of showing that he comes squarely within the ambit of that provision. Here one thrust of the submission has been that if a provision is susceptible to two interpretations, one favorable and one unfavorable, then the onus of proving that the provision applies squarely in favor of the taxpayer has not been discharged. On the basis of one interpretation - that the purpose of the user is irrelevant - the machines are not covered by the exemption; on the basis of the other, they are. But in my view two additional considerations operate here in favor of the appellants' case. One is that when two interpretations are equally

available, then that which does equity is to be preferred. Here equity, in my view, clearly favors the position of the taxpayer who has incurred an expense he would otherwise not have undergone at this time in order to meet the requirements of pollution control. And second, I have found that the interpretation derived from examining the intent of the provision as a whole also clearly points to the conclusion that it is the purpose in the mind of the user which governs. Legal principles of interpretation happily coincide with equitable considerations to persuade me that the appellants have discharged the onus on them.

Before finally answering the precise questions posed in the Stated Case, I should say that the opinion I am expressing is confined to the situation where, as here, in order to meet a pollution control objective, a mechanical barker is installed to replace a hydraulic barker in actual use. I express no opinion as to what should be the decision when a mechanical barker is installed in, say, a new mill, or to meet the purpose of expanded operations in an existing mill, or is installed to replace a mechanical barker already in operation but which has reached the end of its working life. It might very well be held that such installation was not primarily for the purpose of pollution control but was indeed primarily if not exclusively for a commercial purpose: the answer will depend on the intent to be derived from the circumstances of the particular case.

Here I have no evidence as to the circumstances surrounding the installation in 1977 of the new mechanical barker in the Vancouver saw mill of the appellant MacMillan Bloedel - I do not know whether that machine was installed to replace an existing hydraulic barker or to meet expanded production goals, or because the mechanical barker installed in 1975 was defective or worn out. My answer accordingly does not extend to that barker, unless it was installed to replace a hydraulic barker. If it was not, and if counsel for that appellant feels, notwithstanding the reservation I have expressed, that it should be a subject of a further submission he may proceed accordingly.

Subject to the foregoing, in my opinion the answer to each of the two parts of the question in the Stated Case is, "yes".

The appellants are entitled to their costs.