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MACMILLAN BLOEDEL LIMITED (Respondent)

v.

ASSESSOR OF AREA 7 - SUNSHINE COAST (Appellant)

Supreme Court of British Columbia (A843323) Vancouver Registry

Before MR. JUSTICE H.C. MCKAY (in chambers)

Vancouver June 3,4 and 5, 1985

D.W. Shaw, Q.C. and G.B. Gomery for MacMillan Bloedel Ltd.
J. Greenwood for the Assessor of Area 7 - Sunshine Coast

Reasons for Judgment July 15, 1985

Two cases have been stated pursuant to s. 74 of the *Assessment Act*, R.S.B.C. 1979, c. 21. The first, involving thirty questions, was stated at the request of the appellant MacMillan Bloedel Limited and the second, involving two questions, was stated at the request of the Assessor of Area #07 -Sunshine Coast.

In each case opinions are sought from this court arising out of an appeal by the appellant to the Assessment Appeal Board of British Columbia of assessments of the appellant's Powell River mill for the assessment years 1982 and 1983, that is, as at December 31, 1981 and December 31, 1982 respectively.

I will deal first with the case stated at the request of the appellant. The Powell River mill involves a large mill complex located at Powell River. It produces newsprint, market pulp and lumber but the main product is newsprint. The mill has been in operation since 1912 and there have been various changes to the mill's machines, equipment, technology and output since that time.

The actual values of the mill as found by the Courts of Revision are as follows:

December 31, 1981	December 31, 1982
$665,475,281.00	$569,850,635.00

At the hearing of the appeal before the Assessment Appeal Board (the" Board") the appellant, MacMillan Bloedel Limited, submitted valuations of the mill using a market approach, a discounted cash flow (income) approach and a depreciated replacement cost approach and put forward the following as the actual values of the mill:

December 31, 1981	December 31, 1982
$300,000,000.00	$280,000,000.00

The assessor, on the appeal to the Board, submitted a depreciated replacement cost valuation, and ascribed the following actual value to the mill:

December 31, 1981	December 31, 1982
$605,619,550.00	$542,058,226.00

The Board, after a lengthy hearing, gave reasons in which it held that the depreciated replacement cost method was the most appropriate one, and using that method, determined the actual value to be:

December 31, 1981	December 31, 1982
$627,016,150.00	$626,578,535.00

December 31, 1981 December 31, 1982 $627,016,150.00 $626,578,535.00

The relevant portions of the governing sections in the *Assessment Act* are:

> 26. (1) The assessor shall determine the actual value of land and improvements.
>
> (2) In determining the actual value. . . the assessor may give consideration to the present use, location, original cost, cost of replacement, revenue or rental value, the price that the land and improvements might be reasonably expected to bring if offered for sale in the open market by a solvent owner, and any other circumstances affecting the value. . . .
>
> (3) . . . where an industry, commercial undertaking, public utility enterprise, or other operation is carried on, the land and improvements so used shall be valued as the property of a going concern.
>
> 74. (2) A person affected by a decision of the board on appeal, . . . may require the board to submit a case for the opinion of the Supreme Court on a question of law only. . . .
>
> (my emphasis)

The determination of actual value is anything but an exact science and the methods used will vary according to the circumstances of any given appraisal. It is usual, in the case of mills of the type under consideration, to use a depreciated replacement cost analysis (the "cost approach") because of the scarcity of comparable sales. That is the approach that the assessor used and that is the approach that the Board adopted. The appellant, on the other hand, sought to convince the Board that a more realistic approach, because of the current economic outlook for such operations, would be to look as well to methods of valuation that reflect what people were prepared to invest in forest industry mills.

It is to be emphasized that it is the Board that is the sole trier of fact-it is for the Board to consider, weigh and accept or reject the various items of evidence. It was, in short, for the Board to determine all questions relating to valuation including the appropriate approach to valuation. If it does so, without error of law, that is the end of the matter. It is to be kept in mind that the members of the Board are involved, on a regular basis, with questions relating to valuation and bring their knowledge and experience to bear on those questions. The function of the court is, when called upon, to answer "a question of law only".

Before dealing with the specific questions I should deal first with two matters that bear on a number of the questions. The first relates to the reliance by the Board on evidence heard and conclusions drawn in another hearing-*Crown Forest Industries Limited* v. *Assessor of Area #06-Courtenay*, September 14, 1984. It is evident on the face of the Board's decision that it made extensive use of evidence adduced and conclusions drawn in the Crown Forest Industries hearing to contradict evidence led before it on the appeal at hand. That evidence and those conclusions played a large part in the rejection by the Board of the "comparative sales" and "income" approach to valuation and, as well, was used in certain aspects of the "cost" approach. I quote hereunder passages from the Board's decision herein to point out that reliance:

On the purchase of the 96% share equity of Crown Zellerbach Canada Limited, the Board has dealt with that entire matter in the decision of *Crown Forest Industries Limited (formerly Crown Zellerbach Canada Limited)* v. *The Assessor of Area #6-Courtenay* dated September 14, 1984. The Board takes judicial notice of facts and conclusions in that decision. The evidence adduced in the instant appeal on the Crown sale is at variance with the facts found by the board and, therefore, of no probative assistance in determining the value of subject property appealed. This Assessment Appeal Board which adjudicated both appeals has all the facts to determine the comparability of the Elk Falls Pulp and Paper mill, the major asset involved in the Crown purchase, and the Powell River mill. The Board concludes that there is an insufficient degree of comparability between the two properties on which a comparison can be made.

* * *

The discounted cash flow analysis may be an accepted and appropriate method of determining which investment of several types would yield an adequate return on capital, but the analysis is not designed to determine value. It is merely a tool for investment analysis.

A purchaser would consider many factors in establishing the price to be paid for the share equity. Mr. Ryan in the Crown Forest appeal, testified that Fletcher Challenge considered book values, replacement costs, slow recovery scenario forecasts and others when negotiating for purchase. With respect to the future business of the company and the forecasts, of which the discounted cash flow analysis is only one of several scenarios considered, Mr. Ryan made a most frank statement-'Forecasts never are a fact, are they!'

This statement from an extremely knowledgeable purchaser encapsulates the conclusion of the Board that discounted cash flow analysis is not an appropriate method to determine actual value.

* * *

In the Crown Forest decision, the Board could determine what consideration a purchaser did give to the discounted cash flow analysis, and the fact is that he did not rely on that method. The Board, therefore, considers that the discounted cash flow approach can be afforded little weight, if any, and the values advanced are therefore rejected as not applicable.

The use of such a model for replacement cost then eliminates all forms of functional obsolescence. This fact is confirmed in the case of Crown Forest.

The use of that evidence and the conclusions drawn is clearly an error in law and both counsel concede that to be so. In a recent decision of this Court-*B.C. Timber Ltd. (Westar Timber Ltd.)* v. *Assessor of Area #25-Northwest*, No. A843321-April 1, 1985-MacDonald, J. dealt with precisely the same question-again involving reliance on evidence led and facts found in the Crown Forest Industries hearing. MacDonald, J. had this to say, with which I agree.

JUDICIAL NOTICE

On the questions of excess operating costs and interest during construction, the Board in both these cases took judicial notice of the facts and conclusions in its earlier decision in *Crown Forest Industries*. Both parties argue that it was improper for the Board to do so. I agree.

When the Board proceeds in such a fashion the parties have no means of testing the alleged evidence in those other proceedings. While ultimately a board may apply to its

> final administrative decisions certain policy considerations, this portion of the Board's decisions was part of its quasi-judicial function. Where the Board seeks to rely on information gathered by it outside the hearing, it ought to allow that information to be tested in the hearing before relying on it. (see *Township of Innisfil* v. *City of Barrie* (1978) 7 O.M.B.R. 233 (Ont. H.C. Div. Ct.), aff'd 95 D.L.R. 298 (Ont. C.A.). . . . the Board's power to take judicial notice of facts is limited to matters so generally known and accepted that they can be readily verified and cannot reasonably be questioned!

As mentioned, counsel for the Assessor agreed that the Board erred in law-in fact one of the questions posed in the case stated at the request of the assessor raises that very question. Initially, however, he took the position that if there was other evidence on which the Board could have reasonably rejected the "cost" or "income" approach then that error of law would not necessitate a remitting of the matter to the Board. After considering the authorities put forward by counsel for the appellant he conceded that the matter must be remitted. In particular counsel referred to *Re Dinars* v. *Liquor Licence Board of Ontario* (1974), 49 D.L.R. (3d) at 537 and *Dallinga* v. *Council of City of Calgary* (1976), 1 W.W.R. 319. Those cases point out the obvious. Where, as here, the Board appears to rely on the cumulative effect of the evidence it is impossible to determine what the decision would have been if the improperly admitted evidence had not been taken into account.

Another finding by the Board which is central to their whole decision relates to the rated capacity of the subject mill. I quote from the decision:

> A major issue of contention must be considered prior to any attempt at valuation. This issue is the rated capacity of the subject pulp and paper mill. The theoretical capacity is 666,000 tonnes per annum, and the 1981 actual production was 493,000 tonnes. The planned production of 593,000 tonnes was not reached in 1981 due to labour disputes and start-up difficulties with the new T.M.P. lines. The production records for 1981 indicate that in the months of May, November and December, with the total mill in production, monthly tonnages were 1,775 per day, 1,790 per day and 1,798 per day, respectively. The average of 1,790 tonnes per day over the stated annual production days of 353 days, would yield 631,870 tonnes per annum. The appellant corporation states that 359 days is the optimum amount possible due to the labour contract, and if that figure is used, the optimum annual production is 642,610 tonnes, which is within 3.5% of the stated theoretical capacity at 666,000 tonnes. The Board must consider the capability of production at the optimum amount, and the theoretical capacity is considered by the Board to be most representative of the rated capacity of the machinery and equipment in the mill for comparative purposes. If the machines are capable of production and they are not utilized to their optimum, their values cannot be denigrated on the method of operation conducted by a specific operator. The Board finds the rated (theoretical) capacity of the mill at 666,000 tonnes per annum to be the correct rated capacity.

It is the position of counsel for the appellant that in finding the rated capacity of the mill to be 660,000 tonnes per annum the Board acted unreasonably and contrary to the evidence-and that in so doing it committed an error of law which permeated much of the decision making process. I must agree. The Board described the capacity issue as "a major issue of contention". In fact both appellant and respondent did their valuations on the basis that the mill had a production capacity of 593,000 tonnes per annum. The 666,000 tonnes per annum was based upon the "theoretical" rated machine capacity calculated without reference to a number of practical and explained constraints. A historical analysis of "actual" production between 1977 and 1982 demonstrates that even the 593,000 tonnes per annum was never achieved. The Board referred to three record producing months in 1981 and concluded, in effect, that if the mill could produce at that rate over a short period it could produce at that rate over the long haul. The Board said:

> If the machines are capable of production and they are not utilized to their optimum, their values cannot be denigrated on the method of operation conducted by a specific operator.

One cannot quarrel with that general statement but it presupposes a "realistic" capacity to produce at the optimum on an ongoing basis. That is not the case here. There was uncontradicted evidence that the mill had an insufficient pulping capacity to sustain production levels of 660,000 tonnes per annum. The Board apparently overlooked the explanation for the three months of record production set out in the appellant's brief at section 6.01, page 3, filed as Exhibit #1 on the appeal.

> The record production levels obtained late in 1981 were the direct result of a conscious campaign to set records that involves (sic) the deferral of all maintenance that is not absolutely essentially required to be carried out at that particular time. Normally, the hard machine drive for a peak production is followed by a completely depleted stock inventory and unplanned maintenance interruptions. It is interesting to note that although the production on No. 11 PM increased steadily and consistently through the year, the total mill production increased very little. This would indicate some other limiting factor.

It seems clear to me from a reading of the decision of the Board that they were proceeding on the basis that the rated capacity of the mill, <u>as at the present time</u>, is 660,000 tonnes per annum. That finding is wrong and is not supported by any evidence. All of the evidence is to the contrary. As mentioned both parties did their valuations on the basis that the mill had a production capacity of 593,000 tonnes per annum. That finding has no evidentiary base and was unreasonable-it amounts to an error of law.

Dealing then with the specific questions.

Question No. 1:

> Did the Board err in law in acting upon facts and conclusions found in a separate appeal before the Board in the case of Crown Forest Industries, to which appeal MacMillan Bloedel was not a party, nor in attendance, nor given any opportunity to meet whatever evidence was led or findings of fact were made in that appeal?
>
> Answer: Yes.

Question No. 2:

> Did the Board err in law in holding that the determination of actual value is solely factual?
>
> Answer: It is true that the Board did say: "The main and final issue to be determined by the Board in this appeal is solely factual, and that is the determination of actual value". The determination of value involves not only factual matters but as well matters of law and principle and the Board was well aware of that-at most there was some loose language.

Question No. 3:

> Did the Board fail to make its findings on the allocation of asset values of the Fletcher Challenge comparable in accordance with the evidence and thereby err in law?
>
> Answer: This question arises out of the rejection by the Board of a "comparable sales" approach. The two comparables put forward by the appellant were the purchases of 49% of share equity of MacMillan Bloedel Limited by Noranda in April 1981 and the 96% share

equity interest of Crown Zellerbach Canada Limited purchased by Fletcher Challenge Holdings (Canada) Limited in December of 1982. I quote from the decision of the Board:

> The appellant adduced evidence on both of these purchases of share equity based on the allocation of asset values at 'book values.' Allocation on 'book values' is, in the opinion of the Board, a questionable method due to one predominant fact. Book values are historic, and the actual value for taxation to be determined by this Board are the current values at December 31, 1981 and 1982. The distribution of all of the assets, on book values, of these companies may be disproportionate in relation to the single asset under consideration. For example, the No. 11 paper machine expansion represents a $173.6 million investment from 1979 to 1981, and its value relationship to the other major capital investments in the mill since opening some 70 years ago indicates a disproportionate value with book depreciation applied. Allocation of value to a single asset in the sale of a large integrated company as a business is risky at best, and sale of shares is only an indication of the probable value of assets if all factors are and can be known.

It is the reference to "book values" that the appellant points to as constituting error under question No. 3. The evidence led by the appellant on this aspect of the matter was through Mr. James Finkbeiner, a Chartered Accountant and Vice-President of MacMillan Bloedel, and Paul Williams, a Registered Industrial Accountant and Assistant Corporate Comptroller for Crown Forest Industries Ltd. (formerly Crown Zellerbach Canada Ltd.). In their valuations they sought to calculate how much of the purchase price in the Fletcher Challenge comparable could be ascribed to the Elk Falls mill and in doing so they allocated values to the remaining assets of Crown Zellerbach Canada Ltd. The Board, as can be seen from the just quoted portion of the decision, found that they used a book value method of allocation of asset values and held this method to be "questionable". The fact of the matter is, and this is not in dispute, book values played no part whatsoever in Mr. Finkbeiner's valuation and were used by Mr. Williams in only one fairly minor aspect of his valuation. Mr. Finkbeiner used the assessed values of most of the assets and where assessed values were not available he utilized conservative estimates of value. He made no use of book values to estimate asset values. In the case of Mr. Williams he used assessed values to determine the portion of the purchase price attributable to Elk Falls. He did make use of book values with respect to assets of the company lying outside British Columbia and made a deduction on that basis of $10,000,000-out of a total purchase price of $570,000,000-approximately 2% of the total. If the deduction was eliminated entirely the result would be to increase the value attributed to the Elk Falls mill by approximately 2% or $6,000,000. Clearly the Board was operating under a misunderstanding of the evidence of Messrs. Finkbeiner and Williams and to that extent there has been an error of law.

Question No. 4:

> Was there any evidence on which the Board could reasonably find that the rated capacity of the newsprint production of the Elk Falls mill was 407,465 tonnes per annum, and if not, did the Board err in law by making that finding and in relying upon it in rejecting the Fletcher Challenge comparable?

Answer: There was no admissible evidence to that effect-this is another example of the Board using evidence that it heard on the Crown Forest appeal. In using that evidence from another hearing the Board erred in law.

Question No. 5:

> Did the Board in using the rated (theoretical) production capacity of the Powell River mill (666,000 tonnes per annum) in its comparison with the Elk Falls production capacity compare entirely different standards of capacity and thereby err in law?

Question No. 6:

Did the Board fail to make its finding as to the capacity of the Powell River mill newsprint capacity in accordance with the evidence and thereby err in law?

Answers to Questions 5 and 6: Both questions deal with the same subject matter and have been dealt with earlier in these reasons-the answer to each question is "Yes".

Question No. 7:

Did the Board base its comparison of the Elk Falls and Powell River mills on newsprint production only to the exclusion of all other factors of comparison, and if so, did it act unreasonably and thereby err in law?

Question No. 8:

Did the Board fail to make its findings in respect of the comparability of the Elk Falls and Powell River mills in accordance with the evidence and thereby err in law?

Answer: I find it impossible to answer these questions because the whole issue of comparability with the Elk Falls mill is clouded by the serious error in law committed by the Board in taking into account the evidence led and conclusions reached on the Crown Forest appeal. There was a great deal of evidence led by the appellant as to the comparability of the two mills. It was, in the main, not challenged on cross examination and was not challenged by evidence put forward by the Assessor. I quote again, for convenience, from the decision as it related to this matter:

> On the purchase of the 96% share equity of Crown Zellerbach Canada Limited, the Board has dealt with that entire matter in the decision of *Crown Forest Industries Limited (formerly Crown Zellerbach Canada Limited)* v. *The Assessor of Area #6-Courtenay* dated September 14, 1984. The Board takes judicial notice of facts and conclusions in that decision. The evidence adduced in the instant appeal on the Crown sale is at variance with the facts found by the board and, therefore, of no probative assistance in determining the value of subject property appealed. This Assessment Appeal Board which adjudicated both appeals has all the facts to determine the comparability of the Elk Falls Pulp and Paper mill, the major asset involved in the Crown purchase, and the Powell River mill. The Board concludes that there is an insufficient degree of comparability between the two properties on which a comparison can be made.

As I read the decision the Board is saying, in effect - "we reject the evidence of comparability led by MacMillan Bloedel because it does not accord with the evidence and our conclusions in the Crown Forest case". That approach, as I have endeavoured to explain, is a serious error of law.

Question No. 9:

Did the Board fail to make its findings with respect to the method of allocation of asset values by the Noranda comparable in accordance with the evidence and thereby err in law?

Answer: To the extent that the Board was of the view that Mr. Finkbeiner had used only "book values" in his allocation of values of the fixed assets of the appellant it was in error. That aspect of the matter will have to be reconsidered.

Question No. 10:

Was there any probative evidence on which the Board could reasonably find that the Noranda purchase was not a proper comparable on the ground that the shareholders were individuals with no specific knowledge of the relationship of the asset values to the price of shares and if not, did the Board err in law in making that finding?

Answer: Mr. Greenwood demonstrated, by reference to the evidence, that there was some evidence from which the Board could conclude as it did. That being so there is no question of law involved.

Question No. 11:

Was there any probative evidence on which the Board could reasonably find that the No. 11 paper machine expansion from 1979 to 1981 would lead to a disproportionate allocation of value compared to other older assets on the book value method of allocation, and if not, did the Board err in making that finding?

Question No. 12:

Did the Board err in law in acting upon the finding set out in paragraph 11 above in rejecting the Noranda comparable?

Answer: These questions arise out of the following, earlier quoted, statement in the decision of the Board:

> The appellant adduced evidence on both of these purchases of share equity based on the allocation of asset values at 'book values.' Allocation on 'book values' is, in the opinion of the Board, a questionable method due to one predominant fact. Book values are historic, and the actual value for taxation to be determined by this Board are the current values at December 31, 1981 and 1982. The distribution of all of the assets, on book values, of these companies may be disproportionate in relation to the single asset under consideration. For example, the No. 11 paper machine expansion represents a $173.6 million investment from 1979 to 1981, and its value relationship to the other major capital investments in the mill since opening some 70 years ago indicates a disproportionate value with book depreciation applied. Allocation of value to a single asset in the sale of a large integrated company as a business is risky at best, and sale of shares is only an indication of the probable value of assets if all factors are and can be known.

It is the position of counsel for the appellant that there was no evidence before the Board to support the "disproportionate value" comparison. Counsel points to the decision of the Board in the Crown Forest decision and says that it is reasonable to infer that, once again, the Board has made use of evidence and findings from that appeal. I quote from that decision:

> The distribution of all of the assets of this Company may be disproportionate in relation to the single asset appealed, namely, the Elk Falls pulp and paper asset. For example, the number 5 paper machine represents a $190,000,000 investment in 1982, and its value relationship to the other major capital investments in the mill since opening some 30 years ago indicates a disproportionate value with book depreciation applied. The historic book value from 1981 to 1982 increased 110% due to this major addition, and the previous assets are reported not at current cost but historic cost.

It is the position of counsel for the respondent that the Board was merely stating the obvious and no evidence was required. That may be so but in view of the unfortunate and improper reliance by the Board on the earlier appeal it may very well be that the Board, at the earlier appeal, heard

evidence and submissions on this point which were applied to this appeal. If so, that would constitute a serious error of law.

Question No. 13:

> Did the Board fail to make its findings with respect to the propriety of using allocations of share equity purchases in the comparable approach to valuation in accordance with the evidence and thereby err in law?

Question No. 14:

> Did the Board err in law in rejecting the comparable approach to valuation based upon share purchase transactions?
>
> *Answer:* I have already dealt with various errors of the Board in its dealing with the "comparable" approach to valuation. There was, however, other evidence before the Board dealing with the pros and cons of that approach. It is not for this court to determine which approach to valuation is appropriate. I will be commenting later in these reasons as to what should be done on the remitting of the decision.

Question No. 15:

> Did the Board fail to make its findings on functional obsolescence caused by excess operating costs in accordance with the evidence and thereby err in law?

Question No. 16:

> Did the Board err in law by rejecting functional obsolescence caused by excess operating costs as a deduction in determining actual value?

Question No. 17:

> Did the Board err in law in ruling that economic allowance (external obsolescence) was not a factor to be applied when determining actual value?

Question No. 18:

> Did the Board err in relying upon the factual finding of the Crown Forest Industries appeal that economic allowance (external obsolescence) was not applicable in determining actual value?

Question No. 19:

> Did the Board fail to make its findings on external obsolescence in accordance with the evidence and thereby err in law?
>
> *Answer:* Those questions are easily resolved. The Board did not have the benefit of the following decisions of this court on four appeals involving those issues:
>
> (a) *B.C. Forest Products* v. *Assessor of Area No. 3-Cowichan Valley*, (Stated Case No. 193 - November 2, 1984).
>
> (b) *B.C. Timber Ltd.* v. *Assessor of Area No. 18-Trail-Grand Forks*, (Unreported, February 28, 1985).

(c) *D. Groot Logging Ltd.* v. *Assessor of Area No. 25-Northwest-Prince Rupert*, (Unreported, February 28, 1985).

(d) *B.C. Timber Ltd. (Westar Timber Ltd.)* v. *Assessor of Area No. 25-Northwest-Prince Rupert*, (Unreported, April 9, 1985).

On the basis of those binding decisions I hold that the Board erred in law in failing to deduct from the estimated replacement cost amounts for excess operating costs and external obsolescence. As well, dealing with question No. 18, the Board erred in law in relying upon factual findings in the Crown Forest Industries appeal.

Question No. 20:

Did the Board fail to make its findings on physical depreciation in accordance with the evidence and thereby err in law?

Question No. 21:

Did the Board err in law in finding there was no depreciation to be ascribed to No. 11 paper machine of the Powell River mill?

Answer: I am satisfied on the submission of Mr. Greenwood that the Board had before it evidence on which it could conclude as it did on the question of physical depreciation- there is no question of law involved.

Question No. 22:

Was there any probative evidence on which the Board could reasonably find that the 6/10 factor should be applied in carrying out the depreciated replacement cost approach to valuation in the facts of this case, and if not, did the Board thereby err in law?

Question No. 23:

Was there any evidence on which the Board could reasonably find that the parties agreed that the 6/10 factor should be used in the facts of this case, and if not, did the Board thereby err in law?

Answer: Those questions arise out of the following portion of the decision:

The replacement model contemplates a paper mill with a capacity of 700,000 tonnes per annum whereas the optimum capacity of the subject mill is 666,000 tonnes per annum. On the examination of both parties it was agreed that the most appropriate method of downsizing the costs was by employing the '6/10 factor'. This engineering factor is an accepted method of adjustment for cost estimating and is founded on extensive costing studies on the relationship of cost estimates and their economies of scale. The replacement model cost is stated to be $678,000,000 to which must be added a further $15,000,000 for conversion of existing T.M.P. machinery and equipment to C.T.M.P. in the subject facility. The total replacement cost of $693,000,000 for the 700,000 tonne model, downscaled to 666,000 tonnes on a 6/10 factor of 0.971, yields a replacement cost of $672,903,000, rounded to $673,000,000.

(my emphasis)

The Board, in using the "6/10 factor" approach, proceeded on the basis that both parties were in agreement that it was "the most appropriate method of downsizing the costs". That is not the case at all and Mr. Greenwood concedes that there was no such agreement. The appellant took

exception to the 6/10 factor approach and put forward an entirely different method for downsizing. That misunderstanding by the Board constitutes an error of law. It is not for this court to determine the appropriate approach-that is for the Board but only on a proper appreciation of the position of the parties in respect of the evidence led.

Question No. 24:

> Did the Board in using the theoretical production capacity of the Powell River mill (666,000 tonnes per annum) in its comparison with the model replacement mill production capacity compare entirely different standards of capacity and thereby act unreasonably and err in law? .

Question No. 25:

> Did the Board fail to make its findings of the comparative capacities of the Powell River mill newsprint production with that of the model replacement mill in accordance with the evidence and thereby err in law?
>
> *Answer:* The answer is "yes" to both questions. I dealt with the unrealistic use of the theoretical capacity earlier in these reasons.

Question No. 26:

> Did the Board fail to make its finding on the actual value of the Powell River kraft mill's market pulp capacity in accordance with the evidence and thereby err in law?
>
> *Answer:* I agree with Mr. Greenwood that although neither of the two appraisers took the approach that the Board ultimately did, it cannot be said that there was no evidentiary base for the determination made. There is no error of law.

Questions 27 through 30:

> *Answer:* These questions all relate to the rejection by the Board of the discounted cash flow (income approach) valuation put forward by the appellant. I agree with Mr. Greenwood that there was a great deal of evidence from which the Board could reasonably conclude that such an approach was not appropriate in the circumstances of this case. That normally would be the end of the matter but for the fact that once again the Board relied heavily on the evidence led and conclusions drawn in the Crown Forest Industries case. As well there was again the misunderstanding as to the use of book values. One of the reasons given for rejecting the discounted cash flow approach was that such an "approach analyzes the business income and not the income solely attributable to the real property". Section 26 (2) and (3) of the *Assessment Act* requires that a commercial undertaking be valued as the property of a going concern. In any consideration of an income approach to valuation one must have regard to the business income generated by the commercial undertaking.

Dealing then with the case stated at the request of the Assessor.

Question No. 1:

> Did the Assessment Appeal Board err in law in failing to include in the cost approach allowances for interest during construction, excess operating costs and, in respect of the 1983 assessment roll, a local cost allowance when evidence before the Assessment Appeal Board supported the making of allowances in respect of each of these items?

Answer: This question was amended by the Board. When it was submitted it read ". . . when all of the evidence before the Assessment Appeal Board supported the making of allowances in respect of each of these items" (my emphasis). The deletion of the words "all of the" has the effect of putting a completely different question before the court. This was not a case where the Board, of its own volition and during the course of the appeal, requested an opinion from the court to assist in its determination of the matters under consideration. What we have here are appeals by way of stated case by each of the parties to the proceedings. It is for counsel to frame the questions (they are tantamount to grounds of appeal)-not the Board. In addition to the deletion just mentioned the Board deleted in its entirety one of the questions submitted by the appellant. The Board ought not to have made those deletions. To state the obvious-it is not for the court or tribunal appealed from to set out the grounds of appeal-it is for the party who feels himself aggrieved to do so. If any authority is needed for that rather basic proposition I refer to *R.* v. *Tarr*, [1972] 5 W.W.R. 126; *Re Celebrity Enterprises Ltd.*, [1976] 4 W.W.R. 502; *Arbutus Club* v. *Assessor of Area 09-Vancouver* (1981), 24 B.C.L.R. 301; *Assessment Commissioner of British Columbia* v. *Woodward Stores Ltd.* (1981) 28 B.C.L.R. 22, to cite just a few decisions. If in fact all of the evidence supported the making of an allowance then an allowance ought to have been made and I refer to the cases cited in question No. 19 and in particular *B.C. Timber Ltd. (Westar Timber Ltd.)* v. *Assessor of Area #25*. I note that once again the Board improperly relied on its findings in the Crown Forest Industries appeal as a basis for rejecting the evidence before it on this appeal.

Question No. 2:

Did the Assessment Appeal Board err in law in considering and utilizing evidence in another appeal and its own findings in that appeal without giving the appellant or the respondent an opportunity to be heard in connection with such evidence and such findings of the Assessment Appeal Board?

Answer: Yes.

I am unaware of the procedures adopted by assessment appeal boards in cases where the opinion of the court is that there has been a number of errors of law particularly, as is the case here, where the errors are such as to permeate the whole decision making process. In this case justice can only be done, short of another full hearing before a different panel, by permitting counsel to make full submissions on all aspects of the assessment. It will then be for the Board in the light of these reasons and those submissions to determine afresh the "actual value" of the Powell River mill complex.

In accordance with s. 74 (6) of the *Assessment Act*, these reasons will be forwarded to the Board as the opinion of the court.