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ASSESSOR OF AREA 6 - COURTENAY

v.

CROWN FOREST INDUSTRIES LIMITED
(formerly Crown Zellerbach Canada Limited)

BRITISH COLUMBIA COURT OF APPEAL (CA004492, CA004535) Vancouver Registry

CORAM:

Before THE HONOURABLE MR. JUSTICE CRAIG, the HONOURABLE MR. JUSTICE MACFARLANE, and the HONOURALBE MR. JUSTICE ESSON

Vancouver January 30, 1987

J.E.D. Savage and B. MacDonell for Assessor of Area 6 - Courtenay
B.J. Wallace and P.D. Feldberg for Crown Forest Industries Limited

Reasons for Judgment of Mr. Justice Esson
For The Court January 30, 1987

These appeals arise out of the 1983 assessment of certain lands and improvements owned by Crown Forest Industries Limited, one of the large integrated forest companies in the province. I will refer to it as "Crown" or "the company". The land and improvements in question consist of a pulp and paper mill, a sawmill and a planer mill which together make up what is sometimes called the Elk Falls Complex. The company owns and operates a paper box factory and other substantial operations at locations elsewhere; but the Elk Falls Complex is by a substantial margin the largest part of its assets.

Until December 31, 1982, the company (then called Crown Zellerbach Canada Ltd.) was a subsidiary of Crown Zellerbach International Inc. On that date, 96% of the company's shares were bought by Fletcher Challenge Holdings (Canada) Ltd. That sale, coming as it did within months of the valuation date for purposes of the 1983 assessment, gives rise to some of the major issues in this case.

The assessment is, by s. 26 of the *Assessment Act*, R.S.B.C. 1979, c. 21, required to be based upon the "actual value" of the land and improvements at the assessment date. The assessor is required to determine the actual value and to enter that in the assessment roll. Section 26 (3) provides:

> (3) In determining actual value, the assessor may give consideration to present use, location, original cost, replacement cost, revenue or rental value, market value of the land and improvements and comparable land and improvements, economic and functional obsolescence and any other circumstances affecting the value of the land and improvements.

All of the amounts which need to be discussed in this case are in the hundreds of millions. As the exact numbers are not significant in the appeal, I will round out to the closest one hundred thousand dollars. The "actual value" as determined by the assessor and confirmed by the 1983 court of revision was $470 million. On the appeal to the Assessment Appeal Board, Crown

contended that the actual value was $254.2 million. The Board reduced the assessment to $429.5 million.

The proceedings before the Board were very lengthy. Much of the evidence and argument arose from the complex issue as to how the sale price of the shares could be used to determine the actual value of the Elk Falls Complex. Each side presented evidence of a valuation of those assets derived from the sale price of the shares, which was about $533 million. The Board had before it much evidence as to the considerations which led the purchaser and vendor to agree to a sale at that price; and much evidence as to the methods used to derive a value of part of the company's assets from a sale of substantially all of its shares.

Five valuations were presented to the Board. Those put forward by the assessor were based on:

> (1) Cost approach (depreciated replacement cost). This produced an estimate of value of $429.5 million based on a replacement cost of about $661 million before adjustment for depreciation.
>
> (2) A capitalized earnings analysis applied to the most recent two years earnings before 1983 and those for 1983. That resulted in an estimate of value in the range of $450 to $460 million.
>
> (3) An allocation of the share sale price based upon an analysis of the earnings attributable to the assets included in the Elk Falls Complex. That produced an estimate of value of $428.5 million.

The company introduced these two:

> (4) A valuation of about $300 million based upon an allocation of the share purchase price on the basis of book values of assets.
>
> (5) A valuation of about $340 million based on a discounted cash flow analysis.

The Board gave extensive reasons for its conclusion. It accepted the depreciated replacement cost as the most reliable indicator of value and, in fixing actual value at $429.5 million, it accepted the estimate of value based on that appraisal. It gave less weight to the share price allocation method because, in its view, it is inherently difficult to allocate the amount paid for shares amongst specific assets. It did, however, consider and give some weight to the assessor's allocation of the sale price as supporting the figure derived from the replacement cost analysis. It made no reference to the capitalized earnings approach analysis presented by the assessor.

It rejected entirely the valuations presented by the company. It considered that the book value of assets, some quite new and some purchased thirty years earlier, did not provide an appropriate basis for allocating the share price. Similarly, it rejected the discounted cash flow analysis because of its view that, as a matter of principle, such an analysis is inappropriate for assessment purposes.

The company appealed the Board's decision by way of stated case pursuant to s. 74 of the *Assessment Act*. Facts and questions were stated by the Board at the request of both Crown and the assessor. The total number of issues raised was large but not all of those are at issue in this appeal. The most convenient way to explain the remaining issues will be to outline, in relation to each of the five appraisals presented in evidence, the issues raised on the stated case and the issues remaining.

1. *Depreciated Replacement Cost*

Several issues were raised with respect to this approach. The most important remaining issue is whether the approach could be used. The company submitted and the chambers judge found that the Board erred in law in applying replacement cost to determination of value in the absence of any evidence that any purchaser of the Elk Falls Complex would, in 1982, have considered such cost in determining what he was prepared to pay. The assessor appeals against that decision.

It is now common ground between the parties that, if it was open to the Board to employ replacement cost as a basis for evaluation, it erred in failing to adjust the depreciated replacement cost to make allowance for three matters which were provided for in the appraisal evidence:

(i) interest during construction

(ii) external obsolescence

(iii) excess operating costs

Although there is now no issue on this question, consideration of it is relevant to the issue whether replacement cost is appropriate. The learned chambers judge held that, if it was open to the Board to use replacement cost, it was error in principle for it to exclude these matters. Crown initially appealed that finding in respect of interest during construction but abandoned that argument before the hearing in this court. The assessor has, at all stages, accepted that allowances should be made for external obsolescence and excess operating costs. The allowance for interest during construction will tend to increase the indicated value but the allowances for external obsolescence and excess operating costs, it is agreed, will more than offset that. So the net effect will be to decrease the value indicated by the cost approach to something under $400 million.

A separate issue is raised by the company's contention that the Board committed a breach of natural justice in treating as evidence certain documents which had been relied upon by the assessor's witnesses in giving their evidence of depreciated replacement cost. The chambers judge ruled against that contention and the company now appeals that ruling.

2. *Capitalized Earnings Analysis*

This analysis was not referred to by the Board and no issue with respect to it was raised in the stated case or in this court.

3. *Share Price Allocation Based on Earnings*

The company attacked the use of this valuation. The question put was whether there was any evidence to support its use. The learned chambers judge answered that question in favour of the company. However, it is clear from the reasons and the submissions in this court that the defect is not one which vitiates the use of the earnings allocation approach. What was found is that the Board erred in its application of the approach by disregarding uncontradicted evidence that the analysis which led to a value of $428.5 million had overlooked a loss incurred by the Elk Falls Sawmill and had included, as income of the Elk Falls Complex, income actually earned by some of the mainland operations. If those matters are taken into account, the analysis will indicate a substantially lower value.

The assessor, contending that there was evidence to support the analysis as presented, has appealed against the conclusion of the chambers judge on this point.

4. *Allocation by Book Value*

The company attacked in the stated case the rejection of its share price allocation based on book value. The chambers judge found against it, holding that no question of law was raised. The company appeals against that finding.

5. *The Discounted Cash Flow Analysis*

The chambers judge found that the Board erred in principle, and thus erred in law, in rejecting this analysis on the basis of its view that such an analysis does not value the property as it stands and therefore is inappropriate for assessment purposes. The assessor has not appealed that finding. That being so, it is common ground that the matter must return to the Assessment Appeal Board no matter what decision is reached on this appeal.

6. *Question 4 in Stated Case*

An issue which does not appear to relate solely to anyone approach to valuation is raised by question 4 in the stated case and the answer to it. They are:

> *Question 4:* Did the Board err in law in not concluding that the value of the Elk Falls Industrial Complex as a business sets the upper limit of the actual value pursuant to section 26 of the Act, of the assets at issue?
>
> My answer to this question is "yes". I do not see how any reasonable man could hold that the market value of the land exceeded the value of the complex as a business or going concern, including the lands within the assets of the business.

The assessor appeals against that conclusion, contending that there was nothing in the circumstances of the case requiring the Board, as a matter of law, to reach such a conclusion.

ISSUES ON APPEALS

There is before us an appeal by both the assessor and the company. The company's appeal has been treated as a cross-appeal. To sum up, the issues raised by the assessor's appeal are:

> 1. Whether the chambers judge erred in holding that it was not open to the Board to have regard to and apply the cost approach to value.
>
> 2. Whether the chambers judge erred in finding that there was no evidence to support the allocation of the share purchase price accepted by the Board, which resulted in an estimate of value of $428.5 million.
>
> 3. Whether the chambers judge erred in answering question 4 in the affirmative.

The cross-appeal by Crown raises these issues:

> 4. Whether the chambers judge erred in finding that the Board did not err in law in rejecting Crown's share price allocation based on net book value.
>
> 5. Whether the chambers judge erred in holding that there had been no breach of natural justice by the Board in considering the documents relied upon by the assessor's witnesses in arriving at their opinion on depreciated replacement cost.

I. WAS IT OPEN TO THE BOARD TO RELY UPON THE COST APPROACH?

The chambers judge found that the Board, in accepting the opinion of value based on the cost approach, either acted without evidence or upon a view of the facts which could not reasonably be entertained. After noting that s. 26 (3) of the *Assessment Act* provides that the assessor (and

thus the Board) "may give consideration to" replacement cost, the chambers judge went on to say that those words:

> . . . do not warrant the adoption of a method without evidence that a purchaser or owner would use that as a means of determining what he would pay for the lands.

The judge also said:

> I was struck also by something else: the absence of any evidence that any purchaser of any industrial complex, let alone a purchaser of a pulp mill, would have considered in 1982 the replacement cost in the way that the theorists put it forward in determining what he was prepared to pay. That business assets are worth what they can earn when they have no higher or better use, either separately or as an integrated whole, I consider to be self evident. When I say "what they can earn" I am not saying that there are not many acceptable ways of using that self evident proposition to arrive at actual value of income producing lands. Every method of computing a value from earnings is subject to error it must, of necessity, give a present value to future expectations. The seductive charm of the cost approach is in its not concerning itself with present expectations of the future, but I do not consider any reasonable man could entertain it as a method of determining actual value of this complex.
>
> The cost approach is nothing more than a theory without any evidentiary foundation.

That is not merely a finding that the Board erred in law in having regard to replacement cost to the exclusion of other methods of valuation. It goes far beyond that to hold that it was not open to the Board to have regard to replacement cost in this case. That conclusion, in my respectful view, runs counter not only to valuation theory but to generations of decisions binding upon us. The basis for accepting replacement cost as a measure of actual or market value is not one which rests upon a different evidentiary foundation in each case. It is, rather, a logical assumption based on general experience. Mr. Johnstone, Director of Appraisal Services to the British Columbia Assessment Authority put it this way:

> That approach is based on the premise that cost equals value and if it is found at the end of the exercise that that is not so a correction can be made within the cost approach.

The reference to correction within the approach is to such matters as functional obsolescence, as to which I will have more to say later. What is significant at this point is that the basic premise that cost equals value has long been accepted as conferring validity upon the replacement cost approach as a means of arriving at actual value.

An illustration of that is to be found in the decision of the Supreme Court of Canada in *Golden Eagle Canada Ltd.* v. *City of St. -Romuald D'Etchemin*, [1977] 2 S.C.R. 1090; (1977) 14 N.R. 243. That case involved five partially completed tanks at an oil refinery. The assessment of some $2 million was based upon the replacement cost of the tanks, reduced by 20 per cent to allow for their incomplete state. The owner contended that, because the tanks were incomplete, the assessor should have allowed "internal functional depreciation" of 100 percent. The assessor's basis for refusing to give effect to that contention is quoted at p. 245:

> . . . I could not see how Golden Eagle could construct buildings which did not meet the needs for which it had built them.

De Grandpre J. for the court outlined Golden Eagle's arguments that that response constituted error in law and, at p. 248, said this:

> Appellant itself committed the error in law when it forgot that in all cases of construction for special purposes the assessor must necessarily calculate the replacement value in

> order to determine the real value, and in determining the theoretical market value must consider the owner as a possible purchaser. The Privy Council confirmed and reconfirmed this view in *Montreal* v. *Sun Life Assurance Co.*

The view of the learned chambers judge that the "evidentiary foundation" for use of the replacement cost approach was lacking may have been based on a line of cross-examination pursued by counsel for Crown at great length. The judge quoted passages from the cross-examination of Mr. Quayle, the deputy-assessor, including this exchange which is typical:

> Q. There's no - I put it to you, there's no market evidence whatever that anyone would pay the amount that you determine by the cost approach to be the value of this plant.
>
> A. Yeah, there - there - there is not as comparative sale.
>
> Q. But, - worse than that, from your point of view there is no evidence at all, is there?
>
> A. There is no market evidence.
>
> Q. What kind of evidence is there?
>
> A. There is the - there is no - no market evidence I agree,- in respect to the, to the costs I think one has to, you know, consider utility. Um - I'd have to agree there is no, no specific evidence related to this plant.

That exchange, I think, illustrates the confusion of concepts which lies at the root of the position taken by Crown. In the nature of things, there probably never will be "market evidence" of the subjective kind referred to in the questions. It is generally the absence of reliable market evidence which compels resort to replacement cost as a means of arriving at market value. Again, that rests on the basic premise that, in respect of a productive facility, cost equals value. In the absence of evidence that the premise is not applicable, replacement cost may be the only reliable criterion of value. The basic premise does not have to be established by evidence. But if the evidence establishes, in a given case, that the premise is unsound, it would not then be right to base the assessment solely on replacement cost and, in some cases, it should be disregarded entirely.

Facilities such as the Elk Falls Complex are rarely, if ever, the subject of sale on the open market. For that reason, such assets have generally been assessed on the basis of replacement cost. *MacMillan Bloedel Limited* v. *Assessor of Area 7 - Sunshine Coast*, B.C.S.C., B.C. Stated Case No. 206, p. 1151, is a decision of McKay J., concerning the assessment of the mill at Powell River for the same period as is in issue in this case. At p. 1152 McKay J. observed:

> 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, in my view, an entirely correct statement of the position and is fully in accord with the earlier authorities. The leading case is *Sun Life* v. *City of Montreal*, [1950] S.C.R. 220, aff'd [1952] 2 D.L.R. 81 (P.C.) which concerned an assessment of Sun Life's head office building in Montreal. The Privy Council was the fourth court to consider the matter after the Board of Revision. In delivering the judgment of the Privy Council, Lord Porter expressed agreement with the view of the trial judge and the Supreme Court of Canada that actual value in this context is to be equated with market value. At p. 89 he said:

> The Judge of the Superior Court states five ways by which the true figure can be reached:

(a) A recent free sale of the property itself where neither the conditions of the property nor the market have since changed;

(b) recent free sales of identical properties in the same neighbourhood and market;

(c) recent free sales of comparable properties;

(d) the price which the revenue producing possibilities of the property will command;

(e) the depreciated replacement cost.

None of the Judges in Canada so far as their Lordships can ascertain seem to quarrel with this statement and all say that the first three methods are inapplicable to the present case and therefore the last two are the factors from which the true result is to be derived.

The absence of market evidence in that case was attributable to the exceptional nature of the building. In this case, there has been no free sale of this or any identical or comparable property. The result is to require reliance on the fourth and fifth methods. As Lord Porter put it at p. 94:

As they have said, the Board accepts the view that the true test is what a willing buyer would give and a willing seller take.

In many, perhaps in most cases, this figure is not difficult to discover - the first three methods mentioned by the Judge of the Superior Court point out the way. But in a limited number of cases none of these sources of information is available and what such a buyer would give or a seller would take can only be ascertained by indirect means. As has been said those means are to be found by relying upon the replacement value however that term may be interpreted or upon the revenue value, or by a mixture of the two.

And at p. 102 he said:

. . . It is the objective not the subjective value which has to be determined though, as has been said, the owner is to be regarded as one of a possible number of buyers, and subject to careful criticism and a sufficient qualification of price, the cost which he chose to incur is a relevant factor.

A case in which replacement cost was held to be the only acceptable basis for determining market value is *Assessment Commissioner of the York Assessment Office* v. *Office Specialty Ltd.*, [1975] I S.C.R. 677; (1975) 49 D.L.R. (3d) 471. That case concerned the assessment of a modem single storey building which housed the owner's offices and manufacturing facilities. The first section had been built for the company's purposes in 1949 and was expanded in three stages, the latest in 1970 after the date of assessment. It was a building built for the purposes of the owner, entirely suitable for those purposes, and being used to its full potential. The market for property of the general kind was poor at the time and the evidence established that no purchasers would likely be found to use it for its present purpose. The issue was stated thus in the decision of the Municipal Board:

The basic issue here is whether, in determining the assessment according to market value, it is open to the assessor to arrive at that value by using a manual of rates to determine the depreciated replacement cost, where the property, if exposed in the market and an actual sale consummated, would most likely bring a sum considerably less than this depreciated replacement cost.

On appeal to the Court of Appeal, it was held that actual or market value should have been determined on the basis of the market data. On appeal to the Supreme Court of Canada the decision of the Board was restored. Judson J. for the court said at pp. 474 - 475 (D.L.R.):

> My opinion is that the Municipal Board was right in holding that the evidence before it proved that the market data method of valuation in this particular case could not be used to determine actual value or market value. The Court of Appeal held the contrary opinion. I cannot accept that view of the evidence. The witnesses stated plainly that no purchasers for this building for its present use would likely be found. This was entirely attributable to the location of the building in a small village such as Holland Landing.
>
> This building is not going to be put on the market. It is thoroughly suitable for the business being carried on and it is significant that it was being extended by its owner while these appeals were going on.
>
> * * *
>
> How does an assessor determine "actual" or "market" value on facts such as we have in the present case? This is a modem standard, one-storey building, badly located for a general purchaser but entirely suitable and satisfactory to its owner. It is not for sale and it is not likely that it will be offered for sale. I think that in ascertaining "actual" or "market" value, an assessor has to regard the owner as a possible purchaser or estimate what he would expend on a building to replace that which is being valued.

Judson J. went on to quote part of the passage at p. 90 in the judgment of Lord Porter in *Sun Life* which I have already quoted. The principle applied in *Office Specialty*, derived from *Sun Life*, is that the replacement cost, although higher than the amount the building would fetch if offered to others on the prevailing market, may represent the actual value where the circumstances establish that the present owner, if entering the market, would be prepared to pay that amount for this building. It is important to note that the case does not lay down conditions which must be met before replacement cost can be used as a measure of value. What it holds is that cost was, in the particular circumstances of the case, the only acceptable basis for valuation.

The case which is said to establish the proposition that there must be evidence that a prospective purchaser would use replacement cost to determine what he would pay is *Swan Valley Foods Ltd.* v. *Assessment Appeal Board* (1979), 13 B.C.L.R. 304, affirmed (1981) 23 B.C.L.R. 358. This court affirmed the decision of Meredith J. quashing on judicial review a decision of the Assessment Appeal Board. Those judgments must be read with an earlier decision of Meredith J. arising from a stated case in the same matter. That proceeding, which had the same style of cause, bore number C780492 (Van. Reg.) and is reported as B.C. Stated Case 115.

There is some language in those judgments which, taken out of context, appears to lend some support to the proposition. But when that language is read in the context of the facts, it can be seen that the decision is very much one turning on its own facts, that the court intended to state no law different from that enunciated in the *Sun Life* and *Office Specialty* cases, and that the decision provides no support for the position of Crown in this case. To demonstrate that, it is necessary to set out the facts in some detail.

The matter in issue was the assessment of improvements comprising a potato processing plant built near Creston in the years 1973 to 1976. The plant was substantially completed in 1976 but was not in commercial production at the date of assessment in 1977.

By that time, it had encountered many vicissitudes. It had been conceived and built with a substantial financial contribution from the provincial government of the day. The government had owned 40% of the shares and made or guaranteed loans of the order of $11 million. The plant was intended to use a new and untried method of packaging which met with difficulties. There

was a change of government in 1975. The new government appointed a firm of management consultants to act as managers and to seek a purchaser for the company or its assets. After extensive efforts, the building's machinery, equipment, and technology were sold in April 1977. The purchaser acquired the assets by paying $10 for the shares and guaranteeing a debenture for $1.5 million, the guarantee being conditional upon the plant proving within three years to be "economically viable". So, at the date of assessment in 1977, the assets had been the subject of a recent sale at a price of $1.5 million subject to conditions.

The assessor fixed actual value at $4.6 million, the replacement cost of the assets. In upholding that assessment, the Assessment Appeal Board held that factors of economic and functional obsolescence were not applicable, that the assessor was not bound to consider the state of development of the company's business as a matter directly affecting the value of the land and improvements, and was justified in giving no consideration to market evidence. There ensued an appeal by way of stated case which resulted in the first decision of Meredith J. He held that the Board reached a wrong decision in principle in selecting the replacement cost approach to the exclusion of other methods. On the matter coming back to the Board, it was somehow persuaded to ignore the clear direction given it by the court and to again value at the replacement cost amount. That led to the application for judicial review and to the order by Meredith J. quashing the Board's decision. On appeal to this court, the assessor's appeal was dismissed. Although the appeal was in the judicial review proceeding, the decision was, in effect, also one upholding the decision of Meredith J. on the hearing of the stated case.

The ratio of those judgments is best expressed in the reasons of Meredith J. in the first proceeding. He stated his conclusion thus:

> I have concluded, with respect, that the Assessment Appeal Board reached a wrong decision in principle in selecting the replacement cost approach to the exclusion of other methods mentioned in the section and in particular to the exclusion of considerations of "revenue or rental value" and "the price that such land and improvements might reasonably be expected to bring if offered for sale in the open market by a solvent owner".

After considering the decision of the Supreme Court of Canada in the *Office Specialty* case Meredith J. went on to say:

> In the *Office Specialty* case, then, the justification for taking account of the "estimate what he [the owner] would expend on a building to replace that which is being valued" was that it was fair measure of actual or market value where the owner as in that case made full and profitable use of the assets assessed. In the present case the evidence is that the "owner" would expend only a fraction of the cost to replace what is being valued and then only if the operation of the plant were to prove economically feasible. Thus the market data establishes that no one is willing to purchase the assets at anything close to replacement cost. It may well be that as the government imposed as a condition of sale, for political and economic reasons, that the plant be used for the production of french fried potatoes, it might be worth more if used for some other purpose. If so, no doubt the Board would take that purpose and the value resulting therefrom into account in making an assessment.
>
> In my opinion, because there is no evidence whatever that the "owner" in this case, whether or not viewed as having a special interest in the assets, as a potential purchaser, could be taken to be willing to replace the plant at cost and the application of the replacement cost approach is thus wrong in principle.

That states the distinction between that case and *Office Specialty* and identifies the Board's error in law in relying on replacement cost. It is, in my view, a perfectly correct statement. But in saying that "there is no evidence whatever" that the owner would be willing to replace the plant at cost,

the passage is referring to the facts of the case and is not stating a general rule as to conditions which must be met before regard can be had to replacement cost. It is those words which have been taken out of context and used to create the proposition now contended for by Crown. The argument is supported by reference to various passages in the later reasons of Meredith J. and in the reasons of this court dismissing the appeal from the Judicial Review decision. But those are all references to that owner in that particular set of circumstances. With reference to that owner and those circumstances, it was correct to say that there was no evidence that the owner would "use" replacement cost. That is merely a somewhat simplified way of saying that there was nothing in the evidence from which it could be inferred that any hypothetical purchaser, including the owner, would be willing to pay so much. The case cannot be taken as laying down any general rule inconsistent with the law stated in *Sun Life* and *Office Specialty*.

The *Swan Valley* case illustrates a point of general importance. It seems sometimes to be assumed that the assessment must be based strictly upon the results of one method of appraisal or another. Such an assumption appears to have lain at the root of the Board's obduracy in refusing to follow the direction of the Court when the matter was sent back to it for further consideration. Its reasons on that further hearing are quoted at some length on p. 307 of the second judgment of Meredith J. The Board was of the view that the price of $1.5 million was lower than the real exchange value of the property because of restrictions which the government had placed on the use which could be made of the property. That may well have been a valid conclusion and, if it was, would have justified finding an actual value higher than $1.5 million. Meredith J. contemplated that possibility in the passage in his first reasons (quoted supra) where he said that if the Board found that the property would be worth more if used for some other purpose, it no doubt would take that purpose and the resulting value into account in making its assessment. The Board seems not to have appreciated that it could weigh the various approaches and, in the exercise of its judgment, arrive at a value different from any of them.

In relation to this question, I refer to one passage in the judgments in the Supreme Court of Canada in the *Sun Life* case, in which five separate judgments were given. Estey J. dissented on the question of the precise method which should have been employed in the particular circumstances but his summary of the earlier authorities is in accord with the views of other members of the court and those of Lord Porter. At p. 252, Estey J. said:

> Actual value must be, except where there is a market in which the exchange value may be ascertained, a matter of judgment exercised after determining every item that affects the value of the particular immovable under consideration.

One of the two authorities cited in support of that proposition is the decision of this court in *The Bishop of Victoria* v. *City of Victoria* (1933),47 B.C.R. 264; [1933] 4 D.L.R. 524 which decision was also referred to with approval in the judgment of the Privy Council in *Sun Life*. In that case, which involved the assessment of a college building, the original assessment was made solely on the basis of replacement cost. On appeal to a judge of the Supreme Court, which at that time exercised a jurisdiction which included that now exercised by the Assessment Appeal Board, the chambers judge set aside that assessment and held that the building should have been assessed on the basis of what it would fetch at a forced sale. This court allowed the assessor's appeal and sent the matter back for reconsideration. It held that, in the circumstances of that time of deep depression, neither approach taken alone could provide a proper result. The first was too high, and the second too low, to represent actual value. In one of the three majority judgments, Macdonald C.J.B.C. said at p. 528 (D.L.R.):

> [The evaluator] . . . ought not to accept the selling value at a forced sale or the selling value at an open sale as the basis of assessment to the exclusion of all other relevant facts any more than he should accept the cost of construction as the actual value to the exclusion of all other circumstances. The value would depend upon his own judgment after having taken all circumstances into consideration and since the property was not so

> valued but to the exclusion of some of the most important of them, there must be a new trial by a Judge of the Supreme Court.

Macdonald J.A., with whom Martin J.A. and McPhillips J.A. concurred stressed that it was "value in exchange" which was the proper measure of value and that, despite the depressed conditions and the non-commercial nature of the building, regard should be had to the price which would be paid by a "mythical investor".

The circumstances in this case are fundamentally different from those of *Swan Valley*; this is not a case in which it is beyond possibility that either the owner or any other prospective purchaser would be prepared to pay an amount as high as the replacement cost. It is also a different case from *Office Specialty*; this is not a case where the exchange value could be found to be equal to the replacement cost because of the building's particular suitability for the purposes of the owner. In that sense, the Office Specialty building was incidental to the main purpose of the owner. Here, the owner's primary purpose is to operate these facilities to generate profit. This complex no doubt differs in some ways from all other pulp, paper and lumber mills but not in the same sense as the premises of Office Specialty were different from other buildings of the same general kind.

The assessor submits that the proposition enunciated by the chambers judge is in error in that, by requiring evidence of what the owner or purchaser would be willing to pay, or evidence that the prospective purchaser would reach that decision on the basis of replacement value, the result is to introduce subjective valuation as the test for actual value which, as Lord Porter said at p. 102 of *Sun Life,* should not be done. I agree with that submission and with the related submission that, in many cases, the most appropriate objective test to determine whether the cost approach is appropriate will be whether the owner is using the building or plant for the purposes for which it was built. That may be a particularly appropriate test in relation to a large industrial complex of this kind. It is reasonable to assume that, in general, such plants are built at a cost which bears a reasonable relationship to their ability to produce earnings, and therefore a reasonable relationship to their actual value.

In this case, although there is no evidence of the sale of these or comparable assets, there is a type of market evidence arising from the recent sale of shares. There is opinion evidence as to the value of these assets derived from the share sale price. The chambers judge relied upon that fact as an additional ground for holding that the replacement cost approach could not be relied upon. At p. 36 of her reasons, she said:

> But in neither the *Sun Life* case nor the *Office Specialty* case was there, as there is in this case, evidence of a recent sale even though it is a sale of the shares of the owner and not of the lands. . .
>
> I find it difficult to accept that if the shareholders of *Office Specialty Ltd.* had, shortly before their case began, sold all the shares in that company to a new owner the Supreme Court would have had the same view of the applicability of the cost approach.

With respect, I do not think such a conclusion could be reached without knowing whether the assets under assessment were substantially all of the assets of Office Specialty Ltd. or merely part of a larger group of assets of various kinds. If they were the whole of the assets, a reliable conclusion as to their value probably could be drawn from the sale price of the shares. If they were mixed in with many others, it might have been impossible to draw any useful conclusion.

In this case, the Board gave careful consideration to the sale price and decided that the assessor's analysis of it provided a useful but not wholly reliable basis for assessment. Initially, the assessor contended that the sale was below market. To resolve that issue, the Board heard much evidence, some of which was taken from the former owners in San Francisco. It decided that the sale was indeed a market transaction. Having satisfied itself on that question, it went on to consider whether the share sale price could provide a reliable basis for valuing part of the

assets. It rejected entirely the approach of the company witness but accepted the opinion of Mr. Payne, the expert witness for the assessor, as evidence to which it could give some weight. After expressing the view that allocation of value to a single asset in the sale of a large integrated company is "risky at best", it went on to say at p. 8:

> The method adopted by Mr Payne on the allocation, namely "operating earnings by lines of business" , *in this instance* clearly identifies the value of a going concern business as it is attributable to the single asset to be valued on the basis of the income generated. Again, the Board accepts this valuation concept *only as an indication of possible asset values* which can be more appropriately determined by a sale of the assets only.

I see no error of principle in that statement or in the approach of the Board in treating the share sale analysis as evidence which it should take into account, but to which it should give less weight than replacement cost. Had the sale on December 31, 1982 been a sale of the assets making up the Elk Falls Complex, it might well have been error in principle to have regard to replacement cost. Or, if the Elk Falls assets were the whole of the assets of the company whose shares were sold, that sale price might well be a sufficiently reliable indication of asset value to justify excluding replacement cost from consideration. But I think the Board was quite justified in concluding that the asset value derived from sale of the shares should be given only limited weight.

The value indicated by that analysis was within $1 million (less than ¼ of one per cent) of that indicated by the replacement cost analysis. Had those two analyses been sound, and had the Board not erred in law in putting out of consideration the discounted cash flow analysis, I think there could have been no legitimate criticism of the conclusion that actual value was as indicated by the replacement cost analysis. The Board was entitled to give greater weight to the replacement cost and, in any event, in relation to these vast amounts the difference of $1 million was insignificant. In deciding that the replacement cost was the most reliable criterion of actual value, the Board may also have had regard to the earnings analysis presented by the assessor which indicated a value in excess of $450 million. That, like the share sale analysis, was evidence from which it could be inferred that a prospective purchaser would pay an amount equal to the replacement cost. However, it is now common ground that the Board erred in its application of the replacement cost analysis and, for reasons to which I will come later, the Board's treatment of the allocated share analysis also constituted error in law. When correction is made for those matters, the indicated value will be lower and, in any event, the Board in exercising its judgment must decide what weight should be given to the discounted cash flow analysis. So the decision cannot stand. But that is not because it was wrong for the Board to have regard to replacement cost; and to accord it the greatest weight.

The matter of the Board's error in the application of the replacement cost analysis is of considerable significance in relation to the question whether that is an appropriate method in this case. As stated earlier, it is now common ground that the Board erred in failing to take into account interest during construction, external obsolescence and excess operating costs. Interest during construction, which when taken into account will tend towards a higher value, is not relevant to this discussion. But the other two matters, both of which tend towards a lower value and which have a larger influence on the outcome than interest during construction, are relevant. The conclusion that they should be taken into account provides an additional ground for finding the cost approach to be a valid one to be taken into consideration.

In this court, counsel for Crown attempted to support, on a somewhat different ground than that stated in the reasons of the chambers judge, the conclusion that the cost approach should not have been taken into account. He relied on evidence that, in 1982 and 1983, the industry was in a poor financial condition. Demand for its product had fallen at a time when there had been great expansion of capacity to meet an anticipated rise in demand which did not take place. Those factors, it is said, had a particular effect on the Elk Falls Complex because the No. 5 paper machine had been added at great cost, had not proved as efficient as was hoped for, and in any

event was not needed to meet demand. So, it is said, there was no possibility that the complex could generate sufficient earnings to provide an acceptable level of earnings, and therefore no prudent purchaser would be prepared to pay an amount equivalent to the depreciated replacement cost to acquire those assets. The theory underlying replacement cost is the assumption that the facilities are capable of generating an adequate rate of return. That being so, Mr. Wallace submitted, there is no proper basis in the circumstances of this case for inferring that, at the relevant time, replacement cost would reflect the market value of the assets.

Standing alone, there is logic in that basis of attack upon the use of the cost approach. It demonstrates why the Board erred in law in refusing to make allowances for external obsolescence and excess operating cost. Those are examples of what Mr. Johnstone, in the answer which I quoted earlier, referred to as a correction which can be made within the cost approach. From the outset, the assessor acknowledged that those corrections should be made. It was the Board, for reasons which seemed good to it, which refused to take them into account. The same course was apparently adopted in other cases with the result that appeals had to be taken. See, for instance, *British Columbia Forest Products Limited* v. *Assessor of Area 03 - Cowichan Valley*; *Prince George Pulp and Paper Limited* v. *Assessor of Area 26 - Prince George,* Unreported, Van. Reg. Nos. A841788 and A841797, November 2, 1984. In that case, Gibbs J. held that the Board had erred in principle and thus in law in refusing to make such allowances in assessing the value of two pulp and paper mills for the 1983 taxation year. After noting that the allowance described as being for external obsolescence is also sometimes called an "economic allowance", Gibbs J. went on to describe it as follows at p. 6:

> . . . the Board failed to recognize that depressed market conditions are as much a "negative influence from outside the site" as are zoning regulations or inharmonious uses of adjacent properties. Secondly, it is inconsistent with the realities of the market place to conclude that a prudent purchaser looks only at capacity without regard to the market for the commodity which the capacity can produce.

The allowance for excess operating costs differs from the "economic allowance" in that it relates to specific conditions in the mill being assessed. Generally, the excess costs are regarded as "excess" on the basis that the equipment is less efficient than that now available, particularly in requiring a larger number of employees to operate it. The assessor agrees there are such costs at this mill.

These allowances can be seen as refinements to the replacement cost approach to allow it to reflect certain economic realities; and thus to remove some of its frailties as a means of arriving at market or exchange value. The determination that such allowances must be made in this case removes whatever force there might otherwise have been in Crown's objection to the use of the method.

The questions and answers involved in this head of the appeal are these:

Question 2:

> In the Board's "Final Estimate of Value" by the "Cost Approach",
>
> (a) Was there any evidence before the Board upon which it could conclude that the replacement cost of the assets at issue was $661,014,000?
>
> (b) N/A
>
> (c) If Question 2 (a) is answered in the affirmative, was there any evidence before the Board that a purchaser would pay to acquire the assets at issue, the amount the Board determined as the actual value?

(d) If the answer to Question 2 (c) is in the negative, did the Board err in law in relying on the Cost Approach in the absence of any evidence that a purchaser would pay the amount so determined as actual value in order to acquire the assets at issue?

The chambers judge answered question 2 (a) in the affirmative. I agree with that. The answer given to 2 (c) was "no" and to 2 (d) was "yes". The chambers judge observed that 2 (d) appears to be the same question as 2 (c) and that the basis for both answers is the conclusion that the cost approach should not have been used in this case.

For the reasons I have given I disagree with the answers to questions 2 (c) and 2 (d). The answer I would give to question 2 (c) is:

> The question should be interpreted as being whether there was any evidence before the Board which would allow it to give consideration to the cost approach. There was such evidence and therefore that approach is available for consideration along with other indications of value.

Question 2 (d) is effectively answered by 2 (c).

ASSESSORS APPEAL RE SHARE PRICE ALLOCATION

This question arises out of question 1 (a) which reads as follows:

Question 1:

In the Board's "Final Estimate of Value" by the "Direct Sales Comparison Approach" (Share Purchase Allocation):

(a) Was there any evidence before the Board on which it could conclude that the earnings on which its allocation depended were the earnings of the assets at issue?

The learned chambers judge dealt with that question in this way at pp. 31-32 of her reasons:

> *Question 1 (a)* arises in this way: as I have already indicated, a difficulty arises because Mr. Payne, who gave evidence on the share purchase allocation, did not have access to all the books and records of the appellant and determined what income came from what asset by using some figures in the company's annual reports.
>
> In the reports the income was broken down by divisions called, pulp and paper, wood products and merchandising. See, for instance, Crown Zellerbach Canada Annual Report 1982, pages 8 and 9 and Crown Zellerbach Canada Annual Report for 1981, also pages 8 and 9 both of which are part of exhibit 1. But, as was pointed out by counsel, it is almost incontrovertible on the internal evidence of these reports, e.g. the 1982 report at page 6 that for administrative purposes the earnings of the plants at Kelowna and Richmond are included under the pulp and paper division and the losses from the saw mill on the land under assessment are included under wood products' division.
>
> I think it was unreasonable for the Board, when it was adopting Mr. Payne's method, not to deduct from the earnings of the pulp division the earnings from the Mainland plants and the losses from the saw mill. Mr. Savage, for the assessor, directed me in answer to this contention of the appellant to certain remarks made by witnesses to the effect that all the pulp and paper division was at Elk Falls. But to take these answers out of the context in which they were given and give them the meaning attributed to them by Mr. Savage is, I think, to be unfair to the witnesses and to misconstrue the answers. If a witness had been asked: into what division do the earnings of the Kelowna and Richmond plants go?

> and he had answered that they go into wood products or merchandising, I would agree with Mr. Savage.
>
> Thus, the answer to question 1 (a) is:
>
> No, because there were included in determining the earnings of the subject matter of the assessment, the earnings of other lands and there were not deducted losses of the saw mill which was part of the subject matter of the assessment.

For those reasons, I would dismiss the assessor's appeal in respect of question 1 (a). The point taken by the assessor is that there was "some evidence" from which the Board could reach the conclusion that the Elk Falls Complex generated all of the earnings of the pulp and paper division. When fairly read in its context, that evidence was simply not capable of supporting that conclusion, and therefore was no evidence.

QUESTION 4 OF THE STATED CASE

The chambers judge dealt with this question at pp. 43-44 of her reasons as follows:

> *Question 4:* Did the Board err in law in not concluding that the value of the Elk Falls Industrial Complex as a business sets the upper limit of the actual value pursuant to section 26 of the Act, of the assets at issue?
>
> My answer to this question is "yes". I do not see how any reasonable man could hold that the market value of the land exceeded the value of the complex as a business or going concern, including the lands within the assets of the business. In the absence of any evidence that the lands had some special value apart from the business, e.g. if oil or gold had been discovered under them or the land was something that could reasonably be lived off. There are from time to time examples in the business world of that happening. By way of illustration, from a matter recently before the Court, the shares of Woodward Stores Ltd., a Vancouver merchandising company, were valued in the market and trading on the Toronto Stock Exchange until recently at $11.00 per share. Then an offer was made to the shareholders of $19.00 per share, the offer or having the intention to live off the lands and dispose of the merchandising business. There is, however, in this case not the slightest shred of evidence that the land with its installations upon it, can or might possibly fetch in the market place more than the business value of the going concern.

The assessor takes no issue with the general proposition that there is no basis, in this case, for finding a market value which exceeds the value of the complex as a business or going concern. But he submits that the answer is wrong because nothing in the proceedings made it necessary for the Board to come to such a conclusion, and it did not state a contrary conclusion, and it therefore did not err in law in not reaching a conclusion which it was not called upon to reach.

I agree with that view of the matter. The question and answer can be viewed as an academic dissertation which, in itself, may be helpful. But the danger of the finding flows from the significance which Crown seeks to place upon it. Its argument, as I understand it, is that there was evidence before the Board of the value of the complex "as a business"; that that evidence is to be found in the discounted cash flow analysis and the allocated share price analysis submitted by Crown; and that it was therefore wrong in law for the Board to arrive at a higher value than that indicated by those two analyses. Even the assessor's share price allocation, it is pointed out, provides an estimate of value lower than depreciated replacement cost.

The flaw in that submission is that it equates the figures put forward in the opinion evidence (as being the business or going concern value) with the amount of that value as finally determined. The Board may, in the end, conclude that replacement cost, with all proper allowances, should be

given greater weight than any of the other estimates of value. No error in principle would necessarily be involved in arriving at such a conclusion.

I would set aside the answer to question 4 and would answer it "No".

THE CROSS-APPEAL BY CROWN

THE SHARE PURCHASE ALLOCATION BY CROWN

This issue arises from question 1 (b):

> *Question 1:*
>
> In the Board's "Final Estimate of Value" by the "Direct Sales Comparison Approach" (Share Purchase Allocation),
>
> (b) Did the Board err in law in rejecting the Appellant's share purchase allocation based on net book value as indicating the upper limit of the actual value of the assets at issue?

The chambers judge dealt with this question at p. 32 of her reasons as follows:

> *Question 1 (b)* arises because:
>
> 1. Fletcher Challenge paid net book value, plus $23 million for the shares.
>
> 2. The assets are carried at historic costs and thus those assets which were acquired a long time ago are obviously worth more than book value and those acquired recently such as the new paper machine at Elk Falls, a large component of the mill's value, are worth at most what was paid for them.
>
> I do not think this is a question of law and, therefore, the answer to this question is, "no".

The net book value allocation was put forward by Mr. Williams, an accountant employed by Crown. He used the net book values shown on the company records at December 31, 1982. With respect to that analysis, the Board said at p. 7 of its decision:

> The method adopted by Mr. Williams of allocation on "net book value" 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 is the current value at December 31, 1982. 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 No. 5 paper machine represents a $190 million 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. 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.

In this court, Crown does not take issue with the proposition that the distribution of all of the assets of the company may be disproportionate in relation to the asset being assessed. But it says that, if the Board had properly analysed the whole of the evidence, it would have come to the conclusion that there was a greater proportion of new assets in the Elk Falls Complex than in the whole of the company and that the disproportion was therefore favourable to the assessor. Whether or not that contention is right, it merely serves to point up the extent to which this was an

issue of fact for the Board. It had before it evidence of qualified appraisers called by the assessor to establish the inherent unreliability of the book value allocation method. I see no error in law in the Board's rejection of the method. The chamber judge was therefore right to answer "no".

ADMISSION IN EVIDENCE OF DOCUMENTS MARKED FOR IDENTIFICATION

This issue arises out of question 2 (b):

> Did the Board err in law in considering the Kemper Group insurance appraisal and other materials which were marked for identification but which were not introduced into evidence and upon which no opportunity was afforded the Appellant to test the correctness or applicability of their contents in cross-examination?

The chambers judge answered that question in this way at pp. 34-35 of her reasons:

> *Question 2 (b)* arises because the Board used as a foundation for determining replacement cost various documents marked A, B, C and D for identification when the authors of the documents were not called to give evidence. I do not think the Assessment Appeal Board is bound by the strict rules of evidence. Its proceedings can only be vitiated by a non-adherence to the rules of evidence if such non-adherence leads to a breach of natural justice. I cannot see that there was any failure of fundamental fairness in the use of the documents in issue.
>
> Thus, my answer to this question is, "no".

I agree with that answer. However, as the reasons are based on the premise that there may have been a failure to adhere to the rules of evidence, and as the same issue may well arise in other proceedings of this kind, I will explain why I incline to the view that there was no breach of the rules of evidence.

The evidence on replacement cost was given by Mr. Quayle, the deputy-assessor for Courtenay, and Mr. Slavik, an appraiser employed by the British Columbia Assessment Authority. Both men have wide experience in the appraisal field and were undoubtedly qualified to give an opinion on replacement cost. They and their assistants made extensive inspections of the Elk Falls Complex, spending some 95 days on site and another 90 days in other costing procedures. The issue arises from three documents to which they had access and upon which they relied in carrying out those procedures. The Kemper Report was an appraisal of the Elk Falls Complex done for Crown by professional appraisers in December 1982 for insurance purposes. The second, called "North wood Costs" , was a summary prepared by an engineering firm of the actual cost and projected costs incurred in the most recent pulp mill expansion in British Columbia. The third, called the Sandwell Report, was a report of cost estimates for pulp and paper mills prepared for the Assessment Authority by an engineering firm to provide information on the current cost of pulp and paper mills in various locations in British Columbia. During the direct evidence of Mr. Quayle, counsel for Crown objected to these reports being admitted in evidence on the ground that they could be admitted only if their authors were called to testify. The chairman directed that they be marked for identification.

The position taken by Crown in relation to this evidence was that Messrs. Quayle and Slavik had simply adopted the figures derived from the Kemper, Northwood and Sandwell Reports and that they did not therefore give their own opinion of value, but merely offered the opinion of others. That submission is without merit. It ignores the actual contents of the evidence and the course of proceedings. The evidence of Quayle and Slavik was to the effect that they did not accept the opinions expressed in the three reports but utilized the information, item by item, only if their own analysis and comparison satisfied them that it was appropriate to do so. In many cases they utilized the information after making adjustments. In the end, they arrived at their own opinion of replacement cost.

In this court, counsel for Crown relied heavily on the fact that the documents never got beyond being marked "for identification" and that the Board nevertheless made reference in its decision to the Kemper appraisal as being "information before the Board" and therefore evidence to be considered. It seems clear that it considered it only as being generally confirmatory of the opinion put forward by Mr. Quayle. This submission by Crown seeks to attach too much significance to the terminology of "marking for identification". In the context of a trial, it is generally well understood that something marked for identification only is not evidence in the case. But the chairman made it clear in the course of Quayle's direct examination that the reports would be regarded as evidence for limited purposes. After hearing Quayle's explanation of how the reports had been used, the Chairman ruled in respect of the Kemper report that the witness could refer to those pages which he had used and that he would be subject to cross-examination by counsel for Crown on the use which he had made of the reports. Similar rulings were made in respect of the other reports and there was in fact very lengthy cross-examination of the witness on this subject. The chairman also said that he was not prepared to "absolutely restrict" the Board to "not recognizing the value arrived at" but went on to say that he did not think the Board would give much weight to a value arrived at by a witness not called.

I see nothing objectionable in the use made by the witnesses of the three reports. In essence, it was similar to the use made of information as to property sales in *City of St. John* v. *Irving Oil Company Limited*, [1966] S.C.R. 581. Nor was there anything objectionable in the Board relying on the exhibits marked for identification. Having regard to the nature of the proceeding, it was appropriate for the Board to accept the opinions and the documents as some evidence of value; and to treat the question as one of weight.

It may well be that the extensive cross-examination by counsel for the company on the documents had the effect, even on a strict application of the rules of evidence, of making them admissible as evidence of the truth of their contents. But, as s. 55 of the *Assessment Act* provides: ". . . the Board is not bound by the technical rules of legal evidence," it is unnecessary to decide that question.

NATURE OF ORDER

I would dismiss the appeal of Crown. I would dismiss the assessor's appeal in respect of question 1 (a) but would allow his appeal with respect to questions 2 (c) and 2 (d) and would answer those questions as follows:

> 2 (c) The question should be interpreted as being whether there was any evidence before the Board which would allow it to give consideration to the cost approach. There was such evidence and therefore that approach is available for consideration along with other indications of value.
>
> Question 2 (d) effectively answered by 2 (c).

I would also allow the assessor's appeal with respect to question 4 and would answer it "no".

COSTS

The learned chambers judge disposed of costs as follows:

> As Mr. Savage points out, success was divided. However, I think that the appellant had the lion's share of success because I rejected the fundamental thesis of the Board's decision, namely, that the cost approach was open to it on all the evidence.
>
> I order that the appellant should have its costs and recover sixty per cent thereof from the respondent. Whether it can truly be said that there was any amount involved in this

proceeding I do not determine because I consider that there was at issue a sufficiently difficult point of law to warrant my holding, pursuant to Appendix B., that the costs should be taxed as if the amount involved were $50,000.00.

As the assessor is now successful on the "fundamental thesis" , I would set aside that order for costs and direct that the assessor have his costs in the Supreme Court and recover 60 per cent thereof from Crown. I would not disturb the holding that costs should be taxed as if the amount involved were $50,000.

The assessor has succeeded on the major issue and one of the two minor issues in his appeal and has succeeded entirely on Crown's appeal. I would award him the costs of both appeals, to be taxed on the same basis as those in the Supreme Court.

W.A. ESSON, J.A.

CRAIG, J.A.: I agree.

MACFARLANE, J.A.: I agree.