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CALONA WINES LIMITED

v.

ASSESSOR OF AREA 19 - KELOWNA

Supreme Court of British Columbia (A840542) Vancouver Registry

Before MR. JUSTICE K.E. MEREDITH (In Chambers)

Vancouver Sept. 30, 1985

J.K. Greenwood for the Applicant/Respondent
S.B. Armstrong for the Respondent/Petitioner

Reasons for Judgment October 1, 1985

The respondent applies in effect to strike out a Notice of Hearing of a case stated pursuant to s. 74 of the *Assessment Act* as being out of time.

The stated case is by way of appeal from a decision of the Assessment Appeal Board, dated June 14, 1983. The case was filed by the secretary of the Board (after a not inconsiderable delay) pursuant to s. 74 (5) of the *Assessment Act*. The respondent says that the same subsection imposes on the appellant the obligation to bring the case "on for hearing before a judge in Chambers within one month from the date in which the stated case is filed".

I do not agree that the subsection does impose on the petitioner the obligation contended for. Thus I conclude on the authorities that the provision is not mandatory but directory only. The appeal is not therefore vitiated for failure of the petitioner to bring it on for hearing within the time specified.

Section 74 is contained in Part 8 of the Act, headed "Stated Cases and Appeals on Matters of Law". The section itself is headed "Procedure on appeal on law to Supreme Court".

The section reads:

> "74. (1) At any stage of the proceedings before it, the board, on its own initiative or at the request of one or more of the persons affected by the appeal, may submit, in the form of a stated case for the opinion of the Supreme Court, a question of law arising in the appeal, and shall suspend the proceedings and reserve its decision until the opinion of the final court of appeal has been given and then the board shall decide the appeal in accordance with the opinion.
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> (2) A person affected by a decision of the board on appeal, including a municipal corporation on the resolution of its council, the Minister of Finance, the commissioner, or an assessor acting with the consent of the commissioner, may require the board to submit a case for the opinion of the Supreme Court on a question of law only by
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> (a) delivering to the board, within 21 days after his receipt of the decision, a written request to state a case; and

(b) delivering, within 21 days after his receipt of the decision, to all persons affected by the decision, a written notice of his request to the board to state a case to the Supreme Court.

(3) The board shall, within 21 days after receiving the notice under subsection (2), submit the case in writing to the Supreme Court.

(4) The costs of and incidental to a stated case shall be at the discretion of the Supreme Court.

(5) Where a case is stated, the secretary of the board shall promptly file the case, together with a certified copy of the evidence dealing with the question of law taken during the appeal, in the Supreme Court Registry, and it shall be brought on for hearing before the judge in Chambers within one month from the date on which the stated case is filed.

(6) The court shall hear and determine the question and within 2 months give its opinion and cause it to be remitted to the board, but the court may send a case back to the board for amendment, in which event the board shall amend and return the case accordingly for the opinion of the court.

(7) An appeal on a question of law lies from a decision of the court to the Court of Appeal with leave of a justice of the Court of Appeal.

(8) to (10) [Repealed 1982-7-34, proclaimed effective September 7, 1982.]"

(emphasis mine)

I doubt that the words "it shall be brought on for hearing before a judge in Chambers" impose an onus on the appellant to bring an appeal on for hearing. I think in context the words probably impose that onus on the Board. In any event the words are at least equivocal. In either case, the appeal of the petitioner should not be vitiated for alleged non-compliance with the section.

By way of contrast, the appellant was required by subsection (2), within the times limited, to deliver a request to state a case and to deliver notice of the request. These steps are mandatory. Failure to take them would defeat an appeal. But non-performance of conditions precedent imposed on others than the appellant will not be fatal to the appellant's case. Such conditions precedent will be construed as directory rather than mandatory: *Regina* v. *Bourassa* [1972] 1 W.W.R. 285.

The application is therefore refused with costs.