# The following version is for informational purposes only

**RIVTOW INDUSTRIES**
**RIVTOW STRAITS LTD.**
**RIVTOW MARINE LTD.**
**IMPERIAL MARINE INDUSTRIES LTD.**
**POINT GREY TOWING CO LTD.**

**v.**

**THE ASSESSMENT COMMISSIONER OF BRITISH COLUMBIA**

British Columbia Court of Appeal (CA001356) Vancouver Registry

Before: MR. JUSTICE J.D. TAGGART, MR. JUSTICE A.B.B. CARROTHERS and MR. JUSTICE R.P. ANDERSON

January 17, 1986

J.W. Elwick for the Appellants
J.E.D. Savage for the Respondent

**Reasons for Judgment of Mr. Justice Carrothers** January 17, 1986

This appeal has a history that bears repeating. The appellant companies which, for purposes of this appeal may conveniently be referred to collectively simply as "RivTow", were on December 12, 1983 granted leave by Hinkson, J.A. to appeal to this Court from the decision of Dohm, J. pronounced September 27, 1983 answering questions put to him in a case stated July 25, 1983 by the Assessment Appeal Board, pursuant to s. 74 (2) of the *Assessment Act*, R.S.B.C. 1979, c. 21 as amended (the "Act").

[1] Amended 15/9/86.

I think it useful to digress at this point in the history of this appeal to understand the fundamental issue which was of concern to the various tribunals throughout and which is the pivotal issue on this appeal.

The statutory provision for the assessment of land, the fee of which is in the Crown, is to be found in s. 34 (1) of the Act as follows:

> 34. (1) Land, the fee of which is in the Crown, or in some person on behalf of the Crown, that is held or occupied otherwise than by, or on behalf of, the Crown, is, with the improvements on it, liable to assessment in accordance with this section.

It is to be noted that the subject of the assessment is "land", which by s. 1 of the Act includes land covered by water, and which is to be distinguished from the surface of the water.

The stated case, to which I have made reference, had its genesis in the decisions of the 1982 Courts of Revision in respect of a number of water lot leases or licences of use and occupation held by RivTow for log booming and log storage purposes.

These leases or licences, granted exclusively for these limited purposes, were held by RivTow from either the federal Crown or the provincial Crown and purported to grant rights of use and

occupation of the surface of water covering variously the sea bed or a river bed owned or controlled by the Crown, either federal or provincial, in all cases navigable waters.

RivTow, in the exercise of its rights of use and occupation of these water lots as log booming and storage grounds, uses and occupies each lot to different extent and degree and for periods of time varying from hours or days to months. Floating logs and booms of logs are secured in position within the water lots by dolphins or piling standing on, driven into or fixed to the sea bed or river bed. In a few instances, the logs are secured in position by anchor cables affixed to the upland usually with iron pins set in rock or driven into the ground. An inconsequential area of the upland would be employed in this fashion. The unoccupied upland occasionally serves as a windbreak protecting the water lot from the elements, making it more suitable for log storage purposes. These are the only contacts with "land".

Ingress to and egress from a water lot with logs is on the surface of the water and the log booming and storage activity within the water lot invariably takes place on the surface of the water except for the relatively infinitesimal areas of the bottom occupied by footings of any dolphins or piles aforesaid.

The 1982 Courts of Revision held that these water lot leases were assessable and RivTow appealed the issue of assessability to the Assessment Appeal Board. On April 22, 1983, the Assessment Appeal Board dismissed RivTow's appeal.

Both sides sought a stated case: RivTow on the question of assessability and the Commissioner on a question of fixtures and improvements, being the dolphins and anchor devices.

On September 27, 1983, Dohm, J. affirmed the decision of the Assessment Appeal Board finding in favour of assessability of the water lots. The Commissioner's questions respecting fixtures and improvements were withdrawn at the hearing, leaving five questions posed by the stated case, which were answered by Dohm, J. as follows:

| **Question Posed** | **Determination by Dohm, J.** |
|---|---|
| (i) Did the Assessment Appeal Board err in law in holding that the rights conferred on the Appellants by certain Crown leases and licences included the right to use the surface of the water covering the lands described in the said leases and licences (sometimes referred to in the Decision as the demised premises and hereinafter referred to as the "lands")? | No |
| (ii) Did the Assessment Appeal Board err in law in failing to distinguish between the lands, being the property under lease or licence, and the water covering the lands, when deciding that the Appellants possess and use the lands? | No |
| (iii) Does the Appellants' use of the water covering the lands render them "occupiers" of the lands for the purposes of the *Assessment Act*? | Yes |
| (iv) Did the Assessment Appeal Board misdirect itself in holding the frequency of use is not a criterion in determining whether the appellants were in possession or occupation of the lands? | |

No

(v) Did the Assessment Appeal Board err in holding that the "passive use" of some areas in the lands rendered those areas assessable even though not in actual use?

No

Both the Assessment Appeal Board and Dohm, J., in reaching the same conclusion, placed reliance, in my view incorrectly, on the decision of a five-judge bench of this Court in *The Queen in Right of British Columbia* v. *Newmont Mines Ltd.* (1982), 37 B.C.L.R. 1. That case is authority for the proposition that Crown land is not assessable which has not been reduced to possession by other than the Crown and which the lessee or licensee has not occupied. This leaves it open in each case to determine whether and to what extent the land in question has, in fact, been reduced to possession and occupation. Thus, the test which is determinative of assessability is whether the Crown land sought to be assessed has actually been reduced to possession and occupation by the potential taxpayer.

In the case of a mineral claim, the Crown grant specifically gives the claim holder the right to the use and possession of the surface of the mineral claim for purposes of exploration, development and mining production within that mineral claim. In the case of a mineral claim which has been occupied for mining purposes, it can readily be concluded that the surface has been reduced to possession and occupation by the holder of the mineral claim.

However, such a conclusion is not so readily reached in the case of water lots, where log booming and storage is conducted exclusively on the surface of the water. The sea or river bottom is not used or possessed by the lessee or licensee of a water lot except to an insignificant extent by anchoring devices securing the logs or booms and in respect of which the questions of the Commissioner in the stated case have been withdrawn.

In some instances, there is within the water lot lease or license area some dry protective upland and, in some instances, there is some inaccessible or unusable water surface. I exclude those areas from my consideration of the meaning of "occupied" as they are not areas which can be used by RivTow for log booming and storage purposes, being the exclusive use stipulated in the water lot lease or licence.

The attributes of possession and use of the surface of a mineral claim are patently different in many respects from those of a water lot lease or licence. The user of a water lot for log booming and storage purposes conducts such operation suspended in the water and does not possess or occupy the bottom to any significant degree. Indeed the withdrawal by the Commissioner of those questions relating to the assessment of anchoring devices confirm the triviality of the areas occupied by the anchoring devices in relation to the overall question of assessment of water lots.

I do not consider that the case of a lessee or licensee of a water lot for log booming and storage purposes meets the possession and occupancy test of the *Newmont* case.

It is "land" which is to be assessed rather than the surface of the water covering or passing over that land. A demise of the surface of moving water is legally difficult. The demise must perforce relate to the bottom. The fact is that RivTow, while possessing and occupying the surface of the water, has not reduced to possession or occupied the bottom. The possessory and occupation test of the *Newmont* case has not been met.

It follows that I would allow this appeal. However, before doing so, I would like to comment on a point raised by the Commissioner for the first time on this appeal. It was not raised by the stated case nor dealt with by Dohm, J.

The Commissioner submits that the first meaning of "occupier" as defined in s. 1 of the Act, makes RivTow an occupier at law if not in fact. That definition, followed by three further definitions, reads:

> "occupier" means
>
> > (a) a person who, if a trespass has occurred, is entitled to maintain an action for trespass;

So trespass "the fertile mother of actions" raises its ugly head.

As these water lot leases involve the use of the surface of water, any trespass to be actionable by RivTow would have to relate exclusively to the surface of the water. Consequently, in the case of a water lot, an actionable trespass would have to be founded in trespass to the person of RivTow or trespass to the goods of RivTow, rather than trespass to land.

RivTow, by virtue of a water lot lease for log booming and storage purposes, could not found an action against another for trespass to land. The water lot demise does not preclude the laying of cables or other things by others than RivTow along the bottom of these water lots or the dredging of the bottom for sand. There are various conceivable uses by others than RivTow of the sea bed or river bed which would be compatible with RivTow's limited use of the surface of the water lots. The "land" constituting the bottom could well be lawfully used or occupied by others than RivTow, provided such use or occupation does not interfere with the use or occupation of the surface by RivTow. I note that all of the other three definitions of "occupier" in s. 1 of the Act have reference to "a person in possession of land" and, applying the *ejusdem generis* rule of construction, I doubt that the Legislature had in its contemplation when enacting the first definition of "occupier" trespass to the person or trespass to goods. I consider the trespass argument is restricted to trespass to land and fails with the finding that RivTow does not possess or occupy the bottom of the water lots in question.

In my view, this question of trespass is too problematical, indirect and uncertain in this case upon which to found an assessment for taxation purposes.

In the result, this appeal must be allowed. I would answer questions (i), (ii) and (v) in the affirmative and question (iii) in the negative. The frequency of use criterion for determining possession or occupation was not argued before us and was not taken into consideration on this appeal and question (iv) does not require an answer.

I agree. Mr. Justice Taggart.

I agree. Mr. Justice Anderson.