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SHELL CANADA RESOURCES LTD.
DISTRICT OF SPARWOOD
DISTRICT OF ELKFORD

v.

ASSESSOR OF AREA 22 - EAST KOOTENAY

Supreme Court of British Columbia (A863186) Vancouver Registry

Before: MR. JUSTICE SPENCER (In Chambers)

Vancouver, March 19,20, 1987

C.W. Sanderson for Shell Canada Resources Ltd.
J. Galt Wilson, Q.C. and J.E. McDannold for the District of Sparwood and the District of Elkford
J.K. Greenwood for the Assessor of Area 22 – East Kootenay

Reasons for Judgment April 8, 1987
Including Addendum to Reasons filed April 8, 1987 April 10, 1987

This is a stated case from the decision of an assessment appeal board dated September 10, 1986 by which the assessed value of the Line Creek Coal Mine for municipal taxation purposes as of July 1, 1984 was reduced from $142,126,700 to $72,756,955. In spite of the style of cause, it is the Assessor and the Municipalities who appeal, and Shell Canada which responds. In the course of the appeal the Assessor claimed certain omissions from his assessment which, when corrected, would have increased the assessed value to $210,590,350. The two Municipalities, together with the District of Fernie which is not a party but is vitally interested in the outcome of this appeal, share the tax revenues from the mine between them.

The Municipalities and the Assessor between them raise eighteen questions for the Court's consideration, and some of those questions themselves contain double questions. Eventually in these reasons it will be seen that in my opinion the result of this appeal must turn, in favour of the appellants, on the answers to Municipal Questions 7 (b) and 9, and the Assessor's Question 7 (b), but I shall answer all of the questions argued before me, in case that assists the Board. Throughout the consideration of the questions it is necessary to keep in mind that a stated case deals only with alleged errors of law. The Court has no power to review findings of fact or to reconsider the weight to be given to conflicting evidence before the Board. Some of the stated questions overlap, and where this is so I shall deal with them together.

The coal mine in question was some two years old as of July 1, 1984. It had been constructed at a capital cost of $315 million. There were no comparable sales of similar mine properties from which the actual value of this mine could be determined. Therefore the Assessor chose to develop his opinion of value by considering the capital cost of the assessable assets of the mine and making an allowance for their depreciation. The owner challenged that method. According to its witnesses, there has been a substantial downturn in the world coal market since the mine was planned in 1979 which made it far less profitable than was predicted during the planning and development stages. Based on the income it could now develop, as seen on July 1, 1984, the owner said a knowledgeable purchaser, looking for a reasonable return on investment, would only pay $32 million for the assessable assets. The Board found a figure between those of the Assessor and the owner.

Municipal Question Number 1:

> Did the Board err in law when it held that s. 26 (3.1) of the *Assessment Act* was the only guide available to determine actual value of heavy industrial plants for assessment purposes?

Those words frame the question as it was argued before me. It was stated in the case to include s. 26 (3) but that was an error. All parties conceded I should deal with the question as I have framed it above.

The Municipalities argued on this question and throughout the whole stated case that the Board was misled by the judgment of Southin J. in *Crown Forest Industries Ltd.* v. *Assessor of Area #6 - Courtenay*, (1985) B.C. Stated Case No. 210, where she held, on the facts stated in that case, that the Board was wrong in law in excluding a consideration of the discounted cash flow of an industrial undertaking as a proper method of valuing it. In that case the learned Judge went on to say that it was wrong as a matter of law to consider the depreciated replacement cost of the undertaking in the absence of any evidence that a purchaser would consider that cost in arriving at a purchase price. The Court of Appeal reversed the learned trial judge, see *Crown Forest Industries Ltd.* v. *Assessor of Area #6 - Courtenay*, Vancouver Registry CA004492 and CA004535, January 30, 1987. That decision came down after the Board had decided this case.

It is important to note that the Court of Appeal agreed with Southin J. that the Board was wrong in law in the Crown Forest Industries case in rejecting the discounted cash flow completely as a method of valuation upon the ground that it was inappropriate to use it. Esson J.A. said it should be considered as one guide to value. But he found that the learned trial judge erred when she said that replacement cost should only be considered where there was some evidence to show that a purchaser would have regard to replacement cost in determining price. The ratio of that part of the Court of Appeal judgment is to be found at pp. 10 and 12 of the Reasons. I quote from the latter as follows:

> "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."

In saying that the Board erroneously held that s. 26 (3.1) was the only guide available to determine value in the case at bar, the appellants rely upon an extract from p. 54 of the Board's reasons where it wrote:

> "The only guidance the assessor can obtain for the valuation of heavy industrial plants from the *Assessment Act* is a reference in Section 26 (3.1) that '. . . the land and improvements used by it shall be valued as the property of a going concern'."

I do not think the Board was there in error because, as I read their reasons as a whole, they did not fail to consider the other criteria of value set out in s. 26 (3) of the Act. The Assessor's evidence, which included reference to replacement cost, was discussed at pp. 2-49 of the reasons for judgment and the argument supporting replacement cost as an appropriate method of valuation was discussed at pp. 49-53. The Board then compared the relative merits of the depreciated replacement cost method and the income method from pp. 55-60 before deciding to accept the income method. So the Board's statement at p. 54, which I have quoted above, must be considered in the light of the fact that the Board did look at the merits of valuing this property

by reference to replacement cost. In that light I have concluded that the respondents are correct in saying that the quoted passage from p. 54 of the Board's reasons only goes so far as to make the point that s. 26 (3.1) is the only part of the Assessment Act which gives guidance as to how the criteria set out in s. 26 (3) are to be applied to an industrial property. They are to be applied bearing in mind that the property is to be valued as a going concern. The Board acknowledged the replacement cost method but rejected it for this property. The correctness of that rejection is raised by later questions, particularly Municipal Question 3 and Assessor's Questions 2 and 4. So the answer to Municipal Question Number I is "No".

Municipal Question Number 2:

> Was there any evidence before the Board to allow the Board to conclude that a discounted cash flow valuation determined the actual value of the appellant's land and improvements for assessment purposes?

Assessor's Question Number 1:

> Was there any evidence before the Assessment Appeal Board on which it could conclude that the discounted cash flow method of valuation, valued the land and improvements of Shell Canada Resources Ltd. which were the subject matters of the appeal?

The question of whether there was any evidence at all before the Board is a question of law which the Court is required to answer. The weight to be placed upon that evidence, however, was a matter for the Board. See *Provincial Assessors of Comox, Cowichan and Nanaimo* v. *Crown Zellerbach et al.* (1963), 42 W.W.R. (N.S.) 449, per Davey J.A. at pp. 455 and 456; and, more recently, *D. Groot Logging Ltd.* v. *Assessor of Area 25 - Northwest*, Vancouver Registry A843319, February 18, 1985, Stated Case No. 200.

The summary of evidence led for the owner given by the Board at pp. 5 to 32 of its reasons satisfies me that there was evidence before the Board that a discounted cash flow valuation leads to a valuation of the land and improvements for assessment purposes. The value for assessment purposes, pursuant to the *Assessment Act*, is the actual value. The owner's witnesses testified that actual value of a coal mine in the marketplace in the eyes of knowledgeable purchasers is arrived at by considering the income stream which can be derived from a mine and fixing a purchase price in relation to the profit which can be generated from that stream. The income approach has been recognized as one means of determining actual value in the leading authorities, see the Privy Council's decision in *Montreal* v. *Sun Life Assurance Co. of Canada*, [1952] 2 D.L.R. 81 at 89. It is reiterated by reference to that case in our Court of Appeal's decision in the *Crown Forest Industries* case (supra) at p. 13. What the Board did was to accept the discounted cash flow method of valuation to the exclusion of the cost approach. The choice of the appropriate valuation method in any given case is entirely a matter for the Board, unless some error in principle on behalf of the Board is revealed. If it was an error in principle by the Board to exclude reference to the replacement cost method in this case, as the appellants argue by reference to the Court of Appeal's decision in *Crown Forest Industries Ltd.* (supra), that is not an issue raised by these particular questions to the Court. The Board was alive to the fact that it had to value not the owner's business but its land and improvements, witness its remark at p. 62 of its reasons for judgment, under paragraph 6 where it said,

> "6. Section 26 (3) (in its present form) permits the use of revenue value of land and improvements in arriving at actual value under the *Assessment Act*. The Board, however, in accepting this approach is concerned that it is valuing the business and not the real estate. The real estate using this method is valued by deducement."

From that I take it that the Board consciously extrapolated land and improvement value from the discounted cash flow method of valuing the owner's undertaking as a whole. It is noteworthy that from the value achieved by that method the Board reached the value of the assessable items at

p. 60 of its reasons by adopting a method suggested by the owner's witness, Mr. Hildebrand. Although in most cases the value of a business conducted at a premises will be different from the value of the land and improvements, there are undoubtedly cases where they are the same. Such cases may include mines, where the land and improvements are put to their highest and best use in producing an income stream from the production of coal, and where there is no residual value when the deposit is worked out. There was ample evidence in the case to permit the Board to find that the value of these lands and improvements was represented by their income-earning potential as at the relevant assessment date, July 1, 1984.

The answers to Municipal Question Number 2 and the Assessor's Question Number 1 is in both cases "Yes".

Municipalities' Question Number 6:

> Did the Board err in law when it held that the Assessor did not provide the Board with a discounted cash flow value when by the evidence before the Board the Assessor's discounted cash flow value was $227,000,000?

This question stands alone. There is none similar from the Assessor. It stems from p. 58 of the Board's reasons where he wrote,

> "The respondent Assessor did not value the subject property using the income approach. In his opinion this approach is unreliable and unacceptable."

Before me the appellants argued that there was evidence tendered by the Assessor's witness, Mr. DeLisle, who gave evidence of a number of different valuation formulae using the discounted cash flow method. Of those various formulae another witness for the appellants, Mr. Kittridge, selected one which produced a value of $227,000,000. The summary of Mr. DeLisle's evidence contained in the Board's decision at pp. 39-42 however shows that the purpose of his evidence was not to advance an acceptable method of valuing the mine but, by varying the data put into the discounted cash flow calculation, to show how sensitive to error and therefore unreliable that method was.

The appellants' argument before me that the Board ought to have had regard for that evidence of valuation based upon a discounted cash flow is difficult to accept when one considers how strenuously the same parties argued against the use of that method during the rest of their presentation. They opposed it just as strenuously before the Board. The submissions made upon behalf of the Assessor with respect to that evidence of a discounted cash flow appear in the transcript from June 14, 1986 at pp. 251-252. This is what counsel said before the Board:

> "Now, I said it before and I think it's worth saying it again, Mr. Kittridge was not produced to develop a D.C.F. valuation for the mine. Mr. Kittridge was produced because it's always been the Assessor's fundamental position that it's very difficult to rely on a forecast at all. You can produce one, you can produce another. It's very different. Mr. DeLisle was produced and he's the next witness merely to demonstrate that if you perform the same kind of calculation using Mr. Kittridge's forecasts as opposed to Mr. Serrano's forecasts, you can develop some very different values. This was not put forward to prove that Mr. DeLisle's values are in any way correct' cause that would be inconsistent with our fundamental position. It merely shows that you can achieve a great deal of variability by using different forecasts made by reputable people at the right time. And therefore, to drive home the point that the approach is suspect."

That submission was adopted by counsel on behalf of the Municipalities in the same transcript at p. 279. Having expressly told the Board that the Assessor's discounted cash flow evidence was not a reliable indicator of value, the petitioners ought not now to be heard to complain that the Board rejected it. The Board was justified in finding that no discounted cash flow valuation was

produced by the appellants for the purposes of valuation. In so finding the Board did only what the appellants invited them to do. The answer to the Municipalities' Question Number 6 is "No".

Municipal Question Number 3:

> Did the Board err in law when it accepted the discounted cash flow valuation of the appellant's business rather than finding the actual value of the appellant's land and improvements?

Municipal Question Number 5:

> If the answer to (Municipal) Question 2 is no [sic], did the Board apply the discounted cash flow valuation correctly based on the evidence before it.

Assessor's Question Number 2:

> If the answer to (the Assessor's) Question Number 1 is no, did the Assessment Appeal Board err in law in using the discounted cash flow method to determine the actual value of the land and improvements of Shell Canada Resources Ltd. which were the subject matters of the appeal?

Assessor's Question Number 3:

> Having found as it did that it was concerned that the discounted cash flow method determined the value of the business of Shell Canada Resources Ltd., did the Assessment Appeal Board err in law by using that method to determine "actual value" of land and improvements of Shell Canada Resources Ltd., which were the subject matters of the appeal?

Assessor's Question Number 4:

> Did the Assessment Appeal Board err in law by using the discounted cash flow method of valuation to determine the "actual value" of the land and improvements which were the subject matters of the appeal?

These five questions can be conveniently dealt with together. The Municipalities' Question Number 7 tends towards the same subject matter but is limited by its sub-paragraphs (a) and (b), and I think it more appropriate to deal with it separately. The Municipalities' Question Number 5 appears to be misstated and should probably read:

"If the answer to Question Number 2 is yes."

In any event the issue raised by it is whether or not the Board applied the discounted cash flow valuation method correctly based on the evidence before it.

The whole group of questions strikes at the issue whether or not the Board was correct in relying entirely on the discounted cash flow method and excluding consideration of replacement cost as an indicator of value. The authorities show that it is permissible to do so as a matter of law, although the cases may be rare where the evidence justifies it. In *Montreal* v. *Sun Life Assurance Co. of Canada* (supra) Lord Porter wrote at p. 94:

> "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."

In the *Crown Forest Industries* case (supra) Esson J.A. adopted that quotation from Lord Porter at p. 13 of his reasons for judgment, and at p. 12 wrote, speaking of the premise that in respect of a productive facility, cost equals 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, then it would not be right to base the assessment solely on replacement cost and, *in some cases, it should be disregarded entirely.*"

(underlining mine)

It is true that on the same page Esson J.A. went on to adopt, as entirely correct, McKay J.'s statement of the law from *MacMillan Bloedel Ltd.* v. *Assessor of Area 7 - Sunshine Coast* (B.C.S.C.); B.C. Stated Case No. 206, p. 1151, but it is clear that, speaking for the whole Court, he recognized that in some cases the evidence may justify disregarding the replacement cost approach entirely.

Whether or not the evidence in this case justified disregarding the replacement cost method entirely and relying solely on the discounted cash flow was, in my respectful opinion, a question of fact and not of law. The selection or rejection of the appropriate valuation technique is a question of fact for the Board. It is not reviewable on a stated case, provided there was some evidence to support that selection. I refer again to the words of Davey J.A. in *Provincial Assessors of Comox, Cowichan and Nanaimo* v. *Crown Zellerbach Canada Ltd.* (supra) at 455, which I have quoted above, and to the judgment of Gibbs J. in *D. Groot Logging Ltd.* v. *Assessor of Area 25 - Northwest* (supra), at p. 1128, where he reconciles that judgment of the Court of Appeal with the later judgments of this Court in *Swan Valley Foods Ltd.* v. *Assessment Appeal Board* (1979), 13 B.C.L.R. 304, and *Western Indoor Tennis* v. *Assessor of Area 11 -Richmond-Delta* (1981), 29 B.C.L.R. 265.

But although the selection of the appropriate valuation technique is a question of fact, there may be cases where, in deciding a question of fact, the Board errs in principle. It would, for instance, be an error of principle if the Board thought that as a matter of law it was bound to choose one valuation method only and to discard all others, because the *Sun Life* case (supra) and the *Crown Forest Industries* case (supra) both clearly support the principle that different methods may be used side by side. I do not think the board made that error here. It clearly paid close attention to both the discounted cash flow method and the replacement cost method and made a choice between them for a number of reasons articulated at pp. 61-63. Chief among those was the reason that the subject property suffers and will continue to suffer for some time from excessive external obsolescence (depressed international coal prices) and that the discounted cash flow method takes better account of all forms of obsolescence than does the replacement cost method. Although this is a matter to be raised later in discussing Municipal Question 4 and Assessor's Question 6, it is also noteworthy at this point that having accepted the discounted cash flow method the Board went on to use calculations from the replacement cost method to arrive at a breakdown of value between the land, buildings and equipment. That makes it clear that the Board did not totally exclude all reference to the alternative replacement cost method. It considered both approaches and made an informed choice between them.

The question now becomes, was there any evidence upon which the Board was justified in discarding the replacement cost method entirely. In my respectful opinion there was. There was evidence from the owner's witnesses, Mr. Hildebrand, Mr. Glanville and Mr. Lane, that industrial mining properties are bought and sold on a discounted cash flow valuation without reference to replacement cost. Mr. Lane testified that owners laugh at him if he tries to suggest valuation based upon replacement cost. A number of examples of sales achieved using a discounted cash flow valuation were given. There was evidence that the present mining recession is not merely a temporary cycle but is projected over a long term. There was evidence given by Mr. Glanville

(Vol. 8, p. 52 of the transcript), that he knew of several copper mines in the United States which sold, about two years after construction, for about twenty-five per cent of the cost of construction. He could offer no examples from the sale of coal mines, but that evidence was available to the Board to tell them that the market will in fact, on suitable evidence, value a new producing mine at substantially less than what it costs to develop.

The task of weighing that evidence against the evidence tendered on behalf of the Assessor was entirely a question of fact for the Board.

With respect to the question of whether or not the use of the discounted cash flow method arrived at a valuation of the owner's business rather than of the land and improvements, I have already said I think the Board was alive to that danger. In some cases, the owner's business may generate far more income and be worth more than is justified by a valuation of the land and improvements where it is operated. In those cases it is assessable only on the actual or market value, however reached, of the land and improvements, because the *Sun Life* case (supra) in the Supreme Court of Canada shows that the value for assessment purposes is not necessarily the same as the value for expropriation purposes. The latter is to include the value of all the attributes of the property, present and potential, but the former is only to take into account its present value. The expropriation value is closer to the sale value of a property which would also be likely to take into account presently unrealized potential uses. The relevant extract from the *Sun Life* judgment is to be found in the reasons for judgment of Rinfret C.J., [1950] S.C.R. 220 at 224. The Privy Council decision (supra) found no fault with that. In other cases the return from a business may be much less than can be justified by the investment in the land and improvements where it is operated. In the latter type of case there may be some residual value to the land and improvements over and above their value as income-earning assets. For example, an obsolescent business may be conducted at premises which have a higher and better use. But in cases where the return from a business is less than can be justified by the original investment in land and improvements the reason for that must be examined. If it is because of some quality peculiar to the owner, the fact that the income stream is diminished should not affect the value of the assets. But if the land and improvements are already put to their highest and best use, as in the case of a single purpose industrial complex like a coal mine, and if the income potential over a relatively long term is depressed by external conditions that affect all similar properties so that no one, whether a hypothetical or actual purchaser, would buy them at other than the discounted value of their earning power, then their value for assessment purposes is properly calculated by reference to that earning power as of the date of the assessment. If there is any discernible difference between the value of the business, per se, and the value of the land and improvements where it is conducted, an adjustment may be made to take that into account.

In the case at bar the land, improvements, and machinery and equipment have no other application, for all practical purposes, than for the production of coal. They derive their value from that business and it is that business which was found to suffer from excessive and continuing obsolescence. This is therefore a case where the value of land, improvements and equipment closely tracks their income-earning ability. There was no evidence to the contrary and ample evidence to support that view. Other industrial facilities have been viewed in that light by this Court, for example see *British Columbia Forest Products Ltd.* v. *Assessor of Area 3 - Cowichan Valley*, (unreported), No. A841788 Vancouver Registry, November 2, 1984 at p. 10, where my brother Gibbs J. wrote:

> "There was no evidence of comparable sales because lumber mills and pulp and paper mills are not regularly being bought and sold. The only approach that could be adopted therefore was that of the prudent purchaser and that approach must depend in large part on the projected revenue stream and the prospects as a going concern."

In my opinion what the Board did in the case at bar was to find the value of land and improvements by using an approach which determined that value from an analysis of the income which could be expected from a business which put them to their highest and best use.

In Municipal Question Number 5 the Court is asked also whether the discounted cash flow valuation was correctly applied on the evidence before it. That is too broad a question to admit of an answer by way of a stated case. It does not focus upon any question of law, but instead, raises a generalized enquiry which might be directed to questions of fact or law. The former are beyond the scope of a stated case. The whole question amounts to nothing more than asking, was the Board right? See *Cominco Ltd.* v. *Assessor of Area 18 - Trail*, Vancouver Registry C825183, October 12, 1982, B.C. Stated Case No. 170. I therefore decline to answer it as a separate question, but I note that more specific questions with respect to the application of that method of valuation are raised and answered hereafter in Municipal Questions Number 4, 7 (b), and 8.

The answer to the Municipalities' Question Number 3 is "No", and to Question Number 5 is "Yes". The answer to the Assessor's Question Number 2 is "No", to Question Number 3 is "No", and to Question Number 4 is "No".

Municipalities' and the Assessor's Questions Number 8:

> Did the Board err in law in accepting a discounted cash flow value which was less than the depreciated replacement cost of the assets when, contrary to the evidence of the appellant's own witness, no producing mine has ever sold for less than the depreciated replacement cost of the assets.

These questions are common to both the Municipalities' and the Assessor's cases. They may be conveniently dealt with here in the light of my discussion of the preceding group of questions. Both questions are based on the premise that the owner's witness agreed that no producing mine has ever sold for less than its depreciated replacement cost. However, as I have already shown by reference to Mr. Glanville's evidence, that premise is false. Of Mr. Glanville's twelve examples listed at pp. 18-20 of the Board's reasons, only example "e", the Balmer Mine, deals with a coal mine. It was sold in 1980 based upon a discounted cash flow valuation. That was before the recession in world coal markets. Whether it sold for more than its depreciated replacement cost then is not germane to the question of whether the Line Creek Mine would have sold for more or less than its depreciated replacement cost on July 1, 1984, the relevant date for this assessment. There was evidence that new mines, other than coal, have sold for much less than their capital cost. Since the premise to the questions is wrong, the answer to both of them must be "No".

Municipal Question Number 4:

If the answer to (Municipal) Question 2 is no [sic], did the Board err in law when it applied the percentage allocation between improvements and machinery and equipment from the cost approach to the value of the appellant's business derived from the income approach.

Assessor's Question Number 6:

If the answer to (Assessor's) Question 4 is no, did the Assessment Appeal Board err in law in allocating, in the manner in which it did, the value determined by the discounted cash flow method among "land", "improvements assessable for general purposes", and "improvements assessable for school purposes".

Again, the Municipalities' Question Number 4 may be erroneously framed. The preamble should more properly read, "*If the answer to Question 2 is yes*", but the thrust of the question is clear. Both questions complain of error based upon a mixing of methods. The appellants argue that once the Board had found the total value of land (which was agreed), improvements, and machinery and equipment by using the discounted cash flow method it acted arbitrarily and without any evidence in borrowing from the depreciated replacement cost method the percentages of total value which it attributed to the various categories and applying them to the

total value found by the discounted cash flow method, to arrive at separate values for land, improvements, and machinery and equipment. By its nature, the discounted cash flow method which values the undertaking as a whole does not allocate value between the various components of the mine. But the Board was required by statute to allocate value separately to land, improvements, and machinery and equipment. In the depreciated replacement cost method the ratios of value are derived by comparing the original values of each category as percentages of the original cost and applying those percentages to the depreciated value. It was argued for the appellants that if value is found by the discounted cash flow method there is no necessary relationship between the separate values of the three components when found by that method and their separate values found by the depreciated replacement cost method.

The appellants face two difficulties with that submission. The first is that by whatever method value is found it is required to apportion that value between the three components, land, improvements, and machinery and equipment. The second is that no other method of apportioning value was presented to the Board by either side. The owner's witness, Mr. Hildebrand, testified that the Assessor's method of allocating value by reference to the percentage which each category bore to the original cost of the whole was fair and reasonable. He considered whether it was reasonable to base the allocation upon break-up value rather than on replacement cost and opted for the latter. See Vol. 5, pp. 35-37 and Vol. 7, pp. 8-15 of the transcript. The Board, at p. 60 of its reasons, used that approach, although it found a higher overall value for the improvements, machinery and equipment as a whole by using the discounted cash flow method than did Mr. Hildebrand. So there was evidence given in the form of Mr. Hildebrand's opinion, to support the use of that method of allocation as applied to value found from the discounted cash flow. Granted that there was evidence, then the selection of the valuation method, including the apportionment of value between the various assets, is a question of fact for the Board.

The answers to the Municipalities' Question 4 and to the Assessor's Question 6 is "No ".

Municipal Question Number 7:

If the answer to (Municipal) Question 2 is yes, did the Board err in law in rejecting the depreciated replacement cost approach of the Assessor

(a) when the value on the Roll and in the evidence is based upon the conditions as the Assessor found them on the date of the assessment;

(b) in allowing an allowance for economic obsolescence when the evidence, if any, of economic obsolescence was based on a pessimistic prediction for the future and was not known at the date of the assessment.

Assessor's Question Number 5:

If the answer to (Assessor's) Question 4 is no, did the Assessment Appeal Board err in law

(a) by applying the discounted cash flow method in the manner which it did;

(b) in failing, when using the discounted cash flow method, to utilize the most optimistic projections of income, output, costs of production, and discount rates supported by the evidence.

Assessor's Question Number 7:

If the answer to (Assessor's) Question 4, is yes, did the Assessment Appeal Board err in law

> (a) in rejecting the depreciated replacement cost approach of the Assessor when such approach was based upon the conditions as the Assessor found them on the date of the assessment;
>
> (b) in allowing an allowance for economic obsolescence when the evidence, if any, of economic obsolescence was based on a pessimistic prediction for the future and was not known at the date of the assessment.

These three questions do not fall as precisely together as the groups I have already answered, yet I think they may be conveniently answered together. The Assessor's Question 5 (a) can be quickly disposed of. It is far too general a question in the same way as was a part of Municipal Question 5. It does not point to any specific question of law. I decline to answer it for the reasons expressed with respect to a portion of Municipal Question 5 (supra).

Municipal Question 7 (b) and Assessor's Question 7 (b) are each two questions wrapped into one. The first deals with whether the Board was correct in accepting a pessimistic prediction for the future of this mine, and the second deals with whether it was correct in relying upon evidence which was not available to the Assessor at the date of the assessment, July 1, 1984. Thus divided, the questions admit of two distinct answers and I shall deal with each part separately.

The Assessor's Question 5 (b) and the first part of both Questions 7 (b) may be answered together. They simply challenge the Board's selection of a pessimistic forecast of the future of the international coal market and therefore of this mine's predicted performance when there was more optimistic evidence available, and in addition they challenge the Board's alleged reliance on evidence that was not available until after the July 1, 1984 valuation date. Those are two quite distinct challenges. The first is answered by the principle I have already referred to, supported by the judgment of the Court of Appeal in *Provincial Assessors of Comox, Cowichan and Nanaimo* v. *Crown Zellerbach et al.* (supra) that the weighing and selection of evidence is entirely a question of fact for the Board. No question of law is raised. It was for the Board to weigh the evidence of different market projections and decide which it would accept as the more reliable. In fact the Board rejected the most pessimistic evidence of future price trends for thermal coal offered by the owner's witnesses in favour of Mr. Kittridge's evidence called by the Assessor. So the Board clearly exercised its judgment in weighing the evidence. The answers to the first question raised in both Questions 7 (b) is "No", and to Assessor's Question 5 (b) is "No".

Both Questions 7 (a) and the second part of both Questions 7 (b) raise the issue of the effective date of the valuation. Municipal Question 9 overlaps with them and I draw it in at this point to be dealt with together. It is as follows:

"Municipal Question 9:

> In the Board's consideration of the depreciated cost approach, did the Board err in law in adopting an evaluation for economic obsolescence, based entirely on information which was confidential to the company and unavailable to the Assessor or any third party at the valuation date or after."

The law requires values for municipal tax purposes to be assessed on a current basis as of the date fixed by the statute. S. 26 (1) of the *Assessment Act* defines actual value which the assessor and therefore the board, is required to find by s. 26 (2) as the actual value that land and improvements would have had on July 1st. Under the system in place here it is found every second year and the value so found is the assessment for the next two years. The law requires that the value so found be the current value, without regard to future possibilities. The appellants relied upon that proposition to argue that the prediction of continuing poor international markets for thermal coal ought to be disregarded in valuing this mine. They relied upon a passage from the judgment of Rinfret C.J. at the Supreme Court of Canada level in *Sun Life Assurance Co. of Canada* v. *The City of Montreal*, [1950] S.C.R. 220. The Chief Justice wrote at p. 224:

> "The assessor should not look at past, or subsequent or potential values. His valuation must be based on conditions as he finds them at the date of the assessment. In particular, in the present case, there was no ground for considering any other condition, as no suggestion of any kind appears in the record that there was, throughout the period of assessment, a prospect of any change."

That proposition was founded upon a House of Lords' authority, *Great Western and Metropolitan Railway Companies* v. *Kensington Assessment Committee*, [1916] 1 A.C. 23, particularly the judgment of Lord Parmoor at p. 54, where he wrote:

> "It is a principle in rating assessment that the hereditament should be valued as it stands and as used and occupied when the assessment is made."

To the same effect was the judgment of Lord Buckmaster at p. 36, where he wrote:

> "Such considerations depend upon the assumption as facts of conditions that do not exist and may never arise, consequently they cannot be entertained, and the question therefore of a value attributable to competition may be disregarded."

See also the judgment of Lord Atkinson, at p. 43. The question in the *Great Western and Metropolitan Railway* case (supra) was whether, in valuing a portion of railway line that lay within the rating parish regard should be had to the hypothetical influence which might be exerted on the rental value of the line by hypothetical competitors for its use. Since the use of that particular line was confined exclusively to the owners by virtue of an act of Parliament their Lordships refused to consider hypothetical competition to rent it by other rail carriers. The statute and the existing arrangements put the hypothesis out of question. That case, and the *Sun Life* case (supra), dealt with hypothetical facts which were incapable of achievement, but the instant case deals with what the market will pay today bearing in mind the predicted utility of the land and improvements based upon their present exploitation. This case is therefore distinguishable from those authorities. They do not, in my opinion, preclude the Board in an appropriate case, such as this, from fixing value as of the assessment date with reference to the presently predicted future income stream of the property where the evidence shows that the market, including the owner as a hypothetical purchaser, would have regard to that future in arriving at present worth, and where that future simply continues the existing use of the property. The answer to both Questions 7 (a) is "No".

The issue raised in the second branch of both Questions 7 (b) and in Municipal Question 9 is a significantly different challenge to the Board's decision. It is that the evidence produced before the Board was not available to the Assessor as of the July 1, 1984 valuation date. The Assessor could have had access to international coal price forecasts since there was published material about them, but he did not have access to the owner's operating costs or net income. He therefore had no means of capitalizing the present and projected net income flow at an appropriate rate for the purpose of arriving at a present value. There is force to this position taken by the appellants. The Board's task is the same as the Assessor's, to find value as of the assessment date. It cannot be the law that an owner, having kept confidential the information essential to the preferred means of valuation, can come before the Board some two years after the valuation date and require it to consider that information for the first time. It would make the Assessor's task impossible. It is not a question of estoppel to be raised by the appellants which prevents the owner from belatedly revealing evidence of the true costs of mining this deposit and the profit which can be had after payment of those costs. Rather, it is question of valuation. The owner says that from a combination of the depressed world prices for coal and the special costs of mining this deposit the profit to be won from the land and improvements, both now and in the foreseeable future, is drastically reduced. If there are special costs which reduce that profit, and if those are known only to the owner as of the assessment date, and not to any real or hypothetical prospective purchaser, then they could not have the effect of driving down the market value. The market, real of hypothetical, which establishes value whether on the basis of comparable sales or

on the basis of a discounted cash flow, must be an informed market. A valuation by reference to the net income stream can only be adopted where that information is revealed at the time of the original assessment. The owner cannot be allowed to advance the method but deny the information. In my opinion therefore, the answer to both Questions 7 (b) therefore becomes "Yes", and the answer to Municipal Question 9 is "Yes".

The answer to those questions is determinative of this stated case. It will be seen, that in my opinion although the discounted cash flow method is an acceptable way of valuing an industrial undertaking such as the Line Creek Coal Mine on appropriate evidence, it cannot as a matter of law be selected as the method here because some of the facts crucial to its use were kept confidential from the Assessor and were not generally available to him or others at the assessment date.

There was a further Question Number 9 from the Assessor which was not pursued in the presentation before me and which I am not therefore required to answer.

While the majority of the answers I have given to the questions stated support what the Board has done in this appeal, the answers to the last group of questions find error on the part of the Board and require that the Board should deal with this appeal again in the light of the answers to those questions. Accordingly, these reasons shall be remitted to the Board as the opinion of the Court.

The appellants having substantially succeeded in their efforts to review the decision of the Board, they are entitled to their costs.