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WESTCOAST TRANSMISSION COMPANY LIMITED

v.

ASSESSOR OF AREA 9 — VANCOUVER

Supreme Court of British Columbia (A870297) Vancouver Registry

Before MR. JUSTICE CUMMING (in chambers)

Vancouver, May 28, 1987

G.K. MacIntosh and Robert P. Sloman for the appellant
J.K. Greenwood for the respondent

Reasons for Judgment June 10, 1987

THE CASE

This is a case stated by the Assessment Appeal Board pursuant to s. 74 (2) of the *Assessment Act* R.S.B.C. 1979, Chapter 21 at the requirement of Westcoast Transmission Company Limited seeking the opinion of the Supreme Court on the following questions:

> 1. Whether the Assessment Appeal Board erred by not taking into consideration a vacancy allowance in the assessment of the value of the building of the appellant, Westcoast Transmission Company Limited.
>
> 2. Whether the Assessment Appeal Board erred by valuing the covenant of the appellant, Westcoast Transmission Company Limited, rather than valuing the real estate of the appellant.

The case stated sets out the following material facts:

> 1. The subject property is owned by the appellant, Westcoast Transmission Company Limited.
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> 2. The property is a twelve-storey building with basement parking located at 1333 West Georgia Street, Vancouver, British Columbia, on the north side of West Georgia Street at the corner of Broughton Street.
>
> 3. As at July 1984, Westcoast Transmission Company Limited occupied nine of the floors. The other three floors were occupied by tenants, including Xerox Ltd., Excelsior Travel and Beaver Foods Cafeteria.
>
> 4. The total value assessment of the land, buildings and machinery and equipment was $16,794,950 for the 1985/1986 biennial assessment roll.

5. The appellant, Westcoast Transmission Company Limited, has appealed the assessment of the actual value to the Court of Revision and the Assessment Appeal Board of British Columbia.

6. At the Appeal Board hearing, Mr. Geddes, the witness on behalf of Westcoast Transmission Company Limited, submitted a value of the property by the income approach of $13,852,000 . . .

7. At the Appeal Board hearing, Mr. Metcalf, the witness on behalf of the Assessor of Area #09, submitted a value of the subject property by the income approach of $16,125,000 . . .

8. Both the valuation submitted by Mr. Geddes and the valuation submitted by Mr. Metcalf included a 7–½% vacancy rate. The 7–½% vacancy rate utilized by the appraisers does not purport to be the actual vacancy rate of the subject property at the date of valuation. Mr. Geddes, witness for the appellant, listed the results of three surveys of the level of vacancy for A and Triple A class buildings which demonstrated a range between 15.8% and 17.7%. He asserted that a 7.5% vacancy rate was appropriate to the subject on the basis that Park Place, which apparently had a disproportionate influence on the vacancy statistics, was a triple A building, while the subject was an A or A-building.

Mr. Metcalf, the witness for the assessor, based his vacancy allowance on the history of vacancy within the downtown peninsula for a ten-year period. Mr. Metcalf testified 'the average vacancy is 6.47% and the median vacancy is 3.8%. I've allowed myself a little cushion there in pushing the average up to 7–½%'.

9. The Appeal Board accepted the evidence of Mr. Geddes, namely, that the gross rental income for the subject property is $2,681,314, from which should be deducted 'the outgoings' of $1,095,016, resulting in a total net income of $1,586,325.

10. The Assessment Appeal Board found that a capitalization rate of 10% was applicable for the purpose of capitalizing the net income derived from the building. The factors which influenced the Board to determine a capitalization rate of 10% was the age and location of the building and the fact that nine of the twelve floors of the building were occupied by a single tenant who was also the owner of the building.

11. The Appeal Board did not, however, include any vacancy rate allowance for the subject property in the assessment of the actual value, and stated that 'The subject building by the very nature of its ownership and operation is not exposed to the weakness of the marketplace'."

THE ISSUE

Counsel for the appellant formulated the issue raised by the questions posed in the case stated in the following terms:

> "The issue is whether the Board erred when it ignored vacancy rates established by the market, and relied instead upon the fact that this building was fully occupied because the owner occupied nine of the twelve floors."

Counsel for both parties agreed that the issue as stated raises a question of law only as required by s. 74 (2) of the *Assessment Act*.

"ACTUAL VALUE"

Section 26 (7) of the Act provides that "[l]and improvements shall be assessed at their actual value." It is the task of the Assessor, under s. 26 (2) of the Act, to determine the actual value of land and improvements. Under section 44 (1)(b) a Court of Revision constituted under the Act is empowered to adjudicate on the assessments "so that the assessment shall be fair and equitable and fairly represent actual values". Under s. 69 (1) the Assessment Appeal Board, to which appeals from a Court of Revision are taken, has all the powers of the Court of Revision. "Actual value" is defined in s. 26 (1) to mean:

> "… the actual value that land and improvements would have had on July 1 had they and all other land and improvements been on July 1 in the state and condition that they are in on September 30 and had their use and permitted use been on July 1 the same as they are on September 30".

The term "actual value", or a like expression, is found in assessment statutes all across the country. It is synonymous with "exchange value", "economic value" and "market value", all of which terms are used interchangeably.

Section 26 (3) of the *Assessment Act* provides:

> "(3) In determining actual value, the assessor may, except where this Act has a different requirement, 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".

THE ASSESSMENT PROCESS

It is common ground that the income approach is an appropriate and, except in unusual circumstances, the most appropriate method of assessing the actual value of commercial property such as that under consideration here.

It will perhaps remove some of the mystique in the assessment process to lay out the principles applicable to this method of valuation. I take them, with some minor editorializing on my part, from the written submission filed by Mr. Greenwood. There are various approaches to an income valuation. A standard one is known as the capitalization approach. This approach is really a form of the "market approach". Statistics are gathered on the sales of buildings which are considered comparable to the subject property from a point of view of quality, amenities, location, and state of repair. The price at which each building sells in the relevant time period is compared with the income reasonably generated by the building. Income divided by sale price generates a factor called the "capitalization rate". The various capitalization rates for comparable buildings are analyzed with a view to developing a "typical" capitalization rate for that class of property.

The subject building, (which one assumes has not itself sold in the time frame under consideration), can then have its value estimated on the assumption that it also would sell at the same capitalization rate as have others. The appraiser therefore estimates the income generated by the subject building, and divides it by the typical capitalization rate to derive an estimate of value.

For this process to work, it is evident that the appraiser must make some choices about the concepts to be used, and then to use them consistently. "Income", for example, can mean a number of different things. It may mean a gross or a net income, or a "triple net" income. The

appraiser normally will select a net income, recognizing a standard list of expenses to be deducted from the gross.

The appraiser could also use an actual net income, or a calculated income generated on certain standard expectations about the use of the building over time. Actual incomes from any building will vary over short time frames, as tenants move in and out, or as unusual expenses occur. Buildings are not typically bought for short time frames, and thus appraisers attempt to deduce what the typical income would be over a long term (in current dollars), before they calculate a capitalization rate from any sale. They call this, variously, a stabilized net income, or an economic net income, as opposed to an actual net income at the snapshot date of valuation.

Actual incomes are also affected by the abilities of the management of the day. A better manager might reduce expenses, or raise rents successfully, and realize a greater return from the building. When estimating what a building would sell for to a new owner and manager, the qualities of the existing management are eliminated from the analysis.

In valuation theory, the value of an income producing property is merely the present value of future expected income to be generated by the property. The future being looked at is the long term future, and when the appraiser capitalizes an existing or present income, he does so on the premise that the figure being capitalized is representative (in current dollars) of the long-term stabilized situation, not of some temporary or short term situation. Appraisers explain this by saying that they are "capitalizing the income in perpetuity".

For these various reasons, economic net incomes are universally used by appraisers in arriving at a capitalization rate for the building which has sold. This is so even though there are occasions when an appraiser testifies that the actual net income should be used, because it is the best estimate in fact of the economic income of the particular property.

I stated above that the concepts used, in developing capitalization rates for application to the subject, should be used consistently. Thus it makes no sense to develop a capitalization rate on one set of assumptions about long-term vacancy rates, long-term rents, and long-term expenses, and then apply that rate to the income of the subject property that is not derived in the same way.

The choice of a vacancy rate goes directly into the calculation of gross income, from which the appraiser then deducts expenses to arrive at an estimate of net income. All of these factors, for consistency, should be used in the same manner as they were used in the study of comparables which resulted in the development of the capitalization rate. To do otherwise is to offend appraisal theory, and is likely to produce a mistaken result.

DUTY OF THE COURT

In *Crown Forest Industries Limited v. Assessor of Area 6 — Courtenay (1985)*, B.C. Stated Cases, Case 210, Southin, J. said, at page 1191:

> "So long as the Assessment Appeal Board which must, in deciding appeals to it, apply the Act does not:
>
> > 1. misinterpret or misapply the section — see *Pacific Logging Co. Ltd. v. The Assessor [1977]* 2. S.C.R. 623 adopting the dissenting judgment of McIntyre, J.A. in the Court of Appeal 12th November, 1976 (unreported);
> >
> > 2. misapply any applicable principle of general law . . . or

3. act without any evidence or upon a view of the facts which could not reasonably be entertained

this Court has no power to intervene.

On the third proposition, which is fundamental to the appellant's case, see:

a) *Edwards v. Bairstow [1956]* A.C. 14 (H.L.) at 29:

> For it is universally conceded that, though it is a pure finding of fact, it may set aside on grounds which have been stated in various ways but are, I think, fairly summarized by saying that the court should take the course if it appears that the commissioners have acted without any evidence or upon a view of the facts which could not reasonably be entertained . (Underlining mine)."

A further extract from the speech of Lord Radcliffe in the *Bairstow* case warrants citation:

> "When the case comes before the court it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything ex facie which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there, too, has been error in point of law. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination, or as one in which the one and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test." (At page 36.)

DUTY OF THE ASSESSMENT APPEAL BOARD

While the Assessment Appeal Board has sole jurisdiction over questions of fact it must, in deciding appeals which come to it, act judicially upon the evidence before it in the manner described by Southin J. in the *Crown Forest* case (supra) and in the unreported decision of the Divisional Court of Ontario in the case of *Marathon Realty Company Limited* v. *The Regional Assessment Commissioner Region Number 7 and The Corporation of the City of Peterborough and others,* decided October 10, 1979. In that case the Ontario Municipal Board rejected the opinions of all four expert witnesses called before it and adopted instead capitalization rates applied by The Assessment Review Court (ARC) although there was no evidence before the Board to show how or why the ARC concluded that there were the appropriate capitalization rates and no evidence to justify, explain or support the findings of the ARC. Craig, J. giving the judgment of the Court said at page 9:

> "In assessment appeals where expert testimony is adduced by both sides there may be rare occasions where the Board is entitled to reject all of the opinions. It would seem that such a rejection, without any reference to the decision of the ARC, would probably have the effect of confirming the decision appealed from without a finding as to its appropriateness. This Court is not required to decide that last mentioned point because it is my opinion that this is not one of those rare occasions; and also there was a finding by the Board not based on any evidence."

And at pages 22 to 23:

> "With respect to the Board, it is my opinion that it erred in law in both appeals in concluding in effect that it could not, on the evidence adduced, make a finding as to the appropriate capitalization rate. It is inescapable that the Board's decision is based on its own opinions that are unsupported by evidence.
>
> Counsel for the respondent submitted that the Board was entitled to reject the opinions of all four experts. He relied on the reasons given by the Board; but relied also upon the submission that the Board is an administrative body acting in its own field of expertise; and entitled to reject those opinions based upon such expertise. I do not agree. There are occasions when the Board does function in an administrative capacity, and where its decisions are purely administrative … In conducting the hearing of an assessment appeal it is my opinion that the Board functions in a judicial capacity; The *Assessment Act*, *s.* 57 (2); and *Peterkin* v. *Hydro-Electric Power Commission of Ontario*, 12 D.L.R. (2d) 791. It is required to hear and determine the case on the evidence adduced. No doubt the members of the Board do have a certain degree of expertise in assessment matters which assists in understanding, assessing and weighing evidence. In deciding assessment appeals, if the Board were permitted to act on its own expertise in complex matter and substitute its unsupported opinions for those expressed in evidence, then the exercise ceases to be judicial in character. The members of the Board would be their own experts not subject to cross-examination; their opinions would remain unknown until after delivery of the decision and therefore not open to contradiction or challenge. The parties would not know what case had to be met. There is no right of appeal on a question of fact. It would be quite unacceptable in our adversarial system where the parties, and not the court, decide what evidence to adduce."

At page 29, he stated his conclusion:

> "…it is my opinion that the Board erred in law in failing to determine the issue in the case on the expert evidence adduced; and also in adopting the finding of the ARC, which finding was unsupported by evidence."

THE MERITS

Fundamental to proper assessment is the proposition that special value to the present owner is not a proper basis for assessment and is to be disregarded. In *Provincial Assessors of Comox, Cowichan and Nanaimo* v. *Crown Zellerbach Canada Limited and Crown Zellerbach Building Materials Limited* (1963) 42 W.W.R. 449. Wilson, J.A. (as he then was) said at pages 474 to 475:

> "Sec. 37 [which is in substantially the same terms as the present section 26 (3)] has been considered by the courts of British Columbia in various cases. In no case has it been interpreted as permitting the consideration of value to a particular owner, as distinguished from any owner. I first refer to the decision of this court in *Re Assessment Equalization Act; Re appeals of Shell Oil Co. of Can. and Standard Oil Co. of B.C.* (1962) 38 W.W.R. 695. There a property had appurtenant to it a licence which created a special value. It was held by the court that this was a value, not just to a present owner, but to any owner, and therefore acceptable. The values here sought to be attributed to the property are not those of any owner, since another owner might use the property for quite different purposes, say as a long-term investment, or as a property for quick realization by sales of small tracts.
>
> The judgment of Ruttan, J. *Re Assessment Equalization Act; Re Crown Zellerbach Canada Ltd.* (1959) 16 DLR (2d) 144, I interpret as stating, in other words, the same rule.

The only words in sec. 37(1) which might be interpreted as allowing a consideration of value to the present, as distinguished from any owner, were considered by Ruttan, J. in the *Crown Zellerbach* case already referred to. I cite and adopt these words at p 151:

> ‘And so in applying an objective standard to the factors listed in s. 37 (1) of the Act the Assessor is not confined to accepting "present use" as the best or only one to which the property can be put. He may well decide that a water lot used as a dumping ground would be better developed as a yacht anchorage. But he must concede that "present use" does not mean "present value to the present owner". I adopt with respect the words of my brother Wilson in the case of *Re C.P.R. and Assessor of Port Coquitlam* (1957) 77 CRTC 95, at 100:
>
> > ‘ "Present use" must mean present, proper and practicable use, so that the speculator shall not escape proper taxation nor the developer be penalized." ’
> >
> > ‘ "Valued as the property of a going concern "does not mean "as the property of the going concern" and in the present case adds nothing not already included under the factor "present use." ’
> >
> > "It may be objected that under the catch-all phrase ‘any other circumstances affecting the value’ which appears in both s. 37 (1) of our Act and in the relevant section of the Ontario *Assessment Act*, so subjective a factor as profits may be admitted for consideration by the Assessor. This was the situation in *Toronto (City)* v. *Ontario Jockey Club* [1950] 3 DLR 730, [1950] OR 571, where evidence was held admissible under the authority of this clause as to the carrying on of a race track at a profit, and the extent of those profits.
> >
> > "But in that case it was held that the Board needed this information to ascertain what was the actual value of the land with buildings upon it, when used for the purpose of a race track which was the only purpose for which the property had been used for many years and was the proper basis on which the assessment should have proceeded."
> >
> > I conclude that special value to a present owner is not a proper basis of assessment under sec. 37."

See also *MacMillan Bloedel Ltd.* v. *Assessor of Area 7 — Sunshine Coast* (1985) B.C. Assessment Stated Cases, Stated Case 206 at page 1155.

To the same effect is the judgment of the Ontario Court of Appeal in *Re Cardinal Plaza Ltd. et al. and Regional Assessment Commissioner, Region No. 19 et al.* (1934) 15 D.L.R. (4th) 156 where Lacourciere, J.A. said at page 158:

> "We are all of the view that an equitable assessment of multi-residential properties based on the income approach must necessarily use economic rents rather than actual rents. As stated by this Court, speaking through Evans J.A. in *Stevens Building Ltd.* v. *City of Sudbury,* May 22, 1973, unreported:
>
> > ‘… in adopting the income approach to valuation, the income of the property must be calculated on the basis of the current market rent for comparable premises at the time that the assessment is made.’ "

At page 160, Lacourciere, J.A. continued:

> As Weatherston J.A., delivering the judgment of the Court in *Re Campeau Developments Ltd. et al. and Regional Assessment Com'r Region No. 29 et al.* (1983), 41 O.R. (2d) 39, 144 D.L.R. (3d) 632, 15 O.M.B.R. 44, said at p. 42 O.R., p. 635 D.L.R., p. 48 O.M.B.R.:
>
> > 'It has long been recognized that it is not particularly important that an assessment be individually correct, provided that all properties are assessed at the same proportion of their true values, so that each bears its fair share of the tax burden. By s. 90 (1) the amount of any assessment is not to be altered unless the Assessment Review Court, judge, board or court is satisfied that the assessment is inequitable with respect to the assessment for similar real property in the vicinity. That section puts the onus of showing inequity squarely on the appellants.' "

In its reasons for judgment, Schedule A to the Stated Case, the Board said:

> "The subject of this appeal is a fifteen year old, twelve storey Class 'A' office building designed and built to be the head office of Westcoast Transmission Company. It is a unique structure located on West Georgia Street, which is a major amenity thoroughfare.
>
> The evidence led by the appellant indicates that as of July 1984 the date of valuation, nine of the twelve floors were occupied by the owner. The other major tenant, occupying three floors, is Xerox whose lease upon expiry contains an option to renew provided the space is not required by the Owner. It appears that the owners control over the building is absolute.
>
> The Board believes that the *Sun Life Case* and the *Trizec Case* must be considered in arriving at a market value for this unique property. Simply put the *Sun Life Case* requires that the value conclusion reached must be indicative of the actual experience of the property in the year in question. While much is made by both parties of the vacancy experience in quality office space in downtown Vancouver, the Board finds that the subject building by the very nature of its ownership and operation is not exposed to the weakness of the marketplace.
>
> The Board is of the opinion that what would also be apparent in the mind of the sophisticated buyer is the quality, age and location of the building serving the purpose for which it was designed and the security of the covenant of Westcoast Transmission."

I pause to observe that the reference to the security of the covenant of Westcoast Transmission in the Board's reasons for its decision appears to be meaningless. Westcoast Transmission occupies three quarters of the building of which it itself is the owner. As one cannot contract with oneself (see *Crawford et al.* v *Attorney General for British Columbia et al.* [1960] S.C.R. 346 per Locke, J. at 358) the "covenant" must be taken to the non-existent. Neither is the subject property "unique" in the sense that that term was used in the case of *Sun Life Assurance Co. of Canada* v. *The City of Montreal* [1950] S.C.R 229 on appeal sub. nom. *Montreal* v. *Sun Life Assurance Co. of Canada* [1952] 2 D.L.R. 51 (B.C.). In the *Sun Life* case, the Privy Council accepted the proposition that the ideal approach to assessment is to arrive at a value based upon the price which a person who is not obligated to sell could obtain from a buyer who is not obliged to buy, but concluded, because of the special circumstances of that case (being that the subject building, whose size, design and particular architectural features made it impossible to compare it with any other building in the city and so precluded any valid market comparisons) that the actual value of the building should be determined on the basis of a percentage of replacement costs. No such

special circumstances exist with respect to the subject property in this case. The *Sun Life* case does not require that the actual experience of the property in the year in question should govern.

More importantly, as appears from the portions of the Board's reason which I have quoted and from paragraphs 8, 10, and 11 of the Stated Case, the Board has used an actual vacancy rate for the subject building at the valuation date rather than an expected long-term vacancy rate otherwise known as a typical economic vacancy rate. The only evidence before the Board as to the appropriate vacancy allowance to be used in the capitalization rate analysis was that it should be an economic vacancy rate, not the actual vacancy rate which should be used, and that the appropriate rate for the analysis was 7.5%. This appears from the evidence of the qualified appraisers called on both sides — Mr. Metcalf for the Assessor and Mr. Geddes for the taxpayers. Both appraisers derived their figure for an appropriate vacancy rate from their study, not of the subject property alone, but of a number of buildings of similar quality and location. It happened that they arrived at the same conclusion. As this was the only expert evidence before the Board, the Board had no evidence on which it could apply a different concept for vacancy in the analytical framework presented by the experts before them. No witness suggested that the actual vacancy rate should be substituted in the analysis. For this reason, I am forced to the conclusion that the Board has acted without any evidence or upon a view of the facts which could not reasonably be entertained. This is an error in law.

Furthermore, the Board has improperly given effect to the special value of the building to the owner arising out of the fact that it occupied nine of its twelve floors and exercised absolute control over it, factors which by their very nature sheltered it from the weakness of the marketplace. This too is an error in law.

I have not overlooked the decision of Bouck, J. in *Trizec Equities Ltd.* v *Assessor of Area 9 — Vancouver* (1984) B.C. Stated Case 196. In that case, Trizec owned a thirty-six storey office building in downtown Vancouver called the Royal Centre. When a prime tenant moved out during 1983 approximately 30 per cent of the space in the building became vacant. Trizec contended that this circumstance should be taken into account when fixing the actual value of the land and improvements for assessment purposes on the 31 December, 1983 assessment roll. Bouck, J. at page 1105 set out the principle of statutory interpretation upon which he relied as follows:

> "Since the problem is one of statutory interpretation it is helpful to recite a few general principles. In *MacMillan Bloedel Limited* v. *Assessor of Area 07 — Sunshine Coast et al.* (1983) 47 B.C.L.R. 291 (C.A.), Taggart J.A. *per curiam* set out the guidelines a court should follow when ascertaining the meaning of the words used in the *Assessment Act*. He said at page 302:
>
> > 'My opinion is that the Tax Act is an integral part of the statutory scheme whereby taxes are levied on real property and improvements. As a part of that scheme it is to be construed in the same way as a taxing statute.
>
> …Shortly put, the principles are that if the words of the statute are in themselves precise and unambiguous they are to be construed in their ordinary sense. If the imposition of the tax is not shown clearly and without ambiguity the construction should be in favour of the taxpayer.' "

At page 1106, he continued:

> "The words 'state and condition' hide more than they reveal. They do not clearly say a vacancy rate in a commercial building is a state or condition which the assessor must consider or must ignore. But if these words allow the assessor to include a 30% vacancy rate as part of his assessment, there is a possibility this will result in a benefit to the

> taxpayer and not a detriment because notionally a building with a high vacancy rate should have a lower market value than a similar building that is fully occupied.
>
> Applying the earlier principle that any ambiguity (or uncertainty) in the *Assessment Act* should be resolved in favour of the taxpayer, the vacancy rate in the Trizec building must therefore be taken into account by the assessor. This apparently means the assessor must ask himself what would be the market value of the Trizec building as of 31 December, 1982, if on that date it had a 30% vacancy rate?"

It is apparent that Bouck, J. found in favour of the owner on the ground that as a taxpayer it was entitled to the most favorable interpretation of the taxing statute. Nothing in his judgment can, in my view, be construed to mean that in determining actual value using an income or market approach the actual vacancy rate of the subject property rather than the economic vacancy rate indicated by market analysis is to be employed.

CONCLUSION

In response to the questions set out in the case stated for the opinion of the Court, I set out my opinion in the following answers:

Question 1: The Assessment Appeal Board erred by not taking into consideration a vacancy allowance in the assessment of the value of the building of the appellant, Westcoast Transmission Company Limited.

Question 2: The Assessment Appeal Board erred by valuing the covenant of the appellant, Westcoast Transmission Company Limited, rather than valuing the real estate of the appellant.

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