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COMINCO LTD.

v.

ASSESSOR OF AREA 21 - NELSON-TRAIL

Supreme Court of British Columbia (A870801) Vancouver Registry

Before: MR. JUSTICE SHAW

Vancouver, November 17-18, 1987

D. C. Vaughan, Q.C. and R.A. Richardson for the appellant
John E. D. Savage for the respondent

Reasons for Judgment February 5, 1988

INTRODUCTION

This case involves two appeals by way of stated case from a decision of the Assessment Appeal Board. The first appeal is by Cominco Ltd. and it relates to pollution control exemptions from property taxation. The other appeal is by the Assessor concerning the jurisdiction of the Assessment Appeal Board.

I will first address Cominco's appeal on pollution control exemptions and then turn to the Assessor's appeal on the jurisdiction of the Assessment Appeal Board.

COMINCO APPEAL - POLUTION CONTROL EXEMPTIONS

The properties which are the subjects of these appeals are two mills which the appellant Cominco Ltd. owns and operates in Trail, British Columbia. One is the Tadanac smelter and the other is the Warfield fertilizer plant.

The smelting process at the Tadanac smelter produces various pollutants, one of the main ones being sulphur dioxide (SO_2) Cominco has equipment and processes at the smelter for the handling of the pollution.

Much of the SO_2 produced at the Tadanac smelter is changed into SO_3 and then into sulphuric acid (H_2SO_4) and transported by Cominco to its Warfield fertilizer plant. The H_2SO_4 is there used in the manufacture of fertilizer which is sold on the market. The evidence disclosed that for the last 10 years the fertilizer plant has been operating at a loss, but it has continued in operation as a means of getting rid of the SO_2 pollutant produced by the smelter.

Land or improvements that are used primarily to control or abate pollution are entitled to property tax exemptions under s. 398 (q) of the *Municipal Act*, R.S.B.C. 1979, c. 290. In issue on this appeal are the criteria to be used to determine the pollution control or abatement exemptions of Cominco.

A review of the facts found by the Assessment Appeal Board is helpful to understanding the setting in which the Board made its rulings on the criteria to be applied under s. 398 (q). The Board said in its decision, at p. 5:

> The principal operation of the Appellant at Trail is the production of lead and zinc, which are recovered from ore containing significant amounts of sulphur, and varying quantities of other materials. This production takes place in the Tadanac plant. The ore is sintered (lead) or roasted (zinc) which results in the production of ash and slag, smoke, and sulphur dioxide gas in addition to the desired lead and zinc oxides. The major potential pollutant, and the focus of this appeal, is the SO_2, with the particulates another significant problem.
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> The pollution problem inherent in the lead and zinc smelting process at this plant first became a public issue some sixty years ago when the increasing level of sulphur emissions drew the ire of farmers in Washington State, resulting in lawsuits, and the referral of the matter to the International Joint Commission. As a result the Appellant agreed to certain restrictions; and, by its own efforts, developed means of capturing most of the SO_2. One capture process involves scrubbing the smelter gases with aqueous ammonia, creating ammonium bisulphate; and the other involves the creation of SO_3 which is further treated to produce sulphuric acid. Further processing of these "captured pollutants" or "waste products" results in the production of elemental sulphur, pure SO_2, sulphuric acid, ammonium sulphate, and fertilizer.

The appeal to this Court is taken under s. 74 (2) of the *Assessment Act,* R.S.B.C. 1979, c. 21, by way of stated case. Such an appeal is on questions of law only. The Court is entitled to look at the evidence that was taken before the Assessment Appeal Board; s. 74 (5). The duty of the Court is to give its opinion on the questions of law and remit the opinion to the Assessment Appeal Board; s. 74 (6).

The Assessment Appeal Board did not hear detailed evidence on many of the items in dispute. Rather, the Board endeavoured to lay down criteria for the guidance of the Assessor.

The Board did make some specific orders. It held that the ducts, flues, pipes, smoke-stacks, carriers and sewers that discharge treated gases or liquids to the air or water, and monitoring devices were not to be granted exemptions. The Board also ruled against the exemption claimed by Cominco for the Warfield fertilizer plant.

However, the Board, in recognizing that there was not sufficient evidence to make detailed determinations of all the matters in dispute, ordered the Assessor to reconsider Cominco's exemptions in the light of the principals and findings expressed by the Board, and consult with Cominco to achieve "mutually satisfactory" recommendations to be brought back to the Board for an order amending the exemptions in the Assessment Roll.

Section 398 (q) of the *Municipal Act* reads:

> 398. Unless otherwise provided in this Act, the following property is exempt from taxation to the extent indicated:
>
> > (q) an improvement or land used exclusively to control or abate water, land or air pollution, including sewage treatment plants, effluent reservoirs and lagoons, deodorizing equipment, dust and particulate matter eliminators; and where the improvement or land is not exclusively but is primarily so used, the assessment commissioner may, in his discretion, determine the portion of the assessed value of the improvements or land attributable to that control or abatement and that portion is exempt.

Cominco says that the Assessment Appeal Board erred in its interpretation of s. 398 (q) of the *Municipal Act*, with the result that some of the facilities in the Tadanac smelter and the whole of

the Warfield fertilizer plant were not accorded the pollution control exemptions which Cominco claimed.

The Assessor's position is that the Assessment Appeal Board correctly interpreted s. 398 (q) and did not err on the exemptions requested by Cominco.

Cominco Question No. 1

> 1. Did the Assessment Appeal Board (the "Board") err in their interpretation of Section 398 (q) of the *Municipal Act*, R.S.B.C. 1979, c. 290 and, in particular, as to the meaning of the words "used", "pollution", "control" and "abate" used therein with the result that the Board failed to exempt the land and improvements constituting the Warfield plant and certain land and improvements on the Tadanac plant?

Counsel for the respondent Assessor took the position that the above question was not a question of law but rather was one of mixed law and fact. To support his contention he cited *Township of Tisdale* v. *Hollinger Consolidated Gold Mines*, [1933] S.C.R. 321, Cannon, J. for the Court at p. 323, where he said:

> . . . The construction of a statutory enactment is a question of law, while the question of whether the particular matter or thing is of such a nature or kind as to fall within the legal definition of its term is a question of fact.

In my view, question No. 1 posed by Cominco does contain a question of law, that being whether the Board erred in its interpretation of s. 398 (q). It may also contain a question of fact, that relating to whether certain land and improvements were entitled to exemptions. In my view the question of law should be answered. I note that the Supreme Court of Canada in the above-cited decision did answer the question of law. On objections of this nature I prefer what I regard as the commonsense approach taken by Davey, J. A. (as he then was) speaking for himself in the British Columbia Court of Appeal in the *Trans Mountain Oil Pipeline Company* v. *Town of Hope* (1966), Stated Case No. 46, 235 at 237, where he said:

> . . . Only questions of law may be raised by a stated case. There is no appeal of any kind on questions of fact or mixed fact and law.
>
> The questions raised by the stated case appear to be matters of fact and of mixed fact and law, and the case itself does not explicitly state the question of law on which the opinion of the Court is sought; it will not be helpful to recite the questions. In my respectful opinion, it would have been better in the first instance to have remitted the case back to the Board to have the questions properly propounded and to state clearly the points of law to be decided. But that was not done, and in my opinion the appeal having reached us in its present form, we ought to decide the questions of law that emerge from the reasons of the Board, which form part of the case, as was done by the Ontario Divisional Court in *Re Canada Co.* and *Township of Colchester North* (1916), 38 O.L.R. 183. But I express the hope of Meredith, C.J.C.P., in that case that the form of the case may not be adopted as a guide in the future.

I will therefore proceed to address the question of law which is embedded in Cominco's question No. 1:

The Assessment Appeal Board, in its decision, provided a precise and all encompassing scope for the application of the words "control or abate. . . pollution". I should observe at this point that the Board took considerable care in its decision. It is only after a great deal of consideration that I have concluded, however, that the Board was too restrictive in its interpretation of s. 398 (q) and thereby erred in law.

The Board said at pp. 7 and 8 of its decision:

> The Board sees the control and abatement of pollution as involving a number of functions, anyone of which, directly related to the pollution problem, would qualify land or improvements for the exemption. These functions are:
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> > *Capture or retention* (control) - the polluted material (water, land or air) must be controlled for treatment, and/or the pollutant must be trapped, and separated from the water, land or air which can then be safely released.
> >
> > *Containment or storage* (control) - temporary or permanent storage will be required, of either polluted material or the pollutant, while in process, or because current technology offers no better alternatives.
> >
> > *Transportation* (control) - the polluted material or the pollutants will require transportation as other functions are performed.
> >
> > *Conversion or processing* (control or abatement) - the polluted material may be susceptible to further treatment to reduce its level of contamination, and/or the pollutant may require further processing to put it in a more suitable or safer form for storage, transportation or some other function.
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> If these functions occur, and serve the pollution control or abatement objective, then the land and improvements used to provide them have a use in the control or abatement of pollution; and the only further question, to determine the existence or amount of exemption, is whether that is the exclusive, primary, or a secondary use of the subject land or improvement.

In my opinion, the Board erred in treating the above-listed functions as being all inclusive. The Board excluded from s. 398 (q) exemption anything that did not precisely fit into the categories specified in the list. In my view, there is more to pollution control or abatement than that found by the Board. I will expand on this later in the judgment.

The restricted approach taken by the Board shows up in the following passage at pp. 9-10 of its decision:

> Nevertheless, what of the redirection or controlled discharge of pollutants? Does such represent <u>control or abatement</u> within the context of Section 398? The definition which the Board has considered suggests that pollution must either be restrained or diminished if the improvements used for the purpose are to qualify. Mere redirection would not achieve these purposes, there being no less pollution at the point of redirected discharge than at the point of origin.
>
> It may be argued that such a redirected discharge will make possible a dilution of the pollutant such that pollution no longer occurs, or alternatively that some abatement has taken place. Thus, a sewer discharging pollutants into a river would be said to be a pollution abatement device to the extent that the concentration of pollution would be reduced upon the contaminants entering the heavier flow of the stream. With all respect, the Board sees, in this example, the river being the pollution abatement device (if such exists at all) with the sewer merely being the means by which the pollution is transported to it. In fact, there is no diminishment at all in the absolute amount of pollution in this case, only a method of dispersal which reduces its concentration, making it either less harmful and/or more acceptable (and perhaps only in an immediate sense).
>
> To qualify for exemption under Section 398 the Board feels that the land or improvement must serve to control/hold in check, or abate/diminish/eliminate the absolute pollution

> which is fouling/contaminating the land, sea or air. Thus, to serve this function, the use of the improvement or land must either absolutely prevent the pollution, or the polluted matter, from entering the "unpolluted" land, sea or air (control), or must diminish or eliminate the pollutant qualities or effects of the contaminants, such that all or some part is prevented from entering the "unpolluted" land, sea or air (abatement).

In effect, the Board is saying that the capacity of the receiving medium (water, air or land) to control or abate pollution cannot be considered in determining whether a system is used to control or abate pollution. I cannot agree. In my view, the physical, chemical and biological qualities and processes of water, air and land may be important and integral parts of pollution control or abatement systems. This is borne out by a look at the pollution control legislation, both provincial and federal, which is applicable in British Columbia.

The *Waste Management Act*, S.B.C. 1982, c. 41 (successor to the *Pollution Control Act*, R.S.B.C. 1979, c. 332) prohibits the introduction of wastes into the environment other than in compliance with a permit; s. 3 (1) and 3 (3). The granting of permits is subject to requirements for the protection of the environment that a regional waste manager considers advisable; s. 8 (1). The Waste Management Branch uses as its pollution control objectives various policies that were prescribed by the former Pollution Control Board. These policies are published. In *Pollution Control Objectives for The Mining, Smelting and Related Industries of British Columbia* (February 22, 1979), the Pollution Control Board said, at p. 5:

> The aim of these Objectives is to protect the quality of British Columbia's environment for the benefit of present and future citizens of this Province and Canada. The Objectives provide, firstly, for <u>use of the environment's assimilative capacity</u> within limits which do not lead to unacceptable conditions and, secondly, for adopting realistic cost-benefit pollution control strategies.
>
> [emphasis added]

Further, at p. 5:

> . . . While the Objectives focus on points of discharge as the most satisfactory regulatory tactic, the intent is to minimize the effects of known or potentially harmful physical, chemical, and biological changes in receiving environments.

And further, at p. 5:

> <u>Discharge regulation</u>: For the first time the Objectives provide for a wide range of possible discharge concentrations which take into account the needs of particular receiving environments. The more stringent values will apply to sensitive environmental situations, the less stringent where it can be shown that unacceptably deleterious changes will not follow.

The publication also addresses the use of monitoring programmes; *supra*, p. 5.

One aspect that is taken into account in detail is that of dilution. Initial dilution zones in receiving waters are provided for. The waters include rivers, streams, lakes, estuaries and marine waters. These zones are not to intrude on shellfish beds, restricted routes followed by migrating salmon and trout, and other significant resource or recreational areas.

There are similar policies adopted for the forest industry. In *Pollution Control Objectives for The Forest Products Industry of British Columbia* (November 23, 1977), the same overall objectives are adopted as for the mining industry. The following is stated at p. 7:

> . . . Prior to the commencement of discharges, studies may be required to include a comprehensive examination of site suitability, baseline documentation of physical and chemical parameters, a biological resource inventory and detailed impact predictions. Long-term monitoring of parameters specified in discharge permits may be required.

At p. 11 the use of "outfall diffuser systems" is provided for. These systems provide for dilution in the receiving waters.

Other policy publications of the Pollution Control Board set objectives for municipal-type waste discharges (September, 1975), the chemical and petroleum industries (March, 1974), and the food-processing, agriculturally oriented, and other miscellaneous industries (March, 1975). All take into account the qualities and abilities of the receiving medium.

As for federal legislation, I refer first to the *Ocean Dumping Control Act*, S.C. 1974-75-76, c. 55. This statute, which is for the prevention of pollution of ocean waters, takes into account such matters as whether a substance will be rendered harmless by physical, chemical or biological processes of the sea, the effect of dilution, the dispersal characteristics of currents, tides, winds, and mixing, the bottom characteristics, including topography, and the possible effects on marine life. See s. 9 (5) and Schedule III.

In the *Clean Air Act*, S.C. 1970-71, c. 47, the emission standards must take into account the concentration of contaminant in the ambiant air in the geographical area of the emission; s. 11 (1).

The point is that the place where pollutants are taken and what happens to them in the receiving medium are factors which, in my opinion, cannot be ignored in determining whether land or improvements are used to control or abate pollution as contemplated by s. 398 (q) of the *Municipal Act*.

The words "control" and "abate" should be accorded their ordinary usage in the context of s. 398 (q). Such ordinary use of those words is found in dictionaries. In my view, the applicable meaning of the word" control" , in the context in which it is used, is:

> "To exercise restraint or direction upon the free action of."
>
> *Shorter Oxford English Dictionary*, (1975) p. 416

The word "abate" has many meanings. Those which I consider are applicable in the setting of s. 398 (q) are:

- "to beat down, destroy."
- "to bring down in size, amount, value, force."
- "to lower in force or intensity."
- "to strike off a part, deduct."

supra, p. 550.

In my view the dictionary definitions and the ordinary usage of "control" or "abate" include the exercising of restraint or direction upon the free action of pollutants, such that there is a lowering of the force or intensity of the pollution. An example is a system which results in dilution which beneficially lowers the intensity of pollution. Another example is a system which removes pollutants partially or wholly from harm's way. These systems mayor may not bring about a lessening of the absolute amount of the pollutants when dilution or transporting out of harm's way occurs, but that of itself, in my opinion, does not preclude such systems or equipment from qualifying for pollution control exemptions.

There must, of course, be a limit to s. 398 (q). That limit, in my view, is where the system or equipment does not have the overall effect of reducing the force or intensity of pollution. I have in mind here that although nature has some capacity to absorb pollutants, there is no doubt a point where it may fairly be said that the net effect of the means said to control or abate pollution is to create as much or more harm than benefit. This may not be an easy line to draw, but there must be some limit to what qualifies for exemption under s. 398 (q) and this, on my interpretation of that section, is where the line should be.

The Board's error, in my view, affected the Board's approach to pollution control requirements made under the *Waste Management Act*. The evidence before the Assessment Appeal Board disclosed that some of the improvements in the Tadanac smelter were installed pursuant to permits issued under the *Waste Management Act*. Cominco relied on those permits as evidence that the resulting improvements should qualify for exemption under s. 398 (q) of the *Municipal Act* as being for the control or abatement of pollution. In this regard the Board said, in its decision, at pp. 6-7:

> The Appellant was at some pains to produce the various permits by which it is regulated under the *Waste Management Act*, citing the treatment requirements therein as being the minimal indication of those improvements to which an exemption for control or abatement of pollution should apply. In this there was concurrence by the Respondent Assessor who said that one test to be applied was that the improvement "should be shown to be directly required by the Provincial Ministry of the Environment or some other regulatory body since these facilities would not likely be built voluntarily." Although the position may have some merit, the parallel between the two statutes is imperfect. It seems to the Board that, while the *Municipal Act* exemption refers to controlling or reducing pollution, the purpose of the *Waste Management Act* is to permit pollution deemed necessary, within permissible limits and under license, or more specifically, to regulate and determine:
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> (a) the level of pollution permitted in wastes;
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> (b) the means by which these levels are to be achieved;
>
> (c) the methods by which the resulting acceptable wastes may be disposed of, or the storage requirements for those which cannot be; and
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> (d) the requirements for monitoring and reporting performance.
>
> While the *Waste Management Act* is a means of regulating the discharge of pollution to maintain the problem within permissible limits, not all of the land and improvements required by its operation serve to "control or abate" pollution. For example, the monitoring equipment, while necessary to determine whether the standards of the *Waste Management Act* are being met, does not serve, of itself, to control or abate pollution.
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> The Board is satisfied that the permits issued under the *Waste Management Act* identify many of the improvements which may qualify under Section 398; but whether the permits include or omit an improvement is not determinative of whether it is exempt.

In my opinion, the Board's decision reflected in the above passage was based upon its erroneous interpretation of s. 398 (q) in combination with an erroneous view the Board took of the purpose of the *Waste Management Act*. The Board said that its purpose was to "permit pollution deemed necessary" and contrasted this with the purpose of s. 398 (q) of the *Municipal Act* to control or abate pollution. I find, however, that the predominant purpose of the *Waste Management Act* is to control or/and abate pollution, the very same ends as s. 398 (q) is designed to encourage. I based my views on the *Waste Management Act* as a whole and, in particular, s. 3 (1.1) which bans the introduction of wastes into the environment without a permit, s. 8 (1) which makes

permits expressly subject to requirements needed for the protection of the environment, and s. 22 which authorizes pollution abatement orders.

Where improvements are required under s. 8 (1) of the *Waste Management Act*, they must be for "the protection of the environment" as that is the fundamental prerequisite of requirements under that section. In my view, where such improvements are made as required under s. 8 (1), that is strong evidence that they are for the control or abatement of pollution. Why else would they be made? This evidence may, of course, be rebutted by contrary evidence which shows the improvements are not used primarily to control or abate pollution. As I read the Board's decision, this is not the approach which the Board took.

The Board's misinterpretation of s. 398 (q) also, in my opinion, shows up in the following passages at pp. 16 and 17 of its decision:

> The Board finds that those ducts, flues, or carriers which extend to ultimately discharge the treated gases or liquids finally to the air or water are not entitled to exemption pursuant to Section 398. While these smoke-stacks, pipes, and sewers may be required under the waste management permits, the Board is satisfied that they are not used exclusively or primarily for the control or abatement of pollution, but rather for the discharge of those liquids and gases requiring disposal regardless of the level of pollution contained. If the flue or pipe would be required regardless then that is its primary purpose; and if the pollution level at its outflow is the same as at its input then there is no pollution control or abatement occurring. That the pollution has less impact within 25 miles because the stack is 400 feet high helps to avoid annoying the neighbours, but does not reduce the amount of sulphur actually discharged into the air.
>
> The Board finds that those improvements which are primarily required for monitoring compliance with various pollution abatement, control or waste management provisions are not required primarily for the abatement or control of pollution per se and thus do not attract an exemption under Section 398. If their primary use is monitoring, then it can not be control or abatement.

In my opinion, it does not follow that just because a flue, or pipe, or smokestack, or other outfall is made necessary by the manufacturing process, its primary purpose may not be for the control or abatement of pollution as those terms have been interpreted in this judgment. See *Rayonier Canada (B.C.) Limited* v. *Assessment Area of Vancouver* (unreported) Vancouver Registry No. A790412, April 26th, 1979 (B.C.S.C.), Fulton, J. For example, the use of a tall smoke-stack or the placement of effluent outfalls may well provide a measure of control or abatement of pollution, by dilution in the receiving air or water or by other means, or by getting the pollutant partially or fully out of harm's way. As for the monitoring equipment, in my view it generally will be an integral part of any pollution control system because monitoring is essential to ensuring that the system works. The Board's decision to the contrary appears to have flowed directly from the Board's misinterpretation of s. 398 (q).

Having found that the Board erred in its interpretation of s. 398 (q), I think that all the items in issue (including the Warfield fertilizer plant) should be reconsidered by the Board in accordance with the opinions set out in this judgment. Subject to rulings by the Board on specific items, it is open to the Board to make a general order requiring the Assessor to reconsider the remaining items in accordance with the opinions in this judgment and make recommendations to the Board which the Board may consider in its ultimate disposition of the appeal.

If at that time Cominco or the Assessor should consider that the Board has acted without supporting evidence or on a view of the facts that cannot be reasonably entertained on any of the matters in issue, or has otherwise erred in law, a further appeal to this Court can be taken. See *Edwards* v. *Bairstow*, [1956], A.C. 14 (H.L.) at 29.

Answer to Cominco Question No. 1

Yes, the Board erred in its interpretation of s. 398 (q) of the *Municipal Act*, as set out in the above reasons. The issue of the assessment of the various contested items should be referred back to the Board as set out in this judgment.

Cominco Question Nos. 2, 3 and 4

> 2. Did the Board err in concluding that the historic profitability or lack of profitability of the Warfield plant rather than the use of such land and improvements in the valuation period in question was a criterion of exemption?
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> 3. Upon a proper construction of Section 398 (q) of the *Municipal Act*, was there any evidence upon which the Board could find that the Warfield plant was primarily used for the production of fertilizer?
>
> 4. Was the Board's finding of fact that the Warfield plant was used primarily for production of fertilizer, a view that could not reasonably have been entertained on the whole of the evidence?

To understand these questions a summary of the evidence led by Cominco before the Assessment Appeal Board is needed.

The evidence disclosed that Cominco encountered pollution problems with the Tadanac smelter as far back as the 1920s. This pollutant, mainly sulphur dioxide (SO_2) had a harmful effect across the border into the United States. The International Joint Commission was required to study the situation and come up with recommendations. Cominco, under the shadow of the obvious pollution and the gathering forces against it, developed its own solutions in conjunction with the International Joint Commission. One of these solutions was to convert the SO_2 into SO_3 and then into sulphuric acid (H_2SO_4) and convert a large part of this into fertilizer at the Warfield fertilizer plant which was constructed for this purpose. Evidence was led that in due course the Warfield fertilizer plant became profitable, especially when its production was needed during the war years in the 1940s, and during a high demand period for fertilizer in the 1950s. In effect, Cominco turned a solution of a pollution problem to its advantage. There was also evidence that if the Tadanac smelter could not get rid of the sulphuric acid which it produced from the pollutant SO_2, the Tadanac smelter would have to close down in approximately five days because it would run out of storage capacity.

Evidence was led that in spite of the halcyon years of the Warfield plant in the 1940s and 1950s, it had, over the last decade (1976-1985), suffered economic losses measured by before-tax earnings and by cash flow. There have been losses by both measures every year since 1976, and in the years 1982 through 1985 the losses averaged well in excess of $10 million per annum.

Mr. J. McCunn, the supervisor of Cominco's waste control department, was asked why Cominco continues with the production of fertilizers. His answer was that it appears to be the most economical way of disposing of a waste.

Before the Board, Cominco took the position that the Warfield plant was entitled to an exemption under s. 398 (q) on the basis that it was used primarily to control or abate pollution.

The Board addressed the definition of the word "primarily" at p. 10 of its decision as follows:

> The second part of Section 398 refers to an improvement or land not exclusively but primarily so used. The word primary, and hence the adverb primarily, refers not to proportion or share of quantity, but to order of priority. *The Concise Oxford Dictionary*, Seventh Edition defines "primary" as original - first in order of importance - not ancillary to

> another. Thus, the Board perceives that it is not necessary that an improvement or land be used mostly or principally for pollution control or abatement; but rather that the use for pollution control or abatement be the first, or originating, use of the subject of the exemption. This sense of "primary" rather than "major" use suggests that it is not necessary that the exempt use represent more than 50%, or some other proportion, of total use, but rather that it be the most important use.

and further, at p. 11:

> . . . It has been pointed out by the Respondent that the exemption, in its present form, applies solely to use, whereas an earlier form permitted consideration of intent. The Board appreciates that it may be difficult to make an objective determination of which use is primary, and which use(s) may be ancillary or secondary. Would the improvement in question be installed in the same form, or at all, without the pollution control and abatement imperative? Is the non-pollution abatement/control use such that it would have to be performed as part of the process in any case, and by what means if other than in conjunction with the pollution control activity? The correct answers to these two questions should serve to determine both which use is primary, and the degree of relative importance of the ancillary use if the primary purpose is determined as being the exempt uses.

In my opinion, the Board erred in its interpretation of the word "primarily" and in adopting tests which are too restrictive.

I repeat the words of paragraph (q) in s. 398 of the *Municipal Act*:

> (q) an improvement or land used exclusively to control or abate water, land or air pollution, including sewage treatment plants, effluent reservoirs and lagoons, deodorizing equipment, dust and particulate matter eliminators; and <u>where the improvement or land is not exclusively but is primarily so used</u>, the assessment commissioner may, in his discretion, determine the portion of the assessed value of the improvements or land attributable to that control or abatement and that portion is exempt.
>
> [emphasis added]

The word "primarily", in my view, is used in the context of s. 398 (q) in the sense of:

> "Of the first importance; principal, chief."
>
> *Shorter Oxford English Dictionary* (1975)

There are other meanings of "primary" (from which "primarily" is derived), as follows:

> Of the first order in time or temporal sequence; earliest, primitive, original.
>
> Of the first order in any sequence or process, esp. of derivation or causation.

These latter definitions are not, in my view, the sense in which the word "primarily" is used in s. 398 (q). My reasoning is that the "use" referred to in s. 398 (q) is that which occurs at the date of the assessment. It is the most important use as of that date which fits the context of s. 398 (q).

In my view, the Board erred in using both meanings. Although I agree with the Board adopting the definition "first in order of importance", I think it erred in also using the meaning "the first, or originating, use of the subject of the exemption". What is the most important use as of the date of assessment can well differ from the original use, especially when there is a gap of many years between the two. The mixture of these two concepts, in my opinion, was an influencing factor

causing the Board to fail to consider properly Cominco's evidence. I will discuss the Board's findings later in this judgment.

I find that a further error occurred in the apparent acceptance by the Board of a submission by the Assessor "that the exemption, in its present form, applies solely to use, whereas an earlier form permitted consideration of intent". In my view, what something is used for inevitably involves intent. Dictionary definitions of the word "use" abound with expressions like "advantageous end", "profitable end", "with some aim or purpose" and other such expressions which connote intent or purpose. See *Shorter Oxford English Dictionary*, (1975) pp. 2441-2. There is also the element of "importance" which is embodied in the meaning of "primarily" as used in s. 398 (q). In my view, what is important necessarily involves a consideration of intent.

Counsel for the Assessor pointed out that in the periodic revision to the Statutes of British Columbia, which last occurred in 1979, the words "for the purpose of" were removed in the rewriting of what became (by renumbering) the present s. 398 (q) of the *Municipal Act*. The word "used" remained. The Assessor submitted the inference to be drawn was that the Legislature intended to remove from s. 398 (q) a consideration of intent. I do not agree.

It is significant that this change was made as part of a periodic revision of the whole of the Statutes of British Columbia. One of the purposes of revising the statutes is to "make alterations in their language required to preserve a uniform mode of expression. . ." (s. 3 of the *Statute Revision Act*, R.S.B.C. 1979, c. 394). The general rule as to the effect of the revisions is set out in s. 8 (1) of the *Statute Revision Act*, which reads:

> 8. (1) The Revised Statutes of British Columbia, 1979 shall not operate as new laws but shall be construed and have effect as a consolidation of the law as contained in the Acts repealed and for which the *Revised Statutes of British Columbia*, are substituted.

I note that the general rule in s. 8 (1) is not absolute in that s-s. (3) does contemplate the situation where provisions of revised statutes are not in effect the same as their forerunners. In the predecessor to s. 398 (q) the word "used" occurs twice, each time in the same sense. The words "for the purpose of" follow "used" where it is used on the second occasion, but not the first. This, I think, is a lack of uniformity of mode of expression. Having in mind the general rule that the revised statutes are not intended to operate as new laws, in my view the change to s. 398 (q) was carried out to achieve a uniform mode of expression. The words "used" and "primarily" still, in my opinion, connote an element of intent. If physical use without regard to intent were to be the sole criterion for s. 398 (q), I would have expected that to be clearly spelled out, rather than left to implication from an apparently innocuous change under the *Statute Revision Act*.

A further error arises from the two test questions which the Board stated at p. 11 of its decision (quoted above). I repeat the questions:

> Would the improvement in question be installed in the same form, or at all, without the pollution control and abatement imperative?
>
> Is the non-pollution abatement/control use such that it would have to be performed as part of the process in any case, and by what means if other than in conjunction with the pollution control activity?

The Board said that the correct answers to these questions should serve to determine which use is primary and the relative importance of any ancillary use.

In my opinion, these questions do not, as they purport to do, provide an accurate and comprehensive test of what use is primary and what uses are ancillary or secondary. Whether an improvement mayor may not be installed in the same form without the pollution control or abatement imperative is, in my opinion, entirely distinct from the real question to be answered,

namely, what is the primary use of the land and improvements as of the date of assessment? The same observation applies to the Board's second question relating to whether the non-pollution control or abatement usage would have to be performed as part of the process in any event. In my view, pollution control equipment may be quite integral to the manufacturing process but still be considered as having its primary use that of control or abatement of pollution. It comes back to the fundamental question of determining on the evidence whether the control or abatement of pollution usage is the most important.

I consider next the Board's application of its interpretations of s. 398 (q) to the Warfield fertilizer plant. The Board said at pp. 11 and 12 of its decision:

> The Board finds that the Warfield plant is not entitled to an exemption for pollution control on the basis of its use as a giant pollution control device for the lead/zinc smelter. The Board is satisfied that the Warfield plant is primarily used for the production of fertilizer, and as such does not qualify. The Board feels that only the decline in profitability of this plant has led the Company to think of it in this light.

and at p. 13:

> . . . If, as with the Appellant, it was once possible to dispose of these contaminants at a profit, and such is no longer the case, then this goes to the question of the value of the lead/zinc smelter, and of the fertilizer plant; but not to the issue of pollution control exemption.

and further, at p. 13:

> . . . The Company succeeded for some time in generating revenue from the necessary disposal of polluting contaminants; and can not seek alternative relief except to the extent that the actual value of the smelter is affected by the changing economics.
>
> The only basis upon which further processing of the sulphuric acid and ammonium sulphate, such as in the manufacture of fertilizer, might conceivably be thought of as attracting pollution control exemption would be if there was no other means of disposing of them regardless of economics.
>
> The only land and improvements comprising parts of the fertilizer plant which may be exempted from taxation under Section 398, are those which are used, exclusively or primarily, to control or abate pollution which results from the manufacture of fertilizer.

In my opinion, the Board erred in failing to consider Corninco's evidence and submissions in accordance with a proper interpretation of s. 398 (q). The force of Cominco's evidence and submission is that at the date of assessment the Warfield fertilizer plant was used primarily to control or abate pollution produced by the Tadanac lead/zinc smelter: What the Board failed to do was to properly direct its mind as to whether, as at the date of assessment, the Warfield fertilizer plant had, as its primary usage, the control and abatement of pollution generated by the Tadanac smelter, as these expressions have been interpreted in this judgment. In my view, the Board must take into consideration the real primary purpose of Cominco continuing to run the Warfield fertilizer plant at a loss. The evidence of the losses in running the Warfield plant over the past 10 years is, in my opinion, cogent evidence which the Board is obliged to consider.

In the *Rayonier Canada* case, supra, Fulton, J. considered a claim for exemption under the forerunner of s. 398 (q) of the *Municipal Act*. Because a hydraulic log barker used in a lumber mill was found to create pollution by its effluent, it was replaced with a mechanical barker which did not have the effluent problem. The new mechanical barker was, of course, an integral part of the process of the manufacture of lumber. Fulton, J. held that the Board erred in its interpretation of the exemption provision when it disallowed the mechanical barker as an exemption. The learned

judge looked to the intent of the legislation, which he said was to provide a tax relief incentive for pollution control. He held that the legislature intended that when the main object and result of the use of land or an improvement is the achievement of the desired social objective of controlling or abating pollution, then the taxpayer should be relieved. He recognized that improvements may be used to generate revenues, but at the same time have as their primary use the control or abatement of pollution. At p. 762 he said:

> . . . It was recognized that both results could well flow - i.e., a commercial benefit as well as a pollution control benefit, but it is clear from the terms of the provision that the relief is not to be excluded merely because a commercial benefit results, so long as the pollution control benefit remains the primary object and result. Hence the use of the words "not. . . exclusively but. . . primarily so used".

I see no reason in law why a whole plant may not be used primarily for the abatement or control of pollution. Indeed, s. 398 (q) uses as one of its examples "sewage treatment plants". That a sewage treatment plant may produce fertilizer and produce some revenue should not, of itself, disentitle the plant to a pollution control exemption, at least not until the production of fertilizer takes over as the most important use of the plant. It comes back to the same question: what is the most important use of that plant?

The Board further said, at pp. 14 and 15 of its decision:

> The Board recognizes that the capture and containment of the potential pollution is a key to the entire control process, and is effectively achieved, as the Respondent contends, at the point where the SO_2 is scrubbed from the exhaust gases. It does little good, however, in the Board's opinion, for an industrial enterprise to obtain control over ever increasing volumes of contaminants without some reasonable means of safe disposal, or abatement through reducing the contaminants to less dangerous forms. If means were readily available to dispose of the SO_3 without additional processing, surely they would have been actively explored, and some evidence could have been adduced at the hearing. The Board is satisfied that the sulphuric acid and ammonium sulphate which are shipped to Warfield, the sulphuric acid and liquid SO_2 which are sold directly, and the cadmium, antimony, indium, arsenic, mercury and other metals which are extracted during the process, are in a "controlled and disposable" form and the real or potential contamination of the air, water and land which would result from not controlling them, or the compounds from which they have been extracted, has been abated.

The above passage, in my opinion, is a further example of the application of the Board's restrictive interpretations of s. 398 (q). Although the sulphuric acid and the ammonium sulphate may be in controlled or disposable form when they are shipped to the Warfield plant, that does not, in itself, preclude the Warfield plant from being an integral part of the whole of Cominco's system of controlling or abating the pollution caused at the Tadanac smelter. If the fertilizer plant is an essential part of that system, the fact that part of the overall process is completed at the smelter (the manufacturer of the sulphuric acid and the ammonium sulphate) does not, in my view, prevent the fertilizer plant from continuing to be an essential part of the overall system. The question remains to be answered: what is the most important use of that fertilizer plant?

Answer to Cominco Question No. 2

The Board erred in failing to consider properly the evidence of the lack of profitability of the Warfield plant over the past 10 years on the issue of whether the Warfield plant was, as at the date of assessment, primarily used for the control or abatement of pollution.

Answer to Cominco Question No. 3

The Board erred in its interpretation of s. 398 (q) of the *Municipal Act*. The issue of the primary use of the Warfield plant as of the date of assessment should be referred back to the Assessment Appeal Board for decision in accordance with the evidence and interpretations of s. 398 (q) provided in this judgment.

Answer to Cominco Question No. 4

The answer to Question No. 3 also applies here.

Cominco's Question No. 5

> 5. Was there any evidence upon which the Board could have found that the appellant could give away all of the by-products produced in the said plants?

The Board said at p. 13 of its decision:

> The evidence is that these by-products are charged (sold) to WarfieId at cost, and the Appellant then complains that Warfield is unprofitable. If it is not possible to sell them, alternatively, in a sufficiently distant market (Chicago) in order to dispose of them all, then why not give them away?

The Board did not go on to answer the above question. It appears to have been asked rhetorically on the assumption that it was reasonably open to Cominco to give away its by-products. I was referred to no evidence by counsel for the Assessor that supported this factual assumption. No doubt the Board had in mind the ordinary human experience that one can usually give things away. Considering the nature of the products dealt with here with attendant costs of transportation and the problem of flooding an already over-supplied market, I am of the view that this was a subject on which the Board ought to have acted upon evidence rather than its own experience in other areas.

Answer to Cominco Question No. 5

No.

ASSESSOR'S APPEAL – JURISDICTION

Some background is necessary to understand this appeal. Under the prevailing assessment law in British Columbia, two-year assessments are required. This has given rise to rather complicated appeal procedures. After the taxpayer has received the two-year assessment, there is a limited time within which an appeal of that assessment may be taken. The appeal process is commenced by a notice of complaint which is heard by a Court of Revision. The next step is an appeal from the Court of Revision to the Assessment Appeal Board.

If no appeal is taken (i.e., complaint to the Court of Revision) within the time required after receipt of the notice of assessment, the assessment will stand for the first year of the two-year period. However, full appeal rights are retained for the second year of the assessment and may be exercised within applicable time limits.

Where, however, a complaint was made within the time specified for the whole of the two-year assessment, no later appeal is allowed for the second year of the assessment except in quite restricted circumstances.

Generally speaking, those restricted circumstances in which an appeal may be taken for the second year of the assessment when a complaint was made earlier for the two-year roll, are where there have been physical or legal changes made in the interim or/and where certain errors or omissions have occurred.

Further, the assessor is required to make a revised assessment roll for the second year in the same restricted circumstances, i.e., where there have been physical or legal changes or certain errors or omissions.

The above is a general summary only of the two-year assessment system as set out in ss. 2 and 40 of the *Assessment Act*.

In the case at bar there is a significant difference between the Tadanac smelter and the Warfield fertilizer plant. Although in each case the appeals deal with the second year of a two-year assessment, an earlier complaint for the Tadanac smelter was made for the two-year assessment, whereas no such complaint was made for the Warfield plant. The result is that the present appeal of the Tadanac smelter for the second year of its assessment is restricted, whereas the appeal of the Warfield plant is not. Thus the Assessor took the position before the Assessment Appeal Board that it had no jurisdiction to entertain the appeal of the Tadanac smelter on the ground that the subjects of that appeal were outside the restricted area prescribed for a second-year appeal where an earlier complaint had been made as to the whole of the two-year assessment. The Assessment Appeal Board ruled against the Assessor on that objection, and it is the validity of that ruling which is in issue on the Assessor's appeal to this Court.

As I mentioned earlier, the assessor is required to make a revised assessment roll for the second year of the assessment in cases of certain factual or legal changes, errors, or omissions (see s. 2 (1.1) and (1.2). If the assessor fails to make such revisions, or makes them in an unauthorized manner, the taxpayer may appeal. This is under s. 40 (1.1) of the Act, which reads:

> 40 (1.1) Where a person is of the opinion that an assessor made revisions to the assessment roll in a manner not authorized by section 2 (1.1) to (1.5) or failed to make revisions to the assessment roll as required by section 2 (1.1) to (1.5), he may complain in the same manner as in subsection (1) of this section.

It is under s. 40 (1.1) that the Tadanac smelter (Cominco) commenced its appeal of the second year of the assessment. The basis of that appeal was the claim by Cominco that the Assessor failed to make revisions to the assessment roll as required by s. 2 (1.1) to (1.5).

The portions of s. 2 which are applicable to this part of the appeal are as follows:

> 2 (1.1) The assessor shall, not later than September 30, 1985 and September 30 in each odd numbered year after that, complete a revised assessment roll containing revisions to the assessment roll for the purpose of taxation during the following calendar year.
>
> (1.2) Subsection (1.1) applies only to cases where
>
> . . .
>
> (b) the actual value, determined under this Act in relation to a revised assessment roll is not the same as the actual value entered in the assessment roll by reason of
>
> (i) an error or omission,
>
> . . .
>
> (c) there has been a change in any of the following:
>
> (iv) the eligibility for, or the amount of, an exemption from assessment or taxation;

. . .

> (1.4) In subsection (1.2) (b) (i) "error" means an entry resulting from a clerical or arithmetical error, or an entry based on incorrect facts.

The Assessment Appeal Board held that it had jurisdiction on two separate grounds. The first was under s. 2 (1.2) (b) (i). This ground was that by reason of an error or omission the actual value determined under the Act in relation to a revised assessment was not the same as the actual value as set out in the assessment roll. The second ground was under s. 2 (1.2) (c) (iv), that is, a change in the eligibility for, or the amount of, an exemption from taxation.

I will now address the specific questions raised by the assessor in the stated case.

Assessor Question No. 1

> 1. Did the Assessment Appeal Board err in law in its interpretation of the meaning of "actual value" as that word is used in the *Assessment Act*, and in particular Section 2 (1.2) (b) thereof?

Counsel for the Assessor contends that a prerequisite for the application of s. 2 (1.2) (b) is that there must be a difference between the actual value in the assessment roll and the actual value when properly determined for the revised roll. He says that a mere change in classification from "taxable" to "pollution control" , being the relief asked for in the Tadanac smelter appeal, does not involve a change in actual value. He submits that if Cominco is successful, only the classification of the items in issue would change, not their actual value.

The Assessment Appeal Board, in its decision at pp. 17-20, rejected this submission. The Board appears to have given the words "actual value" as used in s. 2 (1.2) (b) the meaning of "net actual value, or actual value of the non-exempt (taxable) components of the property subject to valuation". This enabled the Board to rule that a change in classification would cause a change in "actual value". The assessor contends that this gave an erroneous interpretation to the words "actual value".

I agree with the result of the Board's ruling, but for somewhat different reasons from those given by the Board. The starting point for s. 2 (1.2) (b) is "the actual value entered in the assessment roll ". What is the actual value entered in the assessment roll? Section 2 (2) says:

> (2) The assessment roll and notice of assessment shall be in the form and contain the information specified by regulations made under the *Assessment Authority Act*.

The regulations under the *Assessment Authority Act* (B.C. Reg. 497/77, as amended by B.C. Reg. 265/84) require that the assessment roll set out particulars of, *inter alia*, "the total assessed value of exemptions from taxation". It follows from this that where there is a change in classification from taxable to exempt, or vice versa, there will be a change on the assessment roll in the assessed value (which is actual value) of the exemptions from taxation. In my view, this satisfies the requirement in s. 2 (1.2) (b) that the actual value as determined for a revised roll be different from the actual value entered in the assessment roll.

Answer to Assessor Question No. 1

Question No. 1 need not be answered because, in my view, the conclusion arrived at by the Board was correct.

Assessor Question No. 2

2. Did the Board err in law in holding that Section 2 (1.2) (b) (i) of the Act applied to permit a revision of the exemptions for taxation for a revised assessment roll?

This question refers to the "error or omission" requirement. The Board held that it was dealing with "error" as that word is used and defined in s. 2 (1.2) (b) (i) and (1.4). The Board did not deal with "omission", although Cominco, at the hearing of the stated case, argued that the Board's decision should be upheld on the basis of both the "error" and "omission" grounds.

"Error"

The Board, at p. 18 of its decision, said:

> The Board is of the opinion that, if it is found that the amount of the exemption previously granted pursuant to Section 398 is incorrect, then it is because the previous entry was based on incorrect facts, which constitutes an error as defined in Section 2 (1.4).

The expression in the above passage ". . . entry was based upon incorrect facts," comes from the statutory definition of "error" in s. 2 (1.4), which reads:

> 2 (1.4) In subsection (l.2) (b)(i) "error" means an entry resulting from a clerical or arithmetical error, or an entry based on incorrect facts.

It is clear from the Cominco appeal part of this judgment that Cominco's case has not been based upon clerical or arithmetical errors. This leaves only "an entry based on incorrect facts" for consideration.

The substance of Cominco's case is that the assessor erred in his interpretation of s. 398 (q) of the *Municipal Act*, and this, in turn, led to errors in the determination of what was used, or primarily used, for pollution control or abatement. Cominco argues that while the construction of a statutory enactment is a question of law, the question of whether a matter or thing falls within a legal definition in an enactment is a question of fact. See the *Township of Tisdal* case, *supra*, Cannon, J. for the Court, at p. 323. Cominco submits that the erroneous interpretations of s. 398 (q) led to errors of fact being made and, therefore, entries in the assessment roll were based on incorrect facts.

In my view, this is drawing too fine a line. In my opinion, if there were errors in the entries in the assessment roll, the substance of the cause of those errors was that they were based upon incorrect interpretations of s. 398 (q) of the *Municipal Act*. In reality this is incorrect law, rather than incorrect fact.

I therefore conclude that the Board erred on this aspect of jurisdiction.

"Omission"

The word "omission", as used in s. 2 (1.2) (b) (i), does not have a restricted statutory definition. Cominco submitted that if there has been an omission to categorize pollution control improvements as such, then the Board has jurisdiction to rectify this omission. I agree. Had the Legislature intended to ascribe a limited definition to the word "omission", I would have expected to see it defined in a restricted manner as was done for the word "error". There is nothing which restricts the omission to being based upon incorrect facts. There is therefore no reason why it may not also be based upon incorrect law, which is the essence of the nature of the omissions alleged by Cominco.

I conclude, therefore, that the Board was correct in holding that s. 2 (1.2) (b) (i) of the Act applied to permit revisions of the exemptions for taxation.

Answer to Assessor Question No. 2

No. Although the Board erred in law in its rationale for holding that s. 2 (1.2) (b) (i) of the Act applied to permit a revision of the exemptions for taxation for a revised assessment roll, the Board did not err in result.

Assessor Question No. 3

3. Did the Board err in law in its interpretation of Section 2 (1.2) (c) (iv) of the Act?

The Board's ruling on this point, at p. 20 of its decision, reads as follows:

> Alternatively, the Board is satisfied that, pursuant to Section 2 (1.2) (c) (iv) the "amount of an exemption" refers to the actual dollar amount determined and entered on the Roll rather than the amount to which the taxpayer may be eligible at any given time. The Board is, therefore, satisfied that it has jurisdiction to order an entry in the revised roll for the subject property with respect to the amount of exemption pursuant to Section 398 of the *Municipal Act*.

Section 2 (1.2) (c) reads:

> 2 (1.2) Subsection (1.1) applies only to cases where
>
> . . .
>
> (c) there has been a change in any of the following:
>
> (i) ownership;
>
> (ii) legal description;
>
> (iii) the classification referred to in section 26 (8);
>
> (iv) the eligibility for, or the amount of, an exemption from assessment or taxation;
>
> (v) municipal boundaries,
>
> . . .

I am satisfied here that the Board erred. In my view "change" in the context in which it is used means actual changes which have occurred between the first and second years of the two-year assessment, as distinct from changes flowing from the rectification of errors or omissions where the underlying facts remain the same. Each of the categories under (c) are factual or legal changes that in fact occur. I do not think the changes referred to in s. 2 (1.2) (c) are intended to include the rectification of errors or omissions; that is covered by s. 2 (1.2) (b) (i). Accordingly, in my view, the Board did err in law in its interpretation of s. 2 (1.2) (c) (iv) of the *Assessment Act*. However, because I have already held that the Board was correct in assuming jurisdiction under s. 2 (1.2) (b) (i) of the Act, this error is reduced to having no effect upon the Board having taken jurisdiction.

Answer to Assessor Question No. 3

Yes. However, the error has no effect on the Board having taken jurisdiction.

Assessor Question No. 4

4. Did the Board err in law in ordering or permitting a change to the amount of exemptions from taxation for the 1986 Revised Roll, based on an interpretation of Section 398 (q) of the *Municipal Act*, which interpretation would be equally applicable to the 1985 roll year if correct?

It is difficult to give this question focus. I assume it is aimed at the fact that there have been no changes in the statutory provisions applicable to the 1985 and 1986 rolls. I have already held that the Board had jurisdiction pursuant to s. 2 (1.2) (b) (i) of the *Assessment Act*. There is nothing embedded in the Assessor's question 4 which causes me to alter that ruling. Accordingly, I answer question 4, in the negative.

Answer to Assessor Question No. 4

No.

SUMMARY:

COM/NCO APPEAL - POLLUTION CONTROL EXEMPTIONS

Cominco Question No. 1

1. Did the Assessment Appeal Board (the "Board") err in their interpretation of Section 398 (q) of the *Municipal Act*, R.S.B.C. 1979, c. 290 and, in particular, as to the meaning of the words "used", "pollution", "control" and "abate" used therein with the result that the Board failed to exempt the land and improvements constituting the Warfield plant and certain land and improvements on the Tadanac plant?

Answer to Cominco Question No. 1

Yes, the Board erred in its interpretation of s. 398 (q) of the *Municipal Act*, as set out in the above reasons. The issue of the assessment of the various contested items should be referred back to the Board as set out in this judgment.

Cominco Question No. 2

2. Did the Board err in concluding that the historic profitability or lack of profitability of the Warfield plant rather than the use of such land and improvements in the valuation period in question was a criterion of exemption?

Answer to Cominco Question No. 2

The Board erred in failing to consider properly the evidence of the lack of profitability of the Warfield plant over the past 10 years on the issue of whether the Warfield plant was, as at the date of assessment, primarily used for the control or abatement of pollution.

Cominco Question No. 3

3. Upon a proper construction of Section 398 (q) of the *Municipal Act*, was there any evidence upon which the Board could find that the Warfield plant was primarily used for the production of fertilizer?

Answer to Cominco Question No. 3

The Board erred in its interpretation of s. 398 (q) of the *Municipal Act*. The issue of the primary use of the Warfield plant as of the date of assessment should be referred back to the Assessment

Appeal Board for decision in accordance with the evidence and interpretations of s. 398 (q) provided in this judgment.

Cominco Question No. 4

> 4. Was the Board's finding of fact that the Warfield plant was used primarily for production of fertilizer, a view that could not reasonably have been entertained on the whole of the evidence?

Answer to Cominco Question No. 4

The answer to Question No. 3 also applies here.

Cominco's Question No. 5

> 5. Was there any evidence upon which the Board could have found that the appellant could give away all of the by-products produced in the said plants?

Answer to Cominco Question No. 5 No.

ASSESSOR APPEAL - JURISDICTION

Assessor Question No. 1

> 1. Did the Assessment Appeal Board err in law in its interpretation of the meaning of "actual value" as that word is used in the *Assessment Act,* and in particular Section 2 (1.2) (b) thereof?

Answer to Assessor Question No. 1

Question No. 1 need not be answered because in my view the conclusion arrived at by the Board was correct.

Assessor Question No. 2

> 2. Did the Board err in law in holding that Section 2 (1.2) (b) (i) of the Act applied to permit a revision of the exemptions for taxation for a revised assessment roll?

Answer to Assessor Question No. 2

No. Although the Board erred in law in its rationale for holding that s. 2 (1.2)(b) (i) of the Act applied to permit a revision of the exemptions for taxation for a revised assessment roll, the Board did not err in result.

Assessor Question No. 3

> 3. Did the Board err in law in its interpretation of Section 2 (1.2) (c) (iv) of the Act?

Answer to Assessor Question No. 3

Yes. However, the error has no effect on the Board having taken jurisdiction.

Assessor Question No. 4

> 4. Did the Board err in law in ordering or permitting a change to the amount of exemptions from taxation for the 1986 Revised Roll, based on an interpretation of Section 398 (q) of

the *Municipal Act,* which interpretation would be equally applicable to the 1985 roll year if correct?

Answer to Assessor Question No. 4

No.

DISPOSITION AND COSTS

Pursuant to s. 74 (6) of the *Assessment Act*. I direct that this opinion be remitted to the Board.

As Cominco has had substantial success on both the pollution control exemptions and jurisdiction aspects of the stated case, I order that it recover the costs of an incidental to this stated case.