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**RIVTOW STRAITS LTD., RIVTOW MARINE LTD.,
IMPERIAL MARINE INDUSTRIES LTD., POINT GREY TOWING CO. LTD.,
SEASPAN INTERNATIONAL LTD., GENSTAR CORPORATION,
NORTHWEST WOOD PRESERVERS LTD., COSULICH INVESTMENTS LTD.,
MARITIME INVESTMENTS LTD.,
NORTH WEST WOOD PRESERVERS LTD.**

v.

**THE ASSESSOR OF AREA 1 - SAANICH-CAPITAL,
THE ASSESSOR OF AREA 4 - NANAIMO/COWICHAN,
THE ASSESSOR OF AREA 6 - COURTENAY,
THE ASSESSOR OF AREA 8 - NORTHSHORE-SQUAMISH VALLEY,
THE ASSESSOR OF AREA 9 - VANCOUVER,
THE ASSESSOR OF AREA 10 - BURNABY-WESTMINSTER,
THE ASSESSOR OF AREA 11 - RICHMOND-DELTA,
THE ASSESSOR OF AREA 12 - COQUITLAM,
THE ASSESSOR OF AREA 13 - DEWDNEY-ALOUETTE,
THE ASSESSOR OF AREA 14 - SURREY-WHITE ROCK,
THE ASSESSOR OF AREA 15 - LANGLEY -MATSQUI-ABBOTSFORD,
THE ASSESSOR OF AREA 16 - CHILLIWACK,
THE ASSESSOR OF AREA 25 - NORTHWEST-PRINCE RUPERT,
THE ASSESSMENT COMMISSIONER and SURVEYOR OF TAXES**

Supreme Court of British Columbia (A873559) Vancouver Registry

Before the HONOURABLE MR. JUSTICE GIBBS Vancouver, September 30, 1988

J. W. Elwick for the petitioners, Rivtow Industries Ltd., Rivtow Straits Ltd., Rivtow Marine Ltd., Imperial Marine Industries Ltd., Point Grey Towing Co. Ltd., Seaspan International Ltd., Genstar Corporation, Northwest Wood Preservers Ltd., Cosulich Investments Ltd., Maritime Investments Ltd., North West Wood Preservers Ltd.

John E. D. Savage for respondents, the Assessors and the Assessment Commissioner
J. G. Pottinger for the respondent, Surveyor of Taxes

Reasons for Judgment January 10, 1989

The issues in this case flow in part from the judgment of the Court of Appeal in Rivtow Industries et. al v. Assessment Commissioner of British Columbia (1986) 70 B.C.L.R. 194, and in part from "errors of inadvertence" in the filing of property tax appeals.

The petitioners as a group are the holders of a large number of leases and licences of waterlots granted by the Crown. The waterlots are used for log storage. Property taxes were assessed against the waterlots for the 1982 assessment roll. An appeal was taken by the petitioners to the Assessment Appeal Board which dismissed the appeal on April 22, 1983. An appeal was taken by way of stated case to this court. On September 27, 1983 Mr. Justice Dohm affirmed the Assessment Appeal Board decision. An appeal was taken to the Court of Appeal which, in the judgment cited above, allowed the appeal on the grounds that the use of the water covering the

waterlot lands did not render the users "occupiers" of the lands for purposes of the Assessment Act, R.S.B.C., 1979, chap. 21.

While the various appeals were proceeding, the assessment years 1983, 1984 and 1985 came and went. For each year property taxes were assessed on the waterlots and paid, and for each year the petitioners appealed the assessments to the Assessment Appeal Board. By agreement the appeals were held in suspense, unheard, pending final disposition of the appeal on the 1982 assessment roll.

The Court of Appeal decision was handed down on January 17, 1986. On November 13, 1986 the Assessment Appeal Board allowed the property tax appeals for 1983, 1984 and 1985 and evidently the property taxes were refunded. In the meantime however, and prior to the Assessment Appeal Board decision allowing the appeals, the petitioners discovered that through inadvertence they had omitted to file some 35 appeals for the 1984 assessment roll, and 5 for the 1985 assessment roll. The Assessment Appeal Board held that it had no jurisdiction to deal with waterlots for which no appeal had been filed.

Now the petitioners come before the court under the Judicial Review Procedure Act, R.S.B.C., 1979, chap. 209, asking, in effect, that the inadvertent errors be rectified by appropriate declarations, including a declaration that they are entitled to a refund of property taxes paid on the "missed" waterlots. This is the prayer for relief in the petition:

> The Petitioner applies to this Court:
>
> (a) for a declaration that the Respondent Assessors erred in law in determining that certain properties held by the Petitioners were assessable and taxable for the 1984 assessment roll when the same properties were not assessable or taxable on the 1982, 1983 or 1985 and following assessment rolls;
>
> (b) for a declaration that the Respondent Assessors erred in law in determining that certain other properties held by the Petitioners were assessable and taxable for the 1984 and 1985 rolls, when the same properties were not assessable or taxable on the 1982 and 1983 assessment rolls;
>
> (c) for an order that the Commissioner direct the Respondent Assessors to exempt the assessed and taxed properties referred to in (a) and (b) above by deleting them from the 1984 and 1985 assessment rolls where applicable by the issuance of supplementary assessment rolls pursuant to subsection 11 (3) of the Assessment Act;
>
> (d) in the alternative, for an order directing the Respondent Commissioner and Assessors to amend the 1984 and 1985 assessment rolls relating to the assessed properties of the Petitioners, to reflect that such properties are not assessable or taxable for the 1984 assessment rolls and for the 1985 roll where applicable;
>
> (e) for a declaration that the Petitioners are entitled to a refund of the full amount of the tax paid by the Petitioners on the assessed and taxed properties referred to in (a) and (b) above.

The petitioners assert their entitlement to the relief they claim on the ground that the respondent assessors erred in law in assessing property taxes against the "missed" waterlots:

> The grounds upon which the Petitioner relies in seeking the above declarations, orders and directions are as follows:

1. That the Respondent Assessors erred in law in determining that various waterlot properties held by the Petitioners by way of Crown license and Crown lease were assessable and taxable as being occupied pursuant to the definition of "occupier" in the Assessment Act.

The first question which arises on the application, apart altogether from the merits, is whether the Judicial Review Procedure Act can be invoked by the petitioners in these circumstances. The Court of Appeal held that the assessor was in error in assessing the petitioners as occupiers of the lands underlying the waterlots. But that is not the error which brings the matter before the court. The proximate, or causal, error which underlies the application is the error of inadvertence in not filing the requisite notices of appeal for 1984 and 1985. But for that error the missed waterlots would have been before the Assessment Appeal Board in November of 1986 and no doubt the appeals for those missed lots would have been allowed as were all the others. Put bluntly therefore the question is whether the Judicial Review Procedure Act is available to the petitioners to cure the consequences of their own carelessness? There is not a simple answer to that apparently simple question.

The jurisdiction of the court to make declarations or orders of the kind the petitioners seek is expressed in s. 2 (2) (b) of the Act to be "in relation to the exercise, refusal to exercise, or proposed or purported exercise, of a statutory power". Statutory power, in the context of these proceedings, is defined in s. 1 as "a power or right conferred by an enactment (b) to exercise a statutory power of decision". Statutory power of decision, again in reference to these proceedings, is defined, also in s. 1 as: "a power or right conferred by an enactment to make a decision deciding or prescribing (a) the legal rights, powers, privileges, immunities, duties or liabilities of a person". As pointed out above, the immediate cause of the petitioners' adversity is their own internal error. As that error was not made "in relation to the exercise, refusal to exercise, or proposed or purported exercise, of a statutory power", the court would appear to lack jurisdiction to make the declarations and orders sought. However, it is not sufficiently clear that the case should be dismissed on that ground.

Another aspect of the question focuses upon the remedies which were available to the petitioners internally in the Assessment Act. There is a right of complaint to a Court of Revision under s. 40 (1). There is a right of appeal to the Assessment Appeal Board under s. 67 (1). There is a right to take a stated case to the court under s. 74 (1). Each of these rights has time limitations attached to it. None were exercised by the petitioners for the missed waterlots, the first two because of "inadvertence", and the third because the petitioners mistakenly thought they were protected by filed appeals which were held in suspense pending the decision by the Court of Appeal. This court has consistently and on numerous occasions held that where there are adequate internal remedies under the statute which may provide the relief the petitioner seeks, those remedies must be exhausted before invoking the jurisdiction of the court under the Judicial Review Procedure Act. The adequacy of the internal remedies here is obvious _ in every instance the exercise of them provided the relief the petitioners wanted. But by the time they realized their predicament it was too late for the petitioners to pursue the internal remedies for the missed properties because they were barred by the time limitations. The question therefore is whether this is a circumstance where the court ought to exercise discretion and grant the relief that but for carelessness could have been obtained under the statute, given that the exercise of the discretion will have the effect of rendering the time limitation provisions the legislature inserted in the Assessment Act inoperative.

The question appears already to have been answered by the Court of Appeal in the form of the twofold test found in Crown Forest Industries Limited v. Assessor of Area 24 et al. (1986) British Columbia Stated Cases No. 195, page 1100. The test is whether the assessor's error is one which is within his jurisdiction to make. If it is it can only be remedied by the statutory appeal procedures. If the error is outside the assessor's jurisdiction his assessment will be a nullity and open to challenge under the Judicial Review Procedure Act regardless of whether the statutory

appeal procedures have or have not been invoked. As the nature of the assessor's error here renders the assessment ultra vires, or nullities, of which more later, the failure to exhaust the internal remedies first, whatever the reason, will not be fatal to the Judicial Review Procedure Act proceedings.

Different considerations apply to the last three heads of the relief requested: an order that the Assessment Commissioner direct the assessors to delete the missed waterlots from the 1984 and 1985 assessment rolls; alternatively, an order requiring the Assessment Commissioner to direct the assessors to amend the assessment rolls to show the missed waterlots to be non-assessable for 1984 and 1985; and a declaration that the petitioners are entitled to a refund of the property taxes paid on the missed waterlots. None of those three kinds of relief are within the power of the court to grant under the Judicial Review Procedure Act. As to the first two, there is a power to remit for reconsideration under s. 5 of the Act but there is no request here for a reconsideration. And there is a power under s. 7 to set aside a decision (defined in s. 1 as including "a determination or order") instead of making a declaration. Setting aside the assessment determination for 1984 and 1985 instead of issuing a declaration that the assessors erred in law might produce the end result the petitioners seek, but that is not what they have requested. In any event, there is not in the Act a delegation to the court of a power to order the assessors as to the proper conduct of their administrative duties. The same absence of power (or jurisdiction) is fatal to the request for a declaration of an entitlement to a refund of the taxes paid. Such a declaration would be the equivalent of an order for the payment of money to the petitioners. Anderson, J. of the Ontario Divisional Court appears, with respect, to have stated the proper attitude of the court towards the making of a declaration of that nature, at page 799 of Re Housing and Urban Development Association v. City of London (1981) 30 O.R. (2d) 794:

> In support of that submission and request, counsel for the applicant referred to the relevant provisions of the Judicial Review Procedure Act, 1971, (Ont.), c. 48, which leaves open upon an application of this kind, relief which could be had in an action for a declaration, and he contends therefore, that it is open to this court on this application to make an order for repayment. I point out, although it is not determinative, that historically a declaration was obtainable only in an action for some other relief. In any event, there is no authority for making such an order on an application such as this and, speaking only for myself, I am not prepared to create such authority. I think it is improbable that recovery will be a problem, having regard for the pronouncement of this court upon the validity of the by-law, but if it is a problem it will have to be resolved elsewhere.

In contrast, in R. in Right of British Columbia et al. v. Newmont Mines Limited (1982) 3 W.W.R. 317 (B.C.C.A.), supplementary to the main decision, Mr. Justice Lambert made an order that "the plaintiff is entitled to recover from the Crown the tax that the Crown was not entitled to levy". However it is not apparent that the jurisdictional ground for the making of such an order was disputed. As pointed out above it does not seem to flow from the provisions of the Judicial Review Procedure Act. As well it is outside the historical limits of declaratory judgments, which were confined to declaring the rights of the parties but did not extend to consequential relief. With respect therefore to Mr. Justice Lambert, the making of the declaration in Newmont Mines seems not to stand as a precedent required to be followed in this case.

There is an even more fundamental reason here why a refund cannot be ordered. It is that some of the parties who would be required to make a refund, the municipalities, are not parties to the proceedings. The proposition that a party should be ordered to pay money without being privy to the proceedings and without even being heard is foreign to the common law concept of justice. Such an order cannot be made, or if made could not long stand.

As this court is bound by the decision in Crown Forest Industries v. Assessor of Area 24 (supra), the petitioners are properly before the court, at least for part of the relief they claim. However, it is to be hoped that in this or some similar case the Court of Appeal will undertake an overall review

of the scope of the powers vested in the court under the Act. As the law presently stands, if an applicant can ground his case in an alleged jurisdictional error in the exercise of a statutory power of decision, he will not be barred by any statutory time limits except as found in the Judicial Review Procedure Act. The only limit there is in s. 11 and is based upon a showing that "substantial prejudice or hardship" will result from the delay in bringing the application, or that an enactment imposes a time limit on the bringing of an application under the Judicial Review Procedure Act.

The uncertainty implicit in the conduct of their affairs by both those exercising statutory powers of decision and those affected by them is obvious. Neither can rely upon the expiry of statutory time limits as signals justifying proceeding with confidence with the course allowed or imposed by the decision. This case is a prime example of the consequences. Those whose activities are circumscribed by a budget based upon forecast property tax revenues are now faced with a repayment demand the risk of which they were entitled to assume expired when the statutory time limits expired. Although different in nature, similarly undesirable consequences must result in such fields as labour relations, workers' compensation and the like. It may be that only the legislature has the power to rectify. On the other hand, it may be that it is still open to the Court of Appeal to introduce some limits to the scope of the Judicial Review Procedure Act, if they concur with the view that judicially imposed limits are called for.

Turning now to the merits, the petition raises the following general issues:

> (1) Did the respondent assessors exceed their jurisdiction by determining that the petitioners were "occupiers" of waterlots held pursuant to Crown leases within the meaning of the Assessment Act?
>
> (2) If the respondent assessors did exceed their jurisdiction, thereby rendering the tax assessment of the waterlots a nullity, are the petitioners entitled to a refund of the taxes paid?

The authority of the respondents to assess and tax the occupiers of Crown land is provided in s. 34 of the Assessment Act. That section provides:

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

Occupier is defined as far as it is relevant, in section 1 of the act as follows:

> "occupier" means
>
> (b) the person in possession of Crown land that is held under a homestead entry, pre-emption record, lease, licence, agreement for sale, accepted application to purchase, easement or other record from the Crown, or who simply occupies the land;

Prior to the initiation by the petitioners of the appeals of the liability of the waterlots for assessment on the 1982 assessment roll, the Court of Appeal considered the meaning of these statutory provisions: R. in Right of British Columbia et al. v. Newmont Mines Ltd. (supra). The issue in that case was whether Newmont Mines could be required to pay property taxes on Crown land for which they held mineral claims and leases. The court concluded that the issue turned on whether the Crown land in question had in fact been reduced to possession or occupation by Newmont. Mr. Justice Lambert said at page 34 that:

> I conclude from the definition of "occupier" that possession or occupation in fact is sufficient to make Newmont assessable and taxable, whether the right that is exercised by Newmont to carry out the possession or occupation is an exclusive right or not.

Although it is unclear, the assessors here appear to have relied upon the Newmont case as their authority for assessing the waterlots for the 1982 assessment roll. The Assessment Appeal Board and Dohm, J. of this court held that the Newmont case applied. The Court of Appeal disagreed. At page 198 of the report Mr. Justice Carrothers concluded:

> I do not consider that the case of a lessee or licensee of a waterlot for log booming and storage purposes meets the possession and occupancy test of the Newmont case.
>
> It is "land" which is to be assessed rather than the surface of the water covering or passing over that land. A demise of the surface of moving water is legally difficult. The demise must perforce relate to the bottom. The fact is that Rivtow, while possessing and occupying the surface of the water, has not reduced to possession or occupied the bottom. The possessory and occupation test of the Newmont case has not been met.

Therefore, the Assessment Appeal Board and the Supreme Court misapplied the test of the Newmont case. It follows that the assessors and the Court of Revision must also have either failed to take into consideration or misapplied the Newmont case.

The question came before the Court of Appeal as a stated case on a question of law. The court was not asked to declare that the original assessments were a nullity. The answer to the question of occupancy was that Rivtow was not an "occupier" of the land for the purposes of the Assessment Act. The question of whether the assessments were a nullity in the first place was not in issue and was not decided by the court. If it had been the main issue here would never have arisen.

The petitioners now argue that in reference to the waterlots which were omitted from the appeals in 1984 and 1985, the assessors and the Court of Revision made an error of law that was not within their jurisdiction to make by not considering or by misapplying the Newmont case. The result, it is argued, is that all of the assessments made with respect to all the waterlots were a nullity. This raises the issue of the proper jurisdiction of the assessors and the Courts of Revision which, the respondent contends, involves consideration of the pre-confederation role of the Courts of Revision.

It is convenient first more fully to address the issue touched upon earlier as to whether an error made by the assessors on jurisdiction will render the assessment a nullity and reviewable by the superior courts notwithstanding the appeal procedures and time limits in place in the empowering statute. In Bishop of Vancouver Island v. City of Victoria [1921] 3 W.W.R. 214 (P.C.), the city council was empowered to settle, impose and levy rates and taxes upon land and improvements within the municipality with the exception of buildings set apart and in use for the public worship of God. The City argued that the assessment rolls having been passed and confirmed without an appeal having been taken, and the taxes having been paid, the assessment rolls became valid and binding in spite of their potential inaccuracy. Lord Atkinson stated on p. 224 that:

> The whole question comes back to the proper construction of subsec. 1 of sec. 197 of the Act of 1914. If according to the true construction of that section the land upon which the cathedral stands is exempted from taxation, then if the corporation or its officers attempt through the medium of these machinery sections to assess and tax it, their act is ultra vires and illegal, and the respondent is not disabled from assailing it dispite the terms of their assessment rolls. In their Lordships' view these sections in no way disentitled the respondent from

> insisting on the contention that the ground on which the cathedral stands is exempted from general taxation.

Thus, the issue of determining whether land fell within the statutory exemption was jurisdictional and an error was impeachable in the superior court even though the assessment roll had been confirmed and no appeal had been taken.

The Court of Appeal dealt with the nullity issue in Crown Forest Industries Ltd. v. Assessor of Area 24 - Cariboo et al. (supra). In that case, the petitioner brought an application for judicial review of assessments on several tree farms. The petitioner had not sought an appeal through the statutory assessment appeal board and the time had expired. In considering whether the petitioner was entitled to seek a declaration that the original assessments were a nullity Mr. Justice Lambert said at p. 1100:

> There is a well developed line of cases which establishes that, if, in making an assessment, the assessor makes an error with respect to his jurisdiction then the assessment is ultra vires, and a nullity, and can be declared to be so in appropriate originating proceedings, even if the appeal period has passed, or even if an appeal was taken that was unsuccessful. On the other hand, if the assessor made a mistake that was within his jurisdiction to make, that mistake can only be remedied by the appeal procedures under the assessment and taxation legislation. If the appeal period has expired, then the error must stand.

In that case, the assessments were declared to be nullities even though the appeal procedures had not been, and no longer could be, utilized. The error made by the assessors in failing to apply the relevant valuation provisions of the Assessment Act was a jurisdictional error.

The court in Crown Forest referred to, and the petitioners in this case rely on, Abel Skiver Farm Corporation v. Town of Sainte-Foy, [1983] 1 S.C.R. 403. Mr. Justice Beetz outlined the relevant principles on page 424 as follows:

> On the first assumption, a municipality, in assessing a taxable item applies an incorrect method or an erroneous rule of valuation, which leads for example to an overvaluation and, as a consequence, an increased amount of tax. In this case, the taxpayer must resort to the generally expeditious means to challenge the valuation role which are provided in municipal statutes.
>
> A taxpayer who neglects or refrains from making use of these expeditious and special sections may not challenge the valuation role in the Superior Court, in whole or in part, as plaintiff or defendant, except perhaps in the case of fraud . . .
>
> On the second assumption, the municipality values for tax purposes and taxes a tax-exempt item. The courts then conclude that it has done acts which are ultra vires both as to valuation and taxation, and that these acts may be challenged in the ordinary Superior Courts of law, such as the superior court, in an action or a plea, in whole or in part if the subject-matter is divisible. On this assumption it does not matter that the taxpayer omitted to make use of the expeditious and special actions provided by law, if they were available; it also does not matter, if such actions were used, that they failed . . .

These authorities are all consistent. If the error made by the assessors in the present case was an error of jurisdiction then, notwithstanding that the statutory appeal procedures were not followed and cannot now be followed because of the statutory time limit, this court has jurisdiction to review the initial assessment and declare the assessment a nullity. If the error made by the assessors was not one of jurisdiction, or in other words was an error within their jurisdiction to make, then because the appeal period has expired under the Assessment Act, the error must

stand and the petitioners will not have a remedy. See The Municipality of the Town of MacLeod v. Campbell (1918), 57 S.C.R. 517.

To quote Mr. Justice Lambert in Crown Forest at 1100-1: "The question therefore becomes one of categorizing the error made by the assessors as either jurisdictional or not jurisdictional". The often cited authority on that question is the decision of the House of Lords in Anisminic Ltd. v. Foreign Compensation Commission, [1969] 2 A.C. 147, where Lord Reid at p. 171 said:

> It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word "jurisdiction" has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the enquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the enquiry, it has done or failed to do something in the course of the enquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the enquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly.

The petitioners contend that the error made by the assessors was the refusal to take the Newmont case into account. There is no evidence of this in the affidavit material before the court, and it may well be that like the Assessment Appeal Board and the Supreme Court, the original assessors and Court of Revision took into account the Newmont decision, but misapplied it to the circumstances of the waterlots.

In any event the petitioners argue that the situation is analogous to that in the Crown Forest case. In that case the assessors were required to apply a provision of the Assessment Act but failed; here it is argued, the assessors were required to apply the Newmont decision, which they failed to do either by not applying or misapplying the case.

The respondents on the other hand argue that the error made by the assessors in the present case is not analogous to that in the Crown Forest case and that the question of determining whether land is assessable is in reality not a jurisdictional question at all, but rather a question of law, the answer to which is within the jurisdiction of the assessor to make. In other words, when determining whether the waterlots were assessable or not, the assessors made an error which was within their jurisdiction to make, and accordingly there is no appeal from that decision except through the statutory appeal mechanisms which are no longer available.

The argument falls into two categories. The first is constitutionally based. It is that taking into account the pre and post-confederation duties of assessors and Courts of Revision, and the development of case law on the question, the modern view should be that the Assessors and Courts of Revision have the jurisdiction to decide whether land is assessable or exempt. The second argument, which the petitioners put forward, might be called the "failure to take into account" argument. The failure to take into account the Newmont decision, it is argued was a jurisdictional error. A third possible argument, is that the error was that of a preliminary or collateral matter. Before determining an assessment, the assessors were required to determine whether the land was "occupied" within the meaning of the Act. An error on such a matter will prevent the assessors from having jurisdiction. The basis of this argument is the Anisminic case

and Bell v. Ontario Human Rights Commission, [1971] S.C.R. 756. These arguments require further analysis.

Constitutional Argument:

The respondent submits that any error that was made by the assessors was in substance, a matter of whether land was subject to assessment or was exempt. The issue is therefore to determine whether that question is within the exclusive jurisdiction of the assessors. In other words, is an error made with respect to liability to assessment within the jurisdiction of the assessor to make? If it is, the petitioners' only recourse would be through the statutory appeal procedures which are no longer available. The origin of this argument is the Abel Skiver decision where Mr. Justice Beetz said at p. 435:

> Assessors and the members of a body like the Board of Revision have powers that are essentially administrative. They are generally not lawyers, and they are not a superior court. It has been questioned whether it is or could be part of their functions to decide a question of law like that of the taxable nature of an immoveable, a question which was within the scope of the superior courts in 1867, or to exercise, by appeal or otherwise in respect of this question, a superintending power like that exercised by the Board of Revision over the Town's assessors.
>
> The subject is a complex one, with constitutional ramifications. It has resulted in marked differences of opinion which are stated in the judgments in such cases as Quance v. Thomas A. Ivey & Sons Ltd., [1950] O.R. 397; Bennett v. White (supra); Olympia (supra); and Re Minister of Municipal Affairs & L'eveque Catholique Romain d'Edmundston (1972), 24 D.L.R. (3d) 534. See also "Municipal Tax Assessment and Section 96 of the British North America Act: The Olympia Bowling Alleys Case", Bora Laskin, C. J., while a professor, (1955) 33 Can. Bar Rev. 993.
>
> I am not persuaded that the differences have been completely resolved and it is not possible to do so in the case at bar, where they have scarcely been touched upon.

One of the leading cases for the proposition that questions of assessability are outside of the jurisdiction of municipal assessors is Quance v. Thomas A. Ivey & Sons (1950) O.R. 397 (Ont. C.A.). After reviewing the authorities Chief Justice Robertson concluded on page 408 that:

> In my opinion it is well established by decisions of highest authorities that jurisdiction to decide disputed questions of liability to assessment, such as were raised in the cases I have referred to, and in the present case, was vested in the superior courts of the province, and not in the bodies having jurisdiction to hear assessment appeals under the provisions of the Assessment Act. It is also clear that that jurisdiction was so vested prior to confederation, and continued to be vested thereafter.

His Lordship further held, on page 413, that: "No one at Confederation exercised the jurisdiction in question but the Superior Courts". Thus, on this authority the role of the superior courts and the assessment tribunals prior to confederation controlled their jurisdiction after confederation even though the British North America Act 1867 allocated legislative and judicial powers within the new Canadian federation. The question of law in Quance was whether a greenhouse was exempt from business assessment "as a . . . market garden or a nursery".

The next case on point after Quance was Toronto v. Olympia Edward Recreation Club Ltd., [1955] S.C.R. 454. On page 457, Chief Justice Kerwin stated that:

> It is now settled that the assessor, the Court of Revision, the County Court Judge and the Ontario Municipal Board have no jurisdiction to determine conclusively whether a company is taxable in respect of any particular property.

The question of law was whether bowling alleys formed part of the real estate as defined by the Assessment Act. There were 4 dissenting judgments in the case which departed from or distinguished the Quance decision.

Mr. Justice Estey, who was in the majority, concluded his judgment by saying on page 477 that:

> The effect of this decision and that of Quance v. Ivey, supra, upon which it is founded, is that if either of the parties desires a final determination of the question of law here raised it can only be had, as already intimated, by a court presided over by a judge appointed under s. 96 of the B.N.A. Act.

Chief Justice Laskin, while he was a professor, then wrote an article cited in the quote from Abel Skiver above, commenting on the Olympia case. At page 1006 he criticized the court's reasoning in the Olympia case and the authorities cited therein:

> It was the conclusion of Chief Justice Kerwin and Mr. Justice Estey, and indeed of Robertson, C. J. O. in Quance v. Ivey, that because the construction of the Assessment Act in the Toronto case [Toronto v. York, [1938] A.C. 415 (J.C.P.C.)] established that questions of assessability were not confided to the assessment review tribunals at Confederation, they could not be so confided thereafter. This is a startling conclusion even if it is the case that the construction taken in the Toronto case was the one uniformly adopted by the courts before that decision. Why the leap to the conclusion that, because the statute did not give the power to the court of revision at Confederation, section 96 operated to prevent its conferment later? When the matter is reduced to its essence, it is clear that the conclusion is based on reasoning in Toronto v. York which was discredited in the John East case.

The John East case referred to is a decision of the Privy Council: Labour Relations Board of Saskatchewan v. John East Iron Works, Ltd., [1948] 4 D.L.R. 673. That case dealt with the power of the Labour Relations Board to order a company to reinstate employees and pay them for their loss. The issue was whether the exercise by the Board of judicial powers offended sec. 96 of the B.N.A. Act. The test established in John East was a double one. The first question was whether the board or tribunal exercised a judicial power? The second was that in exercising that power was the tribunal analogous to a superior, district or county court? Professor Laskin on page 1002 suggested that when applying the second branch of the test, "it is then the constitution and functions of the tribunal as a whole that must be considered. Moreover, it was relevant also (said the Privy Council in the John East case) to consider the challenged judicial 'function' in relation to the tribunal's other duties."

The distinction from the Olympia case was that the Olympia case only looked at the first branch of that test without looking at the constitution and functions of the tribunal as a whole to determine if in the exercise of that power, namely the power to determine assessability for land, the tribunal was analogous to a superior court.

That two stage test originating in the John East case was accepted in Tomko v. Labour Relations Board (Nova Scotia) et al., [1977] 1 S.C.R. 112, and City of Mississauga v. Regional Municipality of Peel et al., [1979] 2 S.C.R. 244. Both of these cases involved a challenge to the powers of an administrative tribunal on the basis of an infringement of section 96 of the then B.N.A. Act.

The Nova Scotia Supreme Court, Appeal Division, again considered the constitutional arguments in Re Public Service Commission of Halifax and Municipality of the County of East Hants et al.

(1979), 103 D.L.R. (3d) 633. That case challenged a decision of the Regional Assessment Appeal Court upholding assessment of the appellant as an occupier of land under the Assessment Act, R.S.N.S. 1967, c. 14. One of the arguments before their Lordships was that the Assessment Appeal Court lacked jurisdiction to determine the issue of assessability and therefore so did the County Court and Appeal Division lack jurisdiction. After a thorough analysis of the authorities including Quance, Olympia, John East, and Tomko, Mr. Justice Coffin concluded that the Assessment Appeal Board did have jurisdiction to deal with questions of assessability and therefore so did the County Court and the Appeal Division.

The respondents contend that the Olympia and Quance cases should not be followed in the present petition for these reasons:

(1) The reasoning in those cases has been overtaken by subsequent Supreme Court of Canada decisions, which in effect throw doubt on the proposition that the post-confederation jurisdictional limits are defined by looking only at the function or power, namely determining assessability, in pre-confederation times to establish whether that power was exercised by the superior courts. The later cases would suggest that the power, if judicial, must be looked at in relation to the working scheme of the administrative body to determine if in the exercise of that power the tribunal is acting as a superior court. The argument would then follow that the administrative tribunal in question here, the assessors and the Courts of Revision, determine questions of assessability as an incidental power to their own intra vires administrative functions which include the general evaluation and assessment of land for tax purposes. If that is so, an error with respect to assessability would be within their jurisdiction to make. Therefore, appeals would only be available through the statutory procedures.

(2) The second reason given by the respondents for not following the Olympia and Quance cases is that in British Columbia questions of assessability were not exclusively determined by the superior courts prior to confederation. In other words, there was concurrent jurisdiction between the various administrative bodies and superior courts.

Although the reasoning in the John East and Tomko cases is appealing, the question before their Lordships was not exactly the same as in the present case. In those cases, an administrative power was being challenged as being in violation ofs. 96 of the British North America Act. In this case, the jurisdiction of the assessors and Courts of Revision, and indeed the Assessment Appeal Board, Supreme and Appeal Courts of this province to deal with questions of assessability was not challenged. The issue here is somewhat different. If the question of whether the petitioner was an "occupier" was in substance one of assessability, can the jurisdiction of this court to hear an originating application for a declaration concerning that assessability be ousted by the fact that the administrative tribunal exercises jurisdiction over the same matter and appears to be given exclusive jurisdiction by the privitive clause contained in section 10 of the Assessment Act? The answer is to be found in the judgment of Mr. Justice Beetz in the Abel Skiver case. After reviewing the appeal provisions in a case somewhat analogous to the present his Lordship stated on page 437 that:

> In my view, the provisions are sufficiently general to allow a taxpayer like the appellant to complain of the roll as drawn up on the ground that the roll deprives it of the exemptions to which it is entitled under s. 523 of the Cities and Towns Act, and the members of the council or the board of revision must take this complaint under consideration.
>
> With such a complaint before them, the members of the council or the board of revision cannot avoid making a decision without compromising the integrity of their administrative functions. They must therefore respond in order to exercise the latter in accordance with the law, as much as they are able to do and as everyone must do.

> However, they cannot make an error in this regard, because their administrative authority depends on the correctness of their reply which they give to these questions of law. If they make an error, they remain subject to the superintending and reforming power of the superior court.
>
> Further, when they respond, they exercise a function which is incidental to their administrative duties, and it does not follow from the fact that they must comply with the law and have occasion to express that law that they must do so as would a court of law. Their response accordingly does not have the final nature of res judicata.
>
> This is why it is still open to the taxpayer to start over by a direct action in nullity in the superior court, even when he has brought a complaint to the council or board of revision and that complaint has been decided by one or the other of those bodies.
>
> It is also why the courts have not required the taxpayer to proceed before the administrative tribunals: they have concluded that in this matter of taxation and exemption a taxpayer retains the right to go directly to a judicial forum like the superior court, which has the power to decide the matter with the force of res judicata.

It follows therefore that an error with respect to the question of assessability, which necessarily involves consideration of who is an "occupier", is "subject to the superintending and reforming power of the superior court". In the circumstances of the present case, the question of occupation was, in substance, one of assessability. If the petitioners were found not to be occupiers, they were exempt from taxes on the waterlots. If on the other hand they were found to be occupiers then they would be assessable. Since on this determination of assessability there was an error of law, as confirmed by the Court of Appeal, either through a failure to take the Newmont decision into account or misapplying it, it follows that the original assessments were a nullity.

Refusal to Take Into Account:

This argument, put forth by the petitioners, is based on the elaboration of the concept of jurisdiction by Lord Reid in the Anisminic case, as applied by the Court of Appeal in Crown Forest. Lord Reid stated that the decision maker's decision would be a nullity if he refused to take into account something which he was required to take into account. In the present case, it is argued that the assessors refused to take into account the Newmont decision which they were required to take into account. In the Crown Forest case, the assessors failed to apply certain provisions of the Assessment Act, which led them to the error as described by Lord Reid.

Here there is no evidence in the affidavit material before the court to suggest that the assessors refused to take the Newmont decision into account. It is more likely the case that, like the Assessment Appeal Board and the Supreme Court, the test from Newmont was misapplied. In the absence of evidence to the contrary this court must presume regularity in the administrative process. Under the circumstances, if this were the only ground for finding that the error made by the assessors was outside their jurisdiction there would be grave concerns about declaring the assessment a nullity. But, given the conclusion already reached, this argument affords some support to the petitioners.

Preliminary Matters:

The argument based on preliminary matters is related to the constitutional discussion above. Indeed, it is referred to in the reasoning of Mr. Justice Beetz in the Abel Skiver case and may provide an explanation of the Quance and Olympia cases. The theory is that the power of the administrative body is prescribed in conditional terms. If a certain state of affairs exists then the administrative body has authority to act or make a decision. The preliminary matter goes to

jurisdiction. A defect or error in a preliminary matter will prevent the administrative body from having jurisdiction: Anisminic (supra); Bell v. Ontario Human Rights Commission (supra).

In the present circumstances, the power to assess is dependent upon the preliminary determination of occupation when it relates to Crown land. Therefore, an error in this determination will be fatal to the assessor's jurisdiction. In the circumstances, the determination of whether the petitioners were occupiers would be a preliminary matter relating to the jurisdiction of the assessors to make an assessment of the waterlots. As this preliminary question of occupation was determined in error the assessor did not have jurisdiction to make the assessment. The assessments were therefore a nullity.

It follows from all of the above reasons that the error made by the assessors was not within their jurisdiction to make and accordingly there is no alternative but to hold that the assessments were and are a nullity.

Refund:

The second issue to be dealt with is whether the taxes paid under the assessment are refundable to the petitioners. The petitioners contend that there is a common law right to have the taxes paid under a mistake of law refunded. The law was stated recently in Linden Transport Inc. v. R. in Right of British Columbia (1985), 62 B.C.L.R. 314 (B.C.S.C.). Mr. Justice Taylor reviewed the common law with respect to the return of taxes paid under a mistake of law. His Lordship concluded the discussion by outlining on page 325 those circumstances under which taxes paid under a mistake of law would be recoverable by the taxpayer:

> I conclude that in order to recover unlawfully levied taxes at common law in such a case as this the taxpayer must be able to show that he paid at a time when he took the position that he was not in law obliged to pay and the taxing authority knew he maintained that he was not in law obliged to pay and knew also, in general terms, the ground on which he claimed he was not obliged to pay.
>
> A formal protest is the traditional and, no doubt, the best means of ensuring for this purpose that the taxation authorities are aware of the position taken by the taxpayer. The purpose of such protest is not, as in some other situations, to prove that payment is involuntary, because that seems to me of little or no relevance in the case of taxing statutes. The taxpayer cannot be in a better position simply because he protested, hoping later to find a legal basis for objecting to the tax, or because he withheld payment and thereby put the authorities to the trouble of threatening execution. The purpose of the protest in this context is to inform the authorities that the taxpayer contends, and has a specific basis for contending, that he is not in law obliged to pay the tax. That information may, of course, be conveyed by means other than formal protest.

There is no evidence here that the petitioners protested to the authorities about the payment of property taxes on the missed waterlots. Evidently they did not, in the words of Mr. Justice Taylor, "inform the authorities that the taxpayer contends, and has a specific basis for contending, that he is not in law obliged to pay the tax". Adopting this test, the petitioners have not satisfied the conditions precedent to an order of entitlement to the repayment of monies paid under a mistake of law.

The petitioners are also barred from the right to a refund order because, in the unusual circumstances of this case, the real cause of the money not already having been refunded is not an error of law on the part of the assessors, but the inadvertence or carelessness of the petitioners in failing to file appeals. And there is also the circumstance, previously referred to, that

for some of the missed waterlots the parties who would be required to make the refund are not parties to this proceeding.

Notwithstanding the failure to qualify under the common law doctrine of money paid under a mistake of law, the petitioners may be eligible for refund or repayment under the provisions of the Municipal Act R.S.B.C. 1979, chap. 290 or the Taxation (Rural Area) Act R.S.B.C. 1979, chap. 400. Nothing in these reasons is intended to be a bar to the petitioners making submissions under either or both of those statutes to the appropriate authorities.

Judgment:

The petition is allowed to the extent that there will be a declaration that the assessors erred in law in determining that the missed waterlots were assessable and taxable, as requested in the first two heads of relief. The petition is refused as to the last three heads of relief requested, namely, directions to the assessors with respect to exemptions from or amendments of the assessment rolls, and a declaration of entitlement to a refund of the taxes paid.

There will be no order as to costs.