The following version is for informational purposes only

THE ASSESSMENT COMMISSIONER OF BRITISH COLUMBIA

v.

**THE ATTORNEY GENERAL OF BRITISH COLUMBIA,
THE ASSESSMENT APPEAL BOARD OF BRITISH COLUMBIA &
BRITISH COLUMBIA TELEPHONE COMPANY**

Supreme Court of British Columbia (3147/97) Victoria Registry

Before the HONOURABLE MR. JUSTICE HUTICHSON

Victoria, September 18, 1997

John E.D. Savage & Bruce Hallsor for the Petitioner
Peter D. Feldberg & C.E. Gora for the Respondents

Reasons for Judgment September 18, 1997

On September 18, 1997 this petition pursuant to the *Judicial Review Procedure Act* came before the court. The Petitioner seeks a declaration that the Assessment Appeal Board, in ordering a witness of the Petitioner under cross examination to inform himself of matters relating to Commissioner's rates, (other than the Commissioner's rates for fibre optic cable systems the subject of the appeal), committed errors in the following way:

(a) an error of jurisdiction in requesting to hear evidence of matters outside the scope of the appeal before it;

(b) a breach of natural justice in permitting the leading of evidence that was not disclosed to the Petitioner;

(c) a breach of natural justice in failing to give effect to the purpose of procedural orders given by the Board in advance of the hearing; and

(d) an error of law in failing to properly apply the *Assessment Act* and regulations.

Section 63 of the *Assessment Act* provides that the Assessment Appeal Board, on its own initiative or at the request of any one or more persons affected by a matter before them under appeal, may submit a Stated Case to this court on a question of law arising in the appeal.

In the instant case, the Board refused to state a case when requested to by the Petitioner. That may well be because of the provisions of s. 63(2) which provides that if the Board submits a Stated Case the Board must (a) suspend the proceedings and reserve its decision until the opinion of the final court of appeal has been given; and (b) thereafter decide the appeal in accordance with the opinion. Thus stating a case in the midst of a hearing is disruptive and inconvenient, not only to the Board, but to the parties.

The Assessment Commissioner in mounting its jurisdictional argument before me accepted the law as stated by this court in *Musqueam Holdings Ltd. and Musqueam Properties Ltd.* v.

Assessor of Area 09 - Vancouver, The City of Vancouver, The Union of British Columbia Municipalities, The Corporation of Delta and The Attorney General of Canada, which is Case No. 391 in the B.C. Assessment Stated Cases series, Vancouver Registry No. A962646, 24 October 1996. They sought to distinguish this decision of Madam Justice Sinclair Prowse. There she held the following at p. 2389:

In my view, the law does not go so far as to permit this court to review any interim judicial decision solely because it affects the future course of the proceedings and the case to be met by a particular litigant. Rather, the intervention by this court is restricted to extreme situations such as a *habeas corpus* challenge, an excess of jurisdiction challenge, or a denial of natural justice challenge.

The Petitioner suggests the case at bar fits within the exception of excess of jurisdiction or in the alternative a denial of natural justice.

Earlier in her decision Madam Justice Sinclair Prowse, in discussing the consequences of the Assessment Appeal Board's exercising its jurisdiction in deciding what were, and what were not, Indian lands, said at p. 2389:

. . . However, this consequence must be balanced with the right of the Appeal Board to govern its own process. As was set out in the *City of Vancouver* v. *Assessment Appeal Board, Assessor of Area 9 - Vancouver et al* [and *Assessment Appeal Board et al*, (1996) 135 D.L.R. (4th) 48] case, "[T]he Board should be seen as the master of its own process, and that process should not be interfered with by the courts until a final decision is rendered, lest there be one court application after another, which would clearly frustrate the Board's mandate and legislative process. ... Although a Board in the course of its hearing may make errors, it should be accorded the benefit of the doubt until its final decision has been rendered."

Here, the Assessment Commissioner questions a ruling made during the course of a hearing of the Assessment Appeal Board but argues it is open to challenge as going to the Board's jurisdiction.

Indeed, the Respondent B.C. Telephone Company put before me all of the transcripts of the hearings so far, and the Petitioner put forward a case book of 31 cases and the Respondent 22 cases, along with a multitude of other material, the relevance of which seems questionable.

The real basis of the Petitioner's argument is that the Board has lost jurisdiction by reason of it asking to hear irrelevant evidence.

If a judicial tribunal is to lose jurisdiction by merely hearing irrelevant evidence, litigation in this province would come quickly to a standstill, that is if my own courtroom experience is any yardstick.

The Petitioner's argument is that the jurisdiction of the Board under the provisions of s. 21 of the *Assessment Act* is very limited.

There can be little doubt of this fact. Much of the Respondent's wide ranging argument about equity and the general principles of assessment law has little relevance to the issues presently before the Assessment Appeal Board because of the limitations contained in s. 21 of the *Assessment Act*, formerly s. 27.

The section has been recently amended and to date lacks any judicial interpretation. I set forth its provisions relevant to this petition:

21. (1) The actual value of the following must be determined using rates prescribed by the commissioner:

> (a) ...fibre optic cables...conduits and mains of a telecommunications, ... corporation.

Subsections (b) and (c) go on to deal with the track in place of railway companies and the pipelines of pipeline companies, and (d) and (e) deal with the rights of way for those continuous structures. Subsection (2) reads:

> (2) In prescribing rates respecting improvements referred to in subsection (1) (a) to (c), the commissioner
>
> (a) must base the rates on the average current cost of the existing improvements,
>
> (b) may, within the rates, make an allowance for physical depreciation.

Subsection (3) provides that:

> (3) For the purposes of subsection (2), **"average current cost"** means the cost to construct or install the existing improvements
>
> (a) including all materials, labour, overhead and indirect costs, and
>
> (b) assuming the improvements were to be constructed or installed
>
> (i) on July 1 in the year previous to the year in which the assessment roll is prepared, and
>
> (ii) at a location that has average construction and installation difficulty.

The section then goes on to give a specific right of appeal by a telecommunications corporation to the Assessment Appeal Board.

Subsection (6) provides that:

> (6) An appeal under subsection (5) of rates prescribed in respect of improvements referred to in subsection (1)(a) to (c) must be made, heard and decided only on the ground that the commissioner did not prescribe the rates in accordance with subsection (2)(a) or (b), or both.

That subsection makes clear that the Assessment Appeal Board's jurisdiction is strictly very limited and does not include all of the oft-quoted cases on assessment law, starting as the Assessment Commissioner's brief does with *Sun Life Assurance Company of Canada* v. *City of Montreal*, [1950] S.C.R. 220, [1952] 2 D.L.R. 81 (P.C.) and *The Assessment Commissioner of the York Assessment Office* v. *Office Specialty Limited*, [1975] 1 S.C.R. 677, which cases seem to have little bearing on the issues before this court.

In simpliciter, this court is asked to rule the Board was without jurisdiction because it asked the Commissioner's witness Mr. Tribe to inform himself over the lunch break on how the Commissioner arrived at its rates for railways and pipelines.

The transcript of the hearing reveals that Mr. Feldberg on behalf of his clients submitted the following to the Board:

... Madam Chair, I wanted this witness who has referred to pipeline stuff in his -- I wanted him to be able to tell me how the track in place rates are put together, and what the factors are in those rates, and I want the same answer for the pipeline rates. It is not a complex question. They have the materials at the Assessment Authority, the witness has said that. He is here to testify before the Board, and I don't see the difficulty -- he put them in issue, he said they're done the same way. And I'm entitled to test that.

Thereafter, the Chair heard submissions and reconvened and said the following:

All right. Back on the record after a short break by the Board to consider the request by the appellant that Mr. Tribe inform himself as to the development of the rates for pipelines and railways. The Board has considered this matter and the Board acknowledges that the Board has no jurisdiction to send a rate back for anything other than what is before it which is the fibre optic cables. **Nevertheless, the legislation is the same for all of these continuous structures and the Board considers that it is relevant to know how the other rates are determined and the Board would add that equity is always a concern,** and also adds that the respondent has raised this itself by putting it in its report that the -- all continuous structures are treated uniformly, so the Board would ask Mr. Tribe to inform himself over the lunch hour and we do not expect that it would need to be a lengthy response. Mr. Tribe has provided a formula for fibre optic cables and we would expect, the Board would expect there'd be something similar for these other structures, the pipelines and railways, so the Board will then adjourn until one-thirty --.

Part of Mr. Savage's complaints about the Board is that the adjournment was so short that it deprived the Commissioner of fair notice and that this was a breach of natural justice.

If that be so, it might be an error in law, but in any event the Board clarified this itself and permitted more time, so I do not think that issue is one which can be raised at this stage by way of judicial review.

That is just a matter of how the Board wishes to handle its own procedures, a matter entirely within its jurisdiction.

Similarly, because the Commissioner is taken by surprise on cross-examination and complains that equity between other users was not part of pre-trial discussions, I must conclude that it is for the Board to govern its own procedures and practice. What the Board may well have meant in using the word "equity" was uniformity of interpretation.

While I cannot prevent the Board from making error, nor listening to the evidence that it perceives is relevant to the matters before it, so long as they have jurisdiction, as they clearly do, to hear the appeal, they may hear such evidence in such way and manner as it wishes. If they choose to hear irrelevant evidence, that is perhaps error in law, but it is not error which goes to its jurisdiction since they are entitled, though it is not recommended, to make errors in law in the exercise of its discretion.

The issue before the Board is one of interpretation of the provisions of s. 21 of the *Assessment Act*.

Thus the primary and only issue is:

(a) has the Assessor based the appealed rates "on the average current cost of the existing improvements", which seems very much to be a subjective test, and

(b) made allowance for physical depreciation.

In determining average current costs, the Board must consider whether the rate would be appropriate on July 1st of the year in which the assessment roll is prepared.

Assuming for example, that coaxial cable that was installed in say October 1990, cost $1,000.00 per foot as supplied to it, but by July 1st in the year of the assessment its cost per foot through new technology, had been reduced to $500.00, that reduction would seem to have to be taken into consideration before getting to physical depreciation.

The subsection which seems to present the Board with a more difficult task is (3)(b)(ii), when it must determine whether the Commissioner has assumed the improvements were constructed and installed "at a location that has average construction and installation difficulty".

In determining the meaning of those words, it is no doubt tempting for the Board to inquire as to how the words were interpreted by the Commissioner in arriving at pipeline or track in place rates. However, if they have been arrived at differently, that does not mean they have been arrived at correctly in one case or the other. All three rates for fibre optic cable, railways and pipelines could have been arrived at by using a different interpretation of s. 21 and all could be wrong or only one could be right. Alternatively all three could be arrived at using similar interpretations of the section, as suggested by Mr. Tribe, and be wrong. It is the Board's obligation to determine the proper meaning and method, not the Commissioner's.

No doubt after the Board has completed its work, and this court, as appears likely, has heard a case stated, which would doubtless be appealed, and the Board has heard finally from the Court of Appeal, the Board will be quick to hear from the assessed owners of the other continuous structures, assuming their assessments prove to have been made in contradiction of a correct interpretation of s. 21.

It is indeed a matter of some difficulty for the Board, who have my sympathy, to determine what "the average current cost of existing improvements" is when "constructed at a location of average construction and installation difficulty". That having been said, however, will knowing how the words have been interpreted for railways and pipelines make their task any easier? It will certainly make it more time consuming.

As an aside, it may be something like judging a skating contest, where the top mark and lowest mark are discarded and the other marks are averaged; that is, perhaps the most difficult construction area costs should be discarded, as would be the more modest costs on the bald prairie, and the remainder averaged. The words do not seem to invite averaging the total costs of installation. However, it appears that it is "existing improvements" that must be addressed and not the improvements of some other taxpayer who owns a continuous structure of a type other than fibre optic cable. Put another way, each skater must receive his or her own marks.

Be that as it may, obvious *obiter dicta*, in summation, I cannot find that any relief may properly be granted to the Petitioner at this stage of the hearing before the Assessment Appeal Board under the *Judicial Review Procedure Act* and accordingly, his petition is dismissed with costs to follow the event on Scale 3.