

LEADING ASSESSMENT CASE LAW

LEADING ASSESSMENT CASE LAW

Two leading decisions from the Supreme Court of British Columbia that relate to the valuation of property for assessment purposes have been referenced in the valuation guide. A summary of each of the cases has been included, as well as copies of the full decisions, with pertinent sections highlighted in yellow. One decision relates to Highest and Best Use, the other relates to Income Valuation and the requirement of consistent analysis and use of economic rates when preparing valuations for assessment purposes.

HIGHEST AND BEST USE

The Highest and Best Use of a property must be considered for valuation purposes. It is also ok to consider a higher and better use, even if re-zoning is required, as long as there is better than a 50 per cent chance the re-zoning will be permitted.

Leading Case- Petro-Canada v. Assessor of 12 Area – Coquitlam - Stated Case 321 - 1991

The Appellant taxpayer, Petro-Canada, owned 377 acres of land and improvements, including an oil refinery in Port Moody, B.C. The existing refinery occupied 122 acres of flat bench land while the total area of the flat bench was 177 acres. The assessment appeal board valued all the lands as industrial lands, rejecting the assessor's opinion that some of the lands not used for industrial purposes should be valued according to their Highest and Best Use, which was a residential subdivision. The assessor appealed this decision.

Decision:

The Board acknowledged that not employing the concept of Highest and Best Use in their approach represented a departure from accepted appraisal theory and application. Accordingly, the Board erred in law by failing to determine the market value of the land on the basis of Highest and Best Use.

With respect to the fact a zoning change would be required in order to allow residential development, the judge stated "it was open to the Board to assess the likelihood of future rezoning and changes to the Community Plan on the basis of the evidence before it. If there was a reasonable expectation, i.e., a greater than 50 per cent possibility, that the amendments could be made and the lands rezoned, it would not be "speculative" to consider future changes in permitted use.

INCOME APPROACH – Consistency of Concepts and Use of Economic Rates

The same concept used in establishing capitalization rates from sales, must be used when valuing the subject property. When establishing capitalization rates, economic rates should be used.

Leading case - Westcoast Transmission Ltd v. Assessor of Area 9 – Vancouver
Stated Case 235 - 1987

The appellant, Westcoast Transmission appealed the assessment of its office building in Vancouver. The issue was the selection of the vacancy rate. In his decision, Justice Cumming laid out some principles of the Income Approach. He stated “The subject building, (which one assumes has not sold itself in the timeframe under consideration), can then have its value estimated on the assumption that it also would sell at the same capitalization rate as have others. The appraiser therefore estimates the income generated by the subject building, and divides it by the typical capitalization rate to derive an estimate of value. For this process to work, it is evident the appraiser must make some choices about the concepts to be used, and them to use them consistently.”

“In valuation theory, the value of an income producing property is merely the present value of future expected income to be generated by the property. The future being looked at is the long-term future, and when the appraiser capitalizes an existing or present income, he does so, on the premise that the figure being capitalized is representative of the long-term stabilized situation, not some temporary or short-term situation.”

“For these various reasons, economic net incomes are universally used by appraisers in arriving at a capitalization rate for the building which has sold.”

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

SC 321 Petro-Canada Inc. (Gulf) v. AA12

See Stated Case #321 (BCCA - Leave to Appeal)

PETRO-CANADA INC. (GULF CANADA LTD.)

v.

ASSESSOR OF AREA 12 - COQUITLAM

SUPREME COURT OF BRITISH COLUMBIA (A911184) Vancouver Registry

Before the HONOURABLE MADAM JUSTICE ALLAN (in chambers)

Vancouver, September 5 & 6, 1991

J.R. Lakes for the Appellant

J.E.D. Savage for the Respondent

**Valuation - Land - Highest and Best Uses - Redevelopment Potential -Zoning -
Residual Development Approach - Equity - Appeals - Leave to Appeal - Grounds**

The Appellant taxpayer, Petro-Canada, owned 377 acres of land and improvements including an oil refinery in Port Moody, British Columbia. The existing refinery occupied 122 acres of flat bench land while the total area of flat bench land was 177 acres. The balance had a slope of approximately 8 per cent and was traversed by two creek channels. The Assessment Appeal Board valued all of the lands as industrial lands rejecting the Assessor's submission that some of the lands not used for industrial purposes should be valued according to their Highest and Best Use which was a residential subdivision.

The Board accepted Petro-Canada's submission that the lands must be valued on the basis of the existing use and zoning. The Company appealed the Board's decision on the basis that it did not consider whether its resulting assessment would be fair and equitable as required by the decision of the Court of Appeal in Assessor of Area 09 - Vancouver v. Bramalea Limited. The Company also alleged the Board erred in failing to give proper consideration to the Residual Development Valuation Method. The Assessor appealed the Board's decision on the basis that it had misinterpreted the Bramalea decision as requiring that the land must be valued as an industrial site notwithstanding that the Highest and Best Use for part of the property was for residential subdivision.

HELD:

1. If a party takes a position that a proposed valuation would not be fair and equitable then it must call specific evidence to allow the Board to consider such issue. The Board cannot be faulted for counsel's election not to call specific evidence or to make submissions or to apply to re-open the hearing for either of these purposes once the decision in Bramalea was reached. It is counsel's obligation to determine the evidence to be put before the Board and the Board's obligation to consider that evidence in accordance with applicable statutory and case authority;

2. The Board did not err in rejecting the Residual Development Approach. The Board is not required to set out all of the evidence it considered and accepted or rejected in its reasons. The Board has a wide and flexible discretion with respect to determination of actual value;

3. The Board acknowledged that by not employing the concept of Highest and Best Use their approach represented a departure from accepted appraisal theory and application. The Board erred in interpreting Bramalea as preventing it from any consideration of the Assessor's submission with respect to the Highest and Best Use of the residual lands as residential. There is ample authority for the proposition that actual value is synonymous with market value. Market value reflects the highest and best potential use of the lands in question. The Board recognized that its rejection of the Highest and Best Use analysis represented a departure from the accepted principle that market value is synonymous with actual value. Accordingly, the Board erred in law by failing to determine the market value of the land on the basis of Highest and Best Use.

Reasons for Judgment October 15, 1991

THE CASE

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

1. Did the Assessment Appeal Board err in law by increasing the land assessment value of the Appellant's property without considering whether the resulting assessment would be a fair and equitable actual value as compared to similar assessments within the municipality?
2. Was the assessment made by the Assessment Appeal Board in error because the Board did not consider whether it would result in a fair and equitable assessment as required by the decision of the Court of Appeal, Assessor for Area 09 - Vancouver v. Bramalea Limited and T. Eaton Company, Intervenor?
3. Did the Assessment Appeal Board err in law by failing to give proper consideration to the Residual Development Valuation Method in determining an assessment and therefore was it made on a view of the evidence which could not be reasonably entertained?
4. Did the Assessment Appeal Board err in law in finding that the land must be valued as an industrial site?
5. Did the Assessment Appeal Board err in law in finding that the Highest and Best Use of the property cannot form the basis of valuation for assessment purposes?
6. Did the Assessment Appeal Board err in law in finding that market value is not synonymous with actual value?
7. Did the Assessment Appeal Board misinterpret the decision of Assessor of Area 09 - Vancouver v. Bramalea Ltd.?
8. Did the Assessment Appeal Board err in law applying a conservative value to the subject land notwithstanding the requirement to value at actual value?

The first three questions are posed by the taxpayer; the last five by the Assessor.

FACTS

The Appellant taxpayer, Petro-Canada Inc., owns 377 acres of land and improvements (including an oil refinery) in Port Moody, British Columbia. This application deals only with the valuation of the real property.

The existing refinery occupies 122 acres of flat bench land. The total area of flat bench land is 177 acres; the balance slopes at an 8 per cent gradient and is traversed by two creek channels which collect the local run-off water.

The Court of Revision valued the lands at \$16,732,650 Major Industry in 1989 and \$16,439,800 Major Industry in 1990. The taxpayer appealed the assessment and its appraiser submitted a valuation of \$8,732,500 using the Direct Sales Comparison Approach and the Land Residual Method Approach. Although the Assessor did not appeal or cross appeal, his appraiser submitted a valuation of \$27,000,000 based on the lands' Highest and Best Use. It included a valuation of \$18,960,000 on the refinery site (using the Direct Sales Comparison Approach) and a valuation of the remaining 203.7 acres on "a Hypothetical Residential Subdivision use" (using the Direct Sales Comparison Approach and the Cost of Development method).

The Assessment Appeal Board confirmed the classification of the lands as Major Industry and valued it as \$22,235,000.

Stating that it relied heavily upon the decision of the Court of Appeal in *Assessor for Area 09 - Vancouver v. Bramalea Ltd.* [unreported decision, B.C.C.A. Victoria Registry No. CAV00992, December 14, 1990], the Board rejected the Assessor's submission that the lands which were not used for an industrial purpose should be valued according to their Highest and Best Use which was as a residential subdivision. Instead, it accepted Petro-Canada's submission that the lands must be valued on the basis of its existing use and zoning; i.e., industrial. In doing so, it considered both the zoning and the Municipality's Official Community Plan which states, in part:

Existing industrial areas of the City will be retained for the term of this Plan. They include the heavy industrial uses along the western waterfront, the Gulf [now Petro-Canada] Oil site.

In arriving at its valuation of the lands, the Board accepted the Assessor's valuation of the industrial portion of the lands (174 acres) and the taxpayer's valuation of the excess lands (203 acres).

The Board delivered its Reasons on February 15, 1991. At the request of the parties, it stated a case on March 28, 1991. On May 9, 1991, Madam Justice Sinclair Prowse remitted the Stated Case back to the Board for amendment. On May 29, 1991, the Board filed a Reply to her order.

ISSUES

1. Did the Assessment Appeal Board err in law by increasing the land assessment value of the Appellant's property without considering whether the resulting assessment would be a fair and equitable actual value as compared to similar assessments within the municipality?

2. Was the assessment made by the Assessment Appeal Board in error because the Board did not consider whether it would result in a fair and equitable assessment as required by the decision of the Court of Appeal, *Assessor for Area 09 - Vancouver v. Bramalea Limited and T. Eaton Company, Intervenor*?

The first two questions may be dealt with together. The essence of Mr. Lakes' argument is that once the Board became aware of the decision in *Bramalea*, it had an obligation to re-open the assessment for further evidence or submissions, or both, in order to determine a fair and equitable assessment in relation to comparable (major industrial) land within the municipality.

The hearings before the Board commenced August 7, 1990 and ended October 5, 1990. On December 14, 1990, the Court of Appeal rendered its decision in Bramalea. The Board specified in its written Reasons handed down on February 15, 1991 that it had considered, and "relies most heavily", on that decision.

In its Reply, the Board dealt with the issue of equity raised by Petro-Canada:

With respect to the question of equity as enunciated in the Bramalea decision, the Board heard no evidence of other assessed values within the municipality or elsewhere. The Board made no findings based on equity. The Board stated at page 14 of its decision, "The Board also recognizes that the 'thrust' of the Bramalea decision dealt with the issue of equity and that equity may indeed be better achieved by adopting a 'conservative' approach to value." This statement was meant to indicate that eliminating speculative or subjective elements probably results in a lower valuation. The solicitor for Petro-Canada raised the issue of equitable valuation uniform with other assessments but there was no evidence upon which the Board could deal with this issue particularly when the Bramalea case had not been decided when the evidence was heard in this case.

(emphasis added)

Mr. Lakes submits that when the Board "re-opened the whole question of the assessment" under s. 71 of the Act, it was required, by the principles set out in Bramalea, to give due consideration to the assessment values of other similar lands and improvements in the municipality. In particular, it should have considered the valuation of another oil refinery which is apparently situated in the same municipality.

Although Mr. Lakes concedes that the Board can re-open the whole question of the assessment under s. 71 of the Act, he characterizes the exercise of that jurisdiction as questionable. In my view, the jurisdiction of the Board under s. 71 is not questionable and the fact that the Assessor did not appeal but sought a higher assessment does not impose any higher duty upon the Board. In *Trizec Equities Ltd. v. Assessment Area of Burnaby-New Westminster (10) Case 122*, December 5, 1980 (B.C.C.A.), Seaton, J.A., for the Court, stated that "the Board can fix what it considers to be the proper value no matter how the appeal comes to be before it."

The duty of the Board to consider equitable principles is contained in the Act. Section 69 provides that, in an appeal from the Court of Revision, the Board "may determine, and make an order accordingly":

69. (1) (e) whether or not the value at which an individual parcel under consideration is assessed bears a fair and just relation to the value at which similar land and improvements are assessed in the municipality or rural area in which it is situated;

As the Board noted:

The solicitor for Petro-Canada raised the issue of equitable valuation uniform with other assessments but there was no evidence upon which the Board could deal with this issue particularly when the Bramalea case had not been decided when the evidence was heard in this case.

(emphasis added)

I am unable to accede to Mr. Lakes' argument that the Board had a positive duty to re-open the hearing on its own initiative. Mr. Lakes says that he did not adduce evidence with respect to the value of the other oil refinery at the hearing because the Board had, in another case, declined to hear such evidence. If indeed Bramalea "changed the law" in this regard, surely it was open to Mr. Lakes (who was the successful counsel on the Bramalea appeal) to apply to the Board for the opportunity to adduce further evidence or to make further submissions in light of that decision.

The Board cannot be faulted for counsel's election not to call specific evidence or to make submissions on particular issues or to apply to re-open the hearing for either or both of those purposes. It is counsel's obligation to determine the evidence put before the Board for its consideration and the Board's obligation to consider that evidence in accordance with applicable statutory and case authority.

The answer to Questions No. 1 and 2 is "No".

3. Did the Assessment Appeal Board err in law by failing to give proper consideration to the Residual Development Valuation method in determining an assessment and therefore was it made on a view of the evidence which could not be reasonably entertained?

The taxpayer's appraiser valued the bench land by using both the Direct Sales Comparison method and the Residual Development Valuation method. The Assessor's appraiser utilized only the first approach.

In its Reasons, the Board indicated, without elaboration, that it preferred the Assessor's approach in valuing the bench land.

In its Reply, the Board expanded upon its reason for determining that the Comparative or Direct Sales Comparison Approach was the best method of valuation in this case. It stated that the Residual Development Approach is normally only used where there is little or no other evidence of market value and that those circumstances did not pertain in this case.

Mr. Lakes submits that the Board must act judicially and determine the case on the evidence adduced and that there was no evidence before it to justify that conclusion. In fact, the report of the Assessor's appraiser, which was introduced into evidence, considered both the Residual Development Approach and the Direct Sales Comparison Approach and rejected the former on the basis that it "is best used when no other market evidence is available. It has a multitude of weaknesses." The report goes on to identify some of those weaknesses.

I find that there was evidence before the Board to justify its rejection of the Residual Development Approach in the circumstances and that its rejection of that method was not "arbitrary".

Mr. Lakes points out that the first time that the Board articulated its reasons for rejecting the Residual Development Approach was in its Reply. In my view, the Board was not required to set out all of the evidence it had considered, accepted and rejected in its initial Reasons. When required to clarify and expand upon its Reasons in Reply, it did so.

Mr. Lakes also points out that the Board did not challenge the Development Residual Approach method when the taxpayer's appraiser was giving evidence or at all during the hearing. Again, I think it was the duty of counsel to question the validity of that method through cross-examination of the Assessor's appraiser and direct examination of its own witness, rather than the duty of the Board to raise the issue with any of the witnesses.

Furthermore, the Board has a wide and flexible discretion with respect to its determination of actual value: *R. v. Penticton Sawmills Ltd.* (1954) 11 W.W.R. (N.S.) 351 at 353 (B.C.S.C.). That principle is applicable to the factors which the Board may consider, such as the present use and location of the property which affect its value, and to the method or methods of valuation which the Board considers appropriate to determine actual value in a particular case.

The answer to Question No. 3 is "No".

4. Did the Assessment Appeal Board err in law in finding that the land must be valued as an industrial site?

5. Did the Assessment Appeal Board err in law in finding that the Highest and Best Use of the property cannot form the basis of valuation for assessment purposes?
6. Did the Assessment Appeal Board err in law in finding that market value is not synonymous with actual value?
7. Did the Assessment Appeal Board misinterpret the decision of Assessor of Area 09 - Vancouver v. Bramalea Ltd.?
8. Did the Assessment Appeal Board err in law applying a conservative value to the subject land notwithstanding the requirement to value at actual value?

These questions, posed by the Assessor, can be answered together. They flow from the single issue of whether the Board erred in its interpretation of Bramalea with respect to the proper valuation of the lands.

At the hearing before the Board, Mr. Savage argued that the Highest and Best Use for the lands is partly industrial and partly residential. He referred to an appraisal commissioned by Gulf Canada Ltd. in 1982 which suggested redeveloping a portion of the land as residential and a development potential study commissioned in that year. He submitted that the Official Community Plan was outdated. He adduced evidence before the Board that the City would "favour" rezoning the excess land portion of the site to residential use.

The Board referred to the evidence of the Assessor's appraiser in its Reasons:

The City had indicated that they would support a comprehensive residential development of the "excess" lands involved with this property and, at the same time, favour the continued use of the industrial portion. They indicated however, that they would not favour the expansion of industrial use on to the "excess" lands.

The Board further noted that the Director of Development for the City of Port Moody had confirmed the continuation of the existing industrial use "together with the likelihood of the development of adjoining 'excess' lands for residential use."

In its Reply, the Board stated that the Assessor's analysis of Highest and Best Use for the excess lands would be a reasonable and proper approach in determining market value. However, Bramalea prevented consideration of that approach because the Highest and Best Use of the excess lands as a residential subdivision was dependent upon rezoning of the lands and the Board concluded that it was required to value all of the lands within the framework of the existing industrial zoning. **The Board acknowledged that by not employing the concept of Highest and Best Use, their approach represented "a departure from accepted appraisal theory and application".**

The Board concluded that Bramalea stands for the proposition that valuation cannot be based on speculation, particularly with respect to future changes in permitted use. Residential development of the Petro-Canada site could only occur after rezoning - a change in permitted use. The Board relied upon the following passage from Bramalea:

The elimination of 'subjective' elements of value associated with the concept of 'special value to the particular purchaser' and of factors of a speculative nature, particularly as to future changes in permitted use ... are among factors which render the valuation necessarily a 'conservative' one.

(emphasis by the Board)

Although neither counsel referred me to the following case, I note that Bramalea was considered by Holmes, J. in *T. Eaton Company Ltd. v. Assessor of Area 09 - Vancouver*, unreported reasons, B.C.S.C., Vancouver Registry No. A901589, August 30, 1991. (Appeal to the Court of Appeal filed.) There the property was the subject of a restriction as to its present use under an agreement with the City of Vancouver. At p. 6, Holmes J. noted:

The Board did, however, consider the nature of the restrictive covenant in the agreement in question and found it neither restrictive nor permanent. In doing so, the Board is required to find whether there is a reasonable expectation the restriction in question could be changed. It would not be open to the Board to assume a change could be made, and reasonable expectation "... connotes something higher than a 50 per cent possibility." *Farlinger Development Limited v. Borough of East York* (1975) 8 L.C.R. 112 at p. 123 and 124 (Ont. C.A.).

In finding that the Board committed no error in law, Holmes J. noted that in *Bramalea*, Taylor, J.A., on behalf of the Court, "cautioned as to the 'conservative' nature of assessment valuation and care that must attend giving consideration to' ... factors of a speculative nature particularly to future changes in permitted use, ..." In the case before him, he concluded that it was open to the Board to find that there was a "reasonable expectation" that changes of use could occur.

By analogy, in the present case, it was open to the Board to assess the likelihood of future rezoning and changes to the Community Plan on the basis of the evidence before it. If there was a reasonable expectation, i.e., a greater than 50 per cent possibility, that the amendments could be made and the lands rezoned, it would not be "speculative" to consider future changes in permitted use.

The Board must assess the evidence adduced before it at the hearings and determine whether there is a reasonable expectation that the lands can be rezoned. If the Board concludes that the zoning probably can be changed, it should go on to consider the quality of the evidence with respect to the issue of whether the marketing of the subject lands is a realistic concept. As the Board noted in its Reply:

Developing a site to its Highest and Best Use can also be limited by practical restrictions such as topography, the requirement for municipal services and approvals, etc. The economics of development also require consideration.

In summary, the issues of whether the lands could probably be rezoned and whether the lands could in fact be realistically marketed as residential lots at the relevant time are questions of fact to be determined on the evidence.

I conclude that the Board erred in interpreting *Bramalea* as preventing it from any consideration of the Assessor's submission with respect to the Highest and Best Use of the residual lands as residential.

Mr. Lakes argues that "although the Assessor chose to allege that part of the land was 'excess land' there was no evidence to show that the land was not in fact being used as part of the refinery site." He submits that, in addition to their zoning and their designation in the Community Plan as industrial, the lands have been found to be part of one "continuous oil refinery site." In further support of the argument that the lands must be valued as industrial lands, Mr. Lakes points to s. 26(3.1) of the Act which requires land and improvements to be valued as "the property of a going concern". Those arguments were raised before the Board.

There is nothing in this case to suggest that the Board valued Petro- Canada's lands and improvements as anything other than a going concern. The fact that a going concern is carried on is an additional circumstance for consideration - together with the factors enumerated in s. 26(1) to (3) - for the purpose of determining actual value. Section 26(3.1) is not relevant to the issues raised on this appeal.

The Board also considered Mr. Lakes' submission that the "excess lands" were crossed by pipelines and other equipment and were, therefore, used as a part of the industrial complex. In its statement of material facts, the Board referred to a previous Board decision of November 17, 1989 which found:

That there was a multiplicity of pumps and pipelines connecting the refinery area to the marketing terminal which the Board, therefore found to be part of the oil refinery complex as one continuous site.

On the other hand, the Board considered the 1982 appraisal and the development potential study commissioned by Gulf Canada which proposed that the "excess lands" were suitable for residential development. The development potential study and the appraisal refer to "surplus lands presently existing outside of the refinery area" and to "excess lands" respectively.

In valuing the lands, the Board distinguished between the 174 acres of "Upper Bench Land Capable of Industrial Development" and the 203 acres of "excess lands". By doing so, it would appear that the Board accepted the appraiser's submission and found as a fact that the latter lands were excess to the requirements of Petro-Canada's industrial operations.

The last issue raised on this appeal relates to the relationship between actual value and market value. Section 26 requires the Assessor to determine the actual value of the lands. There is ample authority for the proposition that actual value is synonymous with market value: cf. *Montreal v. Sun Life Assurance Co. of Canada* (1951) [1952] 2 D.L.R. 81(P.C.); and *Assessment Commissioner of York v. Office Specialty Limited* [1975] 1 S.C.R. 677. Indeed, in *Bramalea*, the Court of Appeal stated:

The Courts have held that 'actual value' means the price which property would fetch if sold in the market on the statutory valuation date in a cash transaction between informed parties both free from duress and influenced neither by speculative considerations nor by any 'special value' which the property might have to a particular purchaser, which it would not otherwise have."

In *Jericho Tennis Club v. Assessor of Area 09 - Vancouver*, unreported reasons for judgment of Shaw, J., B.C.S.C. Vancouver Registry No. A903927, April 15, 1991, the Court held that market value reflects the highest and best potential use of the lands in question. At p. 7, Shaw, J. stated:

Thus, where a property such as Jericho's is not put to its highest and best economic use, s. 26(3) nonetheless authorizes a market value assessment which takes account of the land's Highest and Best Use.

In the case at bar, the Board recognized that its rejection of the Highest and Best Use analysis represented a departure from the accepted principle that market value is synonymous with actual value.

I conclude that the Board erred in law by failing to determine the market value of the lands on the basis of Highest and Best Use. The "conservative value" which the Board considered itself bound to find would only be the appropriate value if the proposed "Highest and Best Use" had a less than 50 per cent probability of occurring: *T. Eaton Co. Ltd.*, supra.

The answer to Questions 4, 5, 6, 7 and 8 is "Yes".

CONCLUSION

For the foregoing reasons, I find that the Board did not err in law with respect to the first three questions posed by the Appellant but that it did err with respect to the latter five questions posed by the Respondent.

The Board should determine on the evidence before it (a) whether there is a realistic likelihood that the "excess lands" can be rezoned as residential and that the development plan can be changed; and, (b) after considering all the relevant factors, the Highest and Best Use for those lands. If the proposed "Highest and Best Use" of the excess lands is found to be residential after assessing the probability of rezoning and the feasibility of residential subdivision, then the Board must determine the actual value, i.e., the market value, of the lands on that basis.

The case will be remitted to the Assessment Appeal Board in respect of Questions 4-8, inclusive. The Assessor is entitled to cost at Scale 3.

ASSESSMENT APPEAL BOARD Before King, Le Noury, Cunningham Vancouver, June 26, 1992

SC 235 Westcoast Transmission Co. Ltd. v. AA09

See also Stated Case #264

WESTCOAST TRANSMISSION COMPANY LIMITED

v.

ASSESSOR OF AREA 9 — VANCOUVER

Supreme Court of British Columbia (A870297) Vancouver Registry

Before MR. JUSTICE CUMMING (in chambers)

Vancouver, May 28, 1987

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

Income Approach — Economic Factors — Acting without Evidence — Value to Owner

The Taxpayer appealed its office building in Vancouver. Both the taxpayer's appraiser and the Assessor adopted a capitalization approach to value, and used an 'economic' net income, assuming a normalized vacancy rate of 7.5%. In fact the building had a higher actual income because it was full, being largely occupied by the taxpayer itself.

The Board applied a zero vacancy rate, reasoning that it was in fact full, and that because it was largely occupied by its owner it was 'not exposed to the weakness of the market place'.

HELD:

On further appeal that the Board erred in law in

a) using an 'actual' vacancy rate in developing net income, rather than an economic net income;

b) taking into consideration circumstances peculiar to the current owner, rather than to any owner;

c) acting without any evidence, or on a view of the evidence which could not reasonably be entertained, since all the appraisal evidence was that an economic vacancy should be applied;

HELD ALSO:

That nothing in Trizec Equities Ltd. v. Assessor of Area 9 — Vancouver (1984), B.C. Stated Case 196, can be construed to mean that in using an income or market approach the actual vacancy rate of the subject, rather than the economic vacancy rate indicated by market analysis, is to be employed.

Reasons for Judgment

June 10, 1987

THE CASE

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

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

The case stated sets out the following material facts:

1. The subject property is owned by the appellant, Westcoast Transmission Company Limited.
2. The property is a twelve-storey building with basement parking located at 1333 West Georgia Street, Vancouver, British Columbia, on the north side of West Georgia Street at the corner of Broughton Street.
3. As at July 1984, Westcoast Transmission Company Limited occupied nine of the floors. The other three floors were occupied by tenants, including Xerox Ltd., Excelsior Travel and Beaver Foods Cafeteria.
4. The total value assessment of the land, buildings and machinery and equipment was \$16,794,950 for the 1985/1986 biennial assessment roll.
5. The appellant, Westcoast Transmission Company Limited, has appealed the assessment of the actual value to the Court of Revision and the Assessment Appeal Board of British Columbia.
6. At the Appeal Board hearing, Mr. Geddes, the witness on behalf of Westcoast Transmission Company Limited, submitted a value of the property by the income approach of \$13,852,000 . . .
7. At the Appeal Board hearing, Mr. Metcalf, the witness on behalf of the Assessor of Area #09, submitted a value of the subject property by the income approach of \$16,125,000 . . .

8. Both the valuation submitted by Mr. Geddes and the valuation submitted by Mr. Metcalf included a 7½% vacancy rate. The 7½% vacancy rate utilized by the appraisers does not purport to be the actual vacancy rate of the subject property at the date of valuation. Mr. Geddes, witness for the appellant, listed the results of three surveys of the level of vacancy for A and Triple A class buildings which demonstrated a range between 15.8% and 17.7%. He asserted that a 7.5% vacancy rate was appropriate to the subject on the basis that Park Place, which apparently had a disproportionate influence on the vacancy statistics, was a triple A building, while the subject was an A or A-building.

Mr. Metcalf, the witness for the assessor, based his vacancy allowance on the history of vacancy within the downtown peninsula for a ten-year period. Mr. Metcalf testified 'the average vacancy is 6.47% and the median vacancy is 3.8%. I've allowed myself a little cushion there in pushing the average up to 7½%'.

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

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

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

THE ISSUE

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

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

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

"ACTUAL VALUE"

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

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

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

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

"(3) In determining actual value, the assessor may, except where this Act has a different requirement, give consideration to present use, location, original cost, replacement cost, revenue or rental value, market value of the land and improvements and comparable land and improvements, economic and functional obsolescence and any other circumstances affecting the value of the land and improvements".

THE ASSESSMENT PROCESS

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

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

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

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

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

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

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

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

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

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

DUTY OF THE COURT

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

"So long as the Assessment Appeal Board which must, in deciding appeals to it, apply the Act does not:

1. misinterpret or misapply the section — see *Pacific Logging Co. Ltd. v. The Assessor [1977]* 2. S.C.R. 623 adopting the dissenting judgment of McIntyre, J.A. in the Court of Appeal 12th November, 1976 (unreported);
2. misapply any applicable principle of general law . . . or
3. act without any evidence or upon a view of the facts which could not reasonably be entertained

this Court has no power to intervene.

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

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

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

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

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

DUTY OF THE ASSESSMENT APPEAL BOARD

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

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

And at pages 22 to 23:

"With respect to the Board, it is my opinion that it erred in law in both appeals in concluding in effect that it could not, on the evidence adduced, make a finding as to the appropriate capitalization rate. It is inescapable that the Board's decision is based on its own opinions that are unsupported by evidence.

Counsel for the respondent submitted that the Board was entitled to reject the opinions of all four experts. He relied on the reasons given by the Board; but relied also upon the submission that the Board is an administrative body acting in its own field of expertise; and entitled to reject those opinions based upon such expertise. I do not agree. There are occasions when the Board does function in an administrative capacity, and where its decisions are purely administrative ... In conducting the hearing of an assessment appeal it is my opinion that the Board functions in a judicial capacity; *The Assessment Act*, s. 57 (2); and *Peterkin v. Hydro-Electric Power Commission of Ontario*, 12 D.L.R. (2d) 791. It is required to hear and determine the case on the evidence adduced. No doubt the members of the Board do have a certain degree of expertise in assessment matters which assists in understanding, assessing and weighing evidence. In deciding assessment appeals, if the Board were permitted to act on its own expertise in complex matter and substitute its unsupported opinions for those expressed in evidence, then the exercise ceases to be judicial in character. The members of the Board would be their own experts not subject to cross-examination; their opinions would remain unknown until after delivery of the

decision and therefore not open to contradiction or challenge. The parties would not know what case had to be met. There is no right of appeal on a question of fact. It would be quite unacceptable in our adversarial system where the parties, and not the court, decide what evidence to adduce."

At page 29, he stated his conclusion:

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

THE MERITS

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

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

The judgment of Ruttan, J. *Re Assessment Equalization Act; Re Crown Zellerbach Canada Ltd.* (1959) 16 DLR (2d) 144, I interpret as stating, in other words, the same rule.

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

'And so in applying an objective standard to the factors listed in s. 37 (1) of the Act the Assessor is not confined to accepting "present use" as the best or only one to which the property can be put. He may well decide that a water lot used as a dumping ground would be better developed as a yacht anchorage. But he must concede that "present use" does not mean "present value to the present owner". I adopt with respect the words of my brother Wilson in the case of *Re C.P.R. and Assessor of Port Coquitlam* (1957) 77 CRTC 95, at 100:

' "Present use" must mean present, proper and practicable use, so that the speculator shall not escape proper taxation nor the developer be penalized. '

' "Valued as the property of a going concern" does not mean "as the property of the going concern" and in the present case adds nothing not already included under the factor "present use." '

"It may be objected that under the catch-all phrase 'any other circumstances affecting the value' which appears in both s. 37 (1) of our Act and in the relevant section of the Ontario *Assessment Act*, so subjective a factor as profits may be admitted for consideration by the Assessor. This was the situation in *Toronto*

(City) v. Ontario Jockey Club [1950] 3 DLR 730, [1950] OR 571, where evidence was held admissible under the authority of this clause as to the carrying on of a race track at a profit, and the extent of those profits.

"But in that case it was held that the Board needed this information to ascertain what was the actual value of the land with buildings upon it, when used for the purpose of a race track which was the only purpose for which the property had been used for many years and was the proper basis on which the assessment should have proceeded."

I conclude that special value to a present owner is not a proper basis of assessment under sec. 37."

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

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

"We are all of the view that an equitable assessment of multi-residential properties based on the income approach must necessarily use economic rents rather than actual rents. As stated by this Court, speaking through Evans J.A. in *Stevens Building Ltd. v. City of Sudbury*, May 22, 1973, unreported:

'... in adopting the income approach to valuation, the income of the property must be calculated on the basis of the current market rent for comparable premises at the time that the assessment is made.' "

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

As Weatherston J.A., delivering the judgment of the Court in *Re Campeau Developments Ltd. et al. and Regional Assessment Com'r Region No. 29 et al.* (1983), 41 O.R. (2d) 39, 144 D.L.R. (3d) 632, 15 O.M.B.R. 44, said at p. 42 O.R., p. 635 D.L.R., p. 48 O.M.B.R.:

'It has long been recognized that it is not particularly important that an assessment be individually correct, provided that all properties are assessed at the same proportion of their true values, so that each bears its fair share of the tax burden. By s. 90 (1) the amount of any assessment is not to be altered unless the Assessment Review Court, judge, board or court is satisfied that the assessment is inequitable with respect to the assessment for similar real property in the vicinity. That section puts the onus of showing inequity squarely on the appellants.' "

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

"The subject of this appeal is a fifteen year old, twelve storey Class 'A' office building designed and built to be the head office of Westcoast Transmission Company. It is a unique structure located on West Georgia Street, which is a major amenity thoroughfare.

The evidence led by the appellant indicates that as of July 1984 the date of valuation, nine of the twelve floors were occupied by the owner. The other major tenant, occupying three floors, is Xerox whose lease upon expiry contains an option to renew provided the space is not required by the Owner. It appears that the owners control over the building is absolute.

The Board believes that the *Sun Life Case* and the *Trizec Case* must be considered in arriving at a market value for this unique property. Simply put the *Sun Life Case* requires that the value conclusion reached must be indicative of the actual experience of the property in the year in question. While much is made by both parties of the vacancy experience in quality office space in downtown Vancouver, the Board finds that the subject building by the very nature of its ownership and operation is not exposed to the weakness of the marketplace.

The Board is of the opinion that what would also be apparent in the mind of the sophisticated buyer is the quality, age and location of the building serving the purpose for which it was designed and the security of the covenant of Westcoast Transmission."

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

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

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

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

"Since the problem is one of statutory interpretation it is helpful to recite a few general principles. In *MacMillan Bloedel Limited v. Assessor of Area 07 — Sunshine Coast et al.* (1983) 47 B.C.L.R. 291 (C.A.), Taggart J.A. *per curiam* set out the guidelines a court should follow when ascertaining the meaning of the words used in the *Assessment Act*. He said at page 302:

‘my opinion is that the Tax Act is an integral part of the statutory scheme whereby taxes are levied on real property and improvements. As a part of that scheme it is to be construed in the same way as a taxing statute.

...Shortly put, the principles are that if the words of the statute are in themselves precise and unambiguous they are to be construed in their ordinary sense. If the imposition of the tax is not shown clearly and without ambiguity the construction should be in favour of the taxpayer.’ "

At page 1106, he continued:

"The words ‘state and condition’ hide more than they reveal. They do not clearly say a vacancy rate in a commercial building is a state or condition which the assessor must consider or must ignore. But if these words allow the assessor to include a 30% vacancy rate as part of his assessment, there is a possibility this will result in a benefit to the taxpayer and not a detriment because notionally a building with a high vacancy rate should have a lower market value than a similar building that is fully occupied.

Applying the earlier principle that any ambiguity (or uncertainty) in the *Assessment Act* should be resolved in favour of the taxpayer, the vacancy rate in the Trizec building must therefore be taken into account by the assessor. This apparently means the assessor must ask himself what would be the market value of the Trizec building as of 31 December, 1982, if on that date it had a 30% vacancy rate?"

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

CONCLUSION

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

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

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