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CROWN ZELLERBACH CANADA LIMITED
and Its Associated Companies;
POWELL RIVER COMPANY LIMITED and Its Associated Companies;
ALASKA PINE & CELLULOSE LIMITED;
STRAITS TOWING LIMITED;
TAHSIS COMPANY LIMITED;
MacMILLAN & BLOEDEL LIMITED and Its Associated Companies;
COLUMBIA CELLULOSE COMPANY LIMITED;
and
CANADIAN COLLIERIES RESOURCES LIMITED

v.

ASSESSMENT DISTRICTS OF ALBERNI, COMOX, COWICHAN,
NANAIMO, NEW WESTMINSTER, PRINCE RUPERT and VANCOUVER

Supreme Court of British Columbia (X606/58)

Before: MR. JUSTICE J.G. RUTTAN

Vancouver, July 21, August 5,6,7, 1958

Lloyd G. McKenzie for the Provincial Assessors of the appellant assessment districts
Charles Brazier, Q.C., D.S.D. Hossie, D.L. Vaughan, D. Moffett and J.I. Bird for the Respondent companies

Reasons for Judgment

The subject-matter of this appeal consists of some 400 water lots leased by the Crown in right of Canada and in right of the Province of British Columbia, as the case may be, to the various respondents for purposes of log-dumping, log-booming, and log storage. These water lots are situated in the Coastal area of the Province, for the most part on tidal waters.

The lots were an inspected and revalued as part of a complete reassessment under the direction of the Surveyor of Taxes for British Columbia.

The Court of Revision upheld the assessments, with only minor adjustments as recommended by the appraiser. From that decision the lessees appealed to the Board of Assessment Appeals. This Board found that the method of assessment included use of appraisal report forms which contained certain items described as "economic factors numbers 4, 5, and 6," and certain items having reference to the physical characteristics of the lots.

The Board's finding is contained at paragraph 4 of page 7 of the stated case, as follows:

> 4. The Board found that the use of the appraisal report form which gave consideration to the physical and economic factors was proper for assessment purposes in its use of the physical factors and improper in its use of the economic factors which employed the concept of value to the owner. The Board gave unanimous reasons for judgment, a copy of which is appended hereto.

Upon request to present the case for opinion of this Court, the Board has submitted the following questions for opinion:

> "1. Was the Board correct in finding that the use and consideration by the Assessor of the factors contained in paragraphs 4, 5, and 6 of Exhibit 4 meant the application by the Assessor of the "value to the owner" concept?
>
> "2. If Question 1 is answered in the affirmative, was this concept wrong in law?
>
> "3. Was the Board correct in finding that each lease should be looked at in its entirety and consideration given to the factors of value on the market, location, and physical characteristics to determine its value as opposed to the application of the valuation procedure applied by the Assessor?
>
> "4. Was the Board correct in finding that water lots immediately adjacent to manufacturing operations should be considered as an integral part of the industrial upland, and in the absence of evidence to the contrary should be assessed upon the basis of 50 per cent of the upland value immediately adjacent?
>
> "5. Was there evidence to justify the Board finding that a large number of the parcels under appeal were assessed beyond actual value as defined in section 37 of the *Assessment Equalization Act* (or section 30 of the *Taxation Act*)?"

As a preliminary objection, counsel for the respondent took the position that I am limited in my review to the consideration only of Question 2. It was submitted that all the other questions involved matters of fact or mixed law and fact, and as such were outside the jurisdiction of this Court under the terms of the *Assessment Equalization Act*, section 51 (1).

There is no doubt that this objection is well taken as to Questions 3, 4, and 5. For Question 1, Mr. Vaughan has referred me to the decision of our Court of Appeal in the case of *R.* v. *Penticton Sawmills Ltd.* (1954) 11 W.W.R. (N.S.) at page 351 as authority for the proposition that an appellate Court will not query a Board's finding as to the method of assessment employed, but only as to whether or not that method is right in law. Thus Chief Justice Sloan, at page 352, said as follows:

> The Assessor in valuing land under that section took into consideration as a factor the value of the mature and second growth timber cover thereon and in arriving at the value of the mature timber, after making some adjustments for the location, accessibility and quality of timber, applied the weighted average of the Forest Service upset prices over a period of five years on Government timber sales in the forest district in question.
>
> Other tests of value were applied to the second growth timber, but it seems to me the findings of fact below preclude this Court from venturing upon a consideration thereof, as the issue in this instance involves more than a question of law alone. I propose in consequence to limit my observations to the method adopted to value mature timber.

And again at page 356 of the same judgment the Chief Justice says as follows:

> We are not, however, in this appeal troubled with the actual assessment in terms of quantum, but whether or not the Assessor erred in principle in adopting as a guide to values the upset price of timber sales, subject, of course, to his adjustment of his assessments as differing circumstances demanded.

But in the present case the problem stated in Questions 1 and 2 is, in effect: (a) What principle did the Assessor apply to certain economic factors, and (b) was it the right principle? The Penticton Sawmill case was concerned only with the second of these problems, which is

contained in our present Question 2. There was no dispute as to the nature of the formula or principle that had been applied in arriving at the value of the timber in question. The learned Judge in the Supreme Court had been of the opinion that the Assessor proceeded on a wrong principle and contrary to section 30 of the *Taxation Act*. The Court of Appeal held that the trial Judge erred in this opinion and that the formula was the proper one.

This authority does not therefore help me to decide the first problem, for the appellants here deny the very existence of any such principle described by the Board as "value to the owner concept," and claim an error in law by the Board in reaching that decision.

Certainly the Board has made some findings of fact as set forth in its stated case: that the Assessor in arriving at his valuations for assessment purposes used and applied certain physical and economic factors to the water lots in question, including a table of values as set out in paragraph 6 of Exhibit C and Exhibit D.

These findings are not in dispute and could not in any event be reviewed by me. But in selecting these factors, weighing them and applying them to his formulas to arrive at assessment values, the Assessor purported to follow out the terms of the *Assessment Equalization Act*, section 37 (1). The Board's conclusion is that he erred and followed a wrong principle. These actions of both the Assessor and the Board are matters of law, and as such may be reviewed by me.

But before answering Question 1 there remains the preliminary inquiry: What is meant by the" value to the owner concept"? If the Board meant "value to the hypothetical owner," the appellants could not quarrel with an affirmative answer to Question 1, for, as I understand Mr. McKenzie's argument, he asserts this to be the only true concept of assessment and the one which was applied. If, however, the Board in Question 1 meant "special value to the particular owner," then the appellants charge the Board has misconceived the reasoning of the Assessor and so has reached a faulty conclusion.

The appellants submit that the Board has been led astray into thinking the Assessor was considering solely the necessitous value to the owner in possession and has accused him of applying what is known as the "blackmail principle" as found in the English Railway Assessment cases and referred to by Mr. Justice O'Halloran in the case of *C.N.R.* v. *the City of Vancouver* (1950) 2 W.W.R. at page 342.

In the alternative, or perhaps in addition, the appellants submit that the Board is accusing the Assessor of applying the compensation principle, which is useful only in expropriation cases. In support of that argument it is to be noted that the most recent reference to "value to the owner" is found in an expropriation case recently decided by the Court of Appeal in Ontario in *Steel* v. *the Municipality of Metropolitan Toronto* (1956) 5 D.L.R. at page 239. Mr. Justice Laidlaw, in giving the judgment of the Court, said at page 243:

> The sum to be paid for the land expropriated is measured by the value of the land to the owner at the time of the expropriation.

And again at page 244, quoting with approval the judgment of Mr. Justice Rand in *Diggon-Hibben* v. *The King* (1949) D.L.R. 785 at page 787:

> In this we have no need of an imaginary market, purchase or interest; we have the real interest of the owner, and its measurement in value is the task for the Court. The rule applies to cases such as this where the possibilities of the land for which the claim is made are actually realized by the owner in the use to which he has put it.

And Laidlaw, J.A., continues on the same page:

> It is to be observed that "value to the owner" is not essentially the same as "fair market value," and the learned Chief Justice took pains to make that statement of the law plain when he quoted the language used by Duff, J., in *Lake Erie & Northern R. Co.* v. *Brantford Golf & Country Club* (1916), 32 D.L.R. 219 at page 229, 21 C.R.C. 360, and which I reproduce: "It does not follow, of course, that the owner whose land is compulsorily taken is entitled only to compensation measured by the scale of the selling price of the land in the open market. He is entitled to that in any event, but in his hands the land may be capable of being used for the purpose of some profitable business which he is carrying on or desires to carry on upon it and in such circumstances it may well be that the selling price of the land in the open market would be no adequate compensation to him for the loss of the opportunity to carry on that business there."

Mr. McKenzie argues that here there is no evidence to support the concept of "value to the owner" as defined in the Steel case. For example, he cites the hypothetical case of an actual expropriation of a water lot fronting on a pulp-mill and thus representing the most intensive use of the lot. If such an expropriation should deprive the owner of the mill of all water access and of any immediate storage area, then the value to be placed by expropriation would be greater than that which would be placed on the lot by the present Assessor. The owner's loss of business, the disaster to his operation, would have to be valued on a very subjective basis involving factors having no application and claimed by the Assessor not to have been used in the present case.

I find counsel's illustration a valid one, and if the Board has used "value to the owner" in the same connotation as in the expropriation cases just cited, then I would find their conclusion a wrong one, and answer Question 1 in the negative.

But I cannot find in the statement of fact, nor in the reasons for judgment, that the Board attributes so subjective an approach to the Assessor. What the Board did find was that the Assessor had a difficult task because he had no data on similar properties from which he could draw comparative values. At page 3 of the stated case the Board goes on to say that:

> Because of the lack of sufficient sales data upon which to construct a valuation of the foreshore leasehold properties in question, he used a new procedure which included all the factors which might reasonably be considered by a prospective purchaser were sales of these properties possible.

In carrying out this procedure the Board found that the Assessor used certain economic factors which employed the concept of value to the owner, described as paragraphs 4, 5, and 6, in a document filed in this Court as Exhibit C. These factors in the Board's statement "deal with the normal use made of the lease at the time of the inspection by the appraiser, and the function of the lease as an integrated part of the operation as a going concern."

Mr. Bosdet, the Assessment Commissioner, himself described his value concept in these words at page 3 of his Water Lot Study:

> Thus the value placed on land is not necessarily a general selling or market price, but a reasonable, fair, or warranted utility value, which. after a careful consideration of all elements of value possessed by the property to be appraised, a purchaser would reasonably pay provided he is in the best position to use the property to the best advantage.

Part of the Board's opinion is set out at page 3 of its reasons for judgment:

> It is apparent from an examination of the formula and review of the evidence that additional value was given to leases where they were closer to the mill-sites of the lessees than where they were not. This is attributing special value to the particular lessee. If a lease was transferred from one owner to another, whose mill-site was in a

> different location, a different value would be applied. This is clearly the application of value to the particular owner. This concept has been repeatedly rejected by the Courts as unsound for assessment purposes. The Board therefore finds that the application of such a principle must be rejected.

I interpret the Board's conclusion to be that the Assessor, whatever his original stated intentions, in fact valued the lots on the basis of value to the particular owner, although not going so far as to include the factors of compensation that are considered in expropriations. I hold that the Board is correct in this conclusion, and my answer to Question 1 is therefore "yes."

Is this also an answer to Question 2, or is "value to the owner" so defined above the proper concept for an Assessor to apply?

Mr. McKenzie submitted that if economic factors were employed to investigate the owner of each lot, then this was done only as a means of arriving at the hypothetical reasonable owner who makes that use of his property for the purpose for which it was best designed. How else, he asks, do we apply the factors of "present use" or "location", "valued as a property of a going concern," which appear in the Act, without an inspection of the lots at the time of operation by the present tenants? It will be convenient to set forth section 37 (1) at the present time since it is relied upon by the appellants as containing full authority for the principles followed in this assessment:

> 37. (1) Land and improvements shall be assessed at their actual value. In determining the actual value, the Assessor may give consideration to present use, location, original cost, cost of replacement, revenue or rental value, and the price that such land and improvements might reasonably be expected to bring if offered for sale in the open market by a solvent owner, and any other circumstances affecting the value; and the actual value of the land and the improvements so determined shall be set down separately in the columns of the assessment roll, and the assessment shall be the sum of such value; and without limiting the application of the foregoing considerations where any industry, commercial undertaking, public utility enterprise or other operation is carried on, the land the improvements so used shall be valued as the property of a going concern.

Reference was made in the course of argument to a similar section to be found in the Ontario Assessment Act, Revised Statutes of Ontario, 1952, chapter 24, and in particular section 33 (2) and (3). Although counsel claimed that section 37 (1) of the British Columbia Statute "stretches its net wider and with a finer mesh," I am of the opinion that the two sections have the same effect. In commenting on the Ontario section, Manning (Assessment and Rating, 3rd Edition, 1951) says at page 152:

> Whatever influence these words may have on assessors it now seems quite clear that the introduction of such inconsistent items as cost of replacement, present use, and normal rental and sale value makes a perfect juridicial foundation for any conclusion which may be desired by any tribunal. It has removed the small, amount of objective precision which one might argue did exist in the former language of the Statute.

Despite Manning's gloomy prophecy, I am satisfied that the standard is still in essence an objective one. There is no conflict among the authorities. Thus Mr. Justice O'Halloran in the *C.N.R.* v. *City* case (*supra*) at page 341 said as follows:

> Their value to the Railway Company is subjective and may be described as a necessity value. But that is not a legitimate assessment value since the *latter depends on an objective standard that can be applied with fairly reasonable uniformity to all classes of owners alike*. [The italics are mine.]

And Mr. Justice Kerwin in the *Sun Life* v. *City of Montreal* (1950) S.C.R. at page 229 to the same effect:-

> The rule applicable in determining compensation in expropriation cases is not that to be followed in municipal assessment cases where the land and buildings are to be assessed at their value or real value or actual value. The test is an objective one which in many cases may be applied by seeking the exchange value or the value in a competitive market. If there is no such market, then one may ask what would a prudent investor pay for the subject of taxation, bearing in mind the return that might be expected upon the money invested.

And so in applying an objective standard to the factors listed in section 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 the *Canadian Pacific Railway Co.* v. *Assessor for the City of Port Coquitlam* (unreported), No. 511/57, Vancouver Registry:-

> "Present use" here must mean present, proper, practical 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 section 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 the Ontario Jockey Club case (1950) O.R., page 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.

But here we do not find one particular water lot being used for a special purpose (i.e., log storage), but 400 such lots similarly employed up and down the coastal waters of the Province. Moreover, we are not concerned with an integrated operation of lands with improvements upon them as a unit of value as in the Jockey Club case. Here we are concerned with unimproved water lots, each separate and apart. The profit factor may be a valid one when the property in question can only be assessed as an exceptional case and cannot be treated in relation to any other properties in the area. This was the situation referred to by Lord Chancellor Herschell in the *Erith* case (1893) A.C. at page 592, and again in the case of *Sculcoates Union* v. *Dock Company at Kingston upon Hull* (1895) A.C. at pages 149 and 150. And see the reference made to these judgments by Farwell, L.J., in *East London Railway Joint Co.* v. *Greenwich Union Assessment Committee* (1913) 1 K.B. 620 at page 621. But it cannot be suggested that profit can be the basis upon which to estimate assessment values in the present case.

What of the factor "rental value"? This, is only one of the elements to be considered, and the test is set down by Farwell, L.J., in the case cited (*supra*) at page 620:

> The only question to be answered by the Assessment Committee in rating appeals of this nature is one of fact-what would the hypothetical tenant give for the property in question for a year.

And yet in his Water Lot Study and in the process of carrying out the assessment, Mr. Bosdet appears to have made rental value synonymous with actual value and to have developed his assessments to arrive at figures which could serve both to fix rents for the Forest Branch on all its water-lot leases and to fix the assessments on those same water leases. Thus Bosdet says in the much-quoted passage from his Water Lot Study at page 3:

> The study under consideration deals specifically with the valuation of leasehold water lot properties and has been developed to serve a twofold purpose, that of valuing the property at a figure representing the actual utility value of the property to the lessee upon which the lease rentals may be based, and also to determine the assessed value of the property for taxation purposes.

No great harm would be done if the standard had been "the hypothetical tenant." But the Forest Branch is interested in actual tenants, and in receiving rental income, not taxes. Perhaps they are justified in considering more subjective factors in arriving at the most economic rent they can receive from a particular tenant. It is not the purpose of this review to give an opinion on equity of lease rentals, and I make this comment solely to indicate the different factors that may apply and to emphasize that in the present case these figures cannot be used to serve two different purposes.

The only justification for the method of assessment employed is to be found in the argument that one must start first with the actual lot in its actual economic use because of the scarcity of other available standards of comparison. But the Assessor must not stop there. He must then employ factors to reduce the subjective findings to objective values. I can find no evidence that this procedure was employed here. The answer to Question 2 is therefore "yes."

The Board has made suggestions in Questions 3 and 4 of ways in which the Assessor could correct his method in a more objective manner. Even were I able to comment authoritatively on these suggestions, I consider it is not within my province so to do. I have already ruled that Question 5 is outside my jurisdiction.

'The answers to Questions 1 and 2 are therefore "yes," and the remaining questions are left entirely to the discretion of the Board.