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CITY OF PORT MOODY

v.

CANADIAN COLLIERIES RESOURCES LTD.

Supreme Court of British Columbia. (X605/61)

Before: CHIEF JUSTICE SHERWOOD LETT

Vancouver, September 18 and 19, 1961

John R. Lakes for the Appellant
T.P. Fee for the Respondent Company

Reasons for Judgment

The case as stated by the Assessment Appeal Board recites the facts and submits the questions of law as follows:-

1. The property which is the subject of this appeal consists entirely of land owned or occupied by Canadian Collieries Resources Limited in the City of Port Moody, some of which is land that has been reclaimed, unimproved land, and land covered by water, as well as a mill-site, most of which is the property of the appellant. The "assessment of improvements is not in question.

2. The waterfront property, including both the foreshore and the upland in the City of Port Moody, was reappraised for assessment purposes in 1960, and the property under appeal was part of the said lands. The Assessor placed a total assessment for the said lands of $229,524 or approximately $4,225 per acre. Because the land is situate on the waterfront at the City of Port Moody, and because there were few industrial sales or other sales which the Assessor deemed proper for comparison, he rated the land from west to east, commencing with the assessed values established at the boundary of the City of Port Moody and Burnaby to the municipal park, which, in his judgment, separated the westerly portion of the water from the balance to the east of the park, and in valuing that portion of the land which is land covered by water the Assessor considered rentals fixed by the National Harbour Board. He reduced the rental to determine a 1955 value, which he then capitalized at a rate of 7 per cent to establish an acreage assessment. He placed a value of $4,500 per acre on that land with deep water and $3,600 per acre on the balance, which was shallow and limited in use, and for the waterfront he placed a value east of the park valuing from $2,000 per acre to $3,750 per acre. The land covered by water owned by the appellant is partly classified as log storage and partly as limited scow depth.

3. In assessing the upland the Assessor rated a value of the industrial land from the boundary of Burnaby to the east, commencing with an assessment established on industrial upland in Burnaby of $9,000 per acre and reducing it from there to $7,200 per acre and to the east to $6,000 per acre and to an extreme low value of $2,000 per acre

where there was lack of access to the water. In certain instances the Assessor allowed additional reductions on the said land of 20 per cent for lack of access to part of the land and in another instance a reduction of 20 per cent because the appellant owned the adjoining land.

4. The appellant's evidence is largely contained in a brief filed as an exhibit herein and prepared by an appraiser (hereinafter called the "appraiser "), which submits that the actual value of the land described as of 1955 value was $141,633, and that the assessment should be 60 per cent thereof or $84,979. The appellant's evidence was that to industrialists the City of Port Moody does not offer an attractive waterfront except at the extreme west end, and that the most valuable industrial property was on railroad, and second most valuable would be on road access, and that his value was based primarily on sales of small lots and some acreage lots at the east end of Burrard Inlet, which were not, for the most part, waterfront lots. He compiled all the sales he had discovered for what he considered the relevant period, consisting of 24 sales, and eliminated in his method of valuation all but eight sales, upon which he determined a value of $1,200 per acre. The only sales used by the appellant's appraiser were in sales of land to Western Canadian Pipe Company, which that company bought in order to consolidate land, and the appellant's appraiser did not value this property in his appraisal by applying it as if it was the property of a going concern. and all the sales he used were of land in an area where the water was of no value. On the mill-site itself he compared the land used for the mill to some sales of small subdivided lots not used for industrial purposes.

5. The Assessor did not use the sales relied upon by the appellant's appraiser in making his valuation because he did not consider the property physically comparable on foreshore and land covered with water, and he did not consider it correct to use sales effected for the purpose of consolidating land as a basis of valuing land used for an industrial purpose.

6. The Board held that most of the evidence submitted by the appellant's witness provided a suitable basis from which to derive a valid assessment of the land under appeal, while the Board did not agree entirely with the valuation arrived at by the appraiser. The Board directed various alterations, as shown in the decision of the Board which is filed herewith. The prime industrial site, which consists of upland and fill on a Crown-granted water lot, was fixed at $4,000 per acre, and all parcels of land in District Lot 190 were fixed at $2,000 per acre. The Board sustained the assessment on water lots. Lots A, B, and D adjacent to the appellant's industrial site were fixed at $4,000 per acre, and Lot C at $4,000 per acre for the filled portion and the balance at $3,600 per acre. Certain lots were reduced by one-third and others were sustained.

7. The City of Port Moody, being affected by the decision of the Board, required the Board to submit a case for the opinion of this Honourable Court on the question of the validity of accepting sales of land as the basis for assessment when such sales were not of lands of a going concern and also based on the independent inspection made by the Board.

Wherefore the following questions are humbly submitted for the opinion of this Honourable Court:

> "1. Was the Board right in law in accepting sales evidence as a sound base for the valuation of the appellant's land, notwithstanding the fact that none of the sales were of land which is the property of a going concern?
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> "2. In the alternative was the Board correct in accepting the evidence where no evidence was submitted by the appellant of comparable values or sales of land of an industry valued as the property of a going concern?"

The decision of the Assessment Appeal Board as filed reads in part as follows:-

> The principal witness for the respondent, an appraiser from the office of the Assessment Commissioner, gave evidence to the effect that he could find no suitable sales data sufficient to provide a basis for his appraisal, and therefore he had no alternative but to rely on his experience and his "opinion of value." He made reference to the assessed values of various other parcels nearby, in particular the present assessment on bulk terminal facilities of British American Oil Company at $9,000 an acre. No attempt was made to justify that particular assessment, and it cannot therefore be accepted as proof that the assessments on the subject properties are proper.
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> In this case the Board must find that most of the evidence submitted by the appellant's principal witness, who is an appraiser of many years' experience (and also Chairman of a Court of Revision), to provide a suitable base from which to derive a valid assessment of the land under appeal. While the Board does not agree entirely with the valuation arrived at by him, it is found that the sales comparisons referred to make a sound base from which to commence the required appraisal. It is not considered necessary to review all of the evidence in detail, and regard must be had for the fact that numerous sales examples cited by the appellant were farther removed from the centre of the city than those under appeal. It is also clear, however, that there was an inconsistency in the assessment, particularly with reference to the undeveloped uplands held by the appellant for the purposes of expansion.
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> The Board has inspected all the parcels of land under appeal and, giving due consideration to the sales evidence, directs the following alterations in the assessed values: Lots 3 and 4 and 7 to 12 of Block 3 will be reduced by one-third. The assessment on Lots 1 to 6 of Block 4 is sustained. The prime industrial site, which consists of upland and fill on a Crown-granted water lot, is fixed at $4,000 per acre. All parcels of land in District Lot 190 will be assessed at $2,000 per acre. This is the area in which the inconsistency in the assessments is most obvious, and the Board notes that a completely prepared industrial site occupied by a substantial factory on trackage is presently assessed for $150 per acre more than the original assessment upon the subject land in its raw state.
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> With respect to the water lots, the assessment on these is sustained. It is sustained upon the ground that these water lots are Crown-granted and are a "find of rare value" in this Province, where about a dozen exist in the Coastal area. For that reason they carry a much higher value than leased lots. No inconsistency is to be inferred from the fact that the valuation is approximately the same as that on a deep-sea water lot immediately across Burrard Inlet. Lots A, B, and D adjacent to the appellant's industrial site will be assessed upon a basis of $4,000 per acre. So far as Lot C is concerned, it will likewise be assessed at $4,000 to the extent that it is filled, otherwise at $3.600 per acre.
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> For the future guidance of appraisers, the Board considers it appropriate at this time to express the opinion that waterfront property in the location of the appellant's in District Lot 190 does not acquire any additional value in its present condition. A close inspection of the waterfront at that point indicates that it is of little value for any form of industrial use until such time as dredging and other necessary improvements are made to the land covered by water. In this respect the Board concurs in the opinion expressed by the witness Penny when he indicated that in his opinion the value derived from location on trackage was a dominating factor in value of lands in that area and not waterfront.
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> The respondent will amend his roll accordingly. The appellant is entitled to costs, including one expert witness fee.

(The word "appellant" in the quotation refers to Canadian Collieries Resources Limited, hereinafter referred to as the "Collieries Company.")

A preliminary objection to the wording of Question 1 was taken by counsel for the Collieries Company, but during argument was abandoned, and it is unnecessary for me to deal with it further.

As I understand the present proceedings, no exception is taken to the assessment of the lands covered by water but only to the upland lots; that is, the lots lying above high-water mark. I further understand that, as set out in the case as stated by the Board, the assessment of improvements is not in question.

The first point which I must consider is whether the questions submitted to this Court are questions of fact or questions of law only, as section 51 (2) of the Act permits the submission to this Court by the Assessment Appeal Board of a case for the Court's opinion on a question of law only.

While I appreciate the difficulty expressed by Viscount Cave, L.C., in *Inland Revenue Commissioners* v. *Lysaght* (1928) A.C. 243 at 241, 97 L.J.K.B. 325, that "it is not always easy to distinguish between questions of fact and questions of law for the purposes of taxing Acts," I have no difficulty in arriving at the conclusion that the matter here submitted for the opinion of the Court by Question 1 is on a question of law only.

As I understand the submission of counsel for the City of Port Moody, the principal contention is that under section 37 (1) an Assessor is required to determine the actual value of land and improvements, and in so doing may take into consideration the various items or factors enumerated in the first part of subsection (1), but where an industry or commercial undertaking is carried on, the land and improvements so used shall be valued as the property of a going concern. In other words, that in arriving at a valuation where an industry or a commercial undertaking is carried on, an Assessor cannot escape the mandatory provision of the latter part of subsection (1) of section 37.

Counsel suggests that while the Assessor acted within his jurisdiction, and that while his method of arriving at a valuation was strictly in accordance with the provisions of section 37 (1), the Assessment Appeal Board, by not accepting his valuation, has attempted to ignore the mandatory provisions of the subsection and accepted evidence of the professional appraiser appointed by the Collieries Company, whose valuation of the property, counsel contends, was not made on the basis of the "property as a going concern."

I must confess that I share the same uncertainty as to the precise meaning in the context of section 37 (1) of the words "property of a going concern," as my brother Wilson expressed in the case of *Canadian Pacific Railway and the Assessor of Port Coquitlam*, 77 *Canadian Railway and Transport Cases*, 95 at page 100.

As Brown, J., of this Court has pointed out in his reasons for judgment *In the Matter of an Appeal by the City of Vancouver to the Assessment Appeal Board*. . . *for the Township of Richmond*. . . from the decision of the Assessment Appeal Board on the land owned or occupied by the City of Vancouver as its International Airport (unreported), Vancouver Registry X585/58 (reasons dated August 22, 1958), the term "going concern" had not, so far as he knew, been judicially defined. He went on to say:-

> Whatever "going concern" may mean as to *land and improvements taken together* I am unable to extract a meaning from it as applied to land alone which would have the effect of putting an enterprise assessment on such land; that would result in something almost in the nature of an income tax, not based on the inherent value of the land but on the use to which it happened to be put.

As far as I am aware, the phrase "going concern" as used in section 37 (1) has still to be judicially defined. Nor do I consider it necessary in answering Question 1 of the stated case before me to attempt to define it. It has not yet been made clear how it is to be interpreted if applicable to land only, without improvements.

I would also refer specifically to paragraph 7 of the stated case, where it is stated that the City of Port Moody required the Board to submit a case for the opinion of the Court ". . . on the question of the validity of accepting sales of land as the basis for assessment when such sales were not lands of a going concern and *also based on the independent inspection made by the Board*."

In considering Question 1, it is essential to ascertain precisely what the Board did in considering the appeal.

The extracts from the stated case and the written decisions of the Board show that the Board

> (1) admitted evidence of an experienced appraiser (Mr. Penny), who testified on behalf of the company. This appraiser determined a certain value per acre after compiling sales of "acreage lots in the area which were not for the most part water-front lots, and which had been bought in order to consolidate land, but did not value this property in his appraisal by applying it as if it was property of a going concern, and all the sales he used were of land where water was of no value. On the mill-site itself he compared the land used for the mill to some sales of some small undivided lots in use for industrial purposes ";
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> (2) admitted evidence of Mr. Ives, the Assessor appointed by the Assessment Equalization Commission, who "did not use the sales relied upon (by Mr. Penny) in making his valuation because he (Mr. Ives) did not consider the property physically comparable on foreshore and land covered with water, and he did not consider it correct to use sales effected for the purpose of consolidating land as a basis of valuing land used for industrial purpose";
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> (3) inspected all the parcel of lands under appeal, and its decision was also based upon this independent "close inspection of the waterfront";
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> (4) did not agree entirely with the valuation arrived at by the appraiser, Mr. Penny;
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> (5) found that the sales comparisons made "a sound base from which *to commence* the required appraisal";
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> (6) gave "due consideration to the sales evidence";
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> (7) sustained the assessment on the water lots, directed certain alterations in the assessed values of certain other lots, fixed the value of the prime industrial site as $4,000 per acre, and ordered that all parcels of land in District Lot 190 be assessed at $2,000 per acre. This being "the area in which the inconsistency in the assessments is most obvious, and sustained the assessment upon the ground that the water lots were Crown. granted and are 'a find of rare value.'"

Section 24 of the Act provides that "all inquiries and hearings before the Board or a member thereof shall be governed by such rules as it may adopt, and the Board is not bound by the technical rules of legal evidence."

Section 30 (c) provides that the Board "may make rules, not inconsistent with the provisions of this Act, for its own government and for conducting hearings and proceedings before it."

Section 32 of the Act provides that, among the powers and jurisdiction of the Board, "the Board, or a person authorized by it to make any inquiry or report, may (a) enter upon and inspect any land or improvement."

In my view, having given the Board power to inspect lands, and the Board having exercised that power of inspection specifically granted to it, it would be quite improper to assume that the Legislature intended to deny the Board the right to take into consideration the results of such an inspection when hearing an appeal from an assessment of the property inspected. For what purpose did the Legislature give the power to inspect if it did not intend to give the Board the right to exercise its general powers in the light of the information obtained by it as a result of its own inspection?

Section 37 (1) of the Act provides that the Assessor under the Act shall determine the actual value of land and improvements, and in doing so may give consideration to certain specific factors enumerated in the section and to "*any other circumstances affecting the 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 and improvements so used shall be valued as the property of a going concern."

It is to be noted that the section provides that an Assessor in determining the actual value of land and improvements is specifically empowered to give consideration to "any other circumstances affecting value."

While it would appear from the material before me that the sales comparisons referred to above made a sound base from which "to commence the required appraisal," this cannot be presumed to be all that the Board took into consideration in arriving at its decision. Having exercised its right to inspect the property and, as it states in its findings, having given "due consideration to the sales evidence," the Board then went on to make its directions.

I do not think it would be proper for this Court to assume that the acceptance of the evidence of the sales comparisons constituted the sole or entire basis for its findings, nor that the acceptance of the sales evidence formed or constituted anything more than "a sound base from which *to commence*" to perform its obligations and exercise the powers granted to it by the Act.

I can find nothing in the Act to prevent the Board from adopting any "sound base" as a "base from which to commence" its duties. So long as it uses it only as a "starting point," and proceeds to exercise its powers in accordance with the provisions of the Act, including the provision for inspection by the Board, I cannot see how it can be said to have acted without jurisdiction, or beyond its jurisdiction.

In my opinion Question 1 should be answered in the affirmative. It is therefore unnecessary to answer the alternative question numbered 2.

The Collieries Company is entitled to its costs.