CANADIAN COLLIERIES RESOURCES LIMITED

v.

COMOX ASSESSMENT DISTRICT

Supreme Court of British Columbia (X542/62)

Before: MR. JUSTICE JOHN S. AIKINS

Vancouver, September 26, 1962

T.P. Fee for the Appellant
W.R. McIntyre for the Respondent

Reasons for Judgment

This is an appeal by way of stated case under section 51 of the *Assessment Equalization Act*, chapter 18, R.S.B.C. 1960, against the decision of the Assessment Appeal Board, given the 17th of April, 1962, in which the Board refused to vary the assessment of two parcels of land owned by the appellant Canadian Collieries Resources Limited and situate in the Gartley Beach area in the vicinity of Courtenay on Vancouver Island.

The facts stated in the case are as follows:-

1. The property, the subject of this appeal, comprises two parcels of vacant land owned by Canadian Collieries Resources Limited and described in Exhibit No. 15 filed herein as unimproved bush land, which is classified for assessment purposes with other parcels owned by the appellant as improved land. This property has waterfrontage on the easterly side, found by the Board to measure 5,700 feet, and is bounded on the west by the Island Highway. Four hundred feet of the above 5,700 feet was treated separately but is included in the present appeal.

2. The assessment was placed on the lands under appeal pursuant to section 31 of the *Taxation Act* by the Provincial Assessor in accordance with methods he considered proper, and which methods are detailed in the evidence of said Provincial Assessor appearing in the transcript at pages 13 to 18, inclusive. The said Provincial Assessor determined his assessment after reference to various sales of land nearby from which he derived a front-foot value, and stated that his basic approach to the valuation was the price a "prudent developer" would pay to develop waterfrontage to its best use as summer-home sites. No evidence was given by the Assessor of any offers to purchase the lands under appeal.

The assessment on the lands under appeal amounts to $34,450, reflecting actual value of $68,900.

3. The appellant's evidence is largely contained in a brief filed as an exhibit herein and prepared by a qualified land appraiser, which submits the actual value of the land

described is $53,000 for the 5,300-foot parcel and $6,750 for the 400-foot parcel, totalling $59,750. The appraiser's evidence was that there have been recent sales of comparable large unimproved parcels of land in the general area between Comox and Nanaimo, having waterfrontage and road access, and also recent sales of small vacant unimproved parcels with waterfrontage and road access, and that, in his opinion, the "comparative approach" is the proper one to use here in arriving at market value.

The questions submitted for the opinion of the Court on the facts stated are these:

> "1. Was the Board right in law in sustaining an assessment which was determined in the manner used by the Assessor?
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> "2. In the alternative, was the Board right in law in not basing its decision in part on evidence of recent sales of physically comparable large parcels of land described by the Board as being some distance away from the subject lands and relying principally upon evidence of the sales of small subdivided nearby parcels of land?"

The reasons for the Board dismissing the appellant's appeal to the Board are concisely stated in the following paragraph of the Board's reasons for its decision:-

> The appellant's evidence was largely directed to a comparison with certain other parcels which were claimed to be similar, located in the main some considerable distance to the south of the subject properties. There was the usual disagreement as to whether such properties were comparable or not but in the view which the Board takes of the matter, after having inspected the properties concerned, it does not appear that a great deal turns on the precise comparability when converted to terms of value. All of the evidence has been reviewed in detail and in particular the substantial body of evidence submitted by the respondent with respect to sales in the adjacent areas to the north of the subject properties. When these sales are considered and properly adjusted to reflect their value in unsubdivided acreage the Board finds that the assessment imposed is not, in all the circumstances, excessive. Not only the sales in recent years, but the rapidity with which parcels of land have changed hands convince the Board that the assessment determined in respect of these two parcels is not beyond actual value nor is it inequitable when related to other similar lands.

The argument for the appellant was essentially this: where there is evidence of actual value before the Board based on the sale prices of other comparable properties, then the Board must proceed to reach its decision on that evidence, and may not proceed to its decision on evidence of actual value based, not on evidence of the sale prices of comparative properties, but on evidence directed toward showing the price which a prudent investor would pay for the property, having as his purpose the development of the property for its highest and best use, in this case, on the evidence given by the Assessor, and on the evidence given by the appraiser for the appellant, subdivision and sale of residential lots.

The Board, on the one hand, had before it the evidence of the appraiser, called as a witness for the appellant, and the appraisal made by this witness. The appraiser's evidence may be divided into two categories: firstly, his opinion that the comparative sales approach that he used in making his appraisal was the proper one to use in order to arrive at value, and secondly, the opinion of the appraiser as to value based on the comparative sales approach.

On the other hand, the Board had before it the evidence of the Assessor for the Comox Assessment District, stating, firstly, that in his opinion the sales of land used by the appraiser for the appellant could not be properly used as the lands in question were distant from and not properly comparable to the lands belonging to the appellant, and secondly, that in his opinion the proper approach in the absence of evidence of truly comparable sales was the prudent-investor

method of valuation employed by him, and thirdly, his opinion as to actual value based on the prudent investor method of appraisal preferred and used by him.

Section 31 of the *Taxation Act,* chapter 376, R.S.B.C. 1960, states the matters which the Assessor may consider in arriving at the actual value of land and improvements, and the section is as follows:-

> 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 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.

Section 37 (1) of the *Assessment Equalization Act*, chapter 18, R.S.B.C. 1960, is identical with the above-quoted section 31 of the *Taxation Act*, except for the first sentence, which in the *Assessment Equalization Act* reads as follows:-

> (1) The Assessor shall determine the actual value of land and improvements.

The material shows that the land in question had no improvements and was unoccupied. It was not being used in any way by the appellant.

It is common ground to both sides that the best use (in the sense of the use which will yield the best economic return) to which the property could be put was development for summer-home sites, involving subdivision of the property into residential lots for sale to the public. It is apparent from section 31 of the *Taxation Act* (quoted above) that there arc a number of factors which the Assessor may consider. In my opinion, the Assessor has directed his consideration only to "the price that such land. . . might reasonably be expected to bring if offered for sale on the open market by a solvent owner," and his evidence related primarily to this issue. The appraiser for the appellant directed his attention to exactly the same question. Where the Assessor and the appraiser for the appellant vary is in the respective methods which they used to reach the price that a hypothetical purchaser buying in the open market would pay to a solvent owner.

The method adopted by the appraiser for the appellant is in essence this: He has taken particulars of four sales of what he calls "large blocks" and particulars of five sales of what he calls "small parcels," all in what his appraisal report describes as the "market area." From this he reaches this conclusion, which I take from page 5 of his appraisal report (Exhibit 15):

> From these, it is my opinion that this property has a value of $10.00 per front foot, as a large block, based on the large sales. This is supported, in my opinion, by the small blocks at $40.00 and, realizing that developers estimate that the raw block frontage price is about 25 per cent of the finished sale price of lots.
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> Therefore 5,300 X $10.00 = $53,000.00.

This is the market value found by the appraiser for the appellant for the larger of the two pieces of property.

In my view nothing turns on the appraisal of the smaller piece of property, having a frontage of 400 feet. It is, however, worthy of note than in appraising this piece of property the appraiser for the appellant used the "residual" method of valuation, which involves a hypothetical prudent purchaser, which is, as far as I can see from examining the material, exactly the same method as used by the Assessor in valuing the larger of the two parcels of property. The appraiser for the appellant reached the conclusion that the smaller piece of property had a value of $6,722, which

he rounded out at $6,750. In assessing the smaller parcel, the Assessor simply took a foot-frontage rate which was similar to that of adjoining properties to the north, made certain adjustments for part of the property to the rear-that is, lying away from the waterfront-and reached a valuation of $6,740. Because the appraiser for the appellant in valuing the smaller parcel of property has used exactly the same basic method that the Assessor used in valuing the larger piece of property, it can be taken, I think, that there is common ground between the parties that this method of valuation is a reasonable and proper one to use and is capable of producing an accurate estimation of market value.

Before going on to describe the method used by the Assessor, I note that there was evidence before the Board from the Assessor which showed that he had not ignored the sale price of larger parcels of land, but had, paraphrasing his words (page 13 of the transcript), disregarded, or not used, this particular approach other than as a guide because the area was unique, lying in very close proximity to centres such as Courtenay and Comox.

The method used by the Assessor is based on two premises. Firstly, he says that the best use to which the property can be put is subdivision for summer waterfront home sites, and, secondly, he says that there is a present high demand for such home-site property and that the appellant's property is most suitable for early development. The Assessor uses the "residual technique" to find what a prudent investor would pay for the property. By the use of known sale prices of small properties in the general area, with adjustments, as particularized in his evidence, the Assessor reached the conclusion that this waterfront property would sell at $40 a front foot. He then estimated the gross value for the 5,300 feet of waterfront at $212,000. From this figure the Assessor deducted the value of land which would be lost by subdivision, cost of subdivision, roads, supplying water, legal and surveying expense, cost of sales, etc., an allowance of 33 per cent for profit, and by this method arrived at the sum of $68,900 as the amount which a prudent investor would pay for the property in question.

The first question in the stated case is: "Was the Board right in law in sustaining an assessment which was determined in the manner used by the Assessor?" This question does not, in my opinion, involve any question of law unless it can be said, as a matter of law, that the Board, when confronted with the two methods of appraisal which I have described, *must* prefer the appellant's method. I think it can only be said that the Board must prefer and adopt the appellant's method if it can be said, as a matter of law, that in the circumstances of this case they should not consider the Assessor's method as proper evidence of value at all. If, as a matter of law, the Board may consider the method of appraisal used by the Assessor as a proper method for use under the relevant statutory provisions, then which method the Board prefers-that is, which method the Board concludes gives the better result-is a question of fact for the Board and does not involve any question of law.

The Assessor is charged with determining actual value for the purpose of his assessment. Both relevant Statutes, section 31 of the *Taxation Act* and section 37 (1) of the *Assessment Equalization Act*, permit him to consider what the land might be expected to bring if offered for sale in the open market by a solvent owner. Consideration of this obviously brings up the question of what a purchaser would pay for the land if offered for sale in the open market. The hypothetical purchaser should, I think, be considered as a person acting prudently. In order to consider what a prudent person buying in the open market would pay, it is necessary for the Assessor to consider all the circumstances of and relating to the property which would affect the mind of a prudent purchaser in reaching a decision as to what he would be prepared to pay for the property. In other words, the Assessor should take into account all the relevant circumstances which would be considered by an alert and prudent prospective purchaser. The prudent purchaser would, I am sure, ask himself what he could best do with the property if he bought it, and if he decided that the best course he could take, if he bought the property, would be to subdivide it and sell the subdivided lots, then he would undoubtedly consider what amount of money he might make by doing this. He would consider what profit he would expect in the undertaking, he would work out all the costs involved, and on the basis of the profit that he would

expect to get and on the basis of the cost involved, he would decide upon the price that he would be prepared to pay. The Assessor in the instant case has done, on a hypothetical basis, what a prospective and prudent buyer would actually have done; that is, he has ascertained all the facts that would be considered by a prudent prospective purchaser. He has ascertained the gross return which could be expected, the return by way of profit that would normally be expected by a purchaser in the business world, he has ascertained estimated costs of development and cost of sales and has thus arrived at the purchase price which a purchaser could pay and make the usually expected profit on development of the property.

In re Municipal Act, In re Hudson's Bay Company's Assessment (1942) 2 W.R.R. 1 is an authority for the proposition that the method employed by the Assessor in the present case may be an acceptable method. I have used the word "may" because whether such method is, or is not, the most acceptable method in any case will depend on the facts of the particular case. It is for the tribunal with jurisdiction to deal with questions of fact to decide on the facts in each case whether this method yields a more satisfactory result than does some other method of appraisal.

At page 2 of *In re Municipal Act, In re Hudson's' Bay Company's Assessment*, Robertson, J., said:-

> This is an appeal by the Hudson's Bay Company from the decision of the Court of Revision of Oak Bay Municipality confirming the assessment made on December 1,1941, of its lot "A," containing 120 acres, at $82,000.
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> Section 223 of the *Municipal Act*, R.S.B.C. 1936, chapter 199, provides that land is assessed at its actual value. Our Courts have determined what these words mean-see *Bishop of Victoria* v. *Victoria* (1933) 3 WW.R. 332, at 345, 47 B.C.R. 264, at 280; *In re Lions Gate Assessment Appeal* (1940) 1 W.W.R. 624, at 625 and 627; and *In re Municipal Act and Dixon* (1940) 55 B.C.R. 546. In the Lions Gate case, Murphy, J., at page 625, says:-
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> > "Actual value of land for assessment purposes, where no actual market is in sight, is what a prudent person, attempting to measure the forces at work making for a present shrinkage in value for a time and again likely to arise making for an increase in value, would be likely to agree to pay in way of investment for such land."
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> These cases show that the Assessor should look to the past, present, and future and generally should take into consideration all the many relevant facts. In connection with the assessment in question he would have to consider, *inter alia*, sales of similar property, the chances of a subdivision being successful, restrictions on building, possibly shortage of building materials, brought about by the war, increase in population in the municipality, the trend of building construction, electric light, telephone, water, sewer, and other usual facilities and the competition which the lots in a subdivision would have by reason of the unsold subdivision lots now in the municipality and of the possible sale and subdivision of the 480 acres belonging to the Hudson's Bay Company adjacent to lot "A." The duties of the Assessor are very important. If he acts honestly, without any mistake in principle or law, great weight ought to be given to his valuation, *In re Mackenzie, Mann & Co. Ltd. Assessment* (1915) 22 B.C.R. 15; *In re Vancouver Incorporation Act* v. *C.P.R.* (1930) 4 D.L.R. 80.

In the Hudson's Bay case the assessment was substantially reduced on the hearing *de novo*. It appears to me to have been common ground in that case, as it is in this case, that the property could best be used for subdivision. All the evidence was directed to the value of the property based on future subdivision and sale of lots. The assessment was reduced, but the reduced assessment was based on what a prudent person buying for future subdivision would be prepared to pay. (See the conclusion of Robertson, J., reasons for judgment on page 7.)

Counsel for the appellant relied strongly on the dicta of Lord Parmoor in *Great Western and Metropolitan Railway Companies* v. *Kensington Assessment Committee* (1916 A.C. 23) at page 54:-

> It is a principle in rating assessment that the hereditament should be valued as it stands and as used and occupied when the assessment is made. There is difficulty in the doctrine of a hypothetical tenant, but if to this is added the doctrine of a hypothetical hereditament, the confusion would become hopeless.

Counsel for the appellant also referred me to *Sun Life Assurance Company of Canada* v. *The City of Montreal* (1950 S.C.R. 220) and in particular to a passage in the judgment of Rinfret, C.J., at page 224, which I now quote:-

> I need not insist on the point that a municipal valuation for assessment purposes is not to be made in accordance with the rules laid down with regard to the valuation of a property for expropriation purposes. One main ground why such a course should not be followed is that the expropriation of a property means the permanent divesting of the owner and should legitimately, therefore, take into account the present value and all the prospective possibilities of the property, while the municipal valuation is, generally speaking, only made for one year, or, in the case of the City of Montreal, for three years, with certain provisions for modification if certain events happen, such as alteration, improvement, fire, etc. The rule was laid down by Lord Parmoor in *Great Western and Metropolitan Railway Companies* v. *Kensington Assessment Committee*, that in such a case "the hereditament should be valued as it stands and as used and occupied when the assessment is made." In the yearly valuation of a property for purposes of municipal assessment there is no room for hypothesis as regards the future of the property. The assessor should not look at past, or subsequent or potential values. His valuation must be based on conditions as he finds them at the date of the assessment. In particular, in the present case, there was no ground for considering any other condition, as no suggestion of any kind appears in the record that there was, throughout the period of assessment, a prospect of any change.

The argument advanced for the appellant was that the Assessor in adopting the prudent-investor method of valuation was looking to subsequent or potential values, that he was making hypotheses in regard to the future of the property, and that these were things that he should not do under the authority of the two cases to which I have just referred.

However, the Sun Life Assurance Company does not preclude the method of valuing by the use of a hypothetical prudent buyer; in fact, it expressly sanctions this approach. At pages 244 and 245, Taschereau, J., said:

> Having in mind that the test of "real or actual value" lies in the exchangeability of the property, I believe that the "prudent investor" would particularly be concerned with the "economic value" of the building, in order to get a fair return on his money.
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> The "real value" is the "market value" or the "value in exchange," and in order to ascertain it, one must necessarily, even if there has been no sale of the building, try and find what would be the price of the building in the open market. The rule is not that because there is no buyer and no seller, as in the present case, the well-known theory of "willing buyer and willing seller" does not apply. We must ask ourselves this question: What would occur if there was a buyer and a seller? In *Lacoste* v. *Cedar Rapids*, Lord Warrington, speaking for the Judicial Committee, said at page 285:-
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> > "But the proper amount to be awarded in such a case cannot be fixed with mathematical certainty but must be largely a matter of conjecture. It is the price likely to be obtained at an imaginary sale, the bidders at which are assumed to

> ignore the fact that a definite scheme of exploitation has been formed and compulsory powers obtained for carrying it into effect."

In my respectful opinion, what is meant by the prohibition against" hypothesis as regards the future of the property" and "looking at past, or subsequent or potential values" and what is meant by the dicta of Lord Parmoor, "the hereditament should be valued as it stands and as used and as occupied when the assessment was made," is that the valuation of the hereditament should not be made on the basis of what it has been or what it may become in the future. That is, no element of value may be included which does not exist in the present but may exist in the future. Again, in my respectful opinion, the prohibition does not go so far as to say that the Assessor may not look to the *present* value of the future potential of a parcel of land in order to ascertain what a purchaser would pay for it in the present, before the development of the future potential.

In the Sun Life Assurance Company case the assessment under attack was of a large and then, perhaps, unique office building partially occupied by the appellant company and partially occupied by its tenants. In this appeal I am concerned with unoccupied and unused land, and in my opinion the Assessor must consider to what use the land can best be put in the future, in order to reach a conclusion as to its present value.

For these reasons I am of the opinion that the first question addressed to the Court in the stated case, namely-

> "1. Was the Board right in law sustaining an assessment which was determined in the manner used by the Assessor?"

does not actually raise a question of law because in the circumstances the question of whether the Board should have sustained the assessment determined by the Assessor in the manner in which I have described, instead of preferring the method followed and result reached by the appellant's appraiser, is a question of fact only.

As to the second question in the stated case, namely-

> "2. In the alternative, was the Board right in law in not basing its decision in part on evidence of recent sales of physically comparable large parcels of land described by the Board as being some distance away from the subject lands and relying principally upon evidence of the sales of small subdivided nearby parcels of land?"

in the circumstances I am of the opinion that this does not raise any question of law but that this question involves questions of fact only which were wholly within the jurisdiction of the Board.

Because I am of the opinion that no questions of law are actually raised in the two questions addressed to the Court, this appeal must be dismissed with costs.