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CANADIAN PACIFIC RAILWAY COMPANY

v.

CITY OF VANCOUVER

British Columbia Court of Appeal

Before: MR. JUSTICE F.A. SHEPPARD, MR. JUSTICE A.E. LORD, and MR. JUSTICE E.B. BULL

Vancouver, May 10, 1965

F.E. Dent and A.G. Graham for the Appellant
R.K. Baker, Q.C. and B.W. Wasson for the Respondent

Reasons for Judgment of Mr. Justice Bull May 10, 1965

Per curiam

This is an appeal on points of law under section 51 (7) of the Assessment Equalization Act, R.S.B.C. 960, Chap. 18 from a judgment of McFarlane, J. dismissing an appeal by way of stated case from a decision of the Assessment Appeal Board (the "Board") dated May 7, 1964, which in turn had allowed an appeal from the decision of the Court of Revision of the City of Vancouver which had reduced substantially the assessments for the 1964 taxation year on two parcels of land in the said City, known as Old Shaughnessy Golf Course and Langara Golf Course, the Board thereby restoring the original assessments.

The case was stated to the Supreme Court under the provisions of section 51 (2) of the *Assessment Equalization Act* by the Board at the requisition of the appellant, on questions of law only. The questions of law so posed for opinion in the stated case were as follows:

> "(1) Was the Board correct in law in holding that the right to appeal from the Court of Revision given to the City by the 1964 amendment to section 385 of the *Vancouver Charter* applied to the 1964 Assessment Roll?
>
> (2) If the answer to question (1) is in the affirmative, was the Board correct in law in holding that the City had complied with section 385 of the *Vancouver Charter*, as amended?
>
> (3) Is consent of Council a condition precedent to giving this Board jurisdiction?
>
> (4) Was the Assessment Commissioner of the City (and therefore this Board) required to consider the value of the golf courses as properties of going concerns?
>
> (5) Did the Board err in law in holding that the City had complied with section 37 of the *Assessment Equalization Act*?"

McFarlane, J., answered questions (1) and (2) in the affirmative, questions (4) and (5) in the negative, and found it unnecessary to answer question (3). It is convenient at this stage to note that the case to the learned Judge contained the following important findings of fact:

> "5. The Board found as a fact that the taking of the appeal was authorized by a Resolution of Council.
>
> 6. The City's Assessment Commissioner did not value the golf courses as going concerns."

The appellant submits that the learned Judge erred in law in:

> (i) answering question (1) in the affirmative that the respondent had the right of appeal to the Board.
>
> (ii) answering question (2) in the affirmative that section 385 of the *Vancouver Charter* had been complied with.
>
> (iii) holding that the Assessment Commissioner of the City of Vancouver had assessed the lands in question in the manner required by section 37 (1) of the *Assessment Equalization Act*, such being the appellant's interpretation of the negative answers of the learned Judge to questions (4) and (5).

With respect to the first head of error submitting that no right of appeal of the 1964 assessments in question lay in the respondent, I am in complete agreement with the learned Judge, and for reasons so clearly enunciated by him. The new section 385 of the City Charter enacted in 1964, granting the respondent the right to appeal from a decision of the Court of Revision, by virtue of the amending statute, S.B.C. 1964, chap.72, ss. 13 and 14, clearly came "into force and effect on the first day of January, 1964," and full force and effect of such right so given was clearly expressed to be given "on and after that date". The appeal right given to the City is from the decision of the Court of Revision and that decision was given in February, 1964. When the amending legislation was so enacted in March, 1964, because of its express and clear retroactive effect on and from January 1, 1964, the right of appeal must be deemed to have been in effect and available to the respondent in February at the time when the decision of the Court of Revision was made. The appellant's submission that, as the 1964 Assessment Roll (the subject of the appeal to the Court of Revision and its decision) must be completed on or before December 31, 1963, the substituted section 385 in order to be effective with respect to such 1964 Roll, should have been made retroactive to at least as of and from that date, is, in my respectful opinion, without merit. So to hold would be tantamount to saying that section 385 gives an appeal from the entry of the original assessment in the Assessment Roll. This is obviously what it does not do, it gives an appeal from a decision of a Court of Revision only.

The second submission of the appellant is a technical one, which was first raised in the written argument of the appellant at the end of the hearing before the Board. The simple question of law involved before the learned Judge was whether or not the Board was correct in holding that the respondent had complied with section 385 of the *City Charter*, and the question of law before us is was the learned Judge right in answering that question in the affirmative. The appellant's only suggestion of non-compliance is not that the Council failed to pass a by-law or resolution authorizing this appeal to be taken, but that, as set out in appellant's factum and argued before this Court, no evidence was tendered to show that such authorization was given, and that therefore, the Board had no authority to hear the appeal. To that there are two answers. The first answer is that the Board has found as a fact that the taking of the appeal was authorized by a resolution of Council. The reason for that finding may be found in the fact that the appellant did not raise the question of the resolution of the Council or the Board's jurisdiction at any time during the hearing of the appeal. As already stated, the question was first raised by counsel for appellant on written argument requested by the Board following the hearing. At the hearing before this

Court it appeared that the City had a considerable number of appeals before the Board and the authorization for bringing all the appeals, including the present one, was contained in a single resolution of council, a certified copy of which was filed with the Board on the first appeal. The Board had the right to use this resolution if it so wished under the very wide powers given it under section 25 of the *Assessment Equalization Act*, which reads as follows:

> "25. The Board may, in its discretion, accept and act upon evidence by affidavits or written statements or upon the report of any officer appointed by it or obtained in such manner as it may decide."

Section 24 of that Act provides that the Board "is not bound by the rules of legal evidence." The Court was advised by counsel that the Board made use of this resolution as evidence in making its finding of fact. It is therefore, a question of fact, not of law. There was some evidence and accordingly we are not concerned with its sufficiency. The second answer to the appellant's objection is that even if there was no evidence of such a resolution that fact would not go to the jurisdiction of the Board to hear the appeal. The Board's jurisdiction emanates from the Act under which it is constituted. Section 385 (1), giving the City the right of appeal, does not require as a condition to the exercise of such right that an approving or consenting resolution be passed by the City Council. It would be otherwise if the appeal were by the Assessment Commissioner under section 385 (2), as that subsection specifically provides that there shall be no appeal without the consent of the Council. Under the provisions of sections 137 and 151 of the *Vancouver Charter* the appeal must be authorized by by-law or resolution of the City Council, but so far as the Board's jurisdiction to hear the appeal is concerned, I cannot see the necessity of presenting evidence of such resolution to the Board in order to clothe it with such jurisdiction. In my opinion the maxim, *Omnia praesumunter rite soleniter esse acta donec probetur in contrarium* is applicable. This of course does not preclude a party from taking such steps as may be available to resist or quash an appeal by the city which may not have been properly authorized. Accordingly, I am of the opinion that the learned Judge was correct in answering question (2) in the affirmative.

The third ground of error submitted by the appellant is that the learned Judge answered in the negative to the query as to whether or not the Old Shaughnessy Golf Course and the Langara Golf Course should have been valued as properties of "going concerns" within the meaning of section 37 (1) of the *Assessment Equalization Act* and to the query whether or not the Board erred in holding that such section had been complied with by the respondent. Once again, the case set out that the said properties were not valued by the Assessment Commissioner as those of going concerns, and, as indicated by the learned Judge, the Board's restoral of the Assessment Commissioner's assessment leads to the conclusion that the Board also did not value them in such manner.

Section 37 (1) of the *Assessment Equalization Act* reads as follows:

> "37. (1) The Assessor shall determine the actual value of land and improvements. 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."

The learned Judge in referring to this section, said:

> "Its provisions have been considered by this Court and by the Court of Appeal on several occasions. The first sentence imposes upon the assessor what may be described as the primary and basic duty of determining actual value. The second sentence provides

> guidance and direction to the assessor on determining that value. By the first part of that sentence he is permitted to consider a number of factors. The second part is mandatory in the circumstances to which it applies, namely: 'Where any industry, commercial undertaking, public utility enterprise, or other operation is carried on,' subject to the effect of the phrase: 'Without limiting the application of the foregoing considerations'."

It was held in *Re Assessment Equalization Act, Alkali Lake Ranch Ltd.* v. *Provincial Assessors, Quesnel Forks et al.* (1964) 48 W.W.R. 120, that property that falls within the words "industry, commercial undertaking, public utility enterprise, or other operation", must be valued as the property of a going concern, albeit it is not necessary to find such value is actual value because of the application of other permissible considerations.

In this case the properties were not valued as those of going concerns, and whether the Commissioner and the Board were in error in not so valuing them depends entirely and completely on whether or not the two properties, called "golf courses" come within the words "any industry, commercial undertaking, public utility enterprise, or other operation". It is obvious the Commissioner and Board thought they did not.

In *Township of Tisdale* v. *Bollinger Consolidated Gold Mines Ltd.* (1963) S.C.R. 321, Cannon, J., in delivering the judgment of the Court, said at page 323:

> "The construction of a statutory enactment is a question of law, while the question of whether a particular matter or thing is of such a nature or kind as to fall within the legal definition of its term is a question of fact."

It is a question of law, and would be properly queried in a stated case under section 51 of the *Assessment Equalization Act*, as to whether or not a certain set of facts come within the words in the section, i.e., "industry, commercial undertaking, public utility enterprise, or other operation." But, in this matter, certain facts must be found before a decision could be made as a matter of law as to whether the golf courses in question come within the description of the categories named, bearing in mind that the most relevant of these, "or other operation", could be restricted in its application to operations *ejusdem generis* as those enumerated: *Canadian National Railways and Town of Capreol* (1925) S.C.R. 499 at 502. The generic term "golf course" has not sufficient factual characteristics or implications to be capable of having a nature or kind susceptible to use in the construction of the statutory language. A golf course is essentially an area of improved and prepared land used for the playing of a game. If it were owned by one person for his own enjoyment and that of his friends, or if it were owned by a club for the benefit of its members, it could be argued with no little strength that it should not come within the categories set out in section 37 (1) requiring it to be valued as property of a "going concern". On the other hand, a golf course operated solely on the profit motive as a commercial concern could very well be included. In this matter the learned Judge was faced with the problem of construing as a matter of law the above mentioned words with the necessity of first making a finding of fact as to the nature and kind of the thing to fall in or out thereof. This he had no jurisdiction and quite properly refused to do. His only course was to consider whether or not the two named golf courses, simpliciter without more, were within the ambit of one or more of "industry, commercial undertaking, public utility enterprise, or other operation". Under certain circumstances they could be included and in other circumstances they could not. On the basis that the only relevant fact that could be considered to have been included in the case for the opinion was that the properties were "golf courses", the learned Judge had no alternative than to take the position that there was no requirement to value "golf courses" as such as properties of going concerns and to answer question (4) in the negative. It follows logically that he was also right in negating error of the Board in holding that the respondent had complied with section 37 of the *Assessment Equalization Act*. Accordingly, in my respectful opinion, the learned Judge did not err as submitted.