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**FOREST LAWN CEMETERY COMPANY
AND OCEAN VIEW BURIAL PARK COMPANY**

v.

THE CORPORATION OF THE DISTRICT OF BURNABY

British Columbia Court of Appeal

Before Mr. Justice H. A. Maclean, Mr. Justice E. B. Bull and Mr. Justice M. M. McFarlane

Victoria, October 31, 1968

F. Levine, for the appellant
H. E. Hutcheon, Q.C., and R W. Brough for the respondent.

Judgment

Per curiam

McFARLANE, J.A. (*oral*): There are here two appeals from the judgment of Mr. Justice Brown given on a case stated to him by the Assessment Appeal Board under the *Assessment Equalization Act*. We do not have the benefit of reasons for the learned Judge's judgment, but, in view of the form of the formal judgment which was entered, I think counsel are right in assuming that the learned Judge answered the three questions, to which I will refer, in the negative, and I propose to deal with the matter on that basis.

Both appeals involve the interpretation and application to the facts as stated by the Board of section 327 (1) (g) of the *Municipal Act*, which reads:

Except as otherwise provided in this Act, the following property is exempt from taxation to the extent indicated: (g) Every cemetery within the meaning of the *Cemeteries Act* actually used and occupied for the interment of the dead or designated as an approved burial area by the Public Utilities Commission.

It will be convenient, then, to state at this point what is a cemetery within the meaning of the *Cemeteries Act*, that is found in section 2 of that statute, reading as follows:

"Cemetery" means any land which is set apart or used as a place for the interment of the dead or in which human bodies have been buried, and includes a mausoleum.

I now set out the first question propounded by the stated case, which is in these words:

"Did the Board err in holding that a parcel of land otherwise exempt cannot be in part taxable by reason of the improvements thereon?"

Stating that in another way, and based upon the submissions made to us by counsel, I think it can be fairly said to be intended to mean, "Where land within a cemetery formerly exempt has buildings constructed on it, does the land under the buildings cease to be exempt?"

The submissions on behalf of the municipality and the answer made by counsel for the Forest Lawn Company with reference to this question were, as I understood them, based upon a consideration of the first of the two disjunctive clauses in the exempting section, namely 327 (1) (g), the first of those disjunctive clauses being: "every cemetery within the meaning of the *Cemeteries Act* actually used and occupied for the interment of the dead."

Counsel for the municipality has submitted that the land under such buildings is not actually used and occupied for the interment of the dead and pointed out quite properly that it would be illegal to use that land for that purpose. In my opinion, however, the interpretation for which he argues places much too narrow a meaning on the words "every cemetery." It seems to me that if his submission were accepted we would be reading the first part of the exempting clause as though it said "such part of the land of a cemetery, or such part of the land within a cemetery as is actually used and occupied for the interment of the dead." In my opinion that would be placing an unnatural and unduly restrictive meaning upon the words which I have just read. It seems to me that the intention of the Legislature must have been to treat the land which is used and occupied by a cemetery company for cemetery purposes within the meaning of the *Cemeteries Act* as a unit. I would, therefore, answer the first question in the negative, as I have assumed the learned Judge below did, and hold that the land under such buildings is exempt within the meaning of the first part of the exemption clause.

I turn to the second question, which is in these terms:

"Did the Board err in holding that as the Forest Lawn Cemetery Company was an approved cemetery company under the *Cemeteries Act*, R.S.B.C. 1960, chapter 45, all the land of the said cemetery company was an approved burial area and therefore exempt from taxation?"

It will be observed at once that this question relates to the second of the disjunctive clauses in the exempting subsection, "designated as an approved burial area by the Public Utilities Commission." The case stated by the Appeal Board includes paragraph six as follows:

The Board found as a fact that the described lands of the appellant are a burial area approved by the Public Utilities Commission of the Province of British Columbia.

Faced with the problem that that finding of fact by the Board included in its case stated prevents this Court, or indeed the learned Judge below, from dealing with the question in so far as it is a question of fact, learned counsel for the municipality invited us to deal with the question propounded without reference to paragraph six, which I have just read. That is a rather intriguing invitation but I feel bound to decline it because the question whether an area has or has not been designated as an approved burial area by the Public Utilities Commission is essentially a question of fact. I feel bound to say that interpreting the Board's question as meaning that it found this fact only because the Forest Lawn Cemetery Company was an approved cemetery company cannot in my opinion be supported as a sound proposition.

In endeavouring to persuade us to treat the question as though paragraph 6 were not included in the stated case, counsel directed our attention to a part of the reasons for judgment of the Assessment Appeal Board, from which it appears that the Board made that finding as a result of what it considered at any rate to be evidence; that is an additional reason for declining Mr. Hutcheon's invitation. I feel no doubt that in view of the way in which this question has come before the Court, it cannot be answered as a matter of jurisdiction. This proceeding is of course strictly a statutory proceeding in which jurisdiction of this Court is restricted by the provisions of the statute.

Formally, therefore, in answer to the second question, I would say that this question cannot be answered in view of the fact as found by the Board in paragraph 6, which I have read.

Turning then to the third question, it reads:

"Did the Board err in holding that the mentioned improvements are properly assessable and taxable under section 37 of the *Assessment Equalization Act* and other relevant statutes?"

In order to understand that question it is necessary to refer to further statements of fact found in the stated case describing those improvements. I think I need not read them in full, but this element is common to them all, and counsel agree is applicable to another building, an administration building involved in the second appeal. The characteristic common to them all is that they are used solely in maintaining the cemetery or for uses necessarily incidental to that maintenance and to the use of the cemetery as a cemetery. On this branch of the case, subject to remarks which I will make in a moment, I am prepared and I do adopt the reasoning of Mr. Justice Gould of the Supreme Court in his decision on a stated case under the same statute in the matter of an appeal by the Roman Catholic Archbishop of Vancouver and the Municipality of Surrey. His judgment we are told is not reported, but it is dated February 27, 1968, and can be found in the Vancouver Registry of the Supreme Court in Proceeding X898/67.

In his reasons for judgment in that case Mr. Justice Gould applied to the word "land" in section 2 of the *Cemeteries Act* the definition found in section 24 (u) of the *Interpretation Act*, that definition provides that the word "land" in every Act of the Legislature, unless the context otherwise requires, includes, among other things, buildings.

Counsel for the Municipality of Burnaby here submitted to us that that definition, namely the definition found in the *Interpretation Act*, should not be applied, as Mr. Justice Gould did, to the word "land" in the definition of the word "cemetery" in the *Cemeteries Act*, and submitted that the definition of the word "land" found in the *Municipal Act* itself should be used instead. The latter definition excludes improvements. I cannot accept that submission for two reasons. The first is that it seems to me if it were accepted we would be holding that the kind of cemetery which is exempt under section 327 (1) (g) of the *Municipal Act* is quite a different kind of land, and parenthetically I must say improvements, from that which was intended by the Legislature in enacting the exempting clause in the *Municipal Act*. Secondly, I can find no good reason for applying the *Municipal Act* definition of "land" to the definition of a cemetery incorporated into 327 (1) (g), when the Legislature expressly used the words "cemetery, within the meaning of the *Cemeteries Act*" in that clause (g), whereas, in the preceding clause of the exempting section, it dealt with lands or improvements and in succeeding clauses deals specifically with buildings.

I would, therefore, answer the third question in the affirmative.

I think that the result of all this is that, answering the questions as I have indicated, the appeal of the Municipality of Burnaby is dismissed and the appeal of the Ocean View Company is allowed. I invite counsel to correct me if my last statement is not entirely correct.

MR. LEVINE: Instead of Ocean View it should be Forest Lawn.

MCFARLANE, J.A.: That correction will be made. I would dispose of these two appeals accordingly.

MACLEAN, J.A.: I agree.

BULL, J.A.: I agree. I only wish to add with respect to question two, on the assumption that the answer to it by the learned Judge below was in the negative, that not only do I agree that the question cannot properly be answered by this Court as being one not of law alone, but also that

the assumed negative answer below was in error and the learned Judge should have refused to answer it and have so stated.

MACLEAN, J.A.: The appeal will be dealt with in the manner indicated by my brother McFarlane in his judgment.