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CONSTRUCTION AGGREGATES LTD.

v.

CORPORATION OF THE DISTRICT OF MAPLE RIDGE

Supreme Court of B.C. (C1406-69)

Before: MR. JUSTICE J.G. GOULD

New Westminster, March 16, 17, 1971

C.D. McQuarrie, Q.C., for the Plaintiff
F.D.S. Vernon, for the Defendant

Reasons for Judgment

In this action the plaintiff seeks a declaration that the Municipality of Maple Ridge is not entitled to assess for taxation or to levy taxes on certain lands on an Indian reserve over which have been granted rights to extract and sell "gravel, rocks, sand, stone and aggregates." Alternatively sought is a declaration that the lands are exempt from taxation by the Municipality of Maple Ridge. Further prayed for is an injunction prohibiting both future assessment and taxation, and the return to the plaintiff of taxes as already paid to the municipality, under protest, by Walske Ready Mix Ltd., not a party to this action.

All land involved is part of Langley Indian Reserve 5 and qualifies as "lands reserved for the Indians" within section 91 (24) of the *British North America Act*, 1867. It has never been "surrendered" pursuant to section 37 of the *Indian Act*, such a surrender being a prerequisite to sale, alienation, lease or other disposition.

The rights granted under the land found in agreement (Ex. 22) of February 18, 1964, between Her Majesty in right of the Dominion of Canada, represented by the Minister of Immigration and Citizenship and Valley Ready Mix Ltd., a predecessor in title to the plaintiff. This agreement will be analysed in some detail later. The Minister recites in the document that his authority for entering into it is "Section 28 (2) and section 58 (4)(b) of the *Indian Act*, chapter 149, *Revised Statues of Canada 1952*". It is immaterial which of the two authorizing foundations recited is the relevant one, or whether both are, because there is no doubt that the Minister had all necessary authority, including approval of the Langley Indian Band, for whose benefit the land was held in trust by the Crown Dominion.

The municipality purported and purports to assess and tax the lands under section 335 of the British Columbia *Municipal Act*, chapter 255, R.S.B.C. 1960, and further claims that the land is not exempt pursuant to section 327 of the same Act because of the exceptions to exemption contained in section 327 (1) (f).

The relevant words of section 335 of the *Municipal Act* are:

> 335. (1) Lands the fee of which is in the Crown, or in some person or organization on behalf of the Crown, but which are held or occupied otherwise than by or on behalf of the Crown are, with the improvements thereon, liable to assessment and taxation in accordance with this section, but this section does not apply to make liable to taxation lands or improvements which would otherwise be exempt from taxation under clauses (b) to (l), inclusive, of subsection (1) or section 327 . . .
>
> (2) The lands referred to in subsection (1) with the improvements thereon shall be entered in the assessment roll in the name of the holder or occupier thereof, whose interest shall be assessed at the actual value of the lands and improvements. [*My underlining*]

The relevant words of section 327 of the *Municipal Act* are:

> 327. (1) Except as otherwise provided in this Act, the following property is exempt from taxation to the extent indicated:-
>
> (a) All land or improvements or both land and improvements vested in or held by Her Majesty:
>
> (f) All lands or improvements, or both land and improvements, held in trust for a tribe or band of Indians unless demised by lease to or occupied by a person who is not a member of the tribe or band: [*My underlining*.]

It is agreed that the relevant rights granted by Ex. 22 are not held "by or on behalf of the Crown" but, "by a person who is not a member of the tribe or band." It should be noted that the liability to assessment and to taxation under section 335 attaches where the lands are "*held or occupied* otherwise than by or on behalf of the Crown," but the exemption under section 327 applies to lands unless "*demised by lease to or occupied by* a person who is not a member of the tribe or band." I decline to accede to the theory of careless drafting in the disparity between the wording of the right to tax and that of the right to the exemption. Thus the right of the municipality to assess and tax in this case is conditional upon the lands being "held or occupied" by or through the plaintiff; and the right to exemption from taxation (but not necessarily from assessment) is conditional upon the negative alternative prerequisites that the lands are not "demised by lease to or occupied by" the plaintiff or a derivative of it.

The land is approximately 56 acres in all, but the gravel pit in question is in area approximately only 15 of the 56 acres. The plaintiff says that "to occupy" in law 56 acres, one must occupy the whole 56 acres, not just 15 of them. This argument is as illogical to me as would be one that a man who leases a 56-acre farm, but uses only 15 acres of it, and leaves uncleared and never goes near the other 41 acres, is not in law leasing that other 41 acres.

Exhibit 22, the interpretation of which is the key to this case, follows, with certain irrelevant, in my view, paragraphs not quoted in full but merely described in parentheses. [*The underlinings are mine*.]

> THIS Agreement, made in quadruplicate, this 18 day of February, in the year of Our Lord, one thousand nine hundred and sixty-four
> BETWEEN:
> HER MAJESTY QUEEN ELIZABETH THE SECOND represented herein by the Minister of Citizenship and Immigration, hereinafter called the "Minister,
>
> OF THE FIRST PART
>
> AND:
> VALLEY READY MIX LTD., of Haney, in the Province of British Columbia, hereinafter called the "Permittee",
>
> OF THE SECOND PART

WHEREAS the Permittee has applied to use and occupy a part of Langley Indian Reserve No. 5, on the right bank of the Fraser River, opposite the East end of MacMillan Island, in the Province of British Columbia.

AND WHEREAS the Council of the Langley Band of Indians for whose use and benefit the said Reserve has been set apart has by Resolution dated the 17th day of February 1964, approved the application.

NOW THEREFORE the Minister under authority of Section 28 (2) and Section 58 (4) (b) of the *Indian Act*, Chapter 149, *Revised Statutes of Canada, 1952*, doth hereby grant the Permittee the sole and exclusive right to use and occupy the whole of Langley Indian Reserve No. 5, together with the right to interfere with the riparian rights of the owner with respect to that portion of the foreshore of the Fraser River fronting on the Reserve, SAVING AND EXCEPTING thereout and therefrom the land shown outlined in red on the attached sketch plan. It is agreed that the said sketch plan is correctly drawn to the scale referred to thereon, and correctly delineates the said reserve.

IT IS AGREED AND UNDERSTOOD that the aforesaid permission is granted on the following conditions to which the Permittee agrees:

1. THAT the permit shall be for a term of twenty (20) years, from the first day of January, A.D. 1964 to the thirty-first day of December, A.D. 1983.

2. THAT the Permittee may use and shall have the sole and exclusive right during the life time of this agreement to use the hereinbefore described lands for the purpose of digging, extracting, removing, hauling, processing, stockpiling and loading of gravel (which for the purposes of this agreement shall be deemed to include gravel, rock, sand, stone and aggregates) and for no other purpose.

3. THAT the Permittee may construct and place on the said lands such improvements, plants, buildings, wharves, machinery, equipment and installations that may be required for the foregoing purposes, and may remove the same on termination or expiry of this permit within ninety days of such termination or expiry.

4. Without restricting the generality of the foregoing, the Permittee shall have an exclusive right to take, dig, extract and remove gravel from the hereinbefore described lands.

(Section 5 provides for payment, based on a minimum annual payment, on a sliding scale upward as-the years pass, with additional payments based on a per-cubic-yard extraction and sale in excess of various but certain fixed minimums.)

6. The Permittee shall have the right to terminate this agreement as at the end of any year by giving notice in writing to that effect to the Minister prior to the first day of December of such year. Such notice may be given by mailing the same by registered post in British Columbia, addressed to the Minister at Ottawa, Ontario, and shall be deemed to have been received the day following the date of mailing.

(Section 7 provides for failure of payment and resultant cancellation.)

8. That the Permittee shall give preference of employment to members of the Langley Band of Indians for the clearing of the roads and storage areas, stripping of the gravel pit and as highway crossing flagman insofar as members of the Band are available and suitable for such employment.

9. That the Permittee shall not assign or sublet the rights hereunder without the written consent of the Minister.

10. That the Permittee will pay and discharge all rates, taxes, duties and assessments whatsoever now charged or hereafter to be charged upon the said permit area or upon the said Permittee or occupier in respect thereof or payable by either in respect thereof.

(Section 11 provides for indemnification of the Minister by the Permittee if any of the latter's activities give rise to a claim or action against the Minister.)

12. That members of the Langley Band of Indians shall have the use of access roads and docking facilities constructed by the Permittee insofar as such use does not interfere with the use of the same by the Permittee.

13. That upon termination or expiry of the permit all excavations will be filled and levelled to the grade of the Lougheed Highway.

(Section 14 recites a predecessor agreement, obligates the Minister to assist the Permittee to obtain crossing rights over the highway and railroad on the lands, foreshore rights,, all as may be

necessary to the permitted activities, and provides for a renewal of the agreement under certain conditions.)

The latter part of the said section 14 reads as follows:

> The Minister shall not during the life of this agreement nor of any renewal thereof grant any right, licence or permission to any person, firm or corporation, to use the lands outlined in red on the sketch attached for any of the purposes set out in paragraphs numbered two (2), three (3) or four (4) hereof, or to do any of the acts or things set out in said numbered paragraphs.
>
> IT IS FURTHER AGREED that this permit shall be subject to the provisions of the *Indian Act* and Regulations established thereunder, which may be now in force or which may hereafter be made and established from time to time in that behalf by the Governor in Council.
>
> AND IT IS FURTHER HEREBY STIPULATED AND AGREED that not withstanding anything to the contrary herein contained this agreement shall not be deemed to set up a tenancy by implication or otherwise.

The agreement then concludes with the formal words and signatures of execution.

It is trite law that an agreement cannot be classified in law by words within it; the Court looks to the whole of the agreement and then classifies it regardless of how the parties may have purported to classify or describe it within the document itself.

I proceed first to the question of whether Exhibit 22 constitutes a lease, as was argued on behalf of the municipality. One of the cases relied upon to support this argument involved a timber licence or lease and is *Glenwood Lumber Company* v. *Phillips* (1904), A.C. 405, wherein Lord Davey, at pages 408-9, said:

> In the so-called licence itself it is called indifferently a licence and a demise, but in the Act it is spoken of as a lease, and the holder of it is described as the lessee. It is not, however, a question of words but of substance. If the effect of the instrument is to give the holder an exclusive right of occupation of the land, though subject to certain reservations or to a restriction of the purposes for which it may be used, it is in law a demise of the land itself. By subsection (7) of section 51 of the Act it is enacted that the lease shall vest in the lessee the right to take and keep exclusive possession of the lands described therein subject to the conditions in the Act provided or referred to, and the lessee is empowered (amongst other things) to bring any actions or suits against any party unlawfully in possession of any land so leased, and to prosecute all trespassers thereon. The operative part and habendum in the licence is framed in apt language to carry out the intention so expressed in the Act. And their Lordships have no doubt that the effect of the so-called licence was to confer a title to the land itself on the respondent.

Another timber licence case cited in support of the lease submission is *McPherson* v. *Temiskaming Lumber Company Limited* (1913) A.C. 145, wherein Lord Shaw of Dunfermline, at page 152, said:

> With reference to the land itself, the right of the licensee therein is clear and distinct, namely, it is a right to take and keep exclusive possession of the lands described, with, in the second place, a power to cut and remove timber therefrom. As regards the timber, the property therein, when cut, is vested in the licensee, and this vesting takes place whether the operations of cutting are carried out with or without the licensee's consent.

Another timber-cutting agreement case relied upon is *D. R. Fraser and Company Limited* v. *Minister of National Revenue*, a decision of the Exchequer Court of Canada (Cameron, J.), and reported in (1946) 2 D.L.R. 107, in which the learned Judge held, at page 117:

> I have reached the conclusion that in this particular case the contract, insofar as it relates to the acquisition of timber by the appellant, was a contract for the sale of goods. The timber had to be cut before it became the property of the appellant and it was then completely severed from the soil. The severance was clearly in the contemplation of the parties and payment was provided for on the basis of' board measure after milling. (*See* Ex. 17).
>
> But in the view that I have taken of the whole contract that does not dispose of the matter. In my opinion the contract is something more than a mere sale of goods. It is also a right to enter upon the land for the purpose of cutting and removing the goods agreed to be sold. Do these rights in the land constitute a licence or lease?

And further held at page 119:

> . . . Looking therefore at the substance of the agreement I must on the authorities reach the conclusion that, notwithstanding the words used in the document itself, it contains a lease of the land, and I so find.
> The so-called licence is, I think, both a contract for the sale of goods and a lease.

One must be judicially careful not to fall into the trap of drawing conclusions as to this case by analogy from cases involving timber licences or leases. The, rights being adjudicated upon here are "to use the hereinbefore described lands for the purpose of digging, extracting, removing, hauling, processing, stockpiling and loading gravel (which, for the purpose of this agreement shall be deemed to include gravel, rock, sand, stone and aggregates) and for no other purpose" (sec. 2 of Ex. 22), and for the disposal and sale of the same (sec. 5 of Ex. 22). The dichotomy is neatly phrased by Lord Shaw of Dunfermline at pages 778-9 of the case of *Kauri Timber Company Limited* v. *The Commissioner of Taxes* (1913) A.C. 771, where he says:

> The law - so clearly settled with regard to the working of coal and of nitrates, and settled upon a broad general principle - is in no way different when it comes to be applied to timber-bearing lands. The principle set out above in the present judgment as to the true reason for holding that such timber rights are of the nature of possession of, and interest in, the land itself has long been settled. A note by the learned editor in the first volume of Saunders' Reports, p. 227 c, puts the matter thus:
>
> "The principle of these decisions appears to be this: that wherever at the time of the contract it is contemplated that the purchaser should derive a benefit from the further growth of the thing sold, from further vegetation and from the nutriment afforded by the land, the contract is to be considered as for the interest in land; but where the process of vegetation is over, or the parties agree that the thing sold shall be immediately withdrawn from the land, the land is to be considered as a mere warehouse of the thing sold and the contract is for goods."

I have no difficulty in finding that gravel, unlike timber, in no way enjoys a "further growth . . . from further vegetation and from the nutriment offered by the land . . ." and in holding that Exhibit 22 does not grant any interest in land but constitutes a contract for the sale of goods. Moreover, Exhibit 22, viewed as a whole, and disregarding any inadvertent use of traditional legal language such as is contained in its preamble, is, in essence a contract merely for the right to enter and use the land for the very limited purpose of extracting and selling gravel, etc., from it. It is not an interest in land such as a lease; the permittee has not exclusive occupancy, nor could it maintain an action for trespass.

The exceptions from exemptions from taxation are: "unless demised by lease to or occupied by a person who is not a member of the tribe or band." The matter of whether there is a demise by lease has now been disposed of. There remains the question of whether the land was and is "occupied" by or through the plaintiff.

The British Columbia *Municipal Act*, section 2, defines "occupier" as:

> (a) one who is qualified to maintain an action for trespasser or
> (b) the person in possession of land of the Crown that is held under any homestead entry, pre-emption record, lease, licence, agreement for sale, accepted application to purchase, easement, or other record from the Crown, or who simply occupies the land.

The plaintiff Permittee does not qualify as an occupier under subsection (a) (*supra*), because it could not maintain an action for trespass. Nor is it in *possession* of the land, as required by the first part of *(b) (supra)*. The question remains, does the plaintiff come under the second part of *(b) (supra)*, as one "who simply occupies the land"? To "occupy" land for the purpose of municipal taxation there must be an element of exclusive occupancy. *See Re City of Oshawa and Loblaw Groceteria Company Limited* (1963) 38 D.L.R. (2d) 216; (1963) 1 O.R. 605. There is, and has been, as an agreed fact, logging over the land in question, being lawfully carried out by an Indian or Indians, and in the light of Exhibit 22 I find that the Crown Dominion could grant an interest in this land, including a lease, to a third party, subject only to the Permittee's rights under Exhibit 22 to come onto it for the limited purpose of removing gravel, etc. I hold that the plaintiff Permittee is not an "occupier" of the land within the definition of section 2 of the *Municipal Act*, nor is the land "occupied" by the plaintiff within section 335 or section 327 (1) (f) of the same Act. The authority of the municipality to tax (see. 335) includes land *"held"* or occupied. The exemption section 327 (1) (f) makes no reference to land "held," but only "occupied." As I have found that the plaintiff Permittee is not a lessee, has no interest in the land in the legal sense, is not in possession of it, is not an occupier of it, I refuse to make the semantic leap of finding that, nevertheless, it "holds" the land, whatever may be the precise meaning in law of "holding," *per se*, land.

In fact the land is not and has not been worked as a gravel pit by the plaintiff Permittee, but by Walske Ready Mix Ltd., which does so under a letter of permission, Exhibit 24, from the Plaintiff Permittee to Walske Ready Mix Ltd. The latter's rights are considerably less than those of the plaintiff Permittee, so the letter of permission in that sense falls short of an assignment of the plaintiff's rights under Exhibit 22.

In fact, Walske Ready Mix Ltd. has mistakenly paid the taxes for some years, which, I have held, should never have been paid, because the operation carried out under Exhibit 22 is exempt from taxation by the municipality. I cannot order the defendant municipality to return the wrongfully collected taxes to Walske Ready Mix Ltd. because it is not a party to this action, nor to the plaintiff, because it did not pay them. At this point I record a gratuitous opinion, which is pure *obiter dicta*, if the adjective "pure" can be so applied. Were Walske Ready Mix Ltd., pursuant to this judgment, to sue immediately for the return of the wrongfully paid taxes, I would deprive it of its costs, such a precipitous action being nothing more than a technical move to mulct the defendant municipality of some costs. But, I would not deprive it of such costs if within, say, 45 days the defendant municipality should have still failed to do what it should, namely return to Walske Ready Mix Ltd. the wrongfully paid taxes. I know of no authority in support of a proposition that the municipality should pay any interest on the funds it now should promptly return.

I wish to record clearly that what has been found here is exemption from taxation, but not necessarily from assessment. It may be that the lands herein, although exempt from taxation, are not exempt from assessment. *See* the decision of McIntyre, J., of this Court in *Re Assessment Equalization Act re City of Penticton* (1969) 67 W.W.R. 331. However, it is not necessarily for me to decide this question and I do not do so.

I refuse the injunction prayed for as entirely unnecessary and against the balance of convenience in the instance of a responsible municipality.

The declaration sought by the plaintiff, that it and its derivatives are exempt from taxation in regard to its rights under Exhibit 22, is made. The plaintiff will have its costs.