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NORMAN DENNIS ELSOM AND
DELSOM ESTATES LIMITED

v.

MUNICIPALITY OF DELTA

Supreme Court of British Columbia (NO. X6912-74)

Before: MR. JUSTICE H.E. HUTCHEON

Vancouver, December 16 and 17, 1974

W.H. Thomas for the Appellant
W.G. Weiler for the Respondent

Reasons for Judgment

For a number of years the 11 parcels of land in question have been classified under Section 332 of the *Municipal Act*, R.S.B.C. 1960, c. 255 as farm land and accordingly assessed at a value considerably lower than the value of parcels of the general roll.

In the 1974 Assessment Roll the parcels were not classified as farm land and were assessed in accordance with Section 330(1) of the *Municipal Act*. The result has been to increase the total assessed value by a factor of 30.

The Assessment Appeal Board confirmed the assessment and dismissed the appeal from the Court of Revision.

The following questions were put for the opinion of the Court:

> "(1) Did the Board err in failing to consider in its decision on the said appeals, the factors required by the *Municipal Act*, R.S.B.C. 1960, Chapter 255 and amendments thereto, Section 332 (2) to govern the classification of each of the said parcels as 'Farm Lands'?"
>
> "(2) Did the Board have any evidence upon which it could uphold a refusal by the Assessor to classify as 'Farm Lands', for the year 1974, any, each or all of the several parcels of land or the refusal of the Assessor to continue the previous classification of each or all of the said parcel as 'Farm Lands' for the year 1974?"
>
> "(3) Did the Board err in upholding the decision of the Assessor to refuse to classify as 'Farm Lands' on the Assessment Roll for the year 1974, each, any, or all of the said parcels of land on the ground that 'the subject lands did not meet the minimum standards required by the Assessor in order to qualify for farm classification'?"

The argument dealt with the questions in a different order with Question 1 last in the submission and I propose to follow that order.

The first point made by Mr. Merritt on Question 2 was that the Assessor was not present at the hearing of the Assessment Appeal Board. According to the written reasons of the Board he was represented by his deputy assessor Mr. E. Hatherton and a brief was presented by the Assessment Department through Mr. Howard.

Section 45 of the *Assessment Equalization Act*, R.S.B.C. 1960 c. 18 states in part:

> "45. The procedure in such an appeal shall be as follows:
>
> (e) Upon receiving an appointment, the Assessor of a municipal corporation or Provincial Assessor shall give notice to all parties affected thereby of the time and place fixed for hearing the appeals; and the Municipal Clerk, if the Board so requests, *and Assessor shall, without further notice, attend the hearing of the appeals with the assessment roll, the minutes of the Court of Revision, and all documents and writings having a bearing on the appeals;*" (emphasis added)

There is no specific requirement in the *Assessment Equalization Act* that the Assessor give evidence at the hearing but it was submitted that on the strength of the cases that were cited the Assessor is charged with the judicial function of making the assessment and he, alone, can and must justify that assessment by his evidence before the Assessment Appeal Board.

I accept the proposition for which the cases of *In re. Denne and the Corporation of the Town of Peterborough* (1886) 10 O.R. 767 and *The King* v. *City of Halifax*; re. Stevens (1915) 25 D.L.R. 113 (N.S.) are sufficient authority that the Assessor is fulfilling a judicial function in making the assessment. On an appeal from any person who is required to decide an issue judicially it would be the exception if that person were to be subject to cross-examination as to the reasons on which the decision was based. I would expect the statute to state in very clear terms that such a person was required to submit himself to cross-examination and not leave the matter to implication.

In the present case the appeal from the assessment goes first to the Court of Revision and next to the Assessment Appeal Board. There is no section of the *Municipal Act* or the *Assessment Equalization Act* relating to the proceedings before the Court of Revision which is the equivalent of Section 45. It would be illogical, in my opinion, to imply from the language of Section 45 that the Assessor must give evidence before the Assessment Appeal Board unless there were a similar requirement in the hearing before the Court of Revision.

Both of these reasons persuade me that the Assessor need not be present to give evidence and to be cross-examined.

If, as I have found, the Assessor need not be present to give evidence and to be cross-examined there can be no error of law arising in connection with the appeal if the materials required by Section 45 are brought to the hearing by someone who is accepted by the Assessment Appeal Board as the deputy Assessor.

The next question is whether in the absence of the person who made the assessment, that is to say, the Assessor, there can be any evidence before the Assessment Appeal Board on which to base its decision that the lots in question no longer qualified as farm land.

By Section 25 of the *Assessment Equalization Act* the Board "may, in its discretion, accept and act upon evidence by affidavit or written statement or by the report of any officer appointed by it or obtained in such other manner as it may decide."

In this case the Board accepted the evidence put before it by Mr. Howard of the Assessment Department in the form of a brief entitled "Assessor Submission". Since section 25 authorized the Board to act as it did there was no error on the part of the Board.

There was some evidence, therefore, in the form of the brief upon which the Board could make its decision.

Even if the procedure before the Board could be made the basis of a stated case, as to which I have doubts, I conclude in this case that the Board has not erred and that the answer to Question 2 must be in the affirmative.

In the interests of clarity I repeat Question 3:

> "(3) Did the Board err in upholding the decision of the Assessor to refuse to classify as 'Farm Lands' on the Assessment Roll for the year 1974, each, any, or all of the said parcels of land on the ground that 'the subject lands did not meet the minimum standards required by the Assessor in order to qualify for farm classification'?"

The quotation in Question 3 is taken from the written reasons of the Board and the last paragraph of those reasons reads as follows:

> "The Board has considered all the evidence, argument and exhibits submitted by the appellant and the respondent, and are of the opinion that the subject lands do not at present, nor did they in 1973, meet the minimum standards required by the assessor in order to qualify for Farm classification. The Board has no alternative than to support the opinion of the 1974 Court of Revision."

The statement which I have quoted from the reasons is reflected in the Stated Case in these words:

> "12. The Board concluded that the subject lands did not, in 1974, nor in 1973, meet the 'minimum standards required by the Assessor in order to qualify for farm classification."

I should say at this point that by some misadventure the tape recording of the evidence before the Assessment Appeal Board was mislaid or possibly erased. Contrary to the provisions of Section 51 (5) of the *Assessment Equalization Act* a certified copy of the evidence dealing with the question of law taken in the appeal could not be filed. Because of this it is not possible to conclude whether the minimum standards required by the Assessor are arbitrary as Mr. Merritt has argued or whether they are standards which fit properly within the factors mentioned in Section 332 (2).

The issue that was before the Board, however, was not whether the subject lands met the minimum standards required by the Assessor but whether the subject lands should be classified as farm land.

It seems to me that the Assessment Appeal Board, like the Labour Relations Board in the case of *Metropolitan Life Insurance Company* v. *International Union of Operating Engineers Local 796* (1970) S.C.R. 425 has asked itself the wrong question.

In that case the Labour Relations Board of Ontario was called upon to decide on an application for certification whether certain persons were employees of the trade union. Over the course of the years, the Board had established a policy which set its own standard of membership. The constitution of the trade union in which the requirements of membership were contained was not considered.

Cartwright, C.J. speaking for the Court is quoted at p. 434 as follows:

> "It is clear that the Board had jurisdiction to enter on the inquiry and that the certificate which it granted was, on its face, one which the Board had jurisdiction to issue.

> If. the Board had addressed itself to the question whether fifty-five per cent of the employees were members of the union within the meaning of s. 7(3) of the Act its decision could not have been interfered with by the Court although it appeared that the Board in reaching it had erred in fact or in law or in both. But it is clear from the reasons of the Board read as a whole and particularly from the excerpts therefrom which I have quoted above that the Board did not perform the task imposed upon it by s. 7. Instead of asking itself the question set out in the preceding paragraph the Board embarked on an inquiry as to whether in regard to the requisite number of employees the following conditions had been fulfilled, (i) that the employee had applied for membership in the applicant, (ii) that the employee had indicated his acceptance of membership and his assumption of the responsibilities of membership by paying to the applicant, on his own behalf, at least one dollar in respect of the prescribed fees or dues, (iii) that the constitution of the applicant did not contain an express prohibition of the employee being admitted to membership and (iv) that the union accorded to the employee full rights and privileges as a member. The reasons of the Board make it plain that on being satisfied that these four conditions had been fulfilled in regard to any employee it would treat that employee as a member of the union for purposes of certification even if it were plain from the terms of the union's constitution and from the nature of the qualifications of, and the duties performed by, such employee that he was not, and indeed could not be, a member of the union.
>
> In proceeding in this manner the Board has failed to deal with the question remitted to it (i.e. whether the employees in question were members of the union at the relevant date) and instead has decided a question which was not remitted to it (i.e. whether in regard to those employees there has been fulfillment of the conditions stated above)."

The question that was before the Assessment Appeal Board was whether the land had been improperly classified. The Board erred in law in that it decided that the subject lands did not meet the minimum standards required by the Assessor instead of deciding whether the land qualified for farm classification.

The answer to Question 3 is in the affirmative.

Question 1 is in these terms:

> "(1) Did the Board err in failing to consider in its decision on the said appeals, the factors required by the *Municipal Act*, R.S.B.C. 1960, Chapter 255 and amendments thereto, Section 332 (2) to govern the classification of each of the said parcels as 'Farm Lands'?"

As I understand the first argument on this question, it is that there is no evidence that the Assessor, in reaching his decision that the lots ceased to qualify as farm land, applied the factors in Section 332 (2) to each of the lots.

Section 332 reads as follows:

> "332(1) Subject to this section, the Assessor may classify land of five or more acres in area as farm land.
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> (2) Before classifying any land as farm land, the Assessor may require the owner or lessee to submit evidence of the facts, and the Assessor shall be guided by the following factors:
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> (a) The proportion of the land actually under cultivation or used for agricultural, horticultural, poultry-raising, stock-raising, dairying, fur-farming, or beekeeping purposes:

(b) The time devoted to its cultivation or use by the owner, his tenant, agent, or servant:

(c) The relationship which the value of the products of such land bears to the area of the land so cultivated or used.

(3) In the case of the parcel of land of two acres or more and less than five acres which in the opinion of the Assessor is bona fine used as a farm, the Assessor may, notwithstanding the provisions of subsection (1), classify such land as farm land if he is satisfied that the owner or occupier receives the greater part of his total annual income from such parcel of land and of which fact evidence is submitted to him under oath or statutory declaration by the owner or occupier.

(4) Notwithstanding section 330, land classified by the Assessor as farm land while so classified shall be assessed at the value which the same has for such purpose without regard to its value for other purposes.

(5) Notwithstanding the provisions of subsection (1), where a parcel of land classified by the Assessor as farm land is reduced in area to less than five acres as a result of a portion being expropriated for a public purpose or under section 465, the parcel so affected shall nevertheless be classified as farm land so long as the use of the land is not changed. 1957, c.42, s.330; 1958, c.32, s.153; 1964, c.33, s.21."

I have quoted the whole of Section 332 in order to emphasize the distinction made in the section in several places between "land" and "parcel of land". It is "land" that is to be classified as farm land. Although the taxable unit remains the parcel of land it seems to me that for the purposes of Section 332, the unit is the farm made up of one or more parcels of land.

The second argument is that the Board failed to consider the factors referred by Section 332. Mr. Thomas argued that the Board had before it evidence of the expansion of the gravel pit operation previously confined to two of the lots as well as answers made by Mr. Elson to certain questions asked by the Chairman of the Board relating to the use of the land.

I have held, in answer to Question 3, that the Board had asked itself the wrong question. The pieces of evidence mentioned by Mr. Thomas are relevant on the issue of the application of the factors required by Section 332 but because the Board had not asked itself the right question the evidence before the Board was used for the wrong purpose. In other words, the evidence was considered by the Board as relating to the minimum standards of the Assessor and not as relating to the application of the factors required by Section 332. I must conclude that the Board did err in failing to consider in its decision the factors required by Section 332(2).

The answers to the questions are:

Question 1 Yes

Question 2 Yes

Question 3 Yes