CITY OF VANCOUVER

v.

CANADIAN NATIONAL RAILWAYS
EMPIRE STEVEDORING CO. LTD.
CASCO TERMINALS LIMITED,
NATIONAL HARBOURS BOARD.

Supreme Court of British Columbia (No. X7677-75)

Before: MR. JUSTICE H.E. HUTCHEON

Vancouver, June 12, 13 and 16, 1975

J.L. Mulbery for the Appellant
W.E. Ireland for the Respondents
M.I. Catliff for the Respondents
A. Smith for the Board

Reasons for Judgment

By reason of the provisions of the *Assessment Act* 1974, c. 6, a decision is required on the question which has been stated, within one month of the filing of the application on May 23, 1975. I say this because in the time that is available to me it is not possible to do justice to the careful submissions of counsel or to set out, except in a cursory way, all of the facts which are relevant to the conclusion I have reached. There is, however, no doubt in my mind that the answer which I am compelled by binding authority to reach is the one that is contrary to the submissions of the City of Vancouver.

The question which has been stated by the Assessment Appeal Board is expressed as follows:

> "Are Casco Terminals Limited, Empire Stevedoring Co. Ltd. and Canadian National Railways, or any of them occupiers of the Crown lands within the meaning of the *Vancouver Charter*?"

The material provisions of the *Vancouver Charter* are:-

> "S. 396. All real property in the city is liable to taxation pursuant to a rating by-law, subject to the following exemptions:-
>
> (a) Crown lands; provided, however, that the right or interest of an occupier of Crown lands, not holding in an official capacity, shall be liable to taxation, and he shall be personally liable therefore as if he were the owner of such real property, . . ."
>
> "S. 2. 'Crown lands' means real property belonging to Canada or the Province, and includes real property held in trust for a body or tribe of Indians.

'occupier', when used with respect to Crown lands, includes tenant and holder of an agreement to purchase;"

The National Harbours Board, which is established by federal statute, owns three piers or docks in Vancouver Harbour. Deep sea and other vessels use the piers for the purpose of tying up to unload and load cargo. The three piers are Centennial, Ballantyne and Lapointe.

Prior to December 1973, the National Harbours Board leased the piers to others. For example, Centennial Pier West was leased to Empire Stevedoring Co. Ltd. I have not seen the form of lease but I have been told that the assessments against the various lessees are under appeal.

In December 1973 the National Harbours Board entered into a new form of agreement with each of the firms in question. The arrangement contemplated by the new form of agreement is one of services to be rendered for the Board by a contractor. Thus in Exhibit 5, the agreement made as of the fourth of December 1973, Empire Stevedoring Co. Ltd. agreed as the contractor to provide, perform and carry out services for the Board "incidential to and arising from the operation by the Board of the premises and facilities as a public terminal for the handling, loading and unloading of cargo".

One looks in vain through the express terms of the agreement for any rights in favour of the contractor which resemble, even remotely, an interest in land. Even the most elementary of rights necessary to the work of the contractor, that is the assurance that the contractor will be given the space on the docks to carry out the services, must be gathered, if at all, by implication.

There was no dispute among counsel that I am entitled to consider the substance of the agreement and I am not bound by its form. I turn therefore to the evidence relating to Centennial Pier West given before the Assessment Appeal Board to ascertain how the contractor has carried on the services. The first conclusion that I reach on the evidence is that the procedures followed by the contractor since December 1973 are the same as they were before that date. In other words, the execution of the agreement between the National Harbours Board and Empire Stevedoring Co. Ltd. has had no effect on the daily activity at the dock.

The contractor, subject to certain pre-emptive rights in favour of the Board, arranges the schedule of berthing. When the cargo from a vessel is placed on the dock the contractor removes the cargo either to an open storage area on the dock or into the large sheds. For this purpose the contractor has approximately two hundred forklift trucks and a number of large straddle carriers. Sometimes cargo is loaded directly from the ship into railway cars or barges and if this is done the contractor plays no part in the handling.

Because the docks are located at a port of entry to Canada, various regulations concerning customs, health and agriculture apply. These regulations are administered by officials of the appropriate federal government department who have offices on the dock and have access to all parts of the dock where goods are placed.

The board has available a staff of twenty or more whose job it is to prepare the documentation related to the cargo. This work is done by the Board for the contractor who pays 85% of the cost of operating the central billing organization. It is this staff, using forms showing the contractor as the person rendering the account, which looks after the advice to the owner or consignee of the cargo of the arrival of the goods. The owner of the goods or his agent produces to the employees of the contractor, located in the gate-house from which access to the pier is controlled, the necessary papers, including customs clearance, to establish the right of the owner to remove cargo from the sheds.

The owner pays the contractor for the various services, including service charges, wharfage and demurrage. The latter is a charge which is imposed by the National Harbours Board if the cargo is left on the dock for a period longer than five days. Pursuant to the written agreement the

contractor remits monthly to the Board all wharfage and berthage charges and 50% of the demurrage charges.

At any hour between 8:00 a.m. and 5:00 p.m. one may find on the dock the employees of the contractor, employees of the National Harbours Board, customs official, officials of the Department of Agriculture, agents of owners of cargo, insurance adjusters, crews of ships and others attending to the various needs of the vessels berthed at the pier.

Unless there is a vessel to be served the sheds are locked at 5:00 p.m. by the contractor and are only accessible during the hours until 8:00 a.m. the following morning to officials of the contractor who have keys and to the National Harbours Board Police who have a set of keys to open all areas.

I have said nothing about the manning of the 300 ton gantry crane by employees of the National Harbours Board because that is peculiar to Centennial Pier West and I prefer to examine those facts which, so far. as I followed the evidence, are common to all the docks in question.

The first proposition advanced by Mr. Mulberry for the City of Vancouver is that Empire Stevedoring Co. Ltd. is a tenant and therefore by definition an occupier. He relied upon the payment of wharfage charges as the rent paid by the contractor. The wharfage charges are clearly charges levied, not on the contractor, but on the owner of the cargo pursuant to certain statutory provisions. They cannot be taken as the consideration paid by the contractor for the use of the dock.

The second proposition is that the contractor, although not a tenant, is an occupier.

In this area of the law I am bound by the decision of our Court of Appeal in *Construction Aggregates Ltd.* v. *Corporation of District of Maple Ridge* (1972) 6 W.W.R. 355 (B.C.C.A.) In that case the statute in question was the *Municipal Act*, R.S.B.C. 1960, c. 255. The definition of "occupier" in Section 2 of the *Municipal Act* is given as follows:-

> " 'occupier' means
>
> (a) one who is qualified to maintain an action for trespass; 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; or
>
> (c) the person in possession of land the fee of which is in a municipality and that is held under any lease, licence, agreement for sale, accepted application to purchase, easement, or other record from the municipality, or who simply occupies the land;"
>
> (emphasis added)

I take the words which I have underlined to refer to a person who has no registrable interest in the land but who is in occupation in fact. Thus the definition of occupier in the *Municipal Act* would appear to me to be wider than that in the *Vancouver Charter* since several sections of the *Vancouver Charter* such as Section 341 (i) use the expression "any occupier having any right or interest in such parcel of Crown lands".

In the *Construction Aggregates* case, supra, it was held that a person who had the right to enter upon Indian lands to dig and remove gravel was not an "occupier" for the purposes of the *Municipal Act* because there was no exclusive right of occupation. The learned trial Judge (Gould J.) is quoted with approval in the majority judgment where he said after the reference to the words

"who simply occupies the land" that "to 'occupy' land for the purpose of municipal taxation there must be an element of exclusive occupancy".

The reasons for judgment of Maclean J.A. can only be interpreted as applying the test of exclusive occupancy.

I take it therefore that the *Construction Aggregates* case is authority for the proposition that to be an "occupier" under the *Municipal Act* the element (not "an element) of exclusive occupancy must be found. That case is likewise authority for the proposition, in my opinion, that to be an "occupier" under the *Vancouver Charter* the person must have the exclusive right of occupation.

In the present case the evidence is clear that the National Harbours Board has retained the final say, on a daily basis, over the use of Centennial, Lapointe and Ballantyne Piers.

At all of the access roads there are signs which read "No Admittance Except On Business - By Order National Harbours Board". If anyone other than those who use the piers daily wishes to go upon the piers he applies to the National Harbours Board Police who will issue a permit to him in appropriate cases. Permits are issued for sport fishing, pigeon shooting and touring by groups of sightseers. The parking of motor vehicles on the piers is under the control of the National Harbours Board Police.

The National Harbours Board has a crew of sixty men consisting of carpenters, painters, welders and mechanics who are responsible for the maintenance of the fabric of the three piers.

There may be some areas such as the van maintenance building on Centennial Pier where the straddle carriers are maintained and the offices used by Empire Stevedoring Company employees that could be said to be occupied exclusively by the contractor. The case put forward on behalf of the City of Vancouver is that the contractor is an occupier of the entire pier and in my opinion the evidence does not support a finding that the contractor is in exclusive occupancy.

The National Harbours Board has retained control over the docks in fact and in law. Indeed, as I read the agreements between the Board and the contractors there would be nothing to prevent the Board from leasing the docks to third parties, such as the City of Vancouver, subject to the rights of the contractors, both express and implied.

A number of English decisions were cited to me. I have not found it helpful to refer to them however persuasive their reasoning because I am unable to distinguish the use of the word "occupier" in this case from the interpretation given to that word by the Court of Appeal in the *Construction Aggregates* case.

The question posed is answered in the negative.