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BETHLEHEM COPPER CORPORATION LTD.

v.

ASSESSMENT APPEAL BOARD

Supreme Court of British Columbia (1976)

Before: MR. JUSTICE E.D. FULTON

Vancouver, July 20, 1976

J.F. Tollestrup for the Appellant
K. Clark for the Appellant
R.B. Hutchison for the Respondent

Reasons for Judgment

This appeal is by way of a stated case by the Assessment Appeal Board under the provisions of the *Assessment Act*, S.B.C. 1974, Ch. 6, in respect of a hearing by them at New Westminster, B.C., on October 31, 1974. The Appellant, Bethlehem Copper Corporation Ltd., had appealed the 1974 assessment in respect of lands on which its mine is situate in the Kamloops Land District.

In its decision the Board came to the conclusion that there was insufficient evidence to show that a rate of diminishing returns should be applied for assessment purposes. The Appellant requested a Stated Case pursuant to the provisions of Sec. 67(2) of the *Assessment Act*; the transcript of the proceedings at the hearing, prepared for the purpose of the Stated Case, is defective due apparently to partial failure of the recording device used at the hearing. In the Stated Case, two questions are put as questions of law, as follows:

> (a) Was the Board correct in rejecting as a proper principle to be employed in assessing the value of a mining property, the diminishing nature of its major asset, the ore body?
>
> (b) Has the Appellant been effectively deprived of its right of appeal by the failure of the Board to provide a complete transcript of the proceedings before it?

A third question was abandoned at the hearing of the appeal before me.

Counsel for the assessment authority took the preliminary objection that the appeal, though stated as being on a question of law, is actually an appeal on a question of fact and that therefore I am without jurisdiction to hear it. I am of the view that the preliminary objection is properly taken, and that the appeal must be dismissed.

Sec. 67 of the *Assessment Act* makes it clear that the appeal can only be on a question of law. Sec. 67(2) reads as follows:

> "At any stage of the proceedings, the board on its own initiative, or at the request of one or more of the persons affected by the appeal, may submit, in the form of a stated case for the opinion of the Supreme Court, a question of law arising with the appeal. . ."

Sec. 67(4) reads as follows:

> "Where a case is stated, the secretary of the board shall forthwith file the case, together with a certified copy of the evidence dealing with the question of law taken during the appeal, in the Supreme Court Registry, . . ."

The Stated Case does put the two questions as questions of law - the two questions quoted earlier. However, the mere statement that they are questions of law does not make them such. The decision of the Board, from which this appeal is taken, makes it clear that their view that the principle involved should not be employed, was based on the Board's consideration of the evidence in that regard, and on their finding of fact that the evidence was not sufficient to show that the principle of diminishing return should be applied. They are the finders of fact, and that finding is within their province as such. This does not amount to error in law.

Counsel for the Appellant asks me to find that the question set out in paragraph (b) of the Stated Case is a true question of law . He says that if we had a full transcript available, it might show that the Board erred in law in its decision. But really this can only be to say that, if we had a full transcript, I might feel that the Board was wrong in giving more weight to the evidence and views of the Assessor than to those of the Appellant. It might be that I would conclude that I would have arrived at a different decision on the evidence: but that does not mean that the Board erred in law, and in any event I cannot substitute my view of the facts for that of the Board.

In its decision, the Board summarized the evidence and arguments on the principle to be applied, as follows:

> "Mr. Ted Joslin, an Appraiser was called to testify regarding the company's operation, reclamation of land, valuation of land at different stages. The Appellant tabled with the board a schedule of depreciation, a graph showing the rate of decrease and increase from $560. per acre to minus $226.33 in ten years, the increase to $300. per acre after 20 years, also a most comprehensive report on reclamation research and investigation conducted in 1972, duly marked Exhibits 1, 2 and 3 respectively.
>
> At the conclusion, Counsel for the Appellant conceded that the valuation used by the Respondent in regards to the Industrial land is acceptable, however, being that the mine operation has a life expectancy of 20 years, the assessment should be based on a deminishing (sic) value. Mr. Specht suggested that 2½% should be applied per year in lieu of the deminishing return, for assessment purposes.
>
> Mr. Bennett in his summation again emphasized that there is no evidence indicating the mine has only a ten year ore supply left, nor is there evidence that the land values are going down; this is substantiated by the fact that the Appellant paid $750,000. for 520 acres in 1973. The assessed value used for assessment purposes is $66,560. or less than 10% of the purchase price paid. The Respondent concluded that every consideration has been given to favour the Appellant. The assessment while substantially increased over 1973, is not in excess of 50% of actual value as defined in Section 37 of the *Assessment Equalization Act*. He recommended that the assessment be confirmed."

The Board's conclusion is then stated as follows:

> "The Board having considered the evidence, testimony and arguments by Counsel for the Appellant and the Respondent, is of the opinion that at this stage of the operation of the mine, there is insufficient evidence to show that a rate of deminishing return should be

> applied for assessment purposes; moreover based on the reclamation policy undertaken by the Company, when completed, when the ore supply is depleted, could have a greater value per acre than presently indicated by the assessment."

This indicates clearly that the Board heard all the evidence tendered, and that they had it in mind in reaching the conclusion that there is insufficient evidence that the principle should apply. The provision of a transcript would not alter this situation.

The Appellant's difficulty arises not out of the fact that the transcript is an inadequate reflection of all the evidence that was heard by the Board, but rather out of the fact that the Board, having heard all that evidence, came to a decision based on a fact which it was within their competence to find: namely, that there was insufficient evidence put before them to support the view contended for by the Appellant.

Counsel for the Appellant referred me to the case of *Peverley* v. *Arctic Construction Ltd. etc.*, (1966) 55 W.W.R. 236, a decision of the British Columbia Court of Appeal, a case where the oral judgment and the official reporter's notes of evidence had both been lost. The Court of Appeal allowed the appeal. In that case, however, the Appellant had a right of appeal on fact as well as on law, and the court was concerned that they did not have before them sufficient material to show whether the trial Judge had erred in his conclusions of fact. Here, however, the statute confines the right of appeal to an appeal on law. The decision of the Board makes it clear that no question of law was involved in, or lay at the root of, their finding.

I must therefore sustain the preliminary objection and dismiss the appeal, with costs to the Respondent.