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PACIFIC LOGGING COMPANY LIMITED

v.

THE ASSESSOR FOR THE PROVINCE OF BRITISH COLUMBIA

Court of Appeal for British Columbia

Before: MR. JUSTICE H.A. MACLEAN, MR. JUSTICE M.M. McFARLANE, MR. JUSTICE W.R. McINTYRE

Vancouver, November 12, 1976

Mr. K.C. Murphy, for the Assessor of BC
Mr. R.B. Hutchison, for Pacific Logging Company Limited

Reasons for Judgment of Mr. Justice Maclean

I have had the advantage of reading the judgment of my brother McFarlane and I am in complete agreement with his reasons for judgment. Accordingly, I would allow the appeal and answer the question raised by the Stated Case in the negative and remit this opinion to the Board as required by statute.

Reasons for Judgment of Mr. Justice McFarlane

At the request of the owner (respondent in this appeal) of certain assessed lands the Assessment Appeal Board, acting under section 51 (2) of the *Assessment Equalization Act*, R.S.B.C. 1960, Cap. 18, as amended, submitted a case for the opinion of the Supreme Court. The case must submit a question of law only. The Board had upheld assessments by the assessor which were in turn confirmed by a Court of Revision.

The case was presented to McKay, J. who dealt with a preliminary objection that the facts had not been stated correctly. On May 2,1974 he referred the matter "back to the Board for restatement". It is apparent that in doing so McKay, J. acted under section 51 (6) which provides that the Court may cause any case to be sent back to the Board for amendment. I therefore interpret "restatement" here to mean "Amendment" and I understand counsel to agree with this interpretation. The case was amended by the Board and on October 23, 1974 was presented for hearing before Wootton, J. Objection was taken before him that he had no jurisdiction because McKay, J. was seized of the matter. Wootton, J., having been informed by the Registrar that McKay, J. did not consider himself seized and having considered the relevant terms of the statute overruled the objection, proceeded to hear the appeal de novo and "untrammelled" by any decision of McKay, J. On November 6, 1974 he allowed the appeal, set the assessments aside and remitted the cause to the Board with his opinion that

> the Assessor erred in law in acting arbitrarily and in assessing without statutory authority

The Provincial Assessor appeals to this Court. By virtue of section 51 (7) of the Act his appeal is restricted to any point of law raised before the Supreme Court Judge.

In limine counsel for the appellant repeated his objection that Wootton, J. lacked jurisdiction and asked this Court to set aside his disposition of the case and remit it for hearing by McKay, J. The Court considered the arguments presented on this question, overruled the objection and proceeded to hear the appeal. I record briefly the reasons for that ruling.

The Court was of the opinion that the validity of the objection depended upon a correct interpretation and application of section 51 (6) which reads:

> (6) The Court shall hear and determine the question, and within one month give its opinion and cause it to be remitted to the Board, but the Court may, if it thinks fit, cause any case to be sent back to the Board for amendment, and thereupon the Board shall amend the case accordingly, and the opinion of the Court shall be delivered after the amendment.

It is the Court, i.e., the Supreme Court of British Columbia which shall hear and determine the question and it is the opinion of the Court which is to be delivered. When McKay, J. sent the case back for amendment he was acting as the Court and representing the Court. Likewise, Wootton, J. in hearing the amended case acted as the Court and representing the Court. It was the Court which acted on both occasions and hence no question of jurisdiction arises. This view is consistent with, if indeed not required, by section 17(1) of the *Interpretation Act*, S.B.C. 1974, Cap. 42.

The essential facts and the question for determination are stated in the case as follows:

> 4. The lands under assessment are the beds of all lakes (named in the Schedule with acreage) lying in what is commonly known as the Esquimalt & Nanaimo Railway belt, which belt of lands was granted by the *Island Railway Graving Dock and Railway Lands Act (B.C.)* 1884 C. 14 to the Government of Canada and subsequently granted by the Government of Canada to the Esquimalt & Nanaimo Railway Company in the year 1884.
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> 5. On a number of navigable lakes in said railway belt, portions of foreshore have been leased by the Appellant to logging companies. The leased lands have been separately assessed, and their assessments are not within the present appeal.
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> 6. In a majority of cases, the Appellant did not own any upland bordering on the lakes being assessed, and had no access thereto. That applied to all lakes except 7, namely, Lakes Shawnigan, Upper Quinsam, Wolfe, Cameron, Cowichan, Great Central and Bacon.
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> 7. Section 22 of the aforesaid *Railway Lands Act* provided that all lands in said belt should be free of taxation until alienated by said Railway Company.
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> 8. By Deed dated July 2, 1969, said Railway Company conveyed to the Appellant, Pacific Logging Company Limited, all of the unalienated lands in said belt (other than land used for railway purposes) including the beds of the lakes set out in the Schedule hereto.
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> 9. In the years 1970 to 1973 inclusive, the beds of all lakes owned by Pacific Logging Company Limited, in the land conveyed by said Railway Company to the Appellant by the Deed of July 2, 1969, were assessed by the assessors in the respective assessment districts within which such lakes were located, which assessments were confirmed by the respective Courts of Revision having jurisdiction to hear appeals for such assessors.

10. Assessment appeals were launched by the Appellant for the years 1970, 1971, 1972 to the Assessment Appeal Board but these appeals were never heard by the Assessment Appeal Board then constituted for the Province of British Columbia.

11. On April 12, 1973, the appeals from the 1973 assessments were heard by us, but we ruled we had no jurisdiction to hear the 1970, 1971 or 1972 appeals and these appeals still stand unheard. The Appellant takes the position that none of these appeals has been abandoned.

12. Rejecting two other methods of evaluation, one because of lack of sales data of property containing lakebeds and the other (based on rental income from leased water lots) because of a lack of instances where lakes in their entirety have been leased, the method of assessment adopted by the Provincial Assessors in assessing the Appellant's lakebeds was as follows:

(a) The lakebeds in Comox and Alberni Districts (hereafter referred to as Area A) were assessed on one uniform basis and those in Nanaimo, Cowichan and Victoria Districts (hereafter called Area B) on one uniform basis.

(b) The assessors arbitrarily selected a 50 acre lake bed as the most valuable size on an acreage basis.

(c) A value of $360.00 per acre was selected from sales data as the average value of upland in Area A and $440.00 per acre as the average value of upland in Area B.

(d) A value of $180.00 per acre, that is 50% of the average value of upland in Area A was taken as the starting-point for valuing lakebeds in that Area; and likewise $220.00 per acre, that is 50% of the average value of upland in Area B was taken as the starting-point for valuing lakebeds in that Area.

(e) Accordingly as a lakebed in either Area A or B was above or below fifty acres in size the starting-point value per acre was diminished by five per centum (5%) of such value for every five acres of variance above or below fifty acres.

(f) After diminution described in sub-clause (e) of this clause the starting-point value of each lakebed was further adjusted up or down by reason of that lake's distance from the highway, road access, equality and utility (i.e. multiple recreation use), remoteness for fishing and special utility.

The Appellant having by notice pursuant to Section 51 (2) of the *Assessment Equalization Act* required us to submit the case to the Supreme Court of British Columbia, the following question of law is submitted for the opinion of the Court:

"Did we err when we confirmed the assessors' values of the said lakebeds, computed as aforesaid?"

Although the Board described its question as a question of law it is necessary to deal with the Appellant's submission that it is in reality a question of fact or of mixed law and fact. For this purpose the important part of question as propounded is the words "computed as aforesaid". These words in the context of paragraph 12 indicate that the intent of the question, and therefore its correct interpretation, is that the legality of the method of assessment used by the assessor is the issue which is raised. This means, in my opinion, that the Court is asked to decide whether the use of that method of assessment is contrary to law. The relevant law for this purpose is section 37(1) of the statute which reads:-

> The Assessor shall determine the actual value of the land and improvements. In determining the actual value, the Assessor may give consideration to present use, location, original cost, cost of replacement, revenue or rental value, and the price that such land and improvements might reasonably be expected to bring if offered for sale in the open market by a solvent owner, and any other circumstances affecting the value; and without limiting the application of the foregoing considerations, where any industry, commercial undertaking, public utility enterprise, or other operation is carried on, the land and improvements so used shall be valued as the property of a going concern.

(The words following "circumstances affecting the value" have no direct application to this appeal)

Interpreting as I have done, I think the Board's question does raise a question of law only. In dealing with the question, however, it is essential to keep in mind the fact that this Court is not entitled to interfere with matters of fact decided by the Appeal Board, affirming the Assessor and Court of Revision or to substitute its view of any aspect not strictly of law only. Proceeding to consider the legality of the Assessor's method I find guidance in the judgment of this Court on the meaning and effect of the predecessor of the present section 37(1) in *City of Vancouver* v. *The Corporation of the Township of Richmond*, (1959) 17 D.L.R. (2d) 548 where Sheppard, J.A. speaking for the Court said at pp. 550-1:-

The construction of that section is a matter of law, Camden (Marquis v. Inland Revenue Com'rs, (1914) 1 K.B. 641 per Cozens-Hardy M.R. at pp. 647-8, and it would follow that those matters which are determined by giving proper effect to the words in the section, such as the basis of assessment, which is to be "at their actual value", or the items which may be considered in determining that value, are likewise matters of law. On the other hand, although the section permits consideration being given to certain items specifically mentioned and "any other circumstances affecting the value", those "other circumstances affecting the value" are not designated by the statute and therefore not to be learned by the construction of the statute nor can the Court know judicially as by taking judicial notice, what those circumstances may be. Therefore the question, "What are those circumstances?" cannot be a matter of law but must be a question of fact to be determined by the assessor and others concerned in reviewing the assessment on the facts.

I refer also to *R.* v. *Penticton Sawmills Limited*, (1954) 11 W.W.R. (N.S.) 351, where Sloan, C.J.B.C. (Sidney Smith, J.A. concurring) said of the same section at page 353:-

> It seems to me that sec. 30, in its present form, clothes the assessor with a very wide and flexible discretion as to the methods he may pursue in his determination of "actual value".
>
> Wootton, J. took the view that
>
> As to 12(a) and (b), the assessor has acted arbitrarily.

and he attached some importance to the use of the word "arbitrarily" in clause 12(b). It is apparent that he interpreted the word in that clause in the pejorative sense of being "capricious" or "dependent on mere will or pleasure". I think I must consider whether that interpretation is justified or whether it is more accurate to say that "arbitrarily" is used in the case in the sense of the exercise of discretion or judgment, vide Shorter Oxford Dictionary, 3rd Ed. p. 91; Webster's Twentieth Century Dictionary, p. 90.

At the outset the Assessor had a duty under the statute to assess these lake beds and in doing so to determine their actual value. It is not and cannot be contended that the land in question is not liable to tax. The performance of that duty involved considerable difficulty but the Assessor was required by the law to undertake it, keeping himself always within the bounds of section 37(1). I have concluded that it is not right on the material before the Court to infer that the Assessor acted capriciously, without any basis of fact, for dividing the lake beds into two separate

areas or for selecting a fifty acre lakebed as a foundation to which to apply his other factors and calculations. The respondent asks "Why fifty acres?" and "Why fifty percent of a planned value instead of some other percentage?" The answer to such questions as far as this Court is concerned in this appeal is that if the Assessor were wrong in applying them his error was not an error of law only. These comments apply with at least equal force to the remaining clauses of paragraph 12. It is pertinent also to note that the Appeal Board which had jurisdiction to deal with matters of fact concluded that the assessor "did all he could to be fair and equitable".

Section 37(1) imposed on the Assessor the duty of determining actual value and proceeds to designate in permissive, not mandatory, terms items which may be considered by him. The last of these "any other circumstances affecting the value" is expressed in very general language. If in any case it should be demonstrated that an assessor had under this head considered circumstances which clearly could not affect value it might be possible for the Court to say a violation of section 37(1), amounting to error in law, had occurred. That cannot, however, be said in the present case on the basis of the facts disclosed.

Wootton, J. relied on the dicta of Drake, J. *In Re Assessment Act and The Nelson & Fort Sheppard Railway Co.* (1904) 10 B.C.R. 519. The reasons of Duff, J., later C.J.C., for his dissent in that case are impressive but I do not rely on them. I think the statutory provision which Drake, J. had to consider is so different from the language used in section 37(1) that his decision is not of real assistance in deciding this appeal. This comment applies also to other authorities cited by the respondent such as *Re Starr Manufacturing Co.* (1926) 1 D.L.R. 212 (where assessors arrived at a valuation on grounds inconsistent with the rule laid down in the statute); *Montreal* v. *Sun Life Assurance Co. of Canada* (1952) 2 D.L.R. 83 (where a Board of Revision followed a rigid formula which had no justification in law).

The secondary ground on which Wootton, J. based his decision was described by him in these words:-

> I am of the opinion that, although the statute says that land covered by water is taxable, no method has been laid down by the statute for making an assessment.
>
> If there is no law enabling the assessment to be made, then the assessment cannot be made.

It is true that the statute does not contain a method or formula for making an assessment but I cannot agree that the absence of a statutory formula renders the land exempt from taxation. The Assessor in this case was required to act under and within the terms of section 37(1). For the reasons which I have tried to explain I am unable to say that he made any error of law in using the method which he adopted or that the decision of the Appeal Board was wrong in law.

It was submitted that the Assessor should have inspected each lake. I cannot find in the statute any provision which required such an inspection by the Assessor. The absence of inspection cannot then be said to be a violation of law. I have already noted that consideration of the factors described in section 37(1) is permissive and not mandatory.

I would allow the appeal, answer the question raised by the stated case in the negative and remit this opinion to the Board as required by the statute.

Reasons for Judgment of Mr. Justice McIntyre

I have read the reasons for judgment of my brother McFarlane and, I while I agree with him in the dismissal of the preliminary objection which went to the trial judge's jurisdiction, and that a point of law is raised in the question posed in the case, I do not agree with his disposition of the appeal. I would dismiss it.

The assessor must determine the actual value of these lands. He must do so in accordance with s. 37(1) of the *Assessment Equalization Act*, R.S.B.C. 1960, c. 18 as amended. In doing so he may give consideration to the various factors mentioned in the section, or some of them, and he may as well consider "any other circumstances affecting the value." Failure to assess according to this section amounts to error in law. It is my opinion from reading the stated case that the assessor has not assessed according to the statute and has thus fallen into error.

The method he adopted is clearly set out in paragraph 12 of the case which is reproduced in the judgment of Mr. Justice McFarlane. It seems clear to me that to divide the area into two parts and assign a uniform value per acre to the lakebed in each district is to treat all of the lands as having the same value without reference to individual differences and without reference to the factors mentioned in s. 37(1). This step provided an arbitrarily chosen base for the assessment. The second step described in sub paragraph (b), a selection of a 50-acre lake bed as the most valuable, is stated to have been made on an arbitrary basis. The selection of per acre prices for upland in the two areas described in sub paragraph (c) was said to have been based upon sales data and may be said to rest upon a consideration of factors mentioned in s. 37(1), but to adopt 50% of the upland values so determined as the value of the lake bed bears no apparent relation to the requirements of s. 37(1). The variation of 5% of value for every five acres of variance from the arbitrarily chosen 50-acre area is equally arbitrary. The considerations mentioned in sub-paragraph (f) may well bear a relation to those mentioned in s. 37(1) but since they are applied to values obtained on an arbitrary basis they cannot alter the arbitrary nature of the resulting assessment.

When I use the word "arbitrary" I mean - and from the context in which the word is used in the case I conclude the assessor meant - a decision made at discretion in the absence of specific evidence and based upon opinion or preference (see Shorter Oxford English Dictionary). The resulting assessment is then made without regard for the statutory provisions and uncontrolled by them.

The authorities are clear that an assessment must be made in conformance with the statute which provides for it. The respondent cited various authorities for this proposition including *Re Starr Manufacturing Company* (1926) 1 D.L.R. 212, *In Re Soda Lake Assessment and Malhus* (1923) W.W.R. 19, but the most significant authority is *Montreal* v. *Sun Life Assurance Company of Canada* (1952) 2 D.L.R.

81 where Lord Porter at page 97 stated:

> Their Lordships do not dissent from the view that if the Board of Revision has followed the correct method and used its discretion, its findings should not be interfered with unless it is plainly erroneous, but where as here it has followed a rigid formula which has no justification in law they feel free to disregard the finding which has been reached and to accept that of the Judge of the Superior Court.

Reference was also made to *In Re The Assessment Act and The Nelson & Fort Sheppard Railway Company* (1904) 10 B.C.R. 519 and the comments of Drake, J. at page 523.

They all enunciate the proposition that an assessment made in a manner not justified in law cannot stand. In my view that is what has occurred here. The assessor has assessed upon a basis not authorized in the statute, and in the selection of another method which has no legal warrant, has acted in an arbitrary manner and created an arbitrary assessment. I am aware that in the cases cited above, statutory provision differing from s. 37(1) of the *Assessment Equalization Act* were involved. The important point here, however, is not that statutes differed, but that the assessments were held bad because the assessors departed from the statutory provisions then governing.

It is therefore my opinion that the learned trial judge was right in finding the assessment unlawful and I would therefore dismiss the appeal.