PACIFIC LOGGING COMPANY LIMITED

v.

THE ASSESSOR FOR THE PROVINCE OF BRITISH COLUMBIA

Supreme Court of British Columbia (322/1974)

Before: MR. JUSTICE WOOTTON

Victoria, October 23, 1974

R.B. Hutchison for the Appellant
D.M. Gordon for the Appellant
K.C. Murphy for the Respondent

Reasons for Judgment

This was an appeal by way of stated case pursuant to section 51 (1) of the *Assessment Equalization Act*, R.S.B.C. 1960, c. 18, from a decision of the Assessment Appeal Board. The case stated by the Board is as follows:

> "1. On the 24th day of April, 1973, we dismissed appeals by the Appellant from the 1973 assessments by various government assessors of the respective assessment districts on Vancouver Island in which the lakes specified in the Schedule are located and confirmed the said assessments. Those appeals were each confirmed by the respective Courts of Revision having jurisdiction to hear appeals from the said assessors and each appeal was confirmed without any fresh evidence being introduced.
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> 2. The Appellant being affected by our said dismissals has required us by written notice served on us under S. 51 (2) of the *Assessment Appeal Act* to submit a case to the Supreme Court of British Columbia setting forth the facts and the grounds of our determination for the opinion of the said Court.
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> 3. Now therefore we, the said Board, in compliance with the Appellant's said notice, do hereby state and sign the following case:
>
> *CASE*
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> 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.

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.

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 the lakes except 7, namely Lakes Shawnigan, Upper Quinsam, Wolfe, Cameron, Cowichan, Great Central and Bacon.

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.

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.

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 from 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 lake beds 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 lakebed 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.

13. The Board, after considering all the evidence presented, by both parties, was of the opinion that the method used by the assessor in establishing the assessment on lakebed acreage did all he could to be fair and equitable.

14. The Appellant contends the assessor erred in not determining the actual value of lakebeds per se but instead equated lakebed values to fifty per cent of the value of surrounding land and contends that this is an error in law.

15. The Respondent contends the assessor has determined actual value of the lakebeds pursuant to Section 37 of the *Assessment Equalization Act* and in determining the actual value thereof, he has given consideration to present use and location, two of the items mentioned in Section 37. Even under that Section he is not required to take into consideration the matters mentioned therein - the Section states quite clearly 'that the assessor in determining actual value,

'may give consideration to present use, location. . .'.

The Section goes on to provide he may look at any other circumstances affecting the value. The fact that some other method might be used as a basis of evaluation does not mean that the assessor's assessment is to be upset. In other words, if a different method even equally consistent with Section 37 is followed and a different value is arrived at, the assessor's evaluation must be accepted so long as he is also within the Act.

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 that Court:

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

I note in the foregoing a certain amount of argument has been included in the stated case. I refer particularly to paragraph 15 thereof. A statement of the case should not contain argument. I now deal with the problems involved.

Two preliminary objections were raised. These were:

1. That my brother McKay was seized of this matter and should hear the appeal.

2. That the question raised in the case is not a question of law, but is a question of fact only, and consequently there can be no appeal from the Board.

As to 1, I point out that McKay, J. did hear the matter on May 1, 1974, and before entering into the business of the appeal, he came to the conclusion that the proper course was to refer the matter back to the Respondent Board for re-statement. Before the hearing by me of this appeal I had been informed by the Registrar of the Court that McKay, J. did not consider himself to be seized of the matter. I have considered the position and, in the light of the wording of the statute, I have concluded that, while the appeal is to be heard by the Judge in Chambers, it is the Court that in fact is to hear the appeal, and that would include any Judge of the Court at the time sitting in Chambers before whom the matter should be brought for determination. In the instant matter the case was re-stated as directed by McKay, J. and came before me as if it were presented in the first instance in the form in which received it. I therefore heard it de novo. I heard the matter

"untrammelled" by any decision of McKay, J. *Hartmont* v. *Foster* (1881) 8 Q.B.C. 82, *Lewis* v. *Cook* (1950) 2 W.W.R. 451; *Gulf Islands Navigation Limited* v. *Seafarers' International Union of North America et al* (1959) 28 W.W.R. 517.

As to 2, if the decision purported to be appealed is a question of fact or a question of mixed law and fact, there is no right of appeal. That is clear upon the authorities. Insofar as the appeal attempted here is against the mere quantum of the assessment, that is an appeal upon a question of fact and the appeal is not maintainable. *The City of Vancouver* v. *The Corporation of the Township of Richmond* (1959) 17 D.L.R. (2d) 548.

I direct my mind, therefore, to the question raised and seek an answer sounding in law. I find there are raised questions of law. Hence this appeal is maintainable, in my opinion, for the following reasons:

> The definition of "land" in the *Assessment Equalization Act*, R.S.B.C. 1960, c. 18, as amended, is:
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> > "2. ... 'land' includes land covered by water and all quarries and substances in or under land;"

Seaton, J" then a Member of this Court, determined that that definition means exactly what it says. *Pacific Logging Company Limited* v. *Attorney-General of British Columbia* (1972) 2 W.W.R. 74. I must, therefore, conclude that land under lakes of this Province is taxable.

In this matter there was a number of lakes upon lands owned by the Appellant. The case as stated refers to "beds of lakes." Such beds are included in "land covered by water." As to the duties of the assessor, these are outlined in Section 37 of the statute; in particular, sub-section (1) of that section reads as follows:

> "37.(1) The Assessor shall determine the actual value of 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."

I direct myself to the method employed by the assessor and confirmed by the Board as appears outlined in paragraph 12 of the stated case. As to 12 (a) and (b), the assessor has acted arbitrarily. Such a determination was explained by Drake, J. in *In re The Assessment Act and The Nelson & Fort Sheppard Railway Company* (1904) 10 B.C.R. 519. That learned Judge said at p. 523:

> "With regard to the other portion of the appeal relating to the mode in which the assessment was made, the Judge of the Court of Revision has fixed the amount over 502,861 acres at 45 cents an acre, Under section 51 Cap. 53 of the *Assessment Act*, 1903, property is to be assessed at the actual value in money and each description of property is to be valued by itself at such sum as the assessor believes the same to be fairly worth in money at the time of .assessment; and that is the value at which the property would generally be taken in payment of a just debt from a solvent debtor. The land here has been surveyed into blocks one mile square, and according to the evidence some of this land is alleged to be worth $1 an acre, other portions, nothing. It is land consisting of mountain ranges and narrow valleys, the latter have a prospective value for lumber, but the prospective value is not to be considered in estimating the value for

> taxation purposes. Some land is valuable for agricultural purposes, for which purpose it has to be cleared and fitted for agriculture. It is, in my opinion, impossible on the evidence before us where this large tract of country has to be valued and assessed, to say that a flat rate is a compliance with the statute. Neither is it possible to say that all the land is of equal value."

I refer also to *Regina* v. *Penticton Sawmills Limited* (1954) 11 W.W.R. 351. Sloan, C.l.B.C. at p. 356, said:

> "If the upset price was a mere arbitrary figure with no relation to reality, some criticism might be directed against its use even as a guide, but it is a price arrived at only after a prolonged and careful study of all physical and other factors."

In my opinion the assessor acted arbitrarily and his assessment for that reason is invalid. His foundation, as is said in 12 (b), was arbitrary.

I find also that the assessor had no statutory authority for the method employed in making his assessment. He was legislating. Lord Porter in *Montreal* v. *Sun Life Assurance Co. of Canada* (1952) 2 D.L.R. 81 at p. 97 said:

> "Their Lordships do not dissent from the view that if the Board of Revision has followed a correct method and used its discretions, its finding 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."

As to this point, Mr. Gordon urged that I should find that the English statute, viz., The *Local Government Act*, 1858, by reason of the *English Law Act*, R.S.B.C. 1960, c. 129 is in force in British Columbia. The 1858 Act was in force prior to the 19th day of November, 1858. I do not find that the Act of 1858 is in force in British Columbia by reason of the passing in the Legislature of this Province of the *Taxation Act* and other fiscal statutes. But I do find that, whereas the Imperial Parliament provided the method to be employed in the assessment of land covered by water, the Provincial Legislature has not done so.

The assessor cannot overcome the defect, because he has no power to do so, for that would be legislating. Nor may he stand like a seer and value the land covered by water.

To explain further, I am of the opinion that, before any assessment could be valid, each lake must be inspected by the assessor. As I have said, he may not act arbitrarily. His inspection will disclose if a lakebed be firm or mere silt or rotted vegetation. It is common knowledge that numbers of lakes have sand bottoms or rock bottoms; others have silt, and others an even lighter mass of rotted vegetation many feet in depth. The last described would have little or no actual value whatever. The arbitrary method selected here takes no account of the physical features of the land covered by water and purported to be assessed.

The Board has said in the ease as stated that the assessor appears to have done "all he could to be fair and equitable." That may appear to be so and may be commendable, but the assessor has acted arbitrarily and without legislative authority. 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. *In re Lions Gate Assessment Appeal* (1940) 1 W.W.R. 624; *Consumers Gas Co.* v. *Toronto* (1897) 27 S.C.R. 453.

In summary, therefore, the assessor erred in law in acting arbitrarily and in assessing without statutory authority. The Board approved that assessment.

The question raised is answered "Yes." The assessment is set aside and the Appellant will have its costs of this appeal.

I note that the *Assessment Equalization Act* was repealed on June 20, 1974, and was replaced by the *Assessment Act*, S.B.C. 1974, c. 6.