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CITY OF PRINCE RUPERT
and
ASSESSMENT COMMISSIONER

v.

CANADIAN CELLULOSE COMPANY LIMITED
and
ASSESSMENT APPEAL BOARD

British Columbia Court of Appeal Before: MR. JUSTICE B.B. CARROTHERS, MR. JUSTICE E. HINKSON, and MR. JUSTICE W.A. CRAIG

Peter W. Klassen for the Appellants
W.J. Wallace, Q.C. and D. Haslam for the Respondents

Reasons for Judgment of Mr. Justice Carrothers April 25, 1978

This appeal on questions of law alone, brought by the City of Prince Rupert and the Assessment Commissioner under s. 67 (6) of the *Assessment Act*, S.B.C. 1974 chap. 6, as amended, relates to what is sometimes and somewhat confusingly called the 1975 assessment of certain improvements (buildings and machinery) which at that time comprised part of the sulphite plant of the respondent Canadian Cellulose Company Limited ("CanCel") on Watson Island within the City of Prince Rupert. Although it has been frequently referred to as the 1975 assessment, the assessment in question was made by the assessor of Area No. 25, Northwest Assessment District of the British Columbia Assessment Authority late in 1975 - not later than December 31st, 1975 to be precise - for the taxation year 1976. This assessment was placed on the 1976 tax roll and gave rise to the 1976 taxes exigible on these improvements and payable by CanCel to the City of Prince Rupert. To avoid confusion, I will consistently call it the assessment for 1976.

The assessment for 1976 of these CanCel improvements was appealed by CanCel to the 1976 Court of Revision and from there to the Assessment Appeal Board, which made its decision dated December 31st, 1976. An appeal on questions of law against that decision of the Assessment Appeal Board was brought by the City of Prince Rupert and the Assessment Commissioner to the Supreme Court of British Columbia pursuant to s. 67 (1) of the *Assessment Act* (*supra*) and the judgment of that Court was pronounced by Ruttan, J. on March 31st, 1977. No issue has been made of the fact that a year has since transpired before this appeal has been determined and judgment given thereon and I assume that the parties agree that the judgment of the Supreme Court does not stand by virtue of the provisions of s. 67 (8) of the *Assessment Act* (*supra*).

The appeal to the Supreme Court of British Columbia was brought upon an agreed statement of facts which is fully set out in the reasons for judgment of the learned Chambers Judge. Rather than repeat the agreed statement of facts again, I will make reference to those facts having particular pertinence to this appeal.

There are three major facts bearing on this appeal which might be better described as facets of the circumstances affecting the assessment of CanCel's sulphite mill for 1976.

Firstly, on July 23rd, 1975, the Pollution Control Branch, Water Resources Service, Department of Lands, Forests and Water Resources of the Province of British Columbia, issued an order outlining the specifications and levels of pollution control to be met by CanCel's sulphite plant on or before December 31st, 1979, or alternatively ordering that sulphite plant be shut down permanently by December 31st, 1979. To meet, even problematically, those prescribed levels of pollution control would have involved an expenditure by CanCel of $80,000,000.00 on pollution control devices. Alternatively, to assume a permanent shut down of the sulphite mill by December 31st, 1979 (not to assume an even earlier closure as actually occurred late in 1976) would compel anyone valuing as of December 31st, 1975, the then 25-year-old sulphite mill as "the property of a going concern" in accordance with the principles of valuation as laid down in subsections (1), (2), and (3) of s. 24 of the *Assessment Act* (*supra*), to adopt a relatively high obsolescence or depreciation factor which would have a clearly negative impact on the resulting assessment value.

The second circumstance is a credit to the resilience and resourcefulness of the directors of CanCel. Instead of spending the $80,000,000.00 on pollution control devices or alternatively shutting down the sulphite mill permanently, they decided in November of 1975 to modify the sulphite mill to the manufacture of bleached kraft pulp instead of sulphite pulp and in this way, by the employment of slightly more capital, achieve a mill of greater capacity and one which would meet the pollution levels imposed on them.

The intention of CanCel was to continue the sulphite mill in operation during modification with an anticipated six months' shut down late in 1977 or early 1978 to allow for final conversion to and start-up of the kraft mill.

This decision on the part of CanCel was known to the assessor making the assessment for 1976 and the physical modification of the mill actually commenced in May of 1976. This decision meant that, while some components of the sulphite mill could be adapted to and retained in the kraft mill, others were rendered redundant and had to be dismantled, removed and sold as scrap. The potential redundancy of the unusable components would have a distinct adverse bearing on the value of the sulphite mill "as the property of a going concern" as at December 31st, 1975, notwithstanding that the sulphite mill actually operated as a going concern well into 1976 and it was CanCel's intention as at December 31st, 1975 (the agreed time of making the assessment for 1976), to operate the sulphite mill until late 1977 or early 1978.

The third circumstance has a retrospective characteristic when viewed from the assessment date of December 31st, 1975. In the summer of 1976 the management of CanCel decided to close the operation of its sulphite mill and it indeed ceased operation on October 8th, 1976. The effect of this on "the value of the property of a going concern" is obvious, but clearly these circumstances were not known to the assessor and I agree with the learned Chambers Judge that this third circumstance ought not to have been anticipated or assumed by the assessor when making the assessment for 1976. Consequently, I will have little more to say about this third circumstance except to point out that it is the key to the cross-appeal.

We must examine how these circumstances come into play with the provisions of the *Assessment Act* (*supra*) governing the manner of valuation for assessment purposes, including an overriding provision sometimes referred to as a "freeze". I extract the following from s. 24 of the *Assessment Act* (*supra*): subsections (1), (2), and (3) stipulate the applicable bases and principles of

determining actual value and subsection (6) stipulates the assessment freeze and the exclusions therefrom:

> 24. (1) Land and improvements shall be assessed at their actual value.
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> (2) In determining the actual value for the purposes of subsection (1), the assessor may give consideration to the present use, location, original cost, cost of replacement, revenue or rental value, the price that the land and improvements might be reasonably expected to bring if offered for sale in the open market by a solvent owner, and any other circumstances affecting the value, and the actual value of the land and the improvements so determined shall be set down separately in the columns of the assessment roll, and the assessment shall be the sum of those values.
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> (3) Without limiting the application of subsection (1) and (2), where an 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. . .
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> (6) Notwithstanding subsection (1) or anything to the contrary in this Act,
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> (a) except as provided in paragraphs (b), (c), and (d) and sections 25 and 27, land and improvements shall be assessed at the same value and on the same basis at which the land and improvements were assessed for the calendar year 1974;
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> (b) where a change in the value of land and improvements occurs by reason of
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> (i) a change in the physical characteristics of the land or improvements, or both; or
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> (ii) new construction or new development thereto, thereon, or therein; or
> (iii) a change in the zoning or reclassification of land and improvements that is not included in the assessment roll for the calendar year 1974, the land and improvements shall be assessed at the same value and on the same basis as if those changes in value had occurred and had been taken into account in the preparation of the assessment roll for the calendar year 1974;
>
> (c) subject to paragraph (b), improvements used for industrial purposes shall be assessed at the same value level and on the same basis at which improvements used for industrial purposes were assessed for the calendar year 1974;

Fundamentally, the issue for determination on this appeal is whether circumstances one or two, or both of them, constitute in law exceptions or exclusions from the freeze as being "new development" within the meaning of s. 24 (6) (b) (ii) of the *Assessment Act* (*supra*).

In preparing the assessment for 1976, the assessor did not take into account the first and second circumstances, of which he was aware. Nor did he take into account the third circumstance, because it had not yet occurred.

The Assessment Appeal Board in turn found the pollution control order (circumstance one) and the CanCel decision to convert to a bleached kraft pulp mill (circumstance two) were "new development", but the Assessment Appeal Board went further and held that these two circumstances, together with the later decision to advance the shut down of the sulphite mill (circumstance three), effectively terminated the existence of the sulphite operation and the Board

directed that, based on this early closure, a high depreciation or obsolescence factor be applied by the assessor when valuing the redundant components of the sulphite plant for 1976.

The learned Chambers Judge held that the Assessment Appeal Board did not err in law as to the meaning of the words "new development" and did not err in law in holding that "new development" is not to be confined only to changes in growth and expansion, but should include any changes incremental or detrimental to value. However, the learned Chambers Judge considered and held, and this is the subject of the cross-appeal, that the Assessment Appeal Board overextended their decision by directing that-circumstance three, which had the effect of advancing the redundancy date and increasing the write-off factor, was to be taken into account by the assessor.

Setting aside for the moment the matter of the freeze enacted into the *Assessment Act* in November of 1974 as s. 24 (6), it is argued on behalf of the appellants that the improvements in question ought, as a matter of law, to be valued for assessment purposes as they were actually used and occupied, and in the condition they were found, at the time of the assessment for 1976, that is as parts of an operating sulphite mill, and the impact of the first and second circumstances ought not to be brought into the determination of that value.

Clearly the assessor was bound by subsections (2) and (3) of s. 24 to value the sulphite mill "as the property of a going-concern" and whether he gave consideration to one or more of "cost of replacement", "revenue value", or "the price that the land and improvements might be reasonably expected to bring if offered for sale in the open market by a solvent owner", unquestionably the duration of the productive life of an industry has a direct bearing on its static value. The same 25year-old mill, valued at a given point in time "as the property of a going-concern" with an anticipated productive life of say ten or fifteen years a fortiori must have a greater value than with a known productive life of less than three years. In the latter case a much higher depreciation or obsolescence or write-off factor must be used in determining present actual value. I agree with the learned Chambers Judge that circumstances one and two were properly in evidence before the assessor and were factors in existence at the time of the assessment for 1976 in the sense that they were known factors and in the sense that they could be concretely and objectively measured, evaluated, quantified, and applied. The appellant cites to us the classic statement of Chief Justice Rinfret in *Sun Life Assurance Co. of Canada* v. *The City of Montreal* [1950] S.C.R. 220 at page 224:

> The rule was laid down by Lord Parmoor in *Great Western and Metropolitan Railway Companies* v. *Kensington Assessment Committee* [1916] 1 A.C. 23 at 54, that in such a case "the hereditament should be valued as it stands and as used and occupied when the assessment is made." In the yearly valuation of a property for purposes of municipal assessment there is no room for hypothesis as regards the future of the property. The assessor should not look at past, or subsequent or potential values. His valuation must be based on conditions as he finds them at the date of the assessment.

In the case at bar, circumstance one is not in my opinion, "hypothesis as regards the future of the property" . It is a subsisting and enforceable order with clear and readily ascertainable consequences. It has incontrovertible factual substance.

The assessor in making his assessment for 1976 was not restricted to actual use, occupation and condition of these improvements but must take into account the present impact and effect of redundancy brought about by the enforceable governmental order being a certainty at the time of the assessment, though implementation lay in the future. To ignore this in making his valuation would be an error in principle. In my view, the assessor was bound by the provisions of

subsections (1), (2), and (3) of s. 24 to take circumstances one and two into account when assessing these improvements for 1976.

Turning now to the matter of the "freeze" as contained in s. 24 (6), it is to be noted that it is a true freeze and not a lid or maximum. It prescribes that "land and improvements shall be assessed at the same value and on the same basis at which the land and improvements were assessed for the calendar year 1974". The consequence of any exclusion or release from the freeze would surely be to permit the value to go in either direction, up or down, and I agree with the learned Chambers Judge that, provided the freeze were lifted, the value could be either greater or less than the 1974 valuation. But the nub of the matter is whether the freeze applies; whether circumstances one and two fall within the meaning of the words "new development thereto, thereon, or therein" as found in the exclusionary provisions of s. 24 (6)(b)(ii) *supra*.

Counsel for the appellants stressed that the words "new development" are not preceded by the indefinite article "a" and must not be equated to a happening, an occurrence or an event, but rather connote a progression or growth to a more advanced, developed or effective state. I accept his submission and agree that the words "new development" be given a progressive construction.

By the time of their assessment for 1976, these improvements had become the subject of an enforceable Governmental order with the immediate effect of limiting the duration of the productive life of the sulphite mill and which order was designed to improve the character and quality of the industrial climate and amenities of the City of Prince Rupert generally and the CanCel property in particular by the reduction of pollution and to thereby increase its usefulness. By the *Pollution Control Act, 1967*, S.B.C. 1967 chap. 34, "pollution" means the introduction into a body of water, or storing upon, in, or under land or discharging or emitting into the air, such substances or contaminants of such character as to substantially alter or impair the usefulness of the land, water, or air. Pollution control, in the words of the Legislature, is directed at the enhancement of usefulness. The impact of circumstance one appears colossal and devastating but, particularly when combined with circumstance two, it can only be said to be constructive, progressive and positively efficacious and as aptly falling within the meaning of the words "new development" as connoting modification or change in growth, advancement, evolution or expansion toward perfection, or at least from a lower to a higher state.

This is the construction of the words "new development" that was urged upon us by the appellants. Only by fallacious reasoning could one conclude that such a positive and forward step was not "new development" to the improvements in question merely because those particular improvements were thereby rendered redundant in the new scheme of things. I would have thought that the City of Prince Rupert would have been the last to argue that circumstances one and two were retrograde in effect and hence not "new development".

It was also argued on behalf of the appellants that "new development" must be physical or tangible in nature and that, in this case at the time of the assessment for 1976, no change had taken place physically with respect to the improvements in question. Counsel for the appellants conceded that a subdivision or consolidation of title to land, taking place entirely within a Land Registry Office and in no way making any physical or observable change to the land, but resulting in a change in its value, would be "new development thereto". To be "new development" it may have physical qualities or characteristics, but not necessarily so. Also to require a physical occurrence thereto would be to render the exclusionary category of "new development thereto" as set out in s. 24 (6) (b) (ii) duplicitous or superfluous in view of the fact that "a change in the physical characteristics of land and improvements or both", is previously provided for in an exclusionary way in s. 24 (6) (b) (i).

In *British Columbia Forest Products Limited et al* v. *The Assessors of The Assessment Areas of Cowichan, Victoria, Alberni, Courtenay, Cariboo, Northwest, Nanaimo and Port Alberni*, December 16th, 1977 (as yet unreported), this Court considered the meaning and scope of the words "new development thereto, thereon or therein" as they related to a fresh timber cruise made after the 1974 assessment of timber lands to determine whether such fresh timber cruise constituted an exception to the freeze for purposes of the assessment of those timber lands for 1976. Robertson, J. A. in delivering the judgment for the Court, said at page 14:

> As stated in paragraph 9 of the stated case, a cruise is a method of estimating the quantity of merchantable timber on a tract of land. As an estimate it is only an expression of opinion. The making of a cruise report and filing it with the Assessor may be said to be a new development for the purpose of ascertaining the actual value of the land, but it cannot be said to be new development to, on, or in the land. No one going on the land after as well as before the filing of the report would be able to see on the later occasion that the land had been newly developed.
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> Further, I think that "development" takes some colour from its neighbour "construction", which must be something physical.

It is to be noted that Robertson, J. A. does not go so far as to say that "new development" must have physical substance; he uses his reference to the colour of "construction" to emphasize that a fresh timber cruise produces nothing but an opinion: the number of merchantable trees actually standing on the land all along is not altered by a later count. The conclusion that I draw from what Robertson, J. A. said, when it is considered in relation to a situation such as we have here, is that, in order that something may be "new development" , it must be of such a nature that it can be said to apply something to, or place something on or in, the land; a timber cruise could do none of those things. In my view we must have what I would describe as incontrovertible factual substance.

We have the examples of subdivision and consolidation of title where "new development" would not have a physical presence or influence "thereto, thereon, or therein" though they would have incontrovertible factual substance in the registered plans and certificates of title.

In this case we have, at the time of the assessment for 1976, not hypothesis, opinion or conjecture but rather an enforceable Governmental order with an actual impact on the value of certain improvements, which impact can be ascertained, quantified and applied. Surely it is "new development thereto" of incontrovertible factual substance-probative evidentiary value-though not having a physical characteristic or presence other than the paper that the order was written on.

For the foregoing reasons, I would dismiss both the appeal and the cross-appeal. Costs follow the event and, should this present any difficulty, counsel may arrange to speak: to the matter of costs.

Reasons for Judgment of Mr. Justice Hinkson April 25, 1978

I have had the opportunity of reading the reasons for judgment of my brother Carrothers and for the reasons given by him I would dismiss both the appeal and the cross-appeal.

Reasons for Judgment of Mr. Justice Craig April 25, 1978

The facts are set out in the judgment of Carrothers, J. A. I agree that the cross-appeal should be dismissed for the reasons given by him, but, with deference, I disagree with his conclusion that

the order which was made by the Pollution Control Branch on July 23rd, 1975 and the subsequent decision by the directors of the respondent company to alter the sulphite mill from a manufacture of sulphite pulp to a manufacture of bleached kraft pulp was a "new development" within the meaning of s." 24 (6) (b) (ii) of the *Assessment Act*.

The relevant parts of subsection 6 read as follows:

> "(6) Notwithstanding subsection (1) or anything to the contrary in this Act.
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> . . .
>
> (b) where a change in the value of land and improvements occurs by reason of
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> (i) a change in the physical characteristics of the land or improvements, or both; or
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> (ii) new construction or new development thereto, thereon, or therein; or
>
> (iii) a change in the zoning or reclassification of land and improvements.

In the case of *British Columbia Forest Products Limited et al* v. *The Assessors of the Assessment Areas of Cowichan, et al*, December 16th, 1977 (unreported), this Court considered the meaning of the phrase "new development thereto, thereon, or therein" in sub-paragraph (ii). In page 14, Robertson, J. A., in giving the judgment of the Court, said in part: "I think that 'development' takes some colour from its neighbour 'construction', which must be something physical."

The decision of the Pollution Control Branch and the decision of the board of directors is not "a new development thereto, thereon, or therein. . ." with regard to the land. I would, therefore, allow the appeal.