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SC 103 City of Prince Rupert et al v. Canadian Cellulose Co. et al

CITY OF PRINCE RUPERT
and
ASSESSMENT COMMISSIONER

v.

CANADIAN CELLULOSE COMPANY LIMITED
and
ASSESSMENT APPEAL BOARD

Supreme Court of British Columbia (Victoria 0097/0098/77)

Before: MR. JUSTICE J.G. RUTTAN

Vancouver, March 17,18 and 23, 1977

Peter W. Klassen for the Appellants

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

Reasons for Judgment March 31, 1977

This is an appeal on questions of law pursuant to section 67 (1) of the *Assessment Act*, c. 6, Statutes of British Columbia of 1974, and amendments thereto.

The appellants are the City of Prince Rupert and the Assessment Commissioner appointed under the Assessment Authority of British Columbia Act, hereinafter referred to as "the appellants", from a decision of the Assessment Appeal Board dated the 31st day of December, 1976.

The agreed statement of facts reads as follows:

> "2. By the Notice of Assessment of the B.C. Assessment Authority for Area No. 25 Northwest Assessment District, the 'improvements' comprising the sulphite plant of the Respondent company located in Prince Rupert on lands described for assessment purposes as Roll No. W -000439.000 were assessed for the following years at the following amounts:

1974	General	School and Hospital
	$11,503,607	$31,259,223
	Less Exemptions	Less Exemptions
	$58,782	$138,365
1975	General	School and Hospital
	$11,491,134	$29,944,735

	Less Exemptions	Less Exemptions
	$58,782	$138,365
1976	General	School and Hospital
	$11,504,333	$29,973,817
	Less Exemptions	Less Exemptions
	$58,782	$138,365

The difference between the various assessments resulted only from the deduction of the value of deleted improvements and the addition of the value of added improvements.

3. The Respondent Company appealed to the Assessment Appeal Board against the said 1976 Roll assessment of 'improvement' of the sulphite plant on the ground that the same had been over-assessed and had not been assessed in accordance with the provisions of the *Assessment Act*, as it then was.

4. The 'improvements' in respect of which such appeal was brought are 'buildings, fixtures, machinery and structures' comprising the sulphite plant and as defined by Section 1 of the *Assessment Act*.

5. The sulphite plant is a highly-specialized min, constructed in 1950, for the manufacture of man-made fibres. Compared to the kraft process, the sulphite process is an old and expensive one and creates a high degree of pollution.

6. On July 23, 1975, the Pollution Control Branch, Water Resources Service, Department of Lands, Forests and Water Resources of the Provincial Government issued an order to the Respondent Company (Exhibit No. 4), a copy of which is hereto annexed and marked as Schedule '2', and which Exhibit forms part of the within Agreed Statement of Facts outlining the specifications and levels of pollution control to be met by the sulphite plant on or before December 31, 1979, or, alternatively ordering that the sulphite plant be shut down permanently by December 31st, 1979.

7. The Respondent Company could not meet the required specifications and levels of pollution set out in the Pollution Control Branch order without installing pollution control equipment which would cost at least $80,000,000. Even if such equipment had been installed, its capacity to meet the required pollution standards could not be assured.

8. As a result of the facts set out in Paragraph 7, in November, 1975, the Directors of the Respondent Company decided to modify the sulphite mill to a kraft mill and in this way meet the pollution requirements. It was hoped at that time that the Company would be able to continue the operation of the sulphite plant as long as possible, but not later than approximately six months before the start-up of the modified mill in 1978. However, in the summer of 1976, it was first decided by management to close operation of the sulphite mill in October 1976, and the plant actually ceased operation on October 8th, 1976.

9. The physical modification from a sulphite mill to a kraft mill was commenced in May of 1976 and such modification involves the retention and use of some of the existing components of the sulphite mill and the disassembly and removal of the remainder.

10. As of the date of assessment and up to and including December 31st, 1975, the Respondent Company had made no physical alterations to the sulphite mill, and the sulphite mill was operating as a going concern.

11. Attempts to sell those improvements of the sulphite plant which were not being retained in the modified mill were made, but no purchaser could be found except in March, 1976, at scrap value as a reduction from demolition cost.

12. The Assessment Appeal Board found that the order of the Pollution Control Board was a 'new development' within the provisions of Section 24 (6) (b) (ii) of the *Assessment Act*.

13. The Assessment Appeal Board found that the Pollution Control Branch order combined with the decision of the Board of Directors of the Respondent Company was also a 'new development'.

14. F. A. Hillier, a professional engineer and an expert witness called by the Respondent Company before the Assessment Appeal Board, testified that in his opinion, in valuing the improvements for the 1976 assessment, a reasonable appraiser should have taken the total life of the sulphite mill as being 26 years. He calculated that in 1975, 25 years of the total life had already expired, therefore, he calculated for the 1976 assessment the improvements should be valued at 1/26th of 3.85 per cent, plus 10 per cent, of their replacement cost. The 10 per cent represented scrap value. This would result in a total residual value of 13.85 per cent or a total depreciation of 86.15 per cent.

15. In preparing the 1976 assessment the Assessor did not take into account the Pollution Control Branch order or the decision of the Board of Directors of the Respondent Company to modify the sulphite plant.

16. The Assessment Appeal Board found that the decision of the Pollution Control Branch effectively terminated the existence of the sulphite plant and accordingly directly affected the value of the improvements at the time the order and decision of the Board of Directors were made and accordingly consideration must be given by the Assessor in determining the assessed value for the 1976 Assessment Roll.

17. The Assessment Appeal Board ordered the Assessor to re-assess those portions of the sulphite plant which were to be disassembled and removed. The method of assessment of these improvements was ordered to be based upon the acceptance of the formula of Mr. Hillier's depreciation rate of 86.15 per cent on those portions of the improvements which were to be removed. The Assessment Appeal Board sustained the assessments as struck on the remaining portions of the improvements which were not to be removed."

The appellants submit that the Assessment Appeal Board erred in law when it held the order of the Pollution Control Board, together with the decision of the board of directors made in 1975, were "new developments" within the meaning of section 24 (6) (b) (ii) of the *Assessment Act*, c. 6, S.B.C. 1974.

For convenience sake I set out here the relevant portions of section 24:

> "24. (1) Land and improvements shall be assessed at their actual value.

(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.

(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.

. . .

(6) Notwithstanding subsection (1) or anything to the contrary in this Act,

(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;

(b) where a change in the value of land and improvements occurs by reason of

(i) a change in the physical characteristics of the land or improvements, or both; or

(ii) new construction or new development thereto, thereon, or therein; or

(iii) a change in the zoning or re-classification 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;

. . . "

The appellants submit that the Assessment Appeal Board erred in law in misdirecting itself as to the proper meaning of the words "new development".

The appellants further submit that the Board also erred in law in taking into consideration as relevant facts, future contingencies, proposed and anticipated future use of the property not existing as at the date of the assessment, including decisions of the board of directors of the owner of the property made after the date of the assessment. It is submitted that instead they should have directed the assessment solely on the basis of the use, occupation, and condition of the property as of the date of the assessment, certainly not later than the 31st of December, 1975.

On the first issue as to the proper meaning of "new development" the Board's decision as contained in its judgment is as follows:

". . . In reaching this conclusion, the Board finds that the order of the Pollution Control Board as reflected in Exhibit No. 4 was a 'new development' within the provisions of Section 24 (6) (b) (ii) of the *Assessment Act*. . . Similarly, the Pollution Control Board

> order as reflected in Exhibit No. 4, combined with the decision of the Board of Directors of the Appellant Company as reflected in Exhibit No. 6 was also new development. There is no doubt in the Board's mind that the decision of the Pollution Control Board effectively terminates the existence of the Sulphite plant and accordingly directly affected the value of the improvements at the time the order and decision of the Board of Directors were made and accordingly consideration must be given by the Assessor in determining the assessed value for the 1976 Assessment Roll."

Mr. Klassen, counsel for the appellants, pointed out that the purpose of the *Assessment Amendment Act* was to freeze assessed values for subsequent years at those for the calendar year of 1974, and with this in mind we should scrutinize the exceptions which effect a change in valuation. He submitted the definition intended by the Legislature was of "growth, bring out capabilities, cause to grow or expand" because the words "new developments" were associated in the same subsection with "new construction". So he alleged that the Legislature was considering things that would add to the value of the lands and improvements.

In making his assessment the assessor, Mr. Gibson, had believed there must be physical change before he could change the assessment. He said, when examined on this point on the hearing before the appeal board, as follows:

> "In a response to a question by Mr. Klassen, Mr. Gibson stated that had he been advised of the Pollution Control Board order made in 1975, and of the fact that the Company was going to shut down; he would not have made any adjustment in the assessment until the plant was actually physically taken down. He stated that there must be a physical change such as the demolition of a building before an adjustment would be made in the assessment.
>
> In further response to Mr. Klassen, Mr. Gibson stated that the structures which were used jointly by the Kraft and Sulphite Mills and enumerated in Exhibit No. 6 could be looked at individually for assessment purposes without undue difficulty. In conclusion, Mr. Gibson noted that the Respondent could not vary the assessment until there was actual physical change. He concluded that the Assessment Authority could not vary assessments simply on the supposition of a change."

Before me Mc. Klassen concurred that "new development" need not result in physical change to the improvements. Indeed he successfully argued before my brother Macdonald that the result of a timber cruise could be a new development. That case was an appeal by Crown Zellerbach of Canada Limited from a decision of the Court of Revision of the Assessment Area of Cariboo, filed in the Vancouver Registry on March 11, 1977. It reads in part as follows:

> "There is no need to turn to the dictionaries. People with a modest knowledge of the etymology of English words appreciate that a development may be an abstract thing. I do not accept Mr. Candido's submission that the word development in the context of ss (6) (b) (ii) must mean something physical. I agree with Mr. Klassen that it need not have physical manifestations. The cruises in question were developments. Employing new concepts of marketability and accessibility they brought out, demonstrated, higher potentiality for the lands. They showed that some timber, which had been left out of account earlier, could now be cut with profit. They resulted in the ascertainment of a higher volume of merchantable timber than measured in earlier cruises and, therefore, a change in the value of the land. The assessors proceeded correctly. The answer to the first question is 'yes'."

By the same token, if the timber cruise showed that the quality and quantity was not as great as previously contemplated, but showed instead a lower volume of merchantable timber than measured in earlier cruises, then presumably the change in the value of the land should be downwards. This would still be a new development, because it would reflect a change in the value, though a decrease rather than an increase in value.

So Mr. Wallace for the respondents submitted an alternative meaning or definition as:

> "making known, disclosing, revealing or bringing into being"

and submitted that what is being disclosed or brought into being may add to or diminish the value of the land and premises. So he submitted:

> "New development should not be confined to changes of growth and expansion, and should include any changes detrimental to value."

There have been other decisions recently given on this phrase "new developments" , all of them providing for an increase in value in the particular circumstances, but none of which prescribed that the phrase could cover only an increase in value. Thus my brother Meredith has found that the change in use from unoccupied to occupied property is a "new development" within the meaning of the subsection. Seaton, J., when sitting in this Court, similarly held that subdivision of raw land not previously subdivided was a new development.

In the decision by our Court of Appeal in *Re Village Rentals* (Vancouver Registry May 25, 1976C.A. 760009) Mr. Justice McFarlane *per curiam* said:

> "I think the language of subsection (6) in the portion of it which I have read (including subsection (ii) is clear. . . the exceptions mentioned in subsection (6) (a) *are changes in value brought about by an enumerated cause, after the preparation of the 1974 Roll*."
>
> (my italics)

I see no reason why "new development" cannot be applied to qualify a downward valuation, as I have indicated above.

Mr. Klassen finally submitted that, if "new development" means "a difference either up or down", then the section would not allow for any "freeze" at all. But a freeze implies a maintenance of the status quo, a prohibition of general assessment changes to reflect changes in general property values, caused perhaps by inflationary trends. However, in individual cases which merit special consideration the assessor may still alter the actual value. Certainly he can do so to increase values and no one would say that would disturb the general policy of a freeze. Why therefore should it be any more disturbing to a freeze to lower the prices than to raise them in some particular situation? The variation caused by new development whether it be up or down, is not such as to alter the general policy.

I hold therefore that the Assessment Appeal Board did not err in law in misdirecting itself as to the meaning of the words "new development" and in holding that "new development" is not to be confined only to changes of growth and expansion, but should include any changes detrimental to value.

The second issue or question which remains is this: In arriving at its decision, did the Board err in taking into account the Pollution Control Board order and the decision made by the company in

November of 1975 to modify the sulphite mill to a kraft mill and so to phase out the operation of the sulphite plant some time during the year 1978?

It is common ground that the valuation must be as of December 31st of 1975, and that factors to be considered must be in existence in the sense that they can be concretely and objectively evaluated and applied as of that date to the pre-existing 1974 assessment.

In valuing the property at its actual value, the assessor is given wide discretion. I bear in mind the words of the late Chief Justice Davey in the case of *Provincial Assessors of Comox, Cowichan, and Nanaimo* v. *Crown Zellerbach Canada Limited et al* (1963) 42 W.W.R. (N.S.) 449 at p. 455, where he said:

> "The statutory duty of the assessor is to find the 'actual value' of the taxable property, but sec. 37 permits him to use several different methods and to consider many different elements in finding actual value. I do not think that the use of any specifically mentioned method of finding actual value, or the inclusion or exclusion of any enumerated element, *provided there is evidence to support the reasoning*, can be said to raise a question of law appealable to the courts on a stated case, for those matters lie in the judgment of the assessor and the assessment equalization board: *Reg.* v. *Penticton Sawmills Ltd.* (1954) 11 W.W.R. (N.S.) 351, at 353, 356." (my italics)

Frequent reference has been made by both counsel to the "Royalite" decision by the late Chief Justice Lett. Because His Lordship referred to the restrictions on the Court to matters of law, and to the discretion that remains with the assessor and the Board, I think parts of that judgment bear repeating here. I quote first from page 37 of the report, being Case No. 10, as follows:

> "I take that decision of the Board to be a finding of fact that as at the time of the assessment there was no functional obsolescence. If that be so, again I am precluded by the *Assessment Equalization Act* from dealing with a matter which is not a question of law only, unless I am prepared to say that the Board did not have before it evidence from which such a conclusion could properly be drawn, which I am not prepared to say."

I quote also from pp. 40-41 as follows:

> "While it is not open to Assessors or to the Board to make an arbitrary determination of actual value, nor to make determinations contrary to the evidence placed before or available to them, yet the provisions of section 37 (1) of the *Assessment Equalization Act* would appear to give a wider and more flexible discretion to Assessors in the matter of determining actual value than the provisions of some other Statutes considered by the Courts in assessment cases. Dealing with section 30 of the *Taxation Act*, which is in similar terms, Sloan, C.J.B.C., stated in *Regina* v. *Penticton Sawmills Ltd.* (1954) 11 W.W.R. (N.S.) 351 at page 353:-
>
> > 'It seems to me that section 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."'
>
> I do not conceive it to be the function of this Court, under the provisions of the *Assessment Equalization Act*, to disturb the valuations made by the Board. In the Sun Life Assurance Co. case (*supra*), Taschereau, J., said, at page 246:-

> 'In coming to this conclusion, I have kept in mind that it is not the function of a Court of Appeal to disturb the valuations made by assessors. But in certain cases it is its duty to do so, particularly when the assessors have proceeded on a wrong principle, and when there is a manifest injustice.'
>
> I cannot find here that the assessors have proceeded on a wrong principle, or that there is a manifest injustice. Nor can I find that the assessments were not made in conformity with the proper exercise of discretionary powers."

So what assessment he arrives at and what procedure he follows, what weight he attaches to those factors, is a matter of fact and within his discretion, subject to review and reversal by an assessment board of appeal, but not to be challenged by this Court unless he has erred in law. Unless he has failed to interpret properly his statutory duties, or unless he has taken into account factors that do not exist or failed to take into account some factors that do exist, in arriving at his calculations and decisions, then this Court cannot interfere.

He might in his discretion decide that the pollution control order and the decision by the company to phase out its operations were not factors on which he should assess too much weight. However, he did not consider them at all and there he was in error in law. (Here I refer to his own previous statements (supra».

Holding as I do that the Board was right in considering the pollution order and the company's decision in November of 1975 as "new developments" that should be taken into account-in the assessment for 1976, an assessment which would require a downward revision for 1976 actual value for the sulphite mill improvements, then I hold the Board was right in directing the assessor to reassess.

However, I agree with Mr. Klassen that the later decision of the company made in the spring of 1976 to shut down the mill operation in October of 1976, was not a factor known to the assessor as it was not in existence in November or December of 1975. It is apparent that, in accepting the formula for depreciation submitted by Mr. Hillier, the Board went further and considered the later history of the company and the decision to shut down the premises in October of 1976. Mr. Hillier in making his assessment said he was doing so as of December 31, 1975, and that any assessor properly instructed would have come to the same conclusion. However, in his calculations, the depreciation rate was based on shut-down in 1976. It may well be that the difference between a shut-down in 1976 and one two years later in 1978 is of no great significance as far as the depreciated value was concerned in December of 1975. Nevertheless it remains that the assessment as of the end of December of 1975 should have contemplated a further two years' existence, albeit a very depreciated existence.

I find therefore that the Board in directing a reassessment is entitled to use Mr. Hillier's formula, but must proceed on the original basis of a shut-down in 1978.

In all other respects I follow the Board's ruling and dismiss the appeal.