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SWAN VALLEY FOODS LIMITED
(CRESTON VALLEY FOODS LIMITED)

v.

ASSESSMENT APPEAL BOARD

Supreme Court of British Columbia (No. C780492)

Before: MR. JUSTICE K.E. MEREDITH

Vancouver, March 10, 1978

D. Larson for the Appellant
R.B. Hutchison for the Respondent

Reasons for Judgment April 10, 1978

This is an appeal by way of stated case from the decision of the Assessment Appeal Board which confirmed the assessments made by the assessor of the Nelson Assessment Area, in turn confirmed by the Court of Revision. The facts as set out in the case are as follows:

> "5. The Company owns a potato processing plant located in the Creston Valley approximately 9 miles from the Town of Creston, British Columbia. The plant comprises, *inter alia*, the following buildings:
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> (a) Maintenance;
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> (b) Heating Plant;
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> (c) Potato Storage No. 1;
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> (d) Potato Storage No. 2;
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> (e) Potato Processing; and
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> (f) Fresh Pack.
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> 6. The Plant was originally conceived to produce frozen french fries but before construction the Company adopted a unique technology to preserve its potato product in a plastic pouch. This technology was developed through the University of British Columbia and was proved in a pilot plant in Vancouver.
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> 7. Construction of the plant utilizing this technology took place on the present site over a period commencing in 1973.
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> 8. The Company obtained the support and substantial financial contribution from the Government of the Province of British Columbia for the project. At one point the Government owned in excess of 40 per cent of the shares of the Company and had either guaranteed or loaned to the Company directly in excess of $11 million.

9. The fixed machinery and equipment is integrated into the plant to produce the pouch potato product described above.

10. Construction of the plant was substantially completed between June and September, 1976 but was not at the date of the assessment into commercial production.

11. Difficulties were being experienced in such things as:

(a) the product breaking in the pouch; and

(b) discolouration.

12. As at the date of the hearing it was projected that these technical problems would be resolved by December 1977 or January, 1978.

13. It was further projected that marketing would be commenced in 1978, the first year of operations, on a limited basis, producing up to 2 million pounds of product.

14. The plant capacity is 40 million pounds per year. The break even point was projected at approximately 26 million pounds per year. This level of production is not expected to be reached until 1980.

15. In 1975 a new government was elected in British Columbia. At its instance as at May 5, 1976 the management consulting firm of Woods Gordon, Vancouver was retained to act as Manager of the Company. Woods Gordon retained William McQuaid & Associates to find a buyer for the Company.

16. McQuaid & Associates investigated local, national and international companies to try and find a buyer. These efforts resulted in the incorporation of Creston Valley Foods Ltd. which purchased all the buildings, machinery, equipment and technology under a debenture for $1.5 million dated April 15, 1977.

17. As part of the transaction Hardee Farms International Ltd. purchased the shares of Creston Valley Foods Ltd. through a wholly owned subsidiary called Federal Diversiplex Limited for $10.00 and guaranteed the debenture on the condition that the plant proves to be economically viable by April 15, 1980.

18. The Assessor made his assessment of the plant based solely on the replacement cost value. He estimated the value of:

(a) the improved land portion (03508.001) comprising scheduled land at $2,461,042 and machinery at $2,063,896; and

(b) the water pipeline and storage system (03508.002) at $105,000 for a total assessment of $4,629,938.00.

19. The Assessor made adjustments to the replacement cost value to allow for the fact that the plant was not quite completed and to convert all values to a 1972 base less certain exemptions.

20. In reaching its decision not to reduce the assessment the Assessment Appeal Board decided that:

(a) the cost approach method of finding actual value for this type of industrial property was the only proper assessment method under the circumstances;

(b) the factors of economic and functional obsolescence were not applicable since at the date of assessment, although operations had not commenced, the improvements were substantially complete and there was no evidence that:

(i) the improvements could be replaced at a cost less than set out by the Assessor; or

(ii) the plant would be constructed differently than that in existence.

Any difficulties experienced by the Company were rather in the technology of the product than in the plant facilities themselves;

(c) the Assessor was justified in not taking into account the market evidence.

Appended hereto as Schedule "A" is a copy of the decision of the Assessment Appeal Board.

The Assessment Appeal Board respectfully submits this case under the provisions of Section 67 of the *Assessment Act* SBC 1974, c. 6 and amendments thereto for the opinion of the Supreme Court of British Columbia.

WHEREFORE the following questions are humbly submitted for the opinion of this Honourable Court:

1. Was the Assessment Appeal Board correct in law in deciding that the cost approach method of finding actual value for this type of industrial property was the only proper method of assessment, to the exclusion of all others?

2. Was the Assessment Appeal Board correct in law in failing to decide that the Assessor ought to have taken into account factors other than original cost in the determination of actual value?

3. Was the Assessment Appeal Board correct in law in deciding that the factors of economic and functional obsolescence were not applicable and in failing to consider the state of development of the business of the Company as directly affecting the actual value of the land and improvements?

4. Was the Assessment Appeal Board correct in law in deciding that the Assessor was justified in not considering market evidence?"

The factors which may be taken into consideration by an assessor are set out in s. 24 of the *Assessment Act*:

"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."

Section 67 of the *Assessment Act* restricts the right of appeal by way of stated case to questions of law only. The respondent here contends that the principal question here namely, that the selection of replacement cost as the sole criterion in determining actual value, is a question of fact, not law. But I think the authorities are against this contention. The question of whether the selection of any given method of assessment is wrong in principle is a matter of law. In *Provincial Assessor of Comox, Cowichan and Nanaimo* v. *Crown Zellerbach Canada Ltd.* (1963) 39 D.L.R. (2d) 381, at pp. 395-6, Sheppard, J.A., discusses the distinction between matters of fact and of law:

> "(1) The construction of s. 37 (1): In *Tisdale Tp.* v. *Hollinger Consolidated Gold Mines Ltd.,* [1933] S.C.R. 321, Cannon, J., delivering the judgment of the Court, said at p. 16 D.L.R., p. 323 S.C.R.:
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> > 'The construction of a statutory enactment is a question of law, while the question of whether the particular matter or thing is of such a nature or kind as to fall within the legal definition of its term is a question of fact.'
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> and in *Loblaw Groceterias Co.* v. *Toronto*, [1936] 3 D.L.R. 346, [1936] S.C.R. 219, the facts found brought the valuation within the section. Davis, J., at p. 349 D.L.R., p. 254 S.C.R., said:
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> > '. . . we are bound to determine upon the proper construction of the amendment whether or not, upon the facts stated, the land and building are caught by the increased rate of assessment.'
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> (2) Any error in principle, as, for example, in considering a fact excluded by authority: *R.* v. *Penticton Sawmills Ltd.* (1953), 11 W.R.R. (N.S.) 351 (B.C.C.A.), per Sloan, C.J.B.C. at p. 356:
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> > 'We are not, however, in this appeal, troubled with the actual assessment in terms of quantum, but whether or not the assessor erred in principle in adopting as a guide to values the upset price of timber sales, subject, of course, to his adjustment of his assessments as differing circumstances demanded.'"

That misdirection as to principles by which the Board is to be guided is a matter of law, not fact, is made plain in this passage from the judgment of the Chief Justice in *Driefus* v. *Royds* (1922) 64 S.C.R. 346, at pp. 348-349;

> "I am of the opinion that in a question of this kind as to the 'actual value' of lands for purposes of assessment this Court would not and should not interfere with the finding of fact as to such 'actual value' if there was any evidence to sustain that finding. The Board is constituted of men of experience on questions of this character. They have the great advantage of visiting and viewing the lands in question, and of seeing and hearing the witnesses who may be called to speak to its value. Unless therefore, the Board misdirected themselves on the proper principles which should govern them in determining this 'actual value', or obviously reached their conclusions as to such value by adopting and following some wrong or improper principle, this Court would not and should not interfere with their findings. "

I have concluded, with respect, that the Assessment Appeal Board reached a wrong decision in principle in selecting the replacement cost approach to the exclusion of other methods mentioned in the section and in particular to the exclusion of considerations of "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." The rationale justifying an assessor in taking replacement cost into account is explained in the *Assessment Commissioner of the York*

Assessment Office v. *Office Specialty Ltd.* [1975] 1 S.C.R. 677. Judson, J. at p. 680 recites the reasons given by the Municipal Board for the decision appealed from:

> "The basic issue here is whether, in determining the assessment according to market value, it is open to the assessor to arrive at that value be using a manual of rates to determine the depreciated replacement cost, where the property, if exposed in the market and an actual sale consummated, would most likely bring a sum considerably less than this depreciated replacement cost. The real estate brokers called on behalf of Office Specialty Limited would naturally be in closer touch with the current trends in prices for industrial properties within this area, and if the subject property was vacant and unused at the time, the Board would be in a better position to give effect to depressed market conditions. However, the ratepayer was using the property to its fullest potential and from the evidence presented. the light manufacturing business carried on appears to be a viable efficient operation. The company must be included as a potential purchaser for such property if it were offered for sale, which would have a bearing on the determination of the price that a willing purchaser would pay for the subject lands if offered in the open market. The open market as envisaged by the Act means a normal market one with sufficient buyers and sellers to produce an atmosphere of competition. Where for one reason or another the competitive market is not available, the assessor must arrive at the assessment for the property by some other reasonable method. In this particular case, the replacement cost method was selected as a suitable procedure. The Board was advised that this method is used for other industrial properties within the municipality, and provides reasonable apportionment of the municipal cost burden among the classes of residential, commercial and industrial land uses."

At page 681 His Lordship says:

> "My opinion is that the Municipal Board was right in holding that the evidence before it proved that the market data method of valuation in this particular case could not be used to determine actual value or market value. The Court of Appeal held the contrary opinion. I cannot accept that view of the evidence. The witnesses stated plainly that no purchasers for this building for its present use would likely be found. This was entirely attributable to the location of the building in a small village such as Holland Landing."

And at page 682:

> "How does an assessor determine 'actual' or 'market' value on facts such as we have in the present case? This is a modem, standard, one-storey building, badly located for a general purchaser but entirely suitable and satisfactory to its owner. It is not for sale and it is not likely that it will be offered for sale. I think that in ascertaining 'actual' or 'market' value, an assessor has to regard the owner as a possible purchaser or estimate what he would expend on a building to replace that which is being valued.
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> The principle is well stated in *Montreal* v. *Sun Life Assurance Co. of Canada*, at p. 90 in these terms:
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> > Their Lordships would agree that where no sale is contemplated and indeed any sale would be difficult what has been called the higgling of the market is not an element of much if any consequence, but nevertheless the ultimate aim is to find the exchange value of the property, i.e., the price at which the property is salable. In reaching their result the appointed Tribunal must take into account not only the amount which a buyer would give but also the sum at which the owner would sell. What that sum would be is, as the authorities have pointed out, best ascertained either by regarding him as one of the possible purchasers or by estimating what he would be willing to expend on a building to replace that which is being valued. But the owner must be regarded like any other purchaser and the price he would

> give calculated not upon any subjective value to him but upon ordinary principles, i.e., what he would be prepared to pay, if he was entering the market, for a building to meet his requirements, or would be willing to expend in erecting a building in place of that which is being assessed."

In the *Office Specialty* case, then, the justification for taking account of the "estimate what he [the owner] would expend on a building to replace that which is being valued" was that it was fair measure of actual or market value where the owner as in that case made full and profitable use of the assets assessed. In the present case the evidence is that the "owner" would expend only a fraction of the cost to replace what is being valued and then only if the operation of the plant were to prove economically feasible. Thus the market data establishes that no one is willing to purchase the assets at anything close to replacement cost. It may well be that as the government imposed as a condition of sale, for political and economic reasons, that the plant be used for the production of french fried potatoes. It might be worth more if used for some other purpose. If so, no doubt the Board would take that purpose and the value resulting therefrom into account in making an assessment.

In my opinion, because there is no evidence whatever that the "owner" in this case, whether or not viewed as having a special interest in the assets, as a potential purchaser, could be taken to be willing to replace the plant at cost and the application of the replacement cost approach is thus wrong in principle. The first two questions posed must accordingly be answered in the negative. The answers to those two questions, I think, effectively dispose of what is here at issue although I might add with respect to question 3 that I believe the Board correct in deciding that factors of economic and functional obsolescence were not applicable in the present case. The case will be remitted to the Assessment Appeal Board for further consideration.