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WESTERN INDOOR TENNIS CENTRES LIMITED

v.

ASSESSMENT AREA OF RICHMOND/DELTA (11)

British Columbia Court of Appeal (CA 317/79)

Before: CHIEF JUSTICE N.T. NEMETZ, MR. JUSTICE A.B. ROBERTSON, AND MR. JUSTICE W.A. CRAIG

Vancouver, October 1, 1979

John R. Lakes for the Appellant
Peter Klassen for the Respondent

Reasons for Judgment of Mr. Justice Robertson.

I cannot state the circumstances in which this appeal comes before us more succinctly than by setting out or quoting from the following: (1) The decision of the Assessment Appeal Board; (2) the stated case; (3) the reasons for judgment from which this appeal is taken by the owner of the land; (4) the *Assessment Act*; and (5) two orders-in-council.

(1) THE DECISION OF THE ASSESSMENT APPEAL BOARD.

The appeal is against the decision of the 1978 Court of Revision.

This appeal concerns the classification of land, improvements and machinery and equipment. The appellant stated that there is no appeal on actual value.

The property is a commercial tennis club located at 4991 No. 5 Road, Richmond, B.C. The property consists of a 5.06 acre parcel of land on which the following areas and improvements are described:

A. A permanent metal clad structure housing five indoor tennis courts with parking and access driveway.

B. A two-storey clubhouse building attached to "A" above, with access driveway.

C. Five outdoor tennis courts utilized for four months of each year as outdoor courts and utilized for eight months each year as indoor courts. These courts are covered by a plastic air supported cover hereinafter referred to as the "bubble" during the eight months use as indoor courts. Also in this area is a building for the equipment associated with the "bubble". Parking and access driveway.

D. Six outdoor tennis courts and two outdoor practice courts. Parking and access driveway.

Land in the preceding designated areas as classified by the assessor and as requested by the appellant are as follows:

	Assessor	Appellant
A.	Class 6	Class 1
B.	Class 6	Class 6
C.	Class 6	Class 1
D.	Class 1	Class 1

The classification appeal rests on the interpretation of B.C. Regulations 437/77 and 496/77 wherein Class 1 (d) "land used for a golf course, ski facility, ball park, tennis court, bowling green, or other similar outdoor recreational facility".

The respondent contends that the key words are "similar *outdoor* facility" (italics by Board), and refers only to area "D" as the only continuously used outdoor facility. The appellant solicitor, Mr. Lakes, interprets the section to mean that "tennis courts" in general are included due to the proposition that they are specifically defined.

The Board has considered the construction of section (d) of Class 1 and maintains that the wording should be read in its total context.

The total meaning of the section is completed with the wording "or other similar outdoor recreational purpose". The conjunction "or" clarifies the meaning in that "outdoor" and "recreational" are descriptive adjectives of the purpose for which the land is used.

Class 1 (d) is not specific as to the period of use and in the case of area "C", the Board finds that a seasonal outdoor recreational use is made of the land and that such a seasonal use is sufficient to qualify this area under Class 1 (d).

As to area "A", the land does not qualify due to the fact that the tennis courts are not outdoors in compliance with the aforegoing reasoning and the land must therefore fall in Class 6.

Turning now to the "bubble", the appellant submits that this item is not assessable because it cannot be properly defined within the meaning of the word machinery. The "bubble" is a large inflatable cover that extends to a height of 35 feet, providing a covered playing area over the tennis courts for an eight-month period of each year. The "bubble" is attached and secured by means of wood wedges inserted into a permanent concrete perimeter wall, which is embedded in the land. The "bubble" is a necessary apparatus required in the operation of the tennis club facility. The appellant's solicitor presented a convincing argument that the "bubble" is not machinery. However, the classification of the "bubble" is "Class 4 - Machinery and *Equipment*" (italics by Board). The term equipment is all encompassing and adequately defines an apparatus such as the "bubble". The "bubble", then, is properly classified.

The assessability of the "bubble" is also a question in this hearing. The Board finds that the "bubble" is "affixed" to the land and comes within the definition of "improvements" in the *Assessment Act* as a similar thing "erected or placed in, on, under, or affixed to land".

The Board hereby sustains the assessment and classification of the "bubble" for the 1978 assessment roll.

The final point of submission was the classification of the permanent building and the five tennis courts therein. The appellant's solicitor argues that the tennis courts being the pavement and ground preparation of said courts should be classified as land. He also argues that the building is part of the tennis court and must be included as Class 1.

The Board finds that the tennis courts and the building housing them are improvements within the meaning of section 1 of the *Assessment Act*. As to classification, it is noted that these improvements do not fall within the Class 1 (d) definition as that section refers to "land" only and the improvements must then fall in Class 6 as they are now classified.

The Board hereby orders that the land be classified as follows for the 1978 assessment roll:

Class 1	$182,160	(Sections C and D)
Class 6	121,440	(Sections A and B)
Total	$303,600	

There shall be no order as to costs.

(2) STATED CASE.

THIS CASE STATED by the Assessment Appeal Board at the request of the appellant. The appeal was heard in Richmond, British Columbia on the 17th day of October 1978 in the presence of John R. Lakes, Esq., counsel for the appellant, and Messrs. J. Baker and D. Lee for the respondent assessor.

The facts are as follows:

1. The appellant owns land and improvements situate in Richmond, British Columbia and described in assessment roll R-085-866-902. It consists of a commercial tennis club located at 4991 No. 5 Road in Richmond, B.C. The property consists of a 5.06 acre parcel of land on which there is a permanent metal clad structure housing five indoor tennis courts; a two-storey clubhouse building; six outdoor tennis courts used for part of the year as outdoor courts and covered by a plastic air-supported cover hereinafter referred to as the "bubble" for part of the year; as well as parking and access to the several tennis courts described above.

2. The appellant's land is assessed partly as residential and partly as business and other. Neither the classification nor the value of the properties classified as residential are in issue in this appeal. The classification and value of the clubhouse and the permanent building are not in issue in this appeal. The classification of the land on which the permanent building is situate is in issue in this appeal to the extent that the classification applies to the tennis courts.

3. The "bubble" which is assessed as machinery is a membrane which has no movable parts and which is supported by air and is completely removable when the appellant wishes to use the five outdoor tennis courts as outdoor courts. The membrane is anchored to the foundation which is part of the outdoor tennis courts at times covered by the "bubble" and is then inflated by air pressure from a pump which maintains the "bubble" at all times that it is in use. When the appellant wishes to convert those tennis courts to outdoor tennis courts, the air supply is turned off and the entire structure deflates and is taken up and removed and stored on the property for the whole of the time that these courts are used as outdoor courts. It is the membrane and all parts thereof that are in issue in this appeal.

4. In the decision of the Assessment Appeal Board, which is attached as part of this case, the Board determined that although the "bubble" is not machinery, it is nonetheless to be assessed as an improvement.

5. The appellant requires that the case be stated and signed to this Honourable Court on the following questions of law:

(1) Did the Assessment Appeal Board err in law in finding that the classification of tennis courts as residential under Class 1 (d) applies only to outdoor tennis courts?

(2) Did the Assessment Appeal Board err in law in finding that the "bubble" is assessable as an improvement?

(3) Did the Assessment Appeal Board err in law in finding that the land on which the tennis courts and the building are situate must all be classified as Class 6 "Business and Other"?

Pursuant to section 67 of the *Assessment Act* aforesaid the Assessment Appeal Board submits this Stated Case and humbly requests the opinion of this Honourable Court on the said questions of law.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

(3) REASONS FOR THE JUDGMENT APPEALED FROM.

At the conclusion of the hearing held on March 12, 1979 I indicated that the appellant's appeal was dismissed. These are my reasons for judgment.

Having read the case stated by the Assessment Appeal Board and the reasons given by it on December 6, 1978, I adopt those reasons as my own and answer questions 1, 2 and 3 in the negative and dismiss the appeal for the reasons stated by the Assessment Appeal Board.

(4) EXTRACTS FROM THE *ASSESSMENT ACT*.

1. In this Act, unless the context otherwise requires,

"improvements" for purposes other than for general municipal and Provincial taxation purposes under the *Municipal Act*, *Vancouver Charter* and *Taxation Act* includes

(i) all buildings, fixtures, machinery, structures and similar things erected or placed in, on, under, or affixed to land or to a building, fixture, or structure in, on, under, or affixed to land, and, without limiting the generality of the foregoing, includes aqueducts, tunnels other than mine-workings, bridges, dams, reservoirs, roads, transformers and storage tanks of whatever kind or nature, and fixtures, machinery and similar things of a commercial or industrial undertaking, business, or going-concern operation so erected, affixed, or placed by a tenant, except those exempted by regulation,

. . .

24. . . .

(6) Subject to subsection (17), land and improvements shall be assessed at the percentage of actual value fixed by the Lieutenant-Governor in Council under subsection (7).

(7) The Lieutenant-Governor in Council shall, on or before October 21 in each year, fix the percentage of actual value at which each class of property shall be assessed for the succeeding year, and in doing so, the Lieutenant-Governor in Council may fix the same

percentage or different percentages of actual value for each class of property defined by him.

(8) The Lieutenant-Governor in Council shall define the types or uses of land or improvements, or both, to be included in each class.

(5) EXTRACTS FROM ORDERS-IN-COUNCIL.

B.C. Reg. 437/77
B.C. Reg. 496/77

ASSESSMENT ACT

CONSOLIDATION OF ORDER IN COUNCIL 3084, APPROVED AND ORDERED OCTOBER 7, 1977 AND ORDER IN COUNCIL 3417, APPROVED AND ORDERED NOVEMBER 10, 1977

Pursuant to section 24 (7) and (8), the percentages of actual value at which each class of property defined herein shall be assessed in 1978 be fixed as follows:

Definition of Class

Class 1 - Residential (15 per cent) shall include

. . .

(d) land used for a golf course, ski facility, ball park, tennis court, bowling green, or other similar outdoor recreational purpose.

. . .

Class 6 - Business and Other (25 per cent) shall include all land or improvements or both not included in classes 1 to 5 or 7.

Properties comprising more than one of the classes herein defined shall be assessed at the percentage of actual value applicable to each class.

. . .

Questions (1) and (3).

Under s. 24 (6) and (7) the Lieutenant-Governor in Council is required to fix the percentage of actual value at which each class of property is to be assessed, and under s. 24 (8) he must define the types or uses of land to be included in each class. Classes of land may, therefore, be defined by types or uses.

There are two parts to the definition of Class 1 (d). The first is "land used for a golf course, ski facility, ball park, tennis court, bowling green". The second is "[land used for an] other similar outdoor recreational purpose." The interpretation by the Board and the learned judge below in effect moves the word "outdoor" from the second part to the first part. With respect, I think that this is not sound, for each of two reasons.

Had it been the intention to restrict all the property defined in Class 1 (d) to uncovered land, it would have been easy to do so in clear and simple words, for example:

> land used for an outdoor golf course, ski facility, ball park, tennis court, bowling green or other similar recreational purpose.

To me it seems clear that the original intention was to include in the definition all the kinds of parcels of land that are specifically defined by use in the first part. It then may have occurred to the draftsman that there were similar kinds of parcels that he had overlooked and so he added the second part; but in so doing he recognized the danger of casting too wide a net and out of caution he limited the similar kinds to ones that were outdoors. It was not the intention by so doing to restrict or limit the kinds of land specified in the first part.

My other reason is more technical. In the first part of Class 1 (d) the definition is by use: "land used for a golf course, ski facility, ball park, tennis court, bowling green". Inspection of the land itself and observation of the activity carried on on it can readily determine whether the land is, for example, used for a tennis court. The second part of the definition does not parallel the first part. The test under it is not what the land is used for, but what is the purpose for which it is used. The definition is, therefore, by type and not by use. This difference between the methods of definition in the first part and in the second part appears to me to make it unsound in effect to lift the word "outdoor" from the second part and to insert it in the first part, thereby restricting the clear specificity of the language in the first part.

It might be argued that what I have said in the last paragraph leads to giving no effect at all to the second part of Class 1 (d), but this is not so. One must give meaning to the second part, and I have no difficulty in doing so. Though it is inartistically phrased, I think that its intention was to include in the definition land which is used outdoors for recreation similar to that for which a golf course, a ski facility, a ball park, a tennis court or a bowling green is used. The intention did not, however, go beyond this and certainly not to the extent of introducing the outdoors limitation into the first part in a backhanded way.

In my opinion questions (1) and (3) should both be answered "yes".

Question (2).

This has given me more difficulty than questions (1) and (3). The nub of the question is whether the "bubble" falls within the definition of "improvements" that I have quoted above from s. 1 of the *Assessment Act* and particularly the words there "all. . . fixtures. . . and similar things erected or placed in, on, under, or affixed to land or to a. . . structure in, on, under, or affixed to land".

From the cases cited to us I shall quote from one only, *La Salle Recreations Limited* v. *Canadian Camdex Investments Limited et al* (1969) 68 W.W.R. 339. The case turned in part on this definition in the *Conditional Sales Act*, 1961

> 12. (1) In this section
>
> 'affixed' as applied to goods, means erected upon or fixed or annexed to land in such a manner and under such circumstances as to constitute fixtures;

McFarlane, J.A. delivered the judgment of this Court, and at p. 344 he said:

> A study of these and other authorities has led me to the conclusion that the principles to be applied are stated accurately by Meredith, C.J. speaking for a divisional court in *Stack* v. *Eaton* (1902) 4 OLR 335, at 338, as follows:
>
> > "I take it to be settled law:

(1) That articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as shew that they were intended to be part of the land.

(2) That articles affixed to the land even slightly are to be considered part of the land unless the circumstances are such as to shew that they were intended to continue chattels.

(3) That the circumstances necessary to be shewn to alter the *prima facie* character of the articles are circumstances which shew the degree of annexation and object of such annexation, which are patent to all to see.

(4) That the intention of the person affixing the article to the soil is material only so far as it can be presumed from the degree and object of the annexation."

Haggert v. *Brampton (Town)* (1897) 28 SCR 174, was a dispute between mortgagor and mortgagee where the mortgage charged "all the real estate of them the mortgagors, including all the machinery there was or might thereafter be annexed to the freehold, and which should be known in law as part of the freehold." Delivering the judgment of the Supreme Court of Canada King, J. after referring to certain authorities, commented on the object of annexation as follows at p. 182:

"In passing upon the object of the annexation, the purposes to which the premises are applied may be regarded; and if the object of setting up the articles is to enhance the value of the premises or improve its usefulness for the purposes for which it is used, and if they are affixed to the freehold even in a slight way, but such as is appropriate to the use of the articles, and showing an intention not of occasional but of permanent affixing, then, both as to the degree of annexation and as to the object of it, it may very well be concluded that the articles are become part of the realty, at least in questions as between mortgagor and mortgagee."

Special attention must be given to the use of the word "permanent" in this context. I note the word is used in contradistinction to "occasional". When used with reference to affixing or annexing chattels to realty I cannot believe that "permanent", a relative term, means remaining in the same state and place forever or even for an indefinitely long period of time. Especially must this be so where the chattels being considered are subject to wear and tear through use. Moreover, I think regard must be had to the fact that the use is in a modern hotel where changes from time to time in colour schemes and decor may become important for the purpose of efficient commercial operation of the hotel as a hotel. In my opinion the word "permanent," as used by King, J., should be interpreted for the purposes of this appeal as indicating the object of having the carpeting remain where it is so long as it serves its purpose.

I turn now to the Stated Case and to the decision of the Appeal Board, which is incorporated in it by reference. From them it appears that around the five outdoor tennis courts there is a permanent concrete perimeter wall which is embedded in the land; that when the "bubble" is in use, and that is for an eight month period in each year, it is attached and secured to the perimeter wall by means of wooden wedges inserted in it; that the "bubble" is a huge thing that covers all five courts and extends when inflated to a height of 35 feet; that the "bubble" is inflated by air pressure from a pump that the appellant concedes is permanently affixed to the land; and that when it is desired to uncover the tennis courts the air supply is turned off and the entire membrane is taken up and removed and stored on the property until at the end of four months it is next put into use. There is no suggestion that the "bubble" would fit any other group of courts or serve any purpose than that for which it is used in conjunction with the perimeter wall and the pump.

Applying the principles stated in *La Salle* above to these facts, I am of the opinion that the "bubble" is a "fixture or similar thing". *Inter alia* I have in mind that during two thirds of each year the "bubble" is affixed to the land somewhat more than "slightly", that it can therefore be said to be affixed "permanently" within the meaning given to that word in *La Salle*, that the sole purpose of the existence of the "bubble" and its inflation in place is to improve the usefulness of the courts, which without it could be played on for only part of the year, and that generally the perimeter wall, the pump and the "bubble" are equally parts of one whole that at the bottom is embedded in the land and that without anyone of them would serve no useful purpose.

In my opinion question (2) was properly answered "no".

I would, therefore, allow the appeal to the extent of substituting affirmative answers for the negative answers to questions (1) and (3) below.

The appellant is entitled to the costs of the appeal and of the Stated Case below.

Reasons for Judgment of Chief Justice Nemetz

I have read the reasons for judgment of my brother Robertson and for the reasons given by him, with which I agree, I would allow the appeal to the extent proposed by him.

Reasons for Judgment of Mr. Justice Craig

The facts are set out in the judgment of Robertson, J.A. I agree for the reasons given by Robertson, J.A. that the Assessment Appeal Board was correct in holding that the "bubble" was assessable as an improvement. With deference, however, I think that the Chambers Judge was right in affirming the decision of the Assessment Appeal Board that the phrase "tennis court" in Class 1 (d) of the regulations means "outdoor" tennis courts. I cannot conceive of an indoor golf course, or an indoor ski facility. There are, of course, indoor ball parks and indoor tennis courts, and I assume that there could be an indoor bowling green, although I have never heard of one. I think that the regulation is poorly drafted, but, nevertheless, I think that the intent is that only an outdoor facility comes within the class. Accordingly, I would dismiss the appeal.