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INLAND NATURAL GAS COMPANY LIMITED,
INLAND DEVELOPMENT COMPANY LIMITED,
PEACE RIVER TRANSMISSION COMPANY LIMITED
and
BRITSH COLUMBIA TELEPHONE COMPANY

v.

ASSESSMENT AREAS OF BURNABY/NEW WESTMINSTER
CARIBOO, CHILLIWACK, COURTENAY,
COWICHAN VALLEY, DEWDNEY-ALOUETTE,
EAST KOOTENAY, KAMLOOPS, KELOWNA,
LANGLEY-MATSQUI-ABBOTSFORD, NANAIMO, NELSON,
NORTH SHORE-SQUAMISH, NORTHWEST, PEACE RIVER,
PENTICTON, PORT ALBERNI, VANCOUVER,
PRINCE GEORGE, TRAIL and VERNON

Supreme Court of British Columbia (C792522)

Before: MR. JUSTICE R.P. ANDERSON

Vancouver, June 29, 1979

J.R. Lakes for the Appellants
R.B.

Reasons for Judgment August 10, 1979

This is a stated case submitted by the Assessment Appeal Board pursuant to sec. 67 (1) of the *Assessment Act*.

The Stated Case reads in part as follows:

> "1. The appellants own land and improvements throughout the Province of British Columbia which is classified for the 1979 assessment as Class 2 'Utilities'.
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> 2. Pursuant to section 24 (7) of the *Assessment Act* the Lieutenant-Governor in Council shall, on or before October 21st 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 of each class of property defined by him. Under sec. 24 (8) the Lieutenant-Governor in Council shall define the types or uses of land or improvements or both to be included in each class.
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> 3. That the Lieutenant-Governor by Order 2680 approved and ordered on October 12, 1978 directed that effective October 21, 1978 and 1979 assessments and classes and percentage levels regulation should determine, inter alia, that Class 2-Utilities be assessed at 30 per cent of actual value and that 'Utilities' shall include, other than land or improvements or both, included in Classes 1, 4 and 8:

(a) land or improvements or both owned or occupied by any telegraph corporation, railway corporation, or pipeline corporation;

(b) land or improvements or both owned or occupied by electric light, electric power, telephone, water, gas or closed-circuit television company;

(c) land or improvements or both owned or occupied by the British Columbia Hydro and Power Authority.

4. The said Order 2680 provided also that land or improvements or both not included in Classes 1-5, 7 and 8 shall be assessed as 'Class 6-Business and Other' at 25 per cent of actual value.

5. The said Order 2680 also provides that sec. 24 (11), (12) and (13) of the *Assessment Act* shall apply to Classes 1, 6 and 8 only, as defined therein. As a consequence, the phase in provisions of these subsections of sec. 24 do not apply to Class 2-Utilities.

6. By Order 2679 approved and ordered on October 12, 1978 the Lieutenant-Governor in Council further ordered that the expressions 'types' and 'uses' used in sec. 24 (8) of the *Assessment Act* includes categories characterized by ownership or occupancy or both ownership and occupancy.

7. Order-in-Council 2679 referred to above was published in the B.C. Gazette - Part 11 of November 7, 1978 as B.C. Reg. 469/78 and Order-in-Council 2680 was also published in the said B.C. Gazette as B.C. Reg. 470/78.

8. By Order-in-Council 2748 approved and ordered November 2, 1978 it was ordered that B.C. Reg. 469/78 be repealed and that the time within which provisions of sec. 24 (7) of the *Assessment Act* must be performed in 1978 is extended to November 10, 1978 and that the B.C. Reg. 470/78 be amended by repealing the definition of Class 2 and substituting the following:

30 per cent Class 2-Utilities shall include, other than land or improvements or both, used or held for the purposes of, or for purposes ancillary to, the business of

(a) transportation by railway,

(b) transportation, transmission or distribution by pipeline,

(c) communication by telegraph or telephone,

(d) generation, transmission or distribution of electricity, or

(e) receiving, transmission and distribution of closed-circuit television but does not include land or improvements, or both, included in Classes 1, 4, 5 or 8.

The said Order has been published in B.C. Reg. 487/78.

9. The appellant, B.C. Telephone Company on behalf of itself and also the Okanagan Telephone Company appeals all land and improvements, or land or improvements assessed in those assessment areas of the Province of British Columbia on which the Appellant's property is classified as 'utility' and which includes administrative buildings, plant centres, pole yards, and in some instances vacant land as well as leased land, on the ground that all the said lands and improvements are wrongfully classified as utility

class 2. A schedule of the land and improvements or land or improvements so assessed has been filed with the Assessment Appeal Board setting out the particulars of the said properties appealed.

10. The appellant Inland Natural Gas Co. Ltd. and its subsidiaries Inland Development Co. Ltd. and Peace River Transmission Co. Ltd. also appeal all land and improvements or land or improvements situate in several assessment areas within the Province of British Columbia which are classified as Utility and which generally include compressor stations, gate stations and particulars of which are also set out in the schedule delivered to the Assessment Appeal Board.

Pursuant to section 67 (1) of the Assessment Act the Assessment Appeal Board, on its own initiative, submits this Stated Case to the Supreme Court of British Columbia and suspends the proceedings and reserves its decision pending the opinion of the final Court of Appeal on the following questions:

(1) Is Order-in-Council 2748 *ultra vires* the *Assessment Act*?

(2) If so, is there any definition of Class 2-Utilities which has been validly made under the provisions of the *Assessment Act*?"

The relevant provisions of the *Assessment Act* read as follows:

"24 (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.

(17) The Council of a municipality shall, by by-law adopted on or before November 10 in each calendar year, a copy of which shall be deposited with the commissioner and the Inspector of Municipalities, provide that the assessed values of land and improvements within the municipality for general municipal purposes in the following calendar year, be determined in accordance with one of the following options:

(a) assessment of land and improvements, as defined in this Act for general municipal purposes, at the same percentage of actual values and with the same limitations on assessment increases as those fixed or provided for in subsections (6) to (16); or

(b) assessment of land and improvements, as defined in this Act for general municipal purposes, at the same percentages of actual value as fixed under subsection (7); or

(c) assessment of land and improvements, as defined in this Act for general municipal purposes, at the same average percentages of actual values as those that are determined by the commissioner to have existed within the municipality on April 1 of the calendar year preceding the calendar year for which the assessment roll is being prepared, for each class of property defined in subsection (8); or

(d) assessment of land and improvements, as defined in this Act for general municipal purposes, at actual value or at some uniform percentage of actual value specified in the by-law for all classes of property.

73. (1) For the purpose of carrying out the provisions of this Act according to their intent, the Lieutenant-Governor in Council may make such regulations and Orders as are ancillary thereto and not inconsistent therewith; and every regulation shall be deemed to be part of this Act and has the force of law; and, without restricting the generality of the foregoing, the Lieutenant-Governor in Council may make regulations and Orders

. . .

(c) extending the time within which any of the provisions of this Act must be performed, carried out, or completed."

The appellants contend that Order-in-Council 2748 (B.C. Reg. 487/78), filed November 3, 1978 and gazetted November 21, 1978, is *ultra vires* because it was not enacted "on or before, October 21, 1978" as required by section 24 (7) of the Act.

The respondents submit that the Lieutenant-Governor in Council had the power to extend the time fixed by section 24 (7). The respondents rely on section 73 (1) of the Act.

The respondents contend that Order-in-Council 2748 fulfilled two functions. The first was to extend the time set out in sec. 24 (7) from October 21, 1978 to November 10, 1978. The second was to comply with substantive provisions of sec. 24 (7) within the newly prescribed time limit.

The appellants contend that Order-in-Council 2748 failed to fulfil the first function submitted by the respondents and that it therefore failed to fill any function whatsoever.

Order-in-Council 2748 reads as follows:

"On the recommendation of the undersigned, the Lieutenant-Governor, by and with the advice and consent of the Executive Council, orders that

(a) B.C. Reg. 469/78 (Order in Council 2679/78) be repealed,

(b) the time within which the provisions of section 24 (7) of the *Assessment Act* must be performed in 1978 is extended to November 10, 1978, and

(c) B.C. Reg. 470/78 (Order in Council 2680/78) be amended by repealing the definition of Class 2 and substituting the following:

'Class 2-Utilities (30 per cent) shall include land or improvements or both, used or held for the purposes of, or for purposes ancillary to, the business of

(a) transportation by railway,

(b) transportation, transmission, or distribution by pipeline,

(c) communication by telegraph or telephone,

(d) generation, transmission, or distribution of electricity, or

(e) receiving, transmission, and distribution of closed-circuit television but does not include land or improvements, or both, included in classes 1, 4, 5, or 8.'"

The issue here is whether or not provisions of the *Assessment Act* will allow the Lieutenant-Governor in Council to extend a time period after that time period has expired. The appellants contend that once the time period has expired, there is nothing in existence that can be extended. Therefore, if the Lieutenant-Governor in Council is to validly extend the time period in sec. 24 (7), it must do so on or before October 21 of the year in which it is extending the time period. In support of this the appellants rely on the following two cases:

1. *Brooke* v. *Clarke* (1818) 1 B. & AId. 396, 106 E.R. 146.

2. *Re Cadillac Development Corp. Ltd. et al and City of Regina et al* (1976) 72 DLR (3d) 754, Sask. Queen's Bench; affirmed 74 DLR (3d) 497, Sask. Court of?

In the *Brooke* case Lord Ellenborough, C.J. said in part, at page 403:

"The word extension imports the continuance of an existing thing, and must have its full effect given to where it occurs."

In the *Cadillac* case, Johnson, J. said at pp. 755-56:

"On July 2, 1975, City Council passed a resolution requesting the Minister to extend the time for the adoption of the plan by letter dated July 15, 1975, the Minister purported to grant an extension of time for preparation of the plan to June 30, 1976. Counsel for the applicants contends that when the City Council failed to adopt the municipal development plan before the expiration of the two-year period the effect of the resolution authorizing the development of the plan failed and the Minister had nothing to extend; the proposed plan ceased to have any effect whatsoever. In support of his contention that the Minister could not extend something which had died, counsel relied on *Brooke* v. *Clarke et al* (1818), 1 B. & Ald. 396, 106 E.R. 146; also on *Re MacIntosh and Thomas, Solicitors*, (1903) 2 Ch. 394 (C.A.). He urges that something can only be extended for as long as it exists and once it has ceased to exist it cannot be extended. Any attempt so to do means a recreation. . . .

I think it is clear, on reading ss. 30 to 34 (am. 1973-74, c. 76, s. 3) of the *Planning and Development Act*, 1973, that the legislation intends that the public will be kept fully informed of the state of the development of planning in the city which is indicated by the requirement for advertising as set forth in s. 34 (2). A member of the public would, in my opinion, be entitled to assume that when the two years provided for in s. 32 had expired and the plan of development had not been adopted and had not been extended by order of the Minister, then it would be of no force whatsoever. If the legislation had intended that the Minister would have the right to extend the time for the adoption of the development of the plan after the expiry of the two-year period mentioned in s. 32, then it would have said so in plain unambiguous words. As I read the legislation, there is nothing which prohibits the City of Regina from passing another resolution pursuant to s. 32 and from and after the date of that resolution the city will once again have control of development in those areas which will be affected by the proposed plans. . . ."

The principle to be extracted from the preceding cases accords with commonsense. It is impossible to extend that which is nonexistent, therefore there must be something in existence before that something may be extended. It necessarily follows that once a time period has expired it cannot be extended within the normal meaning of the word "extended"'.

The respondents rely on *British Pacific Properties Ltd.* v. *Assessor, Municipality of West Vancouver*, (1971) 2 W.W.R 429, (B.C.S.C.) in support of their submission that the order-in-council could validly extend the time period set out in sec. 24 (7). The judgment of Dohm, J. in the *British Pacific* case reads in part, at pp. 435-37, as follows:

> "The Order in Council No. 4144
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> Section 56 (1) of the *Assessment Equalization Act*, R.S.B.C. 1960, c. 18, reads:
>
> '(1) For the purpose of carrying into effect the provisions of this Act, the Lieutenant-Governor in Council may make such regulations, not inconsistent with the spirit of this Act, as are considered necessary or advisable, and by such regulations may provided for any proceeding, matter, or thing for which express provision has not been made in this Act, or for which only partial provision has been made.'
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> Subsection (2) reads:
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> '(2) Without limiting the generality of the provisions contained in subsection (1), the Lieutenant-Governor in Council may make regulations. . .
>
> '(d) *extending* the time within which any of the provisions of this Act must be completed.' (The italics are mine.)
>
> Other sections of the Act direct the Appeal Board to make its returns or reports to the Assessor before 15th May in each year (see s. 45 (h) (re-en. 1961, c. 3, s. 5) and s. 50 (1).) No authority was cited to me on the interpretation of orders in council but counsel submitted to me and I accept the principle that I should interpret the order in council as one would interpret a statute.
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> On 15th May 1969 the Lieutenant-Governor in Council passed an order in council extending the time within which the Assessment Appeal Board shall make its returns to the assessors to 31st October 1969.
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> By order in council No. 4144 dated 29th December 1969 the time within which the Board should make its returns and reports to the respective assessors covering appeals received in 1969 'as extended under Order-in-Council No. 1573 to be extended to December 31st, 1969.'
>
> Mr. Lakes's argument is that this is an invalid piece of legislation and that the time had died on 31st October 1969, and that the Cabinet could not extend something that had already expired. He submits that by reason of this proposition the Board's second order would be null and void. I have already held that the Board's second order was an explanatory order and in my opinion could properly be made in justice in December 1969 even if the time had expired on 31st October 1969.
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> The meaning of the words 'extend' or 'extension' was submitted by Mr. Lakes to be that as expressed by Lord Ellenborough C.J. in *Brooke* v. *Clarke* (1818) 1 B. Ald. 396, 106 E.R. 146, wherein he stated at p. 403:
>
> 'The word *extension* imports the continuance of an existing thing, and must have its full effect given to where it occurs.'
>
> and

'It seems to me, that predicating the purpose to be to benefit the author by the *extension* of his rights, is adopting a very different idea, from recreating an expired right.' (The italics are mine.)

He also quoted in support of this interpretation Adams J. in *Kinsman* v. *Brown* (1958) N.Z.L.R. 807, in which Lord Ellenborough C.J. was quoted. Adams J. however also stated (p. 809), 'I prefer to guard myself against laying down any general proposition, and my decision is limited to the particular enactment.' I would, with respect, concur with Adams J. and it should be pointed out that the interpretation by Lord Ellenborough C.J. was in connection with a copyright statute.

In my opinion the order in council No. 4144 when read in its entirety displays an intent that it should have a retrospective effect covering all the appeals in 1969 and that it extended the time from 15th May 1969 to 31st December 1969. In any event it is my opinion that the order in council No. 4144 is a mere procedural matter and as such valid to cover all the returns and reports made in 1969, providing they were made by 31st December 1969. It follows that if I am wrong in interpreting the second order as an explanatory order, then it would be my opinion that the second order was nevertheless made within the statutory period of time."

The first point to be made with respect to the *British Pacific* case is that Mr. Justice Dohm's comments are dicta and not binding on me.

The second point is that the comments of Mr. Justice Dohm were made in light of his finding that Order-in-Council No. 4144 was a procedural matter. It appears that he was willing to deviate from the view of Lord Ellenborough in *Brooke* in so far as the order-in-council was procedural. Had substantive matters been involved he might well have reached a different conclusion.

In this case it is clear that Order-in-Council 2748 is not merely procedural. The order-in-council affects the tax liability of every person in the newly defined "Class 2". I hold, therefore, that as substantive rights are involved that there was no power to extend the time beyond October 21, 1978. As a result I must hold that Order-in-Council 2748 is *ultra vires* the *Assessment Act*.

If I am wrong in holding that the quoted portion of the judgment in the *Brooke* case (*supra*) is applicable I would hold that sec. 24 of the Act contains a specific time schedule fixed by the Legislature which schedule is by its very nature not subject to change. Pursuant to sec. 24 (17) of the act municipal councils are required to enact assessment by-laws by November 10th of each year, such by-laws to be in accordance with orders-in-council enacted pursuant to sec. 24 (7) and 24 (8). Chaos would result if the orders-in-council in existence at the time the by-laws were enacted could be changed or repealed after the enactment of said by-laws. Taxation statutes must be interpreted if possible so as to create a certain and stable taxation structure.

The answer to the first question is that the whole of Order-in-Council 2748 is *ultra vires* the *Assessment Act*.

With respect to the second question I understood counsel for the respondents to say that if Order-in-Council 2748 was *ultra vires* that it was conceded that no valid definition of Class 2-Utilities existed. If I am wrong in this understanding counsel may attend before me to argue this matter.

Judgment accordingly.