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ASSESSMENT COMMISSIONER

v.

WESTCOAST TRANSMISSION COMPANY LIMITED

Supreme Court of British Columbia (A800920)

Before: MR. JUSTICE J.C. BOUCK

Vancouver, May 16, 1980

J. Greenwood for the Appellant
G.F. Macintosh for the Respondent

Reasons for Judgment June 20, 1980

An appeal was taken by the respondent from the decision of the 1979 Court of Revision to the Assessment Appeal Board claiming the actual value of the respondent's land was assessed at too high a price. It was heard in Vancouver on 2 October, 1979 and Reasons were delivered on 1 February, 1980. From that decision, the Board was asked to state a case in accordance with s. 67 of the *Assessment Act*, S.B.C. 1974, c. 6.

The Board quite frankly admitted in its Reasons of 1 February, 1980, that it decided the appeal on grounds not argued before it. Essentially, it concluded the *Assessment Act* does not authorize the assessment of pipeline easements through private or public lands. Both sides concede the Board did not have the power to make such a finding of law because this was beyond the authority of the Provincial Legislature. It could not delegate that kind of a decision to a provincially appointed body such as the Assessment Appeal Board. Instead, the point can only be determined by a judge appointed pursuant to s. 96 of the *British North America Act. Toronto* v. *Olympia Edward Recreation Club Ltd.* (1955) 3 D.L.R. 641 (S.C.C.).

Nonetheless, the Commissioner has agreed that rather than refer the matter back to the Board and have it heard again in this Court, for the purpose of efficiency, it would be better to resolve the dispute now as if the issue were argued and heard here in the first instance. At the same time, he accepted the proposition that the *Assessment Act* does not allow for the assessment of pipeline easements over private lands. Therefore, the question I must answer is whether or not the statute authorizes the assessment of pipeline easements (also called rights-of-way) travelling through Crown owned lands.

The easements in dispute are within the Peace River Assessment Area. Where the pipeline travels across Crown lands, there is a form of agreement between the Province and the respondent. Amongst other things, it provides for:

(a) The burying of the pipeline at a depth no less than 24 inches from the surface, except over rivers, ravines, etc.

(b) The right of Westcoast to remove the pipeline during the term of the agreement.

(c) Reservation of minerals in the Crown.

(d) The right of British Columbia Hydro or other provincial authority to enter upon or cross the right-of-way for their purposes subject to certain conditions.

(e) The Crown to have at all times the use and possession of the surface of the right-of-way and to dispose the same for any purpose whatsoever, subject to the rights given to Westcoast.

(f) The grant being subject to all rights of free miners under the mining laws of the Province.

(g) The right of the Crown to request Westcoast to relocate the easement on other Crown lands if it is in the public interest.

(h) The right of the Crown to grant additional rights-of-way within the right-of-way already granted to Westcoast for any purpose whatsoever.

As a consequence of this agreement, it is obvious that Westcoast has no right of possession to the surface of the easement. That remains with the Crown. Individuals apart from the Crown may use it for access or recreational purposes, subject to the discretion of the Crown. An exception occurs if those individuals interfere with the safe operation of the pipeline. Then, Westcoast may apparently take steps to correct the situation.

The width of the right-of-way varies from about 60 feet to approximately 100 feet. Other evidence before the Board revealed the fact that the Crown had alienated to various individual property owners approximately 250 parcels of Crown land subject to the easement of Westcoast.

It is common ground between the parties that before any assessment can be made with respect to the easement, it must be shown that Westcoast is an occupier of the lands. This arises from s. 26 (3) of the *Assessment Act*. The relevant parts read:

"'occupier' means

(ii) the person in possession of Crown land that is held under a homestead entry, pre-emption record, lease, licence, agreement for sale, accepted application to purchase, easement, or other record from the Crown, or who simply occupies the land; . . ."

Gould J. of this Court investigated a similar section of the *Municipal Act*, R.S.B.C. 1960, c. 255 in *Construction Aggregates Ltd.* v. *The Corporation of the District of Maple Ridge* (1971) 4 W.W.R. 214. Within that Municipality there were certain lands set aside as part of the Langley Indian Reserve. The Crown (Federal) entered into an agreement with a company called Valley Ready Mix Ltd. on 18th February, 1964. It was a predecessor in title of the above-mentioned plaintiff. The municipality purported to assess and tax the lands covered by the agreement under certain sections of the *Municipal Act*. Like the *Assessment Act,* persons who occupied Crown lands were liable to assessment and taxation. The definition of occupier was almost identical to the definition in the *Assessment Act*. It read:

"'occupier' means

. . .

(b) the person in possession of land of the Crown that is held under any homestead entry, pre-emption record, lease, licence, agreement for sale, accepted application to purchase, easement, or other record from the Crown, or who simply occupies the land. . ."

After concluding the plaintiff did not possess any interest in land by way of exclusive occupancy under its agreement with the Crown and so could not maintain an action for trespass, His Lordship went on to inquire whether the plaintiff simply occupied the land within the meaning of

the definition section. Because the contract in question reserved to the Crown the right to allow others to log timber from the land which had been perpetually granted the plaintiff for a gravel pit, he decided the plaintiff was not an "occupier" within the meaning of the Act.

An appeal was taken from this decision to the Court of Appeal. *Construction Aggregates Ltd.* v. *Corporation of District of Maple Ridge* (1972) 6 W.W.R. 355. Maclean J.A. (Tysoe, J.A. concurring) wrote the majority judgment dismissing the appeal. Like Gould J., he quoted with approval a judgment of Ferguson J. in the Ontario High Court: *Re City of Oshawa and Loblaw Groceterias Co. Ltd. (And Three Other Companies)* (1963) 38 D.L.R. (2d) 216. That case held occupation or use is a question of fact. It involved an issue as to whether lessees of a shopping centre could be assessed for land occupied within the adjacent parking lot because at law, it was said these lessees "occupied" the parking lot. By contract from the owner, the tenants had the right (along with their customers and others) to make use of the parking lot which formed part of the shopping centre. The parking lot was not leased to the tenants. They only had a licence to make use of it. Applying other Ontario authority, Ferguson, J. held that where an occupier is in possession by virtue of a licence only, then it has a mere licence or privilege to occupy and so the land is not rateable for land taxes. In part, he relied on the decision of *Westminster Council* v. *Southern Railway Co. et al* (1936) A.C. 511 (H.L.), where Lord Russell made some general observations about rateable occupation at page 529-530.

Counsel for the respondent now says that Ferguson J. misinterpreted the words of Lord Russell in *Westminster Council* v. *Southern Railway Co. et al, supra*. If that be so, then the Ontario case was wrongly decided and since it was partially responsible for the conclusion reached by Gould J. and Maclean J.A. in *Construction Aggregates Ltd.* v. *Corporation of District of Maple Ridge*, the whole house of cards collapses. Nonetheless, he frankly conceded his submission was more appropriate for the court of Appeal than for me. I agree. My duty is to apply the words of Maclean J.A., and if they cover the circumstances in this situation, then that is the end of the matter insofar as this Court is concerned.

As in the case at bar, *Construction Aggregates Ltd.* held the property subject to an agreement. Like the contract before me, the Crown (Federal) reserved its right to grant permits authorizing the use of the same land for other purposes. Since it did not give the plaintiff the "exclusive right of occupation", the Court of Appeal held the property was exempt from taxation. Similarly, Westcoast Transmission Company Limited has no "exclusive right of occupation" to the rights-of-way where they travel over Crown land because its contract with the Crown (Provincial) contains the same kinds of clauses which are inconsistent with such a right. Thus, it is also exempt.

A number of questions were set out in the stated case for the opinion of this Court. They can be answered in the following manner:

> *Question* (a) Did the Board err in law in deciding that it had jurisdiction to determine the question of assessability of the pipeline rights-of-way?
>
> *Answer* Yes, but Counsel agreed the matter could be determined in this Court without sending it back to the Board.
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> *Question* (b) If the Board did have such jurisdiction, did it err in law in determining that the rights-of-way over Crown land were not assessable?
>
> *Answer* No.
>
> *Question* (c) If the Board did have the said jurisdiction, did it err in law in determining that the rights-of-way over private land were not assessable?
>
> *Answer* No: Counsel agreed the rights-of-way over private lands were exempt from assessment.

Question (d) Did the Board err in law in failing either to confirm the assessment, order a reassessment, or order that different actual values for the pipelines rights-of-way be placed on the assessment roll?

Answer Counsel agreed this need not be answered.

Question (e) Did the Board err in law in failing to consider the evidence and the arguments as to actual value of the rights-of-way presented by the assessor and the appellant below and failing to make a decision thereon?

Answer Counsel agreed this need not be answered.

Question (f) Did the Board err in law in determining that the rights-or-way over Crown land were not assessable?

Answer No.

Question (g) Did the Board err in law in determining that the rights-of-way over private land were not assessable?

Answer No.

It follows that the appeal by the Assessment Commissioner, Province of British Columbia, to this Court by way of stated case is dismissed. Costs follow the event.