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BRITISH COLUMBIA FOREST PRODUCTS

v.

ASSESSOR OF AREA 6 - COURTENAY

Supreme Court of British Columbia (A831462), Vancouver Registry

Before MR. JUSTICE A.G. MacKINNON (in chambers)

Vancouver, August 11, 1983

Brian J. Wallace for the Appellant
Julian K. Greenwood for the Respondent

Reasons for Judgment August 11, 1983

The Provincial Assessment Appeal Board submits certain questions of law arising out of hearings whereby it decided the appellant occupied certain lands.

In order to carry out logging operations on Vancouver Island, the appellant obtained from the Ministry of Forests of the Provincial Government certain permits to enter upon and use Crown land. The permits allowed the appellant to use the Crown land for roads, an airstrip, a gravel pit, and a garbage dump. These Crown lands were considered by the Assessor as being occupied by the appellant and therefore assessable. The authority relied upon by the Assessor was s. 34 (1) of the *Assessment Act* which provides:

> "34. (1) Land, the fee of which is in the Crown, or in some person on behalf of the Crown, that is held or occupied otherwise than by, or on behalf of, the Crown, is, with the improvements on it, liable to assessment in accordance with this section."

On appeal, the Assessment Appeal Board upheld the assessment.

The questions on which the opinion of the Court is sought are:

> 1. Did the Board err in law in finding, on the facts set forth in its decision, that the Appellant was the holder or occupier of the subject properties within the meaning of those terms under the *Assessment Act*, R.S.B.C. 1979, Chapter 21?
>
> 2. Was there any evidence before the Board to enable the Board to find that the Appellant was such holder or occupier?”

The principal submission of counsel for the appellant was the Board erred in law by using a test known as the "paramouncy test". Before giving consideration to that question, I will set out my reasons for rejecting the remaining submissions of the appellant.

It was submitted the lands should not be assessed as the appellant did not occupy the lands.

> 1. The permits grant a "use" to the appellant and it exercises only "use" and not "occupation".

It was argued that simple use does not constitute occupation. Unquestionably the permits give the appellant the right to "use" the lands. In granting that use the appellant may or may not occupy the land. It was a question of fact before the Board as to whether the appellant had occupied the lands. They did not make a finding of simple use. Rather they found the manner in which the lands were used by the appellant was such that it had occupied them. In respect of all of the properties, the Board made a finding the property was used and *occupied* by the appellant.

> 2. There was no proof the appellant's occupancy was "substantial".

The extent to which the property is used may be a factor to be considered in determining occupancy. That is a question of fact. The Board made a finding as to the extent of the use and concluded the appellant (excepting for incidental use by the public) was the only user of the lands. That finding cannot be disturbed.

> 3. The appellant did not control the lands.

It was submitted there must be evidence of control by the appellant before it could be found to have occupied the lands. [*City of Oshawu* and *Loblaw Groceterias Co. Ltd.* (*and Three Other Companies*) D.L.R. Vol. 38 (1963) page 216; and *Westminster Council* v. *Southern R. Co. el al.*, [19361 A.C. 511]

The authorities cited by the appellant do not support the proposition advanced. True, the matter of control of the lands is a factor which should be taken into consideration in certain circumstances. In the cases cited above, it was appropriate to look at the control factor in circumstances where lands were occupied by several tenants. Here the use by others was found by the Board to be incidental. The Board found, *inter alia*, the public had the right to use the roads provided it would not impede or obstruct the uses granted under the permit. There was no evidence indicating others had control over the airstrip, the garbage dump, or the gravel pit.

In summary, I am of the view the nature of the use including the extent and the measure of control are all matters that may be relevant in determining who in fact occupies the lands. Those are facts which should be examined in order to reach a conclusion as to whether or not there is occupancy. Looking at the reasons of the Board, I am satisfied it gave consideration to those questions of fact and its findings in that regard are not reviewable.

Turning now to the main submission of the appellant, it is argued the Board made certain findings of fact but erred in law by applying a test that is now inappropriate. It was submitted that when the Board concluded the appellant was in occupation, it did so on the basis of finding there was a greater use by the appellant than others. In other words, it was using a "balance of use test" or the "test of paramouncy" and that such a test is inappropriate. In support of that proposition counsel cited *Newmont Mines Limited* v. *Her Majesty The Queen*, (1982) 132 D.L.R. (3d) at 525.

What was stated in *Newmont* at pp. 886-4 and 886-5 was this:

> "The Crown's approach has required its counsel to advance an intricate argument to the effect that where part of the surface of a parcel of land, whose boundaries are the boundaries of a mineral claim, is occupied by one occupier with non-exclusive rights and another part of the surface of the same parcel of land is occupied by another occupier with non-exclusive rights, then one occupier is subject to assessment and tax on the actual value of the whole parcel and the other occupier is not assessable or taxable at all. Counsel for the Crown then says that the selection of which of the contiguous occupiers

> is to bear the tax depends on which of them is paramount, a text he seeks to support on the basis of English decisions on the rates for the relief of the poor, which is a levy on occupiers, not on owners. Those cases had to solve the problem that arose when two persons simultaneously occupied the very same premises, as in the case of a home owner and his lodger, and it was decided that the homeowner should be rated as the paramount occupier. But those cases adopt a different solution where the occupation is of the same parcel of land but the two occupiers each has exclusive occupation of part of the parcel, as in the case of a bookstall in St. Pancras railway station. In that case the House of Lords decided that each of the occupiers should be rated on the piece of the parcel which he actually occupied. *City of Westminster* v. *Southern Railway Company* [1936] A.C. 511. That approach to the problem of contiguous occupancy is not adopted by the Crown in this case, perhaps because it was not what was done when Newmont was assessed and taxed for 1980. But in my opinion, it is the correct approach. And, of course, it should apply whether there is a contiguous occupier on the same mineral claim or not. That is, Newmont should be assessed and taxed only on that part of the surface of the claim that it actually occupies. If part of the remainder of the surface of the claim is actually occupied by someone else, then the someone else should be taxed on the part which he actually occupies. If the remainder of the surface of a claim is not possessed or occupied by anyone, then no one should be assessed or taxed on that remainder, even though Newmont or others may have a right to possession or occupancy, exclusive or nonexclusive."

Thus *Newmont* did not reject the "paramouncy test". It identified the circumstances in which it is appropriate to give consideration to the paramount occupier of the same premises. That is done where two or more persons simultaneously occupy the same lands. Where there is exclusive occupation of part or all of the lands, there is no need to determine paramount use as there is only one person using the land. Thus the "paramouncy test" may be appropriate in particular circumstances.

In my view, it cannot, as submitted by the appellants, be said the Board applied the "paramouncy test". Indeed it found there was an incidental use of the roads by the public. However for all practical purposes the use and occupation was by the appellants. Having made that finding, it does not necessarily follow that it applied the "paramouncy test". But even if it could be interpreted the Board had invoked such a test, it was in my view done on a proper basis. By that, I mean the Board considered the extent of the use by the appellants and concluded it was the only user save for the incidental use by the public. The Board decided the appellant used and occupied the lands after considering all the circumstances including use by others.

Finally, the appellant submits there are certain parts of the lands not used by it and consequently should not be assessed. The Board however found the appellant was in fact using *all* of the lands and I am not empowered to disturb that finding of fact.

Accordingly, the questions are answered as follows:

1. No.

2. Yes.

The respondent is entitled to its costs.