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ASSESSMENT COMMISSIONER

v.

**INLAND NATURAL GAS CO. LTD.
and
COLUMBIA NATURAL GAS LIMITED**

Supreme Court of British Columbia (A832091) Vancouver Registry

Before: MR. JUSTICE W. J. TRAINOR (in chambers)

Victoria, October 5, 1983

John E. D. Savage for the Appellant
John R. Lakes for the Respondents

Reasons for Judgment

December 2, 1983

This is a case stated by the Assessment Appeal Board pursuant to section 74 (2) of the *Assessment Act* seeking the opinion of this Court on the following questions of law:

1. Did the Assessment Appeal Board err in law in reaching its determination that the Respondents were not "Occupiers" of Crown land for the purposes of assessment?
2. Did the Assessment Appeal Board err in law in determining that the Respondents were not "Occupiers" of all the lands or a portion of the lands, included in the rights-of-way?
3. If the Assessment Appeal Board found that the Appellants occupied a portion of the lands, should that portion be assessed in the names of the Appellants?

In its reasons appended to the stated case, the Board recognized the sole issue as:

". . . the assessability (sic) of certain lands within the boundaries of a number of easements or rights-of-way granted by the Crown Provincial and Crown Federal to the respective Appellants. The appeal does not concern the assessability (sic) of the pipelines laid in these rights-of-way. These are separately assessed under section 27 of the *Assessment Act*."

The rights-of-way and easements were granted under authority of two separate statutes being the *Land Act of British Columbia* and the *Federal Indian Act*. The relevant legislation is the *Assessment Act*.

"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."

1. In this Act

...

'occupier' means

(a) a person who, if a trespass has occurred, is entitled to maintain an action for trespass;

(b) 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;

..."

With respect to the rights granted under authority of the *Land Act*, it provides:

"60. Except as otherwise provided in this Act, a person lawfully entitled to occupy Crown land by virtue of a certificate of purchase, lease, right-of-way, easement or licence of occupation may for that land take proceedings against any person for recovery of possession of or for trespass to the interest in the land in the same manner and to the same extent as if he were the registered owner of the land."

In the case stated, the Board set out the following findings:

"7. After grant of the rights-of-way the Respondents laid the pipeline in the ground by clearing the area of the right-of-way of trees and other growth, digging a trench approximately 30 inches deep near the centre line of the right-of-way, installing the pipeline in the trench, and backfilling the trench.

11. As vegetation grows on the right-of-way so that the ground over the pipeline is obscured from view, the Respondents remove the vegetation so that the pipeline can be inspected for leaks, etc. by air.

12. The Assessment Appeal Board found that the Appellants occupied a portion of the rights-of-way by the presence of the pipeline.

15. The Assessment Appeal Board concluded that the Appellants were not 'Occupiers' within the meaning of the *Assessment Act*, R. S. B. C. 1979, chap. 2 I."

Questions of possession and occupation are questions of fact. I have no jurisdiction to review the findings of fact made by the Board. However, the questions before me are based on the acceptance of undisputed facts including the findings that Inland and Columbia occupied a portion of the rights-of-way by the presence of the pipeline. The construction of the *Assessment Act* and the effect of decisions relating to it are questions of law. These received the consideration of the British Columbia Court of Appeal in *R. In Right of British Columbia et al v. Newmont Mines Limited* (1982) 37 B.C.L.R. 1. *Newmont Mines Limited*, a holder of mineral claims, was held to be assessable as an occupier of land of which it had possession in fact whether or not such possession was exclusive.

At page 6, Lambert, J. A. who gave the judgment of the Court in reviewing the *Assessment Act* referred to:

". . . the correct position, that is, that possession in fact, or occupation in fact, based on an exclusive or on a non-exclusive right to possession or occupation, or even on no right at all, is sufficient to make the person in possession or occupation subject to assessment and taxation."

In the *Newmont* case, the company had a non-exclusive right to possess and use the surface of the land. Its liability to assessment arose not from those rights but from occupation in fact.

At page 9, the Court specifically left open:

". . . the question of what happens when the very same land is occupied simultaneously by two different occupiers for two different purposes."

In its reasons, the Board concluded that unlike the grant of mineral claims in *Newmont* which conferred the right to use and possess the surface of the land, the grant here merely consisted of a right to lay a single pipeline underground in such manner as would not interfere with the ordinary use of such lands. The Board then referred to the fact that there was a reservation of the right of free access and use to the Crown and concluded that the absence of a right to take possession of the surface meant that Inland and Columbia could not be said to be in possession of Crown land within the meaning of the first part of sub-paragraph (b) of the definition of "occupier".

With respect to the remaining portion of that definition, that is, whether the land was simply occupied, the Board concluded that there was no occupation because it was "essentially confined to the physical presence of the pipe under the surface."

The *Newmont* case is concerned with the possession and occupation of the surface of mineral claims. Covering of the surface or the removal of it were held to be conduct indicating exclusive possession and occupation in fact, but at the same time the Court held that it was not essential that possession be exclusive. It does not hold that either the right to possession of or the factual possession of the surface of land is an essential finding before holding someone to be an occupier of land. It is in this respect that the Board is in error in its conclusion that the respondents were not occupiers of Crown land for the purposes of assessment.

Counsel for the respondents based his submission on the assertion that the assessments levied here are all on land on which the respondents do not have any right to possess and use the surface and on which the respondents do not in fact use or possess the surface. I do not accept his argument that:

". . . the essence of the *Newmont* decision is that there must be possession and use of the surface for there to be a valid assessment of the land and where there is neither possession or use of the surface, there is no valid assessment of the land."

It appears to me that because of the error arising from its concern about surface rights, the Board did not properly consider the questions of whether the respondents were occupiers of all or a portion of the lands and if it found that only a portion was occupied, whether that portion should be assessed in the name of the respondents. In view of this conclusion it is not necessary to consider paragraph (a) of the definition of occupier (*supra*) and section 60 of the *Land Act* in relation to grants from the Provincial Crown.

In the result, I find that the Board was in error and that the first and second questions should be answered in the affirmative. With respect to the third question, it should be referred back to the Board for their determination in the light of these reasons.