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BRITISH COLUMBIA HYDRO AND POWER AUTHORITY

v.

ASSESSOR OF AREA 14 - SURREY-WHITE ROCK

Supreme Court of British Columbia (C831952) Vancouver Registry

Before: MR. JUSTICE H.P. LEGG

Victoria, September 23, 1983

L.F. Hindle for the Appellant
P.W. Klassen for the Respondent

Reasons for Judgment November 16, 1983

This is an appeal by way of a stated case from a decision of the Assessment Appeal Board.

The stated case shows that B.C. Hydro appealed the assessments with respect to nine parcels of land in Surrey which it owned.

The properties were zoned as follows:

6 properties were zoned RS - Suburban Residential Zone
1 property was zoned RF - Family Residential Zone
1 property was zoned IG - General Industrial Zone
1 property was zoned A2 - Intensive Agricultural Zone

B. C. Hydro has overhead electrical transmission lines over two of the properties, underground gas pipelines under four of the properties and both forms of improvements with respect to three of the properties.

It has a policy of disposing of all surplus lands, subject to attendant rights-of-way or easements. These properties were normally held until such time as a purchaser or lessee could be found. When a sale occurred the price was below the actual value shown on the rolls when B.C. Hydro was the owner. The Assessor changed the classification and reduced the actual value.

Six of the properties under appeal were leased by B.C. Hydro to lessees for grazing lands or for gardens.

Should any of the subject properties be sold B.C. Hydro would retain a right-of-way or easement for its overhead transmission lines or underground gas pipelines.

The Assessor classified the subject lands whether or not leased as "Class 2 - Utilities".

The electrical transmission lines and underground gas pipelines were assessed separately from the subject lands as improvements for their improvement values only.

Paragraphs 10, 11 and 13 of the stated case read as follows:

> "10. The Assessor valued the lands which are the subject matter of this appeal on the principle of substitution. Such value was determined by the direct market comparison approach of lands within the municipality that are similar in location and amenities to the subject lands. The only evidence of B.C. Hydro as to the value of lands was evidence of sales of land impressed with rights-of-way and/or easements. The rights-of-way and/or easements were not for sale and were not intended to be sold.
>
> 11. It was agreed that there was no sales evidence of lands held in fee simple, before the Assessment Appeal Board, to show the value of the subject lands if the lands were sold to another utility company and used for the purposes of a utility company.
>
> 13. B.C. Hydro, on its own volition, applies its regulations to the use of the fee simple lands, thereby restricting such use of the lands on, over or under which the transmission lines and/or pipelines traverse."

The Board dismissed the appeal of B.C. Hydro and gave reasons which are brief and which I shall repeat because they explain the issues which arise on this appeal:

> "The two issues in this appeal, namely value and classification, shall be dealt with as follows.
>
> *Valuation of Land*
>
> The Appellant contends that such lands, all held by it in fee simple, with overhead electric transmission lines and/or underground gas lines on the property, should be valued for assessment purposes identically to those lands on or over which the Appellant corporation holds an easement for the purpose of said facilities.
>
> There was no evidence tendered of sales of lands held in fee simple and used for the purposes of a utility company. Both parties agreed that, to the best of their knowledge, no such sales evidence exists.
>
> The Respondent valued the fee held lands on the principle of substitution. It was reasoned that the lands have the same value as surrounding or neighbouring lands considering factors such as size, location and services available.
>
> For example, if the fee held land was five acres in size and surrounded by subdivided residential lots, the normal basis of evaluation would call for a value of the five acre site considering its highest and best use, namely, a residential subdivision. The Respondent did not value such land at its highest and best use. The Respondent chose sales of five acres in size with similar services and location which reflected a five acre value exclusive of any potential for such subdivision.
>
> The Appellant adduced evidence of sales of land by it to individuals on which easements for rights-of-way were registered. These sales indicated significantly lower values than the actual values ascribed by the Respondent to the fee held lands, on which no easements were registered. The Appellant contends that these values are representative of land value for lands in fact used for utility company purposes.
>
> The crux of the issue in this appeal is the matter of fee simple and the bundle of rights contained in the fee. The lands appealed are held in fee. The Appellant's sales are not

sales of the entirety of the fee interest, due to the fact that the vendor has reserved a portion of the rights by registration of an easement. The purchaser in the sales transactions cited by the Appellant did not receive the right of unrestricted use of the land. The use of the land is restricted by means of a prior agreement and, therefore, the purchaser did not pay a value commensurate with the purchase of the fee simple. The Appellant's evidence on this issue is not valid and the submission on this point, therefore, fails.

A secondary argument by the Appellant suggested that if the fee held lands, with transmission or gas lines on them in fact, were valued at their highest and best use, then the improvements thereon would have no value. This principle is enunciated in *Corporation of the City of Toronto* v. *Ontario Jockey Club* (1934) S.C.R. 223, and followed in the case of *The Arbutus Club* v. *Assessor of Area #09 - Vancouver* (Vancouver S.C.R. #A800302 - Stated Case No. 140). In this case, the Assessor did not value the lands at their highest and best use as previously stated. These lands are unlike railway lands which are subject to statutory provisions as to use, title and disposal. The lands are not restricted by agreement or zoning regulations imposed by the municipality. The restricted value premise enunciated in *C.N.R.* v. *City of Vancouver* 4 D.L.R. (1950), in the opinion of the Board, does not apply in this case. The Appellant corporation expects the land assessment to be lowered because its works as a utility company are in fact in place, over or under the fee simple lands.

The Board concludes that the valuation completed by the Respondent gave proper consideration to the value of the fee simple interest in the land in its present use for utility purposes. The value of the land is consistent with the unrealizable potential, the existing zoning and value of the surrounding and neighbouring lands. The improvements are, therefore, properly added to the land value as the improvements of a utility company operated as a going concern.

Classification

The Appellant contends that the use of the surface of the land is the paramount test to determine the classification of the land. The case of *Newmont Mines Ltd.* v. *Her Majesty the Queen In Right of the Province if British Columbia et al.* (Vancouver S.C.R. #C803819 and C.A. 810686 - Stated Case No. 151) was cited in support of this premise. The Board distinguishes the said case from the present matter due to the fact that the Supreme Court and the Court of Appeal did not have before them the question of whether or not undersurface or air rights constitute a part of the fee simple subject to classification for assessment purposes.

The Board has reviewed the evidence pertaining to the standard form of right-of-way easement adopted by the Appellant corporation (Exhibit No. 4). This document allows B.C. Hydro the right of access to the lands and to erect, to construct and to excavate for the works of overhead or undersurface electrical transmission lines and underground pipelines. After installation, B.C. Hydro reserves the right to fell trees on the right-of-way, access the land for maintenance, and approve any use of the surface by the registered owner. The Board finds that these rights reserved to B.C. Hydro constitute the paramount use or holding of the land, inclusive of undersurface and air rights, for the purposes enunciated in Class 2 - Utilities, subsections (b) and (e) of B.C. Regulation 438/81."

The questions stated by the Board for opinion of this Court are as follows:

"1. Did the Board fail to value the lands and improvements used by the appellant in its capacity as a public utility enterprise as the property of a going concern?

2. Did the Board err when it found that the use of the lands was not restricted?

3. Did the Board value the land for one purpose and in accepting the value of the improvements on or under the lands for a different purpose, thereby commit an error?

4. If the answer to either Question (2) or (3) is affirmative, did such error affect the purported actual value of the lands as determined by the Board?

5. Was there any evidence to support the following statement of the Board in their award:

> 'The Respondent did not value such land at its highest and best use. The Respondent chose sales of five acres in size with similar services and location which reflected a five acre value exclusive of any potential for such subdivision.' (Page 2, Paragraph 5, Lines 4-7)?

6. Was there any evidence before the Board that the lands and improvements used by the appellant in its capacity as a public utility were valued as the property of a going concern?

7. If the answer to Question (5) or to Question (6) is negative, did the Board thereby commit an error in determining the purported actual value of the lands and improvements of the appellant?

8. Did the Board err when it found that, where some of the lands had been leased to third parties with a right of entry by the appellant for purposes related to its operations as a utility, the leased land was properly classified as Class 2 - Utilities?

9. Did the Board err when it determined that the lands did not include more than one of the classes for the purposes of classification?"

Following these questions the Board stated its opinion with regard to Questions 1, 2 and 3 as follows:

> "IN THE OPINION OF THE BOARD:
>
> Question No. 1 is a question of mixed fact and law. Accordingly, the Board seeks no opinion in respect to such question unless the Supreme Court shall decide to give such opinion.
>
> Question No. 2 is a question of fact. Furthermore, the question is misleading as it suggests a wrong conclusion of fact. The Board found that 'The lands are not restricted by agreement or zoning regulations imposed by the municipality'. (Decision - Page 3, Paragraph 2, Lines 10 to 12) Accordingly, the Board seeks no opinion in respect to such question unless the Supreme Court shall decide to give such opinion.
>
> Question No. 3 is misleading as it suggests a wrong conclusion of fact. The Board valued the land at its actual value and accepted the value of the improvements which were not appealed or at issue before the Board. The Board did not conclude that the value of the land and improvements were for different purposes."

QUESTION 1:

The appeal based on Question 1 of the stated case was abandoned by counsel for the appellant at the hearing before me. I therefore do not give any answer to that question.

Counsel for the appellant dealt with the questions in the following sequence:

Question 2, Question 5, Question 6, Question 7, Questions 3 and 4, Questions 8 and 9. I shall consider the questions in the same sequence.

QUESTION 2:

> "2. Did the Board err when it found that the use of the lands was not restricted?"

Appellant's counsel submitted that the properties in question were part of B.C. Hydro's public utility operations. Under Section 47 of the *Utilities Commission Act* B.C. Hydro was prohibited from discontinuing the use of these lands without first obtaining permission from the Public Utilities Commission. The use of the lands was therefore a restricted use and the Board erred in finding that the use of the lands was not restricted. Counsel relied upon *C.N.R. et al.* v. *Vancouver* (1950), 67 C.R.T.C. 270 (B.C.C.A.) and *Re Assessment Equalization Act, 1953*; *Re De Sautels' Appeal* (1959), 29 W.W.R. 665 (B.C.S.C.)

I agree with the Board's observation that the question stated in the case misstates the Board's finding. The Board's finding is correctly worded in part:

> "The lands are not restricted by agreement or zoning regulations imposed by the municipality."

I also agree with the opinion of the Board that in the context of this case the question of whether the Board erred in finding the lands were not restricted by agreement or by zoning regulations is not a question of law. The Case states. in paragraph 13 that any restriction of use is based upon B.C. Hydro's application of its own regulations to the use of the fee simple lands, thereby restricting such use of the lands on, over or under which the transmission lines or pipelines traverse. This self-restriction is not the same type of restriction as that referred to in *C.N.R.* v. *The City of Vancouver* (supra). That case was concerned with land which might be used for railway terminal purposes "both by agreement with the respondent City, and by actual needs of present railway requirements" (see p. 273). That case is concerned with a principle which has no application in this case.

To the extent that the question raised by the stated case is a question of law, it is my opinion that the Board did not err and the answer to the question is "No".

QUESTION 5:

> "5. Was there any evidence to support the following statement of the Board. . . :
>
> > 'The Respondent did not value such land at its highest and best use. The Respondent chose sales of five acres in size with similar services and location which reflected a five acre value exclusive of any potential for such subdivision'."

In my opinion there was evidence to support that statement that the respondent did not value the subject lands at their highest and best use. The evidence is found in Volume 2 of the proceedings before the Board at pp. 12-17. There the respondent explained how the assessed value of the subject lands was calculated. His approach is accurately summarized in the Board's reasons on p. 2 where the Board points out that there was no evidence tendered of sales of lands held in fee simple and used for the purposes of a utility company, that no such sales evidence existed. The lands had the same value as surrounding or neighbouring lands considering factors such as size, location and services available. While the normal basis of evaluation would call for a value considering the highest and best use, namely, a residential subdivision, the respondent did not value on that basis but chose sales of five acres in size with similar services and location which reflected a value commensurate with the size of the subject land, exclusive of any potential for subdivision.

The answer to Question 5 is "Yes".

QUESTION 6:

> "6. Was there any evidence before the Board that the lands and improvements used by the appellant in its capacity as a public utility were valued as the property of a going concern?"

Counsel for the appellant did not advance this question vigorously. I am uncertain whether the question is pertinent because the issue before the Board was the assessed value of the appellant's land, not the appellant's land and improvements as a going concern. Counsel for the appellant emphasized evidence in Volume 2, page 42, line 20 to page 43, line 12 showing that the Assessor agreed that the words "going concern" in Section 26 (3) of the *Assessment Act* mean valuing as an operational or revenue-producing concern. That was not the approach taken by the Assessor. He presented a market-comparison approach. Appellant's counsel at the hearing before me agreed that the question was academic. I therefore do not answer it.

QUESTION 7:

Question 7 need not be answered in view of the answers to Questions 5 and 6.

QUESTIONS 3 AND 4:

> "3. Did the Board value the land for one purpose and in accepting the value of the improvements on or under the lands for a different purpose, thereby commit an error?
>
> 4. If the answer to either Question (2) or (3) is affirmative, did such error affect the purported actual value of the lands as determined by the Board?"

I agree with the opinion expressed by the Board with regard to Question 3 in that it is misleading as it suggests a wrong conclusion of fact. The Board valued the land at its actual value and accepted the value of the improvements which were not appealed or at issue before the Board. The Board did not conclude that the value of the land and improvements were for different purposes. Accordingly the answer to Question 3 is "No".

QUESTIONS 8 AND 9:

> "8. Did the Board err when it found that, where some of the lands had been leased to third parties with a right of entry by the appellant for purposes related to its operations as a utility, the leased land was properly classified as Class 2 - Utilities?
>
> 9. Did the Board err when it determined that the lands did not include more than one of the classes for the purposes of classification?"

The appellant contended before the Board that the use of the surface of the land was the paramount test to determine the classification of it and relied upon the case of *Newmont Mines Limited* v. *Her Majesty the Queen In Right of the Province of British Columbia* (Vancouver S.C.R. #C803819 and C.A. 810686- Stated Case No. 151).

The Case states that the nine parcels are zoned in the manner described earlier in these reasons. The only area of these lands which was classified as "utility" was the area covered by a right-of-way plan or easement agreement permitting B.C. Hydro to exercise rights in respect of its operations as a utility. It is only these areas which are assessed. The stated case states that B.C. Hydro has overhead electrical transmission lines over two of the properties, underground gas pipelines through four of the properties, and both electrical transmission lines and underground

gas pipelines over or under three of the properties. There is a utility use over or under the assessed lands.

Counsel for the appellant submits however that because the surface of the lands over which B.C. Hydro has a right-of-way or easement is a non-utility use (such as leasing for the grazing of a horse), the Board is in error in classifying the land as utility. Counsel submits that the Board has failed to apply Regulation 12 under the *Assessment Act*.

Regulation 12 reads:

> "12. Where a property includes more than one of the classes defined in Part 1 the assessor shall determine the proportion of the actual value of the property contributed by the property in each class and shall assess the portion of the actual value so determined at the percentage of actual value fixed for that class as set out in Schedule A."

The Regulations also include a regulation which governs utilities.

> *"Class 2 – Utilities*
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> 2. Class 2 property shall include only land or improvements or both, used or held for the purposes of, or for purposes ancillary to, the business of
>
> (d) generation, transmission or distribution of electricity, . . ."

From my review of the stated case and of the evidence referred to above, the Board did not err in classifying the assessed lands as utility. Only the area of the land covered by the right-of-way or easement was classified as utility. In my opinion B.C. Hydro used or held this land for the purposes of generating, transmitting or distributing electricity within the meaning of Regulation Class 2 - Utilities. I accept the submission of Mr. Klassen. An owner can be considered to use land even where the land is vacant if he keeps it in this condition for his own special purposes. (See *Newcastle City Council* v. *Royal Newcastle Hospital*, [1959] App. Cas. 248.) That principle applies here. B.C. Hydro is using these lands covered by the easement or right-of-way agreements for the purposes of a utility as defined by the Regulations. In my opinion Regulation 12 has no application to this matter. The answer to Questions 8 and 9 is "No" to each question.

Judgment accordingly. Costs to the respondent.