**CHEVRON CANADA LIMITED**

**v.**

**ASSESSOR OF AREA 10 - BURNABY-NEW WESTMINSTER**

British Columbia Court of Appeal (CA 003141) Vancouver Registry

Before: MR. JUSTICE J.D. TAGGART
MR. JUSTICE A.B.B. CARROTHERS
MR. JUSTICE W.A. CRAIG
MR. JUSTICE J.D. LAMBERT
MR. JUSTICE H.E. HUTCHEON

February 26, 1986

B.J. Wallace & S.B. Armstrong for the Appellant Chevron Canada Limited
J.K. Greenwood for the Respondent Assessor of Area 10 – Burnaby-New Westminster

**Reasons for Judgment of Mr. Justice Lambert** February 26, 1986

The Court sat in a division of five to hear this appeal because counsel for Chevron Canada Limited had notified the Court that one of his arguments would invite the Court to overrule its previous decision in *Re Trans Mountain Oil Pipe Line Company Appeal* (1966), 56 W.W.R. 705.

Chevron operates an oil refinery and tank farm in Burnaby. There are 171 tanks, of which 35 are blending tanks. This appeal is brought under the *Assessment Act* and concerns the applicability of the definition of "improvements", in the form that the definition takes for general municipal and Provincial taxation purposes, to the blending tanks.

The Assessment Appeal Board placed a great deal of weight, to use its own words, on the decision of this Court in *Trans Mountain*. The Board found that 17 of the tanks were structures and, as such, came within the definition of "improvements". The Board found that the remaining 18 tanks, which were used for storing asphalt, were storage tanks, and were structures too, and so also came within the definition of "improvements".

Chevron required the Board to state a case for the opinion of the Supreme Court of British Columbia, under s-s. 74(2) of the *Assessment Act*.

The following paragraphs from the stated case sufficiently set out the facts for the purposes of this appeal.

> The tanks are cylindrical and have varying dimensions from 29 to 47 feet in height and 36 to 91 feet in diameter. They are constructed of metal sheets with welded or riveted seams and they rest on their own weight on a prepared foundation of sand, asphalt or concrete. The tanks can be moved by cutting the seams of the metal plates, dismantling and reassembling at a new location.

> The raw streams produced continually from the oil refinery area are piped to the tank farm and shipping area and yielded into receiving tanks. The separate streams are then transferred, one component at a time, from the receiving tanks into the blending tanks in proportions according to a specific recipe for final saleable products.
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> When the raw stream components have been transferred into a blending tank, chemical additives are then either injected into the tank or pumped in by recirculating the tank contents and injecting the additives into the recirculating stream. The chemical additives include tetraethyl lead, anti-deposant additive, dyes and various other additives.
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> The mixture of raw streams and chemical additives is then agitated by means of a mixer inside the blending tank. This mixer consists of a propeller inside the tank driven by a motor located outside the tank. The agitation turns the contents of the tank around to accomplish the mixing of the components and additives. In some cases, the tanks do not have a mixer and the mixing is accomplished by use of a pump which circulates the contents by withdrawing and returning them to the blending tank.

In the stated case, the Board said that it was required by Chevron to ask this question:

> 5. Did the Board err in law in finding that certain "blending" tanks were not exempt from assessment as an improvement for general municipal and provincial taxation purposes in accordance with the definition of "improvements" for those purposes under the *Assessment Act*?

But the Board added that, in its opinion, Question 5 was not a question of law arising in the appeal.

The appeal book contains a document entitled "Clarification of the Issues Raised in Question #5". It reads

> Counsel are agreed that the following questions of law are raised by Question #5:
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> 1. With reference to para. (a) of the definition of "improvements" under the *Assessment Act*, for general, municipal, and Provincial taxation purposes:
>
> > Can property which falls into the category of "machinery" and/or "structures" in the general clause of para. (a) also fall into the category "fixtures, machinery, and similar things other than buildings and storage tanks as, if erected or affixed by a tenant, would, as between landlord and tenant, be removable by the tenant as personal property" in the excluding clause of para, (a)?
>
> 2. With reference to para. (a) of the definition of "improvements" under the *Assessment Act*, for general, municipal, and Provincial taxation purposes:
>
> > Where property is found to fall within the category of "machinery" and/or "structures" in the general clause of (a), is that same property excluded from the definition of "improvements" if it is also found to fall within the category of "fixtures, machinery and similar things, other than buildings and storage tanks as, if erected or affixed by tenant, would, as between landlord and tenant, be removable by the tenant as personal property" under the excluding [clause of] para. (a)?

Those two questions have come to be called Questions 5(1) and 5(2).

The appeal, by way of stated case, was heard by Mr. Justice MacKinnon. He said:

> Applying the principles of *Trans Mountain Oil Pipeline*, I am of the view that a finding by the Board the blending tanks were "structures" makes the question of whether or not they were machinery wholly irrelevant.

So Mr. Justice MacKinnon answered "No" to Question No. 5, and he did not separately answer Questions 5(1) and 5(2). This appeal is from his decision. Leave to appeal has been granted under ss. 74(7) of the *Assessment Act*.

The part of the definition of "improvements" with which we are concerned reads:

> "improvements" for general municipal and Provincial taxation purposes under the *Municipal Act*, *Vancouver Charter* and *Taxation (Rural Area) Act* includes
>
> > (a) all buildings, fixtures, machinery, structures and similar things erected in, on, under or affixed to land and, without limiting the generality of the foregoing, includes aqueducts, tunnels other than mine workings, bridges, dams, reservoirs, roads, transformers and storage tanks of whatever kind or nature, but does not include those fixtures, machinery and similar things, other than buildings and storage tanks as, if erected or affixed by a tenant, would, as between landlord and tenant, be removable by the tenant as personal property;
>
> (my underlining)

The real questions at the heart of this appeal are whether, if a piece of plant is a structure, it can also be machinery, and, if so, is it excluded from the definition if it comes within the meaning of the phrase". . . machinery. . .as, if erected or affixed by a tenant, would, as between landlord and tenant, be removable by the tenant as personal property;"?

I think that these questions are answered by an examination of the structure of the definition itself.

The initial words ". . . buildings, fixtures, machinery, structures and similar things. . .", taken as a separate phrase, might well be capable of describing either five mutually exclusive categories or five categories where there could be some overlapping. But the words ". . . but does not include those fixtures, machinery and similar things, other than buildings. . ." make it clear that it was contemplated that "fixtures, machinery and similar things", when used at the exclusion stage of the definition, could apply to buildings and, so, since they were not, at that second stage, to be applied to buildings, it was necessary to add the words "other than buildings". The addition of those words demonstrates that, at the exclusion stage of the definition, the word "buildings" and the words "fixtures, machinery and similar things" describe four separate categories where there might be some overlapping. If those words contemplate overlapping categories where they are used in the exclusion part of the definition, those same words must be taken to contemplate overlapping categories at the beginning of the definition, unless a contrary intention is made clear. It is not. So, in my opinion, as a matter of law, it is possible for a piece of plant to be both a structure and machinery.

If a piece of plant is both a structure and machinery, then the next question is whether the piece of plant, if erected or affixed by a tenant, would, as between landlord and tenant, be removable by the tenant as personal property. That is a hypothetical question, of course, and must be answered with respect to the particular piece of plant, but not with respect to the terms of any particular lease or tenancy agreement. The particular piece of plant must be taken to be on the property under a bare lease for a term of years which is silent on the subject of fixtures and where the tenant's rights with respect to fixtures installed by him are to be dealt with in accordance with general statute and common law. If the piece of plant is removable by the tenant as personal property under that general law, then it is within the exclusion clause in the definition. If it is within the exclusion clause, then it is excluded by the definition, even if it is also within the inclusion

clause. The reason is that exclusions from the definition are paramount over inclusions, because they occur last in the definition and must be applied last in deciding what is to be included and what excluded.

The conclusions set out in the immediately preceding paragraph are sufficient to dispose of the questions of law raised by this appeal. But I propose to add a comment about the *Trans Mountain* case. The property in question in that case consisted of a number of tanks which formed part of an oil pipe line transmission system. When the case reached this Court, separate judgments were given by Mr. Justice Davey, Mr. Justice Lord and Mr. Justice Branca. Mr. Justice Lord and Mr. Justice Branca decided that the tanks were within the definition of "improvements". Mr. Justice Davey dissented. The questions of law are difficult to extract from the reasons. The points that were argued are far from clear. But, at p. 718, Mr. Justice Branca said that "stripping this section of its irrelevant verbiage" the pertinent part should be read like this: "Improvements includes all buildings, fixtures, machinery, structures and similar things, including storage tanks of whatever kind or nature erected in, on or upon lands." And immediately thereafter: "In addition, the tenant's fixture part of the section would be of no benefit to the appellant as storage tanks are specifically excluded from the exception." In my opinion, having regard to Mr. Justice Branca's statements, and to the points to which the *Trans Mountain* decision is shown by those statements to have been confined, no *ratio decidendi* emerges from that case that could be said to apply to this case.

As the Assessment Appeal Board said, Question No. 5 is not a question of law but a mixed question of fact and law.

The factual components of that question are not answered in the stated case, because the relevance of those facts did not become significant until this appeal. Whether the tanks are "machinery", whether they are "fixtures", whether they are "storage tanks" , and whether, on the hypothesis that they were erected or affixed by a tenant on a bare lease that says nothing of fixtures, they would be removable by the tenant as personal property, are questions that have factual components that have not yet been addressed by the Assessment Appeal Board.

The relevant legal components of Question No. 5 have been split out, by the agreement of counsel, as Questions 5(1) and 5(2). I would answer "Yes" to both of those questions.

I would allow this appeal and refer this matter back to the Assessment Appeal Board.

THE HONOURABLE MR. JUSTICE TAGGART: I agree.

THE HONOURABLE MR. JUSTICE CARROTHERS: I agree.

THE HONOURABLE MR. JUSTICE CRAIG: I agree.

THE HONOURABLE MR. JUSTICE HUTCHEON: I agree.