ASSESSOR OF AREA 10 - BURNABY-NEW WESTMINSTER

v.

CHEVRON CANADA LIMITED

Supreme Court of British Columbia (A840694) Vancouver Registry

Before: MR. JUSTICE A.B. MacKINNON

Vancouver, October 4 and 5, 1984

Peter W. Klassen for the Assessor
S. Bradley Armstrong for Chevron Canada Limited

Reasons for Judgment October 11, 1984

Both the Assessor and Chevron appealed by way of stated case pursuant to s. 74 (2) of the *Assessment Act*, R.S.B.C. 1979, c. 21.

BLENDING TANKS

Chevron's oil refinery operation receives raw crude oil through a pipeline operated by Trans Mountain Oil Company. The oil is received into tanks and by a blending process with chemicals converted into gasoline and other fuels. The primary function of the tanks is to blend the crude oil with chemicals, although they are used at times for storage. The blending is achieved by means of a propeller inside the tank driven by a motor outside the tank.

The Assessment Appeal Board (Board) found as a fact on consideration of the physical characteristics of the tanks, their size, their site permanence, and method of fabrication or removal, that the tanks are clearly structures and correctly defined as improvements pursuant to the first definition of "improvements" in s. 1 of the *Assessment Act*.

The questions on which the Board seeks the opinion of the court are:

> 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*?"
>
> 6. "Was there any evidence before the Board upon which to base the finding of fact that certain tanks were "storage tanks" in accordance with the meaning of that term under the definition of "improvements" under the *Assessment Act*?"

The relevant part of s. 1 of the *Assessment Act* defines "improvements" and 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 or to a building, fixture or structure 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.

Chevron submits that, notwithstanding the finding the "blending tanks" are "structures", they are nonetheless "machinery" falling within the exception to the definition of improvements, i.e. ". . . 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 emphasis).

In particular, it is submitted that

(a) The blending tanks are "machinery"; and

(b) The blending tanks would, "as between landlord and tenant be removable by the tenant as personal property," on the grounds that they are either:

(i) not "fixtures" and hence removable by a tenant; or

(ii) "tenant's fixtures" and hence removable by a tenant.

Counsel for the appellant cited numerous cases in support of its submission the blending tanks were machinery:

Hiram Walker & Sons Ltd. v. *Town of Walkerville* (1933),3 D.L.R. 433;

Sogemines Ltd. v. *M.D. of Stoney Plain* (1971), 5 W.W.R. 481; *Auckland City Corporation* v. *Auckland Co. Ltd.* (1919), N.Z.LR 561;

Re Indusmin Ltd. (1972), 1 O.R. 221

Re Weyerhaeuser Canada Ltd. and City of Sault Ste. Marie (1968) 1 O.R. 460;

Warren Bituminous Paving Co. Ltd. v. *Otonabee* (1962), 35 D.L.R. 609.

The Board made no finding as to whether or not the blending tanks were "machinery". Likewise, it did not look into the question of whether or not the blending tanks are "fixtures" or "tenant's fixtures". It contented itself with a consideration of whether or not the blending tanks were "structures". It found they were and, as such, were within the definition of assessable improvements and therefore assessable.

The Board's finding is one of fact or mixed fact in law and not reviewable by the court.

Counsel for the Assessor relies upon *Trans Mountain Oil Pipeline Company* v. *Town of Hope et al.,* B.C. Stated Cases No. 46, where Branca, J.A. said at p. 246:

> I am of the opinion, therefore, that it is quite immaterial whether the tanks in question were mere chattels or personal property, as in either event under the *Northern Broadcasting*

> case they come specifically within the definition of improvements and are specifically excluded from the exception relating to tenants' "fixtures, machinery. . . and similar things" unless a working tank, as the appellant's counsel termed the tanks in question, is not at law a storage-tank, and unless it can be said that tanks of this nature do not come within the connotation of structures erected in, upon, or under, or affixed to land or structures therein, thereon, or thereunder.

And at p. 248:

> Applying that reasoning to the tanks in question, it would appear that the tanks in question are of a size which connotes being built or constructed on the site as opposed to being brought there; they are things which, after installation, have remained on the site permanently and are removable only by a process amounting to taking to pieces. Jenkins, L.J. stated that whether or not the thing was physically attached to the land was only a relative consideration. Each of the tanks in the instant appeal, whether storage-tanks, working tanks, or holding tanks, has been either erected upon land or erected upon land and affixed to a structure (pipe-line) under the land.

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.

Here, "structures" are not specifically excluded in the statutory exception as "storage tanks" were in the *Trans Mountain* case. However, "structures" fall specifically within the definition of improvements and are, therefore, assessable unless otherwise excepted. There was no need for the Board to determine whether or not the blending tanks were also machinery. Once the Board found the blending tanks were structures, they were assessable as improvements.

The answers to the questions in this regard are:

No. 5-No

No.6-Yes

FIRE FIGHTING EQUIPMENT

This equipment consists of pipes welded to the tanks which lead to a metal rim welded to the surface of the top of the tank. If a fire should occur, the mobile fire fighting truck is parked near the tank and a hose is connected to the pipe and a fluid is pumped to the top of the tank where it is converted to foam. This foam is then constrained within the perimeter of the metal ring and acts as a fire retardant.

The Board found that all of this equipment was permanently affixed to the structures and therefore became improvements.

The questions on which the Board seeks the opinion of the court are:

> 3. "Did the Board err in law in finding that certain fire fighting equipment was 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*?"
>
> 4. "Was there any evidence before the Board upon which to base the finding that the fire fighting equipment in question had been permanently affixed to the structure?"

The question of whether or not the fire fighting equipment is in the class of fixtures falling within the statutory exception relating to tenants' fixtures is a question of fact or mixed fact in law and, as such, falls within the jurisdiction of the Board and not the court. After making its finding that the fire fighting equipment was a fixture, the Board should have gone further and determined whether or not it was a fixture that fell within the statutory exclusion. It did not do so. This matter should therefore be referred back to the Board for their consideration as it is not a proper function of the court to make a finding in this regard.

The answers to the questions are as follows:

No. 3- Yes

No. 4- Yes

NOISE ABATEMENT EQUIPMENT

Certain equipment placed in the refinery was installed as a direct result of Bylaw 7332 passed in 1972 by the Corporation of the District of Burnaby. This bylaw makes it an offence to "make or cause any noise in or on a highway or elsewhere in the Municipality which disturbs, or tends to disturb, the quiet, peace, rest, enjoyment, comfort, or convenience of the neighbourhood, or of persons in the vicinity"; or to "make or cause any noise or sound or continuous noise or continuous sound or non-continuous noise or non-continuous sound in the Municipality that exceeds the dBA's authorized by this Bylaw."

The equipment installed did not improve efficiency of the refinery. It was installed for the sole purpose of controlling and abating noise pollution.

The Board found that the equipment was specifically designed and installed to control or abate pollution and, therefore, entitled to be exempted from assessment and taxation pursuant to s. 398 (q) of the *Municipal Act*.

The questions on which the Board seeks the opinion of the court are:

> 1. "Did the Assessment Appeal Board err in law when it found that certain machinery, equipment and improvements installed by Chevron Canada Limited for the purpose of controlling and abating noise were exempt from assessment and taxation pursuant to s. 398 (q) of the *Municipal Act*, R.S.B.C., c 290?"
>
> 2. "Did the Assessment Appeal Board err in law when it held that an improvement used for the purpose of controlling or abating noise was "an improvement . . . used exclusively to control or abate water, land or air pollution . . ." within the meaning of s. 398 (q) of the *Municipal Act*, R.S.B.C., c. 290?"

Section 398 (q) of the *Municipal Act* provides:

> Unless otherwise provided in this Act, the following property is exempt from taxation to the extent indicated:
>
> > (q) an improvement or land used exclusively to control or abate water, land or air pollution, including sewage treatment plants, effluent reservoirs and lagoons, deodorizing equipment, dust and particulate matter eliminators; and where the improvement or land is not exclusively but is primarily so used, the assessment commissioner may, in his discretion, determine the portion of the assessed value of the improvements or land attributable to that control or abatement and that portion is exempt.

Counsel submitted there was no case law of assistance to the court in interpreting whether noise pollution would fall within the scope of the relevant section.

The *Shorter Oxford English Dictionary,* 3rd edition, defines "pollution" as:

> 1. The action of pollution. or condition of being polluted; defilement; uncleanness or impurity. . .

Webster's New Collegiate Dictionary defines "pollution" as:

> To make physically impure or unclean; befoul. dirty esp. to contaminate (an environment) esp. with man-made waste, synonym - *see* contaminate.

In its reasons the Board stated. at p. 14:

> While it is grammatically correct to say that the word "noise" cannot be found in sec. 398 (q) of the *Municipal Act,* the subsection does exempt from taxation, "an improvement or land used exclusively to control or abate water, land or air pollution
>
> . . ."
>
> The Board is confident that the legislators of the Province of British Columbia. as a matter of public policy, intended to assist anyone who is required by any enactment or who is prepared to expend funds solely to control or abate pollution of any kind. by exempting items designed and installed especially for this purpose from assessment or taxation.

However desirable it may be to grant relief to persons expending funds to control or abate pollution of any kind, I am unable to conclude from the plain and ordinary meaning of the words of the section that noise abatement falls within the exemption section.

The answers to the questions are:

No. 1 – Yes

No. 2 – Yes

The parties are in agreement that the question as to whether certain asphalt tanks are properly described as "storage tanks" or as "blending tanks" should be referred back to the Assessment Appeal Board for their consideration and decision. Accordingly, the court makes such a direction.

The Assessor is entitled to costs.

Judgment accordingly.