BRITISH COLUMBIA FOREST PRODUCTS LIMITED

v.

ASSESSOR OF AREA 3 - COWICHAN VALLEY

PRINCE GEORGE PULP AND PAPER LIMITED

v.

ASSESSOR OF AREA 26 - PRINCE GEORGE

Supreme Court of British Columbia (A841788) (A841797)

Before: MR. JUSTICE R.J. GIBBS (in Chambers)

Vancouver October 11, 1984

B.J. Wallace and P.D. Feldberg for the Appellants
J.E.D. Savage for the Respondents
G.H. Copley for the Attorney General of British Columbia

Reasons for Judgment November 2, 1984

These two cases, stated for the opinion of the court under section 74 of the *Assessment Act*, R.S.B.C. 1979, chap. 21 (the Act), were argued before me at the same time. There is a single issue in the British Columbia Forest Products Limited (BCFP) case. The identical issue is raised in the Prince George Pulp and Paper Limited (Prince George) case plus another which applies only in the Prince George case.

Counsel for the Attorney General applied for leave to be heard as amicus curiae on the grounds that there was a matter of public interest in issue, and that as the applicants and the respondent were ad idem on the points of law there would be no one to put the contra arguments unless standing was granted to the Attorney General. I refused the application, giving reasons from the bench. I will repeat those reasons more fully later herein, as the standing question in these circumstances seems to me to be a matter of significant importance.

The subject matter, in the BCFP case, is the Youbou sawmill in the Cowichan/Nanaimo assessment area, and in the Prince George case it is a pulp and paper mill in the Prince George assessment area. The dispute is over the valuation of each for property tax purposes.

In each case the assessor valued the land and improvements as at December 31, 1982, for the 1983 taxation year, in accordance with section 26 of the Act. In the process of making his valuation the assessor incorporated a 10% reduction for BCFP and a 5% reduction for Prince George. The reduction is called an "economic allowance" or, at times, an "allowance for external obsolescence". The Assessment Appeal Board (the Board) disallowed the reductions, hence these stated cases.

The issue, common to both cases, might be stated thus: did the Assessment Appeal Board err in law in refusing to allow deduction of an amount as an economic allowance in determining the actual value of the respective mills? The words "actual value" come from section 26 of the Act which directs the assessor to "determine the actual value of land and improvements".

Notwithstanding the designation of "Appellant" and "Respondent" in the style of cause, both parties challenge the disposition made by the Board. Two grounds are advanced in support of the challenge:

(1) That the Board erred in principle and therefore in law; and

(2) That the Board erred in failing to find in accordance with the evidence.

The alleged error in principle arises from the Board's application of the "cost approach" to valuation, that is to say, a determination of what it would cost to reproduce the property in its present condition. BCFP, Prince George, and the assessor contend that in law, the Board must make an allowance for external obsolescence when there is evidence to support such a finding. They go on to say that in these circumstances the proper method of valuation is to determine what a prudent purchaser would pay as an alternative to reproducing the present mill. Their argument is that a prudent purchaser would have regard, among other things, to potential profit, and that as potential profit depends upon market or economic conditions there must be a reduction when depressed market conditions are shown to be more than temporary.

Except for the use of different percentage numbers, the 10% and 5%, and the description of the type of facility, the Board's reasoning is identical in the two cases. It is as follows:

> In essence, the assessor based the 10% reduction on evidence that the pulp industry suffered a downturn in production during 1982 due to general economic conditions in a recessionary period and, therefore, a reduction in value was warranted.
>
> The Board refers to the latest edition of The Appraisal of Real Estate, Eighth Edition, published by the American Institute of Real Estate Appraisers, where at page 487 we quote:
>
> > "External obsolescence, <u>which is the result of the diminished utility of a structure</u> due to negative influences from outside the site, is always incurable." (underlining by the Board)
>
> The negative influences are those which affect the value of real property. These influences may be zoning regulations or inharmonious uses of adjacent or properties within a neighbourhood. For example, an all-night drive-in restaurant next to an apartment building would possibly cause a loss in rental value on such a property compared with an apartment building which does not have the negative influence of the drive-in restaurant. The property affected would in all probability suffer a loss in rental income from the negative influence compared to the rents in a nonaffected property. This rental loss capitalized would yield a lump sum deduction for external obsolescence on the value of the affected property by the Cost Approach.
>
> It is obvious that the external obsolescence applied to the pulp mill by the assessor is not related to the real property value, but is applied from a loss of business income on the commodity produced on the property. In fact, the production capacity of the pulp mill is not impaired based on the evidence. The improvements (buildings, machinery and equipment, etc.) of the pulp mill are in place over a long period of time, possibly 50 to 60 years, as a capital investment to produce the commodity of pulp over that period of time. Surely the cyclical downturn of the commodity market does not impair the value of capital investment of the improvements required to produce the commodity over the long term. A

> potential purchaser would assuredly consider the capacity of the pulp mill to produce the commodity over the long term based on assumed market conditions for the commodity in the future. A purchaser would consider the cost of building an identical production facility, which is the principle of establishing the value of the Cost Approach. .
>
> The Board finds as a fact that external obsolescence has been applied incorrectly by the assessor and the 10% reduction allowance is, therefore, rejected.

I am not deterred by the statement, in the last paragraph of this quotation, that the Board has made a finding of fact. It is clear from the preceding paragraphs that it is not the method of incorporating external obsolescence that the Board disagrees with, but whether, as a matter of principle, the element of external obsolescence should be employed at all. The parties before me argue that that is a question of principle, or law, regardless of what the Board chooses to call it. I agree with that submission.

The Board's reasoning in rejecting an allowance for external obsolescence is faulty in at least two major respects. Firstly, in applying the textbook quotation which it adopted, the Board failed to recognize that depressed market conditions are as much a "negative influence from outside the site" as are zoning regulations or inharmonious uses of adjacent properties. Secondly, it is inconsistent with the realities of the market place to conclude that a prudent purchaser looks only at capacity without regard to the market for the commodity which the capacity can produce. However, even though the reasoning is faulty, does the failure to take external obsolescence into account amount to an error in law?

The Board understood its duty to be to determine actual value in accordance with the statutory power vested in the assessor in section 26 (1) of the Act. I think that is a correct understanding. However, the blanket direction given in subsection (1) is to be applied in accordance with the provisions of subsections (2) and (3) which, being binding upon the assessor, are also binding upon the Board. Those two subsections provide:

> (2) In determining the actual value under subsection (1), the assessor may give consideration to the present use, location, original cost, cost of replacement, revenue or rental value, the price that the land and improvements might be reasonably expected to bring if offered for sale in the open market by a solvent owner, and any other circumstances affecting the value, and the actual value of the land and the improvements so determined shall be set down separately in the columns of the assessment roll, and the assessment shall be the sum of those values.
>
> (3) Without limiting the application of subsections (1) and (2), where an industry, commercial undertaking, public utility enterprise, or other operation is carried on, the land and improvements so used shall be valued as the property of a going concern.

The meaning and effect of these subsections, or the pre-1979 revision version of them, has been considered in a number of cases. It was held by McEachern, C.J.S.C. in *Western Indoor Tennis* v. *Assessor of Area 11, Richmond-Delta* (1981) 29 BCLR 265 (BCSC), quoting from an unreported portion of the reasons of Meredith, J. in *Swan Valley Foods Ltd.* v. *Assessment Appeal Board* (1979) 13 BCLR 304 (BCSC), that: "The question of whether the selection of any given method of assessment is wrong in principle is a matter of law, not fact." That is also the gravamen of the decision of Taylor, J. in *The Racquet Club of Victoria Holdings Ltd.* v. *Assessor Area No. 01 Saanich and the Islands - Ganges et al.* (1979) 4 WWR 667 (BCSC), and of Lett, C.J.S.C. in *Re Assessment Equalization Act*, *re Royalite Oil Company Limited* (1957) 23 WWR 328 (BCSC) when he found at page 336 that a question putting in issue the right of the then board to make a deduction for alleged economic obsolescence was a question of law.

I pause to note that in the *Racquet Club of Victoria* case and in the *Royalite Oil* case the expression used was "economic obsolescence" to refer, it would appear, to on-site depreciation

of buildings or improvements or both. What was addressed before me was "external obsolescence" which I understand to be a convenient term used to describe off-site influences. That is the sense in which the Board used the expression, particularly in reference to "inharmonious uses of adjacent properties".

Off-site influences are contemplated by the words "revenue or rental value" and "any other circumstances affecting the value" in section 26 (2) of the Act, and the words "a going concern" in section 26 (3). It should be noted that subsection (3) is mandatory in requiring valuation as the property of a going concern. In my opinion, the board, in disallowing the reduction by way of an economic allowance in the face of the uncontradicted evidence before it, failed to give effect to subsections (2) and (3) of section 26 and therefore erred in law. Accordingly, the method of assessment adopted by the Board, in these circumstances, was wrong in principle: *Western Indoor Tennis* case.

The second ground of the challenge, that the Board erred in failing to find in accordance with the evidence, raises a difficult issue. On the one hand there is the House of Lords decision in *Edwards (Inspector of Taxes)* v. *Bairstow and Another* (1956) A.C. 14, at page 29, to the effect that the board's finding must be set aside if it appears that they "have acted without any evidence or upon a view of the facts which could not be reasonably entertained". On the other hand there are such cases as *Lazar* v. *Association of Professional Engineers* (1971) 5 WWR 614 at 624 (Man. Q.B.) and *Re Golomb and College of Physicians and Surgeons* (1976) 68 DLR (3d) 25 at 45 (Ont. H.C.) holding that members of a tribunal may call upon their own knowledge, gleaned by experience and professional training, in deciding the matters which come before them. I tend to think that the apparent conflict can be reconciled on the basis that a board member calling upon his expert knowledge is to be viewed as entertaining a reasonable view of the facts.

In any event, upon a careful reading of the Board's reasons it is clear that they did not follow the evidence. Neither did they reach their conclusions based upon their own expert knowledge. They proceeded upon a misapplication of a textbook quotation without regard to the evidence, and upon an inference drawn from the lack of evidence of comparable sales.

The only evidence before the Board, both from the assessor and from the assessed was that the industry recession was more than a temporary phenomenon. The evidence was not weakened or contradicted in any respect. In fact it was corroborated. There was no evidence of comparable sales because lumber mills and pulp and paper mills are not regularly being bought and sold. The only approach that could be adopted therefore was that of the prudent purchaser and that approach must depend in large part on the projected revenue stream and the prospects as a going concern. The evidence was to that effect. In failing to reach a decision based upon the evidence the Board, in my opinion, erred in law.

The issue which applies only to the Prince George case is whether the Board erred in law in disallowing a reduction of $682,782 called "excess operating costs". The evidence on this issue is accurately summarized in paragraph 4 of the stated case:

> The parties agreed the presence of two boilers in the Pulp Mill rather than one boiler, which would be constructed in a replacement mill, required an additional four men. The parties further agreed that the excess operating costs of these four men would be considered by a potential purchaser and that the present worth of their wages at the appropriate discount rate should be deducted from the replacement cost of the Pulp Mill. The Respondent's appraiser testified that this penalty would reduce the actual value of the mill by an estimated $682,782.

The Board did not accept that excess operating costs would reduce the value of the real property. But, at the same time, it acknowledged the likelihood that excess operating costs would be taken into account by a potential purchaser. The Board's reasoning is that:

> Since all functional obsolescence has been accounted for to the agreed Replacement Cost at $52,200,000, a further deduction for operating costs, which are not inherent in the value of the real property, is not appropriate.
>
> It must be remembered that actual value is the market value of real property. Although the excess operating costs may be considered by a potential purchaser, it is the Board's opinion that such a consideration would in all probability be considered on review of the income-producing capability of the production facility as a standard accounting principle in the valuation of the business. The accountant is not concerned with real estate value, while this is the main interest of the appraiser.

I do not understand how it can be said that, in these circumstances, the market value of the real property can be different than what a prudent purchaser would be willing to pay. If the prudent purchaser would take excess operating costs into account on a review of the income producing capability, ipso facto he must take it into account in valuing the real estate. That is because, in simplified terms, in the absence of comparable sales data, the value of the real estate is the present value of the net income it will produce over a selected period of years. The section 26 (2) and (3) expressions "revenue or rental value", "any other circumstances affecting the value", and "a going concern" are sufficiently broad to embrace that concept.

I can reach no other consideration than that the Board did not apply section 26 (2) and (3) in its consideration of the reduction for excess operating costs. As pointed out earlier, failure to do so is an error in law.

I return now to the issue of standing for the Attorney General, which I refused to grant. His counsel relied upon such cases as *Re Workmen's Compensation Board of Nova Scotia and Treige et al.* (1976) 72 DLR (3d) 246 (N.S.C.A.), *Re City of Dartmouth* (1976) 19 APR 425 (N.S.C.A.), *Re Clarke et al. and the Attorney General of Canada* (1977) 81 DLR (3d) 33 (Ont. H.C.), and several scholarly articles: *Re Northwestern Utilities Ltd. et al. and City of Edmonton* (1978) 89 DLR (3d) 161 (SCC) and *United Brotherhood of Carpenters and Joiners and Citation Industries Limited et al.* (1984) 54 BCLR 114 (BCCA) are also pertinent to the issue, as is section 74 (2) of the Act.

In the two Nova Scotia cases the court was concerned with the propriety of the administrative tribunal appearing by separate counsel and making argument. In each it was suggested that it would be more appropriate for the Attorney General to appear to represent the public interest, although neither describes him as fulfilling the function of amicus curiae. Each seems to proceed upon the assumption that he would automatically have standing by way of inherent right as guardian of the public interest.

Subsequent to the Nova Scotia decisions Estey, J. for the court in the *Northwestern Utilities* case, strongly disapproved of counsel appearing and arguing for a board on an appeal against one of its own decisions, even though the statute gave the Board standing. At page 177 he drew an analogy saying: "The Board is given locus standi as a participant in the nature of an amicus curiae but not as a party". He went on to restrict argument by board counsel to cases where the Board's jurisdiction was in issue. A similar result obtained in the Citation Industries case where the attorney general, having been given notice as required, appeared by counsel on behalf of himself and the administrative tribunal. Jurisdiction not being in issue, he was denied standing. Jurisdiction was not in issue before me. As the Attorney General was denied standing in both capacities in the *Citation Industries* case I infer that in British Columbia the Attorney General does not have the same inherent right to appear and be heard as he appears to have in Nova Scotia, although I repeat that the Nova Scotia cases preceded the *Northwestern Utilities* case.

I was also influenced by the fact that, as in the *Citation Industries* case, the Act under which the parties came before me does not give either the attorney general or the Board standing as a party. However, in section 74 (2), it does give standing to "a person affected by a decision of the

Board on appeal, including a municipal corporation on the resolution of its council, the Minister of Finance, the commissioner, or an assessor acting with the consent of the commissioner." It would appear from that language that the legislature has selected the Minister of Finance as the party to represent the public interest on stated cases under the Act. I do not think that the Attorney General has any mandate to step in if the Minister of Finance elects not to.

Finally, on this issue I concluded as did Evans, CJHC Ont. in *Re Clark and the Attorney General of Canada* at page 38:

> That the experience and competence of counsel for the applicants guaranteed a complete canvass of the legal issues involved and that intervention was therefore not appropriate.

There is one other matter to which I feel obliged to refer before disposing of the questions posed in the stated case, and that is that the Board inserted comments after some of the questions. Following McKay, J. in *Allard Contractors* v. *Assessor of Area # 12* (1984) unreported, Vancouver Registry No. A841238, and for the reasons given by him, I have disregarded the Board's comments.

The questions stated for the opinion of the court and the disposition thereof for each of the stated cases is as follows:

British Columbia Forest Products Limited.

Question 1.

Did the Board err in principle and, therefore, in law in refusing to deduct an amount as an economic allowance in determining the actual value of the Youbou Sawmill pursuant to section 26 of the *Assessment Act*?

Answer: Yes.

Question 2. Withdrawn by the appellant.

Question 3.

Did the Board err in law in refusing to accept the deduction for an economic allowance as proposed by the Respondent and accepted by the Appellant when the only evidence before it was the evidence of the Appellant and the Respondent that supported such a deduction?

Answer: Yes.

Question 4.

Was the Board's conclusion "that the external obsolescence applied to the Youbou Sawmill by the Assessor is not related to the real property value" arbitrary and, therefore, an error in law?

Answer: Yes.

Question 5. Answered by the answer to Question 3.

Question 6. Not argued by the Appellant as a separate issue so no answer required.

Prince George Pulp and Paper Limited.

Question 1.

Did the Board err in principle and therefore in law in refusing to deduct an amount for excess operating costs related to the Pulp Mill in determining its actual value pursuant to section 26 of the *Assessment Act*?

Answer: Yes.

Question 2.

Did the Board err in principle and therefore in law in refusing to deduct an amount as an economic allowance in determining the actual value of the Pulp Mill pursuant to section 26 of the *Assessment Act*?

Answer: Yes.

Question 3.

Did the Board err in law in refusing to accept the deductions for excess operating costs and an economic allowance as proposed by the Respondent when the only evidence before it was the Respondent's evidence that such deductions were appropriate in the circumstances?

Answer: Yes.

Question 4. Answered by the answer to Question 1.

In accordance with section 74 (6) of the Act, these reasons will be remitted to the Board as the opinion of the court on the questions in the two stated cases.