CROWN FOREST INDUSTRIES LIMITED

v.

ASSESSOR OF AREA 24 – CARIBOO
ASSESSOR OF AREA 4 – NANAIMO-COWICHAN
ASSESSOR OF AREA 5 – PORT ALBERNI
ASSESSOR OF AREA 6 – COURTENAY
ASSESSOR OF AREA 25 – NORTHWEST
THE ASSESSMENT COMMISSIONER

Supreme Court of British Columbia (A843012) Vancouver Registry

Before: MR. JUSTICE D.B. HINDS (in Chambers)

Vancouver, December 6, 1984

S.B. Armstrong for the Petitioner
J.E.D. Savage for the Respondents

Reasons for Judgment January 4, 1985

This is an application under the *Judicial Review Procedure Act*, R. S. B. C. 1979, c. 209 for the following relief:

> (a) for a declaration that the Respondent Assessors erred in law in determining, for the 1984 assessment roll, the actual value of Tree Farm #8 and Tree Farm #65 owned and operated by the Petitioner, based upon value ascertained as of December 31, 1982, rather than value ascertained as of December 31, 1983, as required in accordance with the *Assessment Act*, R.S.B.C. 1979, c. 21;
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> (b) for an order that the Commissioner direct the Respondent Assessors to determine the actual value of Tree Farm #8 and Tree Farm #65 based upon value ascertained as of December 31, 1983, and to correct any errors in the 1984 assessment roll by the issuance of supplementary assessment rolls pursuant to subsection 11 (3) of the *Assessment Act*;
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> (c) in the alternative, for an order directing the Respondent Commissioner and Assessors to amend the 1984 assessment rolls relating to the properties of the Petitioner, to reflect values as of December 31, 1983.

I shall briefly summarize the circumstances which give rise to this application.

The petitioner is the owner of certain tree farm lands which have been grouped into Tree Farm numbers 8 and 65. Under the *Assessment Act*, R.S.B.C. 1979, c. 21 (the Act) tree farms are assessable under s. 29, which states:

> 29. Notwithstanding section 26 (1), the actual value of tree farm land, excluding improvements located on the land, shall be ascertained only by considering the present use of the land and the present value of the anticipated revenue from present and future annual or periodic harvests of the forest trees.

In December 1983 the petitioner received Assessment Notices for Tree Farm numbers 8 and 65 for the 1984 taxation year. Each Assessment Notice indicated the actual value of the tree farm land referred to in the Notice and stated, "Actual value shown reflects market value as of December 1982."

The individual respondent assessors, all of whom had issued Assessment Notices for tree farm lands contained in Tree Farm No. 8 or Tree Farm No. 65, or both, had assessed the actual value of the tree farm land as of December 1982 because on November 29, 1983, B.C. Reg. 440/83 had been issued. Section 2-1 thereof stated:

> 2-1 In section 26 of the Act, "actual value" means the actual value that land and improvements would have had on December 31, 1982 had they been on that date in the state and condition that they are in on December 31, 1983, and had their use and permitted use been on December 31, 1982 the same as they are on December 31 , 1983.

There was concern expressed concerning the validity of B.C. Reg. 440/83. Accordingly, there was included in the *Assessment Amendment Act*, S.B.C. 1984, c. 11 (proclaimed in force on May 11, 1984), section 41 - a transitional section - and it provided:

> 41. (1) In this section the reference to section 26 of the *Assessment Act* is a reference to that section as it stood on December 31, 1983.
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> (2) In relation to the completion during 1983 of an assessment roll for the purpose of taxation during the year 1984, the expression "actual value" in section 26 of the *Assessment Act* means and shall be conclusively deemed always to have meant the actual value that land and improvements would have had on December 3 I, 1982 had they been on that date in the state and condition that they were in on December 31, 1983, and had their use and permitted use been on December 31, 1982 the same as they were on December 31, 1983.
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> (3) B.C. Reg. 440/83 is confirmed and ratified and shall be conclusively deemed to have been validly made and to have come into force on November 29, 1983.
>
> (4) This section is retroactive to the extent necessary to give it effect.

The intent of B.C. Reg. 440/83, and the retroactive effect of s. 41 of the *Assessment Amendment Act, 1984*, was to freeze the "actual value" of lands as at December 31, 1982 for 1984 assessments.

The petitioner did not file a complaint under the Act to the various Courts of Revision which had authority to entertain complaints with respect to the assessment of those portions of the tree farm lands owned by the petitioner which lay within the geographic areas of the various Courts of Revision. As the petitioner did not file any complaints to the appropriate Courts of Revision, no direct decisions were made by the Courts of Revision respecting Tree Farm numbers 8 and 65. For that reason the petitioner had nothing to appeal to the Assessment Appeal Board.

When British Columbia Forest Products Ltd. (B.C.F.P.) received in December 1983 the 1984 Assessment Notices for its tree farm lands it, unlike the petitioner, filed complaints with the appropriate Courts of Revision. It was unsuccessful before the Courts of Revision, but on appeal to the Assessment Appeal Board it succeeded. In its decision dated July 26, 1984, the

Assessment Appeal Board ruled that B.C. Reg. 440/83 related only to s. 26 (1) of the Act - the section which dealt with the actual value of general land and improvements - and it did not relate to s. 29 of the Act the section which dealt with the actual value of tree farm land. The Assessment Appeal Board ruled that for 1984 Tree Farm No. 68 owned by B.C.F.P. should be assessed on the basis of its December 31, 1983 actual value, not on the basis of its December 31, 1982 actual value.

I am informed by counsel for the petitioner, who was counsel for B.C.F.P. at the appeal heard by the Assessment Appeal Board, that it was the respondent assessors who, in that case, brought to the attention of the Board the problem with respect to the actual value of tree farm lands having been assessed for 1984 on the basis of their December 1992 values. The respondent assessors in that case, some of whom are the respondent assessors in this case, presented no argument to support their use of the December 1982 values, rather than the December 1983 values, in order to determine the actual value of tree farm lands for the 1984 assessment year.

Counsel agreed that stumpage rates were one of the ingredients used in the determination of the actual value of tree farm land under s. 29 of the Act. They further agreed that stumpage rates were lower in December 1983 than they had been in December 1982. Consequently, if the 1984 assessments were made on the basis of the actual value of tree farm lands as at December 31, 1983, rather than December 31, 1982, the 1984 assessments would have been lower. The amount of taxes payable in 1984 by the petitioner for its tree farm lands would be substantially less than the amount they would otherwise be required to pay.

Mr. Gordon E Littlejohn, the Lands and Properties Manager for the petitioner, became aware of the Assessment Appeal Board's decision in the B.C.F.P. case on or about July 31, 1984. In August he spoke on a number of occasions to Mr. A.C. Sayle, Coordinator - Timber Assessments, regarding the various respondent assessors, or the respondent Assessment Commissioner, themselves revising the 1984 assessments for Tree Farms numbers 8 and 65 to accord with the results of the B.C.F.P. decision. Mr. Sayle was not encouraging. Nothing was done. On September 24, 1984, Mr. Littlejohn wrote to each of the respondent assessors formally requesting that the portion of Tree Farm numbers 8 and 65 lying within their respective areas be reassessed for actual value, taking into account stumpage rates as of December 31, 1983, and that supplementary assessment rolls be issued pursuant to s. 11 (3) of the Act. The respondent assessors replied to Mr. Littlejohn by their individual letters, all of which were written after the deadline for issuing supplementary assessment rolls by the respondent Assessment Commissioner had expired on September 30, 1984.

Mr. J.T. Gwartney, the respondent Assessment Commissioner, filed an affidavit in these proceedings. In his affidavit he acknowledged that he became aware of the Assessment Appeal Board's decision in the B.C.F.P. case but he did not specify precisely when he became aware of that decision. As Mr. Littlejohn became aware of it on or about July 31, 1984, it is a fair inference that Mr. Gwartney became aware of it on or about the same date. It was, after all, an important decision. It meant that all 1984 assessments of tree farm lands were incorrect because all of the assessments had calculated actual values using, as a component, the December 1982 stumpage rates, rather than the December 1983 stumpage rates.

Mr. Gwartney stated in his affidavit that in September 1984 he requested particulars from the respondent assessors regarding the assessment of tree farm lands. Once again, he did not state the specific date upon which he requested the particulars. He referred to a memorandum dated September 18, 1984, from the Regional Director of Region No. 1 Assessment Area directed to the respondent assessors. Mr. Gwartney swore that he did not receive the requested data by September 30, 1984, the expiry date for issuing Supplementary Notices of Assessment. No information was offered by Mr. Gwartney in his affidavit regarding what, if any, steps were taken by him during the month of August 1984, or up to September 18, 1984, in order to rectify the error contained in all of the 1984 Assessment Notices issued with respect to tree farm lands. By his

silence I draw the inference that little, if anything, was done during that entire period. On November 9, 1984, these proceedings were commenced.

Counsel for the respondents opposed the granting of the relief sought by the petitioner on a number of technical grounds. I shall examine them.

Section 10 of the Act is a privative section. It provides:

> 10. The completed assessment roll as confirmed and authenticated by the Court of Revision under section 47 is, unless changed or amended under section 11, 73 or 75, valid and binding on all parties concerned, notwithstanding any omission, defect or error committed in, or with respect to, that assessment roll, or any defect, error or mis-statement in any notice required, or the omission to mail the notice. The assessment roll is, for all purposes, the assessment roll of the municipality or rural area, as the case may be, until a new roll is revised, confirmed and authenticated by the Court of Revision.

Sections 11, 73 and 75 are not relevant to this application. Section 11 refers to a supplementary roll. Section 73 refers to changes being made to the assessment roll to reflect the results of appeals heard by the Assessment Appeal Board. Section 75 refers to amendments being made to the assessment roll to reflect a decision of the Supreme Court or of the Court of Appeal on an appeal by way of stated case. Here, there was no supplementary roll, no appeal heard by the Assessment Appeal Board, and no appeal by way of stated case, with reference to the assessment of Tree Farm numbers 8 and 65.

It was submitted by counsel for the petitioner that the provisions of s. 10 did not preclude the granting of the relief sought herein by the petitioner, and he cited *Bishop of Vancouver Island* v. *City of Victoria*, [1921] 3 W.W.R. 214 (P.C.) and *Dugas* v. *MacFarlane* (1911), 18 W.L.R. 701.

In the former case it was held that a privative clause did not prevent the appellant from bringing an action for a declaration that no rates or taxes had been lawfully imposed on the appellant's lands, and for an injunction restraining the collector of taxes from offering for sale the appellant's lands for failure to pay the taxes which had been assessed. The decision turned upon the assessability of the appellant's lands for taxes, not the method used in determining the amount of the assessment.

In the latter case it was held that a privative clause did not prevent the plaintiff, a Judge of the Territorial Court of the Yukon Territory, from contesting assessments made by the City of Dawson or the Yukon Territory against the living allowance granted to him by the Parliament of Canada as an additional gratuity to compensate for the high cost of living in the Yukon Territory. The facts of that case are unusual indeed. The judgment is long and it deals with a number of issues. Effect was not given to the privative clause because Craig J. was of the opinion that at least some of the actions of the Commissioner and assessor bordered upon fraud.

The *Bishop of Vancouver Island* case and *Dugas* v. *MacFarlane* (supra) are distinguishable from this case because, here, the assessability of the petitioner's tree farms is not contested and the actions (or inaction) of the respondents, while unfortunate, did not border upon fraud.

The decision of the Supreme Court of Canada in *The Municipality of the Town of MacLeod* v. *Campbell* (1918), 57 S.C.R. 517 is instructive in determining the effect to be given in this case to the provisions of s. 10 of the Act. In that case the provisions of s. 285 of *The Town Act* were considered. It provided:

> 285. The roll as finally passed by the council and certified by the assessor as so passed shall be valid and bind all parties concerned notwithstanding any defect or error

> committed in or with regard to such roll or any defect, error or mis-statement in the notice required by section 276 of this Act or any omission to deliver or to transmit such notice.

In *The Municipality of the Town of MacLeod* case, the respondent had appealed the assessment against her lands to the Court of Revision. She was unsuccessful. She appealed no further. Eventually the appellant brought action against her for arrears in taxes and in her defence she raised the issue that the assessor had assessed her property, and all other properties in the municipality, at too high a level. At p. 522 Anglin J. had this to say:

> The purport and intent of section 285 of "The Town Act," having regard to the provisions by which it is preceded, is to make the assessment roll valid and binding in respect of all matters within the cognizance of the Court of Revision. The chief subject of the jurisdiction of that court is the determination of appeals based on the ground that assessments are "too high or too low." In regard to these questions its jurisdiction is exclusive.

Consideration of the several judgments expressed in that case leads to the conclusion that, where the point in issue is the quantum of the assessment against the property rather than its assessability, a privative clause is effective and precludes a Supreme Court of a province from reviewing in any way the quantum of assessment other than by way of appeal pursuant to the appeal provisions contained in the statute in question.

Here, the petitioner did not file a complaint with the Court of Revision and did not avail itself of the various appeal procedures contained in the Act. The assessability of the petitioner's tree farm lands is not in issue. The issue is the method of determination of the actual value of the tree farm lands, by which the quantum of assessment was determined. Here, the quantum of assessment, not assessability, is the real issue. In those circumstances, following the decision in *The Municipality of the Town of MacLeod*, I conclude that the provisions of s. 10 of the Act preclude this court from granting the relief sought by the petitioner.

The foregoing determination of the effect of s. 10, the privative clause, is determinative of this petition. However, should that determination be wrong I shall consider other matters raised by counsel.

It was submitted by counsel for the petitioner that the provisions of s. 40 (1) of the *Assessment Amendment Act*, S.B.C. 1984, c. 11 assisted the petitioner by maintaining the various time limits contained in the Act, rather than the time limits provided by the *Assessment Amendment Act*. Section 40 (1) provides:

> 40 (1) The repeals and the amendments made by this Act shall not affect complaints or appeals relating to an assessment for the taxation year 1984 or any previous year, and those complaints or appeals and every proceeding connected with them may be continued as if this Act had not been enacted, and for this purpose the provisions of the *Assessment Act* repealed by this Act continue in force.

In my view the word "complaints" contained in s. 40 (1) refers to complaints to the Court of Revision; similarly, the word "appeals" refers to appeals to the Assessment Appeal Board and from there to the Supreme Court and the B.C. Court of Appeal. The words "complaints" and "appeals" contained in s. 40 (1) do not pertain to proceedings commenced, as here, by petition wherein the provisions of the *Judicial Review Procedure Act* are sought to be invoked. The provisions of s. 40 (1) of the *Assessment Amendment Act* do not assist the petitioner in the circumstances of these proceedings.

Counsel for the petitioner submitted that this court has the jurisdiction to grant the relief sought by the petitioner because it would come within the ambit of s. 11 (3) of the Act. It provides as follows:
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> 11. (3) Notwithstanding sections 9, 10 and 47, and in addition to supplementary assessments under subsections (1) and (2), the commissioner may, at any time before September 30 of the year following the return of the completed assessment roll under section 6, on his own initiative or where requested by an assessor, correct errors and supply omissions in a completed assessment roll, and an assessor, where instructed by the commissioner, shall correct errors and supply omissions in the completed assessment roll by means of entries in a supplementary assessment roll.

There are a number of difficulties in acceding to this branch of the able argument presented by counsel for the petitioner.

First, the time within which the Commissioner could have exercised the authority vested in him under s. 11 (3) expired on September 3O, 1984. These proceedings were not commenced until November 9, 1984. It was urged by counsel for the petitioner that s. 11 (3) of the Act, as it stood prior to its amendment by the *Assessment Amendment Act* should prevail. The significance of that argument is that, prior to the amendment, the date by which the Commissioner could correct errors or supply omissions in a completed assessment roll was December 31, not September 30, of any given year. However, on the authority of *Orca Investments Ltd.* v. *Vaugier* (1982), 142 D.L.R. (3d) 327 (B.C.C.A.), 1 am unable to give effect to that argument. Prior to September 3O, 1984, the petitioner had done nothing under the former enactment which would have converted a general right of the community at large into a right acquired by the petitioner.

Second, the remedy of mandamus is not available here because the time limited for the exercise of the power by the Commissioner under s. 11 (3) had expired on September 30, 1984. By the time that the petition herein was filed there was no longer any authority in the Commissioner to correct errors or supply omissions in the completed assessment roll. The petitioner had no prima facie legal right to require the Commissioner to amend the assessment roll under s. 11 (3) of the Act at the time that the petition was filed, and was heard in court: see *Re Monarch Holdings Ltd. and District of Oak Bay* (1976), 71 D.L.R. (3d) 530 (B.C.S.C.) and *The King, Rel. Dickie* v. *Minshull and Rhind*, [1932] 4 M.P.R. 251 at p. 261 (N.S.C.A.).

Third, mandamus is an extraordinary remedy which lies to secure the performance of a public duty in which the applicant has a sufficient legal interest. But the performance of the public duty must be mandatory, not discretionary: see *Karavos* v. *Toronto and Gillies*, [1948] 3 D.L.R. 294 (Ont. C.A.) at p. 297, and *Re Hall and Johnson* (1974), 52 D.L.R. (3d) 237 at p. 239-240. Here, the authority of the Commissioner under s. 11 (3) of the Act to correct errors or supply omissions in the completed assessment roll was clearly discretionary. It was not an imperative duty. Therefore, the relief sought in the nature of mandamus cannot be granted.

For the foregoing reasons I am obliged to dismiss the petition. However, in view of the circumstances earlier described concerning the failure of the respondents to recalculate the actual value of the petitioner's tree farm lands in a timely manner immediately following the B.C.F.P. decision, I exercise my discretion and direct that there shall be no costs to either party to these proceedings.