The following version is for informational purposes only

GOLDEN ACRES LTD.
PARK MOBILE HOME SALES LTD.
ACRES HOLDINGS LTD.
BILLABONG MOBILE HOME & TOURIST PARK
WESTGATE DEVELOPMENT LTD.
J. & B. ALEXANDER
and
DUCK LAKE ENTERPRISES LTD.

v.

ASSESSOR OF AREA 19 – KELOWNA
and
NORMA SHARON HEAL
and
KELOWNA AND DISTRICT MOBILE HOME OWNERS ASSOCIATION

Supreme Court of British Columbia (A850250) Vancouver Registry

Before: MR. JUSTICE H.P. LEGG (in chambers)

Vancouver May 22, 1985

J.R. Lakes for the Appellants
J.E.D. Savage for the Respondent Assessor
B.J. Wallace for the Respondents N.S. Heal and Kelowna & District Mobile Home Owners Association

Reasons for Judgment July 19, 1985

This appeal by a case stated by the Assessment Appeal Board is concerned with the assessment of Indian Reserve Lands which are leased by the appellant mobile home park operators from the federal Crown. An important question raised indirectly by the appeal is whether the respondent Heal, a mobile home owner, was properly assessable for that part of the land upon which her mobile home was situated.

The appellants operate mobile home parks on Indian Reserve Lands in the Kelowna assessment area. They held either a lease of lands from the federal Crown or an assignment of such a lease. Each appellant constructed roadways, underground services, and an office building on the leased lands. In some instances there was a campsite facility. The Board found that the appellants had taken possession of and occupied the lands under lease. It held that the appellants were assessable for the entire areas leased by them with the exception of those areas occupied by and rented to mobile home owners. The Board considered that each mobile home owner was assessable for the lot or defined plot of ground because the mobile home owner had acquired dominant occupancy of such lot or plot. The Board found that the appellants were properly assessed on all underground improvements installed by them in each park.

The appellants required the Board to submit eight questions and the respondents required the Board to submit three questions for the opinion of this Court. Of the questions which the appellants required to be stated, two, numbers 3 and 4, were abandoned by the appellants at the outset of this hearing. Questions 1, 2, 5 and 6 were all concerned with whether the Board erred

by adding the value of the pads upon which the mobile homes were situated into the land assessments. Counsel for the appellants and the respondents agreed that the pads were improvements and that their value should not have been incorporated into the values of the lands. These questions are therefore answered in the affirmative.

I turn therefore to the remaining questions required to be answered.

Question 7: Did the Assessment Appeal Board err in law in finding that the underground services should be assessed as "improvements" against the appellants?

The Board found that the appellants were properly assessable for these improvements. It rejected the argument of counsel for the appellants that a strict reading of s. 34 of the *Assessment Act*, R.S.B.C. 1979, chap. 21 under which the lands were assessed omitted improvements under the surface of the land. Counsel repeated that argument before me. I think that the Board was correct and I reject counsel's submission.

> Section 34 reads:
>
> "34. (1) Land, the fee of which is in the Crown, or in some person on behalf of the Crown, that is held or occupied otherwise than by, or on behalf of, the Crown, is, with the improvements on it,* liable to assessment in accordance with this section.
>
> (2) The land referred to in subsection (1) with the improvements on it* shall be entered in the assessment roll in the name of the holder or occupier, whose interest shall be valued at the actual value of the land and improvements determined under section 26.
>
> (3) This section applies, with the necessary changes and so far as it is applicable, to improvements owned by, leased to, held, or occupied by some person other than the Crown, situated on land* the fee of which is in the Crown, or in some person on behalf of the Crown.
>
> (4) This section applies, with the necessary changes and so far as it is applicable, where land is held in trust for a tribe or band of Indians and occupied, in other than an official capacity, by a person not an Indian.
>
> (5) As soon as the assessor ascertains that land is held or occupied in the manner referred to in subsection (1), he shall enter the land with improvements on it* on a supplementary assessment roll in the name of the holder or occupier whose interest shall be assessed at the actual value of the land and improvements."
>
> (* emphasis mine)

Counsel for the appellants submitted that the words "improvements on it" in subsections (1), (2) and (5) and the words "improvements . . situated on land" in subsection (3) show that improvements under the land leased to the appellants were not assessable against the appellants.

But that argument ignores the definition of improvements in s. 1 of the *Assessment Act* where "improvements" are defined to include:

> "(a) all buildings, fixtures, machinery, structures and similar things erected or placed in, on, under or affixed to land or to a building, fixture, or structure in, on, under or affixed to land . . ."

I demonstrate this by substituting the wording (underlined below) from the definition for the words "improvements on it" in ss. 1. When those words are substituted that ss. reads:

> "34. (1) Land, the fee of which is in the Crown, or in some person on behalf of the Crown, that is held or occupied otherwise than by, or on behalf of, the Crown, is, with the fixtures, structures or similar things erected in, on or under or affixed to the land, liable to assessment in accordance with this section."

Sections (2), (3) and (5) can be construed in a similar fashion.

The construction of the section contended for by counsel for the appellants would be contrary to the intent of the legislation.

The Board referred to other arguments made on behalf of the Assessor in support of its conclusion including a reference to s. 38 of the *Assessment Act*. In my opinion s. 34 of the *Assessment Act* applies to the lands in question here. It is unnecessary to go beyond that section. I agree with counsel for the appellants that s. 38 does not apply. But I do not agree with him that s. 34 should be interpreted so as to exclude improvements under the lands. Question 7 is therefore answered "No".

Question 8: Did the Assessment Appeal Board err in law in finding that the land described in the leases but not occupied by the appellants is properly assessable against each appellant?

Although this question is expressed as a question of law, the stated case shows that it is a question of fact and therefore not within the jurisdiction of this Court to answer on this appeal.

> Paragraphs 3 and 4 of the facts stated by the Board read as follows:
>
> "3. The Assessment Appeal Board found that the parks owners have leased the land, have entered on it, have taken possession of it and occupy it. The Assessment Appeal Board found that the park owners are physically occupying the land and are assessable for the entire area leased by them, with the exception of the areas occupied by and rented to mobile home owners.
>
> 4. Notwithstanding that the lease documents in their recitals state that an individual 'Indian' is the possessor of the land, the Board found as a fact that the park owner by entering upon the land has become the de facto possessor and occupier."

The evidence before the board included leases between each of the appellants and the federal Crown. Each lease recited that the demised lands were part of an Indian Reserve set apart for an Indian Band and that the lands were in the lawful possession of a named member of the Band and were leased for that member's benefit. The evidence included maps which showed that part of each leased area of land which was occupied by the appellants. The Board accepted the principle stated in *Newcombe N. Bentley* v. *J. Ashley Peppard* (1903) 33 S.C.R. 444 cited by counsel for the Assessor. That principle was stated in these words:

> " Where the owner lets blackacre, the tenant accepting and entering by virtue thereof has possession of every foot of ground comprised in blackacre, although he may possess himself of but one foot of it only."

The Board stated that the park owners had leased the land, had entered upon it, had taken possession of the land and occupied it and concluded:

> "They are physically occupying land held for Indians and are assessable for the entire area leased by them (except for the areas occupied by the mobile home owners with their leave) pursuant to sec 34 (4) of the *Assessment Act*. The assessor was correct in his method of assessing the surplus or extra land leased by the park owner. The Board does not accept the proposition put forward by Mr. Lakes that the park owner is assessable only for that portion of the leased land that he has developed. The Board finds that

> despite the fact that the lease may say that Mr. Derrickson is the possessor of the land, in fact the park owner by entering upon it has become the de facto possessor and occupier. Mr. Derrickson is simply identified as the Indian in 'possession' of Indian Reserve Land within the meaning of the *Indian Act* as an individual Indian as opposed to land within a reserve held by other Indians or the Band as a whole."

As was stated in Regina v. Newmont (1982) 3 W. W. R. 317 at 324 the question of possession and the question of occupation must be questions of fact.

But counsel for the appellants submitted that the evidence from the leases and maps established the area of the leased land was "not in fact being occupied by the appellant". He submitted that on the authorities and the wording of s. 34 (1), an appellant should not be assessed for that part of the described land which it was not occupying.

That argument invites this Court to find that the Board was wrong in holding that an appellant in fact occupied all the leased land. This Court was not afforded the opportunity of examining a transcript of the evidence before the Board. It was not invited to hold that there was no evidence upon which the Board might make its findings. Rather, counsel referred in his argument to the leases and the map exhibits and argued that these established areas described in the lease which were not in fact occupied by the appellant. But that argument is addressed to a question of fact, not law.

Counsel also argued that the Board erred in ignoring "a declaration of possession" in each lease which recited that the lands were "in the lawful possession of a named member of an Indian Band". But that submission was considered by the Board when it stated:

> ". . . despite the fact that the lease may say that Mr. Derrickson is the possessor of the land in fact the park owner by entering upon it has become the de facto possessor and occupier . . ."

The Board rejected counsel's submission and found as a fact that the appellants by entering upon the leased lands had become the possessors and occupiers of those lands.

I conclude that the Court has no jurisdiction to answer this question because it is a question of fact. Moreover, the question mis-states the facts stated by the Board. There was no finding by the Board that the land described in the leases "was not occupied by the appellant". Indeed, the facts stated by the Board show that a contrary finding was made.

For the foregoing reasons I decline to answer question 8.

I turn next to the questions submitted by the respondent Assessor to the Board for inclusion in the stated case.

Question 1: Are the mobile home park operators properly assessable for the land included in the lease in which they are in possession of, including the land which they have either sublet or licensed to individual home owners?

It is important to note certain facts found by the Board in the stated case when this question is considered.

The Board found that the appellants were assessable for the entire area leased by them except for the areas occupied by and rented to mobile home owners and that each mobile home owner was assessable for the area upon which the mobile home was situated.

Counsel for the Assessor and for the respondent Heal contended that the Board was wrong to assess the individual mobile home owner for the area occupied by the mobile home. Rather, the

mobile home park operator should be assessed for the entire leased areas including those occupied by the mobile home owner and the question answered in the affirmative.

Mr. Wallace's submission was directed to showing that the assessment of the individual mobile home owner was contrary to a proper interpretation of the *Assessment Act*.

Although the question of the assessability of the individual mobile home owner was not raised directly by this question, it was argued extensively by all counsel and it is important to note the Board's reasons for finding the individual mobile home owner assessable. It based its findings in this regard on the ground that such owner had acquired "dominant occupancy" and was therefore in possession of the area so occupied. The Board adopted the language of Lord Russell of Killowen in *City of Westminster* v. *The Southern Railway Company* [19361 A.C. 51 1, applied the decision in *Field Place Caravan Park Ltd.* v. *Harding* [1966] 2 Q.B. 484 and adopted the reasoning of the Court of Appeal decision in *R*. v. *Newmont Mines Limited* (1982) 3 W.W.R. 317 that the possession or occupation in fact by the occupier is sufficient to make the occupier assessable. The Board concluded that the mobile home owner was an occupier within the meaning of s. 34 (4) of the *Assessment Act* and was therefore assessable.

Counsel for the Assessor and for the respondent Heal submitted that the Board was wrong in applying the concept of paramount occupancy. Both submitted that this concept was not applicable in British Columbia under the provisions of the *Assessment Act*, that the decision in *Field Place Caravan Park* (cited earlier) was inapplicable because it was based upon the peculiarities of the English Taxation scheme which did not apply in this province. Counsel submitted that the decision in *Newmont* had been misapplied by the Board because the Court of Appeal had not applied the doctrine of paramount occupancy in that case. Rather, the Court of Appeal had approached the problem by determining whether *Newmont* was in actual occupation of the mineral claims and therefore an occupier under s. 34 of the *Assessment Act*.

Counsel for the Assessor also submitted that the mobile park operators ought to have been assessed with respect to the lands occupied by the mobile home owners because the park operator was a "holder" of land leased from the Crown and therefore a "holder or occupier" under s. 34 of the *Assessment Act*. Counsel referred to the definition of owner in s. 1 of the *Assessment Act*, to sections of the *Municipal Act* and to the decision of the Supreme Court of Canada in *Southern Alberta Land Company* v. *McLean* (1916) 53 S.C.C. 151 in support of his submission that the park operator was a holder of the land occupied by the mobile home owner.

Although I agree that the mobile park operator was a holder of the land under the lease, I am not persuaded that it follows from that conclusion that the mobile home park operators are properly assessable for the land which they have sub-let or licensed to individual mobile home owners.

I reach that conclusion for the following reasons:

The decision in *Newmont* does not stand for the proposition that paramount occupancy should not be applied where there are rival or competing occupancies.

Although *Newmont* did not apply the paramount occupancy concept, and criticized it as a "complex body of law ... which ... could lead to absurd results", the report of the judgment in *Newmont* does not indicate that the Court was concerned with rival or competing occupancies. Rather, it was concerned with the contention that only the holder of an exclusive right of occupation was subject to assessment (see p. 322) and with the Crown's contention that *Newmont* should be assessed for the total area of each mineral claim, not just that part which it actually occupied. The Court expressly declined to "explore the question of what happens when the very same land is occupied simultaneously by two different occupiers for two different" purposes (p. 325). The Court did not examine, as I must, the position when there are “simultaneous occupiers" or rival occupancies.

At p. 323-4 the Court stated:

> " But in my opinion it (actual occupation)* is the correct approach. And of course it should apply whether there is a contiguous occupier on the same mineral claim or not, that is, Newmont should be assessed and taxed only on that part of the surface of the claim that it actually occupies. If part of the remainder of the surface of the claim is actually occupied by someone else, then that someone else should be taxed on the part which he actually occupies. If the remainder of the surface of a claim is not possessed or occupied by anyone, then no one should be assessed or taxed on that remainder, even though Newmont or others may have a right to possession or occupancy, exclusive or non-exclusive."
> *(Parenthesis mine)

I apply the approach which Lambert, J. A. considered correct in *Newmont* when I examine the definition of "occupier" in section 1 of the *Assessment Act* and particularly clauses (b) and (d) thereof. Those definitions read:

> "(b) The person in possession of Crown land that is held under ... lease, licence, or other record from the Crown or who simply occupies the land
>
> (d) A person in possession of land the fee of which is in, or held on behalf of, a person who is exempted from taxation under an act and that is held under a lease, licence ... or other record from the person exempted from taxation or who simply occupies the land"

In my opinion the mobile home owner is an occupier under either of these clauses because he is a person who "simply occupies the land".

But I also conclude that the mobile home park operator is an occupier of the leased land held from the Crown, either under clause (b) or clause (d).

Thus the mobile home park operator is an occupier of land that is held under lease which includes land occupied by the mobile home owner.

Under these circumstances I consider that the paramount occupancy concept which was applied by the Board and which has been considered by courts of high authority leads to a reasonable and just application of the *Assessment Act* and was properly applied by the Board in the case at bar.

Indeed, there is a similarity between the situation in *City of Westminster* v. *The Southern Railway Company* (1936 A.C. 511) cited by the Board and the situation in the case at bar. In that case, the Railway Company had a statutory right to "carve out" of any railway station separate premises and sub-let them. The question considered by the House of Lords was whether such premises were so let-out "as to be capable of separate assessment". In considering that question Lord Russell of Killowen noted that where there were rival or competing occupancies the question must be one of determining "whose position in relation to occupation is paramount and whose position in relation to occupation is subordinate". He stressed that the question must be not who is in paramount occupancy of the whole railway station under whose confines the premises in question were situated but:

> "who is in paramount occupation of the particular premises in question"

(See pp. 529-530.)

This decision was applied in *Field Place Caravan Park Ltd.* v. *Harding* (cited earlier). Lord Denning at p. 499 quoted from *City of Westminster* v. *The Southern Railway Company* and said:

> "Applying these words here each of the caravan dwellers enjoys his caravan and also the pitch around it, as his dwelling. The site operators exercise a good deal of control but not such as to interfere with the enjoyment of the caravan dweller or to be inconsistent with his exclusive use ...
>
> ... In the present case the President of the Lands Tribunal directed himself rightly and said 'I come to the conclusion that those caravan owners satisfied the test of exclusive occupation'. That is a finding of fact with which this court has no power to interfere. The caravan dweller is in paramount occupation of both caravan and pitch."

In my opinion there are no provisions in the English statute or in the *Assessment Act* of this Province which indicate that that principle is inappropriate in the case at bar.

In *British Columbia Forest Products and Assessor of Area 06, Courtenay*, 150 D.L.R. (3d) 172, MacKinnon, J. considered the argument that the test of paramouncy was inappropriate based on *Newmont Mines Limited (1982)* 132 D.L.R. (3d) 525, 1982 3 W.W.R. 317, 37 B.C.L.R. 1. He said that *Newmont* did not reject the paramouncy test but identified the circumstances in which it is appropriate to give consideration to it. He considered that if the paramouncy test was invoked in the case before him it had been invoked on a proper basis.

Here the Board has considered the use by the appellants and compared it with the use by the mobile home owners and found that the mobile home owners were the dominant or paramount occupiers of that portion or lot of the leased Crown land which was occupied by the mobile home.

In reaching the finding that the mobile home owner was the paramount occupier the Board made a finding of fact. I do not consider that the Board erred in applying the concept of paramouncy in reaching that finding.

My conclusion that the concept of paramount occupation is consistent with the provisions of the *Assessment Act* is reinforced by the amendment made to that Act after the making of the assessment in the case at bar. In s. 36.1, which came into effect on May 14, 1984, it is provided that where land is held or occupied in the manner referred to in s. 34, by two or more persons, and there is no "paramount occupier", the land shall be assessed in the name of those persons jointly. The legislation recognizes the concept of paramount occupancy. If the case at bar had been governed by s. 36.1 and the Board had been unable to reach a finding that the mobile home owner was in paramount occupancy, the mobile park operator and the mobile home owner might both have been assessed as occupiers of that part of the leased premises upon which the mobile home was situated.

For the foregoing reasons I do not consider that the Board erred in declining to assess the mobile home park operator in respect of the land which the operator had either sub-let or licensed to the individual mobile home owner. Question I which the respondents required the Board to place before the Court for opinion must be answered in the negative.

The second question which the respondent Assessor required the Board to ask for the opinion of the Court is:

> 2. Are the mobile home park operators holders of the land included in the lease within the meaning of s. 34 of the *Assessment Act* R.S.B.C. 1979 chap. 2 1 ?

For the reasons given earlier on page 1176 of these Reasons that question is answered in the affirmative.

The third question which the Board was required by the Assessor to ask for the opinion of this Court is as follows:

3. Are the mobile home park operators entitled to maintain an action for trespass held under lease if a trespass has occurred?

The Board considered this question and stated in paragraph 9 of the facts of the stated case that there was insufficient evidence before the Board to determine whether or not the mobile home park operators were entitled to maintain an action for trespass.

This finding is a finding by the Board of insufficiency of evidence. Whether the Board was correct in so holding is not a question of law. Rather, this is a question of fact within the exclusive jurisdiction of the Board and not within the jurisdiction of this Court on this appeal. For that reason I decline to answer the question.

Judgment accordingly.