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ASSESSOR OF AREA 25 - NORTHWEST

v.

RIDLEY TERMINALS INC.

Supreme Court of British Columbia (A851269) Vancouver Registry

Before: MR. JUSTICE M.R. TAYLOR (In Chambers)

Vancouver, October 10 and 11, 1985

J.E.D. Savage for the Appellant
J.R. Lakes for the Respondent

Reasons for Judgment January 20, 1986

This is an appeal by way of case stated by the Area Assessor from a decision of the Assessment Appeal Board substantially reducing an assessment for local taxation purposes on the Ridley Island coal loading facility at Prince Rupert.

The questions raised concern principles properly to be applied in a valuation of the facility by the 'depreciated replacement cost' approach for the purpose of arriving at 'actual value' under the *Assessment Act*, R. S.B. C. 1979 Chapter 21. The reasons of the Board show that the taxpayer is a corporation controlled by the federal government which established the facility in 1982-83 under governmental direction so as to be able to move 12 million tonnes of coal a year, a capacity almost twice that required for the traffic available when it opened.

I am told that both the company and the Assessor made presentations to the Board based on assumptions that the so-far unused capacity would eventually be utilized and that they disagreed only as to the length of time for which the excess capacity would probably remain unused.

Each side is said to have discounted the value of the unused portion of the facility for the period which that party considered likely to elapse before it would be used. The Board concluded, however, that no value at all should be ascribed to the unused facilities, substituting its own view of the propriety, according to assessment principle, of including the unused and at present unusable plant in an 'actual value' appraisal for local taxation purposes. It said:

> The Board is convinced that a knowledgeable purchaser would only consider a coal terminal facility with a capacity of 6.6 million tonnes annually as an economic proposition. Therefore, functional obsolescence is evident in the facility to the extent of 5.4 million tonnes annually (12 million tonnes annual design capacity less 6.6 million tonnes throughput capacity - 5.4 million tonnes annual over capacity).

The Board was concerned with the view which would be taken by what it described as a "knowledgeable purchaser" - without further defining the purchaser it had in mind - rather than with the views advanced by the parties.

The Board also arrived at its 'actual value' of the facility by the 'cost approach' without including any amount for interest during construction.

At the end of its reasons the Board says it made a comparison of the assessment at which it had arrived with that on the Westshore terminal at Roberts Bank, the only similar facility on the coast, and that this "confirms to the Board that its conclusion is fair and equitable in all respects."

(a) *The Stated Case*

The Stated Case filed by the Board at the Assessor's request consists of a 10-paragraph statement of facts followed by eight questions which are said to be questions of law, not all of them in the form requested by the Assessor.

Counsel for the Assessor objects that the questions answered by the court should be those questions which the Assessor, as appellant, had asked the Board to state. Counsel for the company takes the objection that some of the questions asked, and sought to be asked, raise issues of fact, rather than questions of law only as required by the Act, and should therefore not be answered.

The findings of fact made by the Board, as set out at the beginning of the Stated Case, are as follows:

> 1. In February 1981, Ridley Terminals Inc. bid to construct and operate a 12 million tonne per annum capacity coal terminal on Ridley Island in the City of Prince Rupert.
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> 2. The design capacity of 12 million tonnes per annum was a specification of tender set by Ports Canada, an agency of the Federal Government.
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> 3. As of 1981, the company believed it would achieve the 12 million tonne throughput as of 1987/1988.
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> 4. Preparation of the site on Ridley Island commenced early in 1982. The company commenced construction of the improvements in September 1982, which were substantially complete in December 1983.
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> 5. During 1982 the company reduced its capital budget due to uncertainties in the prospects of achieving coal contracts for throughput over the then existing contracted throughput of 6.4 million tonnes per annum.
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> 6. The uncertainties of 1982 became facts in 1983 when several coal development projects in the north sector of the province were cancelled.
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> 7. The Board found that a knowledgeable purchaser would only consider a coal terminal facility with a capacity of 6.6 million tonnes annually as an economic proposition and, therefore, functional obsolescence is evident in the facility to the extent of 5.4 million tonnes annually (12 million tonnes annual design capacity less 6.6 million tonnes throughput capacity = 5.4 million tonnes annual over capacity).
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> 8. The Board, in finding the capacity to be 6.6 million tonnes per annum, had regard to the state and condition of the property appealed as of December 31, 1983 pursuant to section 26 of the *Assessment Act* as amended by section 41 (3) of the *Assessment Amendment Act, 1984*.
>
> 9. The Board accepted the replacement cost of a 6.6 million tonne per annum coal facility as stated by Mr. English, witness for the appellant. This replacement cost did not include an amount for interest during construction.
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> 10. The Board accepted, as a fact, the stated actual values for assessment on the Westshore Terminal property as supplied by Mr. Geddes and Mr. Garvie, witnesses for

> the appellant. The values supplied were not challenged by the respondent. The Board considered the actual values as an indicator of comparison of a like facility on a per tonne basis. While the Board did not determine the actual value of the Ridley Terminals property, appealed on the basis of the Westshore Terminals Property, the comparison of the actual values on a per tonne basis substantiated the issue of equity of assessments.

Neither in the questions as submitted by the Assessor nor in those which were put by the Board is it directly suggested that any of these findings may lack evidentiary support. The errors alleged concern the manner in which the Board came to its conclusions on the basis of these and other findings of fact.

While the matter was not much addressed in argument, I think it proper to define at the outset the nature of the exercise in which the Board engaged in trying to determine 'actual value' in this case.

The task of the Board was to determine the 'actual value' of the facility in the sense of its cash value in an arms-length sale to a hypothetical knowledgeable prudent purchaser interested in purchasing the property for an investment return - and not for speculation - on the valuation date for the 1984 assessment roll. I understand that valuation date to be either December 31, 1982, or December 31, 1983, depending on the view properly to be taken of the meaning in this context of section 41 (3) of the *Assessment Amendment Act*, 1984.

In arriving at 'actual value' the Board would therefore be concerned with the expectations of those who decided the government policy which resulted in allocation of public funds to the project, and the expectations of the officers of the government-controlled corporation which owns and operates it, only to the extent that those views would be shared and acted upon by an informed potential commercial purchaser, possessed of all relevant available information, whose intention was to obtain through prudent non-speculative investment a competitive return on its own money or on money entrusted to it.

The Board would not be concerned with any additional value which the property might have for the purpose of achieving special governmental policy objectives or to those interested in purchasing for speculative purposes, that is to say for the purpose of exploiting opportunities which did not exist at the relevant assessment date but might, or might not, arise in the future: *Stock Exchange Building Corp. Ltd.* v. *City of Vancouver* [1945] 2 WWR. 248 (B.C.C.A.); *Sun Life Assurance Co.* v. *City of Montreal* [1950] S.C.R. 220.

I understand the Board, by its fifth, sixth, seventh and eighth findings of fact, to say (i) that there was no assurance during 1982 that more than 6.4 million tonnes of coal a year would be available to be moved through the terminal; (ii) that the company accordingly reduced its capital budget during that year; and (iii) that during 1983 it became certain that no more than 6.6 million tonnes would be moved because projects previously regarded as doubtful were cancelled. By its seventh finding of fact the Board finds that a 'knowledgeable purchaser' would not have considered the useful capacity of the facility to be greater than 6.6 million tonnes at December 31, 1983. I take the Board to mean that such a purchaser would have regarded investment in the facilities for any greater throughput than that as speculative and therefore irrelevant in arriving at 'actual value'.

While the Board does not specifically say that a purchaser buying for investment purposes, and not for speculation, would not in December, 1982, have relied on increased future throughput in establishing the price it would pay, the statement that the present owner at that date regarded future throughput in excess of 6.4 million tonnes per annum as uncertain, and reduced its investment program accordingly, persuades me that the Board must have been of that view.

I will deal with the questions asked in the light of these understandings of the applicable law and of the Board's findings of fact.

(b) *The Excess Capacity*

By its first question the Board asks whether it erred in law "in valuing the coal terminal based on a 6.6 million tonne capacity when: (a) the facility has a capacity of 12 million tonnes per annum; and (b) there was some evidence which indicated that as of December 31, 1982, Ridley Terminals Inc. expected that the 12 million tonnes per annum capacity would be reached in 1987/88".

The Assessor had asked the Board to put the second part of the question in the terms that "(b) it was fully expected that the 12 million tonne capacity would be achieved as scheduled at or near the valuation date". (My emphasis). Had the matter been put as the Assessor desired, the question would have seemed to suggest that the Board had found that this expectation was held universally, and would therefore have been held by a hypothetical prudent investor of the type I have described. I do not understand the Board to have made that finding. While entitled to choose the questions of law to be put on the Case Stated, the appellant was not entitled to insist that the Board base its questions on findings of fact it has not made.

I therefore deal with the question as stated by the Board.

The Board says that there was" some evidence" that the owner expected the full 12 million tonne capacity would be in use in five to six years time. It does not say that a non-speculative investor of the sort to be assumed for the purpose of arriving at 'actual value' under the *Assessment Act* would make that assumption. I conclude that the Board felt that any value which a purchaser would put on the possibility that the unused capacity would become usable in the future should be considered speculative, and therefore be excluded.

I therefore answer the first question in the negative.

The second question, a variation on the same theme, asks whether the Board erred in law "in valuing the coal terminal based on a 6.6 million tonne capacity where there was some evidence before the Board that 12 million tonnes' capacity anticipated as of 1983 was to be achieved at 1991".

The Assessor had asked that the last portion of the question be worded: "when the evidence before the Board was that 12 million tonnes capacity was anticipated to be achieved as of December, 1983 as early as 1991?" The Assessor seems to me to have asked the Board to state a question in a manner contrary to its findings of fact. The Board does not seem to have regarded the expectation said to have been held by the owner in 1983 as one likely to have been shared by a prudent investor such as I have described.

I therefore answer the second question in the negative.

By its third question the Board asks the court to say whether it erred in law "in considering market conditions as of the date of the hearing of the appeal or as of December 31, 1983, rather than as of the date required by section 26, as amended, of the *Assessment Act*?"

The Assessor had asked that the last part of this question read: "as of the date of the hearing rather than as of the date required by statute". The Board might then have seemed to concede that it fell into error of law by admitting that it considered market condition at a date forbidden by the statute. The question as posed by the Board does not make that admission. I find it impossible to answer it otherwise than by saying that the Board could consider market conditions at any date it pleased provided that it did so for the purpose of assisting it in determining 'actual value' at the proper valuation date.

For reasons already stated, it seems to me that the Board did not accept the Assessor's contention that a purchaser of the sort I have described would have included the unused portion

of the facilities in determining the price he would pay, and that this would have been true at any date.

I therefore answer the third question in the negative.

The fourth question asks, somewhat repetitively, whether the Board erred in law "in considering only 6.4 million tonnes throughput as currently and foreseeably available, where there was some evidence that 12 million tonnes throughput was foreseeable as late as December, 1983?"

So far as I can tell this question is a recasting of one submitted by the Assessor which would have asked whether the Board erred "in considering only 6.6 million tonnes throughput as currently and foreseeably available, when 12 million tonnes throughput was foreseeable as late as December, 1983?" Here, again, the Assessor sought to have a question asked which implied a finding that full usage of the facility "was foreseeable" without saying by whom. Such a question would imply that it was foreseeable by everyone who might be interested in the facility, including therefore the sort of investor I have described.

The Board, as I have said, does not seem to have made that finding.

As in the case of the previous questions, I will answer the question posed by the Board as best I can on the basis of the argument which has been presented at this stage of the appeal process, having in mind that the Assessor has the onus of showing that the Board fell into error of law.

I find that the Board must have been of the view that the sort of prudent hypothetical investor I have described, one interested in purchasing the facility for investment return and not for speculation, when deciding on the price he was prepared to pay, would at no time have taken the possibility of additional future utilization into account. Evidence that the present owner "foresaw" such utilization seems not to have satisfied the Board that value would be given to it by a hypothetical investor purchaser of the sort I have described. The Board seems to have been of the view that any value given to the prospect of increased future use would be speculative and should not be included.

I therefore answer the fourth question in the negative.

(c) *Interest During Construction*

The fifth question concerns exclusion of the cost of capital, asking whether the Board erred in law "in deducting from the appellant's evidence of the cost of the facility an amount for interest during construction?"

The reason the Board failed to include interest during construction as part of the cost of the facility is stated in its ninth finding of fact. The Board there says that interest was not included in the appraisal prepared by the witness whose evidence the Board accepted. The Assessor did not frame any question directly challenging that statement. I have, however, been referred to portions of the transcript of the hearing from which it appears that the Board announced that it had decided in other proceedings, as a matter of appraisal principle, that the cost of interest on capital employed during the construction phase should not be included in a determination of 'actual value' by the 'cost' approach. Further discussion seems to have been closed off by the Board taking this position during the hearing, and I think the matter was for this reason not gone into in the testimony of witnesses.

While the matter was not made completely clear, I assume that the interest cost was included by the parties in their original submissions but omitted from their evidence because of a ruling by the Board.

The Board was in my view wrong in law if it intended to rule, as a matter of principle, that cost of capital employed during the construction phase could not be considered a true cost, and could not therefore, be taken into account in arriving at 'actual value' by the replacement cost approach. This matter has since been dealt with by Madam Justice Southin in *Crown Forest Industries Limited* v. *Assessor for Area 6 - Courtenay* (August 8, 1985, Vancouver Registry No. A843031). The reason given by the Board for its finding, that it accepted the evidence of a witness who made no allowance for that cost, would involve no error of law if the evidence of this witness properly arrived at 'actual value' even though it included no specific allowance for interest. But I do not believe this is what happened. I think the Board made it clear, as a matter of principle, that it would not consider interest as a proper cost item in such an appraisal, and that it was for this reason that the witness excluded an allowance for interest in his calculation.

On that understanding of what transpired at the hearing I answer the fifth question in the affirmative.

The sixth question, a very similar one, asks whether there was "any evidence before the Assessment Appeal Board which supported the deduction of interest during construction from the cost estimate?"

This question seems to be answered by the Board's ninth finding of fact. There was evidence to that effect before the Board. It seems, however, to have resulted from the Board's ruling, as a matter of principle, that it could not consider interest during construction in arriving at 'actual value' by the cost approach. If I am right in that understanding, then the evidence referred to did not 'support' the Board's conclusion, but simply gave effect to its ruling.

With that qualification, I answer the sixth question in the affirmative.

(d) *The Westshore Comparison*

The seventh question asks whether the Board erred in law "in considering the assessment of the Westshore Terminal without first determining whether the assessment was at actual value?"

The Board's reasons, read together with the 10th paragraph of its statement of facts, indicate to me that the Board did not use the assessment on the Westshore Terminal at Roberts Point for the purpose of determining 'actual value' of the Ridley Island facility. The Board seems to have made the comparison in order to measure the fairness of a revised assessment valuation which it had already arrived at for the Ridley terminal. The Board felt that it would be unfair to assess the one at a higher level than the other. Since the Board did not make any adjustment as a result of this exercise, so that the exercise had no effect on the outcome of the proceedings before it, I do not understand how the Board could be said to have committed an error in law in making the comparison.

I therefore answer the seventh question in the negative.

The eighth question states the same issue in a slightly different way by asking whether the Board erred in law "in applying considerations of equity based on assessments outside the municipality or rural area?"

For reasons given in answering the last question, this question does not, in my view, raise an issue of law relevant to the outcome of the case before it, no adjustment having been made in the assessment on the basis of the comparison. I would, however, observe that there is a fundamental duty imposed at common law on those involved in the taxation process to endeavour to ensure that rules are applied evenly unless discrimination between taxpayers is expressly authorized: *Jonas* v. *Gilbert,* (1881) 5 S.C.R. 356; *Air Canada* v. *Turner et al* [1984] 6 W.W.R. 346 (B.C.S.C.). I think it was therefore proper for the Board, when dealing with a facility of this sort, to have been concerned with the way in which the only other similar facility was treated under the

same taxation scheme. The Board would, I conclude, have been entitled to make adjustments based on the comparison in question so long as this did not involve violation of any statutory requirement. I do not accept that it was improper for the Board to have looked to the Roberts Bank terminal assessment for the purpose which prompted it to do so.

The Board would, in my view, have been entitled to take the Westshore Terminals assessment into consideration in arriving at a proper assessment for the present facility so long as this did not, of course, result in the assessment under consideration being above or below the 'actual value' range or being inequitable when compared with that of other lands and improvements within the municipality.

I therefore answer the eighth question in the negative.

(e) *Conclusion*

I would record that the rendering of a decision on the present appeal has been made much more difficult and protracted than it might have been by continued adherence of the assessment authority to its policy of requiring this court to deal with such appeals without the benefit of written analysis of the facts, the issues raised and the authorities relied on, of the sort normally provided in appellate proceedings. While the rules of this court do not demand that this assistance be provided, and it can therefore be withheld until the Court of Appeal stage is reached, I remain unable to understand how the interests of the parties are served by the present practice. As I have said before, it is a practice which seems to me to cast an unnecessary extra burden on the court.

There will be no order as to costs.