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NORTHWEST ALFALFA PRODUCTS LTD., In Receivership (RESPONDENT)

v.

BRITISH COLUMBIA ASSESSMENT AUTHORITY,
RONALD F. KENNEDY,
AND
THE CORPORATION OF THE CITY OF DAWSON CREEK (APPELLANTS)

B.C. Court of Appeal (CA006390) Vancouver Registry

Before: MR. JUSTICE CARROTHERS, MR. JUSTICE ESSON, and MR. JUSTICE LOCKE

November 30, 1987

John E. D. Savage for the appellants, British Columbia Assessment Authority et al

R. J. Bauman for the respondent, Northwest Alfalfa Products Ltd., In Receivership

P.G.E. Railway Taxation Exemption Act – *Occupation*

Reasons for Judgment of Mr. Justice Esson April 19, 1988

The issue in this proceeding is whether the petitioner company, ("Alfalfa"), was assessable for municipal taxes for the year 1984 upon certain land in Dawson Creek. The respondents below, who together I will refer to as "the assessor", appeal a decision of Mr. Justice A. G. MacKinnon holding that Alfalfa was not assessable.

The land is owned by British Columbia Railway Company ("B.C. Rail"). Its assets are exempt from taxation under the *Pacific Great Eastern Railway Taxation Exemption Act Amendment Act, 1929*, c. 49 but with this exception: land and improvements held under lease from B.C. Rail are not exempt. Alfalfa was lessee of the land under a lease from B.C. Rail which ran from 1974 to 1993 but which was terminated for breach on December 28, 1983. It is common ground that Alfalfa, as lessee, was properly assessed for the 1983 taxation year. It is now common ground that the lease was terminated on December 28, 1983 although, at trial, the assessor contended otherwise.

The submission now is that Alfalfa, although not a lessee, nevertheless continued to be an occupier "in fact" on December 31, 1983, and that it was thus properly assessed for the 1984 taxation year. The assessor's case depends upon establishing that the land was "held or occupied" by Alfalfa within the meaning of s. 35 (1) of the *Assessment Act*, RSBC 1979, c. 21 and that it was an “occupier" within the meaning of s. 1(b) of that Act. Those sections read:

> 35. (1) Land the fee simple of which is held by or on behalf of a person who is exempted from taxation under an Act, and which is held or occupied otherwise that by, or on behalf of that person, is, with its improvements, liable to assessment under this section.
>
> s. 1 'occupier' means
>
> (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,

> agreement for sale, accepted application to purchase, easement, or other record from the person exempted from taxation or who simply occupies the land

The assessor also relies on this language in the judgment of Lambert J.A. for the Court in *R. in Right of British Columbia et al* v. *Newmont Mines Limited* (1982), 3 W.W.R. 317 at 324:

> ... possession in fact, or occupation in fact, based on an exclusive or on a non-exclusive right to possession or occupation, or even on no right at all, is sufficient to make the person in possession or occupation subject to assessment and taxation.
>
> I conclude from the definition of 'occupier' that possession or occupation in fact is sufficient to make Newmont assessable and taxable, whether the right that is exercised by Newmont to carry out the possession or occupation is an exclusive right or not.

I turn to the facts which are said to render Alfalfa an occupier subject to assessment and taxation. During the lease, it had placed on the land structures and machinery necessary for its business of operating an alfalfa pelleting plant. That included a warehouse, workshop and office, mill building, metal storage shed, oil shed and yard paving. Those assets remained on the property on and after December 31, 1983; most remained in place until 1985 when they were disposed of by the receiver who took possession in September 1984. No active business was carried on by Alfalfa after September 1983. Its operating season would have ended at that time in any event but the company was in financial trouble and it may be that, even before the termination of the lease, it had accepted that it would be unable to carry on business. In September 1983, it had been put on notice by B.C. Rail that the lease would be terminated if certain breaches in respect of payment of taxes were not remedied before December 28, 1983. Alfalfa seems to have accepted before that date that it would not be able to remedy the breach. By December 28, 1983, it had no employees and there apparently was no one in the Dawson Creek area taking any active interest in its affairs. Its principal, Mr. Verdonk, was living in Chilliwack and pursuing other business interests.

In the letter of termination, B.C. Rail warned Alfalfa that, unless and until the taxes were paid, it must not remove from the lands the buildings, the machinery, equipment and other things thereon. Under the terms of the lease, the tenant was entitled to remove those things.

After terminating the lease, B.C. Rail changed the locks on the buildings. Mr. Verdonk occasionally was allowed access to them for the purpose of removing some pieces of personal property and for showing the company's assets to potential purchasers. It is not clear from the evidence when the locks were changed or when Mr. Verdonk first visited the premises. I will assume that none of that took place until after December 31, 1983.

The evidence adduced, mainly on affidavit, was in some respects rather fragmentary. It has not been shown that the judge, in concluding that Alfalfa was not in occupation at the material time, applied a wrong principle. The conclusion was therefore essentially one of fact and was, in my view, one which could reasonably be reached on the evidence.

The nub of the matter is that Alfalfa's right to occupation ended on December 28, 1983 and, while there is some evidence consistent with Alfalfa having retained possession in fact after that date, the evidence as a whole does not support such a conclusion as to the whole parcel or even as to the part occupied by Alfalfa's structures. It does not appear that Alfalfa, after termination, had anything to do with the land except as a place to store its assets, and even that was subject to the restriction imposed by B.C. Rail on Alfalfa's right of removal.

That restriction, while not a matter of conclusive importance in relation to these issues, was of some significance. Even without the restriction, Alfalfa might have left its assets on the property after termination simply because it had no reason to do otherwise, and I do not think that would have led to any different result in this proceeding. The assessor submits that the restriction imposed by B.C. Rail was one which it was not legally entitled to impose, being a purported right

of distress after termination. Assuming that to be so, the position taken by B.C. Rail is nevertheless significant as showing that it asserted immediately the right to exclusive occupancy which arose on termination.

Having found that Alfalfa was not in occupation, the chambers judge went on to hold against the assessor on a second issue which arises out of the wording of s. 2 of the *P.G.E. Railway Taxation Exemption Act*, supra. He held, in effect, that s. 35(1) of the *Assessment Act* does not apply because the question of the scope of exemption is dealt with in the railway's special act and has the effect of exempting from assessment all railway property not held by another under lease. If that is right, the land would be exempt even if occupied in fact.

We heard elaborate submissions on this issue. It is one of some difficulty. I am left in some doubt whether the decision of the chamber judge on this question was correct, particularly as s. 79 of the *Assessment Act* may not have been drawn to his attention. That section provides that, where there is conflict between that act and any other, the provisions of the *Assessment Act* will prevail. I do not say that the provisions are in conflict - but only that the whole issue is one of some difficulty. As the assessor's appeal fails on the question of fact, the issue of law is better left for resolution if and when it arises on the facts.

I would dismiss the appeal.

I agree. Mr. Justice Carrothers.

I agree. Mr. Justice Locke.