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**NORTHWEST ALFALFA PRODUCTS LTD.,
In Receivership**

v.

**BRITISH COLUMBIA ASSESSMENT AUTHORITY,
RONALD F. KENNEDY,
and
THE CORPORATION OF THE CITY OF DAWSON CREEK**

Supreme Court of British Columbia (A851355) Vancouver Registry

Before: MR. JUSTICE MACKINNON (in Chambers)

Vancouver, June 5, 1986

R. J. Bauman for the petitioner, Northwest Alfalfa Products Ltd.
B.T. MacDonell for the respondents, British Columbia Assessment Authority and Ronald F. Kennedy
G. Anderson for the respondent, The Corporation of the City of Dawson Creek

Reasons for Judgment

July 24, 1986

The petitioner seeks an order under s. 2 of the *Judicial Review Procedure Act*, R.S.B.C. 1979, c. 209 to have its name deleted from the 1984 B.C. [Assessment] Authority Assessment Roll.

The petitioner was assessed as an occupier under s. 35 of the *Assessment Act*, R.S.B.C. 1979, c. 21:

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 than by, or on behalf of that person, is, with its improvements, liable to assessment under this section.

The petitioner formerly held the lands as lessee under a lease from the British Columbia Railway Company (B.C. Rail). Because that lease was terminated on December 28, 1983 it was submitted that the lands are exempt from taxation.

The *Pacific Great Eastern Railway Taxation Exemption Act Amendment Act*, 1929, c. 49 provides:

2. The Pacific Great Eastern Railway Company, and its capital stock, franchises, income, tolls, and all its properties and assets, shall, so long as all the issued shares in the share capital of the Company continue to be held by His Majesty in right of the Province, be exempt from all taxation whatsoever, or however imposed, by or under the authority of the Legislature; but the exemption provided by this section shall not apply to lands or to improvements upon lands *held under lease from the Company*, nor to lands which have been subdivided into lots containing one acre or less in respect of which a plan of subdivision has been, or may hereafter be, registered in any land registration district and which do not form part of and are not used in connection with the operation of its railway.

The relevant facts are:

1. B.C. Rail leased to South Peace Dehy-Products Ltd. the subject lands from January 1, 1974 to December 21, 1993;
2. The aforesaid lease was assigned to John Verdonk in late December 1979 and on April 4, 1980 was assigned to the petitioner;
3. On December 28, 1983 B.C. Railway terminated the lease for non-payment of taxes for the year 1983. B.C.R. cautioned the petitioner not to remove from the land the buildings, machinery, equipment and things thereon to which it might claim ownership until such time as the taxes were paid, and thereby exercise the rights of B.C. Rail as landlord to distraint on the assets of the petitioner to satisfy outstanding debts under the lease. A copy of this letter was sent to the respondent, the B.C. Assessment Authority, requesting the cancellation of the lease on its records and the reversion of the property to B.C. Rail on its exempt rolls.
4. The respondent, the City, issued to the petitioner a statement of property tax account for 1984 for the land in the amount of \$27,052.86;
5. By letter dated August 21, 1984 solicitors for B.C. Rail wrote to the City requesting the cancellation of the statement of property tax for 1984;
6. By letter dated September 20, 1984 B.C. Rail wrote to the City advising it that supplementary assessments had been issued to remove the petitioner's name, as mentioned in the letter dated April 5, 1984 from the B.C. Assessment Authority;
7. By letter dated October 4, 1984 the Assessor wrote to B.C. Rail informing it that the letter dated April 5, 1984 was in error and that no supplementary assessments had been issued deleting the petitioner's name from the assessment roll because a company known as Mainline Warehousing & Storage Ltd. was in occupation of the land;
8. Mainline Warehousing & Storage Ltd. was in occupation of the land for a period during 1984, and was using the warehouses thereon for its own purposes, that is to store its own chattels;
9. Mainline Warehousing & Storage Ltd. was not in occupation of the land in 1984 pursuant to any agreement with or under the direction of the petitioner;
10. Mainline Warehousing & Storage Ltd. was not in occupation of the land in 1984 pursuant to any agreement with or under the direction of B.C Rail;
11. By letter dated October 11, 1984 the City wrote to B.C. Rail enclosing a copy of the letter dated October 4, 1984, and informing B.C. Rail that the City would not cancel taxes until a supplementary notice had been received from the B.C. Assessment Authority;
12. On November 22, 1984, the Royal Bank appointed Dunwoody Limited receiver-manager of all the undertaking and assets of Northwest Alfalfa pursuant to the terms of the debenture;
13. By letter dated November 22, 1984 the Assessor informed the City that in his opinion the petitioner continued to occupy the land and was therefore assessable as an occupier pursuant to s. 35 of the *Assessment Act*.

ISSUES

1. Reasonable delay;
2. Jurisdiction of the court;
3. Was the lease terminated?;
4. Occupancy of the lands.

The respondent submits the petitioner failed to exercise its *statutory* right of appeal from the decision of the Assessor and delayed unreasonably in bringing this application and the court should therefore exercise its discretion to refuse relief.

By letter of December 28, 1983 the B.C. Railway gave notice to the petitioner the lease was terminated. A copy was sent to both the B.C. Assessment Authority and the City of Dawson Creek.

On April 5, 1984 the B.C. Assessment Authority advised B.C. Railway the petitioner's name had been removed from the rolls.

On November 22, 1984 the B.C. Assessment Authority advised the City the petitioner continued to occupy the lands and was therefore assessable under s. 35 of the *Assessment Act*.

By the time the B.C. Assessment Authority gave notice to the petitioner of its refusal to allow exemption, the time for appealing the assessment, as provided under s. 40 of the *Assessment Act*, had long since expired.

In such circumstances it would be most inequitable to refuse to hear this petition on the grounds it should have exhausted its remedies under the statute.

JURISDICTION

Whether or not the lands are exempted from assessment under s. 2 of the *Pacific Great Eastern Railway Taxation Exemption Act*, S.B.C. 1926-27, as amended S.B.C. 1929, c. 49, is a question of law. As such the jurisdiction of the court is not ousted: *Abel Skiver Farm Corporation v. Town of Sainte-Foy*, [1983] 1 S.C.R. 403. At 435 Beetz J. said:

The answer to this first question determines whether the items at issue are taxable or tax-exempt. The courts have held that this second question is also one of law: *City of Toronto v. Olympia Edward Recreation Club Ltd.*, [1955] S.C.R. 454; *Protestant School Board of Greater Montreal v. Jenkins Bros. Ltd.*, [1967] S.C.R. 739 at p. 742.

The courts have consistently held, as indicated above, that when the question is whether an immovable is taxable or exempt, in whole or in part, the fact that the municipal taxing statute has provided a special appeal procedure does not oust the superintending and reforming authority of the Superior Court, and it does not matter whether the taxpayer neglected to use this procedure or, in using it, lost his case.

LEASE TERMINATION

On December 28, 1983 B.C. Railway gave notice of termination of the lease for non-payment of the 1983 property taxes.

The respondent contends the termination was invalid because the reason for cancellation (overdue taxes) did not exist. Notwithstanding the notice by the City of Dawson Creek to pay the taxes on or before the *1st of July* the respondent says the taxes were not *due* until December 31, 1983. Thus it was submitted there was no cause for termination: *The Corporation of Delta v. Fahl Holdings Ltd.*, No. C822652 New Westminster Registry, December 22, 1982 - unreported.

The petitioner lessee has not taken the position the lease was improperly terminated.

In my view it is not open to a party (the Assessor), outside the lease contract, to maintain the rights contained in the contract were not properly enforced.

Accordingly, I find the lease was effectively terminated on December 28, 1983.

OCCUPANCY

The Assessor submits s. 35 is the applicable provision that the petitioner occupied the lands and therefore not exempted from taxation.

I find, firstly, on the facts the petitioner was not in occupancy. Furthermore, notwithstanding s. 35 of the *Assessment Act*, even if the petitioner was in occupancy the lands are not under lease and therefore exempted under s. 2 of the *P.G.E. Railway Taxation Exemption Act*, supra.

Section 35 of the *Assessment Act* does permit assessment of lands of the persons exempted from taxation where such lands are held or occupied otherwise than by the exempted person.

In 1927 the exemption afforded the Railway was found in s. 2 of the *P.G.E. Railway Taxation Exemption Act*. It provided, in part, as follows:

. . .but the exemption provided by this section shall not apply to lands or to improvements upon lands held under lease from the Company or occupied for other than railway purposes.

Thus, the exemption did not apply to lands under lease or occupancy.

In 1929 the legislation was amended to provide:

. . . but the exemption provided by this section shall not apply to lands or to improvements upon lands held under lease from the Company.

Thus, the Legislature eliminated the former provision that provided the exemption would not apply to lands *occupied* for other than railway purposes.

In my view the test as to whether the exemption applies to *railway* lands is whether or not they are under lease. If they are not, they are exempt. Occupancy is not relevant.

I find the railway lands were not held under lease from the Company, and are therefore exempt from taxation.

The petitioner is entitled to the relief sought.