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SHELL CANADA RESOURCES LTD.

v.

ASSESSOR OF AREA 22 - EAST KOOTENAY

British Columbia Court of Appeal (CA007653) Vancouver Registry

APPEAL

Before: MR. JUSTICE HINKSON, MR. JUSTICE LAMBERT, MR. JUSTICE HUTCHEON

Vancouver, January 16, 1989

C.W. Sanderson and P.D. Feldberg for Shell Canada
P.W. Klassen for the assessor
G.E. McDannold for the municipality

CROSS-APPEAL

Before: MR. JUSTICE HINKSON, MR. JUSTICE HUTCHEON, and MR. JUSTICE LOCKE

Vancouver, January 17, 1989

C.W. Sanderson and P.D. Feldberg for Shell Canada
P.W. Klassen for the assessor
G.E. McDannold for the municipality

Reasons for Judgment January 16, 1989

HINKSON, J. A.: This is an appeal from a decision of a judge in chambers in respect of a stated case from the decision of the Assessment Appeal Board.

Shell Canada Resources operated a coal mine near Sparwood, British Columbia. In 1984, the Assessor was required to assess the actual value of the mine as of July 1, 1984. The Assessor asserts that pursuant to s. 14 of the *Assessment Act*, he requested information from Shell with respect to certain details of the mining operation and that all that information was not forthcoming.

In particular, the Assessor complains that a report which had been requested by Shell from Strategic Planning Associates Incorporated was not revealed to the Assessor prior to the date upon which he made his assessment for 1984.

An appeal was taken to the Court of Revision and then to the Assessment Appeal Board. Prior to the hearing before the Assessment Appeal Board, the Board directed the parties to exchange their briefs of expert evidence, and that was done. It was at that time, about a month before the hearing before the Assessment Appeal Board, that the Assessor first obtained a copy of the report of Strategic Planning Associates Incorporated.

Ultimately, the Board dealt with the matter of actual value and held that the Assessor had erred in his approach to the matter of value as of July 1, 1984. The chambers judge concluded that it was unfair for the company to first produce the report before the Assessment Appeal Board and he, therefore, allowed the appeal on the stated case and remitted the matter to the Board to consider its decision in light of his conclusion that the Board ought not to have received the evidence contained in the report and the evidence of a witness who testified with respect to the report.

Counsel for the Assessor has informed us that the hearing before the Assessment Appeal Board is a hearing *de novo*. Under the statute, the Board is fixed with a statutory duty to determine whether the assessment is too high or too low with regard to the actual value of the land and improvements at the date of the assessment. It is contended on behalf of the Assessor that the owner has a duty pursuant to s. 14 of the *Assessment Act* to furnish to the Assessor information in the owner's possession necessary to enable the Commissioner to perform his duties. It is asserted that failure to perform that duty should result in a sanction upon the owner and the sanction suggested (and the one adopted by the chambers judge) would be to hold that the evidence first tendered before the Assessment Appeal Board would be held to be inadmissible.

As I have indicated, the statutory duty upon the Board is to find the actual value at the relevant date. The evidence in question was relevant and admissible for that purpose. There is no basis for the court to make a rule of practice which would hold that evidence first adduced before the Assessment Appeal Board and not earlier revealed to the Assessor would be inadmissible. The statute is quite clear with respect to the duty imposed upon the Assessment Appeal Board. If such a rule is to be made, it is a matter for the legislature and not for the courts.

For those reasons, I would allow the appeal and set aside the answers given by the chambers judge to questions 7 (b) and 9 of the stated case. I would allow the appeal accordingly

LAMBERT, J. A.: I agree.

HUTCHEON, J. A.: I agree.

HINKSON, J. A.: The appeal is allowed.

Reasons for Judgment (Cross-Appeal) January 17, 1989

HINKSON, J. A.: I will ask Mr. Justice Hutcheon to give the first judgment.

HUTCHEON, J. A.: Shell Canada Resources is the owner of an open coal mine known as Line Creek and in 1984, the Assessor of Area 22 - East Kootenay valued that mine for the purposes under the *Assessment Act* using a cost approach at approximately $150 million. Shell Canada appealed that assessment in 1985 to the Court of Revision and then to the Assessment Appeal Board.

At the Assessment Appeal Board, the value was reduced by the Board to approximately $72 million using an approach which has been described as "discounted cash flow".

The Assessment Appeal Board was requested to state cases to the Supreme Court and that was done, one on behalf of the Assessor and one on behalf of the District of Sparwood, District of Elkford.

At the level of the Supreme Court, Mr. Justice Spencer answered a large number of questions. From those opinions he gave on those questions, appeals were taken by Shell Canada, by the Assessor, by the District of Sparwood, and the District of Elkford to this court.

Yesterday, we heard the appeal on behalf of Shell Canada and that appeal was allowed. Today we heard the cross-appeal of the District of Sparwood, the District of Elkford, and the Assessor.

The issue on the cross-appeal was framed by Mr. McDannold, counsel for the two districts, in this way:

> Whether the board was correct to accept the discounted cash-flow and reject the cost approach in arriving at actual value.

Mr. Klassen, counsel for the Assessor, put the issue in these terms:

> That the Assessment Appeal Board selected one method over the other on the basis that there was no evidence to support the cost approach.

The district and the Assessor both relied upon the judgment of this court in *Crown Forest Industries Ltd.* (Crown Zellerback Canada Ltd.) v. *Assessor of Area 06 - Courtenay* (1987), 10 B.C.L.R. (2d) 145, and in particular the reasoning expressed by Mr. Justice Esson on behalf of the court that replacement cost is generally used as a means of determining market value in the absence of reliable market evidence and that the Assessment Appeal Board need not have evidence before it in respect of the use of the cost approach, because as a matter of general experience, cost equals value where the plant that is in question is being used for the purpose for which it was built.

Mr. Justice Spencer considered the issues that were before us and in his reasons for judgment, he said this:

> Whether or not the evidence in this case justified disregarding the replacement cost method entirely and relying solely on the discounted cash flow was, in my respectful opinion, a question of fact and not of law. The selection or rejection of the appropriate valuation technique is a question of fact for the Board. It is not reviewable on a stated case, provided there was some evidence to support that selection.

After the citation of a number of decided cases, Mr. Justice Spencer continued:

But although the selection of the appropriate valuation technique is a question of fact, there may be cases where, in deciding a question of fact, the Board errs in principle. It would, for instance, be an error of principle if the Board thought that as a matter of law it was bound to choose one valuation method only and to discard all others, because the *Sun Life* case (supra) and the *Crown Forest Industries* case (supra) both clearly support the principle that different methods may be used side by side. I do not think the Board made that error here. It clearly paid close attention to both the discounted cash flow method and the replacement cost method and made a choice between them for a number of reasons articulated at pp. 61-63. Chief among those was the reason that the subject property suffers and will continue to suffer for some time from excessive external obsolescence (depressed international coal prices) and that the discounted cash flow method takes better account of all forms of obsolescence than does the replacement cost method.

In my opinion, those passages sum up exactly what occurred in this case. The Board concluded:

> The Board is satisfied that the subject property is subject to excessive external obsolescence and will continue to suffer for some time.

The Board then went on to point out that the cost approach did not, in its ordinary use, concern itself with economic obsolescence, but that an appraiser could take that into account having reached a value on the cost approach. The Board then said:

> In theory if all the facts are known then the final value arrived at in using the cost approach and the income approach D.C.F. should be reasonably close.
>
> The difference between the final value using the cost approach ($85,946,150) and the D.C.F. approach ($72,756,955) is $13,189,195 in this appeal. The difference must be attributed, in the Board's opinion, to the difficulty experienced by the appraisers in attempting to quantify external obsolescence using the "cost approach."

And then the Board went on to say it preferred, because of the difficulty encountered with the cost approach, the D.C.F. approach for the purpose of valuation. I agree with Mr. Justice Spencer that the Board did not make the error here of rejecting the cost approach without evidence. He had that evidence and that was quoted again from the reasons for judgment of Mr. Justice Spencer:

> The question now becomes, was there any evidence upon which the Board was justified in discarding the replacement cost method entirely. In my respectful opinion there was. There was evidence from the owner's witnesses, Mr. Hildebrand, Mr. Glanville and Mr. Lane, that industrial mining properties are bought and sold on a discounted cash flow valuation without reference to replacement cost. Mr. Lane testified that owners laugh at him if he tries to suggest valuation based upon replacement cost. A number of examples of sales achieved using a discounted cash flow valuation were given. There was evidence that the present mining recession is not merely a temporary cycle but is projected over a long term. There was evidence given by Mr. Glanville (Vol. 8, p. 52 of the transcript), that he knew of several copper mines in the United States which sold, about two years after construction, for about twenty-five per cent of the cost of construction. He could offer no examples from the sale of coal mines, but that evidence was available to the Board to tell them that the market will in fact, on suitable evidence, value a new producing mine at substantially less than what it costs to develop.

On this basis, there was evidence before the Board in which it was entitled to reject the cost approach, and there was evidence before the Board on which it was entitled to accept the discounted cash flow approach.

For these reasons, I agree with the reasons for judgment and the conclusion of Mr. Justice Spencer and would dismiss the cross-appeal.

HINKSON, J. A.: I agree.

LOCKE, J. A.: I agree.

HUTCHEON, J. A.: The cross-appeal is dismissed.