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B.C. HYDRO AND POWER AUTHORITY

v.

ASSESSOR OF AREA 10 - BURNABY-NEW WESTMINSTER

Supreme Court of British Columbia (A870287) Vancouver Registry

Before: MR. JUSTICE DAVIES (In Chambers)

Vancouver, April 24, 1987

John R. Lakes for the Appellant
Peter W. Klassen for the Respondent

Reasons for Judgment June 11, 1987

This is an appeal to this Court from the decision of the Assessment Appeal Board dated August 19, 1986 by B.C. Hydro and Power Authority. The case stated by the Board is pursuant to s. 74 (2) of the *Assessment Act,* R.S.B.C. 1979, c. 21. The Order of the Board appealed from reads, in part, as follows:

> "It is the Board's conclusion that the lands cannot be designated as Park lands until an agreement committing the lands to that use is finalized, accordingly the values and classification should not be disturbed."

The facts set out in the stated case are as follows:

> "1. The property under appeal is a corridor of land extending from Boundary Road in Burnaby to 12th Street in New Westminster. A location map of this corridor is contained in Appendix 1 of Exhibit 1A filed herein.
>
> 2. There have been three developments contained within the land corridor. namely:
>
> (a) the Advanced Light Rapid Transit System (ALRT) Sky train;
>
> (b) a linear park known as B.C. Parkway which has been developed by B.C. Parkway Society; and
>
> (c) a B.C. Hydro railway line which is known as the Central Park Rail Line.
>
> The majority of the land of the corridor has been converted to use as the park way developed by the B.C. Parkway Society. This is a linear park running the entire length of the corridor. The approximate length of the parkway through Burnaby and New Westminster is 5.87 miles. The average width of the parkway is 33 ft. The park way contains a 9.85 ft. wide asphalt walking path, a 4.9 ft. wide limestone jogging track and landscaping. The area of the land which was developed as a parkway as of September 30, 1985 has been estimated to be 2.475 acres for Roll No. 16200.000, and 10.78 acres for Roll No. 9901-0163-0000 in Burnaby.

3. At the date of valuation the appellant and B.C. Transit were negotiating an agreement whereby B.C. Transit would buy the property comprising the linear park from the appellant. At the date of valuation no sale agreement had been concluded. B.C. Transit requested, by telexes dated December 1984, permission to enter upon the parkway land to begin developing a parkway. On December 14, 1984, the appellant, by letter, granted such a license to B.C. Transit. The B.C. Parkway Society, as a result, has developed and is maintaining the parkway on behalf of B.C. Transit.

4. B.C. Regulation 271/85 grants an exemption from taxation of lands and improvements to the Authority (B.C. Transit) and the B.C. Parkway Society. This regulation was approved and ordered on August 21, 1985.

5. A copy of the Board's decision dated August 19, 1986 is attached as Schedule "A", and a copy of the Board's order dated September 10, 1986 is attached as Schedule "B"."

The questions which the Board was required to submit for the opinion of this Court are as follows:

"1. Did the Assessment Appeal Board err in law by failing to find that B.C. Regulation 271/85 did not apply to include a portion of land as being exempt from taxation which was being maintained as a park?

2. Was the Assessment Appeal Board's failure to find that the said portion should have been exempted under the regulation arbitrary and contrary to the evidence?

3. Did the Assessment Appeal Board err in law by failing to find that the said portion of the land was not occupied by the appellant?

4. Did the Assessment Appeal Board err in law by finding that the said portion of the property should be classified "Utilities"?

5. Was the Assessment Appeal Board's finding that said portion of the property remain classified as "Utilities" arbitrary and therefore an error in law?"

CONCLUSIONS

I have reached the following conclusions with respect to the questions submitted:

1. Yes.

2. Yes.

3. Yes.

4. Yes.

5. Yes.

1. At the outset, counsel for the respondent conceded that the Assessment Appeal Board had jurisdiction to determine whether or not there should be a tax exemption. The Board found that the land of the corridor had, in fact, been converted to a park way by the B.C. Parkway Society, although there had not been a formal agreement completed between the appellant and B.C. Transit and/or the B.C. Parkway Society.

Section 19 of the *British Columbia Transit Act*, R.S.B.C. 1979, c. 421 provides as follows:

19. (1) The Lieutenant Governor in Council may exempt any corporation owned, directly or indirectly, by the government, in relation to its construction or acquisition of a rail transit system or its operation of a public passenger transportation system. from

(a) taxation and payment of fees under the *Municipal Act* or *Vancouver Charter* except with respect to the taxation of real property; or

(b) provisions of the *Motor Carrier Act* respecting the imposition of fees and requirements to be licensed.

(2) The Lieutenant Governor in Council may, notwithstanding subsection (1), exempt a person he specifies from liability under the *Assessment Authority Act*, the *Education (Interim) Finance Act*, the *Hospital District Act*, the *Municipal Finance Authority Act*, the *Municipal Act*, the *Vancouver Charter* and this Act, to taxation of land and improvements that the Lieutenant Governor in Council designates as owned or used by that person for the purpose of the construction, acquisition or operation of the Advanced Light Rapid Transit system. [emphasis added]

The following Regulation (B.C. Regulation 271/85) was passed pursuant to section 19 of the *British Columbia Transit Act*.

British Columbia Transit Act Regulations B.C. Reg. 271/85

21. (1) A person specified in subsection (2) (a) is, effective on and after January 1, 1985, exempt from liability under the Act, the *Assessment Authority Act*, the *Education (Interim) Finance Act*, the *Hospital District Act*, the *Municipal Finance Authority Act*, the *Municipal Act* and the *Vancouver Charter*, to taxation of lands and improvements designated in subsection (2) (b).

(2) For the purposes of subsection (1),

(a) the following persons are specified:

(i) the authority;

(ii) the British Columbia Parkway Society;

(iii) a person whose property is occupied by the authority for the purpose of the construction, acquisition or operation of the A.L.R.T. system, and

(b) land and improvements that

(i) are classified as class 2 property under section 26 (8) of the *Assessment Act*, and

(ii) are owned or used by the authority for the purpose of the construction, acquisition or operation of the A.L.R.T. system, or are maintained by the British Columbia Parkway Society on behalf of the authority,

are designated as owned or used by a person referred to in paragraph (a) for the purpose of the construction, acquisition or operation of the A.L.R.T. system. [emphasis added]

Section 21 (2) (b) (ii) provides, in part, that lands and improvements that are maintained by the B.C. Parkway Society on behalf of the B.C. Transit Authority are to be designated as owned or used by a person specified in subsection (2) (a). The Board found that B.C. Parkway Society was maintaining the subject property on behalf of the B.C. Transit Authority as on the date of

valuation. The British Columbia Parkway Society is a person specified under subsection (2) (a) and therefore the subject lands should be exempt from taxation. Question 1 is answered "Yes".

2. B.C. Regulation 271/85 does not require finalization of an agreement committing the lands as park lands. There is no question but that the wording of the regulation contemplates that there be a formal agreement for the transfer of the land as between the appellant and the B.C. Transit Authority and/or the B.C. Parkway Society. However, it is not a condition precedent that there be a formal agreement committing the land to park use for the subject lands to come within the wording of subsection (2) (b) (ii) as the lands were found to be maintained by the B.C. Parkway Society on the material date.

The question then arises as to whether the Board's finding is an arbitrary decision and contrary to the evidence. The definition of "arbitrary" is set out in *Pacific Logging Company* v. *The Assessor for the Province of British Columbia* (322-1974) Victoria, October 23, 1974. McIntyre J.A. (as he then was) stated at p. 492:

> "When I use the word 'arbitrary' I mean - and from the context in which the word is used in the case I conclude the assessor meant - a decision made at discretion in the absence of specific evidence and based upon opinion or preference (see Shorter Oxford English Dictionary). The resulting assessment is then made without regard for the statutory provisions and uncontrolled by them."

He continued:

> ". . . an assessment made in a manner not justified in law cannot stand. In my view that is what has occurred here. The assessor has assessed upon a basis not authorized in the statute, and in the selection of another method which has no legal warrant, has acted in an arbitrary manner and created an arbitrary assessment."

In my view, the Board has reached its conclusion arbitrarily and the answer to Question 2 is "Yes"

3. I have indicated that I have found the answer to Question 3 to be "Yes". In reaching this conclusion, I have considered section 3 (1) of the *Hydro and Power Authority Act*, R.S.B.C. 1979, c. 188 and section 34 of the *Assessment Act*, R.S.B.C. 1979, c. 21.

> *Hydro and Power Authority Act*
>
> 3 (1) The authority is for all its purposes an agent of Her Majesty the Queen in right of the Province, and its powers may be exercised only as an agent of Her Majesty.
>
> *Assessment Act*
>
> 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 <u>occupied by some person other than the Crown</u>, situated on land the fee of which is in the Crown, or in some person on behalf of the Crown. [emphasis added]

Section 34 of the *Assessment Act* provides that either the name of the holder on behalf of the Crown or the name of an occupier other than the Crown be entered in the assessment roll. The Board found that B.C. Parkway Society developed and maintained the park lands on behalf of B.C. Transit, as a result of the appellant granting a license to B.C. Transit to enter upon the lands for the purpose of developing a parkway. I have, therefore, concluded that the Board erred in law in failing to properly apply the provisions of the *Assessment Act* to the facts. In my judgment, the property occupied by B.C. Parkway Society should be assessed in the name of B.C. Parkway Society (*R. in right of British Columbia et al.* v. *Newmont Mines Ltd.* [1982] 3 WWR 317 (BCCA)).

4. & 5. I have concluded that the Board erred in law in finding that the subject lands should be classified as "Utilities" as provided under the regulations passed pursuant to the *Assessment Act*. B.C. Reg. 290/85, deposited September 10, 1985 pursuant to the *Assessment Act*, repealed section 8 (b) of Regulation 438/81 and substituted the following section 8 (b) "land, but not improvements on that land, used solely as an outdoor recreational facility for the following activities or uses: . . . (xx) parks and gardens open to the public". The wording of the regulations clearly intends that the proper classification of the lands be made based on the use of the property. The use to which this property has been put comes within the description of "parks and gardens open to the public". Therefore, pursuant to the revised regulations, the proper classification for the subject lands should be under Class 8 which is set forth in Part 1 "Prescribed Classes of Property" of B.C. Reg. 438/81 as am. B.C. Reg. 290/85. The answers therefore to Questions 4 and 5 are "Yes".

In accordance with section 74 (6) of the *Assessment Act* these reasons will be remitted to the Board as the opinion of the Court.