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**B.C. HYDRO & POWER AUTHORITY**

**v.**

**ASSESSOR OF AREA 10 - BURNABY-NEW WESTMINSTER**

British Columbia Court of Appeal (CA008077) Vancouver Registry

Before THE HONOURABLE MR. JUSTICE LAMBERT, MR. JUSTICE MACDONALD and MR. JUSTICE MACFARLANE

Vancouver, June 21, 1988

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

**Reasons for Judgment** June 22, 1988

LAMBERT, J.A.: This is an appeal under subsection 74 (7) of the *Assessment Act*. That subsection was amended in 1982 and now reads:

> "74. (7) An appeal on a question of law lies from the decision of the court to the court of appeal with leave of a justice of the court of appeal."

The decision of the Assessment Appeal Board was in these terms:

"The subject property is a System Control Centre owned and operated by B.C. Hydro and located on the top of Burnaby Mountain. This very substantial four storey building was constructed in 1968 conforming to the architectural requirements of the adjoining Simon Fraser University. A part of this complex includes the Radio Communications network located on top of the adjoining Water Tower.

The evidence makes it clear that the building's design and purpose was to be a show-piece for B.C. Hydro. The podium and public viewing areas were situated such as to be an advantageous look-out and observation point. The Board believes that B.C. Hydro in quite a knowledgeable way built what was very much a single purpose building. The Board therefore concludes that it would be inappropriate to value the building on another basis than the cost approach. Both parties provided extensive data in this regard, however the appellant's evidence with respect to replacement cost is considered to be less than adequate if it was the intention to provide a thoroughly documented model for a suitable replacement facility. It is quite clear from the evidence that the functional indicated use of this facility as a public interest area can no longer be permitted because of the victimizing of such facilities by certain public elements.

As a consequence it has been necessary to install substantial protective security services which is an element of functional obsolescence that the Board believes must be considered by the assessor.

The Board is persuaded that the value must therefore be adjusted reflecting a depreciated cost in between the values agreed by both parties. It is concluded therefore that the depreciation factor

should be increased to 3% and applied to the reproduction cost as set out by the Respondent in Exhibit No. 2, page 2 and that all components in that exhibit should be given the full depreciation of 48%, this will conclude a value of $2,705,300 (rounded)."

The facts were stated in this way in the Stated Case:

> "1. The subject improvements are located on top of Burnaby Mountain on land owned by Simon Fraser University, which leased the land to the appellants. The improvements were constructed for the purpose of a system control centre, housing computers and other equipment for controlling generating stations and the flow of power in B.C. Hydro's electrical system through the Province of British Columbia. The control of the various installations is exercised by means of a microwave communication system and the subject facilities were located at their present location for the efficient operation of the microwave communication system.
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> 2. As a condition of the lease the appellant was obliged to accept specific conditions and restrictions from the University to conform to the architectural requirements as determined by the University. Therefore, two of the four levels of the building are underground and there is an extensive area used initially as a public podium area and also an additional raised area which was built for the purpose of providing a public observation deck and which was constructed as part of the building. In addition, there was some open, public space incorporated into the building to comply with the original architectural requirements.
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> 3. The subject improvements, from an operational point of view, still fulfill the function for which they were originally designed and built, however, as a result of vandalism by some members of the public and for security reasons, it has been necessary to restrict public access to certain of the area designed for the public, and to prohibit public access to other areas. Further, the appellant has found it necessary to install substantial security devices in the form of, *inter alia*, alarm systems and surveillance cameras. The Board found that the restriction and prohibition of public access and the installation of security devices caused the building to have an element of functional obsolescence or depreciation.
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> 4. Both the assessor and the appellant valued the improvements on the basis of the cost approach. The assessor's cost approach involved valuing the building as it had been constructed. The appellant purported to value the building on the basis of a replacement model wherein it excluded the costs of the public amenities and architectural conformity required by the lease with Simon Fraser University.
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> 5. The Board rejected the appellant's evidence as to the cost of replacing the improvements on the basis that the Board was not satisfied that such costs could replace the subject improvements. The Board accepted the assessor's method of determining reproduction cost, but in deriving actual value deducted a further 16% functional depreciation from the reproduction cost determined by the assessors. This deduction was made to quantify those matters set out in paragraph 3 hereof.
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> 6. The Board found that there should be an allowance for functional obsolescence but then decided that this should be by way of accelerated depreciation to the reproduction costs used by the assessor."

These four questions were then asked:

> "1. Did the Assessment Appeal Board err in law by arbitrarily imposing its own value on the property under appeal and thereby exceed its jurisdiction under the *Assessment Act*?

2. Was the Assessment Appeal Board's decision as to the value an improper value to owner and therefore an error in law?

3. Was the Assessment Appeal Board's application of depreciation to determine functional obsolescence against all the evidence arbitrary and therefore an error in law?

4. Was the Assessment Appeal Board's application of depreciation to determine functional obsolescence an error in principle which was therefore an error in law?"

The appeal to the Supreme Court of British Columbia on the Stated Case was heard by Mr. Justice Trainor. With respect to the first question in the Stated Case, the definitions of 'reproduction cost' and 'replacement cost' were not in dispute before him and were not in dispute before us. This is how Mr. Justice Trainor set them out:

"Reproduction Cost:

The cost of construction at current prices of an exact duplicate or replica using the same materials, construction standards, design layout, and quality of workmanship, embodying all the deficiencies, superadequacies and obsolescence of the subject building.

Replacement Cost:

The cost of construction at current prices of a building having utility equivalent to the building being appraised but built with modem materials and according to current standards, design and layout. The use of the replacement cost concept presumably eliminates all functional obsolescence, and the only depreciation to be measured is physical deterioration and (economic) external obsolescence."

Then Mr. Justice Trainor dealt with the first question in this way:

". . . Hydro argued to the Board that the appropriate cost approach would be replacement cost as this would eliminate all functional obsolescence. It argued that once the Board had accepted the fact there was functional obsolescence it could not use the reproduction cost."

* * *

The essence of Hydro's argument is that the approach taken by the Board was arbitrary and an error in principle. It relies on *Pacific Logging Company Ltd.* v. *The Assessor for the Province of British Columbia*, Stated Case 99, 1977 S.C.C. in which the Supreme Court of Canada agreed with the dissenting judgment of Mr. Justice McIntyre in which he said at page 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 on opinion or preference. . .'

Applying that definition to the steps taken by the Board, I do not accept the submission of counsel for Hydro that the Board's action was arbitrary. The Board considered the evidence in an attempt to fix replacement cost and found the evidence wanting. It turned then to consider a possible alternative method of ascertaining actual cost. To hold that the Board was barred from considering alternative methods and limited to the replacement cost approach, would be contrary to the power vested in it under s. 26 (3) of the *Assessment Act* and the cases in which that power had been discussed.

In *Crown Forest Industries Ltd.* v. *Assessor of Area 6 - Courtenay*, B.C. Court of Appeal, Reasons for Judgment dated 30 January, 1987, Esson, J.A. in giving judgment of the Court of Appeal said at page 19:

> 'The Board seems not to have appreciated that it could weigh the various approaches and, in the exercise of its judgment, arrive at a value different from any of them.'

* * *

One could say that the Board might have required additional evidence in order to permit a finding of replacement cost, but it chose to adopt a different approach.

In my view, that was an exercise of judgment to find actual value on the basis of the available evidence. That decision was not arbitrary and the answer to the first question must be, No."

Mr. Justice Trainor then turned to the second question. He said this:

> "The second question involves consideration of whether the Board committed an error in law by assessing value to Hydro rather than to any owner. The assessment must be an objective determination of value to any owner. The costs of construction of this particular facility were dictated to a considerable extent by the University and are not a matter of choice by owner. In any event, it is proper for an assessor to regard an owner as a possible purchaser of a specialty building. In *Crown Forest Industries Ltd.* v. *Assessor of Area 6 - Courtenay*, Esson J.A. starting at page 12 quoted extensively from the opinion of Lord Porter in *Sun Life* v. *City of Montreal* [1952] 2 D.L.R. 81, particularly at page 102 where Lord Porter said:
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> > 'It is the objective not the subjective value which has to be determined though, as has been said, the owner is to be regarded as one of a possible number of buyers, and subject to careful criticism and a sufficient qualification of price, the cost which he chose to incur is a relevant factor.'
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> At page 11 of the judgment in *Crown Forest Industries Ltd.* v. *Assessor of Area 6 - Courtenay*, Esson, J.A. quoted De Grandpre J who gave the judgment of the Supreme Court of Canada in *Golden Eagle Canada Ltd.* v. *City of St. Romauld D' Etchemin* [1977] 2 S.C.R. 1090; (1977) 14 N.R. 243:
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> > 'Appellant itself committed the error in law when it forgot that in all cases of construction for special purposes the assessor must necessarily calculate the replacement value in order to determine the real value, and in determining the theoretical market value must consider the owner as a possible purchaser. The Privy Council confirmed and reconfirmed this view in *Montreal* v. *Sun Life Assurance Co*. . . .'
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> In my opinion, the Board did not commit the error of law alleged and the answer to the second question is, No."

With respect to the third and fourth questions, this is how Mr. Justice Trainor dealt with them:

> "With respect to the third and fourth questions, I have already indicated I am not satisfied the Board's action was arbitrary or an error in principle. These questions simply re-cast the submission that once functional obsolescence is found, the Board is obliged to find value by determining replacement cost. I do not accept that submission. It is open to the Board to use an alternative method to find value. In any event, the choice of method of assessment and fixing of value are questions of fact and consequently, are not open to judicial review.

The answers to the third and fourth questions are both, No."

With respect to the first and second questions in the Stated Case, I agree with the reasons and with the conclusion of Mr. Justice Trainor. I cannot usefully add anything to what he has said. The Board did the best it could with the evidence that was presented to it. In doing so it did not commit any error of law.

With respect to the third and fourth questions, it is clear that Mr. Justice Trainor did not regard them as separate issues. They were not argued as separate issues before him. The arguments set out in the appellant's factum with respect to these two questions are arguments in further support of the appellant's argument on the first question.

During the course of the submissions of counsel queries were raised by the court directed to whether the application of depreciation in the way that it was done by the Board by applying it to reproduction costs as an allowance for functional obsolescence was arbitrary. Those queries by the court came within the wording of the third and fourth questions in the Stated Case. After hearing the submissions of counsel we decided that the issues raised by those queries had not been argued before Mr. Justice Trainor. They had not been raised on the application for leave to appeal to this court. They were not raised in the appellant's factum and they could not now be argued.

Setting aside then the issues raised by queries, nothing remains in the third and fourth questions that has not already been dealt with on the first and second questions. Accordingly, I would dismiss the appeal.

MacDONALD, J.A.: I agree.

MacFARLANE, J.A.: I agree.

LAMBERT, J.A.: The appeal is dismissed.