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B.C. HYDRO & POWER AUTHORITY

v.

ASSESSOR OF AREA 10 - BURNABY-NEW WESTMINSTER

Supreme Court of British Columbia (A870288) Vancouver Registry

Before MR. JUSTICE TRAINOR (in chambers)

Vancouver, May 22, 1987

John R. Lakes for the Appellant
Julian K. Greenwood for the Respondent

Reasons for Judgment

July 9, 1987

The Assessment Appeal Board stated a case at the request of the Appellant, B.C. Hydro and Power Authority pursuant to section 74 (2) of the *Assessment Act* by which an opinion is sought on the following questions:

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 questions involve consideration of the procedure taken and decisions made in the process of arriving at the actual value of improvements constructed by Hydro on land leased by it from Simon Fraser University on the top of Burnaby Mountain. 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 Hydro's electrical system throughout the Province of British Columbia. As a condition of the lease, Hydro was obliged to accept specific conditions and restrictions from the University to conform to its architectural requirements. Two of the four levels of the building are underground and there is an extensive area used initially as a public podium area and public space, including a public observation deck.

For security reasons and because of vandalism by some members of the public, it was necessary to restrict public access to certain of the areas designated as public and to prohibit public access to other areas. In addition, Hydro found it necessary to install substantial security devices. The Board found that the restriction and prohibition of public access and the installation of security devices caused the improvements to have an element of functional obsolescence.

In approaching its task, the Board concluded that because Hydro had built a single purpose building, therefore it would be inappropriate to value the building on another basis than the cost

approach. Both parties were in agreement with this approach generally. Their difference is that Hydro asserted that replacement cost was the correct approach, whereas the Assessor's assertion that reproduction cost was correct was accepted by the Board subject to depreciation for the recognized functional obsolescence.

In the course of their submissions, counsel referred to the glossary of terms contained in the judgment of Madam Justice Southin in *Crown Forest Industries Limited v. Assessor Area 6 - Courtenay*, 3 B.C.S.C. (Case 210) 1179 at p. 1182:

"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 modern 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).

...

Incurable Functional Obsolescence (another term for it is 'Excess Operating Costs'):

In cost approach theory, the difference in operating costs between a modern state of the art mill and an older mill with the same capacity. The argument goes that the older mill is less efficient and requires more persons to operate it.

External Obsolescence:

In cost approach theory, the diminished utility of the subject of assessment due to negative influences from outside the site."

The Assessor is charged with responsibility under the *Assessment Act* to determine the actual value of land and improvements. The Act provides:

"26. (3) In determining actual value, the assessor may give consideration to present use, location, original cost, replacement cost, revenue or rental value, market value of the land and improvements and comparable land and improvements, economic and functional obsolescence and any other circumstances affecting the value of the land and improvements."

It is to be noted that subsection includes a reference to replacement cost but does not specifically mention reproduction cost.

The evidence led by Hydro was in support of its position that the correct approach was replacement cost. Hydro relied on the Board's statement that "the functional indicated use of this facility as a public interest area can no longer be permitted", and also the Board's finding that the need to install security services was "an element of functional obsolescence that the Board believes must be considered by the Assessor".

On the basis of those findings, 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. However, the Board found that "the appellant's evidence with respect to replacement cost is considered to be less than adequate if it was the intention to provide a thorough documented model for a suitable replacement facility". The Board then proceeded to assess actual value by deducting 16% functional depreciation from the reproduction cost as determined by the Assessor.

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 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. . ."

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.

In relation to this question, I refer to one passage in the judgments in the Supreme Court of Canada in the *Sun Life* case. . . At p. 252, Estey J. said:

'Actual value must be, except where there is a market in which the exchange value may be ascertained, a matter of judgment exercised after determining every item that affects the value of the particular immovable under consideration'."

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.

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:

"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."

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. Romuald D'Etchemin* [1977] 2 S.C.R. 1090; (1977) 14 N.R. 243:

"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. . . .*"

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, 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.

The Respondent is entitled to its costs.