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SLUMBERLAND DEVELOPMENT CORPORATION

v.

BRITISH COLUMBIA ASSESSMENT APPEAL BOARD
and
ASSESSOR OF AREA 26 - PRINCE GEORGE

Supreme Court of British Columbia (A863231) Vancouver Registry

Before: MADAM JUSTICE ROWLES (in chambers)

Vancouver, October 30, 1987

G. Hiliker for the Petitioner
R.S. Gill for the Respondent, Assessor of Area 26
G. Copley for the Respondent, B.C. Assessment Appeal Board

Reasons for Judgment November 19, 1987

This is an application for judicial review of a decision of the British Columbia Assessment Appeal Board.

The petitioner is the owner of a motel in Prince George. Under the *Assessment Act*, R.S.B.C. 1979, c. 21, (the Act), the Assessor in 1984 assessed the value of the property for the years 1985 and 1986 at $1,143,750. Section 2 (1l) of the Act provides that the "assessor shall, not later than September 30, 1984 and September 30 in each even numbered year after that, complete a new assessment roll . . . and the roll so completed shall, subject to this Act, be the assessment for the purpose of taxation during the two following calendar years."

On October 29, 1984, the assessed values for 1985 and 1986 were appealed to the Court of Revision. Those appeals were dismissed.

The 1985 and 1986 assessments were then appealed to the Assessment Appeal Board. On April 18, 1985, the assessment against the 1985 value was withdrawn, which withdrawal was confirmed by the Assessment Appeal Board by way of written decision dated May 21, 1985.

This application concerns the decision of the Assessment Appeal Board in respect to the 1986 assessment appeal.

The applicable provisions in s. 2 of the Act governing revisions to the assessment roll for the second calendar year, in this case for the year 1986, for lands and improvements where a commercial undertaking is carried on, are as follows:

> (1.1) The assessor shall, not later than September 30, 1985 and September 30 in each odd numbered year after that, complete a revised assessment roll containing revisions to the assessment roll for the purpose of taxation during the following calendar year.
>
> (1.2) *Subsection (1.1) applies only to cases where*
>
> (a) . . .

(a.1) a restriction. not previously taken into account pursuant to section 26 (3.2) and (3.3), affects the value of land and improvements that are liable to assessment [under section 34. 35 or 36,

(b) the actual value, determined under this Act in relation to a revised assessment] roll, is not the same as the actual value entered in the assessment roll by reason of

(i) an error or omission,

(ii) new found inventory,

(iii) the permanent closure of a commercial or industrial undertaking, business or going concern operation.

(iv) *new construction or new development to, on or in the land or improvements or both*, or

(v) a change in any of the following:

(A) physical characteristics;

(B) zoning:

(C) ...

(D) ...

(c) there has been a change in any of the following:

(i) ownership;

(ii) legal description;

(iii) the classification referred to in section 26 (8);

(iv) the eligibility for. or the amount of. an exemption from assessment or taxation;

(v) municipal boundaries,

(d) . . .

(e) . . .

(1.3) The assessor shall not

(a) when acting in a case referred to in subsection (1.2), make an entry on a revised assessment roll so as to *increase or decrease the amount of an actual value shown on the assessment roll except to the extent that the increase or decrease is attributable to a factor referred to in that subsection*, or

(b) act in a case referred to in subsection (1.2) (b) (iii) unless he has received a written statement that the closure is permanent. (Emphasis added.)

The basis of the 1986 assessment appeal was that in April 1984, the petitioner lost a contract with Greyhound Lines of Canada Ltd. which resulted in a drop of gross revenue of 31% due to a drop in occupancy of approximately 28%. The effect of the loss of the contract was said not to have been appreciated by the petitioner until 1985. The petitioner relied on s. (1.2) (b) (iv) in contending that it was entitled to a revised assessment for the year 1986.

The Assessment Appeal Board gave the following decision, dated July 21, 1986, with respect to the 1986 assessment appeal.

> The subject of this appeal is the 54 room Slumber Lodge Motel in downtown Prince George.
>
> Mr. Boden, on behalf of the owner/appellant, sought a reduction in the actual value on the basis that the motel had lost a sizeable portion of its gross income due to the non-renewal of a contract with Greyhound Bus Company. The contract required a minimum of 6 rooms per night to be held and paid for to accommodate bus drivers. He alleged that Greyhound had indeed been using an average of 280 room nights per month during the past five years.
>
> Mr. Boden acknowledged that the assessment on this property had been appealed for 1985 but in his opinion, the judgement of Bouck J. dated January 30, 1985 in the matter of *Trizec Equities* v. *Assessor of Area 09 - Vancouver*, should be considered.
>
> In that case the court found that a substantial decrease in occupancy of a Vancouver office building constituted a change in "state and condition" in the transitional definition of actual value for the 1984 Assessment Year.
>
> The *Assessment Act* as revised to 6/9/85 section 2 (1) reads in part,
>
> > "The assessor shall, not later than. . . September 30 in each even numbered year. . . complete a new assessment roll . . . the roll so completed shall, subject to this Act, be the assessment roll for the purpose of taxation during the 2 following calendar years."
>
> The Act continues in section 2 (1.1) in part.
>
> > "The assessor shall, not later than. . . September 30 in each odd numbered year. . . complete a revised assessment roll containing revisions to the assessment roll for the purpose of taxation during the following calendar year."
>
> In section 2 (1.2) the Act states in part,
>
> > "Subsection (1.1) applies only to cases where. . . (b) the actual value, determined under this Act in relation to a revised assessment roll, is not the same as the actual value entered. in the assessment roll by reason of . . .(iv) new construction or new development to, on or in the land or improvements or both, . . ."

In section 2 (1.5) the Act reads,

> "Notwithstanding anything in this section, depreciation occurring since the completion of the assessment roll shall not be a basis for the making of any entry on a revised assessment roll."

Mr. Boden, in his submission, presented an excerpt from Webster's Dictionary which defined the words "Develop" and "Development" and which in his opinion supported his assertion that the lost Greyhound contract was a "development" as stated in the Act. section 2 (1.2) (b) (iv) supra.

The assessor's position was that the folio had been appealed in 1985 to the Court of Revision, thence to the 1985 Assessment Appeal Board. It was withdrawn before that Board heard the appeal. Because of this, the folio was not appealable in 1986 (in accordance with section 2 (1) and the attempt to do so in this case should not be allowed. It was also his opinion that the loss in revenue was a form of depreciation, not a development.

The Board has given careful consideration to the presentation by both parties. It cannot believe that the word "development" as used in the Act refers to such a situation or occurrence as experienced by the appealed motel. Since they were used in the Act in the same phrase with the words "new construction," it is obvious to the Board that the intention of the legislation is to permit substitution of the words "new development" for the words "new construction" as the situation applies and thus read "new development to on or in the land or improvements or both," and pertain to development in a positive nature in the manner normally accepted in matters of land development by real estate developers.

The Board also believes that if the word "development" was to be used in reference to such an occurrence as lost revenue, the legislation would have been worded to that effect.

The decision of the Board then, is that the appeal is disallowed on the basis that the assessor and the Board are estopped from revising the 1986 Roll by the plain meaning of section 2 (1), (1.2) and (1.5) of the Act.

The grounds on which this application is brought are set out in the petition as follows:

> 1. The Board erred in law and improperly declined its jurisdiction under the Act by ruling that the provisions of s. 2 (1), (1.2) and (1.5) of the *Assessment Act*, R.S.B.C. 1979, c. 21 (the "Act") bars the petitioner's appeal of the 1986 property tax assessment.
>
> 2. The Board erred in law and improperly declined its jurisdiction by restricting the words "new construction or new development" found in s. 2 (1.2) of the Act to "development in a positive nature in the manner normally accepted in matters of land development by real estate developers."
>
> 3. The Board erred in law and improperly declined its jurisdiction under the Act by declining to hear on its merits the petitioner's appeal from the Court of Revision of its 1986 property tax assessment.
>
> 4. The Board erred in law and improperly declined its jurisdiction by ruling that the loss by the petitioner of a major contractor, which has resulted in a substantial decrease in revenue was "depreciation" as set out in s. 2 (1.5) of the Act.

The submissions of the petitioner's counsel are set out in his written outline of argument:

> 1. This is an application for judicial review of a decision by the British Columbia Assessment Appeal Board (the "Board") that the respondent assessor is estopped from revising the 1986 assessment with respect to the petitioner's motel property in Prince George, British Columbia.
>
> 2. The petitioner's property was assessed in 1985. It was not assessed in 1986. Pursuant to section 2 (1.2) of the *Assessment Act,* assessments in even numbered years are carried out only where, *inter alia*, there has been "new construction or new development to, or in the land or improvements or both. . .".
>
> 3. The petitioner seeks a new assessment for 1986 based upon new development to, on or in the land or improvements. The issue in this matter is the meaning to be given to the word "development."

4. The petitioner submits that the loss of a major contract affecting the revenue derived from the property is "development" within the meaning of the *Assessment Act*. The Board held, as a matter of law, that this is not development and therefore the petitioner is not entitled to a new assessment in 1986.

5. The words in the *Assessment Act* are to be given their plain meaning. Ambiguities or uncertainties should be resolved in favor of the taxpayer:

> *Trizec Equities Ltd.* v. *Assessor of Area 9 - Vancouver*, January 30, 1985 B.C.S.C., Vancouver #842726 Stated Case 196.

6. The purpose of the *Assessment Act* is to provide for the assessment of the actual value of property within the province which is subject to taxation. By section 26 of the *Assessment Act* a commercial undertaking shall be valued as the property of a going concern and the assessor may give consideration to revenue or rental value or any other circumstances affecting the value of the land and the improvements.

7. In the *Trizec Equities* case it was held that loss of a tenant was a change in the "state or condition" of the building.

8. In *City of Prince Rupert and Assessment Commissioner* v. *Canadian Cellulose Company Limited and Assessment Appeal Board,* March 31, 1977, B.C.S.C., Victoria 0097/0098/77 Stated Case 103, it was held by Mr. Justice Ruttan that "new developments" need not result in physical change to the improvements. It was further held that:

> "I hold therefore that the Assessment Appeal Board did not err in law in misdirecting itself as to the words "new development" and in holding that "new development" is not to be confined only to changes in growth and expansion, but should include any changes detrimental to value."

The decision in that case was upheld in the Court of Appeal.

9. In the present case if the petitioner had landed a new contract which increased its revenues substantially, and thereby increased the value of the property, then this would no doubt be "new development." It is submitted that the same consideration should apply when there is a loss of a major contract. Otherwise the interpretation given the legislation leads to the harsh and unjust result that a new assessment will take place only in the event that the development leads to increased value but not if it leads to a decrease in value.

Counsel for the Assessor of Area #26 Prince George submitted that:

1. The Board's decision was correct, or alternatively, if wrong in reasoning, correct in result.

2. Regardless of whether the Board was correct in its interpretation of the words "new development;" it would have been an error, taking into account the principles of valuation to consider the loss of the Greyhound contract for assessment purposes and further, any decrease in value resulting from the loss of the Greyhound contract would in any event be classed as "depreciation" which under s. 2 (1.5) of the Act could not be taken into account for the purpose of revision of the 1986 assessment. For these submissions Mr. Gill relied in particular on *Westcoast Transmission Company and Assessor of Area #09 - Vancouver*, (unreported) B.C.S.C., A870297, Vancouver Registry, June 10, 1987 and *British Columbia Forest Products Limited* v. *Assessor of Area 3 - Cowichan Valley; Prince*

George Pulp & Paper Limited v. *Assessor of Area 26 -Prince George*, (unreported) B.C.S.C., A841788 & A841797, Vancouver Registry, November 2, 1984.

3. Regardless of whether the Board's decision was correct, there was an alternative procedure for appeal, that is under s. 74 (2) of the Act, and that where such an alternative procedure is clearly available, the court should refuse to exercise its discretion to grant prerogative relief.

Counsel for the Respondent Assessment Appeal Board supported the third submission of the Respondent Assessor, but argued as well that even if this were an appropriate case for judicial review under the *Judicial Review Procedure Act*, the appropriate test to be applied is whether the interpretation of the *Assessment Act* by the Board was patently unreasonable, which he submitted, it was not.

Because of the conclusions I have reached in relation to the Assessment Appeal Board's decision, it is not necessary for me to address all of the issues raised by counsel. I wish at this point, however, to thank all counsel for their helpful submissions.

Did the Assessment Appeal Board err in its interpretation of the words "new development" as contained in section 2 (1.2) (b) (iv)?

In support of his submission that the Board erred in law in its interpretation of "development," counsel for the petitioner relied on two cases, *City of Prince Rupert and Assessment Commissioner* v. *Canadian Cellulose Company Limited and Assessment Appeal Board*, supra and *Trizec Equities Ltd.* v. *Assessor of Area 9 - Vancouver*, supra. I have not found the *Trizec* decision to be of assistance in respect to this issue, because the words "state or condition" taken in the context of the Reg. No. 440/83 cannot be considered analogous to the words "new development" in s. 2 (1.2) (b) (iv) of the present legislation.

By contrast, the Supreme Court and Court of Appeal decisions in *Canadian Cellulose* specifically considered the words "new development" and did so within the context of legislative provisions which are not dissimilar from those contained in the present Act.

In *Canadian Cellulose*, the company had appealed the 1976 assessment of those improvements comprising a sulphite plant on the ground that the same had not been assessed in accordance with the *Assessment Act* as it then stood. The sulphite plant was constructed in 1950 for the manufacture of man-made fibres, and compared with the kraft process, the sulphite process was old, expensive, and created a high degree of pollution. In 1975, the Pollution Control Branch issued an order to the company requiring that the plant meet certain levels of pollution control by December 31, 1979, or alternatively, to close the plant permanently by the same date. The directors of the company concluded that it could not meet the pollution control requirements without a substantial expenditure of money, and decided to modify the sulphite mill to a kraft mill, and in that way meet the required pollution standards. The directors hoped to operate the sulphite mill as long as possible, but not later than 6 months before the start-up of the modified mill in 1978. In the summer of 1976, however, the directors decided to close the sulphite mill in October, 1976, and did so.

The physical modification of the plant began in May, 1976. It involved retention and use of some of the existing components, and disassembly and removal of the remainder. The mill had continued to operate, however, without modification, until the end of 1975. In preparing the 1976 Assessment Roll, the Assessor did not take into account the Pollution Control Branch order or the decision of the board of directors to modify the plant. The Assessment Appeal Board found that the Pollution Control Branch order combined with the decision of the directors was "new development," and concluded that the decision of the Pollution Control Branch effectively terminated the existence of the sulphite plant. The Board directed the Assessor to reassess those

portions of the plant which were to be disassembled and removed, based on a depreciation formula which had been given in evidence before the Board.

The City of Prince Rupert and the Assessment Commission appealed the decision of the Assessment Appeal Board to the Supreme Court, on the grounds that the Board had erred in law when it held that the order of the Pollution Control Branch, together with the decision of the directors made in 1975, were "new developments" within the meaning of s. 24 (6) (b) (ii) of the *Assessment Act*, c. 6, S.B.C. 1974.

Subsections (1), (2) and (3) of s. 24 of the *Assessment Act* at that time stipulated the applicable basis and principles for determining actual value and subsection (6) stipulated the assessment freeze and the exclusions therefrom. Section 24 provided as follows:

> 24. (1) Land and improvements shall be assessed at their actual value.
>
> (2) In determining the actual value for the purposes of subsection (1), the assessor may give consideration to the present use, location, original cost, cost of replacement, revenue or rental value, the price that the land and improvements might be reasonably expected to bring if offered for sale in the open market by a solvent owner, and any other circumstances affecting the value, and the actual value of the land and the improvements so determined shall be set down separately in the columns of the assessment roll, and the assessment shall be the sum of those values.
>
> (3) Without limiting the application of subsections (1) and (2), where an industry, commercial undertaking, public utility enterprise, or other operation is carried on, the land and improvements so used shall be valued as the property of a going-concern.
>
> . . .
>
> (6) *Notwithstanding subsection (1) or anything to the contrary in this Act,*
>
> (a) *except as provided in paragraphs (b), (c), and (d)* and sections 25 and 27, *land and improvements shall be assessed at the same value and on the same basis at which the land and improvements were assessed for the calendar year 1974*;
>
> (b) *where a change in the value of land and improvements occurs by reason of*
>
> (i) a change in the physical characteristics of the land or improvements, or both; or
>
> (ii) *new construction or new development thereto, thereon, or therein; or*
>
> (iii) a change in the zoning or reclassification of land and improvements that is not included in the assessment roll for the calendar year 1974, *the land and improvements shall be assessed at the same value and on the same basis as if those changes in value had occurred and had been taken into account in the preparation of the assessment roll for the calendar year 1974*;
>
> (c) subject to paragraph (b), improvements used for industrial purposes shall be assessed at the same value level and on the same basis at which improvements used for industrial purposes were assessed for the calendar year 1974; (Emphasis added)

Ruttan, J held that the Assessment Appeal Board did not err in law as to the meaning of the words "new development" and did not err in law in holding that "new development" was not to be

confined only to changes in growth and expansion, but should include any changes incremental or detrimental to value.

The decision of Ruttan, J was appealed to the Court of Appeal. Although the Court of Appeal dismissed the appeal, it is not accurate to say that the Court of Appeal's construction of the words "new development" was entirely in accord with the analysis given by Ruttan, J.

Before referring to the relevant passage in the decision of Carrothers, J.A. in respect to "new development," I must set out what his references were to three "circumstances." Circumstance one was the Pollution Control Branch order, circumstance two was the directors' decision to convert to a kraft mill, and circumstance three was the later decision of the directors to advance the shut down date of the sulphite mill.

At p. 641 of the Stated Case Report 103 Court of Appeal decision in Canada Cellulose, Carrothers, J.A. said:

> Turning now to the matter of the "freeze" as contained in s. 24 (6), it is to be noted that it is a true freeze and not a lid or maximum. It prescribes that "land and improvements shall be assessed at the same value and on the same basis at which the land and improvements were assessed for the calendar year 1974." The consequence of any exclusion or release from the freeze would surely be to permit the value to go in either direction, up or down, and I agree with the learned Chambers Judge that, provided the freeze were lifted, the value could be either greater or less than the 1974 valuation. *But the nub of the matter is whether the freeze applies; whether circumstances one and two fall within the meaning of the words "new development thereto, thereon, or therein" as found in the exclusionary provisions of s. 24 (6) (b) (ii) supra*.
>
> *Counsel for the appellants stressed that the words "new development" are not preceded by the indefinite article "a" and must not be equated to a happening, an occurrence or an event, but rather connote a progression or growth to a more advanced, developed or effective state. I accept his submission and agree that the words "new development" be given a progressive construction.*
>
> By the time of their assessment for 1976, these improvements had become the subject of an enforceable Governmental order with the immediate effect of limiting the duration of the productive life of the sulphite mill and which order was designed to improve the character and quality of the industrial climate and amenities of the City of Prince Rupert generally and the CanCel property in particular by the reduction of pollution and to thereby increase its usefulness. By the *Pollution Control Act*, 1967, S.B.C. 1967 chap. 34, "pollution" means the introduction into a body of water, or storing upon, in, or under land or discharging or emitting into the air, such substances or contaminants of such character as to substantially alter or impair the usefulness of the land, water, or air. Pollution control, in the words of the Legislature, is directed at the enhancement of usefulness. The impact of circumstance one appears colossal and devastating but, particularly when combined with circumstance two, it can only be said to be constructive, progressive and positively efficacious and as aptly falling within the meaning of the words "new development" *as connoting modification or change in growth, advancement, evolution or expansion toward perfection, or at least from a lower to a higher state.*
>
> This is the construction of the words "new development" that was urged upon us by the appellants. Only by fallacious reasoning could one conclude that such a positive and forward step was not "new development" to the improvements in question merely because those particular improvements were thereby rendered redundant in the new scheme of things. I would have thought that the City of Prince Rupert would have been the last to argue that circumstances one and two were retrograde in effect and hence not "new development." (Emphasis added)

It is apparent from the decision of Carrothers, J.A. that if circumstances one and two could be said to fall within the meaning of the words "new development," the "freeze" did not apply, and the assessor was then bound by the provisions of subsections (1), (2) and (3) of s. 24, and required to take those two circumstances into account when assessing the improvements for 1976. The result of the "freeze" not applying would be to permit the assessed value to be either greater or lesser than the 1974 valuation.

In the matter before me, the Assessment Appeal Board was faced with similar legislation to that considered in *Canadian Cellulose*. The assessment made in 1984 under s. 2 (1) was to be the assessment for the two following calendar years. A revision of the assessment roll for the calendar year 1986 could only occur under s. 2 (1.1) if the loss of the Greyhound contract was found to be "new development to, on or in the land or improvements or both" under s. 2 (1.2) (b) (iv).

The Board concluded that the words "new development" in s. 2 (1.2) (b) (iv) pertained to a development of a "positive nature," and that conclusion, in my view, does not appear contrary to the construction placed upon the words "new development" by our Court of Appeal in *Canadian Cellulose*.

In *Canadian Cellulose,* Carrothers, J.A. held that the words "new development" must be given a progressive construction. On behalf of the petitioner, Mr. Hilliker submitted that this meant simply "ongoing effect" and that the effect could be either positive or negative. To say that the ongoing effect could be negative does not appear to be in accord with the later reference in the judgment to "the meaning of the words 'new development' as connoting modification or change in growth, advancement, evolution or expansion toward perfection, or at least from a lower to a higher state."

In this case the Assessment Appeal Board concluded that the loss of the Greyhound contract was not "new development." In view of the construction placed on these words in *Canadian Cellulose*, it does not appear to me that the Board was in error in that *conclusion*.

If the petitioner's loss of the Greyhound contract could not be construed as "new development," under s. (1.2) (b) (iv), the assessment made in 1984 for the two following calendar years, applied for 1986. The Assessment Appeal Board was also correct, then, in concluding that by reason of s. 2 (1) and s. 2 (1.2), the petitioner was not entitled to a revision of the 1986 assessment.

The Petition is accordingly dismissed, with costs.

I wish to add, although these comments are *obiter*, that had I concluded that the Board had erred in respect to the loss of the Greyhound contract being "new development," and that the petitioner was accordingly entitled to a revision of the 1986 assessment, I would seriously question whether the loss of the contract alone would have been relevant for valuation purposes. I say that because the income approach to valuation is not governed by the actual experience of the property in any given year, but instead on *typical* long term vacancy rates. The explanation for that is set forth in some detail in the recent decision of Cumming, J. in *Westcoast Transmission Company and Assessor of Area #09 Vancouver,* (B.C.S.C.) unreported, A870297, Vancouver Registry, June 10, 1987.