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B.C. FRUIT PACKERS CO-OPERATIVE
NARAMATA CO-OP GROWERS EXCHANGE
ASSESSOR OF AREA 17 - PENTICTON

v.

ASSESSOR AREA 17 - PENTICTON AND
LEADER POTATO ASSOCIATION LTD.

Supreme Court of British Columbia (A873056) Vancouver Registry

Before: Mr., Justice Legg (in chambers)

Vancouver, January 7, 1988

John R. Lakes for the appellants
J. Galt Wilson, Q.C., for the respondents

Reasons for Judgment February 24, 1988

This is an appeal by Stated Case from the decision of the Assessment Appeal Board concerning the classification of land of the appellants who are owners of packing houses. The Board ruled that the appellants' properties were not entitled to Farm classification and that the decision of the Court of Appeal in *Leader Potato Association Ltd.* v. *the Assessor of Area No. 17 -Penticton* 5 B.C.L.R. (2d) 327 did not apply to the assessment roll prepared in 1986 for the purpose of taxation in 1987 as a result of an amendment to B. C. Regulation 298/85 made after the Court of Appeal's decision.

The Facts

The facts in the Stated Case (excluding any repetition of Schedules "A", "B", "C", and "D" thereto to which I shall refer subsequently), are as follows:

1. The subject of these appeals concerning the 1987 Assessment Roll are various fruit and vegetable packing houses, owned by certain fruit and vegetable farmers.

2. All property in British Columbia for taxation purposes is classified into various categories pursuant to a regulation passed by the Lieutenant Governor in Council (a copy of B.C. Regulation 438/81 prescribing classes of property is attached hereto and marked Schedule "A").

3. There are standards for the classification of land as a Farm (a copy of B. C. Regulation 298/85 setting out these standards is attached hereto and marked Schedule "B").

4. The three packing house owners argue that the land on which these packing houses are situated should be classified by the Assessment Commissioner as Farm (Class 9) pursuant to Section 5 of B.C. Regulation 298/85, and therefore are entitled to a different rate of taxation than their present classification as Business and Other (Class 6).

5. The issue giving rise to the questions in this Stated Case has a judicial history. The chronology of the sequence of events is set out in pages 10 to 12, inclusive, of the

decision of the Board dated September 13, 1987 (which is attached hereto and marked Schedule "C").

6. The problem occurs when farmers pool resources to acquire structures and machinery by forming co-operatives, associations or corporations (as in the instant appeals) to operate packing houses situated on land not owned or leased by the individual farmer who produces the fruit or vegetables delivered to the packing houses for treatment.

7. On August 15,1986, the Court of Appeal (in considering farm standards before B.C. Regulation 298/85 was amended) found that the farmers were entitled to Farm classification where the parcels of farmland were not necessarily contiguous and also where the parcels of farmland were owned or leased by more than one person (which included a corporation) - (a copy of that decision is attached hereto and marked Schedule "D").

8. The valuation date for lands and improvements for the 1987 Assessment Roll was July 1, 1986 in the state and condition which they were on September 30, 1986 (see Section 26 of the *Assessment Act*, R.S.B.C. 1979).

9. On September 24, 1986, the Lieutenant Governor in Council approved an order-in-council (No. 1785) which added a new section (5.1) to B.C. Regulation 298/85 stipulating that in order to be considered as primary agricultural production, the cleaning, sorting, grading, packing or storage of it must satisfy two prerequisites, viz:

> (i) the title to the land on which the produce is grown and the title to the land where the produce is cleaned, sorted, graded, packaged or stored must be held solely by "the same legal person", and
>
> (ii) the land where the produce is treated or stored must be within a zone which permits this function.

10. After hearing the parties and reviewing the evidence, the legislation, the regulations, the Court of Appeal decision, and after carefully considering the legal argument presented by counsel, the Board held that the appellants were not entitled to Farm classification for the land on which the packing houses were situated, since the land in question did not comply with clause (a) of Section 5.1 of B. C. Regulation 298/85.

There are three questions on which the Board asked the opinion of this Court. I shall deal with each in turn.

Question 1

1. Did the Assessment Appeal Board err in law by finding that the standards for classification of land as "Farm" under Section 28 (2) of the *Assessment Act*, as interpreted by the Court of Appeal in its decision in *Assessor of Area No. 17 Penticton* v. *Leader Potato Association* is not now applicable to the assessment roll prepared in 1986 for the purpose of taxation for 1987 because of the addition of Section 5.1 (a) in B.C. Regulation 298/85 as amended by RC. Regulation 219/86?

The reasons of the Board show that the Board decided that Section 5.1 of B.C. Regulation 298/85 precluded the classification of the packing house lands owned by the appellants as Farm lands.

At page 14 of its Reasons, the Board stated:

> Does Section 5.1 of B.C. Regulation 298/85 preclude the classification of the lands owned by the packing houses as Farm?

Prior to the approval of Section 5.1 (B.C. Reg. 298/85), there was no question that the lands owned by the packing houses were entitled to Farm classification. That had been decided by the Board and confirmed by the Court of Appeal.

After the approval of Section 5.1 (B.C. Reg. 298/85), the lands owned by the packing houses can continue to have Farm classification because they are a part of an integrated farm, occupied and engaged in primary agricultural production - but only if:

(1) The title to the subject lands are in the name of the same owner as the title to the lands on which the crops (which are being processed) were grown; and

(2) The subject lands are zoned to permit primary agricultural production.

Here, again, the pen is mightier than the sword. What the appellants have won through the battles in the courts, including the Court of Appeal, has been taken away by the stroke of the commissioner's pen.

On a careful reading of Section 5.1 of B.C. Regulation 298/85, the packing houses are defeated. The farmers hold title to the lands on which the crops are being grown, and a different legal owner appears on the titles to the land where the crops are being processed.

Opinion

In considering whether the Board was correct in its decision reference must be made to the applicable legislation and regulations.

Section 26 (8) of the *Assessment Act* reads:

"The Lieutenant Governor in Council shall prescribe classes of property for the purpose of administering property taxes and shall define the types of uses of land or improvements, or both, to be included in each class."

The classification under Section 26 (8) has been ordered under B.C. Reg. 438/81. Farm is classified in that regulation as follows:

Class 9 - Farm

9. Class 9 property shall include only land classified as Farm land.

Section 28 of the *Assessment Act* deals with the classification of land as "Farm". Sub-section 2 provides:

(2) "The commissioner shall, subject to the approval of the Lieutenant Governor in Council, prescribe standards for classification of land as a farm and the assessor shall classify as a farm land that is in accordance with the standards."

A short history of the Regulations is instructive. B.C. Reg. 288/79, filed June 25, 1979, set out the standards prescribed by the Assessment Commissioner for the classification of land as a Farm. Paragraph 7 of that regulation read as follows;

"Land may be classified as a farm where it consists of all or part of any parcel or group of parcels of land, contiguous or not, making up a tract of land owned or held under a written lease by a person single or jointly with any other person or persons and operated as an integrated farm operation for primary agricultural production."

This Regulation was in force at the time of the decision of the Court of Appeal in the *Leader* case.

The British Columbia Gazette published on October 1, 1985 shows that B.C. Reg. 298/85 was deposited on September 20, 1985 pursuant to the *Assessment Act*. The pertinent passage in the Gazette reads:

> B.C. Reg. 298/85, deposited September 20, 1985, pursuant to the *Assessment Act* (Section 28 (2)). Order in Council 1768, approved and ordered September 19, 1985. On the recommendation of the undersigned, the Lieutenant Governor, by and with the advice and consent of the Executive Council, orders that the attached regulation of the commissioner is approved. . .
>
> REGULATION MADE BY COMMISSIONER
>
> Pursuant to section 28 (2) of the *Assessment Act*,
>
> (a) the Standards prescribed by the Assessment Commissioner for the Classification of Land as a Farm, B .C. Reg. 288/79, are amended in section 1 by adding the following:
>
> > (2) These standards apply for the assessment rolls prepared for the purpose of taxation during the 1985 and 1986 calendar years., and
>
> (b) the attached Standards for the Classification of Land as a Farm are prescribed for the purpose of taxation during the 1987 and subsequent calendar years.

Section 5 (2) of Regulation 298/85 dealt with an integrated farm operation and provided as follows:

S.5 (2) Land may be classified as a farm where

> (a) it consists of all or part of any parcel or group of parcels of land, contiguous or not, making up a tract of land owned or held under a written lease by a person singly or jointly with any other person or persons and operated as an integrated farm operation for primary agricultural production, and
>
> (b) the integrated farm operation meets the other requirements of this regulation.

It will be noted that B.C. Regulation 298/85 amended Regulation 288/79 by providing that Regulation 288/79 applied to the assessment rolls prepared for the purposes of taxation during the 1985 and 1986 calendar years and that for 1987 and subsequent calendar years the new standard for classification of land as a farm in Regulation 298/85 applied.

B.C. Regulation 219/86 was deposited on September 25, 1986. The pertinent parts of the *Gazette* reference dealing with that regulation read:

> "B.C. Reg. 219/86, deposited September 25, 1986, pursuant to the *Assessment Act* (Section 28 (2)) Order in Council 1785 , approved and ordered September 24, 1986. . .
>
> *ASSESSMENT ACT*
>
> *Regulation of Commissioner*
>
> Pursuant to section 28 (2) of the *Assessment Act* I order that B. C. Reg. 298/85, Standards for the Classification of Land as a Farm, be amended by adding the following section after section 5.

Ancilliary Operations

5.1 Notwithstanding this regulation, primary agricultural production includes the cleaning, sorting, grading, packing or storage of it, but only if

> (a) the title to the land on which the primary agricultural production occurs and the title to the land on which the cleaning, sorting, grading, packing or storing occurs is held solely by the same legal person, and
>
> (b) any authority having jurisdiction over the use of the land on which the production is cleaned, sorted, graded, packed or stored has not regulated the land for a use which would prevent primary agricultural production."

These regulations were consolidated in the *Consolidated Regulations of British Columbia*. It is the version from the Consolidated Regulations which is marked as Schedule "B" to the Stated Case. Thus Schedule "B" contains regulation 5 (2) and 5.1 quoted above but this version does not show when the regulations were deposited. For this reason I have quoted the excerpts from the Gazette in these reasons.

The *Regulations Act*, S.B.C. Ch. 10, 1983 provides that a regulation comes into force on the date of its deposit subject to two qualifications that are not applicable. It is thus important to note that Reg. 298/85 was deposited September 20, 1985 and that Reg. 219/86 was deposited September 25, 1986.

The *Assessment Act*, R.S.B.C. 1979, Ch. 21, provides in Section 26 (1) as follows:

> "In this section and sections 27 to 29 'actual value' means the actual value that land and improvements would have had on July 1 had they and all other land and improvements been on July 1 in the state and condition that they are in on September 30 and had their use and permitted use been on July I the same as they are on September 30;"

Thus it will be seen that this section sets July 1 as the valuation date, but, by definition of actual value, September 30 is the date for determining the state and condition and the use and permitted use of the lands which have to be assessed.

I agree with counsel for the respondent that the actual value is the value on July 1 which the land would have had under the circumstances that existed on September 30. Both amendments were made prior to September 30, 1985 and 1986 respectively. As a result, Regulation 298/85 as amended by 219/86, is applicable for the purposes of taxation during the 1987 and subsequent calendar years as provided for by Regulation 298/85.

The applicable regulation when the Court of Appeal made its decision in the *Leader* case was Regulation 288/79. The section of regulation of 288/79 considered by the Court of Appeal in the *Leader* decision was Section 7. (See the judgment of Mr. Justice Carruthers, 5 B.C.L.R. (2d) 327 at page 330 and the judgment of Mr. Justice Hutcheon at page 333.)

Section 7 was identical to Section 5 of Order in Council 298/85 applicable to the 1987 tax year with this important exception. To the new Section 5 was added the words,

> and
>
> (b) "the integrated farm operation meets the other requirements of this Regulation."

As well, section 5.1 was added to the Regulation.

Section 5.1 contained two statutory prerequisites before land could be included in a farm classification.

> (1) the title to the land on which the growing or raising of the crop occurs and the title to the land on which the cleaning, sorting, grading and packaging or storage occurs must be held by the same legal person, and
>
> (2) any authority having jurisdiction over the use of the land must not have regulated for a use which would prevent primary agricultural production.

Thus in order to qualify for Farm classification title to the lands on which the crops have been grown must be held by the same person who owns the title to the lands where the crops are processed. In short with the amendment made by B. C. Regulation 298/85 and 219/86 the decision of the Court of Appeal no longer applied to the assessment roll prepared in 1986 for the purpose of taxation in 1987.

In my opinion, the answer to Question 1 is, "No".

Question 2

The second question for which the opinion of the Court is sought is Question 2 which reads as follows:

> 2. Did the amendment of standards for classification of land under B.C. Regulation 298/85 by the addition of section 5.1 under B.C. Regulation 219/86 alter the definition of "primary agricultural production" so as to preclude the land which is the subject of this appeal from being classified as Farm under the standards referred to in Section 28 of the *Assessment Act* and therefore under the said Section 28 of the *Assessment Act*?

Section 28 (2) of the *Assessment Act* is mandatory in stating that the Commissioner shall prescribe standards for classification of land as a Farm and shall classify the Farm land that is in accordance with the standard.

Order in Council B.C. Reg. 298/85 applied the standards for the purpose of taxation during the 1987 and subsequent calendar years.

The standards were amended by B.C. Regulation 219/86 deposited September 25, 1986 prior to September 30, 1986.

Section 5.1 of Regulation 219/86 sets out the two prerequisites which must be met before "primary agricultural production" can be said to include the cleaning, sorting, grading, packing or storage of that production. Those prerequisites have already been set out on page 10 of these reasons.

The evidence on whether the respective packing houses of *Leader Potato Association Ltd.*, and the appellant met those prerequisites is as follows:

In the case of *Leader Potato Association Ltd.*, exhibit 1 in evidence before the Board, showed that the property subject to appeal was owned by the company and used by three farmers who produced potatoes. The three shareholder farmers grew their potatoes on other lands. The title to the property was in the name of the company. The land on which the produce was produced was in the name of the individual shareholders. The first prerequisite under section 5.1 was therefore not met.

Moreover the land was located in the City of Grand Forks, was zoned Heavy Industrial which permitted the land only to be used for the uses specified. The zoning prohibited primary

agricultural production as defined in Section 1 of B.C. Regulation 298/85 as amended by B.C. Regulation 219/86. The second prerequisite was therefore not met.

In the case of *B.C. Fruit Packers Co-operative*, exhibit 2 in evidence before the Board, showed that the assessed land was used for packing and storage, was owned by a co-operative and not by the farmers who grew their produce on other land. The land was in three parcels, one in the City of Penticton where it was zoned M-1. This prohibits primary agricultural production as defined in Section 1 of B.C. Regulation 298/85. The two other parcels owned by the co-operative were located in the District of Summerland. One is zoned Light Industrial and the other is zoned Single Family Residential. In both zones primary agricultural production as set out in Section 1 of B.C. Regulation 298/85 was prohibited. Thus neither of the prerequisites under section 5.1 were met.

In the case of *Naramata Co-operative Growers Exchange*, exhibit 3 before the Board, showed that the subject assessed land was in the name of the co-operative and title was not held by the farmers who grew the produce packed and stored there. This was grown on other lands which they owned as individuals.

Further, the land was in the Regional District of Okanagan/Similkameen, was zoned M-2. The use of the land for primary agricultural production as defined was prohibited under the zoning by-law. Again the two prerequisites under section 5.1 were not met.

It is therefore my opinion that the amendment of standards for the classification of land under B.C. Regulation 298/85 by the addition of Section 5.1 under B.C. Regulation 219/86 did alter the definition of "primary agricultural production" so as to preclude the land of *Leader* and of the appellants from being classified as Farm. The answer to Question 2 is therefore, "Yes".

The third question to be answered by the Court is Question Number 3 which reads:

> 3. Does the ownership of the land which is the subject of this appeal by a co-operative or company rather than the owner of the land upon which produce is grown, prevent the land from being classified as a Farm under B.C. Regulation 298/85 as amended by B. C. Regulation 219/86 and also under Section 28 of the *Assessment Act* even though all the shares of the co-operative or company are held by the farmers who do grow the produce on their own land?

The ownership of the land by a company or co-operative who is not the owner of the land upon which the produce is grown prevents the land from being classified as a Farm because the title to the land on which the produce is grown is not held solely by the same legal person who holds title to the land on which the grading, packing or storing occurs as required by Regulation 298/85 as amended by B.C. Regulation 219/86.

In my opinion the answer to this question is therefore, "Yes".

As the respondent assessor has succeeded in its position with respect to all three questions it will have its cost of this appeal.