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CAPTAINS ENTERPRISES LTD.,
DEWDNEY INN LTD.,
VANPAT INVESTMENTS LTD.,
I. & B. INVESTMENTS LTD.

v.

ASSESSOR OF AREA 13 - DEWDNEY/ALOUETTE

B.C. Court of Appeal (V00690) Vancouver Registry

Before HONOURABLE MR. JUSTICE SEATON, MR. JUSTICE MACDONALD and MR. JUSTICE WALLACE

Vancouver, August 10, 1989

C. M. Considine for the respondent (appellant at the Court of Appeal), Assessor of Area 13
J. R. Lakes for the appellants (respondents at the Court of Appeal), Captains Enterprises Ltd. et al.

Reasons for Judgment of Mr. Justice Seaton August 10, 1989

The respondents, public house owners, appealed their assessments to the Assessment Appeal Board. On the evening before the matter was to come before the Board an employee of the Assessment Authority telephoned a principal of one of the then appellants and advised him that the Assessment Authority would be taking the position that the value of that appellant's property should be increased nearly threefold. When the matter came before the Board the then appellants requested an adjournment, which was granted, and later asked for leave to withdraw their appeals. The Assessor opposed the applications and requested that the Assessment Appeal Board take evidence and determine the actual value of the properties in question.

In the course of its decision, the Board observed:

> It is clear that the Board has a discretion to permit or refuse to permit a party to withdraw from an appeal and that the exercise of that discretion must be based on the particular circumstances of individual cases.
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> * * *
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> The Assessor valued the properties in the course of preparing the assessment roll. At the Court of Revision he presumably satisfied himself that different values were appropriate and his recommendations to this effect were implemented by the Court.
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> He then asserted that the property owners should not be allowed to withdraw their appeals because the result would be to deny him the opportunity to establish that a different method of assessment should be employed and still different and vastly higher values found for these properties.

> The Assessor's counsel now asserts that the Assessor wishes the opportunity to show that still another set of values should be applied. Faced with this curious state of affairs the Board can not help but have some misgivings about all the values propounded at various times by the Assessor, including the values recommended to the Court of Revision, which values ultimately became the values on the Rolls.

The Assessment Appeal Board granted the respondents' applications for leave to withdraw their appeals. The Assessor appealed that decision. Legg, J. dismissed the appeal, his judgment is reported (1988), 21 B.C.L.R. (2d) 394, and this appeal by the Assessor is from that dismissal.

The Assessor maintains that once a request is made for the Board to take evidence the Board is bound to take evidence and determine the assessment; that it has lost any jurisdiction it might have had to permit an appeal to be withdrawn.

The decision of this question must turn on Rule 5 of the "Rules of Practice and Procedure before the Assessment Appeal Board" and s. 70 of the *Assessment Act*, R.S.B.C. 1979, c. 21. Rule 5 reads:

> Abandonment of Appeal
>
> An appeal may be abandoned or withdrawn only with leave of the Board.

Section 70 reads:

> An appeal under this part shall be deemed to be in respect of both land and improvements and, at the request of a party to the appeal, the board shall take evidence with respect to, and determine the assessment of, both land and improvements in accordance with section 69.

If the rule and the section conflict the latter must govern. The rule making authority is limited:

> 61. The board
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> * * *
>
> (c) may make rules, not inconsistent with this Act, for its own government and for conducting hearings and proceedings before it.

Quintette Coal Limited v. *Assessment Appeal Board of British Columbia, Area Assessor of Area 27 - Peace River and District Municipality of Tumbler Ridge* (1986), 8 B.C.L.R. (2d) 51 (B.C.S.C.), dealt with Rule 5 under somewhat different circumstances. There, the Board refused the Assessor's application to withdraw its appeal and the Assessor said that the Board had no jurisdiction to require that there be leave to withdraw. Meredith, J. found the rule to be valid and the Board to have exercised its discretion properly. In the course of his judgment respecting the exercising of discretion, he put the assessment appeal process in a proper light (at p. 55):

The assessor and the municipality take several additional positions in respect of the allegation that the discretion was improperly exercised.

Firstly, they equate appellants under the *Assessment Act* to litigants prosecuting lawsuits. True, litigants generally have the undeniable right to abandon their own proceedings. But appellants are not litigants. An assessment appeal invests the appeal board with the power and imposes upon it as well the duty of determining value by a number of means available to it. The process is

essentially inquisitorial. On the other hand, processes before courts of law are adversarial. The court has, in the nature of things, to be responsive, and only responsive, to the litigant who seeks its aid. Unlike the Assessment Appeal Board, the court has no function if the litigant decides to quit. Thus the parallel contended for is inaccurate. The board may continue its inquiry whatever the wishes of an appellant. Thus the appellant may not be allowed to thwart the function of the board by withdrawal, once the appeal process has been put in motion. And even though put in motion by the appellant himself. And once put in motion, the board has a very broad jurisdiction. It is not governed by or confined to grounds of appeal alleged or submissions made to it by the appellant or appellants: *Assess. Commr. of B.C.* v. *Western Forest Indust. Ltd.* (1980), 25 B.C.L.R. 189, 118 D.L.R. (3d) 500 (C.A).

In my view s. 70 and Rule 5 are not in conflict. I do not interpret s. 70 to require that every appeal that is launched will go to a hearing, only to require that if the appeal is heard the Board will take evidence if either party requests it to do so. As the Board put it, "[s.] 70 has no application until the preliminary determination of whether there is to be a hearing is made."

If the legislature had intended that every appeal be heard and no appeal be withdrawn or abandoned even with permission of the Board, it could have expressed that intention quite easily. The limitation section 68 (1) (h) might have read: "the appeal shall be determined and shall not be terminated short of a determination." Section 68 (1) (h) now reads: "the appeal may be determined whether or not the person against or by whom it is made is present." The word "may" is inconsistent with the interpretation that the Assessor seeks to put on s. 70.

Section 61 (c) anticipates that the Board will have some room within which to make the contemplated rules ". . . for its own government and for conducting hearings and proceedings before it." Section 70 ought to be read with recognition of that anticipation, and should not be read to imply a requirement, not clearly expressed, that severely restricts the Board's power.

I agree with the Board and with Legg, J. that the Board did have the power to permit the appeals to be withdrawn.

I would dismiss the appeal.

Reasons for Judgment of Mr. Justice Macdonald August 10, 1989

The respondents, public house owners, appeal their assessment to the Assessment Appeal Board. When the matter came before the Board they requested leave to withdraw their appeals. The Assessor, who had not appealed, opposed the application. Further, he wished to lead evidence to support increased assessments of the properties involved.

The Board granted the respondents leave to withdraw their appeals. The Assessor appealed by way of stated case. Legg, J. dismissed the appeal. His judgment is reported (1988) 21 B.C.L.R. (2d) 394. The Assessor, relying as he had throughout, on s. 70 of the *Assessment Act*, R.S.B.C. 1979, c. 21, appeals from that dismissal.

Section 70 provides:

> An appeal under this part shall be deemed to be in respect of both land and improvements and, at the request of a party to the appeal, the board shall take evidence with respect to, and determine the assessment of, both land and improvements in accordance with section 69.

Section 61 of the same statute reads:

> The board
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> * * *
>
> (c) may make rules, not inconsistent with this Act, for its own government and for conducting hearings and proceedings before it.

Pursuant to that power the Board made rules one of which is the following:

> 5. Abandonment of Appeal
>
> An appeal may be abandoned or withdrawn only with leave of the Board.

This, in summary, is the argument of the assessor. Section 70 is clear and unambiguous. Noting particularly the word "shall", the section requires the Board to continue with an appeal and make a determination at the request of any party. The Board is not simply an adjudicator between two opposing interests. It is there to ensure that accurate assessments are placed on the rolls so that there is an equitable basis for taxation. Section 70 highlights this function and duty of the Board. Rule 5 must be interpreted in a restrictive manner in order to ensure that it does not interfere with the requirements of s. 70.

The question should be approached keeping in mind the differences between the proceedings and function of the Board and those of courts of law. They have been well expressed by Meredith J. in *Quintette Coal Limited v. The Assessment Appeal Board of British Columbia, Assessor of Area 27 - Peace River and The District Municipality of Tumbler Ridge* (1986), 8 B.C.L.R. 51 (B.C.S.C.). Section 70 was not considered. The argument was that s. 61 (c) restricted the Board to making rules governing the conduct of hearings but not preliminary procedures. That argument was rejected. In considering the exercise of the Board's discretion in that case Meredith, J. said this at p. 55:

> The assessor and the municipality take several additional positions in respect of the allegation that the discretion was improperly exercised.
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> Firstly, they equate appellants under the *Assessment Act* to litigants prosecuting lawsuits. True, litigants generally have the undeniable right to abandon their own proceedings. But appellants are not litigants. An assessment appeal invests the Appeal Board with the power and imposes upon it as well the duty of determining value by a number of means available to it. The process is essentially inquisitorial. On the other hand, processes before courts of law are adversarial. The court has, in the nature of things, to be responsive, and only responsive, to the litigant who seeks its aid. Unlike the Assessment Appeal Board, the court has no function if the litigant decides to quit. Thus the parallel contended for is inaccurate. The Board may continue its inquiry whatever the wishes of an appellant. Thus the appellant may not be allowed to thwart the function of the Board by withdrawal, once the appeal process has been put in motion. And even though put in motion by the appellant himself. And once put in motion, the Board has a very broad jurisdiction. It is not governed by or confined to grounds of appeal alleged or submissions made to it by the appellant or appellants: *Assessment Commissioner of British Columbia* v. *Western Forest Industries Ltd. et al.* (1980), 25 B.C.L.R. 189, 118 D.L.R. (3d) 500 (C.A.).

The legislative history of s. 70 is significant. The *Assessment Act* was enacted S.B.C. 1974, c. 6. It contained as s. 63:

> 63. An appeal under this Part shall, without special mention, be deemed to be in respect of both land and improvements.

The words now relied on by the Assessor were added by the *Assessment Amendment Act*, S.B.C. 1977 (No. 2), c. 30:

> 32. Section 63 is amended by adding "and, at the request of a party to the appeal, the board shall take evidence with respect to, and determine the assessment of, both land and improvements in accordance with section 62" after "improvements".

By 1984 it had become s. 70 and was amended again by the *Assessment Amendment Act*, S.B.C. 1984, c. 2:

> 32. Section 70 is amended by striking out ", without special mention."

The deletion of those words is without significance in this case. But the result was to establish s. 70 as it stands today.

The words added in 1977 had legislative effect. It is that when an appeal proceeds, at the request of a party to the appeal, the board shall take evidence with respect to and determine the assessment of both land and improvements in accordance with s. 69. The question is whether it has the additional effect contended for by the Assessor. I think not. The words added in 1977 with the effect I have stated, are ancillary to section (then s. 63) as enacted first in 1974. One expects that words added to a section are ancillary to what was originally there, or at least, legislate further with respect to the same subject matter. Legislation to the effect that an appeal, once brought, must be carried through to determination by the Board is legislation upon a different subject matter and one would expect to see it in a separate section and expressed in clear language.

I cannot construe s. 70 to the effect asserted by the appellant. I would dismiss the appeal for these reasons and also for the reasons of Mr. Justice Seaton with which I agree.

Reasons for Judgment of Mr. Justice Wallace (dissenting) August 10, 1989

The legislative history of s. 70 of the *Assessment Act*, R.S.B.C. 1979, c. 21, is set out in the reasons of my brother Macdonald, J., which reasons I have had the advantage of reviewing.

The only issue upon which I respectfully differ from the view expressed by Macdonald, J. is the construction I would give to s. 70 of the *Assessment Act*.

Section 70 provides:

> " An appeal under this part shall be deemed to be in respect of both land and improvements and, <u>at the request of a party to the appeal</u>, the Board shall take evidence with respect to, and determine the assessment of, both land and improvements in accordance with s. 69."
>
> (Emphasis added.)

In my view, the literal meaning of the section clearly imposes a mandatory obligation upon the Board, at the request of a party to the appeal, to take evidence with respect to, and determine the assessment of, both land and improvements.

This is in keeping with the conclusion expressed by Meredith, J. in *Quintette Coal Limited* v. *The Assessment Appeal Board* (1986), 8 B.C.L.R. (2d) 51 (B.C.S.C.) where he stated:

> ". . . the function of the board is not to weight the interests of any of the parties to the appeal (if the assessor can be said to have an interest) but rather to exercise its jurisdiction to establish the proper assessed value."

Taking into account the inquisitorial nature of the review process, I do not find that a literal interpretation of s. 70 is inconsistent with the objectives of the Act; namely, to ensure, for both the taxpayer and the government, that accurate assessments are placed on the rolls regardless of which party initiates the review.

Turning to the purpose the Legislature intended to achieve by such a section, it appears to me it is designed to equate the position of the appellant and the respondent before the Board and avoid the necessity of detailing procedures for the conduct of a cross-appeal.

Once an appellant has launched an appeal, there is no power in the Board to refuse to receive evidence from the appellant with respect to an assessment, nor may it refuse to determine the assessment (s. 70). Section 69 of the Act reads in part:

> "When board may vary assessment
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> **69.** (1) In an appeal under this Act the board has and may exercise with reference to the subject matter of the appeal, all the powers of the Court of Revision, and without restricting the generality of the foregoing, the board may determine, and make an order accordingly,
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> (a) whether or not the land or improvements, or both, have been valued at too high or too low an amount; . "
>
> (Emphasis added.)

There is no provision or need for a cross-appeal because once the appeal is lodged the Board may, on the basis of all the information before it, reduce or increase the assessment as it considers appropriate, regardless of the fact that the appellant is only asking for a reduction of the assessment.

As determined by Seaton, J.A., in *Assessment Commissioner of B.C.* v. *Western Forest Industries Ltd.* (1980), 25 B.C.L.R. 189 (B.C.C.A.) at p. 205:

> ". . . I think that the board can fix what it considers to be the proper value no matter how the appeal comes to be before it."

Indeed, it may continue the hearing even though the appellant wishes to withdraw and discontinue the appeal (Rule 5).

Accordingly, once the appeal is launched, s. 70 puts the respondent to the appeal in the same position as the appellant. As long as it wishes to introduce evidence the Board cannot refuse to receive it or refuse to make a determination as to the appropriate assessment. This procedure obviates the need for a formal cross-appeal.

With regard to the suggestion that such a construction is inconsistent with other sections of the Act, we were referred to Rule 5, passed pursuant to s. 61 (c) of the Act, which expressly provides

that the Rules must be construed in a manner not inconsistent with the Act. Apart from such a direction, it appears to me that Rule 5 supports the "literal" construction of s. 70. Rule 5 provides that an appellant may not withdraw an appeal without leave of the Board, which in effect insures that once an appeal has been lodged, regardless of the wishes of both parties, it cannot be withdrawn as long as the Board considers there is a question about the appropriateness of the assessment to be resolved.

In my view, the Board erred in granting the appellants leave to withdraw their appeals when one of the parties (i.e., respondent) wished to introduce evidence as to correction of the assessment. The appeals should be allowed and the matter be referred back to the Board for resolution of the matters raised by the parties.