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**CANADIAN NATIONAL RAILWAY COMPANY**

**v.**

**ASSESSOR OF AREA 1 - SAANICH-CAPITAL**

Supreme Court of British Columbia (A880148) Vancouver Registry

Before MR. JUSTICE LEGG

Vancouver, April 29, 1988

David S. Harris for the appellant  
G. E. McDannold for the respondent

**Reasons for Judgment**

June 7, 1988

This assessment appeal is concerned with whether the Assessment Appeal Board was correct in rejecting the assessor's recommendation to reduce the assessment on the railway company's property on the grounds that it was subject to economic obsolescence. Both counsel for the appellant and for the respondent submitted that the Board had erred in rejecting the assessor's recommendation.

The facts in the Stated Case are follows (sic):

"1. The subject of this hearing are three trestles which are part of an existing and used railway line which runs from the Victoria Inner Harbour area (when (sic) there is a barge loading ferry slip), then to B.C. Forest Products and onward to Borden Mercantile.

These three trestles are described as "timber and open deck pile trestles" and are the sole improvements on the two Assessment Rolls. The trestle over Selkirk Water is on Roll No. 01-61-234-11-760-008.

The two trestles shown on Roll No. 01-61-308-65-9462-500 are known as Brett Avenue and Saanich Road.

"2. Two of the trestles were built in 1958 and the third was "considerably renovated and maintained to like new condition"; effective age is 1974.

"3. It was proposed by the assessor that each of the trestles was to receive a reduction in value by virtue of an assessor's recommendation.

In the calculation of each of the proposed reductions by the assessor, a specific deduction was made, titled "Economic Depreciation." The additional amount calculated for Roll No. 01-61-234-11-760-008 was 25% of the Depreciated Value and each trestle on Roll No. 01-61-308-65-9462-500 was accorded 50% of the Depreciated Value.

"4. The Appellant was not present at the hearing but had verbally accepted the assessor's recommendations. Written acceptance was anticipated by the assessor.

The Board, in accordance with the Assessment Appeal Board's Rules of Practice and Procedure, Section 9 (4), disallowed that portion of the assessor's recommendation referred to as "Economic Depreciation" thereby lessening the recommended values.

The Board determined at the hearing that the Respondent Deputy Assessor, Mr. Wilkinson, understood the word "Economic," as used in the report, Exhibit No. 1, as referring to the appraisal term "Economic Obsolescence."

"5. The deduction made for Economic Obsolescence by the assessor was lacking in supporting evidence and was attributed to being "based upon past practice of the assessment authority."

In its deliberations, the Board, considered Takla Forest Products Ltd. v. Assessor of Area #26 -- Prince George, Vancouver Registry No. A862179, and concurred with the definition of Economic Obsolescence put forth by Madam Justice Southin. The Board also considered the Molson Companies Ltd. v. Assessor of Area #09 -- Vancouver decision dated June 9, 1987 published in the Assessment Appeal Board, Blue Book (copies attached as Schedules "C" and "D", respectively).

"6. Attached are copies of the decision of the Board dated August 4, 1987, marked Schedule "A" and order of the Board dated September 9, 1987, marked Schedule "B"."

The questions posed for the opinion of this court are as follows:

"1. Did the Assessment Appeal Board err in law when it failed to direct consideration of Economic Obsolescence as claimed by the Appellant for the subject Improvements (namely, the three (3) railway bridges)?

2. Did the Assessment Appeal Board err in law when it failed to direct a reduction in actual values for the subject Improvements by reason of Economic Obsolescence as claimed by the Appellant and in the specific terms proposed by the Deputy Area Assessor (being 25% in the case of the Cowichan Bridge, and 50% in the case of the Saanich Bridges)?"

In its formal reasons the Board stated as follows:

"Roll Numbers 01-61-234-11-760-008 and 01-61-308-65-9462-500

In each of the above roll numbers, the Board was requested to approve an Assessor's recommendation to reduce the actual value of certain trestles currently in use by the Appellant, Canadian National Railway Co.

One trestle, Roll No. 01-61-234-11-760-008 has an added depreciation allowance deducted called "economic depreciation 25% of depreciated value," page 3, Exhibit No. 1. During the hearing it was determined that this added allowance was offered because of reduced rail shipping usages to the various properties at one time serviced by the railway. Effectively, there has been a loss of business income to the railway.

The Board is mindful that Assessment can not consider "value to the owner" in terms of maintaining equity. Further, economic obsolescence is not a measure in Appraisal terminology of loss of income from a business reduction, nor is it a form of measuring global economy.

The Board therefore denies the additional depreciation allowance proposed by the Assessor, and orders the roll be amended as follows:"

The Board then went on to amend the assessment roll by deleting the allowances for economic obsolescence.

The transcript of the hearing before the Board shows that the Board adopted a concept of economic obsolescence expressed by Mr. Andrews, a member of the Board, when Mr. Andrews stated on page 7 of the transcript, as follows:

"Economic obsolescence is a measurement of the loss of value as a result of an influence that has occurred off the site on other real estate adjacent to site, not the simple fact that the owner of the railway line has lost revenues because there's no longer a use."

Mr. Andrews developed this concept more fully when he referred at pages 9 and 10 of the transcript to the decision of Madam Justice Southin in *Takla Forest Products Ltd. v. Assessor of Area No. 26 -- Prince George, Stated Case No. 225*. He accepted the definition of economic obsolescence given by Southin, J. in that case, although he disagreed with the example she had used.

In my opinion, although the Board was correct in accepting Southin J.'s definition, it erred in law in applying a concept of economic obsolescence which was more limited than that which Southin J., had pronounced and erred in using the definition of "a loss of value as a result of an influence that has occurred off the site on other real estate adjacent to site . . ."

Economic obsolescence is not so limited a concept.

At the hearing of this appeal I indicated to counsel that not only was the concept which the Board adopted contrary to the definition used by Madam Justice Southin in *Takla* but that it was also contrary to a number of earlier decisions of this Court in which economic obsolescence had been considered. Counsel have since assisted me by providing me with references to those decisions.

An early assessment case in British Columbia which considered economic obsolescence was **Re Assessment Equalization Act**, *Re Royalite Oil Company Limited*, (1957) 23 W.W.R. 328 (B.C.S.C.) Stated Case No. 10. At page 38 of the Stated Case, Chief Justice Sherwood Lett quoted a definition of economic obsolescence which he found to be helpful and which shows that it has a wide meaning. He said:

"Economic obsolescence -- Loss of value through economic obsolescence is apparent if the neighbourhood has changed through racial encroachment, through a change in the use of the land, by reason of zoning restrictions, or by the imposition of some other economic law of change. It cannot be estimated as a percentage of reproduction cost new. It has nothing in common with reproduction cost -- nothing to do with cost in any analysis. Its measurements must be otherwise if it is to be estimated reasonably or otherwise if it is to be estimated reasonably or intelligently. The estimate of economic loss is economic inutility. It may best be estimated dollar wise by capitalization of the money lost through estimated comparative failure to produce normal income."

(underlining in original citation)

The Chief Justice stated:

"Obsolescence is a type of classification of depreciation for which an allowance may be made when there is a loss in value resulting from various causes."

Although the Chief Justice did not make an allowance for economic obsolescence in the Royalite case, the definitions which he gave were recently approved by Mr. Justice A. G. MacKinnon in *Lornex Mining Ltd. v. Assessor of Area #23 -- Kamloops*, Stated Case No. 245.

Another case which considered economic obsolescence is the *Corporation of the District of Maple Ridge v. British Columbia Forest Products Ltd.*, Stated Case No. 21. In that case Mr. Justice Sullivan applied the reasoning in the Royalite case and upheld the Board's allowance for economic obsolescence on a cedar mill where the demand for the products of the mill had declined since it was constructed in 1912.

A further leading case in British Columbia is the case of *The Racquet Club of Victoria Holdings Ltd. v. Assessor Area #0 -- Saanich and the Islands-Ganges et al*, (1979) 4 W.W.R. 667 (B.C.S.C.), Stated Case No. 120. In that case Mr. Justice Taylor, at page 716 of the Stated Case report, referred to economic obsolescence in the following terms:

"In valuing the property by the depreciated replacement approach, it is proper, and in my view necessary in law, to ask of oneself: Would a prudent purchaser be prepared to pay what these buildings would in fact cost to replace."

"Normally the assessor can, perhaps, make that assumption. The buildings would not normally be if they were not an economically-justifiable proposition. But there are special circumstances in which it may be apparent that a prudent purchaser would not pay what the buildings would cost to replace, because they are too big, they are mislocated, or their usefulness is no longer recognized by the public in the way that it was at the time they were built. In those circumstances, if the replacement approach is used, there must not only be allowance made for depreciation, to reflect the purchaser's view of the lower value due to wearing out of the premises, but also allowance made to reflect the view that a purchaser today would take of the reduced attractiveness of the improvements. For lack of a better expression, that may be called economic obsolescence."

In *British Columbia Forest Products v. Assessor of Area #03 -- Cowichan Valley and Prince George Pulp and Paper Limited v. Assessor of Area #26 -- Prince George*, Stated Case No. 193, Mr. Justice Gibbs spoke of economic obsolescence as external obsolescence. He said at page 1083:

"The Board's reasoning in rejecting an allowance for external obsolescence is faulty in at least two major respects. Firstly, in applying the textbook quotation which it adopted, the Board failed to recognize that depressed market conditions are as much a 'negative influence from outside the site' as are zoning regulations or inharmonious uses of adjacent properties. Secondly, it is inconsistent with the realities of the market place to conclude that a prudent purchaser looks only at capacity without regard to the market for the commodity which the capacity can produce. However, even though the reasoning is faulty, does the failure to take external obsolescence into account amount to an error in law?" (Emphasis added)

He then went on to find that the Board erred in law in failing to reach a decision based upon the evidence before the Board.

In *B. C. Timber Ltd. v. Assessor of Area #18 -- Trail*, Stated Case 199, Mr. Justice Lander adopted the reasoning of Gibbs, J. in the B.C.F.P. case and held, at page 1123:

"That depressed market conditions are as much as 'negative influence from outside the site' as are zoning regulations or inharmonious uses of adjacent properties. Secondly, it is inconsistent with the realities of the marketplace to conclude that a prudent purchaser looks only at capacity without regard to the market for the commodity which the capacity can produce."

In *D. Groot Logging Ltd. v. Assessor of Area #25 -- Northwest*, Stated Case No. 200, Mr. Justice Gibbs followed his earlier *British Columbia Forest Products Limited* decision in deciding that an allowance for economic obsolescence ought to be allowed when there is evidence of "long term adverse impact of economic recession on the markets for the mill products" (see page 1125). At page 1128, he stated that the method for calculating an economic allowance may well have to be tailored to the individual property.

"Because the appellant's plant is unique and encounters marketing problems attributable to other factors in addition to those that other industries in the area have encountered due to the general economic recession seems to me that this is a case where a generally employed percentage reduction for the geographic area would not be an appropriate method for calculating economic obsolescence."

In *B. C. Timber Ltd. (Westar Timber Ltd.) v. Assessor of Area #25 -- Northwest*, Stated Case No. 201, Mr. Justice Macdonald followed the earlier decisions in *British Columbia Forest Products Ltd.*, *B. C. Timber Ltd.*, and *D. Groot Logging*.

In *Crown Forest Industries Limited v. Assessor of Area #106 -- Courtenay*, Stated Case No. 210, Madam Justice Southin, at page 1183, adopted the Assessment Appeal Board's definition of external obsolescence as being:

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

It is this definition which she adopted in *Takla Forest Products Limited* although she made no reference to her earlier decision in that case. In *Takla* she added to the definition the following limitations:

"It does not mean temporary diminished utility because of the ups and downs of the economy. The word 'obsolescence' means 'the process of become obsolete' (sic) and 'obsolete' means 'that is no longer practised or used; discarded; out of date' (*Shorter Oxford English Dictionary*)."

One final authority to which I shall refer which was cited to me by counsel is *Re Dominion Bridge Co. Ltd. and Town of Mississauga* (1974) 3 O.R. (2d) 205. In that case the Ontario Court of Appeal, at page 208, gave this review of the authorities regarding external obsolescence:

"In the case of *Dominion Engineering Works Ltd. v. City of Lachine*, [1966] Que. Q.B. 621 (affirmed in the Supreme Court of Canada, May 13, 1969 [1969] S.C.R. v], Mr. Justice Brossard dealt at length with the meaning of obsolescence and its application on assessment appeals. He therein cited with approval the following statement of Mr. Justice Mackinnon in the case of *Dominion Textile Co. Ltd. v. City of Montreal*, [1946] Rev. Leg. 257 at p. 264, as follows [at pp. 628-9]:

"Obsolescence is defined in *Prouty and Collin's Appraisers' and Assessors' Manual* (P. 73) as the decrease in functional value of a building, caused by changing utility conditions and is due to one or both of the following factors: 1. Internal obsolescence or obsolescence resulting from the decrease in the ability of a building to serve the purpose

for which it was constructed . . . 2. External obsolescence or obsolescence resulting from the changes of the character of the surrounding district.

'In McMichael's Appraising Manual, published in New York by Prentiss Hall Inc., 1931, "obsolescence" is defined as "functional and economic and denotes loss in value due to any change, lower productivity, inadequate architectural style, shifting of business, aging of residential district, absence of new and efficient building appliances, change in use, adverse business conditions, unfavourable tendencies, improper management and other factors."

'In The Dow Service (p. 37), under the heading Obsolescence, one finds: Obsolescence differs from depreciation in that it concerns itself with a condition having nothing to do with the physical deterioration of the buildings.'

"Brossard, J. [quoting Dominion Textile Co. Ltd. v. City of Montreal], added the following observation at p. 629 of his reasons [translation]:

'One must distinguish between internal "obsolescence" and external "obsolescence"; the first stems from the fact that a building becomes less suitable for the purposes for which it was built; the second from changes in the neighborhood.'

Internal obsolescence represents a lessening of the usefulness for which the building was constructed; external obsolescence, so called, concerns the economic value of the building apart from its intrinsic usefulness and the degree of use to which it is put."

In the case at bar the Board has adopted a concept of economic obsolescence, which is not consistent with these decisions by limiting economic obsolescence to diminution in value caused by other real estate away from the subject site.

If the allowances for economic obsolescence were based upon depressed market conditions or other negative influences from outside the site which affected the value of the railway property to **any** owner, these allowances for economic obsolescence were correct. In my opinion the Board erred in law in not so finding.

I therefore hold that Question 1 in the Stated Case should be answered yes.

I consider that Question 2 should also be answered in the affirmative because the only evidence before the Board was the evidence of the Assessor that in (sic) the railway properties had suffered economic obsolescence. It appears from the evidence that a particular railway line was being phased out and while it had not been abandoned, there were only two customers served by that line. It was therefore subject to influences outside the site for which an allowance for economic obsolescence was justified.

In my opinion the second question must also be answered in the affirmative.

Judgment accordingly.