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**WESTCOAST TRANSMISSION COMPANY LIMITED**

**v.**

**ASSESSOR OF AREA 9 -- VANCOUVER**

Supreme Court of British Columbia (A873312) Vancouver Registry

Before MR. JUSTICE MACDONELL

Vancouver, B.C., October 7, 1988

G. K. MacIntosh, Q.C., for the respondent/cross appellant  
John E. D. Savage for the appellant/respondent on cross appeal

**Reasons for Judgment**

October 19, 1988

This is a case stated by the Assessment Appeal Board, pursuant to s. 74 (2) of the *Assessment Act*, R.S.B.C. 1979, c. 21, at the request of the Assessment Commission (sic) of British Columbia and Westcoast Transmission Company Limited (now known as Westcoast Energy Inc.), seeking the opinion of the Supreme Court on questions of law upon the following material facts taken from the stated case:

1. Westcoast Transmission Company Limited appealed the decision of the 1985 Court of Revision regarding the assessment of an office building which it owned, located at 1333 West Georgia Street, Vancouver, B.C.
2. That appeal was heard by an Assessment Appeal Board composed of Arthur H. Meakin, Chairman; Donald C. Andrews and Roderick I. MacDonald as members, on the 12th day of December 1985, and on the 21st of January 1986. The Board rendered its decision on the 15th of April 1986, which decision forms part of the stated case.
3. Westcoast Transmission Company Limited appealed the decision of the Assessment Appeal Board to the Supreme Court of British Columbia by way of a stated case pursuant to section 74 (2) of the *Assessment Act*. The stated case was heard by Mr. Justice Cumming on May 28, 1987 and his decision was rendered on June 10, 1987.
4. The matter of the assessment of the subject building was brought on for reconsideration in accordance with reasons of Mr. Justice Cumming before an Assessment Appeal Board composed of Donald L. Brothers, Q.C., Chairman, and Wesley J. Hobson and Paul S. Newson as members.

*Regarding the Reference Back to a Different Panel*

(Questions 1, 2 and 3 of the Assessment Commissioner)

1. Section 48 (1) of the *Assessment Act* provides for the “Appointment of an Assessment Appeal Board”. It specifically says — “The Lieutenant Governor in Council shall establish one or more Boards, each to be known as an Assessment Appeal Board, and each consisting of 3 members appointed by him.”
2. For several years there was only one Assessment Appeal Board.
3. All of the remaining sections in this Part of the *Assessment Act* refer to “the Board”.
4. In recent years, with the proliferation of appeals, there are now six Assessment Appeal Boards — each of which is referred to as an “Assessment Appeal Board”.
5. Formerly, all appeals and “referrals back” to the Board by the Court, under section 74 of the *Assessment Act*, were assigned to the “Assessment Appeal Board” by the Senior Chairman. In the recent past, there have been a number of occasions when the Senior Chairman has assigned a matter which has been referred back by the Court, to a Board made up of different personnel than the Board which had heard the original appeal. Latterly, with the appointment of an Executive Director, all appeals and referrals back to the Board by the Court are handled by him.
6. The Board which heard the appeal by Westcoast Transmission Company Limited consisted of Arthur H. Meakin (Chairman), Donald C. Andrews and Roderick I. T. MacDonald, as members, all appointed as members of Assessment Appeal Board No. 3, by Order-in-Council. They handed down their decision on the 15th day of April 1986.
7. Prior to the hearing of the current appeal, Mr. Justice Cumming issued a decision of the Supreme Court, remitting his reasons for answering questions asked by the Board back to the Board as the opinion of the Court.
8. Prior to the handing down of the decision of Mr. Justice Cumming, Mr. MacDonald was transferred to another Board by way of a further Order-in-Council and his place on the Board was taken by Geoffrey J. W. Thomas.
9. Prior to the assignment, by the Executive Director of the Board to hear the referral back to the Board, the following events occurred:
  - (a) An accusation had been made against the original Board as to bias by the taxpayer, Westcoast Transmission Company Limited, and requested that this referral back be “not assigned to the original panel”. This letter was followed by a second in which the solicitor for the appellant corporation renewed his request that this matter be heard by another panel, stating “It is respectfully submitted that it is inappropriate for proceedings to continue where there is an impression of bias, whether or not any bias exists in fact.”
  - (b) The Executive Director was aware of the fact that the terms of some of the Board members were expiring on September 30, 1987 and that Mr. Meakin had expressed his wish to retire from the Board.
  - (c) To reconstitute the original Board would require a new Order-in-Council. The Chairman of the original Board might be retired before the Order-in-Council could be obtained and the referral heard.
  - (d) There was available to the Executive Director a Board concerning which there was no accusation of perceived bias.

(e) The Executive Director appointed an Assessment Appeal Board consisting of D. L. Brothers, Chairman; W. J. Hobson, member; and P. S. Newson, member, to hear the referral back.

10. At the commencement of the hearing of the referral back to the Assessment Appeal Board, the Board heard argument as to whether the Board had jurisdiction and found that it was properly "seized of the appeal".

*Regarding the Terms of the Reference Back*

(Questions 4 and 5 of the Assessment Commissioner and the question of Westcoast Transmission Company Limited)

1. The appellant, Westcoast Transmission Company Limited, appealed the decision made by the Meakin Board to the Supreme Court of British Columbia by way of stated case. The Assessor did not file an appeal against any aspect of the decision.

2. When the stated case was heard before Mr. Justice Cumming, the issue was "whether the Board erred when it ignored vacancy established by the market rates, and relied instead upon the fact that this building was fully occupied because the owner occupied nine of the twelve floors."

3. In his decision, dated June 10, 1987, (Vancouver Registry A870297), Mr. Justice Cumming found that:

"The Assessment Appeal Board erred by not taking into consideration a vacancy allowance in the assessment of the value of the building of the appellant, Westcoast Transmission Company Limited."

"The Assessment Appeal Board erred by valuing the covenant of the appellant, Westcoast Transmission Company Limited, rather than valuing the real estate of the appellant."

4. He then referred the opinions of the Court back to the Board.

5. The solicitor for the Assessor argued that if the new Board as constituted at the hearing was to hear the case, it should be a rehearing of the case, due to the fact that all factors of valuation, particularly in the income approach to valuation, are interdependent and that the Board did not have available to it the transcript of the evidence of the previous hearing, and that the Board had not heard and considered the evidence of the previous hearing.

6. The solicitor for Westcoast Transmission Company Limited then replied that all the Assessor wanted was "a second kick at the can" and a complete rehearing of the first appeal which had been decided in the company's favour by the Board and the Supreme Court.

7. The solicitor for the appellant argued that the jurisdiction of the Appeal Board was limited to correcting the "income" calculations by "plugging in" the correct vacancy rate as determined by Cumming, J.

In the alternative, the solicitor for the appellant argued, if the Appeal Board had the jurisdiction to reconsider the capitalization rate figure, that jurisdiction was limited to a consideration of what effect, if any, the change in vacancy rate as ordered by Cumming J. would have on the capitalization rate.

8. The Board found that the judge had specifically directed it to alter the vacancy rate and proceeded to do so.

9. The Board then considered the judge had found that it had erred when it valued the covenant of the owner which could, in turn, affect the capitalization rate (the final factor in the income approach) and, since the solicitor for Westcoast Transmission Company Limited had agreed that the capitalization rate (cap rate) was “arguable”, issued a ruling that it would hear evidence on this issue and did so.
10. The Board found, after listening to argument of counsel and reviewing the evidence, that it had erred in the original decision and that the correct cap rate to be applied was 9.5 per cent and not 10 per cent (as previously found).

*Regarding the Reopening of the Entire Hearing*

(Questions 6, 7 and 8 by the Assessment Commissioner)

1. The Board (after reviewing the opinions of Mr. Justice Cumming) was satisfied that it had not been requested by the judge to rehear the entire appeal. He had found that the Board had erred on two points only.
2. The Board took into consideration that the Assessor had appeared satisfied with the first decision, since he did not appeal from it.
3. The Board, therefore, found that it was not required to hear any evidence regarding the income or expense calculations to arrive at net income to value the building in issue.
4. After three days of hearing argument and evidence and listening to legal argument, the Board ordered the solicitor for the Assessor to cease and desist from arguing the correct amount of taxation to be allowed in arriving at a figure for expenses to be employed in the use of the Income Approach.

The questions on which the Board is required by the Assessment Commission (sic) to ask for the opinions of the Supreme Court are:

1. Did the Assessment Appeal Board err in law in holding that the appeal should proceed before three Board members who did not hear the original appeal, when:
  - (a) the Board members who heard the original appeal continued to be Assessment Appeal Board members;
  - (b) there was no transcript of evidence of the original hearing available to the new Board?
2. Did the Assessment Appeal Board err in law in finding that it was “seized of this matter”?
3. Did the Assessment Appeal Board err in law in finding that the Assessment Appeal Board which originally heard the matter “no longer exists”?
4. Did the Assessment Appeal Board err in law in finding that the decision of the Honourable Mr. Justice Cumming did not require a reconsideration of all the evidence heard by the original Board?
5. Did the Assessment Appeal Board err in law in finding that the decision of the Honourable Mr. Justice Cumming required only that the Assessment Appeal Board reconsider the vacancy rate and capitalization rate?
6. Did the Assessment Appeal Board err in law in finding that the proper procedure was to accept all of the income calculations and expense calculations presented by Mr. Geddes

in the original hearing and not entertain any further evidence or argument on those calculations?

7. Did the Assessment Appeal Board err in law in not adjusting in its income calculation the amount of tax expense when all the evidence before the Board was that if it found the value of the property to be lower than the figure on the Assessment Roll, the tax expense would be less?
8. Did the Assessment Appeal Board err in law in ordering counsel to desist from arguing that the figure used for tax expense had to be adjusted in the circumstances of this appeal?

The question on which the Board is required by Westcoast Transmission Company Limited to ask for the opinion of the Supreme Court is:

1. Did the Assessment Appeal Board err in law in reducing the capitalization rate from 10 per cent to 9.5 per cent?

The first four questions of the stated case involve the administrative decision to reconstitute the Assessment Appeal Board with different members than originally heard the appeal for the purpose of considering the questions remitted to the Board by the Court. The material facts make it abundantly clear that there was a very good reason for reconstituting the Board with different members than sat initially, because of a comment by one of the members as to the correctness at law of the direction and opinion of Mr. Justice Cumming. What seems to be at the heart of the objection to the Board's sitting was that it was the perception of counsel for the Assessor that there was to be a re-hearing of the whole matter which would go well beyond the opinion and direction of the Honourable Mr. Justice Cumming. Counsel for the respondent viewed the matter in a different light and interpreted the directions as limiting the scope of the hearing to a matter of dealing with vacancy rate and possibly capitalization rate. Counsel for the respondent envisaged that only evidence relating to those two issues would be heard and all other facts not in dispute on appeal were to be accepted as fact.

It is my view that no matter which approach is taken it was appropriate for a new Board to be constituted and that when it undertook the hearing it was seized of the matter. There is only one Board and there is nothing unusual about the members changing for various reasons, as the Board speaks as one body.

It is my opinion, from reviewing the material and hearing the arguments of counsel, that Mr. Justice Cumming did not require reconsideration of all the evidence heard by the original Board, and the Board was correct in holding that Mr. Justice Cumming only required them to reconsider the vacancy rate and the capitalization rate. It is quite clear from the argument advanced on behalf of the Assessor relating to questions 6 and 7 that the perceived potential for error is in accepting as undisputed fact the income calculations and the expenses presented by Mr. Geddes in the original hearing. It is argued for the Assessor that should the income be reduced, the taxes accordingly would reduce as well and that it was necessary to make a recalculation to make sure that the tax expense items be reduced. Superficially, the argument has some attraction. However, it has to be borne in mind that these matters were not raised on the appeal and the figures were accepted for the purposes of argument and the answers to the stated case were predicated on the argument presented and the questions posed. It is my view that it is inappropriate to go back into a full hearing and rework the various calculations for expenses, as this would appear to me to be an unending pursuit, depending on what calculation is made for what item, dependent upon final income values and assessments. It is my opinion that the Assessor is stuck with the agreed facts and cannot now, nor could it before the reconstituted Board, go into that issue. I conclude, therefore, that the Board was not in error when it refused to adjust the income calculations by estimated tax expense in the circumstances. It follows that with the direction of Mr. Justice Cumming and his answers to the questions posed, it was proper for the Assessment Appeal Board to refuse to entertain arguments and evidence dealing with the tax expense calculation in the circumstances.

With respect to the question raised by Westcoast Transmission with regard to the capitalization rate, it is my view that Mr. Justice Cumming did sufficiently discuss the rate for it to be appropriate that the Board reconsider the capitalization rate, and for that purpose it was appropriate to hear evidence. Page 7 of the judgment of Mr. Justice Cumming makes this reconsideration appropriate:

I stated above that the concepts used, in developing capitalization rates for application to the subject, should be used consistently. Thus it makes no sense to develop a capitalization rate on one set of assumptions about long-term vacancy rates, long-term rents, and long-term expenses, and then apply that rate to the income of the subject property if it is not derived in the same way.

*CONCLUSION:*

In response to the questions set out in the stated case for the opinion of the Court, I set out my opinion as follows:

*Question 1 No.*

*Question 2 No.*

*Question 3 No.*

*Question 4 No.*

*Question 5 No.*

*Question 6 No.*

*Question 7 No.*

*Question 8 No.*

*Westcoast Transmission*

*Question 1 No.*