The following version is for informational purposes only

ASSESSMENT COMMISSIONER

v.

CANADIAN PACIFIC LIMITED AND CANADIAN NATIONAL RAILWAY COMPANY

British Columbia Court of Appeal
(V00952) Victoria Registry
(A883710) Vancouver Registry

Before MR. JUSTICE WALLACE (in chambers)

Vancouver, April 27, 1989

D. O. Morley for the appellant
B. W. Hoeschen for Canadian Pacific Limited
F. H. Herbert for Canadian National Railway Company

Reasons for Judgment May 30, 1989

The appellant (the Assessment Commissioner of British Columbia) applies for leave to appeal on a question of law from the decision of McLachlin, C.J.S.C. (as she then was) pursuant to s. 74 (7) of the Assessment Act.

The appeal is confined to the answer given by the Chief Justice to question number 6, which, among other questions, had been referred to the Supreme Court by way of a stated case from a decision of the Assessment Appeal Board.

The assessment concerns the application of s. 27 of the Assessment Act to some seventeen properties owned by Canadian Pacific in eight communities throughout British Columbia and a further twenty-five properties owned by Canadian National in five communities around the Province. Section 27 provides, in part:

> "27. (1) The actual value of the following shall be determined using rates prescribed by the commissioner:
>
> (e) the right of way for track referred to in paragraph (b).
>
> (1.1) Subsection (1) (d) and (e) does not apply in respect of land that has a higher and better use than use for a right of way.
>
> (6) For the purposes of subsection (1) (d) and (e) 'right of way' means land that a corporation is entitled to use for the operation of those things referred to in paragraph (a), (b) or (c) that are to be valued under this section, but 'right of way' does not include land of which the corporation is not the owner within the meaning of this Act.
>
> (7) For the purpose of applying subsection (1) (b), the track in place of a railway corporation is inclusive of all structures, erections and things, coal bunkers, corrals, stand pipes, fuel oil storage tanks, oil fuelling equipment, water tanks, station houses, engine houses,

> roundhouses, turntables, docks, wharves, freight sheds, weigh scales, repair and cleaning shops and equipment, boiler houses, offices, sand towers and equipment, pavement, platforms, yard fencing and lighting, powerhouses, transmission stations or substations, and the separate equipment for each of them, as are necessary for the operation of the railway."

Question number 6 in the stated case for the consideration of the Supreme Court reads as follows:

> "6. Did the Assessment Appeal Board err in law by applying section 27 (1.1) of the Assessment Act on the basis of no evidence or, in the alternative, upon a view of the facts which could not reasonably be entertained?"

The Assessment Appeal Board found that no higher or better use than use as a right of way had been established.

Chief Justice McLachlin approached the question in this manner:

> "As I have already indicated, the Assessor, in order to avail himself of s. 27 (1.1) must show that the land in question has a higher and better use than for right of way. This necessarily involves at least two steps: (1)establishing the value of the piece of land as a right of way; and (2)establishing a higher value of the same land for another use.
>
> In the case at bar, the Assessor never performed the first step. Instead of determining the actual value of the land in its use as right of way, the Assessor assumed that that value was the Commissioner's rate. There is no necessary connection, logical or otherwise, between the Commissioner's rate and the actual value of the land in its use as right of way.
>
> Because he never determined the actual value of the land in its use as right of way, the Assessor did not establish a higher and better use and cannot bring himself within s. 27 (1.1). Thus the Board was correct in concluding that the Assessor had not established higher and better use. I add that this is not so much a matter of no evidence, as question six implies, but a matter of the Assessor not having undertaken the necessary investigation to permit him to establish a higher and better use."

ISSUE:

Counsel for the appellant submits that the Chief Justice misinterpreted s. 27 of the Assessment Act and failed to recognize that the Assessor was required by s. 26 (3) to determine the actual value of railway right of way by reference to the rates prescribed by the Commissioner from time to time.

Furthermore, counsel for the appellant submitted the Chief Justice erred in law in finding that "the Assessor did not establish a higher and better use and cannot bring himself within s. 27 (1.1)". Counsel asserted that with respect to certain of the properties under appeal, the Assessor had clearly established a higher and better use for such property than its use in right of way for railway trackage.

In my view, both conclusions reached by the Chief Justice turn on her construction of s. 27 of the Assessment Act, in the light of the agreed facts, and, accordingly, are questions of law. The matter raises questions of general importance to the parties and the other taxpayers with respect to the assessment of railway property throughout the Province. Section 27 (1.1) has not received previous judicial interpretation apart from this case and, without commenting on the merits of the appeal, I am of the view the applicant has an arguable case.

For these reasons I would grant leave to appeal. Costs shall be costs of the appeal.