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ASSESSMENT COMMISSIONER

v.

CANADIAN PACIFIC LIMITED AND CANADIAN NATIONAL RAILWAY COMPANY

Supreme Court of British Columbia (A883710) Vancouver Registry

Before CHIEF JUSTICE McLACHLIN

Vancouver, January 18 and
February 1, 1989

D.O. Marley for the appellant
B. W. Hoeschen for the respondent, Canadian Pacific Limited
F.H. Herbert, Q.C. and T. J. Potter for the respondent, Canadian National Railway Company

Reasons for Judgment February 16, 1989

This is an appeal from a decision of the Assessment Appeal Board. The issue is whether certain land owned by the respondent railway companies should be taxed on a value basis or on the basis of special "Commissioners' Rates" made applicable to certain transporters and utilities under s. 27 of the Assessment Act. The tax payable under the Commissioner's rates is generally lower than the tax which would be payable on a value basis since many of the properties in question are located in urban areas where property values are high.

The legal issues arising out of the general issue are:

> (1) whether the lands fall within the definition of "right-of-way" in s. 27; and, if so,
>
> (2) whether those lands had a higher and better use which would exempt them from the commissioner's rates imposed by s. 27.

The Assessment Appeal Board ruled that the lands in question fell within the definition of "right of way" in s. 27 and that no higher and better use for the lands in question had been established, with the result that the railway companies were entitled to have the lands taxed at the Commissioner's rates.

THE LEGISLATION

Section 27 of the Assessment Act provides:

> 27. (1) The actual value of the following shall be determined using rates prescribed by the commissioner:
>
> > (a) the pole lines, cables, towers, poles and wires of a telegraph, Telephone, trolley coach, bus or electrical power corporation;

(b) the track in place of a railway corporation, whether the track is on a public highway, or on a privately owned right of way;

(c) the pipe lines of a pipe line corporation for the transportation of petroleum, petroleum products, or natural gas, including valves, cleanouts, fastenings, and appurtenances located on the right of way, but not including pumping equipment, compressor equipment, storage tanks and buildings;

(d) the right of way for pole lines, cables, towers, poles, wires and pipe lines referred to in paragraphs (a) and (c);

(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.

(2) [Repealed 1985-20-6, effective July 11, 1985 (B.C. Reg. 214/85).]

(3) The rates prescribed by the commissioner are subject to appeal to the board by notice served on the board and the commissioner before November 1 following receipt of the assessment notice.

(4) The notice of appeal served on the board shall be accompanied by a fee of $25.

(5) The board shall appoint a time, date and place for the hearing of the appeal and shall give notice to the commissioner and to the appellant of the time, date and place fixed for hearing the appeal.

(6) For the purpose 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 apply (sic) subsection (1) (b), the track in place of a railway corporation is inclusive of all structures, erections and things, other than such buildings, bridges, trestles, viaducts, overpasses and similar 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 clearing 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.

THE DECISION APPEALED

In arriving at its conclusion that the lands in question were taxable at Commissioner's rates rather than on a value basis, the Board made a number of observations, many of which are challenged.

First, the Board said that ambiguity in the legislation should be resolved in favour of the taxpayer. Proceeding to the issue of what constitutes "right of way", the Board characterized the issue as being whether right of way should be confined to the 100-foot strip of land on which railway track was placed, or whether right of way should be defined more broadly as any land which the company required "in the operation of its railway. However, the Board went on to consider not what land was required for the operation of the railway, but the narrow wording of s. 27 (6) - what

was required for the operation of track in place. It concluded that operation of "track in place" in fact meant the "operation of a railway company" in a broad sense.

The Board then had to consider whether the lands in question, being right of way, were excluded under s. 27 (7). It concluded that they were not, although the improvements on the land might be.

Finally the Board approached the question of whether the lands had a higher and better use which required taxation based on value under s. 27 (1.1). It expressed the view that the Assessor had erred in inferring a higher and better use for the lands from the fact that their value exceeded the Commissioner's rates. The Board concluded that the highest and best use of the lands was for railway purposes given the zoning requirements, and that the Assessor had failed to discharge the onus upon him of establishing that the land had a higher and better use than as railway right of way or that a different use of the lands would yield a greater net return than its present use.

THE STATED CASE

The Assessor appeals from the Board's decision, putting six questions to this Court.

> 1. Did the Assessment Appeal Board err in law by failing to interpret section 27 of the Assessment Act in accordance with general principles of statutory interpretation?
>
> 2. Did the Assessment Appeal Board err in law in its interpretation of section 27 (6) of the Assessment Act by holding that the operation of the "track in place" of a railway corporation means the entire operation of a railway corporation?
>
> 3. Did the Assessment Appeal Board err in law in its interpretation of section 27 (6) of the Assessment Act by holding that "right-of-way" includes all land owned by a railway corporation which is required in the operation of its railway as a whole?
>
> 4. Did the Assessment Appeal Board err in law in its interpretation of section 27 of the Assessment Act by holding that land, situate under certain improvements which are by virtue of section 27 (7) other than "track in place", remains part of the "right-of-way" for tracks?
>
> 5. Did the Assessment Appeal Board err in law by failing to interpret section 27 (1.1) of the Assessment Act in accordance with general principles of statutory interpretation?
>
> 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?

DISCUSSION

I will deal with each of the questions in turn.

Question One

> 1. Did the Assessment Appeal Board err in law by failing to interpret section 27 of the Assessment Act in accordance with general principles of statutory interpretation?

I would answer this question in the negative.

The Appellant submits that the Board erred in adopting the principle that a taxpayer should not be assessed or taxed on land or improvements unless the provision in the Act establishing his liability to pay tax is crystal clear.

I accept the appellant's submission that this approach is no longer applicable. As Estey J., quoting Professor Dreidger, put the matter as follows in Stubart Investments Ltd. v. The Queen, [1984] 1 S.C.R. 536:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical or ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.

Similarly, MacGuigan J.A. stated in Harris Steel Group Inc. v. M.N.R. (1985), 85 D.T.C. 5140 (Fed.C.A.):

> It is now settled law that there is only one principle of statutory interpretation, which might be designated as the words in total context approach.

However, while the Board cited the wrong principle of construction, I can find no evidence that it relied on it in arriving at its conclusion. In fact, it looked at the words of s. 27 in their total context, bearing in mind the ordinary and, where appropriate, the technical meaning of the words as well as the purpose of the Act and s. 27's place in the scheme it establishes.

Questions Two and Three

> 2. Did the Assessment Appeal Board err in law in its interpretation of section 27 (6) of the Assessment Act by holding that the operation of the "track in place" of a railway corporation means the entire operation of a railway corporation?
>
> 3. Did the Assessment Appeal Board err in law in its interpretation of section 27 (6) of the Assessment Act by holding that "right-of-way" includes all land owned by a railway corporation which is required in the operation of its railway as a whole?

The second question deals with the definition of "operation of track in place" and the third with "right of way". I propose to consider them together since the definition of "right of way" under s. 27 is "land required for the operation of track in place", linking the two.

The Board defined "right of way" as including the land occupied by the track in place and "any other land owned by the company which is required in the operation of its railway, including the operation of stations, repair yards, loading and unloading facilities, storage areas, wharves, berths and waterlots." It went on to state that the question of what was required was entirely for the railway to decide.

The Board accepted the definition of "operation of track in place" proposed by the Canadian Pacific Railway Company, holding that that phrase encompassed virtually all the business of running a major railway system, including parking lots, loading and unloading areas, sites for station houses, engine houses and so forth, as well as docks and wharves connected with its marine operation.

The Board specifically endorsed the following concept of "operation of track in place":

> The operation of track by the running of trains must have a purpose and that purpose is the receipt, carriage and delivery of freight and passengers. That, in turn, requires and

necessitates a large infrastructure of marketing and sales, management, operation, maintenance and repair, supervision and direction located in buildings or facilities on railway owned land.

Three different concepts of "operation of track in place" were urged on me.

The Appellant Assessor submits that land required for the operation of a right of way encompasses only the narrow strip of land which is used for the placement of railway track.

Canadian Pacific submits that the proper interpretation of operation of track in place is the broad definition which the Board adopted. This would place virtually all adjuncts of the railways operations, including, for example, hotels and restaurants, in the special category entitled to Commissioner's rates.

Canadian National endorses a position between these two extremes, submitting that operation of track in place means the operation of the rail transport system. In particular, it contends that facilities for loading and unloading passengers and freight (including, for example, water lots used to transfer rail containers to barges) fall within the phrase "operation of track in place."

An analysis of "operation of track in place" in s. 27 may usefully be preceded by a brief historical review. Historically, only track in place _ the ties and rails _ were exempted by the Act from taxation based on value. In 1986 the Act was amended, effective for the 1987 tax year. The effect of the amendment was to add land to the exempted category by the addition of the concept of "right of way", defined in terms of "operation of track in place".

The critical question which is being litigated for the first time in these proceedings is the precise extent of the land exempted under the new provisions. Is it the classical concept of a ribbon of land on which the railway run? Is it a ribbon of land on which the railway runs together with loading and unloading and other facilities directly related to transport? Or is it a larger concept, extending to the complex infrastructure of transportation and economic functions that form part of a modern railroad enterprise?

Against this historical background, I turn to the wording of s. 27. Section 27 (1) provides that the Commissioner's rates shall apply to "track in place" and "the right of way for track in place." "Right of way" is defined in s. 27 (6) as meaning "land that a corporation is entitled to use for the operation of those things referred to in paragraph (b) . . . [track in place] . . . 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."

It is clear that the respondents are "owners" of the land in question under the Act. It is also clear that the term "land" in the Act is sufficiently broad to include all the property here in issue, including water lots: see s. 1. The real question then is what is meant by land required for "operation of track in place".

In my opinion the words of the Act considered in their historical context do not support a definition of "operation of track in place" as broad as that adopted by the Board. First, the words chosen for addition to the traditional exemption of actual track are "right of way". "Right of way" has a generally understood meaning as the land reserved for placement of a physical improvement such as a railway, transmission line or pipeline. The legislature's use of that word rather than some broader concept indicates that what it had in mind is the actual strip of land on which the railway track is located.

The question then is whether s. 27 (6) broadens the traditional concept of right of way and, if so, to what extent. In my opinion it does broaden the traditional concept. The traditional concept of

right of way is a purely physical concept. Subsection 6 expands that concept by adding land required for the operation of the track in place. However, the expansion is limited. The "operation" referred to is not that of the railway company, but rather of its "track in place." The choice of "track in place" rather than the general operations of the railway or utility indicates that the Legislature did not intend to include land used for the general operations of the railway within the category entitled to Commissioner's rates. For this reason, I conclude that the Board erred in holding that the special tax consideration conferred by s. 27 (1) extends to virtually all the operations of the railway.

On the other hand, I find the interpretation advocated by the Appellant Assessor to be too narrow. If the only exemption for railways was intended to be for track in place and the physical land on which the track is located, there would have been no need to expand the definition of "right of way" in subsection 6. The principle of statutory interpretation that every provision should be given a meaning if possible dictates that "operation of track in place" means more than the land on which the track is situate.

The Appellant relies heavily on s. 27 (7) which excludes buildings, platforms, pavement and a variety of other structures and equipment from the definition of "track in place." But the fact that such structures cannot be considered as "track in place" does not mean that the land on which they are located may not be land required for the **operation** of track in place under subsection 6. As I see it, subsection 7 assists the Appellant only if the word "operation" in subsection 6 is ignored.

In my opinion, land required for the operation of track in place means land which is necessary to the operation of the transportation system which uses the tracks. The question in each case must be: is this land required for the operation or use of the track in place, i.e., to permit the railroad to use the track for carrying goods or passengers as the case may be?

In my opinion, what is "required" for the operation of track in place is not a subjective matter for the railway companies to determine. Nor does it refer to all of what may be needed to economically operate a railway from a modern business point of view. The wording and context of s. 27 relate to what is required in a physical sense to permit the carriage of commodity in question, not to the economic viability of the transportation or to the supply of the commodity to be transported. For this reason, it may be that the land on which the railway company situates its marketing infrastructure, insofar as that function is unrelated to the use or maintenance of track in place, cannot be said to be exempted from value taxation under s. 27. Similarly, it might be that a hydro-electric power plant owned by a utility company, concerned exclusively with production of the commodity to be transported, would not fall within the definition of right of way under s. 27 (6).

On the other hand, facilities necessary for the loading and unloading of cargo and passengers fall within the exemption. The tracks cannot be operated for the purpose for which they are intended _ the transportation of goods and passengers _ without loading and unloading facilities. I would also take the view (although I need not decide for the purposes of this case) that land on which facilities for the temporary storage of goods in transit are located may fall within the exemption, being required for the physical transport of goods by rail. The accommodation of passengers in transit might be more problematic, at least in the modern age, since the variety of accommodation available at most centres would make it difficult to qualify the operation of railroad hotels as necessary for the transport of passengers.

I return to the questions. As for question number two, I agree that the Board erred insofar as it can be taken to have concluded that the "operation of track in place" means the entire operation of the railway companies. It appears, however, that the Board may not have erred in the final result, since the land in question, being used for the loading and unloading of cargo, falls within the narrower interpretation I would place on "land required for the operation of track in place."

Similarly, I find that the Board erred in defining "right of way" as including all land required by the railway corporation for the operation of its railway as a whole. I find the examples the Board gave of land exempted, however, to be representative of what in my opinion is exempted under s. 27 _ land required for "the operation of stations, repair yards, loading and unloading facilities, storage areas, wharves, berths and waterlots." I do not agree with the Board's suggestion that the railway corporation has the unilateral right to determine what lands are "required" under s. 27 (6).

Question Four

> 4. Did the Assessment Appeal Board err in law in its interpretation of section 27 of the Assessment Act by holding that land, situate under certain improvements which are by virtue of section 27 (7) other than "track in place", remains part of the "right-of-way" for tracks?

Section 27 (7) excludes certain improvements from the definition of "track in place". The Assessor took the position that the land under such improvements must also be excluded, applying what has been called "the footprint theory".

The Board rejected this view, stating:

> It seems obvious to the Board, that if the land and improvements ("track in place") contained within the right-of-way are to be valued by the use of Commissioner's Rates under Section 27, all that Section 27 (7) has excluded from the application of the Commissioner's Rates are specific improvements. The land under these specific improvements continues to be part of "right-of-way", and must be valued by Commissioner's Rates.

I agree with the Board. The Appellant argues that since right of way is defined as land required for operation of track in place, it cannot include land used for such things as loading and unloading facilities and station houses. That argument is dependent on its argument that only the ribbon of land on which the tracks is located is right of way, which I cannot accept. In any event, as the Board points out, s. 27 (7) purports to exclude only certain improvements, not the land on which they are situate. The rate at which such lands are taxable must be determined by reference to other provisions of the Act.

I would answer the fourth question in the negative.

Questions Five and Six

> 5. Did the Assessment Appeal Board err in law by failing to interpret section 27 (1.1) of the Assessment Act in accordance with general principles of statutory interpretation?
>
> 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?

These questions relate to the issue of whether the Board erred in finding that no higher and better use had been established for the lands in question. I propose to consider them together.

If the land is found to have a higher and better use, then under s. 27 (1.1) it will be taxed on a value basis rather than the Commissioner's rates. The Assessor decided that because certain of the lands had a value in excess of the Commissioner's rates ($2,410 per acre), a higher and better use had been demonstrated and the land should be taxed on a value basis. The Board found:

(a) The highest and best use of the land within the railway "right-of-way" is for railway purposes as it complies with the zoning requirements.

(b) The Assessor has failed the onus upon him to establish that the land in question has a higher and better use than as "right-of-way" for a railway.

(c) The Assessor has not established to the satisfaction of the Board that the net return by any other use of the land, would be greater than the net return from the present use of this land.

The Appellant argues that the Board misapplied the concept of legal onus in arriving at these conclusions. On the question of onus, the Board stated:

> The Board has always taken the position that the onus is upon the person claiming an exemption from full taxation . . . However, Section 21 (1.1) is a further exemption provision . . . In the view of the Board, the onus is upon the Assessor to establish to the satisfaction of the Board that the land within the "right-of-way" which he wishes to place on the Roll ad valorem has a higher and better use than use as "right-of-way".

The Appellant argues that the question of onus has no place in a proceeding before the Assessor, in that it is not adversarial, relying on comments made in Quintette Coal Ltd. v. The Assessment Appeal Board of British Columbia etc., unreported S.C.B.C. Stated Case No. 243, October 23, 1986. However, the issue in that case was procedural, not adversarial. It seems fundamental to me that where an assessor seeks to impose tax at a particular rate, he must show that the tax is payable. It is not for the taxpayer to show he should not be obliged to pay tax at the higher rate. This is in accordance with the general proposition, founded on common sense, that a party asserting a proposition has the burden of proving it. In my opinion the Board did not err in putting the onus of proving a higher and better use on the Assessor and I would answer the fifth question in the negative.

I turn then to the final question, which suggests that the Board erred in its conclusion under s. 27 (1.1) because of the view it took of the facts which led it to conclude that there was no evidence of a higher and better use for the lands in question.

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 the 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. In these circumstances, I find it unnecessary to go into the question of whether there was or was not evidence which would have supported the Assessor's conclusion, had he made the necessary finding as to the value of the land in its current use as right of way.

While I find question six difficult to answer as it is framed, I am satisfied that the Board did not err in concluding that the Assessor had not established a higher and better use under s. 27 (1.1).

CONCLUSION

I would answer the questions posed as follows:

Question One: No.

Question Two: Yes. The wording used by the Board and repeated in the question is too broad. However, the Board's conclusion is correct.

Question Three: Yes. The wording used by the Board and repeated in the question is too broad. However, the Board's conclusion is correct.

Question Four: No.

Question Five: No.

Question Six: The Board's conclusion was correct and it is unnecessary and inappropriate to view the matter as one of evidence.