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CANADIAN NATIONAL RAILWAY COMPANY

v.

ASSESSOR OF AREA 9 - VANCOUVER

Supreme Court of B.C. (A882855) Vancouver Registry

Before: MR. JUSTICE LANDER (in Chambers)

Vancouver, March 16, 1989

Gerald W. Ghikas and Shelly-Mae Mitchell for the appellant
Christopher M. Considine for the respondent

Reasons for Judgment March 16, 1989

This is an appeal by way of Stated Case from a decision of the Assessment Appeal Board on August 25, 1988 (Decision). The relevant legislation, the Assessment Act R.S.B.C. 1979, c. 21, provides for an assessor, Court of Revision and an Assessment Appeal Board to work at achieving assessments that are "fair and equitable and fairly represent actual values" (s. 26(2),44(1)(b), and 69(1)), supra. The Appeal Board is a specialized tribunal of persons trained in law or experienced in real property appraisal (s. 48(2), supra. An appeal such as this is limited in jurisdiction to questions of law (s. 74(1)), supra.

The questions flow from the interpretation of section 26 (7), supra, which provides that land and improvements shall be assessed at their "actual value". any reference to the preferred approach to such assessment is limited, other than providing for a broad discretion:

> Valuation for purposes of assessment
>
> 26...
>
> > (3) In determining actual value the assessor may, except where this Act has a different requirement, give consideration to present use, location, original cost, replacement cost, revenue or rental value, market value of land and improvements and comparable land and improvements, economic and functional obsolescence and any other circumstances affecting the value of the land and improvements;

with some reference to the larger context:

> 69.(1) ... [W]ithout restricting the generality of the foregoing, the board may determine, ... (e) whether or not the value at which an individual parcel under consideration is assessed bears a fair and just relation to the value at which similar land and improvements are assessed in the municipality or rural area in which it is situated.

The subject of the appeal by stated case is a major hotel in downtown Vancouver, the Hotel Vancouver (the Hotel). The building is an example of the "chateau" style railway hotel constructed

between 1928 and 1939. In 1975 it was designated a heritage building. As to the assessment, both parties accept that the "income method" may be used to determine the actual value.

The appellant generally questions whether the physical constraints of building design and construction have been adequately considered.

This court is asked whether an error of law occurred (s. 74(l). Southin, J. in Crown Forest Industries, Ltd. v. Assessor of Area 9 - Courtney (Aug. 1985) B.C.A.C. State Cases No. 210 at 1179 (B.C.S.C.), noted that the Court's power to intervene in such cases is limited to where the Appeal Board has:

> (1) misinterpreted or misapplied legislation;
>
> (2) misapplied principles of general law, or;
>
> (3) acted without any evidence or upon a view of the facts which could not reasonably be entertained.
>
> (aff'd in Westcoast Transmission Company, Ltd. v. Assessor of area 9 - Vancouver (May, 1987) B.C.A.C. Stated Cases No. 235 at 1347-48)

In this case, questions one through six may be classified as evidentiary issues relating to the absence of any evidence or the unreasonable view of facts in evidence. Question seven involves the general principal of law of the admissibility of evidence.

As to the evidentiary issues, this Court has no power to intervene unless the Board is found to have (1) acted without any evidence, or (2) upon a view of the facts which could not reasonably be entertained: Westcoast Transmission, supra, at 1348, aff'g Crown Forest Industries, Ltd. supra, at 1191. Under the first condition, the Board cannot base its decision on its own opinions, unsupported by evidence. However, only where there is *no* evidence will an error of law lie; whether there is *sufficient* evidence is a question of fact and cannot be stated: Provincial Assessors of Comox, Cowichan and Nanaimo v. Crown Zellerbach Canada, Ltd. [1963] 42 JW.W.R. 449 at 471 (B.C.C.A.).

The issue of sufficient evidence may be stated as an alleged arbitrary finding. In Pacific Logging Company Ltd. v. Assessor for the Province of British Columbia (Oct. 1974) B.C.A.C. Stated Cases No. 99 the standard was discussed as a finding "impossible on the evidence" or one "with no relation to reality" (at 486). Mr. Justice McIntyre's decision in Pacific Logging was affirmed without reasons by the Supreme Court of Canada, and his definition of "arbitrary" was affirmed by the B.C.C.A. in Kelfor Holdings Ltd. v. Assessor of Area No. 26 - Prince George (1979) B.C.A.C. Stated Cases 130 (at 778-1):

> When I use the word 'arbitrary' I mean, and from the context in which the word is used in the case, I conclude, the assessor meant a decision made at discretion in the absence of specific evidence and based upon opinion or preference (see Shorter Oxford English Dictionary). The resulting assessment is then made without regard for the statutory provisions and uncontrolled by them.

Challenges which merely question the relative weight accorded to certain evidence by the Board will not warrant interference by the Court: Kelfor, supra, at 778-2 D(B.C.C.A.); Bethlehem Copper Corp. v. Assessment Appeal Board (May, 1977) B.C.A.C. State Cases 93 at 450 (B.C.C.A.). Consequently, the extent to which this Court will review evidence to determine whether the

conclusions of the Board disclosed faulty reasoning is limited to situations where "no evidence" is alleged, or where the Board's interpretation was unreasonable.

Although the patently unreasonable test has not been expressly adopted by courts reviewing assessment appeal board findings of fact, such a standard has been practically applied: Provincial Assessors of Comox, et al, supra, and Edwards v. Bairstow [1956] A.C. 14 (H.L.) cited in Crown Forest (1985), supra. Where evidence is adduced which establishes a range of options, the Board has considerable discretion as an expert tribunal in adjudicating from conflicting evidence - it may weigh various approaches and evidence and arrive at a value different from any of them: Assessor of Area 6 - Courtney v. Crown Forest Industries Ltd. (Jan 1987) B.C.A.C. Stated Cases No. 210 at 1202-9(B.C.C.A.).

Within these general principles, questions one through seven are answered as follows:

Questions 1, 2 and 5

> Did the Assessment Appeal Board err in law when it concluded that upon spending five million dollars for deferred maintenance, the expenses of the hotel could be decreased and the net profits could be increased such that the use of industry average ratios in calculations was appropriate?

The Stated Case and the decision indicate that there was some evidence on which the decision could be based. However, the Board also considered evidence which could have lead to a contrary conclusion. The Board recognized that other evidence indicated that due to age and layout the hotel would never be able to achieve the profit-cost ratios of modern plant. On the balance, the conclusion arrived at by the Board falls within the standard noted by Mr. Justice MacFarlane in Kelfor, supra, at 778-2:

> The decision of the Board is attached to the stated case and it shows that the evidence pro and con on value and methods of arriving at value were considered by the Board. At most, it seems to me, it might be argued that the Board had attached too much weight to this factor and too little to another factor, or event that it may *have misunderstood the effect of some of the opinion evidence*.
>
> It, however, does not support the argument of 'arbitrary' in my opinion. On the contrary, I think it shows that the Board examined the evidence and performed the functions which it was required to perform under the statutory provision.
>
> (emphasis added)

The specific industry average expense and profit ratios of 77.8% and 22.2% were put before the Board as evidence. The use of the industry average does not mean that such ratios would in themselves be attained, but only that it is a reasonable value to use in the applicable calculations. Under the circumstances, no error of law occurred.

Questions 3 and 4

> Did the Appeal Board err in law by failing to find that increases in income should be deferred consistently with expenditures on deferred maintenance and improvements?

The Board's decision indicated that there was no significant difference in the estimates of gross revenue between the parties. Although there may be some merit to the appellant's point of deferring income anticipated from improvements at the same rate as they anticipate

expenditures, there is no evidence cited that such a consideration was put before the Board. Quite the contrary is suggested at page 7 of the decision. The Board cannot be faulted for "unreasonably not considering" something which was not before it.

Questions 6

> Did the Assessment Appeal Board err in law when it used an industry average expense ratio based upon some, but not all, of the actual expenses of the subject property.

Given the recognition of classes of property in the valuation process (s. 69(l)(e), and the broad discretion to consider "any other circumstances affecting the value of the land and its improvements: (ss. 26(e), the Appeal Board did not err in law by reasoning that an industry average expense ratio may apply even if all of the actual expenses of the subject property were not applied.

The Board chose the income approach method over the direct sale approach to better accommodate differences in size, age, facilities and quality between the hotel and other properties which had recently been sold. Consequently, the board in its reasons recognized that the subject property is in many respects unique. The hotel's higher than normal room rate and occupancy level was attributed to the hotel's prestige, but much higher operating costs result in a ratio of net profit to gross sales roughly one half of the norm for competitive hotels. The net income was not affected by a change in management and ownership, hence management by inference is not a factor in the low net income levels.

The high operating cost was attributed to functional obsolescence, unusable space, inefficient space planning when designed in the mid 20s, and inefficient heating and equipment. To the extent that these matters may be corrected, a substantial investment of $5,000,000 is proposed for improvements.

Subsequent to this consideration, the reasons of the Appeal Board indicate a detailed summary of the valuation evidence presented to the Board. The board noted that the expert for the appellant took the position that there was "irrefutable evidence that the hotel was under experienced management and was incapable of generating much more than half of the industry average." The respondent assessor's expert, on the other hand, maintained that the industry average properly assessed the market value, and not the value to the owner: see Crown Zellerback Canada Ltd., et al v. Assessment District of Comox, et al (Sept. 1962) B.C.A.C. Stated Cases No. 36 and 157, per Ruttan, J. at 164, aff'd per Sheppard, J.A. at 185. The Board also noted its agreement with the assessor taking a capital deduction for the proposed but deferred maintenance and improvements, "and by doing so he goes some way towards valuing the present worth of future benefits which, in the opinion of the Board and of appraisers in general, is the value to be sought."

The appellant's arguments seem to focus on the need for some special consideration of the hotel building's heritage which is seen as a burden to competitive operations today. Only if the Appeal Board unreasonably or arbitrarily ignored such considerations could this Court interfere. The Board considered the evidence, found that the property was a landmark of considerable prestige, in a prime location and able to command premium rates and above average occupancy. To get a respectable "bottom line" a purchaser would have to spend some money on the building, and for this the Board deducted the estimated deferred maintenance and improvement. The capitalization rate was also selected taking into account the prime location and full weight of the heritage aspect. No error in law occurred.

The last question relates to concerns for procedural fairness or natural justice. The error of law, if any, is not in a misinterpretation of the facts, but rather in misapplying a general legal principle.

The legal principle in this case is that of the admissibility of evidence. This attracts a slightly different test than that for an error of factual interpretation: under a breach of natural justice, the standard of review is whether a breach occurred. The point at which such a breach occurs varies depending upon the tribunal, the legislation, the rights affected, the abilities of the party, and the circumstances of the case itself.

The time the Appeal Board was conducting its hearing on this matter the sale of the Hotel was being concluded. The then owner CNR sold to the CPR and as a result a document filing occurred in the Land Title Office at Vancouver. A Form entitled FIN5-79 must be filed along with the transfer of title, which form requires that the fair market value of the lands and premises be declared.

The counsel for the Assessor sought to introduce the FIN5-79 as evidence before the Appeal Board. The Board refused to admit the evidence.

Question 7

> Did the Assessment Appeal Board err in law when it refused to accept the document entitled Form FIN5-79 into evidence.

This question may be analyzed on the basis of the nature of the alleged error, being the rejection of certain evidence, the rights affected, being the right to adduce evidence, the nature of the tribunal, and any special circumstances of the legislation or of the case. Counsel for the appellant Hotel argues that this question was submitted beyond the time limits of S.74, or that it was properly refused.

Regarding the s. 74 argument, this Court has held that a failure to observe certain procedural requirements of s. 74 will merely be an irregularity which will not defeat a stated case: see Re Genstar Ltd. and Mission (1982) 1452 D.L.R. (3d) 760, B.C.A.C. Stated Case No. 171 at 981 (B.C.S.C.)) consequently, even if the failure of the respondent to add question 7 to the appellants request for a stated case was beyond the 21 day period under s. 74(2), it could be corrected or amended under s. 74 (6). However, giving s. 74(2) the fair, large and liberal interpretation favoured by Chief Justice McEachern in Re Genstar, supra, at 983, there is nothing in s. 74(2) to detract from a party's right to counter claim or respond to an appellant's timely submission under that provision. Accordingly, this Court has the jurisdiction to hear the question.

The court must ensure that both sides to a dispute have an opportunity to adequately prepare for the issue, to be heard before an impartial tribunal, and to be fairly treated: e.g. Cominco v. Westinghouse Canada Ltd. (1978) 9 B.C.L.R. 114 (B.C.S.C.).

> Generally speaking ... a statutory tribunal is, subject to any special requirements established by law, the master of its own proceedings.
> *Burnbrae Farms Ltd.* v. *Canadian Egg Marketing Agency*
> (1976) 65 D.L.R. (ed) 705 at 713 (Fed.C.A.).

Specifically regarding the admission of evidence, s. 55 of the Assessment Act provides that, "the Board is not bound by the technical rules of legal evidence." The words "not bound" indicate that the Board is not restrained from admitting evidence as part of a broader jurisdiction than the courts in this regard. However, nothing (sic) s. 55 indicates that the Board is able to refuse to hear evidence which would be heard in a court of law. If such were the case, serious interference with fundamental principles of natural justice would occur.

I accept that an appropriate guide would be the approach advocated by the Ontario Court of Appeal in Re National Trust Co. and Canadian Pacific Railway (1913) 15 D.L.R. 320:

> All facts and circumstances which afford a fair presumption or inference as to the question in dispute and which may fairly and reasonably aid the jury in arriving at the just and true conclusion are admissible, and ...the true principle is to extend rather than restrict the admissibility of evidence. (at 327, citing Phipson on Evidence, 5th ed. at 370, aff'g Sheen v. Bumpstead 1 H and C 358)

Although the underlying principle of audi alteram partem is not absolute, it is one to be vigorously guarded.

In this case the Board properly considered submissions from both parties in this evidence. Under normal circumstances I would respectfully suggest that in the interest of fully hearing an issue the Appeal Board would be well advised to formally admit evidence and then pass judgment as to its weight. However, in this case the evidence was tendered at a point in the hearing after the Board had decided to take the "income" approach. As the evidence did not go to the nature of that approach, and was only evidence of the market value to one party at one point in time, it was not relevant to the Board's deliberations. The answer to question 8 is no.

The appeal is dismissed. Costs to the respondent.