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PETRO-CANADA INC., SHELL CANADA LIMITED & CHEVRON CANADA LIMITED

v.

ASSESSOR OF AREA 12 - COQUITLAM & ASSESSOR OF AREA 10 - BURNABY/NEW WESTMINSTER

British Columbia Court of Appeal (V00804, V00805 and V00806) Victoria Registry

Before MR. JUSTICE HUTCHEON, MR. JUSTICE MACFARLANE and MR. JUSTICE GIBBS

Vancouver, B.C., November 1, 1989

John E. D. Savage for the Appellant Assessors
John R. Lakes for Petro-Canada Inc. and Shell Canada Limited
S. Bradley Armstrong for Chevron Canada Limited

Reasons for Judgment November 23, 1989

At the request of the parties, pursuant to s. 74 of the Assessment Act , R.S.B.C. 1979, c. 21 ("the Act"), the Assessment Appeal Board ("the Board") stated a case for the opinion of the court on the assessment for the 1987 calendar year of certain improvements (blending tanks) owned by each of Petro-Canada Inc. ("Petro-Canada"), Shell Canada Limited ("Shell"), and Chevron Canada Limited ("Chevron"), the respondents in this appeal. In reasons delivered May 16, 1988, in response to the requests for a stated case, the Board stated the issue as follows:

> At issue is whether Section 26.2 (1) (a) of the Assessment Act as amended by the Assessment Amendment Act, 1987 operates to exempt from inclusion in the definition of "industrial improvement" set out in Section 26 (1) of the Act as amended, not only those improvements which were actually classified for purposes of taxation during the 1985 calendar year, within Class 4 of Part I of B.C. Regulation 438/81, but also those improvements which should have been so classified.

With minor, and unimportant, variations the facts in each stated case are the same. Similarly, with minor and unimportant variations, the question upon which the opinion of the court was requested is the same for each case. This is the question as it appears in the Chevron case:

> 1. Does the exemption from assessment provided in Section 26.2 (1) (a) of the Assessment Act, as amended by the Assessment Amendment Act, 1987, provide for the exemption of items (such as the Additional Blending Tanks), which fell within the terms of Class 4 of Part 1 of B.C. Regulation 438/81, in law, but which were not classified by the Assessor within Class 4 of Part 1 of B.C. Regulation 438/81 for the purposes of taxation during the 1985 calendar year.

There is a second question in the Petro-Canada and Shell cases. The learned chambers judge said, "I see no essential difference between questions 1 and 2" and so he gave the same answer to the second question as he gave to the first. I agree with his conclusion that there is no essential difference and that the same answer, or opinion, will apply to both questions.

The three cases came on for hearing before Mr. Justice Macdonell in chambers. He delivered written reasons at the end of which he answered the question in the affirmative for each case. The cases were then consolidated for appeal purposes and argued as one case in this court.

The issue before Mr. Justice Macdonell, and before this court, is as summarized by the Board in its reasons of May 16, 1988. The answer turns upon the meaning to be ascribed to the words "was classified" in s. 26.2 (1) (a) of the Assessment Amendment Act, 1987, Chap. 53 of the Statutes of British Columbia, 1987. Although the Act was not assented to until December 17, 1987, s. 26.2 (1) was made effective for the 1987 calendar year. This is the full text of s. 26.2 (1):

> **Improvements**
>
> **26.2** (1) For the purpose of section 26.1, the exclusions contained in paragraphs (n) to (q) of the definition of "improvements" in section 1 do not apply and improvements that fall within the definition of "industrial improvement" in section 26.1 means all improvements that fall within paragraphs (a) to (m) of the definition of "improvements" in section 1, other than an improvement that
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> (a) was classified for the purposes of taxation during the 1985 calendar year, within Class 4 of Part 1 of B.C. Regulation 438/81,
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> (b) was completed after September 30, 1984, was or will be completed on or before September 30, 1989 and would have been classified, for the purposes of taxation during the 1985 calendar year, within Class 4 of Part 1 of B.C. Regulation 438/81 if it had been completed on or before September 30, 1984, or
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> (c) is completed after September 30, 1989 and is designated by the Lieutenant Governor in Council as not being an improvement for the purposes of section 26.1 and the Lieutenant Governor in Council may, by regulation, designate a class or type of improvement as not being an improvement for the purposes of this paragraph.

The history of proceedings focussing upon the proper assessment class for blending tanks begins with the calendar year 1983. As the Act then stood, the interpretation section defined two categories of "improvements": improvements for general municipal and provincial taxation purposes (the first category); and improvements for purposes other than for general municipal and provincial tax purposes (the second category). Various sub-clauses within each category described the kinds of improvements included in that category. Apparently, the second category was generally referred to as "the school tax definition". There was also in effect at that time a regulation, Regulation 438/81, made by the Lieutenant Governor in Council pursuant to the authority vested by s. 26 (8) of the Act, prescribing classes of property for administration purposes, and designating what improvements were to be included in each class. One of the classes was the Class 4 referred to in s. 26.2 (1) of the 1987 Act, quoted above:

> **Class 4 - Machinery and Equipment**
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> **4.** Class 4 property shall include only any of the improvements included in the definition of improvements as defined for purposes other than for general municipal and Provincial taxation purposes under the Municipal Act, Vancouver Charter and Taxation (Rural Area) Act, and not included in the definition of improvements as defined for general municipal and Provincial taxation purposes under the Municipal Act, Vancouver Charter and Taxation (Rural Area) Act.

In 1983, Chevron owned and operated blending tanks in Area 10 - Burnaby/ New Westminster. For purposes of making up the assessment roll for 1983 the assessor, as he had done in

previous years, assessed the blending tanks as being in the first category of improvements and not, on his interpretation, within Class 4 of Regulation 438/81. Chevron appealed the assessment in respect of 35 of its blending tanks. The matter proceeded through the various appeal levels and was ultimately resolved by a five-member division of this court in February of 1986 in Chevron Canada Limited v. Assessor of Area 10 - Burnaby/New Westminster (1986), 1 B.C.L.R. (2d) 43. The issue in the case was whether a structure (the tanks) could nonetheless be exempt from assessment as an improvement in the first category by reason of the exclusion words at the end of sub-clause (a) of the first category:

> . . . but does not include those fixtures, machinery and similar things, other than buildings and storage tanks as, if erected or affixed by a tenant, would, as between landlord and tenant, be removable by the tenant as personal property.

At page 47 of the judgment the court held that, "as a matter of law, it is possible for a piece of plant to be both a structure and machinery," and went on to describe the predominant effect of the exclusion wording:

> If a piece of plant is both a structure and machinery, then the next question is whether the piece of plant, if erected or affixed by a tenant, would, as between landlord and tenant, be removable by the tenant as personal property. That is a hypothetical question, of course, and must be answered with respect to the particular piece of plant, but not with respect to the terms of any particular lease or tenancy agreement. The particular piece of plant must be taken to be on the property under a bare lease for a term of years which is silent on the subject of fixtures and where the tenant's rights with respect to fixtures installed by him are to be dealt with in accordance with general statute and common law. If the piece of plant is removable by the tenant as personal property under that general law, then it is within the exclusion clause in the definition. If it is within the exclusion clause, then it is excluded by the definition even if it is also within the inclusion clause. The reason is than exclusions from the definition are paramount over inclusions because they occur last in the definition and must be applied last in deciding what is to be included and what excluded.

The court then referred the matter back to the Board to determine whether the tanks were machinery, or fixtures, or storage tanks, and whether, on the bare lease silent on the subject of fixtures hypothesis, they would be removable by the tenant as personal property. The Board made the determination on October 28, 1986, holding that the 35 blending tanks fell within the exclusion words at the end of sub-clause (a) of the first category of improvements. That determination was then appealed, presumably by the assessor. The determination was upheld by Mr. Justice Meredith in reasons delivered on March 13, 1987, and leave to appeal was refused on June 11, 1987. Paragraph 9 of the facts in the Chevron stated case (and paragraph 16 of the Shell case, and paragraph 14 of the Petro-Canada case) states that the 35 blending tanks were thereupon held to be exempt from assessment under the first category of improvements and classified under Class 4 of Regulation 438/81 for 1983, 1984, 1985 and 1986:

> 9. The result of these appeals and the above decisions, was that the 35 Blending Tanks of Chevron were found to be exempt from assessment for general municipal and Provincial taxation purposes. Accordingly, the 35 Blending Tanks were classified for the 1983 taxation year under Class 4 of Regulation 438/81, as machinery and equipment. The same classification applied for taxation years 1984, 1985 and 1986.

Having made its point Chevron could then anticipate, with confidence, that a large number of additional tanks, agreed for purposes of the stated case to have the same characteristics as the 35 which constituted the test case (called "additional blending tanks" in the stated case) would qualify for the same exemption. Based upon the result of the Chevron test case, Petro-Canada and Shell had the same expectation for their blending tanks. However, exemption did not follow. When the assessor of Area 10 prepared the assessment roll on September 30, 1986 for the

calendar years 1987 and 1988 (after the decision of this court but before the final determination by the Board) he allowed an exemption for the 35 test case blending tanks but not for the additional Chevron blending tanks or for the Shell blending tanks. The assessor of Area 12 did not allow an exemption for the Petro-Canada blending tanks either.

Each of the respondents appealed the 1987 assessment roll to a Court of Revision on the grounds that the exemption ought to have been extended to include respectively, the Petro-Canada and Shell blending tanks and the Chevron additional blending tanks. Evidently, the Court of Revision rejected the respondents' submissions for there was a subsequent appeal to the Board which thereupon stated the three cases for the opinion of the court.

Whether the respondents are or are not entitled to the exemption claimed for the blending tanks which are the subject of the stated cases turns, as pointed out earlier in these reasons, upon the meaning to be ascribed to the words "was classified" in s. 26.2 (1) (a) of the 1987 Act. For convenience I repeat the subsection:

> (a) was classified, for the purposes of taxation during the 1985 calendar year, within Class 4 of Part I of B.C. Regulation 438/81.

The assessors, appellants in this appeal, contend that "was classified" for 1985 means the assessment roll classification as exempt or not exempt. On that interpretation only the 35 test case blending tanks would be exempt, having been given that status by the earlier proceedings. Mr. Justice Macdonell, correctly in my view, rejected the appellants' contentions. He held, again correctly in my view, that the words mean lawfully classified:

> The only reasonable interpretation to put on that subclause is that you would look to the lawful classification of the improvements for 1985. The lawful classification would be in accordance with the Chevron appeal case, which would put the mixing tanks in question within Class 4.

There are a number of reasons in addition to those given by the learned chambers judge why the appellants' position cannot be upheld. The first arises from the plain meaning of the words used. The sub- clause says "was classified . . . within Class 4". The dictionary meaning of class in this context is: "a division of things according to grade or quality; a number of individuals (persons or things) possessing common attributes, and grouped together under a general or class name; a kind, sort, division." Class 4 is precisely that. It is a grouping into one division of a category of machinery and equipment. "Was classified" must mean, therefore, fell within the genus described in Class 4 as a matter of law, which the tanks at issue here did.

Another compelling reason for rejecting the appellants' position is that it violates the presumption against an intention to create an injustice. The nature of the presumption is described at page 208 of Maxwell on Interpretation of Statutes, 12 Ed., 1969:

> 2. PRESUMPTION AGAINST INTENDING INJUSTICE OR ABSURDITY
>
> **Injustice**
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> A sense of the possible injustice of an interpretation ought not to induce judges to do violence to well-settled rules of construction, but it may properly lead to the selection of one rather than the other of two reasonable interpretations. Whenever the language of the legislature admits of two constructions and, if construed in one way, would lead to obvious injustice, the courts act upon the view that such a result could not have been intended, unless the intention to bring it about has been manifested in plain words. "If the court is to avoid a statutory result that flouts common sense and justice it must do so not by disregarding the statute or

> overriding it, but by interpreting it in accordance with the judicially presumed parliamentary concern for common sense and justice." But the possibility of injustice which leads the court to adopt a particularly construction must be a real one: if the injustices suggested in argument are purely hypothetical, and may never or only rarely occur in practice, the court will remain unmoved.

The injustice would arise through the carving out from Class 4, on the whim or error of the assessor when he made up the assessment roll, of items of machinery and equipment identical to items remaining within the class, and rendering them permanently disqualified from the exemption which all other items within the class enjoy, including, by reason s. 26.2 (1) (b), identical items completed in the five-year period September 30, 1984 to September 30, 1989. The permanence and the injustice arise through the indirect denial of a right of appeal against the treatment of the carved out items on the assessment roll. The time for appeal against the 1985 assessment roll has long since expired and any appeal in respect of subsequent years will be met with the same argument as in the 1987 appeal - the statute disqualifies the blending tanks, except the original 35, from the Class 4 exemption. Much stronger and much more compelling language would be required to justify a finding that the legislature intended to deny to these owners in respect to these items of machinery and equipment the right to appeal entries on the assessment roll which the statute expressly confers upon all other owners of all other kinds of property.

As Mr. Lake pointed out, another consequence of the appellants' interpretation would be that the statutory duties cast upon the Court of Revision and the Board to ensure that assessments are fair and equitable would be significantly eroded.

It follows from all of the above that, in my opinion, Mr. Justice Macdonell gave the correct answer to the question posed in each of the stated cases. The appeal is, therefore, dismissed.

* Please note that the Reasons for Judgment from the Supreme Court and from the Application for Leave to Appeal that decision with respect to the parallel cases of Shell Canada Limited v. Assessor of Area 10 - Burnaby/New Westminster, and Petro Canada Inc. v. Assessor of Area 12 - Coquitlam have not been published. In those cases the same issues were decided in favour of the respective appellants for the same reasons as in the Chevron case.