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WESTCOAST TRANSMISSION CO. LTD.

v.

ASSESSOR OF AREA 9 - VANCOUVER

Supreme Court of British Columbia (A881115) Vancouver Registry

Before the HONOURABLE MR. JUSTICE LANDER

Vancouver, October 16, 1988

BARRY T. GIBSON for the appellant
JOHN E. D. SAVAGE for the respondent

Reasons for Judgment January 10, 1989

This is an appeal by way of stated case from a February 16, 1988 decision of the Assessment Appeal Board (Decision). The relevant legislation, the Assessment Act R.S.B.C. 1979 c. 21, provides for an assessor, a Court of Revision and an Assessment Appeal Board to work at achieving assessments that are "fair and equitable and fairly represent actual values" (ss. 26 (2), 44 (1) (b), and 69 (1)). The Appeal Board is a specialized tribunal of persons trained in law or experienced in real property appraisal (s. 48 (2)). An extension to this process is an appeal by stated case to the Supreme Court; the jurisdiction of such an appeal is limited to questions of law (s. 74 (1)).

The questions asked here flow from the interpretation of section 26 (7), which provides that land and improvements shall be assessed at their "actual value". Any reference in the Act to the preferred approach 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 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 stated case of the Assessment Appeal Board provided the following material facts and questions for the Court:

1. The subject matter of this appeal is land and improvements located at 1333 West Georgia Street, Vancouver. The improvements consist of a twenty-one year old twelve storey building providing 137,520 square feet of office area and 180 underground parking spaces. Nine of the twelve floors are occupied by Westcoast Transmission Co. Ltd. and the other three floors are leased to the Xerox Corporation.

2. The office building has not received any structural repair in recent times and is now the subject of a $5.2 million upgrading program necessary to meet the needs of the occupants. This work covers the electrical service, air conditioning, mechanical security, energy efficiency, manpower conservation and the removal of the existing asbestos installation [sic] and the consequent replacement of this material with a sprinkler system. Before the City of Vancouver will issue any building permit, provisions of the fire safety code must be met. Thus, where as here there was removal of the existing asbestos installation [sic] it must be replaced by another fire retardant system, in this case, a sprinkler system.

3. The lease of the Xerox Corporation was ending soon and this company was only prepared to enter into a new lease (Jan. 1, 1988) provided the asbestos insulation is removed, and an inducement in the form of tenant improvements be given in the amount of $1,000,000.

4. The Appellant, Westcoast Transmission Co. Ltd., through its counsel, argued that:

(a) the land and building should be valued using either the "direct sales comparison approach" or "the income approach to value;" and

(b) in the adoption of this method:

(i) The fair market rental value of the subject should be $12 per square foot, since the $13 rental agreed with the Xerox Corporation for three floors was obtained in consideration of certain inducements.

(ii) While the vacancy rate of office buildings in Vancouver is currently high, a purchaser would not expect the vacancy rate to remain high, and would project that it will return to the 5% level or at most 10%.

(iii) The expense level in the subject building could be $10.76 per square foot being the actual expenses in the subject building.

5. The respondent assessor argued that:

(a) the assessor employed all three approaches to value but recommended adoption of the "direct sales comparison approach" or the "income approach." The assessor provided alternate income approaches employing different rates of vacancy and expenses.

(b) the price per square foot of leasable area indicated by comparable sale prices is the definitive yardstick to be applied to the subject property; and

(c) in the use of the "income approach to value" the respondent assessor submitted that:

(i) Using statistics obtained from seventeen rentals in six buildings the economic or fair market rent to be used in valuing the subject property should be $13.

(ii) If the average vacancy rate for this area is to be used it should be 19% whereas, if it is to be the long term vacancy rate derived from cyclical historic rates, it should be 7-1/2%.

(iii) The average economic expense in the market was $9.50 per square foot, and should be employed.

(iv) The capitalization rate should be 9% based on a vacancy rate of 7-1/2%.

6. After listening to the evidence given by the witnesses and after considering the argument of the parties the Board found that:

(a) the "Direct Sales Comparison Approach" used by the respondent assessor should not be relied upon because of the conflicting evidence regarding comparability;

(b) the Board therefore relied upon the Income Method of valuing the subject property and in so doing found that:

(i) The fair market rent to be used in this instance is $12 per square foot since by assuming this effective rent provision has been made for the required tenant improvements of $30 per square foot of leased area. In addition, by the use of this rate of rental a deduction is taken from the capital value equivalent to the cost of the required upgrading work.

(ii) The vacancy rate to be employed should be 10%, since no purchaser would expect the vacancy rate to remain at the currently high level.

(iii) The expenses required in the subject building should be an average of those put forward in the evidence, that is, $8.00 per square foot advanced by Mr. Geddes, $9.50 advanced by Mr. Metcalf, and $10.76 being the actual expenses indicated by the evidence. The Board used $9.25 per square foot.

(iv) The capitalization rate to be employed should be 9%.

(v) The tenants' inducements had been taken care of in the rate of the rental employed.

7. The Board found that the actual value of the land and improvements for the 1987 Assessment Roll should be $13,194,697 made up as follows:

Land	$ 5,346,750
Improvements	$ 7,847,947
Total	$13,194,697

8. From the time the 1987 appeal was filed, the agent for the owner, Mr. Michael Geddes, indicated that he would be acting on his own at the proceedings before the Assessment Appeal Board in this appeal.

9. An appeal was scheduled to be heard by the Burrell Board commencing October 20, 1987.

10. Approximately two weeks prior to the scheduled date for hearing, Mr. Michael Geddes informed the Assessment Authority that he would be represented by counsel, changing his previous position.

11. In the result the Assessment Authority requested legal assistance, specifically, Mr. P. W. Klassen, since he was involved in the 1986 appeal on the same property. Counsel for Westcoast Transmission Company Ltd. on the 1986 appeal was also counsel appearing before the Assessment Appeal Board on the 1987 appeal.

12. The Assessment Authority was able to secure the services of Mr. Klassen on short notice, however, he had to withdraw his services because of a re-scheduling by another Assessment Appeal Board of another case.

13. On or about October 20, 1987 Mr. Lee, Deputy Assessor, requested that the Board adjourn the hearings until such time as counsel will be available to represent the assessor.

14. The Assessment Appeal Board determined to proceed with the case and the case proceeded with Westcoast Transmission Company Ltd. being represented by counsel, Mr. Barry Gibson, and the assessor not being represented by counsel.

15. When the Assessment Appeal Board determined to proceed with counsel representing only one party, Mr. Lee advised that the Assessment Authority would only proceed under protest because the late notice by the Appellant and the Board's determination to proceed had left them without counsel.

16. Attached hereto is a copy of the decision of the Board dated February 16, 1988, marked as Schedule "A".

The questions on which the Board asked for the opinions of the Supreme Court are:

1. Did the Assessment Appeal Board err in law when it failed to determine the vacancy rate applicable to the valuation of the subject property on the basis of the evidence adduced?

2. Did the Assessment Appeal Board err in law when it held "that one standard vacancy rate" cannot "be established, to apply to all properties in the downtown area"?

3. Did the Assessment Appeal Board act in an arbitrary manner and thereby err in law when it determined the expenses of the subject building by averaging the expenses given in evidence by the appraiser called for the owner and the appraiser called for the assessor?

4. Did the Assessment Appeal Board err in law when it is [sic] rejected and failed to take into consideration the direct or comparable sales approach method by valuation?

5. Was there any evidence before the Assessment Appeal Board, which permitted it to reject the direct or comparable sales approach method of valuation?

6. Did the Assessment Appeal Board err when in determining the actual value of the subject property it took into account inducements paid to tenants by owners of the subject property?

7. Was there any evidence before the Assessment Appeal Board on which it could conclude as it did, that in determining the actual value of the subject property it should take into account inducements paid to tenants by the owner of the subject property?

8. Did the Assessment Appeal Board err in law when it failed to adjourn the hearing of the subject appeal at the request of the Assessor, when such request was made by the Assessor for the purpose of having Counsel represent the Assessor at the hearing?

Under a stated case, this Court is asked whether an error of law occurred. Southin, J. in Crown Forest Industries, Ltd. v. Assessor of Area 9 - Courtney (Aug. 1985) B.C.A.A. Stated Cases No. 210 at 1179 (B.C.S.C.), noted that the Court's power to intervene in such cases is limited to:

(1) misinterpretations or misapplications of the legislation;

(2) misapplication of principles of general law, or:

(3) acting without any evidence or upon a view of the facts which could not reasonably be entertained. (at 1191)

In this case, questions one through seven may be classified as evidentiary issues, while question eight involves the general principle of law relating to natural justice.

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 Co. Ltd. v. Assessor of Area 9 - Vancouver (1987) B.C. Stated Cases, Case 235 at 1345, 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 W.W.R. at 471 (B.C.C.A.). The extent to which a Court will look at the transcripts or other evidence to determine whether the conclusions of the Board disclose any faulty reasoning should therefore be subject to situations where "no evidence" is alleged, or where any interpretation by the Board 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. This is the effect of the "no evidence" application in Provincial Assessors, supra, and of the facts in Edwards v. Bairstow [1966] A.C. 14 (H.L.) cited in Crown Forest (1985), supra. In the Edwards case, supra, the facts not only did not justify the conclusion drawn, "they lead irresistibly to the opposite inference or conclusion" (at 29 A.C.). Certainly where evidence is adduced which establishes a range of options, the Board has considerable discretion as an expert tribunal in adjudicating from conflicting evidence. (e.g. Vancouver v. Township of Richmond (1958), (1959) 17 D.L.R. (2d) 548 at 552 (B.C.S.C.)) Indeed, even where the decision is a quantification beyond the range in evidence, there may be valid exercise of discretion. [compare Toronto-Dominion Bank v. Assessor of Area 9 _ Vancouver (August, 1988) unreported, Vancouver A873381 (B.C.S.C.), with Marathon Realty Co. Ltd. v. Regional Assessment Commissioner, Region 7 _ Peterborough, (Oct., 1979) (Ont. S.C.).

This standard is also consistent with other administrative law cases: where a question under consideration falls within the special or core area accorded to a tribunal, curial deference favours the patently unreasonable standard: C.U.P.E. v. N.B. Liquor Corporation [1979] 2 S.C.R. 227 at 235. [1984] 2 S.C.R. 412 (at 443) The effect of the privative clause in that case on this proposition is subject to debate, however the intent here is to indicate support for judicial restraint in finding a specialized tribunal's finding of fact to be an error of law.

Regarding reviewing evidence to determine whether errors of law occurred, a more liberal standard may be appropriate where liberty, livelihood or security rights are at stake: see, e.g. cases discussed in Arbutus Club v. Assessor of Area 9 _ Vancouver (1980) 24 B.C.L.R. 301 at

312ff (B.C.S.C.). Where such rights are not in issue, as in tax assessment appeal cases, the Board's findings of fact should be accepted as conclusive, subject to the demonstration that there was no evidence or a patently unreasonable interpretation.

In this case transcripts and appeal board submissions were submitted, but in every instance the material facts contested by the respondent Assessor were supported by some evidence. The exception may be paragraphs 8-12 relating to the procedural question, however these facts were not relevant to the conclusions in this regard.

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

> 1. Did the Assessment Appeal Board err in law when it failed to determine the vacancy rate applicable to the valuation of the subject property on the basis of the evidence adduced?

The stated case, at 4 (b) (ii), and the Decision (included by way of Stated Case para. 16) at 5-6, indicate that there was some evidence on which the decision could be based. The conclusion was not unreasonable, having regard to the alternative proposals, and market expectations. No error of law occurred.

> 2. Did the Assessment Appeal Board err in law when it held "one standard vacancy rate cannot be established to apply to all properties in the downtown area"?

The short answer is, no. Given the recognition of classes of property in the valuation process, based on architectural quality, state of repair, age, use, location, views, and other amenities, and the discretion flowing from ss. 26 (3) and 69 (1), it is difficult to see how the Appeal Board could have erred in law in reasoning that a standard vacancy rate could not apply to all properties in a downtown area.

> 3. Did the Assessment Appeal Board act in an arbitrary manner and thereby err in law when it determined the expenses of the subject building by averaging the expenses given in evidence by the appraiser called for the owner and the appraiser called for the assessor?

The Board is faced with the task of judicially weighing various factors to arrive at an assessment which is fair and equitable. These concerns often require consideration of both broader market trends and the influence of special characteristics of a given property. The time of consideration, and the relative time period used in assessing average values will also be factors.

In this case, where there was some evidence adduced which established a range of values, no error of law occurred when the Board exercised its discretion in arriving at a value within that range.

> 4. and 5. Did the Assessment Appeal Board err in law when it rejected the direct or comparable sales approach?

In general, the selection of appraisal methods is a question of fact: MacMillan Bloedel Ltd. v. Assessor of Area 4 - Nanaimo-Cowichan (May, 1986) B.C.A.A. Stated Cases No. 220 at 1251 (B.C.S.C.) aff'g Re Plateau Mills and Assessor of Area 26 - Prince George (1981), 120 D.L.R. (3d) 377 at 380 (B.C.S.C.). Although the Board has an obligation to consider evidence tendered on comparable assessments, it is for the Board to decide on its relevance, comparability and weight: Oxford Development Group Ltd. v. Assessor of Area 02 - Capital (1980) 21 B.C.L.R. 263 at 272 (B.C.S.C.).

The stated case at paragraph 6 (a) and the Board's decision at page 7 indicate that there was evidence adduced in this regard, it was conflicting, the Board considered it, and the Board acted judicially in accepting one approach in preference to another:

> The Board is sympathetic to this view, provided that it can be clearly shown that the comparable sales are truly comparable. There was, however, a great deal of conflicting evidence regarding comparability - sufficient to incline the Board to rely more strongly on the Income Method. (at 7).

Consequently, it is not open for this court to review such a decision.

> 6. and 7. Did the Assessment Appeal Board err when in determining the actual value of the subject property it took into account inducements paid to tenants by owners of the subject property?

Although the full rental value of the property in question, including tenant's improvements, will be factors to be considered, generally considerations affecting actual value are questions of fact. As such, short of patently unreasonable interpretation, such considerations are beyond the purvue of this review. Regarding the evidentiary issue associated with the inducements, I read the evidence as indicative of a varied and sophisticated market which would assess inducements in much the same way as the Board summarized:

> [T]he Board favours the Appellant's view which is, in the subject instance, that consideration must be given in some way to the effect of inducements inasmuch as certain work has to be undertaken in order to obtain the rental of $13 per square foot from the Zerox [sic] Corporation, and, it follows, from the entire building. One way of giving effect to the inducements in this case is to value the property by reference to the achievable rent ($13) and to deduct from the capital value the cost of achieving it; and the other way, the method put forward by the Appellant, is to use the uninduced rent which he estimates to be $12. (Decision at 5)

> 8. Did the Assessment Appeal Board err in law when it failed to adjourn the hearing of the subject appeal at the request of the Assessor, when such request was made by the Assessor for the purpose of having Counsel represent the Assessor at the hearing?

The basic issue here is one of natural justice. The question may be analyzed on the basis of the nature of the alleged error, being the rejection of a request to adjourn, the rights affected, being the reason for the request, the tribunal, and any special circumstances of legislation or of the case.

The question of adjournment is a matter of discretion in the court below. Moor v. Moor (1985) 61 B.C.L.R. 73 (C.A.). This principle finds similar application in cases involving administrative tribunals:

> Generally speaking . . . a statutory tribunal is, subject to any special requirements established by law, the master of its own proceedings and, in particular, has a very wide discretion to decide if and when a properly convened hearing will be adjourned and, if adjourned, for how long it will be adjourned: Burnbrae Farms Ltd. v. Canadian Egg Marketing Agency (1976) 65 D.L.R. (3d) 705 at 713 (Fed. C.A.).

In the Moor case the Court found that there was an error in not giving appropriate weight to affidavit material, and that the probability of more accurate determination of facts at issue in the future would justify an adjournment. The court found that the requested adjournment would cause only minimal prejudice to the plaintiff, and granted the appeal.

In the case at bar, the Assessor cites the Moor case for the more general proposition of "an adjournment should always be granted if it is necessary to dispose of a case on its merits and where it can be granted without prejudice to the opposing party". I have concluded that this is an overly broad interpretation of the Moor decision, but even if it is so, here an adjournment was not necessary to dispose of the case on its merits.

Another case cited by the Assessor, Odeco Drilling of Canada, Ltd. v. Hickey's Estate (1985) 55 Nfld. and P.E.I. R 17 (Nfld. S.C.), referred to a line of English cases which place the onus on the party requesting a stay or postponement of a trial. The party must show: (a) that to continue would work an injustice because it would be oppressive or vexatious to them, or an abuse of the process of the court; and b) that a stay will not cause an injustice to the other party. (at 20) This latter test is preferable in this situation in its closer association to cases dealing with the reason for adjournment: the right to counsel.

The Assessor further cites the case of Cominco v. Westinghouse Canada, Ltd. (1978) 9 B.C.L.R. 114 (B.C.S.C.) for the proposition that the court must ensure that both sides to a dispute have an opportunity to adequately prepare for the issue. This is subject to qualification, however:

> The Board must, of course, act fairly and give a reasonable opportunity to the parties to be presented and to be represented by counsel if they so desire. On the other hand, counsel is not entitled to insist upon an adjournment merely to suit his own convenience and the Board must, *in deciding whether to grant an adjournment or refuse it, take into consideration the reason for the request on the one hand and the right of the other parties to have the matter dealt with expeditiously on the other. (Re Gill Lumber Chipman (1973) Ltd. and United Brotherhood of Carpenters and Joiners of America Local 2142* (1973) 42 D.L.R. (3d) 271 at 276 (N.B.A.D.) (emphasis added).

In Brunbrae Farms v. Canadian Egg Marketing Agency (1976) 65 D.L.R. (3d), the Federal Court of Appeal held that its supervisory jurisdiction could only be exercised if "the person concerned has been deprived of a reasonable opportunity of answering the case that is being put against him." (at 714) The judge in that case considered both the adequacy of the time (two weeks), relative to the necessary case preparation, and the more specific reason for requesting an adjournment (to prepare a "completely irrelevant" case), before rejecting the argument.

An adjournment is therefore subject to the discretion of the Board, and only when it is unreasonable in its response will the Court intervene. Although the principle of audi alteram partem is one to be vigorously guarded, it is not absolute and blind to other considerations. In this regard, the right to counsel is not a necessary element in all cases:

> [W]hether or not the person has a right to representation by counsel will depend on the circumstances of the particular case, its nature, its gravity, its complexity, the capacity of the inmate himself to understand the case and present his defence. The list is not exhaustive. (Re Howard and Presiding Officer of Inmate Disciplinary Court, Stony Mountain Institution (1985) 19 D.L.R. (4th) 502 (Fed. C.A.), app'l to S.C.C. dism'd [1987]).

In reviewing the right to counsel, McEachern, C.J.S.C. has noted that where a person's reputation, livelihood or liberty is at stake, the cases have tended to entrench the right to counsel: e.g. Joplin v. Chief Constable of Vancouver Police Department, et al (1982), (1983) 42 B.C.L.R. 34 (B.C.S.C.) app'l to B.C.C.A. dism'd [1985]. Similarly, the expertise of the party involved is significant: "even the intelligent and educated layman has small and sometimes no skill in the science of law" and will gain the favor of the Court when denied counsel when fundamental rights are at stake.

However, there has been no evidence of any precedent entitling a specialized tribunal to counsel under the circumstances of this case. In this case, the hearing date had been set for several months, and the Board in exercising its discretion considered the following matters:

(1) the Board had refused to grant an adjournment when the appellant taxpayer had applied, and the taxpayer had proceeded to prepare its case and was ready to proceed;

(2) the Assessment Authority have capable personnel who are not laypersons in this area but experts who are as capable of conducting the case as most counsel; and

(3) the Board was prepared to receive written argument, but was proceeding to receive evidence as scheduled.

In addition, the circumstances of the case provide additional context for their decision:

(1) the hearing had been set for several months;

(2) there was no evidence that the Assessment Authority had been diligent in retaining counsel; and

(3) there was evidence that the Assessment Authority had faced legal counsel for taxpayers many times without problems.

The Assessment Board's [sic] representative expressed concern over the lack of counsel on the basis of the complex legal issues involved, but agreed to proceeding with having the case go in and later presenting legal arguments. Even if I were not inclined to find that there is no automatic right to counsel, and no automatic right to adjournment in this case, and nothing to indicate that an error of law has occurred such as to justify this Court's intervention - which I am - consent to proceeding subject to legal argument cannot be subsequently revoked to create a ground of the legal argument.

Under these circumstances, there was neither an improper exercise of discretion nor a breach of the requirements of natural justice.

The appeal is dismissed. Costs follow the event.