The following version is for informational purposes only

THE CORPORATION OF THE DISTRICT OF MAPLE RIDGE

v.

ASSESSOR OF AREA 13 - DEWDNEY-ALOUETTE and MUSSALLEM REALTY LTD.

Supreme Court of British Columbia (A893319) Vancouver Registry

Before the HONOURABLE MR. JUSTICE HARVEY

Vancouver, March 6, 1990

A. W. Carpenter for the appellant
John R. Lakes for the respondent, Mussallem Realty
John E. D. Savage, for the respondent, Assessor

Reasons for Judgment April 6, 1990

This matter comes before me by way of stated case by the Assessment Board, pursuant to section 74 of the *Assessment Act*, R.S.B.C. 1979, c. 21. This case involves a dispute between the respondent Mussallem Realty, the owner of a parcel of land in Maple Ridge, and the appellant, the Corporation of the District of Maple Ridge. The dispute concerns the classification, by the Assessment Authority, of the property as farm land and whether that conflicts with a zoning bylaw of Maple Ridge.

In accordance with the Act, the parties have argued their respective positions through the various levels of decision making within the assessment system. The most recent decision on the matter was made by the Assessment Appeal Board on November 1, 1989. The Board decided that the land was properly characterized as farm land and that such classification did not conflict with Maple Ridge's zoning bylaws.

Section 74 of the Act reads as follows:

"74. (1) At any stage of the proceedings before it, the board, on its own initiative or at the request of one or more of the persons affected by the appeal, may submit, in the form of a stated case for the opinion of the Supreme Court, a question of law arising in the appeal, and shall suspend the proceedings and reserve its decision until the opinion of the final court of appeal has been given and then the board shall decide the appeal in accordance with the opinion.

(2) A person affected by a decision of the board of appeal, including a municipal corporation on the resolution of its council, the Minister of Finance, the commissioner, or an assessor acting with the consent of the commissioner, may require the board to submit a case for the opinion of the Supreme Court on a question of law only by

> (a) delivering to the board, within 21 days after his receipt of the decision, a written request to state a case; and

(b) delivering, within 21 days after his receipt of the decision, to all persons affected by the decision, a written notice of his request to the board to state a case to the Supreme Court.

(3) The board shall, within 21 days after receiving the notice under subsection (2), submit the case in writing to the Supreme Court.

(4) The costs of and incidental to a stated case shall be at the discretion of the Supreme Court.

(5) Where a case is stated, the secretary of the board shall promptly file the case, together with a certified copy of the evidence dealing with the question of law taken during the appeal, in the Supreme Court Registry, and it shall be brought on for hearing before the judge in Chambers within one month from the date on which the stated case is filed.

(6) The court shall hear and determine the question and within 2 months give its opinion and cause it to be remitted to the board, but the court may send a case back to the board for amendment, in which event the board shall amend and return the case accordingly for the opinion of the court.

(7) An appeal on a question of law lies from a decision of the court to the Court of Appeal with leave of a Justice of the Court of Appeal.

(8) to (10) [Repealed 1982-7-34, proclaimed effective September 7, 1982.]"

A preliminary objection to the court's jurisdiction to hear the stated case is made by the respondent Assessor and Mussallem Realty. Their objection is made on two grounds:

(1) Maple Ridge did not have the necessary resolution of its council required under s. 74 (2) before it could compel the Board to submit a stated case, and;

(2) Maple Ridge did not deliver notice of its request for a stated case to either the respondent Assessor or Mussallem Realty within 21 days as required in s. 74 (2) (b).

Counsel for the respondents rely principally upon a decision of the British Columbia Court of Appeal in *Anchor Ventures Inc.* v. *Assessor of Area 4 - Nanaimo-Cowichan*, Stated Case 263, June 15, 1988. In that case jurisdiction to hear the stated case was lost due to the appellant's failure to adhere to the time limit provided for in s. 74 (5). The respondents cite this case as authority for the proposition that all aspects of s. 74 are mandatory in nature.

Maple Ridge wants this stated case to go ahead. Counsel therefore submits that the requirements of s. 74 were fulfilled and, in the alternative, if they were not, that such procedural deficiencies should not prevent the stated case from being heard on its merits.

Maple Ridge relies principally on a decision of the Honourable Chief Justice McEachern of the Supreme Court [as he then was], in *Genstar Limited* v. *District of Mission and Assessor of Area 13 - Dewdney-Alouette*, Stated Case 171, November 15, 1982. In that case failure to provide notice of a request for a stated case to an interested party, as required by s. 74 (2) (b), was not fatal to the appeal. The appellant relies upon the judgment at pages 983 and 984 where the Chief Justice states that this legislation should be ". . . given a fair, large and liberal interpretation," (p. 983), and that failure to comply with s. 74 (2) (b) is ". . . an irregularity which can be corrected." (p. 984).

Essentially, we have here a conflict between two competing principles. On the one hand, it is important that all meritorious matters be heard and that all litigants have their day in court. On the other, the courts must impose, in fairness to all parties and to ensure the timely functioning of the courts, time limits and procedural access requirements.

The problem is when to hold a party to the time limits and access requirements involved in obtaining access to the courts. Most often this issue arises with respect to the appeal of lower court decisions, but in this case it arises in the form of a stated case to the Supreme Court on a matter previously decided by a regulatory body. The context is different but the problem is the same.

It is tempting, when deciding whether a time limit or access requirement should be strictly enforced, to resort to the substantive/procedural dichotomy. When doing so, one determines whether a requirement or limit is "substantive" or merely "procedural". If substantive, it will be strictly enforced, if procedural, it will not. Unfortunately, often what is found to be "substantive" and what is found to be "procedural" depends more on whether it seems right to enforce the particular requirement than on the true nature of the requirement. In this sense, the substantive/procedural dichotomy appears to be "effect driven".

In this case, the requirements in s. 74 are procedural in nature. The section sets out the steps that must be taken to bring a stated case before the Supreme Court. The question remains however, should failure to adhere to this procedure prevent the matter from being heard?

Another possible method of analyzing this problem is to deny or allow access to the appeal, in this case in the form of a stated case, based upon whether the person who wants the appeal had control over whether the particular requirement was met. This, in my opinion, appears to be the *ratio decendi* of *Anchor Ventures Inc.* v. *Assessor of Area 4 - Nanaimo-Cowichan (supra)*. In that case the respondent Assessor, who desired the appeal, had control over whether a stated case was initiated and whether it would be initiated within the one month deadline provided for in s. 74 (5). It was not and the Court of Appeal strictly enforced the time requirement against the respondent Assessor. Carrothers, J. A. for the Court, stated, at p. 1518:

"In view of the fact that the time requirement of s. 74 (5) could be and indeed was performed by the respondent Assessor, who was the appellant in the stated case, and a person directly in control of the matter, I consider this particular time requirement to be mandatory . . ."

I am reluctant to deny or allow access to an appeal based upon whether the person seeking the appeal had control over the procedure and could have satisfied the access requirements. One may ask, when will the person who missed the time limit ever have not had control over the matter? Access to appeal is never dependent upon, and under the control of, the party who does not want the appeal. If it is held that access requirements will always be strictly enforced against appellants who had control over whether those requirements were met in the first place, then no access will ever be allowed when the requirements were not strictly adhered to.

In my view, control over the matter should be an important factor, perhaps even presumptive, but it should not be determinative in and of itself. The sophistication of the person seeking the appeal should also be considered. Was the person in a position to know of the requirement and to have met it? If it's a time period which has not been met, by how much time was it missed? How important is the access requirement which was not met? In this way, allowances can be made for unsophisticated parties who fail to satisfy access requirements that they may not even be aware of.

To this end, I propose the following approach; first, it must be determined whether, on the facts of any particular situation, a requirement of s. 74 has not been met. If the requirement has been

met, that ends the matter. If a requirement has not been met, then one moves to the second level of analysis; is the requirement properly characterized as an "appeal access" requirement or is it some other type of requirement? Stricter enforcement of the former is justified given the vested interest of the respondent in the judgement (or, in this case, the Assessment Board decision) from which it is sought to appeal. (Mention is made of a respondent's interest in the judgment which is being appealed in Fraser v. Neas et al. (1924) 35 B.C.R. 70).

Third, if the provision is an appeal access requirement, did the party who wants the appeal have control over whether the requirement was met? If not, perhaps the requirement should be relaxed. Admittedly this will be a rare situation given the structure of appeal procedures.

Fourth, if it is an appeal access requirement that has not been met, how sophisticated is the party? Should the party have known about and met the requirement? If a time limit, by how much was it missed? How important is the requirement? Is it one that necessitates strict enforcement? Overall, are there circumstances which justify relaxing the requirement?

In applying this analysis to the case at bar, it must first be determined whether the disputed requirements of s. 74 were, in fact, met.

Step one: Were the requirements of s. 74 satisfied? Section 74 (2) (b) notice:

As stated earlier, the respondents allege that Maple Ridge did not give notice of its request for a stated case to either the Assessor or Mussallem Realty within 21 days, as required in s. 74 (2) (b).

There are, essentially, two aspects of s. 74 (2) (b) which require interpretation. First, does receipt by an "affected person's" solicitor of the Appeal Board decision, start the 21 days running? Second, what does the word "delivering" mean?

The relevant dates are as follows:

November 2, 1989: Maple Ridge's solicitor received the Appeal Board decision and gave it to Deputy Municipal Clerk Dyer.

November 8, 1989: Maple Ridge received its copy of the decision.

November 23, 1989: Maple Ridge's request for a stated case is received by the Assessment Board and notice of the request is mailed to both Respondents.

November 28, 1989: Assessor received notice of the request.

November 29, 1989: Mussallem received notice of the request.

Whether or not the notice requirement is met depends, in large part, on whether I hold that the 21 days started running on November 2nd, the day that Maple Ridge's solicitor received a copy of the Appeal Board decision, or on November 8th, the day that Maple Ridge, itself, received the decision.

The section itself refers to receipt by the affected "person". However, the definition of "person" in s. 1 of the *Assessment Act* states:

"'person' includes a partnership, syndicate, association, corporation and the agent and trustee of a person."

A solicitor is the agent of his client. On that basis Chief Justice McEachern, in Genstar (supra, p. 984), held that delivery to a "person's" solicitor, was, in effect, delivery to the person himself. Accordingly, receipt of the Appeal Board's decision by the solicitor for Maple Ridge, who was the agent for Maple Ridge in this matter, is, in effect, receipt by Maple Ridge itself. Time then, should start to run from that point onward, in this case, November 2nd. Time would then run out on November 23rd. If this were the only consideration, the notice requirements of s. 74 (2) (b) would not have been met, notice having been received on November 28th and 29th.

However, depending on what interpretation is given to the word "delivering" in s. 74 (2) (b), the 21 day requirement could possibly be satisfied. If "delivering" includes "mailing to", then clearly notice was provided by Maple Ridge within the 21 days as required. The *Assessment Act* contains no definition of "delivering". However, the *Interpretation Act*, R.S.B.C. 1979, c. 206, s. 29 does provide the following definition of "deliver":

"'deliver' with reference to a notice or other document, includes mailed to or leave with a person, or deposit in a person's mailbox or receptacle at the person's residence or place of business."

While some may argue that the purposes of s. 74 (2) (b) is to ensure that all affected parties have at least 21 days' notice of a party's request for a stated case, I cannot ignore the clear definition provided by the *Interpretation Act*. Therefore, because the notice was mailed to the respondents on November 23rd, I find that the notice requirement of s. 74 (2) (b) was met in this case. The respondents' challenge to the court's jurisdiction on this ground fails.

Section 74 (2) resolution of municipal corporation:

The respondents also allege that Maple Ridge, as a municipal corporation, was required to, and did not have, a resolution of its council before requesting a stated case.

The relevant dates are as follows:

October 31, 1989: Resolution of council that appeal be made to the Assessment Authority and further to the Appeal Board.

November 3, 1989: Solicitor for Maple Ridge received a copy of the Appeal Board's decision.

November 23, 1989: Maple Ridge requests a stated case.

December 18, 1989: Resolution of council that the November 1, 1989 Appeal Board decision be appealed to the Supreme Court of B.C. by way of stated case.

With respect to the resolution passed October 31, 1989, the respondents argue that it is inadequate because it does not specifically authorize a request for a stated case, only that the matter be appealed to the Appeal Board. I agree for two reasons.

First, by including the words, ". . . on the resolution of its council" in s. 74 (2), the legislators clearly did intend that the step of asking for a stated case only be taken by a municipality when its council specifically addresses the issue and authorizes the request.

Second, specifically authorizing an appeal to the Supreme Court was not likely in the council members' contemplation since they had not, by October 31st, even received the Appeal Board's decision. The strength of the inference that it was may have been buttressed had their resolution been a more generally worded one authorizing, for example, "Appealing as far as is necessary", rather than referred just to appealing to the Appeal Board.

The first resolution then, because it does not specifically authorize a request for a stated case, does not satisfy the requirements of s. 74 (2).

The second resolution, that of December 18, 1989, is specific enough, but an issue arises as to whether it was passed too late. The appellant argues that there is no reference, within s. 74, as to when a municipality must pass its resolution.

If, as I have found, the intention of the legislators was to ensure that no municipality requests a stated case without specifically discussing the matter, then common sense dictates that that discussion, and resolution, must take place before a request for a stated case is made. One could even argue that the resolution must be passed not only before the request is made, but after the Appeal Board decision is received given the words "A person affected by a decision of the board on appeal . . . may . . . (request a stated case) . . .". A person cannot be "affected" until the event has happened. This is mere speculation however. The important fact is that the December 19, 1989, resolution was not passed before the request for a stated case and therefore does not satisfy this requirement of s. 74 (2).

The appellant submits that council, in the resolution of December 19, 1989, ratified the earlier actions of Maple Ridge's staff who had proceeded with requesting a stated case in the absence of an adequate resolution of council. That may well be a sound proposition. However, the legality of staff actions and the existence of an adequate resolution are two separate things. The ratification of the former does not remedy the latter.

Since I have concluded that the notice provision found in s. 74 (2) (b) was met by the mailing of notice on November 23, 1989, I need only consider the late resolution by council as I move through steps two, three and four of my analysis.

Step two: Is the provision an "appeal access" requirement?

The requirement that a municipality only request a stated case ". . . on the resolution of its council . . ." is an appeal access provision. It is something which must be done to gain access to this form of appeal. Step three: Did the appellant have control over the matter?

Maple Ridge clearly had complete control over whether it passed the necessary resolution before requesting a stated case and thereby satisfied the requirement in s. 74 (2). Step four: Are there factors which justify allowing access?

It is at this stage of analysis that the Court has the most discretion. The Court must decide whether, in the circumstances of the case, there are factors in the appellant's favour which outweigh the presumption that a party who had control over whether access requirements were satisfied, must abide by the result if they are not.

Earlier I suggested a number of considerations which I now propose to discuss. Maple Ridge, as a municipal corporation, is a very sophisticated party. It has both legal counsel and a decision-making council. It, no doubt, is involved in assessment actions on a regular basis. Its advisors are undoubtedly familiar with the Act, including the requirement for a resolution before requesting a stated case.

Arguably however, Maple Ridge may not have been aware of the specificity required of its resolution, in part because the statute is not definitive on this issue. Maple Ridge only passed the second resolution on December 18, 1989, on advice of counsel who had learned, on November 30, 1989, of the respondent's intention to question the adequacy of the first resolution. Ultimately, an adequate resolution was passed almost one month after the request for a stated case was made.

The importance of this access requirement must also be considered. The necessity of a competent resolution being passed by council before action is taken by a municipality goes to the very heart of the legality of all municipal actions, not just the action of requesting a stated case. The legislation is designed to ensure that proper consideration is given to the decision of whether to request a stated case. This desire is laudable given the expense to the public of a municipality proceeding with a stated case and possible subsequent appeals.

In these circumstances, in particular the sophistication of the appellant and the importance of the access requirement, access should not be granted to the appellant. In my view, the appellant's failure to pass an adequate resolution before requesting a stated case results in a loss of jurisdiction. The respondents' challenge to the Court's jurisdiction on this ground succeeds.