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UNITEL COMMUNICATIONS INC.

v.

ASSESSORS OF AREAS:
14 - SURREY/WHITE ROCK
15 - LANGLEY/MATSQUI/ABBOTSFORD
16 – CHILLIWACK
23 – KAMLOOPS
26 - PRINCE GEORGE

Supreme Court of British Columbia (A930728) Vancouver Registry

Before the HONOURABLE MR. JUSTICE SCARTH

Vancouver, April 29 and July 23, 1993

W.A. Scott Macfarlane for the Appellant
Julian Greenwood for the Respondents
Elizabeth B. Lyall for Canadian National Railway

Reasons for Judgment September 20, 1993

This is an appeal by way of Stated Case by Unitel Communications Inc. from a decision of the Assessment Appeal Board of British Columbia dated January 15, 1993, pursuant to s. 74 of the Assessment Act, R.S.B.C. 1979, chap. 21.

The Board's decision concerns the assessment of a fibre optic cable which runs between Edmonton, Alberta and Surrey, British Columbia. The cable is buried underground. It is laid within land owned by Canadian National Railway and along CN Rail's railway right-of-way.

By virtue of an agreement dated December 15, 1988, CN Rail and Unitel each own six of the twelve optical fibres which are housed within the cable. Optical fibres are the operational part of the cable. They transmit communications by pulses of light or light waves. The function of the cable is to protect the optical fibres from being bent, cracked or broken. The agreement provides that CN Rail and Unitel have joint undivided common ownership in use of the common elements of the cable, that is, of the parts of the cable which provide the protective shield for the optical fibres.

CN Rail and Unitel are separate corporations. The former is a railway corporation; Unitel is a telecommunications corporation. Their only connection, is the fact Unitel owns six of the twelve optical fibres housed within the fibre optic cable located on land owned solely by CN Rail and has the right to use the common elements of the cable in conjunction with CN Rail.

The Board found that the actual value of the fibre optic cable was assessable to CN Rail as part of CN Rail's track in place pursuant to ss. 27(1)(b) and 27(7) of the Assessment Act. The Board also found that the actual cost of the fibre optic cable was as well assessable to Unitel as being the fibre optic cable of a telecommunications corporation pursuant to s. 27(1) of the Act.

Unitel now appeals that decision. Although CN Rail maintained a watching brief at the hearing of this appeal, it has not appealed the Board's decision.

The Board has asked for the opinion of the Court on four questions as follows:

1. Did the Assessment Appeal Board err in law in finding that s. 27 of the Assessment Act authorized the double assessment of the same improvement (a fibre optic cable), both as the track in place of a railway corporation, and as the fibre optic cables of a telecommunications corporation?

2. Did the Assessment Appeal Board err in law in its interpretation of s. 27(1)(a) of the Assessment Act by finding that the portion of the fibre optic cable in issue owned by the Appellant (6 fibres within a fibre optic cable containing 12 fibres and 11 copper pairs) constituted the "fibre optic cables of a telecommunications corporation" within the meaning of that expression in s. 27(1)(a)?

3. Did the Assessment Appeal Board err in law in its interpretation of s. 38(1) of the Assessment Act, in finding that s. 38(1) authorized any assessment of the Appellant for the fibre optic cable when the Appellant's interest in the fibre optic cable was not more than one-half?

4. Alternatively, if s. 38(1) of the Assessment Act applied, did the Assessment Appeal Board err in law in finding that the Appellant was assessable under s. 38(1) for the whole of the actual value of the fibre optic cable, notwithstanding that the Appellant's interest in the fibre optic cable was not more than one-half?

It is convenient first to set out the relevant legislation relating to the assessment of fibre optic cables.

Sections 1(2), 1(1), 26(2), 26(7), 27(1), 27(2.1), 27(7) and 38(1) of the Assessment Act provide in part as follows:

1. (2) Without limiting the definition of "improvements" in subsection (1), the following things are deemed to be included in that definition unless excluded from it by a regulation under section 80(1)(a.3): ... (k) any pole lines, metallic or fibre optic cables ... that are used to provide ... telecommunications ...;

1. (1) In this Act ... "improvements" means any building, fixture, structure or similar thing constructed or placed on or in land, or water over land, or on or in another improvement, but does not include any of the following ...

26. (2) The assessor shall determine the actual value of land and improvements and shall enter the actual value of the land and improvements in the assessment roll.

26. (7) Land and improvements shall be assessed at their actual value.

27. (1) The actual value of the following shall be determined using rates prescribed by the commissioner: (a) the pole lines, metallic or fibre optic cables ... of a telecommunications ... corporation ...; (b) the track in place of a railway corporation ..., ...

27. (2.1) In prescribing rates respecting improvements referred to in subsection 1(a) to (c), the commissioner (a) shall base the rates on the average current cost of the existing improvements.

27. (7) For the purpose of applying 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 ... as are necessary for the operation of the railway.

38. (1) A structure, aqueduct, pipe line, tunnel, bridge, dam, reservoir, road, storage tank, transformer, or substation, pole lines, cables, towers, poles, wires, transmission equipment or other improvement, that extends over, under or through land may be separately assessed to the person owning, leasing, maintaining, operating or using it, notwithstanding that the land may be owned by some other person.

The Telephone and Telegraph Corporations Valuation Regulation, B.C. Reg. 226/86, provides in part as follows:

1. In this regulation

"fibre optics cable" means the portion of a fibre optics system between a transmitting and receiving unit and the next transmitting and receiving unit in that system ...

4. (1) In this section ... (e) "Class 5 fibre optics cable" means a complete fibre optics cable on September 30.

4. (2) The actual value of a fibre optics cable shall be determined using the following rates: ... (e) for "Class 5 fibre optics cable", (i) ... (ii) $20 400 per kilometer if the cable (A) is not encased in a conduit, and (B) is installed below ground level at an average depth in the system of less than 5 feet.

The Railway and Pipeline Corporations Valuation Regulation, B.C. Reg. 203/86, provides in part as follows:

3. (2) The actual value of the track in place of a railway corporation shall be determined using the following rates: (a) for Class 1 track, $131,975 per kilometer.

I turn then to a consideration of the first question:

Did the Assessment Appeal Board err in law in finding that s. 27 of the Assessment Act authorized the double assessment of the same improvement (a fibre optic cable), both as the track in place of a railway corporation, and as the fibre optic cable of a telecommunications corporation?

In essence Unitel submits the Board has authorized the double assessment of the same improvement - the fibre optic cable - by assessing it both as the track in place of a railway corporation and as the fibre optic cable of a telecommunications corporation. In doing so, the Board erred in law, it is submitted.

There can be, it is argued, only one actual value for any improvement liable to assessment under the Assessment Act. This is because s. 26(7) of the Act provides that land and improvements "shall be assessed at their actual value". Similarly, it is said, s. 27 provides that only one rate can be applied to an improvement in order to determine the actual value. This is because s. 27(1) does not provide that actual value shall be based on "one or more" of the rates prescribed; the section provides the actual value of the following shall be determined using rates prescribed by the Commissioner: (a) the ... fibre optic cables ... of a telecommunications ... corporation ...; (b) the track in place of a railway corporation .... In prescribing rates respecting improvements referred to in s. 27(1) the Commissioner is required to base the rates on the average current

costs of the existing improvement. Since an improvement can have only one average current cost, only one rate can apply.

Unitel submits the improvement being assessed here was a single fibre optic cable. The Commissioner's role under s. 26(7) of the Act was to determine the actual value of the fibre optic cable on the basis of "actual value" under s. 26 or on the basis of a rate under s. 27. Here, the Board determined that the cable was part of CN Rail's track in place, and thus that the actual value of the cable, along with the other components of the track in place, was included in the total value of the track in place as determined by a rate set by the Commissioner for track in place, that is, $131,975 per kilometer. There is no authority under the Act, it is said, to assess the same fibre optic cable again as the fibre optic cable of a telecommunications corporation by applying s. 27(1)(a) of the Act.

Counsel for the Board, Mr. Greenwood, submits the Board has not assessed the same improvement twice. The Board has, it is said, divided the improvement into two parts - the interest of CN Rail (a railway corporation) and the interest of Unitel (a telecommunications corporation) - and then assessed those interests under different provisions of the Assessment Act. In effect, it is argued, the Board has given separate assessments to two notional cables, each containing six optic fibres but sharing a common housing and location.

It is not in dispute the fibre optic cable is assessable, it is submitted. The questions properly facing the Board, having made that determination, is how the cable is to be valued from assessment purposes, and in whose name it should be assessed. The Board relied on s. 38(1) of the Act and ruled it should be assessed in both names because both CN Rail and Unitel were owners and users of the cable.

The Board then found CN Rail's interest was to be assessed under s. 27(1)(b) of the Act as part of the track in place of a railway corporation. That section could not apply to Unitel, so the Board went on to find that Unitel's interest in the cable constituted a fibre optic cable of a telecommunications corporation and was assessable as such.

In my opinion, the reasoning advanced by Mr. Macfarlane on behalf of Unitel is correct. The Board, having determined that the cable in question was part of CN Rail's track in place, and hence that the actual value of the cable was to be determined using the rate prescribed by the commissioner for the track in place of a railway corporation, was not then authorized to determine that the actual value of the same cable was to be determined using the rate prescribed by the Commissioner for the fibre optic cable of a telecommunications corporation. There can, in my judgment, be only one "actual value" of the cable under the legislation, and not multiple values.

In view of this conclusion it is unnecessary for me to express an opinion with respect to questions 2, 3 and 4.

The matter is remitted to the Board.