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CITY OF NEW WESTMINSTER & CITY OF SURREY

v.

CANADIAN NATIONAL RAILWAY,
ASSESSOR OF AREA 10 - BURNABY/NEW WESTMINSTER &
ASSESSOR OF AREA 14 - SURREY/WHITE ROCK

Supreme Court of British Columbia (A951429) Vancouver Registry

Before the HONOURABLE MR. JUSTICE FRASER (in chambers)

Vancouver, February 21 & 22, 1996

R.M. MacKenzie & D.A. Garraway for the Appellant, City of New Westminster
R.G. Hildebrand for the Appellant, City of Surrey
B.J. Wallace and K. Pepper for the Respondent, Canadian National Railway Co.
J.E.D. Savage for the Respondent, Area Assessors and Assessment Authority

PART I

Reasons for Judgment (Oral) February 21, 1996

The City of New Westminster and the City of Surrey appeal to this Court from a decision of the Assessment Appeal Board of British Columbia concerning the liability of Canadian National Railway to pay taxes on a certain bridge. The appeal is made pursuant to s. 74 of the *Assessment Act*, which permits an appeal in the form of a Stated Case on a question of law.

A preliminary objection has been taken by Canadian National Railway that the appeal is not on a question of law but is rather on a question of fact. The parties agree that the issue is whether Canadian National Railway occupies the bridge in question on behalf of the Crown.

I have read the judgment of the Assessment Appeal Board and I conclude that its decision was substantially if not wholly fact-driven. I note at p. 15 of the decision that the Board begins a segment of its decision with these words:

The Board finds the following circumstances determinative.

Following that sentence, the Board recites various matters of evidence and fact.

Now it is true that, in the course of its decision, the Board cited the decision of the Supreme Court of Canada in *The City of Halifax* v. *Halifax Harbour Commissioners* [1935] S.C.R. 215, but on my reading of that case, it too is substantially if not wholly fact-driven.

Counsel were unable on short notice to find the words of the statute in the *Halifax* case which governed the form of the appeal. My guess would be that that statute authorized appeals in a form similar to the one authorized by s. 74. I am acting on that assumption, at least.

I can only say that the Court seemed to feel free to arrive at its decision on a factual basis. It seems to me that the Assessment Appeal Board here found the analysis of the Supreme Court of Canada persuasive but did not treat it as a matter of legal interpretation, that is, the interpretation of a question of law.

The case which has influenced me in arriving at the decision that I have is *The Municipal Corporation of the Township of Tisdale* v. *Hollinger Consolidated Goldmines Ltd.*, another decision of the Supreme Court of Canada, reported at [1933] S.C.R. 321. At p. 323 of that decision, the following passage appears:

The construction of a statutory enactment is a question of law, while the question of whether the particular matter or thing is of such a nature or kind as to fall within the legal definition of the term is a question of fact.

As I say, it appears to me that the Assessment Appeal Board found as a matter of fact that Canadian National Railway occupies the bridge on behalf of the Crown. That effectively brings the appeal on the first question stated to an end.

I must say that the three decisions of the Saskatchewan Court of Appeal cited to me by the Appellants, *In re Northern Saskatchewan Flying Training School Limited* v. *Rural Municipality of Buckland*, a decision found at [1943] 3 W.W.R. 609, *Regina Elementary Flying School Limited* v. *Regina*, found at [1944] 4 D.L.R. 589, and *In re Regina Industries Limited* found at [1944] 3 W.W.R. 741, seemed to have involved the Court doing what I have declined to do, that is, to review the decision of an inferior tribunal on factual matters even though the statute governing the appeals in those cases is more or less identical to the one I am acting under.

I can only say that these decisions appear to me to be inconsistent with the *Tisdale* decision, which is of superior authority and which is binding on me. It appears to me as well that this appeal cannot be brought based on the criteria articulated by Madam Justice Southin in *Crown Forest Industries Limited* v. *Assessor of Area 6 - Courtenay*. The report I have of that 1985 decision appears in a publication known as 1985 Stated Case and is case 210 in that publication. The criteria I speak of appear at p. 1191.

For these reasons, then, I hold that this Court does not have power to intervene or to answer the question which is the first question stated on the appeal. That concludes my reasons.

PART II

Reasons for Judgment (Oral) February 22, 1996

The cities of New Westminster and Surrey appeal from the decision of the Assessment Appeal Board of the 21st of March, 1995. The decision of the Board had to do with the railway bridge across the Fraser River operated by Canadian National Railway pursuant to an entrustment agreement with the Crown Federal.

New Westminster and Surrey contend on this appeal that Canadian National is liable to pay tax under the *Assessment Act* on its operation and use of the bridge.

The Assessment Appeal Board held that Canadian National was occupying the bridge on behalf of the Crown Federal. Under s. 34 of the *Assessment Act*, this made the bridge exempt from assessment and taxation. I held that the appeal from this part of the Board's decision was not an appeal on a point of law and therefore could not be maintained.

New Westminster and Surrey appeal also on the ground that, apart entirely from s. 34, Canadian National is liable to assessment, that is, payment of tax, under s. 38(1) of the *Act*. I do not agree, for reasons substantially similar to those given by the Board.

Section 38 creates a separate class of taxpayer whose liability is in the discretion of the Assessor but it does not create new classes of taxable property. All the things mentioned in s. 38 are improvements within the meaning of the *Act*. The section must be read in the context of the *Act* generally and in conjunction with other specific sections of the *Act* and in the context of other provincial legislation. It is not to be approached as if it was free standing.

The consequence of the interpretation contended for by New Westminster and Surrey is that the exemption from liability established by s. 34 of the *Act* for those who occupy property on behalf of the Crown is taken away by s. 38. It would also mean that the basis of liability for tax established by s. 409 of the *Municipal Act* is inconsistent with the liability created by s. 38.

The extent of the disharmony and conflict within legislation which the Appellant's submissions imply persuades me that the proper interpretation is as I have outline above. Those are my reasons.

(Submissions Re: Costs)

If this was the first stage of appeal I might agree but this is the second stage of the appeal and my view is that costs should follow the event. My view also is that they should be assessed on scale 3.