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ASSESSOR OF AREA 10 - BURNABY/NEW WESTMINSTER

v.

SCI CANADA LTD.

Supreme Court of British Columbia (A981268) Vancouver Registry

Before the HONOURABLE MR. JUSTICE HOLMES (in chambers)

Vancouver, October 9, 1998

J.H. Shevchuk for the Appellant
G.S. Snarch and N.G. Madryga for the Respondent

Reasons for Judgment October 28, 1998

The Assessor of Area 10 - Burnaby/New Westminster ("Assessor") required this appeal by Stated Case pursuant to section 63(3) of the *Assessment Act*, R.S.B.C. 1996, c. 20 (the *"Assessment Act"*).

The appeal concerns two properties situated in Burnaby, British Columbia. They are known as Forest Lawn Memorial Park ("Forest Lawn") and Ocean View Memorial Park ("Ocean View"). There is a cemetery and funeral home operated on each. In addition, Forest Lawn has a crematorium on the property.

The majority of a three-person Assessment Appeal Board (the "Board") panel held the lands and subject improvements on the properties were a cemetery and exempt from taxation under the provisions of section 339(1)(f) of the *Municipal Act*, R.S.B.C. 1996, c. 323 ("*Municipal Act*").

One Board member dissented. She found the improvements comprising a funeral home on each property and the crematorium located at Forest Lawn were not entitled to exemption. She found the land underlying the funeral homes and crematorium, however, together with all the other lands, were exempt.

During the Board hearing, evidence was given by witnesses called by the Respondent that certain other minor improvements on the properties were not actively in use in the operation of the cemetery. The Assessor requested the Board then rule as to the status of those improvements for exemption. The request was denied.

The Assessor alleges two errors of law in the Board's decision:

1. The Board erred in interpreting the exemption legislation;

2. The Board erred by not considering the exemption status of all improvements.

The court will intervene in a decision of the Board where it has misinterpreted legislation or has misapplied legislation or principles of general law; or where the Board has acted in the absence

of evidence or upon a view of the facts which could not reasonably be entertained [*Canadian National Railway Company* v. *Assessor of Area 9 - Vancouver*, [1990] B.C. Stated Cases 273 (B.C.C.A.)].

The construction to be given a statute is a question of law. It is a question of fact whether a particular matter or thing comes within a legal definition [*Tisdale* v. *Hollinger Consolidated Gold Mines*, [1933] S.C.R. 321 (S.C.); *Hennessy* v. *Assessor of Area 01 - Capital*, [1996] B.C. Stated Cases 367 (B.C.C.A.)].

A. Exemption for Land and Improvements

The properties prior to the 1997 Assessment roll had been listed by the Assessor as entirely exempt from taxation pursuant to the predecessor to section 339(1)(f) of the *Municipal Act*.

On the 1997 Assessment Roll, the Assessor removed the exemption in respect of portions of the land and improvements. Section 339(1)(f) provides:

> Unless otherwise provided in this Act, the following property is exempt from taxation to the extent indicated:
>
> > (f) a cemetery under the *Cemetery and Funeral Services Act* actually used and occupied for the interment of the dead or designated an approved interment area by the registrar under that Act.

"Cemetery" is defined in the *Cemetery and Funeral Services Act*, R.S.B.C. 1996, c. 45 as:

> ... land that is set apart or used as a place of interment, together with any incidental or ancillary buildings.

Therefore at issue is whether the Board erred by misinterpreting and misapplying the phrase "... land that is set apart or used as a place of interment, together with any incidental or ancillary buildings."

The Board found as fact that no human or cremated remains were interred in the funeral homes or crematorium, nor in the land underlying those improvements.

The majority of the Board found all improvements on the properties were part of integrated cemetery operations. It was the decision of the majority that all land and improvements qualified for exemption.

The dissenting Board member would not have allowed an exemption for the funeral homes or crematorium improvements.

1. Did the Assessment Appeal Board err in law in respect of the subject properties when it determined that the funeral homes, the crematorium, the parking lots servicing the funeral homes and crematorium, and the lands underneath those improvements are all exempt from taxation under the Municipal Act*, R.S.B.C. 1996, c. 323*?

It appears the majority and dissenting member of the Board adopted the "plain meaning rule" of statutory interpretation in regard to the words "... incidental and ancillary buildings." They however differ as to that plain meaning. The Appellant Assessor supports the dissenting view.

The majority found funeral homes and crematorium buildings were "... part of the integrated operation of the cemetery and have to do with the operation of the cemetery."

The Assessor withdrew on the hearing of this appeal the issue involving exemption of the parking lots.

The dissenting Board member referred to *Black's Law Dictionary* and the *Concise Oxford Dictionary* definitions of the words "incidental" and "ancillary". She concluded the definitions implied "... a dependent relationship between that which is incidental or ancillary to that which is principal." She concluded therefore "... buildings which are incidental or ancillary to a cemetery would be dependent upon the cemetery, aid the cemetery or further the purpose of the cemetery, and would not operate independently of the cemetery."

The *Concise Oxford Dictionary* defines "incidental" as casual, not essential; and "ancillary" is defined as subservient, subordinate.

I agree with counsel for the Respondent's that the dissenting panel member's concept of importing necessity into the meaning of definition derives from the *Black's Law Dictionary* definition of "incidental". That definition appears coloured by the context of the authority to which reference is made [*Davis* v. *Pine Mountain Lumber Company*, 273 Cal. App. (2d) 825 (1969)].

As noted in *Canadian National Railway* v. *Harris*, [1946] 2 D.L.R. 545 (S.C.C.) "necessity" would be a further limitation upon the usual meaning of incidental:

> That which is incidental to something which is usually or naturally associated with or arising out of the work ... It is as the Oxford Dictionary states: something occurring or liable to occur in fortuitous or subordinate conjunction with something else. The word "necessarily" further limits the word "incidental".

If such a connotation was intended in the legislation, one would expect that limitation to be specifically provided.

There is a significant relationship between funeral and cemetery services. The legislature combines their governance under a single *Act*: the *Cemetery and Funeral Services Act*.

Municipal zoning controls of the properties as "cemetery district". It permits the building and operation of funeral homes and crematoriums on cemetery lands.

The Board found the funeral homes were:

> ... used for the arrangement and provision of funeral services including the preparation of human remains, the storing of remains while awaiting interment, the sale of caskets, coffins, markers, urns and other products, and the sale of flowers for funerals and memorializations.

And the crematorium was:

> ... used for the cremation of human remains and the storage of human and cremated remains while awaiting disposition.

The services of the funeral homes and crematorium can be utilized where actual interment would be other than the subject cemetery. There is no requirement the services be exclusive to user of the Forest Lawn or Ocean View cemeteries.

B. Tax Exemption: Land

The Board was unanimous in holding that the land underlying the funeral homes and crematorium form part of the cemetery.

Counsel for the Appellant argues that the definition of cemetery in the *Cemetery and Funeral Services Act* differs significantly from a definition contained in the *Cemeteries Act*, R.S.B.C. 1960, c. 48 in effect when the decision in *Forest Lawn Cemetery Company* v. *The Corporation of the District of Burnaby*, [1968], B.C. Stated Cases 61 was made. He cautions therefore that although the decision appears to support the Board's view as to the land component exemption at issue, the change in underlying legislation when considered shows it does not.

The definition of cemetery in the earlier *Act* was:

> any land which is set apart or used as a place for the interment of the dead or in which human bodies have been buried, and includes a mausoleum.

The present definition of "cemetery" is:

> land that is set apart or used as a place of interment, together with any incidental or ancillary buildings.

Counsel suggests that under the current definition land used for a purpose other than providing a place for interment and therefore no longer set aside or used as a place of interment would no longer qualify for exemption. He argues the land upon which the funeral home and crematorium buildings rest fit this category.

The *Municipal Act* exempts a cemetery under the *Cemetery and Funeral Services Act* from taxation. The exemption is for "... land that is set apart or used for the purpose of interment ...". It need not be actually used for interments, but it must be designated as an approved interment area.

There will be many parts of cemetery lands not actually used for interment. Walkways, spaces between plots, gardens and parking areas as well as maintenance and storage buildings are a few of the obvious ones. It is the whole of the property, as a unity, which is designated and approved as an interment area. It is only buildings (improvements) that are not "incidental" or "ancillary" that do not qualify for exemption.

The land underlying the funeral homes and crematorium is part of the cemetery as a whole and properly "... land set apart or used as a place of interment together with the whole of the cemetery lands."

The answer to Question 1 stated for the opinion of the court is "NO."

2. Did the Assessment Appeal Board err in law when it refused to review the exemption status of certain greenhouses, a tractor shed and a parking lot located on Forest Lawn Memorial Park lands, a portion of the subject properties and an old stone chapel located on Ocean View Memorial Park lands portion of the subject properties in the face of new evidence adduced during the course of the hearing?

In the course of the hearing before the Assessment Appeal Board, some evidence was heard concerning the use of certain greenhouses, a tractor shed, a parking lot and an old stone chapel on the subject properties. Some were no longer in use, with others the usage had changed.

At the end of the second day of the hearing, the Assessor requested the Board to exercise its investigative function to declare that certain of these improvements were no longer entitled to exemption.

The Respondent had no prior notification the exemption as to these improvements was challenged. It appears the Assessor formed no intention of doing so until midway in the hearing.

The Assessment Appeal Board noted the Assessor had inspected the facility in question prior to completing the 1997 assessment roll, the exemption on the utility improvements in question was not withdrawn, and there was no notice the status of the facilities were at issue in the appeal. It declined in the circumstances to review the exemption status of the facilities for the 1997 roll.

The Board suggested the Assessor could remove any improvement it challenged in the ensuing years Roll and thereby define an issue.

The Board, under s. 58(9) of the *Assessment Act*:

> ... *may* determine, and make an order accordingly,
>
> ...
>
> (c) whether or not an exemption has been properly allowed or disallowed.
>
> [emphasis added]

The section is discretionary.

Section 59 is mandatory and sets out:

> ... at the request of a party to the appeal, the board *must take evidence* with respect to, and determine the assessment of, both land and improvements in accordance with section 58.
>
> [emphasis added]

Section 60 is also a discretionary section, providing:

> On an appeal, on any ground, from the decision of the Court of Revision in respect of the assessment of property, *the board may reopen the whole question of the assessment on that property*, so that omissions from, or errors in, the assessment roll may be corrected, and an accurate entry of assessment for the property and the person to whom it is assessed may be placed on the assessment roll by the board.
>
> [emphasis added]

I do not consider authorities confirming that the *Assessment Act* does not require formalized counterclaim proceedings, that an appeal to decrease an assessment can give rise to an increase, or that it is possible for the Board to review an assessment regardless of how the matter originally came before it are determinative of the present issue.

The issue concerns the discretion of the Board.

The Assessment Appeal Board heard the evidence in respect of the improvements in issue as mandated by section 57.

The Assessment Appeal Board then had a discretion to "... reopen the whole question of the assessment of the property ..." under s. 60 to investigate the exempt status of the facilities not previously challenged by the Assessor; or consider the propriety of the existing exemption under s. 58(2)(c).

In considering the exercise of its discretion in light of the circumstances of neither a prior challenge to the exemption, or notice that it sought review, the Assessment Appeal Board obviously decided that it was inappropriate to decide the issue within the context of the present appeal.

Counsel for the Assessor argues that the Board should have resolved any lack of prior notice by offering the Respondent an adjournment.

That was undoubtedly an option available to the Board. It was not however an exclusive remedy, nor was it one the Board considered appropriate.

I note that the Assessor seeks to blame the taxpayer for failing to disclose relevant information prior to the hearing so the Assessor "... would have been in a position to give notice of his intention to challenge the exemption."

There is no evidence of such a duty; nor a breach of any duty by the taxpayer regarding information that it might be required to provide to the Assessor.

The answer to Question 2 posed for the opinion of the court is "NO."

In the result, the Respondent is entitled to its costs.