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DAVE WEINRAUCH AND SONS TRUCKING LTD.

v.

**ASSESSOR OF AREA 21 – NELSON/TRAIL,
JUDY HAWES, JOSEPH HAWES,
CORAL MCLEAN, PATRICK HARTNET and
PROPERTY ASSESSMENT APPEAL BOARD**

SUPREME COURT OF BRITISH COLUMBIA (15335) Nelson Registry

Before the HONOURABLE MADAM JUSTICE GRAY
Date and Place of Hearing: March 23, 2010, Nelson, B.C.

B.F. Suffredine, Q.C. for the Appellant
G.E. McDannold for the Respondent, Assessor of Area 21 – Nelson/Trail
No other appearances

Reasons for Judgment (Oral) March 23, 2010

[1] **THE COURT:** This is an appeal of a decision of the Property Assessment Appeal Board, which I will refer to as the "PAAB". The Appellant, Dave Weinrauch and Sons Trucking Ltd., which I will refer to as "Weinrauch Trucking", required the PAAB to file a Stated Case and provided the questions to be referred to the court, all pursuant to s. 65 of the *Assessment Act,* R.S.B.C. 1996, c. 20.

[2] Pursuant to s. 65 of the *Assessment Act,* the PAAB's decision is referred to this court "for appeal on a question of law alone in the form of a Stated Case."

[3] This is an unusual appeal, because Weinrauch Trucking seeks to be held to be the "paramount occupier" of land and thus liable to pay taxes. It is, of course, more common for a party to try to avoid liability for tax. The appeal occupied one-half day of hearing, with Mr. Suffredine, Q.C. representing Weinrauch Trucking, and Mr. McDannold representing the Assessor of Area #21. The other named Respondents did not file appearances and did not participate in the appeal.

[4] The essential facts are that the appeal relates to two buildings on an irregular shaped 33.08-acre parcel of land on the west shore of Kootenay Lake in British Columbia. Weinrauch Trucking has held a mineral claim to the parcel since November 14, 2008. One couple lives in each of the two buildings.

[5] The Hawes, who are individuals named Respondents, have lived in one building since 1975. They agreed with a prior owner of the mineral claim to be caretakers of the property on payment of a modest rent.

[6] The other individual Respondents, Ms. McLean and Mr. Hartnet, occupy the other building and have done so since a date which was not clear, but is after 1975.

[7] The PAAB's decision is dated December 14, 2009, and it refers to the two couples together as the "Additional Parties," and I will do the same.

[8] The PAAB confirmed the decision of 2009 of the Property Assessment Appeal Review Panel that the Additional Parties are the paramount occupiers and should be listed as such on the notice of assessment.

[9] The Stated Case poses these three questions for the court:

1. Did the Board err in law in holding that the persons living in premises owned by Weinrauch Trucking were paramount occupiers for the purposes of the *Assessment Act*?

2. Did the Board err in law in holding that a person who is a tenant at sufferance or trespasser is the paramount occupier when the owner of the premises is attempting unsuccessfully to exercise control over the premises?

3. Did the Board err in law in concluding that occupants of the buildings in this case who may be either trespassers or tenants are paramount occupiers over the owner of the buildings by virtue of having a physical presence on the lands and refusing to allow the owner possession?

[10] The Assessor made the preliminary objection that these three questions are questions of fact or of mixed fact and law. The Assessor says the court ought to decline to answer them on that basis.

[11] The *Assessment Act* clearly limits appeals to questions of law. In addition, the case law has held that Stated Case appeals are limited to questions of law only, and questions of mixed law and fact are not acceptable; see *Richland Estates Ltd. v. Assessor of Area #24 - Cariboo* (2002), B.C.S.C. Stated Case 457; and *Winkler v. Assessor of Area #09 - Vancouver* (1998), B.C.S.C. Stated Case 406.

[12] The term “occupier” is defined in s. 1 of the *Assessment Act.* That definition includes s-s. (b) as follows:

> ... the person who is in possession of Crown land that is held under a homestead entry, pre-emption record, lease, licence, agreement for sale, accepted application to purchase, easement or other record from the Crown, or who simply occupies the land ...

[13] The PAAB concluded that both Weinrauch Trucking and the Additional Parties are “occupiers” of the land. Neither party to this appeal questioned that finding in any way.

[14] Section 26 of the *Assessment Act* provides that:

> (1) Land, the fee of which is in the Crown, or in some person on behalf of the Crown, that is held or occupied otherwise than by, or on behalf of, the Crown, is, with the improvements on it, to be assessed in accordance with this section.
>
> (2) The land ... must be entered in the assessment roll in the name of the holder or occupier ...

[15] Section 29 of the *Assessment Act* provides that if land or improvements or both are held or occupied in the manner referred to in a number of sections in the *Act,* including s. 26 which I just referred to, by two or more persons, “and there is no paramount occupier,” the land or improvements or both must be assessed in the names of those persons jointly.

[16] The PAAB agreed with the panel below it that the Additional Parties are the paramount occupiers. There is no definition in the *Assessment Act* of “paramount occupier.”

[17] Issues relating to who was paramount occupier have come before the court before. In *Golden Acres Ltd. v. Assessor of Area #19* (1985), S.C. 209, Mr. Justice Legg, when he was a member of this court, wrote as follows:

> In reaching the finding that the mobile home owner was the paramount occupier the Board made a finding of fact.

[18] In *TSI Terminal Systems v. Assessor of Area #09 - Vancouver,* 2005 BCSC 1573, Mr. Justice Chamberlist said as follows at paragraph 57:

> [57] I also find that the Board was also correct in ... concluding that the question of who is the paramount occupier is a question of fact for determination by the Board in its inquisitional role. This finding of fact, which is provided for by the *Assessment Act,* is not a matter that can be dealt with on a stated case because the question is not a question of law, but a question of mixed fact and law ...

[19] In my view, the three questions posed in the Stated Case are all questions of mixed fact and law. As a result, the court must decline to answer them.

[20] Although not requested by the parties, s. 65(7) of the *Assessment Act* provides that the court may send a Stated Case back to the PAAB for amendment, and the PAAB must promptly amend and return the Stated Case for the opinion of the court. In my view, the Stated Case could be revised to provide a question of law regarding the proper definition of a "paramount occupier."

[21] The PAAB considered several cases to decide how to approach the issue of who is paramount occupier. The cases it considered included *Golden Acres* and *TSI Terminal Systems,* both of which I have just cited, and also *British Columbia v. Newmont Mines Ltd.* (1982), 37 B.C.L.R. 1, 132 D.L.R. (3d) 525 (C.A.); *Delta v. Vancouver Port Authority,* [2003] PAABBC 20039195; and *Gottardo Properties (Dome) Inc. v. Toronto (City),* 162 D.L.R. (4th) 574, 11 O.A.C. 272 (Ont. C.A.).

[22] The PAAB said as follows at paragraph 32 through 37 of the decision under appeal:

> According to *Gottardo Properties,* there are three considerations in determining paramount occupation: physical presence, control imposed by one occupier over the other and the purpose and effect of controls imposed by one occupant on the other's use, and the relative significance of the activities carried out on the land to the primary business of each of the rival occupants.
>
> In the case at bar, the Additional Parties have the physical presence on the properties. It is acknowledged that the right to their presence is strongly disputed by the appellant, but nonetheless they have physical control of the properties and, short of agreement, it will take legal process to have them removed. On the other hand, Dave Weinrauch and Sons Trucking Ltd. does not presently have any actual physical presence.
>
> Secondly, Dave Weinrauch and Sons Trucking Ltd. has not been able to impose any control over the Additional Parties on the property. It has no agreement with the Additional Parties and no judicial or administrative finding to allow it to assert control over the activities of the Additional Parties on the property.
>
> Lastly, the Additional Parties wish to and, in fact, do live on the property. Dave Weinrauch and Sons Trucking Ltd. wishes to carry on mining activity, but to date does not.
>
> The weight of all three of these factors is in the Additional Parties' favour.
>
> For this reason, as between Dave Weinrauch and Sons Trucking Ltd. as owner of the mineral claim and the Additional Parties who have no registered or written interest in the property, but have actual physical occupation and control, the Additional Parties are the paramount occupiers. Accordingly, the assessment should be in the names of the Additional Parties.

These findings are also summarized in the Stated Case at paragraph 15.

[23] The Court of Appeal recently considered a Stated Case pursuant to s. 65 of the *Assessment Act* in *Weyerhaeuser Company Limited v. Assessor of Area #04 -Nanaimo/Cowichan,* 2010 BCCA 46. I will read paragraphs 47 and 48 of the reasons for judgment in that case:

> [47] Since the Board was not determining legal questions of general importance to the legal system as a whole, but rather interpreting a regulation promulgated under their own constating statute, the standard of review in this case is reasonableness....
>
> [48] In *Dunsmuir,* the court provided a functional definition of the reasonableness standard in the following terms (at para. 47):
>
> > Reasonableness is a deferential standard animated by the principle that ... certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. ... In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[24] In this case, the definition of "paramount occupier" is a question that arises from the *Assessment Act* itself. As a result, even if the court were to consider the question of law of the proper definition of "paramount occupier," the court would be required to apply the standard of reasonableness to the decision of PAAB.

[25] The PAAB's decision about how to define "paramount occupier" was a reasonable one. The PAAB considered several relevant court decisions. The determination of who is a paramount occupier involves interpretation of the *Assessment Act* rather than deciding a legal question of general importance to the legal system as a whole.

[26] As a result, and not having been asked by either party to do so, I decline to ask the PAAB to amend the Stated Case to pose a question of law regarding the meaning of "paramount occupier."

[27] Mr. Suffredine suggested that it may have been possible for the Appellant to seek to appeal the finding of the PAAB that the fee of the land was in the Crown and that s. 26 and therefore s. 29 apply. That issue was not before me and I do not make any comment on it.

[28] In conclusion, I decline to answer the questions in the Stated Case because they are not questions of law. The appeal by way of Stated Case is dismissed.

[29] Is there anything else, counsel?

[30] MR. SUFFREDINE: No, thank you.

[31] MR. McDANNOLD: Costs for the Assessor?

[32] THE COURT: What is your position on that, Mr. Suffredine?

[SUBMISSIONS BY COUNSEL RE COSTS]

[33] THE COURT: All right. I have dismissed the appeal which came by way of Stated Case. The Assessor is seeking costs on the basis that the Assessor was successful. The Assessor also argues that this was the third level of appeal, and that costs were not payable in respect of the previous two levels, so it is appropriate to make them payable at this level. The Assessor also relies on two decisions of this court in which costs were ordered against the unsuccessful Appellant. One is *Assessor of Area #01 - Capital v. Bodine,* and that is case 501A. The other is *Assessor of Area #10 - Burnaby/New Westminster v. City of New Westminster and Haggerty Equipment Co. Ltd.,* case 396.

[34] The Appellant is opposed to paying costs in all the circumstances and also argues that it was not aware of the position of the Assessor until relatively recently.

[35] In my view, there is nothing to take this case out of the ordinary rule that costs should follow the event and, in light of the previous cases and the fact that this is the third level of appeal, the Assessor is entitled to its costs. So I will make that order.