SC 547 AA11 v CCS Corporation and PAAB

Link to Property Assessment Appeal Board Decision

ASSESSOR OF AREA 11 – RICHMOND/DELTA
v.
CCS CORPORATION and
PROPERTY ASSESSMENT APPEAL BOARD

SUPREME COURT OF BRITISH COLUMBIA (S122582) Vancouver Registry

Before the HONOURABLE MR. JUSTICE AFFLECK (in chambers)
Date and Place of Hearing: October 24, 2012, Vancouver, B.C.

M.G. Underhill for the Applicant
No one appearing for the Respondents

Classification – Processing of products – Marketability

The property comprises 400,359 square feet of land, divided into two non-contiguous parcels. The smaller parcel (47,758 sq ft) is leased to and occupied by a firm unrelated to the property owner and is used for the purpose of truck-trailer storage. The main parcel (352,601 sq ft) is occupied by HAZCO, a firm related to the Respondent which uses the property for securing and stabilizing hazardous materials for shipping to landfills and other locations. HAZCO stores and treats then disposes of, both hazardous and non-hazardous waste on-site, but does not turn it into a marketable product.

The Property Assessment Appeal Board ("the Board") found that as long as a "product" was altered, it was processed and that it did not need to be marketable. The Board found that the property was used for the purpose of processing hazardous and non-hazardous waste and fell within the definition of Class 5 – Light Industry. The Board found that the part of the property that was leased to a third party should remain in Class 6 – Business and Other along with the regional office and those parts of the office which were used for activities which were not directly related to the production, transportation or storage of products.

The Assessor appealed the Board's decision to this Court asking the following four questions:

1. *Did the Board err in law by failing to find that the definition of "processing" in section 5 of the* Prescribed Classes of Property Regulation *("Regulation") includes two criteria; namely, (a) that the treatment must make a good or product more marketable, and (b) that there must be a material change to the appearance of nature of the good or product?*
2. *Did the Board err in law in failing to interpret the word "processing" within the full and proper context of the Regulation, and in particular within the context of the words "manufacturing" and "extracting" in subsection 5(5)?*
3. *Did the Board err in law in finding that the definition of "product" in section 5 of the Regulation could include non-marketable goods?*
4. *Did the Board err in law by applying an erroneous hierarchy of aids to the interpretation of section 5 of the Regulation?*

HELD: *Appeal Allowed.*

This Court found that the Board had erred in finding that "processing of products" occurred on the property, agreeing with the Assessor that processing required something marketable to result from the activity occurring on the property. This Court also found that the Board had mis-read the decision of Assessor of Area 08 – North Shore/Squamish Valley *v.* International Paper Industries Ltd. *(1995), 7 B.C.L.R. (3d) 138 (C.A.) by concluding that the marketability of the recyclables at issue in the case played no role in this decision.*

Reasons for Judgment December 11, 2012

[1] By way of stated case the Property Assessment Appeal Board has referred questions of law to this Court pursuant to Part 7 of the *Assessment Act*, R.S.B.C., 1996 chapter 20. The notice of stated case in Part 1 reads as follows:

> The Following facts are relevant to the questions of law to be determined by the Supreme Court:
>
> 1. The appeal before the Board was from the decision of the 2011 Property Assessment Review Panel with respect to the assessment of property located at 13511 Vulcan Way, in the City of Richmond (the Property). The Assessor classified the property as Class 6 – Business/Other on the 2011 roll. The issue before the Board was whether all or part of the Property should be classified as Class 5 – Light Industry pursuant to the *Prescribed Classes of Property Regulations*, BC Reg. 438-81.
>
> 2. The Property comprises 400,359 square feet of land. The Property is divided into two non-contiguous parcels. The main parcel fronts onto Vulcan Way; the additional non-contiguous parcel fronts onto River Road and borders the Fraser River. The main parcel is approximately 88% of the total (352,601 square feet). The non-contiguous parcel is approximately 12% of the total (47,758 square feet).
>
> 3. The non-contiguous parcel backs onto the Fraser River and is leased to and occupied by a firm unrelated to the property owner. It is used for the purpose of truck-trailer storage.
>
> 4. The main parcel is occupied by HAZCO a firm related the Respondent property owner, CCS Corporation (Appellant before the Board). HAZCO has a number of industrial buildings of various ages and conditions, including a two storey office building. This office building is used for accounts, sales, billings, bids and other administration services for HAZCO's entire Pacific region, including Victoria, Kelowna, and Fort St. John and is considered a regional office.
>
> 5. The Respondent's facility functions mainly for securing and stabilizing hazardous materials for shipping to landfills and other locations. Services that the Respondent offers from the Richmond address are: recycling, storage facility, non-hazardous waste treatment and/or disposal facility, on-site treatment, and hazardous waste treatment and/or disposal facility. The Respondent stores and treats then disposes of, both hazardous and non-hazardous waste on-site, but does not turn it into a marketable product.
>
> 6. The Board found that as long as a product is altered, it is processed. The Board did not find that a "product" must be marketable. The Board found that the Property is used for the purpose of processing hazardous and non-hazardous waste and falls within the definition of Class 5 – Light Industry.

7. The Board found the Respondent's facility is used for the "transporting of products" and the "storage of products" within the meaning of the *Regulation.*

8. The Board found the non-contiguous part of the Property, leased to a third party, and which comprises about 12% of the Property is not Class 5, but remains Class 6.

9. The Board found the regional office, and those parts of the office which are used for activities which are not directly related to the production, transportation or storage of products, are not Class 5, but Class 6.

10. The Board found the remainder of the Property to the extent that it is used for processing, transporting or storage of products is to be classified as Class 5.

11. By decision dated January 26, 2012, the Board ordered the Assessor to amend the roll to split classify the Property between Class 5 and Class 6. The Board ordered the parties to provide a joint recommendation apportioning the assessed value between Class 5 and Class 6. The Board accepted the joint recommendation provided in accordance with its decision dated January 26, 2012 and by order dated February 29, 2012 ordered the Assessor to amend the 2011 roll as follows:

Roll No. 11-38-320-R-033-299-000:

		FROM	**TO**
Land:	Class 6 – Business and Other	$5,855,000	$1,465,000
	Class 5 – Light Industry	$0	$4,390,000
Improvements:	Class 6 – Business and Other	$1,283,000	$326,000
	Class 5 – Light Industry	$0	$956,000
Total Assessed Value:		$7,138,000	$7,137,000

[2] This Court is bound by the facts as stated: see *British Columbia* (*Assessor of Area No. 10 - North Fraser) v. Sherkat*, 2011 BCCA 16.

[3] In part 2 of the stated case the Appeal Board asks the following questions of this Court:

1. Did the Property Assessment Appeal Board ("Board") err in law by failing to find that the definition of "processing" in section 5 of the *Prescribed Classes of Property Regulation* ("Regulation") includes two criteria; namely, (a) that the treatment must make a good or product more marketable, and (b) that there must be a material change to the appearance of nature of the good or product?

2. Did the Board err in law in failing to interpret the word "processing" within the full and proper context of the Regulation, and in particular within the context of the words "manufacturing" and "extracting" in subsection 5(b)?

3. Did the Board err in law in finding that the definition of "product" in section 5 of

the Regulation could include a non-marketable good?

4. Did the Board err in law by applying an erroneous hierarchy of aids to the interpretation of section 5 of the Regulation?

[4] The applicant Assessor classified the property as Class 6 - Business/Other. The question before the Appeal Board was whether, at least in part, the property should be classified as Class 5 - Light Industry.

[5] The *Prescribed Classes of Property Regulation,* B.C. Reg. 438/81 (the "Regulation"), a regulation made pursuant to the *Assessment Act*, defines Class 5 as follows:

> **Class 5 - light industry**
>
> **5** Class 5 property must include only land or improvements, or both,
>
> (a) used as a gathering pipeline,
>
> (b) used or held for the purpose of extracting, processing, manufacturing or transporting of products, or
>
> (c) used for the storage of products as ancillary to or in conjunction with the extracting, processing, manufacturing or transporting of products referred to in paragraph (b),
>
> but does not include those lands or improvements, or both,
>
> (d) included in class 2 or 4,
>
> (e) used or held for the purposes of, or for purposes ancillary to, the business of transportation by railway,
>
> (f) used principally as an outlet for the sale of a finished product to a purchaser for purposes of his or her own consumption or use and not for resale in either the form in which it was purchased or any other form, and
>
> (g) used for extracting, processing, manufacturing or storage of food, non-alcoholic beverages or water.
>
> [emphasis added]

[6] I am informed that there is no dispute that if the property does not fall within Class 5 it falls within Class 6. The controversy on this appeal arises from the emphasized words from section 5 of the Regulation quoted above. The Appeal Board held that most of the property was used for the processing of a product which use engages the provisions of section 5 (b) or (c) of the Regulation. The Assessor asserts that finding was erroneous because no product was being processed. As I understand it is agreed the question of whether there was processing of a product on the property in question is central to the determination of the appropriate classification.

[7] The Appeal Board began making its decision under the heading "Comments About Statutory Interpretation". It reviewed the well known cases of *Re Rizzo and Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 and *Bell Express View Limited Partnership v. Rex,* 2002 SCC 42. The Appeal Board described "interpretative aids" and ranked them in order of importance. "At the highest level" were the cases from the Supreme Court of Canada "balanced together with the words of the *Interpretation Act*". "At a

secondary level" the Appeal Board placed the interpretation of "words in the same statute by a superior court" which it concluded were binding on an administrative decision maker. At "a tertiary level" the Appeal Board placed the following:

> a. dictionary definitions are useful, but not always determinative of the meaning of a word, given the meaning of the word within a context which the dictionary does not have;
>
> b. the interpretation of the identical words by a decision maker from the same administrative board are also useful and usually persuasive, but again are not unquestioningly determinative;
>
> c. the definitions in legal dictionaries are usually of lesser assistance, certainly when interpreting the meaning of a word which is unquestionably a word with a technical legal meaning like "petition" or "injunction";
>
> d. the legislative history of an enactment might be helpful, but rarely is;
>
> e. the meaning of a similar word in a different statute is rarely helpful;
>
> f. the meaning of words from statutes in cases from other jurisdictions are also rarely helpful.

[8] The Appeal Board described "[t]he issue that separates the parties" as "whether the 'product' is a marketable one or not. If something is not marketable, says the Assessor, it is not a product".

[9] Employing the "interpretative aids", the Appeal Board held that what it characterized as the "narrow definition" of the phrase "processing a product" urged by the Assessor did not apply to the words set out in the definition of Class 5. Accordingly, the portion of the property which is described in paragraph 2 of part 1 of the notice of stated case as the "main parcel" was found to fall within Class 5. The non-contiguous portion fell within Class 6.

[10] For the reasons that follow I conclude the Appeal Board erred in its classification of the "main parcel".

[11] Earlier in these reasons I quoted from the facts stated in part 1 of the notice of stated case. Paragraph 5 of the facts describes the activities of the respondent corporation on the property. The Appeal Board's decision rests on whether the activities taking place on the main parcel should be properly described as "processing" a product. If the answer is yes the property falls within Class 5; if the answer is no it falls within Class 6. The word "processing" is not a technical term. In context of the Regulation it has no specialized meaning as a term of art.

[12] In *Tenneco Canada Inc. v. Canada*, [1988] 2 F.C. 3 at para. 10, an income tax case, the federal court observed that

> …the Income Tax Act does not provide a definition for "manufacturing" or "processing". There is, however, extensive jurisprudence in the matter. It has been held that the technical meaning attributed to the word "processing" by expert testimony ought to be rejected in favour of the ordinary, or dictionary meaning of the word.[1]

[13] In paragraph 12 of *Tenneco* the federal court held

> There are two criteria to define "processing". First, that the treatment must

> make the goods more marketable and, second, that there must be some change in the appearance or the nature of the goods.[6]

[14] *Tenneco* is not mentioned in the Appeal Board's reasons. I was not advised whether *Tenneco* was argued before the Appeal Board but it was referred to in *Sammy's Carpets & Hardwood v. Area 14* (2011 PAABBC 20112125) a decision of the Appeal Board made on December 21, 2011, about one month before the decision in the case at bar. The Appeal Board hearing *Sammy's Carpets* specifically adopted the definition of processing found in *Tenneco*.

[15] The applicant Assessor brings to my attention several dictionary definitions of the word "process" or "processing" as follows:

> "process" - a course of action or procedure, **esp. a series of stages in manufacture or some other operation**; the progress or course of something (in process of construction); handle or deal with by a particular process; treat
>
> *Oxford English Reference Dictionary*
>
> "processing" - includes changing the nature, form, size, shape, quality or condition of a natural product by mechanical, chemical or any other means; with respect to mineral substances, any form of beneficiation, concentrating, smelting, refining or semi-fabricating, or any combination thereof
>
> *Dictionary of Canadian Law*
>
> "process"….. Process is a mode, method or operation whereby a result is produced; and means **to prepare for market or to convert into marketable form**
>
> *Black's Law Dictionary, 6th ed.* (emphasis added)

[16] The applicant relies on *Palace Laundry, Inc., D/B/A Linens of the Week v. Chesterfield County*, 666 S.E. 2d 371 (2008), in which the Supreme Court of Virginia considered an appeal which engaged the question of whether a linen rental company that cleaned its own linens was in the business of processing. That court referred to earlier cases in which "it was stated that processing 'requires that the product undergo a treatment rendering the product more marketable or useful'".

[17] The Appeal Board found the dictionary definitions and American tax cases "have minimal persuasive value". I agree they are certainly not determinative but their value ought not to have been so easily discounted. The Appeal Board in its discussion of the "tertiary level" of interpretative aids made some generalizations about those suggested aids which in my opinion assisted in leading it into error.

[18] There are other decisions which ought to have assisted in the present matter. In *Assessor of Area 08 - North Shore/Squamish Valley v. International Paper Industries Ltd.* (1995), 7 B.C.L.R. (3d) 138 (C.A.), the Appeal Board addressed the question of Class 5 classifications. The Court of Appeal observed that the Appeal Board found "that the 'bulking' of the collected waste was merely a packaging operation with no benefit to the Appellant and no view to producing a commercial or useful product". Therefore the Appeal Board classified the property as Class 6. The Appeal Board's decision in *International Paper* was upheld by the Court of Appeal. The Appeal Board in applying *International Paper* to the facts of the appeal before it on the present matter concluded that the marketability of the recyclables at issue in that case played no role in the decision. In my view that is a misreading of *International Paper*.

[19] In *International Paper* Carrothers J.A., with whom Southin and Cumming JJ.A. agreed, found the material in issue on the relevant property was not "processed" and therefore fell within Class 6. In doing

so Carrothers J.A. distinguished the facts in *Wastech Services Ltd. v. Assessor of Area 12 - Coquitlam*, (7 June 1991) (PAABBC) in which wood was processed into a commercial product, namely hog fuel. In *Wastech* the Appeal Board did not agree that "the essential nature of the thing processed need necessarily be altered. It is sufficient that something be done to the thing being processed that renders it either fit for use in that form or ready for a further step in the process". I understand this to mean that a marketable end-product is necessary for a substance to undergo processing as contemplated by Class 5.

[20] The Appeal Board is not bound by its own decisions. Nevertheless, to achieve some level of consistency to enable businesses to predict their obligation to pay taxes based on determinations made pursuant to the *Assessment Act* and its Regulation, it is important the Appeal Board have a reasonable regard for its own decisions. I conclude the Appeal Board did not follow that path in the matter before me.

[21] The facts in the matter before me do not lead me to conclude that the activity carried out on the main parcel of the relevant property constituted processing. This is so because there is no basis to conclude that a marketable product was created by this activity. It is that marketability which in my opinion would have allowed a classification under Class 5.

[22] The applicant invites me to consider another basis to find the Appeal Board committed on error but in my opinion the above reasons are sufficient to decide this stated case and I should go no further in commenting on the decision of the Appeal Board.

[23] The case as stated asks this Court to find the Appeal Board erred in applying an "erroneous hierarchy" of the interpretative aids to section 5 of the Regulation. I have already commented on the error which I believe was occasioned by the Appeal Boards reliance on the "interpretative aids" that it described, instead of on the cases I have referred to. I will add that I do not find the analysis undertaken by the Appeal Board under the heading "Comments About Statutory Interpretation" to be helpful. The law on the interpretation of statutes has been articulated in a number of cases of high authority, and discussed by learned authors whose writings have often been the subject of comment by the courts. For the Appeal Board to attempt to create a hierarchy of interpretative aids risks creating confusion not clarity. In my view the Appeal Board's main error was in failing to apply the authorities which give more direct assistance on the meaning of the classes within the Regulation and instead considered the appeal as if it was one of first impression.

[24] The following are my responses to the questions posed in the notice of stated case:

1. Yes.

2. I decline to answer this question as it is unnecessary once question 1 is answered in the affirmative.

3. Yes.

4. I decline to provide any further answer to this question beyond my observations earlier in these reasons.