1949
*Oct. 21
1950
*Jan. 30

THE KING ..... APPELLANT;

AND

CHARLES J. JONES, *EX PARTE* NEW BRUNSWICK, RAILWAY COMPANY, *IN RE* THE ASSSESSORS OF THE PARISH OF KENT IN THE COUNTY OF CARLETON } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK APPEAL DIVISION

Assessment and Taxation—Principle to be applied in assessment of timber lands at their "real and true value"—The Rates and Taxes Act, R.S.N.B. 1927, c. 190, ss. 5 (am. 1945, c. 36, s. 2), 78, 124, 125, 126.

The Rates and Taxes Act, R.S.N.B., 1927, c. 190, s. 5, (am. 1945, c. 36, s. 2), provides that "Real and personal property shall be rated at its real and true value". The respondents' assessors in assessing timber lands in the Parish, estimated the average price to be $5 an acre and assessed all such lands, including those of the appellants, accordingly. The appellants appealed to the County Court Judge under s. 78 of the Act alleging that its lands had been overrated absolutely or as compared with other properties in the Parish. He dismissed the appeal. An appeal was then made by way of *certiorari* to the Supreme Court of New Brunswick, Appeal Division, on the grounds that the assessors in making the assessment proceeded upon a wrong principle. That appeal was also dismissed.

Held: The question before this Court is whether on the entire proceedings the assessment appears to have been made on a wrong principle. The Judge in appeal considered the assessment *de novo* in all its aspects. He properly construed the Statute to provide for valuation on a market basis, as between a willing seller and a willing purchaser, each exercising a reasonable judgment, having regard to all elements and potentialities of value as well as of all risks, and reducing them all to present worth: *Montreal Island Power Co.* v. *The Town of Laval des Rapides* [1935] S.C.R. 304. The conclusion to which he came, therefore, is amply supported by evidence adduced before him.

APPEAL from the decision of the Appeal Division of the Supreme Court of New Brunswick (1), dismissing, Harrison J. dissenting, an application by way of *certiorari* from the decision of His Honour C.J. Jones, Judge of the Carleton County Court.

J. J. F. Winslow, K.C., and *C. F. Inches, K.C.,* for the appellant.

A. B. Gilbert, K.C., and *G. W. Montgomery,* for the respondents.

* PRESENT:—Rinfret C.J., Kerwin, Taschereau, Rand and Locke JJ.

(1) (1949) 23 M.P.R. 426; [1949] 4 D.L.R. 259.

The judgment of the Court was delivered by:—

RAND J.:—These proceedings originated in an order of *certiorari* bringing an assessment of lands by the respondents before the Supreme Court of New Brunswick. Under section 78 of the *Rate and Taxes Act* the appellant had appealed against the assessment to the Judge of the County Court who affirmed the assessment. The petition on that appeal alleged that the lands had been "over-valued absolutely and as compared with the valuation of other property real and personal" in the parish. Section 78 gives a right of appeal to a non-resident if he "considers himself over-rated or otherwise unjustly assessed". On the hearing, questions of the proper principle for determining value, the impropriety of the adoption of a flat rate for timber lands, and the valuation of large tracts of such lands as compared with farm lands and personal property, were raised and evidence presented in relation to them.

Under section 126 of the Act, the Supreme Court may remit the roll to the assessors if they have proceeded upon a wrong principle in whole or part and a proper assessment could have been made by them; and the question considered was whether such an error had been made. On the return of the order *nisi*, it was held, Harrison, J. dissenting, that no such error appeared and the rule was discharged.

The right to *certiorari* is either assumed to exist by or is a necessary implication from sections 124, 125 and 126 of the statute; by the order, the entire record, including the proceedings before the Judge in appeal has been brought up; and although section 126 speaks of "the assessors" proceeding upon a wrong principle, the statute, allowing an appeal, and *certiorari* being taken to lie following an appeal, *The King, ex parte Bank of Nova Scotia* v. *Assessors of Rates and Taxes of Woodstock, N.B.* (1), the question before us, as both counsel assumed, is whether on the entire proceedings, the assessment appears to have been made on a wrong principle.

On that footing, two objections were taken; the first was that the "real and true value" of the lands which section 5, as amended by chap. 36, 1945, provides as the

(1) [1924] S.C.R. 457.

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measures or basis of valuation, should have been found by reference to the capitalization of the net annual productive return ascertained by the use of estimated factors of sale price and a fair rate of interest return; and the second, that for timber lands or as they are called "wild lands", an average rate of $5 an acre had been used by the assessors for all such lands in the parish and that no individual valuation of the substantial holdings of the appellant had been made.

The former was the main contention made before us by Mr. Winslow. His proposition was this: the true value of lands of this character depends upon what they will yield in salable products; what is, then, to be ascertained is the quantity of annual growth of the trees, its commercial value, the expenses of management and an estimate of all risks. From this the capitalized value is calculated as of a permanent investment.

In support of that formula, evidence was led of the annual increment of growth by data contained in government reports covering woodlands throughout the Dominion, and the average of 30′ superficial board measure an acre was taken as the first factor. The expenses as shown by the operations of the appellant were reduced to the same basis. The price was put at $2.50 a thousand feet, and the interest rate was at large. In strict mathematics, if all of the factors, including risks, periodic fluctuations and convertible or competing forms of investment for the realizable capital, were fully and accurately weighed and given effect, the resulting capital would approximate the market value.

But the language of the statute cannot be taken to intend such a process. These considerations are indeed relevant to real value but, as all the judges below have held, the task placed upon the assessors, as men of ordinary understanding and knowledge, is of a much simpler and practical, though possibly much rougher, nature. They are to regard these elusive variables and uncertainties not directly but what they sum up to in the minds of people who actually or theoretically buy and sell woodlands. Those elements, consciously or unconsciously, operate on the business mind and determine the business judgment; but to employ them as factors in the manner submitted,

and on the evidence presented, would substitute an imperfect and artificial estimate for that arising from the experience of the market place. Particularly would that be objectionable when it is remembered that relative valuation is here more important in fact than the so-called absolute.

The figure of $5 an acre was the average price estimated by the assessors from their local knowledge of sales of small holdings, such as 100-acre lots. It was said that these sales ran from $3 to $8 an acre, and that $5 was, therefore, a fair valuation. In this the assessors were undoubtedly wrong. Each taxpayer is entitled to have the value of his property separately ascertained. The difference in the prices used might possibly have arisen from differences in time and market conditions rather than in real marketable worth, in which case the propriety of the amount would depend upon equivalence in value, in the absence of which throughout the parish an average figure could not be used. But such a figure is obviously to be distinguished from an average valuation of a large tract of land belonging to one taxpayer and exhibiting wide variations in the value of its several parts.

But the Judge in appeal considered the assessment *de novo* in all its aspects. Rejecting the principle in the inadequate form urged by the company, he properly construed the Statute to provide for valuation on a market basis, as between a willing seller and a willing purchaser, each exercising a reasonable judgment, having regard to all elements and potentialities of value as well as of all risks, and reducing them all to a present worth: *Montreal Island Power Co.* v. *The Town of Laval des Rapides* (1). I say reasonable judgment because an element of time is involved in the words "real and true"; they are, I think, to be contrasted with what the ordinary opinion would consider fictitious, as a nominal value out of relation to reality, to which it would soon and inevitably return.

The appeal was against the value "absolutely" and this the Judge set himself to ascertain. That in doing so, he is to be taken as having disregarded the evidence of a number of sales of large tracts of the same general character as those in question and confined himself to the evidence of stumpage rates, is an inference which is not

(1) [1935] S.C.R. 304.

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justified. He found that $5 was not in excess of the fair value of the land. The purchases made in 1942 and 1943 show one at $3.15 an acre for a tract of 627,800 acres, one at $3.25 for 20,250 acres, two at $3.50 for 85,600 and 40,000 acres respectively and one at $4 for 176,000 acres. He was satisfied that the companies could have disposed of the stumpage for $12.15 an acre, leaving a residue of lands and fire wood. It was conceded that in 1946 there had been a firm increase in the value of the lands and a sale of 68,715 acres, as stated in the prospectus of the St. John Sulphite Company Limited which is to be treated in the same position as the appellant, "for the price of $515,500 payable by the issue of 51,550 preferred shares at $10 each" represents a rate for each acre of $7.50. The area of the lands of the appellant which are in question is 84,574 acres. The conclusion to which he came, therefore, is amply supported by evidence adduced before him.

The appellant had in 1946 and evidently in 1947 been engaged in a detailed survey of the timber on its lands, extending beyond the parish and county in question. On being asked for a report of it, counsel charily stated that the survey had not been completed, but he did not say that it had not already produced matter material to the assessment.

On the second branch of the claim, the Judge in appeal found that the assessors had improperly fixed arbitrary values for automobiles, trucks and tractors, but on the evidence before him he held that relatively to the real and true values of the property whose assessment was challenged, discrimination against the appellant had not been established. As that was a question of fact in which no principle of law was involved, it is not open on these proceedings.

I would, therefore, dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *J. J. F. Winslow.*

Solicitor for the respondent: *G. W. Montgomery.*