CITATION: Craft Kingsmen Rail Corp v. Municipal Property Assessment Corporation,
2022 ONSC 2222
COURT FILE NO.: CV-21-656859
DATE: 20220411

ONTARIO SUPERIOR COURT OF JUSTICE

RE: CRAFT KINGSMEN RAIL CORP, Applicant

-and-

MUNICIPAL PROPERTY ASSESSMENT CORPORATION and THE CITY OF TORONTO, Respondents

BEFORE: FL Myers J

COUNSEL: *Stephen Longo and Alexander Pletsch*, for the Applicant

Melissa VanBerkum, for Municipal Property Assessment Corporation

Christopher J. Henderson, for The City of Toronto

HEARD: April 8, 2022

ENDORSEMENT

The Issue and Outcome

[1] Is an "air parcel" assessable "land" under s. 1 (1) of the *Assessment Act*, R.S.O. 1990, c. A.31?

[2] While the answer is not free from doubt, in my view, the answer is "no".

[3] Accordingly, an order is to go as requested in paras. 81 (a) to (c) of the applicant's factum dated December 23, 2021. This order is stayed for thirty days. The refund ordered is to be made to whomever is entitled to receive it under the statute at the later of: (a) the day that this stay terminates; or (b) the day that any stay pending appeal terminates.

Background

[4] Property ownership includes defined bundles of rights. When one buys land, we also obtain the exclusive right to use a column of space above the land and to exclude others from that column of space. We could not walk on our land if we did not have the right to use the first few feet of space that abuts the ground. Generally we exercise our exclusive rights to use the space above our property by building structures in it or fences around it.

[5] We also have the right to exclude neighbours from building their buildings to extend out over the lot line into our air space. But we do not have the right to exclude airplanes from flying over our houses. Whether we can control drones from flying above our land closer to the ground is an open issue.

[6] So there are limits on our rights to control the space above our land. The common law recognizes some air rights associated with the ownership of land. But is the air, land?

[7] In *Exchange Tower Limited v. Municipal Property Assessment Corporation*, 2011 ONSC 4073 (CanLII), Lederer J. agreed that air rights are not “land” within the meaning of the *Assessment Act*. But he left open the question of whether an “air parcel” defined in a “strata plan” may be land for the purposes of the statutory scheme.

[8] A “strata plan” is a relatively recently creation in s. 16 of O. Reg. 43/96 under the *Registry Act*. A strata plan is a mechanism to define and illustrate the boundaries of horizontal or vertical sections of a subdivision unit for title registration purposes.

[9] Using the rules and standards set out in the regulation defining strata plans, spaces above the ground can be legally described in specified horizontal and vertical blocks referred to as “air parcels”. Conveyances of “air parcels” are then registrable under the *Registry Act* and the *Land Titles Act*.

[10] While we actually own every stick and speck of dirt on our land, it should be understood that we do not actually own the air above our land. The air moves through the space above our houses freely as nature dictates. Ownership of an air parcel simply puts boundaries around a piece of the space above the land to define a place over which a person holds exclusive use rights.

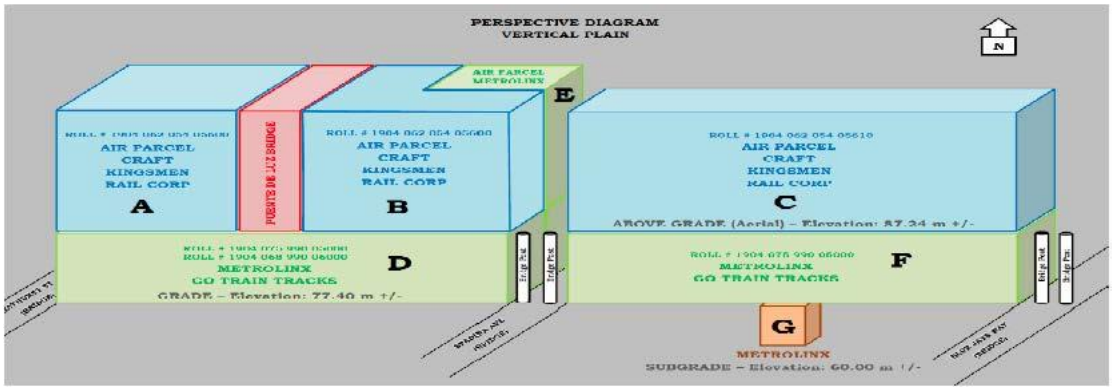
[11] Air parcels are a regulatory creation. But they do not change the nature of our property interest in the space over our respective houses. They just define the space with more precision and thereby make it more easily traded.

The Facts

[12] In this case, the applicant has purchased blocks of space described in air parcels that lie above railway lands near the lake shore in Toronto. It has sought zoning approval to build structures on a physical deck that will be built 27 feet above the ground. The deck will cover the railroad tracks below and serve as the base for the future structures to be developed by the applicant or its successors in the space above the deck.

[13] The proposed deck will have to be anchored to the ground below of course. When it bought the air parcels, the applicant also bought easements to ensure that it has the ability to enter upon the land below so it can build and affix its deck to the land below.

[14] The applicant has purchased the air parcels described as “A”. “B” and “C” in the picture below. Until a deck is built between the air parcels and the land below, the air parcels are just legally defined limits of air rights. They cannot be accessed or used for any meaningful purpose.



The Issue

[15] In *Exchange Tower*, Lederer J. considered whether blocks of air rights defined in zoning by-laws may qualify as “land” under the *Assessment Act*. He wrote:

> [22] The applicants take the position that the extent and dimensions of the "air rights" can be determined by reference to the provisions of the zoning by-law which provides the rights. The by-law outlines the dimensions of the real property that the "air rights" represent. Counsel for MPAC pointed out that these dimensions are not demonstrative of a fixed boundary within which the owner is free to do as it wishes. The zoning by-law creates an envelope within which, and provides limitations (i.e. density provisions) by which, the

> extent of any proposed development is controlled. The shape and massing of any development can, and inevitably does, vary within the envelope. In other words, the extent of the "air rights" is not measured solely by the dimensions of the development envelope. On this understanding, "air rights" cannot be definitively measured.

[16] Much time was spent before me by counsel arguing about the nuances of “air rights” as compared to “air parcels”. It is apparent that to specialists in the field, this is an issue that has interested or perhaps plagued them for some time. I fear however, that the focus has become too narrow for the task at hand.

[17] In para 22 of *Exchange Tower* quoted above, counsel for MPAC argued that the definition of a three dimensional space zoned for a particular use does not actually show where the owner will use the space. You need to wait and see what the owner builds to define its exclusive space. The contrast with an air parcel however, is that the owner actually owns the whole defined parcel. That makes all the difference to the respondents.

[18] The respondents submit that air parcels are land because they are defined, conveyed, and registered like land. But, what they miss, it seems to me, is that this is only so because of a regulation under the *Registry Act* provides a mechanism to describe the space with legal specificity. The regulation does not change or alter the air or the nature of the rights of use or exclusion of others from the space. It just defines the boundaries of the space with reference to the land below. Just like zoning descriptions, the air parcel creates an envelope. And just as Lederer J found with reference to a zoning definition, so too in an air parcel, “[t]he shape and massing of any development can, and inevitably does, vary within the envelope.”

[19] In my respectful view, counsel have become enmeshed in the trees of modern conveyancing techniques and lost the overview of the forest as a result.

[20] The issue in this case is not whether air rights can be defined and transferred under the *Registry Act* or the *Land Titles Act*, or the *Planning Act*. The issue is whether those air rights as defined and transferred in air parcels are assessed as “land” under the *Assessment Act*.

The Statute

[21] Land is defined in s. 1 (1) of the *Assessment Act* as follows:

> 1 (1) In this Act, "land", "real property" and "real estate" include,
>
> (a) land covered with water,
>
> (b) all trees and underwood growing upon land,
>
> (c) all mines, minerals, gas, oil, salt quarries and fossils in and under land,
>
> (d) all buildings, or any part of any building, and all structures, machinery and fixtures erected or placed upon, in, over, under or affixed to land,
>
> (e) all structures and fixtures erected or placed upon, in, over, under or affixed to a highway, lane or other public communication or water, but not the rolling stock of a transportation system;

[22] The modern rule of statutory interpretation in the tax context requires that the words of statute be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the act, the object of the act, and the intention of the Legislature. See *Quebec v. Notre-Dame*, [1994] 3 SCR 3; *Stubart Investments Ltd. v. The Queen,* 1984 CanLII 20 (SCC), [1984] 1 S.C.R. 536, 578 as cited in *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20 at para. 21. Strict or liberal construction will depend on the purpose of the statutory provision under consideration in light of its context. There is no presumption in favour of taxpayer or the tax department except as may be determined from interpretation of the legislative provision being reviewed. As usual, substance is considered rather than formalities.

[23] In *Carsons' Camp Limited v. Municipal Property Assessment Corporation*, 2008 ONCA 17 (CanLII), the Court of Appeal described the object of the *Assessment Act* as follows:

> The definition of "current value" in s. 1 must be read harmoniously in the context of the whole of the Act, **the object of which is to assess all property in Ontario coming within the expanded definition of "land", "real property" and "real estate".** Similarly, the term "fee simple" cannot be isolated from the rest of the definition of "current

> value". That definition clearly states that it is to be applied "in relation to land". From this contextual perspective, it is apparent that the expression "fee simple" was not intended to limit assessment to the "fee simple" interest of the freehold owner at common law or as that interest would appear in the registry or land titles offices. Rather, the words "fee simple" must be interpreted "in relation to" the statutorily broadened definition of "land". [Emphasis added.]

[24] The object of the *Assessment Act* then is to tax land as defined by the Legislature. It is the definition of land that drives the other definitions in the statutory scheme rather than the common law or conveyancing practice in registry and land titles offices.

[25] The applicant submits that if “land” is to include air above the ground or contents of the earth below the ground, then none of definitions in subsections 1 (b) though (e) would have been necessary. They would have all been included in the definition already.

[26] The respondents submit, that the definition is inclusive and not exclusive. By using the word “includes”, the respondents submit, the Legislature may be listing things that are already part of the definition but that it wants to illustrate for clarity. Ms. *VanBerkum* submits that “land”, as defined for this statute, should be understood to take the definition of land at common law with subsections (a) through (e) just added for greater certainty.

[27] The difficulty that I have with that submission is that it goes too far. I accept that the definition of land is inclusive. I accept that it is broader than just the ground. The Supreme Court of Canada has already said so in *Northern Broadcasting Co. v. District of Mountjoy,* 1950 CanLII 9 (SCC).

[28] But there are two problems with saying that the definition of land for this statute starts with the common law definition of land. First, the applicant submits that the Court of Appeal has already found that the definition of land in the statute is not the same as the common law definition. In *Carsons' Camp* the Court of Appeal held:

> If the legislature had intended to do so, it would have changed the definition of land in the Act to make it coincide with the common law definition of land.

[29] While this says that the statutory meaning is not the same as the common law, the Court of Appeal was speaking about adding to the common law

definition. It did not necessarily exclude from the statute items that are already defined as land at common law.

[30] But the second issue is that counsel for the respondents cannot point to any precedent case at common law that recognizes “air parcels” as land or a species of real property or real estate. Some rights to exclude others from the column of space above the ground are a recognized attribute of ownership of the land below the air. But the common law of property stretches back over 500 years. It has never heard of “air parcels” or slices of space described in accordance with a regulation promulgated under Ontario’s *Registry Act* in 1996.

[31] The respondents submit that air parcels are land because they are conveyed like land. They are described in deeds like land. The deeds can be registered like land. Land Transfer Tax is paid on the transfer like land. They look like a duck, quack like a duck, and therefore are a duck.

[32] It is also not lost on the taxation authorities that the applicant paid over $50 million for its air parcels based on their future development value. There is no doubt that these air parcels were only created and conveyed because they have value as sites of future development. On that basis, the respondents submit the air parcels reflect some of the value previously associated with the ownership of the ground below. The owner of the ground has monetized some of the value associated solely with the air rights. Had the owner not been a railway subject to a different assessment process under the *Assessment Act,* that value would have been assessed previously as part of the assessment of the land. The respondents say that the value should not be allowed to leak out of the assessment system.

[33] The City submits that if the court allows owners to hive off from their assessable land the value of their air rights as air parcels, the court will create a huge loophole in the statutory scheme. Everyone will create devices to draw and sell their air parcels to prevent their assessable land from carrying the full value of the entire bundle of ownership rights.

[34] In my view, theses submissions are working backwards. The issue is neither how other statutes treat air parcels nor whether air parcels are valuable as potentially developable land. The issue is whether they are intended to fall within the expanded definition of land in the *Assessment Act*. As the Court of Appeal found, the object of the statutes is to assess all land as defined.

[35] In *Northern Broadcasting* the issue before the Supreme Court of Canada was whether certain large trailers were to be assessed as land under the

Assessment Act. They were big, heavy chattels put on the land with some intended permanence. But they were not fixtures at common law. The majority held that the statutory definition of "land" is broader than just the common law idea of land and fixtures:

> In the context of the Statute, I think the Legislature must be taken to have had in mind the including of things which, although not acquiring the character of fixtures at common law, nevertheless acquire "locality" which things which are intended to be moved about, do not.
>
> It is noteworthy that the Statute does not say "all buildings" *simpliciter*, any more than it says "all machinery." If only buildings which become part of the land at common law are to be considered as falling within the statutory definition, there are many cases of buildings which might well be outside the Statute. All buildings are not necessarily fixtures at law, *vide: Blanchard v. Bishop; Phillips v. The Grand River Mutual Fire Insur. Co.*, *per* Armour J. as he then was, at 353; *Bing Kee v. Yick Chong*. It has also been held that even the word "fixtures" does not necessarily connote things affixed to the freehold (see *per* Parke B. in *Sheen v. Richi*e. **I do not think the intention of the legislature was to merely make assessable buildings which at law become part of the land, and I therefore think that the change in the wording of the Statute should be given its *prima facie* effect.**
>
> It is to be remembered that when the Statute of 1904 was passed, the assessment of personal property was abolished. Prior to the change it was unimportant for assessment purposes whether a given thing had become real or continued to be personal property, as both were assessable. In my opinion, the change in the definition of "land" made by the new legislation indicates an intention which the language used connotes on its face, namely, that the Legislature did not intend to abolish but to continue the assessment of chattels which, **although not fixtures at law, nevertheless were not things intended in use to be moved from place to place.** [Emphasis added.]

[36] The court looked at the words of the definition of land, in the context of the abolition of the taxation of chattels, and found a legislative intention to assess and tax all items on the land that were sufficiently affixed or permanent as to not be intended to be moved from place to place.

[37] In *Exchange Tower*, Lederer J. reasoned,

> [23] These "air rights" should be contrasted to what has become known as a "strata plan" (O. Reg. 43/96 sections 14, 15 and 16). The parties agreed that, in the Canadian context, this is a relatively recent creation. It reflects the increase in vertical development in which title can be and is provided to floors or apartments in high rise buildings. A strata plan, once registered, provides for the ownership and transfer of the space **within the building as described within the plan**. With a strata plan in place, **it may be that buildings in the air, above the ground, are "land" and "real property" for the purposes of the Act**, but that is not the circumstance here.

[38] The applicant agrees that once it affixes its deck to the land below, its “buildings in the air” will meet the definition of land set out in the statute. They will be structures above the ground that will have a permanent affixation to the ground. But, right now, the air parcels are just empty envelopes of space with development potential.

[39] I understand that the applicant also owns easements that will allow it to affix its proposed deck and new buildings to the ground below. For the present however, they are just unexercised rights. There is nothing in the air parcels affixed to the ground below. It is only when the deck is built and affixed, that land will be created. Until then, although described and alienable, the air parcels remain simply unoccupied space above the railway lands. To borrow Justice Lederer’s wording, they do not exist independent of the piece of ground beneath them. See *Exchange Towers* at paras. 28 and 30.

[40] I also understand that there is another view. If the definition of “land” is expansive and is intended to catch all rights associated with land ownership, or anything analogous to land ownership that may have developable value one day, then one can sensibly argue to include as “land” everything and anything that could meet that goal and add to the assessable tax base of the province. But I am pushed back to the words used in the statute however, both because that is my task generally, and because the Court of Appeal expressly identified the object of the statute to be driven off the broadened definition of land in s. 1 of the statute.

[41] Everything about the definitions in s. 1, as broadened by the SCC, speaks to the relationship of something else with the ground. The broadened part of the definition is the inclusion of chattels that are on the land with some permanence but are not fixtures. Nothing in the common law nor the section speaks to air rights whether defined in a strata plan or not. It is only once a

deck becomes fixed to the ground that new “land” will be created in the air and a building can be built “upon, in, over, under or affixed to land”.

[42] If the Legislature wishes to tax air parcels then the statute can be amended. The Legislature does not have to squeeze this new specie of development potential into a 1904 definition of “land”. It can just define and assess “air parcels” if it chooses.

[43] In my view what is really happening is that conveyancing practice has evolved beyond our historic conceptions of land. There are policy decisions to be made as to whether or how the newly available air parcels should be assessed. It is artificial to try to find a specific attribute that converts amorphous air rights into land. Is it is the registration of an air parcel on title, a sale of an air parcel by deed, the construction of a building within the space defined by a strata plan, or a combination of more than one of the foregoing? Would the creation of an air parcel in a neighbourhood zoned for residential development have any real value absent any redevelopment potential? Is there really a floodgates risk?

[44] Lederer J. agreed with the Assessment Review Board's determination that an air parcel has no value without rights-of-way and easements to the ground. I cannot know what types of easements or rights-of-way are sufficient to transform air rights into land. Is an air parcel without any easements or rights-of-way land? If not, what are the attributes of easements or rights-of-way required to change air parcels from defined spaces to land? How many must there be and what must the substance of the rights be to make the space defined in a strata plan land?

[45] In my view, air parcels are useful commercial development conveyancing tools. The issues surrounding if and how they are to be taxed are questions for tax policy advisors to study and recommend to the Legislature. If the Legislature wishes to assess air parcels, with or without other rights, it can choose the attributes that are sufficient or appropriate to make air parcels assessable as future developable rights. But until there is a physical connection to the ground underneath air parcels, I do not see how I can find them to fall within the current definition of "land" in s. 1 (1) of the *Assessment Act* as described in the case law.

Costs

[46] The parties have agreed that upon this outcome, costs should be payable to the applicant by each respondent in the amount of $5,000 for an aggregate payment of $10,000 all-in. So ordered.

FL Myers J

Date: April 11, 2022