LEGAL CHALLENGES OF VALUING PROPERTY IN FALLING (OR OTHERWISE TURBULENT) MARKET - BRITISH COLUMBIA PERSPECTIVE

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CROSS CANADA LEGAL PANEL

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1. Introduction

Thank you for inviting me to speak as part of this Panel.

The task of this Panel is to examine some of the "tools" available to the Board to sort out complex valuation questions complicated even further by the turbulence in our markets over the past 18 months.

As a Panel we have identified 5 areas of particular concern:

- Use of Hindsight Evidence – when and how can appraisers and the Board resort to post valuation date evidence?
- Supplementary assessments in the context of a changing market – when are supplementary assessments available?
- Multi-year cycles and changing markets – how do multi-year assessment cycles play into valuation in a turbulent market?
- Equity – what roll does equity play in fast-changing markets?
- Economic obsolescence – what roll does economic obsolescence play in fast-changing markets?

The following discussion touches on each of these issues from the B.C. perspective.

1. Use of Hindsight Evidence in B.C.

There are two lines of authority on use of hindsight in B.C. Cases decided in the property assessment context unequivocally say that hindsight sales (both of the subject, and of comparables) are relevant and ought to be considered by the Board. Cases decided outside of the property assessment context say that hindsight evidence generally (with the exception of evidence relating to underlying physical property characteristics) is irrelevant and inadmissible. It is difficult to reconcile

these lines of authority. As set out below, the Board has recently embraced the former, indicating that it is prepared to consider sales evidence occurring up to several years after the valuation date.

(a) Assessment Cases on Use of Post-Valuation Date Evidence

In *Assessment Commissioner v. James R. Houston* (Stated Case 126, April 25, 1979, B.C.S.C.), the B.C. Supreme Court held that in determining "actual value", evidence of a transaction involving the subject property which had occurred nine months after completion of the assessment roll was properly admissible before the Board. The Court said this:

> "It would appear that a preliminary point requires determination: that is whether, quite apart from the matter of methodology followed, the Board was in error in admitting and considering, in connection with value, evidence as to a transaction which took place three-quarters of a year after the assessment roll for the year had been completed…. I am of the view that the Board did not err in so doing. What is to be determined is "actual value". There is no question that an actual sale on the open market is an important indication of such value. The Board had evidence that there was no significant change in the market between December 31, 1977, when the roll was closed, and October 3, 1978 when the sale was made. The sale was of all the lots actually concerned, not of a "comparable" lot or lots. In these circumstances I hold that such evidence was properly admitted as a matter for consideration."

In *Gyratron Developments v. Assessor of Area 9 – Vancouver* (Stated Case 221, unreported, June 26, 1986, B.C.S.C.), the Court expanded this doctrine to include not only sales of the subject property, but sales of comparable properties:

> "There is no rule of law that assessors cannot use sales on either side of the valuation date. That question, of whether the sale is determinative of actual value, is evidence to be weighed. There is thus no error in the Board looking at such a sale.
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> The case of … Houston … is not to be interpreted as laying down a restriction that evidence of a sale after the valuation date can only be used if there is evidence of no significant change in the market. In the subject case the Assessor's appraiser testified that he had adjusted the late sale to account for market decline since the valuation date. There was no error in the Board allowing such evidence."

In *Assessment Commissioner of B.C. v. Westar Timber* (Stated Case 271, B.C.S.C.), the Board accepted as evidence the sale of Westar's pulp mill some two years after the valuation date, despite finding that the sale was under duress and there had been some change in the market between the valuation date and sale date. The Board relied on the $60 million sale to reduce the $292 million assessment to $150 million. BC Assessment appealed, arguing that there is a basic valuation principle in all but expropriation cases that hindsight evidence is inadmissible in reaching valuation conclusions at an

earlier point in time. Westar responded that the rule against hindsight is limited to events which occur after the valuation date which would affect value had they been known on the valuation date (eg. discovery of a new ore vein, or premature death of an annuitant, etc.).

In upholding the Board's use of the post-valuation date sale, the Court said:

> "The appellant has been unable to point to a reported decision in an assessment case in which evidence of a subsequent sale has been rejected on the sole ground that it occurred after the fact.
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> It has been suggested that technically it is impossible to estimate "market value" according to the assumptions contained in the standard definition of the term:
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> "The highest price which a property will bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller, each acting prudently, knowledgeably and assuming the price is not affected by undue stimulus."
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> The suggestions of impossibility are based on several reasons which include the fact that parties to a transaction are generally under some degree of compulsion to sell or buy, otherwise they would not be acting at all. Seldom are we blessed with the perfect comparable.
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> In Assessment Commissioner of B.C. v. Houston [1975] 5 W.W.R. 639 (B.C.S.C.) at p.644, a question arose as to whether the Board was in error in admitting and considering evidence of a transaction which took place 9 months after the valuation date for assessment purposes. The court concluded that there was "…no question that an actual sale on the open market is an important indication of such value" where there was evidence of no significant market change during the interval. That reasoning was followed by my brother Legg in Gyratron Developments v. Assessor of Area 9 – Vancouver (unreported, June 26, 1986, B.C.S.C. No. A861453 Vancouver Registry – See BCAA Manual of Stated Cases, Vol I, Case 41) where it was held that there is no rule of law that assessors cannot use sales on either side of the valuation date. "The question of whether the sale is determinative of actual value is evidence to be weighed. Assessment Commissioner v. Houston.. is not to be interpreted as laying down a restriction that evidence of a sale after the valuation date can only be used if there is evidence of no significant change in the market."
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> I accept the submission of Westar, as did the Board, that evidence of a subsequent sale of the very property to be valued was relevant and thus admissible. Once admissible, the question for the Board (but not for this Court) was the weight to be given to that evidence. The Board was conscious of both the retrospective and duress aspects. It had considerable evidence of the state of the market for pulp at both times and of the economic pressures on Westar. While the subsequent sale was not determinative of market value on the valuation date the Board concluded that the $60 million sale in 1986 established that the $292 million assessment in 1984 was too high. It then turned to the income method of valuation to calculate the July 1, 1984 value.

> I find no error in the admission into evidence by the Board of the evidence of the subsequent sale. Having admitted such evidence, the Board was bound to consider it and to place upon it such weight as it saw fit."

On the strength of these authorities, the Board is entitled to admit and consider evidence of sales of the subject property and of comparables occurring up to several years after the valuation date. The Board must, of course, consider the extent of, and reasons for, change in the market between the valuation date and sales date, and determine what adjustments must be made (if any can be made) to use post-valuation date comparables as indicators of value.

(b) Non-Assessment Cases on Use of Post-Valuation Date Evidence

The B.C. Supreme Court summarized the general prohibition against use of hindsight evidence in valuation cases in *Amos Investments Ltd. v. Minou Enterprises Ltd.*, 2008 B.C.S.C. 332. The issue in *Amos Investments* was the proper valuation of shares in a corporate shareholder dispute. In setting aside an arbitral award valuing these shares, the Court set out the law as follows:

> "[40] The valuation to be conducted by Mr. Patrickson was to be his assessment of the shares. "At their fair market value, … As at September 30, 2005." Normally, the evidence considered in establishing fair market value on a particular date is the evidence available prior to that date, because, of course, in some cases subsequent events, when known, could markedly change or even extinguish the value earlier arrived at. Evidence of events subsequent to a valuation date is frequently referred to as "hindsight" evidence.
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> [41] The issue of the use of hindsight evidence was considered by McEachern CJSC, as he then was, in the case of Cyprus Anvil Mining Corporation v. Dickson 1982 CanLII 741 (BC S.C.), (1983), 40 B.C.L.R. 180. That was a proceeding to fix the value of dissenting shareholders under the Canada Business Corporations Act. McEachern CJSC held at pp. 201 - 202:
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> > A difficult question often arises in these cases about the admissibility and usefulness of subsequently obtained information.
> >
> > This problem arises here because of the redrilling program in 1979-80 - after the valuation date - and the subsequent Development Report including Case 4B-V. The law in this connection is compendiously stated by Greenberg J. in Re Domglas Inc.; Domglas Inc., v. Jarislowsky (1980), 13 B.L.R. 135, [1980] Que. S.C. 925 (Que. S.C.), particularly at pages 175-9 under the heading "Hindsight." That judgment has recently been affirmed on appeal, 138 D.L.R. (3d) 521 (Que. C.A.).

Greenberg J. starts with the general proposition that hindsight appraisals are unacceptable, but to this, the authority he cites adds the important qualifications [p. 176, quoting G. Ovens "The Valuation of Private Business and Professional Practice, Can. Institute of Chartered Accountants, December 1959]:

> "...excepting where it [hindsight] applies to evidence in existence or which can be reasonably assumed to have been true as of the required valuation date."

I pause to mention that this so-called rule does not apply to valuation reports prepared after the valuation date except to the extent that they rely wholly or partly upon subsequently obtained information. That is the problem in this case and I shall return to it shortly.

Greenberg J. goes on to mention other authorities which make it clear that subsequently acquired information is admissible for limited purposes such as measuring the accuracy of projections, or testing assumptions which are used by valuators in the preparation of opinion evidence: see Tabco Timber Ltd. v. R., 1970 CanLII 147 (S.C.C.), [1971] S.C.R. 361, 15 D.L.R. (3d) 748; Connors v. R., [1978] C.T.C. 669, 78 D.T.C. 6497; affirmed [1979] C.T.C. 365, 79 D.T.C. 5256 (Fed. C.A.); and Diligenti v. RWMD Operations Kelowna Ltd. 1977 CanLII 393 (BC S.C.), (1977), 4 B.C.L.R. 134 (S.C.).

Many of the authorities which seem to prohibit the use of hindsight in the valuation process are tax cases or cases which deal with the use of evidence about events which occur after the valuation date such as sales of comparable properties the price of which may be affected by market forces not necessarily operating at the valuation date. I have no doubt that such evidence is not properly admissible as evidence of value at an earlier date, but I am not satisfied that the exceptions to hindsight mentioned in the next preceding paragraph are the only bases upon which subsequently acquired information may be used.

I say this because the Court's task is to determine fair value, and value in this case depends in part upon the physical quantity and quality (e.g. tonnage and grade) of ore in the ground. When the method of valuation is not market value but a discounted cash flow analysis, the prohibition against after-acquired information may well apply to components of the valuation such as metals prices, cost of mining and transportation, etc. (except to the extent permitted by conventional exceptions), but it is doubtful wisdom to disregard a better understanding of the physical and unchanging components of the subject of the valuation. Thus the distinction between an altered state of affairs, and an altered (usually better) understanding of a continuing state of affairs convinces me the so-called hindsight rule should not always be followed.

[42] In the case of Nunachiaq Inc. v. Chow reflex, (1993), 8 B.L.R. (2d) 109 Newbury J., as she then was, in addressing the issue of hindsight evidence in a valuation case stated at pp. 120 - 123:

> From the choice of valuation date, it follows that hindsight evidence -- evidence of trends or occurrences taking place after the valuation date -- should not be admitted to bolster or weaken predictions of those occurrences or trends made as at the valuation date. In the much-quoted words of Danckwerts J. in the context of an estate tax case, "It is necessary to assume the prophetic vision of a prospective purchaser at the moment of the death of the deceased, and firmly to reject the wisdom which might be provided by the knowledge of subsequent events." (Holt v. I.R. Commissioners, [1953] 2 All E.R. 1499 (Ch. Div.) at p. 1501.) This view is clearly in accord with that taken in various textbooks on valuation: see Bonbright, Valuation of Property, vol. 1 (1937) at p. 84 and Campbell, The Principles and Practice of Business Evaluation (1975) at p. 19, both quoted in V. Krishna, "Determining the 'Fair Value' of Corporate Shares" (1987) 13 Can. Bus. L.J. at 137-138.
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> However, Canadian courts have made some exceptions to the rule. In Domglas, Greenberg J. noted three decisions in which hindsight evidence had been admitted to "test the validity of the forecasts and assumptions of the experts where those differed, and thus to assist in determining whose forecasts were, and accordingly whose valuation as of [the valuation date] was, the more valid.": per Fulton J. in Diligenti v. RWMD Operations Kelowna Ltd (No. 2) 1977 CanLII 393 (BC S.C.), (1977), 4 B.C.L.R. 134 at 142 (S.C.). In Domglas itself, the Court ruled that in order to measure the reasonableness of projections made as of a date in April 1978, evidence of the actual results of 1978 was both relevant and admissible.
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> In Whitehorse Copper, McEachern C.J.S.C. also referred to an exception to the usual rule:
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> > The most difficult part of this case is to determine what may properly be considered in determining fair value on the valuation date without being overwhelmed by subsequent events. At the trial I could not avoid being aware of the then current rapid and wholly unexpected escalation in metal prices. Similarly, I am aware of the turbulent price variations which have occurred since then. But, disabusing my mind as best I can of these subsequent events, and using some of them only as an aid to test the potential of the copper belt, I have concluded that the best evidence I have of fair value of the Little Chief mine on November 22, 1978 is Ex. 12 which is a complete study of the projected operation of the Little Chief joint venture. [at 168]
>
> In Cyprus Anvil, his Lordship considered the question at greater length and again made an exception in respect of information that

assists the Court "to ascertain the physical quality of an unchanged component" that existed on the valuation date. He stated:

> I have no doubt that [hindsight] evidence is not properly admissible as evidence of value at an earlier date, but I am not satisfied that the exceptions to hindsight mentioned in the next preceding paragraph are the only bases upon which subsequently acquired information may be used.
>
> I say this because the Court's task is to determine fair value, and value in this case depends in part upon the physical quantity and quality (e.g. tonnage and grade) of ore in the ground. When the method of valuation is not market value but a discounted cash flow analysis, the prohibition against after-acquired information may well apply to components of the valuation such as metals prices, cost of mining and transportation, etc. (except to the extent permitted by conventional exceptions), but it is doubtful wisdom to disregard a better understanding of the physical and unchanging components of the subject of the valuation. Thus the distinction between an altered state of affairs, and an altered (usually better) understanding of a continuing state of affairs convinces me the so-called hindsight rule should not always be followed.

Thus, on the issue of tonnage and grade, it is my view that the use of information discovered subsequent to the valuation date, and analyses using that information, would not offend the hindsight rule because these components of fair value have not changed since the valuation date. All that may be changed is one's understanding of those unchanged components, and I reject the suggestion that such information should always be disregarded. [at pp. 201-202 [40 B.C.L.R.]]

This ruling was not argued at the appeal level: see 33 D.L.R. (4th) 641 at 649. (See also *Manning v. Harris Steel*, supra, at p. 74-75.)

In *Smeenk v. Dexleigh*, supra, the dissenters from an amalgamation "squeeze-out" declined to adduce their own expert evidence concerning the value of the company's investment in a subsidiary, but argued that because the subsidiary had, after the amalgamation date, sold a property and received insurance proceeds in respect of the destruction of another property, evidence of the proceeds in each case should be admitted to increase the figure reached by the company's valuator. They relied on land expropriation cases in which evidence of "comparable sales" occurring after the valuation date was considered. The Court, however, gave short shrift to this argument:

> In my opinion these authorities do not support the applicants' methodology. The *Pawson* case is concerned with the forcible taking of land by an expropriating authority and with the relevance of subsequent comparable sales -- not the sale of the expropriated lands.

> That principle has not been adopted, in Ontario at least, with regard to the valuation of shares of shareholders who have voluntarily dissented from the decision of the majority to amalgamate two companies.
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> . . . . .
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> As I have said, the law by which I am to be guided is that, in valuing the shares of the applicants, evidence of transactions taking place after valuation day is irrelevant or has little weight because, first, it invokes the benefits of hindsight and, second, it is meaningless unless there is also evidence as to whether or not alteration in values has taken place since valuation day. [at 418-420].
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> In the case at bar, I was urged to admit and consider two types of "hindsight" evidence. The first -- evidence as to concentrate inventories on hand in the old Pine Point operation as at the valuation date, which became known later -- would appear to fall squarely within the exception described in Cyprus Anvil -- i.e., evidence providing a "better understanding of the physical and unchanging components of the subject of the valuation". The second type of evidence sought to be adduced by Nunachiaq was evidence of subsequent metals prices and to a lesser extent, exchange and inflation rates, as a "guide" to the reasonableness of the predictions made by the experts as at the valuation date. I agreed to hear the evidence at the time, but having reviewed the cases discussed above, I conclude that as helpful as such evidence might be, it should have little, it any, weight. I can see no distinction in principle between evidence of this kind and any other type of hindsight evidence not available to a valuator when making his determination as at the valuation date.

[43] In the present case, Mr. Kuhn as counsel for Amos and Guse wrote a letter dated February 21, 2007, which, among other issues specifically objected to the case of hindsight evidence in the valuation process. The decision of Mr. Patrickson indicates that he relied upon the evidence concerning an offer of employment from Tyam Construction made March 22, 2006 (Appendix A to the decision) and as referred to in Appendix C to the decision, an October 19, 2005 forecast of the Conference Board of Canada, a January 2006 B.C. Economic Forecast from Credit Union Central of British Columbia, a November 2005 Economic Analysis of British Columbia from Credit Union Central of British Columbia, as well as an October 2005 Economic Analysis of British Columbia BC Non Residential Construction Forecast, both from Credit Union Central. Such hindsight evidence could not, in my opinion, have been admissible in this valuation. An arbitrator who considers inadmissible evidence in reaching a decision has exceeded his powers.

[44] I do not find it necessary to deal with the other arbitral errors alleged.

> [45] The arbitral errors that occurred in this case, namely the collection of evidence in the absence of the parties upon which they were not heard and the use of inadmissible hindsight evidence are not matters of "a defect in form or a technical irregularity" (Commercial Arbitration Act s. 30(2)(a)) nor are they errors of fact or law on the face of the award (s. 30(3)). These arbitral errors significantly detracted from the underlying fairness of the proceeding for which the appropriate remedy is to set aside the award. It would not, in my opinion, be appropriate to remit the award to the arbitrator for reconsideration as he has already stated his opinion of the value of the Mattson interest. It would be unreasonable to expect him to re-examine his stated opinion by attempting to remove the influence of the evidence improperly considered.
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> [46] Mr. Patrickson's award is set aside under s. 30(1) of the Commercial Arbitration Act for arbitral error. It is unnecessary to deal with matters argued under s. 31 in light of this result."

Outside of the assessment context, hindsight evidence is generally not permissible. The limited exceptions to this rule relate to use of post-valuation date evidence required to confirm physical characteristics of the property being valued which are germane to the valuation.

(c) Reconciliation of Assessment and Non-Assessment Cases on Use of Post-Valuation Date Evidence

The two lines of cases cannot be easily reconciled. They do not reference one another. I do not see a clear distinction between "events" relating to discovery of facts of underling physical characteristics of a property that would drive a different value if known on the valuation date, and "events" relating to sale of the property itself occurring after the valuation date. Perhaps the distinction simply lies in the different role of the Board as an "inquisitor", responsible for using the evidence at hand to determine accurate assessments.

(d) Latest Pronouncement of the Board on Use of Hindsight Evidence

The Board grappled with the use of hindsight sales evidence in *Lehigh Portland Cement et. al. v. Area 01* (August 6, 2009, 2009 PAABBC 20091446). The issue was whether the Board could, and ought to, compel Lehigh to disclose to the Assessor and City copies of confidential unsuccessful offers it had received from third parties for sale of the subject property. Lehigh objected to disclosure on

grounds including that the information, all occurring well after the state and condition date for the 2008 appeal, were irrelevant hindsight evidence.

The Board ultimately declined to order production. Preferring the line of cases decided in the assessment context, the Board found the hindsight evidence relevant:

> "[25] … Lehigh says that the requested information is "hindsight" information, in that the offers to purchase occurred after the relevant valuation date of July 1, 2007. Lehigh argues that it is not clear that it is "good law" to rely upon hindsight sales and cites non-assessment cases for this argument.
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> [26] However, I accept the Assessor's submissions on this issue that, in assessment law, hindsight sales can be used as an indication of market value, particularly where there is little market change since the valuation date and the date of sale (Assessment Commissioner v. Houston (1979) S.C. 126 (BCSC), Assessment Commissioner v. Westar (1998) SC 271 (BCSC), Gyratron Developments Ltd. v. Area #09 (1986) SC 221 (BCSC)). There is no absolute rule that assessors cannot use sales on either side of the valuation date (Gyratron, supra.). Also, as I indicated above, the relevant valuation dates are <u>both</u> July 1, 2007 and July 1, 2008, therefore, only a few of the requested documents can be said to be "hindsight" evidence. The fact that offers may not be capable of adjustments does not itself render them irrelevant or inappropriate. Rather, this depends on the circumstances of each offer and the market evidence before the panel. It may be more an issue of how much weight a panel may give to the evidence."

The Board therefore seems prepared to entertain sales evidence occurring up to several years after the state and condition date, even in the context of our recent market turbulence. How the Board will ultimately make use of this type of evidence in light of the market changes occurring in the intervening period remains to be seen.

The Assessor has meanwhile applied to appeal the Board's refusal to order disclosure of the offers.

<u>2. Supplementary Assessments in B.C.</u>

Sections 12 and 26 of the B.C. Assessment Act permit supplementary assessments only in 4 situations:

(a) Correction of Underassessment in Current Year

Under ss. 12(2), the assessor can, by December 31 of the year following the close of the roll, issue a supplementary assessment to capture property that should have been, but was not, assessed; or property that was assessed for less than it should have been. In other words, the assessor can supp

the 2009 assessment as late as December 31, 2009. Note that there is no corollary power under this provision for the assessor to issue a supplementary assessment where property was assessed for more than it should have been.

(b) Correction of Underassessment in Previous Year

Under ss. 12(3)), the assessor can, at any time, issue a supplementary assessment to capture property that should have been, but was not, assessed in a previous year, or was assessed for less than it should have been. This can only be done, however, where the mistake was due to an owner's failure to disclose or an owner's concealment of particulars relating to the property. Note again the absence of a corollary power to reassess to correct an excessive assessment.

Assessments for previous years are rare, and I have never seen a supplementary assessment issued against one of my clients. However in one case many years ago, an assessor proposed to deal with an equity argument by issuing a retroactive supplementary assessment against another property owner based on incomplete reporting. This did not ultimately come to pass.

(c) Correction of "Errors and Omissions" in Current Year

Under ss.12(4)), the assessor can, at any time during the current assessment year, supp the roll to "correct errors and omissions". The Act does not define "errors and omissions". However I think it applied broadly to mistakes in inventory, value, class and exemptions, and invests the assessor to correct mistakes made in the original roll against the taxpayer's interest, but which cannot be corrected under the regular supp assessment power under ss. 12(2). Notably, this power used to lie with the Commissioner until the Commissioner's office was removed. All supp assessment powers now lie with the assessor.

(d) Mid-Year Change in Occupation of Crown Municipal Lands

Under ss.26(5), on learning that Crown land in a municipality either starts, or stops, being occupied by or on behalf of the Crown (and therefore occupied by a taxable occupier), the assessor must issue a supplementary assessment. This does not apply to Crown rural land, and does not apply to occupation of property of other types of tax exempt owners than the Crown.

Interplay of Supplementary Assessments and Appeals

Supplementary assessments issued mid-year are subject to appeal the following year. Therefore, issuance of a supp assessment during an appeal has the effect of removing the Board's jurisdiction over the appeal.

In Canpar Industries v. Assessor of Area #17 – Penticton (PAABBC 19990907, set aside in part, 2000 B.C.S.C. 509), the Board dealt with issuance of a supp assessment in the midst of an appeal. Clearly unimpressed by this, the Board said:

> "In reviewing the scheme of the Assessment Act as a whole, the Board concludes that the purpose of the supplementary roll is to provide a vehicle for the Assessor to correct an error in the roll where other avenues to correct the roll at the Property Assessment Review Panel and the Board are not available.
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> ...
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> Once an assessment is before the Board, it is the Board's duty to ensure the accuracy of the roll, subject to balancing this duty against its other duties to ensure procedural fairness and natural justice and to facilitate the just and timely resolution of appeals. Once an assessment is before the Board, the Assessor's obligation is to raise his or her issues on the accuracy of the roll before the Board. The Assessor is relieved of any duty to ensure accuracy; that duty is transferred to the Board.
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> ...
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> Given the direction in section 10 that the Assessor must bring errors to the attention of the review panel, and given the duty of the Board to ensure the accuracy of an assessment in an appeal before it, it is logical to circumscribe the Assessor's ability to issue a supplementary roll to those situations where he or she becomes aware of an error in the roll following the authentication of the roll by the review panel and where there is no appeal before the Board. If there is an appeal to the Board, closure of the assessment lies with the Board. If there is no appeal to the Board closure of the assessment happens 12 months after the completed roll is issued unless a supplementary roll is issued.
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> To allow an Assessor to issue a supplementary roll on an assessment that is before the Board seems completely contrary to any notion of procedural fairness. An Appellant's appeal is effectively "scooped" from the Board and the Appellant is required to start over again with the appeal procedure at the next sitting of the review panel. The Assessor has the same opportunities as a property owner to raise issues before the Board. To have the additional opportunity of subverting the appeal altogether tilts the playing field in a way that cannot have been intended by the legislation and that is certainly contrary to any notions of fair play.

> The Board finds the intent of section 12 is to provide the ability to correct the roll where other avenues are no longer available. The Board finds that the legislation does not intend that the Assessor should be able to issue a supplementary roll on an assessment that has been appealed to the Board.
>
> Accordingly, the Board finds that the issuance of a supplementary roll while an appeal is before the Board is an abuse of process which could be sanctioned with an award of costs.
>
> Even if the Board is wrong in that finding, and the issuance of a supplementary roll while an appeal is before the Board is permitted by the legislation, the Board finds in the particular circumstances of this appeal, that the Assessor's conduct in issuing the supplementary roll warrants an award of costs. In the Board's view, the Assessor's timing, in the midst of settlement discussions and on the eve of the Board issuing its opinion on the various proposals before it, was precipitous, inflammatory, vexatious, and disrespectful to the Board and the property owner. In the context of this case, the Assessor's conduct was high handed and an improper use of authority amounting to an abuse of process.
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> The Board finds that the Appellant is entitled to costs from the Assessor related to the Assessor's issuance of the 1998 supplementary roll to the date of this decision. The Appellant may provide written submissions on quantum, and the Assessor may respond, in accordance with the Order set out at the end of this decision.
>
> The Board has considered Mr. Savage's submissions that any application for costs relating to the 1998 appeal is a matter that should be dealt with when the Board hears the appeal from the 1998 supplementary roll. The Board has not lost jurisdiction in the original 1998 appeal despite the issuance of the supplementary roll. (Canpar Industries v. Assessor of Area #17 - Penticton, Appeal No. 98-17-00015, P.A.A.B. March 5, 1999). The 1998 appeal was included in appeal management with the earlier year's appeals and was actively being worked on by the parties and the Board along with the other year's appeals. It was scheduled for hearing with the 1993 through 1997 appeals and the issue of whether the Board could proceed with the 1998 appeal was argued before and decided by this panel. The issuance of the supplementary roll in the circumstances of these appeals was conduct impacting each of these appeals. As such, the Board finds it is appropriate to consider the application for costs at this time. The Order for costs only extends to costs incurred to the date of this decision. It does not foreclose either party from seeking an award of costs related to the appeal management and hearing of the appeal from the 1998 supplementary roll.
>
> As this is the first time the Board has considered the Assessor's conduct in issuing a supplementary roll where an appeal is before Board, the Board makes no Order for its own costs."

On stated case appeal, the Court found that the Board had erred in saying that that an appeal relieves the assessor of the duty to ensure accuracy, but declined to set aside the costs award, saying:

> "[43] The respondent submits that while the Board did not err in law in its conclusion on the impact of the 1998 supplementary assessment roll or the Board's jurisdiction in the circumstances, it did err in finding that the Assessor is relieved of any duty to ensure accuracy of the roll once an appeal is before the Board, and that it did err in finding that the Assessor's issuance of a supplementary assessment in the circumstances was improper, warranting an order for costs.

> [44] Mr. Savage on behalf of the Assessor pointed to the wording of section 12 (2) of the Assessment Act. He argued that nothing in the Act removes the Assessor's responsibility to ensure accuracy of the assessment roll once an appeal is before the Board. Counsel for the appellant agreed that there might be a flaw in the legislation, but argued that the respondent Assessor should not be permitted to take advantage of it.
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> [45] I agree with the respondent that the Board erred in law in stating that the Assessor is relieved of any duty to ensure accuracy of the roll once an assessment is before the Board. There is no basis for that conclusion in the legislation.
>
> [46] However, I disagree with the respondent that the Board erred in finding that the Assessor's conduct, in issuing the supplementary roll in the particular circumstances of the appeal before it, warranted an order for costs against him. The Board was in a position to consider the entire conduct of the matter and stated that, even if it was wrong in its conclusion that the Assessor was legally precluded from issuing a supplementary roll, his doing so in this context was inflammatory and abusive. I am not persuaded that I should interfere with the Board's discretion in this matter."

The Court appears to say that while supps can be issued amidst appeals, there may be circumstances where they shouldn't be. I am not sure where this leaves us. From a practical perspective, the Board is right in saying that fair play precludes the use of a supp during an appeal. Usurping the Board's jurisdiction after payment of appeal fees, and after significant investment of time and energy in appeal management is both unfair and unhelpful. I am not however aware of this situation having since arisen, and gather it is not in any event BC Assessment's current policy to issue supps during appeals.

Judicial Review of Refusal to issue Supplementary Assessment

Ostensibly, a taxpayer who has missed an appeal deadline could request a supplementary assessment to correct an "error or omission", and, if dissatisfied with the Assessor's refusal to do so, appeal by judicial review, provided the Court's decision is rendered by December 31 of the current year.

3. Multi-Year Cycles

Under legislative direction, the assessed value of property in B.C. for 2009 is the lesser of the value at the 2008 state and condition date (July 1, 2008) and at the 2009 state and condition date (July 1, 2009), in each case taking into consideration the permitted uses of the property at October 31 that year and also any changes in circumstances affecting the assessment including new construction, demolition, closures and the like.

Practical implications of this include that:

- every 2009 appeal in which value is in question automatically requires two valuation opinions (one for 2008 and one for 2009) so that the Board can determine the lesser value. Unless the parties and Board agree that value will be determined on one or the other year, the parties must commission appraisals for both years, adding to the time and cost of the appeal, particularly amidst the market turmoil of the past 18 months;

- where there are outstanding 2008 appeals for property under appeal on value for 2008, it seems likely the Board will order consolidation of appeals for efficiency and to avoid the risk of inconsistent findings on value for 2008, and

- equity considerations are complicated by the fact that 2009 assessments remain open to supplementary assessment, while 2008 assessments, except where under appeal, are now fixed.

4. Equity

Equity is a concept that has received much "fine-tuning" in the last several decades in B.C. As a result of these developments, there is, as a general rule, equity in B.C. in value, classification and exemption for similar properties in a taxing jurisdiction (whether a municipality or a rural area). The challenge generally lies in establishing inequity. The Board has on occasion been persuaded by BC Assessment that value differences of less than the "appraisal tolerance" of some 5% do not create actionable inequity.

Although the Board generally resolves inequity by lowering the appealed assessment or fixing its class or exemptions to coincide with the equity set, one must be mindful of the Board's power under s.57(4)(b) of the *Assessment Act* to order reassessment of the equity set (whether or not under appeal) to achieve equity, if the Board finds that the property under appeal is correctly assessed.

How the Province would view the Board's exercise of this power in the context of B.C.'s 2009 "frozen roll" is open to question.

As noted earlier, normally the "equity set" is comprised of unappealed assessments of similar properties in the same jurisdiction. However the question arises whether, in our 2009 "frozen roll" situation, it is open to the Board to resort to unappealed 2008 assessments of other properties as the "equity set" for 2009 value appeals. Given the Board's duty to find the lesser of actual value both for 2008 and 2009, I think the answer is "yes", so long as there have not been significant changes to the equity set properties between 2008 and 2009 that cannot be adjusted for in a cogent manner.

5. Economic Obsolescence

Prior to the introduction in 1987 of regulated assessments for major industrial properties, and prior to the introduction of commissioner's rates for utility properties, economic and functional obsolescence were important considerations in falling economies.

However, other than to the extent that they are now reflected in prescribed depreciation rates, these factors are no longer relevant for these properties. This is because Major Industrial Property rates are not subject to appeal to the Board or Courts, and Commissioner's rates for utility properties are subject to appeal to the Board only on limited grounds. Whether those grounds include failure to adequately account for economic obsolescence remains to be seen.

Economic obsolescence continues however to be relevant for commercial properties and for Class 5 – Light Industry properties (smaller processing and transportation facilities) valued on a market basis. As a general rule, allowances for economic obsolescence depend on establishing permanence as opposed to cyclical economic downturn. One would expect valuations of businesses (and particularly light industrial properties) whose very existence is now threatened by the recession to reflect a significant allowance for economic obsolescence.

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