Cross-Canada Legal Update

By
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This is a general overview of the subject matter and should not be relied upon as legal advice or opinion. For specific legal advice on the information provided and related topics, please contact the author or any member of the Property Tax Law Group.

NATIONAL VALUATION AND LEGAL SYMPOSIUM

CROSS-CANADA LEGAL PANEL

BRITISH COLUMBIA UPDATE

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1. INTRODUCTION

I am grateful once again to have the opportunity to update the law in British Columbia for attendees of this Symposium. I start with an overview of legislative changes then review topical assessment and taxation issues addressed by our courts in 2008.

2. LEGISLATIVE CHANGE

(a) "Dual" 2009 Roll

Normally, British Columbia has an annual roll. This means that value is established at July 1 as if the property were in its physical state and condition and zoned as of October 31 of the year before taxes are paid.

However in late fall 2008 the Province legislated under Part 3 of Bill 45 (Economic Incentive and Stabilization Statutes Amendment Act, 2008) that in 2009, assessed values would be the lesser of values determined at July 1, 2007 or July 1, 2008, in both cases reflecting the physical state and condition and permitted uses of the property at October 31, 2008.

Improvements values of properties assessed using regulated rates (eg. major industrial improvements, linear properties and managed forest lands) remain unchanged from 2008. Land values for regulated properties reflect the lesser of 2008 or 2009 values.

Property owners received assessment notices indicating the assessed values at 2008 and 2009 levels, and the lesser of these as the assessed value. Appeal provisions remain unchanged. Taxpayers have until January 31 (February 2, due to a weekend) to file appeals to the Property Assessment Review Panel from their assessments. Appeals may be filed on any of the usual grounds (error in value, classification, exemptions, ownership, etc.) with the new twist that error may be alleged in either or both of the 2008 or 2009 values, not simply the value that became the basis of the assessment.

Chief among the practical implications of the change, which applies only for 2009, are that:

- the measure has only marginal positive tax consequences:

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- since the legislation does not freeze municipal tax rates, there is no automatic freeze or reduction in municipal taxes for 2009. It is up to individual municipalities to establish their budgets and rates;

- since Provincial school taxes are already reduced for 2009 by 50% for Class 5 - Light and Class 4 - Major industry, the legislation has the limited practical effect of "capping" school taxes for remaining classes (assuming the Province does not change school tax rates from 2008 levels), and

- the implications of shifts of tax burdens amongst taxpayers resulting from this measure remains to be seen. This too is generating much debate, and

- taxpayers with outstanding 2008 assessments must now consider whether to appeal 2009 simply to ensure that success in 2008 carries forward. The Board must consider whether to consolidate 2008 and 2009 appeals for efficiency and to avoid inconsistent findings for 2008. Further, the Board will require valuation evidence for both 2008 and 2009 to determine actual value. At the outset, the Province spoke of concern for the number of appeals that would otherwise be filed in 2009. The efficiency of the changes introduced for 2009 remains to be seen.

(b) School Tax Credit for Major and Light Industry

Part 1 of Bill 45 creates a new school tax credit in 2009 and (ostensibly) for subsequent years, for owners of Class 4 – Major Industry and Class 5 – Light Industry properties equal to 50% of school taxes otherwise payable.

In the past, owners of Class 4 properties have often sought to reclassify them to Class 5 or Class 6 for lower tax rates. The efficacy of this must now be measured against the loss of the school tax credit.

(c) New Property Class – Class 3 Supportive Housing

In April the Legislature amended the *Assessment Act* and subsequently amended the *Prescribed Classes of Property Regulation* to create a new class of property in 2009 known as "Class 3- Supportive Housing".

Eligible supportive housing is defined by s.19(a) as property that is used by or on behalf of a person who received funding from the government in the previous calendar year for the provision of supportive housing (eg. social housing, homes for mentally or physically disabled, and homes for recovering drug or alcohol addicts), on that property.

Under s.20.4 supportive housing is valued at its actual value less an amount determined by regulation. While the wording of BC Reg 208/2008 (*Supportive Housing Property Valuation Regulation*) seems to suggest that the deduction per property is $2, I am told that the intent is the opposite – to reduce assessed values of supporting housing properties to a nominal $2 per property.

3. LEGAL DEVELOPMENTS

(i) Valuation

(a) Crown Lease Use Restrictions - BCSC Affirms Board Ruling in *Assessor of Area #09 - Vancouver v. UBC Property Trust, 2008 BCSC 822*

In June, 2008 the B.C. Supreme Court dismissed the Assessor's appeal from the Board's decision in this case. The issue before the Board was how to value property owned by UBC, Simon Fraser University, BC Institute of Technology and Emily Carr Institute of Art and Design that was subject to a short term lease restricting the tenant's use to storage purposes and manufacture of concrete framework. The property was zoned CD-1 permitting high tech industrial use, education, development, production and live-work and hotel occupation.

Section 19(5) of the Act requires that exempt (eg. Crown, municipal or other non-taxable) property subject to a lease be valued taking into consideration restrictions on use imposed by the landlord on the tenant. Section 19(6) excludes from consideration as a restriction the duration of the tenancy or right of the landlord to terminate the lease.

The Assessor valued the property at $9.5 million (2005) and $12.8 million (2006) in its highest and best use for redevelopment to accommodate live-work occupation and hotel occupancy in towers. Given the short-term duration of the lease and the lack of an overriding legislative regime precluding redevelopment of the property, the Assessor did not consider the highest and best use to be restricted as set out in the lease but instead by its zoning.

The tenant valued the property at $1 million for 2005 and 2006, based on its restricted use.

The Board accepted the tenant's value. The Court upheld the Board's ruling, finding that:

- where use restrictions exist in properties leased by Crown or other tax-exempt owners, highest and best use must be set taking those restrictions into account under section 19(5), regardless of the duration of the lease, and

- it cannot be presumed that a landlord will consent to uses beyond those set out in the lease. A reasonable expectation of landlord consent to different uses must be proved.

This decision reflects a refinement to the restrictive use valuation principles previously established in *Western Stevedoring* and *CNR*. We can expect further refinements as these principles are brought to bear on other types of restrictive use lease properties.

(b) Cost Approach - BCCA Affirms Board's Decision in *Pacific Newspaper Group Inc. v. Assessor of Area #14 - Surrey / White Rock*, 2008 BCCA 284.

In June, 2008 the BC Court of Appeal released its decision in this stated case, dismissing the Assessor's appeal from the BC Supreme Court ruling.

By way of background, Pacific Newspaper owns the Vancouver Sun and Province newspapers which are printed in Surrey, B.C. The 2000 and 2001 assessments of the printing facility were in

issue in the previous Court of Appeal decision Southam Inc. (Pacific Newspaper Group Inc.) v. British Columbia (Assessor of Area No. 14 – Surrey / White Rock) 2004 BCCA 245 (leave to SCC refused [2004] 3 SCR v).

In the Southam case, the Court of Appeal found that the Board had erred by assessing the printing facility using the cost approach based on its highest and best use as a printing plant for Southam's printing business because there was no evidence of a market for the plant in that use and the parties had agreed on the value of the plant in an alternate use. The Court found that the resulting cost-approach value represented value to owner, contrary to Canadian assessment law.

When assessing the same plant for 2002 through 2005, the Assessor did not follow the Southam ruling based on, among other things, evidence that the plant had changed hands as part of a going-concern transaction which the Assessor considered distinguished Southam by providing evidence of a market for its current use, and the lack of an agreement this time between the parties on the plant's value in an alternate use.

The Board accepted the Assessor's position and distinguished Southam on this basis, dismissing Pacific's appeal of the assessments. On stated case, the Chambers Judge allowed Pacific's appeal on the basis that the Board and Court were bound by the Southam ruling which had been premised on essentially the same factual and legal underpinnings.

The Court of Appeal granted the Assessor leave to appeal, denying a request for a 5-judge panel to reconsider Southam and instead hearing the appeal as a 3-judge panel.

The majority (2 of the judges) concurred in dismissing the Assessor's appeal from the Chambers Judge's ruling. The third judge gave dissenting reasons.

The majority of the Court found that while the Board had additional evidence (compared to what was before the Board in Southam) concerning previous sales of Pacific's business and the market generally for these businesses, this was not sufficient to distinguish the Southam decision. The Court agreed with the Chambers Judge that the Board erred in law in concluding that the ability to sell the printing plant as part of the sale of the business as a going concern meant there is a market for the printing facility in its current use and that ought to be its highest and best use for assessment purposes. The Court agreed with the Chambers Judge that there was no meaningful difference between the legal and factual underpinnings of the Southam decision and the current appeals. Thus, both the Board and Chambers Judge were bound by *stare decisis* to apply Southam.

The Court found that section 19(4) of the Act, requiring that land and improvements which are part of a going concern must be so valued, merely requires that property not be valued as part of the property of a bankrupt or non-operating business. It does not, as the Court took the Assessor to argue, supplant the basic requirement under section 19(2) to determine the fee simple market value which must not be the value to the owner.

In lengthy reasons, the dissenting judge concluded that Southam distinguished authorities (notably *Crown Forest Industries*) endorsing the cost approach as inapplicable where there is no market for the subject property in its current use and there is evidence of a price at which the property would sell in the open market for an alternate use. He found there were sufficient differences between the facts

before the Board in Southam and in the appeals in issue to distinguish Southam and justify using the cost approach.

It is generally felt that the cost approach has been dealt a serious blow in British Columbia by these two decisions, which seem to run contrary to traditionally-held views of appraisal theory on the relevance of the cost approach long grounded in previous Supreme Court of Canada rulings. However beyond the facts of these two decisions, the practical implications of the Southam and Pacific decisions to future valuation cases involving special use properties valued on market (as opposed to regulated cost) bases remain to be seen.

(ii) Classification

(a) Classification of Mixed-Use Development Lands - Court of Appeal grants leave in *Weyerhauser Company Limited v. Assessor of Area #04 - Nanaimo Cowichan* 2008 BCCA 361

Owners of mixed-use development properties have long believed that they should pay taxes on the lands while held for development in the proportion those lands will be developed for residential and commercial uses.

However the leading British Columbia decision (*Bosa Development Corporation v. Assessor of Area #12 - Coquitlam* and *Assessor of Area #9 - Vancouver v. Bastion Development Corp*, both decisions of the Court of Appeal) interpreted section 1(c) of the Classification Regulation as precluding residential classification on vacant development lands that are comprehensively zoned for multiple uses including residential, commercial and industrial uses, regardless of the intent of the developer to put specific proportions of the property into specific uses.

In *P&L Holdings v. Assessor of Area #01*, 2000 PAABBC, the Board recognized a limited exception to this where a zoning bylaw carves out a specific identifiable area of a parcel for residential development to the exclusion of other uses.

Weyerhauser sought residential classification of its properties on this basis. The Board found, viewing the properties as an entire development, that there was insufficient delineation of uses in the zoning bylaw and master planning agreement to justify departure from the general rule, classifying the properties entirely Business & Other. The Board went on to find that, in any event, the property was held for the commercial purpose of development, not residential use and was thus precluded from residential class regardless of zoning. On stated case appeal, the Judge agreed with the Board on the zoning issue, and refused to consider the Board's view on the proper characterization of development properties as "moot".

In September, 2008 the Court of Appeal granted Weyerhauser leave to appeal on the zoning issue, finding there may be sufficient basis in the CD-5 zoning and master agreement to carve out specific areas of land for residential class. Unfortunately, it does not appear that the Board's characterization of holding of development lands as a "business venture" will be likewise scrutinized.

The outcome of this appeal will be discussed in a future installment of Update.

(c) Valuing Property Held in Fractional Interests - BCSC Sets Aside Board Decision in *Assessor of Area #06 - Courtenay v. Crown Isle Development Corporation* 2008 BCSC 100

Crown Isle is a Vancouver Island golf resort where each rental unit is owned by four owners with 1/4 interests, and placed in a rental management pool. The Assessor valued the property as the sum of the value of the individual quarter-share interests using fractional interest sales comparables. Crown Isle valued the property using 100% interest sales comparables.

The Board agreed with Crown Isle's approach, characterizing fractional ownership as an encumbrance on land which must be disregarded by the Assessor in valuing property, and preferring sales of entire fee simple interests to sales of fractional interests as the best indication of market value.

On stated case appeal, the Court held in January that the Board was wrong in considering fractional ownership interests as an encumbrance and therefore declining to determine value using sales of fractional interests. The Court agreed with the Assessor that fractional interests are merely a manner of holding title, not an encumbrance to be disregarded in valuation of property, finding it is appropriate to add together the values of four one-quarter share interests to determine the value of a rental unit.

(iii) Practice and Procedure

(a) Exercising Caution in Framing Stated Case Questions - BCSC Remits Questions to Board for Amendment in *Assessors of Area #01 and #10 v. University of Victoria*, 2008 BCSC 1302

In the past few years, practitioners have had to be particularly careful framing stated case questions, as Courts seem increasingly willing to reject outright questions that do not meet the grade. While clarity and specificity in questions is of course important, one is left to wonder what is accomplished by the remission of questions to the Board for reformulation other than delay and cost. One would think that practitioners could agree on reformulated questions prior to the hearing date and simply proceed with those questions.

In the latest example of judicial intervention, the BC Supreme Court rejected all 3 questions posed by the Assessor in a stated case appeal from the Board's decision finding that commercial operations of tenants of University-owned campus property fulfilled "university purposes" and were therefore entitled to exemption from taxation.

The Court rejected one of the questions as lacking specificity and the remaining two questions as misrepresenting the Board's findings of fact and law. The Board remitted all three questions to the Board for amendment and resubmission to the Court.

Stated case questions can be somewhat difficult to frame with the degree of specificity apparently now required by the Court, particularly given the relatively short timeframe to launch a stated case appeal. Hopefully our Courts will resist the temptation to seek perfection in stated case questions and in technical analyses of standard of review at the cost of substantive analysis and discussion of the merits themselves.

(b) *Revisiting the Board's Duties and Powers – No Longer Inquisitorial?* – BCSC Affirms Board's Decision to Proceed on Expert Evidence of Only One Party in *Vancouver Pile Driving Ltd. v. Assessor of Area #08 - Vancouver Sea to Sky Region,* 2008 BCSC 810

This case involved the taxpayer's appeal from the Board's refusal to grant an adjournment on the eve of a hearing, so that the taxpayer could tender late expert evidence on the valuation of restricted-use crown lease property.

The taxpayer had neglected to comply with Board orders to tender expert reports in a timely way. The Board proceeded to hear the Assessor's expert evidence and lay evidence from the taxpayer.

On stated case the taxpayer challenged the Board's exercise of discretion as contrary to the Board's overriding duty as an inquisitor to find actual value on the best available evidence, arguing that where an adjournment would arm the Board with a fulsome account from experts on an important valuation issue, the Board's duty to inquire ought to override its discretionary power to conclude appeals in a timely way. The Assessor defended the Board's decision as a proper exercise of discretionary power. The Board argued that its traditional inquisitorial duty had been transformed by the *Administrative Tribunals Act* into a discretionary power to find actual value.

In dismissing the taxpayer's appeal and upholding the Board's decision, the Court ostensibly embraced the "discretionary power" rather than the "inquisitorial duty" characterization of the Board's role. However, perhaps reluctant to depart entirely from the traditional characterization of this role as a duty, the Court did not expressly declare the "duty" as a thing of the past. What seems clear from the decision (and others before it) is that the Board's discretion to govern its procedure trumps any duty it has to find actual value. The Board need only do the best that it can with the evidence before it at the end of appeal management. In the author's respectful opinion, this case marks the end of the Board's "inquisitorial" role in appeals. Future challenges to procedural rulings of the Board seem very unlikely to succeed.

This concludes my overview of B.C. legal developments in 2007 for this Symposium.

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