Equitable Classification and Exemption

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EQUITABLE CLASSIFICATION AND EXEMPTION

A. INTRODUCTION

A hallmark of the assessment and taxation of property in B.C. is the principle of equity*: taxing authorities must deal even-handedly with all taxpayers in a municipality or rural area, and all taxpayers with a class must be treated in the same way*.

Equity in the context of the property assessment in B.C. has its roots in the common law principles of equity and consistency explored by the Supreme Court of Canada in *Jonas v. Gilbert* (1881), 5 S.C.R. 356 that "*a power to discriminate must be expressly authorized by law, and cannot be inferred from general words*".

B.C. Courts have interpreted the provisions of the B.C. *Assessment Act*, R.S.B.C. 1996, c.20 (the "*Assessment Act*") and the *Prescribed Classes of Property Regulation*, B.C. Reg. 438/81 (the "*Classification Regulation*") as a statutory basis for discrimination between property classes. As a result, equitable principles apply to *classes of property of similar attributes*. As set out further below, the assessor and the Board have duties and attendant powers to ensure that properties with identifiable, similar attributes within a class are assessed for taxation (eg. classified, valued and subject to exemptions from assessment and taxation) consistently, within a municipality or rural area.

As a practical matter, equity is most often at issue before the Board in valuation cases. Others on this Panel will discuss the principals of equity in valuation and the tools typically brought to bear to achieve this. The author's goal is to provide a brief overview of the statutory basis of the Board's duty to ensure equity in the context of recent developments in the caselaw concerning the application of equity to classification and tax exemption in assessments. Given the narrow topic discussed here, to a large extent, this paper updates the author's paper included in the equitable assessment portion of the 2005 Real Property CLE Course, published prior to the Board's 2007 equitable exemption decision in ***Young Life v. Assessor of Area #08*** (*infra*).

B. STATUTORY BASIS OF EQUITY

B.C. Courts have on a number of occasions (***Bramalea Ltd. (Trizec Equities Ltd.) v. Assessor of Area 9 - Vancouver*** (1991), SC 277 (B.C.C.A.); ***Assessor of Area #09 - Vancouver v. Lount*** (1995), SC 353 (B.C.C.A.), and most recently, ***Weyerhauser, C&C Holdings et al v. Assessor of Area #04 – Nanaimo/Cowichan*** (2003), SC 463 (S.C.), observed that the statutory scheme in B.C. reflects the common law principles of equity and consistency.

Three statutory provisions provide the basis for the duties and powers of the assessor and the Board to ensure equity in assessments. These are discussed below.

Duty to Assess Uniformly

The duty of the assessor to achieve consistency in assessment is embodied in section 9 of the B.C. *Assessment Authority Act*, R.S.B.C. 1996, c.21 (the "*Assessment Authority Act*") which provides as follows:

> "Purpose of the Authority
>
> 9. The purpose of the authority is to establish and maintain assessments that are uniform in the whole of British Columbia in accordance with the *Assessment Act*."

While on its face this provision appears to require uniformity in assessment of properties with similar attributes province-wide (as opposed to within municipal or rural area taxation boundaries), the B.C. Supreme Court has interpreted the duty set out in s.9 as constrained by the provisions of s.57 of the *Assessment Act*, which (as set out below) expressly limit the Board's duty (and therefore the assessor's duty) to ensure equity in assessment to properties within a municipal taxing jurisdiction or rural area (see *C&C Holdings, supra).*

The second and third statutory bases of equity and consistency are set out in ss.57(1)(a) and (4) of the *Assessment Act* which provide that:

> "57 (1) In an appeal under this Part, the board
>
> (a) may reopen the whole question of the property's assessment to ensure accuracy and that assessments are at actual value applied in a consistent manner in the municipality or rural area, and

…

(4) The board may order the commissioner to reassess at actual value land and improvements in all or part of a municipality or rural area, whether or not they are the subject of the appeal, if the board finds

(a) that the assessments in the municipality or rural area, or in part or either of them, are above their actual value, or

(b) that the assessment appealed against is at actual value but that the assessments of similar land and improvements in the municipality or rural area, or in part of them, are below their actual value".

These provisions essentially empower the Board to:

1. order the reassessment of a property under appeal, regardless of the grounds of appeal identified in the notice of appeal or in pre-hearing management, to ensure accuracy (correctness) of the assessment itself, and equity (consistency) amongst similar neighbouring properties, and

2. order the reassessment of all other similar properties, whether appealed to the Board or not, to achieve equity in value.

Each of these powers is discussed below.

Board Power to Reopen Assessment to Ensure Accuracy and Consistency

The Board's broad power to reopen an entire assessment to ensure accuracy and consistency despite the grounds of appeal identified in the notice of appeal under ss.32, 33 and 50 of the *Assessment Act* positions the Board as an inquisitor, as opposed to merely an adjudicator.

The ramifications of this power in the context of an appeal are very important: the Board can, if satisfied that it is appropriate in the circumstances, review and order changes in the identity of the assessed owner or occupier, the inventory, the value, the classification or entitlement of the property to exemptions. Although the Board's power to achieve accuracy and equity is typically called upon by the property owner dissatisfied with some aspect of the assessment, property owners and tax advisors must nevertheless be aware in embarking on an appeal that once the appeal is filed, there is a risk that the assessment may, depending on the nature and scope of issues raised before the Board

in pre-hearing management (or discovered during a site visit), increase significantly, with potentially devastating tax consequences to the owner. Appeals cannot be withdrawn as of right – the Board must agree, and can order the appeal to proceed over the objections of either or both of the owner and assessor. Approval of withdrawal of an appeal is less likely if the Board is aware of potential inaccuracies in the assessment and the withdrawal is opposed by the Assessor.

Board Power to Order Reassessment of Neighbouring Properties to Achieve Equity

In addition to its power to reopen the subject property's assessment, the Board has the extraordinary power, seldom exercised, to achieve equity between the value of the subject property and the values of similar neighbouring properties within a taxing jurisdiction, by ordering the Commissioner to reassess some or all of the neighbouring properties, *despite not having been appealed by their owners*, at a value determined by the Board in the context of the subject appeal.

The Board may invoke this power if, in the context of the appeal, it finds some or all of the neighbouring properties are either overvalued, or undervalued, relative to the property under appeal. As a practical matter, the Board will not be in a position to invoke this power without evidence of the assessments of the neighbouring properties. The author questions whether it is incumbent on the Board to notify the owners of the neighbouring properties that it is considering ordering their reassessment under this provision to avoid challenges on the basis of procedural unfairness. This does not appear to have been the subject of a decision by the Court.

An isolated example of the rare exercise of this power appears in the Board decision in ***CH Golf ltd. v. Assessor of Area #19 – Kelowna*** (2004) PAABBC 20030888. CH Golf appealed 250 of 495 of its strata lots in an RV development. The Board determined that the entire subdivision was assessed higher than its actual value (and each lot higher than its actual median value), and ordered the reassessment (and reduction in value) of all 495 lots under s.57(4) of the *Assessment Act*.

C. EQUITY IN CLASSIFICATION AND EXEMPTIONS

As earlier noted, equity most often comes into play in the context of valuation issues. Less frequently, but with equal significance, it comes into play in the context of classification and exemptions.

Equity in Classification

Although equity has traditionally been acknowledged as applying to classification of properties (see ***St. Helen's Hotel (Vancouver) Ltd. v. Assessor of Area #09-Vancouver***, S.C. 189 (B.C.S.C.)), any lingering question about this was removed by the recent amendment to the definition of "assessment" in s.1(1) of the *Assessment Act*, deeming it to include both the valuation and classification of the property. The question of equity in classification was recently addressed by the Board and the Supreme Court in *C&C Holdings, infra.* In this case, the appellants contended that remanufacturing plants situated in adjacent taxing jurisdictions had been classified inequitably (inconsistently) under the *Exemption from Industrial Improvements Regulation,* B.C. Reg. 97/88, and sought equitable classification (eg. exclusion from Class 4 – Major Industry) on the criteria applied to the neighbouring reman plants which were classified as Class 5 – Light Industry under this regulation.

Without pronouncing on whether an inequity had been established, the Board found that its powers to achieve equity in assessment under s.57(1) of the *Assessment Act* did not extend beyond properties within the same municipal or rural area taxing jurisdiction, despite approximately 25% of the appellants' taxes being paid to the province on the basis of province-wide school tax rates. The Supreme Court upheld the Board's decision, confirming that the assessor and Board have a duty to ensure consistency in classification of similar properties in a class, but that these duties are confined to properties within a municipality or rural area on the words of s.57(1).

The Board had occasion to address equity in classification again in ***Shaw Cablesystems Ltd. v. Assessor of Area #04 – Cowichan*** (2004) PAABBC 200404651. Shaw sought reclassification of its Nanaimo facilities from split-classification between Class 2 – Utilities / Class 6 – Business & Other to Class 6 – Business & Other, relying on the assessment of its other Nanaimo facility as entirely

Class 6 for an equity argument. Applying the decision in ***C&C Holdings*** **and considering its previous decision in** ***Assessor of Area #10 – Burnaby/New Westminster v. 2725321 Canada Inc.*** (2001) PAABBC 20014320, the Board found that it is not sufficient to base an equity argument on the treatment of only one other property in the class, where, as was the case, the subject property was assessed consistently with four other properties in the equity class. The Board distinguished its decision in ***2725321 Canada Inc***. on the basis that in that case, most of the properties in the equity class were classified differently (and more favourably) than the subject property, creating an inequity that could only be addressed by reclassification of the subject property to the class that resulted in the lower tax consequences.

As will be apparent from the papers of the other speakers on this Panel, the Board continues to refine the tools to be used in achieving equitable valuation. While far less refinement has been brought to bear on classification equity, the same basic principles apply:

- Identification of the "equity set" based on common defining characteristics;
- Comparison of classification treatment of the "equity set" with the subject;
- Analysis of whether differences in treatment between the "equity set" and the subject is justified on the facts and the law, and
- Confirmation that the "equity" set cannot be reassessed.

Equity in Exemptions

Generally speaking, exemptions from taxation and assessment are an aspect of the "accuracy" of an assessment and must be administered by the Assessor and the Board consistently amongst similar properties in a taxing jurisdiction.

Previous Board Rulings

Prior to 2007, although equity in exemptions had occasionally arisen in hearings, the Board had not squarely dealt with the issue. For example, although not clearly articulated by the Board in its reasons in ***Fletcher Challenge Canada Ltd. v. Assessors of Area #04, #06*** (A.A.B.), October 16, 1996, in the result the Board granted a pollution abatement exemption for the appellant's expansion of its pulp and paper mill chlorine dioxide facility in part because a similar exemption had been granted to similar systems. Likewise, in ***Norske Skog Canada v. Area #06*** **(2003)** PAABBC 20030456, the Board held, without lengthy discussion of the application of equity to exemptions, that it had no power to achieve equity and consistency in the treatment of underground SET piping amongst pulp mills in the face of the grandfathering provisions precluding new pollution abatement exemptions under the *Community Charter*, R.S.B.C. 2003, c.26 that were not in place on the assessment roll as of 1996.

Young Life Decision

The September 7, 2007 decision of the Board in ***Young Life v. Assessor of Area #08 – Vancouver Sea to Sky Region*** (2007 PAABBC 20070013) marked the first time the Board issued a decision concerning the application of a taxation exemption that turned exclusively on the principles of equity, a milestone in B.C. property taxation.

In its decision, the Board found that Young Life's summer youth camp (Malibu Club) must, even though not entitled on the merits to the tax exemption sought, be exempted in 2004 through 2006 to ensure equal treatment with other similar youth camps in the same rural tax jurisdiction all of whom were exempted from tax.

The Board's decision is under appeal by the Assessor and the stated case is expected to proceed in B.C. Supreme Court in late June, 2008.

By way of background, historically, all youth camps in the Sechelt rural tax jurisdiction had been exempt under section 15(1)(q) of the *Taxation (Rural Area) Act,*[1] which applies to properties operated

[1] R.S.B.C. 1996, c.48

by non-profit organizations "for the demonstrable benefit" of members of the "community where the land is located".

In 2003, the Assessor removed the Malibu Club exemption. Malibu Club appealed to the Board and lost, the Board finding that the provision could not apply to remote youth camps with only slight attendance from the local community (which all agreed was the rural area of the Sunshine Coast where the camp is located). An appeal by stated case likewise failed.

In 2006 Young Life appealed again to the Board, this time renewing its argument that it ought to qualify under the exemption on the merits, and in the alternative arguing it ought to be exempted based on equitable application of the exemption amongst all youth summer camps in the same taxing jurisdiction.

The Assessor took no position before the Board on the application of equity to classification, arguing that on the facts it did not assist Young Life. However the Assessor now argued that the relevant "community" was the entire Lower Mainland instead of the local Sechelt community, because on this new analysis, the camps other than Malibu Club had a more significant % attendance from the "community" than if measured against attendance from Sechelt Rural.

Young Life urged the Board to apply its reasoning from the original decision and continue to treat Sechelt rural (rather the Lower Mainland), as the "community" relevant to the tax exemption, on the basis that these are the taxpayers directly affected by an exemption to a local camp. The Board agreed with Young Life, finding that none of the camps had a significant enough % attendance from the local community of Sechelt rural to qualify for the exemption, but nevertheless ordering the Assessor to exempt Malibu Club to ensure equitable treatment of all the camps.

Young Life has cross-appealed the Board's finding that Malibu Club does not qualify for the exemption on the merits. If Malibu Club succeeds on its cross-appeal, all of the youth camps will be entitled to the s.15(1)(q) exemption going forward. As set out below, what appears to be a legislative response to the equity issue creates a new category of exemption for summer camps based on charitable, rather than non-profit, ownership of the facility.

Judicial Response to Young Life – New Charitable "Recreational Camp" Exemption - Bill 2 – Budget Measures Implementation Act, 2008

Ostensibly in response to the ***Young Life*** decision, the Legislature has introduced a new charitable summer camp exemption in Bill 2, *Budget Measures Implementation Act*, 2008 in the current Legislative sitting. The new exemption is case in the following terms:

Section 115 of the *Taxation (Rural Area)* Act, R.S.B.C. 1996, c. 448, is amended

(a) in subsection (1) by adding the following paragraph:

(y) land or improvements or both that are

(i) owned by or held in trust for a registered charity, or

(ii) occupied by a registered charity, and

(iii) used primarily as a recreational camp, and

(b) in subsection (5) by adding the following definitions:

"recreational camp" means a camp that provides one or more of the following:

(a) recreational experiences;

(b) educational experiences;

(c) rehabilitative or therapeutic experiences for persons with disabilities or chronic or life-threatening illness;

(d) religious instruction;

(e) leadership training;

"registered charity" has the same meaning as in section 248 (1) of the Income Tax Act (Canada).

The transitional provisions of the exemption provide:

Transition — Taxation (Rural Area) Act

122 Land or improvements or both that are, in the 2008 tax year

(a) owned by or held in trust for or occupied by a non-profit organization and used primarily as a recreational camp, and

(b) exempt from taxation under the *Taxation (Rural Area) Act*,

are exempt from taxation under the *Taxation (Rural Area) Act* for each of the 2009 and 2010 tax years in which the land or improvements or both continue to be owned by or held in trust for or occupied by the non-profit organization and used primarily as a recreational camp.

The significant difference between the existing s.15(1)(q) non-profit exemption and the new s.15(1)(y) charitable exemption is twofold:

1. first, the owner or operating entity of the camp must be registered Canadian charity instead of a non-profit society, and

2. second, it is no longer necessary to demonstrate a benefit to the community where the camp is located. The threshold test is simply that the camp be used primarily for one of the defined "recreational camp" purposes, including religious instruction (the purpose of the Malibu Club, and similar, remote summer camps). The advantage to this is that it clarifies and objectifies the threshold for the exemption, resulting in certainty for camp operators.

The Bill has received 3rd reading and awaits Royal Assent. Assuming it comes into force this year, the new property tax exemption will take effect in 2009. To qualify for the new charitable exemption in 2009, camps must either meet the qualifying criteria as of November 1, 2008, or fall within the transitional provisions.

The transitional provisions would exempt camps currently receiving the s.15(1)(q) "non-profit / demonstrable benefit" exemption in 2009 and 2010 without the need to restructure to meet the "charitable ownership or trust" criteria of the new exemption by November 1 this fall.

What Lies Ahead?

The Board having now explicitly recognized the application of equity to all aspects of assessment, it falls to the ingenuity of the Board and practitioners to refine the application of these principles on a case by case basis. Equity remains the "last bastion" of hope for some taxpayers (where they cannot succeed on the merits of the case), and practitioners must be alert to equitable alternatives to traditional assessment questions.

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