British Columbia Update

By

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Cross-Canada Legal Panel

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NATIONAL VALUATION AND LEGAL SYMPOSIUM

CROSS-CANADA LEGAL PANEL

BRITISH COLUMBIA UPDATE

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1. INTRODUCTION

I am grateful to have the opportunity to update the law in British Columbia for attendees of this Symposium. I have attempted to touch on significant legislative changes and have selected several emerging issues that the Board and Court have grappled with in 2007 in the hopes these may spark some questions and debate in your jurisdiction.

I start with an overview of key legislative changes, then turn to emerging issues in the law.

2. LEGISLATIVE CHANGES

(a) Procedural Changes

(i) *Limits on Property Assessment Appeal Board Powers*

(a) *No Jurisdiction Over Constitutional Questions or Human Rights Issues*

Constitutional Questions

For the past several years, the Property Assessment Appeal Board's ("Board's") powers have been determined both by the *Assessment Act*[1] and by certain provisions of the *Administrative Tribunals Act*[2] ("ATA") which are incorporated by reference into the *Assessment Act*.

Since the inception of the ATA, the Board has lacked the jurisdiction to determine constitutional questions[3] arising in appeals. The Board must refer these issues to the B.C. Supreme Court where they are dealt with as stated case questions.

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[1] R.S.B.C. 1996, c.20

[2] S.B.C. 2004, c.45

[3] ATA s.44.

Constitutional questions are broadly defined[4]to include challenges to the constitutional validity or applicability of any law; applications for a constitutional remedy, or challenges to the validity or applicability of a regulation other than on traditional constitutional grounds. Where this type of question arises in an appeal to the Board, the Board must refer the question to the B.C. Supreme Court under section 64 of the *Assessment Act*, and notice must be given by the Board and Appellant to the Attorney Generals of Canada and British Columbia. If the question relates only to B.C. legislation and arises from other than traditional constitutional arguments, notice need only be given the B.C. Attorney General, who may choose to participate in the court hearing.

Traditionally, BC Assessment's costing manuals have been created or updated by BC Assessment, then approved by the Assessment Commissioner and finally promulgated by regulation. As a result, they have been considered to be regulations susceptible to normal rules of statutory interpretation. As a result, there has been some question whether the Board could hear an appeal questioning the validity of costing manual provisions or must refer those questions to B.C. Supreme Court as constitutional questions. Plainly it would make more sense for the Board, an expert in manual interpretation and application, to handle these types of questions which arise frequently. This may be clarified going forward based on 2007 amendments to the *Assessment Act* (dealt with in more detail below) replacing the Commissioner's office with a Board of Directors and Chief Executive Officer, and consequential amendments to the Act.

Human Rights Issues

In 2007, the Board's powers were further constrained when the ATA was amended[5] to remove the Board's jurisdiction over human rights issues arising under the BC Human Rights Code. The practical implications of this remain to be seen.

(b) *Discretion to Entertain Appeals Where No Appeal Filed to PARP*

Historically, the Board had no power to entertain an appeal from the Property Assessment Review Panel ("PARP") where no valid appeal had first been filed with PARP by the January 31 statutory deadline.

However this changed in 2007 with Bill 32, *Assessment Statutes Amendment Act, 2007*, which amended s. 50 of the *Assessment Act* to give the Board the power to grant a property owner leave to appeal a PARP ruling to the Board where the owner can show that his or her failure to appeal to PARP by the statutory deadline arose from "circumstances beyond the owner's control".

Clearly this does not absolve property owners of the responsibility to appeal to PARP to perfect a subsequent appeal to the Board, but (helpfully) gives the Board some latitude to ensure appeal rights are not lost through failure of electronic filing systems or regular mail.

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[4] *Constitutional Question Act*, R.S.B.C. 1996, c..68, s.8

[5] ATA s.46.3

(b) ***Restructuring of BC Assessment***

Until 2007, the Assessment Commissioner was the "commander in chief" of the assessment authority. In 2007, the Commissioner's position was removed under *Bill 32 – Assessment Statutes Amendment Act, 2007*. BC Assessment is now governed by a Board of Directors and a Chief Executive Officer.

Duties that formerly fell to the Commissioner are now performed by others within BC Assessment (ie. the Board of Directors and in some cases, assessors). These include:

- setting rates (formerly "Commissioner's Rates") for linear structures;
- issuing supplementary assessments;
- adopting manuals for costing industrial improvements or electrical power generating facilities, and
- directing whether exempt improvements must be assessed

As a result, taxpayers are unlikely to perceive any significant change in their dealings with BC Assessment.

(c) ***Stated Cases Governed by Rule 33A***

Stated case appeals from Board decisions are now governed by new B.C. Supreme Court Rule 33A. Previously, no specific rule governed stated cases, which were treated like other statutory appeals.

The practical implications of this change are:

- the requirement for the appellant to serve others with the Stated Case once filed and received from the Board;
- a tighter timeline for delivery of the notice of hearing - 14 days notice must now be given instead of the historical 3 day notice. While it is unlikely that failure to adhere to these timelines will result in loss of appeal rights, the additional time and expense of seeking extensions of time for purely administrative issues like this is an added complication that did not previously exist;
- parties (including the Board) must now file appearances to receive materials and participate in a hearing, and
- notice must be given by the Board (and, for safe measure, by the Appellant) to the Attorney General of any constitutional question in the Stated Case

(b) Substantive Changes

New Regimes for Valuing Specific Types of Properties

Important changes occurred in 2007 which provide certainty for stakeholders in the assessment and taxation of special-use properties which have previously not been easily valued using traditional techniques.

(i) *New Classification Rules for Short-Term Overnight Accommodations*

The proper classification of short-term overnight accommodations (eg. privately-owned but group-managed condos in Whistler) has been the subject of much debate and a number of Board decisions in the past several years. Previously, stratified rental-pool condos were required to be classified at Class 6 – Business & Other tax rates instead of at lower Class 1 – Residential tax rates, where the properties were part of a strata plan of 20 or more strata lots, were rented or available for rental for periods less than 7 days per calendar year, and were substantially controlled by a single rental accommodation manager. The *Assessment Act*[6] and *Prescribed Classes of Property Regulation*[7] were amended in 2007 to provide new classification rules for these properties, with a view to providing split-classification so that only the proportion of time a condo is used for short-term rentals will attract higher Class 6 rates, while the balance of the time its residential use will attract more favorable residential class rates.

(ii) *New Valuation Regime for Ski Hills*

There has also been much debate in the last few years over how to value ski resorts (income versus cost approach), many of which sit on Crown lands. The debate was resolved in 2007 with the introduction of section 20.2 of the *Assessment Act* requiring that designated ski hills be valued using a formula prescribed in the Ski Hill Property Valuation Regulation.[8] The valuation is based on the gross lift revenue of the ski hill multiplied by a conversion factor for which a formula is provided. The Regulation deems 30% of the value to be assessed as land and the remainder as improvements.

(iii) *New Valuation Regime and Continuation of Tax Rate Caps for Port Properties*

Likewise, the proper approach to valuing port lands (generally occupied under lease from port authorities with lease-use restrictions governing land use) has been the much-debated and tested before the Board and Courts, culminating in the *Western Stevedoring* decision.

The debate was settled in 2007 with the implementation of section 20.3 of the *Assessment Act*, which requires that designated major industry port properties (including container and bulk terminals) be

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[6] Section 19.1.

[7] Section 1.

[8] BC Regulation 291/2007

valued at prescribed levels designated in the Port Land Valuation Regulation [9] B.C. Regulation 220/2007.

In addition, the Province announced earlier in the year that it will extend the cap on municipal tax rates that apply to major industry port properties into 2018.

(iv) *Abolition of Parking Tax*

The *Greater Vancouver Transportation Authority Act*[10] has been amended to abolish the short-lived parking tax which was the subject of numerous appeals. The Authority retains its right to tax property based on land values.

(v) *Increase in Homeowner Grant*

B.C. property values have again experienced double-digit increases. The Province has responded by again increasing the threshold for homeowners to qualify for the Provincial Homeowner Grant to $1,050,000 (up from last year's $950,000).[11]

3. LEGAL DEVELOPMENTS

(i) *No Appeal Lies from Interim Stated Case Decisions*

In B.C. there are two types of appeals from Board decisions. The first is an appeal under section 64 of the *Assessment Act* on a question of law arising after the hearing has commenced, but before it is complete. This is known as an "interim" stated case. The Board has the discretion whether to suspend its proceedings in order to refer the question to B.C. Supreme Court.

The second type is an appeal on a question of law arising from the Board's final decision, after the hearing is finished, brought under section 65 of the *Assessment Act.* The Board has no discretion and must, if required, state the case.

Until recently, an appeal from a judge's decision at the B.C. Supreme Court level on either type of stated case would lie to the B.C. Court of Appeal, with leave. However this changed in 2007 with the decision of the Court of Appeal in *Arts Umbrella v. Assessor Area #09 – Vancouver*, 2007 BCCA 45, in which the Court found that no appeal lies from the B.C. Supreme Court to the Court of Appeal on interim (s.64) stated cases.

With respect, the utility of this result is debatable. While it makes sense to deal quickly and efficiently with interim appeals, one would think that a question sufficiently important to the Board to justify suspending an appeal in the first place ought to have the benefit of our highest court's scrutiny.

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[9] BC Regulation 220/2007, amended by the Port Land Designation Extension Regulation, BC Regulation 353/2007

[10] S.B.C. 1998, c.30

[11] *Homeowner Grant Regulation*, B.C. Reg. 100/2002 as amended

This also raises the interesting question whether a disgruntled appellant can appeal the Board's refusal to state an interim question of law all the way to the Court of Appeal, even though that Court cannot ultimately address the question of law itself.

(ii) *Board Not Bound to Determine Assessibility Based on State of Title*

Section 3(4) of the *Assessment Act* requires the assessor to complete an assessment based on the information in the records of the land title office as those records stand on November 30 of the year in which the assessment is completed.

The impact of this provision on the Board's ability to inquire into the correctness of an assessment was called into question in the stated case decision in Canadian Pacific Railway v. Assessor of Area #09 – Vancouver, PAABBC No. 2005 PAABBC 20042428 The B.C. Supreme Court had previously found that CPR did not own the "Kit's Wye" (a section of land used for changing train directions) which had reverted to the Crown. CPR sought a return of taxes paid to the City of Vancouver under previous assessments in its name. The Board found that in light of section 3(4) there was no error in the roll, and upheld the assessment. CPR stated a case from this decision and simultaneously commenced a petition seeking a refund of taxes paid from the City.

The Court allowed the stated case appeal, finding that while the Assessor was bound to assess as owner the person shown as such in the Land Title Office, the Property Assessment Appeal Board must fix the resulting inaccuracy in the roll. As a result, the Court dismissed the petition against the City.

This decision underscores the duty of the Board to inquire into and correct errors in the assessment to ensure that it is correct and at actual value applied equitably in the taxing jurisdiction.

(iii) *Equity in Exemptions*

Traditionally, the Board and Courts applied equity to valuation and classification of properties in B.C.

The September 7, 2007 decision of the Board in *Young Life v. Assessor of Area #08 – Vancouver Sea to Sky Region* marked the first time the Board applied equity in exemptions from taxation, 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 and the stated case awaits scheduling.

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,*[12] which applies to properties

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

operated 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 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 exemption going forward.

(iv) ***Exemption of Commercial-Use University Property***

Under section 54 of the *University Act*[13] properties are exempt from taxation if they are "held or used for university purposes". In *University of Victoria and Assessors of Areas #01 and 10*, 2007 PAABBC 20071676, the Board found that properties owned by the University of Victoria and Simon Fraser University that were leased to commercial enterprises (including travel agencies, fast-food outlets and the like) providing services both to students on campus and to the general public, are "held or used for university purposes", and entitled to exemption. The Board interpreted the exemption more broadly than the narrow scope of "university purpose" set out in s.47 of the University Act (teaching and degree-granting). This would appear to set a new high-water mark in expansive interpretation of tax exemptions in British Columbia.

(v) ***Accounting for Lease Use Restrictions in Valuation of Leased Property***

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[13] R.S.B.C. 1996, c.468

The Board had several opportunities in 2007 to apply the principles established in the *Western Stevedoring* case for taking into account lease-use restrictions in valuing Crown lease properties under section 18(5) of the *Assessment Act*. The Board's decisions expand the scope of these principles beyond port lands to railway lands and general commercial use lands under short-term leases.

In the first case, B.C. Rail Partnership v. Assessor of Area #08 – North Shore / Squamish Valley, 2007 PAABBC 20070004, the Board found that a North Vancouver rail yard leased by CN Rail from B.C. Rail Properties under a long-term lease must be valued taking into account the restriction in use of the property to operation and maintenance of a railway. The Board found that although the lease permitted other uses with prior written consent of the landlord, in the circumstances there was no reasonable expectation of consent being granted, and no such consent had been requested or granted to date.

Faced with a dearth of sales evidence to determine market value for railway-use properties, the Board used the value of an industrial property with other value impediments, in my view a questionable approach given the Board had at hand (but rejected) other indicia of railway use value including Commissioner's rates and the property transfer tax valued declared by BC Rail on the transfer of the leasehold interest to CN Rail.

In the second case, *UBC Property Trust v. Assessor of Area #09 – Vancouver Sea to Sky Region* 2007 PAABBC 20070232, the Board grappled with the impact of a use restriction in a short-term lease. Interestingly, a difference in opinion between the Assessor and taxpayer on the relevance and impact of the restriction drove a nearly 10-fold difference of opinion in its value (the Appellant's appraiser valuing the property in its restricted use at just over $1 million, the Assessor's appraiser valuing it at just under $10 million based on his perception of highest and best use as redevelopment to a tower with live-work occupation and hotel occupancy).

The Assessor's appraiser reasoned that, absent an underlying statutory land-use regime akin to the *Canada Marine Act* (which had played a significant role in the Board's analysis in *Western Stevedoring*), the long-term utility of the subject property would be driven not by a short-term lease restriction but instead by zoning considerations, which could be favourably changed within 2 years of a sale.

The Board disagreed with the Assessor's approach, ruling that the use restriction was a relevant consideration regardless of the short-term duration of the lease (a factor not to be considered under section 19(6) of the Act). The Board accepted the Appellant's valuation of the property reflecting the restricted use.

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

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