British Columbia Legal Update
Prepared for the 39th Annual
Canadian Property Tax Association National Workshop
Cross-Canada Legal Panel
September 25-28, 2005

By
James D. Fraser

September 28, 2005

This is a general overview of the subject matter and should not be relied upon as legal advice or opinion.
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please contact the author or any member of the Property Tax Law Group.

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INTRODUCTION

I wish to express my appreciation to the CPTA Executive for asking me to participate as a member of this Panel.

The following is an overview of legislative changes and caselaw developments in British Columbia property assessment and taxation since last September's session. The review is not intended to be exhaustive, but instead to provide a cross-section of topical cases which may be of interest both to the B.C. chapter and the national membership. The focus lies on stated case decisions.

LEGISLATIVE CHANGE

Other than significant consequential amendments resulting from enactment of the *Administrative Tribunals Act*, and some regulatory changes, the B.C. *Assessment Act* and taxation statutes did not see a great many changes in the past year. The following is a review of the *Administrative Tribunals Act* amendments, several key regulatory changes, amendments to the Board's Rules, a new regulation concerning port property tax caps, and a new parking tax roll provision in the *Greater Vancouver Transit Authority Act*.

(a) *Administrative Tribunals Act*

The most significant change to the *Assessment Act*, R.S.B.C. 1996, c.20 (the "*Assessment Act*") is the enactment of the *Administrative Tribunals Act*, S.B.C. 2004, c.45 (the "*Administrative Tribunals Act*"). This Act, which came into force October 15, 2004, repealed and replaced many provisions of the *Assessment Act* which had previously dealt exclusively with Property Assessment Appeal Board ("Board") duties and powers. The complete code for the Board's duties, powers and procedural rules now comprises the *Assessment Act,* the *Administrative*

Tribunals Act, and the Board's Rules of Practice and Procedure. In light of the amendments, cases relating to practice before the Board decided prior to October 15, 2004 must be carefully reviewed in the context of the provisions of both Acts and the Rules.

Noteworthy provisions in the *Administrative Tribunals Act* (as it applies to the Board) include the following:

- Sections 2 to 10 address the appointments, terms of appointment and responsibilities of the Chair and members of the Board;
- Sections 11 and 13 through 15 empower the Board to make rules, orders (including consent orders) and directives consistent with the *Assessment Act* and *Administrative Tribunals Act* to control the Board's own process and facilitate just and timely resolution of appeals;
- Section 29 precludes disclosure of privileged documents prepared for settlement of an appeal;
- Section 32 permits a party to be represented before the Board by counsel or an agent who may make submissions on facts, law and jurisdiction;
- Section 33 permits the Board to allow a person to intervene and sets out the threshold test for intervention;
- Section 39 sets out the factors the Board must consider in exercising discretion to adjourn a hearing or motion;
- Section 44 provides that the Board has no jurisdiction over constitutional questions;
- Section 49 permits the Board to apply to court to hold a person refusing to testify on summons of the Board in contempt;

- Section 54 permits a party to file a certified copy of a final Board decision in court and proceed to enforce it as if a judgment;

- Sections 55 and 56 protect a Board member from being compelled to disclose evidence from a dispute resolution proceeding other than in a criminal proceeding or on judicial review, and from civil liability in the exercise of powers other than in bad faith; and

- Section 61 provides that the B.C. *Freedom of Information and Protection of Privacy Act* generally does not apply to the personal notes, communications or draft decision of a decision maker; notes or records kept by a Board member conducting dispute resolution; information received by the Board in a hearing from which the public, a party or intervener were excluded; a transcription or tape recording of a hearing; or a document submitted in a hearing, or Board decision, for which public access is provided by the Board.

(b) Amendment of Board Rules

The Board amended its Rules of Practice and Procedure twice in the past year. The first amendment in October, 2004 reflected consequential amendments to the *Assessment Act* resulting from the *Administrative Tribunals Act.*

The second amendment on May 2, 2005 followed upon the Board's March, 2005 review of its mandate[2], as a result of which the Board introduced a fundamental change to the appeal management process for management and resolution of commercial and industrial appeals. Board Rules 13 through 15 now provide for the exchange by the parties and filing with the Board during the initial stages of appeal management of Statements of Issues, Evidence and Analysis. These are intended to give the Board and opposing parties a clear sense of the issues,

[2] The Board's Duty: What is it Really? Shifting Gears in the Board's Approach to Appeal Management and Resolution A Discussion Paper Property Assessment Appeal Board, March 2005

why each party takes a particular view of an issue, and the party's proposed disposition of the appeal. Under Rule 14 the Statement must include:

- details and particulars of all issues put forward by a party in an appeal
- a summary of evidence the party may rely on in support of their position on each issue
- a summary analysis of the evidence
- a summary analysis of legal principles if applicable, and
- a without prejudice recommendation for amendment or confirmation of the roll.

(c) Practice Directive

On May 2, 2005 the Board issued a Practice Directive setting out the requirements under the newly revised Rule 14.

(d) Amendments to *Assessment Authority Act* and *Assessment Act* Regulations

On June 18, 2004 the *Assessment Act Authority Regulation*, BC Reg 497/77 was amended (B.C. Reg 271/2004) to remove the previous requirement under section 2 for the Assessor to sign a statutory declaration as part of the annual assessment of a property that the assessment had been prepared in accordance with the *Assessment Act*.

On July 23, 2004 the *Prescribed Classes of Property Regulation*, BC Reg 438/81 was amended (B.C. Reg 340/2004) to, among other things, remove the classification under section 3 of unmanaged forest land and revise the definition of managed forest land. The regulation was amended again on December 8, 2004 (BC Reg 560/2004) to add section 1(a)(iv), which

provides rules[3] excluding from residential classification under certain conditions bed and breakfast operations in a single family principal residence.

On December 8, 2004 the *Standards for Classification of Land as Farm Regulation*, B.C. Reg. 411/95, was substantially amended with respect to, among other things, the threshold criteria for highest and best use and exceptional circumstances warranting farm use classification.

(e) *Ports Property Tax New Investment Regulation*

On December 3, 2004 the *Ports Property Tax New Investment Regulation*, B.C. Reg. 538/2004 was deposited. This regulation provides further detail to the port tax rate cap scheme of the *Ports Property Tax Act*, 2004, S.B.C., which came into force March 31, 2004. Between 2004 and 2008, the Act caps municipal tax rates for designated port property (as identified in the *Eligible Port Property Designation Regulation*, B.C. Reg. 197/2004); provides exemptions for berth corridor improvements at designated break bulk and container facilities (as identified in the *Port Improvements (Berth Corridor) Tax Exemption Regulation*, B.C. Reg. 198/2004); and caps municipal tax rates for new investment in designated port properties (based on the formula set out in the *Ports Property Tax New Investment Regulation*). The Act compensates municipalities for property taxes foregone as a result of the municipal tax rate caps.

(f) Parking Tax Assessments

On October 20, 2004 the *Greater Vancouver Transportation Authority Act*, S.B.C. 1998, c.30 was amended to provide the authority for the Assessment Commissioner to enter into an agreement with the authority for BC Assessment to administer parking tax assessments. Under section 30(4.1) property classes 7 (Managed Forest Land) and 9 (Farm) and property

[3] The exclusion applies to rooms of a prescribed area offered for rent as bed and breakfast accommodation for less than 7 days and at least 50% of the 12 months prior to the taxation year.

that is wholly exempt from taxation under the municipal taxing statutes and the *Taxation (Rural Area) Act* are exempt from parking taxes.

CASE LAW

It has been an active year for the Board and Courts in many areas of assessment and taxation. Some notable decisions are reviewed below.

1. Major Industry / Utility Properties

(a) Split versus Concurrent Major Industry / Light Industry Classification - *Timberwest Forest Products v. Assessor of Area #04 – Nanaimo/Cowichan Valley*, (2004) Stated Case 470 (B.C.C.A.).

The Board and Courts have grappled on numerous occasions with split classification of industrial and utility operations. Taxpayers have been motivated by the typically lower tax rates for Class 5 (Light Industry) and Class 6 (Business & Other) in comparison with Class 4 (Major Industry) and Class 2 (Utility) to seek split classification under section 10 of the *Prescribed Classes of Property Regulation*, B.C. Reg. 438/81. Section 10 provides that where a property falls into two or more prescribed classes, the assessor shall determine the share of the actual value of the property attributable to each class and assess the property according to the proportion each share constitutes of the total actual value. The B.C. Court of Appeal's June 30, 2004 decision in *TimberWest Forest Products* is the most recent judicial pronouncement on split classification for major industrial facilities.

Timberwest sought reclassification of Stuart Channel Wharves, its Vancouver Island wood products shipping facility (comprising a warehouse, paving and a dock) from major industry to light industry or a mix of major and light industry. Timberwest argued that the facility did not comprise a "plant" because it did not have any machinery typically associated with an

industrial facility. Alternatively, Timberwest argued that, as a "plant," the facility's classification should be split between major and light industry on the basis of the relative proportion of its products shipped on coastal barges as opposed to sea going freighters.

The Board held that despite there being no machinery at the facility, it nevertheless comprised a "plant" under section 20(1)(q) of the *Assessment Act*. The Board went on to find, however, (on the basis of the Court of Appeals previous decision in *Quinsam Coal*), that since some 25% of its products were shipped by coastal barge, the classification should be split 75% major industry / 25% light industry. This raised the interesting practical question of how one would value a single improvement like a shipping dock, partly on a manualized basis, and partly on a market value basis.

Following on this decision, a number of plant owners sought, and some were granted, a similar split classification of their shipping facilities.

The Board's decision was upheld by the Supreme Court on the authority of a previous decision in *British Columbia (Assessor of Area No. 17 – Penticton) v. Enertek Products International Inc*, [2000] B.C.J. No. 1961 (B.C.S.C.) permitting split classification. However, on further appeal, the Court of Appeal set the Board and Court's decisions aside, finding, on the authority of its previous decision in *Assessor of Nelson/Trail v. Cominco Ltd.* (1998), 48 B.C.L.R. (3d) 371 (C.A.), that the exclusionary words of section 5 establishing Class 5 (Light Industry) in the *Prescribed Classes of Property Regulation* specifically preclude property that falls into the major industry class from being classified, wholly or partly, as light industry. On this basis, the Court of Appeal ordered the classification of the entire property as Major Industry.

In the author's view, although it would appear that the Court of Appeal's decisions in *Cominco* and more recently in *Timberwest* preclude "split" classification of facilities situated within the site of a major industry plant, this does not necessarily preclude "concurrent"

classification of a site as Class 4 and Class 5. Concurrent classification could arise, for example, where an operation has traditionally comprised a Class 4 plant situated adjacent to a Class 5 facility, both under common ownership, provided there is sufficient evidence that the Class 5 facility is isolated physically, functionally and operationally from the plant, based on the formulation of the test established in *Norske Skog Canada Limited v. Assessor of Area #06 – Courtenay,* 2004 BCSC 576 for the classification of industrial improvements.

(b) Inter-Facility Natural Gas Pipeline Classified Class 5 – Light Industry -*Burlington Resources Canada Ltd. v. Assessor of Area #27 – Peace River* 2005 BCCA 72

On February 15, 2005 the B.C. Court of Appeal released its decision in *Burlington Resources Canada Ltd. v. Assessor of Area #27 – Peace River.* This unanimous ruling of a 5-judge Panel of the Court of Appeal addressing the proper classification of inter-facility gas pipelines in northeastern B.C., has had important ramifications on several aspects of the practice of stating cases from Board decisions, including the jurisdiction of the Court on stated case to review mixed questions of law and fact, the standard of review of Board decisions on stated case, and the use of industry meanings of words established in previous cases. Although the decision on the merits is of obvious importance to the pipeline industry, from a practice perspective, the most significant aspect of the decision is the Court's delineation of the scope and standard of review in stated cases, which continues to have a significant impact on subsequent appeals of Board decisions.

Burlington owns pipeline through which it transports gases from its Noel processing plant in northeastern B.C. to its Elmworth deep-cut processing plant in Alberta. In 2002, the Assessor classified the pipeline Class 2 (Utility). The issue before the Board was whether the inter-facility piping which moves gas between processing facilities is properly classified as Utility, on the basis it is used for "*the business of transportation, transmission or distribution by pipeline*" within the meaning of section 2 of the *Prescribed Classes of Property Regulation*, or whether it is properly classified as Class 5 (Light Industry), on the basis that it is used for "*processing…of*

products". Burlington argued, and the Board accepted, that the pipeline is used for Burlington's undertaking to produce natural gas for its chosen market, not, as the Assessor argued, to move the finished gas to distribution pipelines. As a result, the Board found that the pipeline is not used for the purpose of the business of transmission by pipeline (Utility), but instead meets the requirements of Light Industry classification.

The Assessor appealed by stated case, arguing that the Board had misinterpreted the meanings of "business", "transportation", "transmission" and "distribution" in the *Prescribed Classes of Property Regulation* by focusing incorrectly on the nature of Burlington's business (commercial production and sale of natural gas) instead of the actual use of the pipeline, and by incorrectly drawing on the industry meaning of these words established in a previous case, without receiving expert evidence on industry meaning in the Burlington appeal. Burlington opposed the stated case on the basis that, among other things, the Assessor's stated case questions were questions of mixed law and fact concerning the application of statutory provisions to the facts of the case, and were not reviewable under section 65 of the *Assessment Act*, which permits review only of questions of law.

The B.C. Supreme Court accepted the Assessor's position, ruling that the Assessor's questions were reviewable, and setting aside the Board's decision on the basis that it was "patently unreasonable" in its interpretation of the *Classification Regulation*. Burlington was granted leave to appeal to a 5-judge Panel for the purpose of revisiting the Court's previous decision concerning the meaning of "business" in *Cominco* (*supra*).

The Panel set aside the Chambers Judge's decision and restored the Board's decision on the merits, finding that the inter-facility pipeline is properly classified as Light Industry rather than Utility. With respect to the scope of review on stated case, the Court reviewed the traditional grounds of appeal on a question of law, which included misinterpretation or misapplication of statutory provisions, misapplication of a principle of general law, acting without evidence or acting on a view of the facts that cannot reasonably be entertained, and

held that while questions involving the correct interpretation of statutory provisions are "pure" legal questions clearly within the ambit of section 65 of the *Assessment Act*, not all questions involving the application of statutory provisions to the facts of a particular case are reviewable questions of law. The Panel found that questions of application of statutory provisions will only constitute questions of law on a stated case where the principles arising from the decision are so general in nature that they will have precedential value. In light of this analysis, the Panel found that the Assessor's questions concerning the application of the *Classification Regulation* could have significant precedential value in future British Columbia cases, raising these questions to issues of law reviewable on stated case appeal. The author notes that while the Panel's analysis is sound, it could be said to mark a significant departure from the practice prior to *Burlington*. Previously, stated cases often included questions on the misapplication of statutory provisions without challenge. In light of *Burlington*, these questions will only be reviewable if counsel can persuade the Court of the precedential effect of the Board's (and Court's) decision in future cases involving a substantial part of the assessment base. Subsequent examples of unsuccessful attempts in this regard (eg. *Young Life*; *Fairmont Hotels*) are discussed further below.

As to the standard of review on stated case, the Panel found that the correct standard depends on the level of deference intended by the legislature to be afforded to the Board. Applying principles enunciated in recent Supreme Court of Canada decisions, the Panel found that the Chambers Judge had failed to use the 4-part "pragmatic and functional approach" in determining the standard of review required under the *Assessment Act*. On this analysis, the Panel ruled that, on pure legal interpretation issues, which are traditionally reserved for the Court with no deference to the Board, the standard of review is "correctness". The author notes that in some respects, this too marks a significant departure from the practice prior to *Burlington*. Traditionally, permissible questions of law included "*acting on a view of the facts that cannot be reasonably entertained*". The Panel's articulation of "correctness" as the standard for legal questions on stated case does not fit well with the traditional standard of

"reasonableness" reserved for errors of fact. Although the Court has subsequently attempted (see, for example, *Young Life*), to reconcile the *Burlington* analysis with the "reasonableness" standard for evidentiary issues, the author is of the view that these attempts have, to date, been less than satisfactory, leaving open (perhaps for the Court of Appeal) the question of whether there is any scope for evidentiary issues on a stated case.

Finally, as to the propriety of the Board's reliance on technical meanings of words in the *Classification Regulation* from a previous decision, the Panel found that the Board had committed no legal error. Affording significant deference to the Board, the Panel ruled that the Board, not being bound by ordinary rules of evidence, and having expertise derived from its special knowledge about the classification of properties and from experience and skill gained in the repeated application of the classification regulation to particular properties, had done no more than rely on its "institutional memory" of industry meanings of statutory provisions established in previous cases. The Panel found that, so long as no party is prejudiced, the Board may refer to industry meanings determined in prior cases, without the need for new evidence to establish industry meanings in the hearing. The author observes that while sound in reasoning, this too might be viewed by some practitioners as a marked departure from pre-*Burlington* practice. Generally, legislative provisions are given their plain meaning unless a technical meaning is established on expert evidence, of which notice is generally required in advance of a hearing. *Burlington* suggests that, subject to objection by a party, the Board may essentially take judicial notice of industry meanings established in previous Board decision. The author presumes that if a party intends to rely on the industry meaning from a previous Board decision in the course of a hearing, the Board will require notice of this in the Statement of Issues, so that the opposing party has the opportunity to challenge the meaning with fresh expert evidence at the hearing.

As the author has observed, *Burlington* has created a heightened awareness amongst practitioners and the Court of the scope and standard of review on stated cases. In drafting

stated case questions, counsel should no longer assume that traditionally permissible legal questions (beyond those of pure legal interpretation) will be acceptable, and should be prepared to challenge, or respond to a challenge of, questions dealing with mixed law and fact.

2. Port Properties

Valuation of Port Land / Occupation of Berth Corridor – *Western Stevedoring Co. Ltd. v. Vancouver Port Authority and Assessor of Area #08 – North Shore / Squamish Valley* 2005 PAABBC 0019

The majority of port properties in British Columbia are owned by the federal Crown and administered by port authorities established under the *Canada Marine Act*. Industrial facilities typically lease their premises from the port authorities. The facilities are assessable and taxable under occupier provisions of the *Assessment Act* and taxing legislation (generally the *Vancouver Charter* and *Community Charter*). The Board and Courts have entertained a number of cases in recent years involving assessibility based on occupation of upland and waterlots, refining the legal test of occupation. There have, until recently, been relatively few Board decisions concerning the valuation of leased port lands. Several years ago, upon a marked increase in assessed land values, many Port of Vancouver industrial facilities on the north and south shores of Burrard Inlet appealed the value of their property assessments. The Board's April 22, 2005 decision in *Western Stevedoring* addressed both the issue of leased port land valuation and the issue of assessibility of berth corridor land in the context of the Lynnterm Eastgate and Westgate break bulk terminals on the north shore of Burrard Inlet. The land value decision has sparked significant controversy among stakeholders within the assessment community and is destined for a stated case hearing in December, 2005.

Valuation of Leased Land with Restricted Use

By way of background, section 19(5) of the *Assessment Act* requires the Assessor, in determining actual value of land and improvements, to include in the list of factors

considered any restriction placed on the use of the land and improvements by the owner of the fee. This section comes into play in assessing the value of land occupied under port lease. Under its lease, Western Stevedoring must use the premises in a first class manner as a forest products terminal. Western Stevedoring believed that the Assessor had not taken this into consideration. The Assessor believed he had.

Before the Board, the Assessor and Western Stevedoring advocated fundamentally different approaches for valuing the upland leased premises. Using the direct comparison approach, the Assessor valued the leased lands (other than the berth corridor) at between $94 and $100 million, but to maintain equity, recommended values of between $37 and $52 million. Western Stevedoring valued the lands at $19 million by applying a 10% rental factor (capitalization rate) to the lease income, to take into consideration the restriction on use of the property contained in the lease, less a special purchaser/lessee adjustment reflecting the present value of synergies realized from operating both terminals and achieving cost reductions. The Assessor characterized the purpose clause in the lease as akin to a zoning regime restricting the property to waterfront industrial marine use, and selecting comparables with marine uses. The Assessor rejected Western Stevedoring's rental factor approach on the basis that the rent paid to the Vancouver Port Authority cannot be considered economic or market rent, and that the rental factor or capitalization rate was not derived from market sales, and in any event, capitalization of rent does not equate to a fee simple value, but only a leasehold interest. Western Stevedoring rejected the Assessor's comparables on the basis that, not being port property transactions, none were subject to the unique mandate of the *Canada Marine Act* which enshrines the use of port properties as port properties, creating different and incomparable markets for port properties on the one hand, and urban properties on the other.

Ruling in favour of Western Stevedoring, the Board found that it must be guided in valuing the property by the requirement under section 19(5) to account for the lease restriction in use.

The Board found that, unlike most valuation exercises, highest and best use of the port land is not necessarily a factor in its valuation. Where, as here, the Crown has restricted the use of occupied port land, the highest and best use is the restricted use under the lease. The following passage from the Board's decision reflects the Board's obvious frustration with what it perceives as akin to fitting a square peg in a round hole when attempting to put into play the requirements of the Act in a dearth of market evidence:

> "[71] In fact, in the case of leased Crown land restricted in use to a use for which there are no other fee simple properties trading in the market, such as break bulk terminals, the *Assessment Act* requires a fiction. It requires that the market value of something that does not trade in the market be determined. **How the legislature envisioned that an appraiser would perform that valuation is anybody's guess**. The traditional valuation approaches that appraisers use become useless. Those approaches require the collection and analysis of market data. In this valuation exercise there is no market data. **A proxy must be found**."

In its search for a proxy to market value, the Board rejected the Assessor's direct comparison approach on the basis that none of the comparables were suitable in use for a break bulk terminal (the restricted use of the subject lands), and it was not sufficient for the purpose of accounting for restrictions on use under the lease under section 19(5), to base comparisons on marine industrial uses, which are less specific and less restrictive than break bulk terminal use. Nor, did the Board find, could the comparables have been assembled, due to their characteristics, for the purpose of constructing a break bulk terminal. The Board preferred Western Stevedoring's rent capitalization approach as a proxy for market information, for several reasons. First, the Board dismissed the Assessor's concern that the approach was not based on market evidence because, in the Board's view, there is no market for this type of property. Second, the Board found that since the property was leased for the use to which it is restricted and lengthy sophisticated negotiations on rent akin to any market rent negotiation had occurred, the Board was satisfied that the lease rent represented fair market rent. Third, although not drawn from market sales, the Board was satisfied that Western

Stevedoring's 10% rental factor (taken from the high end of the range for the Crown lease industrial market), represented the greater economic risk in a break bulk terminal. Rejecting Western Stevedoring's adjustment for cost reduction synergies as a "value to owner", the Board found the actual value of the leased upland to be $26.6 million.

The Board rejected Western Stevedoring's valuation of the berth corridor at $1 (premised on payment of all berthage collected by Western to the Vancouver Port Authority), preferring the Assessor's formula of 30% of upland value based on the formula generally applied to value waterlots.

Occupation of Berth Corridor

The Assessor sought to assess Western Stevedoring as an occupier the berth corridors (paved wharf at the water edge of the terminal where vessels tie up and from which cargo is loaded onto ships) at each terminal. The first issue was whether the Board could add the Eastgate berth corridor, which had not been appealed to the Board at first instance, to the issued to be heard. Typically, folios that are not under appeal cannot be addressed by the Board. However the Board has discretion under section 57(2) of the *Assessment Act* to include folios that are adjacent to property that is the subject of the appeal, provided improvements span both properties and the board considers it necessary to include the unappealed folios in order to determine the assessment of those under appeal. This situation typically arises, for example, when a plant is under appeal but several adjacent folios with plant improvements are not.

Here, the Board exercised its discretion under section 57(2) against including the Eastgate berth corridor in the hearing because there was insufficient evidence that improvements spanned both parcels and it was not, in any event, necessary to include the berth corridor in order to determine the assessment of the upland parcel.

The Board went on to find that Western Stevedoring does not occupy the berth corridor in the sense required to be assessable for property taxes. The Board found it significant that Western is but one of several stevedoring companies providing services on the corridor, and does not exercise any control over which companies may provide services, and must accept all vessels that berth, whoever may provide the services. The Board found that while Western has obligations under its berth corridor agreement and must maintain a presence to perform these duties, they do not give Western a possessory right to the corridor or the right to control its use. Despite not having a physical presence, the Vancouver Port Authority remains in control of the berth corridor.

The author observes that in the weeks following the release of the Board's decision, the decision received significant media attention through radio and newspaper articles, raising the profile of the decision well above that normally afforded assessment cases. This is not, however, surprising in light of the high degree of media coverage and public awareness of port taxation issues leading up to the enactment of the *Ports Property Tax Act*. The principles established in the decision are important to all stakeholders including port tenants, the municipalities, and the Vancouver Port Corporation. The Assessor, District of North Vancouver and City of North Vancouver appealed the occupation and valuation decisions by stated case, which is scheduled to be heard in December, 2005. The author expects that this case (and future cases involving port land valuation) is likely to continue to garner public attention in British Columbia. It is an open question whether legislation will ultimately be introduced to address the unique issues raised by port land valuation.

3. Commercial Properties

The assessment of the Victoria Fairmont Empress Hotel has been before the Board for some time now, as the Board addresses various issues of valuation. To date, the Board has released two interim decisions on valuation issues that have not previously been addressed in this

jurisdiction. The first was the Board's August 14, 2003 decision on the treatment of furniture, fixtures and equipment ("FF&E"), which was appealed by stated case. The second was the Board's April 14, 2005 decision on intangibles. Both are reviewed below.

(a) Allowance Must Be Made for "Return On", "Return Of" and "Replacement Of" Furniture Fixtures and Equipment – *Assessor of Area #01 – Capital v. Fairmont Hotels &* Resorts, 2004 PAABBC 20039104, Stated Case 483 (S.C.)

In its first interim decision, the Board addressed the question of how FF&E should be treated in determining the value of land and improvements comprising the Victoria Empress Hotel. The Assessor and Fairmont agreed that the value of FF&E must be deducted from the going concern value. Fairmont argued that separate allowances must be made for three components: "return on", "return of" and a reserve for "replacement of" FF&E. Fairmont's expert witness maintained that the latter two components are mutually exclusive. The Assessor argued that only "return on" and "return of" FF&E should be allowed, because "return on" and "replacement of" FF&E would result in double-counting, and underassessment of the value of the hotel.

The Board ruled in Fairmont's favour. The Board found that it is obliged under the Assessment Act to find the market value of the land and improvements at the valuation date as a going concern which in turn requires periodic replacement of FF&E. The Board ruled that it is acceptable to deduct a reserve for replacement of FF&E against stabilized gross revenue, and this reserve for replacement has nothing to do with extracting the value of the FF&E in place. Fairmont sought a 100% "return of" FF&E. The Board preferred the Assessor's deduction of 50% as a "return of" FF&E, reflecting that on average, at any given time, FF&E would be one-half of the way through its economic life, or 50% depreciated.

The Assessor appealed by stated case, asserting that the Board had misapplied the Act, proceeded contrary to generally accepted assessment principles, and taken an unreasonable

view of the evidence in adopting a methodology that allowed a deduction for replacement of FF&E.

In reasons issued March 31, 2005, the Court dismissed the Assessor's appeal on the basis that the appeal raised no questions of law reviewable by stated case under section 64 of the *Assessment Act*. Traditionally, reviewable questions of law included whether the Board had used a method of assessment that is "wrong in principle". The Court observed that prior to the Board's decision in Fairmont, there had been no definitive or generally accepted method for extracting the value of FF&E and this was the first time the Board had been asked how to treat it. The Court found there was some evidence to support the Board's choice of methodology and it could not be called "so unreasonable that no properly trained assessor would apply it in such a manner".

Turning to the *Burlington* decision, the Court observed that the questions of mixed fact and law raised in the Assessor's stated case are not so general that the decision may have importance in determining future cases, because appraisal methodologies will change from time to time. The Court observed that it is for an appraisal expert, not the Court, to instruct the Board that a particular methodology is wrong. The author reiterates that the Court's ruling on the stated case questions posed by the Assessor serves as a cautionary note to practitioners in framing stated case questions, given the new threshold required to elevate questions of mixed fact and law to questions of law reviewable on stated case.

(b) Brand/Goodwill Only Intangible Deduction – *Assessor of Area #01 – Capital v. Fairmont Hotels & Resorts*, 2005 PAABBC 20040267

In the second Empress Hotel installment, on April 14, 2005 the Board issued its decision concerning which intangible assets are properly deductible from the going concern value of the hotel (total assets of the business, or "TAB"), how they should be valued, and what value

should be deducted. As with FF&E, this was the first time the Board had been asked to rule on this issue.

The Assessor and Fairmont agreed that brand/goodwill is an intangible assets that must be deducted from going concern (TAB) value. The Assessor argued that no other deductions should be made. Fairmont urged the Board to deduct working capital (cash, receivables and inventory), assembled workforce, pre-opening sales and marketing expense, and initial start-up costs as additional intangible assets.

The Board conducted a comprehensive review of academic and jurisprudential authorities, concluding that brand/goodwill is an acceptable intangible asset required to be deducted from TAB, valuing it in the case of the Empress based on 46.6% of the net income differential (the average revenue per available room (RevPAR) differential between the Empress and the market, less 80% operating expense), capitalized at 15.8%, or $4.1 million.

The Board expressed significant concern with the subjective nature of the analysis underlying these calculations, declining to necessarily endorse the methodology for application in other cases.

The Board declined to allow a deduction for assembled workforce, pre-opening start up costs and initial losses, or working capital. As to the first three elements, the Board found that to the extent there may be value, it is inextricably intertwined with the realty and cannot, as a discrete value, be separated. As to working capital, the Board found that cash and receivables are not part of EBITDA. Further, the interest cost of working capital is already deducted from the income stream.

(c) No Deduction for Water License as Intangible - *Delaware North Companies Inc. v. Assessor of Areas #15 & 16 – Fraser Valley Office*, 2005 PAABBC 20050171

Turning to another interesting case involving intangibles, on July 11, 2005 the Board issued a decision denying the Harrison Hot Springs Resort & Spa a deduction from going concern value for the value of the conditional water license issued by the Province under the B.C. *Water Act*. The licenses permit the diversion and use of water from Harrison Hot springs for baths and bottling.

On a review of the provisions of the *Water Act*, the Board found that the right to divert and use water from Harrison Hot Springs is a right attaching to the land comprising the resort and spa, and would be transferred with that property. To the extent the license and the right to divert water contributes to the going concern value of the property, it is inextricably tied with the land and part of the value of the realty, and no deduction can be made in valuing the resort.

(d) Tenants in Shopping Centre Can Appeal Board Decisions on Shopping Centre Assessment - *Morguard Investments Limited and Coquitlam Centre v. Assessor of Area #12 – Coquitlam*, 2004 BCSC 1270 (leave granted, appeal pending)

In British Columbia, despite what the author perceives as a general desire by shopping centre tenants to receive separate assessments for their premises, these are not issued. Instead, the landlord receives an assessment of the entire premises, and tenants pay their pro-rate share of property taxes based on the provisions of the lease which may or may not be directly related to the assessment of the entire shopping centre.

The question of whether anchor tenants in a shopping centre have the right to appeal a Board decision accepting the recommendation for settlement proposed by the Assessor and the landlord is before the Court in Morguard Investments Limited. The Board accepted recommendations with respect to the value of the Coquitlam Centre in a decision issued in July, 2003. The anchor tenants, Hudson's Bay and Zellers Inc., had not participated in the appeals or settlement discussions. Dissatisfied with unanticipated increases in their property

taxes resulting from the settlements, the tenants required the Board to state a case upon receiving a copy of the Board's decision in December, 2003. The Assessor challenged the Board's jurisdiction to state the case at the tenants' behest, on the basis they were not "persons affected by a decision of the Board on appeal" under section 65 of the *Assessment Act*. The Assessor believes that tenants in a shopping centre, who are not separately assessed for their interests, and whose liability for taxes arise under the lease, are not "affected" in the sense required, because they have no direct interest in the assessment or taxation of the shopping centre. The tenants argued that it is for the Court, not the Board, to decide this threshold question, and that the tenants are "persons affected" by the Board's decision on the assessment appeals (here, the acceptance of the settlement between the Assessor and the landlord).

The Board found that the Court must determine this question, and filed the Stated Case with the Court under section 65. The Assessor and tenants sought directions from the Court with respect to whether it is for the Board or for the Court to decide this question, and in any event, whether the tenants are "persons affected by the Board's decision". The Assessor argued that tenants are in a fundamentally different position than taxing authorities and landlords, whose direct interests in the assessment and taxation of a shopping centre are plainly recognized by the *Assessment Act*. To be in a position to appeal by stated case, tenants must participate in the appeal process and be entitled to receive a copy of the Board's decision. The Assessor argued that to permit tenants who receive Board decisions some months after their release to state cases would seriously undermine the finality and certainty of assessment cycles.

In its September 30, 2004 decision, the B.C. Supreme Court ruled that whether or not a person is "affected" by a decision of the Board is a threshold question the Board must decide before stating a case. As to whether Hudson's Bay and Zellers are "affected" in the sense required to state a case, the Chambers Judge found that, in the circumstances at hand, tenants, whose liability to pay property taxes are directly related to changes in the assessments, are

"persons affected by the Board's decision", and are entitled to pursue the stated case appeal despite not having been involved before the Board.

The Assessor was granted leave to appeal to the B.C. Court of Appeal, and the author expects the hearing will be scheduled for mid to late November, 2005. The merits of the stated case (whether the Board acted without evidence or on a view of the facts that cannot reasonably be entertained in accepting the recommendations of the landlord and Assessor on the value of Coquitlam Centre), will be heard once this procedural issue is resolved.

4. Strata Lots

By way of background, the Class 1 (Residential) provisions of the *Prescribed Classes of Property Regulation* were amended in 2001 to exclude from residential classification groups of strata lots used as a rental pool for hotel purposes. Section 1(a)(iii) of the *Prescribed Classes of Property Regulation* excepts out of residential classification "*20 or more strata lots ... on a parcel or contiguous parcels ... used or available for overnight accommodation (where "use or availability for overnight accommodation" does not include parking, storage or other commercial use)... controlled or managed by persons, or a person, who control or manage 85% or more of the strata lots on the parcel or parcels ...and offered for rent, or rented, for periods of less than 7 days to persons, or a person, as overnight accommodation for at least 50% of the 12 month period ending on October 31 of the year during which the assessment roll is completed*". The Court of Appeal issued two decisions in the fall of 2004 concerning the classification of strata lots under these provisions, and the Board issued a decision on February 17, 2005 under these provisions. These decisions are reviewed below.

(a) Terminal City Club Air Space Strata Lots Not "Used for Residential Purposes" – *Terminal City Club Tower v. Assessor of Area #09 – Vancouver*, 2004 BCCA 466

The first decision deals with classification of air space strata lots. The Terminal City Club Tower in downtown Vancouver contains four air space parcels, divided into four strata plans,

collectively subdivided into 225 strata lots. Two of these parcels contain 60 strata lots occupying several floors of the tower. The strata lots below those in issue, and the strata lots in issue, are managed by Terminal City Club Inc., and are rented by the Club on a nightly basis and marketed as the Terminal City Club Tower Hotel. People staying in the 60 strata lots register through a front desk used jointly with the Club. They use the food, beverage and health club facilities of the Club, since none exist within the strata lots. The Assessor classified the 60 strata lots Class 6 – Business & Other. PARP and the Board confirmed this on the basis that the strata lots, which lie on a "parcel" (which includes "air space parcel"), were, although used for residential purposes, excluded from residential classification under section 1(a)(iii)(B) of the *Prescribed Classes of Property Regulation*.

On stated case appeal, the Court set aside the Board's decision, finding that the Board erred in concluding the strata lots were on a "parcel" which the Court did not consider includes "air space parcel". The issues for the Court of Appeal were whether the lots were used for residential purposes and whether they were on a "parcel". In reasons delivered by the Court on September 17, 2004, Madam Justice Southin, with the concurrence of Mr. Justice Esson, allowed the Assessor's appeal and restored the Board's decision denying residential classification. Mr. Justice Esson's reasons confirm the important proposition that air space constitutes land for the purposes of assessment and taxation.

(b) Intermediary Management Company Does Not Obviate Exclusion Under Section 1(a)(iii) from Residential Classification – *Colleen A. Talbot v. Assessor of Area #08 – North Shore / Squamish Valley*, 2004 BCCA 493

In the second decision of the Court of Appeal concerning the "hotel" exception from residential classification for strata lots, released September 27, 2004, the issue was whether the Board and Chambers Judge erred in finding that creation of an intermediate management company in order to reduce below 85% the number of strata lots managed as rental units assisted a taxpayer in obtaining residential classification. Since 1990, 76 strata lots had

participated in a rental pool operated by Delta Hotels Ltd. as the Tantalus Lodge in Whistler. From 1990 to 1998, Delta managed the hotel under a contract, performing all duties for the management and marketing of the hotel. On June 18, 1998 each owner of 14 of the strata lots entered into individual contracts with Function Junction Management Ltd. to control and manage their strata lots, concurrently agreeing with Delta that their lots would no longer be part of the hotel or managed by Delta. However FJM concurrently contracted with Delta to carry out day to day administration of the 14 strata lots on the same terms and conditions used by Delta to administer the remaining strata lots. It was conceded that the purpose of this arrangement was to reduce to 82% from 85% the number of strata lots controlled by Delta, to achieve residential classification. The Board and Court, on stated case, found that Delta continued to control or manage all of the lots and they were excluded from residential classification. On further appeal, the Court of Appeal agreed with the Board and Court that there was no effective change in management by the introduction of the intermediary management company. The Court rejected the Appellant's argument that a taxpayer's right to arrange affairs to minimize tax precluded the Board from going behind the contracts to determine their underlying purpose, finding, to the contrary, that tax jurisprudence uniformly required the Board to do so.

(c) Quarter Share Units Subject to Exclusion Under Section 1(a)(iii) from Residential Classification – *Assessor of Area #08 – North Shore / Squamish Valley v. Legends Owners Association et al*, 2005 PAABBC 20050015

In a decision issued February 17, 2005, the Board was faced with the question of whether strata lots, described by individual roll numbers, but divided into quarter ownership shares, comprising the Legends property, were subject to exclusion under section 1(a)(iii) of the *Classification Regulation* from residential classification. The owners argued that because the Regulation did not specifically exclude quarter-share units, it was not intended to abrogate residential classification. Alternatively, each quarter share must be classified independently

through split classification of the strata lot parcel. The owners also argued that if all conditions of the exclusion were met, equity required that the Legends be treated on the same basis as other operations which were "cheating" in their statistical reporting of use of their facilities to avoid higher taxes. The Board rejected the owners' arguments, finding that the units must be classified based on use, not ownership, that statistically they met the threshold requirements of the exclusion provision from residential classification, and that the provision was intended, despite not being specifically worded, to cover quarter-share units. As to equity, the Board found that it could not rule on the actions of parties not before the Board, and in any event, could not interpret the regulation in a manner that would afford the owners the benefit of "cheating" allegedly derived by others in their reporting. The Board ordered that the properties be classified Class 6 – Business & Other. A stated case appeal from the Board's decision was scheduled for August 10, 2005.

5. Non-Profit / Charitable Exemptions

The Board and Court issued a number of decisions concerning the availability of statutory or permissive tax exemptions in the past year. Two of these are reviewed below.

(a) Tax Exemption Based on "Principle Use for Public Athletic or Recreation Purposes" Granted for Golf Course - *Assessor of Area #06 – Courtenay v. Seven Hills Golf & Country Club,* 2005 PAABBC 20042009

On April 19, 2005 the Board delivered a decision confirming a the availability of a property tax exemption for the Seven Hills Golf and Country Club in rural Port Hardy under the discretionary exemption provisions of section 809(4)(a) of the *Local Government Act*. The Regional District of Mount Waddington had passed a bylaw in 2004 conferring the exemption for land and improvements "owned or held by, or held in trust by the owner of, an athletic or service organization and used principally for public athletic or recreation purposes".

The issue for the Board was whether the property was "used principally for public athletic or recreation purposes" and "owned or held by, or held in trust by the owner for an athletic or service organization". The Board ruled that, in the circumstances, the property met these criteria, and confirmed the discretionary exemption granted by the Regional District. The Board distinguished a line of cases decided under section 15(1)(q) of the *Taxation (Rural Area) Act* denying golf courses tax exemptions based on "demonstrable benefit to the community where the land is located" on the basis of differently worded provisions, and on the lower degree of public access to those golf courses than the Seven Hills course. The Board also distinguished its January 13, 2005 decision denying an exemption to the Port Alberni Yacht Club (*Assessor of Area #04 – Central Vancouver Island v. Port Alberni Yacht Club*, 2005 PAABBC 20042517) on the basis that membership in the yacht club was not open to the general public.

(b) Youth Christian Evangelical Summer Camp Not Subject to Tax Exemptions Based on "Demonstrable Benefit" and "Place of Public Worship" / Power of Board to Award Legal Costs in Appeal - *Young Life Inc. v. Assessor of Area #08 – North Shore / Squamish*, 2004 PAABBC 20042391, 2005 BCSC 1079

On January 6, 2005 the Board delivered a decision denying a property tax exemption to the Malibu Club and related facilities, a non-denominational youth Christian evangelical camp operated in summer months at the entrance of Princess Louisa Inlet. The property is owned by Young Life, and comprises the main camp at the mouth of the inlet, a wilderness hiking basecamp further up the inlet, and the main office facilities and berth for the ship, located in Egmont, used to transport campers staff and hikers to and from the camp. It has traditionally been exempt from taxation, until the Assessor challenged the exemption for the 2003 roll.

Malibu Club defended the exemption under sections 15(1)(q) and 15(1)(d) of the *Taxation (Rural Act).* Under section 15(1)(d) Malibu contended that it was a "place" or "places" of "public worship" insofar as worship occurred regularly at all three locations in a manner

open to the public. Under section 15(1)(q) Malibu Club contended that it provided various benefits to the members of the local community including the opportunity to participate in non-denominational Christian outreach, local employment, and a safe haven for tourists.

The Board denied both exemptions. With respect to the "place of public worship" exemption, the Board found that while worship occurred at the facilities, it was not sufficiently advertised, made available to, or attended by the general public to constitute "public" worship. The Board found it was more akin to private family worship. With respect to the "demonstrable benefits" exemption, the Board found that the opportunity to attend the camps, without evidence of actual manifestation of benefits to the local community, was insufficient. The Board also found that Malibu Club's employment of local residents, provision of tours through boat charters from Egmont, and provision of a safe haven for boaters were, individually or in total, minor and insufficient to attract the exemption. Young Life appealed the Board's denial of the exemptions by stated case.

On January 13, 2005, the Board awarded Young Life some of its actual reasonable legal costs against the Assessor in respect of disagreements between the parties on agreed facts and an application by the Assessor to admit late expert evidence. The Assessor appealed this aspect of the decision. The parties settled this aspect of the stated case.

Young Life's stated case appeal was dismissed by the BC Supreme Court in reasons released July 19, 2005. The Court rejected Young Life's arguments that the Board had erred in its interpretation of "public worship" and "demonstrable benefit" under sections 15(1)(d) and (q).

As to "public worship", the Court found that the Board was correct in treating the camp attendees, although principally from abroad, as members of the core congregation of the facility rather than as members of the "public". The Court also found that Board was correct in finding that there was insufficient invitation to members of the public (other than the campers) to attend worship services at the camp. Finally, the Court found that the Board had

correctly determined the entire facility to be principally used as a summer camp with only incidental worship use, outside of the scope of section 15(1)(d).

As to "demonstrable benefits", the Court rejected Young Life's argument that, among other things, the Board had erred in failing to consider the invitation to youth to attend non-denominational Christian evangelical programs a the camp a demonstrable benefit to society at large within the meaning of section 15(1)(q). The Court agreed with the Board that opportunity alone, without proof of actual benefit to the taxing community, does not suffice to meet the "demonstrable benefits" test of section 15(1)(q).

In its post-*Burlington* analysis on scope and standard of review, the Court found that Young Life's questions concerning the application of sections 15(1)(d) and (q) were not of sufficient precedential value to constitute reviewable questions of law. As to standard of review, the Court found, on the one hand, that the standard is uniformly one of correctness, but on the other hand, that errors involving a view of the facts continue to be reviewed on the basis of "reasonableness". The decision illustrates the unsettled state of the law with respect to these fundamental principles of stated case practice.

6. Miscellaneous Practice Issues

In addition to the *Burlington* practice issues set out earlier, various other miscellaneous practice points arising from decisions in the past year are reviewed below:

(a) Appeal Filing Deadline to Board Mandatory - *Pacific Rim Resort Properties Inc. et al v. Assessor of Area #05 – Port Alberni*, 2005 BCCA 241

Despite the deadlines set out in the Assessment Act for filing appeals to PARP and the Board, the Board and Courts continue to address the validity of late appeals and jurisdiction of the Board to deal with them. The Court of Appeal had opportunity to pronounce on the sanctity of these deadlines in *Pacific Rim Properties*.

PARP ruled Pacific Rim's appeal untimely and Pacific Rim filed a notice of appeal to the Board on May 6, 2002. Section 50(3) of the *Assessment Act* requires the notice to be filed by April 30. The Board ruled that the appeal was filed late and the Board had no jurisdiction to entertain it. Pacific Rim appealed by stated case.

The Court set aside the Board's decision, allowing the appeal and finding that the Board had jurisdiction to address the appeal. The Assessor was granted leave to appeal.

The Court of Appeal allowed the Assessor's appeal and set aside the Chambers Judge's decision. The Court distinguished two previous decisions (founded on different statutory provisions) in which the Board had exercise discretion in circumstances of late-filing, ruling that the Board has no discretion under the current provisions of the Act to extend the time for filing an appeal beyond the April 30 deadline, regardless of intervention of third parties in the delivery of PARP decisions, or any other external factors. One would expect this will be the last judicial pronouncement on appeal deadlines.

(b) Board Without Jurisdiction to Order Access for Assessor to Appellant's Property – *West Fraser Mills Ltd. v. Assessor of Area #23 – Kamloops,* 2005 PAABBC 20051072.

Sections 15 and 16 of the *Assessment Act* confer broad powers (tantamount to a standing search warrant) on the Assessor to enter onto property and conduct inspections, and to inspect and take copies of documents in the course of administering the Act. Section 46(2) of the Act permits the Board, in the course of an appeal, to enter on and inspect property and require production of any record relating to the appeal. There is no specific provision permitting the Board to order a property owner to allow the Assessor access to property in the course of an appeal.

In *West Fraser*, the Assessor applied to the Board under section 46(2) of the *Assessment Act*, and sections 11 and 14 of the *Administrative Tribunals Act*, as well as the Board's general powers under Rule 15(2) of their Rules, for an order compelling West Fraser Mills to permit the

Assessor access to the property so the Assessor could prepare a report for the hearing, or alternatively, to order a Board inspection accompanied by the parties. West Fraser contended that the Board has no jurisdiction to compel access to property, and ought not do indirectly what it cannot do directly.

The Board confirmed its previous ruling in *West Fraser v. Assessor of Area #25* 2000 PAABBC 20004121, to the effect that absent express statutory authority to compel access to the Assessor for inspection, the Board has no jurisdiction to do so. The Board found that despite its broad powers under the *Administrative Tribunals Act* and the *Assessment Act* to make rules and orders to fulfill its mandate, compelling access for inspection of property other than by the Board itself (as specifically permitted by section 46) verges on substantive rights over which the Board has no inherent jurisdiction. The Board observed that a statutory power akin to Supreme Court Rule 30 (under which the Court can compel examinations or inspections by a party's expert) would be a useful "tool" in the Board's "tool kit". Although denying the Assessor's application for access, the Board intimated that it was prepared, if necessary, to invoke its power under section 46 of the Act to order its own inspection, accompanied by the parties, to ensure fairness to the parties, and to seek redress in costs for retaining its own expert witness.

(c) Board Without Jurisdiction to Amend Roll Where Assessor Relies on LTO Records – *Canadian Pacific Railway Company v. Assessor of Area #09 – Vancouver*, 2005 PAABBC 20042428.

Section 3(4) of the *Assessment Act* requires the Assessor to complete the annual assessment based on the information in the land titles office records as they stand at November 30 of the year preceding the year of assessment.

CPR acquired three parcels of land forming part of the Kits Wye near False Creek in Vancouver between 1886 and 1902. They had previously been part of the Kitsilano Indian

Reserve. Between 1989 and 2003 the lands were the subject of a dispute over ownership in B.C. Supreme Court. On June 14, 2000 the Court found that CPR's defeasible interest expired as of June 15, 2000 when the lands reverted back to the federal Crown, to be held for the use and benefit of a yet to be determined Indian Band. The Court of Appeal subsequently held that the land were vested in Canada to be held for the use and benefit of the Squamish Indian Band. CPR filed but later abandoned an application for leave to appeal to the Supreme Court of Canada. CPR was the registered owner in fee simple of the lands, and was assessed during 2001, 2002 and 2003. On December 19, 2003 documents transferring title were registered in the LTO and on February 6, 2004 the federal Crown was registered in place of CPR as registered owner in fee simple.

CPR appealed the 2001 through 2003 assessments on the basis that CPR was not the owner of the property. CPR argued that there was an error in the assessment roll that the Board could correct on appeal. The Assessor argued that since the Assessor had, as required by the Act, placed the name of the registered owner on the roll in each assessment year, there was no "error" for the Board to correct.

The Board dismissed the appeal, finding it had no jurisdiction to correct the roll. The Board found both that there was no error within the meaning of section 32(1) of the Assessment Act and that the Board had no jurisdiction to reopen the assessment under section 57 of the Act to ensure accuracy, in both instances, because the assessment, although based on a fictional notation of ownership in the land titles office, was not itself inaccurate. The Board ruled that, the Court not having specifically ordered a retroactive change in registered ownership as part of its judgment, the Board had no jurisdiction to account for factors other than the records in place at the time in the land titles office. CPR appealed the decision by stated case, which is not yet scheduled for hearing.

(d) Real Estate Evaluator Without Audience to Appear in Supreme Court on Stated Case Appeals - *Broadway Properties Ltd. et al v. Assessor of Area #09 – Vancouver*, (2005) Stated Case 482 (S.C.)

Mr. Parkes, a real estate evaluator, appeared on behalf of his clients before the Board. On stated case appeal, the Assessor applied to Court to deny Mr. Parkes the right of audience because he was acting as legal counsel while not a member of the Law Society. Mr. Parkes argued that because he was acting on a contingency basis (a 50% interest in any tax reduction), he had a personal interest in the outcome and fell within an exception in the Legal Profession Act.

The Court allowed the Assessor's application, denying Mr. Parkes a right of audience. The Court found that Mr. Parkes did not fall within any statutory exceptions in the Act and it was not appropriate to exercise discretion to permit this. He was not a party to the proceeding and was not acting solely on his own behalf or as an officer of a corporation as an appellant.

(e) Standard of Review on Stated Case Appeal from Board Exercise of Discretion / Board Discretion to Ensure Actual Value / Prejudice to Taxing Jurisdiction - *Norske Skog Canada Limited and Elk Falls Pulp & Paper Limited v. Assessor of Area #06 – Courtenay*, 2005 BCSC 1126

Section 57(1)(a) of the *Assessment Act* provides that the Board "may reopen the whole question of the property's assessment to ensure accuracy..." The Board is often asked in the course of appeal management to permit a party to advance an issue in the hearing that has not been identified in preliminary discussions leading up to a hearing. Generally the Board has permitted issues to be added in the interests of ensuring accuracy, based on a balance of procedural and substantive interests.

In this case, the Board conducted a hearing concerning Norske Skog's Elk Falls Mill in October, 2003 and a subsequent hearing in November 2003 was resolved by settlement. In

the course of appeal management aimed at delineating issues for the hearing, the parties had extensive discussions on a variety of legal and appraisal issues. One such issue concerned the effective age of the Mill paper dock. The Assessor proposed a different (newer) effective age with which Norske disagreed, and Norske communicated this to BC Assessment on several occasions. However as appeal management proceeded, Norske came to believe that BC Assessment was not pursuing their effective age, while BC Assessment came to believe that Norske had accepted it, resulting in a misunderstanding amongst the parties. The final list of issues delivered to the Board prior to the hearing did not identify the issue, and the hearings proceeded without mention of the issue. Subsequent assessments issued on the property in the intervening period contained the new effective age which went unnoticed by Norske. A stated case on other issues was pending in Supreme Court. In October, 2005, in the course of reviewing recommendations from the settled hearing, Norske discovered the effective age and objected to it, applying by written submission to the Board in December, 2005 to permit the issue to be raised and argued. The appeals remained open pending resolution of another stated case.

The Board denied Norske's request, ruling that despite the misunderstanding that rose during appeal management, there had been sufficient opportunity to discover the misunderstanding and in the interests of timeliness and roll closure, the Board could not justify permitting the additional issue to be heard. Norske appealed by stated case. The District of Campbell River applied to intervene in the stated case. Norske opposed the intervention on the basis that, among other errors, the Board erred in considering prejudice to the City as a relevant factor in denying Norske's application to reopen the paper dock depreciation issue, the City not having participated as a party or intervenor in the hearings or the application. Norske argued that the City had no role in the proceedings below or in the stated case.

The Court dismissed Norske's appeal and affirmed the Board's exercise of discretion. The Court rejected Norske's argument that, while section 57(2) of the *Assessment Act* grants the

Board a discretion to reopen an assessment, the Board must be guided in using this discretion by a recognition of its principal role of ensuring that the roll is at actual value and must in all but the clearest of cases, exercise that power in favour of allowing issues to proceed to ensure accuracy. The Court accepted the Board and Assessor's interpretation of section 57 that the Board has a discretion, not a duty, to reopen the assessment and that the Board must balance its power to reopen an assessment with its powers under the *Administrative Tribunals Act* in a manner that ensures just and timely resolution of appeals.

The Court found that while most of the time limits concerning the conduct of an appeal (apart from the deadlines to commence the appeal) are directory, not mandatory, the overall scheme of the *Assessment Act* and the companion taxing legislation (in the instance of the District of Campbell River, the *Community Charter*) evokes the legislative intent to resolve assessment appeals and finalize the roll in a sufficiently timely manner to accommodate the requirements of municipalities under their legislation to set annual budgets and tax rates. Accordingly, the Court rejected Norske's argument that tax implications to a municipality are irrelevant to a proper exercise of discretion in an appeal in which the taxing jurisdiction is not a participant.

In the course of its analysis, the Court ruled, on the basis of the "functional and pragmatic" analysis discussed in *Burlington*, that the standard of review of a Board exercise of discretion on procedural issues is "patent unreasonableness" (the highest degree of deference to be afforded a tribunal), and that the Board's decision was not patently unreasonable. The Court also found that the lesser standard of reasonableness was met. The Court did not differentiate between errors of statutory interpretation which might infuse the Board's exercise of discretion, and errors arising from the exercise of the discretion (properly enunciated on the legislation). The author would expect the former to require a standard of correctness.

This concludes the author's legal update for the 39th Annual CPTA National Workshop.

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