



Class 4 Major Industry MIPS EPG Manuals Current Issues

By

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MIPS / EPG MANUALS – CURRENT ISSUES
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Good morning. My name is Jim Fraser. I am a property tax lawyer at Lawson Lundell². I do a fair bit of work with major industrial properties. I assume that is why Al Riches has asked me to take 10 or 15 minutes this morning to cover some topical issues concerning Major Industry and the MIP Manual, and the Electrical Power Group Manual for utilities.

I gather from Al that a pressing issue for taxpayers and BC Assessment is consultation on these manuals before they are implemented each year. Some of the concerns I have heard expressed arise from the official manual changes being delivered to manual holders well after the appeal dates had passed this spring. As an aside, I checked on Saturday morning and it looks like our librarian received the summary of legislated changes to the MIPS Manual for the 2003 Roll on April 16. Before that, what we had was a late-summer 2002 letter from BC Assessment identifying what changes were under consideration.

Given the amount of time, I am going to cover 3 issues I think from my discussions with Al and Joe Martins, whose paper will follow my presentation, should at least generate some interesting discussion this morning. If there is time, I'll take a moment to point out a few recent cases that might be of interest.

The themes I am going to cover are:

1. the "legislative" nature of the MIPS / EPG manuals, how that is significant in appeals to the Board, and the importance of stakeholder input before they are implemented;
2. the timing of legislated changes to MIPS / EPG manuals, and problems that can arise when changes to these manuals are officially given to manual subscribers after appeal dates have passed, and
3. interesting questions that arise from s.15 and s.16 information requests and how they fit into the scheme of a consultative process

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² The views of the author in this paper are not intended as legal advice. Readers are encouraged to seek advice on specific questions they may have.

1. LEGISLATIVE NATURE OF MIPS / EPG MANUALS

One thing I think is useful to keep in mind as BC Assessment and stakeholders consider how to work together to ensure meaningful input into changes is the legal nature of the Manuals.

We may all take it for granted that the MIPS and EPG Manuals are legislation that, like any other legislation, stakeholders would prefer to be consulted about before amendments affecting them are made.

However in an appeal to the Board not too long ago that I was involved in, BC Assessment took the rather interesting position that the Manual was not legislation, but instead a more or less private, copyrighted costing service that BC Assessment compiled and had the absolute right to apply as it saw fit, and the Board did not have the jurisdiction to interpret the Manual on statutory interpretation principles.

I found that position somewhat startling, because in the context of that case (and generally), it would have meant that there was effectively no right to question BC Assessment's application of the Manual where that differed from a taxpayer's interpretation.

Luckily, the Board disagreed and found the Manual is legislation and the Board has the jurisdiction to interpret it like any other legislation.

The specific question the Board had to deal with was what weight should be given to opinions expressed by Cost Services to the appraiser with respect to the appraiser's interpretation and application of the sections of the MIPS Manual that were in dispute before the Board in that case. The appraiser asked for those interpretations while preparing expert reports for the hearing, and included them in the appraisal report. The Board found they should be given basically no weight because they were provided in the midst of the appeals and could have been viewed as self-serving.

Now this is not to say that BC Assessment can't provide administrative interpretations of the Manuals, which I think would be no different really from the IT Bulletins that Revenue Canada regularly provides to help people understand how to apply the Income Tax Act and Regulations.

The Board dealt with this again more recently in a 2001 Westcoast Energy Appeal, this time in the context of deciding what weight to give to other provisions of the Manual when interpreting the specific provisions in question. The Board basically confirmed the Manual is legislation that the Board has the duty to interpret, taking into consideration and giving appropriate weight to provisions elsewhere in the Manual, in the same way Courts look at words of a statute in the context of other provisions in the legislation.

How does this fit into the theme of consultation between BC Assessment and stakeholders? Well, the Board and Courts have told us there are no appeals from the costs in the Manuals. There are only appeals on questions of interpretation on how to apply those costs (or whether to apply them at all). Once cost changes in the Manual are legislation, they are cast in stone. The only way stakeholders can influence the costs themselves is through pre-legislative consultation with BC Assessment. I think that process can also be a useful forum for discussion about how those costs should be applied, so there is an opportunity for debate beforehand, that might possibly avoid costly Board appeals on differences in interpretation later, and give taxpayers some certainty.

2. TIMING OF LEGISLATED CHANGES TO MIPS / EPG MANUALS

As we know, under s.3 of the Act, assessments must be completed by December 31 in a given year, to take effect the following taxation year.

Under s.74(5) of the Act, changes to MIPS and EPG Manuals have to be made before December 31 to take effect the following taxation year.

This means that the Commissioner's order implementing the 2003 MIPS and EPG Manuals had to be approved by Order in Council before December 31, 2002.

This year, the Commissioner's Order implementing those Manuals for 2003 was approved December 18, 2002 by Order in Council.

Under s.20(5.1) of the Act, hard copies or electronic copies of those manuals must be kept at BC Assessment's offices (presumably at least at head office in Victoria, and I guess it is debatable whether copies also have to be kept at area offices as well). Those copies have to be made available for public inspection at those offices during normal office hours.

The Commissioner's Order concerning the 2003 Manuals says they were deposited with him November 1, 2002. I take that to mean that as of November 1, 2002, it would have been open to interested taxpayers (presumably manual subscribers) to go to BC Assessment's offices during normal office hours and look at the Manual that would be used for the 2003 assessment.

Strictly speaking, that, combined with the August 26, 2002 letter from BC Assessment to manual holders setting out the proposed changes to the Manuals should have given you enough information to see if the proposed changes had been made.

The question is how practical that is for manual holders and BC Assessment, and whether it is really the way things ought to be done.

Taxpayers had to appeal their assessments by January 31 this year, like any year. As I understand it, BC Assessment did not mail out a formal notice confirming what changes had been made until early April (although I may be corrected on that). It seems to me there is a bit of a disconnect there, and the prospect of real prejudice to manual holders who don't have that much time between the beginning of the year (once everyone is back from holidays) when they get their assessments, and when they have to file their appeals, to review the assessments, determine if changes have been made as a result of Manual changes, and whether to appeal. Somewhere in there they have to find time to either talk to an assessor or even go over to Victoria to head office to look at the official MIPS Manual to see what has been done.

My own personal view is that this is an unfair and unnecessary burden on taxpayers and on BC Assessment that could be solved by BC Assessment simply advising manual holders early in January (if not late in December the previous year) of the changes that were made to the Manuals for the current assessment. Once the Manual is deposited with the Commissioner, all it needs is Order in Council approval, and presumably letters could be ready to go at the same time as the assessments themselves. In fairness to BC Assessment, I may be oversimplifying the process of notifying Manual holders, and I'm sure there is a response.

Frankly, I can't think of any other legislation, the details of which are not readily available to those affected by it until well after its effects are felt.

3. FORMAL INFORMATION REQUESTS

I gather BC Assessment is increasingly relying on requests for information made under s.15 of the Act. This I gather is causing some alarm amongst those responsible for answering the requests, particularly given the draconian consequences (quasi-criminal penalties) set out in s.15(3) and at the end of the Act for non-compliance. Basically, non-compliance without due diligence is an "offence".

I find the provisions of s.15 and 16 somewhat troubling, and at the least, I think there are interesting questions that remain to be answered about how they fit into the scheme of the Act and the Board's powers.

Section 16 sets out what I call the "warrantless search" provisions that seem to give BC Assessment more power than the police in criminal cases to enter private property. The Board held in a West Fraser Timber case that it did not have the jurisdiction to enforce those provisions. My own personal view is that is right, and BC Assessment would somehow have to involve the Court in enforcement if it ever came to that.

Section 15 is the more commonly-used written request for information. The scope of a request under that provision is for information for "*any purpose related to the administration of the Act*". That is very broad in scope, and could conceivably be broader than the scope of document production that the Board has jurisdiction to order in an appeal. The Board has found it will only order production of documents that are relevant to an appeal. This is far more restrictive than the normal scope of document production in civil cases under the B.C. Supreme Court rules (any documents that could conceivably lead to a train of thought that could be used to destroy one's case).

I would hope that in most situations where a taxpayer receives a s.15 letter, the taxpayer and BC Assessment can agree on some practical limits on what must be provided, and a reasonable extension of the 21 day time limit for providing it, without the need to resort to the underlying threat of offence provisions.

However if a taxpayer thinks there may be problems with this, and can't seem to resolve them quickly with BC Assessment, I think given the gravity of potential consequences for non-compliance, the taxpayer would be wise to seek legal advice.

Although I could personally see a place for the use of these provisions in extraordinary circumstances, I question what kind of message the use of these provisions sends to taxpayers with respect to fostering a co-operative exchange of information on an ongoing basis.

4. RECENT LEGISLATIVE / CASELAW DEVELOPMENTS

There are just a few interesting developments late last year and early this year I would like to bring to your attention:

1. The B.C. Supreme Court recently found that the Board only has the jurisdiction to ensure equity in value and classification of properties within the same taxing jurisdiction (C&C Holdings, Mid-Island Reman v. Assessor of Area #4 – Nanaimo/Cowichan). The taxpayers (owners of lumber remanufacturing facilities in Duke Point Industrial Park – City of Nanaimo) believed their facilities did not meet the 24 million foot board meter per year threshold to be classified Major Industry under the Exemption from Industrial Improvements Regulation. As part of their case, they asked the Board to look at the way other remanufacturing facilities in North Cowichan had been classified as equity comparables. Board declined and found the facilities were property class 4. Taxpayers appealed the part of the decision concerning Board's jurisdiction on equity, pointing to fact that roughly ¼ of tax bill is uniform throughout the province (school taxes, Assessment Levy, etc.). Court upheld the Board's decision.

That Regulation has since been amended by raising the threshold from 24 million foot board metres a year to 100 million foot board metres a year, which I gather now means most lumber remanufacturing operations will be class 5, not class 4.

2. In a January 6, 2003 decision involving the District of Chetwynd, Peace River Assessor and Loisianna Pacific, the issue was whether a pulp mill that had been mothballed in a state that would preserve it, and allow it to be re-activated later, and was being considered for sale by the owner, should receive the additional 10% closure allowance under the MIPS depreciation regulation. The Board upheld the Assessor's granting of the closure allowance against Chetwynd's wishes. The Board basically found that it must have been contemplated at the time the closure regulation was enacted that the owner of a permanently closed facility might want to sell it off to minimize losses.

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