Western Canada Legal Update:
British Columbia
Legislative Changes and a Review of Case Law

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1. INTRODUCTION

This paper provides an overview of legislative changes of particular note and it reviews case law before the Property Assessment Appeal Board and Courts.

2. LEGISLATIVE HIGHLIGHTS

There have not been many significant legislative changes in B.C. this past year. The most notable is the amendment in late fall 2010 of the "vacant development land" residential class regulation.

Amendment to Residential Class Regulation to Allow Split Residential / Business Class

On November 19, 2010 the Province amended section 1(c) of the *Prescribed Classes of Property Regulation*, B.C. Reg 438/81, by adding the italicized words set out below:

> (c) land which has no present use and which is neither specifically zoned nor held for business, commercial or industrial purposes, except that
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> *(i) if land is included in Class 9, it is not included in Class 1, and*
>
> *(ii) if*
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> *(A) a zoning bylaw under section 903 or 904 of the Local Government Act or under section 565 or 565.1 of the Vancouver Charter, a phased development agreement under section 905.1 of the Local Government Act, an official development plan under section 562 of the Vancouver Charter, a covenant under section 219 of the Land Title Act, or a land use contract under the Local Government Act applies to the land, and*
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> *(B) the bylaw, agreement, plan, covenant or contract, either itself or, if more than one applies, read together, permits a specified portion, or a percentage, of the land to be used for residential purposes but does not permit that portion or percentage to be used for business, commercial or industrial purposes, other than a home occupation or bed and breakfast use in conjunction with a single family residence that is the principal residence of the owner or manager, only that portion or percentage is included in Class 1;*

This represents a very important change in the way property developers pay property taxes on vacant lands awaiting development.

Before the amendment, developers holding vacant lands that were zoned "comprehensive development" to allow multiple uses including residential and non-residential development, quite unfairly had to pay property tax at Class 6 – Business & Other rates on all of their vacant land, even if there were land use controls in place such as land use contracts or s.219 *Land Title Act* covenants that restricted the actual % of the vacant land that could be put to non-residential uses. If the delineation between strictly-residential uses and non-residential uses appeared anywhere other than in the words of the zoning bylaw, and were in the least "speculative", developers paid Class 6 taxes on the Class 1 component of their lands.

Successful lobbying led to the November 2010 amendment which comes into play for the 2011 roll. The practical implication of the change is that developers should now be able to structure the land use planning instruments including zoning and ancillary agreements in a way that ensures that they pay property taxes pending development based on a reasonable split between Class 6 – Business & Other and Class 1- Residential rates.

The Board has yet to interpret or apply the amendments. I think that planners would be well-served by ensuring that the zoning and ancillary land use agreements governing their properties very clearly allocate the physical areas or percentages of area or density attributable to residential-only uses, so as to leave no room for doubt that these portions or percentages of their properties qualify for a class split.

Continuation of 60% School Tax Credit for Major and Light Industry

The school tax credit introduced by Bill 45 in 2009 continues for 2011. The credit of 60% (up from the original credit of 50%) of school taxes otherwise payable applies to properties in Class 4 – Major Industry and Class 5 – Light Industry.

The availability of this tax credit remains an important consideration when considering the tax implications of moving a property into or out of Classes 4 or 5 for other reasons (eg. tax rates, depreciation).

3. CASELAW

Court of Appeal Confirms No Absolute Right to an Oral Hearing

***Allard v. Assessor of Area #10 – North Fraser Region*, 2010 BCCA 437**

Background

The Board's rules allow it to order that a hearing be conducted orally or in writing. There has been an increasing tendency toward written submissions for efficiency.

The question in this case was whether the Board breached natural justice and fairness by ordering that a hearing proceed by written submissions rather than by oral hearing including cross-examination. In declining the taxpayer's request for an oral hearing during appeal management, and ordering that the hearing would proceed by written submissions, the Board said:

> *Mr. Allard wants an oral hearing so that he may cross-examine Mr. Grace. I am not satisfied that an oral hearing is necessary for the appellant to be able to put forward market evidence or test and challenge the market evidence put forward by the assessor. The issues in this appeal are not unique or complex. There are no issues with respect to the appellant's ability to communicate in writing.* ***Mr. Allard is at liberty to request an oral hearing in his submissions, and I will leave it to the discretion of the board member or panel to render a decision as to whether he or she thinks an oral hearing or a telephone conference is required to properly consider the evidence***.

In the stated case decision, the Court considered it very important that the Board had reminded Allard of his obligation to renew his request for an oral hearing before the hearing panel, finding that there was no follow up to this.

The Board issued a decision based on the written submissions, and Allard appealed by stated case, alleging that he had been unfairly denied the right to cross-examination.

B.C. Supreme Court Decision:

The upshot of the Chamber's Judge's decision to dismiss Allard's appeal lies in the following observation:

> [7] The complaint of not being permitted to have cross-examination of Mr. Grace simply flows from the fact that Mr. Allard did not renew his request for consideration by the panel member, but even when he provided his written submissions, he did not renew his request as he did before Ms. Vickers. He was given the opportunity to state his case and his complaints and his comparables, and it does not always follow that because there was no cross-examination he was not afforded an equally effective method of answering the case made out against him; in other words, what in essence, in principles of natural justice, a fair opportunity to correct or controvert any relevant statement brought forward to his prejudice. If that opportunity is given, basically that meets the requirements of natural justice.

Court of Appeal Decision:

In the Court of Appeal, Allard made several arguments.

First, Allard said that since s.55 of the *Assessment Act* allows the Board to hold any combination of written, electronic or oral hearings, the Board could only hold an electronic or written haring if held together with an oral hearing. The Court of Appeal disagreed with this interpretation,

finding that the Board has the power to order any type of hearing it considers appropriate, including a written-only hearing, provided the requirements of procedural fairness are met.

Second, Allard said that the Chambers Judge had exceeded his jurisdiction by inferring an additional fact beyond those expressly stated by the Board in the stated case (eg. that Allard was given an opportunity to renew his request for an oral hearing but failed to renew his request). Had the Chambers Judge done so, this would have been an error of law. However the Court of Appeal disagreed that this had occurred, finding instead that the Chambers Judge had properly founded this fact on the directions given in appeal management which were part of the material attached to the stated case filed with the Court.

On a related point, Allard argued that the Chambers Judge had exceeded his jurisdiction by viewing the failure to exercise an opportunity to renew his request for an oral hearing as a waiver. The Court of Appeal did not see it this way, but said that if they had, this would have been an error of law.

Finally, Allard argued that the Board's denial of an oral hearing was a denial of natural justice. The Court of Appeal disagreed, finding that the concept of procedural fairness is variable and its content is be decided in the context of each case.

In the result, the Court of Appeal dismissed Allard's appeal and upheld the Board's ruling denying an oral hearing.

The Board clearly has a very broad discretion to conduct its hearings in the manner it considers appropriate in the circumstances. While it seems likely that the Board will allow oral hearings when the issues and evidence are sufficiently complex to warrant this, in my view we are likely to see a continuing shift away from oral hearings towards written submissions in the majority of cases.

Board Can Deem Appeal Withdrawn Where Appellant Does Not Attend Settlement Conference of Which Appellant Did Not Receive Notice

Golden Win Investments Ltd. v. Assessor of Area #15 – Fraser Valley and Property Assessment Appeal Board, 2010 BCSC 1900

Here, the appellant opted to correspond with the Board by e-mail. The Board e-mailed the appellant a notice of AMC which the appellant did not attend. The Board then e-mailed the appellant notice that if the appellant did not notify the Board of its intention to proceed, the Board would deem the appeal withdrawn, which the Board did. The appellant did not receive the Board's e-mails because they were sent by the appellant's internet server to a spam folder and deleted automatically in 30 days.

The issue for the Court on stated case was whether the Board breached the duty of fairness by deeming the appeal withdrawn despite the appellant not having physically received the e-mails.

The Court found that, in the circumstances, and particularly given that the appellant had asked the Board to correspond by e-mail, there was no breach of fairness. Taxpayers who ask the Board to use e-mail will therefore have to be careful to ensure that the Board is on the "safe sender" list on their servers.

No Requirement that Appraisal Comply with CUSPAP

623700 British Columbia Ltd et al. v. Area 15 (2010 PAABBC 20101843)

Two issues arose in this case.

First, the Board denied the request of the appellant's agent for an oral hearing and proceeded to decide the case on the basis of written submissions, citing the *Allard* decision as authority for its power to do so.

Second, the Board refused to exclude the Assessor's appraisal report simply because the author was not an AIC member and the report did not comply with CUSPAP.

The request for an oral hearing was premised on the appellant's position that since the Assessor's valuation had not been prepared by a member of the Appraisal Institute in compliance with CUSPAP standards, the Board ought to reject it.

In dismissing the application for an oral hearing and allowing the Assessor's report into evidence, the Board said this:

> *"[5] Mr. Bramwell's basis for the in-person hearing request is his opinion that Mr. Jennings' report does not comply with CUSPAP. CUSPAP contains guidelines prepared by the Appraisal Institute of Canada comprising the standards and regulations of appraisal methodology as well as the business practice and conduct of its members. Mr. Bramwell goes into considerable detail outlining the areas Mr. Jennings did not meet CUSPAP standards and requests that I disregard Mr. Jennings' report on this basis. He also notes that Mr. Jennings is not a member in good standing with the Appraisal Institute.*
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> *[6] According to his "Appraiser Qualifications", Mr. Jennings is not a member of the Appraisal Institute of Canada. He does not refer to CUSPAP at any time in his report. He qualifies his valuation by stating that his "report in its entirety is solely intended to provide information and evidence in support of the 2010 Actual value as defined under the Assessment Act... is solely for the use of the Property Assessment Appeal Board in the determination of Actual value during the 2010 appeal process."*
>
> *[7] Whether Mr. Jennings is or is not a member of the institute is not relevant for the matters at hand. As far as I am aware, there is no legal requirement for an appraiser to be a member in good standing with the Appraisal Institute in order to give appraisal advice or evidence. With respect to meeting CUSPAP standards, this is not a matter*

within my jurisdiction. I am not sitting on the disciplinary committee of the Appraisal Institute. My job is to consider carefully and weigh the evidence before me, in whatever form, and to determine the market value of the subject using what I determine to be the best evidence. I find that whether or not CUSPAP has been met, or whether the author is a member in good standing, do not require me to disregard Mr. Jennings' report. His report contains evidence that I will weigh and assess in my decision.

[8] On behalf of the Assessor, Mr. Sidhu objects to the in-person hearing stating that the file is straight forward, the lot is a vacant commercial lot, and the Assessor has spent significant time to ensure the actual value and equity of the subject have been addressed. He also notes the additional (unnecessary) costs which would be incurred for all parties with an in-person hearing as well as that he feels that the Board has enough information to adjudicate the case via written submissions.

[9] An Appellant does not have an absolute right to an oral hearing. The Board has discretion to determine the most appropriate method to resolve an appeal (Assessment Act, section 55(1); Allard v. Assessor of Area #10 – North Fraser Region 2010 BCCA 437). In the Allard decision, the Court upheld the Board's discretion to decline an oral hearing where the issues in the appeal were not unique or complex, there were no issues with respect to the Appellant's ability to communicate in writing, and the parties had the opportunity to present evidence and respond to the evidence of the other party. In the case before me, the issues are not unique or complex. Both appraisers have given me sales and a valuation analysis. Of the five sales presented, three are in common between both appraisers and there is commonality in the sales particulars. Both appraisers were given and took advantage of the opportunity to rebut the other's analysis. There do not appear to be any communication barriers or challenges.

[10] I find that an in-person hearing is not required to fairly adjudicate this appeal. Accordingly, I will rely on the written submissions before me in my decision which follows.

In balance its duty to observe the rules of natural justice and procedural fairness with the need for efficiency, the Board is likely to continue with oral hearings in complex appeals, particularly where there is benefit in hearing from the witnesses on cross-examination and in response to questions.

Continued Uncertainty on Standard of Review

BCSC decisions applying Weyerhaeuser Company Ltd. v. Assessor of Area # 04 – Nanaimo Cowichan 2010 BCCA 46

As reported in earlier legal updates, in an early spring 2010 decision in *Weyerhaeuser*, the Court of Appeal determined the standard of review of the Board's interpretation of the *Prescribed Classes of Property Regulation*, a pure legal issue, to be reasonableness instead of correctness.

This marked a very important departure from the standard of review for pure legal issues which to that point had been "correctness".

It might have been thought that *Weyerhaeuser* definitively established the standard of review for most Board decisions. However post-*Weyerhaeuser* decisions have cast uncertainty on the question of the applicable standard of review.

The *Weyerhaeuser* decision has been variously overlooked (*571016 B.C. Ltd. v. Assessor of Area #09 – Vancouver*, 2010 BCSC 790), distinguished (*Musqueam First Nation v. British Columbia (Assessor of Area #09 – Vancouver*) 2010 BCSC 1259, and relegated in application only to s.65 stated case appeals.

Further, the Court of Appeal declined to comment at all on the precedential value of *Weyerhaeuser in Vancouver (City) v. Entres Nous Femmes Housing Society*, 2010 BCCA 262, on the basis that since the Board had interpreted the relevant statutory provisions correctly, the Court needn't comment on the appropriate standard of review.

It appears that, despite the Court of Appeal's pronouncement in Weyerhaeuser, there remains some room for taxpayers to seek a review on stated case of purely legal issues on the "correctness" standard.

Board Confirms Use of Conventional Income Approach to Valuing Department Store Despite Significant Economic Obsolescence

Sears v. Assessor of Area #09 – Vancouver (2011 PAABBC 20081289)

On January 19, 2011 the Board issued its decision in *Sears*, one of the longest-running recent Board cases. The case involved the 2008 value of the Sears department store in Pacific Centre in downtown Vancouver.

Pacific Centre covers three city blocks. Block 52 comprises the TD office tower, an eight-level department store leased by Sears, underground retail shops and an underground parking garage. Two of the upper floors of the Sears department store were built in 1981 to accommodate a planned expansion. However changing economic conditions rendered the additional floors surplus to (then Eaton's) needs. As a result, at the effective date, levels 6 and 7 of the Sears department store were vacant and level 5 was used for storage.

At the effective date, no redevelopment proposals had been filed with the City of Vancouver, and neither Cadillac Fairview (owner of Pacific Centre) nor Sears had proposed any change of use or significant renovations to the department store.

Sears sought a reduction in the assessed value of Block 52 based on an income approach reflecting the state and condition of the buildings rather than the contribution of land value to Block 52. The Assessor said the assessment should be confirmed, but in theory should be higher

based on the contributory value of the department store improvements as available for reconfiguration to mixed use retail and office.

On the key question of highest and best use, the Board accepted Sears' view that the highest and best use was the current use in the current configuration of the department store, reflecting significant economic obsolescence of the unused space, and rejected the Assessor's view that the highest and best use was for demolition of existing improvements, and redevelopment and reconfiguration with two office towers, three levels of underground parking and a retail building that extends underground. As a result, the Board relied on an income approach in which no rental income was attributed to the upper 3 levels of the department store.

Notably, the Board rejected the Assessor's $94.50 psf buildable land value in favour of a rate of $62.73 psf buildable.

The Board's decision confirms the importance of founding highest and best use on reasonably probable, rather than speculative, scenarios and confirms the usefulness of the conventional income approach even where significant economic obsolescence exists.

The factual and legal underpinning of the Board's conclusions on highest and best and its conclusions on apportionment of income value between land and improvements is set out in the following passages from the decision:

> *"[97] The approach on the roll assumes demolition of the department store improvements at no cost, and without due consideration for the feasibility and cost of construction. Furthermore, it ignores the integrated nature of the entirety of Block 52 and Pacific Centre. This was previously summarized under Highest and Best Use, Scenario 5.*
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> *[98] At the end of the day, the site is built out to full as-of-right density, excepting a small amount of density that the City will permit to be placed on any of the three legal blocks comprising Pacific Centre.* ***Even though there may be some significant obsolescence, this does not mean that the existing improvements can simply be wished away for a higher revenue draw without due consideration for the time and costs involved as well as the feasibility of a redevelopment or reconfiguration scheme.***
> ...
>
> *[112] The highest and best use analysis is a critical component of any appraisal.* ***In this case we found that the Assessor did not conduct a proper highest and best use analysis. The result was that the Assessor concluded a value for the subject not based on market evidence but rather on speculation, specifically on a conceptual exercise of a potential use that is not being viably contemplated by the owner, the lessee, or any other market participant. While any number of conceptual ideas may be considered from time to time by prudent owners seeking to maximize their property values, they are not relevant to market value until such time that they are deemed feasible by the market and they influence how the values of such properties are determined by***

knowledgeable purchasers and sellers. The Assessor should not speculate or lead the market. Rather, it is his or her job to reflect the market and apply proper appraisal principles in roll valuation. *Due to the annual nature of roll values, the Assessor has the opportunity to revalue the property each year, and thus has the ability to reflect development potential in the future, once such potential becomes probable.*

[113] We turned our minds to the leading case that deals with speculation versus a likely probability in regards to the highest and best use of a property.

[114] In Petro-Canada Inc. (Gulf Canada Ltd) v. Assessor of Area 12 – Coquitlam (1991) SC 321 (B.C.S.C) the Court determined the Board must value lands based on their highest and best use and when there are questions regarding the probability of reaching that highest and best use the acceptable lowest threshold is something higher than a 50% probability.

[115] We found the highest and best use for Block 52 in general to be its current use and for the portion in dispute we found that, although there is economic obsolescence, it is operating at its highest and best use. For these reasons Petro-Canada does not apply in reaching a decision regarding either value or equity in these appeals.

[116] However, Petro-Canada is important when considering assessments alleged to be in their foundation more speculative than probable. Petro-Canada says that it would not be speculative to consider a change in use if the probability for that change is greater than 50%. There must be some measurable difference between the two situations or some market derived evidence pointing to a probability higher than the threshold before the Assessor embarks on setting an assessment not founded on market realities.

[117] ***A telling point in Petro-Canada, where part of the dispute revolved around whether industrial lands ought to be valued as residential, was the fact that the owner commissioned an appraisal that suggested redeveloping some of the lands as residential. The same facts do not exist in this dispute. In this case, the Assessor valued the department store improvements based on the value of the underlying land and then attempted to support this as a valuation methodology that was more conjecture and speculative than soundly market based****.*

[118] We have found that the highest and best use of Block 52 is its current mixed use that includes the existing department store improvements. The value of Block 52 is summarized below. The value includes deductions for the cost to cure tenant termination/relocation for the transit station (a previously agreed upon amount that was not contested during the hearing) and the asbestos work in the TD tower, which parties previously agreed on. It also reflects a deduction for asbestos remediation work for the department store premises as accepted above.

Income Value of Block 52 (excl. volumetric parcels)		*$*	*237,508,658*
less	*cost to cure tenant termination/relocation - transit station*	*-$*	*3,936,143*
less	*asbestos work department store*	*-$*	*3,459,600*
less	*asbestos work in TD Tower*	*-$*	*2,477,518*
Adjusted Value of Block 52 (excl. volumetric parcels)		*$*	*227,635,397*

[119] We find the actual value of all components of Block 52 is $227,635,000 (rounded)

[120] Following the Assessor's assessment methodology, the total value is split between land and improvements using a market value applied to the land with the residual then attributable to the improvements. In accordance with our findings, the land portion is valued at $62.73 per sq.ft. buildable applied to the site area of 130,000 sq.ft. at an F.S.R. of 9.47.

Board Exempts Above-Ground Stainless Steel Effluent Tanks as Effluent Lagoons

West Fraser Mills Ltd v. Area 24 *(2010 PAABBC 20102119)*

On December 8, 2010 the Board released its decision in *West Fraser Mills Ltd. v. Assessor of Area #24 - Cariboo* (PAABBC 2009-24-00011). The effect of the decision was to exempt from property taxes two large stainless steel above-ground tanks used for secondary effluent treatment at West Fraser Mills' QRP mill as "effluent lagoons" under s.220(1)(q) of the *Community Charter*, which exempts specific industrial improvements from taxes.

In general terms, the tax exemption of pollution abatement systems as a whole was abolished in 1996, with only those historically-exempt systems that continue to operate receiving current-year exemptions. Section 220(1)(q) of the *Community Charter* provides an exception to the abolishment of pollution abatement exemptions for systems as a whole, providing exemptions for, among other things, "effluent lagoons" and "effluent reservoirs" installed since 1996.

West Fraser installed the MBBR tanks as a modern equivalent to the aerated stabilization basin (ASB) at the mill, which was itself already exempt as an "effluent lagoon". The Board found that since the MBBR tanks are simply modern improvements on ASB technology, performing the same function but on a smaller land footprint and at a fraction of the cost, the MBBR tanks are likewise exempt under s.220(1)(q) of the *Community Charter*.

Court of Appeal Confirms that Redevelopment Highest and Best Use Value Cannot Be Less Than Present Use Value

Assessor of Area #10 – North Fraser v. Sherkat *2011 BCCA 16*

The issue in this case was whether the Board erred in its analysis of highest and best use by accepting a value for the property as though held for redevelopment and zoning which, when

remediation costs were deducted, led to a value less than the income approach value for the property in its actual present use.

The Chambers Judge found that the Board made no such error and was correct in its highest and best use and valuation analysis. The Court of Appeal overturned the Judge's and the Board's decision, making the following observation:

> *"[16] The Board was obliged to value the property at its highest and best use. Once remediation costs were deducted from the value of 221 Twelfth Street, the proposition underpinning its assessment for development no longer complied with the principle of the highest and best use in valuation. There was some evidence before the Board to indicate an income approach valuing the property in its present use might provide the highest and best use. An assessment of its strength or the context in which it was presented are matters for the Board to assess.*
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> *[17] I would accordingly allow the appeal with respect to the first two questions, substitute affirmative answers for them, and remit the valuation of the property at 221 Twelfth Street to the Board for further reconsideration."*

Status of Catalyst Paper Corporation Challenge of Tax Rate Bylaws

Catalyst Paper Corporation v. The Corporation of the District of North Cowichan, October 16, 2009, 2009 BCSC 1420
Catalyst Paper Corporation v. City of Port Alberni, December 21, 2009, BCSC 1751
Catalyst Paper Corporation v. City of Campbell River, December 21, 2009, BCSC 1752
Catalyst Paper Corporation v. City of Powell River, December 21, 2009, BCSC 1753

Background

Property taxes in B.C. municipalities break down into municipal taxes (generally about 60% to 70% of the tax bill), and provincial (predominantly school) taxes (the balance of the tax bill).

The *Community Charter* allows municipal councils to set individual tax rates for each class of property (including for example Class 1 – Residential, Class 2 – Utility, Class 5 – Light Industry, and Class 6 – Major Industry) based on the budgeted amount of tax to be taken from each property class, divided by the total taxable value within each class in the municipality. Although Cabinet has the ability to intervene and fix municipal tax rates, it rarely does so, presumably preferring to defer to municipal councils to exercise their taxing powers in a reasonable manner.

Over the years, the very high ratios of municipal Class 4 rates to Class 1 rates has been the topic of much debate, the sense being that municipal councils have unjustly downloaded the preponderance of the tax burden on Major Industry (or for that matter, any of the other non-residential classes) simply because they can.

In 2009, Catalyst Paper Corporation, which has traditionally operated mills in four coastal communities – Powell River, North Cowichan, Port Alberni and Campbell River, took up a court challenge of the municipal tax rates set by bylaw on Class 4 properties in each of these four municipalities.

Catalyst filed petitions for judicial review of the municipal tax rate bylaws setting the Class 4 tax rates on Catalyst's mills, claiming that the rates were illegal.

The petitions were argued together, and the Court issued reasons first on the North Cowichan case, followed by the other three cases.

BC Supreme Court Decisions

In the result, the Court dismissed all four petitions so far as Catalyst was seeking to strike down the municipal tax rate bylaws relating to Class 4 taxes. In the Campbell River case, the Court struck down the regional district levy as creating a ratio between Class 1 and Class 4 rates of 10.28 : 1, greater than the maximum ration of 3.4:1 permitted under s.4 of the *Municipal Tax Regulation*, B.C. Reg 426/2003.

Since the Court's reasoning in the four petitions is similar, I focus here on the analysis in the first of the four decisions, involving North Cowichan.

BC Supreme Court Decision Regarding North Cowichan Tax Rate Challenge

Catalyst said that in North Cowichan, it had paid about $6.50 in tax for every $1.00 of municipal services received. Moreover, while Class 4 properties made up on 3.7% of the total tax base, their taxes made up 37% of the municipal tax load. By comparison, residential properties made up almost 90% of the tax base but paid only 40% of the tax load. Referring to the 2004 Bish study "Property Taxes on Business and Industrial Property in B.C.", Catalyst noted that major industry taxes in some B.C. communities were the highest in North America. The increasing gap between Class 1 – Residential and Class 4 – Major Industry tax rates was explored further in a 2009 report prepared for the Vancouver Island Economic Alliance, which noted that between 1992 and 2007:

- The total assessed value in Class 1 Residential increased by 271% while Class 4 decreased by 26%
- The weighted average municipal tax rates for Class 1 decreased by 38%, while equivalent rates for Class 4 increased by 21%, and
- The weighted average ratio of Class 4 to Class 1 municipal tax rates nearly doubled from 7.7% to 14.9%

Following years of attempts to persuade municipal councils and Provincial politicians to shift the balance to alleviate their taxes, Catalyst commissioned a series of reports from consultants

(including our past President Norm Stickleman) studying the relationship between Class 4 rates and the cost of municipal services consumed by Catalyst's mills, and proposing that a sustainable level of taxation would result in relative proportionality between net consumption and taxation, with each class paying taxes roughly equivalent to the net value of services they consume. The Model put forward by the reports concluded that Catalyst paid about $1 million in services in 2008, and Catalyst proposed to pay $1.5 million of the $6.8 million Class 4 taxes assessed to its North Cowichan property in 2009, arguing that the 2009 tax rate bylaw ought to be set aside as unreasonable given that the tax rates bore no relationship to the cost of relative consumption of services.

Catalyst did not claim that North Cowichan's bylaw was *ultra vires* its discretion to set rates, but that it was unreasonable. The Court observed that this analysis was correct – although the Province used s.199 of the Community Charter to regulate the municipal discretion to set tax rates, this in no way fetters municipal discretion to set rates. The Court decided that to succeed, Catalyst must meet the standard of review of "reasonableness". Catalyst said the bylaw was unreasonable both because the decision making process of council underlying the bylaw failed to explain any rational basis for the Class 4 rates, and because those rates were so excessive as to be unreasonable.

As to the first argument, the Court found that council must explain some of the factors and considerations underlying its tax rate bylaw, so that the Court can review that decision if necessary, and there must be some evidence to suggest that the rate setting is policy based. The Court found that the statutory scheme, requiring open council meetings, public consultation before adoption of the financial plan and public access to council meeting minutes, ensured transparency in the process.

On the merits, Catalyst drew attention to various provisions of the *Community Charter* and *Local Government Act* which it said focus on the consumption of services as an important factor in the exercise of tax rate setting powers. The Court however found that "a single-minded reliance on a consumption model is inconsistent with the nature of the decision making exercise contemplated by s.165 and s.197 of the *Community Charter*". The Court was not persuaded that the empirical tax Model proposed by Catalyst satisfied the task required by the Act, commenting as follows:

> *"[89]* ***Furthermore, apart from lacking any jurisdictional basis, a single-minded reliance on a consumption model is inconsistent with the nature of the decision making exercise contemplated by s. 165 and s. 197 of the Community Charter. The significant ostensible benefit of the Model, repeatedly referred to by Catalyst in its affidavits and its submissions, is that it provides Council with an "empirical basis" or a "concrete assessment" for its decision making. There is an apparent effort to conflate "empirical" with "rational". The petitioner's emphasis on the Model seeks to ascribe a precision and to impose a rigor that is not consonant with the nature of decision making under s. 197. A review of s. 165 and s. 197, as well as a consideration of the actual exercise undertaken by Council in adopting a financial plan and the taxing bylaw that is to give effect to that plan, reveals that the exercise is not, at core, empirical. Instead it reflects the application***

of judgment based on a knowledge of the community, the community's needs, the economic challenges it faces, the adequacy of the services it provides, and myriad other considerations. It involves a weighing of multiple competing interests. Though it is an exercise that is not amenable to precise calculations or "concrete assessments", it remains nevertheless a rational exercise*.*

[90] In a similar vein, the application of a consumption model contemplates a linear, or roughly linear, relationship with property taxes. The more services the members of a property class use, the higher the taxes of the class. This formulation is, however, at odds with the entitlement of a municipality to discriminate in fixing property tax rates. The very essence of a right to discriminate is that Council can deviate, albeit for relevant purposes, from such a linear relationship or from the need to treat members of different classes in the same way.

[91] The fact that the adoption of the Bylaw reflects the agreement of several members of Council is also significant. These individuals are likely to weigh the benefits and factors relevant to the Bylaw differently. The likely differences in their respective opinions, while leading to consensus on the Bylaw, also belies both the value and tenability of relying on a model that has a single focus – that of consumption – to establish the property tax rates for different property classes within a municipality.

[92] Finally, imposing a requirement to establish property tax rates with reference to the consumption patterns of different property classes gives rise to various practical problems. The Model generated by Catalyst is a serious piece of work. It would have been time consuming and expensive to prepare. Elevating the importance of consumption and the relevance of such models would require municipalities, in the absence of an explicit statutory requirement, to undertake such studies. In addition, though the Model appears to give rise to a credible analysis, I expect that different experts undertaking a similar exercise could arrive at somewhat different results. This, in turn, has the prospect of giving rise to future challenges that would be based on the accuracy or validity of the model relied on by Council.

*[93] **Ultimately, in my view, the actual levels of municipal services consumed by a given class is a potentially relevant factor which can be considered by Council in fixing property tax rates. In instances where such information actually exists, Council is likely required to consider the information. The weight or significance given to such consumption data is a matter for Council alone. It is up to Council to fit and weigh such information, together with other categories of relevant information, into its decision-making matrix in the way that it considers appropriate**."*

The upshot is that while considering the relative cost of services consumed by a municipal taxpayer a relevant factor, and one that, if available, probably must be taken into consideration, the Court was not prepared to bless a tax model based entirely on this factor.

In finding that the tax rate bylaw was not unreasonable, the Court said this:

> *"[108] Based on the foregoing information it is clear that Council had before it and considered many diverse factors relevant to the Bylaw and in particular to Class 4 tax rates. I do not believe it can be said that the types of information or the multiple competing objectives before Council were not intelligible, transparent, rational or that they were not properly relevant to the task faced by Council in exercising its power under s. 197 of the Community Charter. To the extent that Catalyst complains that the respondent has not explained how it weighed or balanced both the information and the competing objectives before it, or how Class 4 tax rates were established, I do not believe this is correct.* ***This is not a case where the respondent has been "sphinx like" in its position. Its letter of May 11, 2009 provides some insight into the considerations and reasoning that underlie the Bylaw.*** *Furthermore, the obligations I've referred to which rest on the respondent to ensure that there is information in the record before the court from which the court can glean the factors Council considered in its deliberations has been satisfied. Council had a great deal of relevant information available to it, all of which was rationally connected to the exercise it faced. Finally, and most importantly, the inherent nature of Council's decision making exercise under s. 197 in relation to the Bylaw is one in which there are multiple competing objectives and policies, where the respective merits of these competing objectives are not easily quantified or measured and in respect of which no precise expression, which would capture the disparate views of Council, can be expected*."

Nor was the Court persuaded, despite evidence that the Class 4 rates under the bylaw were outside the range of rates found elsewhere, that the rates were outside the range of possible and acceptable outcomes:

> *"[109] Catalyst referred to much data to establish that historical Class 4 tax rates in North Cowichan as well as the Class 4 tax rates under the Bylaw are outside of the range of such tax rates elsewhere. The ratio of Class 4 to Class 1 rates in North Cowichan was the highest in the province in 2008. It remains amongst the highest today. Residential tax rates, in an affluent community, remain the lowest on Vancouver Island today. They are likely the lowest amongst North Cowichan's "peer group" municipalities in the province. Furthermore, property tax rates, as a percentage of cost of production, are markedly higher in British Columbia than elsewhere in Western Canada or in Ontario. Class 4 municipal tax rates in British Columbia are also markedly higher than in other jurisdictions.*
>
> *[110] I do not believe any such evidence advances Catalyst in this proceeding. Some of the evidence goes to broad structural difficulties associated with major industry doing business in British Columbia or in Canada as opposed to in other jurisdictions. These are matters properly addressed by different levels of government and not by the courts.*

[111] To the extent that such evidence compares Class 4 tax rates under the Bylaw with such rates in other municipalities, the language of the courts in Kruse, Wedensbury and Lehndorff United Properties is directly relevant. The fact that the Class 4 to Class 1 tax rate ratio established by the Bylaw when compared to other municipalities is at the far end of the spectrum does not mean the result is not a possible or acceptable outcome. In any instance where a number of decision makers address the same question there will be a range of outcomes. The fact that each of Mr. Frame, the Tax Restructuring Committee which included the Mayor, and Council came to three different outcomes for 2009 Class 4 tax rates reflects this. There will always be outliers in the data. Such outliers are not, of necessity or even on a persuasive basis, unacceptable outcomes.

[112] All of this statistical information was before Council when it made its decision. The comments of Hall J. in O'Flanagan are apposite:

> *[23] As to the argument that the Bylaw should be seen as encouraging development rather than taxing parcels that can or will benefit from the service, I consider that submission as being beyond the purview of a reviewing court. The ultimate effects of a bylaw are proper considerations for a municipal council concerned with policy issues. I fail to see how a court could properly address such concerns. I would not accede to this argument.*

[113] I am of the view that the Bylaw is rationally supported and that the effects or outcomes it creates are within the range of permissible outcomes. Accordingly the Bylaw is reasonable."

Catalyst also argued that, despite the legislation permitting discrimination between classes of property, the Class 4 tax rates were so disparate as to be inequitable. The Court did not accept this novel characterization of equity, observing that:

"[119] While Catalyst accepts that the respondent has the jurisdiction to impose different tax rates on different property classes, it says the differences must be rational and equitable. Here it say that the "massive disparity between classes demonstrates that the tax rates set under the Bylaw are outside of the equitable range of values". In emphasizing the importance of rationality and "an equitable range of values", and in again relying on evidence of comparable rates in other municipalities in British Columbia or in other jurisdictions, Catalyst does no more than restate, in modestly modified terms, its submissions in relation to the reasonableness of the Bylaw.

[120] For the reasons I have expressed, I do not believe the Bylaw is inequitable either because it is irrational or because the Class 4 rates it generates are outside of an acceptable range of values."

In the result, the Court was simply loath to interfere with North Cowichan's broad discretion to set tax rates as it sees fit. The Court was not unsympathetic, however, to Catalyst's plight, and the following passage reflects the Court's acknowledgment of the problem with excessive Class 4 rates, and the need for municipalities to continue to address it:

> *"[114] **This is not a case where an irritated corporate taxpayer rushes to court to challenge its tax rates. Catalyst has been trying for more than a half decade to address a structural issue which is widely recognized to be a problem. The third party studies I have referred to as well as the materials filed by the respondent recognize that existing Class 4 tax rates in North Cowichan are at undesirable and unsustainable levels**. The work of the Tax Restructuring Committee, the various reports of Mr. Frame, and the Financial Planning Bylaw all recognized that existing Class 4 tax rates are significantly higher than they should be. Mr. Frame comments "they have gotten off track". The expressly acknowledged corollary of this is that Class 1 residential rates are lower than they should be. Leaving aside the technical issue of whether such comments can properly be considered to reflect the views of the respondent, such acknowledgements are not admissions that the bylaws are legally "unreasonable". **Municipal recognition that Class 4 tax rates are "too high" is an acknowledgement that Council accepts the importance of reducing those rates. The pace at which and extent to which that reduction is to take place is a matter that lies within Council's discretion. The wisdom of that decision is a matter that a court will not interfere with**."*

BC Court of Appeal Decision

On April 22, 2010, the B.C. Court of Appeal issued a decision upholding the B.C. Supreme Court's dismissal of Catalyst's North Cowichan petition, principally on the basis that Catalyst must find relief "in the ballot box", not through a court challenge of the broad discretion conferred on municipal councils in setting tax rates, at least in the circumstances at hand.

The core of the Court of Appeal's analysis is set out in the following passages from its decision:

> *"[37] It is a central principle of democratic government that elected decision-makers must be given the highest degree of deference by courts of law, provided those decision-makers remain within constitutional and statutory boundaries. As seen earlier, this deference was famously enunciated in Wednesbury, supra, where Lord Greene observed that the Court's task when confronted with a municipal decision is not to decide what the Court thinks is reasonable, but to "decide whether what is prima facie within the local authority is a condition which no reasonable authority, acting within the four corners of their jurisdiction could have decided to impose." (At 233.) I do not read Dunsmuir as departing from this principle where policy-laden or legislative decisions are concerned. While it may be true that 'something is either rational or is not', I suggest that a wider range of decisions will be seen as reasonable by a court than might appear to be objectively justifiable according to any particular economic theory or empirical analysis.*

[38] So it is in this case. The District of Cowichan, having considered inter alia Catalyst's Consumption Sustainability Model and the report of its consultants, also considered the interests of residential taxpayers and declined to make a dramatic change from past practice. The result was that the District maintained much of the imbalance that led to these proceedings, a decision which many of the property owners no doubt find eminently "reasonable". As the chambers judge recognized, Catalyst will invariably find the suggestion that the solution lies 'in the ballot box' to be small comfort. Convincing other taxpayers to accept a greater share of the tax burden seems improbable, if not impossible. Nonetheless, Catalyst's hope does lie in the political process: if it is important to the District to retain Catalyst as an employer and a taxpayer, the "collective perception of self-interest" of municipal (or provincial) officials will lead to a recognition that significant accommodation is necessary. That, however, would be a policy decision for elected officials rather than a decision for a court of law. Whether Bylaw No. 3385 was "rational" in terms of Catalyst's sustainability model, I do not believe it could be said that it was a bylaw that no reasonable authority, acting within the four corners of its jurisdiction, could have decided to impose, or that lay outside a "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[39] Seeing no error in the conclusion of the court below, I would dismiss the appeal, with thanks to counsel for their able submissions.

Leave Granted to Supreme Court of Canada

On October 28, 2010, the Supreme Court of Canada granted leave to Catalyst to appeal from the B.C. Court of Appeal's dismissal of its petition.

Other Tax Rate Challenges

TimberWest Forest Corp et al v. City of Campbell River, December 31, 2009, 2009 BCSC 1804

TimberWest owns about 7,000 acres of managed forest lands in the City of Campbell River. About 3,200 of these are within the provincial Agricultural Land Reserve and subject to the Agricultural Land Commission.

In 2004 Campbell River adopted an action plan designed to reduce the share of its municipal taxes taken from major industrial property. This meant shifting taxes to other classes. In 2009 it faced a $4.4 million budget shortfall which it dealt with in party through reduced expenses and in part through a property tax increase applicable to all other classes but Class 4. The May 12, 2009 tax rate bylaw increased the rate for managed forest land applicable to TimberWest as the sole managed forest land owner in the City from $16.87 per $1,000 of assessed value, to $178.24 per $1,000. TimberWest was not told about this until April, 2009. It would have had to apply to remove its property from the class by September 30, 2008 to avoid the tax increase.

Campbell River said that TimberWest was estopped from challenging the tax rate bylaw based on an agreement between the City and TimberWest. The Court found that the City's notes of a crucial meeting with TimberWest in fact showed the contrary – that TimberWest reserved its right to challenge the increase if it could not be resolved through other means, and threw out this defence.

The Court found that the correct standard of review to determine if the City acted within its authority in passing the bylaw was correctness, and to determine if the bylaw ought to be otherwise set aside was reasonableness (as had the Court in the Catalyst decision).
The Court then found that the City's conduct of council meetings dealing with the question of the tax increase behind closed doors violated s.89 of the *Community Charter*, undermining the integrity of the process and lessening the amount of deference to be given Council in its final decisions based on those meetings.

On the merits, the Court found that the City's tax increase was implemented for the improper purpose of attempting to cause TimberWest to withdraw at least some of its land from managed forest class and convert them to a use desired by the City, or in other words, to use the tax increase to force TimberWest to rezone its lands. This was also contrary to the intent of the *Private Managed Forest Land Act* which, together with the *Assessment Act* and *Assessment Act Regulation* intended to encourage managed forest land owners to practice sustainable forestry in exchange for reduced tax rates. Campbell River argued that so long as the attempt to encourage TimberWest to remove lands from managed forest class was not the thrust of the bylaw, but merely a corollary intention, it should not be declared invalid. The Court however found that there was no other purpose in raising the taxes to an uneconomic level than to force TimberWest to remove the lands and convert them to a non-forestry use, which was an improper purpose at law, and outside the City's powers. The Court therefore found the bylaw to be *ultra vires* the City's powers under the *Community Charter* and declared it illegal.

Applying the Court's reasoning in *Catalyst v. North Cowichan*, the Court also agreed with TimberWest that by setting the managed forest rate at 37.9 times the residential rate, the tax bylaw violated the maximum 3:1 ratio prescribed by the *Municipal Tax Regulation*, and declared the portion of the bylaw setting tax rates for regional district purposes *ultra vires*. Having decided to strike the bylaws down on these grounds, the Court declined to consider if the bylaws were also unreasonable.

In the result, the Court quashed the portions of the tax rate bylaws setting rates for managed forest lands for municipal and regional district levies, and sent them back to Campbell River council for reconsideration and resetting of managed forest land rates.

Catalyst Paper Corporation v. City of Campbell River, 2011 BCSC 38

Here, Catalyst challenged the tax rates imposed by the City for 911, library and pools and recreation services.

Catalyst said that these rates should be based on a ratio of 3.4:1 (Class 4 – Major Industry to

Class 1 Residential) as prescribed in the *Municipal Tax Regulation*, B.C. Reg. 425/2003, instead of the 8.679:1 ratio prescribed by the City, and that the 911 and pool and recreation service rates should be levied on the net taxable value, not the assessable value, of improvements.

Campbell River said that it was not constrained to set the rates as Catalyst suggested, and said that the Court's finding that rates should be levied on net taxable value in an earlier Catalyst petition (an appeal of which to the Court of Appeal was subsequently abandoned) did not bind the Judge in this case to make the same finding.

The Court agreed with Campbell River and dismissed Catalyst's petition with respect to all of the impugned tax rates, finding that Campbell River was correct in setting the rates based on the higher ratio and levying the taxes on assessed rather than net taxable values. The Court found it appropriate to depart from the Court's finding in the companion *Catalyst* decision with respect to the tax base on which the rates should be levied, largely on the basis that the arguments on this point were much more refined than they had been in the previous case.

This concludes my legal update and case study of the Catalyst tax rate challenge for this Education Seminar.

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