Western Canada Legal Updates: British Columbia

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Hope in the New Decade: Emerging Trends and Issues

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1. INTRODUCTION

I am grateful once again to have the opportunity to update the law in British Columbia for attendees of this Seminar. I start with an overview of legislative changes then review several topical taxation issues addressed by our courts in 2009 and to date in 2010.

2. LEGISLATIVE CHANGES

(a) End of "Dual" Roll

British Columbia is back to its normal annual roll after the 2009 "freeze" which led to a great deal of confusion, administrative upheaval and backlash, without obviously tangible results. This means that value for 2010 taxes is once again established at July 1, 2009 as if the property were in its physical state and condition and zoned as of October 31, 2009.

(b) School Tax Credit for Major and Light Industry

The school tax credit introduced by Bill 45 in 2009 continues for 2010. The credit of 50% of school taxes otherwise payable applies to properties in Class 4 – Major Industry and Class 5 – Light Industry.

This continues to be a factor to be taken into consideration when deciding whether it is worthwhile reclassifying Class 4 properties to Class 5 or Class 6 for lower tax rates.

3. LEGAL DEVELOPMENTS

(i) Standard of Review Now "Reasonableness" on Statutory Interpretation Issues
***Weyerhaeuser Company Ltd. v. Assessor of Area # 04 – Nanaimo Cowichan* 2010 BCCA 46**

On February 2, 2010 the Court of Appeal released its reasons in *Weyerhaeuser*. The issue in the case was whether Weyerhaeuser's Wynd and Sea development (former forest lands on the coast near Ucluelet under development as a mixed-use golf course / multi-family / hotel resort) was entitled to split classification between Class 1 – Residential and Class 6 – Business & Other. The Board had denied split class. The Court upheld this decision.

On Weyerhaeuser's appeal, the Assessor characterized Weyerhaeuser's stated case questions as questions of mixed law and fact requiring application of the "reasonableness" standard of review, while Weyerhaeuser characterized the questions, involving interpretation of a zoning bylaw and the Classification Regulation, as questions of pure law requiring the "correctness" standard of review.

The Court of Appeal, in a surprising turn of events, came up with a solution neither party had sought, by declaring the standard of review for the Board on all questions of law involving interpretation of the *Assessment Act* (other than purely jurisdictional questions, of which there are very few), as "reasonableness", and dismissing Weyerhaeuser's appeal on this basis.

This marked an fundamental departure in British Columbia from the former standard of review on questions of legal interpretation of "correctness" established by the B.C. Supreme Court in the, until then, leading case *Vancouver Pile Driving Ltd. v. Assessor of Area #08 – Vancouver Sea to Sky Region*, 2008 BCSC 810. The Court of Appeal apparently felt that it must implement the policy of increasing deference to administrative tribunals, even on statutory interpretation issues, articulated by the latest Supreme Court of Canada decision in *Nolan v. Kerry (Canada) Inc*., 2009 SCC 39 to apply the analysis established by the Court in *Dunsmuir v. New Brunswick*, 2008 SCC 9.

The Court's reasoning went as follows:

> [30] In *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39 (CanLII), 2009 SCC 39, 309 D.L.R. (4th) 513, the Court further explained the application of the *Dunsmuir* test when analyzing a tribunal's interpretation of its own constating statute. The court explained that the analysis must balance two considerations. First, that deference is usually owed to a tribunal when it is interpreting its own statute, or statutes closely connected to its enabling statute with which it has particular familiarity (*Nolan*, para. 31). Second, that tribunals must be correct when interpreting the scope of their jurisdiction (*Nolan*, para. 32).
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> [31] When considering these two factors, courts "should be cautious" when considering whether a tribunal's interpretation of its own statute is a jurisdictional issue. **This means that "courts should usually defer when the tribunal is interpreting its own statute and will only exceptionally apply a correctness standard when interpretation of that statute raises a broad question of the tribunal's authority**" (*Nolan*, para. 34)
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> …
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> [57] **I do not disagree with the appellant's argument that these cases are all distinguishable from the case at bar. But the reasonableness standard of review requires a reviewing court to defer to the tribunal on questions of interpretation of its own statute particularly where the tribunal is one whose decision-making involves its own expertise. This is one of those cases in which, as noted in *Dunsmuir*, at para. 47, "the decision falls within a range of possible outcomes which are defensible in respect of the facts and law".** Here the point of departure between the decision of the tribunal and the appellant's argument is the degree of certainty required by s. 1(c) and whether the interpretation of the language of the appendices to the rezoning by-law could be said to be more conceptual than legally certain. **The Board's interpretation is not one that could be said to be indefensible, or outside a range of reasonable possible outcomes. Rather I would say it is one on which reasonably informed adjudicators could disagree.** It follows that I would dismiss the appeal on this point.

The decision has very serious implications for stated cases in B.C. The "limited exceptions" of pure jurisdictional issues to which the correctness standard now applies on a stated case are few

and far between. I will discuss one of those (the recent B.C. Supreme Court decision on a procedural question in the *Lehigh* case) momentarily.

As to "non-jurisdictional" interpretation issues, which will make up most of the stated cases normally taken from Board decisions (eg. interpretation of valuation, classification and exemption statutes and regulations), the standard of reasonableness now applies. The practical effect is that, even where the reviewing Judge disagrees with the Board's interpretation, the Court must not interfere so long as the Board's interpretation is "not indefensible". One is left to wonder whether this is a step backwards in terms of justice for British Columbia taxpayers, who have (at the risk of sounding like Chicken Little), just lost an important right of appeal from Board decisions.

Like it or not, this is now the law in British Columbia either until revisited by a 5-Judge panel of the Court of Appeal, or until the Legislature amends the Assessment Act to make *Administrative Tribunals Act* s.59 part of the Board's statute (and making the standard of review on questions of interpretation "correctness").

Whether or not, in the meantime, the decision reduces the number of stated case appeals taken forward from Board decisions, is anybody's guess.

(ii) Exception to Weyerhauser "Reasonableness" Standard of Review
***Assessor of Area #1 – Capital v. Lehigh Portland Cement Limited et al*, 2010 BCSC 193**

This case involves appeals on the value and classification of Lehigh's former gravel pit in Colwood, B.C. The 450 acre property, under long-term mixed-use development, has been for sale for several years. The City and Assessor demanded production from Lehigh of confidential offers. Lehigh resisted, and the Board ruled that it could not order their production because its power to do so under the *Administrative Tribunals Act* ("ATA") was confined only to documents that are relevant, necessary and appropriate to the appeal. The Board ruled the documents weren't necessary (unaccepted offers are not critical to appraising a property's value), and declined to order their production.

The Board agreed to refer the question of whether it had misinterpreted its power to order document production to the B.C. Supreme Court under s. 64 of the *Assessment Act*. The Court found that the Board had indeed misinterpreted its powers by requiring that documents be "necessary", and remitted the decision to the Board for reconsideration. The case was argued the day after release of the Court of Appeal decision in *Weyerhaeuser*, raising the question of standard of review of the Board's interpretation of the Act and the ATA. The Court found that it should apply the standard of correctness, not reasonableness, for 2 reasons:
First, the Court drew a distinction between preliminary references on questions of law brought under s.64 of the Act, and appeals from final Board orders brought under s.65 of the Act. This meant that the Court was not bound by the Weyerhaeuser analysis, and that the Court must perform its own analysis of standard of review on the *Dunsmuir* criteria.

On the application of those criteria, the Court found that the Board has no particular expertise in the interpretation of the ATA, which applies generally to all B.C. tribunals, and the standard of review for questions involving Board powers under the ATA is correctness.

In light of *Lehigh*, there is therefore at least once exception to the "reasonableness" standard of review set by Weyerhaeuser – where the question involves the Board's powers set by the ATA. This is, however, a very limited exception, and unlikely to have much of an impact on the effectiveness of the stated case appeal remedy going forward, which has been very much dampened by the *Weyerhaeuser* decision.

(iii) New Test for When "Land is Used in Conjunction With the Operation of Industrial Improvements"

***Tolko v. Area #19 - Kelowna* (2010 PAABBC 20091989)**

In this case, Tolko challenged the classification of its log sorts, situated on the opposite side of Okanagan Lake from its sawmill, as Class 4 – Major Industry.
Tolko and the Assessor disagreed on the relevant legal test to be applied to determine if the log sort lands were "used in conjunction with the operation of industrial improvements" (and therefore Class 4).

The Assessor sought to apply the test from the line of authorities including *Quinsam Coal* (where the question was whether a coal loadout was "part of" the mine) and *Catalyst Paper* (where the question was whether a hydroelectric dam was "part of" the paper mill), while Tolko said that these authorities relate to the different question of whether improvements are part of a plant, and do not govern whether land is used in conjunction with the operation of industrial improvements.

Tolko said that the log sorts were not "land used in conjunction with the operation of industrial improvements" because they were physically distant from the sawmill and not part of the sawmill site or operation and that, while the sawmill used logs from the log sort, it also used logs from other sources. Tolko said the log sorts were not different than any lands situated far from a manufacturing facility, and used to marshal raw materials shipped to that manufacturing facility for use in the production process. Tolko instead sought Class 5 – Light Industry classification because the log sorts were used to process the logs for shipment to the sawmill.

Rejecting the "improvement as a part of a plant" line of authorities as irrelevant, and therefore rejecting the "physical, functional and operational integration" test from those authorities as illustrative, the Board found that, on a plain reading of the Regulation, the phrase "land used in conjunction with the operation of industrial improvements" was satisfied simply because the sawmill used logs from the log sort.

The Board declined to temper the application of this criteria by reference to the practical reality of relative dependency between the land and the industrial facility:

"… the land only needs to be used together with the operation of an industrial improvement for it to come within the provisions of section 4(a) of the Regulation, which the subject lands do."

In other words, the Board has established a test for classification of lands "near" an industrial facility which simply says that, so long as it can be shown that those lands are used for a purpose that facilitates the operation of a "nearby" industrial facility (ostensibly, a vastly broad category of possible types of land), those lands attract Class 4.

With respect, one is left to wonder, in light of this rather spare test, where the line will in future be drawn between commercial properties that serve neighbouring industries, and satellite industrial lands.

(iv) No Absolute Right to Oral Hearing Before Board

James T. Allard et al v. Assessor of Area #10 – North Fraser Region et al, 2009 BCSC 792

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**.

The Board later reminded the taxpayer of its obligation to renew his request for an oral hearing before the hearing panel. The Court found that there was no follow up to this, and the Board member assigned to the hearing read the written submissions received from the parties and issued a decision. The taxpayer appealed by stated case, alleging that he had been unfairly denied the right to cross-examination.

In dismissing the appeal, the Court said this:

> [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.

The Board's desire for efficiency must be balance against the right to a full and effective hearing. This decision underscores the importance of making it clear from the outset of appeal management why (if this is the case) an oral hearing is important to fully deal with evidentiary issues, and the consequences of not doing so.

(v) B.C. "Tax Revolt" – Catalyst and TimberWest Decisions

Many of us read the headline "*Forest Companies Gain Legal Traction for Tax Revolt*", in the Globe and Mail on January 2, 2010. This was the top story in the wake of the TimberWest decision quashing Campbell River's 2009 managed forest land tax rate bylaw and sending it back for reconsideration by council.

While catchy, the headline was, frankly, misleading. Catalyst Paper Corporation filed 4 petitions to quash 2009 tax rate bylaws in Campbell River, Powell River, Port Alberni and North Cowichan, where its mills are located. Catalyst's goal was to set aside the Class 4 Major Industry rates because the relationship between Class 4 rates with the cost of services consumed was so far out of step with the equivalent relationship between Class 1 Residential rates and the cost of services consumed by that class that they must be considered irrational and unreasonable. As set out in more detail below, the Court disagreed, and dismissed the petitions on the grounds that the rates were transparent, rational and reasonable, and that it was council's job, not the Court's, to effect change. TimberWest's challenge of Campbell River's 2009 managed forest land rate succeeded not because the Court was prepared to declare the rate unreasonable, but because the Court found that council had used the massive rate increase that year to attempt to force TimberWest to move lands out of managed forest class into another class, or in other words, for the improper purpose of land use control, and because the ratio between regional district levies of managed forest to residential far exceed legislated limits.

The *Catalyst* decisions are under appeal, and we will no doubt hear more on this from the Court of Appeal. Meanwhile, I do not think it is correct to say that the forest companies have gained traction from the *TimberWest* decision, since the Courts have essentially declined to second guess municipal rate setting absent illegality in the passage of the bylaws themselves.

I have included a more fulsome review of these decisions in the attached appendix. The challenges brought by several other B.C. forestry companies appear to be in limbo. It was reported earlier this spring that Zelstoff Celgar, who had challenged Celgar's tax rate bylaw, had agreed to pay its 2009 taxes. West Fraser Timber's challenge of Kitimat's tax rates on its Eurocan mill will no doubt be affected by its recent announcement of its intent to close that mill.

As noted above, reconciliation of the *Catalyst* decisions with the *TimberWest* decision appears to lie in the different remedies sought. Catalyst unsuccessfully challenged the substance of the tax rate bylaws, without challenging the Cities' powers to pass them. The Court was not prepared

to take the rate setting function out of municipal councillors' hands. TimberWest, on the other hand, successfully challenged the process by which the tax rate bylaws were passed, by persuading the Court that Campbell River had passed the bylaws for the improper purpose of attempting to effectively rezone TimberWest's lands, and by setting regional district rates in proportions contrary to the legislation. The Court did not consider whether the rates themselves were reasonable. In light of the result in *Catalyst*, it is questionable whether the Court would have been prepared to do so. I suspect not.

Subject to further word from the Court of Appeal, these decisions reflect a judicial reluctance to interfere with the political decisions that underlie apportionment of municipal taxes between property classes, where councils have followed proper procedures and without ulterior motives in fixing relative tax rates. This underscores the point that equity in tax rates is a fight to be fought at first instance at the municipal council and Cabinet level, and that it is important to keep a close eye on the process leading to the setting of tax rates, as irregularity in the process may provide the only basis for judicial intervention.

Conclusion

This concludes my update of B.C. law, and I thank you once again for the opportunity to speak at this Conference.

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Appendix

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

Catalyst paper operates mills in four coastal communities – Powell River, North Cowichan, Port Alberni and Campbell River. In 2009, Catalyst challenged by judicial review the tax rates bylaws passed by each municipal council imposing tax on Catalyst's mills as Class 4 – Major Industry properties. The petitions were argued together, and the Court issued reasons first on the North Cowichan case, followed by the other three cases.

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.

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

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.

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