Cross Canada Legal Panel:
Appeal Rights - What Do They Really Mean?
British Columbia Perspective

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1. Introduction

Thank you for inviting me to speak as part of this Panel. Our task is to compare the effectiveness of taxpayers' rights of appeal from tribunal (eg. Assessment Appeal Board) decisions across Canada. My paper examines this issue from the B.C. perspective.

Rather than provide a detailed analysis of every aspect of the appeal mechanism in B.C., I have chosen to focus in my paper on what I perceive to be some of the more troublesome issues with the B.C. appeal system and the practical implications to taxpayers. I am hopeful that this will encourage some lively discussion amongst Panel members and delegates with respect to what is right and what needs fixing in the appeal systems across Canada.

I start with a brief overview of the mechanisms for getting before the B.C. Courts in the context of a Board appeal, then turn to a discussion of the specific issues I have chosen to highlight.

2. Appeal Mechanisms

There are three ways a person affected by an appeal[1] before the Board can get before the Courts in B.C. to influence the outcome of the appeal:

- First, by requesting the Board during a hearing to refer a question of law to the B.C. Supreme Court under s.64(1) of the *Assessment Act* (a "reference on a question of law"). The Board can refer questions of law on its own volition, and has the discretion to agree to or decline a request from an affected person to refer questions. If the Board agrees, it must suspend its proceedings until it has received the Court's opinion on the legal issues. There is no right of appeal from the Court's decision to the Court of Appeal (see *Art's Umbrella v. Assessor of Area No. 9 — Vancouver, 2007 BCCA 45*, discussed at length later in this paper);

[1] Per *Morguard Investments Ltd. v. Assessor of Area #12 – Coquitlam*, (2004), SC 479, 2004 BCSC 1270, aff'd (2006), SC 479, 2006 BCCA 26, a person affected by an appeal includes anyone with a direct pecuniary interest in the outcome, eg. a tenant in a shopping centre, even if that person did not file an appeal or participate in the hearing. It falls to the Board, not the Court, to determine if the applicant is a person affected, and whether the requirement to file a stated case was filed within the 21 day time limit.

- Second, by requiring the Board after it makes a final decision to refer questions of law[2] arising in the decision to the B.C. Supreme Court under s.65(1) of the Act (a "stated case appeal"). The requirement to state a case, which the Board has no discretion to decline, must be filed within 21 days of receipt of the Board's decision. The Board must revise its decision to comply with the opinion of the Court. There is a further right to appeal the Court's ruling to the Court of Appeal, if leave to appeal is granted[3]. There is virtually no chance of being granted leave by the Supreme Court of Canada to appeal from a decision of the Court of Appeal, and

- Finally, as a last resort (typically where the deadlines for appealing by stated case under s.65(1) have been missed), by filing a petition for judicial review of the Board's decision. I return later to consideration of what role, if any, judicial review continues to play in assessment law.

Against this backdrop, I turn to discussion of the issues I think require some consideration by practitioners and the Board:

Issue 1: Do Taxpayers (Still) Have a Right of Appeal From Interlocutory Board Decisions?

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[2] Questions of law are construed to include:

- Whether the Board misinterpreted or misapplied a relevant legal provision;
- Whether the Board misapplied an applicable principle of general law, or
- Whether the Board acted with no evidence, or a view of the facts that cannot reasonably be entertained

See for example *Assessor of Area #06 – Courtenay v. Quinsam Coal Corporation* (2002) SC 442, 2002 BCCA 68. It is interesting that Courts have included as "questions of law" questions relating to findings of fact. Resort can be made to exhibits and the transcript of evidence only for the limited purpose of determining if there was any evidence to support the Board's finding of fact. The Court must not reweigh the evidence or make any new findings of fact. The Court of Appeal reiterated its reluctance to delve into fact-based matters on appeal from a Board decision in *Assessor of Area #27 – Peace River v. Burlington Resources Canada Ltd*., 2005 BCCA 72, observing that mixed questions of fact and law ought only to be entertained if the result is of significant precedential value. At least technically, the question of precedential value is something that should be established on the record before the Board, not in oral submissions of counsel during a stated case. However courts seem surprisingly receptive to *ad hoc* evidence from counsel on the comparative precedential value of mixed questions of law and fact.

In my experience, judges are generally loathe to be led to the exhibits or transcript at all, and will generally not be persuaded to retry any aspect of the case. It does not take much in the way of evidence to support a finding of fact.

[3] Leave is granted only where:

- The issue has not previously been addressed by the Court of Appeal;
- The issue concerns a matter of general importance in that it affects a substantial number of assessments and therefore the tax base;
- The issue can be said to admit rationally of a different answer than given below, and\
- The appeal shows some prospect of succeeding on its merits.

See *Vancouver Port Authority v. Delta (Municipality)* (2004), SC 474, 2004 BCSC 343, leave to appeal denied 2004 BCCA 344.

The first concern I have with our appeal system lies in the impact of the distinction recently drawn by the Courts between, on the one hand, the right to refer questions of law to court under s.64, and on the other hand, the right to appeal from final Board decisions under s.65 of the Act. As set out below, I think there is a serious question whether s.64 has been interpreted so narrowly as to preclude its use as an appeal from interlocutory Board rulings.

Section 64 of the Act provides the following right to "refer" questions of law to Court:

> **Reference on a question of law to the Supreme Court**
>
> **64** (1) At any stage of a proceeding before it, the board, on its own initiative or at the request of one or more of the persons affected by the appeal, may **refer a question of law in the proceeding** to the Supreme Court in the form of a stated case.
>
> (1.1) If the question of law that is referred under subsection (1) is a constitutional question, the party who raises the question must give notice in compliance with section 8 of the *Constitutional Question Act*.
>
> (2) The stated case must be in writing and filed with the court registry, and must include a statement of the facts and all evidence material to the stated case.
>
> (3) The board must
>
> > (a) suspend the proceeding as it relates to the stated case and reserve its decision until the opinion of the Supreme Court has been given, and
> >
> > (b) decide the appeal in accordance with the opinion.
>
> (4) The stated case must be brought on for hearing within one month from the date on which it is filed under subsection (2).
>
> (5) Subject to subsection (6), the court must hear and determine the stated case and within 2 months give its decision.
>
> (6) The court may send the stated case back to the board for amendment and the board must promptly amend and return the stated case for the opinion of the court.

By contrast, s.65 provides the following right to "appeal" from Board decisions:

> **Appeal of board decision on question of law**
>
> **65** (1) Subject to subsection (2), a person affected by a decision of the board on appeal, including a local government, a taxing treaty first nation, the government or the assessment authority, may require the board to **refer the decision to the Supreme Court for appeal on a question of law alone** in the form of a stated case.

(2) Within 21 days after receiving the decision referred to in subsection (1), the person must deliver to the board a written request to refer the decision to the Supreme Court, and include in the request the question of law to be referred.

(3) On receipt of the request under subsection (2), the board must promptly provide written notice of the request to

(a) the parties to the appeal from which the reference is requested and any intervenors, and

(b) the chief executive officer of the assessment authority.

(4) Within 21 days after receiving the request under subsection (2), the board must file the stated case with the court registry, including the decision on appeal, a statement of the facts and all evidence material to the stated case.

(5) The stated case must be brought on for hearing within one month from the date on which it is filed under subsection (4).

(6) Subject to subsection (7), the court must hear and determine the stated case and within 2 months give its decision.

(7) The court may send the stated case back to the board for amendment and the board must promptly amend and return the stated case for the opinion of the court.

(8) The costs of, and incidental to, a stated case under this section are at the discretion of the court.

(9) An appeal on a question of law lies from a decision of the Supreme Court to the Court of Appeal with leave of a justice of the Court of Appeal.

(10) The board must direct the assessor to make any amendment to the assessment roll necessary to give effect to a decision made by the Supreme Court or the Court of Appeal under this section.

The question that concerns me is whether s.64 actually provides a right of “appeal”, or whether we now have a gap in our appeal system when it comes to interlocutory Board rulings.

Prior to the decision of the Court of Appeal in *Art’s Umbrella v. Assessor of Area No. 9 — Vancouver*, 2007 BCCA 45, I had understood both s.64 and s.65 to provide rights of appeal from Board decisions, the distinction between the two appeals lying simply in their timing – the former providing the right to appeal from an interlocutory Board ruling (typically a procedural ruling which could have a profound impact on the final outcome), the latter operating as an appeal from a final Board decision.

However in the course of determining that there is no right to appeal to the Court of Appeal from a Court’s decision made under a s.64 reference, the Court of Appeal in *Art’s Umbrella* characterized the distinction between s.64(1) and s.65(1) stated cases quite differently from this:

[18] As I indicated earlier in these reasons, I am of the view ss. 64 and 65 play distinctive roles in the revised assessment appeals system. **The role of s. 64 is to permit the board to obtain the advice of the Supreme Court on a question of law during the proceedings to assist it in coming to a final decision**. In that advisory role s. 64 gives no part to the Court of Appeal directly or by implication. I see the change in the wording of s. 64(3) as decisive that no Court of Appeal role was intended. That change persuades me the Legislature did not contemplate the board staying its proceeding, including its final decision until the resolution of an appeal from the decision of the Supreme Court. Rather, it seems to me that, in accordance with its goal of making the process more efficient, the Legislature was seeking to avoid the delay in the board's proceedings inherent in an appeal from a reference.

[19] **The role of s. 65 is to provide a complete scheme for an appeal from a final decision of the board, a decision the board has no jurisdiction to revisit, except for error identified on appeal**. It permits an appeal by stated case to the Supreme Court (s. 65(1)), a further appeal with leave to the Court of Appeal (s.65(9)), an award of costs in both courts (s. 65(8)), and finally, an amendment to the assessment roll (s.65(10)).

[20] This reading creates fewer problems than would the interpretation favoured by the respondent, giving rise as the reading would, not only to the possibility of two stated cases, but also to two appeals from the decisions on those cases, adding to, rather than reducing, the potential for delay in concluding an assessment appeal. It also obviates a problem identified by the assessor with the interpretation the respondent puts forward. What happens if the board makes its final decision after the Supreme Court makes its decision and before the appeal is decided, the Court of Appeal finds error in the Supreme Court's decision, and as required by s. 64(6), remits it to the board by then *functus*; and without authority to make a further decision. The statute makes no provision for that circumstance for the likely reason it did not intend there to be an appeal from an opinion given on a reference.

[21] **The new assessment appeals system can be made to work if counsel and the board keep clearly in mind the distinction the Legislature has drawn between a reference and an appeal.**

[22] If the assessment appeal turns entirely on a question of law, it seems obvious the more efficient process is to state the question on an appeal under s. 65. **If an opinion on a question of law is needed to assist in the board's decision-making (as appears may have been the case in *Norske Skog*), then the more efficient process is for the board to state the question on a reference (s. 64(1)), to stay the proceeding while the answer is being sought (s. 64(2)(a)), and to make its final decision using that advice when the Supreme Court's opinion is given (s. 64(2)(b)).** In that circumstance, the Supreme Court and the Court of Appeal will have the benefit of the full context in which the final decision was made in considering any appeal under s. 65. It may be, as the respondent suggests, that the Supreme Court will commonly consider itself bound by the

> earlier opinion, in which case little time will be wasted. It may also be that the question of law will not be precisely the same and nothing will have been lost.
>
> [23] In summary, the only appeal to the Court of Appeal of a decision of the Assessment Appeal Board under the ***Act*** is from a Supreme Court decision on an appeal by way of stated case from a final decision. It follows that this Court does not have the jurisdiction to entertain the assessor's application for leave to appeal in this case.

In *Assessor of Area #1 – Capital v. Lehigh Portland Cement Limited et al,* 2010 BCSC 193, the B.C. Supreme Court confirmed the distinction drawn by the Court of Appeal in *Art's Umbrella* between preliminary references on questions of law and appeals from final decisions of the Board. The Judge in *Lehigh* had this to say of the distinction:

> [21] In *Art's Umbrella v. Assessor of Area No. 9 — Vancouver,* 2007 BCCA 45 (CanLII), 2007 BCCA 45, Madam Justice Huddart, sitting as a Chambers Judge, pointed out that in a reference under s. 64 the Board is seeking the opinion of the Court on a point of law to assist it in arriving at a final determination of the matters before it. Thus, in a reference by way of Stated Case under s. 64 the Court is playing a significantly different role than it does under an appeal by way of Stated Case from a final decision of the Board under s. 65. I therefore conclude that *Weyerhauser* does not establish the appropriate standard of review for this case.

Interestingly, despite what both Courts have said about the role of s.64 as a "reference" rather than an "appeal", in both cases the questions before the Court arose in the context of interlocutory rulings which the Board had already made before referring the questions of law to Court for the Court's opinion, and which were therefore effectively under appeal to the Court.

I question whether this is the correct use of s.64. If, as seems clear from the wording of s.64 and s.65, and from the *Art's Umbrella* ruling as applied in *Lehigh*, s.64 is simply a <u>reference</u> tool to clarify legal issues on which the Board's final decision will be based, and if (as seems equally clear from the words of s.65 and from these decisions), s.65 is a mechanism to <u>appeal</u> only <u>final</u> Board decisions, what if any mechanism exists for a party to appeal an interlocutory Board decision which is made before the question of law is referred to Court? Is judicial review (which the Courts have traditionally declined to use as a mechanism for appealing Board decisions, given the presence of s.64 and 65 appeal rights in the Act) the correct mechanism for appeals of interlocutory Board rulings? Must the correctness of interlocutory decisions instead be left to be tested by appealing the Board's final ruling on the merits, by s.65 stated case? Is this the most effective use of the Board's and parties' time and money?

To my knowledge, no party has yet challenged the jurisdiction of the Board to refer, or the Courts to entertain, a question of law under s.64 which arises from an interlocutory ruling which the Board has already made. It seems to me that, in light of the characterization of s.64 in *Art's Umbrella*, this issue is going to arise sooner or later, and that the Courts may find themselves hard pressed to rationalize s.64's continuing use as an interlocutory appeal mechanism without

either an amendment to the wording of s.64, or reconsideration of the *Art's Umbrella* decision by a 5-judge Court of Appeal bench.

Issue 2: Why Shouldn't the Board Address Constitutional Questions?

The next concern I have lies in the practical implications of the Board's inability to handle constitutional questions.

Section 44 of the *Administrative Tribunals Act* precludes the Board (unlike many other B.C. tribunals) from entertaining constitutional questions. The Board must therefore refer any question requiring notice to be given under *Constitutional Question Act*, R.S.B.C. 1996, c.68, to court under s.64.

Section 8(3) of the *Constitutional Questions Act* includes a challenge to the validity or applicability of any regulation. In turn, the Major Industrial Properties ("MIPS"), and associated, costing manuals created by BC Assessment and approved by the Lieutenant Governor in Council under s.20(5) of the Act are regulations[4]. Consequently, the Board cannot, despite tits obvious expertise with respect to costing manuals, entertain any appeals challenging the validity of provisions of the MIPs or EPG manuals (or, for that matter, any of the other regulations made under the Act relating to assessments), which the Board must instead refer as preliminary questions of law to the Courts.

There seems to me to be a serious disparity between, on the one hand, the lack of deference to Board expertise shown by the Legislature's exclusion of constitutional questions from matters the Board may handle, and on the other hand, the extraordinary deference shown by the Court in *Weyerhaeuser Company Ltd. v. Assessor of Area # 04 – Nanaimo Cowichan* 2010 BCCA 46 to the Board on its handling of virtually all other legal questions arising in an appeal.

I find it hard to rationalize the inconsistency. While the Board very likely does not need to have authority to entertain Charter of Rights questions, it seems to me that if the Board is expert enough to be the final authority on a substantive interpretation of the Act and regulations, it is expert enough to determine the validity of the same legal instruments. This problem requires a legislative solution.

I return to this in my discussion on recent developments in the standard of review on stated case appeals.

Issue 3 – What Role Remains for Judicial Review?

Against the backdrop of stated case references and stated case appeals, I think that there are some important questions to be asked about the residual role, if any, of judicial review in the assessment regime in B.C.

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[4] *Fletcher Challenge Canada Ltd. v. Assessor of Area #04 – Cowichan*, July 4, 2000, PAABBC.

The willingness of courts to entertain challenges to Assessors' or Boards' decisions by judicial review (as an alternative to stated case) has steadily diminished over time.[5] Judicial review has generally been regarded as an appeal of last resort, to be used when stated case time limits have expired and an appeal can be pitched on "purely jurisdictional" grounds.

However give the extremely narrow scope of legal issues which can now be properly characterized as "jurisdictional", even this residual role for judicial review in the assessment regime may now be waning.[6]

As I have noted above, there is some question in my mind whether judicial review is, in light of recent developments on the nature of a s.64 reference, now the only available mechanism to appeal from interlocutory Board decisions. I will be interested to hear the views of other Panel members on this issue.

Issue 4 – Is Too Much Deference Being Given to Board Interpretations of the Act and Regulations?

My next concern lies in implications to appeal rights resulting from the recent dramatic change to the standard of review of Board decisions touching on the interpretation of the Act and regulations. These questions arise in the context of s.65 stated case appeals from "final" Board decisions.

As will be seen, the Courts were until recently quite clear that while deference ought to be given to the Board when reviewing evidentiary-type questions of law and exercises of Board discretion, questions of legal interpretation ("pure" legal questions) ought not to attract the same degree of deference and must be reviewed by Courts on the "correctness" standard. The practical consequence of this was that while the facts must be correctly established before the Board in an appeal, taxpayers always had a "second kick at the can" on legal issues, using the stated case appeal procedure.

However the standard of review even for pure legal questions was very recently raised from "correctness" to "reasonableness". Quite apart from the troublesome question of what separates a "reasonable" from an "unreasonable" legal interpretation, I think the change in standard of review directly contradicts the intent of the Legislature to reserve to our superior courts the right to substitute their view of a correct interpretation for one they think is wrong. It is a situation which I think should be fixed either by the Court of Appeal on reconsideration of the decision which has created the problem, or by the Legislature. I return to the latter below.

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[5] Courts view judicial review as inappropriate where there is an existing statutory right of appeal (such as a s.65 stated case appeal) which provides an "adequate alternative remedy" to judicial review. See *City of Vancouver v. Concord Pacific Holdings Ltd*. (1996), SC 368, 20 B.C.L.R. (3d) 79 (C.A.).

[6] See the application of the very narrow scope of "jurisdictional" legal questions as determined in *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, 309 D.L.R. (4th) 513 in *Weyerhaeuser*

By way of background, on February 2, 2010 the Court of Appeal released its reasons in *Weyerhaeuser Company Limited v. Assessor of Area #04 - Nanaimo Cowichan*, 2008 BCCA 361.

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.[7] 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.

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[7] In a line of decisions commencing with *Burlington Resources* and culminating in *Vancouver Pile Driving*, the Courts had determined, through application of the criteria now commonly known as the "Dunsmuir test of standard of review", that Board decisions on pure questions of law (eg. statutory interpretation) clearly and unequivocally attracted the standard of correctness in a stated case appeal.

The "Dunsmuir" test required the Court to assess the standard of review intended by the Legislature on a contextual basis, taking into consideration the following factors:

- The presence or absence of a privative clause (eg. a clause precluding wholly or partly any review of a tribunal decision by a superior court);
- The purpose of the tribunal as determined by the legislation;
- The nature of the question at issue, and
- The expertise of the tribunal

Notably, Deschamps J. in concurring reasons in *Dunsmuir, and of Southin J.A. in British Columbia v. Surrey School District No. 36, 2005 BCCA 106, to the eff*ect that where the Legislature has provided a specific statutory right of appeal on questions of law, no analysis of standard of review is required because it is implicit that the Legislature intended these types of legal questions to be reviewed on the correctness standard.

The Court's reasoning went as follows:

> [30] In *Nolan v. Kerry (Canada) Inc.*, 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).
>
> [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)

…

> [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.

In my view, 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 few exceptions (the recent B.C. Supreme Court decision on a procedural question in the *Lehigh* case) below.

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 might be said to have lost an important right of appeal from Board decisions.

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For better or for worse, this is now the law in British Columbia either until revisited by a 5-Judge bench of the Court of Appeal. Alternatively it seems to me that if the Legislature thinks it appropriate[8] to maintain correctness as the standard of review on pure legal questions, it could simply amend the *Assessment Act* to make *Administrative Tribunals Act* s.59[9] apply to deem the standard of review on questions of interpretation "correctness". This would likely require that the Assessment Act be amended to define "judicial review" to include s.64 and s.65 references and stated cases.

Whether or not, pending a change in the law, the decision has the practical effect of reducing the number of stated case appeals taken forward from Board decisions, is anybody's guess. This may be something the Board is in a position to comment on. My perception is that clients are more reluctant to incur the cost of a stated case given the lesser likelihood of success, even on pure legal interpretation issues. I think that this is problematic both for the parties and for the Board, which must now, to maintain the confidence of all concerned, constitute and conduct itself much more as a formal "court" than a tribunal.

Continued Application of "Correctness" in Section 64 Reference Stated Cases

The last concern I address in this paper is that now, the same legal question attracts a different standard of review depending on how it reaches the court.

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[8] I think that a compelling case can be made that the Legislative intent that our courts review Board interpretations on the standard of correctness is reflected by the specific wording in s.65 (which is clearly an appeal on a question of law) read in the context of previous observations of both the Supreme Court of Canada and Court of Appeal to the effect that statutory appeals on questions of law obviously attract the standard of review of correctness (*Dunsmuir, Surrey School District*, see footnote 7).

[9] Section 59 of the *Administrative Tribunals Act* provides:

Standard of review if tribunal's enabling Act has no privative clause

59 (1) In a judicial review proceeding, the standard of review to be applied to a decision of the tribunal is correctness for all questions except those respecting the exercise of discretion, findings of fact and the application of the common law rules of natural justice and procedural fairness.

> (2) A court must not set aside a finding of fact by the tribunal unless there is no evidence to support it or if, in light of all the evidence, the finding is otherwise unreasonable.
>
> (3) A court must not set aside a discretionary decision of the tribunal unless it is patently unreasonable.
>
> (4) For the purposes of subsection (3), a discretionary decision is patently unreasonable if the discretion
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> (a) is exercised arbitrarily or in bad faith,
> (b) is exercised for an improper purpose,
> (c) is based entirely or predominantly on irrelevant factors, or
> (d) fails to take statutory requirements into account.
>
> (5) Questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly.

Based on the B.C. Supreme Court decision in *Assessor of Area #1 – Capital v. Lehigh Portland Cement Limited et al,* 2010 BCSC 193, on the one hand, the standard of review appears to be "correctness" for legal questions referred under s.64, while on the other hand, it appears to be "reasonableness" for the very same questions if stated on appeal from a final Board decision. I do not see a rational basis for the difference.

The decision of the B.C. Supreme Court in *Lehigh* involved 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* 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 *Administrative Tribunals Act*. 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.

Second, on the application of those criteria, the Court found that the Board has no particular expertise in the interpretation of the *Administrative Tribunals Act*, which applies generally to all B.C. tribunals, and the standard of review for questions involving Board powers under the *Administrative Tribunals Act* 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 *Administrative Tribunals Act*. 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.

I am hopeful that these observations might spur debate and perhaps a call for reform within the assessment community in British Columbia. This concludes my paper on effectiveness of current appeal rights from Board decisions in B.C.

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