Cross-Canada Legal Panel

Legal Update and British Columbia Perspective on Equity

by James D. Fraser

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LAWSON LUNDELL LLP

PART 1 - INTRODUCTION

Thank you for inviting me to speak as part of this Panel. Our task is to provide a legal update and compare the availability and practical implications of "equity" in the appeal process across Canadian taxing jurisdictions.

Accordingly, my paper is arranged to address legal updates then equity.

PART 2 - LEGAL UPDATE

I start the legal update portion of my paper with a review of the decision of the Supreme Court of Canada in Catalyst Paper Corporation's challenge of municipal tax rates, which you may find interesting and relevant in your jurisdictions.

I then turn to recent Court and Board rulings on issues which might also be of interest to you.

Supreme Court of Canada Dismisses Catalyst Paper Corporation Appeal on Judicial Review of Municipal Setting of Annual Property Tax Rates

The Supreme Court of Canada released the much-anticipated decision in *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2 on January 20, 2012.

As reflected in the headnote, by way of background[1], Catalyst judicially reviewed the District of North Cowichan's annual tax rate bylaw setting the Class 4 – Major Industry rate applicable to one of Catalyst's pulp and paper mills located in North Cowichan, on the grounds that the tax rate for Major Industry was unreasonable having regard to objective factors including the pulp mill's relative consumption of municipal services.

North Cowichan defended the bylaw on the grounds that reasonableness must account not only for factors affecting Catalyst, but all manner of social, economic and demographic factors affecting North Cowichan.

The chambers judge dismissed the judicial review. The B.C. Court of Appeal upheld that decision. The Supreme Court of Canada granted leave, and the appeal was argued October 18, 2011.

In a unanimous decision of the 7 judge Coram, Chief Justice McLachlan dismissed Catalyst's appeal on the following grounds:

[1] A more fulsome background can be found in my paper delivered at this Conference last year , which I can provide at your request.

> *"The standard of review applicable is reasonableness. The power of the courts to set aside municipal bylaws is a narrow one, and cannot be exercised simply because a bylaw imposes a greater share of the tax burden on some ratepayers than on others. The critical question is what factors the court should consider in determining what lies within the range of possible reasonable outcomes. Courts reviewing bylaws for reasonableness must approach the task against the backdrop of the wide variety of factors that elected municipal councillors may legitimately consider in enacting bylaws, including broad social, economic and political issues. Only if the bylaw is one no reasonable body informed by these factors could have taken will the bylaw be set aside.*
>
> *The fact that wide deference is owed to municipal councils does not mean that they have carte blanche. Reasonableness limits municipal councils in the sense that the substance of their bylaws must conform to the rationale of the statutory regime set up by the legislature. The range of reasonable outcomes is circumscribed by the purview of the legislative scheme that empowers a municipality to pass a bylaw. Municipal councils must also adhere to appropriate processes and cannot act for improper purposes.*
>
> *The bylaw falls within a reasonable range of outcomes. The bylaw does not constitute a decision that no reasonable elected municipal council could have made. The District council considered and weighed all relevant factors. The process of passing the bylaw was properly followed. The reasons for the bylaw were clear and the District's policy had been laid out in a five-year plan. The District's approach complies with the Community Charter, which permits municipalities to apply different tax rates to different classes of property. The Community Charter does not support C's contention that property value taxes ought to be limited by the level of*
>
> *service consumed. Although the bylaw favours residential property owners, it is not unreasonably partial to them."*

As the following analysis, which lies at the heart of the decision, reflects, although mindful of the harsh impact on Catalyst of the District's rates (among the highest, relative to residential rates, in British Columbia), the Court found no requirement in the *Community Charter* that the District base tax rates on the relative consumption of municipal service model proposed by Catalyst. Indeed, the Court ventured that to do sight might well render the tax rates illegal:

> *"B. Application: Is the Bylaw Unreasonable?*
>
> *[32] To summarize, the ultimate question is whether the taxation bylaw falls within a reasonable range of outcomes. This must be judged on the approach the courts have traditionally adopted in reviewing bylaws passed by municipal councils. Municipal councils passing bylaws are entitled to consider not merely the objective considerations bearing directly on the matter, but broader social, economic and political issues. In*

judging the reasonableness of a bylaw, it is appropriate to consider both process and the content of the bylaw.

[33] I turn first to process. Catalyst does not allege that the voting procedures of the District were incorrect; nor does it allege bad faith. Its contention is rather that the District's process is flawed because it provided neither formal reasons for the bylaw, nor a rational basis (viewed in terms of Catalyst's "Consumption of Services Model") for its decision. This contention cannot succeed. As discussed above, municipal councils are not required to give formal reasons or lay out a rational basis for bylaws. In any event, as the trial judge found, the reasons for the bylaw at issue here were clear to everyone. The District's policy had been laid out in a five-year plan. Discussions and correspondence between the District and Catalyst left little doubt as to the reasons for the bylaw. The trial judge found that the District Council considered and weighed all relevant factors in making its decision. If Catalyst has a complaint, it is not with the procedures followed, but with the substance of the bylaw.

[34] This brings us to the content of the bylaw at issue. There can be no doubt that the impact of the bylaw on Catalyst is harsh. The ratio between major industrial rates and residential rates imposed is among the highest in British Columbia (only two municipalities exceed it) and far outside the pre-1983 norm. In Catalyst's present economic situation, the consequences are serious — indeed, Catalyst suggests that the industrial rate threatens the continued operation of its mill in the District.

[35] However, countervailing considerations exist —considerations that the District Council was entitled to take into account. The Council was entitled to consider the impact on long-term fixed-income residents that a precipitous hike in residential property taxes might produce. The Council has decided to reject a dramatic increase and gradually work toward greater equalization of tax rates between Class 4 major industrial property owners and Class 1 residential property owners. Acknowledging that the rates from Class 4 are higher than they should be, the Council is working over a period of years toward the goal of more equitable sharing of the tax burden. Its approach complies with the Community Charter, which permits municipalities to apply different tax rates to different classes of property. Specifically, nothing in the Community Charter requires the District to apply anything like Catalyst's "Consumption of Services Model". Indeed, the compelling submission made by Mr. Manhas, Counsel for the Respondent, was that it would be "statutorily ultra vires for the [municipality] to impose property value taxes on the basis of consumption alone under section 197(3)(b)" (transcript, at p. 54). The bylaw favours residential property owners, to be sure. But it is not unreasonably partial to them.

[36] Taking all these factors into account, the trial court, affirmed by the Court of Appeal, concluded that the bylaw fell within a reasonable range of outcomes. I agree.

> *The adoption of the Tax Rates Bylaw 2009, Bylaw No. 3385 does not constitute a decision that no reasonable elected municipal council could have made.*
>
> *[37] I would dismiss the appeal with costs."*

This ruling effectively signals a high degree of deference to municipal tax rate setting. Provided council's decision is rational, it will not be subject to review by a judge.

This effectively leaves the taxpayer with two options when it comes to municipal tax rates:

- Prevailing on municipal council to set rates at sustainable levels for major industrial properties, or
- Prevailing on Cabinet to exercise its statutory power of regulatory oversight over municipal tax rates, under section 199 of the *Community Charter* (a power seldom exercised by Cabinet).

As to the latter, there may be some relief for taxpayers if Cabinet follows through this spring on its stated intention to create a new position of Municipal Auditor General, one of whose purposes would be to oversee municipal tax rates.

Supreme Court of Canada Confirms Reasonableness Standard of Review of Administrative Tribunal Interpretations of Home Statutes

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".

The Court of Appeal's analysis derived from the Supreme Court of Canada's ruling in *Nolan v. Kerry (Canada) Inc*., 2009 SCC 39. The latest ruling of the Supreme Court of Canada on standard of review of administrative tribunals is *Albert (Information and Privacy Commissioner) v. Alberta Teachers' Association,* 2011 SCC 61.

In this case, the majority confirmed its analysis in *Nolan v. Kerry* that deference to the tribunal will usually result where the tribunal is interpreting its own statute or statutes closely connected to its function, unless the question falls into a category of question to which the correctness standard continues to apply, eg. a constitutional question, a question regarding the jurisdictional lines between competing specialized tribunals, a question of central importance to the legal system as a whole, or a true question of jurisdiction or *vires*.

The Court reiterated that the category of true questions of jurisdiction attracting a standard of review of correctness in statutory interpretation is narrow, and went on to say that, pending

clarification of the scope of true questions of jurisdiction by the Court, unless the situation is exceptional, the interpretation by a tribunal of its home statute, or of statutes closely connected to its function, should be presumed to be a question of statutory interpretation subject to deference.

This decision suggests that the reasonableness standard is here to stay as the standard of review of Board decisions interpreting the Assessment Act and related regulations.
One practical consequence of this level of deference seems to be an abrupt and marked decrease in stated cases from Board decisions, perhaps achieving the policy direction of the Supreme Court of Canada, but at what cost to the taxpayer?

Court of Appeal Overturns Board Ruling on Exemption From Taxation for Musquem First Nation Lands

In *Musqueam First Nation v. British Columbia* (Assessor of Area #09) (2010 PAABBC 20091957), the Board ruled that lands in the UBC Endowment Lands which were held in trust by two companies owned and controlled by the Musqueam Band for that Band were not exempt from taxation under s.15(1)(q) of the *Taxation (Rural Area) Act*, as adopted for property taxation by the *University Endowment Land Act*. On stated case, the BC Supreme Court upheld the Board's ruling. Both the Board and the Court applied the reasoning of the BC Supreme Court in *Westbank Indian Band Development Co. v. British Columbia (Assessor of Area #19 – Kelowna)*, [1991] B.C.J. 2501 (S.C.), in which the Court held that lands held in fee simple by an Indian-owned corporation, where those lands were not reserve, special reserve lands, or vested in the Crown, were not exempt.

On further appeal, employing current statutory interpretation principles, and largely rejecting as incorrect the analysis and findings in *Westbank*, the Court of Appeal unanimously ruled that the lands are exempt from taxation as "*land and improvements vested in or held by Her Majesty or another person in trust for the use of a tribe or body of Indians, and either unoccupied, or occupied by a person in an official capacity or by the Indians*".

BC Supreme Court Upholds Board Ruling that Co-operative Housing Building Must be Valued at Aggregate Value of Market Sale of Shares and Accompanying Leases

In *Beach Town House Apartments v. Area 09* (2011 PAABBC 20111535) the Board addressed the question of whether a cooperative housing building should be valued (as the taxpayer / appellant believed) on an income approach as a rental property, or (as the Assessor had done) on the aggregate value of the shares / leases of each of the cooperative shareholders / tenants in the building.

The taxpayer argued that despite the share ownership structure, there was only one fee simple interest (that of the cooperative company as fee simple owner of the building) to be valued, and that it was incorrect and inequitable to value the shares which did not represent interests in land.

Applying the decision of the Court in *Panorama Place v. City of Vancouver* (1975) BC Stated Case 83, which the Board considered to be virtually identical on the facts, the Board ruled that, in order to value the full bundle of rights in the property (and not simply the landlord's rights or the tenants' rights), the Assessor must account for the premium over the cost of the land and physical structure that is paid by shareholder-lessees for their occupancy rights in the building.

The taxpayer appealed by stated case. On July 16, 2012, the BC Supreme Court released its decision (*Beach Town House Apartments Ltd. v. British Columbia (Assessor of Area #09 – Vancouver Sea to Sky Region*) 2012 BCSC 1060) dismissing the taxpayer's appeal and upholding the Board's decision. Articles addressing this decision from different perspective were submitted by BC Assessment's in-house legal counsel and by the taxpayer's agent, John Parkes in the July / August issue of Communication Update.

The core issue in this case is whether it is appropriate in light of the seminal decision in *Standard Life* that requires valuation of the fee simple interest in property for assessment purposes, to value rental property by summing the individual values of individual leasehold interests. The Board and B.C. Supreme Court have so far ruled in favour of this approach. At the time of writing, the taxpayer is seeking leave to appeal the decision to the Court of Appeal. I hope to know the outcome of the leave application by the time I deliver this paper.

The Board came to the same conclusion, on different facts, in the May 25, 2012 decision in *Caravans West v. Assessor of Area #20 – Vernon* (2012 PAABBC 20120017). The taxpayer appealed by stated case. In light of the similarity of legal principles, presumably the outcome of the *Beach Town House* appeal will have some bearing on the *Caravans West* appeal.

Board Permits Concurrent Taxation of BC Hydro and Occupier of BC Hydro Right of Way

In *BC Hydro et al. v. Area 10* (2011 PAABBC 20110412**)** the Board addressed the question of whether BC Hydro-owned right of way, part of which was concurrently used by BC Hydro as right of way for its transmission lines, and by Pacific Industrial as licensee for surface storage, could be simultaneously assessed to BC Hydro for school tax purposes using the prescribed transmission line right of way rate, and to Pacific Industrial as "occupier" using ad valorem value. BC Hydro maintained that since the prescribed rate represented "actual value" (eg. the market value of the fee simple interest in the land), the fee simple interest had been fully taxed, leaving no room for taxation of the licensee.

The Board rejected this argument, ruling that it must be the Legislature's intention to permit dual taxation:

> *[35] As pointed out, this amounts to two taxpayers paying the same property tax on the same property, however, there is nothing in the relevant legislation, ie the Assessment Act or the Hydro and Power Authority Act, which forbids this result. By enacting these provisions, the Legislature's intent is discernible, namely to have BCH assessed for the right of way and for Pacific to be assessed as an occupier. If the Legislature wishes to tax*

two different taxpayers the same tax on the same property, then it may do so. It would be simple for the Legislature to ensure this does not occur as the Hydro and Power Authority Act allows for the Lieutenant Governor in Council from opting out of the taxation. However, that has not been done which further supports the interpretation that the Legislature intends BCH to be assessed and taxable, despite an occupier's assessment on the same right of way.

Board Finds No Obligation to Adjudicate Land and Improvement Value in Every Appeal

In *Mark Anthony Properties Ltd v. Area 19* (2011 PAABBC 20110448) the Board addressed the question of whether the Board must adjudicate land and improvement value in every appeal brought before the Board.

The taxpayer initiated an improvement value appeal. The Assessor sought to add land value as an issue part way into the appeal. The taxpayer objected. The Assessor argued, among other things, that section 57(b) of the *Assessment Act* (as set out below) obliged the Board to add land value as an issue:

Section 57(1) provides:

> *57(1) In an appeal under this Part, the board*
>
> *(a) may reopen the whole question of the property's assessment to ensure accuracy and that assessments are at actual value applied in a consistent manner in the municipality, treaty lands of the taxing treaty first nation or other rural area, and*
>
> *(b) when considering whether land or improvements are assessed at actual value, must consider the total assessed value of the land and improvements together.*

The taxpayer argued that the Assessor's position represented an unreasonable and impractical interpretation of section 57, because it would effectively eliminate the ability of taxpayers and the Assessor to focus appeals on specific land or improvement issues, and render the Board's efforts through established appeal management rules and practice to define and isolate issues and streamline the appeal process, meaningless.

Ruling as follows, the Board found that section 57(1)(b) does not compel the Board to determine actual value of land and improvement s in every case, but simply to consider the total assessed value of both in determining one or the other, and confirmed the Board's discretion to permit or deny the addition of issues part way through appeal management, to preserve the integrity of the Board's process:

> *[33] Section 57(1)(b) does not compel the determination of actual value of land or improvements in every case where only the actual value of one or other is in issue. In determining the actual value of land or improvements, however, it does require the Board to consider the total assessed value, and whether the total assessed value should be altered or not. The Board may chose not to increase or reduce a component of value despite a determination of actual value for that component, if to do so results in a total assessed value that does not reflect the lower of actual or equitable value.*
>
> *[34] The Board has the discretion to determine the actual value of land when determining the actual value of improvements, and vice versa, and has the discretion to limit the issues in an appeal. The circumstances of this case do not weigh in favour of exercising the Board's discretion to determine the actual value of the land discreetly from the actual value of the improvements. That does not negate the instruction to consider the total assessed value when determining the actual value of the improvements. But adding land value as a discreet valuation issue will necessitate adding equity as an issue as well, and will inevitably lengthen and complicate this appeal. The Assessor had opportunities to raise land value as an issue. Adding land value at this stage of the proceedings undermines the Board's appeal management process and is prejudicial to the Appellant. The public interest in fair and equitable assessment is not served by expanding the scope of this appeal at this stage of the process.*

Board Sets "High Water Mark" in Meaning of "Processing"

Class 5 – Light Industry is a favorable alternative to Class 4 – Major Industry property because Class 5 typically has a lower tax rate. It is likewise a favorable alternative to Class 6 – Business & Other, because the marginally higher Class 5 tax rate is generally more than offset by the 60% school tax grant available to Class 4 and 5 properties.

Class 5 includes:

Class 5 — light industry

5 Class 5 property must include only land or improvements, or both,

(a) used as a gathering pipeline,

(b) used or held for the purpose of extracting, processing, manufacturing or transporting of products, or

(c) used for the storage of products as ancillary to or in conjunction with the extracting, processing, manufacturing or transporting of products referred to in paragraph (b),

but does not include those lands or improvements, or both,

(d) included in class 2 or 4,

(e) used or held for the purposes of, or for purposes ancillary to, the business of transportation by railway,

(f) used principally as an outlet for the sale of a finished product to a purchaser for purposes of his or her own consumption or use and not for resale in either the form in which it was purchased or any other form, and

(g) used for extracting, processing, manufacturing or storage of food, non-alcoholic beverages or water.

A recent spate of Class 5 cases before the Board has created some interesting interpretations of "processing". Board rulings on "processing" typically apply the somewhat restrictive criteria established in the seminal income-tax court decisions in *Federal Farms Ltd. v. Canada* [1966] 66 D.T.C. 5068 (Ex. Ct. Can.) and *Tenneco Canada Inc. v. Canada* [1991] 91 D.T.C. 5207 (F.C.C.) requiring both that some significant change in the character of goods occur and that the goods be made more marketable. Predictably, the result in a given case turns on the particular facts. So, for example:

- on the one hand, in *Prince Rupert Grain Ltd. v. Assessor Area #25 – Northwest* (1996, PAABBC) the Board found that the mixing and blending of grains at PRG's grain terminal amounted to Class 5 "processing";
- while on the other hand, in *Sammy's Carpet v. Hardwood v. Area #14 – Surrey/White Rock* (2011 PAABBC 20112125) the Board found that cutting carpet rolls into smaller sections for customers, and removing plastic wrap from a pallet of boxed tiles or hardwood flooring did not amount to Class 5 "processing";

- yet, in the most recent of Board rulings, in a decision that runs somewhat contrary to the trend toward restrictive interpretations of "processing", the Board found in *Alsco Canada v. Assessor of Area #09 – Vancouver* (2012 PAABBC 20112487) that, provided the scale of operations is sufficiently large, commercial laundering amounts to Class 5 processing. The Assessor has appealed this ruling by stated case. The hearing of that appeal is scheduled for early spring 2013;

- in a similar vein, the Board ruled in *CCS Corporation v. Area 11* (2012 PAABBC 20112707) that a property used for securing and stabilizing hazardous materials for shipping to landfills and elsewhere falls within Class 5 to the extent used to process, transport or store materials that have been cleaned, even though they are not made more marketable as a result. The Assessor has appealed this ruling by stated case. The hearing is scheduled for fall 2012;

- given the sizeable number of Class 5 cases heading to the Board, it will be interesting to see the Court's reaction to the Board's expansive view of what falls within Class 5 as "processing" facilities.

This concludes the British Columbia legal update. I turn now to equity and consistency in British Columbia assessment law.

PART 3 – EQUITY AND CONSISTENCY IN BRITISH COLUMBIA

Introduction

A hallmark of the assessment and taxation of property in B.C. is the principle of equity*: taxing authorities must deal even-handedly with all taxpayers in a municipality or rural area, and all taxpayers with a class must be treated in the same way*.

Equity in the context of the property assessment in B.C. has its roots in the common law principles of equity and consistency explored by the Supreme Court of Canada in *Jonas v. Gilbert* (1881), 5 S.C.R. 356 that "*a power to discriminate must be expressly authorized by law, and cannot be inferred from general words*".

B.C. Courts have interpreted the provisions of the B.C. *Assessment Act*, R.S.B.C. 1996, c.20 (the "*Assessment Act*") and the *Prescribed Classes of Property Regulation*, B.C. Reg. 438/81 (the "*Classification Regulation*") as a statutory basis for discrimination between property classes. As a result, equitable principles apply to *classes of property of similar attributes*. As set out further below, the assessor and the Board have duties and attendant powers to ensure that properties with identifiable, similar attributes within a class are assessed for taxation (eg. classified, valued and subject to exemptions from assessment and taxation) consistently, within a municipality or rural area.

As a practical matter, equity is most often at issue before the Board in valuation cases. The author's goal is to provide a brief overview of the statutory basis of the Board's duty to ensure equity in the context of recent developments in the case law concerning the application of equity to classification and tax exemption in assessments. Given the narrow topic discussed here, to a large extent, this paper reflects the author's paper included in the equitable assessment portion of the 2008 Real Property CLE Course.

Statutory Basis of Equity

B.C. Courts have on a number of occasions (*Bramalea Ltd. (Trizec Equities Ltd.) v. Assessor of Area 9 - Vancouver* (1991), SC 277 (B.C.C.A.); *Assessor of Area #09 - Vancouver v. Lount* (1995), SC 353 (B.C.C.A.), and most recently, *Weyerhaeuser, C&C Holdings et al v. Assessor of Area #04 – Nanaimo/Cowichan* (2003), SC 463 (S.C.), observed that the statutory scheme in B.C. reflects the common law principles of equity and consistency.

Three statutory provisions provide the basis for the duties and powers of the assessor and the Board to ensure equity in assessments. These are discussed below.

Duty to Assess Uniformly

The duty of the assessor to achieve consistency in assessment is embodied in section 9 of the B.C. *Assessment Authority Act*, R.S.B.C. 1996, c.21 (the "*Assessment Authority Act*") which provides as follows:

> "Purpose of the Authority
>
> 9. The purpose of the authority is to establish and maintain assessments that are uniform in the whole of British Columbia in accordance with the *Assessment Act*."

While on its face this provision appears to require uniformity in assessment of properties with similar attributes province-wide (as opposed to within municipal or rural area taxation boundaries), the B.C. Supreme Court has interpreted the duty set out in s.9 as constrained by the provisions of s.57 of the *Assessment Act*, which (as set out below) expressly limit the Board's duty (and therefore the assessor's duty) to ensure equity in assessment to properties within a municipal taxing jurisdiction or rural area (see *C&C Holdings, supra).*

The second and third statutory bases of equity and consistency are set out in ss.57(1)(a) and (4) of the *Assessment Act* which provide that:

> "57 (1) In an appeal under this Part, the board

(a) may reopen the whole question of the property's assessment to ensure accuracy and that assessments are at actual value applied in a consistent manner in the municipality or rural area, and

…

(4) The board may order the commissioner to reassess at actual value land and improvements in all or part of a municipality or rural area, whether or not they are the subject of the appeal, if the board finds

(a) that the assessments in the municipality or rural area, or in part or either of them, are above their actual value, or

(b) that the assessment appealed against is at actual value but that the assessments of similar land and improvements in the municipality or rural area, or in part of them, are below their actual value".

These provisions essentially empower the Board to:

1. order the reassessment of a property under appeal, regardless of the grounds of appeal identified in the notice of appeal or in pre-hearing management, to ensure accuracy (correctness) of the assessment itself, and equity (consistency) amongst similar neighbouring properties, and

2. order the reassessment of all other similar properties, whether appealed to the Board or not, to achieve equity in value.

Each of these powers is discussed below.

Board Power to Reopen Assessment to Ensure Accuracy and Consistency

The Board's broad power to reopen an entire assessment to ensure accuracy and consistency despite the grounds of appeal identified in the notice of appeal under ss.32, 33 and 50 of the *Assessment Act* positions the Board as an inquisitor, as opposed to merely an adjudicator.

The ramifications of this power in the context of an appeal are very important: the Board can, if satisfied that it is appropriate in the circumstances, review and order changes in the identity of the assessed owner or occupier, the inventory, the value, the classification or entitlement of the property to exemptions. Although the Board's power to achieve accuracy and equity is typically called upon by the property owner dissatisfied with some aspect of the assessment, property owners and tax advisors must nevertheless be aware in embarking on an appeal that once the appeal is filed, there is a risk that the assessment may, depending on the nature and scope of issues raised before the Board in pre-hearing management (or discovered during a site visit),

increase significantly, with potentially devastating tax consequences to the owner. Appeals cannot be withdrawn as of right – the Board must agree, and can order the appeal to proceed over the objections of either or both of the owner and assessor. Approval of withdrawal of an appeal is less likely if the Board is aware of potential inaccuracies in the assessment and the withdrawal is opposed by the Assessor.

Board Power to Order Reassessment of Neighbouring Properties to Achieve Equity

In addition to its power to reopen the subject property's assessment, the Board has the extraordinary power, seldom exercised, to achieve equity between the value of the subject property and the values of similar neighbouring properties within a taxing jurisdiction, by ordering the Commissioner to reassess some or all of the neighbouring properties, *despite not having been appealed by their owners*, at a value determined by the Board in the context of the subject appeal.

The Board may invoke this power if, in the context of the appeal, it finds some or all of the neighbouring properties are either overvalued, or undervalued, relative to the property under appeal. As a practical matter, the Board will not be in a position to invoke this power without evidence of the assessments of the neighbouring properties. The author questions whether it is incumbent on the Board to notify the owners of the neighbouring properties that it is considering ordering their reassessment under this provision to avoid challenges on the basis of procedural unfairness. This does not appear to have been the subject of a decision by the Court.

An isolated example of the rare exercise of this power appears in the Board decision in ***CH Golf ltd. v. Assessor of Area #19 – Kelowna*** (2004) PAABBC 20030888. CH Golf appealed 250 of 495 of its strata lots in an RV development. The Board determined that the entire subdivision was assessed higher than its actual value (and each lot higher than its actual median value), and ordered the reassessment (and reduction in value) of all 495 lots under s.57(4) of the *Assessment Act*.

Equity in Classification and Exemptions

As earlier noted, equity most often comes into play in the context of valuation issues. Less frequently, but with equal significance, it comes into play in the context of classification and exemptions.

Equity in Classification

Although equity has traditionally been acknowledged as applying to classification of properties (see ***St. Helen's Hotel (Vancouver) Ltd. v. Assessor of Area #09-Vancouver***, S.C. 189 (B.C.S.C.)), any lingering question about this was removed by the recent amendment to the definition of "assessment" in s.1(1) of the *Assessment Act*, deeming it to include both the

valuation and classification of the property. The question of equity in classification was recently addressed by the Board and the Supreme Court in *C&C Holdings, infra*. In this case, the appellants contended that remanufacturing plants situated in adjacent taxing jurisdictions had been classified inequitably (inconsistently) under the *Exemption from Industrial Improvements Regulation,* B.C. Reg. 97/88, and sought equitable classification (eg. exclusion from Class 4 – Major Industry) on the criteria applied to the neighbouring reman plants which were classified as Class 5 – Light Industry under this regulation.

Without pronouncing on whether an inequity had been established, the Board found that its powers to achieve equity in assessment under s.57(1) of the *Assessment Act* did not extend beyond properties within the same municipal or rural area taxing jurisdiction, despite approximately 25% of the appellants' taxes being paid to the province on the basis of province-wide school tax rates. The Supreme Court upheld the Board's decision, confirming that the assessor and Board have a duty to ensure consistency in classification of similar properties in a class, but that these duties are confined to properties within a municipality or rural area on the words of s.57(1).

The Board had occasion to address equity in classification again in *Shaw Cablesystems Ltd. v. Assessor of Area #04 – Cowichan* (2004) PAABBC 200404651. Shaw sought reclassification of its Nanaimo facilities from split-classification between Class 2 – Utilities / Class 6 – Business & Other to Class 6 – Business & Other, relying on the assessment of its other Nanaimo facility as entirely Class 6 for an equity argument. Applying the decision in *C&C Holdings* and considering its previous decision in *Assessor of Area #10 – Burnaby/New Westminster v. 2725321 Canada Inc*. (2001) PAABBC 20014320, the Board found that it is not sufficient to base an equity argument on the treatment of only one other property in the class, where, as was the case, the subject property was assessed consistently with four other properties in the equity class. The Board distinguished its decision in *2725321 Canada Inc*. on the basis that in that case, most of the properties in the equity class were classified differently (and more favourably) than the subject property, creating an inequity that could only be addressed by reclassification of the subject property to the class that resulted in the lower tax consequences.

As will be apparent from the papers of the other speakers on this Panel, the Board continues to refine the tools to be used in achieving equitable valuation. While far less refinement has been brought to bear on classification equity, the same basic principles apply:

- Identification of the "equity set" based on common defining characteristics;
- Comparison of classification treatment of the "equity set" with the subject;
- Analysis of whether differences in treatment between the "equity set" and the subject is justified on the facts and the law, and

- Confirmation that the "equity" set cannot be reassessed.

Equity in Exemptions

Generally speaking, exemptions from taxation and assessment are an aspect of the "accuracy" of an assessment and must be administered by the Assessor and the Board consistently amongst similar properties in a taxing jurisdiction.

Previous Board Rulings

Prior to 2007, although equity in exemptions had occasionally arisen in hearings, the Board had not squarely dealt with the issue. For example, although not clearly articulated by the Board in its reasons in ***Fletcher Challenge Canada Ltd. v. Assessors of Area #04, #06*** (A.A.B.), October 16, 1996, in the result the Board granted a pollution abatement exemption for the appellant's expansion of its pulp and paper mill chlorine dioxide facility in part because a similar exemption had been granted to similar systems. Likewise, in ***Norske Skog Canada v. Area #06*** **(2003)** PAABBC 20030456, the Board held, without lengthy discussion of the application of equity to exemptions, that it had no power to achieve equity and consistency in the treatment of underground SET piping amongst pulp mills in the face of the grandfathering provisions precluding new pollution abatement exemptions under the *Community Charter*, R.S.B.C. 2003, c.26 that were not in place on the assessment roll as of 1996.

Seminal 2007 Board Decision in Young Life

The September 7, 2007 decision of the Board in ***Young Life v. Assessor of Area #08 – Vancouver Sea to Sky Region*** (2007 PAABBC 20070013) marked the first time the Board issued a decision concerning the application of a taxation exemption that turned exclusively on the principles of equity, a milestone in B.C. property taxation.

In its decision, the Board found that Young Life's summer youth camp (Malibu Club) must, even though not entitled on the merits to the tax exemption sought, be exempted in 2004 through 2006 to ensure equal treatment with other similar youth camps in the same rural tax jurisdiction all of whom were exempted from tax.

The Board's decision is under appeal by the Assessor and the stated case is expected to proceed in B.C. Supreme Court in late June, 2008.

By way of background, historically, all youth camps in the Sechelt rural tax jurisdiction had been exempt under section 15(1)(q) of the *Taxation (Rural Area) Act,*[2] which applies to

[2] R.S.B.C. 1996, c.48

properties operated by non-profit organizations "for the demonstrable benefit" of members of the "community where the land is located".

In 2003, the Assessor removed the Malibu Club exemption. Malibu Club appealed to the Board and lost, the Board finding that the provision could not apply to remote youth camps with only slight attendance from the local community (which all agreed was the rural area of the Sunshine Coast where the camp is located). An appeal by stated case likewise failed.

In 2006 Young Life appealed again to the Board, this time renewing its argument that it ought to qualify under the exemption on the merits, and in the alternative arguing it ought to be exempted based on equitable application of the exemption amongst all youth summer camps in the same taxing jurisdiction.

The Assessor took no position before the Board on the application of equity to classification, arguing that on the facts it did not assist Young Life. However the Assessor now argued that the relevant "community" was the entire Lower Mainland instead of the local Sechelt community, because on this new analysis, the camps other than Malibu Club had a more significant % attendance from the "community" than if measured against attendance from Sechelt Rural.

Young Life urged the Board to apply its reasoning from the original decision and continue to treat Sechelt rural (rather the Lower Mainland), as the "community" relevant to the tax exemption, on the basis that these are the taxpayers directly affected by an exemption to a local camp. The Board agreed with Young Life, finding that none of the camps had a significant enough % attendance from the local community of Sechelt rural to qualify for the exemption, but nevertheless ordering the Assessor to exempt Malibu Club to ensure equitable treatment of all the camps.

A stated case appeal from the Board's decision was abandoned. As set out below, what appeared to be a legislative response to the equity issue created a new category of exemption for British Columbia summer camps based on charitable, rather than non-profit, ownership of the facility.

Legislative Response to Young Life – Charitable "Recreational Camp" Exemption - Bill 2 – Budget Measures Implementation Act, 2008

Ostensibly in response to the ***Young Life*** decision, the Legislature introduced a new charitable summer camp exemption in Bill 2, *Budget Measures Implementation Act*, 2008. The new exemption was cast in the following terms:

Section 115 of the Taxation (Rural Area) Act, R.S.B.C. 1996, c. 448, is amended

> *(a) in subsection (1) by adding the following paragraph:*
>
> > *(y) land or improvements or both that are*

(i) owned by or held in trust for a registered charity, or

(ii) occupied by a registered charity, and

(iii) used primarily as a recreational camp, and

(b) in subsection (5) by adding the following definitions:

"recreational camp" means a camp that provides one or more of the following:

(a) recreational experiences;

(b) educational experiences;

(c) rehabilitative or therapeutic experiences for persons with disabilities or chronic or life-threatening illness;

(d) religious instruction;

(e) leadership training;

"registered charity" has the same meaning as in section 248 (1) of the Income Tax Act (Canada).

The transitional provisions of the exemption provided:

Transition — Taxation (Rural Area) Act

122 Land or improvements or both that are, in the 2008 tax year

(a) owned by or held in trust for or occupied by a non-profit organization and used primarily as a recreational camp, and

(b) exempt from taxation under the Taxation (Rural Area) Act,

are exempt from taxation under the Taxation (Rural Area) Act for each of the 2009 and 2010 tax years in which the land or improvements or both continue to be owned by or held in trust for or occupied by the non-profit organization and used primarily as a recreational camp.

The significant difference between the existing s.15(1)(q) non-profit exemption and the new s.15(1)(y) charitable exemption was twofold:

1. first, the owner or operating entity of the camp must be registered Canadian charity instead of a non-profit society, and

2. second, it was no longer necessary to demonstrate a benefit to the community where the camp is located. The threshold test is simply that the camp be used primarily for one of the defined "recreational camp" purposes, including religious instruction (the purpose of the Malibu Club, and similar, remote summer camps). The advantage to this is that it clarifies and objectifies the threshold for the exemption, resulting in certainty for camp operators.

The Bill took effect in 2009.

What Lies Ahead?

British Columbia's Board and Courts have specifically recognized equity in value, class and exemptions. It falls to the ingenuity of the Board and practitioners to refine the application of these principles on a case by case basis.

Equity remains the "last bastion" of hope for some B.C. taxpayers (where they cannot succeed on the merits of the case), and taxpayers must be alert to equitable alternatives to traditional assessment questions.

PART 4 – CONCLUSION

I take this opportunity to once again thank you for inviting me to speak on this Panel and share with you some of the recent developments in British Columbia assessment and taxation law and policy.