2020 CPTA Educational Seminar

James D. Fraser, Lawson Lundell LLP[1]

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INTRODUCTION

Thank you for the opportunity to participate on the legal panel today.

My paper outlines several important legal and practical developments in B.C. property tax law since the last conference.

1. PENDING TAX POLICY DEVELOPMENTS

a. RELIEF FOR SMALL BUSINESS OWNERS

Through first reading bill ***Bill 10 – 2020 Municipal Affairs and Housing Statutes Amendment Act, 2020***, the Provincial Government has introduced a first reading bill ***The Municipalities Enabling and***

[1] Jim is a Partner in Lawson Lundell LLP's Vancouver office. This paper represents a general overview of the law in British Columbia. Readers are advised to seek legal advice with respect to specific legal issues.

Validating Act (No. 4), S.B.C. 2011 intended to enable municipalities to grant permissive exemptions to small businesses being onerously taxed based on development potential driven land value.

Early response to the Bill is mixed, presumably reflecting a preference for permanent mandatory relief for example through an intermediate tax class for small business owners or some other measure that exempts or reduces taxes on the speculative aspect of value, as occurs already for homeowners who pay tax based on their actual residential use regardless of development potential of their property.

b. EMPTY STOREFRONT TAX

However on the heels of this news comes the news that Vancouver councilors are studying yet another new tax for property owners (recall that B.C. now has property tax, additional school tax, foreign buyer transfer tax, speculation tax and vacancy tax) – this time, an "empty storefront tax" the purpose of which would ostensibly be to stimulate landlord owners of commercial premises vacated by business owners whose property taxes render their businesses uneconomic, to lease them out at lower rents than the commercial market can bear, rather than pay the tax.

Though councilors are reportedly only looking at the new tax on a conceptual level, I would not rule out such a tax as yet another intervention by government in the property market, to "guide" private property use.

2. PRACTICE ISSUES

a. STANDARD OF REVIEW

Perhaps the single most important change in B.C., and perhaps other jurisdictions, is the return to the "correctness" standard of review for appeals by stated cases on questions of law from Board rulings.

The Vavilov Trilogy[2]

In the cases referred to as *Vavilov* or the Trilogy (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 and *Bell Canada v. Canada (Attorney General)*, 2019 SCC 66), the Supreme Court of Canada clarified the framework for judicial review of administrative decisions.

In the Trilogy, the SCC has ostensibly simplified the law by redefining the framework to determine the standard of review a court is to use when reviewing an administrative tribunal decision.

As CPTA members will know from years of legal discourse on the standard of review, the standard of review determines the degree to which the court may intervene in or must defer to the tribunal's decision and is fundamental to administrative law practitioners and all whose rights are decided by tribunals.

The clarification of law in this area is a watershed development in B.C. property tax law.

This is because it will directly impact the standard of review that courts in B.C. use to review decisions of the Property Assessment Appeal Board. As CPTA members will know, the B.C. Board, created under the *Assessment Act*, R.S.B.C. 1996, c. 20, is charged with deciding property tax assessment appeals from Property Assessment Review Panels ("PARP"). The Act includes a statutory appeal provision called a "stated case appeal" that allows a party to a Board decision to appeal as of right a question of law arising from the Board's decision to court.

Historically a judge hearing a stated case applied a "correctness" standard when reviewing a Board's interpretation of the law, allowing the judge to substitute their interpretation if they disagreed with the

[2] This discussion reflects a blog post that I co-authored with Camille Chisholm, Ian Webb and Cole Rodocker at Lawson Lundell LLP, to whom I am grateful.

Board's. Importantly, this provided parties to an assessment appeal with a "second kick at the can" on legal issues.

However in 2010, in the B.C. Court of Appeal decision in *Weyerhauser*, implementing the SCC's direction to defer to tribunals even on legal interpretations, the Court of Appeal found that B.C. courts were forced to switch to the "reasonableness" standard in stated case appeals. This prevented judges from substituting their interpretation of law for the Board's except in the rarest of cases where the Board's interpretation was irrational. The implementation of the reasonableness standard of review effectively shut down the "second kick at the can", meaning tax appeals were conclusively decided by the Board.

In practical terms, this effectively meant Board decisions stood unchallenged for the better part of a decade because judges simply could not second-guess the Board's interpretation of any piece of legislation remotely connected with the assessment or taxation of property. The result was the death of the stated case appeal as an effective remedy for taxpayers and the Assessor alike. The situation in B.C. seemed destined to get worse before it got better when the Court of Appeal went so far as to propose that the stated case appeal be overhauled to prevent questioning of specific aspects of a Board's legal interpretation, to ensure the decision was reviewed by a court as a "holistic whole".

Thankfully, the SCC's decisions in the Trilogy have, quite likely in large part due to the efforts of Gil and Brian in the *Edmonton East* case, returned the correctness standard of review at least in B.C. to assessment appeal stated cases (because, as discussed further below, such appeals are created by statute).

Going forward, the Trilogy will restore a judge's right to correct interpretation errors in assessment appeal Board decisions, returning the "second kick at the can" for all who appear before the Board.

As a general overview of the changes brought on by the Trilogy, there are two aspects to the judicial review framework that are impacted. First, with respect to the applicable standard of review this analysis now

starts with a presumption that reasonableness is the applicable standard. The reasonableness standard requires that courts limit their interference with the administrative decision maker. The application of this standard, and the court's limited involvement, is aimed at respecting the legislature's intention that the administrative body, not the court, should be the one fulfilling its mandate and interpreting the law and issues the legislature has decided should come before it. By creating a presumption that the reasonableness standard applies, the Trilogy has removed the need for a contextual analysis to determine the appropriate standard of review. One hope is that this will streamline the judicial review process, making it more efficient and cost-effective.

As with any presumption, there are certain situations where the presumed standard of review will not apply. Two situations were expressly set out in the Trilogy. One of these, likely of limited application, arises where the rule of law requires that the standard of correctness be applied. This will occur where certain categories of legal questions are under review, including constitutional questions, general questions of law of central importance to the legal system as a whole and questions related to jurisdictional boundaries between two or more administrative bodies.

The other circumstance in which the reasonableness presumption will be rebutted, and which, as in the case of assessment appeal stated cases, will likely see more frequent application, is where the legislature has signaled an intention that the less deferential correctness standard apply. One way the legislature can signal this intent is by creating a statutory appeal mechanism (such as an assessment appeal stated case) permitting an appeal of the administrative tribunal's decision to the courts. Prior to the Trilogy, where the legislature had included such statutory appeal rights the court would still have to undertake a complicated analysis to determine the appropriate standard of review – far more often than not deciding that the reasonableness standard applied, resulting, as with assessment stated cases, in courts rarely if ever interfering with tribunal decisions even on questions of law.

By once again associating statutory appeal rights with the correctness standard, the Trilogy cases should reinforce the traditional supervisory role of the court on legal issues, a significant improvement in access to justice in the administrative law world. Where statutory appeal rights are not provided and judicial review remains the mechanism to appeal tribunal decisions to court, the Trilogy generally confirms the continued application of the more deferential reasonableness standard.

b. BOARD'S CAN RELY ON EXTRANEOUS EVIDENCE IF DOESN'T TAINT DECISION

In ***992704 Ontario Limited v British Columbia (Assessor of Area #08 – Vancouver Sea to Sky)***, 2019 BCSC 2035 (CanLII) the Court found that in determining the value of a Whistler residential property, the Board had inappropriate (and in error of law) referred to unverifiable, untested, and unproven "facts" (statistical research on home prices that the Board conducted on its own) that were not tendered as evidence by the parties.

However the Court went on to find that as there was independent evidence to support the Board's ultimate valuation of the property, the Board's reliance in extraneous evidence did not render the Board's decision as whole unreasonable.

Query the outcome of this case had the Court applied the new "correctness" standard imposed by the Trilogy. I expect the outcome would have been the same, as it is open to the Court to find that the Board can reach the right decision provided there is some evidence to support its factual findings.

c. 30 DAY DEADLINE TO BRING STATED CASE ON FOR HEARING MANDATORY

In ***Murarka v British Columbia (Assessor of Area #11 – Richmond /Delta)***, 2019 BCSC 1832 (CanLII) the Court confirmed the long-standing principle that a stated case must be brought on by the appellant for hearing within 30 days of filing by the Board, else the Court loses jurisdiction. The underlying tenet is that timelines within the control of

a party are mandatory, while timelines not in the control of a party are directory.

d. DISCLOSURE

Third parties occasionally demand information from BC Assessment under the *Freedom of Information and Protection of Privacy Act.*

However in ***British Columbia Assessment Authority (Re), 2017 BCIPC 53 (CanLII)) as Reconsidered 2019 BCIPC 33*** the FOI Commissioner determined at first instance, then confirmed on reconsideration, that section 21(2) of the B.C. *Freedom of Information and Protection of Privacy Act* prohibits BC Assessment from "*disclosing to an applicant information that was obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax*".

By way of background, the South Vancouver Parks Society and an individual had made separate requests to BC Assessment under the *Freedom of Information and Protection of Privacy Act* for materials underlying an appeal by the owner of the Oakridge Shopping Centre of its 2015 assessment. BC *Assessment* declined to provide most of the materials based on the s.21(2) prohibition noted above, including information that had been directly provided by the taxpayer or by the taxpayer's tax agent, information that the Assessor had obtained from other sources, and the outcome of calculations the Assessor had performed using information not obtained from the taxpayer or its agent, but which could simple arithmetic calculation be used to deduce information that must not be disclosed.

The FOI Commissioner initially ruled (*2017 BCIPC 53 (CanLII)* that the former must not be disclosed but declined to rule that the latter be prohibited from disclosure because it had not been demonstrated how the latter could lead to disclosure of the former through simple arithmetic calculation. The Assessment Authority appealed the latter part of this ruling by petition to court on the basis the refusal to prohibit disclosure of public information that could indirectly result in disclosure of protected information subverted the intent of the legislation.

As the applicants for the information did not participate, the parties requested and the Court agreed to refer the matter back to the FOI Commissioner for reconsideration. In the reconsideration decision of August 22, the Commissioner determined that where protected information could be deduced using non-protected information, the latter must be protected from disclosure by BC Assessment.

This means that whatever information taxpayers or their agents report to BC Assessment that the Assessor uses to determine the assessment of the property may be compellable from the Board in an appeal, but cannot be compelled by a stranger to the appeal from BC Assessment through the FOI Act.

3. SUBSTANTIVE ISSUES

A. CLASS REGULATION SECTION 1(1)(c) DOCUMENTS CAN INCORPORATE OTHER DOCUMENTS BY REFERENCE

Developers continue to push to expand the scope of documents that can be used to justify split residential / commercial classification for vacant development properties. In ***Grosvenor Canada v. Area 08 (2019 PAABBC 20190018))*** the Board determined that the Assessor must look to details in development permits that are incorporated by reference into section 219 Land Title Act covenants registered against title to find the requisite portion or percentage of exclusive residential use to warrant split classification. The Assessor resisted this approach, arguing the categories of documents that can be referred to for split class details is limited to the 5 types of documents listed in section 1(1)(c)(ii) and cannot be expanded by reference to other documents such as permits.

The Board articulated the following stringent test for incorporation by reference in the context of section 1(1)(c)(ii):

> …
>
> *[52] From a plain reading of the words of section 1(1)(c)(ii), I find that section does not expressly prohibit an incorporation by*

reference into the listed documents. From the cases referred to me, especially those dealing with the incorporation by reference in statutory instruments, I could find no basis for concluding the mechanism of incorporation by reference could not apply to a listed document under section 1(1)(c)(ii). I make this finding, notwithstanding I have found the list of documents to be exhaustive, as I conclude the two findings are not mutually exclusive. ***Simply because the list of documents is exhaustive, there is no basis for finding that one or more of those documents may not incorporate another document by reference, provided the necessary indices of incorporation are found****.*

[53] Based on the above, I find that the legal mechanism of incorporation by reference may apply to the listed documents in section 1(1)(c)(ii). However, I want to be clear, simply because I find that the mechanism may apply, does not mean that it will apply in every case. The case law is clear that whether the mechanism applies in a particular circumstance depends on the evidence.

6. The evidentiary test

[54] I find there are no magic words by which the mechanism of incorporation by reference applies. As noted above, ***the primary document must provide explicitly or by clear implication that the secondary document, or part of it, is to form part of the primary document. A passing or mere reference to the secondary document is not enough****. (See Ponderosa Peachland.)*

[55] ***I further find from the authorities, specifically Wright v. T.I.L. Services Pty. Ltd (1956), S.R. (N.S.W.) 413, that for incorporation by reference to apply, there must be certainty about the document to be incorporated, that is, the secondary document***

> ***(or part thereof) must be clearly identified in the primary document and the secondary document must not contain any ambiguity in the terms to be applied. In effect, I agree with and adopt the Appellant's submission that the secondary document must be known, accessible and certain****.*
>
> *[56]* ***Once the document (or part thereof) is clearly identified and found to be without any ambiguity in its applicable terms, in the absence of express wording, the test to be applied is the "integral part" test as set out in Manitoba Language Rights. That is, whether the primary document makes no sense or has no reason for being without the incorporated, secondary document. Put another way, is the secondary document simply mentioned and does not need to be consulted for the primary document to be understood?***

On the particular facts, and as to the 2018 appeal only, the Board found that since key s.219 covenants could not be read and understood without reading a phased development agreement and development permit, those documents must be regarded for the purpose of analyzing split classification as having been incorporated by reference entirely into the s.219 covenant. The Board went on to find that when read together these documents sufficiently clearly defined the two-dimensional FSR attributable exclusively to residential use, to justify split classification in that proportion of residential use. The Board rejected the Assessor's argument that to qualify, the documents must define a volumetric residential use rather than simply a two-dimensional use.

c. POTENTIAL ADVERSE IMPLICATIONS OF RECLASSIFICATION OF UNUSED DENSITY TO RESIDENTIAL CLASS

As noted, the provincial government continues to attempt to drive market prices down through imposition of taxes beyond basic property and transfer tax. As developers vie for split class to reduce holding

taxes on development properties, they must be mindful of the adverse impact on overall taxes of moving property from commercial to residential class.

For example, because additional school tax is levied on Class 1 “land with no present use”, a taxpayer considering seeking split classification between residential and non-residential class for unused property must factor into the projected cost savings the offsetting cost of both additional school tax and speculation / vacancy tax.

The former applies to Class 1 land that is “unused land” under section 1(1)(c)(ii) of the Classification Regulation.

The latter applies to “residential property” defined as either:

a. a parcel or portion of a parcel of land that is class 1 property if there are no improvements on the parcel of land, or

b. a parcel or portion of a parcel of land that is class 1 property, together with any improvement or portion of an improvement that is class 1 property;

This concludes my paper. Thank you again for the opportunity to participate on this Panel.