2022 CPTA-ACTF 56th Annual National Workshop

Cross Canada Legal Update for British Columbia

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Introduction

- Thank you for the opportunity to present the 2022 legal update for British Columbia
- I am a Partner in Lawson Lundell LLP's Vancouver office. This presentation reflects a general overview of recent legal developments in British Columbia. It is not intended as legal advice which readers are encourage to seek with respect to specific legal issues.
- I start with practice tips before moving into substantive developments in recent Court and Board cases
- I am happy to answer any questions during the Panel's presentation, or later.

Practice Points

Foreign Buyer Additional Property Transfer Tax Pitfalls

- Additional property transfer tax at 20% rate is payable on Class 1 – residential portion of property acquired by a "foreign entity", directly or in trust.
- It is important to scrutinize commercial, industrial or other class property for existence of illegal suites (etc.) that can unexpectedly trigger $100's of thousands of dollars of additional transfer tax (a client who recently acquired commercial property for $27mm and wasn't aware at time of illegal residential suites has been assessed an additional $375k FBT).
- It is also important to scrutinize the transaction for the appearance of a resulting trust and take steps to mitigate the risk of additional PTT assessed on this basis.
- Note that the Court recently found a lawyer and realtor jointly and severally liable for negligence in failing to alert a foreign buyer to liability for additional PTT. On appeal the Court of Appeal overturned the decision, finding that the advisors could not have anticipated a change in the PTT rules that occurred subsequent to the transaction that imposed the additional PTT. This leaves open the prospect of a claim against advisors, on appropriate facts.

Practice Points

Discretionary Supplementary Assessment – "Hail Mary" Appeal

- Normally failure to appeal to the Property Assessment Appeal Panel ("PARP") by the statutory January 31 deadline means no right of appeal that year
- However there is a "Hail Mary" available to taxpayer under Assessment Act s.12(4) which allows the Assessor to issue a supplementary assessment by December 31 to correct "errors or omissions"
- As the Assessor is understandably reluctant to agree to this to avoid its widespread use in place of the normal statutory appeal, the taxpayer has a better chance of persuading the Assessor to issue the supplementary assessment if it is based on a clear objective error or omission instead of a simple difference of opinion on value, and is the Assessor's error or omission not the taxpayers
- If the Assessor refuses, the taxpayer can judicially review the refusal as an "unreasonable" decision asking the Court to force the issuance of the supplementary assessment – a tall order given the high threshold on this standard of review, but perhaps worth pursuing if enough $$ are at stake
- As B.C. Courts have consistently found that failure to obtain a Court decision compelling issuance of the supplementary assessment by the December 31 deadline is fatal (*Crown Forest Industries Ltd. v. Assessor of Area #24 – Cariboo*, Stated Case 195 (BCSC), aff'd 1986 Canlii 1055 (BCCA)), it is crucial to start this process as early as possible in the year

Practice Points

Property Assessment Review Panel Power to Compel Testimony or Disclosure

- The Property Assessment Review Panel (PARP) has the technical power under Assessment Act s.39 to compel testimony or disclosure of documents that are "admissible and relevant to an issue in the application".
- However PARP is rarely called on to exercise this power (it has happened only once in my experience), and since time constraints on the duration of PARP's jurisdiction limit the ability to fairly apply the provision, its usefulness is questionable.
- In particular, since PARP hearings typically occur over a relatively narrow window of several weeks before the March 15 deadline for PARP to issue its decisions, it is arguably too late for the taxpayer or Assessor to make a request for disclosure under s.39 at commencement of the hearing itself, without prompting an adjournment that pushes PARP beyond the expiry of its statutory mandate.

Practice Points

Court Quashes Property Assessment Review Panel Decision as Procedurally Unfair – 992704 Ontario Limited v. British Columbia (Assessor of Area #8 – Sea to Sky) 2021 BCSC 1029

- The Property Assessment Review Panel (PARP) is the first level of administrative appeal from annual assessment. Appeal from PARP to the Board is a "*de novo*" appeal, not limited to issues or evidence before PARP.
- As noted, PARP has limited time and ability to conduct a fulsome hearing. PARP sets a maximum time for the appellant to introduce its evidence to meet its burden of proof.
- Here, the appellant's lawyer used much of this time on an application that PARP Panel recuse itself due to institutional bias. PARP declined to rule on the application.
- The appellant's lawyer suggested introducing its case by questioning the Assessor's case. The Board refused, noting the burden of proof lies with the appellant who must present its case first, and noting the Panel's inability to follow questioning on Assessor's evidence which Panel had yet to upload and read.
- After much back and forth between the appellant's lawyer and the PARP Chair about which evidence must be dealt with first and time running out, PARP gave the Assessor several minutes to present its evidence and the appellant's lawyer several minutes to question it, following which PARP Chair closed down questioning, deliberated and dismissed the appeal.

- On judicial review from PARP's ruling, the Court found that the appeal to the Board from PARP's ruling did not provide an adequate alternative remedy to judicial review based on lack of procedural fairness.
- The Court found that PARP made a series of decisions that cumulatively denied the appellant a fair hearing, starting with PARP's refusal to rule on the bias application which the appellant had to bring at the time else risk being said not to have raised it in a timely way, and culminating in PARP unduly restricting the appellant's time to present its case and question Assessor's.
- The Court noted though PARP's hands are tied by time constraints and lack of rules it must nonetheless strive to provide fair hearing.
- As the March 15 deadline for a new hearing had already passed by the time of judicial review, the Court could not order new hearing but instead simply declared PARP had breached principles of procedural fairness.
- The Attorney General of BC who participated in the judicial review filed an appeal to the Court of Appeal. The appellant sought to quash this on the basis the AG has no standing to appeal. The Court of Appeal disagreed, ruling (2021 BCCA 469) that the AG has the statutory right to participate in any judicial review, including the right to further appeal the outcome.

Legal versus Evidentiary Burden of Proof in Assessment Appeals - Trafalgar Lands Ltd. v. British Columbia (Assessor of Area #09), 2022 BCCA 211 (CanLII)

- Section 40(5) of the Assessment Act places the burden of proof on the complainant, or in the case of an Assessor recommendation, the Assessor. The Act does not define "burden of proof" and is silent as to the burden of proof in subsequent proceedings including a Board appeal.

- In Trafalgar Lands, the Court of Appeal was called on to address the degree to which a party must prove its case.

- The Court confirmed that in light of the Board's inquisitorial duty to find actual value, there is no legal burden of proof in an appeal, but an evidentiary or persuasive burden requiring the party asserting a fact to lead evidence to support the fact. It is therefore open to the Board to weigh competing evidence and determine which is more persuasive, without challenge.

Data Available for Purchase not Subject to FOI Disclosure – Order F21-05, 2021 BCIPC 05

- In addition to Board-ordered disclosure, some types of information may be compellable under BC Freedom of Information (FIPPA) legislation.
- Here, the applicant requested a "data set" from BC Assessment under the Freedom of Information legislation (FIPPA).
- BC Assessment denied disclosure under FIPPA s.3(1)(j) based on the individual entries in the "data set" being available for purchase.
- The applicant applied for an inquiry. BC Assessment applied to quash the inquiry. The applicant said whether or not individual entries are available for purchase, the data set as a whole was not, and must be compelled disclosed.
- The inquiry officer agreed with BC Assessment that it was "plain and obvious" the information sought was available for purchase, and excluded from disclosure under FIPPA

SUBSTANTIVE DEVELOPMENTS

Additional School Tax* – Board Rules that Development Land can Simultaneously Have No Present Use and Have a Present Use - *Musqueam Block F Land Ltd v. Area 09 (2021 PAABBC 20210032).

- Additional School Tax (AST) levied under s.117.1 of the *School Act* applies to "*dwelling properties*" exceeding $3mm in assessed value. "*Dwelling property*" is defined as Class 1 – Residential land that, among other things, the assessor determines to **have no present use**. To qualify as Class 1 - Residential property under the Prescribed Classes of Property Regulation, property must either be used for residential purposes, or **have no present use** and be zoned and held partially or wholly only for residential uses.
- Here, the lands were the subject of a variety of development agreements and preliminary residential development activity which the appellant said constituted a "use" sufficient to disqualify application of the AST. The assessor said there was insufficient activity to characterize the property as having a "present use". The parties agreed the lands were properly classified Class 1 – Residential under the Prescribed Classes of Property Regulation as having no present use. A key question for the Board was whether a development property that it is agreed has no present use so as to qualify for Class 1 – Residential classification can at the same time be said to have a present so as to avoid AST.

- In ruling that this can happen, the Board rejected the Assessor's argument that the School Act AST provisions are part of a larger comprehensive taxation scheme including the Assessment Act and Prescribed Classes of Property Regulation, so that "present use" must have the same meaning in both contexts. The Board reasoned that if the threshold determination that a property have no present use to qualify for Class 1 – Residential were intended to be determinative of the existence of a present use for the purpose of application of the AST, the Legislature would not have considered it necessary to ask the question again, in the AST provisions. The Board further reasoned that the purpose of the Prescribed Classes of Property Regulation and the AST provisions were fundamentally different, so that development activity could simultaneously be characterized as "not a present use" and "a present use", to achieve this intent.
- The Assessor and the Province of B.C. have appealed the Board decision by stated case. The Province in particular has articulated its concern that the same term (no present use) not be given opposite meanings on the same facts in a cohesive legislative scheme.

Definition of Industrial Improvement / Availability of Exemption for Vessels - Board Removes Requirement to Prove Vessel is "Production Machinery" to Qualify for Exemption - Fengate Capital Management v. Assessor 26 (2021 PAABC 20211240)

- The *Assessment Act Regulation* exempts certain vessels, including tanks, from assessment and tax, including "*rotary mixers*" and "*dust and particular collectors or separators*"
- Fengate argued that three wood waste silos at its Ft. St. James biomass energy facility qualified for both exemptions based on occurrence of mixing of wood waste and containment of dust in silos.
- *Assessment Act* section 1(1) definition of "*improvement*" deems any structure to be an assessable improvement unless it is among other things "*production machinery*" (a motor, engine or machine used to manufacture, process, repair or convey a product), in which case it is excluded from assessment unless deemed back into the definition of improvement under section 1(2). Section 1(2) specifically deems vessels including tanks of a specified capacity to be improvements, unless exempted under the *Assessment Act Regulation*.
- Assessor argued among other things that because the silos were structures, they could not be excluded from the definition of assessable improvements regardless of whether they were deemed to improvements under section 1(2), and so could never qualify for exemption under the Regulation. Fengate argued that vessels like the silos that are deemed to be improvements under section 1(2) "for greater certainty", automatically qualify for consideration for exemption, and need not be shown to be "*production machinery*" to qualify for exemption.
- While dismissing the appeal on a finding that the silos were principally designed for material storage, not rotary mixing or dust and particulate collection and separation, the Board agreed with Fengate that vessels qualify for consideration for exemption and needn't be shown to be production machinery to so qualify.
- This marks a significant departure from the previous requirement to show that a vessel is production machinery in order to qualify for exemption.

Board Significantly Reduces Scope of Class 4 – Major Industry Classification - District of Sparwood v. Assessor of Area #22 – East Kootenay (2021 PAABBC 202110045)

- Assessment Act s.20 defines Class 4 – Major Industry improvements as improvements that are "part of a plant" designed and built, whether or not capable of going concern operation, for among other things, mining, breaking, washing or beneficiating or coal.
- In a foundational case for the Major Industry Class, the Districts sought to remove Water Treatment Facilities required to be built and operated at Line Creek and Fording coal mines in Elk Valley to remove selenium from wastewater in order for mines to expand and continue operating, from Class 4 as not "part of the plant", because they are not physically used for mining, breaking, washing or beneficiating coal.
- The Board agreed with the Districts and excluded the WTFs from Class 4, noting they lacked sufficient physical, functional and operational integration with the physical processes occurring at the coal mine plant to qualify because they did not physically extract, process or handle coal, and rejecting the notion that the legal requirement to build and operate the WTFs to obtain permits to expand and operate the Mines made them "part of" the Plants.
- The Assessor and Teck Coal Limited (owner of the two plants) appealed the Board's decision by stated case. The Court heard the appeal on May 18 and 19. Given the expansive scope of improvements that stand to be excluded from a "plant" under the Board's ruling, the Court's decision, which is pending, will, as noted, be foundational to the future scope of Major Industry Plant taxation across the Province.

Court of Appeal Addresses Duality of Interests in Land Held under Agreement for Sale - Coquitlam (City) v. British Columbia (Assessor of Area #09), 2022 BCCA 211 (CanLII)

- In *Coquitlam (City) v. British Columbia (Assessor of Area #10 – North Fraser Region)*, 2020 BCSC 440 the Court considered the extent to which land held by Coquitlam under an agreement for sale which the City had not yet fully paid should be exempt as "vested in or held by" the municipality under Community Charter s.220(1)(b).
- The Court considered the City's registered interest, despite falling short of fee simple, to be sufficient to qualify as "vested in or held by" the City for exemption. The Court went on to find that since section 220(1)(b) speaks to a physical parcel of land, exemption of the City's interest under section 220(1)(b) left nothing to be taxed in the vendor corporation's hands so that the property was fully exempt from tax.
- On appeal, the Court of Appeal agreed that the City had sufficiency incidences of ownership under the registered agreement to qualify for exemption of its interest as land "vested in or held by" the municipality.
- However the Court disagreed that this automatically exempted the vendor corporation's interest as part of a single physical parcel of land. Instead the Court interpreted section 220(1)(b) as speaking to interests in land, where the City's interest is distinct from the vendor corporation's interest.
- In the result the Court found the City to be exempt but the vendor corporation to be taxable, reflecting the duality of interests in land held under an incomplete agreement for sale.

Crown Lease Use Restriction as Means to Mitigate Lease Rate Hikes

- The Province has imposed strict rental controls on privately-leased residential properties.
- However as heard in the news early this spring, the Province has not imposed similar rent controls on its own Crown Lease residential properties which are typically charged 5% of assessed value.
- With skyrocketing values (I am aware of a Crown lease property that increased some 400% in value in last few years) tenants facing equivalent rent escalations are prevailing on the Province to impose similar rent controls.
- Some relief is available to Crown lease holders whose leases (as is typical) specifically limit the uses to which the land can be put. This is because Assessment Act s.19 requires the Assessor to account for the impact on value of restrictions on use imposed under Crown leases.
- Where for example the Crown lease restricts use to residential in a neighborhood where highest and best use is also residential, the use restriction is likely not to have effect a material impact on value.
- However where the Crown lease restricts use to something less valuable (eg. charitable use) than the prevailing highest and best use, the Assessor must fulfil their statutory obligation to reflect the impact of that use restriction on assessed value, to help keep Crown lease rent in check.

Conclusion

- This concludes my presentation
- Thank you for your time – I'm happy to answer any questions.

