



Communication

Canadian Property Tax Association, Inc.
Association canadienne de taxe foncière, Inc.

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Editor: J. Bradford Nixon
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EXECUTIVE COMMENT

Submitted by: James D. Fraser,
Executive Vice-President, Vancouver, BC

The 2010 Workshop Committee has been working diligently to prepare the best educational program possible for the Annual CPTA Workshop in Quebec City.

Our workshop theme “**Kicking Off a New Decade of Property Assessment and Taxation: Focus on Policy, Principles and Practice**” / « **Évaluation et taxation municipale 2010-2020 : une analyse prospective et globale des politiques, principes et méthodes d’application** » reflects the hard work of the Workshop Committee to bring you, what I think you will find to be, a highly substantive, educational program of experienced speakers, panels and workshops designed to inform you of recent developments in global tax policy, explore with you creative approaches to vexing appraisal issues, and help you to hone your skills whether as an expert witness or as an advocate for our assessment tribunal.

Some of the distinguished speakers include:

1. Update on Tax Policy and Regional Reform

Our two-day foray into tax policy and global reform features distinguished speakers including:

- Dr. Gary Cornia, Marriott School of Management, Brigham Young University
- Dr. Enid Slack, Director, Institute on Municipal Finance and Governance, Munk Centre for International Studies, University of Toronto
- Dr. Richard Tindal, Ph. D., President, Tindal Consulting Limited
- Mr. Bruce Fisher, MPA, CMA, Manager of Fiscal and Tax Policy Halifax Regional Municipality
- Mr. Paul Sanderson, JP, LLB (Hons) FRICS, IRRV, Director UK Valuation Office Agency, London, England

2. Appraisal Principles Workshop

These Tuesday breakout sessions offer you a choice between our ‘Highest and Best Use’ or our ‘Special Use Properties’ sessions, featuring guidance from:

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- Mr. Jerry Kirkland, Kirkland Balsom & Associates - KBA
- M. Robert Dorion, MBA, É.A., associé, Groupe Altus
- Mr. Scott McGregor, Chair, New Brunswick Assessment and Planning Appeal Board
- Mr. Ken Shaw, Principal, Ryan
- M. Richard Chabot, C.App., Chief Technical Director, Manager of Heavy Industrial Properties Assessment, ÉVIMBEC Ltée.

3. First Nations Tax Commission Update

4. Tribunal Skills Workshop

This Wednesday session offers an introductory talk on the need to separate advocacy from expert evidence, followed by concurrent workshops dedicated to each skill – both of which you can attend – with guidance from:

- The Honourable Mr. Justice John Savage, British Columbia Supreme Court
- Ms. Cheryl Vickers, Chair, British Columbia Property Assessment Appeal Board
- Me Louise Boutin, Attorney-Partner, Langlois Kronström Desjardins, and
- Ms. Dawna Ring, Q.C., Nova Scotia Utility and Review Board

5. Cross-Canada Legal Panel

Our panel of lawyers will update you on "Appeal Rights - What do they Really Mean?" followed by "Questions From the Floor".

This Workshop is at a very modest price compared to the alternative programs offered by many organizations. We believe it will be a necessary and welcome addition to your training as a professional in the assessment and property taxation world.

Le congrès 2010 de l'ACTF vous invite à examiner dans une analyse prospective et globale les politiques, les principes et les méthodes d'application qui prévaudront au cours de la prochaine décennie en matière d'évaluation et de taxation municipale. Une telle démarche s'inscrit dans une dynamique qui contribue à l'originalité et à l'exclusivité des objectifs de formation et d'information qui sous-tendent l'existence même de l'Association canadienne de taxe foncière.

I look forward to seeing you there!

BC CHAPTER

UPDATE

*Submitted by: Peter Austin,
Austin Real Estate Consultants, Vancouver, B.C.*

ELECTION TASK FORCE

A six-member task force report outlined 31 recommendations to improve local elections, next coming up in B.C. on Nov. 19, 2011. Although the task force examined the idea of reinstating the corporate tax, it did not include that in its package of suggestions.

Bill Bennett, Minister of Community and Rural Development, said at a press conference that the task force agreed it is worth looking at the tax ratios for residential, business and industrial use. However, the issue of how municipalities, which have fewer ways to raise funds than senior governments, would deal with a drop in revenue would have to be addressed. The aim is to make property tax "competitive with the rest of the country and the rest of the world," said Bennett, task force co-chairman.

As far as the business vote, Bennett said there are two competing principles here -- taxation without representation, which is what the business organizations have been pointing to. And there's the principle of one-person, one-vote. "When we tried to balance those two principles, the one-person, one-vote principle was more important to the task force ... The decision that we came to is supported by most of the world," said Bennett.

ASSESSMENT APPEAL BOARD

The Provincial Government has made several new appointments:

- Jeffrey Hand is a practicing lawyer and Managing Partner at Singleton Urquhart, Legal Counsel.
- Jack Cockwell is a retired senior appraiser from BC Assessment.
- Dave Lee, is a retired Deputy Assessor
- John Collins, is a past member of BCA Executive

Go to www.assessmentappeal.bc.ca for further information.

INDUSTRY TAX ADVISORY COMMITTEE

The "Advisory Committee" that reports to the Steering Committee referred to in last month's BC Assessment Update has continued to meet. David Lane acts as our delegate. The main issue continues to be how to advise the Steering Committee on equitable solutions with respect to major industry assessment and tax policies, particularly in communities where there is high concentration of major industrial assessment base relative to the assessment base present in other classes.

BCA OFFICE MOVES

400 - 3450 Uptown Blvd., Victoria BC V8Z 0B9

UPCOMING EVENTS

On Tuesday June 29th there will be a presentation on "Property Tax Exemptions", including timely discussions on permissive and statutory exemptions, revitalization exemptions, BCA's perspective on deadlines and requirements, as well as highlights of the UVIC and Entre Nous cases recently decided by the BC Court of Appeal. Panellists include: John McLachan (Lex Pacifica Law Corp.), Ludmila Herbst (Farris Vaughan Wills & Murphy LLP) and others, TBA.

PAAB/CPTA EVENT

The Board met with the CPTA members on April 23rd to enable a discussion on Board Policy and Procedures in 2010. Steve Guthrie opened the meeting with a 2009 update on PAAB, including the following points:

- There are 172 outstanding appeals from prior years, 2008 and earlier (of these 102 are contingent, and mostly involve railway property)
- For 2009, there are 128 outstanding appeals, for a total of 300 o/s appeals; includes all that are active.
- Of the 2009 appeals, 27 of the 128 were contingent as of March 31.
- The current situation is the lowest number of o/s appeals at this time of year in the history of PAAB.
- # of folios is higher – over 400 since many folios can be linked to one appeal

New rules were circulated. Changes are mostly housekeeping things; forms and titles.

2. New section 9.1: must always have the appeal number when communicating with the Board and between all parties; do not communicate with the board without including the other

party. Talk to each other without the board, but not the board without the other party.

2. Also, rule 14: SIEA. Added Without Prejudice to the SIEA so it is clear. Cannot add issues after SIEA is produced (without leave of the Board).
3. Schedule of fees: includes fees for tapes.

You can pay for a transcript, but no more tapes. Transcripts are per page cost. The party can bring a recording device to the hearing, but it would not be an official record. They receive very few requests in the past for tapes and the technology is outdated. We need to upgrade to discs or higher technology. Steve Guthrie will check out the costs of obtaining better technology so transcripts / recording can be more accessible. Fancy legal software is available to record during a hearing; the Board will look into that, but it needs to be affordable (digital recordings, for example).

Other topics covered were: Lehigh Portland Cement Decision: reasonable parameters for disclosure, Madison Decision; Feedback on Decision process; SIEA's and the appeal process; pros and cons of Written Submissions

BCA/CPTA EVENT

A BCA and CPTA round table was held on May 14th. BCA encourages discussions concerning assessed values as early as possible. Making the preview roll, and related PVS's, available in October, is designed to allow early discussions with IC&I property owners and their agents prior to the closing of the assessment roll. BCA is available to discuss any concerns or issues with e preview roll and the PVSS. As BCA get further into producing the assessment roll, it is more difficult to make changes.

December 1st is the last date for making changes to the assessment. Then it is up to PARP. If issues are not resolved at PARP, municipalities have to give refunds. Local governments like BCA's approach of dealing with issues early.

PIN #'s on Assessment Notice - These will provide access to PVS through the BCA website. Last year's PIN # will give access prior to January for the new assessment. BCA is examining how and when to change the PINs to improve security of owner's information.

Continuity of BCA Appraisers - BCA were using a PAAB specialization approach, whereby a different appraiser will deal with an appeal than

the one who originally did the values. This is changing; however, turnover inhibits the goal. Possibly have a transition person to oversee the change of personnel.

Contributory Value of improvements for future development sites - Different percentages of depreciation are used for building values. BCA use current system, namely, depreciated building value, to produce the roll. They cannot state the value on the assessment roll based upon income. It is a holding value based upon the income and holding time that they utilize.

PROPERTY TAX EXEMPTIONS: NON-PROFIT HOUSING SOCIETIES

*Submitted by: Ludmila B. Herbst,
Farris, Vaughan, Wills & Murphy LLP,
Vancouver, BC*

On May 25, 2010, the BC Court of Appeal upheld decisions of the Property Assessment Appeal Board and BC Supreme Court exempting real properties owned by two housing societies in the City of Vancouver from property tax (*Vancouver (City) v. Entre Nous Femmes Housing Society*, 2010 BCCA 262). The Court of Appeal described the housing societies as “charitable institutions that operate residential housing for low-income tenants, with financial assistance from provincial or federal housing agencies. The provision and operation of low-income, non-profit housing for persons in need is within the charitable purposes set out in the constitutions of the housing societies”.

The statutory provision pursuant to which the properties were found to be exempt was s. 396(1)(c)(i) of the *Vancouver Charter*, S.B.C. 1953, c. 55. This subsection exempts real property of which an incorporated charitable institution is the registered owner or owner under agreement, either directly or through trustees, if the real property is in actual occupation by that institution and is wholly in use for charitable purposes.

At the Court of Appeal, the only issue under s. 396(1)(c)(i) was whether the housing societies were in “actual occupation” within the meaning of

that subsection, despite the fact that tenants were physically present in residential units within the properties under leases subject to BC’s *Residential Tenancy Act*, S.B.C. 2002, c. 78. Among other arguments, the City of Vancouver sought to contrast the wording of s. 396(1)(c)(i) with that of Ontario’s *Assessment Act*, R.S.O. 1990, c. A.31, which does not refer to “actual” occupation when exempting land “owned, used and occupied by...any charitable, non-profit philanthropic corporation organized for the relief of the poor”.

The BC Court of Appeal found that the principles set out in *Coast Foundation Society (1974) v. Assessor of Area #09 – Vancouver* (1990) (PAAB), upheld on appeal by way of stated case in *Vancouver (City) v. Coast Foundation Society (1974)* (1990), 2 M.P.L.R. (2d) 148 (B.C.S.C.), aff’d (1991), 6 M.P.L.R. (2d) 311 (B.C.C.A.) applied. This was despite the fact that, unlike in *Entre Nous*, the residents in *Coast Foundation* had entered into licensing agreements rather than leases for the occupation of their units. The BC Court of Appeal agreed with the Property Assessment Appeal Board and the BC Supreme Court that “the difference in the legal terms of the occupancy of the units by tenants who were there in fulfillment of the societies’ charitable purposes did not change the outcome”. Fundamentally, the occupation of the units for the purposes of the charitable institutions, in accordance with those institutions’ charitable mandate, was actual occupation by the societies.

A provision of the *Vancouver Charter* not considered in *Entre Nous* (as it did not apply on the facts), but important for other providers of non-profit housing, is s. 396(1)(g). This subsection provides that notwithstanding s. 396(1)(c)(i), real property of an incorporated charitable institution which is used for senior citizens’ housing or a community care facility, and which receives or has received grants or assistance pursuant to any provincial or federal legislation, shall only be exempt if it is so provided by by-law. That section has recently been amended to specify that the by-law in question must be one under the new s. 396F of the *Vancouver Charter*, which is returned to below.

The *Community Charter*, S.B.C. 2003, c. 26, which applies in BC municipalities other than Vancouver, does not contain a mandatory exemption of the nature found in s. 396(1)(c)(i) of the *Vancouver Charter*. However, s. 224(2)(a) of

the *Community Charter* provides that a council may, by bylaw, exempt land or improvements that (i) are owned or held by a charitable, philanthropic or other not for profit corporation, and (ii) the council considers are used for a purpose that is directly related to the purposes of the corporation.

Similar language is now found as well in the *Vancouver Charter*, although s. 396(1)(c)(i) itself remains in place as well. After the hearing of the appeal in *Entre Nous*, the government introduced what is now the *Miscellaneous Statutes Amendment Act (No. 3)*, S.B.C. 2010, c. 21; on June 3, 2010, that *Act* was given Royal Assent. It amends the *Vancouver Charter* to include s. 396F, which provides that Vancouver council may, by by-law, exempt an “eligible not for profit property” from real property taxation, to the extent, for the period and subject to the conditions provided in the by-law. The section defines “eligible not for profit property” as land or improvements, or both, (a) in respect of which, either directly or through trustees, a not for profit corporation is the registered owner or owner under agreement, or (b) that are held, either directly or through trustees, by a not for profit corporation, and that the council considers are used for a purpose that is directly related to the purposes of the not for profit corporation. Section 396F defines a “not for profit corporation” as a charitable, philanthropic or other not for profit corporation.

In the legislative debate concerning these amendments to the *Vancouver Charter*, the Attorney General noted that they allow the City of Vancouver to provide “permissive tax exemptions to local charitable, philanthropic or other not-for-profit organizations such as the Royal Canadian Legion” and that they are “consistent with the existing authorities of other municipalities under the *Community Charter*....The amendment will ensure that the city of Vancouver has the same flexibility and options available to other communities in the province”. It will be interesting to see the use to which the City of Vancouver puts s. 396F, and whether, or how, it affects the significance of the *Entre Nous* decision.



BC ASSESSMENT UPDATE

Submitted by: A. Shelby Alfred, Communications Coordinator, BC Assessment, Victoria, BC

BC ASSESSMENT'S HEAD OFFICE GETS GOLD

LEED Gold, that is. After outgrowing the location it occupied since 1974, BC Assessment has moved its head office to a new building in Victoria's Uptown office and retail centre located at 400 – 3450 Uptown Blvd. BCA employees occupy the entire fourth floor in the four-storey Leadership in Energy and Environmental Design facility. For the first time in its 36-year history, all staff are located on one floor, significantly reducing our environmental footprint. The open concept design and variety of meeting rooms makes more efficient use of the space by reducing the size of workstations. The floor plan also facilitates more team-oriented work and collaborative business discussions. Phone and fax numbers remain the same.

CONVENTION CONVERSATIONS

BC Assessment's booths were very busy at the recent conventions held by the Local Government Managers' and Government Finance Officers' Associations. Attendees took particular interest in BCA's demonstration of new reassessment technologies the Crown is piloting to test new ways of capturing and updating property data. Two pilot projects are integrating BCA's CAMA system (valueBC) with high-resolution oblique imagery, street-front photos, geographic-information-system layers and orthographic imagery with geo-references sketches.

The first project, which reassessed 23,729 residential properties in Nanaimo, demonstrated significant improvements over traditional methodologies in several areas:

1. Lower total reassessment cost
2. Lower per-folio processing cost
3. Reduced reassessment time
4. More accurate and consistently applied data
5. Improved valuation quality
6. Significant non-market change resulting from the use of desktop review

A second pilot is currently underway in the districts of North and West Vancouver.

2009 ANNUAL REPORT PUBLISHED

BC Assessment has released its 2009 annual report including financial statements. It is now posted on our website: <http://www.bccassessment.ca/publications/reports/index.asp>

BC ASSESSMENT LEGAL CASE

Submitted by: Meredith Parkes, Legal Counsel, BC Assessment, Victoria, BC

The Property Assessment Appeal Board's decision in *Garibaldi Springs Resort Hotel Ltd. v. Assessor of Area 08 – Vancouver Sea to Sky Region*, 2010 PAABBC 20100023, provides some guidance on the classification of hotels under construction. BC Assessment classified the partially complete Executive Hotel and Suites at Garibaldi Springs Golf Resort as Class 6 – business and other on the 2008 assessment roll. The appellant took the position that the property should be in Class 1 – residential except for the portions designated to be a lobby strata lot, restaurant strata lot and pro shop. The Board was called on to decide whether, as of October 31, 2007, the property was “used for residential purposes” within the meaning of section 1(a) of the *Prescribed Classes of Property Regulation*, B.C. Reg. 438/81 and if so, whether it was excluded from Class 1.

The Board considered a number of factors in deciding the appellant was committed to constructing a to-be-stratified hotel, including the disclosure statement filed with the Superintendent of Real Estate, the development permit, the building permit, the stage of construction (75% complete), the absence of a filed strata plan, the proposed rental pool, restrictions on owner use, the zoning and presales. Relying on *Legends Owners Association v. Assessor of Area 08 – North Shore/Squamish Valley*, 2006 BCSC 177, the Board held that a hotel use is a residential use.

However, the Board went on to find that the partially complete hotel was excluded from Class 1 under section 1(a)(i) of the *Prescribed Classes of Property Regulation*. The type of property being developed was a hotel; the appellant's intention was clear. The Board distinguished the situation before it from that in *Happy Valley Resort Ltd. v.*

Assessor of Area 19 – Kelowna, 2007 PAABBC 20071360, which was decided based on language no longer in the *Prescribed Classes of Property Regulation*. Finally, the Board found that the “strata accommodation property exclusion” set out in section 1(a)(iii) of the *Prescribed Classes of Property Regulation* did not apply in the circumstances. The property, not being stratified as of October 31, 2007, did not come within the definition of a strata accommodation property. The Board confirmed that the property was correctly classified as business and other on the 2008 assessment roll.

For the full text of the decision, please see: http://www.assessmentappeal.bc.ca/decisions/dfull/dec_2008-08-00078_2010023.asp.

WESTERN CHAPTER

UPDATE

Submitted by: Monica Keller, Talisman Energy Inc., Calgary, AB

CHAPTER EXECUTIVE / ASB SEMI-ANNUAL MEETING

On April 21 the Western Chapter Executive and the Chair of the Government Liaison Committee met with staff from Alberta Municipal Affairs, Assessment Services Branch. The two groups meet on a semi-annual basis to discuss current issues and initiatives. Items on the agenda at the April meeting included:

- Assessment Services Branch Provincial Update
- Bill 23
- CPTA involvement in board member selection
- Assessment of machinery & equipment at idle well sites
- Power Go-Generation assessment discrepancies
- Residential vs. Non-residential mill rate linkage
- Assessment Year Modifier decreases not reflecting true market value decline
- Buildings being assessed as machinery & equipment in certain circumstances

The next proposed meeting date between the Chapter Executive and the Assessment Services

Branch is October 18th, 2010 in Calgary following the Western Chapters monthly luncheon.

MONTHLY LUNCHEONS

We had a successful turnout for our April 21 meeting which was held at the beautiful Chateau Lake Louise in conjunction with the Alberta Assessor's Association Annual Conference. As our guest speaker we were honored to have Mr. Manmeet Bhullar, Parliamentary Assistant, from Alberta Municipal Affairs address the membership and our invited guests for the evening. Mr. Manmeet spoke about the Ministry and was very entertaining when discussing his own personal experiences in politics.

On May 18th the Western Chapter held its monthly chapter meeting. Our guest speaker for the event was Mr. Bob Brazzell, Senior Director of Realty Tax Advisory Services for the Altus Group. Bob came to speak on behalf of the Coalition for Property Tax Fairness.

The Coalition is an independent group of organizations who represent a wide range of taxpayers. The mission of the Coalition is to review key issues within the interests of taxpayers and to promote the accountability of elected representatives. In 2009 the Coalition released its first Calgary Municipal Report Card grading the City of Calgary Mayor and Alderman.

We will be having our June luncheon on the 15th of this month, at which time the Chapter will hold its annual elections. The nominating committee this year was comprised of Brian Dell, Roger Leachman and Brian Waters. The following members have put their names forward to stand for office for the 2010 – 2011 term:

- Chair – Monica Keller
- Vice Chair – Kirk Wasylik
- Treasurer – Ben Matthews
- Secretary – Ian Magdiak

GOVERNMENT LIAISON COMMITTEE

The Government Liaison Committee met on May 6th in Calgary at the offices of Conoco Phillips. The meeting was held to provide an update and information exchange on the semi annual meeting held between the Chapter Executive and Municipal Affairs.

For further information on the next scheduled meeting of this Committee or to suggest items

you would like the Committee to address, please contact Joanne Manning at (403) 691-7535.

GOLF TOURNAMENT

The annual golf tournament has been confirmed this year for Thursday, August 26th once again to be held in Sundre. More details regarding registration will follow at a later date.

MANITOBA UPDATE

Submitted by: Mark Newman, Fillmore Riley LLP, Winnipeg, MB

All realty and business tax appeals for 2010 have been completed at the Board of Revision, the first level of appeal.

There are now 607 appeals pending at the second level of appeal, the Municipal Board. Of these, 148 are residential.

The deadline for 2011 appeals, with value continuing to be based on an April 1, 2008, reference date, will be June 24, 2010.

EQUITY

Gardentree Village, in respect of which we have previously reported, a case dealing with equity in which the Court of Appeal had remitted the matter to The Municipal Board for rehearing, is scheduled to be heard on June 22 – 23, 2010.

The Municipal Board has recently issued an order relating to disclosure of information to the appellant by the City of Winnipeg.

The appellant had sought information relating to the mass appraisal model created to value apartment buildings in the City of Winnipeg. In particular, information was sought relating to the 263 sales which occurred in the relevant timeframe, the reasons why 112 of those sales were disregarded by the City in the creation of the mass appraisal model, the assessments obtained through the use of the model for each of the 151 sales that were utilized by the City in the construction of the model, and some additional related information.

The City of Winnipeg resisted the disclosure of any information whatsoever. The Board ordered limited disclosure of information, taking the view that other information requested was publicly available and

therefore it was not prepared to order that the City disclose the requested information.

The factual context of the *Gardentree* appeal revolves around an agreed upon market value for a 96 unit apartment building, with the appellant arguing that the property should be assessed at 82% of its market value based on a comparable set of properties, or alternatively, 90% of market value based on the ASR of 90.2% for apartment buildings as a class.

The City of Winnipeg argues that since the ASR for all properties in the City of Winnipeg is 99%, the apartment building in appeal when assessed at 100% of its market value is equitably assessed.

Equity has arisen in another matter involving a freestanding fast food restaurant. In this matter, the critical issue is the rental rate to be utilized in calculating value. The City of Winnipeg had made a recommendation at the first level of appeal to reduce the assessment from \$860,000.00 to \$740,000.00 based on utilizing a rental rate of \$21.00 per square foot.

The owner appealed this decision to the Municipal Board. At the Municipal Board level, the City has now taken the position that notwithstanding its recommendation to reduce the value from \$860,000.00 to \$740,000.00, the value of the property should now increase to \$882,000.00. This increase is driven primarily by the City now wishing to utilize a \$28.50 per square foot rental rate.

The City has provided a series of comparables to support the use of that rental rate. A review of the assessments for the 7 comparables reveals that in 3 of the cases if the \$28.50 per square foot rental rate was utilized for these comparables, the assessments would be higher and for 2 of the comparables would be 30%- 40% higher than they actually are.

The owner is accordingly arguing that equity is not being achieved.

Of the 7 comparables, 4 of them are units within shopping centres or freestanding buildings on shopping centre pad sites. Accordingly, the assessment for these locations is not separately available and the City has been asked to provide information relating to the contribution of each of these comparables to the overall value of the shopping centre.

The City has refused to make this information available, resulting in a disclosure application being made to the Municipal Board.

The Board has heard argument on the matter on April 26, 2010, reserved its decision, and thereafter requested written submissions. The deadlines imposed by the Board for the written submissions extend beyond the hearing dates in the *Gardentree* matter.

It is not clear why the City takes such an adversarial position in respect of disclosure of information necessary to owners to allow for the making of equity arguments. The position of the City of Winnipeg is to be contrasted with positions taken in British Columbia and Ontario, where information in respect of comparable sets of properties to facilitate equity arguments appears to be readily available from assessors.

ONTARIO CHAPTER

UPDATE

Submitted by: Angie DaCosta, Cushman & Wakefield Property Tax Services, Toronto, ON

The Ontario Chapter held its Spring Breakfast Meeting, Annual Elections and Golf Tournament on Thursday, June 4th. Although Mother Nature didn't necessarily smile down on us, I believe we all enjoyed a great day of good learning, fun times and great company.

Carla Nell of Municipal Tax Equity enlightened us all with an update on property tax issues that municipalities are currently facing and the effects of our not-so-straightforward property taxation system on taxpayers across Ontario. Clearly, the complexities of capping and clawbacks on phased-in assessments together with the implications of Ontario Regulations 160 and 161 are daunting and not for the weak of heart.

Following our breakfast meeting, we held our annual elections. Continuing to form part of the Ontario Chapter Executive Committee are Gayelyn Henderson as Vice-Chair, Jason George who has taken on the task and responsibility as our Treasurer and myself as Chair. New to our

group are Elena Balkos who comes on board as our Chair, Tax Policy; Jeff Grad, Secretary; and Chris Walat our Member at Large. Welcome! and I look forward to working with you all.

Over the next few weeks, our Executive Committee will be meeting to begin organizing our fall schedule of breakfast meetings and brainstorming ideas for our 2011 Annual Valuation and Legal Symposium.

We invite and encourage all members across Canada to provide your thoughts and ideas on topics and speakers you would like to see at the Symposium.

On a personal note, I would like to express my tremendous gratitude to Maria Colavecchio who has decided that her time with our Executive Committee has come to an end. Year over year Maria has been an exceptional asset to the Committee bringing with her wonderful ideas, amazing organization and an attention to detail second to none. Thank you, Maria for everything – we'll miss you!

As mentioned above, the Executive Committee will be in "planning mode" for the next little while and will be taking a hiatus from breakfast meetings over the months of July and August. I'd like to wish everyone a wonderful and safe summer. See you in September!

RICHARD TINDAL

will be speaking at the annual Workshop in Quebec City. He is an expert in tax policy. He will participate in a panel with Dr. Enid Slack (Director, Institute on Municipal Finance and Governance at the University of Toronto); and Mr. Bruce Fisher (Manager of Fiscal and Tax Policy for Halifax Regional Municipality), to be chaired by Grace Marsh.

The following article was originally published by the Institute of Municipal Assessors *Insti-News*, Winter - 2010 and in the Association of Municipal Tax Collectors of Ontario, *Tax Collector's Journal*, Volume 44.

The article is thoughtful and informative.

Brad Nixon

THE PERILS OF POLICY MAKING: ASSESSMENT AND PROPERTY TAX REFORMS IN ONTARIO AND SOUTH CAROLINA

*Submitted by: C. Richard Tindal, Ph. D,
President, Tindal Consulting Limited, ON*

In deference to the well known adage that misery loves company, it struck me that those wrestling with the ongoing saga of assessment and property tax reform in Ontario might take some small consolation from knowing that reform efforts in South Carolina have resulted in an even more dysfunctional situation.¹ The main culprit is the same in both areas. It is the provincial or state government, interfering with the normal, proper functioning of the system and introducing changes designed to placate property taxpayers but creating an increasingly complex and unsatisfactory system.

THE ABCS OF PROPERTY ASSESSMENT AND TAXATION

Surprising as it may sound, property assessment and taxation are quite simple concepts.

- A The real property (essentially land and buildings on land) in the municipality is assessed to determine its current or market value.
- B The municipal property tax is levied upon the real property and the amount of taxes you pay is based on how valuable your property is (how high your assessment), not on the services that you receive.
- C If the system is functioning properly, an increase in the market value of your property will be reflected in an increase in assessment values and – without offsetting adjustments by the municipality – an increase in your property taxes.²

¹ To conduct the research underlying the South Carolina saga, it was necessary for me to spend the entire winter of 2009 in Myrtle Beach and I can only hope that you will find that this sacrifice has been justified by the results.

² In an ideal world, a municipality would reduce the tax rate proportionately to increased assessment, leaving taxes unchanged. But values rise more rapidly in some areas of a municipality than others, with the result that increased assessments are almost certain to lead to a hike for some taxpayers.

ONE STEP FORWARD, TWO STEPS BACK: THE ONTARIO STORY

For decades in Ontario there has been a demand for a system that would assess properties accurately and comprehensively, thereby ensuring that increases in market value were reflected in updated assessments. In the mid-1990s legislation was introduced to achieve this objective and yet every time the system begins to work as intended further changes are introduced that undermine that progress.

The *first*, and most dramatic, example of this tampering with the system occurred at the outset when the Ontario government provided transition tax ratios – weighting factors that were used to define the tax rate of each property class in relation to the tax rate for the residential property class. These ratios reflected the distribution of the tax burden between property classes as it existed *prior* to the introduction of the new assessment values and thus perpetuated all of the inequities that the new assessment system had been introduced to eliminate.

Second, the province continued to interject itself into municipal tax policy decision making by imposing a series of tax caps or ceilings, particularly with respect to the business property classes. An optional cap was followed by a mandatory 10-5-5 cap then an ongoing 5% cap and finally some provisions to provide flexibility under that cap. As a result, many municipalities found their capacity to raise revenues restricted unless they were willing to shift the tax burden from business properties to residential – a burden that remained on business properties because of decisions that the provincial government had made but now seemed to find intolerable.

You Can't Get There From Here!

The new assessment and property tax system has been distorted by such provincial interventions as:

- Tax ratios perpetuating inequities in tax burdens between classes.
- Tax capping provisions.
- Assessment freezes and phase-ins.

A *third*, and continuing, example of tampering has been taking place with respect to the timing of reassessments. The new system was originally

designed to incorporate the concept of a rolling average that would blend assessments over a period of years as a way of avoiding large fluctuations in assessment values and therefore taxes that had been experienced with earlier reform efforts. But the introduction of assessment averaging was postponed in 2005 and then abandoned. Annual assessments were reintroduced beginning with the 2006 taxation year. But those assessments reflected substantial growth in property values, especially for residential properties, and the resulting tax increases generated increasing public controversy and concern – even though the system was working exactly as designed.³ In response, the Ontario government suspended assessment updates for 2007 and 2008 – supposedly to allow time to introduce a number of changes in the operations of the Municipal Property Assessment Corporation but also to set aside this “political hot potato” until after the provincial election of October 2007.

The 2007 provincial budget introduced a new approach in which properties would be assessed only every four years. The first new assessment values were established as of January 2008, to be used for taxation in 2009 through 2012. Any assessment increases arising from reassessment are to be phased in over this four year period. With exquisitely bad timing, this policy initiative resulted in new assessment values being established at the peak of the inflation of property values that had been underway for several years and then being locked in for four years – even as property values have continued to fall markedly in response to the world-wide fiscal and economic downturn.

In spite of, and to a large extent because of, the efforts and interventions of the Ontario government, this province remains far removed from the simple, easy to understand, and equitable system of assessment and taxation that was launched with such fanfare over a decade ago.

³ Yes, there were other issues, including criticism of the way the Municipal Property Assessment Corporation operated, culminating in a report and recommendations from Ontario's Ombudsman. But much of the reason for the growing outcry over the assessment system was the fact that it was, correctly, tracking and reflecting the upward trend in property values.

BETWEEN A ROCK AND A HARD PLACE IN SOUTH CAROLINA

A familiar refrain in Canadian municipal circles is that municipalities in the United States are much better off because they have access to a number of other revenues sources and are not so reliant on the property tax. It turns out that far away fields are not always greener, and that is certainly the case with respect to municipalities in South Carolina.

Legislation passed in 2006 does not allow the value of properties to go up more than 15% since the previous reassessment (normally done every five years). The result has been to restrict the growth in the assessment/tax base of municipalities. Because of that cap, owners of rapidly appreciating homes – such as coastal or lakefront property – are paying taxes on a smaller and smaller percentage of the market value of their homes, creating worsening inequities. Moreover, properties that change hands are allowed to be reassessed at market value, sometimes resulting in noticeable discrepancies between taxes paid by neighbouring homeowners.

The 2006 legislation also removed the education tax levy on owner-occupied homes, with the

Double Whammy:

Municipalities face severe cuts in state government transfers, but can't make up the difference because of limits on assessment and tax increases.

result that the property tax burden increased on business properties – and that has been a growing concern with the downturn in the economy. That downturn has also adversely affected the municipal and state yield from sales taxes. The South Carolina sales tax was raised from 5% to 6% by the 2006 legislation but with the extent of the recession, the additional yield has not been sufficient to replace the money for education no longer raised from residential property taxes.⁴ Nor have increased sales taxes at the county level generated as much as expected.

⁴ According to the Palmetto Institute, the sales tax increase to be used to pay for the elimination of residential property taxes for school purposes will be close to \$50 million short this fiscal year and close to \$100 million short for the fiscal year 09-10. See *Update on Efforts to Establish Tax Study Commission*, March 10, 2009, available at www.palmettoinstitute.org.

As economic conditions have worsened, state governments face a growing fiscal shortfall. In these circumstances, a time-honoured response is cuts to the transfer payments made to the local level. In February 2009, the South Carolina government cut transfers to counties by 42%, effectively taking the level of state support back to 1995 levels.⁵ But because the 2006 legislation also imposed a “millage cap” on municipalities, this dramatic loss of state funding cannot be made up through a corresponding increase in property taxes. Apart from any limited improvements in productivity that may be possible, the only way to close the gap will be through cuts to municipal services.

NOTE TO POLICY MAKERS: STOP MEDDLING!

I appreciate that it doesn't really help those involved with assessment and taxation in Ontario to know that the situation is even worse in South Carolina (and many other American states).⁶ But it is instructive to compare the experiences of the two jurisdictions and to observe that any difficulties have been compounded by the interventions from the state and provincial governments.

If the Ontario government finds unworkable the existing system of assessment and property taxation, let it provide alternative revenue sources for municipalities. Otherwise, it should stand aside and let the assessment and property tax system work as intended. Increased property values should be reflected, in a timely fashion, in increased assessment values. That increase will almost certainly lead, in turn, to increased taxes for some portion of property owners. That entirely logical, inevitable result should not be offset, cancelled, suspended, or otherwise distorted by provincial politicians concerned about angry voters – although to make that statement is to demonstrate how idealistic it is

We don't need ill considered interventions from the provincial level to deal with situations in which updated assessments might result in onerous tax

⁵ L. Gregory Pearce Jr., “State's cuts to local government devastating,” *Myrtle Beach Sun News*, March 4, 2009.

⁶ A further problem south of the border is that many municipalities are also constrained by local voter-approved tax and expenditure limits. See Leah Brooks and Justin Phillips, “Municipally Imposed Tax and Expenditure Limits,” *Land Lines*, Lincoln Institute of Land Policy, April 2009.

increases for particular classes (or individual parcels) of property. There are a variety of tools available that municipalities can use to respond to such situations. These include tax deferrals for senior citizens, tax credits for low income taxpayers, the phase in of tax increases, and even a provision in the *Municipal Act* that allows the municipality to cancel, reduce, or refund taxes in a situation in which such taxes are felt to be unduly burdensome.

Lose It or Use It!

The province should either replace the assessment and tax system or leave it alone, let it work, and let municipalities use their tax tools to address the volatility inherent in such a system.

Markets are volatile, and that includes the real estate market. Regular, frequent updating of assessment values will reflect that volatility. Postponing or limiting the change in values

doesn't remove the volatility; it bottles it up and makes it worse. Freezing assessments just leads to a painful thaw later. Let the assessment and property tax system function and let municipal governments exercise the powers that they have to ameliorate any overly burdensome situations that may arise.

It should be noted that these arguments have already been made by others far more expert than I, and they have also pointed out the problems caused by interventions into the normal operations of the system. According to Kitchen, for example, the new four year assessment cycle introduced in Ontario creates a number of problems and distortions and can result in the poor paying proportionately more and the rich paying proportionately less in local taxes. While acknowledging that such an initiative may be politically palatable in the short run, he rejects it as bad policy and bad practice that leads to inequities and distortions during the period of the cap and unpleasant political consequences when the restrictions are removed because significant increases in some property values are inevitably required to put all properties back on a level playing field.⁷

Enid Slack points out that placing limits on assessment increases breaks the link between

⁷ Harry Kitchen, "Ontario's Reassessment Cycle and Phase-In: A Critical Examination," Institute of Municipal Assessors, *Insti-News*, Winter 2009, pp. 4-7.

assessment and market value, makes taxes less uniform and more arbitrary, results in properties with similar values paying different rates, and erodes the municipal tax base. In her view, assessment caps or limits take pity on those who are being made wealthier by the market at the expense of those whose property values are stagnant and pursue stability and predictability at the expense of equity.⁸

A study of American experiences is equally critical:⁹

By severing the connection between property values and property taxes, assessment limits impose widely differing tax obligations on owners of identical properties, reduce economic growth by distorting taxpayer decision making, and greatly reduce the transparency and accountability of the property tax system as a whole.

The inescapable conclusion is that it is the frequent interventions by state and provincial governments that are the problem, not the assessment and property tax system itself. What the Ontario government needs to understand is:

It ain't broke, so don't keep fixing it!

⁸ Enid Slack, "Assessment Limits to Address Volatility, Is the Cure Worse Than the Disease?" presentation to the Institute of Municipal Assessors Conference, June 2009.

⁹ Mark Haveman and Terri A. Sexton, *Property Tax Assessment Limits, Lessons from Thirty Years of Experience*, Lincoln Institute of Land Policy, 2008, p. 2

WHEATLEY HARBOUR AUTHORITY CORPORATION V. MUNICIPAL PROPERTY ASSESSMENT CORPORATION, 2010 ONSC 2499

*Submitted by: Stephen Longo,
Borden Ladner Gervais LLP, Toronto, ON*

In recent years, MPAC has taken a more aggressive stance with respect to exemptions from property tax in Ontario. The requirement that an exemption must be granted by way of application to the Court rather than by the

Assessment Review Board is strange, given that the ARB should, at least in theory, have the appropriate expertise and knowledge of the relevant legislation to make determinations as to exemptions. In fact, Judges themselves have questioned this quirk of Ontario's assessment legislation (of course this is hardly the only quirk in said legislation).

I recently argued an appeal of an exemption before Ontario's Divisional Court. Don Mitchell appeared on behalf of MPAC. I represented the Wheatley and Eireau Harbour Authorities ("HAs"). The HAs are non-profit corporations that manage and operate small craft harbours in Ontario on behalf of the federal Department of Fisheries and Oceans ("DFO"). The HAs are responsible for operations that were previously managed by DFO. Among other things, the transfer of responsibility for operation of the HAs from the Crown was designed to give more control to local communities in handling day-to-day operations of their fishing harbours.

Pursuant to Section 3 of Ontario's *Assessment Act* ("AA"), land owned by the Crown is exempt from taxation. However, pursuant to Section 18 of the AA, a tenant of land owned by the Crown is taxable if "rent or any valuable consideration" is paid in respect of the land. The HAs occupy the small craft harbours by way of lease with DFO. Under their leases, the HAs pay only nominal consideration of \$1.00 per year. This nominal annual rent clearly does not constitute the payment of "valuable consideration". However, MPAC argued that the range of services provided by the HAs essentially constituted a benefit to the Crown so as to constitute "valuable consideration". On the initial application, Justice Quinn of the Superior Court granted the exemption. He found that the HAs benefited local communities, not the Crown. He held that the services performed by the HAs could not be characterized as compensation or profit passing to the Crown. Justice Quinn also found that granting the application was consistent with the overall purpose of the AA. Finally, he found that it did not seem appropriate that the HA should pay property taxes when they continued to receive annual subsidies from the Crown.

MPAC appealed Justice Quinn's Decision to the Divisional Court. The Divisional Court upheld the exemption. In so doing, it held that it could not be said that the Crown was receiving any "profit" in

relation to its leases with the HAs. The Divisional Court also agreed that granting the HAs an exemption was consistent with the overall purpose and scheme of the assessment legislation. Finally, the Court applied the so-called "patrimony" principle set out by the Supreme Court in two Quebec cases (*Buanderie* and *Partagec*) and adopted in an Ontario decision (*University Health Network v. Municipal Property Assessment Corp.*). These cases stand for the proposition that, in looking at the legislative intent of the *Act*, given the identity of "patrimony" (or connection) between the exempt entity and the entity claiming the exemption. In applying this principle, the Divisional Court held that HAs do no more than carry out the same activities that the Crown did before their formation. In the Court's view, it could not be consistent with the purpose of the legislation to penalize the Crown for creating entities whereby the Crown's responsibilities are carried out more efficiently and with greater local input. Given this "identity of patrimony" between the HAs and the Crown, the HA should therefore be exempt.

The Divisional Court's Decision is interesting in that it appears to extend the "patrimony" concept. It also continues a trend in recent Ontario case law wherein the Courts, in looking at exemption applications, appear to be taking an overall and purposive approach rather than merely parse the strict wording of the legislation in determining whether or not an exemption should be granted. As at the time of this writing, it is not known whether MPAC will seek leave to appeal this Decision to Ontario's Court of Appeal.

QUÉBEC

UPDATE

*Submitted by: Jules Mercier,
Poisson, Prud'Homme, Mercier et Associés,
Montréal, QC*

ASSESSOR'S RECORDS COPY

In the last Communication Update, the topic was property owners, taxpayers providing data to assessors when requested by the law. If you remember, all taxpayers or owners are subject to a fine ranging from \$100 up to \$50,000 if they do not

provide the information or data required by the assessor. Certainly, municipalities are not taking legal action against all taxpayers - instead, a selection is made and most probably the non-residential property owners would be chosen for this type of fine. For clarification purposes, this process varies quite a lot from one municipality to another.

This time, we will look at assessors' records and the fact that assessors are not providing a copy of their records.

Although you have provided the information and data requested and/or filled survey forms, this does not mean that assessors would supply a copy of the assessors' records permitting a review of how your property assessment was estimated by the assessor. Owners or representatives are only authorized to examine assessors records.

As per « An Act Respecting Municipal Taxation », under sections 78, 79 and 79.1, the assessor is entitled to give property owners, taxpayers or their representatives access to records for examination, but this is all one can get.

In fact, you must carbon copy the assessor's records. For example if you own a real estate portfolio and your head office is located in Quebec City or Toronto, then you or your representatives must travel to the assessor's office to be able to reproduce the assessor's records.

This situation relates to all municipalities across the Province of Quebec. If your office is located in Montreal and you owned properties in Sherbrooke, then you or your representative must go to the assessor's office in Sherbrooke City to collect data from the assessor's records.

This is why, contrary to some other provinces in Canada, it becomes very costly for owners, taxpayers and occupants to access assessors' records, because you may replicate only if you take a trip to the assessor's office.

Sections 78, 79 and 79.1 are introduced hereinafter:

CHAPTER VII **OWNERSHIP AND CUSTODY OF THE ROLL**

Owner of the roll

78. *The roll is the property of the local municipality for which it is made.*

Documents

The documents gathered or prepared by the assessor for the preparation or updating of the roll, whether or not they were used for such purpose, are the property of the owner of the roll. The municipal body responsible for assessment is the custodian of such documents, for the benefit of their owner, and shall decide where they must be kept.

“document”

For the purposes of this chapter, the word “document” includes a track, a tape, a disk, a cassette or other data carrier and the data it contains. The ownership or the custody of such a document entails for the body or the municipality the right to obtain, without cost, from the assessor and any other person who has entered data therein, all the information necessary to have access to the data and to be able to transcribe it on a conventional document; that right does not, however, include the right to obtain the software without cost.

1979, c. 72, s. 78; 1983, c. 57, s. 112; 1991, c. 32, s. 40.

Access to documents

79. *Notwithstanding section 9 of the Act respecting Access to documents held by public bodies and the Protection of personal information (chapter A-2.1), no person has a right of access to the documents contemplated in the second paragraph of section 78, except the graphic register the preparation and updating of which are provided for by the regulation under paragraph 1 of section 263 and by the Manuel d'évaluation foncière du Québec to which the regulation refers.*

Examination of documents

However, any person may examine such a document respecting the immovable of which he is the owner or the occupant or respecting the business establishment of which he is the occupant, if that document has been used as the basis for an entry on the roll concerning that immovable or business establishment and has been prepared by the assessor. The same applies to a person having filed an application for review or to an applicant with respect to the immovable or business establishment in respect of which the application for review or a proceeding brought before the Tribunal has been

made. The right to examine a document granted in this paragraph is subject to section 79.1.

Minister

In addition to the local municipality and the municipal body responsible for assessment, the Minister may examine a document referred to in the second paragraph of section 78 and prepared by the assessor and obtain a copy thereof without cost.

1979, c. 72, s. 79; 1987, c. 68, s. 78; 1991, c. 32, s. 41; 1996, c. 67, s. 6; 1997, c. 93, s. 117; 1997, c. 43, s. 260; 1999, c. 40, s. 133; 2005, c. 50, s. 64; 2006, c. 60, s. 76.

Revenue generating immovable

79.1. *In the case of an immovable that generates revenues due to the presence of two or more occupants, the right to examine a document granted to each occupant under the second paragraph of section 79 is subject to the rules set out in this section if the document the occupant of a part of the immovable wishes to examine contains financial information for determining the revenues generated by the immovable and that information specifically concerns another occupant or another part of the immovable.*

Rule

The occupant may only examine the document if the financial information concerning any other occupant or part of the immovable is hidden or otherwise inaccessible or if it is integrated into the general information for the whole immovable in such a way that the reader is unable to match the information with another occupant or part of the immovable.

Compliance

If the document is drawn up in such a way that compliance with the rule set out in the second paragraph is not practical, the document may not be examined. In such a case, another document allowing compliance with the rule must be prepared. The occupant may examine the other document or obtain a copy of it, on request.

Exception

The first three paragraphs apply to the right of an occupant, including a person who has filed an application for review or brought a proceeding before the Tribunal, to examine a document. They do not apply to the occupant of a business establishment. They do not limit the right of the Tribunal or a court before which the property value of the immovable is being contested to

issue an order relating to the examination of relevant information by the occupant.

2005, c. 50, s. 65

It is interesting to note that tenants, occupants or the person filing an application for review of assessment are entitled to examine the assessor's records but with limitations on tenants or occupants' review (see Section 79.1).

Since municipal assessors and appraisers (representing owners, taxpayers or tenants/occupants) are members of the same Order and must respect the same standards and code of ethics, why not consider the option of modifying the law so that a copy of these records could be made by the assessors simplifying the work for both assessors, taxpayers, owners and tenants/occupants.

Certainly, not all information would be accessible but a good portion of it would probably be accessible without violating the confidentiality of information received by assessors and therefore respecting section 78.

This is a wish for 2010. Only the future will tell if it will become reality, but many professionals would appreciate such a change as per comments brought to the Quebec Chapter's attention most recently.

2010 ASSESSMENT ROLLS

All 2010 Assessment Rolls for the Province of Quebec are 3-year rolls.

The date of assessment is July 1, 2008. Since the deadline to apply for a review of assessment was April 30, 2010 it is now too late to exercise your right of appeal and, consequently, unless an event as defined by the law occurs, the 2010 assessment will remain in effect for a 3-year period.

2011 ASSESSMENT ROLLS

For your information, all new 2011 new triennial assessment should be entered by September 15, 2010. Some municipalities, will be extending this to October 31, 2010.

For those interested in Pre-roll meetings with assessors, this is the time to call the assessor and set up a date and time for a meeting.

These types of meetings are usually organized to permit one last chance to taxpayers, owners or their representative to provide information that could have a major impact on property assessment.

The Pre-roll meeting window usually starts early in June to conclude by the middle of August 2010.

The timetable varies quite a lot from one municipality to another and you must call the assessors to find out if the procedure is in place and what the timetables are relating to this process.

ACTF/CPTA GOLF TOURNAMENT

Compare to last year, we enjoyed a beautiful sunny day to play golf!

Not many players attended the tournament probably because last year, Mother Nature did not cooperate. We also believe that some attendants are still affected by the economic climate and these types of expenses are still not authorized or permitted by some major companies.

Let's hope that next year, more members and guests will participate in our annual tournament and enjoy a good day outside the office.

In fact, during dinner time, we took advantage of all participants and asked them if they would like to see the Quebec Chapter golf tournament moved to early or mid June, next year. The consensus was that, even if we had 40 players, not all golf courses would be interested in such a small group and fees would increase.

We had explored this option last year and discovered that fees would be higher and that the number of golf courses prepared to receive us was more limited. It was decided, that a week or two would not make a big difference to Mother Nature and the group preferred to remain at the same date.

We would like to take the opportunity to thank the Golf Le Versant staff for their professionalism and their efficiency in serving all golfers. Thanks also to Eric Riberdy for putting in place this event and Alain Roy for being MC during gifts distribution.

IMPORTANT NEWS – FRENCH CONTENT – COMMUNICATION UPDATE

We were informed last week by the CPTA Executive that they would be very pleased to see French articles (texts, comments or analysis) published in the Communication Update. Hopefully, this would generate increased participation from the Quebec Chapter and other French members from the other Chapters.

The only request made concerning this would be to write, at the beginning or at the end, a small summary written in English so that members would see what the articles pertain to and if they are interested, they could communicate directly with the author for more information.

Le comité exécutif de notre association CPTA nous a informé la semaine dernière qu'ils seraient très heureux de recevoir et de publier dans « Communication Update » des articles en français. Cette initiative a pour objectif d'élargir à tous les membres de notre chapitre et aux membres francophones des autres chapitres la possibilité de présenter des textes en français.

Cependant, il faudra prévoir un court résumé de l'article, en anglais, afin de permettre à ceux qui seraient intéressés de communiquer avec l'auteur de l'article.

Hoping that you will take advantage of this opportunity for the next publication.

Espérant que vous saurez prendre avantage de cette opportunité et que nous aurons pour la prochaine édition.

THE QUEBEC CHAPTER EXECUTIVE

Chair: **Jules Mercier**,
Poisson, Prud'Homme, Mercier et Associés


Vice-Chair: **Normand Cloutier**,
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Nexacor Realty Management Inc.

Treasurer: **Gilles Beauchemin**,
Canadian Pacific

For this issue, the following article has been submitted in French and in English.

HAPPY FATHER & GRANDFATHER'S DAY



*" He did not tell me how to live;
he lived, and let me watch him do it! "*

PERI : LA CONSÉQUENCE DU JUGEMENT DE LA COUR SUPRÊME DU CANADA

Submitted by: M^{re} Gilles Fafard,
De Grandpré Chait LLP, Montréal, QC

Le jugement rendu par la Cour Suprême du Canada le 15 avril 2010 conclut que les propriétés des sociétés d'État tout comme les propriétés ministérielles doivent pourvoir aux paiements en remplacement d'impôts sur une base identique, ce qui inclut la taxe d'occupation commerciale lorsqu'elle est perçue en fonction d'un taux foncier varié.

La distinction entre les sociétés d'État apparaissant à l'Annexe III de la loi, lesquelles ne doivent pas payer un PERI en fonction de la taxe d'occupation commerciale et les sociétés d'État apparaissant à l'Annexe IV de la loi, celles-ci devant au contraire l'acquitter, n'existe plus lorsque la taxe d'occupation commerciale est perçue à l'intérieur d'un taux foncier varié en

fonction de la valeur foncière de la propriété par opposition à la situation où elle est perçue comme une taxe personnelle au locataire ou à l'occupant en fonction de la valeur locative de l'espace qui fait l'objet de cette occupation.

L'interprétation donnée par la Cour Suprême amène à conclure qu'il n'est plus approprié de tenir compte cette distinction entre les sociétés d'État, laquelle a toujours été maintenue en fonction de la *Loi de 1980 sur les subventions aux municipalités* autant qu'en fonction de la *Loi sur les paiements versés en remplacement d'impôts* qui l'a remplacée à compter de l'année 2000. Dès lors, le jugement permet d'affirmer que cet aspect de la Loi et du Règlement applicable sont devenus désuets.

Aussi la Cour Suprême décide qu'un silo n'est pas un réservoir ni un réservoir d'emmagasinement.

Ci-après, nous proposons une analyse comparative des motifs principaux des jugements rendus d'abord par la Cour d'Appel fédérale (qui endossent la position de l'Administration portuaire de Montréal) et ceux de la Cour Suprême du Canada (qui endossent la position de la Ville de Montréal).

ANALYSE COMPARATIVE

Jugement de la Cour d'Appel fédérale
du 19 septembre 2008

Jugement de la Cour Suprême du Canada
du 15 avril 2010

I LA TAXE D'OCCUPATION COMMERCIALE

I LA TAXE D'OCCUPATION COMMERCIALE

Terminologie et son impact juridique

1) En 2003 la Ville a abandonné la taxe d'affaires pour procéder à un rajustement à la hausse de la taxe foncière applicable à la catégorie des immeubles non résidentiels [12] et [13].

1) Pour l'année 2003 et par la suite la Ville a aboli sa taxe d'occupation commerciale et a changé la structure de son impôt foncier à taux variable afin de récupérer le montant des pertes de revenus [28].

COMMENTAIRE :

Le jugement rendu par la Cour d'Appel fédérale a initialement été rédigé en français. La version anglaise utilise le mot « abolished » pour traduire le texte français qui parlait de « abandonné ». La Cour Suprême du Canada utilise les mots « abolie » et « abolished » dans les deux versions. Il existe ici une confusion parce que le terme « abandonné » signifie laisser, omettre ou encore se retirer d'un mode de perception de la taxe d'occupation commerciale afin d'en incorporer les re-

venus qui en proviennent par un substitut, soit un taux foncier varié, lequel a été lors de la première année du changement introduit par la Ville de Montréal (2003) comme étant l'équivalent de 1,6360 \$ du 100 \$ d'évaluation du taux de taxe foncière applicable. Cette information apparaissant dans le budget de la Ville de Montréal, il était relativement facile pour le Port de Montréal de calculer que 42% du taux foncier varié applicable aux immeubles non résidentiels pour cet exercice

financier représentait les revenus provenant de l'ancienne taxe d'affaires (i.e. : 1.6360 / 3.9410 / 100 \$ = 41.5%).

Au surplus, la taxe d'affaires, tel qu'elle était imposée par la Ville dans les années précédentes sur la base d'une valeur locative, non seulement n'était pas réclamée de l'APM, mais continue d'exister comme un outil de perception de cette taxe à l'encontre des propriétés non résidentielles.

Aussi peu significatif que cela puisse paraître à première vue, le choix du mot « abolished » (pour traduire « abandonné ») représente la clé de voute des motifs du jugement rendu par la Cour Suprême puisque (au paragraphe [40]) la Cour écrit que les sociétés d'État :

... « ne peuvent baser leurs calculs sur un système fiscal fictif, qu'elles créeraient arbitrairement ». ...

... « Leur travail [consistant à déterminer les valeurs et les taux effectifs d'imposition] ne saurait s'effectuer à partir d'un régime qui n'existerait plus ».

Cependant, le système continue d'exister et de faire partie de la Loi sur la fiscalité municipale du Québec. En réalité, il coexiste en même que la possibilité d'imposer un taux foncier varié pour les mêmes propriétés commerciales et industrielles. Au surplus, si une municipalité choisit de recourir simultanément à la taxe d'affaires et au taux foncier varié, la loi indique que le taux de taxation foncier doit être déterminé en prenant en compte des revenus provenant de l'imposition de la taxe d'affaires sur la base de la valeur locative.

La norme de contrôle

2) a) l'existence d'une discrétion : norme de la décision correcte;
b) exercice de la discrétion : norme de la décision raisonnable en tenant compte de la distinction entre les sociétés des Annexes III et IV.

2) Pouvoir discrétionnaire dans la détermination de la valeur effective et du taux effectif [22].
Raisonnabilité de la décision [36] et à cet égard, attitude de déférence [37].
Ni la transparence ni l'intelligibilité des décisions des sociétés ne soulèvent de problème.

Principes de droit

3) Agissements de la Ville.
Le geste de la Ville a pour effet de rendre applicable aux sociétés d'État de l'Annexe III les dispositions de la partie II du Règlement alors que le Législateur en a indubitablement restreint l'application aux sociétés énumérées à l'Annexe IV.
La Ville tente de faire indirectement ce que le règlement ne permet de faire directement [61].

3) (Sujet non couvert).

Analyse de la mission de l'APM

4) Analyse de la mission confiée à l'APM : objectif de compétitivité et d'efficience : article 4 [62] à [64].
« Les deux appelantes sont régies par des lois d'intérêt public. Elles sont investies soit d'une mission économique, soit d'une mission culturelle et sociale ou les deux. J'en prends à témoin l'APM. »[62]

4) (Sujet non couvert).

<p>« La compétitivité du réseau portuaire canadien est régie par la <i>Loi maritime du Canada</i>, L.C. 1998, ch. 10. La recherche de cette compétitivité et de l'efficience afin d'atteindre les objectifs sociaux économiques désirés constitue l'un des objectifs poursuivis par cette loi, énoncé dans le contexte d'une politique maritime nationale que l'on trouve à l'article 4 de cette loi... » [64]</p> <p>« À ces fins, l'APM et celles de Vancouver et de Halifax, aussi constituées en administration portuaires par lettres patentes en mars 1999, se sont vu confier une administration portuaire et la gestion de propriétés fédérales, dans la poursuite du but recherché par la <i>Loi maritime du Canada</i>. L'objet et l'économie de la <i>Loi maritime du Canada</i> sont compatibles avec, et en fait expliquent, les choix faits et les distinctions retenues par le législateur quant aux paiements en remplacement des impôts fonciers et ceux en remplacement de la taxe d'affaires. Il n'appartient pas au pouvoir judiciaire de substituer ses choix et ses préférences à ceux du législateur. Cette conclusion vaut également pour le traitement que le législateur a choisi d'accorder à la SRC : voir la mission, les pouvoirs et les objectifs commerciaux et socio-culturels qui lui sont confiés par l'article 46 de la <i>Loi sur la radiodiffusion</i>, L.R.C. 1991, ch.I ». [64]</p>	
<u>Impact à long terme de la décision de l'APM</u>	
<p>5) Confusion à long terme au niveau du taux effectif de taxation : ce n'est pas le cas en l'instance et c'est la Ville qui en est responsable. Elle ne saurait en tirer profit au détriment de la LPERI, du Règlement et des objectifs recherchés par les Lois constitutives des appelantes [65].</p>	<p>5) Calcul théorique de plus en plus difficile et illusoire qui avec le temps serait fondé sur des taxes disparues depuis longtemps.</p>
<u>Critère de raisonnabilité.</u>	
<p>6) Raisonnable de la décision prise par l'APM : exercice légal de la discrétion conforme à l'objet et à l'économie de la LPERI et du Règlement à la <i>Loi constitutive</i> et à l'intention du législateur [81]. La décision de l'APM repose sur une assise factuelle raisonnable : décision valide et légale [82].</p>	<p>6) L'interprétation et l'application de la <i>Loi et du Règlement</i> sont entachées d'un vice fondamental parce que la base de calcul est celle d'un système fiscal fictif par rapport au régime qui existe réellement à l'endroit où sont situés les biens. Ce travail ne peut s'effectuer à partir d'un régime qui n'existe plus [40].</p>
<u>Impact sur les Annexes de la Loi sur les LPERI</u>	
<p>7) Extrait du Draft Discussion Paper de 1998 (paragraphe 58 de la décision de la Cour d'Appel fédérale.</p> <p>« Agent Crown corporations are listed in the Act under either Schedule III or Schedule IV. <u>Those</u></p>	<p>7) Extrait du Document Parlementaire déposé par le ministre des Travaux publics et Services gouvernementaux (paragraphe 45 jugement de la Cour Suprême).</p>

<p><u>in Section III, like departments, are not empowered to make grants in lieu of business occupancy taxes. Those in Schedule IV more closely resemble private sector enterprises and are able (but not required) to make grants in lieu of occupancy taxes”.</u></p>	<p>« En multipliant le « taux effectif » par la « valeur effective » pour déterminer le montant de la subvention, on s’assure que les paiements effectués par le gouvernement fédéral en remplacement de l’impôt foncier sont comparables aux montants versés par les autres propriétaires d’immeubles de la municipalité au titre de l’impôt foncier</p>
<p>II LES SILOS :</p>	
<p>8) La restriction à des récipients d’entreposage de produits liquides ou gazeux n’est pas justifiée :</p> <ul style="list-style-type: none"> • ni par les règles d’interprétation, • ni par le sens commun des mots : (référence aux définitions contenues dans les Dictionnaires), • ni par l’intention du Législateur : il n’a pas voulu un résultat aussi absurde que d’exclure les seuls réservoirs de liquide au détriment de ceux de matières solides (ex : réservoirs de sucre liquide vs réservoir de sucre granulé). <p>L’exclusion des silos aurait du être indiquée expressément parce que « réservoir » est un terme générique.</p>	<p>8) Ce sont des contenants. Ils ne peuvent être considérés comme des réservoirs;</p> <p>Ils servent à l’entreposage de produits végétaux secs et non de liquide;</p> <p>L’interprétation de l’APM ne respecte :</p> <ul style="list-style-type: none"> • ni le texte de la loi, • ni la volonté du législateur • ni aucun des sens ordinaires des mots utilisé à l’Annexe II de la Loi. <p>Le Parlement ne les a pas exclus de la base des calculs. Caractère déraisonnable de l’interprétation.</p>
<p>Adjudication au-delà de la demande (Le jugement inclut l’année 2003 alors que la demande de la ville de Montréal ne concerne que l’année 2004 et les suivantes.)</p>	
<p>9) La Cour fédérale de première instance s’est prononcée <i>ultra petita</i>.</p> <p>En opposant la demande de contrôle judiciaire (2004) et l’ordonnance (toute année d’imposition après 2002) il est évident que les conclusions vont au-delà du recours exercé par la Ville et des conclusions recherchées par celle-ci.</p>	<p>9) (Sujet non couvert).</p> <p>Cependant, la Cour Suprême du Canada sur requête en correction a modifié le jugement rendu le 15 avril 2010 et décidé qu’en reconduisant la décision de la Cour fédérale de première instance, elle ne pouvait s’appliquer à l’Administration portuaire de Montréal qu’à compter de l’exercice financier 2004.</p>
<p>10) CONCLUSION :</p>	
<p>Annulation de l’ordonnance de la Cour fédérale et,</p> <p>Rejet de la demande de contrôle judiciaire de la Ville, déclaration que les silos de l’APM doivent être exclus de la demande de paiement.</p> <p>Frais : magnanimité de l’APM en renonçant aux frais d’appels.</p>	<p>Rétablissement des conclusions du jugement rendu par le Juge Martineau de la Cour fédérale en première instance.</p> <p>Sans dépens dans l’appel visant l’APM.</p>

PILT PROGRAM : THE CONSEQUENCE OF THE SUPREME COURT OF CANADA JUDGMENT

Submitted by: M^{re} Gilles Fafard,
De Grandpré Chait LLP, Montréal, QC

The judgment rendered by the Supreme Court of Canada on April 15 2010 determines that “Crown corporation properties” as well as “department properties” must assume PILTS on an equal basis, including the business occupancy tax when it is converted into a realty tax.

The distinction between corporations listed in schedule III of the Act who are not expected to pay the BOT and those listed in schedule IV who are expected to do so does not exist anymore when the BOT is collected on a variable tax rate

based on realty value compared to the situation when it is collected on a personal tax rate based on rental value.

The interpretation of the Supreme Court is to the effect that the longstanding distinction between Crown corporations’ responsibility concerning the BOT is not appropriate anymore. That distinction was first made in the 1980 *Municipal Grants Act* and has been renewed in the 2000 *PILT Act*. In the present circumstances, that piece of legislation became obsolete.

Also, the Supreme Court decides that a silo is not a reservoir.

Following is a comparative analysis of the main reasons for judgment given by the Federal Court of Appeal (endorsing the Port of Montreal’s position) and the Supreme Court of Canada (endorsing the City of Montréal’s position).

COMPARATIVE ANALYSIS

Judgement of the Federal Court of Appeal of September 19, 2008

I THE BUSINESS OCCUPANCY TAX

Judgement of the Federal Court of Appeal of April 15, 2010

I THE BUSINESS OCCUPANCY TAX

Terminology and legal impact

1) “The City, [after abolishing the business occupancy tax], increased the real property tax applicable to the category of non-residential properties.

Before this change in tax structure, the business tax was a specific separate tax that was clearly identifiable and could be easily distinguished from the real property tax. Afterward, according to the City, this was no longer necessarily the case, because the business tax disappeared and was incorporated into the real property tax”.

1) “The City exercised those regulatory powers. For 2003 and the following fiscal years, it abolished its business occupancy tax and changed its property tax structure. It established a variable-rate property tax that would enable it, *inter alia*, to recover the income it would lose after abolishing the business occupancy tax”.

COMMENT:

The Federal Court of Appeal judgment was originally written in french. The english translation utilizes the word “abolished” when the French text indicates “abandonné”. The Supreme Court of

Canada refers to “abolie” and “abolished” in both versions. There is confusion here because “abandonné” means to drop, to renounce, to surrender, to waive or to withdraw from a method

of levying the BOT in order to incorporate the tax revenues derived from that method of collecting the tax into a variable realty rate which has been identified in the first year of the change introduced by the City of Montreal (2003) to be the equivalent of \$1,6360/100 \$ of the realty tax rate. That information being in the budget of the City of Montreal, it was easy for the Port of Montreal to calculate that 42% of the tax rate applicable to non-residential properties for that year represented revenues derived from the BOT (i.e.: \$1,6360 / \$3,9410 / \$100 = 41.5%).

Moreover, the business tax (as imposed by the City in the former years on the basis of rental value) still exists as a taxation tool for levying the tax against non-residential properties.

As innocent as it may seem, the selection of the word "abolished" (to translate "abandonné") is the key of the reasons for the judgment expressed by the Supreme Court because (at paragraph [40])

the Court will indicate that Crown corporations:

... "cannot base their calculation on a fictitious tax system they themselves have created arbitrarily"...

"They cannot do so on the basis of a system that no longer exists".

The system does exist and is still part of the Act respecting Municipal Taxation in Quebec. Actually It co-exists with the possibility of imposing a variable tax rate for the same commercial and industrial properties. In addition, if a municipality decides to levy a BOT having recourse to the two systems simultaneously, (i.e.: rental and realty value based taxes for non-residential properties), the Act provides that the realty taxation rate has to be determined taking into account the revenues derived from the business tax levied on the rental value basis.

The standard of review applicable to decisions by Crown corporations

2) "Crown corporations possess discretion to determine effective value and effective rate and the legality of the existence of that discretion is to be addressed according to the correctness standard."

"The exercise of the discretion has to meet the test of reasonableness and has to take into account the fact that "Parliament did not intend that schedule III Crown corporations should be required and authorized to pay a business tax levied by a taxing authority""

2) "The discretion exists and its exercise is one where « the Court must show deference to the administrative decision maker »

"Neither the transparency or nor the intelligibility of the corporation's decisions is in issue. The respondents made management decisions and clearly explained the basis for those decisions to the City".

Principles of Law

3) "By including in its real property tax the former business tax mentioned in Part II of the Regulations, and by soliciting payment from the appellants, the City rendered the provisions of Part II of the Regulations applicable to Schedule III Crown corporations, although Parliament indubitably restricted the application to corporations listed in Schedule IV to the PLTA. In my opinion, the appellants are correct in stating that the City is trying to do indirectly what the Regulations do not allow to be done directly". [61]

3) (Not considered).

Analysis of the mission of the Port of Montreal

4) “Public policy legislation that governs the appellant sets an economic and social mission. For the Port of Montreal, “the competitiveness of Canada’s network of ports is governed by the *Canada Marine Act*”... The quest for competitiveness and efficiency to attain the desired social and economic goals is one of the objectives of this act, expressed in the context of a national marine policy in section 4 of this act...”

4) (Not considered).

“For these purposes, the MPA and the Port authorities of Vancouver and Halifax, which were also incorporated as port authorities by letters patent in March 1999, were entrusted with port administration and the management of federal property to attain the objective sought under the *Canada Marine Act*. The objective and scheme of the *Canada Marine Act* are consistent with and in fact explain the choices and distinctions made by Parliament concerning payments in lieu of real property tax and payments in lieu of business tax. It is not up to the courts to substitute their choices and preferences for those of Parliament.” [64]

Long term impact of the decision taken by the Port of Montreal

5) “Confusion on a long term basis maybe derived as to the applicable rate of taxation when “it would become impossible to distinguish between the amounts attributable to real property tax and those attributable to business tax”. The court is conscious that the problem may arise in the long term “but such is not the case at present. In any event, if confusion were to arise, it would be caused by the City’s actions, not those of the appellants. The City cannot take advantage of the confusion it creates to the detriment of the PLTA, the Regulations and the objectives of the enabling legislation of each of the appellants.” [65].

5) “Indeed, the Respondent’s position would in practice mean that they would, in establishing the amounts of their PILTs, be entitled — not only now, but also 10 or 20 years from now — to make increasingly complex and illusory theoretical calculations based on taxes that had long since disappeared”. [41]

Standard of reasonableness

6) “In my opinion, the appellants exercised their discretion legally, in compliance with the objective and scheme of the PLTA and the Regulations, their enabling legislation and the intention of Parliament...” [81].

“In my opinion, the decision made by the MPA in exercising this discretion has a reasonable basis in fact. According to the reasonableness standard, which the applicable standard of review here, I conclude that the MPA’s decision is both valid and legal”. [82].

6) “However, there is a fundamental flaw in this interpretation and application of the *PILT Act* and the *Regulations*. As I have indicated, the two corporations certainly have a discretion. It is clear from the definition of “effective rate” that Crown corporations have to decide on the appropriate tax rate. However, they cannot base their calculation on a fictitious tax system they themselves have created arbitrarily. On the contrary, those calculations must be based on the tax system that actually exists at the place where the property in question is located...”.[40].

Impact on Crown corporations listed in schedule III and IV of the *PILT Act*

7) The court quotes an extract from the *Draft Discussion Paper*, from the Department of Public Works and Government Services in Canada indicating:

“Agent Crown corporations are listed in the Act under either Schedule III or Schedule IV. Those in Section III, like departments, are not empowered to make grants in lieu of business occupancy taxes. Those in Schedule IV more closely resemble private sector enterprises and are able (but not required) to make grants in lieu of occupancy taxes”. [58].

7) The court quotes an extract from the same *Draft Discussion Paper* indicating :

“The determination of grant by multiplying the “effective rate” by the “property value” ensures that federal payments in year of taxes are comparable in amount to the local taxes paid by other property owners within the municipality”.

II SILOS :

8) “I am of the opinion that the Federal Court unduly restricted the meanings of the words ‘reservoir’ and ‘storage tanks’ by limiting them to receptacles for storing liquid or gaseous products. In my opinion, this restriction is not warranted by the rules of interpretation, the ordinary meaning of the words or Parliament’s intention.

Silos are a ‘reservoir’ and are included in the objects exempted under Schedule II of the PLTA. Therefore, they must be struck from the application for payments of real property tax.”

II SILOS :

8) “Although silos are containers, they cannot be considered to be ‘reservoirs’. They are structures used to store dry plant products not liquids. Parliament did not see fit to exclude them from the basis for calculating PILTs. The MPA’s interpretation is not consistent with the words of the statute, with Parliament’s intention or with any of the ordinary meanings of the words used in Schedule II to the *PILT Act*. It must therefore be concluded that MPA’s interpretation is unreasonable” [48].

“Ultra petita”

(The Federal Court judgment included for MPA the 2003 taxation year while the application for review by the City of Montreal only started in taxation year 2004 and following)

9) “I will simply state that it is obvious that the application for judicial review brought by the City concerns and is limited to the 2004 fiscal year, while paragraphs 2 and 3 of the order made by the Federal Court in respect of the MPA also covers the 2003 fiscal year. [103].

If I had to decide the issue, it seems to me to be quite obvious that the conclusions of the order of the Court go beyond the City’s application and the relief it sought.” [104].

9) (Not considered).

However, the Supreme Court of Canada upon application for reconsideration corrected the judgment rendered April 15, 2010 and decided that by restoring the Federal Court judgment (of first instance) it applied for MPA’s property only as of fiscal year 2004.

10) CONCLUSION :

The appeal of the MPA is annulled.
The order of Federal Court is quashed.
The application of the City of Montreal for judicial review is dismissed.
The silos of the MPA must be excluded from the application for payment in year of real property tax.
The MPA was magnanimous in waving costs on appeal even though the City claimed them against it.

10) CONCLUSION :

The City of Montreal’s appeals are allowed.
Without costs in the appeal concerning the MPA.
The conclusions of the judgments rendered by Martineau Judge of the Federal Court are restored but in respect only of the 2004 taxation year in the case of the MPA.

ATLANTIC PROVINCES

NEWFOUNDLAND & LABRADOR UPDATE

Submitted by: Michael J. Crosbie,
McInnes Cooper, St. John's, NL

RECENT CASE CONCERNING SPECIAL PURPOSE PROPERTY

1. On March 18, 2010 the first Supreme Court ruling concerning the new assessment provisions relating to special purpose property was filed. The ruling is **Labatt Brewing Co. Limited v St. John's (City)**, 2010 NLTD 57 (the "Labatt Brewing Case"). The ruling is a rejection of the application, to special purpose property assessments, of the basic assessment concept of equity/uniformity/discrimination.
2. The Labatt Brewing Case actually involved municipal tax assessment appeals by both Labatt and Molson. Both those companies were assessed as special purpose properties under the new legislative provision. Under the new provision, if a property was a special purpose property as defined in the *Assessment Act, 2006* (the "Act") then the property shall be assessed based upon reproduction cost whereas, if a property was an ordinary property, then it shall be assessed based upon market value.
3. Under the Act, special purpose property was defined very generally. According to the Act, "special purpose property" means: "real property that has a design or lay out or is constructed of special materials or in a manner that restricts its use."
4. Reproduction cost was also defined in the Act, but it was defined in a more limited manner than the traditional concept of reproduction cost. The Act stated that "reproduction cost" means: the cost, less physical depreciation, required to construct a reasonably identical replacement of the real property using the same or similar materials, construction standards, design and quality of work, calculated on the basis of prevailing prices and on the assumption of normal competency and normal conditions." Traditionally, reproduction cost is cost of construction less all forms of depreciation – physical, functional and external (or economic). However, under the Act's definition, only physical depreciation was to be deducted.
5. The 2007 and 2008 tax years, in the City of St. John's, had the same base date of January 1, 2005. For the 2007 tax year, Labatt and Molson were assessed as to the market values of their real property and those market values were \$993,000 and \$602,363 respectively. For the 2008 tax year, however, Labatt and Molson were assessed as to the reproduction cost of their real property and those reproduction cost values were \$6,531,800 and \$5,556,500 respectively. The difference in Labatt and Molson being assessed as to market value and in being assessed as to reproduction cost was an increase of over 600%.
6. The Act specifically stated: "an assessor shall assess a special purpose property based upon the reproduction cost of the special purpose property."
7. Labatt and Molson (the "Appellants") both appealed their 2008 assessments to the Assessment Review Commission. Prior to the assessment hearing, the Appellants made inquiries of the City and learned that only 6 properties in the City of St. John's had been assessed by the City as special purpose property. The 6 properties were 3 breweries, a soft drink maker, a cookie producer and an ice cream/milk producer.
8. At the Assessment Appeal Hearing, the Appellants complained that there were many other special purpose properties that were not receiving special purpose property notices of assessment and that were not being assessed based upon reproduction cost, but rather upon the more advantageous basis of market value. The Appellants complained that the City's approach to assessing special purpose property was discriminatory, inequitable, non-uniform behavior and was contrary to the provisions in the Act and to common law principles.

9. At the Hearing, the Appellants ascertained from the Director of Assessment for the City that though the Provincial Government owns hospitals, schools and a penitentiary, none of these properties received special purpose property Notices of Assessment. The Appellants also ascertained that properties such as movie theatres, television production studios, newspaper printing plants, private schools, greenhouses, farms, fast-food restaurants, stadiums, museums, petroleum bulk storage facilities, chicken slaughtering facilities, automobile garages and funeral homes all received market value assessments (using, for example, reproduction cost less all forms of depreciation – physical, functional and external (or economic)) whereas the Appellants and only 4 other property owners received special purpose property assessments (using reproduction cost less only physical depreciation).

10. At the Assessment Hearing, the City disagreed with the Appellants about whether various real properties were special purpose property as per the statutory definition. However, the City did admit that hotels, greenhouses and fast food restaurants were special purpose properties and that the City had not assessed those special purpose properties as to the reproduction cost of those properties, but rather as to the market value of those properties.

11. Notwithstanding the admission by the City that hotels, greenhouses and fast food restaurants were special purpose properties, the Commissioner in his Decisions concluded that:

“The Court has not been provided with sufficient information on other properties to prove that they should be classified as Special Purpose properties. There was no indication that there was non uniformity amongst those properties which the Respondent [City] has classified as Special Purpose properties and with the subject property. Accordingly, I find that the subject property has been assessed uniformly and equitably.”

12. The Appellants appealed the Decision of the Commissioner to the Trial Division and the Trial Judge denied the appeals. The Trial Judge stated:

On a plain reading of the legislation, I conclude that it requires the assessor and the Commissioner to treat each special use property individually and because of its uniqueness not to attempt to compare it to other properties. Simply put, once a property has been classified as a special purpose property, the Act, 2006 requires that it be assessed on a stand-alone basis. The Act does not invite comparisons -indeed it precludes comparisons with other properties. The Act requires the assessor to have 'tunnel vision'; to focus only on the subject property and on its reproduction cost as defined by the Act.

Even though they own special purpose properties, the appellants want the assessor and this Court to look beyond the four corners of their properties and to note that, according to the appellants, there are other properties that should have been assessed as special purpose properties but were not. That is, they complain not about their classification and assessments as such, but about the fact that some other properties could and should, they say, have been classified as special purpose properties and assessed accordingly...

The evidence before the Commissioner dealt mostly with the failure of the assessor to assess other properties as special purpose properties for taxation purposes. In my respectful view, this evidence was irrelevant to the real issue before the Commissioner, which was whether the appellants' properties had been properly assessed as special purpose pursuant to the Act, 2006. The fact that other properties which could be special purpose were not so assessed does not assist the appellants in an appeal against the validity of its own assessment...

The only issue to be determined is whether the assessment of the appellants' properties is correct or should be increased or reduced in accordance with a proper assessment based on reproduction cost as defined in ... the Act.

13. As a result of his ruling, the Trial Judge referred the appeal back to the Commissioner to determine whether the reproduction cost values were correct.

advantageous approach of reproduction cost less only physical depreciation. The Trial Judge never sought to explain why some special purpose properties should have a much lower tax burden than others.

14. As a result of this ruling the City can assess some special purpose properties based upon market value and other special purpose properties based upon the much less

15. The Appellants have appealed the Decision of the Trial Judge to the Court of Appeal.

THE 2010 NATIONAL NOMINATIONS COMMITTEE

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