



# Communication

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

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Editor: Grace Marsh  
Co-Editor: Jim Fraser

## EXECUTIVE COMMENT

Submitted by: Gilles Fafard,  
CPTA Immediate Past President, Montréal, QC



The Board of Directors, as usual, is always concerned with membership renewals at this time of the year. Especially this year when corporate budgets have been reduced and repositioned in order to face the uncertainty created by what we finally dare to admit, the economic recession.

The historical trend has been that 15 to 20 members have not been renewing, a phenomenon that can be observed for a number of years.

To compensate for those losses, there is always the influx of new members that contributes to maintain an overall stabilized membership between 400 and 415, for the last five years.

The Board is also concerned with the impact of the present economic situation on the attendance at the National Workshop in Whistler. In order to alleviate costs of transportation for the future - since workshop locations are decided two years in advance - serious consideration is being given for a 2011 Workshop in central Canada (Ontario).

On the positive side, the National Symposium held in Toronto last week do not appear to have suffered any negative impact as the number of participants appears to have been the same as last year.

Also, and maybe for the first time ever, all Chapters will be holding seminars in 2009:

- **Ontario:** February 17 and 18
- **Western Chapter:** March 23 and 24
- **B.C. Chapter** (industrial seminar) in June
- **Quebec Chapter:** March 17

These seminars are held for a period of time that varies from ½ day to 2 days. That phenomenon indicates that Chapter Chairs, Boards and their Committees try to respond to the needs of the membership as they have never been so active at the same time.

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Finally, the very creative and original program for the National Workshop in Whistler will solicit interactive participation from the delegates and should open a most welcome dialogue with the representatives of the judiciary.

WELCOME TO THESE NEW MEMBERS

- **Lynne Ashton**                   AEC International - ON
- **Pierre Chauvette**            Joli-Coeur, Lacasse  
  S.E.N.C.R.L. • LLP - QC
- **Stuart Dalgleish**            City of Calgary - AB
- **David Hurst**                   Cushman & Wakefield - ON
- **Reg Knapp**                    Pengrowth Corporation - AB
- **Patrick S. Lambie**            DuCharme, McMillen  
  & Associates Canada, Ltd. - AB
- **Brian Lutz**                    City of Red Deer - AB
- **Joanne Parkin**                City of Red Deer - AB
- **Valerie Quach**               Penn West Energy Trust - AB
- **Louis St-Martin**            Joli-Coeur, Lacasse  
  S.E.N.C.R.L. • LLP - QC

## BC CHAPTER

### UPDATE

*Submitted by A. Shelby Alfred, BC Assessment, Victoria, BC*

#### **B.C. SUPREME COURT – INTERIOR HEALTH AUTHORITY DECISION**

On December 12, 2008, the BC Supreme Court issued reasons for judgment in *Assessors of Areas 17, 21 & 23 v. Interior Health Authority*, 2008 BCSC 1719.<sup>1</sup> The central issue in this case is the tax status of regional health board property occupied by physicians. The Court considered the interpretation and application of section 15(1) and section 15.01(2) of the *Health Authorities Act* (the “HAA”). Section 15(1) of the HAA grants an exemption to property vested in a regional health board and used for the purposes of the HAA. The relevant paragraphs of section 15.01(2) of the HAA grant an exemption to real property that is part of a hospital or designated hospital facility provided that property is used by specified third parties for specified purposes.

The Court rejected the propositions that (i) regional health board property must be used by

*the regional health board* for the purposes of the HAA to benefit from the exemption in section 15 (1), and (ii) regional health board property occupied by a physician is not exempt unless it meets the requirements in section 15.01(2)(e) (i.e., occupation by a medical practitioner who is a member of the UBC medical faculty teaching staff). The Court held that section 15(1) is satisfied if one of the principal uses of the property is a purpose of the HAA, noting that the Property Assessment Appeal Board had found as a fact that making facilities available to physicians to facilitate the delivery of regional health services is one of the core purposes of the HAA.<sup>2</sup> The Court went on to find that section 15.01 “does not deal with uses for the purposes of the HAA. If it did, those uses would be entitled to the exemption under s. 15(1), and a further exemption for those matters under s. 15.01 would not be needed.” Accordingly, regional health board property occupied by physicians has been treated as exempt on the 2009 assessment roll.

#### **2009 ASSESSMENT ROLL - LEGISLATIVE CHANGES**

On November 27, 2008, the B.C. government passed Bill 45 - *The Economic Incentive and Stabilization Statutes Amendment Act* - which provided special valuation rules for the purpose of the 2009 tax year only. Part 3 of Bill 45 provides that properties valued at market value will, on the 2009 assessment roll, be valued at the actual value calculated using either a July 1, 2007 or July 1, 2008 valuation date, whichever is lower. Properties valued using regulated rates will be valued at the rates developed for the 2008 assessment roll.

BC Assessment assessed properties reflecting their physical condition and permitted use as of October 31, 2008 using the lower of a July 1, 2007 or a July 1, 2008 valuation date. In determining the assessed value, changes such as new construction or inventory, permitted use (eg., zoning), property class, occupation, eligibility for an exemption or in the taxing jurisdiction boundary, will be reflected on the roll. All other dates in the *Assessment Act* stay the same. To find out more about Bill 45, visit [www.gov.bc.ca/sbr/popt/property\\_assessment/index.html](http://www.gov.bc.ca/sbr/popt/property_assessment/index.html)

<sup>1</sup> For the Court decision, see: <http://www.courts.gov.bc.ca/jdb-txt/sc/08/17/2008bcsc1719.htm>.

<sup>2</sup> The Board decision, see: [http://www.assessmentappeal.bc.ca/decisions/dfull/dec\\_2007-21-00004\\_20080012.asp](http://www.assessmentappeal.bc.ca/decisions/dfull/dec_2007-21-00004_20080012.asp).

## **2009 ASSESSMENT ROLL FACTS**

- The taxable value of the entire 2009 assessment roll is \$953 billion, up from last year's total of \$940 billion. This year, 1,854,009 properties were valued, up 1.41% from 1,820,044,329 properties on the 2008 roll.
- BC Assessment has assessed all non-market change, including new construction and development, at approximately \$20.3 billion, a slight decrease of \$1.3 billion from the record \$21.6 billion on the 2008 Roll.
- BC Assessment mailed 1,920,826 assessment notices to property owners, a slight increase from the 1,920,054 notices mailed last year.
- As at February 17, BC Assessment received 30,613 public enquiries, a 36% reduction over last year's total of 47,973. This number may increase slightly over the next month.
- As at February 17, BC Assessment received 7,764 letters of appeal, representing 18,750 individual properties. This number may increase slightly by March 16 and currently represents a 58% reduction over last year's letters of appeal, and a 35% reduction over last year's property appeals.

## **BC ASSESSMENT'S COMMITMENT TO CONTINUOUS CUSTOMER SERVICE IMPROVEMENT**

In response to customers' demands for online services, BC Assessment provides extensive property assessment information through e-valueBC™, an Internet-based system that provides homeowners with their property assessment on a year-round basis and additional assessment information such as comparable sales and property details for limited periods during the defined assessment inquiry and appeal periods. Paper copies of the e-valueBC™ information, which includes assessment and sales data, but not owner information, are available at assessment offices, most libraries, municipal halls and government agents' offices until the end of the Property Assessment Review Panel period in mid-March.

## **BC ASSESSMENT'S 2009-2011 SERVICE PLAN AVAILABLE ONLINE**

The Corporation tabled its revised Service Plan at the B.C. Legislature on February 17. The Plan lays out BC Assessment's five corporate goals, key supporting initiatives and performance measurements. One initiative of interest to CPTA

members is BC Assessment's new measure to further define progress on producing accurate assessments. The Coefficient of Dispersion (COD) measures the quality of assessments by calculating the dispersion, or spread, of all the assessments-to-sales ratios (ASRs) around the median ASR. Less dispersion, or lower CODs, indicates higher quality assessment information. To calculate the COD, add the differences between each ASR in the group and the median ASR. The average difference is the sum of these numbers divided by the median and expressed as a percentage.

To read the 2009-2011 Service Plan, please visit: <http://www.bcasessment.bc.ca/publications/reports/index.asp>

## **BC ASSESSMENT WELCOMES NEW BOARD MEMBER**

Doug Morneau has joined BC Assessment's Board of Directors. Doug brings extensive experience in marketing, consulting, management and volunteer work at provincial, national and international levels.

As the founder and CEO of Rhino Marketing, Doug has built his client base with companies such as Shell Oil, HSBC and Uniglobe Travel. More recently, he has taken an interest in e-marketing to create enhanced levels of success for his clients.

With membership in five affiliate organizations, Doug also sits on the Board of the DMA Marketing Technology Council. He currently lectures at Douglas College and is a facilitator for the college's intensive jump-start marketing program. He is a sought-after presenter on topics like direct marketing, direct mail and integration of technology for the primary objective of marketing, lead generation, sales automations and customer loyalty programs.

To read biographies of all Board members, please visit: <http://www.bcasessment.bc.ca/about/board.asp>

## **BC ASSESSMENT WELCOMES NEW EXECUTIVE MEMBER**

Andy Robinson, Vice President, Policy and Legal Services, is seconded to BC Assessment from B.C. government's Ministry of Finance where for three years he was Assistant Deputy Minister, Strategic and Corporate Policy Division, Ministry of Finance. Read Andy's business interview in the next issue of CPTA's newsletter.

## **BUSINESS INTERVIEW WITH HARRY MERCER, BC ASSESSMENT'S NEW VICE PRESIDENT, BUSINESS AND CUSTOMER SERVICES**

Harry Mercer joined BC Assessment in November, 2008. He brings an extensive telecom and IT background, with experience in technology innovation, business transformation, change management, competitive strategy, business development, marketing, sales, operations, customer service and technology management. Harry has worked with a number of organizations, including AppLocation Systems Inc. and xwave in Victoria, Telus in Vancouver and a number of telecom and IT companies in Ottawa and New Brunswick.

Harry's educational background includes an Electrical Engineering degree and completion of numerous Management and Leadership programs, including through McGill University, Harvard Business School and the University of Western Ontario.

In his new role with BC Assessment, Harry will be responsible for customer service, information technology and project management

### **Q: What attracted you to BC Assessment?**

**A:** The opportunity to apply my telecom and IT background in a very customer-focussed and innovative organization. BCA is known as a very progressive organization in which employees are proud of their capabilities and accomplishments.

### **Q: What are your core responsibilities at BC Assessment?**

**A:** In a nutshell: customer and systems services, information technology and project management. I'm especially focussed on providing excellent service to both external and internal customers, including the provision and operation of cost and service-effective Information and Communications Technology (ICT) infrastructure.

### **Q: What in your view are the essential characteristics of excellent customer service?**

**A:** Exceptional customer service includes offering customers choice and control over how they do business with us, and that begins and ends with our employees focussed on customer needs and how best to deliver them.

### **Q: What are your top customer service priorities?**

**A:** Over the next year, our priorities are a focus on customer segmentation to better understand their needs; implementing Customer Relationship Management (CRM) tools to help manage our ongoing contact with customers; implementing information interchange capabilities and improved website design to facilitate improved information exchange. In the first half of this year, we're attending two CPTA events to give you key information and to learn more about your members' needs. The events are:

**March 23-24** BCA's corporate update at the CPTA's Western Chapter seminar in Calgary

**June 2** BCA industrial property update at the CPTA's BC Chapter seminar in Vancouver

### **Q: What are your top information technology-related priorities?**

**A:** Several initiatives, including satellite imagery (orthos), aerial photography (obliques) and street-front photography, to utilize new technology for improved desktop assessments; implementing a province-wide integrated voice and data telecom capability to improve internal effectiveness and customer service delivery.

To read biographies of all BC Assessment Executive members, please visit: <http://www.bcasessment.bc.ca/about/executive.asp>

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## **STRATA UNIT SALES AND THE BRITISH COLUMBIA PROPERTY TRANSFER TAX**

*Submitted by Bruce Hallsor,  
Crease Harman & Company, Victoria, BC*

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### **INTRODUCTION**

The Property Transfer Tax is a fairly straightforward tax that is most often paid without much thought as to its proper calculation. It is most often paid in full at the time of registration of the conveyance at the land Title Office. The amount paid at that time is

based on fair market value for the interest being transferred, and is set at 1% of the first \$200,000 in value, and 2% of the balance.

Fair market value is the price that would be paid by a willing purchaser to a willing seller in the open market on the date of registration. An open market is where the property is offered for sale so that anyone likely to be interested in purchasing it may make an offer.

However, for sales of condominiums, there are a few wrinkles in this calculation that should be noted by real estate agents, conveyancing solicitors, and their clients. An improper understanding of these rules can result in clients paying more tax than they are required to.

### **STRATA PRE-SALES**

In 2001 and 2004, amendments were made to the *Property Transfer Tax Act* to change the way market value is calculated for transfers of pre-sold strata units. A pre-sold strata unit is defined as a strata lot, or portion thereof, which is transferred pursuant to a contract which is signed before the registration of the strata plan in the Land Title Office. Generally Speaking, sale of these units will be subject to the Real Estate Marketing Act. With these sales, where the contract can be written up many months or even several years before the actual registration, the fair market value of the strata unit on the day of registration can be very different from the contract price. In order to avoid situations where buyers could not rely on their contracted purchase prices for PTT purposes, and were being required to present appraisals, the legislation allowed for purchasers to pay tax for these units based on the "total consideration paid", rather than actual fair market value.

This amendment has been a boon for purchasers and developers in the rising market that British Columbians have enjoyed since its implementation. However, now that we are heading into a period where pre-sale contract values will likely be higher than fair market value on the closing date, the provision has the opposite effect.

### **ASSIGNMENTS OF STRATA PRE-SALES**

The total consideration rule has also been applied to assignments. Interpretation Bulletin PTT024, states that "total consideration" includes not only the original contract price, but also any additional payments made by subsequent purchasers of

assignments from the original purchaser. For example, if A signs a pre-sale contract for \$500,000, and then assigns it to B for \$600,000, the total consideration paid for the unit is \$600,000.

However, in a declining real estate market, where A takes a loss, and assigns his pre-sales contract to B for only \$400,000, the total consideration of B is only \$400,000. If \$400,000 is indeed market value, this will reduce the tax paid even if the transfer between A and B is one between related parties. So, if a husband has signed a pre-sale contract and intends to follow through with it, he could, in this case, save \$2,000 in tax by assigning the contract to his spouse for the actual fair market value of the unit just before the transfer, and let her close on the deal, and declare the lower total consideration. The same maneuver could be done between related companies, sometimes with very significant tax implications.

### **FRACTIONAL STRATA UNITS**

An unrelated issue that often comes up with strata lots is taxation of fractional ownership units. While the application of the PTT is made on each individual interest being transferred, so that two unrelated business partners who each by half of a rental unit or a recreational cottage, can both claim the lower 1% rate on their purchase, there are rules against splitting transactions into pieces in order to take advantage of the lower 1% rate on more than \$200,000.00.

Section 3(2) of the *Property Transfer Tax Act* states that if a purchaser acquires a portion of a property, and then acquires another portion within 6 months, those two transactions will be taxable as a single transaction, with the higher 2% rate applying to any amount paid over \$200,000. This is often overlooked by people who purchase more than one ¼ share unit in the same strata development, and it can lead to a nasty surprise for the conveyancing solicitor who finds his clients are suddenly liable for an extra \$2,000 in tax over and above what was in his statement of adjustments.

Section 3(2) creates this obligation for additional tax even where there are two owners, but only if they are related individuals or corporations.

### **CONCLUSION**

Even real estate practitioners who are familiar with the Property Transfer Tax should look twice at any transaction involving strata units. In respect of fractional interests, assignments, and pre-sale contracts, the rules are slightly different than they

are for other properties. A second look at the ordinary way of calculating tax can often result in thousands of dollars saved for a purchaser.

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## WESTERN CHAPTER

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### UPDATE

*Submitted by Joanne Manning, AltaGas Ltd.,  
Calgary, AB*

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#### DECEMBER MEETING

Our December meeting is traditionally our Christmas social where we look forward to hosting our regular members and our retirees. Due to the very busy year our Chapter experienced, there were a great number of volunteers to thank. We had a short business meeting and, despite that, a good time was had by all those who were able to attend.

#### JANUARY MEETING

The January 20th meeting did not have a speaker to enable us to have a more in-depth business meeting. Topics included Alberta Appeal Fees, CCRG, Well Drilling and Equipment Tax Consultation, Agent/Representative Authorization Forms, Machinery & Equipment Manual Rates and Education Seminar update.

#### FEBRUARY MEETING

The February 17<sup>th</sup>, 2009 meeting guest speaker is scheduled to be Sheila Young, Director of Regulated Assessment Policy, Alberta Municipal Affairs. Sheila's topic is the CCRG Scenarios which were distributed by AMA for discussion purposes in January.

#### GOVERNMENT LIAISON COMMITTEE MEETING

The Committee's next meeting is scheduled for Tuesday March 3. For more information, contact Kevin Nelson at 403.233.3056 or Joanne Manning at 403.691.7535.

#### WESTERN CHAPTER EDUCATIONAL SEMINAR

The 2009 Education Seminar is scheduled for **March 23 & 24, 2009**. Once again, it will be held in Calgary at the Executive Royal Inn.

This year, our Seminar is titled Weathering the Storm, The Global Economic Crisis and It's

Impact to Western Canada. Our Committee has lined up some exceptional speakers:

Keynote Speaker, Mary Kate MacIsaac, highly respected photojournalist

- Using photos and stories, highlighting donor aid and its impact on crisis and conflict situations.

Keiren Ferris, Shell Canada Energy

- The royalty tax structure and how it affects the Oil & Gas industry.

Rob Irwin, Calgary Real Estate Board, Commercial/Rural Division

- Information on real estate values, lease and vacancy rates and construction activity.

Scott Sitter, BC Assessment Authority

- An overview of the standardized (assessment) models of oil and gas well sites.

Danielle Smith, Canadian Federation of Independent Business

Patricia Pidruchney, Lakeland College

- The College's curriculum of the Appraisal and Assessment Diploma.

Laurel Edwards, Colliers International Realty Advisors Inc

- Calgary's downtown leasing market.

John Elzinga, Strathcona County

- Update on Alberta's Industrial Heartland and the changing economic climate.

Provincial Government Update

- Gregg Paton (BC)
- Steve White (AB)
- Saskatchewan TBA

Legal Panel

- Jim Fraser (BC)
- Gil Ludwig (AB)
- Saskatchewan TBA

Due to the feedback received from last year's seminar and the success of the memory sticks at the 2008 National Workshop, we're "going green". The reference material will be provided on CD prior to the seminar.

The Brochure has been circulated by the National Office and our Members are encouraged to share it with those outside of our Association. Seminar program and registration form can be downloaded at

[https://cpta.org/index.php?option=com\\_docman&task=cat\\_view&gid=56&Itemid=68](https://cpta.org/index.php?option=com_docman&task=cat_view&gid=56&Itemid=68)

### UPCOMING MEETING DATES

- **Wednesday, April 29<sup>th</sup>** in Edmonton at the Mayfield Inn & Suites. This is a dinner meeting held in conjunction with the Alberta Assessors' Association Conference.
- **Tuesday, May 19<sup>th</sup>** at the International Hotel.
- **Tuesday, June 16<sup>th</sup>** at the International Hotel. Meeting dedicated to Chapter Elections.

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## ALBERTA APPEAL FEES CAPPED BY MINISTER

*Jointly submitted by Jud Virtue and Ryan Penner of Macleod Dixon LLP and Robert Brazzell of Altus Group Ltd.*

On January 1, 2009, a new regulation took effect in Alberta. This regulation limits the amount municipalities can charge as filing fees for assessment complaints. The regulation limits such fees to \$50 per roll number for farm land and for residential property containing up to three dwellings. A maximum fee of \$650 applies for residential property containing more than three dwelling units, non-residential property and machinery and equipment.

The regulation was enacted in direct response to numerous complaints received by the Ministry regarding already high filing fees in many municipalities, and massive fee increases being implemented by the two largest municipalities in the Province, Calgary and Edmonton..

For example, on the recommendation of the City of Calgary's Standing Policy Committee on Finance & Corporate Services, the City of Calgary purported to adjust the effective complaint filing fee from a flat fee of \$50 per roll number to 1% of the previous year's tax levy recalculated with the current year assessment. This would amount to filing fees of about \$1,000 for every \$10,000,000 of assessed value, resulting in filing fees for downtown office towers in excess of \$100,000 in many cases.. The fee proposal by the City of

Edmonton would have seen the appeal fee increase to \$5,000 for most commercial and multi-residential buildings.

The recommendations of the cities of Calgary and Edmonton were made despite objections from many taxpayers and associations, including the Coalition for Property Tax Fairness, an umbrella group representing the Canadian Property Tax Association, Building Owners and Managers Association, RealPac, Canadian Taxpayer Federation and the Calgary Chamber of Commerce.

Taxpayers argued that the legislation authorized municipalities to charge a "filing fee" but did not authorize recovery of the costs associated with operating the Municipal Assessment Review Boards. The taxpayers outlined how the new fee structure was not at all related to the actual cost of filing assessment complaints. In addition, they argued that the new fee structure would unreasonably deter the filing of legitimate assessment complaints and represent an unreasonable barrier to the assessment complaint process.

The taxpayer groups further submitted that the proposed fee increases violated established principles of law that administrative fees charged by a public body must reflect the cost of the regulatory service offered: *Eurig Estate (Re)*, [1998] 2 S.C.R. 565, para. 21.

Regrettably, the municipalities allowed for very limited feedback from interested stakeholders during the review process. Taxpayer submissions met with considerable resistance from municipalities.. Ultimately, the Coalition for Property Fairness appealed directly to the Minister and received a full and objective audience. In addition to the enactment of the new regulation capping the complaint filing fees, the Minister has undertaken a welcomed comprehensive review of the assessment complaints and appeal system.

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## NORTHERN DISCLOSURE

*Submitted by Carol Zukiwski & Katharine Holland, Reynolds Mirth Richards & Farmer LLP, Edmonton, AB*

### COURT OF APPEAL CONFIRMS THE NECESSITY OF DISCLOSURE

In a 2 to 3 decision the Court of Appeal of Alberta

has reconfirmed the importance of disclosure in its 2008 decision, *Nortel Networks Inc. v Calgary (City)*, 2008 ABCA 370. However Justice Slatter wrote a dissenting opinion as he did not see the issue as strictly one of disclosure, but rather one of relevance and materiality of evidence. In this decision, the Court discusses the significance of full disclosure in ensuring that parties are aware of the case against them and are given fair opportunity to rebut opposing evidence. These considerations are essential to ensuring procedural fairness within a proceeding.

This case arose out of an appeal of the business and property tax assessments of one of Nortel's Calgary properties. The building had particular power, air quality, vibration and temperature controls as well as other features unique to its use as a research and development centre for telecommunications technology. The City classified the property as 100% office space with a slight reduction for the lesser interior finishings in part of the building. Nortel appealed the assessment, arguing that the property was an office/warehouse hybrid due to the laboratory and research aspects of its use and should be assessed at a lower rental rate in accordance with this classification.

At the Municipal Government Board ("MGB") hearing, the City of Calgary presented 25 comparable properties in support of its assessment. However, the City declined to provide Nortel with the addresses of the properties that were used because of confidentiality concerns. Nortel requested a Preliminary Hearing asking the MGB to compel disclosure of the property addresses of the comparables so that Nortel could effectively review the City's submissions. The MGB felt that the issue of disclosure was premature and decided to defer decision on the issue until the merit hearing. At the merit hearing, the addresses of the City's comparables were not presented. The ruling on the disclosure request was not made until the MGB's decision was rendered. The decision merely stated, with regard to the request for disclosure, that "the MGB was satisfied that a decision could be made on the evidence before it" with no further explanation or reasons for denying the request. Nortel sought a rehearing and the City maintained the addresses were not necessary to the panel's decision making process.

The Court of Appeal found that it was clear from the MGB's decision that it relied upon the comparables

put forth by the City. The Court of Appeal held that Nortel was unable to respond adequately to this evidence without disclosure of the addresses of the comparables and lease details of the comparables. The main issue in contention, was whether procedural fairness required the MGB to order disclosure in order for Nortel to meaningfully respond to the City's evidence. The Court of Appeal agreed with the Chambers Judge's observation that in these circumstances it was impossible for Nortel to deal effectively with the comparable properties put forward by the City. Without the information Nortel was not able to test the alleged comparables. The Court of Appeal found that the lack of disclosure prevented the property owner from either tendering evidence through its own witness to show whether or not they agreed with the City's comparables, or from demonstrating the same through cross examination. The Court of Appeal determined that this was a breach of procedural fairness and that disclosure of the information requested by Nortel should have been ordered by the MGB.

This decision recognizes the importance of disclosure in ensuring procedural fairness. The Court of Appeal agreed with the lower Court that the lack of disclosure deprived Nortel of an opportunity to challenge the evidence presented against it, which evidence was ultimately relied upon by the MGB. While a board is able to deny a request for information that it feels is irrelevant, a party must be given a fair opportunity to challenge and test any evidence that the board relies upon. The Court of Appeal felt that this had not occurred as the lack of disclosure deprived Nortel of any ability to test the evidence presented against it, resulting in a breach of procedural fairness.

As mentioned, Slatter, J. wrote a dissenting decision. Justice Slatter would have reversed the lower Court and upheld the MGB's decision. Justice Slatter stated that "*the ultimate issue... comes down to who is to decide on the relevance and materiality of evidence that goes to assessed value: the taxpayer, the Board or the court?... Even if the court must make the final decision on procedural fairness, that decision must be deferential to the Board's conclusions about what is relevant and material*". [page 11 paragraph 48]. In the minority decision, Justice Slatter was of the opinion that the failure to order disclosure of immaterial detail did not result in procedural unfairness.

The City of Calgary has filed for leave to appeal the Court of Appeal's decision to the Supreme Court of Canada.

*This article is intended to provide comments on recent legal developments and is not intended to give legal advice. You should seek legal advice on matters of concern to you.*

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## **ASSESSMENT UPDATE - MANITOBA**

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

With the general reassessment which becomes effective in 2010, Manitoba moves to a 2 year cycle for assessments from the existing 4 year cycle.

The new reference date, or date of value, will be April 1, 2008, for the new assessment to be effective for 2010 and 2011.

Over the past number of months the Assessor for the City of Winnipeg has previewed the new assessments for single family residential and multi-family buildings. Increases on average for single family residential have been 78% and for multi-family 107%.

Hotels, office and industrial properties will be forthcoming in the next number of weeks.

The formal assessment notices will issue in late May, 2009, with an appeal deadline to expire approximately the third week in June, 2009.

Winnipeg has seen unprecedented increases in value in residential and multi-family properties. Other property types are not anticipated to see increases of the same magnitude.

The Provincial Assessor has not yet commenced the preview process for the new assessments.

On the litigation front, the Court of Appeal has reserved its decision on a matter involving the penalty provisions of the municipal assessment legislation, there is pending in the Court of Appeal the equity issue in respect of which leave was granted with this matter likely to be heard in April or May, 2009, and there is pending in the Court of Queen's Bench the challenge to the municipal assessment legislation pursuant to which the City of Winnipeg has attempted to impose business tax on satellite television revenues.

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## **ONTARIO CHAPTER**

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### **UPDATE**

*Submitted by: J. Bradford Nixon,  
Walker Poole Nixon LLP, Toronto, ON*

The essential element of a Communication Update is that there must be information to communicate. We had anticipated having information to communicate but we are still waiting for the following:

1. New regulations related to the calculation of the assessment phase-in and tax-related adjustments;
2. New rules of the Assessment Review Board to deal with 2009 appeals. Unfortunately, as I say, nothing has yet been finalized.
3. As we write, we learned that MPAC will not execute 2008 Minutes of Settlement because the computer is not yet capable of calculating the adjusted 2009 phase-in. We, therefore, wait for the MPAC computer to be reprogrammed.

We expect there will be much of news to communicate with the next update - once all of our partners in the assessment review process have completed their work.

We thank all those who attended the Valuation and Legal Symposium on February 17<sup>th</sup> and 18<sup>th</sup>. The agenda was full and exciting.

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## **SEAWRIGHT v. MUNICIPAL PROPERTY ASSESSMENT CORPORATION**

*Submitted by Kenneth R. West,  
Walker Poole Nixon LLP, Toronto, Ontario*

**ARB FILE NO. DM 72714 DATED JANUARY 16,  
2009, BY ARB MEMBER J. WYGER**

Recently, the Assessment Review Board heard a Motion for rehearing brought under the Rules of the Assessment Review Board pursuant to the *Statutory Powers Procedure Act*, R.S.O. 1990, c.

S.22, as amended. The Motion was brought by the Municipal Property Assessment Corporation ("MPAC") after the Board rendered a decision in the original hearing of the matter. MPAC sought a rehearing based on errors of fact and law, such that the Board would likely have reached a different decision.

The issue in the original hearing of the matter was whether a garage which had been the subject of certain renovations, so as to provide space for a home business run by the property owner. The business was that of a master electrician. MPAC assessed the property as part residential ("RT") with the garage portion of the property being assessed as commercial ("CT"). The property owner acting without representation brought a complaint before the Assessment Review Board arguing that the garage was his home office and ought to be subject to the RT classification. The Board determined that, indeed, the use of the space as a home office was a residential use and, as such, returned the classification of the subject property as entirely RT.

The garage space in question consisted of four work areas including four desks and four computers, which appeared to the assessor as a commercial space warranting the CT classification. On hearing, the Board found that the garage was used by the residents of the property for, among other things, the running of the business. On initial hearing, the Board stated various criteria could be utilized to determine whether a home office might rise to the level of CT classification. The Board opined that having such things as an external sign; parking facilities; or whether there was a consistent flow of clients to the space could be helpful in determining which classification is most appropriate in the circumstances. In the end, the Board found that the garage area did not rise to the level of CT classification, as its use fell within the scope of residential use.

At the Motion for rehearing, the Respondent, Seawright, made two distinct arguments before the Board. The first line of argument was to question whether the Board had authority to rehear a case on a question of law. The *Assessment Act* provides specifically for an appeal, with leave, to the Divisional Court on questions of law. The second argument was that on rehearing the Board should apply the same standards of review that the Courts would apply

on Judicial Review or on an appeal of an Assessment Review Board decision.

MPAC argued that the findings of the Board did not demonstrate a residential use of a portion of the property; and that without finding a residential use, the Member applied the law incorrectly. MPAC asserted that without a residential use, the Board may not conclude that the RT classification applies. Indeed, MPAC submitted that only the CT classification can be applied if there is no basis for residential use, and that concluding that space used by a corporation to run a business could only be a commercial or, at least, a use not within the residential class parameters; thus, resulting in CT classification.

With regards to the first argument of the Respondent, Seawright, of whether the Board possessed the requisite jurisdiction to hear the matter on review when a question of law is at issue, the Board stated that it "has the requisite authority and jurisdiction to review one of its own decisions for errors of law and fact." With regards to the Respondent's second line of argument, the Board agreed that a decision of the Board ought not be overturned lightly and that deference is deserved where the decision furnishes "adequate enough reasons so that the basis for the decision can be satisfactorily determined, and that to overturn a decision should be the exception, requiring compelling circumstances." The Board applied the test as set out in the Dunsmuir v. New Brunswick, [2008] S.C.J. No. 9 (S.C.C.) case. Thus, the Board recognizes that on rehearing, the Board has an obligation to apply the same standards of review that a s.96 Court would apply when exercising its power for Judicial Review and/or on appeal. The standards of review being either "reasonableness" or "correctness". In this case, the Board applied the Dunsmuir reasonableness standard, stating that the reasonableness standard is "concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process and whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of facts and law". This is especially so when the Board is reviewing a question of law based on its home statute, being the *Assessment Act* and, one might argue, portions of the *Municipal Act, 2001*, S.O. 2001, c.25.

In the end, the Board found that the standard of reasonableness was met and that indeed it was open

to the Board, in the original hearing, to conclude that the garage, as used, constituted a residential use. Thus, the RT classification was justified.

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## QUÉBEC

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### UPDATE

*Submitted by: Jules Mercier, AEC International, Montréal, QC*

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#### CHAPTER EXECUTIVE MEETING

The next meeting of the Quebec Chapter Executives will be held the first week of March 2009.

#### BREAKFAST MEETING

The next Breakfast Meeting of the Quebec Chapter will be held on March 17, 2009.

The proposed speaker, Jeff Cowan of WeirFoulds, will be presenting a development session devoted to the 2009 Ontario's MPAC 4-year Assessment Roll and other topics:

- Phase-in
- Right to appeal
- Claw backs
- Capping
- Impacts for tax payers and real estate consultant
- Bank Tower Decision - Toronto...etc.

#### PROFESSIONAL DEVELOPMENT PROGRAM

In April, the Quebec Chapter will be proposing a Professional Development Session pertaining to commercial leases and the real estate tax clause included in the leases and more:

- Tenant right's to appeal
- Communication line between the landlord and the tenant regarding notices of assessment, etc.

This will be a 90-minute session.

#### ACTF/CPTA GOLF TOURNAMENT

Éric Riberdy, É.A. of Nexacor Realty Management Inc. will be responsible for organizing the 2009 Golf Tournament. It will be held at the Golf Le Versant in Terrebonne on May 14, 2009.

#### 2009 ASSESSMENT ROLLS

All 2009 Assessment Rolls for the Province of Quebec are 3-year rolls. The date of assessment is July 1, 2007.

The deadline to log an application for assessment review is April 30, 2009.

In the Province of Québec, you can appeal the assessment only the first year a new roll is implemented. If you don't, then you have to accept the new assessment for a 3-year period.

#### 2010 ASSESSMENT ROLLS

For the 2010 Assessment Rolls, the municipalities having properties classified as "Single Purpose Property" (Immeuble à Vocation Unique – IVU) have the obligation of advising the taxpayer by February 15, 2009.

Then the taxpayer must be prepared to reply to the municipality by June 1, 2009.

Among the municipalities depositing a new roll for 2010 there are:

- Laval
- Québec
- Sherbrooke
- Trois-Rivières
- Longueuil

The city of Montreal would depose a new assessment for 2011.

#### JURISPRUDENCE

The Tribunal Administratif du Québec (TAQ) has rendered an interesting decision on December 18, 2008:

Domtar inc. c. Ville de Windsor and MRC Val-Saint-François

Date: December 18, 2008  
Number: SAI-Q-130457-0609/SAI-Q-130459-0609  
Tribunal: Tribunal Administratif du Québec (TAQ)

The municipality and the MRC are requesting the right of appealing the judgment.

This request is introduced mainly because the court has recognized an external obsolescence factor, something not very frequent in Québec during the last 10 years.

This factor was fixed at 20 % and could have a real impact on future court cases involved.

If the municipal parties are authorized to appeal, the decision may be changed but at this time it is the talk in town. Me Gilles Fafard has prepared a review of this decision.

The judgment is written in French but an electronic copy can easily be obtained at this address:

<http://www.jugements.qc.ca/php/decision.php?liste=35183643&doc=030346415F481602>

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## **ECONOMIC OBSOLESCENCE - THE SILENT KILLER**

*Submitted by Gilles Fafard,  
de Grandpré Chait, Montréal, Québec*

The mist in the valley is raising slowly, outlining the contours of Windsor. Not the world renowned castle. Ville de Windsor located in the Eastern Townships, QC. Population: 5,305.

We can find 17 different industrial properties serviced by the St. Lawrence and Atlantic railroad that connects the Eastern Townships to New-England. On top of the list, Domtar inc, a state-of-the-art installation with an international status where are manufactured fine papers. The new mill started operations in 1987.

Ville de Windsor advertizes, like many similar rural municipalities, that it is a community centered on family and the well being of its constituents.

### **CHALLENGING THE ASSESSMENT**

Domtar challenged the value of its industrial installation for the triennial roll 2006, 2007 and 2008. The assessment originally was:

L: \$ 2,107,600  
B: \$114,070,000  
T: \$116,177,600

Domtar proposed that an adequate assessment should at \$66 672,600 in total.

During the trial hearing, the municipal assessor suggested an increase of value for the building from \$114,070,000 to \$136,739,000.

On December 18, 2008, the Tribunal Administratif du Québec (TAQ) concluded that the total value should be \$81,518,600.

The land valuation was not in dispute.

In view of the position taken by the assessor, the presumption that usually supports the valuation as it appears on the roll was cancelled with the result that the parties were on the same level as far as the burden of evidence was concerned.

There were five issues discussed in this decision and the major one in the application of an economic obsolescence percentage to the overall value of the buildings. Before spending much of the analysis on the economic obsolescence, we should have look at the four other issues and their respective solution as adopted by the Board.

#### 1. Determination of a class category

Due to the exceptional character of the industrial complex of Domtar/Windsor, a global attribution of class 4 should be appropriate as well as the factor to be applied corresponding to the one recommended by the Manual as it existed at the time of the assessment, being July 1<sup>st</sup> 2004. Subsequent amendment to the Manuel could not be predicted at that date (hindsight) and therefore could be taken into consideration in that respect.

#### 2. "F" Factor

Experts for both parties concluded to a similar result: "F" factor should be 1.05 but a detailed analysis of comparable properties adduced as evidence by Domtar is to be preferred to a factor recommended by the Manual, especially when such factor is not applicable to properties exceeding a cost new of \$32 M.

#### 3. Economic life expectancy

The economic life of the Domtar complex has been established by the Board at 45 years (instead of 50) for a single purpose property with no residual value at the end of its economic life.

#### 4. Settling pounds (assessibility)

Settling pounds were described as being linked to industrial production as they were playing the roll of effluent treatment. They should not be inscribed on the roll.

A distinction was made between settling ponds of that nature, part of a water treatment process, and other land improvements or facilities like dikes built with the intention of protecting the property against accidental spills, fire or other hazardous casualties.

### **ECONOMIC OBSOLESCENCE**

This was the most controversial finding; the Tribunal started by exploring the definition of economic obsolescence applicable in the present instance. It had an external market basis originating from offer and demand that carried an impact on the desirability of installations for a similar utility as the one being debated. Also the Tribunal said that such obsolescence would be “structural”, a deficiency that give an indication for a long term perspective, which is different than being “conjectural”, the latter being the normal ups and downs of any industrial or business venture.

The owner cannot do anything to correct such obsolescence because it is not attributable to his business plan, the functional flow of the industrial process or the age of the building. External obsolescence can increase, diminish or possibly vanish.

The assessor for the municipality suggested a non significant economic obsolescence of 2.5%, having no negative result on the value of the property.

The taxpayer on the other hand proposed an adjustment of 36%.

Having qualified the nature of the industrial plant as being a single purpose property, the Tribunal was of the opinion that the value is to no surprise irrevocably linked to the value of the business and that the future of the industrial production of fine papers was intimately connected to the value of the building.

#### **5.1 Objection to the admissibility of evidence as to business and property.**

The city’s lawyer objected to the consideration by the Board of different information pertaining to the qualification and quantification of the economic obsolescence. The basis of that objection was that such obsolescence would be attributable to the business and not to the building where the business takes place.

In numerous cases, it has been decided that as long as a property qualifies as a single purpose building, it is obvious that the industry that operates within those premises has to be take into account. An economic obsolescence, if proven, is intimately linked to a diminution of the demand for its product. The property becomes then less desirable and less profitable. It is not always true for all single purpose properties who do not react in the same manner in an economic recession situation.

#### **5.2 Objection to the admissibility of evidence: hindsight.**

Another objection from the lawyer for the City was that information pertaining to economic obsolescence was “hindsight“, in the sense that it relied on facts that became known only after the date of reference, July 1<sup>st</sup> 2004. The Board is of the opinion that facts subsequent to the date of reference are admissible, if they could be known before or anticipated by well informed buyers and sellers. There is ample jurisprudence to support that information derived from political, social and economic normal knowledge is part of the behaviour that influences transactions, if of course they could be foreseeable, reliable and accessible.

In the sections of the Act that contribute to characterize the definition of market or actual value, the last paragraph of section 46 reads as follows:

« **Market conditions.** – For the purposes of determining market conditions on the date contemplated in the first paragraph, the information relating to transfers of ownership that have occur before and after that date, may, in particular, be taken into account”.

The words “*in particular*” support the proposition that the intention of the legislator was not to restrict the analysis to sales only but also to market conditions in general. It is a question of relevancy and appreciation as to the impact of such information submitted to the interpretation of the Board. Detecting a market trend is a matter of foreseeability and, since transactions are nothing else than the conclusion of a “work in progress”, the situation commands flexibility when proceeding with a particular analysis of significant information in order to support realistic results.

## **FACTORS TAKEN INTO CONSIDERATION IN ORDER TO DETERMINE ECONOMIC OBSOLESCENCE.**

According to the evidence adduced by the economists of both parties, the Board proceeded to determine what were the factors that contributed to economic obsolescence and arrived eventually at the conclusion that some of them but not all of them supported an economic obsolescence of 20%. Those factors were:

- competition;
- dimension and aging of Canadian pulp and paper plants;
- high costs of fibre;
- low investment and return;
- governmental policies and taxes
- the strength of the Canadian dollar.

Increased **competition** was attributable not only to traditional but also to emerging countries like South America, Asia and Oceania who can benefit from a faster growing forest and where there industrial plants are processing fibres with lower costs and where manpower is much cheaper. Moreover, these countries have new and large plants. Fibre from the eucalyptus tree for instance is quite adequate to process fine paper of the kind manufactured in Windsor. Therefore, accrued competition is there to stay and it contributes to a structural feature that can be one of the cause for economic obsolescence.

**Size factor:** smaller and older Canadian plants is another source of obsolescence considering that competition has been investing into new equipments and relying upon new technology. In order to achieve costs savings, and reduce costs of production per unit, the size of the plant is an incremental factor. Domtar however had a privileged position because it owned the largest and more recent plant in Canada.

**Cost of fibre** was on the other hand much higher in Quebec than on the rest of the global market. Not only Quebec, but also in Ontario. Thus a higher cost for the finished product.

**Weakness** as to investment and **return** on the investment did not stimulate the injection of new capital. Perspective for the future looked grim because of an insufficient performance or return on the investment. This low return does not generate new capital and on a long term basis does not promote investments that would be

essential for the survival of the industry, creating another dimension of the structural defect that is responsible for obsolescence.

**Governmental policies and taxes:** the exploitation of forest in Canada is governed by the provincial Legislatures. That contributes to market fragmentation, the raising of interprovincial barriers and the creation of a pulp and paper industry in each of the provinces concerned being Quebec, Ontario and British Columbia as the major players. It is also known that taxes and income taxes are higher in Canada and there is no foreseeable future where this situation may change.

**The strength of the Canadian dollar:** the more the value of the Canadian dollar approaches the value of the American dollar, the more the costs of the Domtar/Windsor plant are increasing while, adversely, revenues are decreasing. But to compare value of both dollars is always a fluctuating, unforeseeable and difficult to verify exercise. The nature of that factor illustrates that it participates to the conjectural side of the situation and not its structural dimension.

## **IN CONCLUSION:**

The Board finds that in a single purpose property similar to the one in the present instance will see its intrinsic value affected by permanent and irreversible deficiencies of the economic activity that takes place in the premises.

Therefore, a substantial part of the evidence adduced, but not all of the elements discussed, lead the Tribunal to observe an economic obsolescence as being present in the Domtar plant in Windsor.

There is no precise way that would quantify such obsolescence. The Board heard economist consultants from both parties and was not satisfied with the reliability of the statistical data that were utilized. In such a case, the Board members must utilize their experience and specialized knowledge in order to formulate a calculation that would justify and support the percentage arrived at.

Eliminating the non structural factors of obsolescence, the Board, at the end, arbitrates at 20% the subtraction to the depreciated costs of the buildings to take into consideration the economic obsolescence affecting the industrial property, a feature that operates somehow like a silent killer.

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# ATLANTIC PROVINCES

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## NEW BRUNSWICK UPDATE

*Submitted by Scott Wilson, McInnis Cooper, Saint John, NB*

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On December 19, 2008 the Province of New Brunswick enacted several key changes to the provincial *Assessment Act*, R.S.N.B. 1973, c. A-14, designed to improve the property tax assessment appeal process. These changes are in response to a report filed by the New Brunswick Ombudsman on February 28, 2008.

The key amendments to the Act which became effective on January 1, 2009 are:

1. the burden of proof is no longer solely on the party appealing an assessment;
2. the Province will now start to disclose real estate sale prices;
3. the initial level of appeal process is renamed to "Request for Review of Assessment";
4. there will be more time to appeal a decision of the Assessment and Planning Appeal Board; and
5. written submissions from all parties are required at least 15 days prior to an appeal hearing.

### **BURDEN OF PROOF**

Section 32(5) of the Act previously placed the onus of proving that an assessment is too high on the party appealing the assessment. The new amendments to the Act repeal section 32 (5), thereby making the Act silent as to the onus of proof. In effect, repealing this section ensures that both the tax payer and Assessment Services must provide evidence to support their value positions.

### **DISCLOSURE OF SALES INFORMATION**

Section 12(1) of the Act previously prohibited the disclosure by the Province of sales information except in limited circumstances. The new amendments eliminate this prohibition for any sales information filed after December 31, 2008. Thus, beginning January 1, 2009, the Province will be able to disclose sales information which

will be of use to tax payers in gathering comparable sales data as part of their assessment appeals.

### **INITIAL LEVEL OF APPEAL - REQUEST FOR REVIEW OF ASSESSMENT**

The first step in appealing a property tax assessment was the filing of a "Notice of Reference of Assessment" to the Executive Director of Assessment. The new amendments to the Act now refer to this first stage of the appeal process as filing a "Request for Review of Assessment."

### **INCREASED APPEAL PERIOD FROM ASSESSMENT AND PLANNING APPEAL BOARD**

The Act previously provided that an appeal lies to the Court of Queen's Bench from a decision of the Assessment and Planning Appeal Board on any question of law. Section 37(2) of the Act stated that such an appeal must be made within 30 days of the Board's decision. The new amendments to the Act will increase this appeal period to 60 days, providing more time to the parties to evaluate their options.

### **WRITTEN SUBMISSIONS PRIOR TO AN APPEAL HEARING**

The new amendments to the regulations under the Act will require that all parties file written submissions with the Board at least 15 days prior to an Appeal Board hearing. Failure to do so within the time required may result in the Board dismissing the appeal or proceed to the hearing of the appeal. This amendment will ensure that tax payers have sufficient time to review the data used by Assessment Services in support of its assessment.

### **SUMMARY**

The above changes to the *Assessment Act* and its regulations became effective on January 1, 2009, and the changes to the appeal process will apply to all new assessment appeals for the year 2009 onward. Any Notice of Reference of Assessment received by the Director prior to January 1, 2009, and any appeal pertaining to it, will follow the rules and procedures in place prior to the January 1, 2009 amendments.

SNB is currently developing systems and procedures to enable release of sale information by way of self-service, and anticipate having this information available on the Internet in conjunction with the issuing of the 2009 Assessment/Tax Notices in March.

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## NOVA SCOTIA UPDATE

Submitted by Giselle Kakamousias,  
Turner Drake & Partners Ltd., Halifax, NS

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### NOVA SCOTIA - CASE LAW

On the 19<sup>th</sup> of December 2008, the Nova Scotia Court of Appeal rendered its decision in the matter of **Director of Assessment v. Louise Wolfson (2008 NSCA 120)**.

The case involved a single-family dwelling in Halifax's south end. Ms. Wolfson had appealed her 2005 property assessment to the Regional Assessment Appeal Court ("RAAC"). The RAAC confirmed the assessment, and Ms. Wolfson further appealed to the Nova Scotia Utility and Review Board. Her Notice of Appeal to the Board said her ground of appeal was "Assessment too high" and in particular "Land value too high".

In Nova Scotia, valuation for assessment purposes is governed by s.42(1) of the *Assessment Act*. Section 42(1) says that "all property shall be assessed at its market value ... but ... the assessor shall have regard to the assessment of other properties in the municipality so as to ensure that ... taxation falls in a uniform manner upon all residential ... property ...".

Uniformity is determined as stated by Chief Justice MacKeigan in *Hebb v. Director of Assessment and Town of Lunenburg* (1979), 32 N.S.R. (2d) 427 (SCAD) at p 436:

A county court judge in an assessment trial *de novo* should apply the s. 38 (now 42(1)) rules as directed by Chief Justice Ilesley. He should, I suggest, first ascertain the actual cash value of the property under appeal and determine the ratio of the assessment to that value. He then should determine the 'general level of assessment' relative to the actual cash values of properties in the town or municipality generally. To do so he should ascertain on the evidence before him whether the general assessment ratio is what the assessor states it is or whether it is a different ratio. In most cases lack of other evidence may compel him to accept the assessor's ratio. If the ratio is thus higher, the judge should reduce the

appealed assessment to confirm with the general ratio.

In response to Ms. Wolfson's appeal, the Director of Assessment filed a report stating that "The Level of Assessment for the subject Municipal Unit for the year 2005 is **96.7%**". Before the hearing of the appeal, the Board wrote to counsel for the Director stating:

**Wolfson, Louise - 5900 Inglewood Drive, Halifax - Assessment Appeal - AS-06-06**

The Board has perused the report of Mr. Terrence E. Naugle dated March 7, 2007. The Board directs the following be filed on or before **Wednesday September 12, 2007**:

...

4. For each of the properties listed in Schedules B and D, please provide the following:
  - (a) PRC reports;
  - (b) if the PRC reports do not provide the assessment value from the date of sale, please provide it for the years not disclosed on the PRC reports;
  - (c) please provide the assessment price/sale price ratio on the date of each sale; and
  - (d) were each of these sales included in the calculations for the level of assessment for HRM the corresponding taxation years? If not, why not?
5. The Board has previously heard evidence from an Assessor for the Director that although he did not do the analysis for the level of assessment, it was his understanding that the ratios [assessment value/sale price] for all qualified sales (the Board understood this to mean all arm's length sales excluding those under duress such as tax sales "arm's length sales") are plotted on a graph. The person in each area [municipality] responsible for doing the market analysis would then

determine the general range on graph within which most of the properties are clustered, like a band of sales around a line. The few outliers that are outside of this general range (above and below this band) are not included in the calculation of general level of assessment. Please advise the Board of the answers to the following questions:

1. Is this how the level of assessment for residential properties for the 2005 taxation year was calculated for HRM? If yes, provide a copy of the plot graph prepared for HRM for 2005.
2. If not, how are "qualified sales" and "outliers" determined? (Attach any written policies)
3. Are all outliers considered unqualified sales?
4. Have the policies for determining "qualified sales" and "outliers" changed since 2005? If yes, provide a copy of the new policies.
5. If the above description is generally correct, what was this general range of ratios for the residential property sales for HRM for the 2005 residential level of assessment? (For example, a range of 5% below and 5% above the line)
6. Why are any outliers excluded from the residential calculation of the level of assessment for HRM in 2005? Include in your comments the relevance and application of the *Homco* decision.
7. If all outliers were included in the calculation for the level of assessment for the residential properties in HRM for 2005, what would the level be?
8. To further understand how the assessment value is determined by the Director in accordance with s. 42(1) of the *Assessment Act*, the Board directs the following information to be provided:

- (a) what affect does the market oriented cost approach in

determining assessment values have on the high market value properties like those in Schedule "B" and "D", and how does it compare to the sales at the other end of the market value spectrum throughout HRM?

- (b) in answering question 8(a), please provide the list of sales in HRM 6 months before and 6 months after the base date of January 1, 2003 for these two ends of the spectrum. As the Board understands the computer system used by the Director can produce the lists of the following information, the Board directs the following be provided to the Board:
  - (i) for the time period noted above, a list of the assessment /sale price ratios for each of the properties sold throughout HRM having a sale price of \$750,000 or more; and a separate list of the ratios for each of the properties sold for \$100,000 or less? The information for each sale should include the address, sale date, sale price, assessment value, and ratio.

The Director's counsel objected to answering the Board's questions and production of records on the grounds that they were not relevant to the appeal because Ms. Wolfson had not explicitly challenged uniformity. Counsel asserted that the Board did not have the authority to seek answers to question relating to issues not raised by parties to the appeal.

The Board held a preliminary hearing, and later issued a written decision concluding that the Board did have jurisdiction to order production (2008 NSUARB 9). The Director appealed.

The Director's grounds stated that the property owner, Ms. Wolfson, did not challenge the Director's treatment of uniformity and the general level of assessment ("GLA"). Accordingly, the Board automatically should have accepted the Director's treatment of uniformity and the GLA at 96.7%, and no further evidence on those topics

was relevant. The Director submitted that, by ordering production of irrelevant evidence on the Board's own initiative, the Board presumed that the Director's treatment of uniformity was wrong. This reversed to the Director's shoulders the onus of proof that should rest on Ms. Wolfson as appellant. The Director's Notice of Appeal said that the Board Chair exhibited bias. At the hearing in the Court of Appeal, the Director's counsel said that the bias argument was secondary to the principal submission that the Board had improperly reversed the onus of proof.

### FINDINGS

The Court of Appeal found that the issue of uniformity had, in fact, been raised by both parties to the appeal- by the Director in her report, and by Ms. Wolfson's agent at the preliminary Board hearing (at which time he stated that the GLA was at issue any time the assessed value of property was under review, due to the marriage of market value and uniformity under s.42 of the Act).

In summary, the Court found that Board did not request irrelevant information, did not prejudge an issue of the merits, did not reverse the burden of proof and did not exhibit bias. The appeal was dismissed.

### NOVA SCOTIA - UPCOMING DATES

2009 assessment notices were mailed on January 26<sup>th</sup> 2009. There is a 21-day appeal period.

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## NEWFOUNDLAND AND LABRADOR UPDATE

*Submitted by Michael j. Crosbie,  
McInnes Cooper, St. John's, NL*

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The most significant, recent case from the Province of Newfoundland and Labrador is **Gander International Airport Authority v. Gander (Town)**, 2008 CarswellNfld 181 (T.D.). In the case, the assessment was of public property – an international airport, which property had to be used as an airport, but which property lost money in its one legally allowed use. Consequently, since the market evidence was that no one would purchase the property and since the assessment legislation required that value in exchange had to be determined, the Court reduced the assessment from \$24,800,000.00 to \$1.00.

It is interesting to contrast the **Gander** case with another recent Atlantic Canadian case concerning public property - the **Citadel** case (**Halifax Regional Municipality v. Her Majesty the Queen as Represented by the Minister of Public Works and Government Services Canada**, a decision of the Payment in Lieu of Taxes Dispute Advisory Panel dated December 13, 2007).

In the **Citadel** case, the assessment of a national historic property known as the Halifax Citadel was in issue. The property consisted of land and fortifications used for museum and park purposes. The assessment for municipal tax purposes was \$39,606,000 - \$19,000,000 for land and \$20,606,000 for improvements. The Halifax regional municipality was seeking to obtain a payment in lieu of taxes ("PILT") grant from the Federal Government based upon the \$39,606,000 assessment. The municipality took the issue of the value before the PILT Dispute Advisory Panel, which administrative Panel had been created by the Minister in order to advise him as to what value should be used in determining PILT grants pursuant to the *Payment in Lieu of Taxes Act* R.S.C. 1985 c.M-13.

The Department of Public Works argued that the assessment was greatly in excess of the property's market value. The Department suggested that the land value was \$286,010 and that the improvement value was \$2,233,550 for a total assessable value of \$2,519,560, as opposed to the municipality's assessment of \$39,606,000.

The PILT Dispute Advisory Panel reviewed the evidence and the *PILT Act* and concluded that the Minister should consider giving a PILT grant based upon a value of \$4,106,200 - \$1,550,000 for land and \$2,556,200 for improvements.

The **Gander** case and the **Citadel** case are an interesting contrast to one another because the **Gander** case was also a situation where the Minister of Public Works was being asked to provide a PILT grant. However, instead of the Gander International Airport Authority ("GIAA") arguing the assessable value issue before the PILT Dispute Advisory Panel, the Airport Authority argued the matter under the assessment appeal legislation. GIAA did this because under Newfoundland's assessment legislation, GIAA had the right to appeal the assessment and under the *PILT Act* the Minister of Public Works could not give a grant in excess of what was otherwise

payable under the local assessment legislation. Thus, rather than have a recommendation to the Minister from an Advisory Panel as to the amount of the assessable value, GIAA decided to have the assessable value set pursuant to assessment appeal provisions and an appeal first to the Assessment Review Commission and then to the Courts.

The **Gander** case and the **Citadel** case are also an interesting contrast because it appears that the **Gander** case was a determination of market value under the local assessment legislation whereas the **Citadel** case was a determination of value pursuant to the requirements of the *PILT Act*.

The PILT Panel noted in its decision that it is:

**“Required to consider the purpose of the *PILT Act* as set out in section 2.1, which is to ‘provide for the fair and equitable administration of payments in lieu of taxes’.”**

The foregoing quotation is extremely interesting because while the Panel continued on in their decision to note that they were examining market value under the *Nova Scotia Assessment Act*, the Panel still were looking at determining a fair and equitable administration of payment in lieu of taxes. By contrast, in the **Gander** case, the Court was just determining market value pursuant to the *Newfoundland and Labrador Assessment Act*. In the **Gander** case there was no determination as to what would be a fair and equitable payment in lieu of taxes.

This backdrop in the **Citadel** case of determination of a fair and equitable PILT payment seems to have affected the Panel's value conclusion. Though the Panel professed to be determining market value, the **Citadel** decision appears to be a decision as to what payment in lieu of taxes the Panel thought would be fair and equitable. When one examines the **Citadel** case, the Panel correctly noted the restrictive use of the **Citadel** property pursuant to the *National Parks Act*. The Panel correctly concluded that the property's highest and best use was as a national historic site. The Panel noted and accepted the comment that:

**“If two pieces of property did not have the same highest and best use, then they could not be said to be comparable.”**

The Panel faulted one of the appraisal reports for using comparative sales that had a different highest and best use than the subject property. The Panel faulted that report for its lack of understanding or disregard of the restrictions placed on the **Citadel** site by virtue of the historic site designation. However, oddly, the Panel itself also lost sight of this or else allowed fairness and equitable payment considerations to enter the picture because the Panel itself was willing to use one of the comparative sales that had a different highest and best use. The Panel used a sale that was zoned for a park but in which the buyer bought the property believing that he could get the property re-zoned. The re-zoning application apparently failed, but the Panel used the purchase price as comparative sales data concerning the value of park property. The trouble with this thinking is that the suggested comparative sale is not in fact comparable. The purchase in expectation of re-zoning was not a sale of park land – it was a sale of park land with an expectancy of re-zoning. There is no expectancy that the **Citadel** property will ever be re-zoned - it is an historic site invaluable to the public of Nova Scotia and Canada.

The Panel correctly noted caselaw stating that if land is limited in its use by statute or agreement, then it must be assessed in that limited use. The Panel also correctly noted that in the **Sunlife** case, it was stated that:

**“For purposes of a municipal assessment there is no room for hypothesis as regards to the future of the property.”**

According to the **Sunlife** case and many other cases, valuation must be based on the conditions of the property at the date of assessment. However, the Panel somehow thought that though they could not speculate, they could consider future potentiality. This is contrary to the caselaw which says that, in order for something to be considered, it has to be a probability not a potentiality. This is because in assessment law future possibilities are picked up in future years when future assessments are made and because assessments are made annually.

Consequently, from a market value point of view, the Panel was not justified in working with the sale of the property made with an expectation of re-zoning. That sale may have helped the Panel come up with a fair and equitable PILT amount but it was not a relevant comparable

demonstrating market value. The sale of park land with an expectancy of re-zoning was not a sale of park land – it was a sale of land which the buyer thought had a probability of being re-zoned. The Citadel property cannot be valued as if it could be re-zoned. What chance is there of the Citadel being re-zoned? Zero chance. So the re-zoning comparable sale property and the Citadel property are not comparable.

Another point of concern regarding the Panel's valuation was that the Panel realized that the improvements had to be depreciated by all forms of depreciation – physical, functional and external/economic; however, the Panel did not fully and properly analyze the economic obsolescence issue (i.e. the external/economic depreciation issue concerning the fortifications). No one today would re-build the Citadel fortification structure. It has limited or no market value. There needed to be evidence about what the market place would pay for such a property. The Citadel structure has historic value, but it has doubtful market value. Based upon the ruling in the **Gander** case, the valuation in the Citadel was too high. The question in assessment law was: what would someone pay to own and operate the land and improvements, the public property, the public infrastructure and historic site? Would someone be willing to pay \$4,106,200 in order to own and operate the Citadel?

Both the **Gander** case and the **Citadel** case have been appealed.

### Here's a question

In nature, there's always a balance, right? You can't have an "up" without a "down", a "left" without a "right", an "in" without an "out" or even a "top" without a "bottom"

So if we're in a "bad" economy, there's got to be some "good" in there, too, right?

It stands to reason but how do we find it?

One way would be to register early for the 43rd Workshop in Whistler! We will have our usual July 31st Early Bird registration fee reduction but, this year, the Whistler Hilton has provided one gift certificate of \$300 for a draw for those who have booked their rooms by July 31st.

## THE 2009 NATIONAL NOMINATIONS COMMITTEE

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*If you intend to let your name stand,  
or if you wish to nominate  
a CPTA member  
for the position of*

**Vice President, Communication,**

*please contact one of the above*

*committee members*

*or notify Gilles Fafard*

*through the National Office*

*by*

**Friday, August 7<sup>th</sup>, 2009.**

# *Valuation and Taxation In Uncertain Times*

**Monday:** Staying on Course in Uncertain Times  
The Tax Payers' Perception of Justice  
View from the Board

**Tuesday:** Cross Canada Legal Panel  
Questions from the Floor to the Legal Panel  
Reflecting Economic Obsolescence  
Annual Meeting

**Wednesday:** Cross Canada Market Update  
How to Value in a Recessionary Market  
- an Appraiser's Perspective

**October 4 - 7, 2009**

## **CPTA 43rd Annual National Workshop**

**The Hilton Resort & Spa – Whistler, BC**

## Hot Chocolate

A group of graduates, well established in their careers, were discussing their lives at a class reunion. They decided to go visit their old University professor, now retired, who was always an inspiration to them.

During their visit, the conversation turned to complaints about stress in their work, lives and relationships.

Offering his guests hot chocolate, the professor went into the kitchen and returned with a large pot of hot chocolate and an assortment of cups. Some cups were porcelain, glass, crystal, some plain looking, some expensive and some exquisite. He invited each to help themselves. When they all had a cup of hot chocolate in hand, the professor shared his thoughts.

“Notice that all the nice looking, expensive cups were taken, leaving behind the plain and cheap ones. While it is normal for you to want only the best for yourselves, that is the source of your problems and stress. The cup that you are drinking from adds nothing to the quality of the drink. In most cases, it is just more expensive and, in some cases, even hides what we drink. What each of you really wanted was hot chocolate. You did not want the cup... but you consciously went for the best cups. And soon, you began to eye one another’s cups.”

“Now friends, please consider this... Life is the hot chocolate... your job, money and position in society are the cups. They are just tools to hold and contain life. The cup you have does not define, nor does it change, the quality of life you are living.”

Sometimes, by concentrating only on the cup we fail to enjoy the hot chocolate life has provided us. Always remember this... Life brews the hot chocolate – it does not choose the cup. The happiest of people don’t have the best of everything. They just make the best of everything they have.

Live simply – love generously – care deeply – speak kindly  
The richest person is not the one who has the most  
but the one who needs the least.

Enjoy your hot chocolate!



# CPTA CHAPTER MEETINGS & EVENTS

## BC CHAPTER

April  
May  
June 01 & 02

PAAB Presentation:  
BCA Forum (Proposed)  
Industrial / Valuation Seminar

## WESTERN CHAPTER

March 23 & 24  
April 29  
May 19  
June 16

Education Seminar:  
Dinner Meeting in Edmonton  
Lunch Meeting  
Lunch Meeting

## ONTARIO CHAPTER

April 2009 Meeting:  
*(date TBD)*

Recent Amendments to Property  
Tax Legislation & Regulations

## QUEBEC CHAPTER

March 26  
May 14  
September 17  
November

One-day Seminar  
Golf Tournament  
Breakfast Information Session  
Christmas Dinner

**NEW CAREER OPPORTUNITIES HAVE BEEN POSTED PLEASE VISIT THE CPTA WEBSITE**

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