

## **NEW DIRECTIONS FOR THE COURTS: INTEGRATING B.C. CASE LAW INTO ONTARIO**

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Much has been said, at least politically, arising from the recommendations of the Report of the GTA Task Force for implementing property assessment reform in Ontario.

Clearly, many people appear to be enamoured by the British Columbia experience and the utilization of "actual value assessment" for property tax reform. The recently appointed Who Does What Panel parroted the recommendations of the GTA Task Force in its periodic reports to the Minister regarding assessment policy and property tax reform.

If the Who Does What Panel is at variance at all with the British Columbia experience in its recommendations, it is with respect to the overriding concept of "current" property values. The Who Does What Panel feels strongly that in a value-based system as contemplated by the British Columbia experience with annual updates, it would be important to estimate those property values based upon current uses as opposed to estimates of potential property values. It has therefore recommended that properties be assessed at their current values based on current use. The implications of these recommendations upon the overhaul of the property tax assessment system in Ontario may or may not be significant.

As we move toward the overhaul of the property tax assessment system in Ontario, it is important to determine what might change and what might not change in the result. More often than not, the more things change, the more they stay the same.

How might the proposed actual value assessment regime differ from the existing system of market value assessment? The definition of "actual value" may perhaps accord an interpretation for property tax purposes separate and apart from the definition of "market value".

It could be said that by utilizing the word "actual", emphasis would be placed upon circumstances as they exist in fact as opposed to "potential" circumstances which might

arise in the future. This interpretation would reinforce the current value analysis recommended by the Who Does What Panel.

Assessment jurisprudence, however, has uniformly established that the principles of assessment at actual value and at market value are identical. Decisions that question that fundamental principle have been subject to reversal by superior courts.

We need only look at the decision of the Ontario Court of Appeal in *Re Office Specialty*, which was overruled by the Supreme Court of Canada in *Assessment Commissioner v. Office Speciality*, to find the truth of that statement.

Similarly, in the British Columbia experience, the concept of actual value being identical to market value is continually reinforced by the jurisprudence most recently reiterated in *Assessor of Area No. 10 - Burnaby v. Sears Canada Inc.*

Even as actual or market value becomes the determinative force for the proposed overhaul of the property tax assessment system in Ontario, political rhetoric will no doubt target potential differences amongst groups of taxpayers that may arise as a result of that overhaul.

Looking to the British Columbia experience, some differences from the existing system may well manifest themselves.

First and foremost will be the juxtaposition of the actual value determination with the concept of equity of assessment with respect to the assessment of similar real property in the vicinity as defined by section 60(1) of the Ontario Assessment Act.

Clearly, in an actual value system the equity of assessment does not drive the assessment as it does in a uniformity assessment system such as is presently in place in Ontario.

On the other hand, the concept of equity of assessment is not foreign to an actual value assessment regime.

Despite specific legislative enactments directed to the question of fairness and equity in assessment enacted by the British Columbia Legislature, the application of the concept that assessments should be made in a fair and equitable manner has been solidly affirmed by the British Columbia Court of Appeal.

By the principle established in *Bramalea* and reaffirmed in *Lount*, there is no doubt that there must be a fair and equitable relationship of assessments, and that if this relationship leads to an assessment which is lower than actual value then the taxpayer is entitled to that lower assessment.

These concepts are in keeping with assessment practices and procedures being established in order to create a fair and equitable distribution of the tax burden amongst ratepayers within the local municipality.

Arising from these fundamental principles, however, there will be certain questions to be asked in determining whether or not an appropriate assessed value has been achieved on particular properties, should such reform in fact occur.

Some of the issues arising could include the following:

### **1. What is the actual value of the property?**

In determining the actual value of the property should consideration be given to the actual economic circumstances relating to the specific property or can industry averages be utilized to determine a fair and equitable assessment?

The jurisprudence establishes that both the principle of industry averages for income producing properties and a reflection of individual characteristics particular to the property can be utilized to determine actual value.

Similarly, principles of valuation in fee simple remain appropriate in an actual value system such that contractual arrangements affecting the owner's interest will be disregarded and reliance placed on economic income as opposed to actual income in those circumstances.

Actual expenses and income will be adjusted and specific reference will be made for historical and other considerations particular to the property in special circumstances.

### **2. How can the actual value be determined?**

The three traditional approaches to value, namely, the income approach, the sales data approach, and the replacement cost approach are useful tools to determine actual value. The jurisprudence indicates that preference need not be given to any particular approach in determining actual value, but rather the assessor's resulting actual value is the basis upon which the test of the appropriateness of the assessment is undertaken.

Owners, however, of single-purpose industrial buildings will possibly look forward to a "major industry valuation" section as in the amended British Columbia Assessment Act. Section 26.1 of that Act establishes this category and defines the type of single-purpose industrial building to which it applies. It thereafter regulates the determination of "actual value" by way of a prescribed manual establishing rates, formulae, rules and principles for the calculation of replacement cost.

This treatment of major industrial property differs dramatically from the principles of "actual value" long established for other types of property. No doubt it was a reaction to significant litigation brought by the forest products industry within British Columbia which attacked the depreciated replacement cost approach to value. While, historically, in applying the depreciated replacement cost approach to value significant concepts of functional and economic obsolescence were appropriately measured, the forest products industry argued that discounted cash flow analysis and share purchase prices were more

important to ascertain the value of such facilities, and that the rejection of the cost approach was appropriate. By concluding that these alternative approaches to value might be appropriate in an actual value regime, the fundamental impact upon the assessment base of the relevant municipalities no doubt caused the concern which in turn led to the above-quoted amendment.

On the other hand, in the absence of specific statutory direction, the issue of the appropriate valuation of major industrial property as canvassed in detail by the British Columbia Court of Appeal will give rise to interesting valuation concepts applicable to those types of property.

For commercial standard industrial property, the income approach is generally utilized to establish "actual value" within the British Columbia assessment system. This approach involves a determination of rental value, often by utilization of industry averages/economic rents and capitalization rates ascertained as best as possible from the market.

It is open, particularly in the absence of specific market data, to reference, for example, capitalization rates used on comparable properties for assessment purposes as a benchmark to the ascertaining of the appropriate actual value.

In those circumstances, however, even in utilizing such benchmarks, specific anomalies with respect to an individual property will be subject to adjustment of that basic applicable capitalization rate or valuation principle.

### **3. Is the "highest and best use" considered?**

The concept of "highest and best use" permeates the determination of "actual value" in the British Columbia experience.

The Who Does What Panel has wrestled with the impact of the concept of "highest and best use" in the implementation of an "actual value" system in Ontario. One of the concerns expressed in the Golden report and reiterated by the Who Does What Panel was the speculative nature associated with valuing property for assessment purposes at its highest and best use. Although that concept is embedded in the British Columbia experience, nevertheless, its impact is cushioned by the judicial direction that in determining "actual value" subjective elements of value associated with the concept of a special value to a particular purchaser and of factors of a speculative nature, particularly as to future changes in permitted use, require that the value so determined is necessarily a "conservative" one.

Ironically, the concept of "highest and best use" does not readily adapt itself to a concept of a "conservative" valuation. For example, in valuing improvements on a replacement cost approach, typically the land is valued at its highest and best use and the depreciated replacement cost of the improvements is added thereto. This is clearly an inappropriate valuation procedure for assessment purposes.

An extension of this principle would appear to be contemplated by the recommendations of the Who Does What Panel. It has suggested that in determining actual value, those values will be determined on the basis of current sales and current rents for income producing properties and not speculative value. In this recommendation, there is little distinction between the concept of current value and the historical assessment practices, policies and procedures in determining either actual or market value. We assume, however, that the scope of the recommendation encompasses properties which might potentially be underutilized at the time of the making of the assessment. In those circumstances, it is suggested that the value for assessment purposes be based upon the present utilization as opposed to any potential for future development. As an illustration of this recommendation, it is proposed by the Who Does What Panel that the Province discontinue the practice of applying the residential tax rate to vacant commercial and industrial property because it believes that in a system of frequent updates, vacancy will be reflected in the assessed value of the property.

Caution, however, must be exercised in considering the concept of current use as the basis of value in relation to the concept of highest and best use. Overemphasis on either principle can lead to significant distortions in the property tax system giving rise to artificial determinations of value for assessment purposes.

### **Conclusion**

As can be seen, hopefully, from this analysis, the more things change, the more they seem to stay the same. We would, however, anticipate that in assessment review, or in the determination of a fair assessment within an overhauled assessment regime, consideration of current market conditions will no doubt continue to play a key role, as will site specific considerations. If there is a change of substance, it is the reliance primarily in such a system upon the "actual value" with due consideration given to the equities of assessment that arise from that actual value. This may be contrasted to the uniformity system presently in Ontario which relies virtually exclusively upon the principles of the equities of assessment and pays little more than lip service to considerations of the actual market value of the assessed property.