Property Tax Assessment of Oil and Gas Facilities in British Columbia — Current Issues and Emerging Trends

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This is a general overview of the subject matter and should not be relied upon as legal advice or opinion.
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PROPERTY TAX ASSESSMENT OF OIL AND GAS FACILITIES IN BRITISH COLUMBIA - CURRENT ISSUES AND EMERGING TRENDS

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Under the B.C. Assessment Act, R.S.B.C. 1996, c.20, the actual value and depreciation for property tax purposes of most of the components of oil and gas facilities including wellsite production equipment, gathering pipelines, gas plants and refineries is assessed by BC Assessment using regulated costs or rates prescribed by the government and designed by BC Assessment in accordance with the statutory and regulatory requirements of the Act. In addition, the actual value of the right of way on which pipelines exist is determined using prescribed rates.

As a result, the assessment of oil and gas facilities differs significantly in principle and methodology from the typical market value assessment of light or non-industrial land and improvements. In particular, the use of prescribed cost manuals and depreciation to value production and refinery facilities, and rates to value pipelines and right of way, gives rise to questions of how closely assessments track the market value of these facilities.

The purpose of this paper is to provide a general overview of the statutory framework relevant to assessment and classification of oil and gas facilities in B.C., and to review recent caselaw reflecting emerging issues in this regard.

This paper, and the accompanying discussion, are not intended to be exhaustive, and are not intended to be construed as legal advice. Taxpayers should review these and other issues of assessment and taxation with legal counsel to determine the merits of an appeal.

GENERAL PRINCIPLES OF ASSESSMENT OF OIL AND GAS FACILITIES

Subject to some exceptions, all land and assessable improvements in B.C. must be valued at their "actual value", and classified for tax purposes, under the Assessment Act.

Further, all assessable property must also be "classified" for property tax administration. Municipalities set different mill (tax) rates for each class of property, and tax rates for industrial and business properties are typically significantly higher than for other classes (e.g. residential, recreational).

Industrial land and improvements are classified under the Prescribed Classes of Property Regulation BC Regulation 438/81 for property tax purposes either as Class 4 (Major Industry); Class 5 (Light Industry) or Class 6 (Business and Other), depending on their design and use. Utility land and improvements are classified under Class 2 - Utility. Major industry properties include large industrial plants like aluminum smelters, petroleum refineries and gas plants, pulp and paper mills, and ocean-going barge or freighter terminals. Utility properties include land pipeline transportation, transmission or distribution facilities that are not major industrial. Light industry properties include facilities that are not major industrial or utility, and which are used for extracting, processing, manufacturing or transporting finished products.

ASSESSMENT OF MAJOR INDUSTRIAL OIL AND GAS FACILITIES

Major industrial properties comprise: (i) "industrial improvements", defined in section 20 of the Act as improvements that are part of a plant, whether it can be operated as a going concern or not, or is temporarily or permanently profitable, if the plant is designed and built for the purpose of (in the case of oil and gas facilities) "producing, manufacturing, processing or refining of petroleum or natural gas", and (ii) land used in conjunction with industrial improvements. This includes, for

example, wellsite land and production facilities, gas plants and refineries, and the land comprising the plants.

Valuation - Major Industrial Property Manuals

Major industrial improvements are not valued using general appraisal principles typically used to determine market value (e.g., discounted cash flow) Instead, section 20 of the Act defines the "cost of industrial improvement" to mean the cost of replacing an existing industrial improvement with one that (a) has the same area and volume; (b) serves the same function the existing improvement was designed for or, if the existing one is no longer used for that function, one that serves the same function; and (c) is constructed using current, generally accepted construction techniques and materials for the type of improvement being constructed.

Actual value as determined in accordance with section 20 of the Act is prescribed under costing manuals (the "Major Industrial Property" Manuals, or "MIP Manuals") prepared and administered by BC Assessment or, in some cases, using the Marshall Swift costing service.

The MIPS Manuals are divided into divisions which apply to particular categories of industrial plants. Division 6 "Chemical and Petrochemical" provides costing information for all manner of buildings, structures and pipeline systems at chemical and petrochemical plants and gas refineries. Division 11 "Petroleum Industry Production Facilities" provides costing information for petroleum industry production facilities, covering everything from buildings, road, remote airstrips and modular camps, to flare pits or stacks and radio towers, but excluding gathering pipelines, which are valued using Commissioner's rates, and pumping stations, which have their own manual (which is not included in the MIPS publication).

Prescribed Depreciation

Depreciation of major industrial property is prescribed under the Depreciation of Industrial Improvements Regulation B.C. Reg. 379/88. This regulation provides a fixed depreciation rate for each category of industrial plant (e.g. 3% per year for plants designed and built to produce, manufacture, process or refine petroleum or natural gas). Depreciation is determined by multiplying the prescribed rate of depreciation by the age of the improvement or, if parts of an industrial improvement have different chronological ages, the "effective age" (the weighted age by cost) of the industrial improvement as a whole. Maximum depreciation of an improvement is 80%, although this increases to 90% where a plant is shut down and BC Assessment notified in writing.

As an exception to the general rule, production machinery, and some other types of specific improvements at a production site, gas plant or refinery, are deemed not to be assessable. The definition of "improvement" in section 1 of the Act generally deems all immovable structures, excluding production machinery (engines, motors or machines used to manufacture, process repair or convey a product) to be assessable, unless specifically exempted under BC Regulation 69/91 (Improvements Exclusion Regulation). The list of things that are included or excluded is comprehensive. Significantly, all mains, pipes and pipelines for the movement of fluids or gas are generally assessable. However, all piping in a major industrial plant, other than piping which supplies or moves water to the beginning of a plant process; fuel or steam used for heating or power production; materials to the point where major processing of them begins; industrial or non-industrial waste, or materials that have been refined, manufactured or otherwise processed in the plant, and aren't subject to any further refinement, manufacture or processing, are deemed exempt from assessment. Similarly, casings or piping in oil or gas wells, and a very extensive list of

columns, process units, reactors, towers and condensers used in the petroleum and gas industry, are deemed exempt from assessment.

Recent Issues / Cases Concerning Assessment of Major Industrial Plants

When is an Improvement "Part of a Plant"

Sometimes it is not clear whether a particular improvement at, or associated with, an industrial plant is "part of" that plant, and therefore should be included in the major industrial class (and valued by MIPS and classified under Class 4), or whether it should be valued and classified some other way, most often as Class 5 - Light Industry (with lower tax rates and a market valuation).

There are two ways an improvement can fall within this part of the definition:

1. as "part of" another, larger plant; or

2. as a separate, stand-alone plant.

To avoid classification and valuation as Class 4 - Major Industry a taxpayer must prove that neither 1 nor 2 are true. It is in all cases a question of fact whether a particular improvement is "part of" a major industrial plant. However there is a line of cases setting out the principles and factors which are typically considered relevant by the Board and Court in addressing this issue.

In the leading case ***Westar Mining Ltd. v. Assessor of Area 22 - East Kootenay*** (Stated Case 292, November 16, 1990), the Court held that a central laboratory providing services to many mines in the area when first built, a component re-build shop (garage) built as a tire shop but later used to rebuild Westar's mining equipment; a central warehouse which provided storage for several mines, and a light vehicle built to service a mine which had since been closed were part of Westar's mining business but nevertheless were not part of Westar's two mining plants because three of the four

improvements were central service facilities, not used for purposes directly attributable to coal production, and not part of a particular mine, the fourth was not functionally related to either plant's operations, all four were located miles from the two plants, and none required a special valuation technique.

Change of Classification and Valuation on Plant Closure / Conversion

The closure or conversion to another purpose of a refinery or gas plant can result in significant changes to its assessment and classification. This arose in the context of the shut down a crude oil refinery operation and conversion of the facility from refining to partial product finishing in ***Shell Canada Ltd. v. Assessor of Area #10 - Burnaby/New Westminster*** (P.A.A.B., May 3, 1996). Shell Canada owned the 200 acre Shellburn refinery site, with railway access and a marine terminal. Until 1993, it was both a crude oil refinery and distribution point. Shell's Burmount Terminal about 5 miles away stored product in smaller 700 series and larger 800 series tanks, and distributed it by pipelines and truck loading. In 1993, at a cost of about $28 million, Shell shut down the crude oil refinery operation, as well as its asphalt and sulphur plants and its blending and packaging facility, and converted the refinery operation to partial product finishing, mainly fractionating a pre-refined jet fuel mix (Scot mix) from the Scotford Refinery in Alberta through a Splitter Unit which was modified after shut down of the refinery operation into naphtha, jet fuel, diesel, cat feed and marine diesel fuel. The refinery operation shut down and conversion reduced the workforce from 135 to 53 employees, and rendered about 75% of the old equipment and improvements redundant. Shell continued to distribute its product by rail, truck, pipeline and the marine terminal.

On receiving notice in writing from Shell of the refinery shutdown and conversion to partial product finishing, BC Assessment, considering the facility to still be 25% operational, classified it Class 4 - Major Industry, but applied a 90% depreciation shutdown allowance. In 1995, BC Assessment

changed the classification at the Court of Revision from major industry to Class 5 - Light Industry. However BC Assessment subsequently asked the Board to reclassify it to major industry, on the basis that so long as some equipment was on the site it should be considered major industry.

Shell and BC Assessment agreed that the new partial product finishing plant and marine facility should be classified as Class 4 - Major Industry. However Shell opposed the reclassification back to Class 4. The issues before the Board were: (i) whether the components of the old refinery site and Burmount Terminal be classified as Major Industry, Light Industry or Business & Other (the latter two classes resulting in a market valuation), and (ii) which components of the old refinery site were associated the marine facility and should be depreciated at the prescribed 5% rate for marine facilities (rather than at the prescribed rate of 3% for refineries).

Shell sought light industry classification of the old refinery improvements on the basis that they were no longer "part of" a plant designed and built for refining petroleum, and of the Burmount facilities on the basis that the only function they performed was transportation of finished product. Shell also sought light industry classification of the lands because they were no longer used in conjunction with the operation of any industrial improvements which still remained, although mothballed, on site. BC Assessment characterized the refinery as being temporarily closed and able to be re-established as a refinery operation, and characterized the product finishing facility and marine facility as part of one operation which should be depreciated together at 3%.

The Board found that the old refinery plant, having been disabled, with parts converted to other use, sold off or deteriorating past reasonable salvage, could not be operated and had ceased to exist, and, with the exception of some components that could be used with one of the existing plants, could not be classified as major industry. The Board also found that the product finishing plant and marine facility were separate "plants", the latter of which should be depreciated separately at the 5%

prescribed rate, and the former at 3% as a processor of petroleum or natural gas. The Board also found that since no processing of petroleum products occurred in the storage and distribution operations at the Burmount site, which received and stored product from a number of sources in Alberta and distributed it to a number of destinations, it could no longer be associated with a particular plant, and must be classified as light industry. Finally, the Board held that the pipeline connecting the old refinery site with the Burmount terminal was no longer associated with a particular plant, and should be classified light industry.

Accessibility of Plant Piping

In ***Westcoast Energy Inc. and Westcoast Transmission Ltd. v. Assessor of Area #27 - Peace River*** (P.A.A.B., May 19, 1999) the issue before the Board was whether various types of pipe at Westcoast Energy's McMahon (Taylor) and Fort Nelson gas processing plants were exempt from assessment on the basis of being deemed excluded from the definition of "improvement" under the Improvements Exclusion (1991) Regulation.

Interpreting the exclusion provisions of the regulation in the context of the function of the various types of piping, the Board found that the line carrying liquid sulphur from the sulphur plant to the prilling plant; the sales gas line from the last point of process to the main underground gas line; the inlet gas line; the raw water line carrying water from the sulphur plant to the pelletizing plant and the fire protection line, and the flare gas piping at the Fort Nelson plant were assessable under the Regulation. The sanitary sewer and effluent outflow, as well as the tail gas piping, although assessable, were exempt as pollution abatement improvements.

The Board also found that the domestic, discharge, and fire water lines; propane/butane line; and flare line at the Taylor plant were assessable. However the Board found that the line bringing water

from the river to various buildings at the plant was not assessable because the water it transported, while used to cool machinery, was not used in the processing of gas. The Board also found that while flare gas piping was itself assessable, the portion of the pipe leading up to the knockdown drum was exempt as process piping.

Depreciation: Effective Age

An emerging issue in major industrial plant assessment, which would have application in the context of refineries and gas plants which are upgraded and expanded from time to time, is the question of when original buildings and their additions should be depreciated with an "effective age" determined under the Depreciation Regulation as the weighted average age, by cost, of all of the parts that make up a particular improvement. The question is whether a building constructed, for example, 30 years ago, to perform a particular purpose, to which one or more additions serving the same purpose have been recently added, should be treated for depreciation purposes as a single industrial improvement with a single blended, or effective age, or whether the building and its additions should be depreciated separately at their chronological ages. An effective age depreciation can significantly increase the overall depreciation applicable to the components of the building.

The Board considered this issue in ***Canpar v. Assessor of Area #17 - Penticton*** (P.A.A.B., August 13, 1999). The owner of a particle board plant sought to have various buildings at the plant depreciated by a single effective age, on the basis that the improvements were simply part of a single industrial improvement. The Board rejected this notion, and held that a plant is a collection of a variety of distinct industrial improvements, each of which is structurally independent. In the Board's view, it would be appropriate to apply an effective age analysis in depreciating a single improvement which is made up of an original building and later additions, provided that they are structurally interdependent. The decision is under appeal by Stated Case.

Valuation of Industrial Use Land

Industrial use land must be valued under section 19 of the Act, which sets out general factors which the assessor may consider. These factors include the industrial land's present use, location, original cost, replacement cost, revenue or rental value, selling price (of the land itself, and comparable land), economic and/or functional obsolescence, and any other circumstances affecting the value of the land.

Recent Issues / Cases Concerning Assessment of Industrial Use Land

"Excess Land"

One important issue to keep in mind in reviewing the assessment of a plant with "bench" or "excess" land, adjoining or in close proximity to the parcel upon which the plant itself is physically located, is whether the "excess" land has a different, and less valuable, highest and best use and should therefore be assessed for less than the plant site. In ***Petro-Canada Inc. v. Assessor of Area #12 - Coquitlam*** (Stated Case 321, September 5, 1991, B.C.S.C.) one issue before the Board was whether the Assessor properly valued the land adjacent to the Appellant's oil refinery, some of which was flat benchland, some of which was steeper and less useable.

The Assessor valued the "excess" land (i.e., excess to the Appellant's industrial operations) adjoining the site of the oil refinery based on a highest and best use for residential development, which had a higher value than the continued industrial use attributed to the refinery site.

The Board accepted this distinction but as, the Court held on stated case, failed to go on to consider whether there was a reasonable likelihood of rezoning of the "excess land" to permit residential development, and if so, what the value of the land should be by market standards.

The court remitted these questions to the Board. Leave to appeal to the Court of Appeal was dismissed.

Contamination of Industrial Sites

An increasingly relevant issue for prospective buyers or owners of former industrial sites is the impact of contamination on the market value of the property and its actual value for property taxation purposes.

In ***Assessor of Area #10 - Burnaby / New Westminster v. Haggerty Equipment Co. Ltd.,*** **(**Stated Case 396, May 9, 1997, B.C.S.C.) the 1994 and 1995 Courts of Revision determined the value of a 2.1 acre former garbage incineration site in New Westminster to be $428,000 and $830,000 respectively.

Based on the evidence of several expert witnesses the Board concluded that although no remediation may ultimately be required to control groundwater contamination, there could be some economic risk to a prospective buyer of the property and such a purchaser would reduce their bid for the property by the cost of a risk assessment/risk management analysis (amounting to an average of $428,000 in costs) to investigate, monitor and eventually control groundwater contamination.

The Board reduced the assessed value of the property in both roll years by deducting this allowance from the unimpaired actual value of the property. On further appeal by stated case the Court held that the Board erred in determining the actual value of the property by considering only what a prudent purchaser would take into account in bidding for the property, and not taking into account that the vendor might require the actual risk of contamination to be determined instead of accepting a reduction in value based on risk alone.

The Court concluded that the Board erred by speculating, in the absence of evidence to support a finding of a reasonable expectation (i.e. greater than a 50% probability), that a purchaser and vendor would deduct the groundwater contingency costs from the unimpaired value of the property.

The Court noted that while the Board had the power to independently assess the actual contamination risk of the property and adjacent properties to perform its duty to determine the actual value of the property, it did not have the resources to retain an expert to do so, and could not impose that cost involuntarily on the parties.

The Court remitted the case to the Board to reconsider its findings on the contamination issue. As an aside, the case contains an interesting discussion of the Board's "inquisitorial" rather than "adversarial" process, a distinction which is beginning to have significant impacts on the conduct of assessment appeals at the Board level, the ability of taxpayers to withdraw appeals which have been commenced, and on the onus of proof required of the parties before the Board.

In another case of interest, ***Allard v. Assessor of Area 12 - Tricities / Fraser Valley*** (unreported, July 4, 1997, Vancouver No. A962945, B.C.S.C.), the issue before the Court was whether the Board should have taken into account the fact that open ditches in the vicinity of the property carried water which was contaminated. The Board had confirmed the initial assessment. The appellant's appraiser did a sales analysis which tended to support the assessment but he concluded that the value was actually 1/2 that value because the sales evidence was of transactions where the vendor and purchaser didn't know of the contamination. The Board found that it could not conclude that the subject property was contaminated, or if it was, that it would impact on the market value of the property in relation to other properties. On stated case, the court noted that there was some evidence to support the Board's conclusions and seemed impressed by the fact that there was no

comparable sale of which would have been subject to contamination and from which a discount could be calculated.

Special Rules of Assessment of Industrial Use Lands

Although industrial use land is required to be valued separately from industrial improvements, it is important to note that under section 19(4) of the Act land used by an industrial undertaking must be valued as "property of a going concern". Indeed, the Assessor may, and generally does, consider the current industrial use of the property to be its highest and best use for valuation purposes.

Further, pursuant to section 19(5) of the Act, if the land (or improvements on it) are liable to assessment based on sections 26, 27 or 28 (e.g., land owned by the Crown, or municipal land but leased or otherwise occupied by an industry), the Assessor must account for any restrictions on use of land and improvements by the owner of the fee. In ***Neptune Bulk Terminals (Canada) Ltd. v. Assessor of Area #08 - North Shore / Squamish Valley*** (P.A.A.B. September 11, 1998), the Appellant, who operates a bulk storage and shipping terminal facility on North Shore land held under a long-term lease from Vancouver Port Corporation; questioned whether the Assessor had failed to take into account a use restriction in the lease limiting the Appellant to operating only as a bulk terminal facility. The Board found that the land should be valued by capitalizing the annual rent by 8% as typically done by VPC, and that the Appellant's annual rent implicitly accounted for the lease restrictions.

ELIMINATION AND GRANDFATHERING OF POLLUTION ABATEMENT EXEMPTIONS

Probably one of the most significant recent changes to the property taxation system as it affects industrial improvements has been made to the taxing statutes themselves, to effectively eliminate the pollution abatement exemption for new facilities, and to "grandfather" pre-existing pollution abatement exemptions.

Before 1997, under the previous taxing legislation (for example, section 13(1)(r.1) of the Taxation (Rural Area) Act, R.S.B.C. 1979, c.400, equivalent provisions of the Municipal Act and Vancouver Charter), land and improvements were exempt from taxation is they were *adapted or designed and exclusively used for the purpose of abating pollution by controlling waste substances*, but *not including improvements used for the purpose of converting or treating waste substances with a view to producing from them any commercial or useful product*. Where such land or improvements were not *exclusively* used to abate pollution, but were *primarily* so used, the assessment commissioner could in his discretion determine the portion of assessed value of land and improvements attributable to that abatement, and exempt that portion from taxation.

Effective January 1, 1997, under (new) sections 339(1)(q), (3) and (4) of the Municipal Act, R.S.B.C. 1996 c. 323, section 15(1)(s), (3) and (5) of the Taxation (Rural Area) Act, R.S.B.C. 1996, c. 448, and sections 396(1)(e.01), (3) and (4) of the Vancouver Charter, S.B.C. 1953, c.55, land and improvements exempt from property tax based on pollution abatement exemptions granted previously up to and including the 1996 taxation year under the former words of the sections set out above:

1. continue to be exempt in subsequent taxation years if the land, improvements or both continue to meet the previous threshold for exemption under the relevant provision of the particular statute;

2. to the lesser of:

   (a) the portion which the Assessment Commissioner determines, subject to appeal, is attributable to the use of pollution abatement for that taxation year;

   (b) the portion exempted (after appeals) for pollution abatement purposes for the immediately preceding taxation year, or

   (c) the portion exempted (after appeals) for the 1996 taxation year.

The effect of these amendments has been to limit the availability of pollution abatement exemptions to lands and improvements previously exempt (after appeals) in the 1996 taxation year, and to preclude any new exemptions.

In ***Weyerhauser Canada Ltd. v. Assessor of Area #23 - Kamloops*** (Stated Case 407, March 31, 1998, B.C.S.C., aff'd June 11, 1999, B.C.C.A.) the Appellant sought a pollution abatement exemption for its Kamyr continuous digester which replaced the mill's batch digesters at the Appellant's Kamloops pulp mill.

Applying the line of cases which had interpreted the relevant provisions of the taxing legislation, the Board denied the exemption on the basis that the Appellant had not proved *both* that it designed or adapted the improvements in question primarily or exclusively for pollution abatement and that at the date of assessment it actually so used the improvements. The Board found that while

environmental concerns may have been the primary motivating factor for the purchase of the Kamyr digester, its principal or chief use was to cook wood chips, a production function.

On stated case the Court agreed with the Board's interpretation of the legislation and its conclusion that the Kamyr digester was *production equipment with a pollution abatement benefit rather than pollution abatement equipment with a production benefit.*

The availability of pollution abatement exemptions for gas plant facilities arose more recently in ***Westcoast Energy Inc. and Westcoast Transmission Ltd. v. Assessor of Area #15 - Langley/Abbotsford et al*** (Stated Case 42, August 10, 1999, B.C.S.C.). Applying ***Weyerhauser*** and the previous line of decisions bearing on this issue, the Board found that facilities which remove hydrogen sulphide from natural gas at Westcoast Energy's McMahon gas plant were not adapted or designed and exclusively or primarily used for the purpose of abating pollution by controlling waste substances, and therefore did not qualify for the exemption. The Board also found that the facilities installed as part of Westcoast Energy's booster station liquids handling upgrade were not exempt.

On appeal by Stated Case, the Court held that the Board had properly taken into consideration Westcoast Energy's intentions in installing the hydrogen sulphide removal facilities and had reasonably concluded that, while the facility was later adapted to eliminate or reduce sulphur emissions, it could not be said that Westcoast Energy had installed the original equipment to eliminate or control waste substances, there having been no regulatory requirement to do so at the time of installation in 1957.

However the Court held that the Board had erred in finding that the booster station liquids handling upgrade did not qualify for an exemption on the basis that the liquids being handled were not "waste" according to dictionary definition of that word. The Court held that the Board should

instead have referred to the B.C. Waste Management Act definition of "waste" in its analysis, which could include the liquids being handled.

In another case involving Westcoast Energy's facilities, ***Westcoast Energy Inc. and Westcoast Transmission Ltd. v. Assessor of Area #15 - Langley/Abbotsford et al*** (Stated Case 428, August 27, 1999, B.C.S.C.), the Board found that Westcoast Energy's tank berms, sulphur storage and removal facilities, and cryogenic line and low temperature flare, did not qualify for tax exemption. On appeal by Stated Case, the Court held that the Board had erred in reaching the conclusion that since the berms were constructed to address fire, safety and insurance concerns, they could not have been designed *exclusively* for the purpose of abating pollution. The Board having reached this erroneous conclusion, had further erred by failing to consider whether the substances in the tanks surrounded by the berms were waste substances.

As to the sulphur removal systems, the Court found that the Board erred in wrongly attributing to Westcoast Energy a statement by the Assessor that sulphur is not itself a waste product, and in finding that because sulphur was converted into a commercially viable product, the improvements were not part of the overall scheme of pollution abatement.

As to the cryogenic line and low temperature flare, the Court found that the Board, having misunderstood how the cryogenic system worked, had erred in concluding, as it had with the berms, that safety related benefits disentitled the cryogenic system to a pollution abatement exemption.

ASSESSMENT OF PIPELINES AND RIGHT OF WAY (COMMISSIONER'S RATES)

Unlike other components of oil or gas facilities, pipelines are not valued using manuals. Instead, like other continuous structures, including railway track in place of a railway corporation, fibre optic cable of a telecommunications corporation; and transmission lines of an electrical power corporation, all typically classified for property tax purposes as Class 2 - Utility, the pipelines of a pipeline corporation are valued using prescribed Commissioner's rates.

In particular, under section 21(1)(c) of the Act, "*the actual value of pipe lines of a pipe line corporation for the transportation of petroleum, petroleum products or natural gas, including valves, cleanouts, fastenings, and appurtenances located on the right of way, but not including distribution pipelines, pumping equipment, compressor equipment, storage tanks or buildings*", must be determined using rates prescribed by the Commissioner. Similarly, the actual value of right of way for pipelines must be determined using separately prescribed Commissioner's rates.

Basis of Commissioner's Rates

Under section 20(3)(b) of the Act, the Commissioner must base the rates for improvements, including pipelines, on the "*average current cost of the existing improvements*" and may, within the rates, make an allowance for physical (but, notably, no other type of) depreciation. "*Average current cost*" is defined to mean *the cost to construct or install the existing improvements including all materials, labour, overhead and indirect costs, assuming they were to be constructed or installed at July 1 of the preceding year, and at a location that has average construction and installation difficulty*. As discussed later in this paper, the meaning of these words is the subject of ongoing litigation in B.C. Separate criteria are prescribed for the creation of right of way rates.

Rates are prescribed annually under different regulations for the various types of continuous structures. Pipeline rates are prescribed annually under the Railway and Pipeline Corporation Valuation Regulation, B.C. Regulation 203/86. The rates for pipelines are expressed according to their outside pipe diameter, ranging from $14,927 per kilometre under 76 mm, to $1,019,862 per kilometre for 1422 mm or greater outside diameters. Abandoned pipelines, of which BC Assessment is given notice by certificate under the B.C. Pipeline Act, are valued at $1 per kilometre. If operations of the pipeline have been suspended at least 1 year, 10% of the rate is used for valuation. For a pipeline at least 20 kilometres long, with a maximum outside diameter of 168 mm, lying directly on the ground and without man-made foundations, 50% of the rate is used for valuation. Where a pipeline is under construction, the rate is applied to the percentage complete by October 31.

Appeals of Rates or Rate-Based Assessments

Appeals of Commissioner's rate property can either be taken against the rates themselves or against the assessments based on the rates. Appeals against the rates put all such rates in issue, and can only be made on the basis that they were not based on "average current cost of the existing improvements" and/or depreciation was not properly accounted for (in which case, if the appeal succeeds, the Commissioner must reissue the rates, subject to further appeal to the B.C. Supreme Court on a question of law).

Recent Issues / Cases Concerning Assessments of Commissioner's Rates Property

Meaning of "Average Current Cost"

The Commissioner's rates provisions of the Assessment Act were amended in 1989 to require that Commissioner's rates be based on the "average current cost" of existing improvements. The

amendment effectively put an end to a series of appeals against the pipeline rates that had been brought on the basis that the rates valued pipeline at a value higher than actual value determined by other means, and in particular, an appeal by Westcoast Transmission Company against the Commissioner's rates for pipelines on this basis.

The interpretation of "average current cost" and "at a location that has average construction and installation difficulty" are presently before the Courts in ***BC TEL v. The Assessment Commissioner of British Columbia*** (Stated Case, December 30, 1999, B.C.S.C.). BC TEL (now Telus Communications (BC) Inc.) built its portion of the Trans Canada Lightguide System (the first fibre optic cable system in B.C., and the first to be valued by Commissioner's rates) from Vancouver to the Alberta border, in its own right of way, at an actual cost of $118 million, over some of the most rugged terrain in B.C. Subsequent fibre optic cable installations by Telus and its competitors have cost significantly less.

In establishing rates for fibre optic cables, the Commissioner derived a specific rate for each specific cable line in B.C., using the actual costs of construction to estimate the current cost of reproducing each specific fibre optic cable system as is, where is, deducting physical depreciation, and dividing the total cost by the length of the system to establish a rate per kilometre.

Telus appealed the 1994 - 1996 Commissioner's rates for all fibre optic cables on the basis that the Commissioner misinterpreted the definition of "average" current cost by (i) creating a separate rate for each cable, built as is, where is, instead of an objective rate representing the cost to as though constructed or installed at a location that has average construction and installation difficulty and (ii) wrongly including site preparation costs attributable to the land, not the fibre optic cable improvements.

The Board agreed with the Commissioner's method of determining specific rates for each system, but disagreed that the cost for each system could be divided by its length to find an average difficulty location. The Board also found that site preparation costs should be included in the improvement rates.

On further appeal by Stated Case, the Court held that the Board erred in its interpretation of "average current cost" and found that the words "at a location that has average construction or installation difficulty" should not be limited to the average of locations along only the specific property being valued. However, the Court agreed with the Board that site preparation costs should be included in the improvement rates. The decision is under appeal to the Court of Appeal.

What is Included in Commissioner's Rates

In ***Westcoast Energy Inc. and Westcoast Transmission Ltd. v. Assessor of Area #15 - Langley/Abbotsford et al*** (Stated Case 428, August 27, 1999, B.C.S.C.) one of the issues before the Court was whether land under minor improvements including flare stacks, metres, monitoring stations, valve covers, Kontol injection facilities, and telemetry towers were "appurtenances" to a the pipeline which were located on the right of way and to be assessed using Commissioner's rates for pipeline, or should instead be assessed separately at their market values.

The Board held that the right of way comprised only the 3 foot wide strip of land on which the pipeline was situated, and that the improvements in question were not appurtenances, in the sense that they were not accessories or attachments to the line, under the dictionary definition of appurtenance, but were instead supplements to the line, often built long after the line itself.

On further appeal by Stated Case, the Court held that the Board had erred in its finding that the right of way comprised only the narrow 3 foot wide strip on which the pipe was situated, instead of

the wider 60 or 100 foot wide strip of land, and that the Board also erred in considering pipe lines as not including the valves, cleanouts, fastenings and other similar improvements located on that right of way.

Conversion Factors for Pipeline Measurement

In ***Westcoast Energy Inc. and Westcoast Transmission Ltd. v. Assessor of Area #15 - Langley/Abbotsford et al*** (P.A.A.B., July 27, 1998) the Board was asked to determine the appropriate conversion factor to determine the length of pipeline for Commissioner's rates valuation. Faced with a choice between the conversion factor 1.609344 used by BC Assessment to convert pipeline length in miles to kilometres, and the 1.609 conversion factor proposed by Westcoast Energy, which was the Canada Gas Industry conversion factor, the Board preferred the Assessor's factor, which apparently produced the more accurate conversion.

EQUITABLE TREATMENT OF SIMILAR TYPES OF INDUSTRIAL FACILITIES

Equity plays an important role in assessment appeals. Traditionally, B.C. Assessment has been required to assess property for tax purposes at its actual value, but in a manner ensuring equitable taxation between similar types of property in the same geographic area. This can give rise to a conflict where the actual value of a particular property exceeds the actual value of similar properties in the same municipality or rural area. The B.C. Court of Appeal held that a taxpayer has the right not to be assessed at greater than actual value, and not to be assessed at an inequitably high value.

Despite an amendment following ***Bramalea***, to (then) sections 44(2) and 69(1) of the Act replacing the words "fair and equitable" with the words "actual value applied in a consistent manner" in section 44(1), and permitting the Board under (then) section 69 to direct the reassessment of neighbouring properties which were not at actual value, even if the properties were not the subject of the appeal itself ((then) s.69(2)), equity continues to be a basis of appeal of an assessment (see ***Assessor of Area 9 - Vancouver v. Lount*** (1995), SC 353 (B.C.C.A.), in which the Court held that, despite the amendments, *Bramalea* is still the law in British Columbia).

The Panel and Board may, to achieve equity, direct the reassessment either of the property under appeal, or of properties in all or part of a municipality or rural area. However the Board may not do the latter unless and until it finds as a fact either that:

(1) the assessments of lands and improvements in all or part of a municipality or rural area, whether or not the subject of appeal, are above their actual value, or

(2) the assessment appealed against is at actual value, but the assessments of similar land and improvements in all or part of the municipality or rural area are below their actual value.

Furthermore, the Board cannot increase the assessments of only some comparables that are assessed below their actual value within a municipality or rural area. It must consider the assessment of every property within a municipality or part of it.

Section 12 of the Assessment Amendment Act, 1988, Bill 21, in force October 23, 1998, amended the provisions in section 60, Part 6 of the Act dealing with the Board's power to reopen an assessment in an appeal by expressing that power under section 57(1)(a) in order to ensure accuracy and that assessments are at actual value and applied in a consistent manner in the municipality or rural area.

Equitable valuation of industrial land was at issue before the Board in ***Trans Mountain Pipeline Co. Ltd. v. Assessor of Area #10 - Richmond-Delta*** (P.A.A.B., February 7, 1995). The Board was asked to consider whether land in Burnaby, B.C. used by Trans Mountain Pipeline for storage, off loading of air jet fuel from a pipeline from a site on Burnaby Mountain and from barges from Washington State, with subsequent distribution by pipeline to Vancouver Airport in Richmond, was assessed at actual value and equitably when compared to the assessed values of other properties.

Trans Mountain Pipeline asked the Board to take into consideration that the assessed values of the 5 comparable sales relied on by BC Assessment were 25% below their market value, creating two levels of assessed value and giving rise to inequity between the subject lands and similar lands.

While acknowledging this disparity, the Board noted that BC Assessment was seeking to confirm the lower assessment value, not to apply the higher market value of the comparable sales to the lands in question, and also that BC Assessment had established an overall 94% assessment to sales ratio for industrial property sales in Burnaby. The Board concluded that the assessed value of the subject lands was not inconsistent with, or inequitable compared to, similar properties.

More recently, in ***Fletcher Challenge Canada Ltd. v. Assessors of Area #04, #06*** (P.A.A.B., October 16, 1996), the Board granted a pollution abatement exemption for the appellant's expansion of its chlorine dioxide facility in part because a similar exemption had been granted to similar systems elsewhere.

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