IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Aspen Planers Ltd. v. Assessor of Area #23,* 2015 BCSC 1573

Date: 20150902
Docket: L140404
Registry: Vancouver

In the Matter of a Stated Case under the *Assessment Act*, R.S.B.C. 1996, Chapter 20, Section 65 and in the Matter of an Appeal to the Property Assessment Appeal Board of British Columbia and in the Matter of the Decision of the Board dated the 5th day of November, 2014 in such Appeal

Between:

Aspen Planers Ltd.
Mill & Timber Products Ltd.

Applicants

And

Assessor of Area #23 - Kamloops
and Property Assessment Appeal Board

Respondents

Before: The Honourable Madam Justice Sharma

(In Chambers)

On appeal from: An order of the Property Assessment Appeal Board of British Columbia, *Aspen Planers et al. v. Area 23 et al.(2014 PAABBC 20140441***)**, 2013-23-00058; 2014-23-00004; 2014-23-00011 dated November 5, 2014

Reasons for Judgment

Counsel for the Applicants: J. Shevchuk

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Place and Date of Hearing:	Vancouver, B.C. May 26, 2015
Place and Date of Judgment:	Vancouver, B.C. September 2, 2015

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[1] This is an appeal of a decision of the Property Assessment Appeal Board of British Columbia (the "Board") delivered November 5, 2014 (the "Decision"). Aspen Planers Ltd. and Mill & Timber Products Ltd. (the "Applicants") bring the case pursuant to section 65 of the *Assessment Act*, R.S.B.C. 1996, c. 20 (the "*Act*") which requires appeals to proceed by way of a stated case on a question of law alone. The Board issued a stated case on December 15, 2014 (the "Stated Case").

[2] The issue at the heart of this appeal is whether certain buildings at the Applicants' sawmill property are separate industrial improvements or whether they are part of other, pre-existing industrial improvements. The difference is significant because it dictates the method of calculating the improvements' depreciation for the purpose of valuing the property for taxation purposes.

I. RELEVANT LEGISLATIVE PROVISIONS

[3] Before turning to the facts, it is important to understand the legislative provisions applicable to the issues in the case. Section 20 of the *Act* addresses "major industry valuation". Section 20(4) states the actual value of properties that fall into that category is determined by adding the actual value of the land to the cost of industrial improvements, less depreciation. That depreciation must be at a rate and applied in a manner as set out in the regulations.

[4] Section 20(1) defines certain relevant terms:

> **20** (1) In this section:
>
> **"cost of industrial improvement"** means the cost of replacing an existing industrial improvement with an improvement that
>
> (a) has the same area and volume as the existing industrial improvement,
>
> (b) serves the same function that the existing industrial improvement was designed for or, if the existing industrial improvement is no longer used for that function, serves the same function that the existing industrial improvement now serves, and
>
> (c) is constructed using current, generally accepted construction techniques and materials for the type of improvement being constructed;

> **"industrial improvement"**, subject to subsection (2), means an improvement that is part of a plant, whether or not the plant can be operated as a going concern or is temporarily or permanently unprofitable, if the plant is designed and built for the purpose of one or more of the following:
>
> …
>
> ((f) manufacturing of lumber or other sawmill and planing mill products
> …

[5] The *Depreciation of Industrial Improvements Regulation*, B.C. Reg. 379/88 (the "*Regulation*") is the *Regulation* referred to in s. 20(4) and its reads:

> **Interpretation**
>
> **1** In this regulation:
> **"Act"** means the *Assessment Act*;
> **"chronological age"** means the number of years determined by subtracting
> (a) the year in which the plant first commenced operation, or
>
> (b) in the case of an industrial improvement or part of an industrial improvement that was constructed or installed after the plant commenced operation, the year in which the construction or installation of the industrial improvement or part of it was completed
>
> from the year in which the new assessment roll is completed;
>
> **"effective age"** means the number of years determined by
> (a) calculating the total cost of the industrial improvement,
>
> (b) multiplying the chronological age of each part of the industrial improvement by the cost of that part to give the weighted age of that part,
>
> (c) adding the weighted ages of all of the parts of the industrial improvement, and
>
> (d) dividing the sum of the weighted ages by the total cost of the industrial improvements and rounding the quotient up to the next whole year to yield the effective age;
>
> **Determining depreciation**
>
> **2** Subject to the other provisions of this regulation, for the purposes of section 20 of the Act, depreciation of an industrial improvement shall be applied in accordance with the following formula:
> where
>
> (a) **"annual depreciation rate"** is the percentage rate set out in the Schedule for the category of plant of which the industrial improvement is a part, and

> (b) **"age"** is the chronological age or, where parts of an industrial improvement have different chronological ages, the effective age of the industrial improvement.
>
> [am. B.C. Reg. 76/2015, s. 2.]

[6] Neither the *Act* nor the *Regulation* specifies how to determine whether an improvement is "part of" another one. The Applicants' position is that the structures at issue in this case should be considered "part of" existing structures and therefore their depreciation should have been based on "effective" age. The Board used chronological age to calculate their depreciation.

II. FACTS

[7] The court is bound by the facts as stated by the Board*: British Columbia (Assessor of Area 11 – Richmond/Delta) v. CCS Corporation*, 2012 BCSC 1864 at para. 2. I will summarize the most relevant facts from the Stated Case.

[8] The Applicants own a sawmill which converts logs into kiln-dried boards. The sawmill is composed of several buildings and other structures; the status of two structures is at issue. For the 2013 - 2014 assessment, the Assessor of Area #23 - Kamloops (the "Assessor") determined that those two structures were improvements separate from existing improvements, and therefore depreciation for them would be calculated on a chronological age basis. The Applicants argued that the improvements were actually parts of existing industrial buildings and therefore the depreciation should be calculated on the basis of effective age.

[9] The characteristics of the sawmill and its operations are described by the Board at paragraphs 6 to 22 of the Stated Case:

> 6. The Aspen Planers Site 1 turns raw logs into kiln-dried boards, chips, and sawdust. Raw logs arrive at one end of the sawmill, and through various processes are turned into boards and chips. There are three main sawing machines, the "Head Rig," the "Chip N Saw," and the DDM. The boards are dried in kilns before being removed for further processing at another location. The chips are also sold or processed further at other locations. The sawdust is a waste product.
>
> 7. The sawmill is a complex operation but its main operations can be divided into three general categories: debarking, sawing, and drying.

8. The structures in question in this appeal are referred to as the DDM structure or building and the Moore kiln.

The DDM Building

9. The DDM building is a rectangular building approximately 102 feet long, 50 feet wide, and 54 feet high. It is a metal clad, structural steel framed building. It is joined with the original, main sawmill building along 24 feet of its length, for its entire height. Its interior houses one of the three sawing machines at the Aspen Planers Site 1. The interior appears to be one large open space for the upper part but it also has a basement-like area under the main floor.

10. The DDM building and the main sawmill building were open along the shared 24 foot wall when the DDM building was originally built, but at some later date a plywood partition wall was built to provide better temperature control and perhaps to slow the egress of dust. There is a doorway in that partition wall.

11. There is also access between the DDM building and the main sawmill building on the basement level. Chips are conveyed from the DDM building to (and through) the main sawmill building on the basement level.

12. The rooflines of the DDM building and the original sawmill building are seamlessly joined.

13. On its north side, the DDM building is supported by five steel building columns. Two of these columns were built on, and chemically and physically bonded with, pre-existing foundations of the main sawmill building. These two columns sit on pedestals that sit on the original sawmill foundations. The other three columns sit on new concrete footings.

14. Functionally, the DDM building appears to have added new sawing capability to the sawmill. A specific size of logs are debarked before being processed in the DDM building. Boards are moved outside the DDM building, to the exterior, before being moved again into the sawmill building. The processes carried out in the DDM building result in an end product (green boards) that might have some independent economic value. In relation to the business of Aspen Planers, such green boards must be further processed in order to be a marketable and economically viable product.

15. Services for the DDM building (compressed air, electrical, water) are somewhat intermingled with services for the main sawmill building.

The Moore Kiln

16. The Moore kiln is a rectangular building approximately 94 feet long, 31 feet wide, and 29 feet tall (at the roof peak). It is a metal clad, structural steel framed building. It sits immediately adjacent to a building of similar size, the Salton kiln. It is joined with the Salton kiln for its entire length. The evidence does not disclose the exact contents of the kiln buildings.

17. The interior of the Moore kiln is completely separated from the interior of the Salton kiln. There is no interior access between the buildings.

18. The Moore kiln and Salton kiln are joined together by aluminum panels and they share one interior wall, consisting of foam sandwiched between layers of aluminum. It is not a structural wall. Its sole purpose is as a thermal barrier. The rooflines are joined by aluminum flashing.

19. The Moore kiln was formerly at a different location. It operated as a standalone kiln for some period of time before it was relocated to its present location. If the Moore kiln were removed, the Salton kiln could continue to operate by itself.

20. Similar to the situation with the footings of the original sawmill building and the DDM building, the footings and column pedestals of one side of the Moore kiln were built on top of the pre-existing Salton kiln footings. From a structural engineering standpoint the new footings became a part of the existing strip footings and the new and existing footings now act as one structural element.

21. The two kilns are operated from one control room containing furnaces, electrical services, and computer equipment used in kiln operations.

22. Functionally, the two kilns operate in the same manner but independently of one another.

III. ISSUES

[10] In the Stated Case there are eight questions of law, one of which has been abandoned by the Applicants. I prefer to analyse this case under three issues:

1. Did the Board err in its interpretation and application of the *Regulation* when it articulated a test to be used for deciding whether chronological or effective age is appropriate in any given fact situation?

2. Did the Board err by taking an unreasonable view of the evidence when applying the *Regulation* to the DDM building and the Moore kiln?

3. Did the Board err by considering an irrelevant factor (whether the industrial improvement could be disassembled without affecting the structural integrity of the original building) when applying the *Regulation*?

[11] Before addressing any of those issues, however, I must address the appropriate standard of review.

IV. THE STANDARD OF REVIEW

[12] The Applicants submit that the proper standard of review with regard to the first and third issues is correctness and reasonableness for the second one. The Assessor says that reasonableness is the applicable standard for all issues before the court.

[13] Before addressing what standard applies in this case, it is useful to review some fundamental concepts of judicial review discussed in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 (paras. 27):

> **27** As a matter of constitutional law, judicial review is intimately connected with the preservation of the rule of law. It is essentially that constitutional foundation which explains the purpose of judicial review and guides its function and operation. Judicial review seeks to address an underlying tension between the rule of law and the foundational democratic principle, which finds an expression in the initiatives of Parliament and legislatures to create various administrative bodies and endow them with broad powers. Courts, while exercising their constitutional functions of judicial review, must be sensitive not only to the need to uphold the rule of law, but also to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures.

[14] Thus “deference is both an attitude of the court and a requirement of the law of judicial review" (para. 48) but it does not involve courts being subservient to administrative law decision makers. The essence of deference is respect for legislative choice to leave some matters in the hands of administrative decision makers. Those decision makers possess expertise with the processes and determinations that arise from the legislative scheme by virtue of working with the legislation on a daily basis.

[15] When deciding how to apply these principles to determine an applicable standard of review, the court stated:

> [64] The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal.

[16] In *Dunsmuir*, the Supreme Court of Canada also confirmed that a full standard of review analysis is not required if "existing jurisprudence may be helpful in identifying some of the questions that generally fall to be determined according to the correctness standard" which will mean the standard of review analysis "is already deemed to have been performed and need not be repeated" (para. 57).

A. Prior cases considering the standard of review

[17] The Applicants say the standard of review applicable in this case has been settled by *Musqueam Indian Band v. British Columbia (Assessor of Area #9 – Vancouver Sea to Sky Region)*, 2012 BCCA 178. The Court of Appeal applied the correctness standard to the Board's interpretation of the *Taxation (Rural Area) Act*, R.S.B.C. 1996 Chapter 448 (the "*Taxation Act*"), legislation that is closely tied to the Board's duties and function.

[18] The Assessor seeks to distinguish *Musqueam* on the basis that the Board was not interpreting its constituent statute or regulations. That is true but in my view, it is not significant. *Dunsmuir* does not differentiate, for the purpose of categorizing the question while undertaking the standard of review analysis, between a tribunal engaged in statutory interpretation of its constituent legislation and other legislation with which it has expertise. The issue is whether the statutory provision under scrutiny engages the Board's expertise.

[19] The issue in *Musqueam* was the application and interpretation of section 15(1)(h) of the *Taxation Act*. That section states that lands or improvements vested in Her Majesty the Queen or another person, but held in trust for the use of a "tribe or body of Indians", which is either unoccupied or occupied by the Indian Band or someone in an official capacity, is exempt from taxation. The Board found it was bound by a Court of Appeal decision that held section 15(1)(h) does not exempt from taxation non-reserve lands held in trust for an Indian Band that are owned by a corporation: *West Bank Indian Band Development Corporation v. British Columbia (Assessor of Area # 19 - Kelowna)*, 1991 B.C.J. 2501.

[20] The Musqueam Indian Band appealed to the B.C. Supreme Court from the Board's decision. At that appeal, the Assessor argued that the standard of review should be reasonableness relying on a Court of Appeal decision that was also brought to my attention by the Assessor in this case: *Weyerhaeuser Co. Ltd. v. Assessor of Area #04 – Nanaimo Cowichan*, 2010 BCCA 46. The Assessor submits that the Court of Appeal in *Weyerhauser* had already identified the applicable standard of review for Board decisions for the category of questions that arose in *Musqueam*. According to the Assessor, the category of question in *Weyerhauser* was the application of the law to the facts when a legal question cannot readily be extricated from the facts (*Weyerhauser*, para 19); in other words, it was a question of mixed fact and law.

[21] The property owners in *Musqueam* argued that *Young Life v. Assessor of Area #8*, 2005 BCSC 1079 was the precedent that should be followed. It too involves the interpretation of section 15(1)(d) of the *Taxation Act*. Justice Smith agreed. He found the crux of the issue in the case before him was statutory interpretation. He also noted that the Board was interpreting prior decisions of the court and considering the applicability of *stare decisis* both of which he found to be pure questions of law. He therefore concluded that the standard of review had been settled by the court in the *Young Life* case, and it was correctness.

[22] The preliminary issue before me is whether "[t]he jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question" (*Dunsmuir*, para. 62). In my view, the discussion about a "category of questions" is not referring to classification of issues as questions of fact, law or mixed law and fact. In *Musqueam*, both courts were influenced by the fact that prior case law had already established that the Board's interpretation of the identical statutory provision attracted a standard of correctness. Following the court's direction in *Dunsmuir*, a full standard of review analysis was therefore unnecessary.

[23] In *Weyerhauser*, the Court of Appeal said the main issue was the classification of property for the purpose of taxation that involved, similar to this

case, the interpretation and application of a *Regulation* under the *Act* to the facts before the Board. Since that did not require the Board to determine "legal question of general importance to the legal system as a whole", reasonableness was found to be the appropriate standard.

[24] *Musqueam* does not provide a satisfactory precedent for this case because the statutory provision at issue was of a different nature than the one in this case. That difference is not only the fact that different legislation was considered in *Musqueam*. The difference is the type of enquiry the Board must undertake in each case, and how the Board's expertise is involved, or not.

[25] In *Musqueam*, the central issue was whether a statutory exemption from taxation applied to a particular type of land ownership. As Justice Smith noted, the answer depended wholly upon an interpretation and application of the statute. It did not require the Board to sift through and weigh evidence in order to determine the characteristics or the use of the property. Nor did the Board need to employ or rely on its expertise.

[26] The analysis required in this case is very different. Here the Board had numerous uncontested facts about the physical and operational attributes of the DDM building, the two kiln buildings and the building attached to the DDM building. The Board had to analyze those facts to determine if they demonstrated that the DDM and Moore Kiln were "part of" the existing structures, or were improvements in their own right. The statute provides no direction on what will establish that a structure is "part of" an existing improvement. Instead, the Board applies its expertise to analyze the physical and operational characteristics of the property in order to categorize it for assessment purposes. Classifying property for the purposes of taxation is the Board's bread and butter.

[27] Similarly, in *Weyerhaeuser*, the Board had to decide whether property was zoned for residential use or not. Like this case, the Board in *Weyerhaeuser* was interpreting and applying a *Regulation* under its home statute (although I note it also needed to analyze an external legislative instrument, the zoning by-law). The court decided the appropriate standard of review was reasonableness.

[28] An important similarity is that both cases dealt with the interpretation and application of *Regulations* under the *Act*. *Regulations* are subordinate legislation. They must be interpreted and applied in a manner consistent with and not beyond the scope of the section in the statute that authorizes them in the first place. They articulate details needed to apply the statute which are too cumbersome to include in the statute such as highly technical formulations, definitions or tests, geographic locations, detailed procedure or processes, etc. Typically, the subject matter of *Regulations* is heavily fact-dependent and falls within the Board's expertise.

[29] I find that *Weyerhaeuser* has sufficiently stated the applicable standard of review when applying a *Regulation* under the *Act* to classify or categorize property for taxation purposes. The Court of Appeal's analysis in *Weyerhaeuser* at paragraphs 37 to 47 is equally applicable in this case.

B. Other Considerations

[30] The Applicants claim the decision in this case is likely to have an impact beyond the parties of this case. It points to the fact that in the decision the Board discussed a number of its previous decisions which had interpreted the *Regulation*, and purports to restate the test. The Applicants also point out that the Board has agreed to stay an upcoming appeal while waiting for the outcome of this case. The Chair made the following comments in doing so:

> The parties disagree on the import of the *Aspen Planers'* decision. *West Fraser* argues that *Aspen Planers* substantially narrows the circumstances in which the board may order application of effective age and imports 'economic function' of a structure into the test. The assessor argues *Aspen Planers* does not substantially change the test.
>
> . . .
>
> Given the parties' disagreement as to whether Aspen Planers substantially changes the test for application of effective age, I find it is prudent to await the court's decision in the Aspen Planers' stated case before proceeding further with these appeals.
>
> . . .

[31] In my view, the consistency of the Stated Case with prior Board decisions is not relevant to determining the appropriate standard of review. Instead, it is a

factor I must consider in determining whether the Board's decision can withstand judicial review according to the applicable standard, whatever that standard happens to be.

[32] Having considered all the factors discussed above, I find that the standard of review for the interpretation of the *Regulation* for the purpose of deciding whether chronological age or effective age should be applied to industrial improvements is reasonableness. Thus, reasonableness is the appropriate standard for all the issues in this case.

V. THE BOARD'S INTERPRETATION AND APPLICATION OF THE REGULATION

[33] The Applicants argue that the *Aspen* test has created confusion and is inconsistent with previous decisions, resulting in an unreasonable interpretation and application of the *Regulation*. The Assessor's position is that the Decision is not inconsistent with previous Board decisions, but even if it was, that does not render the Decision unreasonable.

A. The Board's Analysis

[34] In the Decision, the Board reviews nine of its previous decisions all of which address the *Regulation*; I summarize the most significant ones. The starting point is *Canpar Industries Ltd. v. Area 17*, August 13, 1999 ("*Canpar No. 2*"). In that case, the Board relied on opinion evidence and decided that calculating the depreciation of a structure is related only to the physical integrity of the components without considering economic factors. A structure physically independent will not be considered "part of" an improvement. This test was adopted in *Fletcher Challenge Canada Limited v. Assessor of Area #4 - Nanaimo/Cowichan,* July 4, 2000, Appeal Nos. 1999-04-00051;1995-04-00019; 1996-04-00063; 1997-04-00049;1998-0400028 but two new criteria were added: points of access between the two buildings and "structural interdependence". The latter meant whether the two structures were physically tied into one another such that if the new structure was removed, the original building would suffer some sort

of structural or functional loss. The Board explicitly stated the following test for applying the *Regulation*:

> Therefore, the Board finds that whether a structure that is small in relation to the original structure, should be considered to be part of the original structure is a question of fact in each particular case. The criteria that should be considered in each case include:
>
> 1. Are the two structures physically tied into each other? If they are not physically connected, they are not part of the same industrial improvement.
> 2. If so, are the interiors of the two structure open to each other?
> 3. If not, is there a door providing direct interior access between the two?
> 4. Does the addition directly service the physical process taking place in the original building?
> 5. If not, are the two building structurally interdependent?

[35] In *Canpar Industries Ltd. v. Area 17*, (2001 PAABBC 20014260)("*Canpar No. 3*"), the Board made no reference to *Fletcher Challenge* even though it had already been released. The Board re-iterated that physically independent structures will not be considered "part of" existing improvements and economic interdependency is irrelevant.

[36] The Board attempted a reconciliation of the prior three decisions in *Norske Skog v. Area 04* (2002 PAABBC 20017170) by saying that if it has sufficient information to apply the test from *Canpar No. 2*, that is determinative and no further analysis is needed. Therefore, the test as stated in *Fletcher Challenge* would only be invoked in those cases where there is insufficient information to apply the *Canpar No. 2* test, or *Canpar No. 2* test does not resolve the issue.

[37] But in *Canadian Forest Products Ltd. v. Area 26* (PAABBC 20071762 ("*Canfor*") the Board preferred the *Fletcher Challenge* test over the *Canpar No. 2* test, although it augmented the test by adding a consideration of a structure's "general impression" and the operational relationship of the structures to each other:

> Whether a structure is an improvement or part of an improvement will depend on a number of criteria. The criteria that should be considered in each case include:

- Are the two structures physically tied into each other? In other words, do they meet the "driveway test"? If they are not physically connected, or for structures in the nature of a building, if they do not give the general impression of being "a building" in the ordinary sense, they are not part of the same industrial improvement.

- if so, are the interiors of the two structures open to each other?

- if not, is there a door providing direction interior access between the two?

- Does the addition directly serve the physical process taking place in the original building?

- If not, are the two buildings structurally interdependent?

[38] In *Aspen Planers Ltd. v. Area 23* (2013 PAABBC 20121269) ("*Aspen 2013*"), the Board addressed the identical structures at issue in this case but it had different evidence before it. The Board affirmed the *Canfor* test but clarified that an affirmative answer is not necessary to each question in order to conclude effective age was the appropriate method of depreciation, and that the criteria were not exhaustive. In the end, the DDM and Moore Kiln were not found to be "part of" existing structures and were therefore depreciated according to their chronological age.

[39] In the Decision, the Board states that recent cases have consistently applied the *Canfor* test (counsel agreed there is an error in paragraph 46 of the Decision because the Board refers to the *Canfor* test but mistakenly quotes from *Fletcher Challenge*). When discussing the proper approach, the Board opted to further clarity the test from *Canfor*.

[40] In particular, the Board decided the "driveway test" and reference to "general impression" are not helpful because they are subjective and meaningless. The Board then stated that the phrase "structural interdependency" was troubling:

> The idea of structural interdependency as a requirement is also somewhat troublesome to me. In every case where this is an issue, there will be an original improvement and an addition. Counsel for the assessor submitted that if the two structures are not interdependent, then they cannot be considered one single improvement. It seems unlikely to me that an original

> improvement will ever be truly structurally dependent on an addition. If structural interdependency were a requirement, it would be very rare for any addition to qualify as part of an improvement rather than an improvement on its own. In my view, it is reading too much into the regulation to require interdependency before an addition can be considered part of an improvement rather than an improvement on its own, unless the word interdependent is watered down so much that it loses its meaning.

[41] Based on those concerns, the Board restated the test as follows (the "*Aspen*" test):

> [50] Whether a new structure is a part of an already existing improvement or an improvement in its own right depends on a number of factors. No one factor is determinative and additional factors may be relevant, but the factors that should be considered in every case include the following:
>
> - Whether and to what extent the new structure is physically joined or attached to the existing structure
> - Whether and to what extent the new structure depends upon the existing structure for its structural integrity
> - The relative sizes of the new structure and the existing structure
> - Whether and to what extent the interiors of the structures (if the structure as of the type to which this applies) are open to each other or are internally accessible
> - Whether and to what extent the use and function of the structures are common or intermingled
> - Whether, if the existing structure were removed, the new structure could fulfill its function (physically and/or economically).

B. The consistency of the *Aspen* test with previous Board cases

[42] The Applicants' position is that there are inconsistencies between the *Aspen* test and previous case law that not only create confusion, but amount to the Decision being unreasonable. The Applicants describe the crux of the problem in their written submissions: "[w]hile many cases since *Canfor* can be thought to simply clarify and expand upon the direction provided by the *Canfor* Board, other cases such as [the Decision] introduce significant departures that make it impossible for the assessment community to predict how the [*Regulation*] will be

applied thus eliminating the ability to plan one's business affairs and assessment function".

[43] Notwithstanding the Board saying the factors are not determinative and others may be relevant, the Applicants point out that the *Aspen* test factors are mandatory since the Board states that those factors "should be considered in every case". They question whether any other factor not expressly included in the test will be weighed equally or not. In particular, the fourth factor from *Fletcher Challenge* (Does the addition directly service the physical process taking place in the original building?) is no longer part of the test, so its relevance is unclear.

[44] The Applicants also suggest that there is considerable confusion about the difference, if any, between structural dependence and structural interdependence. The latter phrase was part of the *Canfor* test yet within that decision, the Board referred to "structural dependency" and "structural dependence" (Decision, para. 48). Also, even though structural interdependence is no longer a part of the test, a new factor seems to look at similar aspects of the buildings' relationship to one another: "whether, if the existing structure were removed, the new structure could fulfill its function (physically and/or economically)? Lastly, the relative size of the buildings is a consideration that was not part of the *Canfor* test.

[45] The Assessor's position is that there is no direct conflict between the *Canfor* and *Aspen* tests so they are not inconsistent. Instead, the Board's interpretation of the *Regulation* has evolved over time. The *Canfor* test was restated and perhaps augmented but the Assessor says the substance has not changed.

[46] It is natural that as more fact situations come before a tribunal, its interpretation and application of legislation may become more sophisticated, but I do not agree with the Assessor that the differences in a Board's interpretation of the *Regulation* represents an evolution. Factors previously adopted have apparently been dropped (the drive-way test; structural interdependence) or factors previously found to be irrelevant now form part of the test (economic

factors). The *Aspen* test is the third statement of a test for the *Regulation*. If there was an evolution of the Board's approach, there would be greater clarity. Instead, greater confusion has been generated.

[47] The Chair noted in her interim decision staying an appeal that "[t]he Board has struggled to apply the regulation over many years, with the result that the test for the application of effective age has changed or been restated more than once". In the Decision, the Board found its "previous decisions variously interpret and apply the *Regulation* in subtly different ways" (para. 34,) and that the analysis has been "confusing" (para. 47).

[48] I am persuaded by the Applicants that the Board's approach to the *Regulation* has been inconsistent. Even if I am wrong about that, I am satisfied that the confusion created by this latest restatement of the test is equally concerning.

C. Inconsistency as a ground for judicial review

[49] As the Applicants point out, if the Board is free in each case to change the test used for the *Regulation*, property owners cannot have confidence that they are aware of what factors are important should they wish to challenge assessments of their industrial property. On this basis the Applicants ask that the court provide guidance to determine the appropriate test or considerations that would meet the legislative intent of the *Regulation*.

[50] The Assessor suggests that the court need not take into the interests or desires of the assessment community because those are concerns beyond the court's consideration. It is not clear to me why that is so. In my view, the court would be remarkably insensitive to ignore the interests of the assessment community particularly the comments of the Chair of the Board. Acknowledging these concerns may not affect the legal analysis, but it does influence the context in which the Stated Case should be assessed.

[51] The Assessor also claims "[i]t would be contrary to … jurisprudence for the court -- having no specialized expertise relating to the matters in issue -- to direct

the more specialized board in its interpretation of its home statute and regulations" and seeking "direction" from the court is inappropriate. It goes further and submits that "the essence of administrative review jurisprudence in Canada over at least the last decade and from the highest levels of judicial authority, precludes courts from giving "direction" to specialized administrative tribunals in relation to their areas of expertise".

[52] The Assessor has over-stated basic principles of administrative law. Section 5 of the *Judicial Review Procedure Act*, R.S.B.C. c. 241 specifically empowers the court to provide directions to tribunals. More fundamentally, whether by petition, statutory appeal or stated case, a challenge to a tribunal's decision triggers this court's constitutional and inherent supervisory authority over tribunals. The whole point of standard of review jurisprudence is to delimit the scope of the court's review but not to preclude it. A tribunal to which deference is owed is still subject to the court's direction where its interpretation of its statute is unreasonable.

[53] With regard to the impact of the inconsistency, the Assessor submits the Board is not bound by its own earlier decisions and therefore, if inconsistency exists, that is an insufficient basis for judicial review: *Communications*, *Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper Ltd.*, 2013 SCC 34 at para. 6 (*CEPU*) and *Halifax Employers Assn. v. International Longshoremen's Assn. Local 269*, 2004 NSCA 101 at para 82.

[54] It is not clear to me how *CEPU* supports the Assessor's position. At paragraph 6, the Supreme Court makes the obvious point that it is not bound by previous arbitral decisions; but it also found that the arbitral body of law is a benchmark against which the decision being reviewed can be measured. The Supreme Court concluded the decision being reviewed was reasonable in part because it relied on the consensus on the issue that exists in previous arbitration cases (paras. 8 and 42). If relying on previous case law is an indicia of reasonableness, failing to do so can suggest unreasonableness.

[55] Although dissenting on the issue of whether the arbitrator's decision was consistent with arbitral law in *CEPU*, Justices Rothstein and Moldaver agreed with the majority that "arbitral precedents *in previous cases* shape the contours of what qualifies as a reasonable decision" (para. 75). The dissent goes further:

> [78] Respect for prior arbitral decision is not simply a nicety to be observed when convenient. On the contrary, where arbitral consensus exists, it raises a presumption -- for the parties, labour arbitrators, and the courts -- that subsequent arbitral decision will follow those precedents. Consistent rules and decisions are fundamental to the rule of law. As Professor Weiler, a leading authority in this area, observed in Re United Steelworkers and Triangle Conduit & Cable Canada (1968) Ltd. (1970), 21 L.A.C. 332
>
> > This board is not bound by any strict rule of stare decisis to follow a decision of another board in a different bargaining relationship. Yet the demand of predictability, objectivity, and impersonality in arbitration require that rules which are established in earlier cases be followed unless they can be fairly distinguished or unless they appear to be unreasonable. [emphasis added; p. 344]
> >
> > [other citations omitted]
>
> [79]Thus, while arbitrators are free to depart from relevant arbitral consensus and march to a different tune, it is incumbent on them to explain their basis for doing so. As this court has stressed, "reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process" (Dunsmuir, at para. 47). … Reasonableness review includes the ability of court to question for consistency where, in cases like this one, there is no apparent basis for implying a rationale for an inconsistency. [emphasis added]

[56] Also, I do not find the *Halifax Employers Assn*. case to be helpful because the issue addressed in that case was purely procedural. The case involved an appeal from a judicial review of an arbitrator's decision under the *Canada Labour Code*. The arbitrator exercised his discretion and granted a long extension of time for an employee to file a grievance against dismissal from employment. The trial judge overturned that decision in part because he found it included a factor that had not been considered by other arbitrators. The Court of Appeal held the judge erred (para 82):

> With respect, the arbitrator was not obliged to follow "the relevant case law" developed by other arbitrators or to limit himself to "recognized criteria" or to act only on a basis of propositions for which there is "common law" support in

> the awards of other arbitrators. There is no principle of stare decision in labour arbitration: [cites omitted]. The arbitrator's duty is to apply the statutory test to the facts, not to adhere to what other arbitrators in other contexts have said or done. Departures from other awards do not, in themselves, make the arbitrator's award patently unreasonable.

[57] An exercise of discretion extending time to grieve a dismissal involves an open-ended enquiry, mainly into issues of prejudice and fairness. That is markedly different than the articulation of a statutory test which is at issue in this case.

[58] The Assessor also referred to *Canpar Industries Ltd. v. Assessor Area #17 - Penticton*, 2000 BCSC 509 (this appears to be an appeal of *Canpar No. 2)* ("*Canpar 2000*"). The issue in *Canpar 2000* was whether the doctrine of *res judicata* applied to prevent the Board from assessing a plant differently from previous years' assessments. The property owner argued that the Assessor had previously viewed the plant as a single improvement thus using effective age to calculate depreciation. The Assessor claimed it had not done so but that the Board did, although apparently this was not clear on the face of the Board's decisions and did not come to light until some time had passed (para. 31). The Board also found that the parties did not raise the issue of how depreciation should be calculated in the previous years' assessments.

[59] The Assessor's position was that the Board was not constrained by the principles of *res judicata* and could calculate depreciation differently from year to year. The chambers judge based her reasoning on a slightly different basis. She framed the issue as follows: whether "[a]ccepting that the board was not bound by its earlier decision and could decide, as it did, to treat the plant differently in the 1993-97 assessment years than it had in 1991-92, did it misinterpret or misapply the legislation, or act without evidence or upon a view of the facts which could not reasonably be entertained?" (para 33). The court found there was no error. In doing do, the chambers judge relied on *Quintette Coal Limited v. British Columbia (Assessment Appeal Board*) (1986), 21 B.C.L.R. (2d) 193, in which this court concluded that *res judicata* does not apply to property assessments because: (1) the assessor is carrying out a statutory duty; (2) an assessment is temporary in

nature and limited in time; (3) jurisdiction of a decision making tribunal is limited with its function beginning and ending with the determination for a defined period; (4) the assessment for a new year is not the same question and (5) no real *lis* is involved since the assessor has no self-interest.

[60] In my view neither *Canpar 2000* nor *Quintette* are on point to the issues before me. In neither case was the court considering *stare decisis*. More importantly, it is clear that the challenge to the Board's decision in both cases was limited to there being different results in subsequent years. The Applicants here do not raise that argument; their appeal is based on the reasonableness of the test as stated by the Board, and its application to the facts in this case. Moreover, the issue in *Quintette Coal* was purely procedural. The issue was the ability of the Board to order the property owner to produce information that it had furnished the previous year. The court concluded the Board could make that order because it was not barred by *res judicata*.

[61] But the Assessor is correct that in general, courts have held that the principle of *stare decisis* does not apply to tribunals in the same manner as it does to courts. This principle was discussed thoroughly in *Domtar Inc. v. Quebec*, [1993] S.C.R. 756 at para 91.

[62] *Domtar* was a labour arbitration case. An employee was injured three days before the plant at which he worked closed. The company refused to pay his disability claim beyond those three days even though without the closing, the employee would be entitled to 14 days. The first tribunal ruled in favour of the company, but that decision was overturned by the appellate tribunal. The Quebec Superior Court dismissed the company's application for judicial review. The Court of Appeal held the decision was not patently unreasonable but because there were conflicting tribunal decisions on the issue, judicial intervention was warranted.

[63] The Supreme Court of Canada overturned the Court of Appeal and stated the issue before it was whether a decision that is not patently unreasonable is

open to judicial review because "there were, at least apparently, divergent interpretations of the same legislative provision by two administrative tribunals". The judgment contains a thorough and detailed review of the consistency of precedents and judicial review at paras. 58 to 94.

[64] The Supreme Court held that consistency in the application of the law is "unquestionably a valid objective" and for a litigant to receive "diametrically opposite answers to the same question, depending on the identity of the members of administrative tribunals, may seem unacceptable to some and even difficult to reconcile with several objectives, including the rule of law" (para. 66).

[65] But Justice L'Heureux-Dube, writing on behalf of the court, stated that "consistency in decision-making and the rule of law cannot be absolute in nature regardless of context" and that "for the purposes of judicial review, the principle of the rule of law must be qualified" (para. 93). In the court's mind, this was the result of the evolution of administrative law that led to the development of the patently unreasonable error test in the first place. The court concluded (para. 94):

> If Canadian administrative law has been able to evolve to the point of recognizing that administrative tribunals have the authority to err within their area of expertise, I think that, by the same token, a lack of unanimity is the price to pay for the decision-making freedom and independence given to the members of these tribunals". Recognizing the existence of a conflict in decision as an independent basis for judicial review would, in my opinion, constitute a serious undermining of those principles.

[66] In my view, this analysis from *Domtar* must be considered in light of *Dunsmuir*. In discussing the fundamental nature of judicial review, the court in *Dunsmuir* stated (paras. 27):

> **27** As a matter of constitutional law, judicial review is intimately connected with the preservation of the rule of law. It is essentially that constitutional foundation which explains the purpose of judicial review and guides its function and operation. Judicial review seeks to address an underlying tension between the rule of law and the foundational democratic principle, which finds an expression in the initiatives of Parliament and legislatures to create various administrative bodies and endow them with broad powers. Courts, while exercising their constitutional functions of judicial review, must be sensitive not only to the need to uphold the rule of law, but also to the necessity of avoiding undue interference with the discharge of administrative

> functions in respect of the matters delegated to administrative bodies by Parliament and legislatures.

[67] The court also reviewed what was at the time the prevailing jurisprudence of standard of review, and specifically in relation to the standard of patently unreasonableness, it stated (para. 44):

> **44** As explained above, the patent unreasonableness standard was developed many years prior to the introduction of the reasonableness *simpliciter* standard in *Southam*. The intermediate standard was developed to respond to what the Court viewed as problems in the operation of judicial review in Canada, particularly the perceived all-or-nothing approach to deference, and in order to create a more finely calibrated system of judicial review (see also L. Sossin and C. M. Flood, "The Contextual Turn: Iacobucci's Legacy and the Standard of Review in Administrative Law" (2007), 57 U.T.L.J. 581). However, the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently [page220] greater flexibility of having multiple standards of review. Though we are of the view that the three-standard model is too difficult to apply to justify its retention, now, several years after *Southam*, we believe that it would be a step backwards to simply remove the reasonableness *simpliciter* standard and revert to pre-*Southam* law. As we see it, the problems that *Southam* attempted to remedy with the introduction of the intermediate standard are best addressed not by three standards of review, but by two standards, defined appropriately.

[68] Apart from the difficulties inherent in attempting to distinguish patently unreasonable errors from merely unreasonable ones (paras. 41), utilizing the patently unreasonable test tended to "focus on the magnitude of the defect and on the immediacy of the defect (para. 40)". The court also found that patently unreasonable standard itself was untenable:

> **42** Moreover, even if one could conceive of a situation in which a clearly or highly irrational decision were distinguishable from a merely irrational decision, it would be unpalatable to require parties to accept an irrational decision simply because, on a deferential standard, the irrationality of the decision is not clear *enough*. It is also inconsistent with the rule of law to retain an irrational decision.

[69] In my view, *Dunsmuir* has sufficiently altered the landscape of judicial review that the inapplicability of *stare decisis* to administrative tribunals cannot be assumed to be an absolute rule. In my view, the Alberta Court of Appeal has

accurately captured how inconsistency in tribunals' decisions should be treated on judicial review in *Altus Group Limited and Calgary City*, 2015 ABCA 86:

> [27] While some statutory provisions may be amenable to different, yet reasonable interpretations, it is difficult to conceive of meaningful legislation that would allow diametrically opposed interpretations, both of which are reasonable, not to mention correct.
>
> [28] Opposite interpretations of a legislative provision are also difficult to accept under the presumption of legislative coherence. An interpretation that is so broad that it fosters inconsistency or repugnancy should be avoided: [case cite omitted]. In the context of the statutory interpretation of taxation powers, consistency is also particularly important. Tax legislation should be interpreted to achieve 'consistency, predictability and fairness' to achieve equity and finality in taxation and allow taxpayers to manage their affairs [case cites omitted].

[70] The Alberta Court of Appeal concluded:

> [31] Assuming reasonableness applies as the standard of review of administrative tribunals in the interpretation of their home statute or closely connected legislation, while an administrative decision maker is unconstrained by the principles of *stare decisis* and is free to accept any reasonable interpretation of the applicable legislation, the reasonableness standard does not shield directly conflicting decisions from review by an appellate court. In assessing the reasonableness of statutory interpretation by the administrative tribunal, the appellate court should have regard to previous precedent supporting a conflicting interpretation and consider whether both interpretations can reasonably stand together under principles of statutory interpretation and the rule of law.

[71] On that basis (and others) the Applicants submit the decision should be subject to judicial review because of the inconsistency of its approach.

[72] Based on the foregoing discussion, I conclude that the inconsistency in a tribunal's interpretation of its home statute or regulation can be an independent ground for judicial review. While in general, tribunals are not bound by *stare decisis*, that cannot prevent a court from analyzing that inconsistency to determine if the tribunal has erred. Ultimately, the issue is whether the tribunal's decisions represent -- in both outcome and analysis -- a reasonable interpretation and application of the legislation.

[73] I therefore agree with the Applicants that it is appropriate to review the Decision for the reasonableness of its approach to the *Regulation*, as well as the outcome.

D. The reasonableness of the stated case

[74] Before beginning the analysis it is apposite to review comments about the concept of reasonableness in *Dunsmuir* (para. 47):

> **47** Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquiries into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of [page221] justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[75] Therefore it is not just the reasonability of the outcome that is under review, it is also the articulation of how that outcome is a reasonable interpretation of the *Regulation*. This raises two different questions: is the *Aspen* test a reasonable articulation of how to interpret and apply the *Regulation*, and was the Board's application of the *Regulation* to the facts before it reasonable? I address the second question later in these reasons.

E. The reasonableness of the Aspen test

[76] Understandably, the parties have focussed on whether the restatement of the test is reasonable in light of the Board's previous decisions, but that is not quite the right question. First and foremost, the Board's analysis must be a reasonable interpretation of the *Regulation*. The starting point for answering that question is to understand the role the *Regulation* plays in the overall property assessment. This requires reference to the legislation.

[77] To calculate the value of the major industrial property for the purpose of property assessment, the assessor determines the actual value of the land which is added to the cost of industrial improvements, minus depreciation [s. 20(4)]. Thus, depreciation is an essential component of the "cost of industrial improvements", which is a defined phrase. It means "the cost of replacing an existing industrial improvement with an improvement" that: (1) occupies the same area and volume; (2) serves the same function that the existing industrial improvement was designed for, or is currently being used for; and (3) is constructed using current and generally accepted techniques and materials. Industrial improvement is also a defined phrase and it means "an improvement that is part of a plant, whether or not the plant can be operated as a going concern or is temporarily or permanently unprofitable".

[78] The pivotal portion of the *Regulation* is the definition of "age" which is "the chronological age or, where parts of an industrial improvement have different chronological ages, the effective age of the industrial improvement." Both chronological and effective age are defined in the *Regulation*. But neither the *Act* nor the *Regulation* outlines how to determine when an improvement is "part of" a pre-existing one. In the Decision, the Board identified the difficulty of the task (para. 31):

> [31] The problem of interpretation arses where there are improvements of different ages on a major industrial property. Since the legislation contemplates not only the possibility of improvements of different ages but also the possibility that the newer improvements will be parts of older improvements rather than improvements in their own right, it follows that there must be real differences between the two. Differentiating between the two has sometimes been difficult.

[79] Turning to the *Aspen* test, it identifies six factors that must be considered. Four of those relate to physical features only. Clearly, the physical aspects of property are highly relevant to property assessment given the "cost of industrial improvement" is meant to be an estimate of the cost of replacing the structure. Also, the factors in the test that refer to physical features are logically connected

to determining if two structures can be considered one industrial improvement (physical connection, structural integrity, size and access).

[80] Two factors address both physical and functional features. Functional features are reflective of the legislation because one aspect of the definition of cost of industrial improvement requires an assumption that the replacement structure serves the same function as the original one. More generally, it is clear the function of a structure is related to its cost. Lastly, for two structures to be considered one industrial improvement you would expect some logical connection between their functions.

[81] This enquiry into functionality, however, does not necessarily mean economic factors are relevant. Nowhere is the economic viability of the improvement mentioned. In fact, the definition of industrial improvement suggests economic factors are irrelevant because it specifically includes parts of a plant whether or not the plant is profitable or not. That may explain why economic factors were specifically excluded in *Canpar No. 2.* I add that in my view evaluating the economic features of a plant is not part of the Board's expertise.

[82] The Applicants say the listed factors must be considered in every case, and therefore the Board has made it mandatory to consider economic factors in the last step. This they say is unreasonable. The last factor in the test is a consideration of whether the new structure could fulfill its function – physically and economically -- if the original structure was disassembled. In my view, an evaluation of economic features of the plant is not rooted in the legislation and is outside the expertise of the Board and therefore it is unreasonable for it to be a mandatory consideration.

[83] Even that part of the last consideration looking at the physical independence of the structure, is curious, given the Board comments about the term "structural interdependence". One reason the Board found that term unhelpful is because the possibility of using effective age to calculate depreciation only arises where there are additions and/or new structures. To assess the likely

physical status of an addition in the hypothetical situation where there is only one structure is illogical; if there is only one structure, effective age is inapplicable.

[84] The *Aspen* test already includes in the second step a consideration of the structural dependence of the new improvement on a pre-existing structure. I do not see that the last step's consideration of the hypothetical disassembly of the pre-existing improvement adds anything helpful to the analysis. Because it relies on supposition rather than facts in existence, I think it unwise to include it.

[85] The Applicants also point to other portions of the test they say are different from *Canfor*. They point to the fact that the "driveway test" has been eliminated. In my view, this is eminently reasonable. Counsel informed me there is no explanation in any Board decision of what the "driveway" test is, and there is no obvious meaning. Without clear definition of what it is, it ought not to be part of the test. I did not understand the Applicants to suggest, however, that the elimination of that factor in this case had an impact on the ultimate decision.

[86] The same reasoning applies the Board's eliminating a consideration of the "general impression" of the property. The Board's reasoning on this is sound. It concluded the phrase "is an admission that the factors that go into the impression cannot be articulated. If the factors cannot be articulated, they are not relevant; if they can be articulated, then they ought to be individually articulated…" (para. 47).

[87] The Applicants say the relative size of the improvement was not part of the *Canfor* test. In my view, it is reasonable to consider this factor because the volume and area of an improvement is one of the mandatory factors captured in the definition of the cost industrial improvement.

[88] The Applicants also point out that an improvement's "service" to the physical process of the pre-existing improvement (or vice versa) is no longer part of the test. In my view, this is an enquiry into the extent to which the two structures are functionally integrated. The fifth bullet is worded broadly enough to include that consideration. In any event, the Board is not precluded from

considering other factors and a property owner would be able to introduce evidence on that.

[89] For all those reasons I find the last factor in the *Aspen* test is not reasonable; it does not flow from the legislation and the economic aspect is not within the Board's expertise.

[90] I add that it would be advisable for any future Board, should it consider (whether during the hearing or after) a change to the test to ensure the parties had been given a chance to make submissions both on the proposed change, and if that proposed change justifies further evidence. I am not suggesting that the Board will automatically err if this is not done but apart from ensuring a reasonable application of the *Regulation*, procedural fairness must be adhered to and that requires that a party know the case it has to meet when appearing before a tribunal.

VI: THE BOARD'S VIEW OF THE EVIDENCE

[91] I have compressed into this one issue the following two questions from the Stated Case:

> 2. Did the Board take an unreasonable view of the evidence and thereby err in law when it held that the DDM building should not be depreciated on the basis of effective age under *B.C. Regulation 379/88 -- Depreciation of Industrial Improvements Regulation* ("Regulation") even though the Board found that:
>
> a. the DDM building is physically attached to the original sawmill;
>
> b. the DDM building is structurally dependent on the original sawmill building;
>
> c. the DDM building is significantly smaller than the original sawmill building;
>
> d. there are points of access between the DDM building and the original sawmill building;
>
> e. there is intermingling in the functions of the structures; and
>
> f. if the sawmill foundations were to fail or to be demolished, the DDM building would collapse?
>
> 4. Did the Board take an unreasonable view of the evidence and thereby err in law when it held that the Moore kiln should not be depreciated

> on the basis of effective age under the *Regulation* even though the Board found that:
>
> a. the Moore kiln and the Salton kiln are physically joined along their entire length and for their entire height;
>
> b. the Moore kiln and the Salton kiln share concrete footings;
>
> c. the structural integrity of the Moore kiln is dependent upon the structural integrity of the Salton kiln foundations; and
>
> d. the Moore kiln would collapse if the Salton kiln foundations were to fail?

[92] In my view, these two questions combine two different aspects of the Applicants' appeal. First, it asks whether the Board's findings are reasonable given the evidence that was presented. Second, it asks whether its conclusion that the DDM and Moore Kiln should be depreciated on the basis of chronological age is reasonable, given the specific findings identified in the questions. I address these separately.

A. The Board's findings

[93] In the Stated Case, the Board outlines the relevant facts and then outlines its findings at paragraphs 23 to 38. To succeed in demonstrating the Board was unreasonable in its view of the evidence, the Applicants must demonstrate that the findings in those paragraphs are perverse or inexplicable given the facts as stated in the previous section. As shown below, all but one of the Board's findings are referenced in the evidence (the first number in brackets refers to where the "finding" is found in the Stated Case, the second and subsequent numbers are references to the facts):

a) The DDM is physically attached to the main sawmill (paras. 24, 9, 12, 13);

b) The DDM building depends to a considerable degree on the sawmill building for its structural integrity for two of its five columns on one side and the roof to a certain extent rests on the sawmill building's roof (para. 25, 13);

c) The structural integrity of the DDM building is dependent on the structural integrity of the sawmill building (26, 13);

d) The DDM building is smaller than the sawmill building (27, 9);

e) The interior of the DDM was open to the sawmill but only through one door on the upper level and a conveyor in the basement area. Chips and rough boards cut in the DDM building are conveyed or transported back to the sawmill building. It had previously been completely open but a barrier was erected for temperature control and sawdust mitigation (28, 9, 10, 11);

f) The sawmill and the DDM buildings perform different functions and contain different processes. Although they both process raw logs, they process different sizes of logs (29, possibly 14);

g) There is some intermingling in the functions of the DDM and sawmill (29 and 30, 11, 14);

h) If the sawmill foundations were to be demolished, the DDM building would collapse (30, 13);

i) The DDM building serves the processes in the original sawmill building, and they are just one part of a long chain of processes (30, 9, 11, 14);

j) The DDM building could be disassembled without impacting the physical integrity of the sawmill building (30, no reference in facts).

[94] With regard to the Moore Kiln, all of the Board's findings are rooted in evidence presented to the Board:

a) The two kilns are physically joined and the structural supports of the Moore kiln rest on the Salton kiln's original footings (32 and 33, 18, 20);

b) The structural integrity of the Moore Kiln building is dependent on the structural integrity of the other kiln (33);

c) The two kilns are almost identical in size and shape (34, 16);

d) The two structures are not open or internally accessible (35, 17);

e) While they perform the same function, their uses are not intermingled and neither is functionally dependent upon the other (34 and 37, 22);

f) If the Moore kiln were removed, the Salton kiln could continue to operate by itself (37, 19).

B. Conclusion on the Evidentiary Findings

[95] It is clear there are no facts in the Stated Case supporting the Board's finding that "[t]he DDM building could be disassembled without impacting the physical integrity of the saw mill building". Nor could I find any reference in the

evidence or analysis portions of the Decision about the impact of disassembly of the DDM building on the sawmill. This is an unreasonable finding because it is not supported by any of the facts in the Stated Case.

[96] The inclusion of one unreasonable finding does not necessarily render the conclusion to be unreasonable; it depends on the degree to which that factor influenced the conclusion and the weight attached to it.

C. The Board's conclusions about the depreciation calculation

[97] The second issue is whether, given the evidentiary findings, the application by the Board of the *Aspen* test is a reasonable interpretation of the *Regulation*.

1. The DDM Building

[98] After setting out the test it will follow, the Board examines each factor (Decision, paragraphs 52 to 71) and comments both on which conclusion the evidence supports and the weight given to each factor. Part of that discussion captures what is included in paragraphs 7 to 9 above. However as noted above, the Stated Case asks whether the Board's view of the evidence is reasonable given six specific fact findings (see above paragraph 91).

[99] The Decision does contain additional reasoning surrounding each of those findings which in my view it is appropriate to consider. With regard to each of the six factors, the Board noted:

a) The greater the extent of physical attachment, the more likely the addition is part of the original improvement. The Board found the DDM building is physically attached to the sawmill (its structural support columns are physically and chemically bonded to the sawmill's footings and the roofs are joined) but "this physical attachment is only along 24 feet of the total DDM building length of over 100 feet". The Board decided this factor did not militate strongly for or against a finding that it is an improvement on its own.

b) The greater the degree of dependency, the more likely the addition is part of the existing improvement. It is significant in my view that the Board accepted expert evidence from a structural engineer (Mr. Hargreaves) whose testimony was strongly supportive of a finding that the two buildings were integrated, including his evidence that if the footings were removed, both buildings would collapse. The Board found that the DDM building depends "to a considerable" degree on the sawmill building. It concluded the factor militates "slightly against the DDM building being an improvement on its own".

c) If an original improvement is significantly larger than addition, it is more likely the latter is part of the original. The DDM building is smaller than the sawmill building but it is "a large structure, even in relation to the sawmill building". This factor favoured the conclusion that the DDM building is an improvement on its own.

d) The greater the extent of internal access, the more likely the addition is a part of the sawmill building. There are points of access between the two buildings: a door on the upper level and a conveyor in the basement area. The Board concluded this does not militate strongly for or against the DDM being independent improvement.

e) The greater degree of functional intermingling, the more likely the DDM is part of the sawmill building. The Board concluded that "on balance, it appears that the DDM building performs its own function for the most part independently of the sawmill building". But the Board also found that the DDM is just a part of one long process and that there is intermingling between the functions performed in both buildings [para. 93(g) and (i)]. The Board concluded these findings favour a conclusion that the DDM building is an improvement on its own.

f) The more likely it is that an addition would physically fail or collapse if the old structure were removed and the less likely the new structure could

> fulfill its role in production if the old structure were removed, the more likely the structure is part of the existing improvement. This factor involves hypothetical considerations which suppose scenarios incompatible with the application of the *Regulation* in the first place.

[100] After analyzing each of the factors in the test, the Board's conclusion was:

> [71] In conclusion with respect to the DDM building, of the factors to be considered, my view is that one suggests the DDM building is part of the original improvement, two are neutral and three suggest that the DDM building is an improvement rather than part of an improvement. This particular case is very close to the line. However, on balance, I find the DDM building is an improvement on its own.

[101] Given that this was a "close case" it is significant that one of the factors relied upon by the Board as supportive of its conclusion is what I have found to be an unreasonable finding (see paras. 81-84 above). I also note that the Board's examination of the functional integration of the two structures includes references to the economic aspects of the production. I have already found that factor is problematic and my concern is confirmed by how it was used in this case.

[102] It was key to the Board's conclusion that "the DDM building performs its own function for the most part independently of the sawmill buildings" (para. 65). Apart from comments on the physical features of the processing of logs, the Board also noted that in cross-examination, Mr. Hargreaves said that "the processes carried out in the DDM building result in an end product (green boards) that might have some independent economic value", although he emphasized that specifically in relation to the business of Aspen Planers, "such green boards must be further processed in order to be a marketable and economically viable product".

[103] In my view, the evidence about the possible marketability of the green boards is irrelevant to the Board's enquiry. I also find the hypothetical scenarios posed by the last factor to be unhelpful. It is clear the Board placed weight on both factors and they had an impact on the conclusion (both in favour of concluding the DDM building was an improvement on its own).

[104] Lastly, the Board accepted the expert evidence of the structural engineer. His evidence was strongly supportive of a finding that the DDM structure is part of the sawmill. Given those comments, and my analysis of the reasonableness of the *Aspen* test, I conclude the Board's application of the *Regulation* to the DDM building was unreasonable.

2. The Moore Kiln

[105] The analysis of the Moore Kiln was supported by facts on the record, and in my view it was not a "close" case. There does not appear to be any consideration of economic factors.

[106] The Applicants submit it is irrelevant that the Moore Kiln was brought from another location, where it has previously operated. In my view, that is an inquiry into its functionality and therefore relevant to the extent of its integration with the Salton Kiln. That is reasonably related to the *Regulation* and it was not unreasonable for the Board to reference it. I do not see that reference as implicating economic considerations.

VII: IRRELEVANT CONSIDERATIONS

[107] The Applicants submit that the Board's consideration of whether the original improvement could still operate if the addition was disassembled is not only a new factor, it appears to contradict the Board's reasons why structural interdependence was removed from the *Canfor* test and is therefore irrelevant.

[108] I would adopt my discussion above (paras. 84, 89, 95, 99(f) and 103) which is equally relevant to this discussion. I agree with the Applicants that this factor is irrelevant and the Board erred in considering and placing weight on it.

VIII: CONCLUSION

[109] For all those reasons, I conclude it is unreasonable for the last factor in the *Aspen* test ["whether, if the existing structure were removed, the new structure could fulfill its function (physically and/or economically"] to be a mandatory consideration. Also, the Board's interpretation and application of the *Regulation* to the DDM building is

unreasonable. The issue of whether the DDM building is part of the sawmill is remitted to the Board for re-evaluation in light of these Reasons.

[110] The Board's conclusions with regard to the Moore Kiln are reasonable and therefore that portion of the Stated Case is not remitted.

"Sharma J."