

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Catalyst Paper Corporation v. North
Cowichan (District),*
2010 BCCA 199

Date: 20100422
Docket: CA037651

Between:

Catalyst Paper Corporation

Appellant
(Petitioner)

And

The Corporation of the District of North Cowichan

Respondent
(Respondent)

Before: The Honourable Madam Justice Newbury
The Honourable Madam Justice Huddart
The Honourable Madam Justice Saunders

On appeal from the Supreme Court of British Columbia (*Catalyst Paper Corporation v. North
Cowichan (District)*, 2009 BCSC 1420,
Vancouver Registry Docket S094246)

Counsel for the Appellant:

R. Millen
A. Luchenko

Counsel for the Respondent:

S. Manhas

Place and Date of Hearing:

Vancouver, British Columbia
March 18 & 19, 2010

Place and Date of Judgment:

Vancouver, British Columbia
April 22, 2010

Written Reasons by:

The Honourable Madam Justice Newbury

Concurred in by:

The Honourable Madam Justice Huddart
The Honourable Madam Justice Saunders

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] For more than 50 years, “the mill” at Crofton, on the east coast of Vancouver Island, has been an important feature of the local landscape and an important driver of the local economy. The mill produces pulp and paper products. It is complemented by a deep-sea port and has its own transportation infrastructure, waste disposal, emergency response systems, and water supply. It is therefore not highly dependent on municipal facilities or services. In recent years, it has been upgraded to minimize its environmental footprint. At one time it employed about 1000 workers, and as at the end of 2008, still employed about 760. The mill and surrounding area are located in the District of North Cowichan, the respondent herein.

[2] In recent years the District has prospered from the general influx to Vancouver Island of retirees and others seeking – and able to pay for – residential and recreational property on or near the waterfront. Property values have increased dramatically, and the District is now described as affluent. Unusually, however, residential property taxes have remained low. According to one report in evidence, the total assessed value of residential property in North Cowichan increased 271% between 1992 and 2007, such that the mean assessed value of a home in the District was about \$300,000 in 2007. While residential properties account for almost 90% of the total value of property in the District, the taxes payable in respect thereof constitute only about 40% of the total collected by the municipality. The average property tax bill payable by a homeowner is \$610 per year – one of the lowest rates in the Province. In contrast, the assessed value of real property classified as “Major Industry” (Class 4) as a proportion of the total assessed value of all property in North Cowichan has declined steadily in recent years, falling from 8.30 % in 2002, to 3.72% in 2008. This fact has not been reflected in the amount, or proportion, of taxes levied on such property. In 2009, the tax rate for this class was set at \$43.3499 per \$1000 of assessed value, while in respect of Residential properties (Class 1) it was set at \$2.1430 per \$1000, resulting in a ratio of 1:20.3 as between the Residential and Major Industry classes. This ratio is dramatically higher than the 1:3.4 ratio that was prescribed by statute for all municipalities in British Columbia until 1984, and indeed is the highest in the Province.

[3] The owner of the Crofton mill is the appellant Catalyst Paper Corporation (“Catalyst”), which also owns mills at Port Alberni, Elk Falls and Powell River. It has encountered severe challenges in recent years, as reflected in the drop of its share value from \$7 per share in 2002 to about \$0.16 in June 2009. As noted by the court below, Catalyst posted an after-tax net loss of more than \$220 million in 2008. It has had to shut down its kraft pulp production line at the Crofton mill and to reduce its workforce there and elsewhere. According to a press release issued by Catalyst’s predecessor, NorskeCanada, its property taxes in 2004 were about twice as much per tonne of product as the average for other North American facilities, putting the company’s operations at a major competitive disadvantage.

[4] Not surprisingly, Catalyst became concerned that it could not sustain what it regards as the unreasonably high property taxes to which it is subject, both in North Cowichan and in the other municipalities in which it has industrial facilities. It began to make representations to local and Provincial officials, the Pulp & Paper Workers' Union and to the public, seeking a "fair and equitable solution" to the manner in which pulp and paper mills are taxed in coastal British Columbia. In 2008, the company retained a group of consultants, Messrs. Fitzgerald, Stickleman and Enemark, to analyze the relationship between the services and benefits provided by local municipalities and consumed by or available to Major Industry on the one hand, and the proportion of taxes paid by that class on the other. The authors consulted with officials in various municipalities and in 2008 prepared a brief to the Province proposing a pilot program for the reform of municipal property taxation of the pulp and paper industry. (Separate reports were also prepared relating to each of the municipalities in which Catalyst has mills.) The authors advanced a "Municipal Sustainability Model" (the "Model") the goal of which was described by Mr. Fitzgerald in his affidavit:

... to establish the empirical relationship between a municipality's overarching economic, social and environmental policies, consumption of service patterns, cost of service delivery, and property tax distribution. By relating these factors in an empirical rather than arbitrary manner, a municipality can ensure that its property tax practices and tax distribution policies are demonstrated in a transparent, justifiable, informed and sustainable manner.

[5] The consultants found that Major Industry "pays a disproportionately high percentage of the total municipal levy relative to its consumption and assessment, while Classes 1 and 6 pay far less in taxes than they consume in services". In Cowichan, property belonging to Catalyst consumed approximately 6% of the District's municipal services, while Catalyst paid 50% of the District's property taxes. If property taxes were set to reflect the average consumption of Class 4 property owners in the District, the consultants calculated that Catalyst's tax bill would be approximately \$1.15 million, rather than the nearly \$6.9 million for which it was assessed in 2009.

[6] Despite Catalyst's efforts, the District passed a Tax Rates By-law, No. 3385, in May 2009 that perpetuated a very high ratio between Classes 1 and 4. Taking the view that Cowichan's approach to setting the rates among classes of property lacked any empirical basis and that it, Catalyst, could not "continue to pay the unsustainable levels of property taxation to which it is subject", the company carried through with an earlier promise that it would pay only \$1.5 million in property taxes for 2009.

[7] Catalyst also filed a petition in the Supreme Court of British Columbia seeking:

1. An order setting aside Tax Rates Bylaw 2009, Bylaw No. 3385, adopted by The Corporation of the District of North Cowichan on May 8, 2009 (the "Bylaw") for illegality; or, in the alternative,
2. A declaration that the property tax rate set under the Bylaw in respect of Class 4 Major Industry properties is unreasonable and *ultra vires* The Corporation of the District of North Cowichan ...

The statement of facts appended to the petition set forth the material circumstances of Catalyst's financial position, its relationship with North Cowichan generally and the impact of the District's tax rates on its competitiveness and reinvestment opportunities. Catalyst stated that it was commencing the proceedings "as its last resort". In its words, "the taxes levied on Catalyst under the Bylaw are far higher, relative to assessment and consumption, than the taxes levied on any other individual or class of tax payer. For these reasons, it is Catalyst's position that the Bylaw is unreasonable and therefore illegal."

[8] The chambers judge below, Mr. Justice Voith, dismissed the petition, giving lengthy reasons indexed as 2009 BCSC 1420. Catalyst now appeals.

Legislative Context

[9] Before referring to the chambers judge's legal analysis, it may be useful to begin with the statutory context in which municipal tax rate bylaws are passed. At paras. 24-9 of his reasons, Voith J. set out the provisions of the *Community Charter*, S.B.C. 2003, c. 26, which establish the "broad framework" in which municipal powers are to be interpreted and exercised, and those that relate specifically to the power to impose "property value" taxes. Among the former group are ss. 1 and 4, which provide in material part:

- 1.(1) Municipalities and their councils are recognized as an order of government within their jurisdiction that
 - (a) is democratically elected, autonomous, responsible and accountable,
 - (b) is established and continued by the will of the residents of their communities, and
 - (c) provides for the municipal purposes of their communities.
- (2) In relation to subsection (1), the Provincial government recognizes that municipalities require
 - (a) adequate powers and discretion to address existing and future community needs,
 - (b) authority to determine the public interest of their communities, within a legislative framework that supports balance and certainty in relation to the differing interests of their communities,
 - (c) the ability to draw on financial and other resources that are adequate to support community needs,
 - (d) authority to determine the levels of municipal expenditures and taxation that are appropriate for their purposes, and
 - (e) authority to provide effective management and delivery of services in a manner that is responsive to community needs.
- ...
- 4(1) The powers conferred on municipalities and their councils under this Act or the *Local Government Act* must be interpreted broadly in accordance with the purposes of those Acts and in accordance with municipal purposes.
- (2) If

- (a) an enactment confers a specific power on a municipality or council in relation to a matter, and
- (b) the specific power can be read as coming within a general power conferred under this Act or the *Local Government Act*,

the general power must not be interpreted as being limited by that specific power, but that aspect of the general power that encompasses the specific power may only be exercised subject to any conditions and restrictions established in relation to the specific power.

Section 7 of the *Community Charter* describes the purposes of a municipality, which include providing for “services, laws and other matters for community benefit” and “fostering the economic, social and environmental well-being” of the community.

[10] Moving to those provisions that relate more directly to taxation, s. 165 of the *Community Charter* requires each municipality to establish a financial plan, to be adopted annually by bylaw before the annual property tax bylaw is adopted. Although the plan may be amended by bylaw at any time, it is intended to cover a five-year period. Subsections 3.1 and 4 of s. 165 impose the following requirements:

- (3.1) The financial plan must set out the objectives and policies of the municipality for the planning period in relation to the following:
 - (a) for each of the funding sources described in subsection (7), the proportion of total revenue that is proposed to come from that funding source;
 - (b) the distribution of property value taxes among the property classes that may be subject to the taxes;
 - (c) the use of permissive tax exemptions.
- (4) The financial plan must set out the following for each year of the planning period:
 - (a) the proposed expenditures by the municipality;
 - (b) the proposed funding sources;
 - (c) the proposed transfers to or between funds.

[11] Having established a financial plan, a municipality is required by s. 197(1) to impose property value taxes before May 15 in each year by establishing tax rates for:

- (a) the municipal revenue proposed to be raised for the year from property value taxes, as provided in the financial plan, and
- (b) the amounts to be collected for the year by means of rates established by the municipality to meet its taxing obligations in relation to another local government or other public body.

The remainder of s. 197 provides in material part as follows:

- (2) Unless otherwise permitted by this or another Act, a property value tax under subsection (1) must be imposed
 - (a) on all land and improvements in the municipality, other than land and

- improvements that are exempt under this or another Act in relation to the tax, and
- (b) on the basis of the assessed value of the land and improvements.
- (3) For the purposes of subsection (1) (a), the bylaw may establish for each property class
- (a) a single rate for all revenue to be raised, or
- (b) separate rates for revenue to be raised for different purposes but, in this case, the relationships between the different property class rates must be the same for all purposes.
- (3.1) In relation to tax rates established for the purposes of subsection (1) (a), before adopting the bylaw, the council must consider the tax rates proposed for each property class in conjunction with the objectives and policies set out under section 165 (3.1) (b) [property value tax distribution] in its financial plan.
- (4) For the purposes of subsection (1) (b), for each local government or other public body in relation to which the amounts are to be collected,
- (a) the bylaw must establish separate rates for each property class, and
- (b) the relationships between the different property class rates must be the same as the relationships established under subsection (3) unless otherwise required under this or another Act.
- (5) If the amount of revenue raised in any year for a body under subsection (1) (b) is more or less than the amount that is required to meet the municipality's obligation, the difference must be used to adjust the rate under subsection (1) (b) for the next year. [Emphasis added.]

[12] The classes of property in respect of which tax rates may be established by a municipality are prescribed by Reg. 438/81 to the *Assessment Act*, R.S.B.C. 1996, c. 20 as follows:

Class 1	Residential
Class 2	Utilities
Class 3	Supportive Housing
Class 4	Major Industry
Class 5	Light Industry
Class 6	Business
Class 7	Managed Forest
Class 8	Recreational Property/Non-Profit Organization
Class 9	Farm

Section 199 of the *Community Charter* enables the Lieutenant Governor in Council to impose regulations respecting tax rates by prescribing relationships between tax rates for the foregoing classes. As mentioned earlier, the former *Municipal Act* historically regulated the relationship between tax rates on Residential property and those on Major Industrial property, fixing the ratio at no greater than 1:3.4 (this was historically done under B.C. Reg. 438/81). This restriction now remains in force only with respect to taxes imposed by regional districts: see B.C. Reg. 439/2003, enacted pursuant to the *Local Government Act*, R.S.B.C. 1996, c. 323.

[13] Having reviewed the foregoing legislative context, the chambers judge observed that

although s. 197 “establishes some timelines and structural requirements and requires adherence to the financial plan, it also confers an unfettered discretion to Council in terms of the factors it can consider in fixing property tax rates”. (Para. 26.) He continued:

No part of the foregoing legislative scheme and none of these examples expressly limit, in any way, the discretionary authority of a municipality to establish property tax rates in respect of Class 4 properties. Not surprisingly then, no part of the petitioner’s submission was based on the proposition that adoption of the Bylaw was *ultra vires* the authority of Council. Instead, the petitioner’s submissions are largely limited to the proposition that the Bylaw is unreasonable in relation to the rates prescribed for Class 4 property holders. [Para. 29.]

Legal Analysis of the Chambers Judge

[14] Voith J. next analyzed the legal principles applicable to the judicial review of municipal bylaws for unreasonableness. Since Catalyst does not take issue with any of his conclusions of law, I will not recount his reasoning at length, with which I am in general agreement. It will, I hope, be sufficient to state below in point form his conclusions and the authorities on which they were based:

- (a) Municipal bylaws are not “immune from review”, nor does a municipality have “unfettered discretion” in passing bylaws, as the District had suggested. Rather, as stated in both *Shell Canada Products Ltd. v. Vancouver (City)* [1994] 1 S.C.R. 231 and *Pacific National Investments Ltd. v. Victoria (City)* 2000 SCC 64, [2000] 2 S.C.R. 919, a municipality is a creature of statute that has only those powers expressly or impliedly delegated to it by statute. It follows that municipal bylaws are subject to judicial review, the function of which was said in *Dunsmuir v. New Brunswick* 2008 SCC 9, [2008] 1 S.C.R. 190, to “ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes”. [At para. 28.]
- (b) Although the municipal legislation of some provinces prohibits judicial review on the grounds of unreasonableness (see Rogers, *The Law of Canadian Municipal Corporations* (2nd ed.) at 406-8), there is no such provision in the *Community Charter*, and British Columbia courts have on previous occasions entertained challenges to bylaws on this ground: see *Westcoast Energy Inc. v. Peace River (Regional District)* (1998) 54 B.C.L.R. (3d) 45, 167 D.L.R. (4th) 98 (C.A.), *Canadian National Railway Co. v. Fraser-Fort George (Regional District)* (1996) 26 B.C.L.R. (3d) 81, 140 D.L.R. (4th) 23 (C.A.), *Vancouver Island Entertainment Inc. v. Victoria (City)* 2006 BCSC 1150, 58 B.C.L.R. (4th) 316 (S.C.), and *O’Flanagan v. Rossland (City)* 2009 BCCA 182, 270 B.C.A.C. 40.
- (c) Since *Dunsmuir* was decided, the previous standard of review applied to municipal bylaws in cases such as *Nanaimo (City) v. Rascal Trucking Ltd.* 2000 SCC 13, [2000] 1 S.C.R. 342, has been “collapsed into the general reasonableness standard”. The

chambers judge quoted the following passage from *Dunsmuir* which informed his analysis:

We therefore conclude that the two variants of reasonableness review should be collapsed into a single form of “reasonableness” review. The result is a system of judicial review comprising two standards correctness and reasonableness. But the revised system cannot be expected to be simpler and more workable unless the concepts it employs are clearly defined.

What does this revised reasonableness standard mean?

Reasonableness is one of the most widely used and yet most complex legal concepts. In any area of the law we turn our attention to, we find ourselves dealing with the reasonable, reasonableness or rationality. But what is a reasonable decision? How are reviewing courts to identify an unreasonable decision in the context of administrative law and, especially, of judicial review?

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 inquires 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 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. [At paras. 45-7; emphasis added.]

- (d) Notwithstanding the reference in *Dunsmuir* to the “process of articulating the reasons” for the decision under review, and notwithstanding some specific provisions in the *Community Charter* that “reflect an increasing legislative emphasis on accountability and transparency in municipal financial planning”, a municipality exercising its powers under s. 197 is not bound by any direct or specific obligation to give reasons. Unlike the decision under review in *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)* 2004 SCC 48, [2004] 2 S.C.R. 650, which concerned an individual’s rights and interests, a duty of procedural fairness is not generally engaged “when a body undertakes decision making that is legislative in nature and is intended to have broad application: [Jones and DeVillars, *The Principles of Administrative Law* (5th ed., 2009)] pp. 239-244.” (Para. 56.) Nevertheless, there was some obligation on the part of the District “to disclose some of the factors and considerations that underlay its adoption of the bylaw and in particular, its fixing of the Class 4 property rates.” (Para. 57.) This flowed from the need both to ensure that a right of appeal or a judicial review is meaningful and to engender confidence in the municipal decision-making process. As the chambers judge explained:

The very factors which militate in favour of judicial deference to municipal decision making – that municipalities are political bodies and

that they are best positioned to weigh the interests of their constituents – support the importance of ensuring that such decisions are transparent and intelligible. It is neither palatable, nor would it engender confidence in the municipal decision making process, for a municipality to simply cloak itself in the mantle of deference when its decisions are questioned. In addition, the oft heard refrain that “councillors are accountable at the ballot box” is in many cases hollow. Here Catalyst has no ability to vote in municipal affairs. It has endeavoured to persuade both Council and the public that the taxes it is paying are unfair or unreasonable. The reality, however, is that it is the rare citizen who will voluntarily acknowledge that their neighbour’s taxes are unreasonable and that their own taxes should accordingly be adjusted. Hence, the further reality is that the only remedy available to a citizen in many instances is to be found in the courts. Whatever the level of deference given to a decision, the review of that decision should be meaningful and effective. It should not be cosmetic.

In cases where a provision in municipal legislation requires reasons or a written explanation of the basis for a decision, or where a municipal body performs an adjudicative role, or where considerations of procedural fairness are engaged the content of the formal reasons required are defined by the specific statutory provision or by the specific circumstances that underlie the decision. In this case, where the Bylaw is the product of an exercise of power which is legislative in nature, there is no obligation to provide any reasons in the formal sense. There must, however, be sufficient evidence in the record before the court to enable the court to have some understanding of how and on what basis the decision was made. The court must be able to satisfy itself that the decision is rational. [At paras. 65-6; emphasis added.]

- (e) Applying these comments to the bylaw in question, a “certain measure of transparency” is insured by fact that meetings of municipal councils are generally open to the public, that the *Community Charter* requires at least two council meetings prior to the adoption of a bylaw, and that councils must carry out public consultations before adopting financial plan bylaws. As well, all materials presented to municipal councils are publicly available.
- (f) The reasonableness standard of review mandated by *Dunsmuir* is informed by caselaw relevant to the specific nature of the decision under review: *Canada (Citizenship and Immigration) v. Khosa* 2009 SCC 12, [2009] 1 S.C.R. 339, *Teamsters’ Local Union No. 31 v. Shadow Lines Transportation Group* 2009 BCCA 130, 90 B.C.L.R. (4th) 74 at para. 90.
- (g) The authorities make it clear that municipal decisions, in particular those that lie at the legislative and policy-driven end of the spectrum, must be given particular deference, as established in the venerable case of *Kruse v. Johnson* [1898] 2 Q.B. 91, which was cited in both *Rascal Trucking* and *Shell Canada Products, supra*. In *Kruse*, Lord Russell of Killowan C.J. said this:

But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved

such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say, "Parliament never intended to give authority to make such rules; they are unreasonable and *ultra vires*." But it is in this sense, and in this sense only, as I conceive, that the question of unreasonableness can properly be regarded. A by-law is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception which some judges may think ought to be there ... [At 99.]

The well-known passage from the reasons of Lord Greene in *Associated Provincial Picture Houses, Limited v. Wednesbury Corporation* [1948] 1 K.B. 223 (C.A.) was also instructive:

It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere. That, I think, is quite right; but to prove a case of that kind would require something over-whelming, and, in this case, the facts do not come anywhere near anything of that kind. I think Mr. Gallop in the end agreed that his proposition that the decision of the local authority can be upset if it is proved to be unreasonable, really meant that it must be proved to be unreasonable in the sense that the court considers it to be a decision that no reasonable body could have come to ... [At 230; emphasis added.]

- (h) The exercise of the power conferred on a municipality by s. 197 is "fact-driven, policy-laden and discretionary" and the "range of outcomes" is broad. (Para. 78.) Thus, the chambers judge stated:

The overarching comments of the courts in decisions such as *Shell Canada Products* and *Rascal Trucking* and the more focussed comments that I have referred to in *Kruse*, *Wednesbury* and *Lehndorff United Properties* confirm how constrained a court is in questioning the outer boundaries of a municipal decision made under a power such as that conferred by s. 197. Barring something aberrant or "overwhelming", barring a decision "no reasonable body could come to", a court will not revisit the outcomes or "outer boundaries" determined by Council to be appropriate. It will not substitute its own view of a more suitable outcome. [At para. 80.]

- (i) A municipal council is permitted to differentiate (or "discriminate") between classes of property in the taxation scheme: *Jericho Tennis Club v. British Columbia (Assessor of Area No. 9 – Vancouver)* (1991) 55 B.C.L.R. (2d) 332 (S.C.), at paras. 31-6.

The Factual Context of Bylaw No. 3385

[15] By the time the District received the report of Catalyst's consultants in draft in April 2009, it had already given considerable attention to the relationships (expressed as ratios or multiples) between Classes 1 and 4. Cowichan's Director of Finance, Mr. Mark Frame, deposed that

historically, the District had had a general policy of “maintaining the amounts of property taxes imposed from the various classes of property from year-to-year, subject to adjustment for new construction and market conditions.” Beginning in 2003, however, Council had begun “taking steps to change its historical general property tax apportionment policy as it relates to the major industry class of property”. Between 2003 and 2007, an amount equal to 1% of the previous year’s taxes on Residential property had been “shifted” annually from Class 4 to Class 1, reducing the percentage of property taxes paid by Major Industry from 54% to 48% of the District’s total. When the District built a new aquatic centre, Council made another adjustment, such that about \$400,000 that would normally have been imposed on the Major Industry class was “shifted” to the Residential class. As a result, the share of the District’s taxes paid by Class 4 was down to 44% in 2008.

[16] In addition, Mr. Frame carried out a review of “options” for the reapportionment of property taxes between the classes. His report recommended that Council “establish a process for developing objectives and policies regarding the proportion of total revenue that comes from property taxes and the distribution of those taxes among the property classes.” Appended to the report was a comparison of historical tax rates from 1998 to 2008. As will be seen, the multiple allocated to Major Industry decreased generally between 1999 and 2004 but increased substantially again by 2007, reducing only slightly in 2008. The amount of taxes raised from Class 4 increased markedly in 2002 and 2003 and continued to increase thereafter to a high of \$7,445,929 for both 2007 and 2008. In 2009, it decreased to approximately \$6.5 million.

[17] In October 2008, Mr. Frame prepared a report to the Council’s Administration and Finance Committee in order to “provide a number of scenarios detailing the consequences of different levels of reduction in Major Industry taxation.” The options he considered included shifting 10, 30, 50, or 100% of Major Industry taxation to all other classes, and shifting the same percentages to the Residential class only. The amount of the increase in taxes that would be payable by an average homeowner was calculated in each case. Mr. Frame observed:

One of council’s economic agendas in 2009 is to reduce Industrial property taxes. The Municipality’s largest taxpayer, Catalyst, has requested property tax relief. Catalyst has a pulp and paper operation in Crofton that paid \$6.6 million in municipal property taxes in 2008. This represents 89% of total Major industry property taxes and 39% of total property taxes. The Coastal Forest Industry is struggling and Catalyst feels this level of property taxation is not sustainable.

The Municipality has very low residential taxes and very high Major Industry Taxes. This has been a historical pattern that has continued as Major Industry assessment has decreased. Major Industry accounts for 3.7% of assessment and 44% of property taxes. Residential accounts for 89.5% of total assessment and 40% of property taxes. All other property classes account for 6.8% of assessment and 16% of property taxes.

[18] At some point, the Council also established a Property Tax Restructuring Committee, chaired by the Mayor and comprised of nine residential taxpayers. Reporting in October, 2008, this committee concluded that “Tax policy should be neutral – neither an incentive nor a deterrent to industry and commercial development”. To this end, it suggested that the multiplier used in North

Cowichan should be the provincial average for municipalities in British Columbia who were similarly situated to the District, i.e., that the multiplier (which assumes a figure of 1 for Residential property) should be 10 for Major Industry, 5 for Light Industry, and 3.5 for Business. This would increase the Residential tax on an average home by \$243, bringing the total tax on an average home to \$853. This figure was, the Committee noted, substantially lower than the corresponding figures in Ladysmith, Nanaimo, Port Alberni, Campbell River and Powell River.

[19] North Cowichan received a draft of the report of Catalyst's consultants based on the Municipal Sustainability Model in early April 2009. On April 16, Mr. Frame reported to the Administration and Finance Committee concerning Catalyst's presentation. He said it was clear the District's tax rates had:

... gotten off track over the years. North Cowichan has very low residential taxes and high Major Industry taxes. The problem has come to a head with Catalyst being in financial difficulty, and not willing to pay taxes at historical levels. Council established a Property Tax Restructuring Committee to provide recommendations on a long-term tax strategy.

North Cowichan needs to reduce its reliance on Major Industry taxes and start taxing the residential class for the services they receive". [Emphasis added.]

He provided the Committee with a spreadsheet detailing three potential tax shifts away from Major Industry. We were not provided with a copy of the minutes of the Committee's meeting of April 29, but according to Mr. Frame's affidavit, the Committee recommended to Council that some \$855,000 of property taxes be shifted from Class 4 to Class 1.

[20] The Council still declined to support the adoption of the Model, however. Mr. Frame deposed that the reasons for this included the following:

(a) It would be very difficult for North Cowichan to account for and absorb a reduction of property taxes paid by major industry class properties of the magnitude being suggested by the model. It was the view of the North Cowichan Council that a shift of property taxes of such a magnitude from the major industry class of property to other classes of property causes far too great a hardship.

(b) The model does not reflect the potential for major industry class properties to benefit from municipal services (even though the properties may not use the services now). It was the view of the North Cowichan Council that there is significant benefit to major industry to have municipal services available to it[t]. For example, major industry benefits from the knowledge that municipal firefighting and first responder services are available in the event of a significant fire, chemical spill, or other catastrophe at the property.

(c) The model does not reflect the indirect benefits that the owners of major industry class properties receive from lower commercial and residential property taxes. It was the view of the North Cowichan Council that major industry benefits where employees that reside in the municipality (of which Catalyst has many) pay lower property taxes and acquire goods and services from businesses that pay lower property taxes as well. [Emphasis added.]

[21] On May 8, 2009, the Council adopted Bylaw No. 3384, the five-year financial plan required by s. 165 of the *Community Charter*. Table 2 of Schedule C to the Plan outlined the allocation of tax rates amongst the property classes and contemplated that Major Industry would pay 37% of the

total property taxes. The Plan noted that the District had formed a Property Tax Restructuring Committee to examine its tax structure and make its recommendations on its modification. The objectives and policies of the Plan related to the distribution of property taxes among property classes were described as follows:

Objectives

Over the next five years, reduce the share of property tax paid by Major Industry (Class 4). This reduction of the tax burden on industrial properties will come primarily by shifting taxes to residential.

Over the next five years, reduce the share of property tax paid by Light Industry (Class 5). This reduction of the tax burden on industrial properties will come primarily by shifting taxes to residential and commercial.

Policies

Supplement, where possible, revenues from user fees and charges to help to offset the burden on the entire property tax base as a result of the reduction in the tax rate to major industry (Class 4).

If a tax shift to other property classes is required as a result of the reduction in the taxes from major industry (Class 4), Residential (Class 1) should be the first to absorb any such shifts.

The Cowichan Aquatic Centre constructed in 2008 will be financed based on Provincial class multiples which puts approximately 11% of the cost on major industry (Class 4) and 75% of the cost on residential (Class 1) as oppose[d] to using historical class multiples which put 44% of the burden on major industry.

Major Industry taxes were reduced by \$856,000 in 2009, reducing the % of total taxes paid from 46% to 37%.

Continue to maintain and encourage economic development initiatives designed to attract more retail and commercial businesses to invest in the community. New investment from these areas will help offset the reduction to major industry (Class 4) while providing more revenue for the District.

Regularly review and compare the District's distribution of tax burden relative to other municipalities in British Columbia. [Emphasis added.]

[22] On May 8, 2009, the Council also adopted Bylaw No. 3385, approving tax rates of \$2.1430 for every \$1000 of net taxable value for Residential property and \$43.3499 for every \$1000 of net taxable value for Major Industry – a ratio of 1:20.23. Mayor Walker wrote to Catalyst shortly thereafter, stating in part:

Residential taxpayers in North Cowichan will see their taxes increase at a rate of \$17/\$100,000 of assessed value for the pool and another \$13/\$100,000 for the \$500,000 shift. While the actual tax increase for budget purposes is 3.36% and represents the additional tax for a full year's operation of the new pool, the overall increase in taxation for the average residential assessment combining the pool and the additional shift is 16.1%. Members of our Council recognize this total increase will cause hardship to some in our community who are either on fixed incomes or impacted directly through layoffs or job loss as our economy struggles.

Council has appointed a Property Tax Restructuring Committee which was tasked to provide short term recommendations to address the apportionment of taxes between the property assessment classes for 2009. While I chair this Committee, it is made up of nine residential taxpayers of our community. This Committee provided an initial draft report for Council's review in its discussion on 2009 apportionment and will continue to meet over the next few

months to formulate a strategy for Council's consideration to reduce reliance on major industry and to reapportion taxes across the classes.

We recognize and appreciate the amount of taxes that Catalyst pays into this community. We also recognize that we are fortunate in the amount of per capita spending relative to other communities in British Columbia. We both face challenges. While we understand your financial challenges, we cannot accept your consumptive services model. Our expectation of your company, as it is with all taxpayers of North Cowichan, is that taxes will be paid when due. It is not acceptable that individual taxpayers, including Catalyst, can simply decide based upon their own rationale, to pay or not pay all or some of their taxes. [Emphasis added.]

[23] It appears that Catalyst found little comfort in the new bylaws or in the continuation of a gradual trend towards taxing Major Industry less and Residential properties more. It decided that judicial review was its only option. In the words of its Vice-President, Finance, Mr. Smales:

... Catalyst has imposed ... drastic measures on its operations in an effort to survive the current economic downturn and ensure that we can continue to prosper in the communities in which we operate long into the future.

Apart from permanently shutting down production, Catalyst has no other means of addressing its tax bill, other than by judicial review. Catalyst cannot vote in municipal elections. Its efforts at political persuasion over the past number of years have been largely unsuccessful ... There is no practical way to relocate operations; it is not feasible to move an existing mill, and the cost of building a new one is prohibitive. In any event, given Catalyst's experience, there is no guarantee that another British Columbia municipality might not also raise its tax rates to unreasonable levels.

Analysis of Reasonableness

[24] At para. 82 of his reasons, Voith J. turned to the relevance of Catalyst's Municipal Sustainability Model in assessing the reasonableness of Bylaw 3385. Catalyst submitted that because the Bylaw imposed rates on Major Industry which "far exceed any reasonable measure of the municipal services provided to and consumed by Major Industry", it was not rationally supportable and (drawing from *Dunsmuir*) fell outside the "range of acceptable outcomes". (It was not contested by Cowichan that Catalyst was largely self-sustaining and used few municipal services.) Although it was clear that s. 197 of the *Community Charter* did not expressly require the District to consider this fact in fixing property taxes, Catalyst submitted that the Model provided a rational basis for fixing property tax rates and should be used in the absence of any other coherent theory that gave rational support to the Bylaw. (Para. 84.) The company sought to bolster this proposition with the fact that the *Community Charter* "recognizes the importance of a municipality having the authority to deliver services" and that a municipality is prohibited by s. 25 from giving an advantage or assistance to a particular business without explicit authority. (Here Catalyst was suggesting that the tax rates effectively subsidized owners of the other classes of property.)

[25] The chambers judge found that these arguments did not assist Catalyst by establishing broader principles or informing the interpretation of s. 197. (Para. 87.) The argument based on the Model was, he found, inconsistent with the nature of the decision-making process contemplated by ss. 165 and 197. In his analysis:

... The significant ostensible benefit of the Model, repeatedly referred to by Catalyst in its affidavits and its submissions, is that it provides Council with an “empirical basis” or a “concrete assessment” for its decision making. There is an apparent effort to conflate “empirical” with “rational”. The petitioner’s emphasis on the Model seeks to ascribe a precision and to impose a rigour that is not consonant with the nature of decision making under s. 197. A review of s. 165 and s. 197, as well as a consideration of the actual exercise undertaken by Council in adopting a financial plan and the taxing bylaw that is to give effect to that plan, reveals that the exercise is not, at core, empirical. Instead it reflects the application of judgment based on a knowledge of the community, the community’s needs, the economic challenges it faces, the adequacy of the services it provides, and myriad other considerations. It involves a weighing of multiple competing interests. Though it is an exercise that is not amenable to precise calculations or “concrete assessments”, it remains nevertheless a rational exercise.

In a similar vein, the application of a consumption model contemplates a linear, or roughly linear, relationship with property taxes. The more services the members of a property class use, the higher the taxes of the class. This formulation is, however, at odds with the entitlement of a municipality to discriminate in fixing property tax rates. The very essence of a right to discriminate is that Council can deviate, albeit for relevant purposes, from such a linear relationship or from the need to treat members of different classes in the same way.

The fact that the adoption of the Bylaw reflects the agreement of several members of Council is also significant. These individuals are likely to weigh the benefits and factors relevant to the Bylaw differently. The likely differences in their respective opinions, while leading to consensus on the Bylaw, also belies both the value and tenability of relying on a model that has a single focus – that of consumption – to establish the property tax rates for different property classes within a municipality. [At paras. 89-91; emphasis added.]

Although the consumption of municipal services by a given class was a “potentially” relevant factor that could be considered by a municipal council in fixing property tax rates, the weight to be given to such information was a matter for the council alone. In the Court’s words, “[i]t is up to council to fit and weigh such information, together with other categories of relevant information, into its decision-making matrix in the way it considers appropriate.” (Para. 93.)

[26] The chambers judge reviewed the information that had been available to the Council, including the Municipal Sustainability Model, which it had clearly considered. In his analysis:

Ultimately, in the 2009 Financial Plan Bylaw, the [District] took the information available to it and developed a detailed Plan which dealt not only with the revenue it anticipated generating from different sources including property taxes, but also with ongoing service levels as well as with anticipated capital expenditures. The breadth of this information again speaks to the complexity and discretionary nature of the exercise. As it relates to the distribution of property tax rates, Council referenced the work of the Committee and set the objective of further reducing Class 4 tax rates over the next five years. It also established the following specific policies: [See quotation at para. 21 above.]

He accepted that Council’s decision was based on many competing objectives and policies that could not be precisely expressed or measured. (Para. 108.) In these circumstances, the chambers judge said, Council could not be expected to explain how it had weighed the information before it or exactly how the Class 4 tax rates or the ratio between Classes 1 and 4 had been established.

[27] Finally, the chambers judge turned to the question of whether the Bylaw was within a range

of “reasonable and acceptable outcomes” – the question that also lies at the heart of Catalyst’s appeal in this court. Whilst acknowledging that the ratio of Class 1 to Class 4 rates in North Cowichan was the highest in the Province in 2008 and still remains very high, he was of the view that some of Catalyst’s evidence “goes to broad structural difficulties associated with major industry doing business in British Columbia or in Canada as opposed to in other jurisdictions. These are matters properly addressed by different levels of government and not by the courts.” (Para. 110.) Further, the fact that North Cowichan’s ratio was “at the far end of the spectrum” did not mean that the result was not an acceptable outcome; in Voith J’s analysis:

The fact that each of Mr. Frame, the Tax Restructuring Committee which included the Mayor, and Council came to three different outcomes for 2009 Class 4 tax rates reflects this. There will always be outliers in the data. Such outliers are not, of necessity or even on a persuasive basis, unacceptable outcomes.

All of this statistical information was before Council when it made its decision. The comments of Hall J. in *O’Flanagan* are apposite:

As to the argument that the Bylaw should be seen as encouraging development rather than taxing parcels that can or will benefit from the service, I consider that submission as being beyond the purview of a reviewing court. The ultimate effects of a bylaw are proper considerations for a municipal council concerned with policy issues. I fail to see how a court could properly address such concerns. I would not accede to this argument.

I am of the view that the Bylaw is rationally supported and that the effects or outcomes it creates are within the range of permissible outcomes. Accordingly the Bylaw is reasonable. [At paras. 111-13; emphasis added.]

Nor was he persuaded that the District’s acknowledgment that Class 4 tax rates had “gotten off track” amounted to an admission that the Bylaw was unreasonable in law.

[28] For the same reasons, Voith J. rejected Catalyst’s submission that the large disparity between tax rates on Classes 1 and 4 meant that the rates were inequitable. Catalyst’s petition was dismissed.

On Appeal

[29] Catalyst’s grounds of appeal are stated in very general terms in its factum. It alleges that the chambers judge erred in:

- (a) failing to correctly apply the reasonableness standard to the tax rates set by the Bylaw in determining the validity of the Bylaw; and
- (b) failing to properly interpret and apply section 197 of the *Community Charter*, S.B.C. 2003, c. 26 in determining the scope of the District’s taxing authority and the policies to be taken into account by the District in exercising that authority.

[30] Counsel’s oral submissions were necessarily more specific and built on the facts found by the chambers judge and on his exposition of the relevant law, which as noted earlier Catalyst does not challenge. First, counsel submits that the chambers judge failed to provide any real analysis as

to why he regarded the tax rates adopted in the Bylaw as objectively or rationally supportable – that having enunciated the principle that the judicial review of a municipal decision should be “meaningful and effective”, he did not ‘carry through’ and apply the requisite degree of analysis and scrutiny. Catalyst also emphasized the District ‘s own acknowledgement, through Mr. Frame, that its Class 1: Class 4 tax ratio is too high or “off track” and that North Cowichan has begun a shift towards “neutrality”. (The Mayor’s official rationale for this shift was, I note, not based on the Consumption Sustainability Model but on the desirability of reducing the District’s overdependence on one class of property.) Catalyst regards this acknowledgement – with which the chambers judge did not express any disagreement – as logically and legally incompatible with his conclusion that the Bylaw was not unreasonable.

[31] Closely related is Catalyst’s argument regarding the role played by the “history” of tax ratios in the District over the past several years. As we have seen, the District simply tried to keep the amount of taxes paid in respect of each property class unchanged from year to year, ignoring the rapid increase in the assessed values of residential property in comparison to the much slower increase in the Major Industry values. Faced with the extreme imbalance that had been allowed to develop, Council concluded in 2009 that a dramatic increase in property taxes in the Residential class would effect a hardship on taxpayers of that class and opted for a slow “shift” towards “neutrality”. Mr. Millen submitted that while it is understandable how the present situation came about, an unreasonable bylaw cannot be saved either by the fact that it reflects a policy that evolved gradually over time, or by vague assurances that the municipality intends to remedy the situation in the future. Rather, Bylaw No. 3385 must be considered on a stand-alone basis without regard to previous or future years – a principle supported by the statutory taxation scheme, and in particular the requirements of ss. 185 and 197 of the *Community Charter*. Considered this way, it is said the Bylaw lacks any rationale connected to the purpose of the statute or any other policy grounded in the “best interests of the community as a whole” and is simply an historical anomaly.

[32] In this regard, Catalyst relies on the observations of the majority of the Court, *per* Bastarache and LeBel JJ., in *Dunsmuir*, who said this in their discussion of the standards of patent unreasonableness and [un]reasonableness *simpliciter*:

... both standards are based on the idea that there might be multiple valid interpretations of a statutory provision or answers to a legal dispute and that courts ought not to interfere where the tribunal's decision is rationally supported. Looking to either the magnitude or the immediacy of the defect in the tribunal's decision provides no meaningful way in practice of distinguishing between a patently unreasonable and an unreasonable decision. As Mullan has explained:

[T]o maintain a position that it is only the “clearly irrational” that will cross the threshold of patent unreasonableness while irrationality *simpliciter* will not is to make a nonsense of the law. Attaching the adjective “clearly” to irrational is surely a tautology. Like “uniqueness”, irrationality either exists or it does not. There cannot be shades of irrationality.

See D. J. Mullan, “Recent Developments in Standard of Review”, in Canadian Bar Association (Ontario), *Taking the Tribunal to Court: A Practical Guide for Administrative Law Practitioners*

(2000), at p. 25. [At para. 41; emphasis added.]

The majority also noted the unpalatability of retaining an irrational decision, as described by LeBel J. in his concurring reasons in *Toronto (City) v. C.U.P.E. Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77:

In the end, the essential question remains the same under both standards: was the decision of the adjudicator taken in accordance with reason? Where the answer is no, for instance because the legislation in question cannot rationally support the adjudicator's interpretation, the error will invalidate the decision, regardless of whether the standard applied is reasonableness *simpliciter* or patent unreasonableness ... [At para. 108; emphasis added.]

In Catalyst's submission, the District has not enunciated any objective standards or rational criteria by which the tax rates can be judged. In the absence of such standards, it submits, the Bylaw is arbitrary, unfair and unreasonable.

[33] I agree with Mr. Millen that Bylaw No. 3385 must stand or fail on its own – i.e., that an unreasonable bylaw could not be 'saved' by the existence of an explanation, however 'understandable', of how it came about. I do not agree, however, that in order to be reasonable, a decision of a municipal council must be founded on a particular set of objective criteria or even a demonstrably "rational" policy. Certainly nothing in the statutory context reviewed above supports such a principle. The only legislative purpose that emerges, in my view, from the provisions of the *Community Charter* dealing with property taxation is that every municipality must have an annual financial plan for collecting revenue that will enable it to meet its expenditures from year to year. As Voith J. observed, a municipality has virtually unfettered discretion to consider whatever information it deems relevant and to allocate the tax burden among the classes as it sees fit. Nor is a council required to give reasons for adopting bylaws unless the statute so specifies.

[34] This accords with the obviously political – as opposed to administrative or adjudicative – functions of municipal councils. Members of such councils are elected to act in what they believe is in the best interests of the municipality rather than to play an independent role in adjudicating between specific interests. They bring certain views – on the basis of which they are elected – to bear on municipal decisions. These views may include ideologies that may or may not place value on the presence of industrial enterprises in the municipality, even those that employ large numbers of workers. Other members of the same council may have different views. Compromises are often necessary. Council members do not give reasons in any formal sense. Finally, they are 'accountable' in a way no court or administrative tribunal is accountable – i.e., at the ballot box. As was noted by Ann McDonald in "In the Public Interest: Judicial Review of Local Government" (1983) 9 *Queen's L.J.* 62:

Once elected ... the council is entrusted with responsibility for governing, not just in the interest of those who elected them, but in the interest of the community generally, that is, in *the public interest*. This is a fairly vague and controversial concept, however. It is a generalized judgment of what is best for individuals, *as a part of a community*. From the perspective of particular individuals and interest groups, the public interest may be conceived

differently and, as amongst them, views of the public interest will inevitably conflict. A council making its decision on the public interest will identify and weigh a wide variety of competing considerations: the demands of various interested parties, the advice of its experts, data from its own research resources. And it will undoubtedly be influenced by the preferences expressed by the electorate. The decision is ultimately a matter of choice and what a council decides is necessarily its own collective perception of the public interest.

The voters of a community give their elected council members the final judgment in this controversy. Whether the councillors are right or wrong in their judgment depends on the vantage point of the person making this assessment, but in any event, this is the decision they were elected to make. There may, in fact, be no right or wrong in the matter. Persons displeased with a council's decision have "a remedy at the polls". [At 100, quoted by McLachlin C.J.C. in dissent in *Shell Canada, supra.* at para. 22.]

[35] With respect to judicial authorities on the question of standard of review, it is generally assumed that *Dunsmuir* applies to the decisions of municipal councils and that therefore the standard of "patent unreasonableness" previously applied in *Rascal Trucking* has been "collapsed" into one of [un]reasonableness *simpliciter* – a standard that under the older case law required the decision be "supported by reasons that can bear even a somewhat probing examination". (See *Director of Investigation and Research v. Southam Inc.* [1997] 1 S.C.R. 748 at para. 56; *Baker v. Canada (Minister of Immigration)* [1999] 2 S.C.R. 817 at para. 63; *Ryan v. Law Society (New Brunswick)* 2003 SCC 20, [2003] 1 S.C.R. 247 at para. 47; and *R. v. Owen* 2003 SCC 33, [2003] 1 S.C.R. 779.) It is difficult to imagine how a court could carry out a "probing examination" of a council's decision adopting a bylaw other than by considering the bylaw itself.

[36] *Dunsmuir* was concerned, of course, with the standard of review to be applied by courts of law to the decisions of administrative tribunals. It made no direct reference to the decisions of municipal councils. The Supreme Court defined "reasonableness" not in terms of the older caselaw but in terms of whether the decision falls within the range of acceptable outcomes that are defensible in respect of the facts in law. (Para. 47.) This led Ryan J.A. for this court in *Teamsters' Local Union 31, supra*, to suggest that "if the new reasonableness standard was meant to be indistinguishable from the reasonableness *simpliciter* standard, reference would have been made to previous definitions of reasonableness *simpliciter* as a guide to the new standard." (Para. 83.) In *Khosa, supra*, it was said that reasonableness is a single standard, but takes "its colour from the context." Where the decisions of municipal councils are concerned, the factors that led the Court in *Rascal Trucking* (at paras. 31-2) to choose a standard of patent unreasonableness still form part of that "colour", in my opinion.

[37] It is a central principle of democratic government that elected decision-makers must be given the highest degree of deference by courts of law, provided those decision-makers remain within constitutional and statutory boundaries. As seen earlier, this deference was famously enunciated in *Wednesbury, supra*, where Lord Greene observed that the Court's task when confronted with a municipal decision is not to decide what the Court thinks is reasonable, but to "decide whether what is *prima facie* within the local authority is a condition which no reasonable authority, acting within

the four corners of their jurisdiction could have decided to impose.” (At 233.) I do not read *Dunsmuir* as departing from this principle where policy-laden or legislative decisions are concerned. While it may be true that ‘something is either rational or is not’, I suggest that a wider range of decisions will be seen as reasonable by a court than might appear to be objectively justifiable according to any particular economic theory or empirical analysis.

[38] So it is in this case. The District of Cowichan, having considered *inter alia* Catalyst’s Consumption Sustainability Model and the report of its consultants, also considered the interests of residential taxpayers and declined to make a dramatic change from past practice. The result was that the District maintained much of the imbalance that led to these proceedings, a decision which many of the property owners no doubt find eminently “reasonable”. As the chambers judge recognized, Catalyst will invariably find the suggestion that the solution lies ‘in the ballot box’ to be small comfort. Convincing other taxpayers to accept a greater share of the tax burden seems improbable, if not impossible. Nonetheless, Catalyst’s hope does lie in the political process: if it is important to the District to retain Catalyst as an employer and a taxpayer, the “collective perception of self-interest” of municipal (or provincial) officials will lead to a recognition that significant accommodation is necessary. That, however, would be a policy decision for elected officials rather than a decision for a court of law. Whether Bylaw No. 3385 was “rational” in terms of Catalyst’s sustainability model, I do not believe it could be said that it was a bylaw that no reasonable authority, acting within the four corners of its jurisdiction, could have decided to impose, or that lay outside a “range of possible, acceptable outcomes which are defensible in respect of the facts and law.”

[39] Seeing no error in the conclusion of the court below, I would dismiss the appeal, with thanks to counsel for their able submissions.

“The Honourable Madam Justice Newbury”

I agree:

“The Honourable Madam Justice Huddart”

I agree:

“The Honourable Madam Justice Saunders”