



***CATALYST PAPER CORPORATION V.
NORTH COWICHAN (DISTRICT), 2009
BCSC 1420***

On October 16, 2009, the B.C. Supreme Court released its judgment in Catalyst Paper Corporation (“Catalyst”) and the District of North Cowichan (the “District”), dismissing Catalyst’s petition to set aside the District’s tax rate bylaw.

Catalyst challenged the property tax rates established by the District’s Tax Rates Bylaw 2009, Bylaw No. 3385 (the “Bylaw”). Specifically, it sought a declaration that the tax rates established under the Bylaw for Class 4 Major Industry properties was unreasonable and, thereby, illegal, because there was no correlation between the amount of the municipal services consumed by Catalyst and the share of the taxes that it paid.

Catalyst also challenged the 2009 property tax rate bylaws adopted by each of the City of Campbell River, the City of Power River and the City of Port Alberni in four companion proceedings. The parties decided that in the *Catalyst* decision, the court was to address the legal issues common to all four proceedings and, subsequently, the reasons will only address the evidence specific to each particular situation in the context of the legal framework that the *Catalyst* decision establishes.

The Honourable Mr. Justice Voith for the B.C. Supreme Court held that the Bylaw was not unreasonable. The District was under no obligation to set the tax rates in accordance with a consumption-based formula proposed by Catalyst. Instead, the considerations that go into adopting a financial plan and the taxing bylaw are knowledge of the

community, the community needs, the economic challenges of the community, the adequacy of the services provided and myriad other considerations, which the District properly weighed in the present situation.

In coming to his decision, Voith J. commented on a number of important principles of municipal and administrative law, such as the ability of a court to review a municipal policy decision, the level of deference accorded to a municipal council in such review and the burden of proof that the parties have in such situation.

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Ultimately, Voith J. recognized that the discrepancy between the consumption of the municipal services and the Class 4 tax rates is a structural issue that has widely been recognized as a problem. However, the pace at which and the extent to which the reduction in the Class 4

rate is to take place is within the discretion of individual municipalities.

BACKGROUND

THE STATUTORY AUTHORITY TO FIX TAXES

The main provisions of the *Community Charter* that pertain to the authority of a municipality to impose property value taxes are section 165 and section 197. Section 165 requires a municipality to establish and adopt, by bylaw, a financial plan before establishing its annual tax bylaw.

Section 197 provides that, after adoption of the financial plan but before May 15, a council must by bylaw impose property value taxes for the year by establishing tax rates. Section 197 confers an unfettered discretion to council in terms of the factors it can consider in fixing property tax rates.

REFUSAL OF CATALYST TO PAY TAXES

Catalyst is the largest specialty paper and newsprint producer in Western North America. Catalyst has four



pulp and paper operations in British Columbia, located at Crofton (North Cowichan), Port Alberni, Elk Falls (Campbell River) and Power River. In its operations, Catalyst is self-sufficient. Its products are overwhelmingly shipped out and delivered by sea rather than over municipal roads. The water used by the mill is delivered to Catalyst through its own pumping and pipe system. The mill does not use the municipal sewer system as it has its own waste management system. The mill has its own fire trucks and emergency vehicles though it is able to look to the municipality for fire and police protection.

Since 2003, Catalyst had written numerous letters to officials in the municipalities where it operated, claiming that the tax rates bore no relationship to the municipal services Catalyst actually used or consumed. Catalyst calculated that for every \$1 of municipal services received from the District, Catalyst paid \$6.50 in taxes. In 2008, Catalyst sought to make clear that the status quo was no longer sustainable or tenable from its perspective.

In support of its premise that the tax rates bore no relationship to the municipal services actually used or consumed, Catalyst generated a series of reports that provided a model for distribution of property taxation between different classes of property. Supported by such reports, Catalyst indicated to the District on April 27, 2009 that it would only pay \$1.5 million in property taxes for 2009, notwithstanding the required payment of \$6.8 million under the Bylaw.

On May 8, 2009, the District adopted the Bylaw, and subsequently, Catalyst initiated a legal action challenging the legality of the Bylaw.

THE DISTRICT'S ARGUMENT THAT THE COURT HAS NO AUTHORITY IN THIS MATTER

The District argued that Catalyst was asking the court to engage in a process which was beyond the court's authority. The District asserted that it was an independent level of government with the authority to pass bylaws and the bylaws had the same force and effect as legislation enacted by the provincial government, and thus, the deliberations of council to determine tax rate bylaws were purely political decisions made in good faith by elected officials acting as community representatives; therefore, the rates could not be subject to judicial review.

ANALYSIS

DOES THE COURT HAVE AUTHORITY TO REVIEW THE BYLAW?

Voith J. observed that municipalities have only the powers that have been expressly delegated to them or that are directly derived from the delegated powers, which powers are not unlimited, even if the words of the legislation on their face do not impose a limit. The fact that the municipalities are political bodies does not insulate their acts from review.

Having said that, Voith J. considered a number of decisions where courts discussed the degree of deference to be given to administrative decisions that have significant policy and political content, and concluded that:

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.

WHO HAS THE BURDEN OF PROVING THAT THE BYLAW IS UNREASONABLE?

The burden of proving that a bylaw is unreasonable generally rests with the party challenging the bylaw.

Voith J. stated, however, that there is some obligation on the part of the municipality whose bylaw is challenged to disclose some of the factors and considerations that underlay its adoption of the bylaw because:

- a. reasonableness of that decision necessitates some understanding on the part of a court of how the decision was made, and
- b. there should be some evidence in the record which supports the reasonableness or rationality of the municipal decision being challenged.

Ultimately, there must 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.

IS THE BYLAW UNREASONABLE?

Catalyst argued that the Bylaw was unreasonable because:

- a. a consumption of services model provides a rational basis for fixing property tax rates, and

should be used unless the District advances a different coherent theory to support the Bylaw;

- b. the decision making process engaged in by Council in relation to the Bylaw was unintelligible; and
- c. the Bylaw was outside the range of possible and acceptable outcomes available to Council.

Voith J. found that the Bylaw was not unreasonable on all these bases.

Firstly, a single minded reliance on a consumption model was inconsistent with the nature of the decision making exercise contemplated in sections 165 and 197. Instead, these sections reflect 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.

Secondly, the need for transparency was satisfied (at least in part) by various requirements of the *Community Charter*, such as open meetings (s. 89), two council meetings held prior to adoption of a bylaw (s. 135), and public consultation before a financial plan bylaw is adopted (s. 166).

The materials considered by Council in considering the Bylaw prior to adoption included, among other information, various communications and presentations from Catalyst including Catalyst's consumption-based tax model. Voith J. concluded that:

Based on the [reviewed] information it was clear that Council had before it and considered many diverse factors relevant to the Bylaw and in particular to Class 4 tax rates. I do not believe it can be said that the types of information or the multiple competing objectives before Council were

not intelligible, transparent, rational or that they were not properly relevant to the task faced by Council in exercising its power under s.197 of the *Community Charter*.

Lastly, even though the Class 4 to Class 1 tax ratio established by the Bylaw when compared to other municipalities was at the far end of the spectrum, it did not mean that the Bylaw was outside the range of possible and acceptable outcomes.

Voith J. commented that this was not a case where an irate corporate taxpayer rushed to court to challenge its tax rates. Catalyst had been trying for more than a half decade to address a structural issue that is widely recognized to be a problem. The municipalities recognize that Class 4 rates are too high and need to be reduced. However, the pace and the extent to which that reduction is to take place is at the discretion of various municipalities and is not a matter for a court to decide.

WHERE TO FROM NOW?

The decision sets a legal framework for the three outstanding challenges by Catalyst and similar challenges brought by other heavy industries across the province. Any appeal of Voith J.'s decision must be initiated within 30 days of the decision.

Alternatively, heavy industry can lobby the provincial government for a legislative resolution of the problem.

In the meantime, Catalyst is subject to the entirety of the taxes assessed under the Bylaw.

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