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SC 525 AA09 v. Four Seasons Hotel Ltd et al

Link to Property Assessment Appeal Board Decision

ASSESSOR OF AREA 09 - VANCOUVER SEA TO SKY REGION

v.

FOUR SEASONS HOTEL LIMITED
CADILLAC FAIRVIEW CORPORATION LIMITED and
PROPERTY ASSESSMENT APPEAL BOARD

SUPREME COURT OF BRITISH COLUMBIA (S084949) Vancouver Registry

Before the HONOURABLE MADAM JUSTICE GEROW
Date and Place of Hearing: December 4 and 5, 2008, Vancouver, BC

P.W. Klassen for the Appellant
W.G. Allen, R. Breder for the Respondent, Four Seasons Hotel Limited

Hotel – NOI – Cap Rates – FF&E – Economic Obsolescence

The Four Seasons is a full service hotel which is part of the Pacific Centre mixed-use complex in downtown Vancouver. The Four Seasons is leased from Cadillac Fairview Corporation Limited by the Respondent, Four Seasons Hotel Limited. On May 28, 2008 the Property Assessment Appeal Board (the "Board") rendered a decision concerning the 1999 to 2005 assessments for the Four Seasons Hotel. The issues before the Board were the actual (market) value of the land and improvements and whether the actual value represented equitable value.

The Appellant appealed to this Court, taking the position that the Board erred in law by acting without evidence, by acting on a view of the evidence that could not be sustained and by adopting a method of appraisal that is wrong in principle. In its questions, the Appellant took issue with the management fee and the capitalization rate used by the Board, and said that the appraisal method the Board used was wrong in principle because they did not apply the principle of consistency. As well, the Appellant's questions addressed whether there should have been certain deductions made in respect of the FF&E.

HELD: *Appeal Dismissed.*

This Court found that the Board was not unreasonable in dealing with the management fees in the manner that it did and that there was evidence to support the conclusion that a 3% management fee should be utilized. It also found that the Board did not act unreasonably in analyzing and determining the capitalization rate for comparable properties, or act in the absence of any evidence, or make a determination that was not available to it on the evidence. The Court found that it was not unreasonable for the Board to conclude that the Fairmont transactions were not appropriate comparables to use in the circumstances, or that the method of assessment it adopted was wrong in principle. The Court found that the evidence presented to the Board regarding the FF&E supported the determination made by the Board and that the Board did not act unreasonably in analyzing and determining whether a write down factor should be applied, or make the determination in the absence of any evidence, or make a determination that was not available to it on the evidence. This Court answered all the questions put forth by the Appellant "no".

Reasons for Judgment February 27, 2009

[1] The Assessor Area #09 - Vancouver Sea to Sky Region (the "Appellant") brings this Stated Case appealing a decision of the Property Assessment Appeal Board (the "Board") pursuant to s. 65 of the *Assessment Act*, R.S.B.C. 1996, c. 20. At issue is the valuation of the Four Seasons Hotel (the "Four Seasons") in Vancouver, B.C. over a seven year period from 1999 to 2005 for property tax purposes.

[2] The Four Seasons is a full service hotel which is part of the Pacific Centre mixed-use complex in downtown Vancouver. It was built in 1976 and opened that year. The Four Seasons is leased from the Respondent, Cadillac Fairview Corporation Limited by the Respondent, Four Seasons Hotel Limited (the "Respondent"). By agreement between the parties, the Respondent Cadillac Fairview did not appear at the hearing. As well, the Board did not appear at the hearing although it was named as a Respondent.

[3] On May 28, 2008, the Board rendered a decision concerning the 1999 to 2005 assessments for the Four Seasons. On July 10, 2008, the Appellant filed its Stated Case seeking the opinion of the court regarding whether the Board erred in law in its decision. The issues before the Board were the actual (market) value of the land and improvements comprising the Four Seasons for the assessment years 1999 to 2005, and whether the actual value represented equitable value. In its questions, the Appellant takes the position that the Board erred in law by acting without evidence, by acting on a view of the evidence that could not be sustained, and by adopting a method of appraisal that is wrong in principle.

[4] The parties agree that the best method for determining the value of the Four Seasons for assessment purposes is the income approach. The agreed approach determines the stabilized net operating income (the "NOI") for the property each year and capitalizes that income by a rate of return. The income that is capitalized is not pure property income but is the NOI of the hotel derived from all sources of revenue in the hotel.

[5] It is agreed between the parties that there are three components to be considered in determining the NOI: 1. the land; 2. the building; and 3. the furniture, fixtures and equipment ("FF&E"). Under the *Assessment Act*, the only property to be valued for tax purposes is the land and improvements, i.e. the building, fixture, structure or similar thing constructed or placed on or in the land. The FF&E is not included in the property to be valued, whereas the going concern includes the FF&E. The parties agree that in order to obtain the assessed value of the Four Seasons for the years in question, the FF&E values were to be extracted.

[6] In the questions, the Appellant takes issue with the management fee and the capitalization rate used by the Board, and says that the appraisal method the Board used was wrong in principle because they did not apply the principle of consistency. As well, the questions address whether there should have been certain deductions made in respect of the FF&E.

ANALYSIS

Standard of Review

[7] A threshold issue is the standard of review that is to be applied to the stated questions. Stated Case appeals are limited by s. 65 of the *Assessment Act* to questions of law.

[8] In *British Columbia (Assessor of Area No. 26 – Prince George)* v. *Cal Investments Ltd.*, [1993] B.C.J. No. 93 (S.C.), Ryan J. (as she then was) considered what is a question of law for the purposes of the *Assessment Act* at para. 18:

> For purposes of the Act a "question of law" has been defined as follows:
>
> 1. A misinterpretation or misapplication by the Board of a section of the Act.
>
> 2. A misapplication by the Board of an applicable principle of general law.

3. Where the Board acts without any evidence.

4. Where the Board acts on a view of the facts which could not reasonably be entertained. ....

5. Where the method of assessment adopted by the Board is wrong in principle. ....

[9] This definition was endorsed by the Court of Appeal in *Gemex Developments Corp.* v. *Assessor of Area 12 – Coquitlam* (1998), 62 B.C.L.R. (3d) 354 (B.C.C.A.).

[10] The Appellant takes the position that the appropriate standard of review is correctness because the questions posed are questions of law. The Appellant submits that the Board is not entitled to deference.

[11] The Respondent takes the position that the standard for review is reasonableness because the questions do not constitute questions of law; rather they are fact and evidence intensive. The Respondent submits that in determining the proper standard of review, the court must consider the nature of the question in issue and the expertise of the Board in regard to the issue.

[12] The Supreme Court of Canada recently reconsidered the standards of judicial review in *Dunsmuir* v. *New Brunswick*, [2008] 1 S.C.R. 190, and concluded that there ought to be two standards of review: correctness and reasonableness. Reasonableness is a deferential standard concerned with "justification, transparency and intelligibility within the decision-making process," and with whether the decision falls within a range of possible results which are defensible in respect of the facts and the law (at para. 47). The standard of correctness, which applies in respect of jurisdiction and some questions of law, does not involve deference to the decision maker's reasoning process. Rather, the court "will undertake its own analysis of the question" (at para. 50).

[13] Questions of fact, discretion and policy, as well as questions where the facts and law are intertwined, generally attract a standard of reasonableness. Although many legal questions will attract a standard of correctness, some legal questions attract the standard of reasonableness.

[14] An exhaustive review is not required in every case to determine the proper standard of review. As stated by the majority at para. 62:

> In summary, the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.

[15] The analysis must be contextual. The factors to be considered may include:

1. the presence or absence of a privative clause;

2. the purpose of the tribunal;

3. the nature of the question; and

4. the expertise of the tribunal.

[16] In *Vancouver Pile Driving Ltd.* v. *British Columbia (Assessor of Area No. 8 – Vancouver Sea to Sky Region)*, 2008 BCSC 810, the appropriate standard of review for the Board was considered. It was determined that the standard of review on an appeal from the Board could be either reasonableness or correctness depending on the nature of the question.

[17] I have reached the same conclusion regarding the standard of review from an analysis of the factors set out in *Dunsmuir.*

[18] There is no privative clause in the *Assessment Act*, however, the right to appeal from a decision of the Board is narrowly confined to stated questions of law in s. 65.

[19] The purpose of Board and the appeal procedures provide a scheme for resolving disputes between the Assessor and tax payers: *British Columbia Assessor of Area No. 27 - Peace River* v. *Burlington Resources Canada*, 2005 BCCA 72. The Board is a highly specialized tribunal whose members have expertise in administering the *Assessment Act* and *Regulations*, and in considering appraisal issues in determining the valuation of properties for property tax purposes.

[20] I have concluded that the questions are factual in nature as that they are questions of fact, discretion and policy. The questions raise the issue of whether the Board had any, or sufficient, evidence to make its determinations regarding the various percentages and deductions which it used, and whether it used the wrong method of appraisal because it was inconsistent in its approach. As stated earlier, the definition of an error of law includes situations where the Board acts without any evidence or on a view of the facts which could not reasonably be entertained. As well, the definition includes the situation where the method of assessment adopted by the Board is wrong in principle.

[21] The Appellant submits that another factor that should be considered is the importance of the questions to the legal system at large and as an issue of general law. The Appellant argues that the questions posed are of general importance because they apply to assessment law in general and will apply to future cases. Consequently, the standard of review ought to be correctness and the Board is not entitled to deference.

[22] However, it is clear from the Board's reasons that the assessment of the Four Seasons is unique and has limited precedential value. In its reasons, the Board notes that the valuation is complicated by the fact that the hotel is part of a larger complex, which includes two office towers, a retail mall and underground parking, and states at para. 11:

> The hearing of these appraisals was long and drawn out. It occupied 30 days over a period of more than one year. Both parties engaged counsel and a number of expert witnesses. Perhaps because of the number of years in issue and the combined amount of money at stake, the parties felt it worth their while to litigate the appeals in this manner. From the Board's perspective, however, a lengthy hearing of this nature is an unsatisfactory way to resolve these very difficult issues. We say this because the disputes are over matters that at the end of the day are incapable of proof. Their resolution involves consideration of complex appraisal theory, consideration of the opinions of individuals with extensive experience and expertise in the valuation of hotels, who despite their experience and expertise, cannot agree on the "right" answer, and the exercise of appraisal judgment. The fact is, there are no absolute or "right" answers to the questions raised in an appeal of this nature. We appreciate that in weighing the evidence before us to determine which evidence gives us the "best estimate" of the probable market value of the land and improvements comprising the Four Seasons Hotel in any given assessment year, that our findings with respect to the "best evidence" in this case may not necessarily provide the answers for future cases where different evidence may be available. We can only hope that in our weighing of the evidence and opinions presented during the course of this hearing, and in the articulation of our rationale for the exercise of our judgment on the evidence presented, we can provide some guidance to the appraisal community that may assist them in resolving these difficult theoretical issues.

[23] Having considered all of the factors, it is my view that the appropriate standard of review to be applied to the questions posed is reasonableness.

Question 1: Did the Board err in law when it held, contrary to the evidence, that the appraisers for both the Appellant and Respondent applied a three percent (3%) management fee as an expense when stabilizing the net operating income of the property under appeal?

[24] The net operating income figures ("NOI") for the Four Seasons for the years in issue were agreed upon by the parties at a settlement conference. The agreed definition of the NOI was: "a stabilized one year's maintainable income stream based on trailing years' income with deductions for management, reserve for replacement and structural allowances". No evidence of the specific components of either party's total was presented to the Board during the hearing other than what was put forward in the respective expert reports of the parties.

[25] The Appellant asserts that the Board concluded contrary to the evidence, or alternatively, that the Board acted without any evidence or on a view of the facts that could not reasonably be entertained, in finding that the appraisers retained by the parties used a 3% management fee.

[26] In essence, the Appellant argues that the Board erred in law by not adding an incentive fee to the management fee. The Appellant submits that the management fee and the incentive fee should be added together in order to determine the appropriate deduction for management fees for the purposes of the NOI.

[27] In an expert report filed by the Appellant, the expert Reuben Danakody states under the heading "Management": "An expense of 3.0% is adopted for management expenditures" (Exhibit 29, p. 72). Mr. Danakody goes on to state under a separate heading "Franchise Incentive Fees": "In addition to the management expense, there is an incentive fee based on performance. The average fee expense in the past ten years has been approximately 1.3%."

[28] The principal expert appearing for the Respondent, Joe Rosen, states under the heading "Management Fees":

> The Hotel is managed by Four Seasons Hotels under a management fee contract. Four Seasons received a base management fee of 3% of total revenue, plus an incentive fee.

[29] The Board discusses the definition for the NOI agreed to between the parties at para. 16:

> The NOIs are not representative of the actual earnings of the hotel but are based on the following agreed definition: "a stabilized one year's maintainable income stream based on trailing years' income with deductions for management, reserve for replacement and structural allowances". In determining NOI, therefore, the appraisers made adjustments to actual income and expenses to reflect market norms, and in stabilizing expenses applied a 3% management fee, a 2% structural allowance, and a 4% reserve for replacement of FF&E. We are satisfied that the agreed NOIs reflect economic income and expenses stabilized in accordance with the agreed definition.

[30] As stated earlier, the Appellant asserts that the Board erred in not adding the management and franchise incentive fee together to make up the management fee. The Respondent takes the position that the agreed definition for NOI referred to "deductions for management" and did not refer to a deduction for franchise incentive fees. That in my view is an issue of fact and not an issue of law.

[31] In both expert reports, the appraisers identified the management fee as 3%. It is difficult to see how the Board utilizing the 3% management fee is an error of law as defined by the case law. There was clearly evidence before the Board that the management fee was 3%.

[32] The Appellant also asserts that there was an error in law because the method of assessment adopted by the Board was wrong in principle, relying on *Lornex Mining Ltd.* v. *British Columbia (Assessor of Area No. 23 – Kamloops)*, [1987] B.C.J. No. 2555 (S.C.). However, the Appellant has presented no authority for the proposition that the Board's failure to include the incentive fee in the management fee is wrong in principle as a method of assessment. As set out above, the appraisers identified the management fee as 3%.

[33] In my view, it cannot be said that it was unreasonable for the Board to have determined that a 3% management fee should be utilized.

Question 2: Did the Board err in law when, in analyzing sales for the purpose of determining a market derived capitalization rate in order to value the property under appeal, it applied an "industry standard" management expense of three percent (3%) as opposed to the "actual" management expense applicable to the property under appeal, when both the Appellant's and the Respondent's appraiser, when stabilizing the net operating income of property under analysis for the purpose of valuing the subject property, used a stabilized actual management fee applicable to this property?

[34] The Appellant asserts that the Board erred in law because the method of assessment adopted by it was wrong in principle. The Board derived a capitalization rate for a comparable property, the Westin Bayshore, by using a 3% management fee. The Appellant says the Board chose the 3% standard management fee arbitrarily and contrary to the evidence. The Appellant submits that both appraisers used actual management fee data when determining the NOI and producing their appraisals. The Westin Bayshore should have been analyzed using actual management fees rather than an arbitrary industry standard.

[35] The Appellant argues that the effect of this, and the use of only one year's trailing income, was to raise the NOI for the Westin Bayshore, resulting in a capitalization rate of 7.1% rather than the 6.27% used by Mr. Danakody for this sale. The Appellant says that the Board erred by then using this 7.1% to conclude that capitalization rates of 7.0% and 7.15% were appropriate for the subject property for the years in question, and that this in turn impacted the Board's ultimate conclusions on value.

[36] The Board dealt with the issue of comparable properties at paras. 73 and 74:

> We are discouraged by the limited market evidence available. Given the paucity of good market transactions, a capitalization rate analysis using the methods employed by Mr. Rosen with market inputs would have been helpful. Overall, we find that the best evidence of a market capitalization rate to apply to the Four Seasons is that indicated by the Westin Bayshore sale based on the last year's stabilized NOI (2004) at 7.1%. The 2003 figures stabilized result in the same capitalization rate. While this sale postdates all of the valuation dates in issue and has not been adjusted for surplus land, it is nevertheless a market transaction. ...
>
> Although the sale of the Pan Pacific is also a market transaction, and is more contemporaneous with some of the valuation dates in issue, the difficulty in actually determining the sale price leads us to place less weight on this sale. Relying principally on the sale of the Westin Bayshore with some support from the sale of the Pan Pacific, we find the most appropriate capitalization rate for the 2003 through 2005 assessment rolls is 7.0%.

[37] The Appellant asserts that this is the wrong capitalization rate to apply, and that it was caused by the Board applying a standard 3% management fee to the Westin Bayshore arbitrarily and contrary to the evidence. However, there was evidence as to management fees for the Westin Bayshore in an appraisal report, filed as Exhibit 27, which indicated that base management fees typically ranged between 2.0% and 4.0% of total revenue.

[38] As well the Board discussed the evidence of another expert appraiser, Paul Martin, who the Board described as an accredited appraiser who has extensive experience in real estate and the hospitality industry, at para. 39:

> Mr. Martin typically takes the income from the year prior to the sale, stabilizes it for management fees and reserves, and with the resulting NOI, calculates his capitalization rate. In his experience, appraisers primarily use market capitalization rates indicated by sales activity. With respect to Mr. Rosen's concerns about this approach, Mr. Martin's evidence is he has not had any problems in obtaining reliable information and that he has been able to use that information to arrive at a 12-month equivalent financial statement. He explains that in stabilizing the NOI, typical deductions include a 4% reserve for replacement and 3% management fees.

[39] It is apparent that there was evidence before the Board regarding the management fee of the Westin Bayshore and appraisal practice generally. In my view, it cannot say that it was unreasonable for the Board to deal with management fees in the manner it did.

> **Question 3: Did the Board err in law when it used one year's trailing income as the income stream for the purpose of analyzing and determining a capitalization rate from comparable sales when the formulization agreed upon and used by both appraisers for the purpose of determining a stabilized income for the property under appeal was "a stabilized one year's maintainable income stream based on 'trailing years' (more than one years) income..."**

[40] The Appellant asserts that this question turns on the same principle as question 2; that is, in determining the value under income approach using data from comparable properties, the comparable properties must be analyzed in the same way as the subject property.

[41] When it came to determine the NOI for comparable properties, the Board was provided with three reports from experts whose opinions about the proper appraisal approach differed. In other words, there was a high level of expertise before the Board presenting different methods with which to determine the NOI for the comparable properties.

[42] The Appellant is, in essence, arguing that the Board should have preferred the appraisal approach of its expert, Mr. Danakody, over the appraisal approaches taken by the other appraisal experts.

[43] The Board rejected Mr. Danakody's approach as inconsistent and preferred that of Mr. Martin, the other expert called by the Appellant, as stated at para. 61:

> The agreed stabilized NOI is based on historical figures. Thus, using the actual performance of sale properties (which represents historical market performance rather than projected income) provides comparability. We heard evidence, however, that in any industry there will be trough years and peak years, which is one of the reasons why Mr. Danakody stabilized income for the sales. His stabilization, however, is inconsistent. For some of the sales, he relies primarily on the income and expenses in the year immediately preceding the sale date, whereas for other sales he uses a number of years to establish a trend, even going forward in time to confirm his stabilized figures. He is also inconsistent in applying standard expenses for example management, which ranges from 3% to 6.5% of gross revenue for the six top-tier hotels he presents. Given Mr. Danakody's inconsistent analysis, we prefer Mr. Martin's simpler approach in which the last year's revenue and expenses are used with only the management fees stabilized to 3%, the reserves for replacement at 4%, and 2% structural reserve deducted. While Mr. Martin's approach relies on only one year's performance rather than "trailing years" as per the definition agreed to by the parties, it is based on historical performance and provides a more consistent approach than the erratic stabilization applied by Mr. Danakody.

[44] The Board noted that while the last year's income may be used to analyze sales, it is important that the results be understood and applied cautiously. The Board then went on to analyze a number of sales, to find that the Westin Bayshore was the most appropriate comparison, and to look at the two years prior to the sale as the best evidence of the market capitalization rate.

[45] The Appellant has failed to satisfy me that the Board either acted unreasonably in analysing and determining the capitalization rate from comparable properties or acted in the absence of any evidence, or made a determination that was not available to it on the evidence.

> **Question 4: Did the Board err in law when it found that a number of sales of comparable properties to the REITs and a sale of a majority interest of a comparable property were non-arm's length sales?**

> **Question 5: Did the Board err in law when it did not take into account and rejected as inappropriate for use as comparable sales for analysis to determine a capitalization rate, a**

number of sales to a REIT and the sale of a majority interest of a property because they had no "market exposure" and were "non-arms length sales"?

[46] The Appellant concedes that questions 4 and 5 are closely connected. The questions raise identical issues and both the Appellant and Respondent dealt with them together. The Appellant argues that the Board erred in law in failing to comprehend the nature and extent of an "arm's length" transaction and market exposure in the context of the facts, and consequently failed to consider all the evidence available to it in determining the actual value of the Four Seasons.

[47] The Appellant's expert, Mr. Danakody, used the Fairmont hotels as comparables in his income approach analysis. Legacy Hotels Real Estate Investment Trust (the "REIT") acquired three of the hotels (the Empress Hotel, the Hotel Vancouver and the Waterfront) from Canadian Pacific Hotels Real Estate Corporation.

[48] There was extensive evidence and argument before the Board as to whether there was a relationship between the purchaser and vendor of the three of the Fairmont hotels. At para. 67, the Board noted that since the vendor of the Fairmont hotels held approximately 35% of the shares of the purchaser and holds a long term management contract for the hotels, the parties were not at arm's length. As well, the Board noted that the properties had no market exposure. The Board concluded that it was unable to rely on the three Fairmont transactions, not because they were REIT transactions, but because the transactions were between related parties and the properties were not exposed to the market.

[49] The other Fairmont hotel transaction (the Chateau Whistler) was the sale of a partial interest in which the minority shareholder bought out the majority shareholder, and the property was not exposed to the market.

[50] It is apparent that there was evidence before the Board on which it could make a finding of fact regarding a relationship between the purchasers and vendors involved in the transactions of all of the Fairmont hotels. In my view, it cannot be said it was unreasonable for the Board to conclude that the Fairmont transactions were not appropriate comparables to use in the circumstances, or that the method of assessment it adopted was wrong in principle.

Question 6: Did the Board err in law and act without evidence when, after having concluded that the value of certain categories of furniture, fixtures and equipment (FF&E) belonging to the property under appeal that had been expensed by the Appellant in the year of purchase should not be deducted from the "going concern value" of the property under appeal, it deducted only a portion of the value of such categories of FF&E because although these items were expensed, "these items had a longer expected life"?

[51] The Appellant asserts that the evidence before the Board supported the conclusion that all of the FF&E that had been expensed should have been deducted from the going concern value, and not have been included as part of the contributory value of the FF&E to the going concern. The Appellant asserts that to both deduct such items from the NOI in the year of purchase for valuation purposes and to include them in the FF&E for valuation purposes, is double counting and leads to a distorted overall value. The Appellant argues that there was no evidence before the Board to support its conclusion that only some of the expensed items should be deducted from the FF&E.

[52] The Board heard extensive evidence as to what should and should not be included in the FF&E and on the approach that should be taken to estimate the replacement cost new (referred to in the Board's reasons as the "RCN") for the FF&E. Three experts gave their opinions about the approach that should be used.

[53] Mr. Danakody relied on the agreed RCN for the FF&E for the Fairmont hotels. However, the Board found his opinion of comparability was based on little other than impression.

[54] The Board was hesitant to rely on one of the experts, Mr. Metcalf, because there were insufficient details to use his method of calculating FF&E.

[55] The Board accepted the opinion of the Respondent's expert in quantity surveying, Mr. Elias, as a starting point for determining the FF&E. The Board stated at paras. 104 and 105:

> A costing of actual FF&E in place is an onerous task, and as it is site specific, it does not necessarily reflect an economic RCN for FF&E in a comparable hotel, although it might. As indicated earlier, the going concern value generated by the income approach in an assessment appeal is not the actual going concern value of the business of the Four Seasons hotel but reflects an economic business value to any owner. The contributory value of the FF&E to be extracted is also an economic figure. We are satisfied, however, that Mr. Elias' costing, once adjusted further to remove items we find are included in the expenses statements, provides the best evidence before us from which to determine RCN for the Four Seasons for use in the formula to determine the contributory value of the FF&E. While the costing estimates the value of the actual FF&E in place, it can be accepted as an estimate of high quality FF&E in a hotel similar to the subject, as such as an economic figure to replace FF&E of a similar quantity and quality in a comparable hotel.
>
> Based on the detailed testimony we heard, we find that Mr. Elias' final estimate of the undepreciated RCN of the FF&E per room should be adjusted to exclude a number of items that are included in the expense statements. Therefore, we deduct roughly 65% of the room linens (all items except those with a longer expected life for example duvets, blankets, throws), all food and beverage linens, 20% of the food and beverage glassware and china (an estimate based on the amounts expensed for 2003), expensed cleaning and laundry supplies, guestroom supplies, a number of kitchen utensils and bar items, and all staff uniforms.

[56] Although the Appellant argues that all expensed items should have been excluded, it is apparent from the reasons that the Board heard extensive evidence concerning which expensed items should not be included in the FF&E and determined which expensed items should be excluded.

[57] This is not a case in which there was no evidence, or the evidence did not support the determination made by the Board.

[58] The Appellant asserts that this is a question relating to assessment law in general and will apply to future cases. However, the Board makes it clear that this is a unique case. The Board states that it does not necessarily expect future Appellants to undertake an actual costing of actual FF&E in place, and encourages parties to assessment appeals of hotel properties to find a simpler and less expensive way to find the RCN of the FF&E if they are going to use the income approach to determine actual value.

Question 7: Did the Board err in law when contrary to all of the evidence and established valuation principles it proceeded to utilize the "reproduction costs" of the FF&E of the property under appeal for the purpose of determining the value of the FF&E that should be deducted from the "going concern" value of the subject property?

[59] The Appellant asserts that the Board used reproduction costs rather than replacement costs as a result of using Mr. Elias' figures as a starting point for its analysis of the RCN of the FF&E. The Appellant argues that the Board used Mr. Elias' figures without any explanation, without any adjustment, and in contradiction to its own reasoning, and that by so doing, the Board erred in law.

[60] As well, the Appellant submits that this is a question relating to assessment law in general and will apply to future cases.

[61] As stated under question 6, it is clear from the Board's reasons that it was faced with extensive evidence regarding the FF&E, including expert evidence as to the approach that should be used to assess the RCN of the FF&E.

[62] In the reasons, the Board articulated that in order to determine the value of the land and improvements, the contributory value of the FF&E had to be extracted from the going concern value, stating at para. 94:

> We are not necessarily looking for the market value of the FF&E if it were sold on its own in the open market, or the salvage value of the FF&E if the hotel was disbanded, but a number that represents the contributory value of the FF&E to the value of the going concern.

[63] The Board rejected all of the experts' opinions regarding the approach to be taken to determine the contributory value of the FF&E. However, the Board found that, while Mr. Elias' costing had significant flaws, it provided the best evidence from which to estimate an RCN of comparable FF&E stating at para. 103:

> Although we are to determine the economic contribution of the FF&E, we find that Mr. Elias' specific costing helps us to understand both the quality and quantity of the FF&E in an upper-tier hotel such as the subject.

[64] It is clear from the reasons that the Board did not adopt Mr. Elias' costing. Rather, it used Mr. Elias' costing as an estimate of contributory value and as an indicator of the economic figure to replace FF&E of a similar quantity and quality in a comparable hotel.

[65] The Appellant has failed to satisfy me that the Board acted unreasonably in analysing and determining the RCN of the FF&E in this manner, or made a determination that was not available to it on the evidence.

[66] The Appellant asserts that this is a question relating to assessment law in general and will apply to future cases. However, as stated above, the Board makes it clear that this is a unique case.

> **Question 8: Did the Board err in law when, contrary to the evidence and established valuation principles, it concluded that the property under appeal and the FF&E which belonged to the property under appeal was not suffering from "external" or "economic" obsolescence and therefore no "write-down" factor or other recognition of external (economic) obsolescence should be applied to the FF&E in place?**
>
> **Question 9: Did the Board err in law, when contrary to established appraisal principles, it found that the "going concern" and the property of the going concern were not suffering from economic obsolescence, when all the evidence established that the value of the "going concern" and hence the property of the "going concern" had decreased due to causes external to the property?**
>
> **Question 10: Did the Board err in law when, contrary to established appraisal principles and the evidence, it found that a reduction in value of the "going concern" from external causes not attributable to any specific asset of the "going concern" should not be applied pro rata among the assets of the "going concern," namely land, building and FF&E?**

[67] The parties agree that questions 8, 9 and 10 are closely connected and that they should be addressed together.

[68] These questions address the manner in which the FF&E is to be depreciated in order to determine its contributory value to the going concern. The Appellant takes the position that the Board erred by not accepting the opinion of the Appellant's expert, Mr. Danakody, that a write down factor should be applied to the RCN of the FF&E on top of a depreciation factor since the value of the Four Seasons as a going concern had declined during the years in question due to external or economic factors such as 9/11 and the SAARS outbreak. The Appellant says that the rationale for such a write down factor is that if the going concern declines in any given year due to external or economic factors, all aspects of the going concern, including the FF&E, decline either equally or proportionally.

[69] The Appellant submits that the approach the Board used resulted in an illogical conclusion because the FF&E increased in value whereas the land and improvements decreased in value. The Appellant submits that a logical conclusion in a going concern valuation is that all of the assets that contribute to the operation and value of the going concern would suffer any debilitation in value as a result of external forces either equally or proportionally. The Appellant asserts that the Board's failure to apply a write down factor as advocated by the Appellant is a failure to take into account external obsolescence based on market conditions, and amounts to an error in law: *D. Groot Logging Ltd.* v. *British Columbia (Assessor of Area No. 25 – Northwest - Prince Rupert)*, [1985] B.C.J. No. 961 (S.C.).

[70] The Appellant submits that the manner in which the Board reached its conclusion regarding the write down factor is an error of law because it is based on the Board's misinterpretation of the case law, and particularly of *Takla Forest Products Ltd.* v. *Assessor of Area 26 - Prince George*, [1986] B.C.J. No. 1158. The Appellant says that the Board misinterpreted *Takla* to mean that when the economic or external factors that are temporary, there should be no write down factor applied.

[71] In determining the appropriate depreciation rate to apply to RCN, the Board concluded at paras. 114 and 115:

> So the term, "depreciated RCN" in the context of the exercise at hand, means the replacement cost of FF&E of comparable utility at a similar stage in its economic life. Given that a hotel has many different items of FF&E with different economic lives, and assuming periodic replacement of the FF&E to ensure that it continues to contribute to the going concern at required levels, and assuming that at any given stage there will be FF&E at the beginning, middle and close to the end of its economic life, it is not unreasonable to assume that at any given time the FF&E, collectively, will be one half of the way through its economic life. RCN "depreciated" at 50% means FF&E that is half way through its economic life.
>
> In light of the scarcity of evidence before us on depreciation, we accept the 50% depreciation applied in the Fairmont decision.

[72] The Board then went on to address Mr. Danakody's argument that there should be a write down factor and noted that Mr. Danakody neither supported his theory with case law nor provided any evidence to support the write down factors. The Board also commented that Mr. Danakody was unable to explain what impact this economic obsolescence had on other hotels in Vancouver and that his figures did not reflect a consistent relationship between the trend of the going concern value and that of the contributory value of the FF&E. The Board discussed the evidence from the other experts and noted that neither of the other experts included a calculation for economic obsolescence, and that Mr. Rosen's opinion was that since FF&E was already depreciated it did not need an additional write down.

[73] The Board did not accept that there should be a further write down for economic obsolescence for a number of reasons, including:

- there was no evidence before them that the hotel or FF&E within the hotel are becoming or had become economically obsolete;
- the economic events that affected the hotel and the hotel industry were temporary in nature;
- Mr. Danakody had only applied economic obsolescence to the FF&E and not to the land or improvements;
- Mr. Danakody did not provide support for his method of calculating economic obsolescence;
- Mr. Danakody did not rely on any of the accepted methods of measuring external obsolescence; and

- There was no evidence that the cost figure put forward by Mr. Danakody of 13% for new hotels in the United States is indicative of the contributory value of the FF&E as it relates to a going concern.

As a result the Board concluded that a write down factor should not be applied.

[74] As stated earlier, the Appellant asserts that the Board misinterpreted the case law and erred by determining that, because the economic events were temporary, there should be no write down. However, it is evident from the Board's reasons that the fact that the economic events were temporary is only one factor that the Board took into consideration in determining that a write down factor was not appropriate in the circumstances of this case. There was ample evidence, including expert opinion, before the Board on which it based its decision that a write down factor was not appropriate in the circumstances of this case.

[75] The Board did not, contrary to the wording of question 10, make a finding that a reduction in value of the going concern from external causes should not be applied pro rata. Rather, the Board specifically noted that Mr. Danakody had not considered economic obsolescence for the land or improvements in his cost approach and the Board questioned why it would only apply to the FF&E (at para. 118).

[76] The Appellant has failed to satisfy me that the Board acted unreasonably in analysing and determining whether a write down factor should be applied, or made the determination in the absence of any evidence, or made a determination that was not available to it on the evidence.

CONCLUSION

[77] For the foregoing reasons, the answer to all of the questions posed is no. The appeal is dismissed with costs to the Respondent, Four Seasons Hotel Limited at Scale B.