SC 533 John Lowan v. AA01 et al

Link to Property Assessment Appeal Board Decision

JOHN LOWAN

v.

ASSESSOR OF AREA 01 – CAPITAL
MADELEINE M. AITCHISON
JOHN W. AITCHISON
ANNE LOWAN
ROBERT D. MACDONALD
VALERIE I. MACDONALD
NORMAN J. PUGH
ANNE E. WARREN
ROBERT R. WARREN
RENATO L. ZULLICH
IRENE M. ZULLICH and
PROPERTY ASSESSMENT APPEAL BOARD

SUPREME COURT OF BRITISH COLUMBIA (09-3513) Victoria Registry

Before the HONOURABLE MR. JUSTICE MACAULAY
Date and Place of Hearing: December 3, 2009, Victoria, B.C.

John Lowan In Person
G. McDannold for the Respondent, Assessor of Area 01 - Capital

Farm – Split Classification – Questions of Fact v Questions of Law

The Appellant, John Lowan and his wife Anne Lowan, one of the personal Respondents, are the long-time owners of property in Saanich where they live, operate a farm and have an horticultural operation. The remaining personal Respondents are the respective owners of four similar properties in Saanich, but took no position in this Stated Case appeal.

The Appellant appealed the decision of the Property Assessment Appeal Board ("the Board") to split classify the subject lands between farm and residential class instead of classifying them wholly as farm. The Board found that portions of the property were not used for primary agricultural production but failed to meet the requirement of "no present use" set out in the Standards for the Classification of Land as a Farm *(the* Standards*), and consequently those portions did not qualify for farm class.*

***HELD:** Appeal Dismissed.*

The Court held that correctness is the standard of review applicable to questions of law. The Board was correct in recognizing that entitlement to farm classification turned in each case, in part, on the "no present use" requirement in section 4(3.1) of the Standards*. The Board correctly interpreted and concluded that the regulation "must be interpreted in the context of the statutory scheme for the classification of property for assessment purposes as a whole", and pointed out that but for their use for primary agricultural production, the parcels at issue would be classified as residential in their entirety. The Board further recognized that all four requirements in section 4(3.1) of the* Standards *had to be*

satisfied for the land to qualify for farm class. The fact that the subject portions of the lands were not unused, but used for residential purposes meant farm class could not apply.

This Court answered all six questions in the Stated Case in the negative and dismissed the appeal.

Reasons for Judgment February 11, 2010

[1] The Appellant, John Lowan and his wife, Anne Lowan, one of the personal Respondents, are the long-time owners of property in Saanich, British Columbia, where they live, operate a farm and have an horticultural operation. The remaining personal Respondents are the respective owners of four similar properties in Saanich. None of the remaining personal Respondents took any position on this Stated Case appeal.

[2] At issue on this appeal, by way of Stated Case, is the decision of the Property Assessment Appeal Board (the "Appeal Board") to uphold the decision of the Assessor of Area #01 not to classify the Lowan land wholly as farm class but, instead, to split classify the property between farm and residential class for the 2008 roll. The Appeal Board referred to this as the "split class" issue for farm properties.

[3] After reassessment by the Assessor, the property owners, including the Lowans, successfully appealed to the 2008 and, in one case, 2009 Property Assessment Review Panels (the "Review Panel"). The Appeal Board overturned the Review Panels' decisions primarily on the basis that portions of the properties not used for primary agricultural production failed to meet the requirement of "no present use" set out in the applicable regulation.

[4] The Appeal Board now seeks, pursuant to s. 65 of the *Assessment Act,* R.S.B.C. 1996, c. 20 (the Act), as required by the Appellant, the opinion of this court on the questions of law set out in the Stated Case.

[5] The Appellant framed the questions of law for determination. They are set out in the Stated Case, as follows:

> 1. Did the Board err in "harmonizing" a Farm Regulation 4[3.1] with a non-farm classification regulation in a way that ignores and defeats the legislative intention and purpose of the Farm Regulation, thereby rendering it pointless or futile?
>
> 2. Did the Board make an error of law in interpreting and providing context for Regulation 4[3.1] based on fairness to residential acreages that are not farms?
>
> 3. Did the Board make an error in law in not interpreting Regulation 4[3.1] "no present use" in "its grammatical and ordinary sense harmoniously with the scheme of the Regulation, the object of the Regulation, and the intention of Parliament"?
>
> 4. Did the Board err in not providing a clear definition of "no present use"?
>
> 5. Did the Board err when it adopted a method of assessment that is wrong in principle by assessing portions of the Lowan and Macdonald farms in question as farm and as residential?
>
> 6. Did the Board err when it misunderstood that Regulation 4[3.1] was introduced in 2004 and consequently failed to provide a remedy for BC Assessment's lack of due process?

While the Appellant sets the issues of law, it is the responsibility of the Appeal Board to set out the facts in the Stated Case. I will only refer to facts as necessary.

[6] Stated Case appeals under the *Act* are limited solely to questions of law. Section 65, as it applies here, states:

> 65 (1) Subject to subsection (2), a person affected by a decision of the board on appeal ... may require the board to refer the decision to the Supreme Court for appeal on a question of law alone in the form of a stated case.

In *Gemex Developments Corp. v. British Columbia (Assessor of Area #12)* (1998), 112 B.C.A.C. 176, 62 B.C.L.R. (3d) 354 at para. 9, the Court of Appeal adopted the following definition of a question of law:

> 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.

As is apparent from the foregoing, questions of fact or mixed fact and law are not permissible. I accept the Assessor's contention that I must be cautious in distinguishing questions of law from those that are actually mixed fact and law:
Burlington Resources Canada Ltd. v. Peace River (Assessor of Area #27), 2005 BCCA 72, 37 B.C.L.R. (4th) 151 at para. 27.

[7] During submissions, Mr. Lowan referred to evidence and information other than the facts that the Appeal Board found and included in the Stated Case. I have not relied on the additional evidence or information.

[8] A summary of the decision of the Appeal Board is also set out in the Stated Case, commencing at paragraph 12. The relevant portions are:

> 12. The Board found that the portions of these properties that are not used for primary agricultural production or which are otherwise necessary to the farm are "used for residential purposes" within the meaning of section 1 of the Prescribed Classes of Property Regulation, BC Reg. 438/81 (the "Classification Regulation"), and the rest of those properties, but for their use for primary agricultural production, would be classified as Class 1 - Residential in their entirely [sic] pursuant to the Classification Regulation. The Board found the portions not used for primary agricultural production do not have "no present use" within the meaning of section 4(3.1) of the Farm Class Regulation. Consequently, the Board found the properties were not wholly entitled to Farm Class.
>
> 13. The Board could not determine the highest and best use of each property and could not conclude that the highest and best use of the portions of each property not used for primary agricultural production was greater than that of a farm.
>
> ...
>
> 15. The Board found no unfairness resulted in the proper application of the legislative scheme.
>
> 16. The Board found the Pugh, Macdonald and Lowan properties fell into two classifications, Residential and Farm, and section 10 of the Classification Regulation applied to apportion their value between the two classifications. For the Aitchison and Zullich properties, the Board found the properties must be wholly classified s [sic] Residential.
>
> [Emphasis added.]

While the above accurately describes the decision, my references from this point on will be to the written decision of the Board released June 29, 2009 (2009 PAABBC 20090216). The Appeal Board submitted the decision as part of the Stated Case.

[9] Correctness is the standard of review applicable to questions of law:
Burlington Resources Canada at para. 33.

[10] The "split class" issue for farm land stems from the *Act*, the *Prescribed Classes of Property Regulation,* B.C. Reg. 438/81 [*Classification Regulation*]*,* and the *Standards for the Classification of Land as a Farm Regulation,* B.C. Reg. 411/95 [*Farm Class Regulation*]*.* The applicable provisions are as follows:

> ***Act***
>
> **Classification of land as a farm**
>
> 23 (1) An owner of land who wants all or part of the land classified as a farm must apply to the assessor using the application form, and following the procedure, prescribed by the assessment authority.
>
> (2) Subject to this Act, the assessor must classify as a farm any land, or any part of a parcel of land, that meets the standards prescribed under subsection (3).
>
> (3) The Lieutenant Governor in Council must prescribe standards for classification of land as a farm.
>
> ...
>
> ***Classification Regulation***
>
> **Class 1 - residential**
>
> 1 Class 1 property shall include only:
>
> > (a) land or improvements, or both, used for residential purposes, including single family residences ... and ancillary improvements compatible with and used in conjunction with any of the above ...
> >
> > ...
> >
> > (c) land having no present use and which is neither specifically zoned nor held for business, commercial or industrial purposes ...
> >
> > ...
>
> **Class 9 - farm**
>
> 9 Class 9 property shall include only land classified as farm land.
>
> **Split classification**
>
> 10 Where a property falls into 2 or more prescribed classes, the assessor shall determine the share of the actual value of the property attributable to each class and assess the property according to the proportion each share constitutes of the total actual value.
>
> ***Farm Class Regulation***

Classification of land as a farm

4 (1) Unless this regulation provides otherwise, the assessor must classify as farm all or part of a parcel of land used for

(a) primary agricultural production,

(b) a farmer's dwelling, or

(c) the training and boarding of horses when operated in conjunction with horse rearing.

(2) Land only will be classed as farm where part of a parcel or parcels of land are

(a) necessary to the farm, and

(b) predominantly used for primary agricultural production.

...

(3.1) Despite subsections (1), (2) and (3), the assessor must classify land as farm if

(a) the land has no present use,

(b) the land has a highest and best use that is a use not better than that of a farm,

(c) the land is part of a parcel, a portion of which is used for primary agricultural production, and the portion used for the primary agricultural production makes a reasonable contribution to the farm operation, and

(d) the portion being used for primary agricultural production meets the other requirements of this regulation.

...

[Emphasis added.]

[11] The Appeal Board stated in its written decision at para. 5 that the broad issue in the appeals was "whether any or all of the land is entitled to Farm Class." The Appeal Board also stated at para. 8 that "the owners question the fairness of changing the classification of these properties wholly from Farm Class."

[12] Commencing at para. 24 of the decision, the Appeal Board accurately set out the test for statutory interpretation, including the need for a contextual analysis. Mr. Lowan does not take issue with these statements of legal principle and I need not set them out here. I will set out the detail of the Board's application of the principles below when I address the issues on the Stated Case. I will also set out its decision respecting fairness when I address that issue.

[13] The Appeal Board rejected the Appellants' contentions and then concluded:

> [60] We find the portions of each of the properties not used for primary agricultural production do not have "no present use" within the meaning of section 4(3.1) of the Farm Class Regulation. As one of the four criteria set out in section 4(3.1), is not satisfied, these portions of each property are not entitled to Farm Class and the properties are not wholly entitled to Farm Class.
>
> [61] The Pugh, Macdonald and Lowan properties fall into two classifications, Residential and Farm, and section 10 of the Classification Regulation applies to apportion their value between the

two classifications. Although a portion of both the Aitchison and Zullich properties is used for primary agricultural production, as that portion does not otherwise meet the requirement of the Farm Class Regulation in that the requisite income for the size of the property used for primary agricultural production was not met, that portion is not entitled to Farm Class and the whole of both properties must be classified as Residential.

[14] Mr. Lowan argues issues 1 to 4 of the Stated Case collectively. He maintains that the Appeal Board ignored the plain meaning of s. 4(3.1) of the *Farm Class Regulation,* used too broad a context and, under the guise of harmonization, effectively substituted residential for farm classification. According to Mr. Lowan, the Appeal Board misinterpreted the requirement for classifying land as a farm, found in s. 4(3.1)(a), that "the land has no present use" by, in effect, substituting a new requirement, "used for residential purposes". This had the effect, according to Mr. Lowan, of making it impossible to meet the four requirements of s. 4(3.1). He says that the result is absurd, it offends the grammatical and ordinary sense of the provision and undermines the legislative intent. In support of his position, Mr. Lowan relies largely on the same authorities setting out the principles of statutory interpretation as the Appeal Board in its decision.

[15] The Appeal Board recognized that entitlement to farm classification turned in each case, in part, on the "no present use" requirement in s. 4(3.1). At para. 24 of the decision, the Appeal Board correctly set out the approach to statutory interpretation and concluded that the regulation "must be interpreted in the context of the statutory scheme for the classification of property for assessment purposes as a whole." In that regard, the Appeal Board recognized the obvious benefit of significantly lower property taxes associated with farm class contrasted to most other classifications, including residential. The Appeal Board further recognized that all four requirements in s. 4(3.1) had to be satisfied for the land to qualify for farm class.

[16] The passages at issue are found at paras. 31-38 of the decision, as follows:

> Does the land not used for primary agricultural production have "no present use"?
>
> [31] The owners argue that the words "no present use" in the Farm Class Regulation should be interpreted as "unsuitable for other uses such as residential or commercial". They equate the requirement for "use" of the land to an active use as opposed to a passive use such as providing ground water, shade, absorbing carbon, animal habitat, noise barrier, windbreak, etc. From the owner's perspective, the portions of their land not classified as Farm have "no present use". The land was described variably as being "useless", or "unusable", or "wasteland". Some portions of the land, however, were also described as "providing drainage", "providing privacy", or as "buffer".
>
> [32] The phrase "no present use" is also found in section 1(c) of the Classification Regulation dealing with the entitlement to Residential classification. Section 1(c) of the Classification Regulation entitles "land having no present use and which is neither specifically zoned nor held for business, commercial, or industrial purposes" to be classified as Residential. This provision has been interpreted to apply to vacant land (*Weyerhaeuser Company Ltd. v. Assessor of Area #04,* 2008 BCSC 550; *Jericho Tennis Club v. Assessor of Area #09,* 1999 Stated Case 424 (BCSC); *Eccom Developments Ltd. v. Assessor of Area #09,* 1989, Stated Case 269 (BCSC), (BCCA)). Class 1 property includes land and improvements "used for residential purposes" as well as vacant land that is not actively used for residential use (i.e. there is no house on it) and that is not zoned or held for business, commercial or industrial purposes. Vacant parcels surrounding a lot used for residential purposes and used in conjunction with the residential lot are "used for residential purposes" within the meaning of section 1(a) and entitled to be classified as Residential (*Hutchison v. Corporation of the District of Saanich,* 1975 Stated Case 86 (BCSC)) as are the "unused" or inactively used portions of large residential properties.
>
> [33] These properties, but for their use for primary agricultural production, would be classified as Class 1 - Residential in their entirety. They are "used for residential purposes" in that they are

improved with single family residences in which people live. The land surrounding the residence, if it were not used for primary agricultural production, would also be classified as Residential as being "used for residential purposes" in conjunction with the residence.

[34] Considering the legislative scheme as a whole, we find that the Farm Class Regulation entitles the owner to the benefit of Farm Class for the part of a property that is used for primary agricultural production and is necessary to the farm, but is not intended to entitle an owner to the benefit of Farm Class for parts of a property that are not predominately used for primary agricultural production or necessary to the farm, except in limited circumstances.

[35] Section 4(3) provides an exception for those parts of a parcel of land within the ALR that are not used for primary agricultural production. The exemption recognizes that land within the ALR will be restricted in its use, so even if a parcel is not fully used for primary agricultural production, it cannot generally be used for other purposes. Section 4(3.1) is intended to provide the same type of exemption for the portions of a parcel not within the ALR that are not predominately used for primary agricultural production when it is clear that, despite that they are not in the ALR, they do not have a higher and better use than farm use, and are not otherwise used for another purpose. In the case of land that but for its use for primary agricultural production, is used for residential purposes as being part of a large residential lot, that land has another use, namely residential use. If a parcel that is part of a farm is not otherwise used for residential purposes, the portions of the parcel not used for primary agricultural production may qualify for Farm Class if they are not used for another purpose to which another classification would apply, and where the market does not indicate the land has a higher and better use than farm.

[36] The portions of each of these properties that are not used for primary agricultural production or otherwise classified as Farm as being necessary to the farm, are not land with "no present use". They are lands that are used for residential purposes as vacant and wooded or forested land used in conjunction with residential use. In the Zullich case, there are also lands used as a horse pasture for a non-breeding horse ancillary to residential use. But for any agricultural use, these properties would be properly classified as Class 1 - Residential as are other large residential lots without primary agricultural production. To be fair to the other owners of large residential properties, these properties must also be classified in the same manner except to the extent the Farm Class Regulation permits and to which there is strict compliance with the Regulation. To the extent land is used for primary agricultural production and necessary to the farm, the owners may enjoy the benefit of Farm Class. To the extent it is not, they should be classified and taxed in a similar manner to owners of other large residential properties. Such an interpretation maintains equity between the owners of large residential lots to the extent they are not used for primary agricultural production and harmonizes the Farm Class Regulation with the Classification Regulation to provide consistent treatment of unused, inactively used or vacant property.

[37] Mr. Lowan submitted the Board should apply the test developed in *Cherry Creek Ranches, et al v. Assessor of Area #23* (1999) PAABBC 19990988 and subsequently applied in *Mueller v. Assessor of Area #11* (2001) PAABBC 20015337 and *Miller v. Assessor of Area #23* (2002) PAABBC 20027676 to determine whether land qualifies for Farm class, and that applying that test to these properties indicates they are entitled to Farm class. The cases referred to pre-date the enactment of section 4(3.1) of the Regulation and therefore, must be read with caution. In so far as the analyses in those decisions do not take into account the implications of section 4(3.1), for cases to which section 4(3.1) will apply, they do not assist.

[38] We find that the portions of these properties that are not used for primary agricultural production or otherwise necessary to the farm are "used for residential purposes" within the meaning of section 1 of the Classification Regulation. These portions, therefore, do not have "no present use" within the meaning of section 4(3.1).

The Appeal Board applied the interpretation set out above in reaching its final decisions.

[17] The essential ruling of the Appeal Board arising from its interpretation of the regulations is found at para. 12 of the Stated Case set out earlier in these reasons. Essentially, the Appeal Board concluded that portions of the property that are not used for primary agricultural production cannot be said, in law, to have no present use because those portions fall within residential class as legislatively defined. As a result, the lands are not wholly entitled to farm class.

[18] The Assessor says that the short answer to Mr. Lowan's contention is that the Appeal Board was required to harmonize the *Farm Class Regulation* and the *Classification Regulation* by reading them together. Mr. Lowan's mistake, according to the Assessor, is reading the *Farm Class Regulation* independently without regard to the content of the other regulation. I have concluded that the Assessor is correct in this regard.

[19] The *Classification Regulation* prescribes nine classes of property ranging from Class 1 - residential to Class 9 - farm.

Under s. 1:

> 1. Class 1 property shall include only:
>
> (a) land or improvements, or both, used for residential purposes, including single family residences
>
> ...
>
> (c) land having no present use and which is neither specifically zoned nor held for business, commercial or industrial purposes;
>
> ...

Under s. 9:

> Class 9 property shall include only land classified as farm land.

Section 10 addresses split classification and reads:

> 10 Where a property falls into 2 or more prescribed classes, the assessor shall determine the share of the actual value of the property attributable to each class and assess the property according to the proportion each share constitutes of the total actual value.
>
> [Emphasis added.]

[20] While the *Farm Class Regulation* instructs the Assessor when to classify land as a farm, it is significant that split classification is a possibility. Section 4(1) states, in part: "the assessor must classify as farm all or part of a parcel of land used for ...".

[21] At paragraphs 32-33 of its decision, the Appeal Board correctly interpreted the reach of the residential classification and pointed out that, but for their use for primary agricultural production, the lands at issue would be classified as residential in their entirety. The Appeal Board went on, in paras. 34-38, to consider the legislative scheme as a whole and concluded that s. 4(3.1) of the *Farm Class Regulation* only exempts the portions of a parcel that are not predominately used for primary agricultural production "when it is clear that, despite that they are not in the ALR, they do not have a higher and better use than farm use, and are not otherwise used for another purpose." The Appeal Board concluded that, as residential is another use, it cannot be said that the land had no other use.

[22] I find no legal error in the reasoning of the Appeal Board in that regard. It follows that the answers to questions 1 and 3 are no.

[23] Question 2 interjects an issue of fairness but is also answered in the passages from the decision referred to immediately above. Mr. Lowan argues that the decision of the Appeal Board rests on alleviating perceived unfairness to residential property owners. As I understand Mr. Lowan's point, he contends that the interpretation benefits residential owners at the expense of farm operators.

[24] The Appeal Board is required to ensure that classification and valuation are both fair and equitable within a taxing jurisdiction. In *C & C Holdings Inc. v. British Columbia (Assessor of Area #04 - Nanaimo-Cowichan),* 2003 BCSC 230, 36 M.P.L.R. (3d) 101, the court stated at para. 17:

> [17] It is an accepted principle of property taxation that taxing authorities must deal even-handedly with all taxpayers in a municipality or rural area and that all taxpayers within a class be treated in the same way: [citations omitted]. The issue is whether taxpayers in different taxing jurisdictions, but within the same class, must be treated in the same way.

The court concluded, in regard to its powers and duties under s. 57 respecting appeals, at paras. 27-28:

> [27] Since classification affects the determination of actual value and, therefore the amount of the assessment which is defined as the valuation of property for taxation purposes, s. 57 must be construed to require the Board to ensure consistency of classification within a municipality or rural area. ...
>
> [28] The conclusion that the common law principles of equity and consistency in classification are to be considered within a municipality or rural area and not across boundaries is consistent with the scheme of the *Assessment Act* and its purpose, quite apart from statutory interpretation. ...

[25] In the present case, at paras. 53-59 of the decision and following, the Appeal Board addressed the fairness issue:

> [53] The owners argued that the large scale reassessment initiative undertaken by BC Assessment in Area 01 has created a situation where farmers in Area 01 are being assessed on a significantly different basis than farmers in other areas of the province. They say the result of the reassessment has subjected these properties to massive tax increases which are unfair, as farms in the rest of the province have not been split classified in this manner. They say farmers in Area 01 were given short notice of the intention to declassify portions of their land from Farm Class with no advance communication or explanation. The Assessor argued the legislation changed and the Assessor had a duty to apply the statute despite what may have been done previously, and that in so doing, no "unfairness" results.
>
> [54] The Board has no evidence with respect to how the Farm Class Regulation has been interpreted and applied in other jurisdictions throughout the province. In any event, the Board's jurisdiction to ensure equity, both with respect to valuation and classification, is restricted to ensuring consistency within the taxing jurisdiction (*C & C Holdings v. Assessor of Area #04 - Nanaimo-Cowichan,* 2003 BCSC 230). The evidence before us is that the Regulation was consistently applied within the taxing jurisdictions within which these properties are located.
>
> [55] We understand the tax consequences to these and other owners of farms on the Saanich Peninsula in having portions of their land removed from Farm Class, and appreciate that the owners are upset. However, the taxation consequence of legislation is not a relevant consideration for the Board. The Board's jurisdiction is to ensure that assessments are accurate and consistent within a taxing jurisdiction. The tax consequences of so doing are not a matter of concern for the Board.

[56] The “fairness” argument cuts both ways as far as taxation is concerned. While these and other owners of property previously classified entirely as Farm consider it unfair that they are faced with a large tax increase, it is also not fair to the owners of large residential properties without any farm use, that land not strictly entitled to the tax benefit of Farm Class receive the benefit. The inappropriate application of the Farm Class Regulation to properties that would otherwise be classified as Residential shifts the tax burden to other properties in Residential Class in a manner not intended by the legislation.

[57] We have somewhat more sympathy for the owners’ arguments with respect to process and the fact that they were given little time to react to the change to the Regulation and the Assessor’s application of it. Nevertheless, the Assessor has an obligation to apply the Regulation, and when the Regulation changes, to apply any changes. The Regulation does not give the Assessor discretion with respect to its application or discretion or authority to phase in changes.

[58] The owners submitted it was not the intention of the Regulation to split classify single property farms with viable farm activity and unused land. We find, however, considering section 4(3.1) in the context of the whole of the legislative scheme for the classification of property for assessment purposes, that it is clearly the legislative intent to apply the benefit of Farm Class only to those portions of property that strictly qualify. The Farm Class Regulation clearly contemplates that Farm Class may only apply to a “part of a parcel of land” and the Classification Regulation clearly contemplates that when property falls within two or more classifications it should be split classified. The classification scheme operates to qualify the properties as Residential that are “used for residential purposes” and then to qualify those portions of the land meeting the requirements of the Farm Class Regulation for Farm Class. It is clear from the classification scheme as a whole that the vacant, unused and inactively used portions of land that are part of a parcel of land used for primary agricultural production but that are used for residential purposes, are intended to be classified as Residential. It is only where vacant, unused or inactively used land that is part of a parcel of land used for primary agricultural production is not otherwise used for residential or other purposes thereby having “no present use”, where it does not have a higher and better use than farm, and where the portion used for primary agricultural production otherwise meets the requirements of the Regulation, that it is entitled to be classified as Farm.

[59] While we appreciate that the change to the Farm Class Regulation and its application resulted in significant financial consequences for these and other owners, we find the consequence to be the logical result of the application of the legislative scheme. No unfairness results in the proper application of a legislative scheme. In time, some properties may be entitled to Farm Class for a greater portion of their land as more area is brought into primary agricultural production, thus easing the financial consequence.

[26] In my view, the requirement that the Appeal Board deal even-handedly with all taxpayers in a municipality or rural area necessitates a comparison of properties classified as wholly residential and those that are split-classified residential and farm. I answer question 2 in the negative as well.

[27] In question 4, Mr. Lowan contends that the Appeal Board erred by not providing a clear definition of “no present use”. Mr. Lowan says that the Appeal Board altered the plain and ordinary meaning of the phrase by, in effect, replacing it with “used for residential purposes.” Mr. Lowan confuses actual use with classification. I reject his submission. The answer to question 4 is no.

[28] Question 5 is a frontal attack on split-classification in spite of s. 10 of the *Classification Regulation* set out earlier which requires the Assessor to assess the property proportionately if it falls into two or more prescribed classes, Mr. Lowan did not directly address s. 10 in his argument. Nor did he address s. 4(1) of the *Farm Class Regulation* which requires the Assessor to classify as farm “all or part of a parcel of land” that meets the requirements. In my view, these provisions are a complete answer to the attack. The answer to question 5 is also no.

[29] The final question raises a further fairness issue but this time relating to process. Section 4(3.1) of the *Farm Class Regulation* came into effect in December 2004, yet the process that resulted in the reassessments and split-classifications of the Appellants and personal Respondents' properties did not occur until 2007.

[30] Mr. Lowan states in his written submission:

> Farmers in District 01 (Victoria) were given short notice with *no advance communication or explanations or background on the mass reassessment and split classification* that took place in 2008. We believe that government has an obligation to *fully communicate in advance* the effect the new initiative would have on farms to each farm likely to be effected [sic].
>
> The large-scale reassessment initiative undertaken by BC Assessment of 204 [sic] farms in District 01 in 2007 has created a situation where *farmers in this area are being assessed on a significantly different basis than farmers in other areas of the Province.*
>
> [Emphasis in original.]

In support of this contention, Mr. Lowan relies on para. 57 of the Appeal Board's decision, which I repeat for convenience:

> [57] We have somewhat more sympathy for the owners' arguments with respect to process and the fact that they were given little time to react to the change to the Regulation and the Assessor's application of it. Nevertheless, the Assessor has an obligation to apply the Regulation, and when the Regulation changes, to apply any changes. The Regulation does not give the Assessor discretion with respect to its application or discretion or authority to phase in changes.

The Appeal Board was referring in that passage to s. 4(3.1) of the *Farm Class Regulation* which first came into effect on December 8, 2004, although, the Assessor did not take any steps to reassess the subject properties on the basis of the change to the regulation until 2007, effective for the 2008 assessment.

[31] Underlying this ground of attack is the implication that fairness required the Assessor to give advance notice before proceeding with the reassessments. As the Appeal Board pointed out in the passage above, there is no support for that in the *Act* or the regulation. Whatever the reason for the Assessor not proceeding earlier, there is no enforceable obligation to give advance notice of a reassessment.

[32] Mr. Lowan's written submission makes it clear, although the Appeal Board made no findings of fact for the purpose of the Stated Case in this regard, that he believes political intervention in 2008 resulted in a moratorium on split-classification for farm properties throughout the province and culminated in amendments to s. 4(3.1) in 2009. Unfortunately, as Mr. Lowan also points out, the changes were not retroactive and, in the result, Saanich farmers are apparently the only property owners facing reassessments for 2008. Mr. Lowan describes that result as "grossly unfair". Others might agree but Mr. Lowan's complaint is with the political process. It is not the role of the Assessor to alleviate any unfairness that flows from legislative provisions.

[33] Assuming Mr. Lowan's account is accurate, and opposing counsel never challenged it, Mr. Lowan failed to demonstrate any legislative basis for the Assessor to exercise discretion not to apply the *Farm Class Regulation.* In the circumstances, the answer to question 6 is no.

[34] To summarize, I have answered all six questions on the Stated Case in the negative. Accordingly, I dismiss the Stated Case appeal. By agreement of the parties, the successful party is entitled to all-inclusive costs totaling $2,000. I award those costs to the Assessor.

The Honourable Mr. Justice Macaulay