Federation of North Vancouver Community Associations

FONVCA AGENDA

THURSDAY November 19th 2009

Place: DNV Hall 355 W. Queens Rd V7N 2K6
Time: 7:00-9:00pm
Chair: K'nud Hille – Norgate Park C.A.
Tel: 604-980-8762 **Email:**kshille@yahoo.com

Regrets: Val Moller

1. Order/content of Agenda

2. Adoption of Minutes of Oct 15th

http://www.fonvca.org/agendas/nov2009/minutes-oct2009.pdf

3. Old Business

3.1 OCP Roundtable – Updates

3.2 Resilient Cities:- feedback?

3.3 NS Police Services Review

http://www.dnv.org/article.asp?a=4103
Update by Cathy Adams (as per 5.5 of Oct 15th Agenda)

4. Correspondence Issues

4.1 Business arising from 2 regular emails:

4.2 Non-Posted letters – 0 this period

5. New Business

Council and other District issues.

5.1 Policy on green waste limit

Issue carried over from Oct 15th

- need to increase bag limit (6→10)
- need for unlimited amounts once spring & fall

Recommend that FONVCA make a formal request for above.

5.2 Comments on Nov 18th OCP Visioning Workshop

5.3 A New Fire Hall in your Neighbourhood?

- The gotcha: – no zoning (eg. height) restriction)
- Report on Nov 17th Public Hearing

5.4 North Van Drivers Ignore Stop Signs?

- Sun – page G6 – 6Nov2009 **attached**

5.5 Housing "Affordability Gap"

http://www.chfcanada.coop/eng/pdf/DunningReport2009EnWeb.pdf
Sun - 6Nov2009 **attached**

5.6 Seylynn signals "End of Suburban Domination"

- SUN 6Nov 2009 "Densification is the path to affordable housing" – by Sam Sullivan.

6. Any Other Business

6.1 Legal Issues

(a) **Excessive Municipal Industrial Tax Rates?**
Supreme Court of BC decision on Catalyst Paper Co. vs. Corp. of District of North Cowichan. Some remarks about judgment at http://www.courts.gov.bc.ca/jdb-txt/SC/09/14/2009BCSC1420.htm

- Municipalities do not have independent constitutional status
- Tax rated do not need to be related to services consumed
- Municipal taxes were about 1% of Catalyst operating costs

It should be noted that Catalyst concedes a somewhat higher rate is justified due to its income tax deductibility (something is not allowed by residents)

(b) **Neighbours Feud over Noise & Video Surveillance**
http://www.courts.gov.bc.ca/jdb-txt/SC/09/14/2009BCSC1403cor1.htm
SUN - 2Nov2009 **– attached**

- camera constituted a nuisance
- air conditioner constituted a nuisance
- injunction and $6,000 award granted
- 45 db(A) limit at night at property boundary

(c) **Home Inspector fined in BC Supreme Court Ruling**
http://www.courts.gov.bc.ca/jdb-txt/SC/09/15/2009BCSC1515.htm
Concerned a home on Skyline Dr. Action against DNV were dropped. Fine was $192,920.45

6.2 Any Other Issues (2 min each)

a) Climate Change Deniers - **attached**
b) Chilliwack Landslide – Geotechnical Engineer quit/retired so district responsible - **attached**
c) Terminology for Disaster Risk Reduction **- attached**
d) Retroactive Legislation & Olympic sign bylaw – **attached**
e) Air Pollution and Bronchiolitis **- attached**

7. Chair & Date of next meeting.

Thursday December 17th 2009

Attachments

-List of Email to FONVCA - ONLY NEW ENTRIES
OUTSTANDING COUNCIL ITEMS-Cat Regulation Bylaw; District-wide OCP; Review of Zoning Bylaw; Securing of vehicle load bylaw; Snow removal for single family homes bylaw.

Correspondence/Subject Ordered by Date
12 October 2009 → 15 November 2009

LINK	SUBJECT
http://www.fonvca.org/letters/2009/12oct-to/Wendy_Qureshi_13nov2009.pdf	Lynn Valley Library heating/cooling the outdoors at the taxpayers' expense
http://www.fonvca.org/letters/2009/12oct-to/Corrie_Kost_14nov2009.pdf	Bears – Garbage – law of unintended consequences

FONVCA
Minutes October 15th 2009

Attendees

Diana Belhouse	Save Our Shores
Cathy Adams **(Notes)**	Lions Gate N.A.
Dan Ellis **(Chair)**	Lynn Valley C.A.
Val Moller	Lions Gate N.A.
Paul Tubb	Pemberton Heights C.A.
Eric Andersen	Blueridge C.A.
Peter Thompson	Edgemont C.A.

The meeting was called to order at 7:05 PM

Regrets: Del Kristalovich, Corrie Kost

1. ORDER / CONTENT OF AGENDA
Added: 6.2(a) Olympic Police Powers

2. Adoption of Minutes of Sep. 17th
Adopted as circulated.

3. OLD BUSINESS
3.1 OCP Roundtable Update
There was a kickoff event for the District OCP process, and there have been 2 "visioning workshops". Some of those present attended one or more of them. They consisted of small group discussions on one topic, with an attendee being able to take part in two different sessions.

An overall concern was the level of public participation in the OCP opportunities. DNV has tried many different strategies, but the feeling is that the turnout to these workshops has been inadequate.

The next event, the OCP Visioning Summit, to be held at the District Hall, has been postponed to November 18th (6:30-9:00pm)
There is lots of information on the District website (http://idendity.dnv.org)from the workshops that have been held, and the draft Vision and Goals Workbook.

3.2 Resilient Cities
Urban Strategies for Transition Times
http://www.gainingroundsummit.com/theme.htm
A follow up from Sept. 17th FONVCA meeting. Letter was sent to DNV asking council and staff to consider attending this conference to be held on October 20th -22nd, and that they report back to the public on the issues discussed. At this point it is unknown whether any will attend.

4. CORRESPONDENCE ISSUES

4.1 Business arising from 3 regular e-mail
No business arising.

4.2 Non-posted letters – 0 this period.

5. NEW BUSINESS
Council and other District Issues

5.1 Policy on green waste limit
A suggestion has been made that the limit for green waste be increased from 6 bags, to 10 bags – especially during spring and fall clean-ups. What would the implications be? **Tabled until next meeting.**

5.2 Democracy at work in Cranbrook
Cranbrook residents were successful in getting the signatures needed to force a referendum in that municipality concerning the annexation of two parcels of land that would double the urban footprint there. Cranbrook council was forced to either hold the referendum, or abandon the expansion plan. From Cranbrook's website – On November 14, 2009 a referendum will be held to decide if the East Hill lands should be included within the boundaries of the City of Cranbrook.
http://www.vancouversun.com/news/Citizens+battle+heard+local+town+halls/2003164/story.html
http://www.dailytownsman.com/article/20090827/CRANBROOK0101/308279959/over-3000-signatures-delivered-to-city-hall

5.3 Billboards on the North Shore
The Department of Indian and Northern Affairs and the federal environmental assessment office has granted approval for billboards proposed by the Squamish band. The current plan by the Squamish band is for 6 billboards – near the North shore bridges, the Burrard Street bridge and near the Chief outside Squamish. The billboards are planned to be 10 feet by 30 feet, with three sided rotating slats. There was massive opposition to this when the proposal was made 2 years ago, and District council sent a letter opposing them at the time.
Action Item – send email to Council:

Motion moved by Diana Belhouse, seconded by Eric Andersen and carried unanimously –
"That FONVCA urges District Council to restate their position from 2 years ago opposing these billboards and send a request that the decision to permit these billboards be rescinded,
And to solicit the support of the other North Shore councils to do the same."

5.4 BC Greenhouse Gas Emission Legislation

Document entitled "Greenhouse Gas Emission Assessment Guide: for British Columbia Local Governments" was distributed and is available at http://www.townsfortomorrow.gov.bc.ca/docs/ghg_assessment_guidebook_feb_2008.pdf - it's intended as a resource for local governments in estimating emissions reductions that would arise from infrastructure projects.

5.5 North Shore Police Services Review

This lengthy report (318 pages - available at http://www.dnv.org/article.asp?a=4103)
has been released. Is there a better model for policing on the North Shore – would local control give a better product? The report gives many options, but it is felt that the pros and cons are not clearly given, so it's difficult to know the process and opportunities.
Action Item – Cathy Adams will contact Dave Stuart and report back to FONVCA on the process and next steps for this issue.

6. ANY OTHER BUSINESS

6.1 Legal Issues

(a) **"Local Government in B.C."** A 250 page pdf publication – freely available from the UBCM. This is a useful guide for residents, and especially involved citizens and politicians.
4th edition by Bish
http://ubcm.civicweb.net/contentengine/launch.asp?ID=4244
Alternate:
http://www.ubcm.ca/assets/Library/Publications/Local~Government~in~British~Columbia/LGBC-All.pdf

(b) Retroactive Legislation to "Fix" UBC Parking Tickets. This is a follow-up of FONVCA item 6.1(a) April 16/09 meeting. The courts ruled in March that UBC lacked the power to issue parking fines. Now there has been **retroactive legislation** introduced that would allow universities to issue parking tickets. You can be right, but still lose in the end!

(c) Seismic Test for Mid-Rise Wood Frame Buildings
A lot of work and investigation took place before the building code was revised concerning mid-rise (up to 6 storeys) wood frame buildings. A news release
http://www.fonvca.org/agendas/oct2009/SEISMIC.pdf
from the province in September states that seismic tests have verified mid-rise wood building safety during an earthquake.

6.2 Any Other Issues (2 min each)

.
(a) Olympics – Police Powers A Bill has been tabled in the legislature which would empower authorities in Vancouver, Richmond and Whistler to enter homes and remove or cover up "unauthorized" signs during the Games. The proposed law would let authorities remove any sign on a person's residence or property that doesn't 'celebrate' the Olympics.

7. CHAIR AND DATE OF NEXT MEETING

7:00pm Thursday November 19th 2009

K'nud Hille -Norgate kshille@yahoo.com
Tel: 604-980-8762
or
Paul Tubb – Pemberton Hts petubb@hotmail.com
Tel: 604-986-8891

Meeting was adjourned at ~ 9:20PM.

Subject: Fwd: RE: Proposed Billboards on the North Shore
From: Cathy Adams <cathyadams@shaw.ca>
Date: Wed, 28 Oct 2009 15:24:42 -0700
To: FONVCA <fonvca@fonvca.org>

Date: Wed, 28 Oct 2009 15:18:59 -0700
From: "Richard Walton, Mayor" <waltonr@dnv.org>
Subject: RE: Proposed Billboards on the North Shore
To: 'Cathy Adams' <cathyadams@shaw.ca>
Accept-Language: en-US
Thread-topic: Proposed Billboards on the North Shore
Thread-index: AcpYG9/pP2rOcascSYWVka69AuU7jQAAGG+g
acceptlanguage: en-US
X-Cloudmark-SP-Filtered: true
X-Cloudmark-SP-Result: v=1.0 c=1 a=KerZRsWbzCwA:10
a=EqQSfi14VIFPo7qEvRg4lA==:17 a=LVFTIrLcjpv1_oroz7UA:9
a=0qrjAm1qJYK2raquLFk3aQNQmasA:4 a=AD5KGrVjH20r0wpF:21 a=NQ_YM20Fdj67QZrW:21
a=yMhMjlubAAAA:8 a=SSmOFEACAAAA:8 a=ud6IgbR0EN_vxdkEzTQA:9
a=P3-hLpsUbS3RidT9NEQA:7 a=AZvWv6Fn6KA5wDR2mqR-6EB3IUQA:4
X-MS-Has-Attach:
X-MS-TNEF-Correlator:
Original-recipient: rfc822;cathyadams@shaw.ca
X-Message-flag: In case of problems, email postmaster@dnv.org.

Thanks Cathy...FONCVA's views resonate everywhere but with the Squamish Nation. Council has within the past two days sent additional letters to Minister Prentice and the Squamish Nation requesting intervention and interruption respectively. Your community support motion will be communicated again to Mr. Toby Baker when Council meets with him next week. Best wishes, Richard

From: Cathy Adams [mailto:cathyadams@shaw.ca]
Sent: Wednesday, October 28, 2009 3:14 PM
To: Mayor and Council - DNV
Cc: FONVCA
Subject: Proposed Billboards on the North Shore

On behalf of the Federation of North Vancouver Community Associations

Mayor Walton and Members of Council
At our last FONVCA meeting we discussed the proposal by the Squamish Nation to erect billboards on the North Shore. As you are aware, the Department of Indian and Northern Affairs and the federal environmental assessment office has recently granted their approval.

Please be advised of the following Motion passed unanimously at our meeting on October 15th, 2009:

that an email be sent to District Council advising as follows:

Motion duly moved, seconded and carried unanimously –
"That FONVCA urges District Council to restate their position from 2 years ago opposing these billboards and send a request that the decision to permit these billboards be rescinded,
And to solicit the support of the other North Shore councils to do the same."

Thank You for considering this request.

Sincerely,
Cathy Adams,
on behalf of FONVCA

Subject: [Fwd: Lynn Valley Library heating/cooling the outdoors at the taxpayers' expense]
From: Brian Platts <bplatts@shaw.ca>
Date: Fri, 13 Nov 2009 16:03:29 -0800
To: Corrie Kost <corrie@kost.ca>

Subject: Lynn Valley Library heating/cooling the outdoors at the taxpayers' expense
From: Wendyqureshi <wendyqureshi@shaw.ca>
Date: Fri, 13 Nov 2009 15:52:39 -0800
To: 'Mayor and Council - DNV' <Council@dnv.org>
CC: fonvca@fonvca.org

Hi folks,

I am writing today about the fact that the two (motion-activated) doors to the Lynn Valley Library (one on Lynn Valley Road and the other onto the plaza) are always open. Isn't the DNV policy to become sustainable? Why are we District taxpayers paying to heat the outdoors in the winter and cool it in the summer? I have spoken to many staff at the library and they agree with me but they say that there is nothing they can do because the "Juice Guy" says it is too hot or too cold.

I respectfully request that these doors be closed.

Wendy Qureshi

Lynn Valley Library heating/cooling the outdoors at the taxpayers' expense.eml	**Content-Type:** message/rfc822 **Content-Encoding:** 7bit

Subject: Bears - Garbage - and the law of unintended consequences
From: Corrie Kost <kost@triumf.ca>
Date: Sat, 14 Nov 2009 11:22:17 -0800
To: DNV Mayor and Councilors <dnvcouncil@dnv.org>
CC: 'FONVCA' <fonvca@fonvca.org>
BCC: Brian Platts <bplatts@shaw.ca>

Your Worhip & Members of Council,

Please read the attachment.

Yours truly,

Corrie Kost

unintended-consequences.pdf	**Content-Type:** application/nappdf **Content-Encoding:** base64

Your Worship & Members of Council

Subject: **Law of unintended consequences**

Councils are often pressured by special interest groups to pass bylaws before they have realized their full consequences. A case in point is the passage of a bylaw requiring that garbage be put out at the curb on the morning (5:30-7:30am) of pickup. A number of residents, either because they are employed in shift work or find it difficult to get up that early for other reasons and finding the bylaw unreasonable, have put their garbage out the previous evening. This has resulted in friction with the neighbours – in some cases one reporting the violation of another. The harmony of our neighbourhoods is thus threatened by what some feel is an unreasonable bylaw and others feel puts our bears at risk. Personally, my sympathies lie with the former. This is further re-enforced by the increasing incidence of bears breaking into sheds and even homes to obtain access to an easy meal. The resolution to the "problem" is not an easy one but to me it seems clear that the path council has taken is not the proper one. Pitting neighbours against neighbours is not a good solution.

Clearly 100% compliance of any of our bylaws is impossible. At 99% compliance there would still be hundreds of homes in violations – sufficient to support a number of bears invading the area. Even if 100% of us store the garbage indoors (which often is not a very healthy thing to do) the bears would then simply break into our homes resulting in much more damage all around. The inevitable conclusion is that a more balanced solution is required. Consideration of the following is suggested:

a) Any bears sighted in a residential area should immediately and persuasively be encouraged to return to the wilderness.
b) Bear-proof garbage containers be provided to all residential properties.
c) The garbage bylaw allow for bear-proof containers to be placed at curbside the evening prior to pick-up.

In the interim period please advise Bylaw enforcement personnel to enforce the bylaw with some compassion to our residents.

Yours truly,

Corrie Kost
2851 Colwood Dr.
N. Vancouver, V7R2R3

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Catalyst Paper Corporation v. North Cowichan (District),* 2009 BCSC 1420

Date: 20091016
Docket: S094246
Registry: Vancouver

Between:

Catalyst Paper Corporation

Petitioner

And

The Corporation of the District of North Cowichan

Respondent

Before: The Honourable Mr. Justice Voith

Reasons for Judgment

Counsel for the Petitioner:	Roy W. Millen Alexandra Luchenko
Counsel for the Respondent:	Sukhbir Manhas
Place and Date of Hearing:	Vancouver, B.C. August 6 and 7, 2009
Place and Date of Judgment:	Vancouver, B.C. October 16, 2009

Table of Contents

1. Introduction

[1] The petitioner, Catalyst Paper Corporation has challenged the property tax rates established by Tax Rates Bylaw 2009, Bylaw No. 3385 adopted by The Corporation of the District of North Cowichan on May 8, 2009 (the "Bylaw"). Specifically, it seeks a declaration that the property tax rate established under the Bylaw for Class 4 Major Industry properties is unreasonable and thereby illegal.

[2] Catalyst's challenge to the Bylaw is one of four companion proceedings. Catalyst has also challenged the 2009 property tax rate bylaw adopted by each of the City of Campbell River, the City of Power River and the City of Port Alberni in Action No.'s S094249, S094317 and S094250, respectively. Though the specific facts and circumstances that underlie these various tax rate bylaws vary significantly from one proceeding to the next, it has been agreed between the parties that the relevant statutory schemes as well as the legal issues that arise in each of these proceedings are largely consistent. Thus, though the various counsel who appeared on behalf of the respondent municipalities emphasized different issues and advanced their respective submissions in different ways, all parties accepted the significant commonality in the legal issues

that arise in these various proceedings.

[3] Accordingly the parties have agreed that in these reasons I am to create a central framework which addresses these shared issues. Thereafter the reasons that follow for each of the remaining individual proceedings will address the evidence specific to that particular proceeding, albeit in the context of the overall legal framework that these reasons establish. Subsequent reasons will also address any legal issues which are unique to a particular proceeding.

2. Background

(a) The Petitioner and the Facilities it Operates at Crofton

[4] Catalyst, a limited company, is the largest specialty paper and newsprint producer in Western North America, and one of the largest producers of telephone directory paper in the world. Catalyst also operates the largest paper recycling operation in Western Canada. It was formed on September 1, 2001 by the amalgamation of Norske Skog Canada Limited and Pacifica Papers Inc.

[5] Catalyst has four pulp and paper operations in British Columbia, located at Crofton (North Cowichan), Port Alberni, Elk Falls (Campbell River) and Powell River. Catalyst operates a recycling operation in Coquitlam. It also owns a recycled paper operation in Arizona.

[6] Catalyst's Crofton Division is located adjacent to the community of Crofton, within the broader District of North Cowichan. The Division has three paper mills, two pulp machines and a deep sea port which is a gateway to major markets in Western North America, Western Europe, Asia and Latin America. At the end of 2008 the Division had some 770 employees.

(b) The Nature of Catalyst's Concern

[7] Catalyst asserts that by various measures, and in particular in relation to the municipal services it actually consumes, its property tax rates are unreasonable. In the four municipalities within which it operates mills it paid more than $28 million in property taxes in 2008. In 2007, the latest year for which confirmed provincial data is available, Catalyst's property taxes in the four municipalities in question, together with its operation in Coquitlam, amounted to one sixth of all Class 4 taxes in the province.

[8] Catalyst has calculated that it received approximately $1 million in municipal services from the District of North Cowichan in 2008. Excluding school and regional taxes, Catalyst paid $6.7 million in taxes to the District in 2008. Using this $6.7 million figure, Catalyst has paid approximately $6.50 in taxes for every $1.00 in municipal services received from the District. Under the Bylaw, the Class 4 tax rate is approximately 20 times that of the Class 1 Residential Property rate. Of the property taxes levied by the District under the Bylaw, 37% are allocated to Class 4 properties even though Class 4 properties only account for 3.7% of the total tax base of the District based on assessed value. Conversely, Class 1 properties account for almost 90% of total assessed value

and pay only 40% of the property taxes. The mean assessed value of a home in the District in 2008 was approximately $300,000 and yet the average property taxes paid by a homeowner in the District was approximately $610.00 annually. This is one of the lowest tax rates in the Province and is the lowest property tax rate for a home, on a comparative basis, on Vancouver Island.

[9] Though Catalyst has been concerned for many years about the amount of property tax it pays, recent economic circumstances have heightened those concerns. The financial challenges that presently face Catalyst are many and varied. The company has significant debt. Its share price has dropped from $7.00 in 2002 to approximately 16¢ in June of this year. It has not paid a dividend to its shareholders in several years. In 2008, Catalyst posted an after-tax net earnings loss of more than $220 million.

[10] As a result of these realities, Catalyst has worked hard to reduce its costs. It has reduced its overall workforce by more than 1,000 employees in the last two years. It has moved its head offices. It has shut down its kraft pulp production line at the Crofton mill.

[11] Catalyst is of the view that the high tax rates established by the Bylaw and the property tax bylaws in the other municipalities where it operates puts Crofton and other mills in jeopardy and impedes its ability to compete globally. The municipal tax problem it faces is significant. In the five year period from 2004-2008 Catalyst posted an after-tax net loss of $186 million. During that same period Catalyst paid $157 million in municipal taxes in British Columbia.

(c) The Apparent Origin of the Problem

[12] Disproportionately high tax rates for Class 4 property owners have apparently been a problem of long standing. In 2004, Professor Bish of the University of Victoria Local Government Institute, in a study entitled "Property Taxes on Business and Industrial Property in British Columbia", concluded that major industry tax rates in some communities are "the highest in North America". This includes the communities where Catalyst operates.

[13] Earlier this year, a report prepared for the Vancouver Island Economic Alliance addressed the scope of the problem. The report reviewed assessed values, property tax rates, and major industry/residential tax rate ratios on Vancouver Island and the Central/Sunshine Coast. In comparing 1992 to 2007 data, the report found that:

(a) The total assessed value in Class 1 Residential had increased by 271%, while Class 4 Major Industry total assessed value decreased by 26%;

(b) The weighted average municipal tax rates for Class 1 decreased by 38%, while the weighted average municipal tax rates for Class 4 increased by 21%; and

(c) The weighted average ratio of Class 4 to Class 1 municipal tax rates nearly doubled, from 7.7% to 14.9%.

[14] The increasing gap in tax rates between Class 1 and Class 4 has been caused, at least in part, by municipalities holding steady the amount of tax from each property class from year to year even though the assessment bases for these classes has changed. Thus, if the Class 1 assessment base increases and its total share of municipal taxes is kept static, the Class 1 tax rate actually declines. Conversely, with a shrinking assessment base in Class 4 Major Industry, caused by the closure of mills and other industrial operations, the Class 4 rate must increase in order to maintain the same Class 4 share of municipal taxes.

[15] In relation to North Cowichan, Class 4's share of the total assessed value decreased dramatically from 15.74% in 1991 to 4.05% in 2007 while its share of overall property taxes decreased by a much smaller proportion – from 58% in 1991 to 48% in 2007.

(d) Catalyst's Efforts to Address the Issue

[16] Catalyst has sought to address its concerns with the levels of property tax it is levied. Since at least 2003 it has written numerous letters to officials in the municipalities where it operates. It has sought and obtained numerous meetings with both Mayors and their Councils in different municipalities as well as with appropriate Provincial representatives.

[17] Since 2008, the frequency and urgency of these communications and meetings has increased. The recipients of these communications were broadened to all members of the Legislative Assembly and to all residents in each of the four municipalities. Catalyst sought to make clear in these meetings and communications that the status quo was not sustainable or tenable from its perspective. Its communications detail much of the financial and statistical information I have outlined above.

(e) The Catalyst Consumption of Services Model

[18] A cornerstone of Catalyst's claim that its tax rates are unreasonable is premised on its assertion that these rates bear no relationship to the municipal services it actually uses or consumes. That premise is based on a series of reports generated by Catalyst's consultants for each of the four municipalities.

[19] Catalyst's stated purpose in generating these reports was simple. It wished to provide a rational basis for the distribution of property taxation between different classes of property. Municipal taxes are, in part, raised to pay for a wide range of municipal services such as roads, fire and police protection and land use planning. It was Catalyst's position in these reports and in its submissions before me that property taxes should be distributed among property classes in a way that generally accords with the value or volume of services consumed by each class.

[20] The various consumption reports were prepared by Messrs. Fitzgerald, Stickleman and Enemark. These gentlemen hold multiple professional qualifications and designations and have

impressive work histories.

[21] The methodologies and data used for the North Cowichan study, which is titled "Municipal Sustainability Model District of North Cowichan" (the "Model"), are described at some length in Mr. Fitzgerald's affidavit and in the study itself. The methods used followed, for the most part, processes used by the City of Vancouver and the District of North Vancouver in earlier similar studies. Much of the information in the Model came directly from staff employed by North Cowichan. The Model, of necessity, makes numerous assumptions and extrapolates from other relevant data when direct information from North Cowichan was not available. Nevertheless, the Model, which is almost 200 pages in length, appears to be a thorough and comprehensive piece of work. An earlier draft of the Model was delivered to North Cowichan with virtually no negative comment from District staff. Indeed, subject to some modest concerns, the validity of the conclusions of the Model was not seriously argued before me.

[22] As stated, the core premise of the Model is that a sustainable level of taxation would result in relative proportionality between net consumption and taxation, with each class paying taxes that were approximately equal to the net value of the municipal services they received. The Model established that in 2008, Class 4 properties consumed approximately 6.8% of City services, but paid 44.1% of City taxes. Catalyst accounts for just under 89% of all Class 4 Major Industry assessments in North Cowichan. It also accounts for the same proportion of Class 4 taxation. Class 1 Residential Properties consumed approximately 64.6% of City services but paid only 40.2% of City taxes. Class 6 Business Properties consumed approximately 27.7% of services but paid only 8.9% of taxes.

[23] The Model concluded that Catalyst consumed approximately $1 million in District services in 2008. By letter dated April 27, 2009 and addressed to the Mayor and Council of North Cowichan, the President of Catalyst, Mr. Garneau, confirmed Catalyst's earlier advice that it would pay $1.5 million in property tax for 2009. Notwithstanding that the property tax payment required of Catalyst by the Bylaw was in excess of $6.8 million, Catalyst has in fact only paid $1.5 million to North Cowichan in 2009.

3. The Relevant Legislative Framework

[24] The following general provisions of the *Community Charter*, S.B.C. 2003, c. 26, introduce and establish the broad framework within which municipal powers are to be interpreted and exercised:

> Principles of municipal governance
>
> 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.

...

Purposes of Act

3. The purposes of this Act are to provide municipalities and their councils with

(a) a legal framework for the powers, duties and functions that are necessary to fulfill their purposes,

(b) the authority and discretion to address existing and future community needs, and

(c) the flexibility to determine the public interest of their communities and to respond to the different needs and changing circumstances of their communities.

Broad interpretation

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.

...

Municipal purposes

7. The purposes of a municipality include

(a) providing for good government of its community,

(b) providing for services, laws and other matters for community benefit,

(c) providing for stewardship of the public assets of its community, and

(d) fostering the economic, social and environmental well-being of its community.

[25] Several provisions of the *Community Charter* pertain directly to the authority of a municipality to impose "property value" taxes. Section 165 requires a municipality to establish and adopt, by bylaw, a financial plan before establishing its annual tax bylaw. Section 165 establishes the necessary content of such a financial plan and provides, in part:

165. (1) A municipality must have a financial plan that is adopted annually, by bylaw, before the annual property tax bylaw is adopted.

(2) For certainty, the financial plan may be amended by bylaw at any time.

(3) The planning period for a financial plan is 5 years, that period being the year in which the plan is specified to come into force and the following 4 years.

(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.

[26] The balance of s. 165 establishes additional requirements for the financial plan. Having adopted a financial plan, a municipality must impose, by bylaw, property value taxes for the year. The authority to fix such taxes, as well as the requirements for the taxing bylaw, are found in s. 197 of the *Community Charter*. I have included s. 197 in its entirety to demonstrate that while it 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:

197. (1) Each year, 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 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.

(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.

(6) The minimum amount of tax under subsection (1) in any year on a parcel of real property is $1.

(7) Property value taxes under subsection (1) are deemed to be imposed on January 1 of the year in which the bylaw under that subsection is adopted, unless expressly provided otherwise by the bylaw or by the enactment under which they are imposed.

[27] Section 199 of the *Community Charter* enables the Lieutenant Governor in Council to make regulations respecting tax rates. Specifically, it provides:

199. The Lieutenant Governor in Council may make regulations respecting tax rates that may be established by an annual property tax bylaw, including regulations doing one or more of the following:

(a) prescribing limits on tax rates;

(b) prescribing relationships between tax rates;

(c) prescribing formulas for calculating the limits or relationships referred to in paragraph (a) or (b);

(d) allowing the inspector under prescribed circumstances to vary, by order, a limit, relationship or formula prescribed under this section.

[28] The Province has in some instances, under the authority of s. 199 or otherwise, regulated the delegated discretion contained in s. 197. Examples are found in the *School Act*, R.S.B.C. 1996, c. 412, s. 119; 2008 – Non Residential School Tax Rate Order, OIC 260/08; *Taxation (Rural Area) Act Regulation*, B.C. Reg. 387/82; *Municipal Liabilities Regulation*, B.C. Reg. 254/2004, s. 5; and *Municipal Tax Regulation*, B.C. Reg. 426/2003, s. 4.

[29] 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.

4. The Extent of Permissible Review

[30] The respondent starts with the proposition that Catalyst is asking the court to engage in a process which is, in large measure, beyond its authority. It says the Bylaw can only be reviewed for compliance with formalities or, at most, can be reviewed to determine whether Council has exceeded the jurisdiction provided to it in s. 197. The respondent says that it is an independent level of government with the authority to pass bylaws and that these bylaws have the same force and effect as legislation enacted by the provincial government. In making this claim the respondent relies on *Pacific National Investments Ltd. v. Victoria (City)*, 2003 BCCA 162, 11 B.C.L.R. (4th) 234 at para. 26. Furthermore, the respondent submits that the deliberations of Council to determine tax rate bylaws are purely political decisions made in good faith by elected officials acting as community representatives in order to raise the necessary revenue to run local government. Sections 1, 3 and 4 of the *Community Charter* are said to reinforce this immunity from review. Finally, decisions relied on by the petitioner, which deal with the reasonableness of taxing bylaws, such as *Canadian National Railway Co. v. Fraser-Fort George (Regional District)* (1994), 1 B.C.L.R. (3d) 375, 29 Admin. L.R. (2d) 97 (S.C.) aff'd (1996) 26 B.C.L.R. (3d) 81, 140 D.L.R. (4th) 23 (C.A) and *Westcoast Energy Inc. v. Peace River (Regional District)* (1997) 30 B.C.L.R. (3d) 120, 43 Admin. L.R. (2d) 133 (S.C.) aff'd (1998), 54 B.C.L.R. (3d) 45, 167 D.L.R. (4th) 98 (C.A.) are said to have been overruled, or at a minimum, would be decided differently today. They are said to have been overruled in part because cases such as *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231; *Nanaimo (City) v. Rascal Trucking Ltd.*, 2000 SCC 13, [2000] 1 S.C.R. 342 and *Pacific National Investments Ltd. v. Victoria (City)*, 2000 SCC 64, [2000] 2 S.C.R. 919, each of which I will return to and deal with more fully, have established that municipalities can exercise legislative and executive powers, are political bodies, and are primarily accountable at the ballot box.

[31] I believe many of these various conclusions are misconceived in principle. Furthermore, they are inconsistent with those decisions that post-date both *Shell Canada Products* and *Rascal Trucking* as well as the enactment of ss. 1, 2 and 4 of the *Community Charter*.

[32] First, the legal status of municipalities and of the Province are fundamentally different. Section 92(a) of the *Constitution Act, 1982,* grants to the Provincial Legislature exclusive authority to make laws in relation to municipal institutions in the province. Municipalities do not have independent constitutional status.

[33] In *Shell Canada Products*, Sopinka J. said at p. 273:

As creatures of statute, however, municipalities must stay within the powers conferred on them by the provincial legislature. In *R. V. Greenbaum*, [1993] 1 S.C.R. 674, Iacobucci J., speaking for the Court, stated, at p. 687:

> Municipalities are entirely the creatures of provincial statutes. Accordingly, they can exercise only those powers which are explicitly conferred upon them by a provincial statute.

[34] In *Pacific National Investments* (S.C.C.), Lebel J., writing for the Court, affirmed the following principle at para. 33:

> A municipality is a creature of statute and has only those powers that have been expressly delegated to it or that are directly derived from the powers so delegated …

[35] The fact that municipalities are political bodies and that councillors are accountable at the ballot box may well be taken into "consideration in determining the standard of review for *intra vires* decisions": (*Rascal Trucking* at para. 33). These factors do not, however, serve to insulate the acts of local government from review.

[36] Furthermore, ss. 1, 2 and 4 of the *Community Charter* largely confirm existing principles that emerge from the relevant case law. They do not expressly confer the immunity from review claimed by the respondent and should not be interpreted as creating a statutory impediment or prohibition to the judicial review of municipal conduct. Instead, s. 262 of the *Local Government Act*, R.S.B.C. 1996, c. 323, relied on by the petitioner in this proceeding, expressly enables a party to apply to the Supreme Court to set aside a bylaw for illegality. A bylaw determined by a court to be unreasonable would be illegal.

[37] Moreover, the powers of a municipality under its enabling legislation are not be construed as unlimited or unfettered, even if the words of the legislation on their face do not impose specific limits. Provisions which are open-ended in nature are still subject to vigilant scrutiny regarding the true purpose of the bylaw; *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40, [2001] 2 S.C.R. 241 at para. 20.

[38] In *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, [2004] 1 S.C.R. 485, Bastarache J., speaking for the court, observed at para. 11:

> It is well established that the legislature is presumed not to alter the law by implication: *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 395. Rather, where it intends to depart from prevailing law, the legislature will do so expressly.

[39] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, Bastarache and LeBel J.J., speaking for the majority, said:

> [28] By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.

[40] For a court to be precluded from engaging in judicial review, which is one of its core

functions, and to thereby be prevented from considering the *vires*, bad faith or unreasonableness of municipal conduct would require express statutory language. Such language is found, as it relates to judicial review on the grounds of unreasonableness, in the municipal legislation of numerous provinces: Rogers, *The Law of Canadian Municipal Corporations* (2 ed. (looseleaf)), at pp. 406-8. Section 148 of the *Vancouver Charter*, S.B.C. 1953, c. 55 also contains such an express prohibition. There is, however, no such provision in the *Community Charter*.

[41] In *Vancouver Island Entertainment Inc. v. Victoria (City)*, 2006 BCSC 1150, 58 B.C.L.R. (4th) 316 (S.C.), Neilson J. directly addressed the question of whether a legislative act of local government is reviewable for reasonableness. After reviewing a number of authorities, Neilson J. concluded that such municipal conduct was reviewable for reasonableness albeit, at that time, on the standard of patent unreasonableness.

[42] Recently, in *O'Flanagan v. Rossland (City)*, 2009 BCCA 182, 270 B.C.A.C. 40, a case that dealt in part with a challenge to a taxing bylaw on the basis of reasonableness, Hall J., speaking for the court, said:

> [22] The chambers judge held:
>
> > [18] I cannot say that the City's decision is patently unreasonable. All taxation bylaws will discriminate in some respect. The City must exercise judgment as to where and how to impose taxes. In doing so, the City may take into account any number of considerations. The court will, and should, be slow to impose its considerations or values in determining issues of taxation. The court will only interfere where the municipality goes beyond its statutory power, or where the decision is patently unreasonable. I find that neither of these two considerations applies here.
>
> ...
>
> [24] The decision to exclude parcels that had previously been taxed for an earlier improvement was in my respectful view a matter that could properly be considered by the council of the respondent City. Absent bad faith or an improper motive, it is for councils, not a reviewing court, to make such determinations. ... What I draw from the case of *Rascal Trucking*, cited to us by counsel in this case, is that courts should be slow to impose their notions of what is fair or appropriate in place of decisions of those in local government. As McLachlin J. (as she then was), dissenting, observed in *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231 at 244, 110 D.L.R. (4th) 1 (cited in *Rascal Trucking*), "courts must respect the responsibility of elected municipal bodies to serve the people who elected them and exercise caution to avoid substituting their views of what is best for the citizens for those of municipal councils."

[43] The comments of Hall J. are inconsistent with the suggestion that the legislative activity of municipalities is immune from challenge for reasons other than formalities or the *vires* of the bylaw in question. The nature of the power that is exercised under s. 197 of the *Community Charter* is directly relevant to the degree of deference that is to be afforded to that exercise. The concept of deference is not, however, co-extensive with a court being foreclosed from considering the propriety of municipal conduct.

[44] I also do not accept that each of *Westcoast Energy* and *Canadian National Railway* have

been overruled or overcome by subsequent decisions. Both decisions were expressly referred to and relied on in *Vancouver Island Entertainment* as well as in the recent case of *Western Forest Products Inc. v. Capital Regional District*, 2009 BCCA 356.

5. What Constitutes an Unreasonable Municipal Bylaw?

[45] There is significant confusion surrounding the content of the various distinct grounds that can be raised to challenge an exercise of delegated discretionary power. In Jones and de Villars, *Principles of Administrative Law*, (5th ed. 2009) each of bad faith, irrelevant considerations, discrimination and unreasonableness are treated as distinct grounds on which a party can potentially challenge the exercise of a discretionary power.

[46] In *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corporation*, [1948] 1 K.B. 223 (C.A.), the court dealt with a bylaw that was challenged as being *ultra vires* the legislature on the basis of unreasonableness. This fact, without more, reveals that an abuse of discretion, which includes unreasonable administrative action, can give rise to an error which is jurisdictional in nature: Jones and De Villars at p. 175; *Canadian National Railway* at para. 10.

[47] In *Wednesbury* Lord Greene M.R. said at p. 229:

> Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably". Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington, L.J. in *Short v. Poole Corporation* (l) gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith, and, in fact, all these things run into one another.

[48] The authors of *Principles of Administrative Law* concede (at p. 191) that "[i]t may well be that unreasonableness can in some circumstances be treated as a synonym for the exercise of a discretion for an improper purpose, in bad faith, or on irrelevant considerations". In this case Catalyst does not say that in adopting the Bylaw, Council acted for an improper purpose or in bad faith or on the basis of irrelevant considerations. Instead, Catalyst relies on the guidance provided in *Dunsmuir* as to what constitutes a reasonable administrative decision, or in this case, municipal decision.

[49] In *Dunsmuir,* the court revisited the standard of review applicable to different exercises of administrative decision making. The court had before it the review of a decision of an adjudicative body. The decision is, however, directly relevant to the judicial review of legislative action by local government: *Western Forest Products; O'Flanagan*. In *Dunsmuir*, the Court established that there

were two standards of review – correctness and reasonableness. The pre-existing standard of review that had been applicable to the exercise of *intra vires* municipal conduct had been patent unreasonableness: *Rascal Trucking*. In *Dunsmuir*, that standard was collapsed into the general reasonableness standard.

[50] Importantly, for the purposes of the present case, the court expanded on the substance and content of reasonable administrative decision making. In so doing, the court said:

> [45] 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.
>
> [46] 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?
>
> [47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness 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.

[51] Based on the foregoing structure, Catalyst says that the Bylaw is unreasonable in two respects. First, it claims that the decision making process engaged in by Council in relation to the Bylaw is unintelligible. One is unable to discern any rational basis, rationality being the hallmark of reasonableness, for how Class 4 property tax rates were established. Second, it claims that the Bylaw falls outside the range of possible and acceptable outcomes. In other words, Class 4 property tax rates are so excessive, by any one of a number of measures, as to be unreasonable.

6. What Does "Justification, Transparency and Rationality" Mean in the Context of s. 197 of the *Community Charter*

[52] *Dunsmuir*, as I have said, was concerned with the reasonableness of the decision making process of an adjudicative body. In this context reference to "the process of articulating reasons" or to "intelligibility" is readily understood. But what, if any, explanation is required of a municipality engaged at the legislative end of decision making when its decision is challenged in a judicial review proceeding?

[53] The burden of proof in this proceeding lies on Catalyst. A presumption of validity applies to the Bylaw: *MacMillan Bloedel Ltd. v. Galiano Island Trust Committee* (1995), 10 B.C.L.R. (3d) 121,

126 D.L.R. (4th) 449 (B.C.C.A.) at para. 156. Consequently, the Bylaw is presumed to be valid, and therefore reasonable, until the contrary is established by Catalyst.

[54] Catalyst concedes that Council is under no obligation to give reasons, in the formal sense, which would explain or communicate how it arrived at the various property tax rates for different classes in the Bylaw. It says, however, that the importance of transparency and the need to give reasons, found in various parts of the *Community Charter*, should inform the obligations of Council in the exercise of its powers under s. 197. Thus, for example, s. 165(3.1) and s. 197(3.1), which I have already referred to, reflect an increasing legislative emphasis on accountability and transparency in municipal financial planning. Similarly, s. 200(4) requires that a municipality make available, on request, a report respecting how parcel tax rates were established under s. 200(3). Section 8(9) also requires that Council provide, on request, a statement respecting Council's reasons for adopting prescribed categories of bylaws.

[55] These specific statutory provisions do not assist Catalyst. They reflect specific and finite requirements that are referable to the particular categories of bylaw or municipal activity that are expressly identified in the provision. They do not give rise, by implication or otherwise, to any broader obligation that is relevant when Council engages in decision making under s. 197.

[56] I was also directed by Catalyst to various authorities where courts have confirmed that a public body is bound by a duty of procedural fairness when it makes administrative decisions affecting an individual's rights, privileges and interests. One aspect of that duty is an obligation to provide reasons: *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48, [2004] 2 S.C.R. 650. This duty is not, however, generally engaged when a body undertakes decision making that is legislative in nature and is intended to have broad application: Jones and de Villars pp. 239-244.

[57] Nevertheless, and notwithstanding the fact that the burden of proof rests with Catalyst, I believe there is some obligation on the part of the respondent 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 tax rates. This is so for several reasons.

[58] First, whatever the level of deference given to the decision of a municipal council, a consideration of the reasonableness of that decision necessitates some understanding on the part of a court of how the decision was made. In *Canada (Minister of National Revenue – M.N.R.) v. Wrights' Canadian Ropes, Ltd.*, [1946] J.C.J. No. 2 (P.C.), the court considered a discretionary decision by the Minister of National Revenue to reject an application for a tax exemption. Today, the requirement of procedural fairness would likely require that the Minister provide some reasons or rationale for his determination. Lord Green M.R. said at para. 10:

> Their Lordships now return to a consideration of the language of s. 6, sub-s. 2. They cannot help thinking that some confusion has been caused throughout the history of this controversy

> by the phrase contained in the sub-section "in his discretion". The word "discretion" is in truth scarcely appropriate in the context, since what the Minister is required to do before he can make a disallowance is to "determine" that an expense is in excess of "what is reasonable or normal for the business carried on by the taxpayer". The reference to "discretion" in this context does not, in the opinion of their Lordships mean more than that the Minister is the judge of what is reasonable or normal. If the matter had stood there, and there had been no right of appeal against the decision of the Minister, the position would have been different from what it is. But in contrast to cases arising under sub-ss. 3 and 4 of sec. 6, where the decision of the Minister is to be "final and conclusive", a right of appeal to the Exchequer Court is given, and the appeal is to be regarded as an action in that Court. This right of appeal must, in their Lordships' opinion, have been intended by the legislature to be an effective right. This involves the consequence that the Court is entitled to examine the determination of the Minister and is not necessarily to be bound to accept his decision. Nevertheless the limits within which the Court is entitled to interfere are, in their Lordships' opinion, strictly circumscribed. It is for the taxpayer to show that there is ground for interference, and if he fails to do so the decision of the Minister must stand. Moreover, unless it be shown that the Minister has acted in contravention of some principle of law the Court, in their Lordships' opinion, cannot interfere: the section makes the Minister the sole judge of the fact of reasonableness or normalcy and the Court is not at liberty to substitute its own opinion for his. But the power given to the Minister is not an arbitrary one to be exercised according to his fancy. To quote the language of Lord Halsbury in *Sharp v. Wakefield* [1891] A.C. 173 at p. 179, he must act "according to the rules of reason and justice, not according to private opinion... according to law and not humour. It is to be, not arbitrary, vague and fanciful, but legal and regular".

[59] Lord Greene continued at para. 11 to say the following:

> Their lordships find nothing in the language of the Act or in the general law which would compel the Minister to state his reasons for taking action under s. 6, sub-s. 2. But this does not necessarily mean that the Minister by keeping silence can defeat the taxpayer's appeal. To hold otherwise would mean that the Minister could in every case, or, at least, the great majority of cases, render the right of appeal given by the statute completely nugatory. The Court is, in their Lordships' opinion, always entitled to examine the facts which are shown by evidence to have been before the Minister when he made his determination. If those facts are in the opinion of the Court insufficient in law to support it, the determination cannot stand. In such a case the determination can only have been an arbitrary one. If, on the other hand, there is in the facts shown to have been before the Minister sufficient material to support his determination the Court is not at liberty to overrule it merely because it would itself on those facts have come to a different conclusion. As has already been said, the Minister is by the sub-section made the sole judge of the fact of reasonableness and normalcy, but, as in the case of any other judge of fact, there must be material sufficient in law to support his decision.

[60] In *Dunsmuir*, the court made similar comments about the balance between deference and meaningful judicial review:

> [48] … the concept of deference, so central to judicial review in administrative law, has perhaps been insufficiently explored in the case law. What does deference mean in this context? Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference "is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers"

(*Mossop*, [1993] 1 S.C.R. 554 at p. 596, *per* L'Heureux-Dubé J., dissenting). We agree with David Dyzenhaus where he states that the concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision": "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279 at p. 286 (quoted with approval in *Baker*, [1999] 2 S.C.R. 817 at para. 65, *per* L'Heureux-Dubé J.; *Ryan*, [2003] 1 S.C.R. 247 at para. 49).

[61] Thus, in order for the court to fulfill a meaningful or effective role in considering the reasonableness of an administrative decision, it must have some sense of the basis on which that decision was made. Once it is in a position to comprehend the manner in which the decision was arrived at and the factors which are said to rationally support the decision, the court is required, depending on the character of the decision, to accord it deference. Absent any appreciation of how or on what basis the decision in question was made a court would simply abdicate its role on judicial review. It would become subservient to the decision maker.

[62] The second reason there should be some evidence in the record which supports the reasonableness or rationality of the municipal decision being challenged is policy based.

[63] In *Dunsmuir*, the court supported fixing a single standard of reasonableness partly on the basis of the palatability of the decision to the parties involved in the litigation. Specifically, the court said:

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

[64] In *Congrégation des témoins de Jéhovah,* the Court dealt at length with the duty of fairness in specific circumstances and on the basis of given factors. The Court held that the duty of procedural fairness required that reasons for the decision in question be given. The Court also, however, addressed the policy which supported the importance of such reasons. In affirming the need for reasons, McLachlin C.J. said:

> 12 The five *Baker,* [1999] 2 S.C.R. 817, factors suggest that the Municipality's duty of procedural fairness to the Congregation required the Municipality to carefully evaluate the applications for a zoning variance and to give reasons for refusing them. This conclusion is consistent with the Court's recent decision in *Prud'homme v. Prud'homme,* [2002] 4 S.C.R. 663, 2002 SCC 85, at para. 23, holding that municipal councillors must always explain and be prepared to defend their decisions. It is also consistent with *Baker*, where it was held, at para. 43 dealing with a ministerial decision, that if an organ of the state has a duty to give reasons and refuses to articulate reasons for exercising its discretionary authority in a particular fashion, the public body may be deemed to have acted arbitrarily and violated its duty of procedural fairness.
>
> 13 Giving reasons for refusing to rezone in a case such as this serves the values of fair and transparent decision making, reduces the chance of arbitrary or capricious decisions, and cultivates the confidence of citizens in public officials. Sustained by both law and policy, I conclude that the Municipality was bound to give reasons for refusing the Congregation's second and third applications for rezoning. This duty applied to the first application, and was

> complied with. If anything, the duty was stronger on the Congregation's second and third applications, where legitimate expectations of fair process had been established by the Municipality itself.

[65] 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.

[66] 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.

[67] In the particular case of the Bylaw the need for transparency is, at least in part, addressed by a series of relevant statutory provisions. Section 89 of the *Community Charter* requires, as a general rule, that meetings of Council be open to the public. Section 135 imposes the requirement for at least two Council meetings prior to the adoption of a bylaw. Section 166 requires public consultation before a financial plan bylaw is adopted. The materials that are presented to Council, together with all agendas and minutes, are also available to the public. Thus, the statutory scheme in place ensures that the Bylaw has a certain measure of transparency.

7. What Level of Deference is to be Given to the Bylaw?

[68] Prior to *Dunsmuir intra vires* municipal decisions were reviewed on the basis of patent unreasonableness. With there now being a single standard of unreasonableness, how are *intra vires* municipal decisions to be analyzed? Several comments from *Dunsmuir* are particularly instructive. First, the Court confirmed, at para. 48, that:

> The move towards a single reasonableness standard does not pave the way for a more intrusive review by the courts and does not represent a return to pre-*Southam* formalism.

[69] Second, the Court said, at para. 54:

> Guidance with regard to the questions that will be reviewed on a reasonableness standard can be found in the existing case law.

[70] Later it said, 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 defence 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.

[71] Thus, the collapse of the patent unreasonableness standard of review does not give rise to any dilution in the deference given to decisions weighed on this standard in the past. Furthermore, case law relevant to the specific nature of the administrative decision being reviewed is directly relevant to the reasonableness of that decision and in particular to the "range of possible outcomes" that are acceptable.

[72] A number of recent decisions address the degree of deference to be given to administrative decisions that have significant policy and political content. In *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, the respondent Khosa had applied, unsuccessfully, to the Immigration Appeal Division ("IAD"). Binnie J., writing for the majority, said:

> [4] *Dunsmuir* teaches that judicial review should be less concerned with the formulation of different standards of review and more focussed on substance, particularly on the nature of the issue that was before the administrative tribunal under review. Here, the decision of the IAD required the application of broad policy considerations to the facts as found to be relevant, and weighed for importance, by the IAD itself. The question whether Khosa had shown "sufficient humanitarian and compassionate considerations" to warrant relief from his removal order, which all parties acknowledged to be valid, was a decision which Parliament confided to the IAD, not to the courts. I conclude that on general principles of administrative law, including our Court's recent decision in *Dunsmuir*, the applications judge ws right to give a higher degree of deference to the IAD decision than seemed appropriate to the Federal Court of Appeal majority. In my view, the majority decision of the IAD was within a range of reasonable outcomes and the majority of the Federal Court of Appeal erred in intervening in this case to quash it. The appeal is therefore allowed and the decision of the Immigration Appeal Division is restored.

[73] In *Teamsters Local Union No. 31 v. Shadow Lines Transportation Group*, 2009 BCCA 130, 90 B.C.L.R. (4th) 74, Ryan J., writing for the court, said:

> [90] If *Dunsmuir* left open the issue of deference, more recent cases from the Supreme Court indicate that deference continues to play a role in the application of the reasonableness test. In *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 S.C.R. 761, the question was whether the Minister's decision in declining to refuse the surrender to the United States of a fugitive under the *Extradition Act*, S.C. 1999, c. 18, s. 44(1)(a) could be overturned on judicial review as a violation of s. 6(1) of the *Canadian Charter of Rights and Freedoms*. The

> court asked first what the standard of review ought to be and second whether in light of that standard the Minister's decision should be set aside. In determining the standard of review, the Court noted with approval its own earlier cases which held that the Minister's decision was "'at the extreme legislative end of the *continuum* of administrative decision-making' and is viewed as being largely political in nature" (para. 22, quoting *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631 (S.C.C.) at p. 659). This finding not only determined the standard of review, reasonableness, but it informed the answer to the test itself, whether the Minister's decision fell within a range of reasonable outcomes. Discussing the test LeBel J. said this for the Court at para. 41:
>
> > [41] Reasonableness does not require blind submission to the Minister's assessment; however, the standard does entail more than one possible conclusion. The reviewing court's role is not to re-assess the relevant factors and substitute its own view. Rather, the court must determine whether the Minister's decision falls within a range of reasonable outcomes. To apply this standard in the extradition context, a court must ask whether the Minister considered the relevant facts and reached a defensible conclusion based on those facts. I agree with Laskin J.A. that the Minister must, in reaching his decision, apply the correct legal test. The Minister's conclusion will not be rational or defensible if he has failed to carry out the proper analysis. If, however, the Minister has identified the proper test, the conclusion he has reached in applying that test should be upheld by a reviewing court unless it is unreasonable. This approach does not minimize the protection afforded by the *Charter*. It merely reflects the fact that in the extradition context, the proper assessments under ss. 6(1) and 7 involve primarily fact-based balancing tests. Given the Minister's expertise and his obligation to ensure that Canada complies with its international commitments, he is in the best position to determine whether the factors weigh in favour of or against extradition.

[74] The authorities which confirm that courts are to give municipal decisions considerable deference are also clear and consistent. In *Western Forest Products,* the court, in referring to each of *Shell Canada Products*, *Rascal Trucking* and *United Taxi Drivers*, elaborated on the modern approach to the judicial review of local government conduct. In each of *Western Forest Products*, *Shell Canada Products* and *United Taxi Drivers* the court was dealing with whether specific municipal conduct properly fell within the purview of a given statutory provision. In *Rascal Trucking* the court was focused on the standard of review applicable to a municipality's adjudicative function as opposed to its policy making role. The cautions expressed in each of these cases about judicial interference with municipal decision making resonate even more strongly in a case such as this one where what is at issue is a discretionary decision that is largely unfettered by any statutory restrictions.

[75] The reluctance of courts to question the rationality of municipal decisions or to second guess the range of permissible outcomes for such decisions has been expressed in the strongest of terms. In *Kruse v. Johnson*, [1898] 2 Q.B. 91, a decision that is often referred to and indeed was referred to in each of *Shell Canada Products* and *Rascal Trucking*, Lord Russel of Killowan C.J. said at p. 99:

> 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 bylaw 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. Surely it is not too much to say that in matters which directly and mainly concern the people of the county, who have the right to choose those whom they think best fitted to represent them in their local government bodies, such representatives may be trusted to understand their own requirements better than judges.

[76] In *Wednesbury*, which was again referred to in *Shell Canada Products*, Lord Greene M.R. said at p. 230:

> 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. It is not what the court considers unreasonable, a different thing altogether. If it is what the court considers unreasonable, the court may very well have different views to that of a local authority on matters of high public policy of this kind. Some courts might think that no children ought to be admitted on Sundays at all, some courts might think the reverse, and all over the country I have no doubt on a thing of that sort honest and sincere people hold different views. The effect of the legislation is not to set up the court as an arbiter of the correctness of one view over another. It is the local authority that are set in that position and, provided they act, as they have acted, within the four corners of their jurisdiction, this court, in my opinion, cannot interfere.

[77] More recently, in *Lehndorff United Properties (Canada) Ltd. v. Edmonton (City)* (1993), 146 A.R. 37, 14 Alta. L.R. (3d) 67(Q.B.) aff’d 157 A.R. 169, 23 Alta. L.R. (3d) 1 (C.A.), the applicant sought to quash a municipal tax bylaw on several grounds including the ground that it was unreasonable. In addressing this latter issue, the court said:

> 68 The Applicants suggest that the philosophy underlying municipal taxation legislation is that the burden of taxation should be shared equitably in each category of property according to the assessed values of the properties that make up such category. On examining the scheme set out in the Municipal Taxation Act I would say that the philosophy is that the burden of taxation should be shared equitably in each category of property according to the assessed values of the properties that make up such category. I have difficulty concluding that the scheme set out in the Municipal Taxation Act places limits upon the amount by which the non-residential tax rate may exceed the residential tax rate in the case of the City of Edmonton. Am I to say that a 57% or 74% increment is satisfactory but 101% is in excess of the jurisdiction set out in the Municipal Taxation Act? If the legislature had wanted to impose a limit on the increment in the case of cities it would surely have done so. It had no hesitation in setting a 75% limit in the case of certain rural municipalities.
>
> 69 Am I to condemn the tax because some economists are displeased with the distribution? I think not. In Falardeau v. Town of Hinton, supra, at 125-6:
>
> > "If the form of taxation is in fact authorized by statute, the choice of the scheme of taxation to be adopted is one entirely within the discretion of the council of the municipality irrespective of whether, in the opinion of economists, such a scheme is

> founded on sound economic principles."

[78] Sections 1 and 3 of the *Community Charter* confirm that municipalities “require ... adequate powers and discretion to address existing and future community needs” and the “authority to determine the levels of municipal expenditures and taxation that are appropriate for their purposes”. Furthermore, s. 3 of the *Community Charter* confirms that Councils are to have “the flexibility to determine the public interest of their communities and to respond to the different needs and changing circumstances of their communities”. These objects, at least in significant measure, are achieved through s. 165 and s. 197 of the *Community Charter*. In setting its financial plan and adopting its property taxing bylaw Council performs a vital role. It is a role that requires Council to weigh and balance the interests of its constituents. Council must take into account the circumstances, both short term and long term, of the community. It will be making fundamental discretionary decisions about what services to offer, what services to reduce, and what services to expand. It will of necessity consider how the revenue for these services is to be raised. The exercise of the power conferred by s. 197 is “fact driven, policy laden and discretionary. Thus, the range of outcomes” is broad: *Teamsters Local Union No. 31* at para. 94.

[79] In separate concurring reasons in *Dunsmuir,* Binnie J. said, at para. 141:

> The danger of labelling the most “deferential” standard as “reasonableness” is that it may be taken (wrongly) as an invitation to reviewing judges not simply to identify the usual issues, such as whether irrelevant matters were taken into consideration, or relevant matters were not taken into consideration, but to reweigh the input that resulted in the administrator’s decision as if it were the judge’s view of “reasonableness” that counts. At this point, the judge’s role is to identify the outer boundaries of reasonable outcomes within which the administrative decision maker is free to choose.

[80] 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.

8. The Ability of a Municipality to Discriminate in a Taxing Bylaw

[81] It was common ground between the parties that Council’s power to impose different rates of tax on different classes of property is lawful and within its authority. In *Jericho Tennis Club v. British Columbia (Assessor of Area No. 9 – Vancouver)* (1991), 55 B.C.L.R. (2d) 332, 26 A.C.W.S. (3d) 631 (S.C.), Shaw J. said:

> 31 ... It became clear during the course of argument that Jericho's concern was that in the City of Vancouver the tax rate for Class 6 (Business & Other) is set at a higher level than the rates for Class 8 (Recreational) and Class 1 (Residential).

> 32 The respective tax rates are set yearly by City Council and may vary between classes as Council sees fit. I observed under Question No. 2 that municipal councils (including Vancouver Council) are authorized under s. 273.1(1) and (2) of the *Municipal Act* to impose different rates of taxation upon the various classes of property designated under s. 26(8) of the *Assessment Act*. When s. 273.1 of the *Municipal Act* and s. 26(8) of the *Assessment Act* are read together, it is apparent that they authorize a discriminatory or variable taxation based upon land classification.
>
> ...
>
> 35 While the principle of even-handedness or equity set out in the above passages is of general application, specific legislation can authorize discriminatory or variable taxation. Ritchie C.J., in the above-quoted passage in *Jones v. Gilbert*, used the qualifying words "Unless the legislative authority otherwise ordains . . .". He also said, at p. 365, that ". . . a power to discriminate must be expressly authorized by law, and cannot be inferred from general words."
>
> 36 Thus, although classification may lead to more onerous taxation of some classes of property than others (the rates will depend upon the bylaws passed by municipal councils) the scheme of differential taxation is expressly permitted by statute. Accordingly, there is no basis for the application of the principle in *Bramalea*.

9. The Relevance of Consumption in Assessing the Reasonableness of the Bylaw

[82] As I have indicated, a cornerstone of the petitioner's challenge is premised on the proposition that the Bylaw is unreasonable because the property taxes imposed on Class 4 are disproportionate to the level of services consumed by Class 4 tax payers. Specifically, the petitioner's Outline asserts "the Bylaw is unreasonable and unsustainable because it imposes tax rates on Class 4 Major Property owners ... which far exceed any reasonable measure of the municipal services provided to and consumed by Major Industry property owners". This submission is directed to establishing both that the Bylaw is not rationally supported and that the effect of the Bylaw, as it pertains to Class 4, causes it to fall outside of the range of acceptable outcomes which are defensible.

[83] Both the affidavit of Mr. Fitzgerald and the Model are directed to establishing that Catalyst's use of municipal services bears no relationship to the municipal taxes that the Bylaw imposes. The affidavit of Mr. Johnston, a Vice President of Catalyst, further addresses Catalyst's use of municipal services and confirms that in many respects, Catalyst is self-sustaining or self-sufficient. Its products are overwhelmingly shipped out by sea rather than over municipal roads. So too, most products are delivered to it by sea. 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. None of this information is seriously contested by the respondent.

[84] The question is whether any of this information assists the petitioner. As a starting point it is important to emphasize that nothing in s. 197 expressly requires the respondent to consider consumption patterns in fixing property taxes; whether for Class 4 property owners or otherwise.

Indeed, as I have said, Catalyst does not argue that the Bylaw is *ultra vires*. Instead, it says even if a consideration of consumption is not expressly required by s. 197, a consumption of services model provides a rational basis for fixing property tax rates and, in the absence of the respondent advancing a different coherent theory to rationally support the Bylaw, should be used.

[85] Catalyst further argues that other provisions in the *Community Charter* and the *Local Government Act*, R.S.B.C. 1996, c. 323, which speak to the use of services, are directly relevant to construing s. 197. In interpreting the scope of the City's taxation powers regard must be had, Catalyst argues, to the text and context of its governing legislation as gleaned from its underlying objects and policy rationales: *Pacific National Investments* (S.C.C.) at para. 36. Section 1(2)(c) of the *Community Charter* recognizes the importance of a municipality having the authority to deliver services. Section 7, under the heading "Municipal Purposes" confirms that a purpose of a municipality is to provide services. Section 8(3)(a) enables Council, by bylaw, to regulate or impose requirements in relation to municipal services. Furthermore, a number of specific provisions directly relate a fee or tax to consumption or use. Section 200 of the *Community Charter* which deals with parcel taxes is an example. Section 200 and s. 216 of the *Community Charter* which deal with local services taxes are others. Sections 933 and 935 of the *Local Government Act* which relate to development cost changes are yet others.

[86] Catalyst also argues that unless one considers tax rates in the context of the consumption of services different classes are, in real terms, being given financial assistance and are being exempted from the taxes they should rightly be paying. Catalyst says that this too is contrary to the underlying intention of the *Community Charter*. Thus, s. 25 of the *Community Charter* prevents council from giving a particular business an advantage or assistance absent specific conditions. Section 224 expressly gives charities and similar entities a permissive exemption. Section 215 allows municipalities to establish business improvement areas the cost of which must be recovered by a local service tax.

[87] None of these provisions assist the petitioner. The early provisions of the *Community Charter* recognize the importance of providing Council with the authority and tools necessary to ensure that a municipality is properly provided with the services it requires. Those provisions which establish specific regimes within which the users of services are to pay for such services do exactly that – they establish specific and finite regimes with explicit statutory requirements. Those provisions that address the circumstances where Council can provide tax exemptions or assistance are also finite in ambit. These provisions do not establish principles of broader application nor do they inform the interpretation of s. 197.

[88] Catalyst also placed significant reliance on *Canadian National Railway* and *Westcoast Energy*. Both of these cases dealt with Regional Districts that had drawn the boundaries of a service area so as to maximize the greatest possible degree of tax contribution or financing from the respective corporate petitioners. In both cases the court was satisfied that the boundaries of the

local service area had been "gerrymandered" and were unreasonable. In both cases the court concluded that the local service area boundaries that had been established bore no relationship to the people who would be served within the area. While *Canadian National Railway* and *Westcoast Energy* were both decided on the basis that the bylaws in question were unreasonable, it is important to recognize the circumstances within which they were decided. The statutory provisions governing municipal and regional district services are markedly different. Section 800 and 800.1 require a regional district to adopt an establishing bylaw for a service and to tie that service to a defined service area. Neither case establishes the broader linkage between services and usage that Catalyst advocates.

[89] Furthermore, apart from lacking any jurisdictional basis, a single-minded reliance on a consumption model is inconsistent with the nature of the decision making exercise contemplated by s. 165 and s. 197 of the *Community Charter*. 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 rigor 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.

[90] 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.

[91] 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.

[92] Finally, imposing a requirement to establish property tax rates with reference to the consumption patterns of different property classes gives rise to various practical problems. The

Model generated by Catalyst is a serious piece of work. It would have been time consuming and expensive to prepare. Elevating the importance of consumption and the relevance of such models would require municipalities, in the absence of an explicit statutory requirement, to undertake such studies. In addition, though the Model appears to give rise to a credible analysis, I expect that different experts undertaking a similar exercise could arrive at somewhat different results. This, in turn, has the prospect of giving rise to future challenges that would be based on the accuracy or validity of the model relied on by Council.

[93] Ultimately, in my view, the actual levels of municipal services consumed by a given class is a potentially relevant factor which can be considered by Council in fixing property tax rates. In instances where such information actually exists, Council is likely required to consider the information. The weight or significance given to such consumption data is a matter for Council alone. It 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 that it considers appropriate.

10. <u>The Reasonableness of the Bylaw</u>

(a) Was the Bylaw Rational?

[94] Catalyst agreed that if particular information was before Council it was reasonable to infer that Council considered that information prior to adopting the Bylaw. Council had available to it, and can be taken to have considered, a considerable body of information.

[95] Council had Catalyst's various written communications and presentations. It had the information from its meetings with Catalyst representatives. These written communications and meetings provided Council with Catalyst's position. This would include Catalyst's specific concerns, its comparative economic data, and information relating to its deteriorating economic position.

[96] Council had the Model. At one point Catalyst argued that Council's failure to make use of the Model was in itself unreasonable as it evidenced a failure to consider relevant information. I do not accept this. The record is clear. Mr. Frame, the Director of Finance for North Cowichan, has deposed:

> 26. Prior to the adoption of North Cowichan Bylaw No. 3384 and North Cowichan Bylaw No. 3385, the North Cowichan Council considered the Consumption of Services Model for imposing property taxes in respect of major industry class property being proposed by Catalyst.
>
> 27. North Cowichan Council was unable to support the adoption of the Consumption of Services Model proposed by Catalyst for a number of reasons. Some of those reasons are that:
>
> (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.

[97] Mr. Frame also referred to other factors which go to the merits of the Model and which I need not address. Catalyst contests the assertion that a shift in property taxes, as advocated by the Model, would have caused too great a shift in property taxes and says such a reduction would merely have brought residential tax rates into line with levels that are prevalent elsewhere on Vancouver Island. Thus, Catalyst's real concern is not that the respondent failed to consider the Model, but that it failed to give it the effect proposed.

[98] Mr. Frame further deposed:

> 13. In adopting the annual tax rates bylaw, and establishing the tax rates to be imposed by North Cowichan in respect of each of the classes for property located within its boundaries for that year, the North Cowichan Council considers, among other things, the relative ability of each of the classes of property to meet the overall property tax burden.

Catalyst says this position is "unreasonable" when one looks to its own dire financial circumstances and its ability to pay the tax burden imposed upon it. This, however, is the type of weighing of competing interests that properly lies in the purview of Council and to which a court will defer.

[99] Council had significant historical information available to it. It was aware of:

a) the historical basis of allocating taxes to different classes which had given rise to the existing tax rates for Class 4;

b) the fact that starting in 2003, Council had commenced shifting one percent of the tax burden annually from Class 4 to Class 1. As a result, the percentage of property taxes for Class 4 was reduced from 54% in 2002 to 48% in 2007;

c) the fact that in 2006, Council decided that the cost of a new aquatic facility would be borne largely by Class 1. As a result, Class 4 was spared having to pay approximately $400,000;

d) the fact that in 2008, Council allocated 100% of a $300,000 budget reduction to Class 4 alone.

[100] These latter factors caused the percentage of property taxes paid by Class 4 to decrease from 48% in 2007 to 44% in 2008.

[101] Prior to the adoption of its financial plan and the Bylaw, Council requested and received three further things. First, Council asked staff to provide options for the apportionment of taxes between classes. Mr. Frame prepared such a report on October 27, 2008. That report again provides historical information and provides various scenarios which shift different percentages of the Class 4 tax burden to either other classes or to Class 1 alone. The average cost of each such

scenario on a Class 1 homeowner is identified.

[102] Second, Council was provided with a series of approximately 15 charts, each of which contained pertinent information. Some of this information was historical, some compared the respondent's Class 4 tax rates as well as its Class 4 to Class 1 ratios with other municipalities in the province. Still others provided information about how Class 4 rates in North Cowichan compared with other municipalities within which Catalyst operates on Vancouver Island.

[103] Third, Council had established the North Cowichan Property Tax Restructuring Committee, which was chaired by the mayor and nine residential taxpayers. Catalyst was not aware of the Committee or its work until after the adoption of the Bylaw. The Committee prepared a draft report, perhaps a dozen pages in length, for Council before adoption of the Bylaw. The Terms of Reference for the Report demonstrate how varied and judgment-based the considerations relevant to such an exercise are. Specifically, the Committee identified the following factors which it considered relevant to its work:

- Review the Municipality's current financial bylaws, policies and guiding documents;
- Review the Municipality's property taxes, user fees and other sources of revenue;
- Identify long-term taxation issues and trends that will impact the Municipality's fiscal sustainability;
- Compare the Municipality with other similar communities using appropriate indices, benchmarks, performance indicators, taxation levels, and service levels;
- In the event of significant reduction in the payment of major industrial tax, recommend how to adapt to that reduction (prior to presenting these recommendations the Committee will seek public input)
- Provide a 5-year recommendation plan for re-apportioning property taxes, including a strategy to reduce reliance on major industry

[104] Importantly, the Committee concluded that tax policy "should be neutral, neither an incentive or a detriment to industry and commercial development." In order to achieve such "neutrality" the Committee compared the Major Industry, Light Industry and Business tax rates in North Cowichan with some 50 "peer group" communities in British Columbia. The Committee then recommended a very significant tax shift from Class 4 over a three year period.

[105] Prior to adoption of the Bylaw, Council received a further report from Mr. Frame dated April 16, 2009 which dealt with Class 4 property taxes and which included multiple policy considerations, various possible scenarios and their ramifications, and the following recommendation:

> That Council shift $1,000,000 of property taxes from Major Industry to Residential, for 2009; and further, that Council finalize a long term tax restructuring strategy in the fall of 2009, to reduce North Cowichan's reliance on Major Industry taxes and on a single tax payer.

[106] Ultimately, in the 2009 Financial Plan Bylaw, the respondent 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:

> 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 majority industry (Class 4) and 75% of the cost on residential (Class 1) as oppose 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 distributions of tax burden relative to other municipalities in British Columbia.

[107] Finally, on May 11, 2009, after adoption of the Bylaw, the respondent wrote to Catalyst in response to the various letters it had received earlier. In that letter it said, in part:

> Our budget has a 0% increase year-over-year, save and except the costs for the first full year of operating costs for the new Cowichan Aquatic Centre. You are no doubt aware that this new facility was built on the understanding that the ultimate operating costs and debt retirement would be apportioned using provincial multiples, rather than municipal multiples as was done with the old Aquannis Center. Based on this method of apportionment, major industry's reduction in taxes for the new pool was $391, 279 in 2008 and $872,152 in 2009. In addition to this reduced burden of taxes for major industry from the use of the provincial multiple for the new Cowichan Aquatic Centre, Council has also decided to transfer $500,000 in 2009 from major industry to residential.
>
> 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 for Council's review in its discussions 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.

[108] Based on the foregoing information it is 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*. To the extent that Catalyst complains that the respondent has not explained how it weighed or balanced both the information and the competing objectives before it, or how Class 4 tax rates were established, I do not believe this is correct. This is not a case where the respondent has been "sphinx like" in its position. Its letter of May 11, 2009 provides some insight into the considerations and reasoning that underlie the Bylaw. Furthermore, the obligations I've referred to which rest on the respondent to ensure that there is information in the record before the court from which the court can glean the factors Council considered in its deliberations has been satisfied. Council had a great deal of relevant information available to it, all of which was rationally connected to the exercise it faced. Finally, and most importantly, the inherent nature of Council's decision making exercise under s. 197 in relation to the Bylaw is one in which there are multiple competing objectives and policies, where the respective merits of these competing objectives are not easily quantified or measured and in respect of which no precise expression, which would capture the disparate views of Council, can be expected.

(b) Is the Bylaw within the Range of Possible and Acceptable Outcomes?

[109] Catalyst referred to much data to establish that historical Class 4 tax rates in North Cowichan as well as the Class 4 tax rates under the Bylaw are outside of the range of such tax rates elsewhere. The ratio of Class 4 to Class 1 rates in North Cowichan was the highest in the province in 2008. It remains amongst the highest today. Residential tax rates, in an affluent community, remain the lowest on Vancouver Island today. They are likely the lowest amongst North Cowichan's "peer group" municipalities in the province. Furthermore, property tax rates, as a percentage of cost of production, are markedly higher in British Columbia than elsewhere in Western Canada or in Ontario. Class 4 municipal tax rates in British Columbia are also markedly higher than in other jurisdictions.

[110] I do not believe any such evidence advances Catalyst in this proceeding. Some of the 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.

[111] To the extent that such evidence compares Class 4 tax rates under the Bylaw with such rates in other municipalities, the language of the courts in *Kruse*, *Wedensbury* and *Lehndorff United Properties* is directly relevant. The fact that the Class 4 to Class 1 tax rate ratio established by the Bylaw when compared to other municipalities is at the far end of the spectrum does not mean the result is not a possible or acceptable outcome. In any instance where a number of decision makers address the same question there will be a range of outcomes. 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.

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

> [23] 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.

[113] 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.

11. The Relevance of Acknowledging that Class 4 Tax Rates are Too High

[114] This is not a case where an irritated corporate taxpayer rushes to court to challenge its tax rates. Catalyst has been trying for more than a half decade to address a structural issue which is widely recognized to be a problem. The third party studies I have referred to as well as the materials filed by the respondent recognize that existing Class 4 tax rates in North Cowichan are at undesirable and unsustainable levels. The work of the Tax Restructuring Committee, the various reports of Mr. Frame, and the Financial Planning Bylaw all recognized that existing Class 4 tax rates are significantly higher than they should be. Mr. Frame comments "they have gotten off track". The expressly acknowledged corollary of this is that Class 1 residential rates are lower than they should be. Leaving aside the technical issue of whether such comments can properly be considered to reflect the views of the respondent, such acknowledgements are not admissions that the bylaws are legally "unreasonable". Municipal recognition that Class 4 tax rates are "too high" is an acknowledgement that Council accepts the importance of reducing those rates. The pace at which and extent to which that reduction is to take place is a matter that lies within Council's discretion. The wisdom of that decision is a matter that a court will not interfere with.

12. Is the Bylaw Inequitable?

[115] Though Catalyst's Petition does not allege that the Bylaw is inequitable in its treatment of Class 4 property owners vis-a-vis owners of other classes of property, its Outline does so as did its

submissions before me.

[116] In asserting the Bylaw is inequitable, Catalyst relies on *Bramalea Ltd.v. British Columbia (Assessor for Area 9 (Vancouver))* (1990), 52 B.C.L.R. (2d) 218, 76 D.L.R. (4th) 53 (C.A.) citing *Jonas v. Gilbert* (1881), 5 S.C.R. 356 at 366:

> Unless the legislative authority otherwise ordains, everybody having property or doing business in the country is entitled to assume that taxation shall be fair and equal, and that no one class of individual, or one species of property, shall be unequally or unduly assessed.

[117] *Bramalea* was concerned with both the common law requirement and the provisions of the *Assessment Act*, R.S.B.C. 1979, c. 21 which established that there is to be "equity" between the assessed value of similar land. It is a decision that would have relevance to land within the same class of property. In this case, what is at issue is the "equitable" treatment of one class of property when compared to another class of property.

[118] In *Jericho Tennis Club*, after referring to both *Bramalea* and *Jonas*, Shaw J. confirmed that specific legislation can authorize "discriminating or variable taxation".

[119] While Catalyst accepts that the respondent has the jurisdiction to impose different tax rates on different property classes, it says the differences must be rational and equitable. Here it say that the "massive disparity between classes demonstrates that the tax rates set under the Bylaw are outside of the equitable range of values". In emphasizing the importance of rationality and "an equitable range of values", and in again relying on evidence of comparable rates in other municipalities in British Columbia or in other jurisdictions, Catalyst does no more than restate, in modestly modified terms, its submissions in relation to the reasonableness of the Bylaw.

[120] For the reasons I have expressed, I do not believe the Bylaw is inequitable either because it is irrational or because the Class 4 rates it generates are outside of an acceptable range of values.

13. Conclusion

[121] The petition is dismissed and the respondent is to receive its costs.

"Voith J."

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Suzuki v. Munroe,*
2009 BCSC 1403

Date: 20091014
Docket: S107052
Registry: New Westminster

Between:

May Yuen Mui Ngan Suzuki and Kazuo Suzuki

Plaintiffs

And

Janice Munroe and Richard Munroe

Defendants

Corrected Judgment: The text of the judgment was corrected at paragraphs 77, 99, 106 and 107, where changes were made on November 5, 2009.

Before: The Honourable Mr. Justice Verhoeven

Reasons for Judgment

Counsel for the Plaintiffs:	R.K. Oliver
Counsel for the Defendants:	T. Yu
Place and Date of Trial:	New Westminster, B.C. September 21, 22, 23, 24, 25, 2009
Place and Date of Judgment:	New Westminster, B.C. October 14, 2009

I INTRODUCTION

[1] Mr. and Mrs. Suzuki claim that their neighbours Mr. and Mrs. Munroe have committed the tort of private nuisance. They say that the installation of a central air conditioning unit outside the Munroes' home and just a few feet away from the home of the Suzukis has created a nuisance as a result of noise. They also allege that the installation of a surveillance camera which overlooks the front yard, driveway and entrance to the Suzukis' home is a private nuisance in that it interferes with their privacy. They seek damages and an injunction.

[2] The Munroes deny that any nuisance was ever caused by them. They say the Suzukis are unduly sensitive. They say that the air conditioning unit was reasonably quiet when first installed, and has been made quieter through various modifications that they have voluntarily undertaken. They argue that central air conditioning appliances like the one they installed are common in the neighbourhood, and that their appliance complies with the relevant local bylaws. They say that the surveillance camera was installed in order to monitor the side area of their own home, and any view of the Suzukis' property taken in by the camera is minor and incidental, and does not cause any significant intrusion to the privacy of the Suzukis, and is not a nuisance in law.

II FACTUAL OVERVIEW

[3] The Suzukis and the Munroes reside as next door neighbours on Madrona Place, in the City of Coquitlam. The neighbourhood consists of single family homes built on medium sized lots in a residential suburban setting. The precise lot measurements were not given in evidence but Mrs. Munroe estimated the length of her property at about 155 or 160 feet. From the various plans and aerial photographs produced, the width of the property is about 55 feet. The Suzukis' property is a similar size. Both homes are moderately large, with several bedrooms on the upper floor, the main living space on the main floor, and a basement. Both have enclosed garages and driveways facing the street.

[4] Madrona Place is a cul de sac. There are minor arterial streets in the immediate vicinity but there are no major arterial thoroughfares or highways. There is no industry or commercial activity in the immediate area.

[5] The Suzuki and Munroe houses are situated quite close together. The distance between them is about 13 feet.

[6] Mrs. Suzuki is a retired postal worker. She retired in early 2005. Mr. Suzuki is a chemical engineer, who retired in October 2006. They purchased the property on Madrona Place in 1991 and had the house built in 1992.

[7] The Munroes moved into the property next door in or about 2000. Mrs. Munroe is a

pharmacist. Mr. Munroe is a former police officer who took early retirement in 2004. He is a professional geologist who works as a consultant and business executive.

[8] The Munroes found their home to be uncomfortable in warm weather. It has poor ventilation. They decided to purchase and install a central air conditioning unit. They hired a reputable contractor. The contractor installed the unit in the optimal location which was the side of the house nearest the furnace. The Munroes say that the installer assured them that the air conditioning unit and its installation would comply with all applicable laws. The installer did not testify.

[9] The Suzuki master bedroom is located on the southeast corner of their home. One of the master bedroom windows faces Madrona Place, and there are two master bedroom windows on the easterly side of the house, facing the house owned by the Munroes. The head of the bed in the Suzukis' master bedroom is against the east exterior wall. There is a window on each side of the bed. Both of those windows open to the space between the two houses.

[10] The air conditioning unit was installed on Sunday, June 25, 2006. It was installed on the ground just outside the west side of the Munroe home, in the space between the two houses. The result is that the air conditioning unit is about 18 feet from the side bedroom windows of the Suzuki master bedroom which is on the upper floor. The distance to the Suzukis' dining room, located on their first floor beneath the master bedroom, is less.

[11] The Suzukis have no central air conditioning and therefore rely on open windows for cooling and ventilation.

[12] Mr. and Mrs. Suzuki were out during the day on Sunday, June 25, 2006, the day of the air conditioning unit's installation. Upon returning they noticed the noise from the new air conditioning unit. Mrs. Suzuki was kept awake all night. Mr. Suzuki took refuge in a corner of the basement.

[13] The perceptions of the parties vary dramatically as to the noise level of the unit upon installation. Mrs. Suzuki testified that upon installation the air conditioner sounded "like a lawnmower" when operated. By contrast, Mr. Munroe said that he was shocked that Mrs. Suzuki found the air conditioner to be too loud. He thought that upon installation in 2006, even before modifications to make it quieter, it was already quiet, and was no louder than his refrigerator.

[14] On Monday, June 26, 2006, the day after installation, Mrs. Suzuki complained to the City of Coquitlam concerning the noise. Mrs. Suzuki also went to the Munroes' residence on June 26 and spoke with one of the Munroes' sons about the noise. According to her, the Munroes' son came with her back to the Suzukis' residence and listened to the noise. She says the son agreed that they would not operate the air conditioner after 9:00 p.m. After some days of compliance with this, however, on June 29 the air conditioner was operated until nearly midnight. Its operation started up again at 5:30 or 6:00 a.m. the next morning.

[15] The Munroes deny that their son was ever involved in discussions with the Suzukis concerning the air conditioner. The point is not material in view of the facts upon which there is agreement.

[16] On July 2, 2006, Mrs. Suzuki approached Mr. and Mrs. Munroe, who were outside their home. She said that their master bedroom was on the side of the house next to the air conditioner and that the noise of the air conditioner was preventing the Suzukis from sleeping. The Munroes were not unsympathetic. They agreed to turn the air conditioner off at 9:00 p.m. and not to operate it prior to 7:00 a.m.

[17] In the conversation, Mrs. Suzuki says she suggested that the Munroes relocate the air conditioner to their back yard. She says that she told them that if they did so, they would be free to operate it 24 hours a day. Mrs. Suzuki said that Mrs. Munroe said that she would check with the contractor about the possibility of relocating the unit.

[18] Mrs. Munroe's version of this discussion is not substantially different. She agrees that she and her husband agreed not to operate the unit between the hours of 9:00 p.m. and 7:00 a.m. "as long as our house does not get too hot".

[19] However, beginning July 20, 2006, the air conditioner was operated more or less continuously for a period of about a week, during a period of very warm weather. Mrs. Suzuki could not sleep in her own bedroom and went to sleep in another room on the opposite side of the house. Mr. Suzuki continued to sleep in the basement.

[20] Pursuant to Mrs. Suzuki's complaint to the City of Coquitlam, a bylaw inspector attended and inspected the air conditioner on June 26, 2006, the date of the complaint. In the inspector's view, there was no infraction of the Coquitlam noise bylaw. She so advised Mrs. Suzuki by telephone later that day. Mrs. Suzuki was unaware that the inspector had in fact attended the premises before advising Mrs. Suzuki that there was no infraction of the bylaw. The Munroes place considerable reliance on the determination of the inspector.

[21] On July 8, 2006, Mr. Suzuki went to speak with Mr. and Mrs. Munroe. The conversation went badly. Mr. Suzuki complained about the noise of the air conditioner. He spoke to Mr. Munroe, while Mrs. Munroe was present. He asked that they move the air conditioning unit to a location on their property that did not bother the Suzukis, and to apply acoustic insulation to minimize the noise. Unfortunately, he also made reference to an unrelated matter. He referred to the existence of some landscape ties located on the rear of the Suzuki property, which served as a retaining wall for some soil and, according to Mr. Munroe, a utility storm sewer drainage line running along the back of the Munroe property. Mr. Munroe considered this a grave threat to the safety of his family. He decided never to speak to him again. Mrs. Munroe felt the same way.

[22] The Suzukis engaged legal counsel who wrote to the Munroes on July 20, 2006. The letter

from counsel noted the voluntary agreement of the Munroes to limit the operation of the air conditioner so that it did not operate between 9:00 p.m. and 7:00 a.m. Nonetheless, through their solicitors, the Suzukis took the position that the air conditioning unit remained a nuisance and they demanded that it be moved. The Munroes also retained legal counsel who took the position that the request of the Suzukis was unreasonable. The perceived threat to remove the landscape ties was noted. This threat was never repeated. I doubt if it was serious when it was made. It was never acted upon.

[23] The Suzukis repeatedly requested that the air conditioning unit be moved to another location on the Munroe property, or that the Munroes take steps to reduce its noise level to no more than 45 decibels. The Suzukis pointed to a City of Toronto bylaw setting out that standard for central air conditioning units. There are no local government bylaws in this region specifically dealing with air conditioning noise.

[24] While the Munroes did not agree to the applicability of the Toronto bylaw standard and maintained that the unit could not be moved, they made significant efforts to attenuate the noise. They installed a timer so that the unit would not operate outside of the agreed upon hours. They spoke with the installer of the unit, who installed a noise attenuating blanket on the inside of the unit at a cost of about $500. They say that the installer advised that moving the unit to another location on their property was not feasible. This advice was not proven in the evidence.

[25] Prior to the summer of 2007, Mr. Munroe constructed a wooden enclosure around the air conditioner, and lined it with sound-insulating materials. The enclosure was constructed in the spring of 2007, prior to the first day of operation of the unit for 2007, which was May 30.

[26] Mr. Munroe has continued to, as he put it, “tinker” with the enclosure, in order to attempt to improve its sound-attenuating capabilities.

[27] He has modified it several times by, for example, altering or increasing the sound insulating materials inside the enclosure. He chose not to use concrete block because Mrs. Munroe thought it would be ugly, and he was of the view that construction of a permanent structure would be contrary to relevant bylaws. There is no evidence from the City of Coquitlam to this effect. He has been mindful of the need to retain proper ventilation for the unit. He has had no professional assistance or advice concerning the design of the enclosure. He has relied upon his own experience and skills as a professional geoscientist.

[28] Mrs. Suzuki has kept detailed and meticulous records relating to the operation of the air conditioning unit, including the hours of operation of the unit for each day since it was installed on June 25, 2006. She says that during 2006, the unit was operated for a total of 68 days, and on 17 occasions was used after 9:00 p.m. or before 7:00 a.m. On 10 occasions, it was operated for 24 hours. During 2007, the unit was operated for 73 days in total, and on 54 occasions, was operated after 9:00 p.m. or before 7:00 a.m. There was one day during 2007 when it was operated

24 hours. These facts were not challenged by the Munroes.

[29] The Suzukis obtained an interlocutory injunction on September 10, 2007. The order required that the air conditioning unit not be operated between 9:00 p.m. and 7:00 a.m. daily.

[30] As noted, on May 30, 2007, the unit was operated for the first time during that calendar year. Contrary to the then informal agreement made between the parties, the unit was operated well after 9:00 p.m. The Suzukis’ son, a medical doctor who ordinarily resides in Australia, was visiting his parents and staying with them in their home. At the request of Mrs. Suzuki he attended at the home of the Munroes to complain about the air conditioner. An hour or so later Mrs. Suzuki attended at the front door of the Munroes’ home herself. She says Mr. Munroe yelled at her and refused to turn off the air conditioner. Nonetheless the air conditioner was turned off sometime later that evening.

[31] During 2006, the Munroes installed a surveillance camera on the outside of their home. The camera is mounted on the side of their home between the two houses, and faces the Suzuki residence. It is directed at a forward angle, towards the air conditioning unit on the side of the residence. It has a very wide angle lens. The view from the camera takes in a portion of the Suzuki entrance, front yard and driveway. The Suzukis complained of this and have amended their Statement of Claim to add a claim of nuisance in relation to the surveillance camera.

III ISSUES

[32] The issues to be decided are as follows:

a) whether the Munroes have committed the tort of private nuisance through use and operation of the air conditioner, either in the past, or currently;

b) whether the operation of the surveillance camera constitutes a private nuisance;

c) if the tort of private nuisance is established, what is the appropriate remedy, and in particular:

1) the amount, if any, of monetary damages; and/or

2) whether an injunction should be granted, and if so, the terms thereof.

IV ANALYSIS

a) Whether the Munroes have committed the tort of private nuisance through use and operation of the air conditioner, either in the past, or currently

i) Legal principles

[33] A leading authority in British Columbia on the law of nuisance is *Royal Anne Hotel Co. Ltd. v.*

Village of Ashcroft (1979), 95 D.L.R. (3d) 756. The judgment of the Court was delivered by McIntyre J.A. He noted at 759 that "The essence of the tort of nuisance is interference with the enjoyment of land. (Street, *Law of Torts*, at p. 212.)". He added at 759:

> That interference need not be accompanied by negligence. In nuisance one is concerned with the invasion of the interest in the land, in negligence one must consider the nature of the conduct complained of. Nuisances result frequently from intentional acts undertaken for lawful purposes. The most carefully designed industrial plant operated with the greatest care may well be or cause a nuisance, if for example effluent, smoke, fumes or noise invade the right of enjoyment of neighbouring land owners to an unreasonable degree ...

[34] McIntyre J.A. referred to the following proposition from H. Street, *The Law of Torts*, 4th ed. (London: Butterworths, 1968) at 215:

> A person then, may be said to have committed the tort of private nuisance *when he is held to be responsible for an act indirectly causing physical injury to land or substantially interfering with the use or enjoyment of land or an interest in land where, in the light of all the surrounding circumstances, this injury or interference is held to be unreasonable.*

[35] He added at 760-61:

> What is an unreasonable invasion of an interest in land? All circumstances must, of course, be considered in answering this question. What may be reasonable at one time or place may be completely unreasonable at another. It is certainly not every smell, whiff of smoke, sound of machinery or music which will entitle the indignant plaintiff to recover. It is impossible to lay down precise and detailed standards but the invasion must be substantial and serious and of such a nature that it is clear according to the accepted concepts of the day that it should be an actionable wrong. It has been said, see McLaren, "Nuisance in Canada", *supra*, that Canadian Judges have adopted the words of Knight Bruce, V.-C., in *Walter v. Selfe* (1851), 4 De G. & Sm. 315, [at p. 322], 64 E.R. 849, to the effect that actionability will result from an interference with "the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions". These words were approved by Middleton, J., in the Ontario High Court in *Appleby v. Erie Tobacco Co.* (1910), 22 O.L.R. 533 at pp. 535-6. In reaching a conclusion, the Court must consider the nature of the act complained of and the nature of the injury suffered. Consideration must also be given to the character of the neighbourhood where the nuisance is alleged, the frequency of the occurrence of the nuisance, its duration, and many other factors which could be of significance in special circumstances. While an owner of land in a quiet residential district may well expect to be protected from the operation of a boiler factory on his neighbour's land, he may not be entitled to expect to prevent the boilermaker from pursuing his lawful calling when he seeks to put his residence in an industrial area next to the factory. The conflicting interests must be weighed and considered against all the circumstances. The social utility of the conduct complained of must be weighed against the significance of the injury caused and the value of the interest sought to be protected.

[36] The principles were also reviewed by the Supreme Court of Canada in *Tock v. St. John's Metropolitan Area Board*, [1989] 2 S.C.R. 1181, at 1190 through 1192, and more recently in *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64, at para. 77. There, the Court stated as follows (references omitted):

> At common law, nuisance is a field of liability that focuses on the harm suffered rather than on prohibited conduct. Nuisance is defined as unreasonable interference with the use of land. Whether the interference results from intentional, negligent or non-faulty conduct is of no

> consequence provided that the harm can be characterized as a nuisance. The interference must be intolerable to an ordinary person. This is assessed by considering factors such as the nature, severity and duration of the interference, the character of the neighbourhood, the sensitivity of the plaintiff's use and the utility of the activity. The interference must be substantial, which means that compensation will not be awarded for trivial annoyances.

[37] As can clearly be seen from the authorities, a nuisance may be created even where the activity complained of is otherwise lawful.

[38] In particular, compliance with local municipal bylaws does not mean that the activity complained of cannot be a nuisance: *Kenny v. Schuster Real Estate Co.* (1992), 10 B.C.A.C. 126 (C.A.).

[39] The invasion complained of must be substantial and serious, and it must be clearly unacceptable according to accepted concepts of the day.

[40] Negligence is not required to make out the tort of nuisance. The converse is also true: the existence of due care will afford no defence if the other ingredients of the tort are present.

ii) Discussion

[41] As previously noted, the subjective views of the parties as to the amount of noise created by the air conditioning unit are dramatically at odds. Even after installation of the noise-attenuating blanket and construction by Mr. Munroe of the enclosure, Mrs. Suzuki maintains that it still sounds like a kitchen fan on a high setting. Mr. Suzuki testified that initially the air conditioning unit sounded "like a table saw". He said he was forced to move into a corner of the basement to sleep in order to get away from the noise. He conceded that he has sensitive hearing. With the modifications, the noise is louder than his limit of tolerance and affects his sleep. He continues to sleep in the basement when the air conditioning unit is operating.

[42] The Munroes maintain that the noise was minimal at all times and that their efforts to further reduce the noise have been neighbourly gestures carried out in order to accommodate their unduly sensitive neighbours.

[43] Mr. and Mrs. Suzuki both used to enjoy spending a lot of time in the garden. Mr. Suzuki used to spend 50% of his daytime leisure time in the garden. He now spends only as much time as is required in order to maintain the garden.

[44] The Suzukis contend that the noise has damaged Mrs. Suzuki's health. In 2007, Mrs. Suzuki was referred by her family physician to a psychiatrist, Dr. Oduwole, who first saw her June 15, 2007.

[45] Dr. Oduwole noted that Mrs. Suzuki had no prior psychiatric problems. She had no prior history of emotional problems or difficulties with neighbours. Dr. Oduwole has seen Mrs. Suzuki in

follow-up approximately 25 times since first seeing her June 15, 2007 and he continues to treat her currently. He has prescribed anti-depressant medication and sleep medication. Mrs. Suzuki continues to use both medications as needed. During the winter months, when the air conditioner is not operating, she worries about the forthcoming air conditioning season. She describes her condition as being much better in the winter months (October through April) when the air conditioning unit is not operated.

[46] Dr. Oduwole noted that as of December 4, 2008, Mrs. Suzuki was completely preoccupied with the situation. He diagnosed a chronic stress disorder manifested by depression and anxiety, with poor sleep, agitation, tiredness, tremors, irritability, lack of enjoyment of her usual pleasures including her home, a sense of helplessness and hopelessness, anger that her hopefully happy retirement in her home has been made impossible, frustration and decreased energy.

[47] He stated that her condition was due to two factors; the noise pollution and effects on her health from that, and the chronic, intractable personal conflict with the neighbours.

[48] Dr. Oduwole gave a guarded prognosis, because the condition has become chronic.

[49] Mr. Suzuki has not been affected as severely as Mrs. Suzuki.

[50] Mr. Munroe testified that the conflict has become a consuming issue for their family. He points to Mrs. Suzuki's records of the operation of the air conditioner and suggests that Mrs. Suzuki is "stalking" them. The Suzukis complain of being watched by the Munroes' surveillance camera.

[51] The Munroes rely on the subjective evidence of several persons concerning the noise level from the air conditioner.

[52] Coquitlam's bylaw inspector, Susan Baldwin, attended the premises on June 26, 2006 in response to the complaint from Mrs. Suzuki. The notes she took on the occasion she attended indicate that the unit sounds "like a refrigeration unit and not a lawnmower". The notes state that "from the street the noise of a fan could be heard". At trial, she testified that she could barely hear the unit even when she was up close, within inches of it. It was on this basis that she advised Mrs. Suzuki that she had no ground of complaint as there was no failure to comply with Coquitlam's noise bylaw.

[53] Ms. Baldwin did not confirm with the Munroes that the unit was in operation on the day that she attended. She did not advise either party of her presence. She had no sound meter, and is not qualified to test for sound scientifically. Her evidence as to the amount of noise made by the unit is inconsistent with the objective evidence concerning the noise level. At the time, the unit was unshielded by any noise attenuating materials and the manufacturer's rating for the unit is 74 decibels. I seriously doubt whether the unit was in fact operating when she attended.

[54] The Munroes' neighbour on the side opposite of the Suzukis is Jacqueline Ting. She testified

that her home has a central air conditioning unit. Her neighbours have not complained about it. She attended the Munroe residence recently and thought that the unit, fully enclosed, made only a "little humming sound", and sounded like a fan. Another neighbour, David La Ballister, testified to similar effect.

[55] Mrs. Munroe testified that there are several homes with central air conditioners in the neighbourhood. The owners of the home behind the Munroes have a central air conditioner. That air conditioning unit is located at the rear of that neighbour's home. I note that the unit in question is located about 100 feet away from the Munroe home.

[56] There was no evidence provided concerning the measured sound levels from this or any other air conditioning units in the neighbourhood.

[57] The Munroes have maintained that moving the unit is not feasible. They rely on advice from the installer to that effect. As noted, no admissible evidence in this respect was led by them.

[58] On the evidence, after installing the noise blanket on the inside of the unit, the Munroes did not obtain any professional opinion as to steps that they could take to reduce or eliminate the noise from the air conditioner.

iii) Objective evidence of sound levels

[59] In August of 2006, the Suzukis hired a professional sound technician to take measurements of the sound levels emanating from the air conditioner and as experienced in the Suzukis' bedroom. He provided the Suzukis with a written report. The technician was not called to give evidence at the trial and therefore the report was excluded from evidence. After having the sound levels professionally determined, Mrs. Suzuki purchased her own hand-held sound measuring device and has taken numerous sound level measurements.

[60] According to her readings, noise from the air conditioner in 2009 inside her bedroom window was in the range of 51 to 53 decibels. She says the noise is much louder when the unit starts and stops, but it is impossible to measure that. She is not qualified to provide technical evidence and I cannot give that part of her evidence much weight.

[61] The Munroes retained a professional engineer, Mark Gaudet, to measure the sound levels in 2009. That is after installation of the sound-insulating blanket and construction of the enclosure by Mr. Munroe.

[62] The engineer testified that the appropriate measurement scale for noise in this regard is dB(A), which is decibels on the "A" scale. The "A" scale is designed to approximate the sensitivity of the human ear to sound. He observed that three decibels is widely accepted as the minimum needed for a subjective increase or decrease in sound level to be perceived. A ten decibel difference is generally accepted as equating to a perceived halving or doubling of the level of

sound. In a free field, that is, absent structures which would reflect, deflect or screen sound, the decibel level is reduced by six decibels each time the distance from a point source is doubled. From this it can be seen, as we know from common experience, that the distance between the source of the noise and the listener is critical.

[63] Mr. Gaudet's consulting firm published a table which states in part as follows:

Common Noise Levels and Typical Reactions

Sound Source	Noise Level	Apparent Loudness	Typical Reaction
Highway traffic at 15 m	70	Base Reference	Telephone use difficult
Light car traffic at 15 m	60	1/2 as loud	Intrusive
Noisy office	50	1/4 as loud	Speech interference
Public library	40	1/8 as loud	Quiet

[64] Mr. Gaudet measured readings of about 50 dB(A) (decibels) over a 24-hour period on July 15 and 16, 2009. The measurement was taken by a microphone placed on a pole at the Munroes' property line between the two houses. The location of the microphone was about eight feet away from the Suzukis' bedroom window, and five feet away from the Munroes' home. He also measured the ambient noise level at that location. He testified that it averaged 45 dB(A) during the time period of measurement. The ambient noise level diminished to a level of 35 decibels at 2:00 a.m., and was in the range of 40 decibels or lower from midnight to 5:00 a.m. On this basis, therefore, the noise emanating from the air conditioner is about ten decibels or more above the ambient noise level from midnight to 5:00 a.m. During the daytime hours, the difference between the ambient noise level and the noise of the air conditioner is less than 10 decibels.

[65] Mr. Gaudet testified that the narrow space between the Suzuki and Munroe home acts as a sound alley, which reduces the sound attenuation that would otherwise occur, absent the structures.

[66] As noted the air conditioning unit installed by the Munroes is rated by the manufacturer at 74 decibels. It can therefore be seen that the combination of the noise reduction blanket, the sound enclosure constructed by Mr. Munroe, and the distance from the air conditioning unit to the microphone pick-up point utilized by Mr. Gaudet have reduced the amount of noise significantly, to approximately 50 decibels.

[67] Mr. Gaudet took further measurements on September 15, 2009. Fully enclosed, the noise level emanating from the air conditioning unit as measured at the property line was slightly higher at 51.8 decibels. With the enclosure completely removed, the noise level was 56.9 decibels.

iv) Noise standards

[68] There was very little evidence adduced as to objective standards for noise. The Suzukis have pointed to the "Guidelines for Community Noise" published by the World Health Organization ("W.H.O.").

[69] A "Fact Sheet" issued by the W.H.O. states:

> Noise can cause hearing impairment, interference with communications, disturb sleep, cause cardiovascular and psycho-physiological effects, reduce performance, and provoke annoyance responses and changes in social behaviour.

[70] The Fact Sheet indicates that the W.H.O.'s Guidelines for Community Noise was the outcome of a W.H.O. task force meeting in London, England, in March 1999. The W.H.O. Guidelines contain the following table:

Environment	**Critical health effect**	**Sound level dB(A)**	**Time hours**
Outdoor living areas	Annoyance	50 - 55	16
Indoor dwellings	Speech intelligibility	35	16
Bedrooms	Sleep disturbance	30	8
School classrooms	Disturbance of communication	35	During class
Industrial, commercial and traffic areas	Hearing impairment	70	24
Music through earphones	Hearing impairment	85	1
Ceremonies and entertainment	Hearing impairment	100	4

[71] W.H.O.'s Fact Sheet indicates that the Guidelines it has published offer recommendations to governments for implementation, such as extending and enforcing existing legislation and including community noise measurements in environmental impact assessments.

[72] In Dr. Oduwole's report of July 5, 2007, he referred to the W.H.O. Guidelines. He states:

> According to the WHO Guidelines for good sleep, sound levels should not exceed 30 decibels for continuous back ground noise and 45 decibels for individual noise event. (Birgitta Burglund et al 1995. Stockholm University and Karolinka Institute.)

[73] In Dr. Oduwole's July 13, 2009 report, he stated as follows:

> Noise pollution is environmental noise that is annoying, distracting and/or physically harmful. The Sources may be human, non human or machines.
>
> The effects can be immediate and can be accumulative. The immediate effect is annoyance and other negative affects like anger, helplessness and anxiety.
>
> The cumulative effects include problems with relationships.
>
> Problems with concentration and fatigue.
>
> Decreased working capacity.
>
> Physical health problems due to increased autonomic and hormonal activation such as hypertension, increased heart rates, irregular heart beat, sleep problems characterised by

> problems falling asleep, frequent awakenings, alterations in sleep stages especially a decrease in deep sleep and alteration in sleep depth.
>
> Emotional or mental health problems such as depression, anxiety, emotional stress, nervous complaints. Emotional instability, increased use of psychotropic medication as well as consumption of sleeping pills.
>
> The magnitude of these changes is determined by individual characteristics and they can be temporarily [sic] but they may also become more permanent with prolonged and continuous exposure.
>
> The effects can also be affected by the severity as well as the duration of exposure.
>
> Those who are most vulnerable are usually the ill, the depressed and the elderly.

[74] This evidence was not challenged.

[75] Another objective standard can be found in some local municipal bylaws.

[76] The bylaw of the City of Coquitlam regulating noise dates from 1982. It contains no objective standards. It defines noise as follows:

> "Noise" includes any loud outcry, clamour, shouting or movement, or any sound that is loud or harsh or undesirable.

[77] The bylaw prohibits such noise. The City of Coquitlam bylaw is of no help in assessing whether the noise emanating from the Munroes' air conditioning unit complies with community standards that might be evidenced by the local bylaw. The subjective nature of the Coquitlam bylaw and its vague and general terms helps explain why Coquitlam's inspector concluded that the Munroe air conditioner was not in breach of the bylaws.

[78] Other municipal bylaws contain objective standards. The Suzukis pointed to a bylaw of the City of Toronto. The Toronto bylaw specifically regulates installed air conditioning devices. The bylaw is somewhat technical but contains a standard of 45 decibels in what might be considered suburban environments, and 50 decibels in an urban environment.

[79] A number of bylaws in the metropolitan Vancouver area regulate noise by means of decibel levels. None refer specifically to air conditioners. The specific bylaw terms vary somewhat, but the bylaws of Vancouver, Burnaby, Richmond and Port Moody and several others in the Vancouver area all provide that in quiet residential areas of their respective municipalities, daytime noise is not to exceed 55 dB(A), and night time noise is not to exceed 45 dB(A). Several of the bylaws define daytime hours as between 7:00 a.m. and 10:00 p.m.

[80] I view these bylaws as providing at least some objective evidence of what is generally acceptable noise in this part of the Province of British Columbia, in quiet residential neighbourhoods, notwithstanding the fact that the particular community in which these parties reside, the City of Coquitlam, has not yet chosen to adopt a bylaw containing objective standards. The decibel levels set out in the bylaws are maximums, beyond which a party will be subject to

prosecution under the bylaw. The decibel levels stipulated are of general application, and do not seek to provide appropriate guidelines for any specific location or circumstance.

[81] As compared to the standards set out in these bylaws, the noise from the Munroe air conditioner exceeds commonly accepted night time maximum noise level standards. However, the Munroe air conditioner, when fully enclosed, is within commonly utilized maximum daytime standards. Without the enclosure, the Munroe air conditioner slightly exceeds maximum daytime noise standards.

[82] The specific circumstances in this case render noise made by either party in the narrow area between the two homes especially bothersome. Therefore, in my view the bylaw standards should be considered absolute maximums as to the level of continuous noise that the Suzukis should be required to tolerate in the circumstances applicable here.

v) Conclusion

[83] I can give little weight to the subjective descriptions of noise levels from any witness and rely instead on professionally-obtained noise level measurements.

[84] The Munroes did not consult with the Suzukis prior to installing the air conditioning unit just a few feet away from the Suzukis' property. This would have been neighbourly and prudent, but they were not obliged to do so. It appears that the Munroes and their installer paid little attention to the effect on the Suzukis' property of the installation of the air conditioner. The site of the air conditioner was chosen based upon what was optimal for the Munroe residence. The sound-insulating blanket was obtained later after a complaint was made. Mr. Munroe began exploring sound enclosures after the issue escalated further. The Munroes have never explored professional engineering solutions for the problem. It may well be that there would be no nuisance created had the unit been located at the rear of the Munroes' property as the Suzukis contend. The evidence does not allow me to make that determination.

[85] The Munroes point to the fact that central air conditioners are common in the neighbourhood. They say these are now everyday appliances. This is true. However, whether the noise from an air conditioner will cause a nuisance to one's neighbour is heavily dependent upon many specific factors including the precise site of the air conditioner, the model, the nature of the noise generated, the measures taken to attenuate the noise, and the location of buildings on neighbouring properties, including where bedrooms and bedroom windows are situated.

[86] One of the factors to be considered in deciding whether a nuisance exists is the social utility of the activity complained of. Here, the air conditioning was installed by the Munroes in order to enhance the comfort of their own home. Their enhanced comfort should not come at the expense of significantly reduced comfort for their neighbours. Nor should the Suzukis be required to close up their windows and acquire an air conditioner in what might be considered self-defence.

[87] Mrs. Suzuki testified that she uses a portable air conditioning unit only when the temperature inside the master bedroom exceeds 30 degrees Celsius. She uses it as little as possible. It is a water-evaporative type appliance which she thought was more environmentally friendly.

[88] The law requires that the activity complained of must be objectively unreasonable in order to constitute an actionable nuisance. The Munroes argue that the Suzukis, and especially Mrs. Suzuki, are unduly sensitive.

[89] The Suzukis have maintained, from the beginning, that they would have no objection to the Munroes' air conditioner being operated 24 hours a day, if it were not located between the two houses, right next to the Suzukis' master bedroom.

[90] The Munroes operate an indoor portable air conditioner which exhausts through their bedroom window, in close proximity to the Suzuki bedroom window. Mrs. Suzuki indicates that she has no objection to that air conditioner, which does not bother her. The Suzukis are not bothered by the air conditioning unit in the home behind the Munroes, which is at a similar distance to the Suzuki home as it is to the Munroe home.

[91] Dr. Oduwole did not state in his evidence, or concede in cross-examination, that Mrs. Suzuki was unusually sensitive concerning noise.

[92] In my view, although Mrs. Suzuki may have become somewhat obsessed with the noise and the operation of the air conditioner, and the conflict with her neighbours, none of this means that the air conditioning noise is not objectively a nuisance. In my view, most people would consider an air conditioning unit operating in excess of 50 decibels only a few feet from one's bedroom window as being a serious and substantial interference with one's enjoyment of property.

[93] I am satisfied on all of the evidence that the Suzukis are not abnormally sensitive individuals and that the noise caused by the Munroe air conditioner is unreasonable, by objective standards.

[94] In all of the circumstances of the case, I conclude that the operation of the Munroe air conditioner has caused and is likely to continue to cause a nuisance for the Suzukis. Based on the objective evidence available, the noise emanating from the air conditioner is well above the existing night time ambient noise levels. It is above the levels set out in the various bylaws. When initially installed, the noise from the air conditioner must have been significantly higher. During the daytime, the noise level, with the unit fully enclosed, causes persistent noise, but at a level which is less than the maximums set out in the various bylaws.

[95] The Munroes have limited the operation of their air conditioner so that it does not operate between 9:00 p.m. and 7:00 a.m. Initially they did so by voluntary agreement. The court order that was later obtained has been substantially complied with. However, that interlocutory order will end when final judgment is obtained in this action. It is therefore be necessary to consider whether an

injunction is needed in future.

b) Whether the operation of the surveillance camera constitutes an actionable private nuisance

[96] As noted, the Munroes installed a surveillance camera on the side of their house pointing toward the Suzuki property in or about July 2006. At trial they stated that the camera was for the purpose of monitoring the air conditioning unit and that side of their home against vandalism. I took it that they were concerned about vandalism by the Suzukis. The Suzukis say that initially they were not concerned with the camera as they did not know the camera took in a view of their front steps, yard, and driveway. They became very concerned upon learning of this in 2008. In 2008 they amended their statement of claim to add a complaint about the surveillance camera. They seek a permanent injunction to remove or redirect the camera so that it does not observe their property and invade their privacy.

[97] The Munroes have declined to move the camera or to redirect it. They say the image from the camera takes in only a small part of the Suzuki property, which is barely discernable in the image seen. They do not deny that the view from the camera takes in a portion of the Suzuki property.

[98] A photographic image from the surveillance camera was produced at trial. The resolution shown in the printed photograph is so poor that one can hardly make out anything. However it is clear that the camera is directed in part so that it has a view of not only the air conditioner but also the Suzukis' entrance, front yard and driveway. If the resolution of the camera is as poor as the photograph presented at trial, I would see no purpose in having the camera at all. I do not accept that the resolution is as bad as the photograph I was shown. I infer that the camera is connected to an electronic monitor of some kind and that the picture on the screen of that monitor must be adequate to be of use.

[99] I have no doubt that a surveillance camera continuously observing the entrance areas to a neighbouring property, or any part thereof, in these circumstances, is an intolerable interference with the use and enjoyment of the neighbouring property. There is no reason the Munroes could not monitor the side of their home utilizing a camera positioned so that it takes in no part of the Suzuki property. No useful purpose of any kind is served by having the camera directed at any part of the Suzuki property. I am forced to conclude that the Munroes installed the camera and refused to remove or redirect it at least in part in order to provoke and annoy the Suzukis.

[100] Acts done with the intention of annoying a neighbour and actually causing annoyance will be a nuisance, although the same amount of annoyance would not be a nuisance if done in the ordinary and reasonable use of the property: A.M. Dugdale & M.A. Jones eds., *Clerk & Lindsell on Torts,* 19th ed. (London: Sweet & Maxwell, 2006) at 11782. In my view this is the natural corollary

of the principle that the social utility of the activity complained of may be considered in deciding whether the activity is unreasonable. Activities designed to annoy one's neighbours and having little or no redeeming social utility are unreasonable and should be discouraged by the law.

[101] Mr. and Mrs. Suzuki have been very upset by the surveillance camera. Mr. Suzuki avoids being present on the part of his property taken in by the camera. The Suzukis feel that their comings and goings and those of their visitors are being monitored by their neighbours. This is a reasonable perception on their part.

[102] The installation of a surveillance camera overlooking a neighbouring property has been found to comprise an actionable nuisance in several cases: *Wasserman v. Hall,* 2009 BCSC 1318; *Lipiec v. Borsa*, 31 C.C.L.T. (2d) 294, [1996] O.J. No. 3819, (Ont.C.J.) (QL); and *Saelman v. Hill*, 20 R.P.R. (4th) 118, [2004] O.J. No. 2122 (Ont.S.C.J.) (QL). I find that the surveillance camera installed by the Munroes constitutes a nuisance.

c) If the tort of private nuisance is established, the appropriate remedy, and in particular: 1) monetary damages; and/or 2) injunction

[103] I have concluded that the Munroes have committed the tort of nuisance by the operation of the air conditioner and also by the installation and operation of the surveillance camera. These wrongs have caused considerable distress and suffering to Mr. and Mrs. Suzuki and therefore are entitled to damages and injunctive relief.

i) Damages

[104] As plaintiffs' counsel conceded in argument, the case is not really much about damages. The purpose of the proceedings is to eliminate the nuisance caused by the Munroes. Nonetheless, an award of some damages as solace is justified in all of the circumstances.

[105] Mrs. Suzuki has suffered more than Mr. Suzuki has. The consequences for her have been noted in the evidence of Dr. Oduwole to which I have already made reference. She continues to be under medication currently.

[106] Dr. Oduwole noted that the chronic stress disorder from which Mrs. Suzuki has been suffering for now in excess of three years, stems from two factors, the air conditioning noise itself, and the conflict with the Munroes.

[107] The damage she has suffered is indivisible as between the two causes. The noise itself has been the major contributing factor. It is not necessary that the tortious conduct of the defendants be the sole cause of the injuries sustained. It is enough if the tortious conduct is a materially contributing cause of the injury. In such circumstances the defendants are liable for the whole loss. There is, therefore, no room for apportionment of the loss or reduction of the damages based upon

the fact some of the injury results from the dispute itself rather than the nuisance; see *Athey v. Leonati*, [1996] 3 S.C.R. 458 at 467-468.

[108] I will award $4,000 to Mrs. Suzuki and $2,000 to Mr. Suzuki as damages for nuisance. If I were not granting an injunction, the damages awarded would be significantly higher.

ii) Injunctive relief

[109] An injunction is an equitable remedy, and therefore the granting of one is discretionary: R.J. Sharpe, *Injunctions and Specific Performance*, 3rd ed. (Aurora: Canada Law Book Inc., 2000) at para. 4.10, *Boggs v. Harrison*, 2009 BCSC 789 at para. 141.

[110] A number of factors are relevant in determining whether or not to grant an injunction. The inadequacy of damages is frequently considered, along with the nature of the plaintiff's injury and the balance of convenience between the parties: Sharpe, *Injunctions and Specific Performance* at paras. 1.60-1.140, *Boggs* at para. 141, A.M. Linden & B. Feldthusen, *Canadian Tort Law*, 8th ed. (Markham: LexisNexis Canada Inc., 2006) at 594.

[111] In situations where the nuisance is likely to continue without the granting of the injunction, as is the case here once the interlocutory order ends and the Munroes are no longer enjoined from operating the air conditioner at night, the inadequacy of damages is easily satisfied: Linden & Feldthusen, *Canadian Tort Law* at 594.

[112] In terms of the damage to the plaintiffs, I have already found that the noise from the air conditioner has caused the Suzukis considerable distress and suffering: see para. 103 of these reasons. The distress is likely to continue if no injunction is granted.

[113] Regarding the balance of convenience, the harm to the plaintiffs is compared against the reasonableness of the efforts the defendants have made and could make to eliminate the nuisance caused by their air conditioner.

[114] I have confidence that it is technically feasible for the Munroes to enjoy central air conditioning in such a manner that it does not cause a nuisance at law to their neighbours. The evidence does not allow me to conclude that they adequately explored the option of moving the air conditioning unit to another location on their property where it might not cause a nuisance. As noted, there was no evidence that they have retained any technical or professional engineering expert who could explore solutions to reduce the noise of the air conditioner. There was evidence that quieter air conditioning units are now available on the market. The model installed by the Munroes is a Lennox XC13 which according to the manufacturer's literature has a sound rating of 74 decibels. The Suzukis have pointed to another appliance, a Lennox XP15 heat pump which is rated at 64 decibels. There was no evidence that this quieter appliance was available in 2006. It is now on the market. I am also confident that, Mr. Munroe's best efforts notwithstanding, a

professionally designed and constructed enclosure for the unit could well perform better than Mr. Munroe's enclosure.

[115] Mr. Munroe suggested the construction of a fixed enclosure would violate Coquitlam bylaws set-back requirements. There was no evidence that the City of Coquitlam would not allow such a solution to be implemented. Ultimately, the manner in which the Munroes choose to abate the nuisance is up to them. What the Suzukis are entitled to is an assurance that the nuisance will not continue in future.

[116] On the evidence, no objective standard is available to me concerning acceptable noise standards other than that which is reflected in the various bylaws.

[117] It is unfortunate that the City of Coquitlam has no applicable bylaw containing an objective standard. In my view, had such a bylaw existed, this lawsuit would have been unnecessary.

[118] Applying the same principles, I am satisfied that an injunction prohibiting the Munroes from employing the surveillance camera which monitors any part of the Suzuki property should be ordered. The existing security camera could perhaps be redirected so that it does not take in any part of the Suzuki property. It is impossible to know what view is taken in by the security camera unless one has access to the monitoring equipment inside the Munroes' home. In the circumstances, the Suzukis are entitled to receive some formal confirmation that the Munroes have complied with the injunction concerning the surveillance camera. The Munroes may seek to remove the existing camera, redirect it, or install other surveillance equipment. Again, how the Munroes choose to comply with the order and eliminate the nuisance is up to them. I will order that Mr. and Mrs. Munroe shall each execute a statutory declaration which will be delivered to the Suzukis and will confirm that they have complied with the order.

V CONCLUSIONS

[119] I order as follows:

a) the Munroes may not operate their air conditioner such that it causes sound beyond 55 dB(A) during the hours of 7:00 a.m. to 10:00 p.m., and 45 dB(A) during the remaining hours of the day, measured at any point along the Munroe-Suzuki property line;

b) the Munroes are prohibited from employing a surveillance camera which monitors any part of the Suzuki property;

c) Mr. and Mrs. Munroe shall each execute a statutory declaration which will be delivered to the Suzukis and will confirm that they have complied with the above order regarding the surveillance camera.

[120] Subject to submissions within 45 days concerning the potential effects of Rule 37B of the *Rules of Court*, the plaintiffs are entitled to their costs of this action.

[121] Both parties sought special costs. Special costs are usually awarded only in relation to misconduct in the course of litigation. There is no basis for an award of special costs in this case.

"The Honourable Mr. Justice Verhoeven"