



**BC Marine Terminal  
Operators Association**

## **British Columbia Marine Terminal Operators Association**

**Submission to  
Canada Transportation Act Review Panel**

**December 31, 2014**

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## **BACKGROUND**

The BC Marine Terminal Operators Association “BCMTOA” (formerly the BC Wharf Operators’ Association) was established on November 14, 1963.

The purposes of the Association are as follows:

- To identify common issues that impact members’ ability to operate efficiently in both the short and the long term.
- To assist the federal, provincial and municipal authorities in protection and preservation of existing and required facilities and support land to meet current and future transportation needs.
- To consider any questions of common concern to members and to that end to deliberate with government and other bodies.
- To compile and distribute statistical and other information of interest to the members.
- To encourage the maintenance of an efficient public service through the exchange of information and advice among members, by promoting co-operation

among members, and by providing suitable spokesmen for the members whenever the common interests of the members are affected.

We note that the last review of the Canada Transportation Act concluded with a panel report called "Vision and Balance" in June 2001.

Similarly, the last review of the Canada Marine Act concluded with a panel report called "Beyond Tomorrow" in June 2003.

Significant changes have occurred in the environment under which our members operate since those panel reports were completed. In our submission we will outline the areas that require attention to keep our members and the port community efficient, competitive and responsive to the ever changing global marketplace.

There are a number of areas of concern that we believe must be addressed through this review of the Canada Transportation Act in relation to the role of Port Authorities which is the primary focus of our members. This submission will also address rail services issues that affect our ability to perform the tasks that have been entrusted to our members.

## **PORT AUTHORITY GOVERNANCE**

The port authority model is generally built around three functional areas:

- Operations
- Regulator
- Landlord

Within Canada, these responsibilities are of a federal nature starting with Section 91 of the Constitution Act. Further responsibility is defined in the Canada Marine Act ("CMA") and the letters patent of each individual port authority.

Section 4 of the CMA recognizes the significance of marine transportation. In this section the CMA lays out key cornerstones of a national marine policy including the principle that marine infrastructure and services are based on international practices and approaches that are consistent with those of Canada's major trading partners and that marine transportation services are organized to satisfy the needs of users and are available at a reasonable cost to the users.

This submission by the BCMTOA will address areas of concern within port governance that have arisen in these areas over the last number of years.

## **Operations**

### **WE ARE THE OPERATORS**

BCMTOA members hold long term leases for our facilities with the port authority. Our members bring national and international expertise as we operate the terminals, we promote the terminals, and we maintain the terminals.

With the introduction of long-term leases our members have made and continue to make the ongoing capital investment that are required to keep the current portfolio of port assets prepared to function in an ever changing world environment. Since 2004 our members have invested in excess of \$1 billion in infrastructure and equipment and we believe that an additional \$2 billion in investments could be made to meet projected growth in this Gateway. These investments will result in significant additional direct employment as well as creating significant employment in the construction industry.

It is our members that work every day to attract cargoes to our facilities and the port when a variety of choices are available for shippers with our competitors in the Pacific Northwest, the Columbia river basin and the ports of California.

Our landlord the Vancouver Port Authority (as they were then – three separate port authorities, Vancouver, Fraser and North Fraser) recognized the competitive threat of these US Ports in their submission dated September 2002 to the Canada Marine Act Review Panel.

## **WE ARE THE GATEWAY**

It is our BCMTOA members who are operating these facilities that are the point of entry or exit for the wealth of Canadian import and export cargoes on Canada's West Coast. As such we are a critical component of Canada's Asia Pacific Gateway that generates an estimated 82,000 direct jobs and when indirect and induced employment is added that number rises to 182,000 generating \$15.7 billion in GDP and providing \$1.8 billion in Federal tax revenues and in excess of \$1 billion in tax revenues to provincial and local governments.

Our contribution to the local and provincial economies is significant. In 2013, BCMTOA members paid in excess of \$23.7 million in municipal taxes, purchasing goods and services totaling \$400 million province wide in British Columbia, with over 90% of that amount in the lower mainland area.

We must be able to continue to provide the cost effective and efficient services required to facilitate Canadian trade through the gateway and to make the significant capital investments required to meet projected growth.

## **Regulator**

It is the view of the BCMTOA that the Port Authority, as regulator, should have a primary focus on facilitating international trade on behalf of Canadians by ensuring that

terminal operators and marine vessel operators operate in a safe and environmentally responsible manner through clearly defined and consistently applied permit approval processes.

As part of this role the Port Authority should provide assistance to the port community to comply with rules and regulations. Unfortunately, our members often find themselves in an ever changing permit approval process, with a lack of inter departmental cohesion between departments within the port authority, that not only delays our ability to move forward but also adds significant additional costs to our projects.

We fully support the need to ensure that we meet required standards but believe that there is a need for clarity of process and adherence to specified timelines.

### **Landlord**

#### *Port Authority Self Sufficiency*

There is clarification required on what is meant by financially self- sufficient under section 8 of the Canada Marine Act. This section allows the Minister to issue letters patent to a port authority where the Minister *“is satisfied that the port is, and is likely to remain, financially self-sufficient “*. We are supportive of the principle that the Government should not directly subsidize the operating costs of the Port Authority, in turn however we have had a long standing concern related to the federal stipend paid annually by the port.

Our main issue, however, is that we have seen a continual escalation in income from operations of PMV with the most recent annual report indicating an operating income of \$106 million.

#### Income from Operations (000's)

2009	\$49,612
2010	\$83,470

2011	\$82,858
2012	\$85,769
2013	\$105,805

The majority of that revenue is generated from tenant lease rates that are passed on to those customers who are competing in the International market place or are borne by the terminal operators who are already responsible for significant continuing capital investment.

Many of Canada's export commodities are high tonnage low dollar value cargoes with transportation costs representing a significant component of their costs. As a trading nation we must be sensitive to the competitiveness of our commodities that provide significant employment to Canadians across Western Canada and that generate hundreds of millions of dollars in revenues and fees for all levels of government.

#### *Port Authority Investment Policy*

We are encouraged by the efforts of the port authority to acquire industrial lands in the local area to maintain flexibility to meet the demands of today and into the future, however, the BCMTOA is concerned that this strategic policy is being accomplished via an aggressive rental policy on our current members.

Rental criteria as discussed in a following section is not the hypothetical market value between sellers and buyers of the underlying land but market rent levels between lessors and lessees. Market rent levels have a legislative, professional practice and judicial backdrop that is further explored in that section.

Land purchased by the port authority immediately becomes a specialized public service asset. These assets provide a benefit to the nation and its citizens as a whole. This specialization relates to attributes such as the location, specification and size. Very few locations can be used as marine terminals; as a result there is no commercial use against



which the value of these assets can be benchmarked. It is the characteristics of the asset and the service it provides to the nation that are relevant to its' valuation.

This valuation has been examined in the past by the Chief Appraiser of the Government of Canada. He stressed that the market for ports is truly global and that analysis would have to include any "creative" financing programs; incentives and hidden subsidies to ensure that these are reflected in the value.

In this matter note the simple comparison of:

BC Ports – pay rent, pay wharfage and pay a gateway improvement fee for common infrastructure.

Washington State ports – pay rent but have access to tax free bonds and are a taxing authority. This tax advantage is invested in infrastructure.

Thus we are concerned due to an inconsistent commercial relationship between the Port Authority and its' tenant classes. Careful review and consideration is warranted to ensure that lease levies are only intended to recover costs of required infrastructure rather than to provide financing for the purchase of additional lands for new terminals. In recent years much of the capital has been provided by BCMTOA members, who are willing to invest with the certainty of long term lease arrangements.

The Port should be guided by the Chief Appraiser and by Treasury Board policy on the management of real property.

### *Port Rents*

This is an extremely significant issue. In recent years the port authority has stated that the local industrial real estate market is the market on which to base a rental policy. BCMTOA members strongly disagree with this approach and believe it will have long

term damaging effects on the ability of the port to fulfill its' mandate under section 4 of the CMA.

Since port lands are meant to support the national interest of Canada over vast and diverse areas of the country, there is a need to move the discussion towards the overriding principle of national interest and away from the simply not applicable local market forces that are distinct in each CMA jurisdiction across Canada. External trade that is so critical to our national economy recognizes only competitive supply chains that are capable of delivering Canadian goods that compete in world markets and allow for the importation of goods that support Canadian's standard of living and our manufacturing base.

The BCMTOA includes a separate detailed discussion paper as an appendix to this submission that addresses the basis on which rental criteria should be determined. Port lands are of a national interest and compete in a global environment. As noted previously, the port authority itself has recognized the presence of a serious competitive threat from US ports.

The overarching question to answer in this discussion is not the hypothetical market value between sellers and buyers of the underlying land but market rent levels between lessors and lessees.

## **RAIL SERVICES**

BCMTOA members are reliant on an efficient and reliable rail service to ensure that Canadian import and export cargoes are handled in the best interests of all participants in the supply chain. One area of concern is the recent Government legislation the "Fair Rail for Grain Farmers Act" S.C. 2014, c.8 that amended the Canada Grain Act and the Canada Transportation Act. This federal legislation requires that railways meet established quotas for the movement of Canadian wheat to market. While the BCMTOA is very supportive of our Canadian agriculture sector, we are very concerned regarding the precedent of one export commodity receiving preferential treatment over all other

commodities that are exported, that also contribute so significantly to our national economy.

We believe that all commodities should receive equal treatment as they are all competing in the international market place. Another provision of this act provides additional benefits to this sector by extending the inter-switching distance (where CN and CP must deliver the others cars without additional switching fees) from 30 km to 160KM. BCMTOA is encouraged that the regulations amending the railway inter-switching regulations (SOR 2014-193 August 1, 2014) specifically state that the Canada Transportation Agency is now moving forward to meet the Government's objective by amending these regulations to extend this provision for all commodities.

Additionally, we are aware of planning that is underway to expand capacity for containers, agricultural products, coal, potash and other commodities that are all reliant on rail capacity. This is particularly true for expansion plans scheduled for the North Shore of Burrard inlet that are dependent upon a rail tunnel and bridge connection to the North Shore.

Since rail plays such a critical role in our supply chain, we believe that a comprehensive rail capacity study should be undertaken for all trade areas to ensure that investment in expansion of facilities are consistent with the ability of rail to meet projected growth in an efficient and cost effective manner. We also believe that there should be regularly schedule reviews of rail capacity that would assist Terminal Operators in decision making with respect to future capital investments in plant and equipment.

There is in our view, a need for a central depository for up to date information on current and projected cargo volumes to ensure that investment decisions in plant and equipment are made with the full knowledge that the supply chain will be capable of meeting importer and exporter needs

#### Other

We believe that the current requirement to resolve differences between Railways and or Port Authorities through the Court process should be replaced by a more cost

effective and timely process. We believe that Arbitration would be a suitable alternative dispute resolution mechanism.

## Summary

The Port System on Canada's west coast has transformed from a government operated gateway under the National Harbours Board of 1936, to local port corporations with annual service agreements, to a model today where it is now been privatized through multi decade lease arrangements in order to move goods in an efficient manner pursuing the national goals outlined in section 4 of the Canada Marine Act.

The British Columbia Marine Terminal Operators Association request:

1. That a federally appointed agency, such as Public Works and Government Service Canada purchase the required industrial lands that could operate as marine terminals and support facilities, alleviating the need of the port authority to make such purchases at the expense of our current members.
2. That the Port Authority be relieved of the obligation, by specific amendment of the Canada Marine Act, to charge full market rent without adjustment to accommodate the competitive disadvantages caused by the financial mechanisms available to our competitors in US ports.
3. That a regularly scheduled set of meetings be structured that will allow BCMTOA members to,
  - a. Firstly, converse with port authority board members so that they can be fully informed in their decision making processes.
  - b. Secondly, that federal Ministry of Transport staff meet directly with our members, allowing for the regular exchange of challenges and opportunities in the ever changing global trade environment.
  - c. Thirdly, that Marine Terminals that provide such a critical service in the supply chain be included as a member of the Pacific Gateway Alliance.
4. That a division of the CTA or Transport Canada be established and become the depository for up to date information on current and projected cargo volumes

that would allow supply chain partners to make appropriate and timely investment decisions with respect to current and future equipment and facility requirements.

5. That a mechanism such as Arbitration be established to resolve differences that might arise between Marine Terminal Operators and Railways and or Port Authorities. This would replace the current requirement to address such differences through the Court Process which is both time consuming and expensive.

The BCMTOA appreciates this opportunity to provide a submission to the Review of the Canada Transportation Act, chaired by the Honourable David Emerson, P.C.

We agree that the Canadian transportation system needs to be globally competitive, efficient, reliable, innovative, and responsive to change and resilient to disruptions.

Our members operate in a truly international environment and applaud efforts to create a Canadian system that supports future growth and prosperity.

## **APPENDIX A - DISCUSSION PAPER REVIEWING**

### **PORT METRO VANCOUVER'S**

#### **RENTAL POLICY CRITERIA**

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## 1. OVERVIEW

The objective of this discussion paper is to review the legislative, judicial and professional practice frameworks that should guide the PMV in the creation of a rental policy document. While it is not meant to be an exhaustive review of the elements that would lead to the creation of such a document it will provide a suitable background from which the process could be generated.

The result of this effort using generally accepted principles from the framework should result in a rental policy document that is transparent and easy to understand by all the interested stakeholders.

If this paper does not align with specific rental policy pronouncements coming forth from the PMV, those policies should be subject to subsequent interpretation or review.

**The overarching question to answer in this discussion is not the hypothetical market value between sellers and buyers of the underlying land but market rent levels between lessors and lessees.**

## 2. BACKGROUND

The British Columbia Marine Terminal Operations Association (BCMTOA) has for some time sought clarification of the PMV approach to rental policy criteria.

In April 2012, the Executive Director of the BCMTOA asked the President and Chief Executive Officer PMV, a series of questions around approved Rental Policy and Practice, the reply was as follows:

### ***QUOTED IN FULL***

#### *Mandate*

*We summarise our mandate under the Canada Marine Act as:*

*The Vancouver Fraser Port Authority, doing business as Port Metro Vancouver, is a non-shareholder, financially self-sufficient corporation, established by the Government of Canada in January 2008, pursuant to the Canada Marine Act, and is accountable to the federal Minister of Transport, Infrastructure and Communities. Port Metro Vancouver is able to make independent and timely commercial orientated decisions on business plans and capital spending, clearly focused on the operational needs of port users, and guided by a vision for long-term efficient growth and competitiveness.*

*The CMA promotes infrastructure development and increased operating efficiencies and fosters a commercially based financial environment.*

*The CMA is "an Act for making the system of Canadian Ports competitive, efficient, and commercially oriented". The objectives of the Act also include implementing "a National Marine Policy that provides Canada with the marine infrastructure it needs and that offers effective support for the achievement of*

*national, social, and economic objectives and will promote and safeguard Canada's competitiveness and trade objectives".*

*It is PMV's statutory mandate to ensure these objectives are accomplished within its jurisdiction ("the Port"). The Canada Marine Act in full is available at <http://www.tc.gc.ca/eng/acts-regulations/acts-1998c10.htm>*

*Relevant to our discussion, as you can see from the Purpose section of the Act, a stated purpose (inter alia) of the act is to "(f) manage the marine infrastructure and services in a commercial manner that encourages, and takes into account, input from users and the community in which a port or harbour is located;"*

#### Rental Policy and Practice

*We do not have a "Rental Policy and Practice" document. Our approach to setting rent is guided by our mandate under the act and by discussions, as you will recall, with our board on the appropriate principles for rent setting. With regard to commercial terminal activities our position can be summarised as:*

*Our general philosophy is that the local real estate market should guide the amount of rent PMV charges for the use of its lands. This serves as an objective, fair and equitable indicator of marketplace conditions, protects against competitive inequality between tenants, avoids subsidisation of the private sector, and encourages more efficient use of limited land resources.*

*The appropriateness of a market based approach are evidenced by factors such as low rent receivables, low vacancy rates, good absorption of newly acquired lands, and continued private sector investment in new port facilities and infrastructure.*

#### Urban Industrial Land as comparables

*This could probably be the subject of a dissertation in itself, which is why we rely on appraisers to find marketplace comparables used in rent appraisals of our industrial properties, including marine terminals. As no two industrial properties are exactly alike, appraisers will adjust the value of one industrial property to bring its value in line with the one being appraised. If your members want detail on this (many of them have direct experience of it of course) you may want to discuss the process with a group like the Appraisal Institute of Canada, BC division operating at 210 - 10451 Shellbridge Way, Richmond.*

#### Definition of Market

*We define the market as the local real estate market*

**END OF QUOTE**

### **3. A) LEGISLATIVE AUTHORITY – CANADA MARINE ACT**

The PMV finds its authority from the Canada Marine Act (the "Act") and the letters patent of incorporation issued under Part 1 Canada Port Authorities Section 8. Where appropriate the Canada Marine Act also references

other federal acts such as the Federal Real Property and Federal Immovables Act, the Financial Administration Act and the Canada Business Corporations Act.

The letters patent are not regulations within the meaning of the Statutory Instruments Act, but shall be published in the Canada Gazette and are valid with respect to third parties as of the date of publication.

In addition to the references of 4(a) and 4(f) of the Act above, within the same section heading of the National Marine Policy, further clarification is obtained:

*(b) base the marine infrastructure and services on international practices and approaches that are consistent with those of Canada's major trading partners in order to foster harmonization of standards among jurisdictions*

*(c) ensure that marine transportation services are organized to satisfy the needs of users and are available at a reasonable cost to the users.*

### **3. B) LEGISLATIVE AUTHORITY – LETTERS PATENT**

We next look to the letters patent of the PMV for further guidance. See Order in Council OC2007-1885 dated December 6, 2007. This order amalgamated the Vancouver Port Authority, Fraser River Port Authority and the North Fraser Port Authority as one port authority to be named the Vancouver Fraser Port Authority and provided the Letters Patent of the new authority.

#### Article 7 – Activities and Powers of the Authority and Subsidiaries

*To operate the port, the Authority may undertake the port activities referred to in paragraph 28(2)(a) of the Act to the extent specified below:*

*7.1 (c) management, leasing or licensing the federal real property described in Schedule B or described as federal real property in any Supplementary Letters Patent, subject to the restrictions contemplated in sections 8.1 and 8.3 and provided such management, leasing or licensing is form, or in connection with, the following:*

*(iii) The following uses to the extent such uses are not described as activities in sections 7.1, 7.3 or 7.4:*

*(A) Uses related to shipping, navigation, transportation of passengers and goods, handling of goods and storage of goods, including the following uses to or for users of the port in connection with their use of the port and its facilities: marine and marina services and ferry operations.*

#### Article 8 – Leasing and Contracting

Article 8.1 describes the term of lease allowed, 8.1 further defines the calculation of this term. Article 8.3 outlines a Fair Market Value Requirement,

*The Authority shall ensure that every lease or license of federal real property described in Schedule B or as federal real property in any Supplementary Letters Patent to be entered into following the effective date of the Letters patent pursuant to which the lessees or licensees carry on uses described in subparagraph 7.1(c)(iii)(C) or 7.11(c)(iii)(D) or section 7.3 or 7.4 shall be for not less than fair market value...*

**NOTE: THAT 8.3 SPECIFICALLY DOES NOT MENTION THE ACTIVITIES UNDER SUBPARAGRAPH 7.1(c)(iii)(A).**

Nonetheless, for sake of discussion this paper will follow the trail of Fair Market Value. This term is provided a definition within Article 1.

*“Fair Market Value” means for a good, service, facility or right, the amount which would be paid or received by an arm’s length third party acting free from compulsion or duress in an open market for a comparable good, serve, right or facility available on comparable terms.*

There are several items within that definition that require further definition. What reference should an individual rely on for those definitions; this paper proposes International Valuation Standards.

**4. A) PROFESSIONAL PRACTICE – INTERNATIONAL VALUATION STANDARDS**

International Valuation Standards (IVS) contain procedures for undertaking valuation assignments using generally recognized concepts and principles, with supporting guidance to assist the consistent application of those principles. The IVS Framework sets forth generally accepted valuation principles.

The governance of IVS as proclaimed by the International Valuation Standards Council (IVSC) to this rental policy issue is twofold. Firstly, for the PMV as an organization, look for guidance to Article 11 of the Letters Patent, titled Federal Obligations.

*11.1 International and Provincial Obligations. The Authority shall comply with all obligations applicable to the Authority arising under any international agreement, convention or arrangement, or any federal-provincial agreement (a number of examples are listed) to which Her Majesty is a party, whether such agreement, convention or arrangement, or federal provincial agreement is entered into before or after the date of issuance of these letters patent.*

Canada is a member of APEC (Asia Pacific Economic Cooperation) an intergovernmental forum dedicated to promote free trade and investment, economic growth and development, and cooperation in the Asia-Pacific region. The APEC region encompasses countries critical to Canada’s future economic prosperity and security interests. Various Government of Canada departments are active in over 30 APEC working groups and committees.

APEC Finance Ministers have agreed that all 21 member economics should work towards region wide adoption of global standards for valuing assets due to recent huge growth in cross border transactions. The formal

agreement means public and private sector organizations will work with the IVSC to promote high quality valuation practices and professionals in their economies.

Secondly, for PMV representatives including but not limited to directors, officers, employees, agents and representatives. While not each of these individuals will be professionally accredited in the appraisal profession reliance on individuals who hold such accreditations will mean that IVS must be followed. The Appraisal Institute of Canada's (AIC) "Canadian Uniform Standards for Professional Appraisal Practice" (CUSPAP) effective April 1, 2014, endorses IVS as an authority promoting worldwide acceptance of standards for property valuation. AIC is one of the founding organizations of the IVSC and the Canadian standards are compliant with the 2013 version of IVS.

#### **4. B) PROFESSIONAL PRACTICE – INTERNATIONAL FINANCIAL REPORTING STANDARDS**

Finance professionals will look to the International Accounting Standards Board (IASB) and its' International Financial Reporting Standards (IFRS) for guidance in this matter. IFRS standards align with IVS standards. IFRS 13 – Fair Value Measurement states in its overview that it is not intended to establish valuation standards or affect valuation practices outside financial reporting but it does address some key components:

Fair value is defined as:

*The price that would be received to sell an asset or paid to transfer a liability in an orderly transaction between market participants.*

*A fair value measurement is for a particular asset or liability. Therefore, when measuring fair value an entity shall take into account the characteristics of the asset or liability if market participants would take those characteristics into account when pricing the asset or liability at the measurement date. Such characteristics include, for example, the following:*

- a) The condition and location of the asset, and*
- b) Restrictions, if any on the sale or use of the asset*

Nothing within the IFRS standard on Fair Value Measurement contradicts the framework from IVS. In fact the two organizations, IVSC and the IASB have a statement of protocol on cooperation and a shared interest in consistent measurement.

#### **5. DEFINITIONS**

Several terms are left to be defined from the broad definition of fair market value in article 1 of the letters patent above:

Market – the PMV position is that the market is the "local real estate market".

The IVS Framework states:

*In order to estimate the most probable price that would be paid for an asset, it is of fundamental importance to understand the extent of the market in which that asset would trade. A market can be defined by various criteria including geography, e.g. the market for similar goods or services may be local, regional, national or international.*

It has always been the position of the BCMTOA that we operate in a truly international marketplace. If the PMV desires to be the Pacific Gateway then it must compete against facilities located along the West Coast including Prince Rupert, the Pacific Northwest, the Columbia River and even California.

Comparable Goods and the Basis of Valuation – The IVS Framework provides clarity in that:

*Valuations may require the use of different bases of value that are defined by statute, regulation, private contract or other document.*

*A basis of valuation can fall into one of three principal categories:*

- *Hypothetical exchange in a free and open market exchange – market value*
- *Value specific to that person or entity, and may have no relevance to market participants in general – investment or special value*
- *Although the parties may be unconnected and negotiating at arm's length, the asset is not necessarily exposed in the market and the price agreed may be one that reflects the specific advantages or disadvantages of ownership to the parties involved rather than the market at large.*

*The concept of market value presumes a price negotiated in an open and competitive market where the participants, are acting freely. The market for an asset could be an international market or a local market. The market in which the asset is exposed for sale is the one in which the asset being exchanged is normally exchanged.*

*Fair value requires the assessment of the price that is fair between two identified parties taking into account the respective disadvantages that each will gain from the transaction*

*Fair value is a broader concept than market value.*

The PMV has suggested that the market is defined as the local real estate market. The PMV have often used as comparables industrial land sales in various municipalities throughout the Lower Mainland. The value of these smaller parcels that never had any resemblance to a marine cargo terminal in Lake City or Morgan Creek bears little relation as a comparable good given the actual restrictions can be identified in following the prescribed valuation process outlined. The question remains one of lessor and lessee for marine terminals.

There are significant restrictions on use of the marine terminals flowing from the statutory requirements of the Canada Marine Act, the PMV Letters Patent and the individual lease terms included within the agreements with

leaseholders. Most leases contain clauses articulating the “harbour oriented use” stemming from the legislation, in many cases there are restrictions on product types handled or the percentages thereof, alternate uses, etc.

Comparable Terms – There are many terms contained within individual leases that restrict the use of the subject marine terminal properties to a specific use. Such restrictive clauses serve to narrow the sample size of similar properties.

**Additional items for consideration:**

Highest and Best Use – this term is described in section 14.33 of the CUSPAP and in the IVS Framework. It is an economic concept that measures the interaction of four criteria: legal permissibility, physical possibility, financial feasibility, and maximum profitability. Thus the use of land or a site is the use among all reasonable alternatives uses that yields the highest present land value, after payment of labour, capital and co-ordination.

*The highest and best use of an asset may be for continuation of an asset’s existing use.*

*The determination of the highest and best use involves consideration of the following:*

- (a) To establish whether a use is possible, regard will be had to what would be considered reasonable by market participants*
- (b) To reflect the requirement to be legally permissible, any legal restrictions on the use of the asset, e.g. zoning designations, need to be taken into account.*
- (c) The requirement that the use be financially feasible takes into account whether an alternative use that is physically possible and legally permissible will generate sufficient return to a typical market participant, after taking into account the costs of conversion to that use, over and above the return on the existing use.*

On a continuing basis the PMV and its leaseholders examine the potential for alternative uses of terminals. However, time and time again detailed study by leaseholders, the PMV or in cooperation with each other concludes that the current use to be the highest and best. Thus, a discussion of future desired or invented uses of the leasehold has no basis to be included in rental policy.

Comparable Rents (within the class) – it has often been articulated in rental discussions by the PMV that one site is paying significantly more than another. Confidentiality provisions never allow this subjective statement to be quantified, however in section 50 (2) of the Act:

*It is not unjust discrimination and it is not an undue nor an unreasonable preference or disadvantage for a port authority to differentiate among users or classes of users on the basis of the volume or value of goods shipped or on any other basis that is generally commercially accepted.*

Classes of users are defined in Schedule D of the letters patent with lease holders being grouped within "General Commercial Users". Thus, this quantitative comparison of one leaseholder versus another has no basis to be included in rental policy.

#### Other significant qualitative factors that could affect Comparable rents

Several other factors need to be determined in each individual lease with major terminal operators, including, but not limited to:

- Directly off-site municipal bylaws and restrictions
- Access to water and the depth of water at the berth face
- Access to rail or highway connections
- Clauses related to improvement removal terms
- Physical conditions related to the shape, size, configuration and load bearing characteristics of a terminal
- Preexisting environmental conditions

These factors will tend to have an effect on the productivity of a terminal and thus the financial feasibility of a given location.

## **6. JUDICIAL REVIEW**

2006 BCSC 509 Assessor of Area #08 v. Western Stevedoring Co. Ltd.

The Supreme Court (the "Court") is of course bound by the decisions of higher courts and other decisions of the Court that have come before it, several references are made in the Court's decision in this case to such other cases. This specific case is extremely topical in that it involved one of the major terminal leaseholders with the PMV.

The case involved the appropriate assessment of waterfront property owned by the Federal Government and administered by the (as it was at the time) Vancouver Port Authority (VPA). The Supreme Court of British Columbia was asked to consider whether any restrictions placed on the use of the land and improvements affected the valuation question.

The Court found that the restrictions on use were articulated in the terms of the lease between Western Stevedoring and the VPA, such as:

- Western must use the premises as....
- The volume of break bulk products other than forest products must not exceed....
- The volume of containerized goods must not exceed....



The Court held that the restrictions on use of the property were properly taken into account when it rejected appraisal information based on “comparable” properties. The Court was asked to address a number of questions of law but did not find error in the Property Assessment Appeal Board (the “Board”) decision.

*29. The Board found that where the Crown has restricted the use of an occupied Crown property, the highest and best use for valuation purposes can only be the restricted use imposed by the Crown.*

*30. The Board found that in the case of leased Crown land restricted in use to a use for which there are no other fee simple properties trading in the market, such as break bulk terminals, the Assessment Act requires a fiction. (The Board at para. 71 - It requires that the market value of something that does not trade in the market be determined). The Board found that the traditional valuation approaches that appraisers use become useless.*

*31. The Board found the direct comparison approach employed by the Assessor’s witness was useless to determine the market value of the properties. The Board found none of the sales used were suitable for use as a break bulk terminal. The Board found comparables with similar uses were not good enough.*

Thus, in the valuation process and hence rental policy, the PMV use of the “local real estate market” contradicts the opinion of the Court.

## **7. APPLYING THE CONCEPTS OF VALUE TO GROUND RENTS**

With the background of the recognized valuation standards previously outlined, how do we apply these techniques to the ground leases between the PMV and the major terminal operators?

This will require us to review the language contained in the lease documents, paying attention to the relevant provisions, definitions and descriptions of terms while understanding constraints imposed by the quality and quantity of available market data. If Port terminals do not change hands then there is no market data on which to base ground rents.

In most cases all the responsibilities of ownership have been transferred to the lessee for the entire term of the lease. A marine terminal lease will identify the PMV property, however responsibilities for upkeep, maintenance and repair of these assets is the responsibility of the lessee, often backstopped by a condition survey undertaken at the commencement of the lease.

The PMV retains the reversionary interest in the land realizable upon the expiration of the lease and often at their sole discretion, may keep or require the tenant to remove any tenant improvements made during the life of the lease.

Both parties to a lease arrangement are looking to recover their capital investment. The prevalent practice decades ago was for the PMV, during its time operating under the National Harbours Board regime, to construct marine facilities and contract for short term (often annual) service arrangements. In recent years, major terminal operators have made their own substantial investments in expanding facilities or curing functional obsolescence. Much of the Port’s initial capital investment has long since been recovered.

What factors should be reviewed during a rent review process and how can the leaseholder be protected against unanticipated spikes in future basic rent payments that may overwhelm the earning capacity of the leasehold. The parties must agree on what the market is and if there is no market data then the parties are left to the basic fact pattern:

- What is being leased
- What are the constraints of the lease
- What are the legally permissible leases
- What are the physical constraints of the land
- What is the remaining term of the lease (hampers tenant investment)
- What is the marketability of the terminal asset in its market segment

What is being determined is not market value between sellers and buyers but market rent between lessors and lessees.

The market rents should be based on comparable information within the geographical area of concern. Furthermore, in determining the market rental, the terms of the lease are critical as the tenant should not be put into a position of paying rent based on some unrestricted use of the lands when they are not able to enjoy what may be this alternate use.

A United States court found that an interpretation that rent during a rental review period is to be based on some alternate use of the property despite the purpose for which the lessor and lessee agreed it could be used, would be economically unreasonable and violate the intent of the parties.

## **8. SUMMARY**

This paper has reviewed the three areas from which the PMV would gather knowledge in order to create a rental policy and practice document. These areas are the Authorities' legislative mandate, professional practice standards and the guidance of the Court.

Where such a document or unwritten policy deviates from the expected result of this framework questions will undoubtedly arise about the objectivity of such a policy. This in turn will lead to a substantial effort from all stakeholders in interpreting and debating subjective pronouncements.

## **9. CONCLUSION**

The PMV is mandated to act in a commercial manner taking into account input from its' stakeholders. In setting a rental policy this must translate into taking a holistic view of all of the factors involved in promoting Canada's

competitiveness and trade objectives while adhering to professional standards as proclaimed by the International Valuation Standards Council.

The PMV must compare "Like" rents with "Like" rents in a properly defined market area which by the actual transfer of export and import product business between jurisdictions extends at a minimum through the Pacific Northwest including the Columbia River.

~ END ~