CITATION: Municipal Property Assessment Corporation v. Schumacher et al., 2016 ONSC 3239
DIVISIONAL COURT FILE NO.: DM3-00626-00
DATE: 20160615

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Swinton, Pattillo and Kurke JJ.

BETWEEN:	
MUNICIPAL PROPERTY ASSESSMENT CORPORATION Appellant	D.G. Mitchell, for the Appellant
– and –	
CHRISTIAN SCHUMACHER and the CORPORATION OF THE TOWN OF MARKHAM Respondents	B. Teichman, for the Respondent Schumacher No one present for the Respondent Corporation of the Town of Markham M.E. Peck, for the Intervenor, Assessment Review Board
	HEARD at Oshawa: March 2, 2016

JUDGMENT ON APPEAL

THE COURT

BACKGROUND

[1] The Appellant Municipal Property Assessment Corporation ("MPAC" or "the Appellant") appeals against the assessment of the Respondent Schumacher's ("Schumacher")

office building located at 25 Centurian Drive, Markham ("The Property"), by the Assessment Review Board ("the Board") on November 20, 2013.

[2] Schumacher purchased the Property in 2004 for $9,950,000. MPAC assessed its value at $9,901,000 for the 2009-2012 taxation years. Schumacher's appeal of that assessment to the Board required it to apply s. 44(3) of the *Assessment Act*, R.S.O. 1990, c. A.31 ("the Act"), which provides:

> 44. (3) For 2009 and subsequent taxation years, in determining the value at which any land shall be assessed, the Board shall,
>
> (a) determine the current value of the land; and
>
> (b) have reference to the value at which similar lands in the vicinity are assessed and adjust the assessment of the land to make it equitable with that of similar lands in the vicinity if such an adjustment would result in a reduction of the assessment of the land.

[3] In the November 20, 2013 decision, the Board found that the current value should be $8,179,000, which it reduced to $6,767,000 to achieve equity pursuant to s. 44(3)(b) of the Act. On February 20, 2015, a Review Panel of the Board dismissed MPAC's motion to vary the November 20, 2013 decision ([2015] O.A.R.B.D. No. 73). The Review Panel found that the "member's method of calculating the equity adjustment, while not ideal, results in a value that can be characterized as a reasonable, intelligible outcome defensible in light of the facts and the law".

[4] Section 43.1(1) of the Act provides that an appeal lies from the Board to the Divisional Court, with leave of the Divisional Court, on a question of law. On June 25, 2015, Douglas J. granted leave to MPAC to appeal, on the following two grounds:

1) Did the Board err in its interpretation of section 44(3)(b) of the Assessment Act, R.S.O. 1990, c. A.31, as amended? and

2) Did the Board err in basing its equity comparison with similar real properties on a comparison of square foot rates rather than a comparison of their current values?

[5] The Respondents have filed no materials on this appeal. Schumacher's counsel attended on the hearing, to indicate Schumacher's agreement to an assessment figure of $7,293,000 to be imposed by this Court, should the appeal be allowed. The Board, given Intervenor status on this appeal, has filed a factum concerning the appropriate standard of review.

STANDARD OF REVIEW

[6] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court of Canada held that the process of judicial review involved two steps (at para. 62):

> ...First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular

category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.

[7] Relying on *BCE Place Ltd. v. Municipal Property Assessment* Corporation, [2010] ONCA 672, at paras. 14-17, the Appellant argues that the standard of review is correctness, as it asserts that the appeal concerns simply an issue of statutory interpretation that does not engage the Board's expertise. It must be remembered, however, that what was at issue in *BCE Place* itself was the appropriate meaning to be given the expression "fee simple, if unencumbered", terminology that was standard fare for courts.

[8] In *BCE Place*, Rosenberg J.A. held that "pre-*Dunsmuir* jurisprudence has already determined the standard of review [for the Board] in a satisfactory manner. In a series of cases, the Divisional Court has found that the standard of review on questions of law is correctness, even where the Board is interpreting its home statute" (para. 17). Indeed, the Divisional Court in *BCE Place* itself applied a standard of correctness. But *BCE Place* has been overtaken by the guiding principles set out by the Supreme Court of Canada in more recent cases dealing with the standard of review of decisions of tribunals.

[9] The Supreme Court now instructs that normally, when a tribunal is applying its home statute, its determinations will be subject to a standard of review that is presumed to be reasonableness. An exception to this rule involves issues of law that are of "central importance to the legal system as a whole", and that lie outside the specialized expertise of the tribunal: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, at para. 39; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, at para. 21. Following these cases, which recognize a presumptive reasonableness standard and narrow the field reserved for a review by a standard of correctness, what appeared in 2010 to have been "determined in a satisfactory manner" now requires reassessment.

[10] Thus, post-*Alberta Teachers* and *McLean*, panels of this Court have repeatedly held that appeals relating to the Board's determination of issues under the Act or other related statutes or Rules of the Board are subject to deferential treatment on a reasonableness standard: *Kensington Foundation v. Municipal Property Assessment Corporation et al.*, 2013 ONSC 7694, at paras. 12-13; *Toth Equity Ltd. v. Ottawa (City)*, 2014 ONSC 941, at paras. 22-28; *Junvir Investments Ltd. v. Municipal Property Assessment Corporation*, 2015 ONSC 1526, at para. 5. In a case relied upon by the Appellant, *Chrysler Canada Inc. v. Municipal Property Assessment Corp.*, 2012 ONSC 2129, at para. 4, a panel of the Divisional Court applied a correctness standard, but that was on agreement of the parties, on reference to *BCE Place* alone. Like the Courts in *Junvir*, *Toth Equity*, and *Kensington Foundation*, we are respectfully of the view that the Supreme Court's presumption of reasonableness must be accounted for.

[11] In order to determine the appropriate standard of review afresh, a standard of review analysis must be undertaken. A reasonableness standard will tend to apply where there is a privative clause in the home statute, or where the question is one of fact, discretion, or policy, or where the legal and factual issues are so intertwined that they do not admit easily of separation. And of course, reasonableness is more likely where the tribunal is interpreting its home statute,

or in an area in which the tribunal has expertise: *Dunsmuir*, at paras. 51-64; *BCE Place*, at paras. 14-16.

[12] Such an analysis in the circumstances of this case points to a reasonableness standard, even in the absence of a privative clause. Even though an appeal lies to this Court on a question of law, the Board was interpreting its home statute, in a highly specialized area with which it is profoundly familiar: the assessment of commercial properties for the purposes of municipal taxation.

ANALYSIS

[13] In assessing a decision for reasonableness, a reviewing Court needs to maintain a deferential understanding that there may be more than one reasonable conclusion available, and that specialized tribunals "have a margin of appreciation within the range of acceptable and rational solutions": *Dunsmuir*, at paras. 45-50.

[14] In its very detailed decision, the Board, in the exercise of the expertise expected of it:

1) Set out the competing factual matrices that the parties used to advance their views of the proper assessment. Complicating that assessment was the fact that, unlike in most such cases, "no party has referred to sales of other properties to support the assessment sought";

2) Set out the legislative provisions guiding the calculation;

3) In the absence of specific evidence of nearby building sales that were proximate to the appropriate valuation date to use as comparators, adopted the methodology advanced by both parties: using rents, vacancy, and management costs, together with capitalization rates, as a proxy for determining marketplace value;

4) Went item by item through the variables, and determined from the evidence and arguments of the parties what was the more appropriate value to assign to each of these items;

5) From those figures, calculated a current value of $8,179,000;

6) Heard argument, considered the alternatives, and explained in detail how it chose the selected method to determine the appropriate means of ensuring an equitable assessment in comparison with the assessment of similar lands in the vicinity, pursuant to s. 44(3)(b) of the Act, resulting in the final figure of $6,763,000.

[15] The Appellant submits that the Board incorrectly interpreted and applied s. 44(3)(b) of the Act by failing to have reference to the current value at which similar lands in the vicinity were assessed. In so doing, the Board adjusted the correct current value of the Property absent any evidence that it was inequitably assessed. The Appellant submitted that this resulted in the Property being assessed for taxes at 83% of its current value assessment, while similar lands were all assessed at 100% of their current values.

[16] The Board discussed its s. 44(3)(b) determination at length in the decision (paras. 43-57). The Board noted that the Appellant had failed to put before it evidence for the purpose of the equity test in s. 44(3)(b) (para. 44). Thus, for example, the Board stated that the Appellant offered no evidence to permit it to consider the impact of aging or depreciation on buildings that the Appellant proposed to delete as comparables, as they were older than the Property (para. 51). Likewise, while the Respondent Municipality complained that the Board should use a broader sample of comparables than the eight chosen by it, the Board responded that it would have used more properties, if there had been proper evidence before it to do so. Indeed, the Appellant proposed as comparables only three properties about which any evidence was offered, and that evidence was not even offered by the Appellant (paras. 53-54).

[17] The Board further noted that there was no issue raised by any party about the method that the Board employed, "of comparing assessments on a psf of building basis", which method the Board considered to be "most appropriate in the circumstances" (para. 55).

[18] Section 44(3)(b) does not specify any particular methodology. We cannot say that at any step of the analysis, the Board erred in law or behaved unreasonably in determining the issues advanced on appeal, even though other possible determinations or methods were available to it, and urged upon us by the Appellant.

[19] The Appellant relies on a chart in its factum setting out rent per square foot for each comparator building and current value assessment compared to income. This chart was not before the Board.

CONCLUSION

[20] The Board made reasonable determinations on the evidence and argument before it. Having regard to the evidence before the Board, we do not find any error with the Board's decisions. Tribunals, like Courts, must work with the material that is before them.

[21] Accordingly, the appeal is dismissed.

[22] As no costs were sought, there is no order as to costs.

K. Swinton J.

L.A. Pattillo J.

A.D. Kurke J.

Date: JUN 15 2016

CITATION: Municipal Property Assessment Corporation v. Schumacher et al., 2016 ONSC 3239
DIVISIONAL COURT FILE NO.: DM3-00626-00
DATE: 20160615

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Swinton, Pattillo and Kurke JJ.

BETWEEN:

MUNICIPAL PROPERTY ASSESSMENT CORPORATION

Appellant

– and –

CHRISTIAN SCHUMACHER
and
THE CORPORATION OF THE TOWN OF MARKHAM

Respondents

REASONS FOR JUDGMENT

THE COURT

Released: June 15, 2016