Court of King's Bench of Alberta

Citation: Canadian Tire Properties Inc. v Medicine Hat (City), 2024 ABKB 589

Date: 20241003
Docket: 2308 00483
Registry: Medicine Hat

Between:

Canadian Tire Properties Inc. and Filcan Properties Ltd.

Applicants

- and -

The City of Medicine Hat and The Medicine Hat Composite Assessment Review Board

Respondents

Memorandum of Decision
of the
Honourable Justice D.V. Hartigan

I. INTRODUCTION

[1] The Applicants seek Judicial Review of three decision of the Respondent, The Medicine Hat Composite Assessment Review Board (the "Board"), regarding the assessed values of three "Big Box" retail stores located in the City of Medicine Hat. In each of the Board's decisions, the Board dismissed the complaint without hearing from the Respondent, The City of Medicine Hat (the "City") on the grounds that the complainant had failed to meet its initial evidentiary onus.

II. ISSUES

[2] The Applicants raise three concerns with respect to the decisions of the Board:

1. Did the board err in misconstruing the onus and burden of proof by wrongly placing the onus on the Applicants?
2. Did the Board's decision to dismiss the Applicants' complaints without considering the evidence of the City amount to procedural unfairness?
3. Did the Board provide adequate reasons?

[3] It should be noted that the Applicants originally raised concerns with respect to an apprehension of bias on the Board's part; however, that issue was not raised at the hearing of the three matters before me in this review. Rather, those concerns were raised at a fourth hearing held contemporaneously with the three before this Court. As such, that matter is not properly before me, and I will not address that issue.

III. BACKGROUND

1. The Legislative Scheme

[4] At the hearing before the Board, the Applicants argued the assessments of their properties were inequitable insofar as they were inconsistent with the values of other, similar properties in the Municipality.

[5] Pursuant to the *Municipal Government Act*, RSA 2000, c M-26 ("*MGA*") and the *Matters Relating to Assessment and Taxation Regulation, 2018*, Alta Reg 203/2017 (the "*Regulation*"), Municipalities must prepare assessments for properties within the municipality on an annual basis.

[6] Under section 299 of the *MGA*, an assessed person may request information showing how the municipal assessor prepared the assessment of that person's property. A request under that section must be made in the manner required by the municipality. The court has described the purpose of section 299 as follows:

> "The central purpose of tax payment information rights is to provide tax payors with information about the preparation of the tax assessments. In deciding whether to make a complaint, and if so, on what grounds, the tax payor must know what it can rely upon."
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> ***Canadian National Resources Ltd. v Wood Buffalo (Regional Municipality),*** 2014 ABCA 195 at para 20.

[7] Section 300 of the *MGA* provides that any assessed person may request a summary of the most recent assessment for *any* assessed property in the municipality. Again, a request made under section 300 must be made in the manner required by the Municipality.

[8] An assessed person may make a complaint about an assessment to an Assessment Review Board under Part 11 of the *MGA*.

[9] Prior to the hearing before an Assessment Review Board, the parties must make disclosure of their case to the other party and to the Assessment Review Board. Under section 9 of the *Regulation*, each party must disclose to the other and the Board the documentary evidence

they seek to rely on, a summary of any testimonial evidence they intend to call (including signed witness statements), and any written argument that the party intend to present at the hearing.

2. Standard of Review

[10] In ***Canada (Minister of Citizenship and Immigration) v Vavilov***, 2019 SCC 65 ["***Vavilov***"] The Supreme Court of Canada held reasonableness to be the presumptive standard for review of administrative decisions. The parties agree that this is the standard applicable to the Board's decision on this case.

[11] The reasonableness standard has recently been summarized by Justice J.C. Kubik in ***City of Lethbridge v University of Lethbridge***, 2024 ABKB 23, at paras 7 to 10:

> [7] Reasonableness review engenders respect for the expertise of administrative decision makers and requires courts to exercise restraint, intervening only to "safeguard the legality, rationality and fairness of the administrative process". As expressed in ***Vavilov***, reasonableness review starts with the reasons of the administrative decision maker and the role of the Court is to assess whether those reasons are transparent, intelligible, and justified on the record: para 15.
>
> [8] The reasons of administrative decision makers must demonstrate an internally coherent and rational chain of analysis which is justified on the facts of the case and the applicable law. If the reasons demonstrate this, deference is required: para 85.
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> [9] Reasons must be read in the context of the evidentiary record and the arguments made before the tribunal. As noted in ***Vavilov*** courts are not on a treasure hunt for error. A decision will be reasonable if there are no "fatal flaws in logic" and the analysis of the administrative decision maker flows logically from the evidence before it to the result. In other words, the decision does not stand on its own but must be considered in the context of the record.
>
> [10] It falls to the party seeking review to demonstrate that the decision is unreasonable.

[12] However, as the issue of procedural fairness has been raised by the Applicants, it should be noted that no deference is due were the issue is a breach of procedural fairness or natural justice (***Calgary (City) v Renfrew Chrysler Inc***, 2017 ABKB 197 at para 20).

IV. DISCUSSION

1. Did the Board error in misconstruing the onus and burden of proof and wrongly placing the onus on the Applicants?

[13] As stated, the Board dismissed the Applicants' complaints without hearing from the Respondent City as it determined the complaint failed to meet its initial evidentiary burden.

[14] The Applicants assert that the Board erred in its reliance upon a recent decision of this Court in ***Costco Wholesale Corporation v Calgary (City)***, 2022 ABQB 615 [**"*Costco v Calgary*"**] rather than relying upon the test as set out in ***Ross v. Edmonton (City)***, 2016 ABQB 730 [**"*Ross*"**].

[15] The leading authority with respect to the evidentiary burden upon the parties in a proceeding such as this is ***Ross.*** In that case, the court stated (at paras 23 – 25):

[23] In civil proceedings, a claimant must, initially, only provide some evidence in support of its claim. Once that threshold is satisfied, the evidentiary onus switches to the respondent, here the City, to lead evidence.

The way in which the test operates was outlined recently by Goss J. in ***Winship***:

> [3] Rule 8.20 states:
>
> > At the close of the plaintiff's case, the defendant may request the Court to dismiss the action on the ground that no case has been made, without being asked to elect whether evidence will be called.
>
> [4] The test on a rule 8.20 (non-suit) application is set out *in Prudential Securities Credit Corp, LLC v Cobrand Foods Ltd,* 2007 ONCA 425 at para 35, 85 OR (3d) 561:
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> > On a non-suit motion, the trial judge undertakes a limited inquiry. Two relevant principles that guide this inquiry are these. First, if a plaintiff puts forward some evidence on all elements of its claim, the judge must dismiss the motion. Second, in assessing whether a plaintiff has made out a *prima facie* case, the judge must assume the evidence to be true and must assign "the most favourable meaning" to evidence capable of giving rise to competing inferences. ...
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> [5] Our Court of Appeal adopted this test in *Capital Estate Planning Corp v Lynch*, 2011 ABCA 224 at para 19, 510 AR 244 [*Capital Estate*]; and recently cited it with approval in *Elan Construction Ltd v South Fish Creek Recreational Assn*, 2016 ABCA 215, [2016] A.J. No. 710 at para11 (QL).
>
> [6] In *Capital Estate* at para 20, the Court rephrased the test this way:
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> > In short, a non-suit application will fail if the plaintiff has adduced some evidence on each of the essential elements of her claim. In making this assessment, the trial judge does not weigh the evidence or assess credibility. Furthermore, the trial judge must assume that the plaintiff's evidence is true, and draw all reasonable inferences from it. ...

[24] It is important to recognize that the hearings before the Board were not a summary judgment application; therefore, there was no obligation on Ms. Ross to prove her case on a balance of probabilities before the evidentiary burden shifted to the City to make a response.

[25] In any civil matter, the respondent – here the City – is not obliged to call evidence to respond to the claimant's evidence; however, the respondent takes an obvious risk in not calling evidence.

[16] In that case, the court found that the Board had committed an error of law in requiring the complainant to prove that her assessment was incorrect before requiring the City to engage. The test was further succinctly summarized in ***Costco Wholesale Ltd. v City of Medicine Hat,*** 2022 ABQB 129 at para 32 ["***Costco v Medicine Hat***"]

> 1. The onus is initially on the Complainant to raise a doubt about the reliability of the Respondent's assessment;

> 2. The onus then shifts to the Respondent to prove that its assessment is a correct and equitable estimate of market value;
>
> 3. While the overall onus is on the Complainant to prove on a balance of probabilities that the assessment is wrong, it is not incumbent on the Complainant to then prove unfairness or inequity, nor what the correct assessment should have been.

[17] The court further references ***Ross*** when at para 66, it states that:

> "The Court in ***Ross v Edmonton (City)*** at paragraph 21 sets out the appropriate framework from which the CARB must approach their task. The Applicants must show "some evidence that the assessment is incorrect after which, the evidentiary onus then switches to the City to provide some evidence that the assessment is correct." The Board then weighs all of the evidence and decides whether the Applicants have met their ultimate burden, on the balance of probabilities, to demonstrate that the assessments were not fair and equitable."

[18] The Applicants in this case submit that the Board used the wrong tests to dismiss their complaints at the threshold stage, relying upon ***Costco v Calgary***, rather than the established line of case law stemming from ***Ross***. The Applicants take the position that ***Costco v Calgary*** is inconsistent with ***Ross***, in that it endorses a dated municipal government board ruling that suggested that a complainant had an obligation at the initial evidentiary stage to convince the panel that there was merit to the appeal and establish it is more probable than not that the assessed value is incorrect. This would suggest that the complainant is required at the initial evidentiary stage to provide evidence capable of showing that the assessment contains a mistake "on the basis of probability", which is inconsistent with ***Ross***.

[19] In response, the Respondents state that first, the Board was reasonable in adopting and relying on a recent Court of King's Bench decision regarding the appropriate standard to apply for determining if a *prima facie* case had been made out, especially when there was no objection raised before the Board at the hearings. Further, the Respondents state that the court in ***Costco v Calgary*** at para 37, correctly articulated the requirements:

> "The complainant need only provide evidence that is capable of showing, on a balance of probabilities, that a mistake exists such that the assessment is not fair and equitable. If the evidence is not sufficient to support that conclusion, then the complaint has not met its initial evidentiary burden. The evidential burden is the burden placed on a party to reduce sufficient evidence to put a matter in issue: it is not the same has having to prove a fact."

[20] In my view, ***Ross*** and ***Costco v Calgary*** are not irreconcilable. As Justice Renke stated in ***Beta Management Inc. v Edmonton (City)***, 2017 ABQB 571 [***"Beta Management"***]:

> "Regardless of nomenclature, the point is that the complainant does not have the "legal" or persuasive burden of establishing error on a balance of probabilities before the municipality responds."

[21] The notion that there is an inconsistency between ***Costco v Calgary*** and ***Ross*** would appear to arise from para 35 of ***Costco v Calgary***:

> "...At the initial evidential stage, a complainant need not prove that the assessment is in error, exactly quantify the error or specify what the assessment should be. The

> complainant need only provide evidence that is *capable* of showing, on a balance of probabilities, that a mistake exists such that the assessment is not fair and equitable. If the evidence is not sufficient to support that conclusion, then the complainant has not met its initial evidentiary burden. The evidential burden is the burden placed on a party to reduce sufficient evidence to put a matter in issue; it is not the same as having to prove a fact."

[22] I am not of the view that these authorities are inconsistent. Both require *some* evidence that is capable of showing that a mistake exists. The balance of probability standard which is described in the above paragraph of ***Costco v Calgary*** is not in relation to the overall evidentiary burden, but whether it is more likely than not that the evidence provided *could* disclose an error.

2. Procedural Unfairness

[23] The Applicants argue that requiring it to provide evidence beyond what was presented at the hearing constitutes procedural unfairness, in that it will require the Applicants to submit evidence solely within the knowledge and control of the City. However, I am of the view that the issue here is not one of procedural fairness, but whether or not the Applicants had met their initial evidentiary burden as set out in ***Ross***. The requirement for the Applicants to meet their evidentiary burden before the City has to respond is well established. If the Applicants had in fact met that burden and the Board had not gone on to consider the City's case, that is not an issue of procedural fairness: rather it would have been a misapplication in the test of ***Ross*** and ***Costco v Calgary***. Put another way, a misapplication in ***Ross*** should be examined in the context of whether such a misapplication impacted the reasonableness of the Board's decision, rather than whether some principle of fairness or natural justice had been breached. The Applicants take issue with the fact that there were difficulties in obtaining evidence from the City since the City imposed administrative requirements on the requests under sections 299 and 300 of the *MGA*. Those conditions required a signing officer of the Corporation to swear an Affidavit in support of the request prior to the complainant's filing deadlines. This evidence, which could have been obtained through such a request, was included in the City's materials at the hearing and was provided to the Applicants through the disclosure process required by the appeal.

[24] While the Applicants asserted that it would be difficult to obtain the necessary signatures for the request, no evidence was provided to the Board that they attempted to obtain those signatures. In fact, there was no evidence before the Board that the Applicants had made any effort to obtain the required Affidavits from the appropriate Corporate Officer.

[25] The Applicants point out that it is not mandatory that a person appealing an assessment obtain materials available to them via sections 299 and 300 of the *MGA.* In effect, they argue that as requesting this information is not necessary to proceed with an appeal, there was no need for them to do so.

[26] This position confuses the minimum statutory requirements for an appeal with the decisions a litigant makes in presenting its case.

[27] Justice Renke discussed such litigation decisions in ***Beta Management***. A respondent municipality may choose to challenge whether the complainant has provided a case to meet without advancing. If they are successful in their initial evidentiary challenge, their choice to not advance evidence would be of no import and would save resources. However, if the complainant has provided a case to be met, the municipality would maximize the risk that the Board would alter the assessment.

[28] Justice Renke describes such a decision on the part of the municipality as a “tactical” one. Similarly, it follows that where a litigant challenging an assessment chooses not to obtain (or even request) information available to them, they run the risk that, without that information, the evidence they present will be insufficient to meet their initial evidentiary burden.

V. WAS THE BOARD’S DECISION REASONABLE?

[29] As stated above, the Applicants raise concerns about the sufficiency of the Board’s reasons. Sufficiency of reasons is one of the factors to be considered in assessing the overall reasonableness of the Board’s decision. A reasonable decision “is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law the constrain the decision maker.” (***Vavilov***, at para 85) A decision maker’s reasons must therefore be sufficient to demonstrate that chain of analysis.

[30] The evidence presented on each of the three appeals before this Court for review were somewhat different from one another. Nonetheless, for the purposes of brevity, the Applicants’ evidence in each involve a comparison of the assessed values of similar kinds of properties to the Applicants (Big Box “Anchor” Stores and/or Supermarkets) and while there were some photographs and other materials provided, essentially the Applicants’ evidence was based upon a gross calculation which took the total assessed value of the properties and divided it by the main floor square footage, which he then compared to the assessed valued of his property. By that calculation, the assessment per square foot of the Applicants’ property was higher than that of the purported similar property comparators.

[31] The Applicants argue that the difference in valuation per square foot are sufficient evidence of inequitable assessments to meet their initial evidentiary burden. While it is true inequitable assessments could result in differences of those assessments, it is not the case that differences necessarily imply inequity.

[32] The actual findings sections of the three impugned decisions are relatively brief. Looked at in isolation, it could well appear that the Board failed to adequately “wrestle”, in the Applicants’ counsel’s words at the hearing of this matter, with the issues. However, those conclusory statements must be read in the context of the entirety of the Board’s decisions. Those decisions clearly set out the position of the Respondent City on the sufficiency of the evidence of the square foot comparison approach. For example, in the decision *CARP-0217-030-2023*, the Board sets out the City’s criticism of the square footage comparison approach. At paragraph 20 of that decision, the Board reviews the Respondent City’s position: “the requested value... was presented without the foundation that would be provided by comparison of variables such as the typical market rent, vacancy, operating costs, non-recoverable allowance, reserves for replacement and capitalization rate.” In its findings, the Board stated at paragraph 25, “The complainant calculated a rate/SF of the total assessed value of each comparable by dividing the square footage of the main area into the total assessed value of the property and assumed any discrepancies between the resulting values for the subject and the comparable properties reflected an inconsistency in equitability. This methodology ignores any distinctive features of each property that would have contributed to the total assessed value, and accordingly, would have resulted in a difference assessed value/SF for each property”. It is clear the “distinctive

features" referred to by the Board are indeed those submitted by the Respondent and enumerated in the Board's review of the Respondent's position.

[33] The Board is a specialized tribunal. What might appear to a layman as a significant discrepancy between the assessments of two properties might not, in light of the expert knowledge of the tribunal, reflect some evidence of inequity. As Justice Campbell stated in the ***Costco v Calgary*** decision, and which was referred to by the Board in their summation of the Respondent City's position of the hearing: "...When assessing whether a complainant has established a *prima facie* case, the CARB is not required simply to accept the complainant's evidence at face value. The CARB is charged with assessing whether a complaint has merit, and in so doing, is entitled to use its expertise to evaluate whether the evidence is sufficient to warrant consideration of the complaint. To preclude the CARB from making any assessment of the complainant's evidence would render the initial evidentiary burden meaningless" (***Costco v Calgary***, at para 44). It is permissible for a tribunal to use their specialized knowledge so long as how it is used is articulated in an understandable manner.

[34] As well, in each instance, the Board also rejected the Applicants' claim that their logistical difficulty with section 299 and section 300 requests precluded them from obtaining further evidence.

[35] It is clear, when reviewing the decisions, including the portions of the decisions that set out the respective positions of the parties, that the Board rejected the total value/square footage approach utilized by the Applicants, as that approach did not take into account any distinctive features of those properties which would have factored into their assessments. They therefore found the *quality* of the Applicants' evidence did not reach the level of meeting their preliminary evidentiary burden. Such an assessment of the quality of that evidence was within the scope of the Board's area of expertise.

VI. CONCLUSION

[36] I therefore find as follows:

1. The Board applied the correct test in determining whether the Applicants had met their initial burden;
2. That the Applicants failure to obtain evidence available to them pursuant to sections 299 and 300 did not give rise to any procedural or other unfairness;
3. That the Board was entitled to utilize its expertise as a specialized tribunal in assessing whether the evidence presented by the Applicants was of a sufficient quality to meet their initial evidentiary burden;
4. That the reasons of the Board sufficiently demonstrated an internally coherent and rational chain of analysis, justified on the facts of the cast and the applicable law; and
5. The decisions of the Board in the three challenged appeals were reasonable.

[37] The applications are dismissed.

VII. COSTS

[38] The City of Medicine Hat as the successful party in this matter is entitled to costs pursuant to Section C, Column 1.

Heard on the 21st day of June, 2024.
Dated at the City of Medicine Hat, Alberta this 3rd day of October, 2024.

D.V. Hartigan
J.C.K.B.A.

Appearances:

Gilbert J. Ludwig, K.C.
for the Applicants

Kathleen Elhatton-Lake
for the Respondent, The City of Medicine Hat

Kate Hurlburt, K.C.
for the Respondent, The City of Medicine Hat Composite Assessment Review Board