



**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL**

Citation: *Loblaw Properties Limited v. City of Mount Pearl*,
2017 NLCA 6

Date: January 30, 2017

Docket: 201601H0048

BETWEEN:

LOBLAW PROPERTIES LIMITED

APPELLANT

AND:

CITY OF MOUNT PEARL

RESPONDENT

Coram: Welsh, White and Harrington JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
General Division 201301G4007
2016 NLTD(G) 30

Appeal Heard: October 20, 2016

Judgment Rendered: January 30, 2017

Reasons for Judgment by Welsh and Harrington JJ.A.
Concurred in by White J.A

Counsel for the Appellant: Michael J. Crosbie Q.C.

Counsel for the Respondent: Jamie Smith Q.C.

Welsh and Harrington JJ.A.:

[1] Assessors for the city of Mount Pearl assessed commercial property of Loblaw Properties Limited for municipal tax purposes. Loblaw unsuccessfully appealed the assessment to an assessment review commissioner. Loblaw then appealed the commissioner's decision to a judge of the Trial Division who affirmed the commissioner's decision. Loblaw appeals that decision.

BACKGROUND

[2] Loblaw owns a large commercial building consisting of two main areas, a distribution warehouse on the first floor and office space on the second floor. Assessors for the city of Mount Pearl (City) assessed the value of the Loblaw property based on an income approach for the tax year 2013. Pursuant to section 30 of the *Assessment Act, 2006*, SNL 2006, c. A-18.1, Loblaw appealed the assessment to an assessment review commissioner who upheld the assessment.

[3] The commissioner gave a written decision in which she succinctly stated the positions of Loblaw and the City. Giving reasons, the Commissioner found that the City's assessors had properly applied the income approach and rejected the request by Loblaw for the application of the direct sales approach. The use of the income approach is not challenged by Loblaw and is not at issue in this appeal.

[4] In applying the income approach, the City assessed the property at \$11.25/sq. ft. Using the same approach, Loblaw's figure was \$10.07/sq. ft. In confirming the City's assessment, the commissioner explained:

To determine the gross rent to be applied, Mr. Hearn [for the City] informed the Commission that a review of lease rates for warehouses in Mount Pearl were reviewed. The leases ranged from \$9.17/sq. ft. to \$20.00/sq. ft. The average rent was \$14.00/sq. ft. and the median was \$15.00/sq. ft. Mr. Hearn confirmed that the size of the area for lease was factored in and given the size of the subject property, it was believed that the property would lease for less than the rates reviewed. Therefore, a gross rent of \$11.25/sq. ft. was applied.

...

The market rental rate applied by the [City's] Assessor in utilizing the income approach to value is accepted by the Commission. The gross rent was adjusted to

factor in the large size of the subject property and this adjustment was a fair and just approach to values.

[5] In dismissing Loblaw's appeal, the Trial Division judge addressed issues which are not before this Court on appeal and on which this Court, accordingly, makes no comment. At issue here is whether Loblaw had access to details of information on which the City's assessors relied and which, it submits, were necessary to ensure procedural fairness.

ISSUE

[6] Loblaw's appeal is based on the commissioner's failure to identify and disclose the rental information obtained by the assessors with respect to specific locations in the City, and her failure to disclose the applied rental rates "so that accuracy and relevancy of the rental information could be tested".

ANALYSIS

The Legislation

[7] Section 39 of the *Assessment Act*, provides for an appeal of a decision of an assessment review commissioner to a judge of the Supreme Court, Trial Division on a question of law or jurisdiction:

(1) A party aggrieved by a decision of a commissioner may appeal from that decision to a judge of the Trial Division in the judicial centre in which the real property is located upon giving written notice to all parties and to the Trial Division within 30 days after the mailing or delivery to that person of the decision of the commissioner.

...

(3) An appeal of a decision of a commissioner under subsection (1) may be made on a question of law or jurisdiction.

[8] Section 39(5) addresses the role of the Court, consistent with the limitation on appeal to a question of law or jurisdiction:

The court shall either confirm or vacate the decision of the commissioner and where vacated the court shall refer the matter back to the commissioner with the opinion of the court as to the error in law or jurisdiction and the commissioner shall deal with the matter in accordance with that opinion.

[9] A “commissioner” is an assessment review commissioner appointed under the *Act* by the city of St. John’s or another municipality, including Corner Brook and Mount Pearl (section 2(j), (n) and (s)). Section 32 provides:

(1) A municipality or the city shall, by resolution, prior to January 31 in a year, appoint a commissioner.

...

(3) A commissioner holds office until he or she resigns or is dismissed.

(4) A commissioner appointed under subsection (1) shall be compensated under the terms negotiated between the commissioner and the city or municipality that made the commissioner’s appointment.

(5) The city or municipality that made the appointment may dismiss a commissioner from office.

The effect of section 32 is that there is no single board of commissioners, but rather, individual commissioners appointed by each different municipality in the Province to perform assessments for that municipality.

[10] Under section 35, a commissioner has authority to direct the production of evidence:

(1) A commissioner may summon witnesses to attend and give evidence and produce documents at an appeal hearing.

...

(4) For the purpose of holding an inquiry under this *Act*, a commissioner has all the powers of a commissioner under the *Public Inquiries Act*.

(5) In the conduct of an inquiry or a hearing, a commissioner is not bound by the rules of evidence.

[11] Section 37 of the *Act* sets out the powers of a commissioner:

(1) A commissioner, after hearing the evidence, shall confirm or amend the assessment appealed against by increasing or decreasing it but the commissioner shall not amend an assessment only on the ground that it is above or below the actual value if the assessment bears a just and fair relation to the value at which other properties are assessed in the city or municipality.

...

(4) A commissioner, after hearing from the parties and any witnesses produced, shall decide the matter and shall provide reasons in writing to the parties to the appeal.

[12] It follows from the legislation read as a whole that the determination of issues of fact falls within the realm of a commissioner, with appeals restricted to questions of law or jurisdiction.

The Standard of Review

[13] The restriction on an appeal to a question of law or jurisdiction informs the analysis necessary to ascertain the appropriate standard of review. In the recent decision in *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, Karakatsanis J., for the majority, referred to the “four categories of issues identified in *Dunsmuir* [2008 SCC 9, [2008] 1 S.C.R. 190] which call for correctness” as the appropriate standard of review (paragraph 24). The effect is that “[w]hen the issue falls within a category, the presumption of reasonableness [as the appropriate standard of review] is rebutted, the standard of review is correctness and no further analysis is required” (paragraph 24). Further, the “presumption of reasonableness may be rebutted if the context indicates the legislature intended the standard of review to be correctness” (paragraph 32). Karakatsanis J. continued:

[33] The presumption of reasonableness is grounded in the legislature’s choice to give a specialized tribunal responsibility for administering the statutory provisions, and the expertise of the tribunal in so doing. Expertise arises from the specialization of functions of administrative tribunals like the Board which have a habitual familiarity with the legislative scheme they administer: “... in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime” Expertise may also arise where legislation requires that members of a given tribunal possess certain qualifications. However, as with judges, expertise is not a matter of the qualifications or experience of any particular tribunal member. Rather expertise is something that inheres in a tribunal itself as an institution: “... at an institutional level, adjudicators ... can be presumed to hold relative expertise in the interpretation of the legislation that gives them their mandate, as well as related legislation that they might often encounter in the course of their functions” (*Dunsmuir*, at para. 68). As the Court has often remarked, courts “may not be as well qualified as a given agency to provide interpretations of the agency’s

constitutive statute that make sense given the broad policy context within which that agency must work”

[14] In this appeal, the question of the appropriate standard of review cannot be determined by the categories identified in *Dunsmuir*. Rather, it is necessary to consider, from the context of the legislation, whether the presumed standard of reasonableness has been rebutted based on the legislative intention to require correctness when questions of law and jurisdiction are reviewed pursuant to section 39 of the *Act*.

[15] In the *Edmonton City* case, following a contextual analysis, the majority concluded that the presumption that reasonableness is the appropriate standard of review had not been rebutted. Karakatsanis J. referred to the nature of the board and its authority:

[47] The Board is not simply an adjudicator responding only to the parties’ record and submissions, as evidenced by its inquisitorial powers (s. 465) and power to refer an assessment to the Minister even when it is not the subject of a complaint (s. 476.1). Within the complaints process, the Board’s role is to determine whether the assessment is fair and equitable (s. 467(3)). Outside the complaints process, the Board may refer an assessment it “considers unfair and inequitable” to the Minister, who may investigate or quash the assessment (s. 476.1). ...

[16] A similar scheme has not been adopted in the legislation at issue here. Indeed, the above factors stand in contrast to the appointment and the powers of assessment review commissioners under the *Act*. There is no board of assessment review commissioners. Rather, section 32(1) provides for each municipality to appoint its own commissioner. The legislation directs that an appointment shall be made by resolution “before January 31 in a year”. A commissioner may be dismissed by the municipality that made the appointment. The authority of a commissioner is limited to hearing the evidence and submissions by the parties where a tax assessment has been challenged. Factual findings by a commissioner may not be appealed.

[17] Given the nature of a commissioner’s authority and the appointment process, it follows that the work of a particular commissioner does not engage broad policy considerations under the legislation, such as in the case of a board. In these circumstances, an appeal limited under the *Act* to a question of law or jurisdiction indicates a legislative intention that, to achieve consistency on issues of law, including statutory interpretation,

relevant to municipal taxation assessments requires a standard of review of correctness.

Interpretation of Section 44 of the Act

[18] Loblaw characterized the question of its access to information used by the assessors as a matter of procedural fairness. However, the *Act* addresses that particular issue. Insofar as this appeal requires an interpretation of the *Act*, it engages a question of law to be determined on a standard of review of correctness.

[19] Section 44 of the *Act* provides for disclosure of information that, in the corporate context, may otherwise be confidential. Subsection (1) creates an offence for disclosure of certain information obtained for purposes of an assessment while subsection (2) sets out a limited exception:

(1) An assessor or another person who in the course of duties imposed by this *Act* or otherwise as an employee of the city or a municipality has acquired or has access to information provided by a person for the purpose of helping in the determination of the value of real property and who wilfully discloses or permits to be disclosed to a person not entitled to acquire or have access to that information any of that information which is not required to be entered on the roll and which is not a matter of public knowledge is guilty of an offence and liable upon summary conviction to a fine of not more than \$200 and in default of payment to imprisonment for a period of not more than 3 months, or to both a fine and imprisonment.

(2) Notwithstanding subsection (1), a person giving evidence in an assessment appeal under this *Act* may disclose in that evidence information which in the opinion of the commissioner or the presiding judge is relevant to the appeal.

(Emphasis added.)

[20] Section 44 reflects the intention of the legislature to strike a balance where it is an offence for an assessor or other person, who obtains data while performing duties imposed by the *Act*, to disclose confidential information to a person who is otherwise “not entitled” to it, while allowing disclosure where necessary for purposes of the appeal. It is for the commissioner to determine the factual question of whether the information “is relevant to the appeal” and should be disclosed.

[21] However, since the fundamental premise flowing from section 44(1) is that information is not to be disclosed, there is an onus on the person who

is seeking to use the data in a tax assessment appeal to establish an entitlement to it under subsection (2). The Trial Division judge concluded that:

[59] ... There was no evidence that Loblaw requested further information at any time during the appeal hearing [before the commissioner] Loblaw prepared its own expert report and was given a copy of the report relied upon by Mount Pearl's Assessors. While the transcript was incomplete in some instances, Counsel for Mount Pearl underscored that the source of the rental rate and information was simply not an issue before the Commissioner. ...

[22] Loblaw did not establish that a request was made under section 44(2) for the rental information relied upon by the assessors and the specific locations of the related properties. Because section 44(2) requires a determination by the commissioner as to whether the information "is relevant to the appeal" and should be disclosed, absent special circumstances, the request must be made at the time of the assessment appeal.

[23] The decision in *Hiscock Estate v. St. John's (City)*, 2014 NLTD(G) 110, 356 Nfld. & P.E.I.R. 184, provides an example of special circumstances. In referring to that decision, the Trial Division judge distinguished the facts in *Hiscock* from this case:

[58] ... Prior to the appeal hearing [in *Hiscock*], the taxpayer had been assured that the proceedings would be informal and that assistance would be provided to her by a senior assessor with the City. Further, the taxpayer had not been given key comparable sales information, denying her the opportunity to properly prepare for her appeal. To compound her difficulty in understanding the case she had to meet, she was not provided copies of the City's comparable sales at the hearing, despite a request to see them. ...

[59] The facts here are distinguishable from those in *Hiscock*. Loblaw, a sophisticated taxpayer, was represented at the hearing by two experienced appraisers. There was no evidence that Loblaw requested further information at any time during the [commissioner's] appeal hearing

[24] The conclusion follows that, if Loblaw wanted disclosure of information as to the basis for the City's assessors' rental information, section 44(2) provided an appropriate avenue of recourse to ensure procedural fairness. In the circumstances, it was necessary for Loblaw to make the application to the commissioner. Without such an application, the

absence of disclosure could not be characterized as a lack of procedural fairness or as a question of law or jurisdiction.

SUMMARY AND DISPOSITION

[25] In summary, insofar as a question of law or jurisdiction is raised, a standard of review of correctness applies. Section 44(2) of the *Act* provided the means for Loblaw to obtain information as to the basis of the City's assessment. In the absence of the necessary application made to the commissioner, the appeal to the Trial Division did not raise a question of law on this issue. The appeal to this Court being restricted to that issue, it follows that the Trial Division judge did not err in dismissing Loblaw's appeal.

[26] Accordingly, we would dismiss the appeal with costs under column 3 of the scale of costs under the *Court of Appeal Rules*.

B. G. Welsh J.A.

M. F. Harrington J.A.

I Concur: _____

C. W. White J.A.