



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

Citation: *City of St. John's v. St. John's International
Airport Authority*, 2017 NLCA 21

Date: March 27, 2017

Docket: 201601H0002

BETWEEN:

CITY OF ST. JOHN'S

APPELLANT

AND:

ST. JOHN'S INTERNATIONAL AIRPORT
AUTHORITY

RESPONDENT

Coram: Green C.J.N.L., Welsh, Barry, Harrington JJ.A. and LeBlanc J. (ex
officio)

Court Appealed From: Supreme Court of Newfoundland and Labrador
Trial Division (G) 201301G2976
2015 NLTD(G) 175

Appeal Heard: January 19, 2017

Judgment Rendered: March 27, 2017

Reasons for Judgment by Welsh J.A.

Concurred in by Green C.J.N.L., Barry, Harrington JJ.A. and LeBlanc J. (ex
officio)

Counsel for the Appellant: Irene Muzychka Q.C.

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

Welsh J.A.:

[1] An assessment, made by the City of St. John's for purposes of taxation, was appealed by the St. John's International Airport Authority to an assessment review commissioner. The commissioner made amendments which resulted in a reduction in the assessment. However, the Airport Authority did not accept the revised assessment. This resulted in an appeal of the commissioner's decision by the Airport Authority to the Trial Division and a cross-appeal by the City. The Trial Division judge determined that the commissioner had erred in applying certain principles of assessment. In accordance with the legislation, she vacated the decision and remitted the matter to the commissioner.

[2] In this Court, the City submits that the judge was correct in vacating the decision of the commissioner, but appeals on the basis that the judge erred in setting out the law that must be applied by the commissioner in reconsidering the Airport Authority's appeal. The City seeks to have the original assessment confirmed by the commissioner.

BACKGROUND

[3] The City provided the Airport Authority with notices of assessment stipulating values of \$45,685,100 for 2009 and \$50,685,100 for 2010 to 2012. On appeal to the assessment review commissioner, the Airport Authority argued for values of \$13,571,000 for 2009 and \$6,066,000 for 2010 to 2012. The commissioner adjusted the assessments to \$35,428,000 for 2009 and \$35,371,000 for 2010 to 2012.

[4] The commissioner provided a comprehensive decision. He summarized the positions of the parties and reviewed the evidence of the expert witnesses and the City's assessor. He gave reasons for accepting or rejecting certain of that evidence. The commissioner emphasized, at page 18:

While I have only used excerpts from the reports and testimony of the various witnesses I have fully reviewed the reports and all my notes from the direct testimony in arriving at my conclusions. I have also reviewed all the Exhibits, Court decisions, etc. submitted by both parties and have considered them in my deliberations.

[5] In rejecting the evidence of Dr. Tretheway, the expert provided by the Airport Authority, the commissioner summarized, at page 19:

Dr. Michael Tretheway claims that the income methodology is the only basis to establish market value. Judge Orsborn has stated in *3163083 Canada Limited v. St. John's (City)*, 2005 NLTD 32 that property can be assessed using a number of approaches. The single methodology used by Dr. Tretheway did not provide an accurate valuation. In addition the statement of projected revenue compiled by Transport Canada and used by Dr. Tretheway which proved to be inaccurate produced an unreliable valuation. Dr. Tretheway could have used the actual figures from the Airport Authority's Financial Statements to either finalize his valuation or use it as a validation against the value he arrived at using the Transport Canada projections.

[6] The City's assessor, Mr. Cheeseman, stated that he used a combination of the income and direct comparison methods, and that "different valuation methods [were] used for different parts of the property depending on the availability of information" (commissioner's decision, at page 10).

[7] The commissioner concluded, at page 19:

Therefore, I am satisfied that the combination of approaches used by the assessor [Mr. Cheeseman] are appropriate and the method applied by Jeffrey Climans [the expert provided by the City] as a check of the valuation is appropriate. In any event I am satisfied that the use of the actual expenses and revenues as available from the [Airport Authority's] financial statements as used by Jeffrey Climans produced a more reliable valuation.

[8] Regarding restrictions on use of the property as a result of the lease, the commissioner stated, at page 20:

The lease of the airport property from Transport Canada to the St. John's International Airport Authority does have restricting use clauses in it but this does not prohibit the land from being used for "airport related" activities. Many airports in Canada and elsewhere have hotels, car rentals, food suppliers, etc. located on airport property. Indeed the St. John's International Airport has a number of commercial facilities located on portions of its property. Therefore to value the property as if no other uses are permitted will not produce a valid market value.

[9] The commissioner referred to the City assessor's use of a "combination of valuation approaches", being "the same method he used for the St. John's International Airport property in the past when he coordinated his valuations with a Public Works Canada representative", that is, before the property was leased to the Airport Authority and the federal government made a payment in lieu of taxes (commissioner's decision, at page 21). (For

a discussion of the effect of transferring the property to the Airport Authority, see *Gander International Airport Authority v. Gander (Town)*, 2011 NLCA 65, 313 Nfld. & P.E.I.R. 125.)

[10] The commissioner concluded, at pages 21 to 22:

Having considered all the information submitted by both parties I am satisfied that the [Airport Authority] did not prove that the assessment of the City of St. John's is wrong. The valuation of Dr. Tretheway used unreliable data from Transport Canada projections rather than actual data readily available from the St. John's Airport Authority annual financial statements. He also restricted his valuation to a single methodology without applying other methodologies either as a check against his final valuation or to support the valuation using the Income Approach.

The City assessor applied a combination of valuation methodologies which are accepted methods of valuation.

[11] Finally, the commissioner discussed the applicable capitalization rate, summarizing, at pages 22 to 23:

Finding an appropriate capitalization rate is always difficult when you have a property that is unique in the local market and therefore it becomes very subjective. Mr. Climans used a rate of 5.25%. However he did not factor into his calculations a percentage for the municipal taxation. This should be considered in determining an appropriate [capitalization] rate for the subject property.

The [capitalization] rate used by Dr. Tretheway [10%] is based on Treasury Board Guidelines which were designed for a different use and therefore make the recommendation for the valuation of St. John's International Airport property weak.

...

I have reviewed the rationale put forward by each party and the arguments to support them. Having considered the relevant factors, the St. John's International Airport Authority property would have minimum level of risk for a potential purchaser as most of the economic variables are known and are manageable. I therefore consider a lower [capitalization] rate as appropriate in this instance. I consider a [capitalization] rate of 7% (which includes the tax consideration) to be appropriate for the subject property. When this rate is applied to Jeffrey Climans' valuation the estimate of value changes to \$35,428,000 for the base year 2005 and to \$35,371,000 for the base year 2008.

(Emphasis added.)

[12] The commissioner concluded, at page 23:

In conclusion I am satisfied that the City has used appropriate methodology for its assessment. However they also engaged an expert in airport valuation in the person of Jeffrey Climans to check on their methodology and to check the validity of the assessed value. Mr. Climans' values when adjusted for the [capitalization] rate is lower than the City appraiser's estimate of value. As Jeffrey Climans is an experienced national and international airport valuator and he was engaged by the [City], I have accepted his valuation methodology.

[13] For purposes of the appeal, the City takes the position that the commissioner erred in his analysis and conclusion in two aspects: the capitalization rate and reliance on the valuations provided by Mr. Climans.

[14] In remitting the matter to the commissioner for reconsideration, the Trial Division judge concluded (2015 NLTD(G) 175, 374 Nfld. & P.E.I.R. 273):

[134] I am satisfied that the deficiencies advanced by both the Airport Authority and the City establish that the Commissioner failed to assess the airport property in accordance with a key provision of the *Act* and the body of law as it pertains to municipal taxation assessments. The Commissioner here, in his determination of actual value, selected the capitalized net operating income approach. The record and the relevant law satisfy me that in doing so, he made errors of law. He mistakenly relied on evidence which was incomplete and in some cases non-existent, and he also failed to follow the requirements of generally accepted appraisal principles in the computation of value under the capitalized net operating income approach. Further, he did not adhere to principles contained in the general law of assessments, including the identification of the market as articulated in *Gander International Airport*.

ANALYSIS

The Legislation

[15] A party assessed by a municipality for purposes of taxation may appeal the assessment to an assessment review commissioner appointed under the *Assessment Act, 2006*, SNL 2006, A-18.1. Section 30(1) provides:

A party objecting to or complaining of an omission from or an error in a roll may personally or by agent, serve notice of appeal to the city clerk or the director within 30 days from the date of the notice of assessment.

[16] An appeal is to a commissioner appointed under section 32:

(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 a yearly resolution by each different municipality in the Province to perform assessments for that municipality.

[17] 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.

[18] 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.

(Emphasis added.)

[19] Section 39 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.

(Emphasis added.)

[20] 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.

(Emphasis added.)

[21] It is clear from the legislation that a commissioner and a judge on appeal have specific roles. The commissioner has broad authority to receive and consider evidence, make findings of fact, and apply the law in determining whether to confirm or amend an assessment. The court has authority only to address questions of law or jurisdiction, and to remit the assessment to the commissioner with directions as to the law to be applied. Even where the court is involved, it is the commissioner who makes the final decision.

The Standard of Review

[22] An appeal of a commissioner's decision to the Trial Division is restricted to questions of law or jurisdiction. The standard of review that applies to such an appeal is correctness, as determined by this Court in *Loblaw Properties Limited v. City of Mount Pearl*, 2017 NLCA 6.

Analysis of the Commissioner's Decision

[23] The Airport Authority, having filed a notice of appeal under section 30, had the burden of demonstrating that the City's assessment was in error. In considering the appeal, the commissioner set out extensive reasons for concluding that the Airport Authority "did not prove that the assessment of the City of St. John's is wrong" and that the "City assessor applied a combination of valuation methodologies which are accepted methods of valuation" (commissioner's decision, at pages 21 and 22).

[24] The Trial Division judge summarized the position of the Airport Authority:

[39] The Airport Authority argued that the airport property's fee simple interest had no market value because of the restrictions imposed by the ground lease on its use, noting in particular (i) the requirement that it be used to operate an international airport maintained in an up-to-date first class condition; (ii) the restrictions on its ability to charge airport improvement fees; and (iii) the fact that the lands had to be returned in a debt free condition to the federal government at the end of the lease term, making financing during the latter years particularly difficult.

[25] However, by using the income approach as a part of the assessment analysis, these factors would be taken into account. That is, insofar as the restrictions in the lease had an impact on the Airport Authority's income, this would be reflected in the financial statements. In contrast to the situation in *Gander International Airport Authority v. Gander (Town)*, *supra*, the Airport Authority conceded that it had the ability to generate significant income. (See the *Gander* decision at paragraphs 21, 22 and 31 for a summary of the particular circumstances affecting that assessment.)

[26] The commissioner had authority to accept the City assessor's methodology, provided it fell within generally accepted appraisal principles. He also had authority to amend the assessment based on the evidence he received and to summon witnesses to give evidence or provide

documentation as authorized under section 35 of the *Act*. In the result, relying on the evidence adduced by the parties, the commissioner concluded that the Airport Authority failed “to prove that the assessment of the City of St. John’s is wrong” (paragraph 23, above).

[27] However, having found that the Airport Authority had not demonstrated an error in the City’s assessment, the commissioner nonetheless went on to amend the assessment using the methodology and property valuation prepared by Mr. Climans. This involved the application of a capitalization rate, which he determined, and then applied to Mr. Climans’ valuation. It is as a result of this analysis that the commissioner erred.

[28] The commissioner had accepted that the City assessor had applied a combination of accepted methods of valuation. Without explanation, he then proceeded on the basis of Mr. Climans’ capitalized net operating income approach. Indeed, after discussing the question of a capitalization rate, the commissioner concluded that he accepted Mr. Climans’ valuation methodology, an approach that was, in fact, not used by the assessor. The commissioner could not accept both the City assessor’s approach and that of Mr. Climans’ because they were not the same and did not result in the same property valuation. The Trial Division judge summarized:

[30] The record disclosed that in undertaking the assessments, the City’s assessors determined the value of the seven buildings separately and then applied a cost approach to them all. They applied an income approach to valuation in other aspects of their assessments. For example, with respect to the air terminal building, the assessors performed both an income approach to value and a cost approach, but placed reliance on the income approach.

...

[32] The City’s expert, Mr. Climans, did not proceed in this manner, adopting instead an income approach respecting the whole property, as opposed to a valuation of the seven buildings and land. The City explained that Mr. Climans’ valuation was not intended to be complete but was simply a validation exercise, using only the revenues and expenses in the Airport Authority’s financial statements. While he did not adopt their approach, Mr. Climans nonetheless testified that he supported the assessors’ use of the cost and replacement valuation approaches.

[29] A further difficulty in relying on Mr. Climans’ approach is the basis on which it was proffered by the City. In his decision, on a number of

occasions, the commissioner recognized that Mr. Climans had not done a complete assessment and that his evidence, tendered by the City, was intended “as a check of [the City’s] valuation” (commissioner’s decision, at page 19). By applying the capitalization rate to Mr. Climans’ valuation, the commissioner was relying on an incomplete property valuation and making a decision which was lacking an evidentiary foundation.

[30] In effect, the commissioner erred in principle and in law when he accepted differing approaches and property valuations, as between the City’s assessment and Mr. Climans’ property valuation, and when he made a decision based on Mr. Climans’ valuation without a proper foundation in the evidence. Once the commissioner had concluded that the Airport Authority had not demonstrated an error in the assessment, that was the end of the matter. He erred by changing his position, in effect rejecting the methodology of the City assessor in favour of Mr. Climans’ approach which was intended only as a “check”.

[31] I note in passing that, pursuant to section 35 of the *Act*, it was open to the commissioner to request additional evidence at the hearing if he concluded that this was necessary to determine the assessment appeal. He did not undertake that step and, instead, found that the Airport Authority had not established that the City’s assessment was wrong. The capitalization rate used by the City assessor was not challenged. Mr. Climans’ valuation was accepted as providing only a “check”. Further, I would reiterate that, when a matter is remitted to a commissioner pursuant to section 39 of the *Act*, the purpose is to allow the commissioner to “deal with the matter in accordance with [the court’s opinion on the question of law or jurisdiction]”. In other words, the reconsideration proceeds by applying the correct law to the record. Such a reconsideration does not engage section 35 of the *Act* so as to allow for a new hearing based on different evidence.

[32] The Airport Authority also submitted in the Trial Division that the commissioner, in applying the capitalized net operating income approach, erred with respect to consideration of reserves for replacement, the capitalization rate, and income from non-assessables (decision of the judge, at paragraph 95). The first two of these issues need not be considered here given the conclusion that the commissioner had accepted the City’s assessment and should not have then proceeded to make an adjustment based on Mr. Climans’ valuation. With respect to the issue of including non-assessables in the valuation, at the hearing, it was conceded that there were some errors with respect to items, both included and excluded, and that they

would, for purposes of the assessment, likely cancel each other out, and that an evidentiary basis was lacking.

[33] To summarize, the commissioner erred in principle and in law when he amended the City's assessment using the capitalized net operating income approach together with the property valuation provided by Mr. Climans. Once the commissioner concluded that the Airport Authority had not established an error in the assessment, the proper course, in the absence of seeking or receiving additional evidence or documentation under section 35, was to confirm the assessment.

[34] With respect to the reference by the parties and the Trial Division judge to the decision in *Gander International Airport Authority v. Gander (Town)*, *supra*, it should be noted that the circumstances surrounding the assessment of the two airports are markedly different. The restrictions applying to the Gander airport were more onerous in their effect and the ability to generate income was significantly impaired. The circumstances applicable to the St. John's airport, particularly the ability to generate income, are entirely different, resulting in a different analysis and assessment.

[35] Finally, the Trial Division judge erred in her analysis of the law regarding the appropriate valuation methodology. The choice of methodology will depend on the factual circumstances in a particular case. A commissioner has authority to accept or reject the approaches used by an assessor. This is generally a factual determination by the commissioner which is not subject to an appeal to the Trial Division because an appeal under section 39 of the *Act* is limited to questions of law or jurisdiction. An example of the exercise of the commissioner's authority is his rejection of the valuation approach employed by Dr. Tretheway for the Airport Authority. (It should be noted that the legislation in place at the time of the Gander airport decision did not limit the role of a judge on appeal to a question of law or jurisdiction.)

[36] In this case, the commissioner erred in principle and in law by accepting inconsistent methodologies and valuations. However, there is no basis on which to conclude that he erred in law insofar as he accepted the City assessor's approach and valuation. In the result, the Trial Division judge's discussion of the law regarding the appropriate valuation methodology must be disregarded. The commissioner is not bound by that opinion.

SUMMARY AND DISPOSITION

[37] I would allow the City's appeal of the Trial Division judge's decision on the basis that she erred in the reasons for which she vacated the commissioner's decision. In light of the above analysis, I would vacate the decision of the commissioner and remit the Airport Authority's assessment appeal to the commissioner to deal with on the basis that, due to the lack of an evidentiary foundation, it was an error in law to rely on the property valuation provided by Mr. Climans. There was no error in law in accepting the methodology and property valuation of the City assessor.

[38] In the result, I would allow the appeal as set out above and remit the Airport Authority's assessment appeal to the commissioner for reconsideration in accordance with the above opinion as to the law. Being the successful party, the City should have its costs under column 3 of the scale of costs in this Court and in the Court appealed from. In accordance with section 37(5) of the *Act*, there should be no order as to costs in the matters before the commissioner.

B. G. Welsh J.A.

I Concur: _____

J. D. Green C.J.N.L.

I Concur: _____

L. D. Barry J.A.

I Concur: _____

M. F. Harrington J.A.

I Concur: _____

R. D. LeBlanc J. (*ex officio*)