



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

Citation: *66202 Newfoundland and Labrador Inc. v.
Municipal Assessment Agency*, 2019 NLCA 1

Date: January 9, 2019

Docket Number: 201601H0066

BETWEEN:

66202 NEWFOUNDLAND AND LABRADOR INC.
(c.o.b. as MOUNTAIN VIEW RETIREMENT CENTRE) APPELLANT

AND:

MUNICIPAL ASSESSMENT AGENCY FIRST RESPONDENT

AND:

CITY OF CORNER BROOK SECOND RESPONDENT

Coram: Welsh, White and Hoegg JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
General Division 201404G0139
(2016 NLTD(G) 91)

Appeal Heard: October 11, 2018

Judgment Rendered: January 9, 2019

Reasons for Judgment by: Welsh J.A.

Concurring Reasons by: White J.A.

Concurring Reasons by: Hoegg J.A.

Counsel for the Appellant: Sarah Clarke

Counsel for the First Respondent: Jamie Smith Q.C.

Counsel for the Second Respondent: Lorilee Sharpe

Welsh J.A.:

[1] Mountain View Retirement Centre, owned and operated by 66202 Newfoundland and Labrador Inc., was assessed as a personal care home by the Municipal Assessment Agency for purposes of taxation by the City of Corner Brook. The Company appealed the assessment to the Supreme Court of Newfoundland and Labrador on the basis that the property is not a personal care home, but individual rental units, and that the incorrect methodology was used in determining the assessed value of the property. That appeal was dismissed. The Company now appeals to this Court.

BACKGROUND

[2] The Municipal Assessment Agency (the “Agency”) is legislatively mandated to supervise and coordinate the work of assessors who assess property throughout the Province for purposes of taxation. An assessment roll for a municipality is prepared annually by an assessor. A party objecting to an assessment may appeal to a commissioner appointed in accordance with the *Assessment Act, 2006*, SNL 2006, c. A-18.1. The decision of a commissioner may be appealed to the Supreme Court on a question of law or jurisdiction.

[3] In this case, upon receiving the notice of assessment for the property, which was characterized as a personal care home (the “Property”), the Company filed a notice of appeal regarding the property tax assessment stating:

The assessment is not proper. This property is 95% a retirement home. The rooms are the homes of the residents through rental. It should be accordingly assessed.

[4] Similarly, the Company filed a notice of appeal regarding the business tax assessment:

The assessment is not proper. This business tax is based on the presumed value of the property used by 66202 to do its business. It should therefore, only assess the value of part of the building and land because the rooms are rental.

[5] The commissioner accepted the evidence of the Agency staff that there was only one other reasonably comparable property in the municipality, a smaller personal care home in Corner Brook. In addition, the commissioner found that the income approach to assessing the value of the property was appropriate and provided “the best financial benefit” to the Company (decision of the commissioner, at page 4).

[6] Regarding the nature of the business, the commissioner was satisfied that the rooms occupied by the residents “cannot be considered as purely residential and therefore must be considered as the commercial element of the business” (decision of the commissioner, at page 4). The commissioner described the nature of a personal care home and concluded, at page 4:

... there is no doubt in my mind that the residents of Personal Care Homes differ substantially from those persons who normally rent apartments in terms of the level of independent living. To facilitate the living conditions of the Personal Care residents, many services have to be provided, from the basics of food and comfortable living quarters to the social and cultural components of the residents’ lives. ...

Therefore, I must conclude the provision of rooms and the delivery of the associated services, all of which are restricted to the specified levels of care, are in fact a business and would therefore be subject to the assessment for Business Tax purposes. I note that there has been adequate provision for exemption for the caretaker’s apartment provided.

Therefore, the appeal is denied. ...

[7] On appeal to the Supreme Court, the judge found no error by the commissioner and dismissed the appeal.

ISSUES

[8] Two components of the assessment analysis are at issue in this appeal: (1) characterization of the Property as residential or business; and (2) the method of conducting the assessment, which has two aspects: (a) application of the uniformity principle, and (b) use of the income approach. The role of the Agency in an appeal is also considered.

ANALYSIS

The Legislation

The Assessment Roll

[9] Section 3 of the *Assessment Act* provides for the assessment of property in the Province:

(1) Where a tax is imposed on real property by ... a council, all the real property in ... a municipality, whether or not it is subject to taxation, shall be assessed in accordance with this Act, ...

(2) Real property shall be assessed as either

- (a) commercial property;
- (b) residential property; or
- (c) partly residential and partly commercial property.

“Council” is defined in section 2(o) to mean “a town council ... and includes the Corner Brook City Council ...”. Similarly, the City of Corner Brook is included in the definition of “municipality” (section 2(s)).

[10] Pursuant to section 10(1), an assessment roll for a municipality is “prepared annually between January 1 and September 30 by an assessor designated by the director”. The assessor, after “diligent inquiry”, sets down the assessed value of real property on the assessment roll (section 11). The assessor is also responsible for having the notice of assessment delivered to the person named in the roll (section 25(1)).

[11] The “director” is defined in section 2(p) to mean “the executive director of the agency”. The duties of the director are set out in section 6(1) of the *Act*:

The director ... shall supervise the assessment of real property and shall supervise, direct, guide and co-ordinate the work of all assessors with a view to bringing about and maintaining a uniform standard of assessment in ... all municipalities in the province.

Appealing an Assessment

[12] Section 30 of the *Assessment Act* addresses the manner of commencing an appeal:

(1) 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 director within 30 days from the date of the notice of assessment.

For purposes of Part II of the *Act*, which addresses appeals, “party” is defined to mean “the real property owner, ... a municipality or the agency” (section 29).

[13] The legislation provides for the appointment and powers of a commissioner in a municipality:

32(1) A municipality ... shall, by resolution, prior to January 31 in a year, appoint a commissioner.

...

37(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 ... 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.

(5) The commissioner shall not award costs against a party to an appeal or to another person.

[14] Section 39 of the *Act* provides for an appeal to the Supreme Court 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 Supreme Court

(2) The practice and procedure relating to appeals under the *Judicature Act*, and the *Rules of the Supreme Court, 1986* apply to proceedings under this section.

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

(4) A commissioner may be represented by counsel and heard on an appeal under this section.

(5) 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.

Preliminary Issue – Role of the Agency in an Appeal

[15] In *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44, [2015] 3 S.C.R. 147, Rothstein J., for the majority, set out factors that may be helpful in the exercise of the court's discretion when defining the role of a tribunal or government agency in an appeal:

[59] ... where the statute does not clearly resolve the issue, the reviewing court must rely on its discretion to define the tribunal's role on appeal. While not

exhaustive, I would find the following factors, identified by the courts and academic commentators cited above, are relevant in informing the court's exercise of this discretion:

- (1) If an appeal or review were to be otherwise unopposed, a reviewing court may benefit by exercising its discretion to grant tribunal standing.
- (2) If there are other parties available to oppose an appeal or review, and those parties have the necessary knowledge and expertise to fully make and respond to arguments on appeal or review, tribunal standing may be less important in ensuring just outcomes.
- (3) Whether the tribunal adjudicates individual conflicts between two adversarial parties, or whether it instead serves a policy-making, regulatory or investigative role, or acts on behalf of the public interest, bears on the degree to which impartiality concerns are raised. Such concerns may weigh more heavily where the tribunal served an adjudicatory function in the proceeding that is the subject of the appeal, while a proceeding in which the tribunal adopts a more regulatory role may not raise such concerns.

See also *Weir's Construction Limited v. Warford (Estate)*, 2018 NLCA 5, at paragraphs 37 to 41.

[16] In this case, the Agency is named as a respondent in the appeal. The “agency” is defined to mean “the corporation incorporated ... to conduct, in municipalities, assessments” under the *Act* (section 2(b)). In assessing the role of the Agency in an appeal, it is helpful to compare that role with the role of the municipality.

[17] Under section 29 of the *Act*, “party” is defined to include both a municipality and the Agency. This definition takes into account the Agency's expertise, experience and broad provincial perspective, which a municipality would not have, in assessing property. That said, including the municipality as a party recognizes that the Agency and the municipality may have different interests and objectives at stake in an appeal. For example, in this case, the municipality's focus is the characterization of the Property as a personal care home, while the Agency is most concerned with uniformity in assessing personal care homes, an area in which it has expertise and a public policy interest in “bringing about and maintaining a uniform standard of assessment in ... all municipalities in the province” (section 6 of the *Act*).

[18] Applying the criteria set out in *Ontario (Energy Board)*, if the Agency did not have standing to take a position adverse to the property owner, and if the

commissioner did not participate in the appeal as authorized under section 39(4) of the *Act*, the result may be that the appeal would be unopposed or not fully argued. The nature of the exercise in assessing property is such that the municipality, a possible alternate party, may not have the knowledge and expertise to assist the court in reaching a correct and just determination. In addition, there is a public policy component to the Agency's role in providing property assessments. Pursuant to section 6 of the *Act*, the work of all assessors is supervised and coordinated by the director of the Agency "with a view to bringing about and maintaining a uniform standard of assessment in ... all municipalities in the province".

[19] In this case, because the commissioner did not participate in the appeal, the role to be exercised by a commissioner under section 39(4), which may be different from the role of the Agency discussed above, is not before the Court on this appeal. In the circumstances, I am satisfied that the Agency is a proper party and, as a named respondent, is authorized to make submissions in response to the Company's appeal.

Characterization of the Property – Residential or Business

[20] The *Assessment Act* defines "residential property" to mean "real property that is used or designated for use as a domestic establishment in which one or more persons usually sleep and prepare and serve meals ..." (section 2(u)). On appeal, the judge rejected the Company's submission that the Property met the definition of residential property. Rather, he was satisfied that the commissioner had made findings of fact supporting the conclusion that this was a personal care home.

[21] The judge referenced several factors, beginning with the essence of a personal care home as providing personal care services that "are not incidental to its business, but constitute its core purpose" (decision of the judge, 2016 NLTD(G) 91, at paragraph 28). In this case, the Property is, in fact, "licensed by the Department of Health and Community Services as a Level I and Level II Personal Care Home", regulated under the *Health and Community Services Act*, SNL 1995, c. P-37.1, and the *Regulations* (decision of the judge, at paragraph 29). The judge explained:

[29] ... Admission to these personal care homes is handled entirely by the local Western Health Office which conducts an assessment of the resident prior to entry and every 30 days afterwards. According to the Western Health Website, Personal Care Homes provide care to individuals who are unable to live independently due to social

circumstances, disabilities as a result of emotional or physical illness, injury, birth defect or aging.

[22] In this case, various services, such as meals, are provided by twenty-two attendants. The fact that other personal care homes may provide more extensive services and higher levels of care does not alter the characterization of the Property as a personal care home, particularly where it is licensed as such.

[23] The judge concluded that the commissioner's decision that the Property was a personal care home was a factual determination supported by the evidence. No question of law or jurisdiction was engaged, with the result that appeal to the Supreme Court pursuant to section 39 of the *Assessment Act* was precluded. There is no basis on which to conclude that the judge erred in that determination.

Uniformity Principle – Comparison to Other Properties – Use of the Income Approach to Determine the Assessed Value

[24] Section 17 of the *Assessment Act* deals with the assessment of property and uniformity in assessing comparable properties:

(1) An assessor shall assess real property at actual value.

...

(3) In forming an assessment for the purpose of subsection (1) an assessor shall have regard to the assessment of other properties in the ... municipality being assessed to ensure that the taxation falls in a uniform manner upon the real property that is subject to taxation in the ... municipality.

[25] In this case, the commissioner accepted the evidence called by the Agency that there was just one other reasonably comparable property in the municipality, that is, a personal care home which was smaller than the Property being assessed in this case. That is a factual determination, not subject to appeal pursuant to section 39 of the *Act*.

[26] Further, after identifying the “three generally accepted methods of property valuation”, the commissioner accepted that the income approach was the correct assessment tool to be applied in assessing a personal care home (decision of the commissioner, at page 4). On appeal to the Supreme Court, the judge concluded:

[50] In determining the valuation based on the Income Approach, the assessor attempted to obtain and review information detailing income and expenses from all personal care homes in the Province assessed by [the Agency], which is in the vicinity of 70 institutions.

...

[54] ... All personal care homes, including the ones in Corner Brook, are assessed on an income approach. ... The director of valuation stated that the valuation of personal care homes is not impacted by geographic location. However, where there are specific or extraordinary expenses with a particular personal care home such as high vacancy rates, a valuation would be adjusted. However, it was confirmed that the income and expenses generally of personal care homes across the Province are fairly standard with a small likelihood of variance.

[27] Regarding the other personal care home in Corner Brook, the judge was satisfied that there was “absolutely no evidence that [the other home] was assessed or set at a lower rate than the [Property]” (decision of the judge, at paragraph 56).

[28] The judge also dismissed the Company’s submissions that the assessor should have considered other types of businesses for purposes of comparison:

[55] As an alternative argument, [the Company] indicated that the assessor should have considered the valuation of other types of properties in the area. The evidence confirmed that the comparisons of personal care homes with such business enterprises such as garages and auto dealerships would not be appropriate as the income and expenses of the latter are of a more variable nature from one business to another. As well, it was noted that the capitalization rate for other businesses would not be financially suited for an investor in a personal care home. ...

[29] Regarding whether the issue raised a question of law, the judge concluded:

[57] I would also question whether this ground of appeal raises a question of law. The record clearly shows that the Commissioner heard much evidence concerning the manner and methodology of assessment of personal care homes within its jurisdiction in the Province and the common approach taken in arriving at a reasonable assessment for each facility. [The Company] did not establish that the Commissioner failed to consider relevant matters or considered irrelevant matters

[58] However, if [the Company] can be said to be raising a question of law in maintaining that subsection 17(3) limits the assessor from considering income and expenses and related information from businesses outside the relevant municipality, I am of the opinion that the Commissioner was correct in rejecting that interpretation.

As was stated, there was uncontradicted evidence that the assessment complied with uniform principles and was otherwise fair and equitable when compared to comparable or like properties in the municipality.

[30] I agree with these conclusions. I would add a reference to section 6 of the Act which provides for a uniform standard of assessment throughout the Province:

The director ... shall supervise the assessment of real property and shall supervise, direct, guide and co-ordinate the work of all assessors with a view to bringing about and maintaining a uniform standard of assessment in ... all municipalities in the province.

That provision, read in conjunction with section 17, lends further support to the conclusion that, in the circumstances, the assessment properly included consideration of personal care homes located outside the municipality where the Property is located.

[31] Regarding the method used to assess the Property, based on the evidence, the commissioner gave reasons for using the income approach. Further, with respect to the other two methodologies, the judge explained:

[62] The assessor indicated that he did not use the Direct Sales Comparison Approach, which establishes a value based on recent sales, listings or offers to purchase comparable properties in the market. This method was also considered, but due to lack of personal care home sales there were no comparable properties within the municipality as of the base date January 1, 2011. ...

[63] The assessor gave detailed evidence relating to the determination of the valuation based on the income approach, which he concluded to be in the amount of \$3,992,400.00. The Cost Approach was nevertheless considered and produced a total value of \$4,024,400.00. For the reasons stated, no valuation could be completed because of using the Direct Sales Comparison Approach because of the lack of relevant sales.

The Company “did not call evidence or suggest what the market value of the property should be” (decision of the judge, at paragraph 65).

[32] I agree with the judge that there is no basis on which to conclude that the commissioner erred in law or jurisdiction regarding application of the uniformity principle or the method of assessing the Property.

Costs

[33] The Agency was awarded costs in the Supreme Court and requests its costs of the appeal. The judge did not give reasons for the costs order. While costs ordinarily are awarded to the successful party, special factors may fall to be considered in an appeal under the *Assessment Act*, such as, the possible effect of the public policy role of the Agency and of section 37(5) which precludes a commissioner from awarding costs.

[34] In this case, in the absence of submissions providing rationale for awarding costs to the Agency, I would make no order as to costs. I would not, however, vary the order awarding costs in the court appealed from.

SUMMARY AND DISPOSITION

[35] The Agency is a proper party and, as a named respondent, is authorized to make submissions in response to the Company's appeal. The commissioner's decision that the Property was a personal care home was a factual determination supported by the evidence. No question of law or jurisdiction was engaged, with the result that appeal to the Supreme Court pursuant to section 39 of the *Assessment Act* was precluded. Finally, there is no basis on which to conclude that the commissioner erred in law or jurisdiction regarding application of the uniformity principle or the method of assessing the Property.

[36] The judge gave reasons for concluding that the commissioner did not err in law or in the exercise of his jurisdiction in dismissing the Company's appeal regarding assessment of the Property under the *Assessment Act*. There is no basis on which to conclude that the judge erred in his analysis of the appeal under section 39 of the *Act*.

[37] Accordingly, I would dismiss the appeal with no order as to costs.

B. G. Welsh J.A.

Concurring Reasons by White J.A.:

[38] I agree with my colleague that the appeal should be dismissed with no order as to costs.

[39] My colleague has fully analyzed the statutory role of the Agency, and I do not disagree with this assessment. My concern is not with the Agency's right to participate, but rather with the approach taken by the Agency on appeal.

[40] In the present case, an objective observer would see the Agency's position as that of a litigant seeking a win. As an administrative decision maker exercising a statutory right of participation, a more circumspect and nuanced approach than that of an adversary would better serve the public interest. This is particularly true when the Company and the City of Corner Brook are able to appear before the Court as the "conventional" adversaries.

[41] While there is nothing inherently inappropriate with the Agency taking a position consistent with furthering their statutory authority, it is inappropriate for the Agency to simply, and aggressively, advance arguments defending their assessment. The process would be better served by the Agency providing contextual information on their approach to assessment and on the implications of any potential findings of the Court. The role of *amicus curiae* comes to mind, with the Agency offering the Court the benefit of their knowledge and expertise to ensure the issues are fully and appropriately canvassed.

C. W. White J.A.

Concurring Reasons by Hoegg J.A.:

[42] I agree with my colleague Welsh J.A. that the judge did not err in concluding that the commissioner did not err (1) in determining that the appellant's property was a personal care home and (2) in his method of valuing the property, and accordingly, that the appeal be dismissed.

[43] I also agree with Justice Welsh's comments respecting the expertise and public policy mandate of the Agency. However, I share the concerns of my colleague White J.A. respecting the appropriate role to be taken by the Agency on an appeal of a commissioner's decision. In these regards, I wish to add additional comments respecting the role of the Agency in this particular appeal.

[44] The appropriate role to be taken by the Agency on appeal is a contextual determination involving the governing legislation, the nature of the issues, and the presence or absence of other parties before the court. It may not always be appropriate for the Agency to argue in defence of or in opposition to a commissioner's decision on appeal.

[45] Section 29 of the *Assessment Act* confers party status on the property owner, a commercial tenant, the municipality and the Agency. Party status, however, does not determine the appropriate role the party ought to take in the litigation.

[46] Section 39(4) of the *Act*, which authorizes the commissioner to be represented by counsel and heard on appeal, also touches on the issue. In the present case however, the commissioner did not exercise his right to appear and be heard. While the City of Corner Brook, the taxing authority, did participate as a named respondent, its submission was more akin to a watching brief, with an overall endorsement of the Agency's arguments.

[47] In the circumstances of this case – where the commissioner did not participate in the appeal and there was limited participation by the municipality – it was not inappropriate for the Agency to argue that the commissioner's decisions should be upheld. The content and tone of the Agency's submissions were both appropriate and necessary to permit a fully informed adjudication of the issues before the Court.

L. R. Hoegg J.A.