

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Barbara M. Hamilton
Mr. Justice Martin H. Freedman
Mr. Justice Richard J. Chartier

BETWEEN:

<i>GARDENTREE VILLAGE INC.</i>	)	<i>M. Newman</i>
	)	<i>for the Appellant</i>
<i>(Appellant) Appellant</i>)	
	)	<i>D. A. M. Pambrun</i>
<i>- and -</i>	)	<i>for the Respondent</i>
	)	<i>The Assessor for the</i>
	)	<i>City of Winnipeg</i>
<i>THE ASSESSOR FOR THE</i>)	
<i>CITY OF WINNIPEG</i>	)	<i>M. K. Stonyk</i>
	)	<i>for the Respondent</i>
<i>(Respondent) Respondent</i>	)	<i>The Municipal Board</i>
	)	<i>of Manitoba</i>
<i>- and -</i>)	
	)	<i>Appeal heard:</i>
<i>THE MUNICIPAL BOARD</i>	)	<i>June 3, 2009</i>
<i>OF MANITOBA</i>)	
	)	<i>Judgment delivered:</i>
<i>Respondent</i>	)	<i>August 4, 2009</i>

CHARTIER J.A.

ISSUES

1 This is an appeal from the decision of the Municipal Board of Manitoba (the Board), which refused the appellant’s request to fix the

assessed value of the subject property at 90% of the agreed-upon market value. Leave to appeal was granted on the following two questions:

- 1) Did the Board err in concluding that the onus lay on the appellant to establish that the assessed value of the subject property does not bear a fair and just relation to the assessed value of other assessable properties (the onus question)?
- 2) Did the Board err in concluding that the only remedy open to it was to order a “redo” assessment pursuant to s. 60(3) of *The Municipal Assessment Act*, C.C.S.M., c. M226 (the *Act*) (the remedy question)?

STANDARD OF REVIEW

2 The parties have all agreed that the standard of review on the onus question is correctness. It is well settled that when the question is where the onus may lay, it will be reviewed on the correctness standard. On the remedy question, both the appellant and the Assessor for the City of Winnipeg (the Assessor) submit that the question must be reviewed on the standard of correctness. However, counsel for the Board contends that although the remedy question is one of law, the standard may be reasonableness.

3 An in-depth review is not generally required when existing jurisprudence has already established the standard on a similar issue (see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190). In the recent decision of *Hill-Everest Holdings Ltd. v. The Assessor for the City of*

Winnipeg et al., 2009 MBCA 57, this court dealt with a question of law in the same section (s. 60(2.2)) and concluded that the correctness standard was to be applied. See also, the pre-*Dunsmuir* decisions of *Winnipeg City Assessor et al. v. Licharson et al.*, 2005 MBCA 95, 195 Man.R. (2d) 234, and *Kisil Hotel Ltd. v. Winnipeg City Assessor*, 2007 MBCA 114, 220 Man.R. (2d) 179, where similar standard of review conclusions were reached.

4 In my view, because of this court’s long history in reviewing matters similar to the remedy question, and since this question is one of general application and central importance to the assessment system which impacts not only this case, but also others that may arise in the future, this is not one of those cases where the question of law will be reviewed on a standard of reasonableness. See also, *Shier v. Manitoba Public Insurance Corp. et al.*, 2008 MBCA 97, 231 Man.R. (2d) 198 at para. 41, where the correctness standard was applied post-*Dunsmuir*, even when the tribunal was interpreting its own legislation.

THE FIRST ISSUE: THE ONUS QUESTION

5 With respect to the onus question, the Board relied on Huband J.A.’s decision in *The Pas (Town) v. Skeena Cellulose Inc.* (1995), 107 Man.R. (2d) 52 (C.A.), as authority for the proposition that the owner had the burden of proof to establish that the assessed value of the property did not bear a fair and just relation to the assessed value of other assessable property. This “fair and just relation” consideration, which I will call the “equity factor,” is found in s. 18 of the *Act*. That section is set out later in this decision. Although I understand why the Board relied on *Skeena Cellulose* in the

manner that it did, I am of the view that it erred in law in doing so.

6 First, *Skeena Cellulose* is a chambers decision of a single judge denying leave and not a decision of the full court. Thus, it is not binding authority for this court. Moreover, it is clear from *Skeena Cellulose* that onus was not at issue as the placement of the onus on the owner was “accepted” by the parties (at para. 4). As well, in *Skeena Cellulose*, the chambers judge relied on *Premark Canada Inc. v. Provincial Municipal Assessor (Man.)* (1994), 95 Man.R. (2d) 196 (C.A.), where the only issue was an interpretation of depreciation principles (see para. 11 of that decision). Once again, onus was not a live issue before the court.

7 Second, and moreover, s. 59(5) of the *Act* clearly places the burden of proof on the Assessor in matters regarding the amount of the “assessed value.” That section reads as follows:

Burden of proof on appeals

59(5) Subject to subsection (6), the Municipal Board shall, at a hearing of an appeal, place the burden of proof on the assessor on matters at issue with respect to the amount of the assessed value and on the appellant on matters at issue with respect to the classification of property.

[emphasis added]

8 In my view, the equity factor (found in s. 18) is an integral component to the determination of “assessed value.” That term is defined in s. 1 of the *Act* to mean “the value determined by an assessment under Part 5.” Part 5 contains, in addition to the s. 17(1) “at value” assessment, the equity factor found in s. 18. Those two sections, as well as the definitions of “assessed value” and “value,” are set out below:

“assessed value” means the value that is determined by an assessment under Part 5 or as revised on an application or an appeal under Part 8 and does not include a portioned value based on a percentage of value under subsection 17(14);

“value” means, in respect of property being assessed under this Act, the amount that the property might reasonably be expected to realize if sold in the open market in the applicable reference year by a willing seller to a willing buyer.

Assessment at value

17(1) Subject to the provisions of this Part, an assessor shall, for purposes of this Act, assess property at value.

Presumption of validity of assessment

18 Notwithstanding any other provision of this Act, an assessment is presumed to be properly made and the assessed value to be fixed at a fair and just amount where the assessed value bears a fair and just relation to the assessed values of other assessable property.

9 When the owner raises the equity factor as an issue with respect to the “assessed value,” a correct assessment will involve a two-step process. First, the property is assessed at “value”: what a willing buyer would pay to a willing seller in an open-market transaction (see s. 17(1) and the definition of “value”). If the owner challenges the assessment on the basis that it does not respect the s. 18 equity factor, then the Assessor must show that the “assessed value bears a fair and just relation to the assessed values of other assessable property” (see s. 18 and the definition of “assessed value”).

10 In the end, this conclusion (that the onus remains on the Assessor during equity considerations) is in line with the decisions of the chambers judge in *Flanders (John A.) Ltd. v. Winnipeg City Assessor et al.* (1993), 83 Man.R. (2d) 288 (C.A.), and by a panel of this court in *Leila Farms Ltd. v. Winnipeg City Assessor et al.* (1997), 115 Man.R. (2d) 60.

11 As a result, if the equity factor is a matter at issue with respect to the

assessed value, the burden of proof remains on the Assessor, as set out in s. 59(5). I should also point out that, at the hearing before us, counsel for the Assessor conceded that the onus should remain on the Assessor during a consideration of the equity factor.

THE SECOND ISSUE: THE REMEDY QUESTION

12 With regard to the remedy question, the Board ruled that the only remedy open to it, had the appellant been successful on the equity issue, was to order a “redo” assessment pursuant to s. 60(3).

13 The Assessor argues that because s. 17(1) states that the Assessor shall “assess property at value” and that since the s. 1 definition of “value” as found in the *Act* does not include the equity component, this would preclude the Board from using the s. 60(1) remedy of simply decreasing the assessed value of the subject property. The Assessor’s submission is better understood when it is put another way: the Assessor’s position is that the Board can only use the s. 60(1) adjustment remedy if it is convinced that the assessed value does not reflect the market value. It argues that if there are adjustments to be made as a result of equity considerations, only the s. 60(3) redo remedy is available. Section 60(1), (2) and (3) reads as follows:

Order by Municipal Board

60(1) After hearing an appeal, the Municipal Board may, by order,

(a) confirm the assessment; or

(b) change the assessment as the circumstances require and direct a revision of the assessment roll accordingly,

(i) subject to subsections (1.3) and (2), by increasing or

decreasing the assessed value of the subject property,

(ii) by changing the classification of the subject property,
or

(iii) by changing the assessed value and the classification
of the subject property;

and the board may award costs against a party.

No change by Board if fair and just relation

60(2) The Board shall not change an assessed value where the assessed value bears a fair and just relation to the assessed values of other assessable property.

Board may direct assessments redone

60(3) Subject to subsection (5), where, after hearing and deciding upon appeals made to it, the Municipal Board finds that a number of assessments might be erroneous, the Board may, by order, direct that

(a) the assessments that might be erroneous be redone; or

(b) assessments of a type or class of property specified in the order be redone.

[emphasis added]

14 In my view, there is no merit to the Assessor’s argument. First, s. 17(1) specifically states that it is “[s]ubject to the provisions of this Part,” which includes the equity factor found at s. 18. As was stated above, the determination of the assessed value of a property must follow the two-step process, which includes equity considerations.

15 Second, the power to adjust upwards or downwards found in s. 60(1) refers to the “assessed value” of the subject property, not simply to the “value” of it. The definition of “assessed value” (see para. 8) necessarily includes the equity factor because the value is to be “determined by an assessment under Part 5,” which, as already stated, includes the s. 18

equity factor.

16 As mentioned above, the equity factor (in s. 18 and also in s. 60(2)) is integral to the determination of assessed value. A correct assessment will only be attained following the two-step process, which includes the equity factor. As a result, the Board is not limited to a s. 60(3) “redo” assessment should it decide that an assessment is erroneous because of equity considerations: it can use the general powers found in s. 60(1).

CONCLUSION

17 I would therefore grant the appeal with costs in favour of the appellant, to be paid by the Assessor, and order the matter back to the Board for rehearing in accordance with the principles set out in this decision.

_____ J.A.

I agree:

_____ J.A.

I agree:

