



Procido LLP
LEGAL + ADVISORY

2023 Case Law Review &
Conceptual Takeaways
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Overview

1. Court of Appeal Case Review

- *Brandt Properties Ltd v Sherwood (Rural Municipality)*, 2023 SKCA 4 (CanLII)
- *Brandt Properties Ltd. v Sherwood (Rural Municipality)*, 2023 SKCA 5 (CanLII)
- *SBLP Southland Mall Inc v City of Regina*, 2022 SKCA 115
- *SBLP Town N Country Mall Inc v Moose Jaw*, 2023 SKCA 94
- *SBLP Town N Country Mall Inc v Moose Jaw (City)*, 2022 SKCA 10

2. Conceptual Takeaways and Associated Cases

- Disclosure
- Procedural Fairness
- Standard of Review
- Comparability
- Section 165 (3.1) “Facts, Conditions, and Circumstances”
- Double Teaming

3. Questions

Case Review

Brandt Properties Ltd v Sherwood (Rural Municipality), 2023 SKCA 4 (CanLII)

- Appeal on 21 property tax assessments
- The Board initially dismissed the appeal
- Committee also dismissed the appeal

Issues

- (a) Did the Committee correctly find that the Board had selected and applied the correct standards of review of an assessment?
- (b) Did the Committee correctly interpret and apply *Harvard Property Management Inc. v Saskatoon (City)*, 2017 SKCA 34 [Harvard], regarding the relevance of statistical evidence as a factor in determining comparability?
- (c) Did the Committee deprive Brandt of its right of appeal by failing to remedy errors of law it found in the Board decision or by failing to address a ground of appeal before it?

Standard of Review

- (a) “[A]n error of fact will arise where a fact, condition or circumstance that the assessor has found to have affected the property has been disproved or has been proven not to have affected the property as of January 1 of the year in question. That is, where a board makes a finding of fact that differs from the assessor’s apprehension of the facts, conditions and circumstances affecting a property, then the board has found error in the assessment” (at para 75).
- (b) “Questions of assessment law are determined by boards of revision on the standard of correctness” (at para 77).
- (c) “Questions of assessment practice are determined by boards of revision on the standard of correctness” (at para 81).
- (d) “Questions of mixed fact and assessment law are determined by boards of revision on the standard of reasonableness” (at para 86).
- (e) “Questions of mixed fact and assessment practice are determined by boards of revision on the standard of reasonableness” (at para 87).

Statistical Evidence

Harvard provides some insight into the interplay between statistical testing and comparability:

[25] The approach taken by the Committee in this case put the cart before the horse. Statistics alone do not determine comparability or the strength of arguments in relation to comparability. In developing a capitalization rate, an assessor must begin by selecting the properties to be considered in the analysis. This must be done by having resort to factors properly bearing on comparability. When this bridge has been successfully crossed, and a group of comparable properties identified, statistical analyses can then be used to determine the quality of the stratifications in issue.

Brandt 2019 Takeaways

1. Standard of Appeal
2. Statistical Evidence

Brandt 2020, 2023 SKCA 5

Board decision

- Brandt argued that properties in neighbourhood 101, were different from the others and that once excluded time adjustments would be required
- Board dismissed the appeal

Committee decision

- Brandt argued that the Board ignored evidence of comparability, failed to recognize new evidence, failed to provide adequate reasons, and had rendered an unreasonable decision

Grounds of Appeal

- (a) Did the Committee incorrectly find that the Board of Revision had selected and applied the correct standard of review to the assessment?
- (b) Did the Committee err in law by failing to apply the reasonableness standard of review?
- (c) Did the Committee err in law by depriving the Appellant of its right of appeal by failing to remedy errors of law it found in the Board Decision or by failing to address a ground of appeal before it?
- (d) Did the Committee err in law by failing to find that the Board had improperly required the Appellant to demonstrate how the alleged errors and/or proposed remedy “would impact the population as a whole”?

Standard of Review

[23] ... A reasonable decision has two aspects: (a) it is based on an internally coherent and rational chain of analysis; and (b) it is justified in relation to, among other things, the facts, circumstances and conditions affecting the property. **In the context of this case, an inquiry as to the reasonableness of the Board's decision should have involved consideration of whether that decision "added up", whether the Board had** 2023 SKCA 5 (CanLII) Page 7 **misapprehended evidence, and whether the Board had ignored or failed to come to grips with Brandt's arguments.**

Reliance on Prior Decisions

[29] The Committee's reasoning reveals an error of law. As noted, the assessment appeal for each year is independent of appeals in other years.

...

It will never be appropriate to approach a year 2 appeal as if the property owner has the burden of overcoming the Board's or the Committee's year 1 decision

Brandt 2020 Takeaways

- Standard of Review
- Prior Decisions

SBLP Town N Country Mall Inc v City of Moose Jaw and Saskatchewan Assessment Management Agency, 2023 SKCA 94

- SBLP own a mall in Moose Jaw
- Current appeal was for the assessed value of the Mall in the 2019 and 2020 assessments
- BOR found SAMA's approach was in error
- SAMA appealed to Committee
 - Argued BOR had erred by accepting unreliable, shopping-centre capitalization rates
 - Appeal allowed

SBLP Town N Country Mall Inc v Moose Jaw (City), 2022 SKCA 10

- Town N Country Mall contested value of an enclosed shopping mall in Moose Jaw
- What is the test for leave to appeal from the committee?

5 Points of Emphasis for Leave to Appeal Applications

1. Frame your questions as clear and precise as the case permits
2. Identifying the question of law rests with the appellant, not the judge
3. Proposed questions must be directed so that there is a sufficient factual and evidentiary background to allow the Court to deal with the question in context and apply it to the dispute
4. Leave of appeal will only be granted in exceptional circumstances where a question is raised for the first time at this Court that could have been raised before the committee
5. Proposed questions should normally be considered individually

*SBLP Town N Country Mall Inc v City of Moose Jaw and
Saskatchewan Assessment Management Agency, 2023
SKCA 94*

Leave Granted so back to the Appeal

Issues

1. Did the Committee err in law by applying the incorrect standard of review to the BOR's findings and substituting its own view of the evidence for that of the BOR?
2. Did the Committee err in law in its interpretation and application of *TNC 2020*?
3. Did the Committee err in law in its interpretation and application of *Walmart 2018*?

Did the Committee err in law by applying the incorrect standard of review to the BOR's findings and substituting its own view of the evidence for that of the BOR?

- a) Accepting as correct all facts as found by the board of revision unless they have been put in issue by the appellants in the notice of appeal and, if so challenged, unless they are shown to be in error; and
- b) Accepting as correct the assessment law and practice identified and applied by the board of revision in its decision unless put in issue by the appellant in the notice of appeal and, if so challenged, unless its is shown to be in error.

Plainly demonstrates Committee misapplied the standard of review

[32] Upon consideration, it appears the Board placed great reliance on Mr. Levis's testimony in determining that SAMA erred in calculating the CAP Rate for the Subject Property. In our opinion, this approach is difficult to support based on the evidence on the Record and our review of Mr. Levis's testimony reproduced in the transcript. Mr. Levis testified (Transcript of Proceedings, Volume 1, page 115, lines 20 to 22) that the time adjustment is "... not a really good fit, but, again, I was asked if I could perform a time adjustment in there, and I did." Mr. Levis's lack of enthusiasm for the utilization of the time adjustment, indicated by these comments, undermined the Board's adoption of Mr. Levis's CAP Rate calculation.

Did the Committee err in law in its interpretation and application of *TNC 2020*

- Each appeal is based on a different evidentiary record
- Something as small as the passing of a year affects a property
- Rejected SAMA's argument that there is a threshold to be crossed

Did the Committee err in law in its interpretation and application of Walmart 2018?

- The Committee's ability to expand the relevant timeframe is restricted to fulfilling its mandate of correcting "errors in and omissions from the assessment roll" and ensuring that "an accurate, fair, and equitable assessment for the property is placed on the assessment roll".

Takeaways from *TNC Mall v Moose Jaw*, 2023 SKCA 94

- There is no threshold to cross before a board of revision undertaking a review of an assessment in a particular year can deviate from a previous year's assessment.
- The question in each year is one that must be undertaken based on the evidence presented to the board of revision in that year.
- Boards of revision, assessors and assessment appraisers have the same ability to extend the relevant timeframe when that is necessary to achieve equity in the assessment of properties.

SKLP Southland Mall Inc v City of Regina and Saskatchewan Assessment Management Agency, 2022 SKCA 115

- What are the disclosure obligations of assessors?
- Jurisdiction of the Committee to address concerns about the procedural fairness of proceedings before the Board

Facts

- Southland owns an enclosed shopping center
- Regina estimated its value for tax purposes using the ESC Model
- ESC uses the income approach to valuation
- Southland took issue with its center being including Cornwall Center properties rents

Board of Revision

- Southland obtained subpoena compelling production from assessor
- Southland took issue with what was produced
- Assessor missed 3 properties
- Board declined further production

Committee Decision

- Southland argued Board breached its duty of fairness
- Committee applied *Baker* factors but found the Board acted properly

Grounds of Appeal

- (a) What is the nature and extent of an assessor's duty of disclosure under The Cities Act?
- (b) Does the Committee have the jurisdiction to address allegations of a denial of procedural fairness at a board of revision assessment appeal hearing?

Do assessors owe a duty of fairness?

- Assessors, boards of revision, and the committee must abide by the principles of natural justice and procedural fairness
- Court of Appeal outright rejected the idea that the *Cities Act* supplanted common law fairness
- Moreau-Bérubé v Nouveau-Brunswick (Judicial Council), 2002 SCC 11

Disclosure to Assessed Persons

- Discretionary prior to appeal
- Mandatory during the appeal process
- **[56]** while disclosure is statutorily mandated under s. 200 in an assessment appeal, we have concluded that it may occur voluntarily under the statute at other points in the assessment and assessment appeal processes.
- **““Information necessary to providing an explanation of how the assessment was determined should be made available on request”**

Summary

- Assessors do not have general obligation to disclose assessment information
- Assessors are statutorily obligated to disclose to assessed persons when appealed
- Disclosure may occur outside an assessment appeal
- “Fair hearing” is achieved where assessed persons are fully informed of the factual and legal basis of the assessments under appeal
- Procedural fairness requires that full disclosure of relevant information occur in accordance to timelines in *The Cities Act*
- **the statutory scheme, the objects of The Cities Act and legislative intent support prompt and full disclosure by assessors.**

Conceptual Takeaways

Conceptual Takeaways

1. Disclosure
2. Procedural Fairness
3. Standard of Review
4. Comparability
5. Section 165(3.1) “Facts, conditions, and circumstances”
6. Double Teaming

Disclosure

- *Baker, Cities Act, 2022 SKCA 115* – assessors **may** disclose information about assessments
- Confidential or sensitive information may still be disclosed
- Assessors are obligated to disclose pertinent assessment information at appeal

Disclosure

- S. 200 of *Cities Act* provides that hearings before the board are adversarial
- Parties involved in the appeal process have “participatory rights”
- Without full disclosure in appeals, assessed persons will not be able to identify or dispel allegations of errors of fact, principles or in the application of the law
- *Various (Altus Group Limited) v Estevan (City)* [2022 SKMB 105]
 - If directed, any person who has charge of books relating to appeal, must appear to the hearing
 - No pre-hearing jurisdiction to make such an order

Procedural Fairness

SBLP Southland Mall Inc v Regina (City), 2023 SKMB 27

- May consider issues of procedural fairness on a standard of correctness
- Upon breach must conduct *de novo* reviews

SBLP Southland Mall Inc V Regina (City), 2022 SKCA 115

- “the duty to comply with the rules of natural justice and to follow rules of procedural fairness extends to all administrative bodies acting under statutory authority”
- Fair hearing is achieved where assessed person are fully informed

Procedural Fairness

- (a) the Committee has the jurisdiction to consider issues of procedural fairness arising from proceedings before boards of revision;
- (b) the Committee should review allegations of a denial of procedural fairness by boards of revision on the standard of correctness; and
- (c) where the Committee concludes that breaches of procedural fairness have occurred, it must conduct *de novo* reviews of assessments on the record of the proceedings taken before boards of revision, as may be supplemented in accordance with s. 223 of *The Cities Act*.

Standard of Review

- *VC Lemieux Holdings Inc v Prince Albert (City)* [2023 SKMB 3]
 - Assessment law to be reviewed on the correctness standard
 - This includes the Boards interpretation of assessment practice
- *SBLP Southland Mall Inc v Regina (City)* [2022 SKCA 115]
 - Committee should apply correctness standard when assessing procedural fairness
- *855 Park Street Properties GP Ltd Hungerford Properties (SK) v Regina (City)* [2022 SKCA 86]
 - “Form should not be a substitute for substance”
 - It is not the failure to state a standard of review that is fatal
- *Brand Properties Ltd v Sherwood (RM)*, 2023 SKCA 4
 - Reasonableness does not turn on the perspective of a “reasonable person”

Standard of Review

- (a) “[A]n error of fact will arise where a fact, condition or circumstance that the assessor has found to have affected the property has been disproved or has been proven not to have affected the property as of January 1 of the year in question. That is, where a board makes a finding of fact that differs from the assessor’s apprehension of the facts, conditions and circumstances affecting a property, then the board has found error in the assessment” (at para 75).
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Comparability

Wal-Mart Canada Corp v Kindersley (Town) [2023 SKMB 16]

- Only when the Board's findings are not supported by evidence can the decision be unreasonable

Brandt Properties Ltd v Sherwood (RM) [2023 SKCA 4]

- Affirmed *Harvard*
- Ignoring the comparability of properties in determining the capitalization rate and defaulting to statistical testing is an error

Section 165 (3.1)

Midtown Plaza Inc. v Saskatoon (City), 2022 SKCA 145

- Leave Application
- Central Theme was about the Covid Pandemic and whether it should be considered as a “fact, condition, or circumstance” under section 165 (3.1)
- Board and Committee both found the reference in 165 (3.1) to refer to physical characteristics not economic considerations
- The Owner’s sought leave to the Court of Appeal on the basis of the interpretation of section 165(3.1).

Section 165 (3.1)

Midtown Plaza Inc. v Saskatoon (City), 2022 SKCA 145

- The Court did grant leave, in part, but on other questions that formed a part of the application.
- Section 165(3.1) questions:

[3] The following questions are common to all three proposed appeals:

- (a) the Committee erred in law when it misinterpreted subsection 165(3.1) of the Act by:
 - (i) concluding that the phrase “facts, conditions, and circumstances” is limited to physical characteristics, rather than those factors that may affect value identified in assessment guidance materials, according to the approach set out by this Honourable Court in *Preston Crossing Properties Inc. v. Saskatoon (City)* and *Westfair Properties (1981) Ltd. v. Prince Albert (City)*; and
 - (ii) concluding that information arising from after the base date cannot be considered in analysis under that provision;
- (b) the Committee erred in law when it overlooked the evidence relating the effects of the COVID-19 pandemic to the economic downturn in Estevan, or by concluding that such evidence was not evidence; and
- (c) the Committee erred in law when it required the Prospective Appellants to prove that income tends to affect the market value of properties that have been assessed according to the income approach.

Section 165 (3.1)

- Court made 4 conclusions in dismissing the application:
 - 1) First, and most importantly, the Court has spoken to this issue in a line of cases indicating that “facts, conditions and circumstances” in s. 165(3.1) refers to the characteristics of the property itself and to factors that directly affect the property such as location and zoning.
 - 2) Second, the property owners’ approach would be extraordinarily difficult to operationalize. They suggest that “typical” market conditions should not be seen to impact assessed value but that “dramatic” changes should be taken into account. It is very unclear, however, how an assessor, a board of revision or the Committee might go about drawing such lines on a property-by-property and event-by-event basis. I doubt that the Legislature can be taken to have intentionally injected this degree of uncertainty into the property assessment system.

Section 165 (3.1)

Third, the property owners' approach is difficult to reconcile with the idea of a four-year assessment cycle. Their reading of s. 165(3.1) would tend to erode the concept of a “base year” and lead to a situation where assessed values are substantially built from something like the ground up on a year-by-year basis. This does not sit happily with the overall scheme of Part X of the [Act](#).

Fourth, the owners' position does not take proper account of the “Market Value Evidence” order of the Saskatchewan Assessment Management Agency dated December 15, 2017. It prescribes that market data that occurred or arose after January 1, 2019, shall not be used to determine non-regulated property assessments for the years 2021 to 2024. When pressed, the owners say this order, having the status of a regulation, cannot trump s. 165(3.1) itself. However, they have made no effort to argue that the order is of no effect because it is in conflict with the [Act](#).

Double Teaming?

- SBLP Southland Mall Inc. v Regina (City), 2022 SKCA 115 (CanLII)

Questions?

