

2013 CarswellOnt 2815, 76 O.M.B.R. 301

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Cooper v. Municipal Property Assessment Corp., Region No. 15

In the Matter of Section 40 of the Assessment Act, R.S.O. 1990, c. A.31, as amended

In the Matter of a motion with regard to appeals with respect to the assessment for taxation years 2009, 2010 and 2011 of premises known municipally as 124 Caulder Drive, Oakville

Harold Walter Cooper, Eleanor Elizabeth Cooper, Moving Party and The Municipal Property Assessment Corporation, Region No. 15 and the Town of Oakville, Respondents

Ontario Assessment Review Board

J. Wyger Member

Heard: November 20, 2012

Judgment: March 12, 2013

Docket: DM 117732

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Counsel: R. **Baranowski**, for Moving Party

C. Mattat, for Municipal Property Assessment Corporation

S. Price, for Municipality

Subject: Public; Tax — Miscellaneous; Property

Municipal law --- Municipal tax assessment — Valuation — Evidence

Municipal law --- Municipal tax assessment — Valuation — Powers on review or appeal

Cases considered by J. Wyger Member:

Cooper v. Municipal Property Assessment Corp., Region No. 15 (2012), [2012 CarswellOnt 632](#) (Ont. Assess. Review Bd.) — referred to

Statutes considered:

Evidence Act, R.S.O. 1990, c. E.23

Generally — referred to

Statutory Powers Procedure Act, R.S.O. 1990, c. S.22

s. 15 — considered

Rules considered:

Assessment Review Board Rules of Practice and Procedure, April 1, 2009

R. 48 — considered

R. 146 — considered

R. 149 — considered

R. 149(b) — considered

MOTION for review on the ground of alleged failure of procedural fairness.

J. Wyger Member:

1 This motion came before the Assessment Review Board ("Board") at a teleconference hearing on November 20, 2012 in the Town of Oakville.

Introduction

2 Robert **Baranowski**, the agent for the owner, brought this motion for review of a decision of the Board released on January 24, 2012 as WR 113171 [2012 CarswellOnt 632 (Ont. Assess. Review Bd.)]. This motion for review was granted on the narrow ground that there was an alleged failure of procedural fairness on the part of the Member in "disallowing part of appellants evidence". The evidence in question was a sale shown on a four page property report that had been part of the evidence used in an unsuccessful Alternative Dispute Resolution ("ADR") event prior to the hearing.

Disposition of Motion

3 The motion is granted. The decision is cancelled and the matter will be scheduled to be re-heard before a different Member.

Reasons for Disposition of Motion

Board's Rules of Practice and Procedure

4 Rule 146

146. Board's Powers on Review

The Board may review all or part of a decision, and may confirm, vary, suspend or cancel the decision. It may order a re-hearing before a different Member.

5 Rule 149

149. Reasons for Review

The Board will hear a motion to review a decision or grant a rehearing without a motion only if the reasons provided in the request raise an arguable case that the Board,

- (a) acted outside its jurisdiction;
- (b) violated the rules of natural justice or procedural fairness, including allegations of bias;
- (c) made an error of law or fact such that the Board would likely have reached a different decision;
- (d) should consider new evidence, which was not available at the time of the hearing, but that is credible and could have affected the result; or
- (e) heard false or misleading evidence from a party or witness, which was discovered only after the hearing and could have affected the result.

6 Rule 48

48. Disclosure Prior to a Hearing Event

Unless the Board orders otherwise, if a party intends to present documentary evidence at a hearing, at least 21 days before the hearing, the party must provide one copy of each document to each party. If documentary evidence is not exchanged at least 21 days before the hearing, the Board may refuse to accept the documents at the hearing. Material in response must be exchanged 14 days prior to the hearing and other parties may respond 7 days prior to the hearing.

Positions of the Parties

7 Mr. **Baranowski's** written submission states that "the appellant has the right to cross-examine and show to the Board that evidence presented by MPAC was misleading...". He confirmed on the motion that he attempted to use the evidence in question on cross-examination of the MPAC witness, who had declared that "...in order to find comparable sales, he had to move outside of the subject's vicinity of A85..." The evidence in question contained supposedly comparable properties within A85. Mr. **Baranowski** pointed out that the property in question was also in MPAC's evidence in Appendix D and that he had requested details on it prior to the hearing. Mr. **Baranowski** quoted sections of the *Evidence Act*, R.S.O. 1990, c.E. 23, to support his position that he should have been allowed to put this document to the witness to challenge his statement.

8 Mr. **Baranowski** states that the Member advised him to wait for his turn to present this evidence, at which time it was challenged and disallowed because it was not part of his disclosure package and also because it had been part of the ADR event.

9 Both Christine Mattat representing MPAC and Susan Price for Oakville repeated these arguments on this motion. In addition they made the point that the sales in Appendix D were part of MPAC's equity presentation and not to be used for current value. Ms. Mattat argued further that even if the evidence had been allowed in, it would not have resulted in a different decision. Neither Ms. Mattat nor Ms. Price refuted Mr. **Baranowski's** version of events surrounding the cross-examination of the assessor.

Analysis

ADR Evidence

10 Evidence that is used in an ADR event is not thereafter excluded from a subsequent hearing of the matter. Parties are expected to bring their best case to the ADR in an effort to sway the Mediator and the other side to their point of view. While the discussions, proposals and positions expressed within an ADR are confidential, the evidence presented is not, and will commonly be used again at the hearing if there is no resolution.

Disclosure

11 Rule 48 requires parties to disclose the documentary evidence they intend to present at the hearing to support their respective positions. The intent of the rule is that a party not be surprised by a document never seen before. In the subject case, there would have been no real surprise as the evidence was there for all to see at the ADR event. The particular property in issue was also a part of MPAC's evidence. The spirit of Rule 48 was not breached.

12 It is arguable that since the parties were exposed to this evidence at the ADR, that they had knowledge of it sufficient for the purposes of Rule 48 disclosure. The rules permit the member to refuse to accept documentary evidence presented at the hearing that was not disclosed. I note also that the disclosure rule is permissive, so that the refusal of non-disclosed documents is not mandatory, but discretionary. Further, section 15 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c.S.22 permits a tribunal to admit any relevant document that is not privileged.

13 In this instance the document that listed sales of properties within A85, was attempted to be put to the witness to challenge his statement that he had to look outside A85 to find comparable sales. It was clearly relevant to the current value. Given that I find the advanced disclosure to be sufficient, to refuse to permit a relevant document on cross-examination, runs the risk of being unfair to the party tendering it. It is important for tribunals to maintain flexibility when applying evidentiary rules so that parties may advance their best case, and in this instance allowing questions on the document would also assist in getting the best evidence before the panel.

Equity Evidence

14 It does not matter that the sale(s) were only used by MPAC to support their ASR analysis or equity position. If that is the answer, then let the witness say so and explain why the evidence should not be used for current value. It is within this Board's authority to use whatever evidence is before it, for current value or equity purposes regardless of how it was presented.

Result Not Affected

15 Ms. Mattat also asserted that even if the evidence had been allowed in, it would not have resulted in a different decision. I have reviewed the comparable properties in A85 on the property report, and agree that there is little there to support a different decision. Indeed the Member has written a well-reasoned and convincing decision that the current value is correct. However, that is not part of the test in Rule 149(b). While three other grounds for review of a decision contain the secondary test of whether the result or decision could have been affected or different, absent the breach, that is not the case for a violation of procedural fairness. In such cases, the

only realistic exercise of the Board's powers under Rule 146 is to cancel the decision and order a re-hearing.

Conclusion

16 I find that not permitting Mr. **Baranowski** to place the document before the assessor on cross-examination, for the reasons that were set out in the decision, is a failure of procedural fairness, and I hereby order a re-hearing of the matter before a different member.

Motion allowed; rehearing ordered.

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