IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Michel A. Monnin
Madam Justice Holly C. Beard
Madam Justice Janice L. leMaistre

B E T W E E N :

BOEING CANADA OPERATIONS LTD.	)	***D. A. Pambrun***
	)	*for the Appellant*
(Applicant) Respondent	)	
	)	***J. A. Mercury***
- and -	)	*for the Respondent*
	)	
THE ASSESSOR FOR THE CITY OF WINNIPEG	)	*Appeal heard:*
	)	***March 17, 2017***
	)	
(Respondent) Appellant	)	*Judgment delivered:*
	)	***September 5, 2017***

On appeal from 2016 MBQB 175

BEARD JA

I. THE ISSUES

[1] The Assessor for the City of Winnipeg (the assessor) has appealed from a judgment granted on judicial review, wherein the reviewing judge quashed two orders of the Board of Revision of the City of Winnipeg (the Board) on the basis that the applicant, Boeing Canada Operations Ltd. (Boeing), was denied procedural fairness. The grounds of appeal are:

> (i) the reviewing judge erred in exercising her discretion to take jurisdiction over the question of the application of section 54(3.2) of *The Municipal Assessment Act*, CCSM c M226 (the *MAA*); and

(ii) the reviewing judge erred by applying a standard of review of correctness, rather than reviewing the Board's decision on the standard of reasonableness.

[2] While it is not identified as a separate ground of appeal, it is clear from the facta and the oral arguments that the real issue in this case is whether the reviewing judge erred in finding that Boeing's right to procedural fairness had been breached by the assessor. This alleged breach is in relation to the provision of notice of the request for information under section 16(1) of the *MAA* and in granting the order deferring the assessment reduction and, therefore the tax reduction, for one year under section 54(3.2). This is, in fact, a third ground of appeal.

II. BACKGROUND

[3] This litigation relates to the assessment for municipal tax purposes of the property at 1345 Redwood Avenue in the City of Winnipeg (the property). At all relevant times, Boeing was the lessee of the property and was, pursuant to the terms of its lease with the property owner, required to pay the municipal taxes. The property was owned by Redwood Properties Ltd. (Redwood) until March 16, 2012, on which date possession of the property changed to PIRET (1345 Redwood Avenue) Holdings Inc. (PIRET), the new owner. Title issued to PIRET on March 23, 2012.

[4] In preparation for the 2014 general assessment, the assessor sent a request for information under section 16(1) of the *MAA* to Redwood on April 12, 2012. That request was never received by either Boeing or PIRET. On June 1, 2012, the assessor sent out a second request for information, this time sending it to PIRET, directing that the required information be provided by

June 22, 2012. PIRET neither replied to the assessor nor forwarded the request to Boeing. Thus, the assessor did not receive any reply to either of the requests.

[5] The assessment process continued and, on June 7, 2013, the value of the property was assessed for the 2014 general assessment at $9,725,000, an increase of $5,047,000 since 2012. Both Boeing and PIRET filed applications to the Board to challenge the increase in the assessed value.

[6] At the hearing, the assessor requested a reversal of the onus of proof pursuant to section 53(3) of the *MAA* and a deferral of any reduction in the assessed value pursuant to section 54(3.2) of the *MAA* (a deferral) by reason of the failure to reply to the requests for information. The Board made those orders. It also reduced the assessed value of the property, leading to a reduction in the annual municipal taxes of $92,892. Because of the deferral, the assessment reduction was postponed for one year, resulting in additional municipal taxes of $92,892.

[7] Boeing was content with the reduction in the assessed value, so it had no intention of challenging that part of the Board's decision. It was, however, not content with the deferral of the reduction and wished to challenge that part of the decision. The parties were not in agreement as to whether that challenge should proceed by way of appeal to the Municipal Board of Manitoba (the Municipal Board) or by way of application for judicial review to the courts. Boeing filed both applications and proceeded first with the judicial review.

[8] The reviewing judge granted Boeing's application and ordered that the orders of the Board under sections 53(3) and 54(3.2) be quashed. The

assessor has appealed that order.

III. THE LEGISLATION

[9] The sections of the *MAA* relevant to the request for information are:

> **Name in which property assessed**
> **11(1)** Except as otherwise provided in this Part, an assessor shall assess property in the name of the following person:
>
> (a) in the case of real property assessment, the registered owner of the land;
>
> . . .
>
> **Assessor may request information**
> **16(1)** An assessor may request that a person, including a Crown agency or Crown corporation, who owns, uses or occupies assessable property, provide to the assessor information or documentation that relates or might relate to, or that affects or might affect, the value of the property being assessed or that is or might be relevant to assessment of the property which, without limiting the generality of the foregoing, may include information for each year since the previous general assessment respecting
>
> (a) any sale of the property;
>
> (b) the cost of any construction on the property; and
>
> (c) any income or expense related to the use or operation of the property.
>
> **Time to provide information and declaration**
> **16(2)** Where a person, including a Crown agency or Crown corporation, receives a written request from an assessor under subsection (1), the person shall, within 21 days of receiving the request, provide information or documentation to the extent that information or documentation to which the request relates is in the possession or control of the person and shall provide, in the form of a signed statement, a declaration of the person affirming that the information or documentation provided by the person is

complete, true and accurate.

. . .

Effect of providing no information
54(3.2) Where a person failed to comply with a request for information or documentation under clause 16(1)(c), the board or panel shall specify in its order that any reduction in the assessed value of the person's property is not to take effect until the year following the year to which the application relates.

[10] The sections of the *MAA* relevant to an appeal of the Board's decision are:

Appeal to Court of Queen's Bench
56(1) A party may appeal an order made under subsection 54(1) to the Court of Queen's Bench with respect to liability to taxation only.

Appeal to Municipal Board
56(2) A party may appeal an order under subsection 54(1) to the Municipal Board only with respect to the amount of an assessed value or a classification of property.

[11] Subsection 54(1) sets out the types of orders that can be made by the Board or panel following the hearing of an application for the revision of an assessment.

IV. FIRST GROUND OF APPEAL – EXERCISING THE DISCRETION TO PROCEED WITH JUDICIAL REVIEW

The Reviewing Judge's Decision

[12] The reviewing judge began her analysis by stating (at para 20):

It is well established that the court has a discretion to determine whether a judicial review should be undertaken rather

> than requiring an applicant to proceed through a statutory appeal procedure. This necessarily requires consideration of whether an adequate alternative remedy exists (*Harelkin v. University of Regina*, [1979] 2 S.C.R. 561 and *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3). The approach of the courts has been that, absent exceptional circumstances, a party must exhaust any available adequate alternative remedy within the administrative process before pursuing an application for judicial review (*Toth Equity Ltd. v. Ottawa (City)*, 2011 ONCA 372, 283 O.A.C. 33).

[13] The reviewing judge noted that the statutory right of appeal under the *MAA* is silent on the right to appeal a board order granting a deferral. She rejected the assessor's argument that Boeing should have appealed to the Municipal Board by appealing the assessed value as well as the deferral, describing that as "an awkward contrivance which in itself does not respect the legislation and would involve unnecessary duplication and costs" (at para 29).

[14] She found that this was an appropriate case for the court to intervene by way of judicial review, and she proceeded to hear the application.

Standard of Review

[15] The exercise of discretion to hear a judicial review application was most recently dealt with by the Supreme Court of Canada in *Strickland v Canada (Attorney General)*, 2015 SCC 37. Cromwell J, for the majority, stated as follows regarding the nature of judicial review and the standard for reviewing the judge's decision (at paras 37, 39):

> Judicial review by way of old prerogative writs has always been understood to be discretionary. This means that even if the applicant makes out a case for review on the merits, the reviewing

court has an overriding discretion to refuse relief. . . .

> The fact that undertaking judicial review is discretionary means that the Federal Court judge's exercise of that discretion is entitled to deference on appeal. As this Court noted in *Matsqui*, an appellate court "must defer to the judge's exercise of . . . discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently": para. 39, quoting Lord Diplock in *Hadmor Productions Ltd. v. Hamilton*, [1982] 1 All E.R. 1042, at p. 1046.

[16] The discretionary standard of review was explained by Freedman JA in *Perth Services Ltd v Quinton et al*, 2009 MBCA 81 (at para 28):

> The standard for intervention in a discretionary decision is very high. It is not enough that the appellate judges think the trial (or motions) judge simply reached a wrong result; there rarely is, in truly discretionary matters, a "right" or "wrong" result. It is not enough that the appellate judges would have decided differently; they are to respect, and not replicate, the unique role of trial judges. Assuming there have been no reversible errors on fact or law, the appellate judges are not to usurp the trial judge's role in discretionary matters, barring a decision so "clearly wrong" as to yield a truly unjust result.

[17] The standard of review for questions of law is correctness and for questions of fact is palpable and overriding error. (See *Housen v Nikolaisen*, 2002 SCC 33.)

The Parties' Positions

[18] The assessor relies on the Municipal Board's decision in *GBR International Inc v Winnipeg (City) Assessor*, 2011 CarswellMan 463, to support its position that Boeing could have appealed the Board's decision to

the Municipal Board by appealing its assessment pursuant to section 56(2) of the *MAA*. It argues that the reviewing judge misdirected herself by taking jurisdiction where Boeing failed to follow this alternative available statutory appeal process.

[19] Boeing takes the position that the Municipal Board's decision in *GBR International* is of no assistance in this case, where the appeal is limited to an appeal of the deferral order only. It states that it would be unreasonable and inappropriate to require a party to appeal the assessment as an indirect means of challenging the deferral order.

Analysis – Judicial Review

[20] The *MAA* is silent on the right to appeal a deferral order. It is not an order with respect to the amount of assessed value or a classification of property, which can be appealed to the Municipal Board under section 56(2) of the *MAA*.

[21] Further, *GBR International* does not assist the assessor. In that decision, the Municipal Board's jurisdiction to hear the appeal of the deferral order was tied to the appeal of the assessed value. The Municipal Board stated as follows (at para 24):

> . . . In this instance, the [Municipal] Board agrees with the parties that an appeal to the [Municipal] Board on Assessed Value, of a decision of the Board of Revision that applies a deferral under Section 54(3.2), includes both an appeal on Assessed Value and on Deferral. The Board notes that in this appeal, the Notice of Appeal includes both the Assessed Value and the non-compliance which led to the deferral.

[22] I agree with the reviewing judge that requiring a party to appeal the assessed value solely as a means of appealing the deferral order is not appropriate and does not respect the legislation. Thus, there is no statutory right to appeal only the deferral order to the Municipal Board.

[23] The deferral of the reduction in the assessed value results in a liability to pay additional taxes, so there may be an argument that there is a right of appeal to the Court of Queen's Bench under section 56(1) of the *MAA*, which permits an appeal with respect to liability to taxation. This raises issues regarding the interpretation of section 56(1) which were not addressed by the parties, so I will leave this to be determined at another time.

[24] It is of note that, whether this matter proceeds by way of judicial review or statutory appeal, the standard of review would be the same, which should lead to the same outcome. (See *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47 at paras 27-30.)

[25] In my view, the parties have not pointed to an alternate remedy to that of judicial review to challenge the imposition of the deferral order. Thus, I would find that the reviewing judge did not err in holding that this is an appropriate case for judicial review.

V. SECOND GROUND OF APPEAL – STANDARD OF REVIEW OF THE BOARD'S DECISION

The Reviewing Judge's Decision

[26] The reviewing judge applied a standard of correctness to questions of the Board's interpretation of the *MAA*, citing with approval the decision of the Alberta Court of Appeal in *Edmonton East (Capilano) Shopping Centres*

Limited v Edmonton (City), 2015 ABCA 85 (*Edmonton East*). In that case, the Court applied a standard of correctness to its review of the Assessment Review Board's interpretation of the governing legislation. (See the reviewing judge's decision at paras 35-51, 73.)

[27] The reviewing judge also applied a standard of correctness to the issue of procedural fairness, stating that "breaches of procedural fairness and a denial of natural justice are entitled to no deference" (at para 72).

The Parties' Positions

[28] The assessor states that the reviewing judge applied a standard of correctness when reviewing the Board's decision, pointing to her comments at paras 49, 56 and 72. It notes, however, that the reviewing judge's statement that "I cannot say that the Board incorrectly interpreted the meaning of 'person'" (at para 51) is an indication that she did not consider the Board's decision to be unreasonable.

[29] Boeing argues that the issue under review is not one of statutory interpretation of the Board's home statute, to which the standard of reasonableness would apply, but whether the taxpayer was treated fairly. It agrees that the determination of procedural fairness or natural justice is not entitled to any deference, with the result that the applicable standard of review is correctness.

Analysis – Standard of Review

[30] The first issue considered by the reviewing judge was whether the Board erred in its interpretation of the word "person" in section 54(3.2) of the

MAA. Her ultimate decision on that issue has not been appealed, but the assessor has taken issue with her choice of standard of review. While the reviewing judge relied upon the Alberta Court of Appeal's decision in *Edmonton East*, that decision has since been overturned by the Supreme Court of Canada (see 2016 SCC 47). Karakatsanis J, for the majority, stated (at para 22):

> Unless the jurisprudence has already settled the applicable standard of review (*Dunsmuir* [*Dunsmuir v New Brunswick*, 2008 SCC 9], at para. 62), the reviewing court should begin by considering whether the issue involves the interpretation by an administrative body of its own statute or statutes closely connected to its function. If so, the standard of review is presumed to be reasonableness. . . .

[31] Although the reviewing judge adopted the wrong standard of review, that error would not have affected the outcome of the proceeding. Given that she concluded that the Board's interpretation of the *MAA* was correct, it must have also been reasonable. Thus, her decision would have been the same, even if she had applied the standard of reasonableness.

[32] The substance of the judicial review and of this appeal is whether there was a breach of procedural fairness by the assessor. In reviewing that issue, the reviewing judge applied a standard of correctness (see para 72). The Supreme Court of Canada has, in two recent decisions, confirmed that the standard of review on issues of procedural fairness in the context of an administrative decision is correctness. (See *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; and *Mission Institution v Khela*, 2014 SCC 24 at para 79.)

[33] The Federal Court of Appeal, and in particular Stratas JA, has questioned whether the applicable standard is still correctness, or whether, post-*Dunsmuir* (see *Dunsmuir v New Brunswick*, 2008 SCC 9), that standard has been replaced by correctness with some deference to a board's choice of procedure, or reasonableness. (See, for example, *Maritime Broadcasting System Limited v Canadian Media Guild*, 2014 FCA 59; *Forest Ethics Advocacy Association v Canada (National Energy Board)*, 2014 FCA 245; and *Bergeron v Canada (Attorney General)*, 2015 FCA 160.)

[34] In *Eagle's Nest Youth Ranch Inc v Corman Park (Rural Municipality #344)*, 2016 SKCA 20, the Saskatchewan Court of Appeal also questioned whether the standard of review applicable to matters of procedural fairness remains that of correctness. Caldwell JA, for the Court, concluded (at para 20):

> . . . [*C*]*orrectness* is an "awkward word to use" in the context of procedural fairness, see: *Spinks v Alberta (Law Enforcement Review Board)*, 2011 ABCA 162 at para 23, [2011] 10 WWR 264. I say this because procedural fairness often calls for judicial deference to certain aspects of the administrative decision under review, but the rule of law ultimately requires that superior courts still ask whether the decision is itself borne of a "'just' exercise of power" (*Dunsmuir* at para 90). So, while awkward, this is best reflected in the correctness standard.

[35] I agree with Stratas JA's sentiment in *Bergeron* that "with so many conflicting decisions, perhaps only a reasoned decision of the Supreme Court can provide clarity" (at para 71).

[36] I am of the view that, while some courts may be considering the possibility of a different standard on a question of procedural fairness, the

standard remains that of correctness, at the present time. Thus, the reviewing judge was correct in applying the standard of correctness to her review of the Board's decision related to procedural fairness.

VI. THIRD GROUND OF APPEAL – PROCEDURAL FAIRNESS

Standard of Review

[37] On an appeal from the decision of a judge sitting in judicial review of a decision of an administrative tribunal, appellate courts are to determine whether the reviewing judge chose and correctly applied the correct standard. (See *Dr Q v College of Physicians and Surgeons of British Columbia*, 2003 SCC 19 at para 43; *The Armstrong's Point Association Inc v The City of Winnipeg et al*, 2013 MBCA 110 at para 3; *Bourgouin v Rosser (Rural Municipality) et al*, 2014 MBCA 103 at para 16; and *Loewen v Manitoba Teachers' Society*, 2015 MBCA 13 at para 24.) If the reviewing judge has not applied the correct standard, the appellate court must substitute the correct standard and assess the administrative tribunal's decision on that standard.

[38] In this case, the reviewing judge chose and applied the correct standard, being that of correctness. The issue is whether the reviewing judge was correct in finding that the Board erred in granting the orders because the assessor had breached Boeing's right to procedural fairness.

The Board's Decision

[39] The Board gave only very perfunctory reasons granting the deferral, stating:

> The Registered Owner had received the request for information

> and documentation by Certified Mail as per the evidence submitted by the Assessment and Taxation Department. Photocopies of the Income and Expense Questionnaire, the Certified Mail Envelope, and the Confirmation of Delivery document were reviewed by the Panel. No evidence was presented by the Applicant to prove that the Registered Owner requested that the request for information and documentation be sent to the Tenant.

[40] The Board made no reference to procedural fairness in its reasons and the assessor advised that there was no transcript of the arguments presented to the Board. That said, if that argument was raised before the Board, it is clear that it was rejected, because the Board granted the orders. While the parties asked the Board for reasons, they did not request further reasons when this issue was not addressed and there was no application to quash the Board's orders on the basis of a lack of reasons.

[41] The reviewing judge proceeded to determine the issue on the evidence that she had and the arguments of counsel. This is consistent with the standard of correctness, which, according to Bastarache and LeBel JJ in *Dunsmuir*, is to be applied as follows (at para 50):

> . . . When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

The Reviewing Judge's Decision

[42] The reviewing judge was correct to consider the factors set out in

Baker v Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817, to determine the nature of the duty of fairness owed by the assessor to Boeing. Of particular relevance to her decision and to this appeal is her finding on the last factor, being the procedural choices made by the assessor.

[43] The reviewing judge found that Boeing, as the taxpaying tenant, was unaware that a request for information had been made by the assessor and not complied with, resulting in Boeing becoming liable to pay the additional taxes through no fault of its own. She stated that Boeing had dealt with the assessor for years in relation to past assessment appeals that it had made regarding this property, so one could assume that the assessor was aware that Boeing was responsible for the taxes and had a vested interest in the assessment.

[44] The reviewing judge further found that the assessor could have sent some form of notification to Boeing, as the tenant, to notify it of the owner's failure to comply with the request for information and the possible consequences. In her view, this was not an onerous responsibility or expense for the assessor. She stated that this would have maintained the integrity of the assessment scheme and purpose of the legislation, balancing the restrictions and time limits placed on the assessor as well as the legitimate interests of Boeing, being to be treated fairly.

[45] The reviewing judge concluded that Boeing was entitled to a procedure that was "transparent and fair and which respected its legitimate expectation to be treated in accordance with the rules of natural justice" (at para 72). She found that the "compelling circumstances" of this case mitigated in favour of judicial intervention (at para 73).

The Assessor's Position

[46] The assessor argues that its responsibility to provide notice of the request for information was settled by this Court in *Winnipeg City Assessor et al v Licharson et al*, 2005 MBCA 95. Its position is that the essence of *Licharson* is that it is appropriate under the legislation to let the assessor set up a consistent system related to the deferrals, which is necessary for two reasons.

[47] Firstly, it states that the application of consistent rules ensures that all property owners are treated the same. It states that, if accommodations are made for some, then it is difficult not to make accommodations for others, and the result is that there are no rules. It argues that it needs consistent rules so that it can comply with its responsibility.

[48] Secondly, it points out that it sends out over 12,000 requests for information in an assessment year in order to prepare the assessment roll, which must be done within a specific time. Requiring it to follow up on service beyond the property owner is too onerous as it does not have the time or the resources to contact each property owner to determine who is liable to pay the taxes in that assessment cycle. The only public registry is the Winnipeg Land Titles Office, from which it can obtain both the name of the property owner and an address for service, and it uses only that information to communicate in relation to property unless the owner provides alternate instructions. It points out that the person ultimately responsible to pay the taxes could be a tenant, a mortgagee in possession or others, which can change frequently, and it would have no way of determining who was liable.

[49] The assessor's position is that, in accordance with the directions

provided in *Licharson*, it has no legal obligation to either provide a second notice to the property owner or to give notice to anyone other than the property owner, or an agent designated by the property owner, to receive such requests. It states that it complied with its duty of procedural fairness by providing one notice to the property owner, and it had no further legal obligation.

[50] In particular, the assessor argues that it owed no duty of procedural fairness to Boeing, absent receiving notice from the property owner directing that any requests be sent to Boeing. It further points out that, while Boeing may have been liable to pay the taxes, that was a contractual liability arising out of its lease with the property owner. It was PIRET, the property owner, that had the statutory liability to pay the taxes.

Boeing's Position

[51] Boeing argues that the reviewing judge did not err in her decision. Its position is that, in the circumstances of this case, the basic principles of fairness required that it, as the taxpaying tenant, be notified of the owner's failure to reply to the section 16(1) request for information well before the assessment roll was finalized, so that it would have an opportunity to comply. Those circumstances include that it had, on its own, appealed the assessments for this property for the last two assessment cycles. As a result, the assessor was aware of its liability to pay the taxes, including any deferral, and its interest in receiving notice of a request for information under section 16(1).

[52] Boeing argues that *Licharson* either does not apply or can be distinguished because it does not deal with the common law principles of procedural fairness or with the rights of a taxpaying tenant who was penalized as a result of the property owner's failure to reply to a request for information.

It argues, further, that the decision of the Supreme Court of Canada in *Canada (Attorney General) v Mavi*, 2011 SCC 30, affirmed the presumption in favour of the duty of fairness, which applies to administrative officials unless specifically excluded by clear statutory language. It states that there is no such language in the *MAA*.

[53] Boeing also takes issue with the following aspects of the service effected on PIRET: PIRET received only one, not two, notices; the information sought from PIRET was, on its face, inapplicable to PIRET; and the service was inadequate, given that it was served at an address in Toronto and was not directed to anyone's attention.

Analysis – Procedural Fairness

[54] This Court's decision in *Licharson*, which involved four related appeals, was intended to resolve problems related to the implementation of section 16(1) and the granting of deferral orders. Huband JA, for the Court, noted that "the issues involved are of importance in other potential cases" (at para 43). In granting leave to appeal the Board's decision in that case, Freedman JA stated (2004 MBCA 34 at para 14):

> . . . Having in mind the many requests for information that could be sent by the City, it is important that the City and its taxpayers know whether the Board has the power to decline to impose the statutory penalties if, on the facts, it believes a taxpayer has not been treated fairly or appropriately.

[55] Huband JA explained the purpose of the provisions (at para 9):

> The purpose of the legislation appears to be this. The assessor must complete the assessment roll by a certain timetable. Once

> the assessment roll is completed, the tax obligation of the individual property owner can be determined. The property owner is entitled to appeal the assessment; first at the Board of Revision and again at the Municipal Board. If the property owner fails to provide information to the assessor as requested, and if successful in reducing the assessment, it distorts the City's budget due to the unanticipated reduction in taxes. The statute thus imposes a deferral of the reduced assessment. One of the issues which arises in these appeals is the extent of the deferral.

[56] In *Licharson*, the deferral was imposed by the Municipal Board pursuant to section 60(2.2) of the *MAA*. This section has the same wording, with exceptions that are not relevant to this decision, as the deferral in section 54(3.2), which is imposed by the Board.

[57] The following is a summary of this Court's decision in *Licharson*, as it is relevant to the issues in this case:

- While the assessor has a discretion whether to send a second request for information or a reminder if there is no response to the first request, there is nothing in the *MAA* that requires it to do so. One request, brought to the attention of the property owner or its agent (subject to my next comment), is sufficient (see paras 29, 31). (See also *Hill-Everest Holdings Ltd v The Assessor for the City of Winnipeg et al*, 2009 MBCA 57 at para 24.)

- The deferral cannot be applied if the assessor fails to prove that the request for information was brought to the owner's attention. A request for information sent to an agent is effective against the owner only if the owner held out to the assessor that the agent had authority to receive the request on the owner's behalf (see

paras 42, 89).

- While the assessor must prove that the request for information was brought to the owner's attention, there is no mandated method for service or proof of service on the owner – "[h]ow that is established is unimportant." (See para 89.)

- The use of the word "shall" in section 60(2.2) is mandatory, with the result that the Municipal Board has no choice other than to grant the deferral. Thus, once the failure to respond to a request for information is established, no application by the assessor is required. It simply follows automatically that the Municipal Board "shall" order the "clear statutory obligation" (at para 56) in section 60(2.2). (See paras 56, 62, 76.) In my view, this applies equally to a deferral by the Board under section 54(3.2).

[58] While there was no specific reference to the duty of procedural fairness, it is clear from the decisions of both Freedman JA and Huband JA that fairness on the part of the assessor was raised by the parties and formed an important part of the Court's decision. Huband JA stated (at para 97-98):

> . . . Even where the assessor purports to act within his statutory powers under s. 16(1), the assessor must not act unreasonably or in bad faith.
>
> It is not my purpose to try and define what would constitute an abuse of authority by the assessor. No doubt it would likely be a rare occurrence, involving bad faith or improper motive. . . .

[59] While he did not define abuse of process, his following comments assist in understanding the concept (at paras 81, 90-91, 97):

Finally, the fact that no deferral was requested at the Board of Revision level is of no benefit to the Convalescent Home and is not a basis for attacking the order to defer the reduced assessment of $200,000 ordered by the Municipal Board. There is bound to be what I will call bureaucratic unevenness from time to time. The assessor might fail to request a deferral at the Board of Revision level because the particular file is incomplete or not in proper form. Unless there is some ulterior purpose on the part of the assessor in failing to raise the matter at the Board of Revision level, there can be no abuse of process on the part of the assessor. The Municipal Board did not err in law or jurisdiction by failing to find an abuse of process in seeking the deferral order at the Municipal Board level, having failed to do so at the earlier stage.

. . . [T]here is bound to be some unevenness in the administration of the assessment process. One taxpayer receives a reminder that a response is overdue, while another is given no warning. In most instances where a failure to respond has taken place, or the response is inadequate, the failure or inadequacy will be brought to the attention of the Board of Revision or the Municipal Board, as the case may be. But that will not always happen. The property owner will occasionally be late in providing the information, and sometimes, but not always, the failure to respond on a timely basis will be brought to the attention of the applicable Board. So long as the assessor is not guilty of an abuse of authority, the assessor will be entitled to seek a deferral, and the Municipal Board is bound to grant the deferral where a failure to respond within the terms of the statute has been established.

For the Municipal Board to withhold the deferral on the ground of its perception of unfairness would be tantamount to giving the Municipal Board a licence to amend the legislation.

. . . Where the assessor imposes a requirement to provide myriad documents collected from all across the country, much of it seemingly irrelevant to the assessor's task, there is room for the property owner to ask that the request for information be set aside by the Municipal Board as an abuse of authority. Even where the assessor purports to act within his statutory powers under s. 16(1), the assessor must not act unreasonably or in bad faith.

[60] In my view, this Court's decision in *Licharson* addresses all of the issues raised in this appeal.

[61] In *Licharson*, this Court gave the assessor the guidelines for a fair procedure for obtaining information under section 16(1): it was required to prove that one request for information had been brought to the attention of the property owner or its designated agent. Once that was proven, the failure to reply would require the Board to automatically impose the deferral (see para 62). It is clear from the Board's decision that that is what it did in this case.

[62] Boeing argues that there are circumstances that make that procedure unfair in this case and that, to be fair to it, the assessor should have gone one step further and served the notice on it when the property owner did not reply. I do not agree.

[63] First, in terms of statutory liability to pay taxes, that liability falls on the property owner, and that was the case in this matter. The assessor had a procedure in place to obtain information for the preparation of the assessment roll and applied that procedure to all properties. Its procedure was to obtain the name and address for service of the property owner from the Winnipeg Land Titles Office, the only available registry, and serve the request for information on that person, unless that person had given alternate instructions to the assessor.

[64] In one of the *Licharson* appeals, the assessor had served the request for information on the property owner's property manager, which had a history of receiving and dealing with tax bills on behalf of the property owner. The property manager neither replied to nor advised the property owner of the

request. This Court said that service of the request for information on the property manager was not sufficient, unless the owner held out that the property manager had authority to receive such a document. In this case, there was no notice to the assessor to serve the request on anyone other than the property owner. The assessor applied this Court's instructions in *Licharson* and served the request on the property owner.

[65] What of the argument that, because Boeing had appealed the two prior assessments, the assessor should have known that it was either liable for taxes or had an interest therein and served the request on it when the property owner did not reply? The reviewing judge stated that this is more so here given that the assessor could be taken to know that the property had just recently changed ownership.

[66] In my view, placing that kind of obligation on the assessor would re-introduce the type of uncertainty into the process that *Licharson* was intended to resolve. Tenants and tenancy agreements change with no notice to the assessor. Who does the assessor have to contact and how many notices does it have to send out? While it may seem like a small accommodation in this one case, when considered in the context of the over 12,000 requests that are sent out bi-annually, the requirement to accommodate other than property owners and those entities which the owner held out as authorized to receive notice would be too onerous, both financially and practically, for the assessor to manage.

[67] While it does not arise on the facts of this case, there is a further issue related to the giving of notice to someone other than the property owner. Even if the property owner replies to the request for information, the assessor

can ask for a deferral if the owner's response is incomplete or inadequate (see *Licharson* at para 92). If the deferral is granted, the additional taxes would be payable. If someone other than the property owner was entitled to notice of the request for information/failure to reply to the request (such as Boeing), would it also be entitled to notice of the property owner's response to the request, to judge whether it was complete and adequate? This would add a further level of complexity to the notice process.

[68] Second, Boeing takes issue with several aspects of the notice to PIRET. Again, each of those issues was dealt with in *Licharson*. As already noted, this Court found that, even though the assessor had a policy of sending out a second notice to those who did not reply, sending out a second notice was within the discretion of the assessor and one notice to the property owner was sufficient. On the issue of requesting inappropriate information, Huband JA stated that that does not excuse the property owner from its statutory obligation to respond to the request (see para 74). Finally, while Boeing complains about the manner of service, the request was served on PIRET at the address for service recorded in the Land Titles Office and there is no evidence that it did not receive that notice. This complies with the requirements for notice in *Licharson*.

[69] In my view, there is nothing in the facts of this case that differentiates it from *Licharson*, wherein this Court found that there had been no abuse of process on the part of the assessor.

[70] I would find that the reviewing judge's finding that the assessor breached Boeing's right of procedural fairness in relation to giving notice of the request for information or in requesting the deferral was not correct.

VII. DECISION

[71] In summary, I would decide the grounds of appeal as follows:

(i) the reviewing judge did not err in exercising her discretion and hearing the application for judicial review;

(ii) the reviewing judge erred in applying the standard of review of correctness to the Board's interpretation of the *MAA*, but she was correct in applying the standard of correctness to the issue of procedural fairness; and

(iii) the reviewing judge erred in finding that the assessor breached Boeing's right to procedural fairness and in quashing the Board's orders under sections 53(3) and 54(3.2) of the *MAA*.

[72] I would grant the assessor's appeal and reinstate the orders of the Board.

[73] The parties did not speak to costs. If costs cannot be resolved, they should contact the registrar of this Court to arrange to make representations in that regard.

Beard JA

I agree: Monnin JA

I agree: leMaistre JA