IN THE COURT OF APPEAL OF MANITOBA

B E T W E E N :

	)	***M. Newman***
IRVING M. KIRSCH et al	)	*for the Applicants*
	)	
(Appellants) Applicants	)	***K. B. Bomback***
	)	*for the Respondent*
- and -	)	*The Assessor for the City of Winnipeg*
	)	
THE ASSESSOR FOR THE CITY OF WINNIPEG	)	***T. D. Gisser***
	)	*for the Respondent*
(Respondent) Respondent	)	*The Municipal Board of Manitoba*
	)	
- and -	)	
	)	*Chambers motion heard:*
THE MUNICIPAL BOARD OF MANITOBA	)	***May 23, 2019***
	)	
Respondent	)	*Decision pronounced:*
	)	***August 22, 2019***

CAMERON JA

Introduction and Background

[1] This is a motion for leave to appeal the decision of the Municipal Board of Manitoba (the Board) regarding the assessed value of 83 apartment buildings (the subject properties) made by the Assessor for the City of Winnipeg (the Assessor) for the years 2006 and 2008. For the purpose of this motion, there is no distinction between the 2006 and 2008 assessments.

[2] While the Board was not initially a party to the proceeding, it has filed a brief and was represented by counsel who made submissions at the hearing of the motion.

[3] The parties agree as to the market value of the subject properties. The Assessor maintains that the assessed value of the subject properties should be the market value. The applicants assert that such an assessment is not equitable as it does not bear a fair and just relation to the assessed values of other assessable property, as required by the equity principle found in sections 18 and 60(2) of *The Municipal Assessment Act*, CCSM c M226 (the *Act*), which state:

> **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.
>
> **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.

[4] This is the third motion for leave to appeal that has been made to this Court regarding the manner in which the Assessor assessed the value of apartment properties in its 2006 assessment. In the first motion (*Gardentree Village Inc v Winnipeg (City) Assessor*, 2008 MBCA 117 (*Gardentree 1*)), Hamilton JA allowed leave to appeal on three of the seven proposed grounds of appeal and reduced them to two questions. Each of those were decided by a panel of this Court in *Gardentree Village Inc v Winnipeg (City) Assessor*, 2009 MBCA 79 (*Gardentree 2009*). In that case, the Court held that the Assessor has the burden of proof to show that a property has been assessed at

an amount that bears a fair and just relation to the assessed values of other assessable properties. Further, it held that the Board is not limited to a section 60(3) "redo" assessment if it determines that an assessed value is not fair and just (at para 16).

[5] In the second motion (*Gardentree Village Inc v Winnipeg (City) Assessor*, 2012 MBCA 34 (*Gardentree 2*)), Beard JA denied leave to appeal on a number of questions similar to those raised in this case on the basis that most of the issues raised concerned methodology and did not raise questions of law. In the one instance where a question of law was raised, she held that the question was not a live issue as the Board had considered and answered the question based on the applicant's position.

[6] In my view, the current motion addresses many of the same issues decided in the above cases. For the reasons that follow, I would deny leave to appeal.

The Proceedings Before the Board

[7] In their submissions to the Board, both the Assessor and the applicants relied on the International Association of Assessing Officers' (the IAAO) *Standard on Ratios Studies* (International Association of Assessing Officers, (Kansas City: IAAO, 2013), online: <www.iaao.org/media/standards/Standard_on_Ratio_Studies.pdf>) (the Standard), to evaluate the reliability and equity of the assessments.

[8] In arriving at its general assessment for the years 2006 to 2009, the Assessor divided all properties in Winnipeg into two strata: residential (including condominiums) and income-producing properties (office, retail, warehouse and hotel). Properties with apartment buildings (apartment

properties) were considered to be income producing. Relying on a number of variables, models for calculating the values of different types of properties (including apartment properties) were developed. The reliability of the models was determined by certain statistical measures, one of which was the Assessment to Sales Ratio (ASR). The ASR is a ratio that compares the assessment derived from the model for each property that sold with the actual sale price of each property. The Assessor combined the ASRs for all properties in reaching its final calculation of an ASR of .999. This ratio shows that, on average, the assessments of all properties (residential and income producing) that had sold around the 2003 reference year were 99.9 per cent of their respective sale prices. In addition, the Assessor calculated an ASR of 1.00 for residential sales and an ASR for income-producing properties of 0.946. The Assessor maintained that an ASR of .999 met the IAAO Standard which indicates an acceptable ASR range of between .90 and 1.10. In light of that, it argued that the models it developed and used in calculating assessed values for all properties were near their respective market values and, therefore, were fair and just in relation to the assessed values of other assessable properties.

[9] The applicants' position was that it was not equitable for the ASR to have been calculated based on all properties. The applicants relied on the evidence of a professional appraiser employed by them who acted as their agent (the applicants' agent) at the hearing before the Board. They argued that the ASR for the subject properties was much lower than that calculated by the Assessor.

[10] Using 131 of the 151 sales considered by the Assessor, the applicants' agent calculated several ASRs for various apartment properties, stratifying them into eight groupings and using some of the same variables

that the Assessor used in creating its models for apartment properties. Depending on the grouping, the ASRs ranged from .821 to 1.005. The applicants' agent argued that the market value of each property should be reduced by the ASR applicable to its group to arrive at the assessed value. However, it was also his position that the assessed value should not exceed the market value.

[11] The applicants' alternate position was that the ASR of .906, which was the applicants' agent's calculation for all apartment properties, should be applied to the market value of the subject properties in order to reduce their respective assessed values.

[12] Key to each parties' position was the definition of "other assessable property" found in sections 18 and 60(2) of the *Act*. The Assessor argued that such properties were comprised of all other assessed properties, while the applicants maintained that the phrase refers to a type or class of property and, therefore, the legislation does not preclude the use of only similar or like properties.

The Decision of the Board

[13] The Board agreed with the Assessor that, in Manitoba, the *Act* "envisages the consideration of equity in relation to all other properties" (2013 CarswellMan 305 at para 42 (Mun B)). It first considered the alternate position advanced by the applicants. It rejected the argument that apartment properties should be considered as a separate group for the calculation and application of the ASR. It was concerned that the sample size of 151 apartment properties out of 1,856 properties was not "necessarily representative of the apartment population" (at para 54). Rather, it found that the most appropriate stratum was one that included all income-producing properties. It stated that that

stratum satisfied the IAAO standards. It concluded that, generally, the Assessor's income-producing models, including the apartment model, met the IAAO standards and, generally, the apartment building assessments were fair and just in relation to all other assessable properties. It further concluded that it could be assumed that "most of the assessments determined by the mass appraisal process are fair and just in relation to other assessable properties when the standards in the *Standard on Ratio Studies* have been met" (at para 55). It found that the application of an equity ratio of 0.906 suggested by the applicants was not warranted.

[14] Next, the Board considered what it termed the applicants' "primary position"—the differing interpretations of the term "other assessable properties" (at para 57). The Board agreed that, even where, in general, the assessments of apartment properties were fair and just in relation to other assessable properties, there are circumstances where a property may be in a stratum that meets the standards but may still be appealed on equity. However, it noted that, in accordance with the Standard, "ratio studies should not be applied to individual properties unless the level of appraisal (ASR) is outside the acceptable range" (at para 59). It acknowledged that there may be properties with attributes and unusual features which are not contemplated by the model and which may result in a market value that does not reflect the assessed value of other similar assessable properties. Despite being of the view that the sample size of the eight groupings suggested by the applicants was so small that the results of a statistical analysis would be of little relevance, the Board did analyse two of the groupings suggested by the applicants' agent. The Board noted that the agreed market value of the individual properties was already lower than the original assessed value. It commented that applying the ASRs, as suggested by the applicants, would

lower the assessed value even further. The Board stated that the wide difference in the assessed values of the subject properties when compared to the ASR and the assessed values of the 131 sales considered by the applicants' agent demonstrated the difficulty with working with such a "small and unrepresented sample" (at para 65). Thus, the Board concluded that there was insufficient data supporting the applicants' ASRs and held that equity ratios should not be applied to the individual properties in the eight groupings produced by the applicants.

Grounds of Appeal

[15] The applicants apply for leave to appeal on the following questions which I have summarised as:

1. Did the Board err in concluding that, because ratio standards have been met, assessments can be assumed to be fair and just in relation to other assessable properties?

2. Did the Board err in concluding that there was insufficient data to utilise the eight groupings suggested by the applicants when the Assessor employed the same groups?

3. Did the Board err in concluding that the sample size of apartment properties was insufficient to utilise as the comparison group for equity purposes when the Assessor considered the same apartment properties?

4. Did the Board err in concluding that "other assessable property" means all properties?

5. Did the Board err in placing the onus with respect to equity on the applicants?

The applicants submit that each of the above questions constitutes a question of law.

Test for Leave to Appeal

[16] The test for leave to appeal from a decision of the Board is set out in *Gardentree 1* (at para 20):

> Leave to appeal a decision of the Board may only be granted on a question of law or jurisdiction. See s. 63(1) of the *Act*. Questions of fact or mixed fact and law do not meet the threshold for leave. For leave to be granted for a question of law, the question must be of some importance to engage the attention of the court and there must be a genuine issue concerning how the Board decided the matter. Methodology used by the Board to determine the assessed value of a property is a question of fact. See *Manitoba (Provincial Municipal Assessor) v. Ducks Unlimited Canada*, [1998] M.J. No. 547 (C.A.) (QL) [in chambers].

Grounds of Appeal

Ground 1—Did the Board err in concluding that, because ratio standards have been met, assessments can be assumed to be fair and just in relation to other assessable properties?

[17] The applicants rely on jurisprudence which supports the equity principle. That is, once the market value of a property has been determined, it is fundamental that the final test of an assessed value is that it bears a fair and just relationship with other assessable property (see, for example, *John A Flanders Ltd v Winnipeg (City) Assessor*, 1993 CarswellMan 358 at para 4 (CA)).

[18] The applicants submit that simply finding that the IAAO standards have been met does not meet the equity principle which addresses the "fair distribution of taxes based on properties being assessed on an equivalent basis." In their view, the Standard is about the reliability of mass appraisal models and not equity. They submit that the approach taken by the Board incorporates a limitation on the availability of the equity principle to property owners.

[19] The Assessor and the Board argue that the ASR evidence considered by the Board was a question of methodology and, therefore, does not amount to a question of law. I agree.

[20] At the hearing before the Board, each party provided ASR evidence. The Assessor maintained that the evidence it filed supported the conclusion that the models on which the subject properties were assessed complied with the IAAO standards. The applicants relied on their own ASR evidence in their attempt to demonstrate that the models resulted in the overassessment of the subject properties. As noted by the Board, both parties relied on the Standard in the hearing. In considering the IAAO standards, the Board noted that they were advisory in nature and not binding. It then stated (at para 43):

> The IAAO standards have been adopted in practice as a means of evaluating appraisal performance and as a means of determining whether the assessments are fair and just in relation to other assessable properties. The Board agrees that the IAAO [Standard] is an appropriate guideline for determining the acceptable levels of appraisal and appropriate performance standards.

[21] In my view, the adoption of the IAAO Standard is a question of methodology and, therefore, a question of fact (see *Gardentree 1* at paras 21-22).

[22] Finally, regarding equity, I would note that the Board stated that, while compliance with the IAAO standards in general can lead to the assumption that most of the assessments are fair and just in relation to other assessable properties, there may be circumstances "where equity is at issue and where the appropriate approach is to compare a specific property to similar properties to determine if the assessment is fair and just" (at para 69) (also see *Gardentree 2* at para 53). Thus, in my view, the Board did not reach as stark a conclusion regarding equity based on compliance with the IAAO standards as suggested by the applicants.

[23] In my view, the applicants have not raised a question of law.

Ground 2—Did the Board err in concluding that there was insufficient data to utilise the eight groupings suggested by the applicants when the Assessor employed the same groups?

Ground 3—Did the Board err in concluding that the sample size of apartment properties was insufficient to utilise as the comparison group for equity purposes when the Assessor considered the same apartment properties?

[24] The essence of the applicants' argument is that the Board erred in rejecting the eight subgroups suggested by the applicants' agent as not being representative despite the fact that the Assessor considered the very same properties in creating its model. They argue that the Assessor clearly felt that there was sufficient data to construct a reliable model; otherwise, it would have obtained appraisals. It argues that for the Board to have rejected the applicants' agent's evidence based on the same data was arbitrary and illogical.

[25] The Board carefully considered the applicants' position in this regard. First, it acknowledged that, in one of its earlier decisions (*Gardentree Village Inc v Winnipeg (City) Assessor*, [2010] MMBO No 268 at para 52), it noted that "the models for income producing properties . . . [were] smaller [than those of residential properties] and may not provide the statistical reliability of the sample sizes used for residential properties" (at para 53). It stated further (at para 54):

> The Board is concerned that the sample size of the three income producing models is not sufficiently large to be divided into substrata. The apartment sample is based on sales (151 sales out of 1,856 properties) and the sample is not necessarily representative of the apartment population. The Board notes that while the details driving the income producing models are similar, the methodology for calculating the [net operating income] and applying a Capitalization Rate are the same. The Board is satisfied, given the similarity of the modeling and the small sample sizes, that the most appropriate stratum for the alternate position is the income producing properties.

[26] In other words, the Board chose to rely on the larger group in reaching its conclusion rather than the smaller ones despite the applicants' agent's argument that his groupings were more representative and, therefore, more accurate. The above is apposite to the questions raised in *Gardentree 2*, wherein Beard JA stated (at paras 53, 55-56):

> - The Board then considered Gardentree's argument that, when the assessment of the Property was compared to that of similar properties, the assessment of the Property should be reduced so that it is equitable. The Board considered the proposed groupings and found that:
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>> - the groupings of four and seven apartments were too small to provide a statistically reliable ASR;
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>> - the properties in the two groupings were not sufficiently similar to be used to determine equity; and

> - those findings notwithstanding, upon making the comparison between those properties and the Property, the Board found that there was nothing to suggest that the Property's assessment, at market value, was significantly different from the assessments of the properties in the groups.
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> When one takes a look at the steps taken by the Board in analyzing the assessment of the Property, it is clear that it first undertook an analysis of the assessment carried out by the Assessor and then proceeded to examine the bases on which Gardentree was challenging the assessment. Having found that the assessment of the Property was just and equitable when compared to other assessable properties, whether that includes all other assessable properties or other apartments, the Board considered and rejected the issues raised by Gardentree.
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> While an analysis of the Board's findings does not demonstrate that it erred in the manner alleged by Gardentree, I agree with the Assessor that, in the end, this alleged error is a matter of methodology.

[27] In this case, the Board made the same type of assessment. It demonstrated that the market value agreed upon by the parties was already lower than the original assessed value and how the application of the ASRs suggested by the applicants would result in an even wider difference in the assessed values of the subject properties when compared to the assessed values of the 131 sale properties relied on by the applicants. In my view, the above evidences a question of methodology or a finding of fact.

Ground 4—Did the Board err in concluding that "other assessable property" means all properties?

[28] This question has been the subject of numerous decisions. It arises from the interpretation by Philp JA in *Seabrook Industries Ltd v Winnipeg (City) Assessor*, 1997 CarswellMan 46 (CA) (in chambers), that "the

relationship which must be fair and just, is the relationship between the assessed value of a particular property and the assessed values of all other properties in the municipal jurisdiction" (at para 8). That decision was affirmed by a panel of this Court (see 1997 CarswellMan 436).

[29] Based on the above, as well as its own interpretation, the Board concluded that the term "other assessable property" found in sections 18 and 60(2) of the *Act* means "all . . . properties" as opposed to "similar properties" (at para 41).

[30] In *Gardentree 2*, Beard JA also considered the question of how the Board dealt with this issue as follows (at paras 17-18):

> The Board stated that Gardentree's position was that the application of the equity provisions had not been dealt with in depth in *Seabrook Industries* and that this interpretation was at odds with decisions from other jurisdictions and with the Supreme Court of Canada's decision in *Morguard Properties Ltd. et al. v. City of Winnipeg et al.*, [1983] 2 S.C.R. 493.
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> The Board then found as follows (at para. 47):
>
> > The submissions of the parties demonstrate that the case law in Manitoba generally has interpreted other assessable properties as "all" other assessable properties, and in other jurisdictions as "similar" assessable properties based on their particular statutory provisions. The Board agrees that the legislative scheme in Manitoba envisages the consideration of equity in relation to all other properties and not to a type or class or sub-stratum of similar properties.

[31] In that case, Beard JA acknowledged that, while the issue raised a question of law, it was not a live issue. She noted that, while the Board disagreed with the interpretation advanced by the applicant, it nonetheless considered "whether the assessed value of the Property bore a fair and just relation firstly to all assessable properties and then to the assessable properties

identified by Gardentree as being similar to the Property" (at para 25). In her view, a rehearing would not have changed the outcome because the position and the evidence of the applicant had already been considered by the Board and a substantive decision had been made (see paras 24, 28).

[32] In this case, the Board undertook a similar analysis to that in *Gardentree 2*. It commenced by observing that, while, in situations where the IAAO standards have been met, the assessments of apartment properties are generally fair, there may be circumstances where an individual property should be compared to similar properties when equity is at issue. While it was not persuaded that the sample was sufficient to calculate an equity ratio for each of the eight groupings, it nonetheless did consider the assessment of the subject properties in relation to the eight groupings developed by the applicants' agent and reviewed the median ASR of the three broad groupings developed from the 131 sales.

[33] Focussing on two types of groupings, the Board found that the agreed-upon market value was lower than the original assessed value. Further, if the ASRs suggested by the applicants' agent were applied, the difference was much greater. It concluded (at para 65):

> The wide difference, in the assessed values of the properties under appeal when compared to the ASR and assessed value of the 131 sale properties, demonstrates the difficulty with working with a small and unrepresentative sample. The Board, from the submissions and presentations at the hearing, does not have sufficient information to make relevant comparisons for the specific properties under appeal.

[34] As pointed out by the Board, nothing has changed in respect of the evidentiary or statutory foundation between *Gardentree 2* and this appeal. As in *Gardentree 2*, further analysis using the method suggested by the applicants

would not have changed the result. Therefore, I see no basis on which to distinguish that decision and would similarly find that there is no live issue in this case.

Ground 5—Did the Board err in placing the onus with respect to equity on the applicants?

[35] As I earlier indicated, in *Gardentree 1*, Hamilton JA granted leave to appeal the Board's conclusion that the burden was on the property owner to establish that the assessed value of the property does not bear a fair and just relation to the assessed value of other assessable properties. In *Gardentree 2009*, a full panel of this Court determined that, where the equity factor is raised, the burden remains on the Assessor pursuant to section 59(5) of the *Act*.

[36] The applicants argue that the Board wrongly placed the burden on them. They rely on the fact that, in its reasons, the Board stated that it "has determined that the IAAO standards have been met, and that [the applicants] have not demonstrated that the properties under appeal were unfairly assessed in comparison to other similar properties" (at para 71). They argue that it committed the very same error as it did in *Gardentree 1* and, therefore, leave should be granted. I disagree.

[37] There is no question that the Board was aware of the nature of the burden on the Assessor. It specifically stated, on the issue of onus, that "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) [of the *Act*]" (at para 7, quoting from *Gardentree 2009* at para 11).

[38] Later, the Board specifically stated that the Assessor had met its burden of proof in convincing it that the most appropriate stratum for its alternate position was the income-producing properties (see para 54). The Board did not stray from its understanding of the onus. The comments that the applicants refer to are found in the commentary at the end of the Board's decision. They simply refer to the fact that, in its view, the Assessor had satisfied its burden and, despite their attempt to convince the Board otherwise, the applicants were not successful.

[39] Therefore, even if this issue raises a question of law, in my view, it is not one that merits the attention of this Court.

[40] Based on all of the above, I would deny leave to appeal on each of the questions raised by the applicants.

Cameron JA