SC 534 AA01 v. Lehigh Portland Cement Limited et al

Link to Property Assessment Appeal Board Decision

ASSESSOR OF AREA 01 – CAPITAL

v.

LEHIGH PORTLAND CEMENT LIMITED
CITY OF COLWOOD and
PROPERTY ASSESSMENT APPEAL BOARD

SUPREME COURT OF BRITISH COLUMBIA (S096915) Vancouver Registry

Before the HONOURABLE MR. JUSTICE SEWELL
Date and Place of Hearing: February 4 & 5, 2010, Vancouver, B.C.

J. David Houston for the Appellant
James Fraser for the Respondent, Lehigh Portland Cement Limited
Reece E. Harding for the Respondent, City of Colwood

***"Production of Documents or Information" – Standard of Review – Section 15(2)(d) of the* Rules**

Lehigh Portland Cement appealed to the Property Assessment Appeal Board ("the Board") the 2008 and 2009 assessment of certain lands which it owned in the City of Colwood. The City of Colwood also appealed the 2009 assessment. The Board dismissed an application by the Assessor for the pre-appeal hearing production of certain offers to purchase the Lehigh Lands which the Assessor had requested pursuant to Rule 15(2)(d) of the Board's Rules of Practice and Procedure ("Rules") *and section 34(3)(b) of the* Administrative Tribunals Act ("ATA"). *The Assessor appeals the Board's dismissal to this Court by asking the following five questions:*

1. *Did the Board err in law in interpreting section 34(2) of the* ATA *and Rule 15(2)(d) of the* Rules *by finding that information which was "relevant and appropriate" but which the Board did not find was "necessary", did not have to be produced on a prehearing application for the production of documents?*
2. *Did the Board err in law pursuant to section 34 of the* ATA *when it held that "the correct test for production of documents or information" application pursuant to section 34(3)(b) of the* ATA *is whether "the information is relevant (not simply may be relevant), necessary and appropriate and is not privileged"?*
3. *Did the Board err in law when it held that Rule 15(2)(d) of the* Rules *"does not reflect the Board's jurisdiction in the* ATA *and because the Board as an administrative tribunal, is bound by legislation, the legislation must take precedence over the Board's enactments"?*
4. *Did the Board err in law when it held that Rule 15(2)(d) of the* Rules *were inconsistent with the provisions of the* ATA *and therefore were* ultra vires *the rule making powers of the Board as set out in section 11 of the* ATA*?*
5. *Did the Board err in law when it held that in the context of an application for prehearing production of documents under section 34(3)(b) of the* ATA *in "determining what is necessary to an issue may require a pre-weighing of the information on his own in the context of other evidence, as well as a balancing of the parties interests and benefit obtained from disclosure compared to any resulting prejudice"?*

HELD: *Appeal Allowed.*

As the Board does not have any particular expertise in the questions of statutory interpretation arising in this case, the standard of review for their decision is correctness. This Court found that the decision of the Board was not correct. The Board erred in holding that it could only permit evidence that was "necessary" to the decision to be produced. The proper test with respect to the pre-hearing disclosure of documents is found in section 15(2)(d) of the Rules*. That rule places the power to require disclosure in the hands of the presiding board member and requires documents to be material and relevant before their production can be ordered. Rule 15(2)(d) is not* ultra vires *the powers of the Board.*

This Court answered questions 1 to 4 "yes". Question 5 was not answered by this Court because it found that this question involved a consideration of the procedure by which the Board exercised its jurisdiction under the Rules *and the* ATA *and did not raise a question of law alone.*

Reasons for Judgment February 11, 2010

[1] Lehigh Portland Cement Limited (Lehigh) has appealed to the Assessment Appeal Board (the Board) the 2008 and 2009 assessment of certain lands (approximating 420 acres) (the Lehigh Lands) which it owns located in the City of Colwood. The City of Colwood (the City) has also appealed the 2009 assessment. The issues in the appeals of the assessments are the determination of actual value and the appropriate classification of the Lehigh Lands for the 2008 and 2009 assessment rolls.

[2] The application before me is a reference by way of Stated Case with respect to an order of the Board made August 6, 2009 dismissing an application by the Assessor Area #01 - Capital (the Assessor) for the pre-appeal hearing production to the Assessor and the City of certain offers to purchase the Lehigh Lands, as listed in Schedule A to the Board's decision.

[3] The questions of law referred to the Supreme Court are set out in the Notice of Stated Case as follows:

> 1. Did the Board err in law in interpreting section 34(2) of the *Administrative Tribunals Act* and Rule 15(2)(d) of the Board's *Rules of Practice* by finding that information which was "relevant and appropriate" but which the Board did not find was "necessary", did not have to be produced on a prehearing application for the production of documents.
>
> 2. Did the Board err in law pursuant to section 34 of the *Administrative Tribunals Act* when it held that "the correct test for production of documents or information" application pursuant to Section 34(3)(b) of the *Administrative Tribunals Act* is whether "the information is relevant (not simply may be relevant), necessary and appropriate and is not privileged".
>
> 3. Did the Board err in law when it held that Rule 15(2)(d) of the Board's Rules of Practice "does not reflect the Board's jurisdiction in the *Administrative Tribunals Act* and because the Board as an administrative tribunal, is bound by legislation, the legislation must take precedence over the Board's enactments".
>
> 4. Did the Board err in law when it held that Rule 15(2)(d) of the Board's Rules of Practice were inconsistent with the provisions of the *Administrative Tribunals Act* and therefore were *ultra vires* the rule making powers of the Board as set out in Section 11 of the *Administrative Tribunals Act*.
>
> 5. Did the Board err in law when it held that in the context of an application for prehearing production of documents under Section 34(3)(b) of the *Administrative Tribunals Act* in "Determining what is necessary to an issue may require a pre-weighing of the information on his own in the context of other evidence, as well as a balancing of the parties interests and benefit obtained from disclosure compared to any resulting prejudice".

[4] The Assessor applied for disclosure of the documents in issue pursuant to Rule 15(2)(d) of the Board's *Rules of Practice and Procedure* (the *Rules)* and s. 34(3)(b) of the *Administrative Tribunals Act,* S.B.C. 2004, Ch. 45 (the *ATA).*

[5] Rule 15(2)(d) of the *Rules* provides:

> (2) The member or registrar presiding at an appeal management conference may make any order considered appropriate for the efficient conduct of the appeal and, without limitation, may...
>
> > (d) require a party to produce to the board or another party, or allow the board or another party access to, any documents or other information which may be material and relevant to an issue in the appeal

[6] Section 34(3)(b) of the *ATA* provides:

> (3) Subject to section 29, at any time before or during a hearing, but before its decision, the tribunal may make an order requiring a person
>
> > (b) to produce for the tribunal or a party a document or other thing in the person's possession or control, as specified by the tribunal, that is admissible and relevant to an issue in an application.

[7] In her decision the Panel Chair of the Board decided that the test for prehearing disclosure was the same as that for admission of information at the appeal hearing and stated the applicable test as follows:

> The question is whether this information is relevant, appropriate and necessary to determine the issue of the market value of the properties as of July 1, 2007 and July 1, 2008.

[8] The Panel Chair concluded that the use of the word admissible in s. 34(3)(b) of the *ATA* meant that the test for production of documents at the pre-hearing stage of an appeal was the same as the list of admissibility under s. 40 of the *ATA.* She reasoned that the requirement that the documents be necessary was implied in the requirement that they be admissible. The Panel Chair found that the documents for which production was sought were relevant, appropriate and not privileged, but went on to find that the information sought was not "necessary".

[9] The Panel Chair found that determining whether the information is "necessary" within the meaning of the *ATA* means that the information should be necessary to the determination of the issues in dispute. She found that determining what is necessary to determine an issue may require a pre-weighing of the information on its own and in the context of other evidence, as well as a balancing of the parties' interests and the benefit gained from disclosure compared to any resulting prejudice. She concluded that the requested information was not necessary to the determination of actual value and that the Assessor had failed to establish the grounds necessary to justify an order that it be produced.

[10] The Panel Chair proceeded on the basis that the sole legislative authority for the Board to order production of information or documents from a party or non-party is set out in section 34(3)(b) of the *(ATA).* The Panel Chair held that as Rule 15(2)(d) of the *Rules* does not reflect the Board's jurisdiction in the *ATA* the legislation takes precedence over the *Rules.*

[11] The Panel Chair concluded that Rule 15(2)(d) purported to grant powers to the Board which were greater than the Board's jurisdiction to order production of information under ss. 34(3)(d) and 40 of the *ATA.* She concluded that on a proper construction of the *ATA* the Board had power to compel production of documents only if the Board concluded that the documents were necessary to the decision of an issue in the appeal. As the Panel Chair was of the view that it was possible to determine the issue of value without reference to the documents, she was without jurisdiction to order their production. She was of the view that she could not find that jurisdiction pursuant to Rule 15(2)(d) because that rule purported to grant a power not found in the authorizing legislation.

[12] In the result the Panel Chair held that Rule 15(2)(d) extended beyond the power to order production contained in the *ATA* and that accordingly the Assessor could not rely on the definition of producible

documents contained in that Rule. The Assessor was denied production of the documents because the Panel Chair was of the view that the documents in question could not be brought within the requirements of s. 34(3)(b) of the *ATA.*

[13] At the request of the Assessor the Board has referred the above questions to the Court pursuant to s. 64 of the *Assessment Act.*

STANDARD OF REVIEW

[14] In *Weyerhauser Company Limited. v. Assessor of Area No. 4 - Nanaimo Cowichan,* 2010 BCCA 46, the Court of Appeal decided that the approach to judicial review of Board decisions set out by Madam Justice Smith in *Vancouver Pile Driving Ltd. v. Assessor of Area No. 08 - Vancouver Sea to Sky Region,* 2008 BCSC 810 needed to be revisited and updated in view of the decision of the Supreme Court of Canada in *Nolan v. Kerry* 2009 SCC 39.

[15] At paragraph 36 of *Weyerhauser* Madam Justice Garson, in speaking for the court, stated the following:

> *Nolan* is a strong statement that questions of the interpretation of a tribunal's own constating statute in matters relating to its own expertise is reviewable on the standard of reasonableness. In my view, the pre-existing jurisprudence is insufficient to determine the standard of review. It is therefore necessary to address the four part *Dunsmuir* analysis.

[16] I am of course bound to apply the decision in *Weyerhauser* to the extent that it is applicable to the facts of this case, and to apply the approach to judicial review set out in *Dunsmuir v. New Brunswick* 2008 SCC 9 and further explained in *Nolan.*

HAS THE JURISPRUDENCE ESTABLISHED THE APPROPRIATE STANDARD OF REVIEW?

[17] I begin my analysis of the proper standard of review in this case by considering whether the question of the appropriate standard has already been established in the existing jurisprudence. I have concluded that it has not. In this case I had the benefit of submissions from counsel who are very experienced in this area of practice. None of the counsel were able to find any case dealing with the appropriate standard of review to be applied in the circumstances of this case. That is hardly surprising given the new approach to this question as set out in *Weyerhauser.*

[18] The Court decided that in *Weyerhauser* reasonableness was the appropriate standard of review. However, in my view, *Weyerhauser* is distinguishable from the case before me in two important respects.

[19] Firstly, it is quite clear that in *Weyerhauser* the issue being addressed by the Board was one within its own particular area of expertise, that is the proper classification of property pursuant to the provisions of the *Assessment Act.* In this case the essential question before the Board was the proper construction of provisions of the *ATA* dealing with the power of tribunals to order production of documents.

[20] Secondly, the proceeding before the Court of Appeal in *Weyerhauser* was an appeal from a case stated pursuant to s. 65 of the *Assessment Act.* In this case I am dealing with a reference under s. 64 of the *Assessment Act,* which is in the following terms:

> **64** (1) At any stage of a proceeding before it, the board, on its own initiative or at the request of one or more of the persons affected by the appeal, may refer a question of law in the proceeding to the Supreme Court in the form of a stated case.
>
> (1.1) If the question of law that is referred under subsection (1) is a constitutional question, the party who raises the question must give notice in compliance with section 8 of the *Constitutional Question Act.*

(2) The stated case must be in writing and filed with the court registry, and must include a statement of the facts and all evidence material to the stated case.

(3) The board must

(a) suspend the proceeding as it relates to the stated case and reserve its decision until the opinion of the Supreme Court has been given, and

(b) decide the appeal in accordance with the opinion.

(4) The stated case must be brought on for hearing within one month from the date on which it is filed under subsection (2).

(5) Subject to subsection (6), the court must hear and determine the stated case and within 2 months give its decision.

(6) The court may send the stated case back to the board for amendment and the board must promptly amend and return the stated case for the opinion of the court.

[21] In *Art's Umbrella v. Assessor of Area No. 9 - Vancouver,* 2007 BCCA 45, Madam Justice Huddart, sitting as a Chambers Judge, pointed out that in a reference under s. 64 the Board is seeking the opinion of the Court on a point of law to assist it in arriving at a final determination of the matters before it. Thus, in a reference by way of Stated Case under s. 64 the Court is playing a significantly different role than it does under an appeal by way of Stated Case from a final decision of the Board under s. 65. I therefore conclude that *Weyerhauser* does not establish the appropriate standard of review for this case.

[22] Having concluded that the jurisprudence does not establish the appropriate standard of review, I turn to a review of the *Dunsmuir factors.*

[23] The elements of the four part *Dunsmuir* test are:

a. the presence or absence of a privative clause;

b. the purpose of the tribunal;

c. the nature of the question in issue; and

d. the expertise of the tribunal.

PRIVATIVE CLAUSE

[24] In *Weyerhauser,* the Court of Appeal considered the nature of the review jurisdiction being exercised at this stage of its *Dunsmuir* analysis. In so doing it expanded the first consideration beyond simply considering whether there was a privative clause.

[25] It seems to me that this consideration favours a correctness standard of review in this case. Section 64 of the *Assessment Act* was enacted by the legislature as a means of permitting the Board to obtain the opinion of the Supreme Court with respect to a question of law during the pendency of proceedings before the Board. It is to be noted that the Board has a discretion whether to refer to the question to the Supreme Court for its opinion at an interim stage in the proceedings before it.

[26] I think that the very nature of this proceeding, that is, asking the Court for its opinion with respect to a question of law on which the Board then can proceed, points strongly to a correctness standard of review on any such reference.

PURPOSE OF THE TRIBUNAL

[27] In my view, this aspect of the *Dunsmuir* analysis is of less significance in this case than it was in *Weyerhauser.* The issue in this case will not usurp the function of the tribunal, which is to act as the final level of Administrative Appeal in assessment matters. It will provide the Board with the Court's opinion on an important question of law which the Board itself has referred to the Court.

NATURE OF QUESTION

[28] In this case the nature of the question in issue does involve a broad question of the tribunal's authority. The Panel Chair of the Board has ruled that one of the Board's own rules of procedure is *ultra vires* of the power granted to the Board to make the *Rules.* This decision was based on an interpretation of the *ATA,* a statute which has potential application to all tribunals. It therefore seems to me that the nature of the question favours a correctness standard of review.

EXPERTISE OF TRIBUNAL

[29] Finally, I do not consider that the Board has any particular expertise in the questions of statutory interpretation which arise in this case. On the contrary, it seems to me that the questions raised in this reference, that is the interplay of the provisions of the *ATA,* and the *Rules* are ones which are outside of the expertise of the Board.

[30] I therefore have concluded that correctness is the appropriate standard of review to the central questions before me.

IS THE DECISION CORRECT?

[31] Although the Board has referred five questions to the court, in my view the critical issue before me is set out in questions 3 and 4.

[32] At paragraph 17 of her decision the Panel Chair concluded that the legislative authority of the Board to order production of information or documents is found exclusively in s. 34(3)(b) of the *ATA.*

[33] In arriving at her decision the Panel Chair concluded that s. 34(3)(b) and s. 40 of the *ATA* must be read together. I have set out the relevant portions of s. 34(3)(b) at para. 6 of these Reasons. Section 40 of the *ATA* is as follows:

> **40** (1) The tribunal may receive and accept information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law.
>
> (2) Despite subsection (1), the tribunal may exclude anything unduly repetitious.
>
> (3) Nothing is admissible before the tribunal that is inadmissible in a court because of a privilege under the law of evidence.
>
> (4) Nothing in subsection (1) overrides the provisions of any Act expressly limiting the extent to or purposes for which any oral testimony, documents or things may be admitted or used in evidence.
>
> (5) Notes or records kept by a person appointed by the tribunal to conduct a dispute resolution process in relation to an application are inadmissible in tribunal proceedings.

[34] The Panel Chair concluded that s. 40 of the *ATA* is exhaustive of the grounds on which the Board may accept and receive information. More particularly she decided that s. 40 required that the Board accept information only if it was relevant, necessary and appropriate. In other words, the Panel Chair concluded that the test for requiring pre-hearing production was the same as that for admitting information

into evidence at the hearing. In both cases the Panel Chair concluded that the Board could only permit evidence which was necessary to the decision of an issue to be admitted or produced.

[35] In my respectful opinion, in so doing the Panel Chair fell into error. Section 40 and s. 34 of the *ATA* deal with related but distinct topics. Section 34 deals with the Board's power to order disclosure. This case involves the power to order disclosure. Section 34(3)(b) gives the power to the Board to order any person to produce to the Board or a party a document in that person's possession or control that is admissible and relevant to an issue in an application.

[36] Section 40 gives the power to the Board to receive and accept information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law. I take the reference to evidence admissible in a court of law to mean admissible in accordance with the rules of evidence applied in such court.

[37] It seems to me that the intent of s. 40 is to make it clear that a tribunal, in this case the Board, may consider and act upon information whether or not the information would be admissible in a court of law. I think that the use of the word necessary in s. 40 is intended to set out one of the requirements for the Board to accept evidence which would otherwise be inadmissible. I do not think it is correct to import the test for receiving evidence at the hearing into the test for ordering production in s. 34.

[38] The effect of the Panel Chair's interpretation of ss. 34 and 40 of the *ATA* is to restrict the power of the Board to require pre-hearing discovery of documents. Such an interpretation could significantly hamper the ability of Board to adjudicate upon appeals and the ability of the parties before it to prepare for such appeals.

[39] It is quite clear to me that in promulgating the *Rules* the Board appreciated the importance of pre-hearing disclosure in appropriate cases. Rule 15(2)(d) places the power to require disclosure in the hands of the Board member presiding at a pre-appeal conference and introduces further limitations, that of materiality and relevance, with respect to any documents ordered to be produced.

[40] I am also persuaded that the conclusion of the Panel Chair would place an unreasonable burden on the Board and the parties to an appeal when issues of document disclosure arise. It seems to me that it will be in many cases difficult if not impossible to determine whether production of a particular document is necessary, as that term has been defined by the Panel Chair. Introducing the concept of necessity into a consideration of whether to receive information which would not otherwise be admissible under the rules of evidence makes considerable sense at the hearing stage of an appeal. To attempt to determine whether a particular document is necessary to a determination of an issue at the pre-appeal stage seems to me to be impracticable.

[41] In addition, in my respectful opinion the Panel Chair overlooked the introductory words of s. 11(1) of the *ATA* when considering the jurisdictional foundation for Rule 15(2)(d). Section 11(1) of the *ATA* provides that, subject to the *ATA* and the tribunal's enabling *Act*, the tribunal has the power to control its own processes and make rules respecting practice and procedure to facilitate the just and timely resolution of the matters before it.

[42] The Panel Chair appears to have proceeded on the basis that s. 34(3)(b) of the *ATA* was the only legislation authorizing the Board to order production of documents. However s. 46(2) of the *Assessment Act* gives members of the Board, in performance of their duties, the power to require the production of any record. The definition of "record" contained in the *Interpretation Act* would include the documents in issue in this reference. It seems to me that Rule 15(2)(d) gives guidance to a board member conducting an appeal management conference as to how to exercise her power to require production of documents pursuant to s. 46(2) of the *Assessment Act.*

[43] It is to be noted that the powers granted to a member presiding at an appeal management conference are to be exercised in the interests of the efficient conduct of the appeal. It seems to me that the powers set out in s. 15(2)(d) are consistent with the mandate granted to the Board pursuant to s.

11(1) of the *ATA,* that is the power to make rules respecting practice and procedure to facilitate the just and timely resolution of the matters before it.

[44] I therefore find that there was no basis for the Panel Chair to conclude that Rule 15(2)(d) was *ultra vires* of the powers of the Board.

[45] I had considered remitting the question of whether the documents should be produced to the Panel Chair for reconsideration in accordance with this decision. However, as this is a reference I propose simply to answer the questions put to me.

[46] I answer the first 4 questions posed in the Stated Case as follows:

Question 1: Yes

Question 2: Yes

Question 3: Yes

Question 4: Yes

[47] It seems to me that Question 5 stands on a different footing than Questions 1 to 4. Question 5 involves a consideration of the procedure by which the Board exercises its jurisdiction under the *Rules* and the *ATA.* I do not think that this question raises a question of law alone. It may well be that the Board can and should balance the probative value of information against efficiency and the confidentiality interests of parties in making decisions on document disclosure. I therefore decline to answer Question 5.

[48] The parties may speak to costs if they cannot agree on that issue.

"The Honourable Mr. Justice Sewell"