

In the Court of Appeal of Alberta

Citation: Pincher Creek (Town) v. Alberta (Municipal Government Board), 2007 ABCA 360

Date: 20071127

Docket: 0603-0252-AC

Registry: Edmonton

Between:

Town of Pincher Creek

Respondent
(Applicant)

- and -

The Municipal Government Board

Respondent
(Respondent)

- and -

**The Good Samaritan Society
(A Lutheran Social Service Organization)**

Appellant
(Respondent)

The Court:

**The Honourable Mr. Justice Jean Côté
The Honourable Madam Justice Marina Paperny
The Honourable Madam Justice Sheila Greckol**

**Memorandum of Judgment
Delivered from the Bench**

Appeal from the Judgment by
The Honourable Mr. Justice S. Sanderman
Dated the 07th day of July, 2006
Filed on the 08th day of September, 2006
(2006 ABQB 513, Docket: 0603-01290)

**Memorandum of Judgment
Delivered from the Bench**

Paperny J.A. (For the Court):

[1] The issue on this appeal involves the interpretation and application of s. 362(1)(g.1) of the *Municipal Government Act*, R.S.A. 2000, M-26 (*MGA*) which provides for an exemption from taxation for:

(g.1) property used in connection with health region purposes and held by a health region under the *Regional Health Authorities Act* that receives financial assistance from the Crown under any Act;

[2] The panel is unanimous that the appeal must be dismissed. We are all of the view that the reviewing judge did not err in remitting the matter back to the Municipal Government Board (MGB) for rehearing. However, we differ in our reasons for so finding.

[3] The issue before the MGB was whether the property in question, Vista Village, an assisted living seniors' care facility in Pincher Creek is exempt from taxation because it is "held by" the applicable health region. Vista Village is owned by the Good Samaritan Society, a non-profit society, and is operated by that society for the health authority pursuant to a "continuing care agreement".

[4] In considering the meaning of "held by", the MGB reviewed several case authorities from the Queen's Bench and the MGB and distilled the following legal principles: the term "held by" may mean something other than ownership and ought to be interpreted broadly to facilitate the overall purpose of the section. It concluded that one can hold property by owning it, leasing it or by physically controlling it.

[5] The health authority had neither an ownership nor a leasehold interest in the property. However, the MGB reviewed the continuing care agreement to ascertain whether it could be said that the health authority "physically controlled" the property and concluded that it did.

[6] Pincher Creek sought judicial review of the MGB's decision. Rather than engage in a full *Pushpanathan* analysis, the court relied on *Alliance Pipeline Ltd. v. Alberta (Minister of Municipal Affairs)*, 2006 ABCA 9 (*Alliance Pipeline*), that held that the standard of review of a particular decision by the MGB in interpreting a phrase within its statute was correctness, and concluded, relying on that decision, that the appropriate standard of review of this issue was one of correctness.

[7] The reviewing judge agreed that the property could be considered held by the health authority for purposes of s. 362 of the *MGA* if it were either owned, or physically controlled by the authority. He determined however that the MGB erred by reducing the requisite physical control to

a form of control arising through contract. He concluded there was no basis for this broad interpretation and that the MGB was incorrect in finding that the health authority held the facility. He quashed the decision and remitted it to the MGB for rehearing. We agree with that disposition.

[8] An important issue is that of the appropriate standard of review to apply to the MGB's decision in this case, reasonableness or correctness. In either event, we are of the view that authority from this court see: *Alliance Pipeline, Alberta (Minister of Municipal Affairs) v. Telus Communications Ltd.*, 2002 ABCA 199 (*Telus*), *University of Alberta v. Edmonton (City)*, 2005 ABCA 147 (*University of Alberta*), and from the SCC (see *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247), mandate a fresh *Pushpanathan* analysis in this case. Although the tribunal in question and the statute in issue are the same as in *Alliance Pipeline*, the specific provisions and the factual matrix are different. Given this court's comments in *Foster v. Alberta (Transportation and Safety Board)*, 2006 ABCA 9 (*Foster*), we are of the view that those differences require that a new *Pushpanathan* analysis be conducted in this case.

[9] The privative clause here is "a weak privative clause" which points to a moderate degree of deference. See *Alliance Pipeline* and *Telus*. On the issue of expertise, this court has repeatedly said that the MGB has expertise in the area of property assessment. In *Alliance Pipeline*, the court concluded that interpreting the phrase "capable of being used for the transmission of gas" did not involve assessing the value of property but rather was a question of statutory interpretation in which the court has expertise.

[10] The conclusion that a correctness standard should be applied in this case does not appear to be supported by this court's decision in *University of Alberta*. The court in that case considered s. 362(1)(d)(i), (the same section of the same legislation involving the same tribunal and a similar although not identical issue) which provided that property, is exempt from taxation if it is held by the board of governors of a university and used in connection with educational purposes. In considering the MGB's level of expertise, this court held that the specific provision in question relating to assessing property requires a degree of balancing among different constituencies diminishing the appropriateness of court supervision.

[11] Insofar as the purpose of the legislation and the provision at issue go, the comments in *University of Alberta* apply equally.

[12] As to the nature of the question, in *University of Alberta* the court concluded that the nature of the problem here is one of mixed fact and law, primarily requiring the interpretation of the statute, followed by the application of facts to that interpretation." That court concluded that this involved a moderate level of deference. In our view, the Board's inquiry in this case involves the same exercise of statutory interpretation, fact findings and application of the statute to those findings. Thus, a moderate level of deference should be accorded to the Board.

[13] In our view, the analysis would lead to a standard of review of reasonableness on this question rather than one of correctness. However, this distinction is of little consequence to the

result because even on a reasonableness standard the MGB's interpretation cannot stand. The MGB failed to draw any distinction between the word control and physical control. It cannot be said on any reasonable interpretation of the relationship between the Health Region and Vista Villages, including a review of their agreement, that the health region is in physical control over the property.

[14] If the MGB's decision was intended to expand the definition beyond the requirement for physical control, it ought to have said so and given reasons why it was entitled to do so. We do note however, the section is clear: the control must relate to the physical property itself.

[15] Accordingly, the appeal is dismissed and the entire matter is remitted back to the MGB for rehearing on whether the property is exempt from taxation.

Appeal heard on November 01, 2007

Memorandum filed at Edmonton, Alberta
this 27th day of November, 2007

Paperny J.A.

Appearances:

A.R. Kosak
for the Respondent, Town of Pincher Creek

M.J. D'Alquen
for the Respondent, The Municipal Government Board

W.W. Shores, Q.C.
for the Appellant