

 **Bayer Inc. v. Sarnia (City), [2011] O.A.R.B.D. No. 8**

Ontario Assessment Review Board Decisions

Ontario Assessment Review Board

Panel: J.D. Brownlie, Member

Decision: January 14, 2011.

File No.: WR 98315; Hearing Numbers: 242959;

Application Numbers: 2501557,
2501657, 2501757, 2501658, 2501758 and 2501759

[2011] O.A.R.B.D. No. 8

IN THE MATTER OF Subsection **357.(1)(d)** of the Municipal Act, S.O. 2001, c. 25, as amended, AND IN THE MATTER OF an application with respect to taxation years 2003, 2004, 2005, 2006 and 2007 on premises known municipally as 1055 Vidal Street South and 1265 Vidal Street South. Between Bayer Inc., Lanxess Inc., Assessed Persons/Applicants, and The City of Sarnia, Respondent

(17 paras.)

Appearances

L. Ashton - Representative for the Parcel Owner.

P. Sanford - Counsel for the Applicants.

J. O'Kane - Counsel for the City of Sarnia.

DECISION

1 These applications came before the Assessment Review Board on June 22, 2010 in the City of Sarnia.

ISSUE

2 Do the applicants qualify for a cancellation, reduction or refund of taxes pursuant to subsection **357.(1)(d)** of the *Municipal Act*.

DECISION

3 The Board orders the City of Sarnia make refunds to the applicants for the years 2003, 2004 and 2005 for the buildings in question, as set out on page 1 of Exhibit A, totalling \$445,523.

REASONS FOR DECISION

4 On February 3 and 4, 2009 the Board heard these appeals and delivered its decision released September 4, 2009.

5 During that hearing, the parties advised the Board that counsel would probably be able to work out the details of the cancellation, reduction or refund of taxes pursuant to subsection **357.(1)(d)**(ii) of the *Municipal Act* after the Board's decision.

6 On June 22, 2010, the parties appeared before the Board stating they were unable to agree upon the result, and asked the Board to decide.

7 Exhibit A produced at this hearing is a table of the differences which the parties have agreed upon. Essentially, it shows that the Municipality takes the position that these reductions should be done on a declining value basis and that there should be a tax cancellation of 20% in 2003 and 35% in 2004 and 2005; Lanxess, on the other hand, believes it should be a 65% tax cancellation for all three years. (Note that Lanxess had already applied for and received vacancy allowances of 35% after the buildings in areas 12 and 33 were vacated.) We are here only concerned with the buildings in areas 12 and 33.

8 These questions all turn upon the correct interpretation of subsection **357.(1)** of the *Municipal Act* ([S.O. 2001, c. 25](#)).

357(1) Cancellation, Reduction, Refund of taxes.- Upon application to the treasurer of a local municipality made in accordance with this section, the local municipality may cancel, reduce or refund all or part of taxes levied on land in the year in respect of which the application is made if,...

(d) during the year or during the preceding year after the return of the assessment roll, a building on the land,

(i) was razed by fire, **demolition** or otherwise, or

(ii) was damaged by fire, **demolition** or otherwise so as to render it substantially unusable for the purposes for which it was used immediately prior to the damage;

9 Mr. O'Kane produced as witnesses, Peter Prull, a Senior Valuation Analyst with MPAC and Brian McKay, the City Treasurer and Director of Finance with the City of Sarnia. Both of them are very qualified and experienced in their fields. Mr. Prull said that the properties are costed on a replacement basis and an appropriate depreciation factor is applied depending on the building's state and age; then one estimates the "cost to cure" and takes into account economic obsolescence and finds a market value. He said "we're reluctant to swipe the entire value off, because we've seen the building become useable again". He also said that "each year the building stays there, it loses value, so we take 20% each year off the remaining balance, so it never goes to 0%". When asked in cross-examination whether it was true that there was no alternative use that Lanxess could put the buildings to, Mr. Prull agreed, but said that "some of the buildings could have been used for something".

10 The short answer to this is that if the buildings were, after the years in question, fixed up and put to some other use, it would be a simple matter to re-assess them.

11 Mr. McKay said that the City of Sarnia had a "brown fields" program which provides incentives for companies to improve old buildings. This provides for refunds to the companies for clean up costs over a period of 10 years. From this, Mr. O'Kane submitted that the section should be interpreted so that municipalities can create incentives for companies not to "gut and cut" and to avoid demolishing buildings. (It was admitted by the Municipality that so soon as the buildings were demolished, it would, on application, refund the taxes paid.)

12 It is clear from Exhibit B, that Sarnia retained a consultancy (Municipal Tax Equity), to research the practices used by other Ontario municipalities in applying section **357**. This survey reveals that there are some 444

municipalities which were surveyed, 159 who were contacted and 49 who responded. All of the responses that were received dealt with that municipality's administration of requests for tax rebates. None of the respondents (few in number) indicated that an established policy existed, or that a by-law was in place governing the matter. Some of the municipalities appeared to accept the advice of MPAC, and others exercised their discretion.

13 The Board considers that, once these applications reach it, they should be determined on an interpretation of section **357**. Mr. O'Kane said "this is a search to do an essential justice".

14 In the leading case of Empire Realty Ont. CA. (1968), Vol 2, Mr. Justice Kelly, for the court, said, at p390,

A prime objective of municipal taxation is the equitable distribution of the burden according to the value of the property possessed by each taxpayer.

15 If the property in question has no value, then the municipality should not be permitted to use "incentives" to persuade the taxpayer to fix up or improve the building, against the wishes of the taxpayer. The Board recognizes that, particularly in regard to industrial property, a municipality may wish to "encourage" industrial growth; but the *Assessment Act* is not the correct vehicle to do this.

16 Mr. Sanford said that since the Board had already found that the damage done to the buildings rendered them "substantially unusable for the purposes for which they were used immediately prior to the damage" the correct interpretation of subsection **357.(1)(d)** was to refund all the taxes paid in 2003, 2004 and 2005 on the buildings in question.

17 The Board agrees with this and orders the City of Sarnia shall make refunds to the applicants for the years 2003, 2004 and 2005 for the buildings in question, as set out on page **1** of Exhibit A, totalling \$445,523.

J.D. Brownlie
Member

DECISION RELEASED ON: January 14, 2011