CITATION: London Jewish Community Village v. The Municipal Property Assessment Corporation, Region 23 et al., 2020 ONSC 6794
COURT FILE NO.: 2562-18
DATE: 2020/11/05

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: LONDON JEWISH COMMUNITY VILLAGE, Applicant

AND:

THE MUNICIPAL PROPERTY ASSESSMENT CORPORATION, REGION 23 and THE CORPORATION OF THE CITY OF LONDON, Respondents

BEFORE: Justice I.F. Leach

COUNSEL: John D. Goudy, for the Applicant

Sarah W. Corman and Michelle Stephenson, for the Respondent Municipal Property Assessment Corporation, Region 23

The Respondent Corporation of the City of London not participating

HEARD: July 8, 2020

ENDORSEMENT

Introduction

[1] Before me is an application, brought by the London Jewish Community Village, ("the Village"), pursuant to s.46(1) of the *Assessment Act*, R.S.O. 1990, c.A-31, and Rule 14.05(2) of the *Rules of Civil Procedure*, seeking:

a. a declaration that a portion of the land it owns here in London, (i.e., the portion classified as "New Construction Commercial"), was/is exempt from taxation for municipal and school purposes during 2018 and all subsequent tax years; and

b. an order directing corresponding alteration of the city of London's assessment roll, (in relation to the relevant assessment number for the Village's property), to reflect that claimed exemption status, and a corresponding refund of municipal taxes paid on that "New Construction Commercial" portion of the Village's property.

[2] The Municipal Property Assessment Corporation, Region 23, ("MPAC"), one of the two named respondents to the application, has filed a notice of appearance and has opposed granting of the relief sought by the application. The other named respondent, (i.e., The

Corporation of the City of London), has not filed a notice of appearance, and has not participated in this proceeding.

[3] As discussed in further detail below, the application turns primarily on whether the Village has demonstrated, on a balance of probabilities, that it is entitled to rely on the exemption from assessment and taxation set forth in paragraph of s.3(1) of the *Assessment Act*, *supra*.

Further background

[4] There essentially was no dispute as to the underlying facts to date, which are set forth in:

a. the application record filed by the Village, which includes an affidavit sworn by Tammie Ashton, a director and president of the Village;

b. a transcript reflecting cross-examination of Ms Ashton on her supporting affidavit; and

c. further documents supplied by the Village in satisfaction of undertakings given during the course of Ms Ashton's cross-examination.

[5] I have reviewed and considered all of that material. For present purposes, however, I think the relevant history of this matter may be summarized as follows:

a. The Village is a corporation, without share capital, that was formed by letters patent issued on June 16, 1980. Its stated objects, (the promotion and/or attainment of which focus and/or circumscribe its other stated activities), are:

i. to establish, maintain, operate and provide facilities suitable for the housing and accommodation of senior citizens and/or families of low income; and

ii. to promote the efficient development and maintenance of social services designed to benefit senior citizens and/or families of low income.[1]

b. The letters patent state that the Village is to be operated as a non-profit corporation, (i.e., to be "carried on without the purpose of gain for its members", and with "any profits or other accretions" it receives to be "used in promoting its objects"), and that its directors are to serve without remuneration or direct/indirect profit.

c. The letters patent also indicate that the Village is to be operated as a charitable corporation; i.e., one subject to the *Charities Accounting Act*, R.S.O. 1990, c.C.10, *The Charitable Gifts Act*, R.S.O. 1990, c.C.8, and the *Mortmain and Charitable Uses Act*, R.S.O. 1987, c.297, (although the latter statute was repealed by the *Mortmain and Charitable Uses Repeal Act, 1982*, S.O. 1982, c.12), and with all

[1] During cross-examination on her affidavit, Ms Ashton confirmed that those objects, stated in the corporation's original letters patent, have not been amended since its creation.

remaining property of the Village upon its dissolution, (after payment of its debts and liabilities), to be distributed or disposed of to charitable organizations carrying on their work solely in Canada.

d. The Village is the registered owner of a property approximately 3.33 acres in size, and identified by its municipal address as 536 Huron Street, here in the city of London. As for the structures thereon:

    i. The buildings originally constructed on the property, in 1980, included a seniors' apartment building and attached community centre, all of which was and has been classified for property tax assessment purposes as "Multi-residential". In that regard:

        1. Although there ostensibly are different external doors leading primarily into the apartment building and community centre areas, Ms Ashton confirmed during her cross-examination that the apartment building and community building are "totally attached", and that there really is no physical separation or barrier between the two inside the building. To the contrary, they essentially are joined by "rather open" space, such that they form "one sort of large building". As Ms Ashton put it, "once you get inside, you could walk completely between those two [external] doors without ever going through another door or wall."

        2. Property management and maintenance in relation to both the apartment building and community centre, and the running of educational and other programs offered in the community centre, (e.g., adult Jewish education programs, children's programs and childcare services, guest speakers, social worker assistance, exercise classes, card-playing and bingo sessions in respect of which the Village provides supplies and prizes), are carried out by employees of a separate corporation called the "London Jewish Community Council",[2] ("the JCC"), to which the Village pays an annual "management fee" for completed services. The Village itself has no employees in that regard.

        3. Although the Canada Mortgage and Housing Corporation (or "CMHC") subsidized the Village's mortgage interest payments for

[2] During cross-examination on her affidavit, Ms Ashton referred to that separate corporation as "The Jewish Community Centre", but the relevant letters patent, (produced in response to an undertaking), indicate and confirm its proper name. Created on July 26, 1974, the principal objects of the JCC, (another non-profit corporation, and the directors of which are the same directors for the Village), are "to supervise and administer the activities of the London Jewish Community", and "to plan for the philanthropic, cultural and educational advancement of the London Jewish Community and to foster co-operation among organizations directed towards that end".

the entire life of mortgage,[3] (finally paid off in 2020), the Village has no affordable housing agreement with the province of Ontario in respect of its apartments.

4. As indicated on the Village website and confirmed by Ms Landry, during her cross-examination, the apartment building owned by the Village is designated a seniors apartment building for those "55 and older", and the vast majority of its occupants are recipients of government-sourced income, such as Old Age Security ("OAS") and Canada Pension Plan ("CPP") benefits paid by the federal government. While the Village deliberately sets the monthly rental rate for its apartments at "below market" rates, less than five of its apartment units have rental rates specifically linked to occupant income. Eligibility for residence in the apartment building accordingly is determined by age, rather than income. During her cross-examination, Ms Ashton confirmed that "just a few" of the resident seniors qualify for social services programming, offered through the services of the JCC, that provides money for food and/or which is tied to certain holidays. Nor is residence in the apartment building limited to those from the Jewish community; indeed, beyond indicating that "all the Village is not Jewish" and "definitely not majority Jewish", Ms Ashton confirmed during cross-examination that occupants of the Village are "not even slightly" majority Jewish.

5. The programming offered at the Village, through the services of the JCC, is deliberately not restricted to seniors or members of the Jewish community. During her cross-examination, Ms Ashton confirmed that such programming is used by everyone from seniors to children. Moreover, although such programming is advertised in the Jewish community, the programs are "open to anybody who would come", "technically anyone" is able to participate, and the Village "would not exclude anyone" who "showed up". Ms Ashton confirmed that, to the best of her knowledge, there essentially is no criteria for participation in such programs "other than a desire to participate". Such programs accordingly are not designed to provide services primarily to those in economic need, to reduce such a need.

ii. In 2008, the Village undertook the construction of another attached but largely distinct and self-contained building on the property; i.e., an addition, approximately 10,000 square feet in size, that was and has been classified

[3] In material delivered by counsel for the Village, in satisfaction of undertakings provided during cross-examination on Ms Ashton's affidavit, there is an indication of Ms Ashton's belief that the subsidy was received on the basis the Village was providing housing to low income or poor seniors.

for property tax assessment purposes as "New Construction Commercial". That addition was purpose built for use by The London Community Hebrew Day School Co-operative, Inc., ("the School"). In that regard:

1. The School was incorporated without share capital on November 28, 1974, pursuant to the *Co-operative Corporations Act, 1973*, S.O. 1973, c.101, (now the *Co-operative Corporations Act*, R.S.O. 1990, c.C.35. Its principal objects, (set forth in its articles of incorporation), are:

    a. to provide care and education for young children through a program promoting their healthy physical, social, emotional and intellectual growth; and

    b. to provide opportunities for family life education through parent participation in the children's program and other activities of the co-operative.

2. The first of those objects received further clarification and confirmation in Article 1 of the School's by-laws, which provide, in paragraph 2, that the "purpose of the school shall be to enrich Jewish life in London by providing a Community Jewish Day School in which shall be combined a Jewish program imbued with the traditions and ideals of Judaism, and a secular program satisfying the requirements of the Ontario Ministry of Education, and duly licenced". [Original underlining.]

3. The School's articles of incorporation confirm that it is a non-profit organization; i.e., one to be "carried on without the purpose of gain for its members", with "any profits or other accretions to the co-operative" to be "used in promoting its objects".

4. The same articles of incorporation indicate that the School is to be operated as a charitable organization; i.e., subject to the *Charitable Gifts Act, supra*, and the *Mortmain and Charitable Uses Act, supra*, with any of its remaining assets, upon dissolution, to be distributed and disposed of to charitable organizations carrying on their work solely within Canada.

5. The School is not controlled by the Village. Nor does the Village control the school. They are completely separate corporations, and each corporation's board of directors is completely different from that of the other corporation.

6. From 1979 until 2008, the School operated its day school, ("the London Community Hebrew Day School"), in the former Broughdale Elementary School; a property, located on Epworth

Avenue here in the city of London, that was owned by the School. During that period, there apparently was no dispute that the School's property was exempt from municipal assessment and taxation pursuant to paragraph 5 of s.3(1) of the *Assessment Act, supra*; provisions which exempt, *inter alia*, "land owned, used and occupied solely by a non-profit philanthropic, religious or educational seminary of learning".

7. By 2008, the former Broughdale Elementary School property was no longer suitable and/or sufficient for the School's day school operations, and making it so would have required a great deal of work. Arrangements therefore were made with the Village, on a co-operative basis, for the planning, design and construction of the "New Construction Commercial" space on the Village's property, and associated fundraising. Those agreed arrangements included:

    a. the School providing the Village with two million dollars towards the cost of that "New Construction Commercial" space;

    b. the Village constructing that new space specifically for use by the School; and

    c. the Village, in consideration of the School's two-million-dollar investment, leasing that "New Construction Commercial" space to the School, (to be used "exclusively" by the School to operate the London Community Hebrew Day School), in exchange for the School's payment of $1.00 per year in rent to the Village.

8. In 2008, the Village proceeded with construction of the "New Construction Commercial" space, which is set up for use as a school; i.e., with a one storey design configuration including, (beyond cloakrooms, washrooms, storage space and mechanical facilities), six classrooms, separate principal and administration offices, and a staff room. Although that "new" structure may be physically attached to the older premises owned and occupied by the Village, (i.e., such that all of the structures on the Village's property form one building), Ms Ashton confirmed during her cross-examination that the newer school space is "definitely separate" from the portions of building space occupied by the apartment building and community centre; i.e., with the school space having a "totally separate entrance" externally, and being separated and partitioned internally by "a security door and everything".

9. Since September 1, 2008, the School has been the sole occupant of the "New Construction Commercial" space, pursuant to the aforesaid lease arrangement, and has operated its day school in that space.[4] During her cross-examination, Ms Ashton indicated the existence of an informal understanding and practice whereby the Village and the School occasionally "share space back and forth" if there is a need for that; e.g., with the Village permitting the School to use areas of the community centre free of charge for certain activities, and the School permitting the Village to use the School's library for certain programming. However, Ms Ashton also confirmed that such arrangements are not covered by terms of the relevant lease. As indicated in the "Acknowledgement of Lease" executed by representatives of the Village and the School, the formal lease arrangement provides that the "New Construction Commercial" space is to be "used exclusively" by the School, to operate its day school.

10. The aforesaid "Acknowledgment of Lease" is silent in terms of indicating any length or duration of the lease arrangement between the Village and the School. However, Ms Ashton indicated, during her cross-examination, the Village's understanding that the lease arrangement with the School would continue "as long as there is a school". As Ms Ashton put it, in other words: "If they close, that would be the end of the lease".

e. From time to time, the Village has received public funding. In particular:

   i. In 1999-2000, the Village received $66,000 from the Ontario Trillium Foundation to create a Holocaust library and resource centre, to advance public awareness and provide specialized learning opportunities. The funding was in the nature of a "one off" capital payment, directed towards furniture, books, computers and initial research to create the library, which did not previously exist. The facility does not have a librarian, and does not operate on a "drop in" or "walk in" basis, in a manner similar to a public library. Interested users must instead schedule an appointment through the JCC staff, who operate the facility.

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[4] Neither the Village nor the School was able to locate formal documentation, from 2008, confirming the relevant lease arrangement. However, although the Village and the School may not have entered into a formal written lease agreement at the time, it was always their intention to do so. On November 20, 2019, representatives from each corporation accordingly executed a formal "Acknowledgment of Lease", confirming the lease arrangement that has existed since September 1, 2008, and the Village's receipt of the agreed upon $1.00 annual rent. During her cross-examination, Ms Ashton confirmed that the reason for that nominal rent was the School's large two-million-dollar investment towards construction of the "New Construction Commercial" space.

ii. In 2009-2010, the Village received a $691,086 grant through the city of London's Social Housing Renovation and Retrofit Program to repair and upgrade the "Multi-Residential" portion of its building. During her cross-examination, Ms Ashton confirmed that the funding program was "housing-specific", and that the Village qualified for receipt of such funding because it provided social housing for seniors. The funds received by the Village were applied to a new "HVAC" system, roof and other kinds of building improvements for that housing.

iii. In 2011-2012, the Village received a further $50,000 in funding from the Ontario Trillium Foundation to upgrade dated aspects of its building by the installation of automatic doors, new lighting and other electrical systems "to make the building fully accessible and safer for the enjoyment of its users".[5]

f. As reflected in a Property Assessment Notice sent by MPAC to the Village for the 2017-2020 property taxation years, and a tax bill for 2018 rendered to the Village by the city of London, MPAC has assessed the Village's property as fully taxable for school and municipal purposes on the assessment roll for the 2018, 2019 and 2020 taxation years, and the city of London has taxed the Village accordingly; i.e., without application of any exemption in relation to the "New Construction Commercial" space on the Village's property. In other words, no portion of the property identified by its municipal address as 536 Huron Street, entirely owned by the Village, has been treated as exempt from municipal taxation.

g. Ms Ashton confirmed during the course of her cross-examination that, to her knowledge, no portion of the Village's property has been exempt from taxation since being owned by the Village. Nor was it disputed that the circumstances have not and do not justify any exemption in relation to the apartment building and community centre portions of the property owned by the Village.

[6] Beyond that knowable and demonstrable history of events that have occurred to date, I also was presented with evidence from Ms Ashton concerning the Village's intentions for the future, in the event the School ceases to occupy and use the "New Construction Commercial" space for its day school. In that regard:

a. Ms Ashton says that, in such an event, the Village would occupy and use that space "for the relief of the poor through the development and maintenance of social services designed to benefit senior citizens and/or families of low income as mandated by its Letters Patent", and "would seek public funding" to assist with such work.

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[5] In her affidavit and examination evidence, Ms Ashton does not specify the building areas to which such funds were devoted. However, I think it likely, on a balance of probabilities, that the indicated changes were made to the multi-story apartment building and community centre built in 1980. In particular, it seems unlikely that such renovations would have been required in relation to the one-storey school space built only three years earlier.

b. Ms Ashton says that, although the space admittedly is "set up for a school", and is "divided mostly into classrooms", it is capable of being used "to deliver multiple free of charge services to senior citizens and families of low income" exclusively. Among various potential uses of the space, Ms Ashton mentions the possible provision of:

   i. child care services;

   ii. a kosher food bank;

   iii. hospitality meals;

   iv. classes teaching English as a Second Language;

   v. "social services case management";

   vi. a legal clinic;

   vii. "financial management" classes;

   viii. computer training;

   ix. other unspecified "skills training";

   x. "life-long learning" classes;

   xi. memory maintenance/retention classes;

   xii. translation services;

   xiii. operation of a new and used clothing donation outlet; and/or

   xiv. operation of a hygiene and sanitary supply donation outlet

c. Ms Ashton notes that "public funding to support capital improvements and the delivery of social services is available through a number of government sources", including the Ontario Trillium Foundation and the London Community Grants Program,[6] and says that the Village's contemplated future efforts "for the relief of the poor" would be supported in part by public funds.

[7] With such facts and evidence in mind, I turn next to an overview of the relevant legislative provisions and legal principles which govern such determinations, including a focus on statutory interpretation in the context of the *Assessment Act*, *supra*.

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[6] Included in the application record filed by the Village are copies of the London Community Grants Policy, (including an outline of it eligibility criteria), and the "Eligibility Policy" of the Ontario Trillium Policy.

Legal principles

LEGISLATION – THE ASSESSMENT ACT

[8] The basic structure of the relevant legislative provisions is relatively straightforward, and for present purposes may be outlined by citing just some of those provisions.

[9] Pursuant to s.3(1) of the *Assessment Act, supra*, "All real property in Ontario is liable to assessment and taxation", subject to a list of specified exemptions set forth in 29 following paragraphs of that subsection. I have regard to all of those paragraphs, and the exemptions set forth therein, and will have further comments about them in the course of these reasons. For now, I note that they include, in paragraphs 5 and 12 of s.3(1) of the *Assessment Act, supra*, exemptions which read as follows: …

> **Philanthropic organizations, etc.**
>
> 5. Land owned, used and occupied solely by a non-profit philanthropic, religious or educational seminary of learning or land leased and occupied by any of them if the land would be exempt from taxation if it was occupied by the owner. This paragraph applies only to buildings and up to 50 acres of land. …
>
> **Charitable institutions**
>
> 12. Land owned, used and occupied by:
>
> i. The Canadian Red Cross Society,
>
> ii. The St John Ambulance Association, or
>
> iii. any charitable, non-profit philanthropic corporation organized for the relief of the poor if the corporation is supported by public funds.

[10] Pursuant to subsections 7(1) and 7(2) of the *Assessment Act, supra*, the Minister of Finance must prescribe classes of real property for the purposes of the Act; subclasses which include but are not restricted to "multi-residential" property and "commercial" property.

[11] Pursuant to s.14(1) of the *Assessment Act, supra*, MPAC must prepare an assessment roll for each "municipality", (defined by section 1 of the legislation as meaning "a local municipality", including "a locality for the purpose of making any assessment required for the levying in a locality of a tax for school purposes"), with the roll to contain specified particulars that include, amongst other required details:

a. a description of property sufficient to identify it;

b. the names of all persons, (with "person" defined by section 1 of the legislation to include a corporation), liable to assessment in the municipality;

c. the amount assessible against each person/corporation liable to assessment;

d. the number of acres or other measurement showing the extent of the relevant land;

e. the current value of the relevant parcel of land;

f. the amount of taxable land; and

g. the classification of the parcel of land.

[12] Pursuant to s.40(1) of the *Assessment Act, supra*, any person may complain in writing to the Assessment Review Board that:

a. the current value of the person's land or another person's land is incorrect;

b. the person or another person was wrongly placed on or omitted from the assessment roll;

c. the person or another person was wrongly placed on or omitted from the roll in respect of school support;

d. the classification of the person's land or another person's land is incorrect; and/or

e. for land, portions of which are in different classes of property, the determination of the share of the value of the land that is attributable to each class is incorrect.

[13] Pursuant to s.46(1) of the *Assessment Act, supra*, any person assessed may apply to the Superior Court of Justice for the determination of any matter relating to the assessment, except a matter that could be the subject of a complain to the Assessment Review Board under s.40(1) of the legislation, or a determination that lands are conservation lands for the purposes of paragraph 25 of s.3(1) of the legislation.

[14] However, pursuant to s.46(7) of the *Assessment Act, supra*, no order of a court on an application under s.46 shall alter an assessment or classification so as to alter taxes for a taxation year before the year in which the application was made.[7]

[15] Pursuant to s.48 of the *Assessment Act, supra*, where any part of an assessment is declared invalid or in error by the Superior Court of Justice, the whole assessment is not thereby invalidated; the court may direct that the assessment roll be altered in accordance with its

[7] In this case, the application brought by the Village was formally issued on December 18, 2018. The court accordingly is prohibited from making any order purporting to alter assessment of the Village's property, so as to alter any taxes thereon, in relation to any year prior to 2018. The relief sought in the notice of application filed by the Village, (i.e., insofar as it seeks a declaration of exemption and corresponding alteration of the city of London's assessment roll only "during the 2018 and all subsequent taxation years"), implicitly acknowledges that limitation.

judgment, and the clerk of the municipality concerned shall, where the judgment is not appealed, so alter the roll.[8]

STATUTORY INTERPRETATION – GENERAL PRINCIPLES

[16] In this case, the parties agree that the issues raised by the Village's application turn on statutory interpretation, in relation to the above tax-related legislative provisions, (particularly insofar as the legislated exemptions from assessment and taxation are concerned), as applied to the particular facts of this case.

[17] As for applicable general principles of statutory interpretation:

a. Historically, caselaw had established numerous different rules or approaches to be employed in ascertaining the meaning of a statute, such as:

i. the "purpose" approach or "mischief" rule, whereby a statute was to be construed to suppress a perceived mischief and advance a perceived remedy;

ii. the "literal" approach or "plain meaning" rule, whereby only the words of the statute could be looked at, and if they were clear by themselves, effect had to be given to them whatever the consequences, with the object of the statute being considered only if there was doubt; and

iii. the so-called "golden rule", which some courts relied upon to permit departure from the literal meaning of a statute if that meaning led to consequences such courts considered to be absurd.[9]

b. However, in the first edition of his text dealing with the construction of statutes, published in 1973, Elmer Driedger assessed the ongoing evolution of the law in this area, and arrived at what he described, in the following terms, as "the modern principle" underlying the proper approach to the interpretation of statutes:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[10]

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[8] Pursuant to s.341 of the *Municipal Act, 2001*, S.O. 2001, c.25, where changes are made to the assessment roll for a municipality, the treasurer of that municipality is required to adjust the municipality's tax roll, and the municipality is obliged to refund any resulting overpayment of tax to the owner of the relevant land, (as shown on the tax roll on the date the adjustment is made), or credit all or part of the tax refund owing to any outstanding tax liability of the owner.
[9] See E.A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto and Vancouver, Butterworth & Co. Canada Ltd., 1983), at p.1.

[10] Ibid., at p.87.

c. That "modern principle" or approach to statutory interpretation, articulated by Driedger, thereafter was cited and relied upon in innumerable decisions of Canadian courts, and was declared to be the approach preferred by the Supreme Court of Canada in *Re Rizzo and Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, at p.41; a preference reiterated and confirmed in *Bell ExpressVu Limited Partnership v. R.*, [2002] SCC 42, at paragraph 26.[11]

d. Following adoption or endorsement of that "modern principle" or approach to statutory interpretation, the Supreme Court of Canada has emphasized that the principle or approach does not permit courts to disregard the actual words chosen by a legislature, and effectively rewrite legislation to accord with the court's own view of how a perceived legislative purpose could be better promoted.[12] Such comments echo earlier comments of the Supreme Court of Canada, emphasizing that a contextual approach may allow courts to depart from the common grammatical meaning of words where doing so is required by a particular context, when words are "reasonably capable of bearing" a particular meaning, but generally does not mandate courts to read words into a statutory provision which are simply not there. Doing so is tantamount to amending legislation, which is a legislative and not a judicial function. Legislation is deemed to be well drafted, and to express completely what the legislator intended to do. Courts should not attempt to reframe statutes to suit their own individual notions of what is just or reasonable.[13]

STATUTORY INTERPRETATION – TAX LEGISLATION

[18] A similar evolution has taken place in the interpretation of fiscal/tax legislation. In that regard:

a. Historically, the courts took a literal approach to revenue statutes to determine legislative intent, and that focus on written expression prevailed almost exclusively over legislative content and purpose. That literal approach, coupled with that restrictive approach to interpretation, resulted in courts placing the onus on legislatures to express themselves clearly, failing which the benefit of doubt went to the taxpayer. In the result, statutes imposing a tax on the person or property of a subject were construed strictly in favour of the subject and against the Crown.[14]

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[11] See also R. Sullivan and E.A. Driedger, *Construction of Statutes*, 4th ed., (Markham and Vancouver, Butterworths Canada Ltd., 2002), at p.1.

[12] See *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, [2011] 2 S.C.R. 306, at paragraph 40.

[13] See, for example, *R. v. McIntosh*, [1995] 1 S.C.R. 686, at paragraphs 26 and 28.

[14] See *Royal Bank of Canada v. Saskatchewan* (1990), 73 D.L.R. (4th) 257 (Sask.C.A.), at p.264, and Sullivan and Driedger, *Construction of Statutes*, 4th ed., *supra*, at pp.441 and 443.

b. That traditional approach to the interpretation of fiscal/tax legislation was based on a number of notions, not all of which have survived or retained their former significance in this area following more recent judicial scrutiny. In particular:

   i. the commitment to literalism was grounded in the idea that tax legislation had no purpose other than raising revenue;

   ii. the insistence on strict construction and the resolution of doubt or ambiguity in favour of the taxpayer was grounded in judicial respect for private property rights; and

   iii. the judicial response to apparent tax avoidance schemes was a strong emphasis on the rule of law, particularly its ideals of certainty, stability and predictability – all of which ensure that taxpayers are able to order their affairs with confidence, and are not taken by surprise.[15]

c. However, in *Stubart Investments Ltd. v. R.* (1984), 84 D.T.C. 6305 (S.C.C.), at p.6323, the Supreme Court of Canada announced a new approach to the interpretation of fiscal/tax legislation. In particular:

   i. The Supreme Court of Canada declared that the view that fiscal legislation was merely a revenue-raising mechanism was no longer tenable. In the hands of modern government, taxation and exemption from taxation have become sophisticated and important tools to promote various economic and social policies and objectives.

   ii. In keeping with that new appreciation, fiscal/tax legislation was to be interpreted in the same manner as other legislation, in an effort to discern and give effect to the intention of the legislature. Words found in tax statutes accordingly are no longer confined to a strict literal interpretation, but are also read in their entire context, having regard to the legislative purpose and scheme. In other words, fiscal/tax legislation, like all legislation, henceforth was to be read and interpreted by courts in accordance with the "modern principle" or approach to statutory interpretation articulated by Driedger. Going forward, Canadian courts interpreting tax legislation, including provisions creating tax exemptions, were to rely on the same principles and techniques used to interpret other kinds of legislation.[16]

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[15] See Sullivan and Driedger, *Construction of Statutes*, 4th ed., at p.441.

[16] See also Sullivan and Driedger, *Construction of Statutes*, 4th ed., *supra*, at pp.446 and 447.

d. The points made by the Supreme Court of Canada in the *Stubart* case were reiterated, with further comments, in *R. v. Golden* (1986), 25 D.L.R. (4th) 490, and *Quebec (Communaute Urbaine) v. Corp. Notre-Dame de Bon-Secours*, [1994] 3 S.C.R. 3. The general principles regarding the interpretation of tax legislation were summarized with greater particularity in the latter decision, at page 20, as follows:

   i. The interpretation of tax legislation should follow the ordinary rules of statutory interpretation;

   ii. A legislative provision should be given a strict or liberal interpretation depending on the purpose underlying it, and that purpose must be identified in light of the context of the statute, its objective and the legislative intent: this is the teleological approach;

   iii. The teleological approach will favour the taxpayer or the tax department depending solely on the legislative provision in question, and not on the existence of predetermined presumptions;

   iv. Substance should be given precedence over form to the extent that this is consistent with the wording and objective of the statute; and

   v. Only a reasonable doubt, not resolved by the ordinary rules of interpretation, will be settled by recourse to the residual presumption in favour of the taxpayer.[17]

e. However, later decisions - including decisions of our Court of Appeal – have reiterated and emphasized the overarching principle that taxing statutes, including exemptions within those statutes, are now subject to the generally applicable rules of statutory interpretation. A provision in such fiscal/tax legislation must be read in its statutory context having regard to the meaning of the words used, the scheme and object of the statute, and the intention of the legislature.[18]

STATUTORY INTERPRETATION – THE ASSESSMENT ACT

[19] Not surprisingly, the approach to statutory interpretation outlined above has been applied repeatedly to the *Assessment Act, supra*. General principles emanating from the caselaw in that regard include the following:

a. The general purpose of the *Assessment Act* is obvious. It is expressed in s.3(1) of the Act; i.e., "All real property in Ontario is liable to assessment and taxation". The

[17] See also *Ottawa Salus Corp. v. Municipal Property Assessment Corp.* (2004), 69 O.R. (3d) 417 (C.A.), at paragraph 23.

[18] See, for example, *Anglican Church of Canada, Diocese of Toronto Camps v. Municipal Property Assessment Corp., Region No. 16*, [2004] O.J. No. 4443 (C.A.), at paragraph 15.

purpose of s.3(1) is "to impose upon all real property in Ontario a general obligation to pay a property tax so that the government can meet its expenditures".[19]

b. However, that purpose is not an absolute one. Section 3(1) of the *Assessment Act* expressly provides that the general purpose is "subject to the following exemptions from taxation". As noted above, twenty-nine exemptions follow, including exemptions for churches, public education institutions, public hospitals, houses of refuge, various charitable institutions, small theatres and large non-profit theatres. Many of the organizations listed in the exemption paragraphs perform activities which are of great benefit either to discrete groups of disadvantaged persons or to society as a whole. The clear implication of these exemptions is that while there is a substantial public interest in the generation of revenue through the taxation of real property, in the context of the real property covered by these exemptions, that public interest is outweighed by the public interest in giving relief from property taxation to certain organizations.[20]

c. It nevertheless must be remembered that it was not the Legislature's intention to grant tax exemptions to all worthwhile charitable institutions, and courts accordingly must scrutinize exemption applications carefully. A charitable institution may carry out worthwhile and commendable work, and still not be entitled to an exemption from municipal assessment and taxation. In relation to applications for an exemption pursuant to s.3(1) of the *Assessment Act, supra*, the quality of work undertaken by an applicant is not the issue.[21] In coming to its conclusions, a court accordingly should not be influenced by the sympathy it might feel for the laudatory aims and commendable activities of the organization requesting a s.3(1) exemption, or the difficulties that organization might face in obtaining funding for the tax liability if the exemption is not granted.[22]

d. Where a court must interpret one of the exemptions provided for in s.3(1) of the *Assessment Act, supra*, the interpretive exercise comes down to a determination of the scope of the exemption. That interpretative process is informed by an appreciation that the exemptions reflect the legislature's assessment of the competing policy considerations identified in the preceding sub-paragraph.[23] It is

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[19] See *Ottawa Salus Corp. v. Municipal Property Assessment Corp.*, *supra*, at paragraph 25, quoting, with approval, *Canadian Mental Health Association v. Ontario Property Assessment Corp.*, [2002] O.J. No. 2199 (S.C.J.), at paragraph 42.

[20] See *Ottawa Salus Corp. v. Municipal Property Assessment Corp.*, *supra*, at paragraph 26.

[21] See *LDARC Corp. v. London (City)* (1985), 29 M.P.L.R. 9 (Ont.Div.Ct.), at paragraph 14.

[22] See *Causeway Foundation v. Ontario Property Assessment Corp., Region No. 3*, [2002] O.J. No. 2482 (S.C.J.), at paragraph 49, affirmed [2003] O.J. No. 1640 (Div.Ct.), affirmed [2004] O.J. No. 214 (C.A.).

[23] See *Anglican Church of Canada, Diocese of Toronto Camps v. Municipal Property Assessment Corp., Region No. 16*, *supra*, at paragraph 16.

also informed by ordinary principles of statutory interpretation requiring that legislation should be interpreted in a manner consistent with the plain meaning of its words, and that every word in a statute is to be given meaning; i.e., that "when a court considers the grammatical and ordinary sense of a provision", it bears in mind that "the legislator does not speak in vain".[24]

e. The test for determining whether an exemption should be granted accordingly is whether the primary purpose of the institution claiming the exemption comes within the words defining the exemption in the *Assessment Act, supra*. This is true with respect to section 3 of the *Assessment Act* generally. It is also true with respect to the interpretation of the specific exemptions set out in section 3 of the Act. That "primary purpose" test is well established in the jurisprudence of this province, and requires an objective determination of the principal purpose for which land is used and occupied, which must be distinguished from others that are incidental to it.[25]

f. Where a court must interpret one of the exemptions provided for in s.3(1) of the *Assessment Act, supra*, reading the legislative provisions of that exemption in context includes having regard to the wording of other exemptions provided for in s.3(1).[26]

g. The law is clear that, when a taxpayer claims an exemption from taxation, that taxpayer has the onus of showing that the situation comes clearly within the terms of the exemption clause in the relevant statute; i.e., because every exemption from otherwise applicable taxation throws an additional burden on the rest of the community. A person claiming an exemption, pursuant to any paragraph of s.3(1) of the *Assessment Act, supra*, accordingly has the onus or burden of establishing that a subject property is exempt from taxation.[27]

h. In relation to what constitutes a "non-profit philanthropic, religious or educational seminary of learning", within the meaning of paragraph 5 of s.3(1) of the *Assessment Act, supra*:

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[24] See *Young Men's Christian Assn. of Greater Toronto v. Municipal Property Assessment Corporation*, 2015 ONCA 130, at paragraphs 13-14.

[25] See *Buenavista on the Rideau v. Ontario Regional Assessment Commissioner, Region No. 2* (1996), 28 O.R. (3d) 272 (Div.Ct.), at p.276; and *Anglican Church of Canada, Diocese of Toronto Camps v. Municipal Property Assessment Corp., Region No. 16, supra*, at paragraphs 11-12.

[26] See, for example, *Anglican Church of Canada, Diocese of Toronto Camps v. Municipal Property Assessment Corp., Region No. 16, supra*, at paragraphs 17-18.

[27] See *Re Ina Grafton Homes v. East York (Township)*, [1963] 2 O.R. 540 (C.A.), at paragraph 13; *Religious Hospitallers of St Joseph Housing Corp. v. Ontario Regional Assessment Commissioner, Region 1* (1998), 42 O.R. (3d) 532 (C.A.), at paragraph 2; and *Canadian Mental Health Association v. Ontario Property Assessment Corporation*, *supra*, at paragraph 23.

i. A "seminary of learning" is not a term of art. It is simply a place of education; a place which is fundamentally devoted to teaching subjects or skills.[28]

ii. For property to be used solely as a "seminary of learning" for purposes of the exemption, subjective intention, (for example, as expressed in a corporation's stated objects), is neither conclusive nor sufficient. Determining the availability of the objection otherwise would depend purely on the corporation's unilaterally drafted statement of intentions; e.g., in the drafting of its corporate objects. There must not only be an intention to use the property for the purpose of a seminary of learning, but the persons in attendance at the property must have dedicated themselves to that purpose, with all profits from use of the property being used for the seminary of learning on that property. Whether a property is used as a seminary of learning accordingly is determined by its primary use, and that is determined by an objective test rather than a subjective test. In each case, courts consider the actual use of land to determine its principal use; not the idea or stated objects of its owners or users.[29]

i. In relation to whether a corporation is "organized for the relief of the poor", within the meaning of sub-paragraph 12(iii) of s.3(1) of the *Assessment Act*, *supra*:

i. The specific purpose of sub-paragraph 12(iii) of s.3(1) of the *Assessment Act* is to grant relief from property taxation to non-profit corporations "organized for relief of the poor" because the public interest in granting these organizations additional resources to relieve property outweighs the public interest in generating revenue through the taxation of property.[30] The relevant tax expenditure subsidy, extended in the public interest, accordingly must be circumscribed so as to be directed only at the charitable activity recognized and approved by the Legislature; i.e., in furtherance of the objective of relieving the poor.[31]

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[28] See *Worldwide Evangelization Crusade (Canada) v. Beamsville (Village)*, [1960] S.C.R. 49, at paragraph 6; *Emmanuel Convalescent Foundation v. Whitchurch (Township)*, [1967] 2 O.R. 487 (H.C.), at paragraph 1, affirmed [1967] 2 O.R. 676 (C.A.); and *Childreach Centre v. Ontario (Regional Assessment Commissioner)*, [2000] O.J. No. 5039 (S.C.J.), at paragraphs 52-53.

[29] See *Inter-varsity Christian Fellowship of Canada v. Muskoka Assessment Commissioner* (1979), 23 O.R. (2d) 589 (H.C.), at p.593; *Associated Gospel Churches v. Ontario Regional Assessment Commissioner, Region No. 13*, (1979), 9 M.P.L.R. 287 (Ont.Div.Ct.), at paragraphs 11 and 15; *Religious Hospitallers of St Joseph Housing Corp. v. Ontario Regional Assessment Commissioner, Region 1*, *supra*, at paragraph 11; and *Childreach Centre v. Ontario (Regional Assessment Commissioner), supra*, at paragraphs 54-55.

[30] See *Ottawa Salus Corp. v. Municipal Property Assessment Corp., supra*, at paragraph 27.

[31] Ibid., at paragraphs 28 and 36.

ii. In this context, the word "poor" does not mean the very poorest, or the absolutely destitute. The word "poor" is more or less relative, and has been extended to encompass those in need of some sort of care to relieve their poverty. Certainly, the word "poor" need not be used expressly in stating or executing such a purpose; calling or labelling the recipients of such relief as "poor" is demeaning to those of low income.[32]

iii. Our courts recognize that, in the context of our complex, multicultural society, and current concerns about relieving poverty, the modern approach to relieving poverty is a multidimensional one which seeks to provide something beyond the basic necessities of life such as food, shelter and clothing; those who provide services to the poor necessarily must concern themselves in the broadest sense with the human as well as the physical condition of their clients.[33]

iv. Generally, however, to gain the benefit of the exemption set forth in paragraph 12 of s.3(1) of the *Assessment Act, supra*, an applicant needs to demonstrate that there is "an element of economic deprivation or need, the relief from which is a part of the purpose of the institution claiming the exemption".[34] To qualify for the exemption, the focus, thrust or emphasis in fact must address poverty in economic terms, and not in accordance with non-economic parameters.[35]

v. While corporate objects may be of assistance in determining whether an institution is organized for "the relief of the poor", it is well settled that a statement of objects contained within incorporating documents is not

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[32] See *Stouffville Assessment Commissioner v. Mennonite Home Association*, [1973] S.C.R. 189, at paragraph 21; *Canadian Centre for Torture Victims (Toronto) Inc. v. Ontario Regional Assessment Commissioner, Region No. 9* (1998), 36 O.R. (3d) 743 (Gen.Div.), at paragraph 3; and *Mackay Homes v. North Bay (City)*, [2005] O.J. No. 919 (S.C.J.), at paragraphs15 and 18.

[33] See, for example: *Canadian Centre for Torture Victims (Toronto) Inc. v. Ontario Regional Assessment Commissioner, Region No. 9*, *supra*, at paragraph 9; *Canadian Mental Health Association v. Ontario Property Assessment Corporation*, *supra*, at paragraph 35; and *Mackay Homes v. North Bay (City)*, *supra*, at paragraph 15.

[34] See, for example: *London (City) v. Byron Optimist Sports Complex Inc.*, [1983] O.J. No. 62 (C.A.), at paragraph 4; *Sandy Hill Community Health Centre Inc. v. Ontario Regional Assessment Commissioner, Region No. 3* (1997), 34 O.R. (3d) 226 (Div.Ct.), at paragraph 14; *Canadian Centre for Torture Victims (Toronto) Inc. v. Ontario Regional Assessment Commissioner, Region No. 9*, *supra*, at paragraphs 4 and 7; *SIM v. Scarborough (City)*, [1998] O.J. No. 2072 (Gen.Div.), at paragraph 52; and *Canadian Mental Health Association v. Ontario Property Assessment Corporation*, *supra*, at paragraph 24.

[35] See, for example: *Sault Ste Marie & District Group Health Association v. Ontario Regional Assessment Commissioner, Region No. 31*, [1999] O.J. No. 1773 (S.C.J.), at paragraphs 13-15; and *Canadian Mental Health Association v. Ontario Property Assessment Corporation*, *supra*, at paragraphs 48-49.

conclusive. The proper enquiry must instead be directed to an examination of the actual activities of the corporation; i.e., to consider whether the institution in fact operates for the relief of the poor, and actually undertakes some form of endeavor to provide such relief. An institution's actual administration and operation are of primary concern in determining whether exemption criteria are met. Expressed in the vernacular, "What you are is what you do." Once again, the applicable test is objective, not subjective.[36]

vi. In making such determinations, it also has been noted and emphasized:

1. that paragraph 12 of s.3(1) of the *Assessment Act, supra*, previously included reference to "any incorporated charitable institution organized for the relief of the poor, the Canadian Red Cross Society, St Johns Ambulance Association, *or any similar incorporated institution* conducted on philanthropic principles and not for the purpose of profit or gain", [emphasis added];

2. that the Legislature amended paragraph 12 in 1998 to remove the "similar incorporated institution" category to which the exemption described therein might apply;

3. that the amendment can only be construed as reflecting an intent on the part of the Legislature to narrow the scope or ambit of the exemption provision in paragraph 12; and

4. that the amendment effectively imposed a formal requirement on charitable institutions claiming the exemption, (other than the Canadian Red Cross Society and St Johns Ambulance Association), to show that they are actually organized for the relief of the poor.[37]

j. In relation to whether land is owned, used and occupied by any charitable, non-profit corporation organized for the relief of the poor and "supported in part by public funds", for the purposes of sub-paragraph 12(iii) of s.3(1) of the *Assessment Act, supra*:

i. Such words, (e.g., "supported in part by public funds", or "supported, in part at least by public funds"), are descriptive of the institution receiving

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[36] See, for example: *Stouffville Assessment Commissioner v. Mennonite Home Association*, *supra*, at paragraph 20; *Sandy Hill Community Health Centre Inc. v. Ontario Regional Assessment Commissioner, Region No. 3* (1997), *supra*, at paragraph 4; *SIM v. Scarborough (City)*, *supra*, at paragraph 52; *Childreach Centre v. Ontario (Regional Assessment Commissioner)*, *supra*, at paragraph 30; *Canadian Mental Health Association v. Ontario Property Assessment Corporation*, *supra*, at paragraph 25; and *Mackay Homes v. North Bay (City)*, *supra*, at paragraph14.

[37] See *Canadian Mental Health Association v. Ontario Property Assessment Corporation*, *supra*, at paragraph 4.

such funds, and not of the particular work that is being conducted on the property in question.[38]

ii. In this context, the term "public funds" means funds received from a government source, not from members of the public.[39]

iii. The relevant charitable institution must also receive such funds directly from a government source; i.e., rather than indirectly.[40]

[20] Before applying those legal principles to the particular facts and circumstances of this case, I pause briefly to summarize what I understand to be the position of each party.

Party positions

[21] At the risk of over-simplification, I think the position of the Village in relation to its application may be summarized broadly as follows:

a. As noted above, the relief sought by the Village is focused on that portion of its property occupied by the School, (i.e., the portion which was classified as "New Construction Commercial" space), which to date has never been treated as falling within an applicable exemption set forth in s.3(1) of the *Assessment Act, supra*. The Village does not suggest that it is exempt from assessment and taxation in respect of the apartment building and community centre portions of its property. To the contrary, the Village expressly acknowledges that its current use of the apartment building and community centre portions of its property are not organized and used primarily for the relief of the poor.[41]

b. In claiming that the "New Construction Commercial" portion of its property should be exempt from assessment and taxation, the Village relies directly on paragraph 5 of s.3(1) of the *Assessment Act, supra*, and indirectly on sub-paragraph 12(iii) of s.3(1) of the *Assessment Act, supra*. In particular:

i. In relation to paragraph 5 of s.3(1) of the *Assessment Act, supra*, the Village submits:

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[38] See *Re Ina Grafton Homes and Township of East York*, *supra*, at paragraph 21.

[39] See *Stouffville Assessment Commissioner v. Mennonite Home Association*, *supra*, at paragraph 17; *Causeway Foundation v. Ontario Property Assessment Corp., Region No. 3*, *supra*, (C.A.), at paragraph 22.

[40] See *Causeway Foundation v. Ontario Property Assessment Corp., Region No. 3, supra*, (S.C.J.), at paragraph 69, and (C.A.), at paragraph 24.

[41] See paragraph 43 of the factum filed by the Village. The same point was acknowledged by counsel for the Village during the course of oral submissions.

1. that its "New Construction Commercial" space constitutes buildings or land clearly less than 50 acres in size, insofar as the entire property of the Village is approximately 3.33 acres in size;

2. that its "New Construction Commercial" space is land "leased and occupied" by the School;

3. that the School is a "non-profit philanthropic, religious or educational seminary of learning"; and

4. that the "New Construction Commercial" space is land that "would be exempt from taxation if it was occupied by [its] owner", as the Village, in that event, would be entitled to the exemption in sub-paragraph 12(iii) of the *Assessment Act, supra*.

ii. In relation to sub-paragraph 12(iii) of the *Assessment Act, supra*, the Village submits that, if the "New Construction Commercial" space was not occupied and used by the School:

1. the Village is and would remain a charitable, non-profit philanthropic corporation;

2. the Village "could and would" own, use and occupy that space "for the relief of the poor", insofar as the Village could and would take steps to use the space to develop and maintain social services designed "to benefit senior citizens and/or families of low income", (an activity contemplated by the letters patent of the Village), through one or more of the possible activities identified in paragraph 6(b) of these reasons; and

3. the Village would be "supported in part by public funds", insofar as it would apply for and likely receive funds from the Ontario Trillium Foundation and/or the London Community Grants Program, as it has in the past.

c. While acknowledging that it does not currently own, occupy and use any property qualifying for any exemption pursuant to s.3(1) of the *Assessment Act, supra*, the Village submits that the language of the relevant exemptions does not make that a disqualifying consideration. It says entitlement to the exemption in sub-paragraph 12(iii) of s.3(1) of the *Assessment Act, supra*, and entitlement to the exemption in paragraph 5 of the Act in turn, is really a "question of capability".

d. While acknowledging that the Village would have no binding obligation to actually own, occupy and use the New Construction Space for the "relief of the poor", the Village notes that there is no such requirement in the wording of paragraph 5 of s.3(1) of the *Assessment Act, supra*, and submits that interpreting the exemption in a manner effectively requiring such an obligation would be overly restrictive. It

also emphasizes that its statement of intention regarding the future, articulated by Ms Ashton in her affidavit, was not challenged expressly in cross-examination.

e. The Village rejects suggestions by MPAC that allowing the Village to secure an exemption from assessment and taxation, based on subjective and unilateral statements of hypothetical conduct in the future, would "open the floodgates" to similar arguments by other property owners, and render the limits on such exemptions meaningless. In that regard, the Village emphasizes that its requested exemption would only apply, and continue to apply, only to the extent its relevant property is leased and occupied by a seminary of learning.

f. The Village urges the court to interpret and apply the exemptions of the *Assessment Act* in a manner giving what it says would be precedence to substance over form, noting that the "New Construction Commercial Space" clearly would be exempt from assessment and taxation if it was owned by the School, just as the former Broughdale Elementary School property was exempt from assessment and taxation when it was owned, used and occupied solely by the School as a seminary of learning.

g. The Village says that granting it the requested exemption would be consistent with the legislative purpose of the exemptions, insofar as the Village is not a "commercial landlord" but a charitable, non-profit philanthropic corporation that benefits the London community, and would be able to do so to a greater extent if it was relieved of the "financial burden" of having to spend a "disproportionate amount of its budget on paying property taxes for the space currently occupied by the London Community Hebrew Day School.

[22] At the risk of engaging in similar over-simplification in relation to the submissions articulated on behalf of MPAC, I think its position in opposing the application brought by the Village may be summarized broadly as follows:

a. MPAC accepts, or in my view at least did not dispute, for the purposes of this application, that:

i. the "New Construction Commercial" space is owned by the Village and consists of buildings and land less than 50 acres in size;

ii. the space currently is leased and occupied by the School, which is a non-profit philanthropic "seminary of learning", and previously owned property, (i.e., the former Broughdale Elementary School Property on Epworth Avenue), that properly qualified for the exemption set forth in paragraph 5 of s.3(1) of the *Assessment Act, supra*; and

iii. the Village is a charitable, non-profit philanthropic organization.

b. However, MPAC denies that the "New Construction Commercial" space falls within the scope of the claimed exemption set forth in paragraph 5 of s.3(1) of the *Assessment Act, supra*, insofar as:

    i. the relevant portion of land clearly is not "owned, used and occupied" by the School; and

    ii. MPAC contends that there is no legal or factual basis for finding that the Village has satisfied its onus of proving that "the land would be exempt from taxation if it was occupied by the owner", so as to qualify the property for the paragraph 5 exemption in that manner.

c. The latter position adopted by MPAC is based on a number of grounds, but includes the following submissions:

    i. MPAC says the relevant statutory language does not support or permit the approach suggested by the Village. In particular:

        1. MPAC says the language and context of the relevant exemption in paragraph 5 of s.3(1) of the *Assessment Act* requires a consideration of whether the nature and character of the relevant property owner, (i.e., the owner of the property leased and occupied by a non-profit philanthropic, religious or educational seminary of learning), as that owner exists and operates in a relevant taxation year, would cause the land to be exempt from assessment and taxation if the owner itself occupied the relevant land.

        2. MPAC says the language and context does not permit qualification for the exemption based on entirely hypothetical scenarios involving activities an owner says it *might* conduct that *could* make the owner eligible for an exemption if it occupied the land in question, and that such an approach essentially would constitute an impermissible rewriting of the statute. In particular, MPAC says allowing such an approach would render the important qualifying limitation set forth in the exemption – i.e., that the land *would* be exempt from taxation if it was occupied by *the owner* – effectively meaningless. It would permit qualification for the exemption by an applicant owner simply positing various hypothetical scenarios in which the owner might engage in transformative activities, (i.e., potentially changing the nature and character of the relevant owner), that might never come to pass, without evidence of any actual qualification for the exemption.

        3. MPAC emphasizes that the Village - as it has existed and operated in the relevant taxation years - has not been eligible, and currently is not eligible, for any exemption from assessment and taxation

pursuant to s.3(1) of the *Assessment Act, supra*, including any exemption pursuant to sub-paragraph 12(iii) of that subsection. In particular, the Village has not conducted and currently does not conduct itself in the hypothetical manner contemplated in Ms Ashton's affidavit; i.e., using any portion of its land primarily for the purpose of "relief of the poor", through any of the possible activities mentioned by Ms Ashton. Nor does it have any immediate plans to do so. To suggest that the Village will do so essentially suggests that the Village, in the future, will assume a nature, character and purpose, (i.e., through fundamentally changed operations), that it currently does not in fact have.

ii. MPAC submits that, even if consideration of such hypothetical scenarios was permitted by the legislation, the Village has failed to provide any evidence sufficient to meet its burden of proving that it would qualify its property for the exemption set forth in sub-paragraph 12(iii) of the *Assessment Act, supra*, and therefore for the exemption set forth in paragraph 5 of the *Assessment Act, supra*. In that regard, MPAC notes and emphasizes that:

1. the existing letters patent of the Village do not expressly contemplate any of the hypothetical activities listed by Ms Ashton in her affidavit;

2. the Village has not even clarified or confirmed which of the "laundry list" of highly varied activities provided by Ms Ashton it would engage in, if it occupied and used the "New Construction Commercial" space on its property; and

3. the Village also has failed to provide any particulars in relation to any of the hypothetical activities listed by Ms Ashton, in turn preventing any adequate demonstration that its operations would in fact meet the criteria required to qualify for an exemption, even if it was engaged in one or more of the hypothetical activities suggested in Ms Ashton's affidavit.

iii. MPAC submits that the Village has failed to demonstrate, in any event, satisfaction of the "public funds" requirement in sub-paragraph 12(iii) of s.3(1), thereby providing another reason why the Village not met its onus of demonstrating, on a balance of probabilities, satisfaction of the paragraph 5 requirement that the "New Construction Commercial" space would be exempt from taxation if it was occupied by the Village. In that regard:

1. MPAC does not dispute that the Village has received public funds in the past, in the manner described above.

2. MPAC nevertheless emphasizes that the Village is not presently supported by public funds. Moreover, its past receipt of public funds has been limited to isolated funding for specific capital improvements and financing in respect of its non-exempt apartment building, and a one time-grant for its non-exempt Holocaust Library.

3. On a related note, MPAC emphasizes that the Village has never received any public funding for services primarily related to relief of the poor. The best the Village can and does say, in that regard, is that it has previously received government funding, and would seek government funding again, in relation to its hypothetical proposed use of the "New Construction Commercial" space, if it occupied that space instead of the School.

4. In the result, MPAC essentially argues that, in relation to the "supported in part by public funds" requirement of the exemption set forth in sub-paragraph 12(iii) of s.3(1) of the *Assessment Act, supra*, the Village once again relies on hypothetical scenarios not permitted by the legislation, and/or has failed to demonstrate, with sufficient evidence, on a balance of probabilities, its actual satisfaction of the "public funds" requirement.

[23] With all of the above in mind, I turn finally to my own analysis of the situation, and the merits of the application brought by the Village.

Analysis

[24] For numerous reasons, I find that MPAC's position is generally correct, that the Village's position is incorrect, and that the Village's application must be dismissed. Without limiting the generality of the foregoing:

a. For the reasons set out hereafter, in my view there is no reasonable doubt as to the proper interpretation of the relevant provisions of the *Assessment Act, supra*, not resolved by the ordinary rules of interpretation, requiring resolution by recourse to the residual presumption in favour of the taxpayer.

b. In my view, MPAC's interpretation of the exemption set forth in paragraph 5 of s.3(1) of the *Assessment Act* is supported by the ordinary and grammatical meaning of the words used by the Legislature in the relevant statutory provision. In that regard:

i. The relevant provisions of paragraph 5 of s.3(1) of the *Assessment Act, supra*, relied upon by the Village, are those allowing an exemption for land leased and occupied by a seminary of learning "if the land would be exempt if it was occupied by the owner".

ii. I think the natural and ordinary meaning of that wording obviously calls for consideration of a hypothetical scenario, but one limited to notional occupation of the relevant land by "the owner" of the land; i.e., the existing owner of the property during the relevant year for which the exemption is sought. In effect, the relevant wording of the exception makes the existing nature, character and operations of that owner, if notionally put in occupation of the relevant land, the touchstone for exemption qualification.

iii. In my view, the natural and ordinary meaning of the relevant wording does not contemplate or permit a hypothetical upon a hypothetical; i.e., permitting consideration of a scenario where the owner is not only notionally placed in occupation of the property, but also notionally transformed into an owner with a fundamentally different nature, character and/or operations than the existing owner demonstrably has or had during the relevant tax year, in order to bring itself within another s.3(1) exemption where that otherwise would not be possible. I think such an approach and exercise would require reading additional words into the statute which are simply not there.

iv. I think my views in that regard are supported by the words deliberately chosen by the Legislature, and their proper grammatical interpretation. In particular:

1. It is important to note that the Legislature deliberately chose to frame and limit the permissible hypothetical by use of the words "if it *was* occupied by the owner", (emphasis added), and not "if it *were*

occupied by the owner". By doing so, the Legislature signalled its use of an *indicative* clause, (where the word "if" introduces a thought that is true or could well be true), rather than its use of a *subjunctive* clause, (where the word "if" introduces a notion that is demonstrably untrue, hypothetical or improbable), in turn providing an indication that the Legislature was intended to limit the scope of consideration to notional occupation by the owner and what that alone demonstrably would mean in terms of exemption qualification; i.e., without opening the door to an unlimited range of further hypotheticals incapable of immediate proof one way or the other.[42]

2. That inference is reinforced by the Legislature's deliberate use of the word "would" rather than "could" to frame and limit the permissible hypothetical; i.e., intentionally limiting consideration to whether "the land *would* be exempt from taxation if it was occupied by the owner", (emphasis added), rather than opening the door to an unlimited range of further hypotheticals by inviting consideration of whether "the land *could* be exempt from taxation if it was occupied by the owner". The word "would", (a variation of the verb "will"), is one "indicating the consequence of an imagined event", whereas the word "could", (a variation of the verb "can"), is a word referring to ability, and one used to express an element of doubt as to whether something will happen.[43]

3. Drawing those word choices and their grammatical implications together, it seems clear the Legislature contemplated a more focused exercise than that contemplated by the Village when determining whether the relevant provisions of paragraph 5 of s.3(1) of the *Assessment Act*, *supra*, would apply to exempt a property from assessment and taxation. In particular, the limited hypothetical or "imagined event" was occupation of the property by the existing owner in any given taxation year, the tax/exemption consequence of which then would be something capable of proof one way or the other by examination of that existing owner's nature and character – including but not limited to that existing owner's organization and activities during the relevant tax year. The words and grammar employed by the Legislature did not invite a further leap into consideration of innumerable possibilities that might or might not come to pass in the future, if changes were or were not made to the

[42] See Bill Bryson, *The Penguin Dictionary of Troublesome Words*, 2nd ed., (Markham, Penguin Books Canada Ltd., 1987), at pp.85-86.

[43] See *The Concise Oxford Dictionary*, 11th ed., Revised, at pp.1664 and 202, respectively.

nature, character, organization and/or activities of the property's owner in the future; all matters inherently speculative and incapable of proof.

c. In my view, MPAC's interpretation of the exemption set forth in paragraph 5 of s.3(1) of the *Assessment Act*, *supra*, is also supported by the broader context in which that exemption appears. In that regard:

i. A number of judges have commented on a perceived lack of "rhyme or reason" when it comes to explaining why and how the Legislature has chosen to extend certain exemptions to assessment and taxation; e.g., in terms of how the Legislature has chosen and framed eligibility criteria applicable to certain exemptions, so as to make the exemption available in some situations but not others.[44] Such realities, and the obvious wide variety of situations addressed by the 29 paragraphs of s.3(1) of the *Assessment Act*, *supra*, generally make it difficult to discern any commonalities between the various exemptions, warranting application of the *ejusdem generis* rule of statutory construction.

ii. Having said that, in my view, a review of the 29 paragraphs of s.3(1) of the *Assessment Act*, *supra*, reveals a remarkably pronounced and generally consistent focus on the present when the Legislature is describing situations that give rise to the contemplated exemptions; i.e., on current circumstances, rather than on what may or may not come to pass in the future. To cite just some examples:

1. Throughout many of the various exemptions, the Legislature clearly speaks to land "owned" by certain levels of government, land that "is" owned, "used", "occupied", "leased" and/or "operated" by certain institutions or in certain ways. The Legislature does not speak to land that may be owned, used, occupied, leased, operated, etc., by some other owner, or used in some other manner, in the future.

2. In other exemptions, the Legislature effectively indicates its focus on the present rather than the future by use of verbs and qualifying adjectives in the present tense, and in other ways; e.g., by reference to "actual occupation", to land "being … maintained, preserved and kept open", to machinery being "used" for certain purposes, to the foundations on which machines and equipment "rest", to the current age of persons for whom certain lands are improved, to designated airport authorities qualifying for an exemption so long as they are

[44] See, for example, *Young Men's Christian Association of Greater Toronto v. Municipal Property Assessment Corporation*, 2014 ONSC 3657, at paragraph 42.

and remain designated and continue to make certain required payments to municipalities, to land that "is" conservation land, and so on.

iii. Having regard to that rather consistent focus throughout s.3(1) of the *Assessment Act* – i.e., on whether present circumstances warrant an exemption from assessment and taxation under s.3(1) of the *Assessment Act, supra* - I think it would be anomalous if the far less frequent references to hypothetical scenarios, (e.g., in paragraphs 4, 5 and 22), were interpreted as permitting reliance on wide-ranging future possibilities to obtain eligibility for an exemption. In my view, it is more consistent with the broader context in which such exemptions are found to limit the contemplated and permissible hypothetical to the specific fact scenario expressly contemplated and described by the Legislature, (e.g., immediate notional occupation of land by "the owner", or the need for a senior or disabled person to live in other premises with on-site care but for the availability of a particular improved accommodation or facility being considered for a tax exemption), without allowing that particular, specified and limited hypothetical scenario to be compounded by additional hypothetical qualifications regarding the future.

d. In my view, MPAC's interpretation of the relevant exemptions, and their application to the situation of the Village, is harmonious with the scheme and object of the *Assessment Act, supra*, and furthers the purpose intended by the Legislature. In that regard:

i. Although the Village emphasizes its charitable, non-profit and philanthropic nature, that it is not a "commercial landlord", that its laudable work benefits the London community, and that it would be able to carry out that work more easily without the burden of paying tax on the "New Construction Commercial" portion of its property, it bears repeating that it was not the Legislature's intention to grant tax exemptions to all worthwhile charitable institutions, however commendable their work might be.

ii. The Legislature instead chose to specify a limited range of circumstances wherein the Legislature decided that the substantial public interest in raising revenue through the taxation of real property was outweighed by the public interest in giving relief from property taxation to certain owners/organizations; i.e., so that those particular identified owners/organizations would have more funds available to engage in the beneficial work the Legislature considered, on an exceptional basis, to be more important to the public interest than the raising of tax revenue.

iii. In my view, the statutory interpretation and outcome proposed by the Village would not be consistent with that legislative scheme and purpose

underlying the *Assessment Act, supra*, and its s.3(1) exemptions. In particular:

1. If the Village's position is accepted, the "New Construction Commercial" portion of its property would be exempt from assessment and taxation indefinitely; i.e., for each and every year the School leases and occupies that portion of the Village's property, using it as a seminary of learning.

2. During each and every year of that exemption, the public interest in raising revenue through taxation of that portion of the Village's real property, which otherwise would flow from general application of the *Assessment Act, supra*, would not be served.

3. However, during each and every year of that exemption, that detrimental impact on the public interest through lost tax revenue would not necessarily be offset by any corresponding benefit to the public interest from the untaxed funds being devoted to an institution or particular use the Legislature specifically deemed worthy of support and promotion, on an exceptional basis, through the deliberately limited and circumscribed exemptions in s.3(1) of the *Assessment Act, supra*. In particular, the Village might *never* reorganize its affairs and actually use any of its property principally "for relief of the poor", as that term has been interpreted for purposes of the *Assessment Act, supra*. The Village and the School might continue their current arrangement and operations indefinitely, such that the Village is never put in the position of having to decide how it will use the "New Construction Commercial" space. Alternatively, if and when the School ceases its operations or otherwise vacates the relevant space, the Village - through choice or supervening events - might never follow through on its currently stated intention to reorganize its operation and use the space principally "for relief of the poor".

4. In the indefinite meantime, while entitlement to the desired exemption certainly would provide the Village with more available funding it could and likely would devote to its current commendable activities, those simply are not activities the Legislature singled out for special consideration and promotion through the exemptions to s.3(1) of the *Assessment Act, supra*.

5. In short, the statutory interpretation and outcome contemplated by the Village is fundamentally inconsistent with the Legislature's determination of how competing public interests should be balanced, in relation to taxation and exemption from taxation under the *Assessment Act, supra*.

e. On a related note, in my view the statutory interpretation and approach suggested by the Village would be at odds with the substantial jurisprudence that has developed, in relation to the exemptions granted by s.3(1) of the *Assessment Act, supra*, insisting on an objective rather than subjective approach to determining the primary or principal use of a property.[45] In that regard:

   i. In my view, such insistence is a reflection of our courts' dedication to ensuring that the *Assessment Act* is interpreted in a manner that is harmonious with the scheme and object of the Act and the intention of the Legislature in that regard, as confirmed by our Court of Appeal; i.e., to ensure respect for the public interest balance struck by the Legislature in enacting the specified exemptions. In particular, subordinating the public's interest in generating tax revenue, through the granting of an exemption from assessment and taxation to promote another objective the Legislature has deemed desirable, must be offset by an actual arrangement whereby the retained revenue will be devoted to the particular beneficial institution or use the Legislature has chosen to subsidize via the exemption. If an applicant for an exemption is incapable of demonstrating the actual existence of such an offsetting arrangement, (as opposed to mere contemplation of such an arrangement which has yet to be made manifest), the exemption should be and usually is denied.

   ii. As noted earlier in these reasons, insistence on an objective rather than subjective approach to such determinations is particularly well settled in relation to application of the exemption permitted by sub-paragraph 12(iii) of s.3(1) of the *Assessment Act, supra*. Again, our courts repeatedly have emphasized that it is not enough that an applicant intends to engage in activities for the "relief of the poor"; e.g., through a statement of objects in the applicant's incorporating documents or otherwise. The relevant exemption is granted only if the applicant institution in fact operates for the relief of the poor, and actually undertakes some form of endeavor to provide such relief.

   iii. In approaching paragraph 5 of s.3(1), in situations where an applicant is relying on the provisions exempting land leased or occupied by a seminary of learning "if the land would be exempt from taxation if it was occupied by the owner", there clearly must be some allowance and adjustment made for the reality that the applicant, not in possession of the land, obviously cannot demonstrate the owner's actual use of that land for the principal or primary purpose of "relief of the poor". In such situations, the relevant land inherently will not be available for actual use by the owner; i.e., if the land is leased and occupied by a seminary of learning. Having said that, in my

[45] In my view, that is the relevant "substance over form" consideration that needs to be given precedence, in terms of adopting a statutory interpretation consistent with the wording and objective of the *Assessment Act, supra*.

view recognition of that reality warrants modification - rather than complete waiver - of the requirement otherwise applicable to demonstrating entitlement to an exemption pursuant to sub-paragraph 12(iii) of s.3(1) of the *Assessment Act, supra*; i.e., the normally required evidence that the applicant is actually organized and engaged in "relief of the poor". For example:

1. Objective demonstration that an applicant property owner already is organized for and engaged in such "relief of the poor" activity, in some fashion other than use of the particular land leased and occupied by the relevant seminary of learning, might sufficiently increase the likelihood that applicant owner would use the relevant leased and seminary-occupied property for the purpose of "relief of the poor", if the owner occupied that property. That in turn might warrant a conclusion, depending on the evidence presented, that granting the desired paragraph 5 exemption, in such circumstances, would further the scheme, object and intent of the legislation. In particular, where an applicant who owns land leased and occupied by a seminary of learning seeks an exemption pursuant to paragraph 5 of s.3(1) of the *Assessment Act, supra*, in relation to that land, and objectively is already organized and engaged in activities for "relief of the poor", granting such an applicant use of the paragraph 5 exemption frees up revenue, otherwise payable in taxes, which the applicant then can devote to the particular "relief of the poor" purpose the Legislature wanted to subsidize through the exemption.

2. Even without a substantial existing "track record" of such "relief of the poor" organization and activity, a similar likelihood of a such an applicant using such property for "relief of the poor", (i.e., if the owner of property leased and used by a seminary of learning occupied that property instead), and corresponding furtherance of the legislative scheme, object and intent of the *Assessment Act, supra*, might be demonstrated sufficiently by evidence confirming, in an objective and satisfactory way, some kind of legal compulsion effectively requiring the applicant to engage primarily in such "relief of the poor" activity if the desired exemption is granted; for instance, letters patent that are essentially immutable for some reason, requiring the applicant corporation to engage in that type of activity and no other.

3. Moreover, while the Village has focused on arguments that it qualifies for the exemption in paragraph 5 of s.3(1) of the *Assessment Act* because it would qualify for the sub-paragraph 12(iii) exemption of s.3(1) if it occupied its property leased and occupied by a seminary of learning, (apparently because the Village perceives that principal or primary use of the "New Construction

Commercial" space for "relief of the poor" would be the only exempt activity/use permitted by the stated objects in its existing letters patent), it should be borne in mind that a corporation seeking to rely on the exemption in paragraph 5 of s.3(1) need only demonstrate that "the land would be exempt from taxation if it was occupied by the owner". In other words, demonstrated eligibility for an exemption pursuant to any of the paragraphs or sub-paragraphs to s.3(1) of the *Assessment Act, supra,* if the owner occupied land leased and used by a seminary of learning, would suffice.

iv. For present purposes, however, I think I need only state my conclusion, for the reasons outlined above, that the current application and suggested approach of the Village sets the bar too low, insofar as it essentially suggests that a mere non-binding statement of subjective future intention to engage in "relief of the poor", without any significant past history or current practice of engaging in such activity, should suffice; i.e., in terms of the court making an objective determination that an applicant corporation would be eligible for an exemption pursuant to sub-paragraph 12(iii) of s.3(1) of the *Assessment Act, supra,* if it occupied property owned by the corporation but currently leased and occupied by a seminary of learning.

f. I am inclined to agree with MPAC that, even if consideration of entirely hypothetical scenarios was permitted by the legislation to demonstrate satisfaction of the criteria for exemption eligibility demanded by paragraph 5 of s.3(1) of the *Assessment Act, supra*, (i.e., to support the Village's contention that it would use the "New Construction Commercial" principally for "relief of the poor), the evidence tendered by the Village in that regard is insufficient to permit a finding that the Village has satisfied the relevant onus it would bear to demonstrate entitlement to the desired exemption. In that regard:

i. I am not particularly troubled by the fact that the existing letters patent of the Village do not expressly contemplate any of the hypothetical activities listed by Ms Ashton in her affidavit. In my view, the broadly stated objects of the Village – particularly insofar as they allow the Village to develop and maintain social services to benefit senior citizens and/or families of low income - are wide enough to encompass many, (although not all), of the possible activities mentioned by Ms Ashton in her affidavit, if organized and carried out in a manner designed to effectively extend such benefits.

ii. However, I share MPAC's concern that the intentions/plans of the Village in that regard are so unspecified and lacking in particulars that they defy any meaningful practical assessment of whether use of the property for one or more such purposes would demonstrate its principal use for relieving an element of economic deprivation or need.

iii. I also agree with MPAC that the Village has failed to demonstrate, on the evidence presented, satisfaction of the "public funds" requirement in sub-paragraph 12(iii) of s.3(1) of the *Assessment Act, supra*. In that regard:

1. I think the wording of sub-paragraph 12(iii) makes it abundantly clear that the Legislature did not contemplate satisfaction of that requirement, in relation to any and all taxation years, by the simple expedient of an institution having received a degree of public funds on some isolated occasion in the past. The wording used by the Legislature an applicant corporation, satisfying the sub-paragraph's other criteria, will be entitled to the exemption "if the corporation *is* supported in part by public funds". [Emphasis added.]

2. In this case, the evidence indicates that the Village has received public funds directly from government sources in the past, but also that such funding, apart from the CHMC mortgage subsidy, has been sporadic. It also has been specific purpose or project oriented, and inherently time limited. Moreover, now that the Village mortgage has been paid in its entirety, there is no evidence to suggest any current or pending receipt of additional public funding. Even if that mortgage subsidy was sufficient to constitute public funding for the 2018, 2019 and 2020 taxations years, the Village's receipt of public funding in the future seems, on the presented evidence, to be entirely speculative.

[25] Collectively, if not individually, such considerations and concerns are more than sufficient to persuade me that the Village has not satisfied its onus of demonstrating that it is entitled to the exemption it seeks. It accordingly is also not entitled to the consequential relief it requested; i.e., in terms of an order directing alteration of the City of London's assessment roll, and the refund of paid municipal taxes that would follow on such an alteration.

[26] For the reasons outlined above, the application brought by the Village is dismissed.

Costs

[27] Because my decision was reserved, the parties were unable to make any submissions regarding costs, having regard to the substantive outcome of the application and counter-application.

[28] It is always preferable for parties to discuss and agree on cost resolutions acceptable to all concerned.

[29] However, if the parties are unable to reach an agreement on entitlement and/or quantum in relation to outstanding cost issues:

a. MPAC may serve and file written cost submissions, not to exceed five pages in length, (not including any bill of costs, settlement offers, authorities or other necessary attachments), within two weeks of the release of this decision;

b. The Village then may serve and file responding written cost submissions, also not to exceed five pages in length, (not including any necessary attachments similar to those described in the previous sub-paragraph), within two weeks of the time specified for delivery of MPAC's written cost submissions; and

c. MPAC then may serve and file, within one week of receiving any responding cost submissions from the Village, reply cost submissions not exceeding two pages in length.

[30] If no written cost submissions are received within four weeks of the release of this decision, there shall be no costs awarded in relation to the application.

Ian F. Leach

Justice I.F. Leach

Date: November 5, 2020