

Federal Court



Cour fédérale

**Date: 20160208**

**Docket: T-925-15**

**Citation: 2016 FC 124**

**Ottawa, Ontario, February 8, 2016**

**PRESENT: The Honourable Mr. Justice Barnes**

**BETWEEN:**

**MARCUS BRAUER**

**Applicant**

**and**

**CANADA (ATTORNEY GENERAL)**

**Respondent**

**JUDGMENT AND REASONS**

[1] This is an application by Major Marcus Brauer challenging a decision by the Treasury Board Secretariat [Treasury Board] which denied his claim for reimbursement for the loss of \$88,000.00 in equity arising from the sale of his home in Bon Accord, Alberta. This is the second time Major Brauer has brought his case before this Court on judicial review. On May 23, 2014 Justice Richard Mosley allowed Major Brauer's application for judicial review. He ordered the Respondent to reconsider his claim for reimbursement because the Treasury Board's decision

was based on sales data for the City of Edmonton and not for the Town of Bon Accord: see *Brauer v Canada*, 2014 FC 488, [2014] FCJ No 553.

I. Background

[2] Major Brauer is a member of the Canadian Forces. In 2007, in conjunction with a promotion, he was posted to Canadian Forces Base [CFB] Edmonton from CFB Borden. Because there was no on-base rental housing available to the family, the Brauers purchased a modest home in Bon Accord at a price of \$405,000.00. The Town of Bon Accord lies 40 km north of the City of Edmonton and is home to about 1500 residents.

[3] In 2010, Major Brauer was assigned to CFB Halifax. On the advice of a local real estate agent the family home was listed for sale at \$349,000.00. The home was eventually sold for \$317,000.00. This represented a loss of equity of \$88,000.00 – or almost 22 percent of Major Brauer’s initial purchase price.

[4] Major Brauer’s claim for reimbursement was made under the Canadian Forces Integrated Relocation Program Directive (2009) [CFIRP Directive] and, in particular, Article 8.2.13 dealing with home equity assistance. That provision provides the following relief to Canadian Forces members who sustain home equity losses upon being reposted:

As per the HEA calculation criteria listed below, CF members who sell their home at a loss are entitled to reimbursement for up to 100% of the difference between the original purchase price and the

Conformément aux critères de calcul de la garantie de remboursement ci-dessous, les membres des FC qui vendent leur maison à perte ont droit au remboursement d’une portion où de la totalité de la

sale price from specific funding envelopes as follows:

différence entre le prix d'achat original et le prix de vente, par l'entremise d'une enveloppe de financement spécifique, de la façon indiquée ci-dessous.

Core benefit:

Indemnité de base

- 80% of the loss, to a maximum of \$15,000; and
- 100% of the loss, in places designated as depressed market areas by Treasury Board Secretariat (TBS).

- Remboursement de 80 p. 100 des pertes jusqu'à concurrence de 15 000\$.
- Remboursement de 100 p. 100 des pertes dans les endroits désignés par le Secrétariat du Conseil du Trésor (SCT) comme des secteurs où le marché de la vente de maisons est faible.

...

[...]

Depressed market, as established by Treasury Board Secretariat, is defined as a community where the housing market has dropped more than 20%.

Le marché déprimé, comme établi par le secretariat du conseil du trésor (SCT), est défini en tant que communauté où le marché du logement a baissé de plus de 20%.

[5] In order to obtain a full indemnity for his home equity loss Major Brauer was required by the CFIRP Directive to establish that the real estate market in Bon Accord had declined by at least 20 percent during the period between the purchase and the sale of his home. In fulfilment of that requirement, Major Brauer obtained a real estate market analysis from Royal LePage (Brad Redekopp). The Redekopp Report indicated that, from the beginning of 2007 through to the end of 2009, the average sale price of single family homes in the Town of Bon Accord had decreased by an average of 23.11 percent: in other words, the market was “depressed”.

[6] Following Justice Mosley's decision, the Treasury Board engaged the services of Acumen Real Estate Valuations Inc. to conduct an analysis of the real estate market in Bon Accord. The Acumen Report examined sales data for both the City of Edmonton and the Town of Bon Accord. With respect to the latter, the author concluded as follows:

With respect to the Town of Bon Accord, we analyzed 109 sales of single family dwellings which sold on the MLS between June 2007 and May 2010. Regarding the 109 sales, the average sale price, during each year was calculated. On this basis, we found the average price declined 15.11% from 2007 to 2008, a further 8.30% from 2008 to 2009, followed by an increase of 13.30% in 2010 (first five months). Overall, the variance from the average 2007 and 2010 price indicates a decline of 11.79%.

[7] The Acumen Report was sent to Major Brauer and to the Treasury Board for consideration. The Treasury Board appointed an Advisory Panel to assess the Acumen Report and the other relevant evidence, including the Redekopp Report and submissions from Major Brauer's legal counsel. The Advisory Panel concluded that the Bon Accord real estate market did not constitute a "depressed market" because the valuation decline was in the range of only 10.8 percent to 11.8 percent. This conclusion was based on the following rationale:

The Panel approached the evidence objectively and with an open mind. Given that the applicant provided a limited number of home sales in 2010, the Panel relied on Acumen's report as the primary source of evidence because it included all single-family dwellings sold in 2010 prior to the applicant's exit from the market. The Panel assessed the effect on the outcome of the discrepancies noted above between the applicant's and Acumen's reports. It also considered an alternative approach, based on a six-month rolling average, to define comparable reference periods to assess the size of the housing market decline. The results of the various calculations considered are summarized in Table 1 below.

As shown in Table 1, Acumen concluded that the decline from June-December 2007 to January-May 2010 in the Bon Accord housing market for single family dwellings was 11.8%. Although the applicant's house was taken off the market on May 30, 2010, it

was not included in the May data due to a lag in the MLS reporting system. In order to determine whether including the sale of the applicant's house would have a material impact on the outcome of Acumen's overall housing market assessment, the Panel added it to the data. This increased the number of 2010 sales listings in the Acumen report from 10 to 11. The impact on the calculation was that the decline in average sale price dropped to 10.9% from 11.8% in Acumen's report.

Additionally, the Panel was able to develop an alternative assessment of Bon Accord with the evidence before it. Due to the overlap of the data on property sales provided by the applicant and Acumen, it was able to assess housing sales between January 1, 2007 and May 31, 2010. The combined data set includes 124 properties (less the two bungalows sold in 2007 and the four vacant lots sold in 2009, mentioned previously). Next, it calculated a six-month rolling average of sale prices. Rolling averages are a common measure of the health of a market often used in the financial world. Indeed, the applicant cites a similar measure in his depressed market assessment, a four-quarter rolling average. The main differences provided by this approach compared to the Acumen calculation are: 1) that it bases the estimated average market price at the time of purchase on the six-month period prior to the purchase of the residence by the applicant, instead of the seven months after the purchase, as per the Acumen report, 2) that it takes into consideration more property transactions in the calculation of the average market price at the time of purchase and sale of the applicant's house, and 3) that it uses consistent periods for comparison. Based on this approach, the average sale price in the six months prior to the applicant's sale of his residence, which included 15 sales, was 10.8% below the average sale price of the six months leading up to his purchase in June 2007, which included 24 sales.

Finally, the Panel reviewed the applicant's assessment to determine the impact on his calculation of excluding the four vacant lots sold in 2009. The result is that the average sale price in 2009 dropped by 17.1% from 2007, compared to 23.1% when the vacant lots are included. This shows clearly that when the vacant lots are excluded from the calculation, the market decline estimation for 2009 drop significantly below the threshold required to consider the market depressed.

In summary, the Panel has determined that the applicant's evidence was insufficient to carry out the FCC order for reconsideration. In order to provide more complete evidence to meet the FCC requirements, TBS solicited third-party expertise. Acumen, the

selected firm, determined that Bon Accord was not a depressed market in 2010. TBS provided the applicant with an opportunity to review Acumen's report and provide submissions. The Panel validated Acumen's conclusion with an alternative assessment based on a six-month rolling average. Moreover, Acumen's assessment identified the inclusion of four vacant lots sold in 2009 that biased the applicant's calculation. Upon exclusion for the reasons noted above, the estimated market decline for 2009, which was presented in the applicant's submission (as opposed to 2010, instructed by the FCC), dropped below 20%.

Overall, it is evident in the Panel's view that Bon Accord's housing market did not meet the definition of depressed market status when the applicant sold his residence in 2010.

[8] It is apparent that the Advisory Panel Report was not shared with Major Brauer before the Treasury Board accepted its findings. At the same time, Major Brauer did not, at any point before the hearing of this proceeding, contend that he was denied procedural fairness by the Treasury Board.

[9] It is from the Treasury Board decision that this application arises.

## II. Issues

- A. *What is the applicable standard of review?*
- B. *Did the Treasury Board err in its decision that Bon Accord was not a depressed market as defined by the CFIRP Direction?*
- C. *Did a breach of procedural fairness occur from the fact that Major Brauer was not provided with a copy of the Advisory Panel Report before the Treasury Board make its decision?*

III. Standard of Review

[10] Justice Mosley's decision includes a thorough standard of review analysis leading him to apply the standard of reasonableness.

[11] The issue before Justice Mosley concerned the interpretation of the word "community" as used in the CFIRP Directive. He found it was unreasonable for the Treasury Board to have relied upon sales data from the City of Edmonton as a proxy for the community of Bon Accord. In the result, he remitted the matter for redetermination with a direction that, in determining the extent of any market decline, the Treasury Board use residential sales data limited to the Town of Bon Accord.

[12] The issues before me involve evidentiary challenges. Among other things, Major Brauer argues that the Treasury Board erred by relying on a third-party appraisal report (the Acumen Report) that contained several material errors. These are matters attracting a deferential standard of review and I will, therefore, adopt and apply the reasonableness standard in accordance with Justice Mosley's analysis. I note, as well, that the parties agree that deference applies to the evidence-based issues before the Court.

*Did the Treasury Board err in its decision that Bon Accord was not a depressed market as defined by the CFIRP Direction?*

[13] Major Brauer argues that the Treasury Board decision was unreasonable because its Advisory Panel relied, to a significant degree, on the Acumen analysis – an analysis that Major Brauer characterizes as “fatally flawed”.

[14] The errors asserted on behalf of Major Brauer are the following:

- (a) By incorporating sales data for the City of Edmonton into its analysis, Acumen failed to comply with Justice Mosley’s direction that only sales data for the Town of Bon Accord be considered;
- (b) The Acumen Report acknowledged on its face the absence of sufficient sales data to support a statistically relevant conclusion; nevertheless, it concluded from that deficient data that Bon Accord was not a depressed market;
- (c) The Acumen Report failed to address any known or planned economic activity that would be relevant to the assessment as required by the terms of its engagement;
- (d) It was arbitrary and an error for the Advisory Panel and Acumen to exclude condominium and vacant lot sales from their assessments and it was also an error for the Advisory Panel to reject Acumen’s paired sales data;
- (e) The Advisory Panel reasons failed to disclose any underlying analysis or to define what was considered to be acceptable data.

None of the above arguments is persuasive.

[15] A fundamental weakness to the above criticisms is that they are not, for the most part, directed at the Treasury Board decision. Instead, Major Brauer's primary challenge is directed at the methodologies and findings of Acumen. The Acumen Report is, however, not the decision under review. While it forms part of the evidentiary record, it is quite apparent that the Advisory Panel did not wholly adopt the Acumen methodologies or its findings. Instead, the Advisory Panel applied its own appraisal methods to the Acumen sales data and made an independent finding that Bon Accord was not a depressed market. Among other approaches, the Advisory Panel adopted a "rolling average" analysis, which it concluded "validated" the Acumen results. The Advisory Panel ignored the three paired-sales comparisons used by Acumen because of difficulties assessing the relevance and fairness of that limited data set. It also excluded from consideration the sales data for four vacant lots because those were not considered to be valid comparables. In the absence of those four sales, the Advisory Panel concluded that Major Brauer's own market valuation fell below the 20 percent threshold.

[16] There is nothing in the record before me to suggest that Acumen or the Advisory Panel used sales data for the City of Edmonton in its assessment of the real estate market in Bon Accord. Indeed, the record clearly indicates that the Advisory Panel was careful to carry out its mandate in conformity with Justice Mosley's direction.

[17] While it is apparent that Acumen had some concerns about the quantity of the available sales data for the Town of Bon Accord, both Acumen and the Advisory Panel found that the 20 percent depressed market threshold had not been met by a wide margin. The Advisory Panel

also addressed the quality of the available sales data and found it to be sufficient to calculate the change in market values over time.

[18] It was only on the strength of sales data for four vacant lots that a case for depressed market status could be asserted. The Advisory Panel excluded vacant lot sales from its analysis because it concluded that those properties were not representative and, therefore, distorted the calculation of the average sale price for single family homes. That decision was based on a point of professional judgment that was neither arbitrary nor unfair. It must, of course, be remembered that the Court, sitting on this or any judicial review, lacks the expertise and the authority to substitute its judgment on such matters for those of the assigned, expert decision-maker.

[19] The same considerations apply to the decisions to exclude condominium sales and the paired sales data from the Advisory Panel's depressed market analysis. Those, too, are matters of professional judgment falling exclusively within the decision-maker's assigned authority.

[20] Finally, I do not agree that the Advisory Panel erred by failing to disclose its underlying calculations, by failing to define what it considered to be reliable data or by failing to consider the underlying causes of the downturn of the real estate market in Bon Accord.

[21] It is at least implicit in its reasons that the Advisory Panel was relying on the raw sales data supplied by Acumen. It was open to Major Brauer to subject those same data to a third-party expert review using different appraisal methodologies. It was also open to him to critique the Acumen Report and in some measure he did so. He cannot, therefore, claim to have been

disadvantaged by these asserted weaknesses in the Acumen analysis. In short, these are hypothetical concerns that do not establish a reviewable error.

[22] The complaint that the Advisory Panel failed to take account of the broader economic factors influencing the downturn in the Bon Accord real estate market is without merit. Those factors are addressed in the Panel's Report at pages 1 and 2 and they would not, in any event, have entered directly into its financial analysis which was based only on sales data.

[23] In my view, the Advisory Panel Report is both thorough and reasonable. Indeed, it appears to make a stronger case for the absence of a depressed market in Bon Accord than did the evidence produced by Major Brauer in support of the opposite conclusion.

[24] It seems to me that the source of the difficulty facing Major Brauer and his family does not lie so much in the assessment of the housing market decline in Bon Accord as it does in the limitations imposed by the CFIRP Directive. Indeed, Major Brauer did not advance a particularly strong case to establish a 20 percent decline in that market during the period of his home ownership.

[25] The CFIRP Directive imposes most of the burden of home equity losses upon CF members who are required to relocate as a condition of their employment. In order to recover the entirety of such a loss the member must prove, to the satisfaction of the Treasury Board, that the local real estate market has sustained a decline of at least 20 percent – a situation that has apparently rarely occurred.

[26] It is not altogether surprising that the CF Ombudsman, Pierre Daigle, considered Major Brauer's situation and sought redress on his behalf from the then Minister of National Defence. His letter to the Minister of September 10, 2013 explained the problem in the following way:

Major Brauer was posted to Edmonton in 2007 and then to Halifax in 2010. He was accompanied by his wife and five children. Major Brauer expressed serious concerns about obtaining affordable housing in the Edmonton market, whether renting or purchasing. Private married quarters were considered, but there was a long waiting list. Major Brauer's request to be posted elsewhere in Canada was denied due to operational priorities and manning requirements. Major Brauer purchased a home for \$405,000 in Bon Accord, a small community 40 kilometres north of Edmonton. In 2010, Major Brauer was posted to Halifax and sold his house for \$317,000, resulting in a loss of \$88,000.

Pursuant to the HEA, Major Brauer received the basic \$15,000 in addition to \$4,455.72 from his personal envelope, but was denied full reimbursement on the grounds that, in 2010, no community had been declared a depressed market area by TBS. Major Brauer's request was denied notwithstanding the documentation submitted supporting the claim that housing prices in Bon Accord had declined 23% since 2007.

The Chief of the Defence Staff (CDS), in reviewing Major Brauer's subsequent grievance, considered the possible avenues of redress and determined that he did not have the authority to grant relief to Major Brauer. The CDS directed that the HEA submission be transmitted to TBS for evaluation of depressed market status. Major Brauer personally lost more than 20% on the sale of his home. In July 2012, TBS denied his HEA application on the grounds that Bon Accord was considered to be part of the Edmonton metropolitan area. According to TBS, the average decline in the Edmonton-Bon Accord area was 2.9% between 2007 and 2010, and did not meet the TBS definition of "depressed market."

It is also to be underlined that the CDS identified the situation as a systemic one and directed his staff to engage TBS in a review of the HEA provisions and the Canadian Forces Integrated Relocation Program.

The unfairness of Major Brauer's situation was brought to the attention of your predecessor by Senator Roméo Dallaire in his letter of June 26, 2013. Senator Dallaire's comments that the current HEA provisions have resulted in severe hardship to CF members and their families is consistent with our findings.

I bring this issue to your attention because Major Brauer, as well as other CF members, has suffered significant financial loss due to an unfortunate combination of fluctuations in the real estate markets, a deficient/outdated policy, and the requirement to report to a military posting. Clearly there are a number of converging bureaucratic issues that are creating unfair hardship for some CF members simply because they are doing their duty.

[27] Apparently nothing came of this submission and the \$15,000 limit on recovery was maintained and continues to be applied.

[28] I note, as well, Justice Mosley's concerns about the Treasury Board reimbursement policy as expressed in the following passages from his earlier decision:

[64] The applicant's situation seems to me to be precisely the type of problem the CFIRP Directive was meant to remedy as indicated in the views expressed by the Grievance Board and the CDS. As interpreted by TBS, however, "CF members are subject to [...] absorbing an equity loss" upon "relocation akin to a "forced relocation"". This cannot be what the Government of Canada intended for its military personnel.

...

[67] The transfer to Edmonton and subsequent posting to Halifax were operational decisions made by the CF over which Major Brauer had little or no control. He could refuse the posting only at the peril of his career progression and even then may have been required to move or resign from the Forces. In this regard, the choice of a place to live which many other Canadians take for granted was largely at the discretion of his employer. It was reasonable for him to expect that in making the move, he and his family would be protected by the employer's HEA policy. That expectation, as it turned out, was not well-founded. The employer, through its agent, the TBS, expects the family to bear most of the

cost of a dramatic down-turn in the market value of their home when they were again posted to a new base. This was clearly not what was intended when the policy was devised by the government. But the effects of its application in this instance on the Brauer family have been devastating.

[29] It is not the role of this Court to rewrite the government relocation policy for CF members which, without doubt, imposes most of the financial risk of home equity losses on CF members who are required to relocate. The fairness of government policy is a valid political concern but it is not, on its own, a basis for the grant of judicial relief.

*Did a breach of procedural fairness occur from the fact that Major Brauer was not provided with a copy of the Advisory Panel Report before the Treasury Board make its decision?*

[30] At the hearing of this matter, after a question from the Court, counsel for Major Brauer raised an issue of procedural fairness based on the apparent failure by the Treasury Board to disclose the contents of the Advisory Panel's Report. Although Major Brauer had been permitted to respond to the Acumen Report, he was unaware of the Advisory Panel's independent analysis.

[31] Because the Advisory Panel adopted a different valuation methodology and came to its own conclusions, Major Brauer now contends that he ought to have been able to respond to the contents of its report.

[32] Having regard to this new and unbriefed issue, I asked counsel to set out their respective positions in post-hearing submissions and both parties did so. Perhaps not surprisingly, counsel

for Major Brauer argues that the Treasury Board's failure to disclose the Advisory Panel Report constitutes "a severe breach in procedural fairness" because it formed an independent factual basis for the impugned decision. Implicit in this argument is that Major Brauer would have mounted a challenge had he been aware of the content of the Advisory Panel Report.

[33] Needless to say, counsel for the Attorney General argues that it would be highly prejudicial to consider this fairness argument in the absence of any explicit reference to it in either the Notice of Application or in Major Brauer's Memorandum of Argument.

[34] On this point, I agree with counsel for the Attorney General. This was an issue that would have been obvious to the Applicant at the very latest when the certified tribunal record was served. If Major Brauer took issue with the content of the Advisory Panel Report, presumably he would have sought an amendment to his Notice of Application supported by an argument that he had been deprived of an opportunity to respond to its contents. His failure to take those steps is an implicit acknowledgement that he had nothing more to add to the record beyond the evidence he had already submitted. I do not agree that the bare assertion of an unspecified procedural lapse in the Notice of Application is sufficient to overcome the failure to brief this issue in Major Brauer's Memorandum. Fairness demands that the Attorney General know before the hearing of the case what is being asserted: see *Adewole v Canada*, 2012 FC 41 at para 15, [2012] FCJ No 37.

[35] I would add that the determinative factual question addressed by the Advisory Panel involved its decision to remove data for the sale of four vacant lots from its analysis. This was

the same approach adopted by the author of the Acumen Report. The rationale for ignoring this data was the same in both instances – that those sales were not valid comparables and they negatively distorted the average sale price for single-family homes during the relevant period. Major Brauer was thus aware of this issue from the Acumen Report and had the opportunity to address it. It is a telling omission that in his counsel's letter to the Treasury Board dated December 12, 2014 no challenge to this approach was raised. Having effectively walked away from this issue when it first came up, Major Brauer cannot now complain that he was deprived of an opportunity to respond at a later stage in the process.

[36] For the foregoing reasons, this application is dismissed, but without costs.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** this application is dismissed without costs.

"R.L. Barnes"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-925-15

**STYLE OF CAUSE:** MARCUS BRAUER v ATTORNEY GENERAL OF CANADA

**PLACE OF HEARING:** OTTAWA, ONTARIO

**DATE OF HEARING:** JANUARY 19, 2016

**JUDGMENT AND REASONS:** BARNES J.

**DATED:** FEBRUARY 8, 2016

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