NOVA SCOTIA COURT OF APPEAL
Citation: ***Nova Scotia (Assessment) v. Knickle***,
2007 NSCA 104

Date: 20071106
Docket: CA 279690
Registry: Halifax

Between:

Director of Assessment

Appellant

v.

Watson E. Knickle and Julia A. Knickle

Respondents

Judges:	Bateman, Saunders and Hamilton, JJ.A.
Appeal Heard:	October 9, 2007, in Halifax, Nova Scotia
Held:	Appeal allowed per reasons for judgment of Bateman, J.A.; Saunders and Hamilton, JJ.A. concurring.
Counsel:	Mark V. Rieksts, for the appellant respondents in person

Reasons for judgment:

[1] This is an appeal by the Director of Assessment (the "Director") from a decision of the Nova Scotia Utility and Review Board (the "Board") dated March 13, 2007. The Board decision is reported as 2007 NSUARB 15. For the reasons which follow, I would allow the appeal.

BACKGROUND

[2] The appeal concerns the assessment of property located on Nova Scotia's South Shore and owned by the respondents Watson E. Knickle and Julie A. Knickle. The single family residential dwelling is located at 103 Dauphinee Road, Second Peninsula, Municipality of Lunenburg.

[3] In 2003 the assessed value of the property was $145,600. Assessments for the years 2001 and 2002 were $127,400 and $136,200. The assessed value of a property for a particular year is meant to reflect its market value on a prescribed past date (s. 42 of the **Assessment Act**, R.S.N.S. 1989, c. 23 (the "**Act**")). When notified that the 2004 assessed value was set at $235,800, the Knickles appealed to the Regional Assessment Appeal Court ("RAAC"). Unsuccessful on that appeal, they further appealed to the Board.

[4] After filing that Notice of Appeal, the Knickles met with Jason Brown, the assessor for Lunenburg County and his supervisor, Mark Peck. The Knickles reached agreement with Messrs. Brown and Peck that the assessed value would be set at $194,500. A May 2005 hearing before the Board was adjourned at the Director's request, with the possibility of settlement pending. The Board was subsequently advised that, in the Director's view, there was no enforceable agreement on value. The appeal hearing proceeded on April 26, 2006 before Board member Dawna Ring, Q.C. The question of whether there was, in fact, a binding agreement was raised by the Knickles before the Board. At the conclusion of the hearing the Board member requested and received a written submission from the Director on this issue. The Board ultimately determined that the assessed value was substantially less than $194,500 and, therefore, concluded that it was not necessary to decide whether the prior agreement bound the Director.

[5] At the hearing the Director relied upon the expert report and oral evidence of municipal assessor Mary Ellen Hernden, CRA, in support of an assessed value of $319,000 as well as the evidence it had presented before the RAAC, which supported the original assessment. Although the assessed value initially proposed by the Director ($235,800) was confirmed by the RAAC and the Director had not filed an appeal from that decision, he asked the Board to increase the valuation of the property to $319,000.

[6] The Board rejected the evidence of Ms. Hernden and conducted its own assessment of the property. In a written decision rendered March 13, 2007, the Board determined that the 2004 assessed value of the Knickle property was $58,190.

ISSUES ON APPEAL

[7] In the Notice of Appeal the Director articulated numerous grounds said to reflect error of law or jurisdiction by the Board. These can be summarized as follows, recognizing there is some overlap between issues:

(i) the Board erred in concluding that on an appeal by the taxpayer to the Board from the RAAC the burden of proof does not rest on the appellant to establish on the evidence presented that the Director's assessment is incorrect;

(ii) the Board erred by misinterpreting the nature of its function in conducting a *de novo* hearing;

(iii) the Board erred in raising and deciding the issue of the burden of proof on its own motion, without notice to the parties and without inviting or hearing submissions from the parties;

(iv) the Board erred in conducting a valuation of the property in the absence of a supporting evidentiary basis;

(v) the Board exhibited bias and a lack of impartiality in the proceeding by acting as an advocate for the taxpayers.

STANDARD OF REVIEW

[8] In **Creager v. Provincial Dental Board (N.S.)**, 2005 NSCA 9; [2005] N.S. J. No. 32 (Q.L.)(C.A.) Fichaud, J. A., for this Court, described the process for identifying the standard of review to be applied to an administrative tribunal's decision:

> **[15]** Judicial review of an administrative tribunal's decision involves different standards of review than those stated by **Housen** for an appeal from a court's decision. Under the pragmatic and functional approach, the court analyses the cumulative effect of four contextual factors: the presence, absence or wording of a privative clause or statutory appeal; the comparative expertise of the tribunal and court on the appealed issue; the purpose of the governing legislation; and the nature of the question, fact, law or mixed. From this, the court selects a standard of review of correctness, reasonableness, or patent unreasonableness. The functional and practical approach applies even when there is a statutory right of appeal: **Dr. Q Re**, [2003] 1 S.C.R. 226, at paras. 17, 21-25, 33; **Ryan v. Law Society of New Brunswick**, [2003] 1 S.C.R. 247, at para. 21. The approach applies even to pure issues of law, for which the standard of review need not be correctness. The existence of the statutory right of appeal and whether the issue is one of law, are merely factors weighed with the others in the process to select the standard of review: **Ryan** at paras. 21, 41, 42; **Dr. Q** at paras. 17, 21-26, 28-30, 33-34.

[9] I will review the four contextual factors. Dealing first with the privative clause: The **Utility and Review Board Act** S.N.S. 1992, c. 11, s. 1, as amended, (the "**URB Act**") provides that the Board may determine all questions of law and of fact within its jurisdiction (s. 22(2)). Factual findings by the Board within its jurisdiction are binding and conclusive (s. 26), thus attracting a high level of deference. An appeal from an order of the Board is expressly permitted on questions of law or jurisdiction (s. 30(1)). The fact that there is no privative clause with regard to these issues tends to support a less deferential standard of review (**Logan v. Nova Scotia (Workers' Compensation Appeals Tribunal)**, 2006 NSCA 88, [2006] N.S.J. No. 297 (Q.L.)(C.A.), at para. 17).

[10] As to the comparative expertise of the tribunal: The Board is comprised of eight full time members and not more than eight part-time members (**URB Act** s. 5). The statute does not prescribe particular qualifications for the Board's membership. Through the frequency and scope of the appeals that come before it,

the Board has developed some expertise within the area of property assessments and assessment appeals (**Nova Scotia (Director of Assessment) v. Gatsby's Bar and Eatery**, 2004 NSCA 56; [2004] N.S.J. No. 145 (Q.L.)(C.A.) at para. 17). An administrative body called upon to answer a question that falls within its area of relative expertise will generally be entitled to greater curial deference (**Pushpanathan v. Canada (Minister of Citizenship and Immigration)**, [1998] 1 S.C.R. 982 at para. 32).

[11] As to the statutory scheme: The **Act** provides a framework for the establishment of fair property values. While the Board, acting on assessment appeals, must be mindful of the interests of various stakeholders including the government, the individual taxpayer and the general public, appeals come to the Board as a dispute between two parties - the Municipality, commonly represented by the Director of Assessment, and the taxpayer. In determining an assessment appeal the Board in not exercising a broad discretionary power suggestive of policy-laden purposes (**Dr. Q v. College of Physicians and Surgeons of British Columbia**, [2003] 1 S.C.R. 226 at para. 31). The remarks of Cromwell, J.A. in **Logan**, **supra** about the function of the Worker's Compensation Appeals Tribunal are equally applicable to that of the Board when adjudicating assessment appeals:

> [20] . . . it is a tribunal that in many respects has more in common with the "judicial paradigm involving a pure *lis inter partes* determined largely by the facts before the tribunal" than with tribunals that exercise a broad, policy-laden jurisdiction: **Dr. Q v. College of Physicians and Surgeons of British Columbia**, [2003] 1 S.C.R. 226 at para. 32. This aspect tends towards less rather than more deference: **Dr. Q** at para. 31.
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> (Emphasis added)

[12] Dealing with the nature of the question raised on this appeal: The grounds of appeal concern the burden of proof and the fact that the Board raised issues of its own motion and failed to afford the parties an opportunity to address them, made findings of fact for which there was no evidence and exhibited bias in the conduct of the proceeding. These are questions of law. While all questions of law are not reviewed on a correctness standard, where, as here the appeal raises general legal issues which are not within the tribunal's core area of expertise, a correctness standard applies. These are pure legal questions properly within the province of the judiciary (**Logan**, **supra** at para. 26; **Creager**, **supra** at para. 19; **Barrie**

Public Utilities v. Canadian Cable Television Assn., [2003] 1 S.C.R. 476 at paras. 12 to 16).

[13] I would conclude that the standard of review on the legal issues discussed below is one of correctness.

ANALYSIS

[14] As set out above this matter commenced when the Knickles received notice that the 2004 assessment of their property had increased from $136,200 in 2002 to $235,800. When the RAAC confirmed that assessment, they appealed to the Board.

The Burden of Proof

[15] The significant finding of the Board, which, in my respectful view fatally infected the entire proceeding, is the conclusion that on an assessment appeal to the Board, the appellant bears no burden of proof.

[16] For the reasons set out below, it is my respectful opinion that the Board's error in this regard compromised the proceeding both procedurally and substantively.

[17] There are two aspects to the error which I will discuss in turn:

(i) The Board's finding is inconsistent with the language of the statute and contrary to established, binding judicial precedent; and

(ii) The issue of the burden of proof was not raised by the Board either during or after the hearing had concluded. It was addressed without any notice to the parties, the Board having decided to raise this fundamental issue.

[18] The Board's error derives from its interpretation of s. 87 of the **Act** which provides:

> 87 (1) The Nova Scotia Utility and Review Board shall inquire into the matter de novo and shall examine such witnesses and take all such proceedings as are requisite for a full investigation of the matter.
>
> (2) On the appeal the Board shall have all the powers of the regional assessment appeal court.

[19] The Board interpreted the statutory direction to "inquire into the matter de novo" as supplanting the usual rules of law and procedure applicable to a traditional adjudicative hearing. The Board member wrote:

> [135] In my opinion, the Legislative directive for the Board to conduct a full investigation de novo in assessment appeals displaces the ordinary principles of burden of proof and technically does not place the onus of proof on either of the participants before it. It is for the Board to determine the matter after completing its investigation. In an investigation, the participant with the information and who has performed the tasks, shares that information first. By having the property owner bear the burden of proof, having to present their evidence first and be sufficient to show on a balance of probabilities that the assessment is incorrect and how it is incorrect does not meet the objects of the *Act* of making the appeal process accessible.
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> . . .
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> [204] Reading the Board's investigative provisions in the context of the whole *Act* and giving it a broad and liberal interpretation in 2006/7, in my opinion the *Act* displaces the common law principles respecting the burden of proof and instead directs the Board to investigate the issues and satisfy itself of the proper assessment value pursuant to the *Act*. Neither participant bears the burden of proof.
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> (Emphasis added)

[20] The Board was aware that this Court has long held that the burden of proof is on the appellant in assessment appeals. She wrote:

> [129] In 1961, the County Court and the Court of Appeal interpreting the *Assessment Act* adopted from H.E. Manning's text, a portion of his general statements regarding appeals that "in all appeals, the onus, as might be expected, is upon the appellant", *Morash v. The Municipality of Chester* (1961), 28 D.L.R.(2d) 428. In 1996 in (*Nova Scotia (Director of Assessment) v. Wandlyn Inns Ltd.*, [1996] N.S.J. No. 145 (N.S.C.A.) was extended to: "the burden was on

> the taxpayer to prove that the Director's assessment was incorrect and to prove the extent to which the Director erred".
>
> [130] If I am permitted to interpret the *Act* as always speaking and taking into consideration current social norms, including access to justice, I would interpret the *Act* as displacing the common law burden of proof. It is unclear when a Tribunal can reconsider the interpretation of the legislation it administers and take into consideration the interpretive principle of "always speaking". There were no cases found on point.

[21] To justify her departure from the common law principle that “he who asserts must prove” and the clear statements of this Court that the burden of proof falls on the appellant, the Board opined that the nature of assessment appeals had changed. This change, she concluded, was evidenced by a number of factors: appeals from the RAAC, formerly heard in the County Court, were now heard, more informally, by the Board; the majority of appellants are lay persons; an assessment appeal is not deciding “the rights between opposing parties”; and the **Assessment Act** “does not state that either party has the onus of proof” (Board decision at paras. 178 to 182).

[22] With respect, none of these points nor the expanded reasoning in her written remarks justify the Board’s conclusion that the burden of proof is other than on an appellant in an assessment appeal.

[23] As stated above, the decisions of this Court have consistently recognized that in assessment appeals, as in any appeal, the appellant, whether it be the Minister or the taxpayer, bears the burden of proof. For example, in **Morash v. Municipality of Chester** (1961), 28 D.L.R.(2d) 428 (N.S.S.C.A.D.) this Court discussed the burden of proof on appeals from the Board of Revision and Appeal (now the RAAC) to the County Court (now to the Board) under s. 62(1) of the **Assessment Act**, R.S.N.S. 1954, c.15, a predecessor to the current s. 87:

> 62(1) The county court shall inquire into the matter *de novo*, and examine such witnesses and take all such proceedings as are requisite for a full investigation of the matter.
>
> (2) On the appeal the county court shall have all the powers of the court appealed from.

[24] There, where the taxpayer had appealed alleging that the assessed value was too high, Ilsley, C.J. wrote for the Court at pp. 432-33:

> . . . The onus in the appeal to the County Court was on the appellant to show that the amount for which his property was assessed was too high. . . .

[25] Later, in **Hebb v. Town of Lunenburg and Director of Assessment**, [1979] N.S.J. No. 576 (Q.L.)(N.S.S.C.A.D.); 32 N.S.R.(2d) 427, on an appeal pursuant to s. 101 of the **Assessment Act**, R.S.N.S. 1967, c. 14 (with identical wording to the 1967 provision), Jones, J.A., dissenting in the result but not as to the burden of proof, said:

> 54 In my view a new hearing is necessary. I have already indicated that the burden of proof in the County Court was upon the appellant, in this case the Town. It was incumbent upon the assessor to show that the assessment was uniform in accordance with market values. In giving evidence the assessor should have demonstrated to the satisfaction of the judge the basis on which he arrived at a uniform rate. Having done that the evidentiary burden would shift to the ratepayer to show that the overall assessment was not uniform. This onus cannot be discharged by merely showing that certain other individual properties are assessed lower in relation to their actual cash value. I refer to *Dreifus v. Royds,* 61 S.C.R. 326, and particularly at p. 334.
>
> (Emphasis added)

[26] More recently, in **Nova Scotia (Director of Assessment) v. Wandlyn Inns Ltd.**, [1996] N.S.J. No. 145 (Q.L.); 150 N.S.R. (2d) 177 (C.A.), by which time appeals from RAAC were heard, not in the County Court, but by the Board, this Court again recognized that the burden of proof rests with the appellant. There the Minister had appealed alleging that the value set by the RAAC was too low. The taxpayer cross-appealed. In addressing the submission by the cross-appellant taxpayer that the assessed value of its commercial property was too high in that it did not adequately take into account the principle of uniformity of assessment, Freeman, J.A. wrote:

> **[58]** The burden would then be upon the taxpayer to show that taxation for the current year does not fall on his property in a manner uniform with the taxation which falls on other commercial properties in the municipality. To discharge this burden, the taxpayer might bring forward information, which might be information in his possession not otherwise available to the assessor, either prior to the state date or at any stage of appeal through to and including the Board

> hearing. The taxpayer would have to show that his property was assessed at a market value proportionately higher than the market value assessments of other commercial (or residential) properties in the municipality. . . .

[27] Similarly, Hallett, J.A. in **Wandlyn**, for himself and Clarke C.J., confirmed that the burden of proof falls on the appellant:

> **[74]** That aside, Wandlyn did not adduce evidence before the Board as to the extent to which the value of its property had decreased in relation to the decrease in value of other commercial property in the municipality. While it did adduce expert evidence that, the market value on December 1st, 1991, was $900,000 and this means that Wandlyn's assessment by the Director for the taxation year 1992 was 260% of its market value in 1992, there is no evidence as to how this compares with the December 1st, 1991, market value of other commercial property in Dartmouth. The burden was on the taxpayer to prove that the Director's assessment was incorrect and to prove the extent to which the Director erred.
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> (Emphasis added)

[28] This burden of proof has been applied by the Board on assessment appeals without exception, until the decision under appeal.

[29] As is evident in from the comments reproduced at para 19, above, the Board here determined that the statutory requirement to conduct the appeal *de novo* displaced the usual burden of proof. In this regard, the Board misinterpreted the statute and fundamentally misconstrued the nature of the proceeding before her. I repeat her comments:

> [135] In my opinion, the Legislative directive for the Board to conduct a full investigation de novo in assessment appeals displaces the ordinary principles of burden of proof and technically does not place the onus of proof on either of the participants before it. . . .

[30] And further:

> [182] . . . these appeals are different from a typical civil appeal and different from the power given in other jurisdictions, such as Ontario. Unlike a typical civil appeal, the Board is no longer deciding the rights between opposing parties. . . . the process differs from a typical civil appeal as the Board is to conduct a new inquiry and full investigation to determine the value as noted above. In an investigation, the participant with the information and who has completed the

> task, usually presents their information first to provide the background for the investigation and to provide the ability for all to meaningfully participate in the process. The Director has that information.
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> . . .
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> [208] If the Board has the burden to conduct an investigation and act if the value does not achieve market value in accordance with the *Act*, then the Board will collect and analyze all of the information it needs to determine the matters and decide whether the valuation meets the criteria of the *Act*, and if not, change it.
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> (Emphasis added)

[31] The character of a *de novo* appeal was discussed by the Supreme Court of Canada in **R. v. Dennis**, [1960] S.C.R. 286, where the Court considered a **Criminal Code** provision entitling an accused to an appeal by trial *de novo*. Ritchie J. wrote, for the Court at pp. 290-91:

> . . . the distinction between "an appeal by holding a trial *de novo*" and an appeal to the provincial Court of Appeal is that although the object of both is to determine whether the decision appealed from was right or wrong, in the latter case the question is whether it was right or wrong having regard to the evidence upon which it was based, whereas in the former the issue is to be determined without any reference, except for purposes of cross-examination, to the evidence called in the Court appealed from and upon a fresh determination based upon evidence called anew and perhaps accompanied by entirely new evidence.

[32] The nature of a *de novo* appeal under the **Act** was accurately described in **Helio Research Re** 2006 NSUARB 82 where Board member Cochrane wrote:

> 29 In considering an appeal under the Assessment Act, the Board must inquire into the matter de novo: s. 87(1). This means that the Board conducts a whole new proceeding, in which evidence presented at the R.A.A.C. hearing may be presented again, or new evidence may be presented which was not seen by the R.A.A.C. The ultimate decision of the Board is based upon that de novo hearing, not upon a scrutiny of an R.A.A.C. decision, in the manner of an appellate court reviewing a decision by a trial court. This is not to say that the Board cannot, having held its hearing, set an assessment at a level different from that of the R.A.A.C. -- thus, in effect, reversing the R.A.A.C. decision. It is simply to say that such Board decisions are made on the basis of the evidence submitted to the Board, and not as a result of a review of the process followed by the R.A.A.C.

[33] On a *de novo* appeal, the Board is not looking for error within the reasons of the RAAC but is determining from the evidence presented to the Board, whether that court reached the correct result. This does not alter the fundamental fact that the burden of proof is on the appellant.

[34] The Board interpreted the statutory direction in s. 87(1) of the **Act** to "inquire" as empowering the Board to act in an inquisitorial rather than in a traditional adjudicative capacity. It is abundantly clear from the language and content of the **Act** that an appeal is to be conducted as an adjudicative process where the decision of the RAAC and of the Board is based upon the evidence presented by the parties. In outlining the appeal procedure before the RAAC, s. 71 of the **Act** speaks of "hearings" and "adjournments". Section 72 provides:

> 72 (1) The court, after hearing the appellant and any witnesses he produces, and the respondent and any witnesses he produces, and the assessors, if necessary, shall determine the matter.

[35] A review of the decisions of this Court leaves no doubt that the process is a traditional adjudicative one. In **Hebb, supra,** this Court said:

> 53 The weight of the evidence was entirely a matter for the County Court Judge. It was open to him to reject the evidence of the assessor that the general level of assessment was less than 90% of market value. In coming to that conclusion he could not use assessments which were not in evidence. . . .
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> . . .
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> 54 In my view a new hearing is necessary. I have already indicated that the burden of proof in the County Court was upon the appellant, in this case the Town. It was incumbent upon the assessor to show that the assessment was uniform in accordance with market values. In giving evidence the assessor should have demonstrated to the satisfaction of the judge the basis on which he arrived at a uniform rate. Having done that the evidentiary burden would shift to the ratepayer to show that the overall assessment was not uniform. This onus cannot be discharged by merely showing that certain other individual properties are assessed lower in relation to their actual cash value. I refer to *Dreifus v. Royds,* 61 S.C.R. 326, and particularly at p. 334.
>
> (Emphasis added)

(See also **Nova Scotia (Director of Assessment) v. T. Eaton Co.** [1993] N.S.J. No. 287 (Q.L.); 124 N.S.R. 92d) 19 (C.A.) at paras. 29 - 30).

[36] An error respecting the burden of proof is central to the integrity of the appeal process. In **Newterm Ltd. v. St. John's (City)**, [1991] N.J. No. 261 (Q.L.); 93 Nfld. & P.E.I.R. 49 (Nfld. S.C.T.D.), Steele, J., on a preliminary motion, was called upon to address the nature and scope of a *de novo* assessment appeal. There assessment appeals are heard first by the Assessment Review Court with a further appeal to the Trial Division. Section 89 of the **St. John's Assessment Act**, S.N. 1970, c. 39 uses language equivalent to s. 87(1) of the Nova Scotia **Act**, providing that on such an appeal:

> The Trial Division of the Supreme Court of Newfoundland shall enquire into the matter de novo and examine such witnesses and take all such proceedings as are necessary for a full investigation of the matter.

[37] Steele, J. held that, although the taxpayer was the appellant before him, the burden of proof was on the respondent city to establish the validity of the assessment. The city appealed. In allowing the appeal on this issue (appeal decision reported at [1988] N.J. No. 379 (Q.L.); (1989), 74 Nfld. & P.E.I.R. 328) Gushue J.A., writing for the Court, discussed the importance of the burden of proof:

> [14] The appeal judge here was asked to determine, prior to the commencement of the trial, how that trial was to proceed. The matter of the extent of the burden of proof and on which party that burden lay was also raised. He felt that these points, and in particular the onus of proof issue, warranted the filing of a written decision. He dealt with those issues in the manner stated above.
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> [15] For the purpose of determining whether this Court should entertain the appeal, it is necessary only to refer to the issue of the extent of the burden of proof. There is no question that this is an issue of fundamental importance to the parties which should be determined prior to the hearing. Obviously, the appeal judge felt likewise because he stayed further proceedings before him pending its determination on appeal. Further, it is apparent that if the Trial Division hearing proceeded and an appeal then resulted in disagreement with the judge's determination of that threshold issue, the parties could be put to the expense of a new hearing. In the circumstances of this case, the appeal on the point in issue obviously should be heard now rather than after the inquiry de novo before the appeal judge.
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> . . .

> [22] As to the onus of proof and of leading evidence when the hearing is conducted by way of hearing de novo, that rests upon the appellant, as it did before the Review Court and does on any appeal. . . .
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> [23] In the present case it is Newterm which disputes before the Trial Division the assessment as determined by the Review Court. The onus lies upon Newterm to establish that the valuation should be reduced.
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> (Emphasis added)

[38] In summary, I would find that the Board erred at law in concluding that the burden of proof on an assessment appeal did not rest with the appellant and that the nature of the appeal was other than a traditional adjudicative process.

[39] The second troubling aspect of the Board's approach to burden of proof was the fact that this issue was raised without notice to the parties. The principle *audi alteram partem* applies - it is a principle of natural justice that parties know the case to be met. As noted by author Sara Blake in *Administrative Law in Canada*, 4th ed., (Markham: LexisNexis Butterworths, 2006) at p. 38:

> A party should not be left in the position of discovering, upon receipt of the tribunal's decision, that it turned on a matter on which the party had not made representations because the party was not aware it was in issue. ...

[40] The Director could not have anticipated that the long settled law on this point would be revisited and ultimately altered by the Board. That the Board did not raise this key issue with the parties is a denial of natural justice.

[41] The impact of the Board's approach to the burden of proof and its misconception of the nature of the hearing is apparent throughout the decision. Although the Board purported to determine that neither party bore the burden of proof, which in itself is error, it would appear that she placed the burden on the respondent Director. I cite but a few examples:

> [182] ... In an investigation, the participant with the information and who has completed the task, usually presents their information first to provide the background for the investigation and to provide the ability for all to meaningfully participate in the process. The Director has that information.

. . .

> [197] Relative to the complexity of the information, if the lay taxpayers have all of the raw information, concepts of burden of proof, relevant evidence and the ability to prove their case are difficult. Although some may argue these property owners could read the decisions of the Courts or Board, if law was that easy to understand and apply, we would not need lawyers or law schools.
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> . . .
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> [198] Both the Director and the Board have the expertise to understand all of these matters. Many property owners do not. . . .
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> [199] If a taxpayer must hire an expert to bear the onus of proof, what is the cost of hiring the expert relative to the size of their claim, being the associated increased tax expense.
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> [209] It also means the lay taxpayers do not have the burden of presenting their evidence first. Rather, in an investigation the participant who has the information, has collected and analyzed it, (the Director) would present all of the relevant information and analysis at the beginning of the inquiry. The Board and both participants are then better able to address the matters at issue.

[42] Flowing from her misconception of the burden and misunderstanding of the adjudicative process the Board member neglected to consider whether she had before her evidence of the market value of the property. Mr. and Mrs. Knickle testified at the hearing. Their evidence consisted of a recitation of the history of the proceeding and a description of the features of their property which they felt reduced its value below that assigned by Ms. Hernden. These deficiencies included the fact that the property was only accessible by easement; that the waterfrontage was a mud cove; and that the property was subject to a right-of-way.

[43] The impact of each of these alleged deficiencies on market value had been addressed in the Hernden report. As previously mentioned, the Board did not accept the Hernden evidence. In addition to evidence of the appraiser, Hernden, the Director had tendered the evidence it had presented on the appeal to the RAAC, which that court had accepted as supporting an assessed value of $235,800. The Board made no reference to the fact that this evidence was before her.

[44] Critically, the Knickles did not present any evidence of market value. Neither did they provide evidence that the alleged deficiencies in the property would diminish its value to a greater extent than that allowed in the valuations presented by the Director.

[45] As previously stated, the Board set the assessed value at $58,190. This decision was based upon its own opinions which were unsupported by evidence. In **Marathon Realty Co. v. Ontario (Regional Assessment Commissioner, Region No. 7)** [1979] O.J. 1090 (Div.Ct.) the board fell into similar error. Craig, J., writing for the Court, said:

> ¶ 33 Counsel for the respondent submitted that the Board was entitled to reject the opinions of all four experts. He relied on the reasons given by the Board; but relied also upon the submission that the Board is an administrative body acting in its own field of expertise; and entitled to reject those opinions based upon such expertise. I do not agree. There are occasions when the Board does function in an administrative capacity, and where its decisions are purely administrative. See Re Cloverdale Shopping Centre Ltd. et al., and Township of Etobicoke et al., [1966] 2 O.R. 439 (C.A.) and the cases therein cited. In conducting the hearing of an assessment appeal it is my opinion that the Board functions in a judicial capacity; The Assessment Act, s. 57(2); and Peterkin v. Hydro-Electric Power Commission of Ontario, 12 D.L.R. (2d) 791. It is required to hear and determine the case on the evidence adduced. No doubt the members of the Board do have a certain degree of expertise in assessment matters which assists in understanding, assessing and weighing evidence. In deciding assessment appeals, if the Board were permitted to act on its own expertise in complex matters and substitute its unsupported opinions for those expressed in evidence, then the exercise ceases to be judicial in character. The members of the Board would be their own experts not subject to cross-examination; their opinions would remain unknown until after delivery of the decision and therefore not open to contradiction or challenge. The parties would not know what case had to be met. There is no right of appeal on a question of fact. It would be quite unacceptable in our adversarial system where the parties, and not the court, decide what evidence to adduce.
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> (Emphasis added)

[46] For the above reasons I am satisfied that the Board erred in law in its conduct of this assessment appeal. Consequently, it is unnecessary to consider the allegation of bias.

DISPOSITION

[47] I would allow the appeal and remit this matter to the Board for hearing by another member to be decided on the evidence to be adduced. As Freeman, J.A. said in **Wandlyn**, **supra**:

> [66] This court is asked to adopt and impose the $900,000 figure to save the cost and inconvenience of a return to the Board. The actual determination of value for assessment purposes is a fact-finding exercise beyond the jurisdiction of this court, which is limited to questions of law and jurisdiction.

[48] In this unfortunate circumstance I would not depart from our usual practice not to award costs in tribunal appeals (**Civil Procedure Rule** 62.27).

[49] As this appeal will again be before the Board, should Mr. and Mrs. Knickle choose to present evidence of market value, they may find helpful the comments of Board member Cochrane in **Re MacLean**, 2002 NSUARB 68, [2002] N.S.U.R.B.D. No. 71(Q.L.):

> ¶ 37 In general, it seems that typical appeals of assessments by taxpayers are more likely to succeed if they focus upon the market value of the property in question. This is not to say that uniformity cannot be pursued, but merely that the basis upon which an appeal related to uniformity can succeed is limited (see Doucette, above, paras. 17 and 23, and Re Creighton, below, para. 39). Pursuit of an appeal on the basis of market value does require that the owner of a property assemble information about the market value of the property as of the base date. Market value can be determined by any one of three traditional approaches (income, cost, and direct comparison), but the market value of single family houses -- particularly where, as here, there are a number of nearby comparable houses, and an active market -- is often regarded as more conveniently and accurately determined on appeal by the direct comparison method. This means, in essence, obtaining sale prices for comparable properties sold reasonably close to the base date, which can be very persuasive evidence.
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> ¶ 38 As the Board noted at the hearing (see para. 42, below), the Director has chosen to place assessed values of properties upon its website, but not sale prices, so an appellant attempting to gather information on comparable sales must look to other sources -- meaning personal knowledge, a cooperative real estate agent, or an appraiser.
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> ¶ 39 In practical terms, it may be that the most efficient way to get the quantity and quality of information needed for a successful appeal is through a report from

an appraiser. Reports on residential market value, prepared by qualified appraisers, are, in general, available for an average house for between $225 and $300 (not counting any fees payable to an appraiser for appearing at a hearing). Such reports usually contain detailed base date information respecting comparable sales, which can be of considerable relevance in establishing market value. Although not commonly done, appraisers' reports can also, if expanded in scope, include evidence respecting uniformity: see, for example, Re Creighton, NSUARB-AS-94-72, [1997] N.S.U.R.B.D. No. 107, in which the opinion of appraisers engaged by the appellant was accepted in place of the Director's on the subject of the general level of assessment.

¶ 40 In referring to the possible utility of an appraisal report, the Board does not mean to imply that an appellant must always obtain an appraisal report in order to succeed in an appeal. The Board merely observes that such reports may be available at a relatively low price, and may provide relevant and persuasive evidence.

Bateman, J.A.

Concurred in:

Saunders, J.A.

Hamilton, J.A.