C.A. No. 132281

NOVA SCOTIA COURT OF APPEAL

Clarke, C.J.N.S., Matthews and Freeman, JJ,A.
Cite as:Nova Scotia (Assessment) v. Canada Trustco Mortgage Company, 1997 NSCA 38

BETWEEN:

THE DIRECTOR OF ASSESSMENT Appellant - and - CANADA TRUSTCO MORTGAGE COMPANY and HALIFAX REGIONAL MUNICIPALITY Respondents - and - AND BETWEEN: CANADA TRUSTCO MORTGAGE Cross-Appellant - and - THE DIRECTOR OF ASSESSMENT and HALIFAX REGIONAL MUNICIPALITY Cross-Respondents	Margaret L. MacInnis for the Appellant Joel E. Fichaud, Q.C. for the Respondent Appeal Heard: January 27, 1997 Judgment Delivered: March 3, 1997

THE COURT: Appeal and cross appeal dismissed per reasons for judgment of Freeman, J.A.; Clarke, C.J.N.S. and Matthews, J.A. concurring.

FREEMAN, J.A.:

The Appeal

This appeal results from the 1994 municipal property tax assessment of a 990-unit residential apartment complex built in the former City of Dartmouth after the relevant assessment base date of January 1, 1988.

The appeal is focused on the building known as 25 Highfield Park, which contains 71 residential units. Counsel are in agreement as to the method of extrapolating the assessment of that building to the other 919 units in 13 other buildings, all located in north Dartmouth, N.S. All were built between 1989 and 1991 by the same developer and bought in at foreclosure by the first mortgagee, Canada Trustco, a respondent and cross-appellant.

The 1994 assessment of 25 Highfield for $2,891,400 was confirmed by the Regional Assessment Appeal Court. On appeal to the Nova Scotia Utility and Review Board that figure was reduced to $2,250,500. The Director of Assessment appealed that result to this court, and Canada Trustco cross-appealed, urging a figure some $500,000 lower.

The issues involve the application of principles resulting from amendments to the **Assessment Act**, R.S.N.S. 1989 c. 23, intended to avoid the necessity of annual reassessments. The **Act** provides for reassessments taking all relevant factors, economic and physical, into account as of a base date prescribed by the Director of Assessment which must be earlier than the current taxation year. As of December 1 of the year preceding the taxation year, the state date, the assessor adjusts the base date valuation of a property by any physical changes--improvements or demolitions--which have altered its state in the meantime. Market considerations are those of the base date, not the state date.

The provisions were considered by this court in **Director of Assessment (N.S.) v. Wandlyn Inns Ltd. et al.** (1996), 150 N.S.R. (2d) 177; 436 A.P.R. 177, which also related to the 1994 taxation year. The court was in agreement as to the overall operation of the **Act**; the majority held that an individual taxpayer could not show that changing market conditions after the base date created a disproportionate burden on his or her property.

The difficulties in the present appeal arise from the fact that none of the buildings existed on the base date, January 1, 1988. By the state date, December 1, 1993, economic conditions, primarily high vacancy rates, had profoundly affected the market value of the buildings.

The Board agreed with two expert witnesses that the income approach was appropriate to the valuation of the buildings. It correctly instructed itself that the income approach had to be determined according to base date values. It committed no error in determining that while actual vacancy rates subsequent to the base date had no application, the adverse impact on vacancy rates of nearly 1,000 units introduced rapidly to a small market could be considered to the degree that it was foreseeable on January 1, 1988.

The latter principle is recognized in Chapter 19 of the textbook **The Appraisal of Real Estate**, Canadian Edition, published by the Appraisal Institute of Canada, which states at p. 419:

> To apply any capitalization procedure, a reliable estimate of income expectancy must be developed. Although some capitalization procedures are based on the actual level of income at the time of the appraisal rather than a projection of future income, an appraiser must still consider the future outlook. Failure to consider future income would contradict the principle of anticipation, which holds

> that a value is the present worth of future benefits. Historical income and current income are significant, but the ultimate concern is the future. The earning history of a property is important only insofar as it is accepted by buyers as an indication of the future. Current income is a good starting point, but the direction and expected rate of income change are critical to the capitalization process.
>
> . . .
>
> If a market value estimate is sought, the income forecast should reflect the expectations of market participants.

The Board thus defined the appropriate vacancy rate according to proper principles. It then set about quantifying it, carefully weighing the evidence of both experts, Richard J. Escott who testified for Canada Trustco and Jill Brogan, an assessor for the Department of Municipal Affairs. Ms. Brogan was not the assessor involved in the relevant assessment--present methods involve many participants in the assessment process--but she was able to speak to the data used in the computer-generated assessment report considered by the Board. Like the assessment appeal court before it, the Board heard the matter *de novo*.

One ground of appeal relates to the Board's view of Ms. Brogan's formal qualifications, but it is clear the Board rejected her proposed vacancy rate on the basis of methodology used in the assessment, not her qualifications. A seven per cent vacancy rate, the actual statistical 1988 rate, had been used without making allowance for the impact of the new rental units on the market. Mr. Escott's rate of 20 per cent was rejected because it reflected actual experience after 1988, and was not limited to what was foreseeable on the base date.

The Board was required to abandon present considerations, step back to January 1, 1988, and scan the future from that vantage to determine the economic

impact of 990 rental units to be built some two years later, and express its findings as a vacancy rate. It found that rate to be 17 per cent. Whether this court would have reached the same result is not the question: it was not required to replicate the steps taken by the Board. Section 26 of the **Utility and Review Board Act**, S.N.S. 1992 c. 11 provides:

> 26. The finding or determination of the Board upon a question of fact within its jurisdiction is binding and conclusive.

The Board stated:

> "In an attempt to balance all hypotheticals and arrive at the correct value for #25 Highfield the Board will select what it considers, on all the evidence presented, the suitable vacancy rate to be applied for the Income Approach to value. . . . The Board holds the opinion that the appropriate vacancy rate which should apply is 17 per cent."

This was a finding or determination supported by evidence and arrived at by weighing all appropriate factors. No wrong principle was followed. This court has no jurisdiction to disturb the Board's conclusion that 17 per cent is the appropriate vacancy rate, either by reducing it as urged by the appellant or increasing it as argued by Canada Trustco.

Applying that vacancy rate, the Board arrived at an assessment for 25 Highfield Park of $2,250,500. Counsel acknowledged that this calculation contained an error of arithmetic which they proposed to deal with by agreement; this was not made an issue on the appeal. Assuming that the base date was properly prescribed, I would dismiss the appeal.

The Cross Appeal

Canada Trustco, as cross appellant, asserts that the Director did not

prescribe the base date in a manner that made it legally effective. The issue is stated as follows:

> Did the Board err in law by ruling that the Director "prescribed" January 1, 1988 as a base date under Section 42(2)of the Assessment Act in a manner sufficient to constitute subordinate legislation.

It is not clear that the Board made such a ruling. It stated:

> The appellant made a two pronged attack on the assessment. The first prong, that of the non-publication of the Director's designation of an artificial base date in the past as opposed to a default base date of December 1, 1993 (possibly January 1, 1994), failed for technical statutory reasons. It was not pursued further by either counsel.

Thereafter the Board appears to have simply accepted, on the evidence, the base date of January 1, 1988, as the relevant base date used in the assessment. John MacLellan, Assistant Provincial Director of Assessment, testified that the January 1, 1988, date had been used following the previous reassessment. It was intended that 1993 be a reassessment year. After various factors and trends were considered the decision to continue using January 1, 1988, as the base date after 1993 was made by Mr. Warren, the provincial director of assessment, since retired.

Mr. MacLellan did not specifically recollect when he first heard of that decision but in "all likelihood" he and the other 14 regional directors of assessment were notified at one of their directors' meetings, which were regularly held quarterly. The "key players," the media and the municipal units, were notified by a press release issued by the Nova Scotia Information Service which was entered as an exhibit. Information kits were also distributed to the media, the municipal units, and possibly to real estate agents and appraisers. Newspaper clippings referring to the

designation of the base date were entered in evidence. On cross examination Mr. MacLellan agreed that the base date applies to all residential properties in Nova Scotia, and that hundreds of thousands of properties were affected for the taxation years 1993, 1994, 1995 and 1996.

What Mr. MacLellan described was an informal but effective way to establish a base date, which seems to have achieved its purpose. The January 1, 1988, base date became the foundation for the 1994 assessment. On the strength of it every residential property in Nova Scotia was assessed and added to a municipal assessment roll: assessments were appealed, tax rates were struck in every municipal unit, and taxes were paid. Municipalities were able to provide services to their citizens from their taxation revenues. These considerations lend great weight to the presumption of regularity. Uniformity is the accepted standard for fairness in property taxation, and in **Wandlyn** the January 1, 1988, base date was found consistent with uniformity.

Canada Trustco argues that the base date should have been prescribed by regulation because it is a rule of general application and therefore subordinate legislation. This focuses a technical spotlight on the means chosen by the director of assessment to bring it into existence, rather than the wisdom of that particular date or the process by which the Director selected it. Acceptance of the view that the base date was improperly prescribed and not legally binding would not leave provincial assessments for 1994 in disarray, Canada Trustco argues, because only appeals now outstanding would be affected. The date for bringing new appeals is long past.

The concept of the base date is created by ss. 42(1) and 42(2) of the Act. Section 42(1) provides in part:

> 42(1) All property shall be assessed at its market value, such value being the amount which in the opinion of the assessor would be paid if it were sold on a **date prescribed by the Director** . . . (emphasis added)

Section 42(2) is the actual expression of statutory authority empowering the Director to determine the base date:

> (2) The Director **may** from time to time **prescribe a past date as a base** for the determination of the market value of a property for the purposes of subsection (1). (emphasis added)

Canada Trustco submits that the determination of a base date under s. 42(1) is a legislative function, a rule of general application to hundreds of thousands of properties: subordinate legislation rather than an administrative act. Subordinate legislation requires embodiment in an instrument to make it a law. No instrument or law embodied any decision of the Director making January 1, 1988, the base date for the 1994 assessment year, so there is no legally binding subordinate legislation.

In support of this thesis Canada Trustco cites de Smith, **Judicial Review of Administrative Action** (4th Edition) p. 71 as follows:

> A distinction often made between legislative and administrative acts is that between the general and the particular. A legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases; ...

The widespread importance and effect of the base date lends support to

this argument, although the distinction between general and particular in deSmith is not conclusive. In the same section the author describes an administrative act as one involving "the adoption of a policy" or "the making and issue of a specific direction." It is the intention of the legislature which must govern.

Analysis

Section 2(g) of the **Regulations Act,** R.S.N.S. 1989, c. 393, provides:

> "regulation" means a rule, order, proclamation, regulation, by-law, form, resolution or tariff of costs or fees **made in the exercise of a <u>legislative</u> power** conferred by or under an act of the Legislature
> . . .
>
> (ii) by the minister presiding over a department of the public service of the Province **or by any official of such department**, whether or not such regulation is subject to the approval of the Governor in Council. . . . (emphasis added.)

Section 7(3) of the **Interpretation Act**, R.S.N.S. 1989, c. 235 also defines "regulation":

> 7 (3) In this Act and every enactment made at the time, before or after this subsection comes into force "regulation" includes any rule, rule of court, order prescribing regulations, tariff of costs or fees, form, by-law, resolution or order **made in the execution of a power** given by an enactment **except where the definition of "regulation" as defined by the Regulations Act** applies or where a contrary intention appears from the enactment. (emphasis added.)

At first blush s. 2(g) of the **Regulations Act** and s. 7(3) of the **Interpretation Act** seem to deal with similar concepts, but in fact two distinct categories of regulations emerge. Section 7(3) of the **Interpretation Act** excepts out the definition

of "regulation" in the **Regulations Act**. What remains as regulations as defined by the **Interpretation Act** are all regulatory acts which are not included in the **Regulation Act** definition. The two separate categories of regulations recognized by the two Acts are:

(1) **Regulations Act** regulations made in "the exercise of a legislative power" as described in s. 2(g), that is, subordinate legislation;

(2) **Interpretation Act** regulations "made in the execution of a power," which are any rules or the like that continue to be described by s. 7(3) after regulations made in the exercise of a **legislative** power are excluded from the definition. These would include a variety of administrative acts which are "regulations" because they are defined as such for purposes of the **Interpretation Act**.

The first category, **Regulations Act** regulations, are by definition true subordinate legislation. The formal requirements of that **Act** apply to them: e.g. they must be filed with the Registrar of Regulations and, in many cases, published in the **Royal Gazette**.

The second category includes less formal rules and the like by which powers given by an enactment are **executed**, a term more consistent with administration than with legislation. They are defined as regulations under the **Interpretation Act** but, by definition as well, the formalities of the **Regulations Act** do not apply to them.

Section 12 of the **Regulations Act** is the mechanism by which the category of formal subordinate legislation regulations defined and dealt with by that **Act** is distinguished from the other category of regulations defined in the **Interpretation Act**, the less formal means by which statutory powers are executed in the administration

of government. Section 12 provides:

> 12. Where any regulation-making authority or other authority responsible for the issue, making or establishment of a regulation, or any person acting on behalf of such an authority, is uncertain as to whether or not a proposed rule, order, regulation, ordinance, direction, form, tariff of costs or fees, commission, warrant, proclamation, by-law or resolution would be a regulation if it were issued, made or established by such authority, the authority or person shall cause a copy of the same to be forwarded to the Deputy Attorney General, who shall determine whether or not it would be a regulation if it were so issued, made or established.

It is not apparent from the materials before us that any such reference was made to the Deputy Attorney General with respect to the Director's prescription of the base date as January 1, 1988.

In attempting to determine how the legislature intended the director to exercise the authority with which he was clothed by s. 41(1) and 41(2), it is noteworthy that no form of the word "prescribe" appears in the **Regulations Act**, either in s. 2(g) or s. 12. Given the comprehensiveness of the list of regulation-like nouns in s.12, the choice of a verb that matches with none of them can hardly be accidental. This suggests that the legislature did not intend that the Director, in prescribing a base date, should be considered to be making a regulation under the **Regulations Act**. It would follow that the legislature did not consider the prescribing of the base date to be "the exercise of a legislative power."

The **Interpretation Act** definition includes a form of the verb "prescribe." The list in 7(3) includes "order prescribing regulations" and "order", modified, like the other regulation-like concepts included in the list, by the words "made in the execution of a power given by an enactment".

Section 42 does not direct the manner or form in which a base date is to be prescribed. This suggests a legislative intent to give the Director wide latitude to find an effective method within the bounds of what is fair and reasonable.

The legislature used the word "prescribe" in s. 123(9) of the **Planning Act** R.S.N.S. 1989 c. 346 which was considered In **Waverley (Village Commissioners) v. Nova Scotia (Minister of Municipal Affairs)** 1994, N.S.R. (2d) 298. The section provides:

> "(9) The Minister may prescribe for the area to which the Regional Development Plan applies or any part or parts thereof developments for which no permit shall be required."

In that case the Minister exercised his discretion by issuing a written exemption, a kind of order, and the issue on an application for judicial review by way of *certiorari* was whether he had abused his discretion. In upholding the Supreme Court decision to dismiss the *certiorari* application this court considered the law relating to administrative acts and cited authority that the basic question raised on the review of discretionary decisions is whether "the ambit of the discretionary authority granted authorizes the decision under attack." The issue is not "whether the decision is correct but whether it is authorized."

In the present appeal the question is not whether the statute authorized the director to prescribe the base date, but whether he did so in the proper form.

Canada Trustco argues that to have the force of law the prescription of the base date should have been by way of written instrument. It cites the judgment of Chief Justice MacKeigan in **R. v. Michelin Tires Manufacturing (Canada) Ltd.** (1976), 15 N.S.R. (2d) 150 (C.A.) at p. 176:

> ...I conceive that for an order or regulation to

> have the force of law to bind a person or make him open to prosecution for its violation, it must be made, i.e. executed with due authority, and issued, i.e. promulgated or publicized in some suitable way. (emphasis in original.)

Although a base date is intended to be binding, it would not be binding in the sense that a person would be open to prosecution for violation of one. It is merely the temporal, and therefore variable, element in a statutory formula for determining the market value of real property in a uniform manner based on the well understood concept of a hypothetical sale. Chief Justice MacKeigan went on to say in the **Michelin** case that where formal issuance is not required by the **Regulations Act**,

> ...I would like to think that effective issuance involves some reasonable minimum publication, the nature and degree of which will depend on the kind of order and the persons to whom it is directed.

The author of de Smith states at p. 71:

> In certain circumstances an order has to be published as a statutory instrument if it is of a legislative character but not if it is of an executive (i.e. administrative) character. But the test adopted for discriminating between the legislative and the executive often appears to be pragmatic (is it in the public interest that this order should be published?) rather than conceptual.

Nothing could be more clear than the legislature's expressed intention that the Director is to designate a base date. In carrying out this duty it might well have been preferable if the Director had prescribed the base date in a written order. The method he chose, by announcement to his regional directors, public notice by press release through the official provincial government information agency and information kits, leading to publication in the press, was perfectly effective, and would have been no more effective if a written order had existed. The date he selected became the

basis for the 1994 assessments. The Director acted consistently with s. 41 and infringed no statutory duty nor requirement. In my view his prescription of the base date by the manner he chose was a valid administrative act, and I would not disturb it.

In any case, I do not consider that the issue of the prescription of the base date was validly before the Utility and Review Board. Section 62 of the **Assessment Act**, provides a right of appeal for wrongful inclusion or omission from the tax roll, under- or over-valuation, or an error in classification. The powers of the assessment appeal court, which are the same powers exercised *de novo* by the Board, do not provide for striking down the assessment roll for want of form in the prescription of the base date. It would require distortion of the language and scheme of the **Act** to consider the base date issue in the guise of overvaluation.

An administrative act, such as I consider the prescription of the base date to be, in theory is subject to judicial review. As stated in **Waverley**,

> The Supreme Court of Canada settled the question of availability of judicial review of discretionary administrative decisions in **Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police,** [1979] 1 S.C.R. 311 and **Martineau v. Matsqui Institution Disciplinary Board,** [1980] 1 S.C.R. 602, 106 D.L.R. (3d) 385. In the latter case Dickson, J. (as he then was), Laskin C.J.C. and McIntyre J. concurring, concluded at (p. 410 D.L.R.) after a review of the authorities:
>
> > 1. *Certiorari* is available as a general remedy for supervision of the machinery of Government decision-making. The order may go to any public body with power to decide any matter affecting the rights, interest, property, privileges, or liberty of any person. The basis for the broad reach of this remedy is the general duty of fairness resting on all public decision-makers.
> >
> > 2. A purely ministerial decision, on broad grounds of public policy, will typically afford the individual no

> procedural protection, and any attack upon such a decision will have to be founded upon abuse of discretion. . . .

The Supreme Court of Nova Scotia would therefore appear to be the appropriate forum for a challenge to the prescription of the base dates, for the Board does not possess the necessary review jurisdiction. The **Assessment Act** deals with *certiorari* in a limited context in s. 89, which provides in ss. (2) that no assessment, rate, order or proceeding is to be quashed for a matter of form only.

In any event, in my view it was not necessary for the Director to prescribe January 1, 1988, as a base date in a manner sufficient to constitute subordinate legislation because he did so as an administrative act, not in the exercise of a legislative power, and his manner of doing so was sufficient. I would dismiss both the appeal and the cross appeal. This is a tribunal appeal in which Canada Trustco has enjoyed mixed success. I would make no order as to costs.

Freeman, J.A.

Concurred in:

Clarke, C.J.N.S.

Matthews, J.A.

C.A. No.132281

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REASONS FOR JUDGMENT BY:

FREEMAN, J.A.