C.A. No. 120545

NOVA SCOTIA COURT OF APPEAL
Cite as: Nova Scotia (Assessment) v. Wandlyn Inns Ltd., 1996 NSCA 80

Clarke,C.J.N.S.; Hallett and Freeman, JJ.A.

BETWEEN:

The Director of Assessment	)	Randall R. Duplak, Q.C.,
	)	Amy J.A. Parker
Appellant	)	for the Appellant
	)	
- and -	)	
	)	
	)	
Wandlyn Inns Limited and	)	David A. Miller, Q.C.,
The City of Dartmouth	)	Nancy I. Murray
	)	for the Respondents
Respondents	)	
	)	

BETWEEN

Wandlyn Inns Limited	)	
	)	
Cross Appellant	)	
	)	
- and -	)	
	)	
The Director of Assessment and	)	
The City of Dartmouth	)	
	)	
Cross Respondents	)	
	)	
Appeal Heard:		
	)	February 5, 1996
	)	
	)	
	)	Judgment Delivered:
	)	April 11, 1996

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

Freeman, J.A.: (Dissenting)

This is an appeal by the Director of Assessment from a decision of the Nova Scotia Utility and Review Board which reduced the 1992 assessment on a motel property of the respondent Wandlyn Inns Limited to $1,351,000 on an appeal from a decision of a regional assessment appeal court.

The issues involve the valuation of the property, which includes the need to interpret the **Assessment Act** R.S.N.S. 1989 c. 23 as to the effect of amendments respecting dates relevant to the assessment. Wandlyn has cross appealed, urging that the administrative changes must be tempered by the principle of uniformity. These broad statements encompass the various grounds raised by counsel with the exception of two based on admonishments by the Board to Mr. Duplak, counsel for the Director, not to make unsupported statements. While the issues do not turn on this, in fairness to Mr. Duplak, he does not appear to have gone beyond the bounds of good advocacy.

The Property

The property is a motor inn constructed in 1972 on a 54,400 square foot lot near the Burnside Industrial Park in Dartmouth, Nova Scotia. It consists of 53 guest rooms in the main building and 39 in an annex, an executive suite, dining room, lounge and meeting rooms. It was purchased by Wandlyn for $2,500,000 in March, 1988, and conveyed to another purchaser for $1,000,000 in 1992 when Wandlyn was operating under the protection of the **Companies' Creditors' Arrangement Act.** It was assessed for $2,361,400 on the 1992 assessment roll for the City of Dartmouth, and the assessment appeal court had reduced this to $2,125,000 before the appeal to the Board.

Rights of Appeal

Upon the filing of a notice of appeal, the Director of Assessment is required by s. 68(2) to review the assessment complained of and this may result in an alteration which settles the appeal. If not, the assessment appeal court conducts a full hearing *de novo* pursuant to s. 72. The powers of the court enumerated in s. 74 include decision-making powers as to evaluation similar to those

of an assessor. The appeal which lies from the assessment appeal court to the Board is also by way of a trial *de novo* pursuant to s. 87 of the **Assessment Act**. The Board is required to "examine such witnesses and take all such proceedings as are requisite for a full investigation of the matter", with all the powers of the assessment appeal court.

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.

An appeal lies to this court under s. 30 of the **Utility and Review Board Act**, upon any question as to the Board's jurisdiction or upon any question of law.

Valuation

The valuation of the property is governed by s. 42(1) of the **Assessment Act**, which states:

> 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 in the open market by a willing seller to a willing buyer, but in forming his opinion the assessor shall have regard to the assessment of other properties in the municipality so as to ensure that taxation falls in a uniform manner upon all residential and resource property and in a uniform manner upon all commercial property in the municipality.

Subsections 42(2) and (3) provide:

> 42 (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).
>
> (3) Notwithstanding subsections (1) and (2), the assessment of a property shall reflect its state as of the date referred to in subsection (2) of Section 52.

Section 52(2) prescribes that:

> 52 (2) The assessment shown on the roll shall be the assessment that reflects the state of the property as it existed on the first day of December immediately preceding the filing of the roll.

Those provisions are now modified by **Nova Scotia Regulation 57/94**, Vol. 18, No. 9, dated April 6, 1994, filed April 7, 1994:

> 1. For purposes of subsection (3) of Section 42 and subsection (2) of Section 52 of the Assessment Act, the word "state" refers to the physical conditions of property and includes leasehold improvements and any additions to, deletions from, or destruction of property, effective from base date January 1, 1988.

The concept of a "base date" was introduced by a 1984 amendment to s. 42, then s. 38, by the addition of the words "on a date prescribed by the Director". This followed a decision by O Hearn, C.C.J. in **Halifax Developments Limited v. Director of Assessment and City of Halifax** (1983), 55 N.S.R. (2d) 455, known as "the Scotia Square decision", in which he rejected base dates earlier than the year preceding the assessment roll. He stated at page 483:

> Counsel for the Halifax Developments Limited posed the question 'Whether the data base for applying the capitalized-net-income approach should be the period ending December 31, 1978, or the period ending December 31, 1979?' The question is not primarily a legal one but has legal components, because certain provisions of the **Assessment Act** are involved including, above all, the paramount consideration of uniformity. Thus, by s. 64(1) the Director must complete and forward the assessment roll each year on or before December 31st, and by subs. (1A) the assessment shown on the roll must reflect the state of the property as it existed on December 1st 'immediately preceding the filing of the roll'. (The 'state of the property' probably means the ownership, occupation, use and physical state of the property at that date.) While the wording of these two subsections would permit the roll for, e.g. the 1980 assessment year to be filed before December 1, 1979, subs. (1A) would throw back the 'state of the property' in that case to December 1, 1978. This is not consistent with the provisions in the Act governing change of use. Accordingly, the universal practice seems to be to finalize the roll for the succeeding year in the month of December preceding that year.

Judge O Hearn, in the course of a long and thorough decision in which he carefully considered assessment practices, concluded that while it would be impractical to require annual reassessments of all properties, a "level-of-assessment" concept based on data obtained from market experience could be used to bring the valuation of all properties into line for each assessment year.

It is to be noted that s. 64(1A) referred to by Judge O Hearn is identical with the present s. 52(2); it was added to the **Assessment Act** by Chapter 10 of the Statutes of 1978-79 and therefore preceded the reference to a "date prescribed by the Director" in s. 42(1).

The present statute accommodates but does not mandate the present practice of reassessing

commercial properties every third year. The base date relates to such reassessment, when all factors relating to the value of each property should be taken into account. This raises the question, germane to this appeal, of what factors are to be considered in the off years between reassessments. The 1994 regulation provides that only the physical condition of properties is to be considered, but the issues in this appeal arose before the regulation was passed. However, the uniformity principle, discussed below, makes it unnecessary to consider an interpretation at variance with the plain language of the regulation.

The First Issue--The Sale Price

The Director as appellant argues that the sale of the property to Wandlyn in 1988 "in the open market by a willing seller to a willing buyer" fulfilled the requirements of the hypothetical sale described in s. 42(1) and, therefore, should have been binding on the assessor, the assessment appeal court, the Board, and on this court, as a matter of law. That is, $2,500,000 should have been accepted as the market value subject to a statutory adjustment under s. 42(6) which deems untaxable personal property to be fifteen per cent of the value of a hotel or motel--the $2,125,000 value arrived at by the assessment appeal court.

In the absence of coercion or duress of one kind or another, the actual sale of a property always presupposes a willing seller and a willing buyer. It would be taking a long step, however, to conclude that, because the buyer and seller are both willing, the market must therefore be open, and the price definitive of market value within the meaning of s. 42(1). In the present case, the buyer and seller were at arm's length. The seller stated a price and refused to negotiate. The buyer met it.

It was open to the Board to conclude, upon a consideration of the evidence, that the price represented market value. It was equally open to the Board to conclude, as it did, that the buyer had acted imprudently.

An actual sale price can be persuasive as to market value but it is never binding. The

favoured approach for valuing commercial property is by the capitalized-income approach, as Judge O Hearn noted in the Scotia Square case. This is necessarily so because it can be applied to every property, and actual sale prices are only rarely and randomly available. The capitalized income approach involves a wide choice of variables, and uniformity would become an elusive ideal if a few properties were valued according to their selling prices while the others were valued by the capitalized-income approach. Actual sales figures are primarily useful as a statistical control to ensure that the results of the capitalized-income approach remain realistic.

Market value for purposes of s. 42(1) is not the price paid by the buyer to the seller, but "the amount which in the opinion of the assessor would be paid if it were sold . . . in the open market". That is to say, "market value" in s. 42(1) is not intended to be a real figure but a creation of the opinion of the assessor, who in reaching it, must take into account numerous factors, not least of which is uniformity, and ultimately rely on his own judgment and experience. On appeals, the final figure is a matter of fact on which the opinion not of the assessor but of the assessment appeal court or the Board is final and conclusive.

Montreal v. Sun Life Assurance Co. of Canada (1952), 2 D.L.R. 81, a decision of the Judicial Committee of the Privy Council, is the leading case on the determination of market value. Lord Porter said at p. 94:

> As they have said, the Board accepts the view that the true test is what a willing buyer would give and a willing seller take . . .
>
> But in saying this their Lordships must not be taken to disparage a regard for and in some cases an acceptance of the sum actually paid as a partial or possibly in appropriate cases as a complete guide to the proper amount of the assessment. . .

The sum actually paid, therefore, may coincide with, but it does not determine, market value.

The Director also cites The Dictionary of Real Estate Appraisal, (2nd ed.) Chicago: American Institute of Real Estate Appraisers, 1989 at p. 192 for a definition of "market value" as

> The most probable price, as of a specified date, in cash, or in terms equivalent to cash, or in other precisely revealed terms for which the specified property rights should sell after reasonable exposure in a competitive market under all conditions requisite to a fair sale, with the buyer and seller each acting prudently, knowledgeably, and for self-interest, and assuming that neither is under undue duress.

In the present case, the Board considered the evidence and found that the circumstances of the sale did not establish an open market, by which it may be assumed that it was not satisfied the property changed hands "in a competitive market under all conditions requisite to a fair sale, with the buyer and seller each acting prudently, knowledgeably and for self interest". In short, it considered the price too high. There was evidence in support of this view. The Board accepted the evidence of James Bogart, employed as vice-president and secretary-treasurer of Wandlyn, a family owned enterprise. Mr. Bogart had advised the owners against buying the property because the price was too high to justify. An evaluation made at the time by an accounting firm for financing purposes was based on speculative considerations that never materialized. The Board described this as "a leap of faith". Mr. Bogart considered a fair price to be at or below the low end of a range from $1,700,000 to $2,100,000. Thus, there was evidence the buyer did not act prudently. The Board committed no error of law or jurisdiction in determining the market value for assessment purposes to have been $1,600,000 at the base date, about three months before the date of the sale.

"Base Date" and "State Date"

The "base date" and "state date" concepts have evolved from a combination of assessment practice and supporting amendments to the **Assessment Act**. Traditional assessment approaches have been preserved in form with modified effects.

The introduction of the base date was made necessary by the current practice of assessing commercial properties on a three-year cycle for reasons of economy and convenience. In a reassessment year, all factors affecting the value of a property are taken into account, including

the state of the market as well as the state of the property. Assessment rolls are updated in off years between reassessments only by considering changes to the physical state of the property such as additions or demolitions, and market trends are ignored. Values remain those of the reassessment year, or base date.

The assessment roll contains a list of the valuations of all taxable properties in a municipality. It is prepared by the Director of Assessment from updated information gathered by him and his staff prior to December 1st in each year and filed with the clerk of the municipality. It then becomes the basis for municipal property taxation for the following year. The December 1st date was formerly the relevant date for assessment purposes. Now known as the "state date", it has been eclipsed in importance by the "base date". However, it is always the state date value, and never the mere base date value, that appears on the assessment roll.

Section 42(1) requires that 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". The date prescribed by the director is the base date, which is set at the beginning of the year two years prior to the first year for which it is reflected in the assessment roll. Thus, the base date of January 1, 1988, in the present appeal did not affect assessments until the assessment roll for the taxation year 1990. This delay is presumably necessary to perfect data and make adjustments, such as permitting the market studies subsequent to that date which result in the general commercial level. Pursuant to s. 52(2) the assessment shown on the roll "reflects the state of the property as it existed on the first day of December immediately preceding the filing of the roll". For the 1992 assessment roll, market value on the date prescribed by the director had to be adjusted to changes in the state of the property occurring between January 1, 1988, and December 1, 1991, a period of almost four years. Such changes would be valued according to property values on the base date, not in the year in which they occurred.

The general commercial level is arrived at by analyzing sales data from the six-month periods before and after the base date to establish the relationship between the base date market

values of commercial properties determined by the opinion of the Director and the market value determined by the actual market. The general market level determined for the January 1, 1988, base date was 99.35 per cent, which means that commercial properties in Dartmouth are deemed to have been assessed at 99.35 per cent of their true market value.

Wandlyn argues in its cross appeal that the same considerations that are relevant in a reassessment year should apply with respect to the value established as of the first day of December preceding the filing of the assessment roll, the so-called "state date". However, that view appears to be contrary not only to the assessment practice which has developed under the **Act** in its present form, but, more importantly, to the intention of the legislature in enacting the relevant amendments.

The Director's position is that economic information is sought only as of base dates, and that to admit considerations other than physical changes to properties in determining their value between reassessments would undermine the integrity of the base date concept as a means of achieving uniformity of assessments. Even without the assistance of the 1994 regulation, this is not an unreasonable submission.

These current assessment practices are supported by the **Assessment Act**. The "state of the property" referred to in ss. 42(3) and 52(2) must obviously mean something other than "market value" as used in s. 42(1). Sections 42(3) and 52(2) do not mention the state of the market. Without determining that the "state of the property" can mean only its physical condition, it is not necessary in this appeal to go beyond the ordinary meaning of the words of the 1994 regulation: "the word 'state' refers to the physical conditions of property and includes leasehold improvements and any additions to, deletions from, or destruction of property, effective from base date January 1, 1988". The regulation was passed only in 1994 presumably to confirm prevailing assessment practice. While it cannot define the term "state" retroactively, nor amend the statute, it is nevertheless consistent with the clear meaning and apparent intent of the provisions in question.

Therefore, once market value of an assessed property is determined as of a base date, that

value relative to other commercial or residential properties in the municipality can, as a rule, be altered between reassessment years only by evidence of changes to the physical condition of the property, which will generally mean improvements added or removed. A three-year assessment cycle is clearly less sensitive to fluctuating market conditions than a one-year cycle, and the anomaly of properties assessed for more than their market value in any current tax year is distinctly possible. In establishing the statutory framework for this scheme - the "base date" and "state date" provisions - the legislature presumably balanced such possibilities against the uniformity achieved by adjusting assessments only for changes in physical conditions during off years, and the impracticality, the cost and inconvenience, of reassessing every property every year. It is apparent that such a scheme preserves uniformity of valuation among all commercial properties in a municipality between base dates so long as economic trends affecting all commercial properties are uniformly up or down and do not vary between one sub-category of property and another, or between an individual property and the other properties generally. In adopting a scheme which may generally be expected to result in a reasonable degree of uniformity of assessment, the legislature must be assumed to have recognized that a rigid standard of precise uniformity of taxation would not be achieved.

In my view, therefore, the current practice of assessing commercial property on a three-year cycle is justified under the **Assessment Act** and assessors are justified in following the general practice of updating assessment rolls as of state dates by considering only changes to the physical state of assessed properties. This view is subject, however, to further considerations of uniformity of taxation which are discussed below.

The Decision Appealed From

The Board apparently followed the above interpretation in arriving at its conclusions, which it summarized as follows:

> Having reviewed carefully all the evidence, the Board determines that the market value of the subject property for assessment purposes for the assessment year 1992, with base date January 1, 1988, is $1,351,000. This is based on a market value of $1,600,000, from which is deducted 15 % for furniture, fixtures and equipment as mandated by s. 42(6) of the Assessment Act, applying the commercial general level of 99.35%, as stated in Mr. MacDonald's evidence and rounding to the appropriate number of significant digits. The business occupancy assessment of 25% of the commercial assessment (rounded) therefore will be $338,000.

There was evidence in support of that finding; the weight of that evidence is for the Board. On appeals before the Board evidence of the state of the market and other economic considerations is clearly relevant to determining the base date value. The Board stated it did not consider itself restricted to consider only evidence of the physical condition of the property in fixing the assessed value for 1992, but this is not reflected in its conclusions. There was no evidence of physical change so the 1992 figure arrived at by the Board was in the same amount as the valuation it determined for the base date. The Board found "that the market value of the subject property for assessment purposes for the

assessment year 1992, with base date January 1, 1988, is $1,351,000". That figure reflected an opinion of a market value of $1,600,000 as of the base date with appropriate adjustments.

Wandlyn argues that the Board did not make a finding of the market value of the property as of December 1, 1991, which it urges is required for the 1992 assessment. In the absence of

evidence of physical change, however, the state date figure would be in the same amount as the base date valuation. The lower figure urged by the appellant was based on evidence as to the state of the market.

Uniformity

While the Board's decision is sound as far as it goes, Wandlyn argues that it must go further and take the principle of uniformity of taxation into account.

Under ordinary circumstances, the current scheme outlined above achieves uniformity of assessment within parameters apparently deemed acceptable by the legislature. Wandlyn does not take issue with uniformity of assessment in that context. Mr. Miller, Wandlyn's counsel, urges that the controlling principle is uniformity of taxation.

There is merit to this submission. Property assessment is an inexact science in which all goals are relative, not absolute. Chief among those goals is uniformity. The underlying concern is the fair distribution of the municipal tax burden. While administrative convenience is an important feature of the state date/base date concept, its ultimate purpose is to achieve uniformity. When that formula can be shown to have produced an unfair result, the time-tested principle of uniformity must be applied directly, overriding the formula. It is not the formula that matters but the result. The tail must not be allowed to wag the dog.

It will be recalled that s. 42(1), which incorporates the 1984 amendment, provides:

> 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 in the open market by a willing seller to a willing buyer, **but in forming his opinion the assessor shall have regard to the assessment of other properties in the municipality so as to ensure that taxation falls in a uniform manner upon all residential and resource property and in a uniform manner upon all commercial property in the municipality.** (Emphasis added.)

The predecessor section was s. 38 of Chapter 38 of the Revised Statutes of Nova Scotia, 1967, which provided:

> 38. All property shall be assessed at its actual cash value, such value being the amount which in the opinion of the assessor it would realize in cash if offered at auction after reasonable notice, but in forming his opinion the assessor shall have regard to the assessment of other properties in the town or municipality so as to ensure that taxation shall fall in a uniform manner upon all real property in the town or municipality and that taxation shall fall in a uniform manner upon all personal property in the town or municipality.

This was preceded by Rule 2 of Section 18 of Chapter 15 of the Revised Statutes of 1954, which read as follows:

> Rule 2--All property liable to taxation shall be assessed at its actual cash value, such value being the amount which in the opinion of the assessor it would realize in cash if offered at auction after reasonable notice but in forming such opinion the assessor shall have regard to the assessment of other properties in the town or municipality so as to ensure that taxation shall fall in a uniform manner upon all real property in the town or municipality and that taxation shall fall in a uniform manner upon all personal property in the town or municipality.

Except with respect to the classes of property to which uniformity principles apply, e.g. commercial and residential, the requirement that the assessor shall form his opinion of market value bearing uniformity of taxation in mind has not changed in substance since it was considered in the decision of Chief Justice Ilsley in **Mersey Paper Co. Ltd. v. County of Queens** (1959), 18 D.L.R. (2d) 19. After a thorough analysis he wrote at page 28:

> I think the history of this Rule and the words beginning "so as" show that the Legislature by the second amendment intended that the dominant and controlling factor in determining the amount at which property is to be assessed should be not its actual cash value but uniformity. I think the first part of the Rule directing assessment of property at its actual cash value is subsidiary or subordinate to the latter part of the Rule. The use of the words "but" (in introducing the latter part of the Rule), "shall", and the words beginning "so as to ensure" point to this conclusion.

("Actual cash value" was replaced by "market value" in Chapter 15 of the Statutes of Nova Scotia, 1981, but any distinction between these terms is not significant to this appeal.)

This was confirmed by Macdonald, J.A. writing for this court in **Lehndorff Management Limited v. City of Dartmouth** (1975), 15 N.S.R. (2d) 40 at p. 45:

> . . . [I]t is clear that since the judgment of this Court in **The Mersey Paper Co. v. The County of Queens** (1959), 42 M.P.R. 297, uniformity rather than actual cash value is the dominant and controlling factor in determining the amount at which property is to be assessed.

Given the widespread adoption of this interpretation and the various amendments to the present s. 42(1) since 1959, it is obvious that the legislature has not only accepted the paramountcy of uniformity but has deliberately avoided altering the language or the structure of the provision. Both the **Mersey Paper** and **Lehndorff** cases refer to uniformity of assessment. The **Act**, as Mr. Miller points out, refers to uniformity of taxation. Ordinarily this will give rise to no difficulty because uniformity of assessment may be presumed to give rise to uniformity of taxation.

"Uniformity of assessment" in this context can only mean that uniformity which results from uniformity in the method of assessment. Assessments which are genuinely uniform must necessarily result in uniformity of taxation. Uniformity in the method of assessment, such as strict application of the base date/state date approach, will usually result in uniform assessments, but as noted above, this is not necessarily so in every case. The presumption that uniform assessment methods yield uniform assessments may have been consistently valid when the one-year assessment cycle coincided with the one-year municipal taxation cycle. It must now be seen to be rebuttable. A three-year assessment cycle has been imposed on an unchanged municipal taxation cycle with *ad hoc* amendments rather than an in-depth review of the statutory provisions. Two or three years into an assessment cycle, municipal taxation may not fall uniformly on a property which was uniformly assessed on the base date and which remains physically unchanged.

As noted in the **Mersey Paper** case, Rule 2, now s. 42(1) had two main divisions: the first related to the Director's opinion as to the value of the property; the second making that opinion subordinate to uniformity of taxation. The structure of that section has not changed.

Under the first parts of Rule 2 and s. 38, the value sought for assessment purposes was a product of the exercise of the opinion of the assessor, who was required to direct his mind to the cash value the property would bring at an imaginary auction.

Under the first parts of s. 42, the value sought for assessment purposes is a product of the exercise of the opinion of the assessor, who is required to direct his mind not to an imaginary auction but to an imaginary sale between a willing buyer and a willing seller on a prescribed date.

Under the second part of all three divisions, the assessor (or Director) is required to modify his opinion as to value by having regard to other assessments "so as to ensure that taxation falls in a uniform manner".

That exercise of the Director's opinion is required to take place as of the December 1st state date to provide the property value to be used in the assessment roll on which municipal taxation is to be based during the following year. No matter what steps the Director follows in arriving at his opinion of market value with respect to a particular property, it is contrary to s. 42(1) if he has

reached it without ensuring that taxation will fall on that property in a manner uniform with all commercial property in the municipality.

The consideration only of uniformity of assessment on the base date, modified by state date changes in the physical condition of the property, may result in an opinion of market value that ensures uniformity of taxation. When it does not, s. 42(1) as interpreted by the case law requires that the assessment be altered so uniformity results. An opinion of value that does not ensure uniformity of taxation following the base date/state date approach can be expected to occur only when conditions relevant to value have changed dramatically for a subgroup or individual property within the inclusive classification of commercial property. Therefore, it is unlikely that the overall uniformity of assessment of commercial properties arrived at by application of "state date" principles will be affected by correcting the anomaly. If all other commercial properties in Dartmouth are assessed at market value or some uniform percentage of market value as of the state date, the prevailing uniformity will be enhanced rather than worsened if the subject property is also assessed at its market value or a similar percentage of it. That percentage may be greater or less than one hundred per cent, depending on market trends after the base date.

It is noteworthy that the Director of Assessment himself appears to have departed from strict adherence to the base date/state date formula in negotiating reduced assessments for other hotel and motel properties in Dartmouth for the 1992 assessment year. The Board decision contains the following passage:

> The Board . . . does not consider it is specifically prohibited from considering matters which it considers relevant and, consequently, will consider not only the physical condition of the subject property but other factors which it deems pertinent as well.
>
> This approach in fact would not seem to be at variance with the Department's actual practice. The Board was made aware of reductions in assessments for the 1992 assessment year of five competitive hotels and motels relative to the values for 1990. The 1992 assessments ranged from approximately 20% to 50% lower than the corresponding assessments for 1990. For both assessment years the base date is January 1, 1988. There was no indication of any massive reduction in physical plant in any of these properties.

It may be noted in passing that the Board's difficulty with the confined scope of relevant "state date" factors might have been overcome by application of uniformity principles. In the result, the Board decision, as noted above, reduced the base date value to $1,600,000. As there were no physical changes, the same figure was used to yield the value for the 1992 assessment, despite the 20 to 50 per cent reductions in other hotel and motel assessments negotiated by the assessor in the absence of evidence of substantial reductions to their physical state.

The reference to "taxation" in the language of s. 42(1) dealing with uniformity invokes the current municipal taxation year in the dominant provision of the section, to which the preceding language, linking market value to the base date, is subsidiary or subordinate. It is not the assessment by itself but the resulting taxation which can give rise to the unfairness sought to be remedied by the second part of s. 42(1). In my view, there is no ambiguity on this point, but if there were it would have to be resolved in favour of the taxpayer (See e.g. **Forbes Chevrolet Oldsmobile Limited v. City of Dartmouth** (C.A. 118581 February 6, 1996--Unreported).

The conclusion that the principle of the paramountcy of uniformity in s. 42(1) has survived the base date/state date amendments and remains alive and well takes little from the overall effectiveness of present assessment approaches. As a general rule, they will provide a uniform result, but the present appeal involves an exception. As a practical matter, nothing more can be asked of an assessor in preparing an assessment roll than that he assess each property correctly and uniformly as of the base date and make any necessary adjustments based on physical changes as of the state date. That must be presumed to yield a uniform value to be used on the assessment roll. Exceptions do occur, however, and the presumption must be seen to be rebuttable.

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. Relief would be confined to the difference between the assessment of that property and the general level of all other commercial assessments in the municipality for the current municipal taxation year.

Any evidence, including state of the market evidence, could be used to show that the base date/state date approach had not enabled the assessor to reach an opinion of value that ensured uniformity in the specific instance. Then, with the formula discredited with respect to the assessment of the subject property, there would be no reason to exclude state of the market evidence.

The taxpayer could expect relief only by showing that the change in market value of the subject property since the base date was substantially disproportionate to the general level of changes to the market value of commercial property in the municipality. The change should be substantial to warrant correction because the adoption by the legislature of the relatively imprecise state date mechanism for achieving uniformity in off years necessarily contemplates minor discrepancies.

The assessor, or the assessment appeal court or the Board in his stead, would consider this evidence in forming an opinion as to the assessed value of the subject property shown on the assessment roll for the current year, having "regard to the assessment of other properties in the municipality so as to ensure that taxation falls in a uniform manner upon all . . . commercial property in the municipality".

This approach differs from that taken by Bouck, J. in **Trizek Equities Limited v. Vancouver** (1985), 28 M.P.L.R. 286 (B.C.S.C.) although the result is similar. Bouck, J. was faced with the interpretation of the following by-law:

> 2-1 In section 26 of the Act, 'actual value' means the actual value that land and improvements would have had on December 31, 1982 had they been on that date in the state and condition that they are in on December 31, 1983, and had their

> use and permitted use been on December 31, 1982 the same as they are on December 31, 1983.

He found that "state and condition" could include a 30 per cent drop in a vacancy rate in an office building between December 31, 1982, and December 31, 1983, and should be considered by the assessor in determining market value.

Conclusion

In the present appeal, Wandlyn argues that both a low occupancy rate and a general reduction in the market value of motel properties because of overbuilding and increased competition have reduced the market value of the subject property relative to other commercial property in Dartmouth. It argues that at its original assessed value, its tax burden would be more than 260 per cent of the tax burden on other commercial properties in the City of Dartmouth. It urges that proper market value for the 1992 assessment roll would be $900,000, the valuation arrived at by the one appraiser to give evidence as to the actual market value of the property on December 1, 1992.

If a departure of such magnitude from uniform taxation based on market value were found by the Board to be proven on the evidence, it could not be defended under s. 42(1).

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.

I would dismiss the appeal, allow the cross appeal, and remit the matter to the Board for a finding as to the value of the property for purposes of the 1992 assessment roll having regard to

the principle of uniformity of taxation. Taking all of the circumstances into account, I would order that Wandlyn should have costs, which I would fix at $2,000 inclusive of disbursements.

FREEMAN, J.A.

HALLETT, J.A.:

I agree with Justice Freeman that the Minister's appeal should be dismissed. However, I would not allow the cross-appeal. Section 42(1), (2) and (3) and s. 52(2) are relevant; the sections provide:

> "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 in the open market by a willing seller to a willing buyer, but in forming his opinion the assessor shall have regard to the assessment of other properties in the municipality so as to ensure that taxation falls in a uniform manner upon all residential and resource property and in a uniform manner upon all commercial property.
>
> (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).
>
> (3) Notwithstanding subsections (1) and (2), the assessment of a property shall reflect its state as of the date referred to in subsection (2) of Section 52.
>
> 52 (2) The assessment shown on the roll shall be the assessment that reflects the state of the property as it existed on the first day of December immediately preceding the filing of the roll." {Emphasis Added}

In my opinion the Legislature in enacting s. 52(2) by use of the phrase "state of the property" intended that the Director of Assessment, in assessing property in the off year, to use Mr. Justice Freeman's apt expression, reflect only changes in the physical condition of the property and not changes in market value arising out of other than physical changes. To interpret the section as reflecting market value due to other than physical changes as of the "state date" would nullify the provision of s. 42(1) which mandates that the Director assess property at market value at a date prescribed by the Director; in this case, January 1st, 1988. The words "state of the property" in s. 52(2) must mean something other than state of the market for the property. To interpret it as my learned colleague, Justice Freeman has, would, in my opinion, destroy the base date concept of the assessment legislation as assessments in the off year would be based on market value as of the state date and not the base date. In enacting s. 52(2) the Legislature could not have intended such a result. In my opinion the combined effect of s. 42(1), (2) and (3) and s. 52(2)

requires that the Director, in the off years in assessing property, reflect only physical changes in the property (such as the construction of a building on the property, an addition to a building or the destruction of a building) subsequent to the prior state date .

A reading of s. 42(1) of the **Act** as a whole satisfies me that the duty on the Director to ensure that taxation falls in a uniform manner upon commercial property in the municipality relates to the Director "forming his opinion" of market value of the property at the date prescribed by the Director pursuant to s. 42(2), in this case, January 1st, 1988 and not uniformity of taxation in years subsequent to the base date year.

The base date/state date method of assessment is such that a taxpayer in a deflationary market is stuck for a period of years with assessment based on market value at a past date. Conversely, in a rising market the taxpayer may have the benefit of a lower assessment in relation to market value in subsequent years. The tax rate set in the off years will be fixed by the municipality based on its financial needs and the assessments of the property in the municipality by the Director irrespective of whether the assessments are above or below current market value.

Assuming that the Director, in a re-assessment year, has properly performed his duty under s. 42(1), all assessable property will have been valued as of the base date at market value so that changes in market value in subsequent years due to market conditions, as opposed to physical changes in the property should not affect uniformity of taxation to any significant extent.

Unfortunately, Wandlyn's property has suffered a significant decrease in market value. This decrease might be greater than the decreased value of other commercial properties in Dartmouth between the market value on January 1st, 1988, to that on December 1st, 1991. However, in a base date/state date system there is not a remedy. That is one of the deficiencies in this method of assessment but that is what the Legislature has put in place. We cannot change the **Act** nor interpret it in a manner that is inconsistent with the legislative intent as expressed in the words of the relevant sections.

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. Wandlyn succeeded, to a certain extent, in that the Board accepted the evidence of Mr. Bogart as to the market value of the property in 1988. As a result, the Board found that as of January 1st, 1988, the market value of the property was $1.6 million and after making the necessary statutory adjustments for the personal property component, reduced the assessment from $2,125,000 to $1,351,000. There were no physical changes in the property from January 1st, 1988, to December 1st, 1991. Therefore, the assessment of the property for the 1992 taxation year should be $1,351,000 as found by the Board. While there are inconsistencies in the Board's reasoning, there was no overriding error by the Board in its consideration of the evidence respecting the market value of the property for assessment purposes.

I would affirm the Board's reduction of Wandlyn's assessment to this figure. Both appeals have failed. Therefore, I would not make an order of costs in favour of either party.

Hallett, J.A.

Concurred in:

Clarke, C.J.N.S.

C.A. No.120545

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

The Director of Assessment Appellant	)	
- and -	)	REASONS FOR JUDGMENT BY:
Wandlyn Inns Limited and The City of Dartmouth	)	Hallett, J.A.
Respondents	)	Freeman, J.A. (dissenting)
Wandlyn Inns Limited Cross Appellant	)	
- and -	)	
The Director of Assessment and The City of Dartmouth Cross Respondents	)	