N O V A S C O T I A
COUNTY OF HALIFAX C.H. 34806

I N T H E C O U N T Y C O U R T
OF DISTRICT NUMBER ONE

BETWEEN:

THE DIRECTOR OF ASSESSMENT,

Appellant

- and -

HALIFAX DEVELOPMENTS LIMITED,

Respondent

AND BETWEEN:

HALIFAX DEVELOPMENTS LIMITED,

Appellant

- and -

THE DIRECTOR OF ASSESSMENT, and
THE CITY OF HALIFAX,

Respondents

Douglas J. Keefe, Esq., for the Director of Assessment.
John S. McFarlane, Esq., and
David A. Miller, Esq., for Halifax Developments Limited.
Mary Ellen Donovan, for the City of Halifax.

1983, January 6, O Hearn, J.C.C.:- Scotia Square is a very large business redevelopment of what was formerly a city-centre slum area, containing also some commercial and industrial properties. Lands were acquired and cleared by Halifax City, which eventually accepted proposals for redevelopment. These are matters of common knowledge in the vicinity. According to the pre-trial memorandum submitted by the respondent (which I have found very helpful) the Scotia Square project was developed in a number of stages all of which were separately assessed. It appears from the evidence, however, that they are all in common ownership, although they could be said to form three parcels, because two long-existing city streets divide the development into three distinct portions.

The components of the development and their various locations were discussed throughout the evidence, but everyone proceeded

on the basis that the general features of Scotia Square are well known. Thus, it is a little difficult to discriminate between what has been proved about them in evidence and what is common knowledge in Halifax. Nothing really depends upon the distinction, however.

Beginning at the southeast corner of the development,* at the intersection of Barrington and Duke Streets, there is a two-level shopping mall. (There is a further very much smaller level west and uphill on Duke Street, at the corner where it intersects Market Street (see ex.3D). A major tenant in the shopping mall complex is the Woolco Department Store.

North of the Barrington-Duke intersection, on the west side of Barrington Street and inset in the mall, is the Barrington Tower, an office tower. North again on Barrington Street, on its own pad but directly connected to the mall and the Parkade, is a hotel, the Château Halifax. North of this again but set back a considerable distance from Barrington Street is the Cogswell Tower, another office tower. It is bounded on the north by Cogswell Street (corresponding roughly to what was formerly Jacob Street), which at this point curves somewhat to the south to meet Barrington Street as part of a traffic interchange.

To the north of Cogswell Street is the Trade Mart, a mixture of office and warehouse space, with some commercial space also. It was the first part of the development to be undertaken. Proceeding west on Cogswell Street, one can see a pedestrian overpass connecting the Trade Mart to the Parkade. Proceeding further west on Cogswell and passing the intersection of Market Street, on the left, one comes to the Cogswell-Brunswick Streets intersection. On the left, as one goes south on Brunswick Street, are the three apartment towers, MacKeen Towers, Scotia Towers and Plaza 1881. All three are apartment towers, but Plaza 1881 also has some commercial development.

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* Ex. 12, 13, 15, 16, 18 & 20 have ground plans of the development just before the back cover of each.

Turning east at the intersection of Brunswick and Duke Streets one passes the south end of Market Street, which has the rear portions of the three apartment buildings on the west side, and Parkade entrances and a service station on the east side. Further east, on Duke Street and downhill, are successive entrances to the mall levels, and almost at the Duke-Barrington intersection, inset in the mall, the Duke Tower, the third office tower.

There were general reassessments in the City of Halifax for the assessment years 1978 and 1981. The then City Assessor based the 1978 assessments mainly on depreciated replacement cost. Subsequent to that reassessment the present Director of Assessment, Mrs. Gloria McCluskey, was appointed and undertook a review of the large office and shopping centre properties in the City, as well as certain large appartment buildings. The new assessments of Scotia Square for the year 1980 were based on the financial data for 1978, since that provided the most up-to-date material available for the income and expenses of the properties concerned.

The assessor, Mrs. McCluskey, assessed the apartment buildings using a gross-rent multiplier and the value of the leasehold improvements, using a depreciated-replacement-cost estimate. She assessed the remainder of the property on the basis of the capitalized value of net income produced. All of the assessments, other than that of the Château Halifax, were appealed to the Regional Assessment Appeal Court, but there the Cogswell-Tower appeal was abandoned. Plaza 1881 is not on appeal to this court.

The Director of Assessment appealed from the decision of the Regional Assessment Appeal Court with respect to the assessments of the Mall and Parkade, Duke Tower, Barrington Tower, Scotia Towers, MacKeen Towers and the Trade Mart. Halifax Developments Limited appealed with respect to the Mall and Parkade assessment only. The appeals have been consolidated for the present hearing.

At both hearings each side called experts. For the Director of Assessment, in addition to herself, Mr. Lincoln North

testified, and for Halifax Developments Limited Mr. Charles Hardy was the author of the opinions chiefly relied on. In arriving at his opinion, Mr. Hardy had considerable field work done by his brother Mr. Neil Hardy. Mr. Arthur Speed also gave expert evidence for Halifax Developments Limited.

In the following table are set out the original assessment of the properties on appeal, the amount fixed by the Regional Assessment Appeal Court, Mr. Charles Hardy's opinion and Mr. Lincoln North's opinion, in each of the latter cases updated to conform with their testimony at the trial in the County Court.

TABLE I - ASSESSMENT VALUATIONS

Building	Original Assessment[1]	Assessment Appeal Court	Lincoln North	Charles Hardy[3]
MacKeen Towers	2,327,000 (1,666,132)	1,549,400	1,553,720	1,520,000
Scotia Towers	3,643,600 (2,608,818)	2,766,800	2,506,000	2,544,000
Duke Tower	9,184,400	5,970,200	6,254,260	6,119,000
Barrington Tower	7,540,000 (5,398,640)	5,729,900	5,502,460	5,230,000
Trade Mart	3,283,400	2,655,300	3,089,540	2,610,500
Scotia Square & Parkade	14,241,449[2]	13,821,000	14,742,440	10,616,000

Notes:

[1] These appear to have been 100% assessments. The figures in parentheses represent the top figure x 71.6%

[2] This figure is as amended at the Regional Assessment Appeal Court.

[3] Messrs North's and Hardy's figures are for a general assessment level of 71.6%.

As noted in the pre-trial memorandum filed for Halifax Developments Limited, the approaches taken by Messrs Lincoln North and Charles Hardy are in general very similar, but they do raise a number of questions that have to be resolved. Some questions are of general application; some relate only to particular classes of building or components of the Scotia Square development. Some of the questions involve legal principles, at least in part. Others are almost purely matters of market expertise.

The Basis of Valuation

The basis of valuation is contained in ss.38,39 and 40 of the Assessment Act, R.S.N.S. 1967 c.14 (C.S.N.S. c A-18). Of these the most pertinent provisions are contained in ss.38 and 39(1), as follows:

> 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.
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> 39 (1) Except as provided in this Act, property shall be valued by the assessor as if the person assessed were the owner of the title in fee simple and no reduction in value shall be made merely because the property is subject to any lien, mortgage, lease, claim, licence or other encumbrance on the title.

In seeking to fix the meaning of 'actual cash value' in s.38, one should remember that there has been a process of development throughout the century not only in the case law but by legislation. The Nova Scotia Court of Appeal has not expanded on the meaning of 'actual cash value', having been much preoccupied with the second portion of s.38, the requirement for uniformity. That requirement was not present in the Assessment Act, R.S.N.S. 1923 c.86, s.17 r.2, but a first attempt at it was added by S.N.S. 1931 c.33. This amendment failed of its purpose and was changed to the present form by S.N.S. 1954 c.38, s.3, which was also incorporated in Chapter 15 of the Revised Statutes of that year.

The various opinions concerning the relative importance of actual cash value and uniformity are illustrated by *Glace Bay v. Seaboard Power Corporation Limited*, [1952] 2 D.L.R. 826,

N.S.C.A., and *Mindamar Metals Corporation v. Richmond* (1953), 33 M.P.R. 75, N.S.C.A., in which the Court was divided on the question.

After the 1954 amendment, however, the court accepted the principle that the actual cash value should be multiplied by a figure representing the true level of assessment, so as to assure uniformity: see *Mersey Paper Company v. County of Queens* (1959), 42 M.P.R. 297, 18 D.L.R. (2d) 19, N.S.C.A. It is true that some of the language used is mathematically imprecise. Thus, Illsley, C.J.N.S., who gave the judgment of the court, said 'The dominant and controlling factor in determining the amount at which property is to be assessed should be not the actual cash value but uniformity'. Since all the *factors* multiplied to yield a product enter equally into the product, none can be said to be 'dominant and controlling' in the strict sense. The language was probably chosen to reflect that used by Doull, J. in *Mindamar Metals v. Richmond, supra*, in reaching the opposite conclusion under the previous legislation. Courts have continued to use the expression 'dominant and controlling factor' since, but what is meant is reasonably clear: uniformity is more important than rigid adherence to actual cash values.

The Nova Scotia Court of Appeal in dealing with the meaning of 'actual cash value' has usually appeared to act on the assumption that it is equivalent to 'actual value', 'real value', 'value in exchange', 'market value', 'exchangeable value', 'what a willing buyer would agree to pay and a willing seller would agree to accept', all of which are employed by various judges in the Supreme Court of Canada and in the Privy Council in *Sun Life Assurance Company of Canada vs. City of Montreal*, [1950] S.C.R. 220, [1950] 2 D.L.R. 785, S.C.Can., affirmed *Montreal vs. Sun Life Assurance Company*, [1952] 2 D.L.R. 81, [1951] W.N. 575, P.C. A number of Nova Scotia cases since have proceeded on the basis that the principles set out by the Supreme Court of Canada and the Privy Council in *Sun Life* are applicable in Nova Scotia: see, e.g., In addition to *Mindamar* and *Mersey v. Queens, supra*, *B.F.Wood v. Queens* (1971),

2 N.S.R. (2d) 798, C.A.; *Canadian Shopping Centre Ltd. v. Sydney* (1973), 5 N.S.R. (2d) 785, C.A.; *Lehdorff Management Ltd. v. Dartmouth* (1975), 15 N.S.R. (2d) 40, C.A.; *McGray v. Yarmouth* (1976), 18 N.S.R. (2d) 11, C.A.; *Morgan v. Halifax* (1976), 20 N.S.R. (2d) 356, Co.Ct.; *Olivet Development Ltd. v. Antigonish* (1978), 30 N.S.R. (2d) 191, 49 A.P.R. 191, Co.Ct.; *Hebb v. Lunenburg* (1979), 32 N.S.R. (2d) 427, 54 A.P.R. 427, C.A.: *Gateway Realty Ltd. v. Bridgewater* (1978), 30 N.S.R. (2d) 438, 49 A.P.R. 438, C.A.

In *Morash v. Municipality of Chester* (1961), 28 D.L.R. (2d) 428, N.S.C.A., Illsley, C.J.N.S., for the court, seems to draw a distinction between 'market value' and 'actual cash value', at p.44. There is speaks of discounting

> ...the amount so arrived at, representing the *market value*, by 25% to bring it down to the actual cash value, as experience had shown that this was about the percentage by which it should be discounted to achieve that result. There was no criticism of a flat 29% [*sic*] reduction to bring the market value to the statutory actual cash value.

The remainder of the judgment was clear that 'actual cash value' was to be determined by the method commonly used to determine market value. It seems a fairly sound conclusion that when Illsley, C.J.N.S. spoke of the 'statutory actual cash value' he meant the final assessed value. It is a possible interpretation of s.38, i.e., that 'actual cash value' means the market value multiplied by the uniformity factor representing the general level of assessment in the district. That is not the meaning generally applied to 'actual cash value', however, because the cases, including our own, generally treat it as equivalent to market value.

Does 'cash' add anything to the meaning of 'actual value'? The expression 'actual cash value' was used in a number of assessment statutes in Canada at one time. In most cases it was associated with the requirement that that value be estimated as the value of the property as it would be appraised 'in payment of a just debt from a solvent debtor'. This led in Ontario to the

so called 'scrap-iron' rule with respect to chattels: see *Re Bell Telephone Company and the City of Hamilton* (1898), 25 A.R. 351, which is at the root of this interpretation. This rule was decisively rejected by our court *in banco* in *Re Maritime Telegraph and Telephone Company* (1939), 14 M.P.R. 387, C.A. The case is interesting because in discussing the true test, Graham, J. anticipated several of those mentioned in *Sun Life*. His remarks were cited in some later cases with approval, although the principal judgment was given by Smiley, J. The decision was affirmed by the Supreme Court of Canada in *Maritime Telegraph & Telephone Company v. Antigonish*, [1940] S.C.R. 616, 51 C.R.T.C. 198. The Ontario provision was subsequently changed to 'actual value', and by S.O. 1968-69 c.6, s.27, to 'market value'. We adopted the latest Ontario provision by S.N.S. 1981 c.15, s.8, which repealed s.38 and substituted the following:

> 38 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 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 town or municipality so as to ensure that taxation falls in a uniform manner upon all property in the town or muncipality.

This unfortunately is not directly appliable to the instant case.*

The meaning of 'cash' in 'actual cash value' is probably to emphasize that the hypothetical sale or auction is to be for cash and not on any form of credit, as far as the immediate hypothetical vendor and purchaser are concerned. This is expressed by O'Halloran, J.A., for the British Columbia Court of Appeal, in *Stock Exchange Building Corp. Ltd. v. Vancouver*, [1945] 2 D.L.R. 663, [1945] 2 W.W.R. 248, 61 B.C.R. 205, where ([1945] 2 D.L.R. 665) he says:

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*But it would make no difference in the result if it were: see *York Assessment Office Assessment Commissioner v. Office Specialty Ltd.*, [1975] 1 S.C.R. 677, 2 N.R. 612, 49 D.L.R. (3d) 471.

> The additional descriptive words make it plain that "actual cash value" does not include a forced sale, a speculative sale price, or a sale at an excessively high or at an unduly low price. "Actual cash value" clearly contemplates the value represented by the price obtainable in a sale by a willing vendor to a willing purchaser both alive to commercial realities, for cash and not upon extended or unsecured terms. ... To my mind it relates to *bona fide* investment as distinct from speculation. So described and understood "actual cash value" in s.39 reflects nothing more or less than "actual cash value", "fair market value" or "actual value", the latter term being employed in the general *Municipal Act*, R.S.B.C. 1936, c.199, s.223(1).

O'Halloran, J.A. referred, in this passage, to *Grampian Realties Co. v. Montreal East*, [1932] 1 D.L.R. 705, S.C.Can., in which the expression in issue was 'real value'. The section he had to interpret was in the same terms as the old Ontario provision, but that does not seem to have had any effect on the interpretation. Indeed, His Lordship finally settled on 'exchangeable value' as the core of all the different expressions used in the United States, Canada, and, indeed, one case from Scotland, *Lord Advocate v. Earl of Home* (1891), 28 Sc.L.R. 289. This was taken to mean 'the price which the subject will bring when exposed to the test of competition.'

Since all the elements of 'actual cash value' have thus been held to be contained, at least implicitly, in 'actual value', 'real value', 'market value' and 'exchangeable value', the expressions can be and have consistently been applied as equivalent. In *Sun Life, supra*, all the judges of the Supreme Court of Canada and Lord Porter, for the Privy Council, agreed that exchangeable value or value in exchange was the same as market value, and Taschereau, Rand and Estey, JJ., as well as the Privy Council, equated market value with 'what a prudent man of business, taking into consideration the "reversible currents which affect the value of land," would be likely to pay for a property of the character under assessment'. Lord Porter put it more generally as 'the price which a

person who is not obliged to sell could obtain from a buyer who is not obliged to buy', or, more shortly, 'what a willing buyer would give and a willing seller take'.

The Prudent Investor

In *Sun Life* it is clear from the context that all of the judges accepted the limitations upon the market voiced by Taschereau, J. who was, in fact, citing the headnote of *Bishop of Victoria v. City of Victoria*, [1933] 4 D.L.R. 524. The headnote is, however, a possibly misleading paraphrase of the judgment of Macdonald, J.A. in that case. The similar remarks of O'Halloran, J.A., in *Stock Exchange Building Corporation v. Vancouver, supra*, were based on *Grampian Realties Co. v. Montreal East, supra* in the Supreme Court of Canada.

In the Privy Council, Lord Porter did not advert to the 'prudent investor' aspect of the hypothetical sale. In several places, he reiterated the 'willing buyer and willing seller' test, and at one point while conceding that 'the higgling of the market' was not an element of much consequence in valuing the Sun Life building he added 'nevertheless the ultimate aim is to find the exchange value of the property, *i.e.*, the price at which the property is salable.' Indeed, in the Supreme Court of Canada the only judge other than Taschereau, J. who touched on the 'prudent investor' limitation was Rinfret, C.J.C., who refers to the prudent-investor test at [1950] 2 D.L.R. p.789. On the previous page he cited a statement of Lord Parmoor, in *Great Western and Metropolitan Railway Companies v. Kensington Assessment Committee*, [1916] 1 A.C. 23, at p.54, that in cases of municipal valuations 'the hereditament should be valued as it stands and as used and occupied when the assessment is made'. The Chief Justice went on to say:

> In the yearly valuation of a property for purposes of municipal assessment there is no room for hypothesis as regards the future of the property. The assessor should not look at past,

> or subsequent or potential values. His valuation must be based on conditions as he finds them at the date of the assessment. In particular, in the present case, there was no ground for considering any other condition, as no suggestion of any kind appears in the record that there was, throughout the period of assessment, a prospect of any change.

This dictum has been the basis of several cases in Nova Scotia that are seemingly difficult to reconcile with the market-value test: *e.g., B.R. Wood Estate v. Municipality of Queens* (1971), 2 N.S.R.(2d) 798, C.A.; *McGray et al. v. The Municipality of the District of Yarmouth* (1976), 18 N.S.R. (2d) 11, C.A.; and *Bowater Mersey Paper Co. Limited v. Digby Municipality* (1979), 33 N.S.R. (2d) 181, 57 A.P.R. 181, C.A. The true intent of these cases seems to have been to distinquish between elements that a prudent investor would take into account in making a bid for the property and purely speculative elements. In view of the weight of authorities supporting the market-value concept, they cannot be taken to exclude any element that a prudent investor would take into account in forming his own concept of the value and in making his bid.

There is another aspect of Chief Justice Rinfret's cited remarks in *Sun Life* that requires some attention. That is, his repetition of Lord Parmoor's words 'the hereditament should be valued as it stands and as used and occupied when the assessment is made'.

First of all, it should be noted that while Chief Justice Rinfret arrives at the same conclusion as the other judges in *Sun Life* his reasons are remarkably at odds in detail with the approach employed by the other four members of the court, Kerwin, Taschereau, Rand and Estey, JJ., each of whom delivered a separate judgment. Rand, J., in discussing value in excess of the investment value, which a would-be owner might place on the property, states 'the crux of the problem would be in estimating the present value of those possibilities.' (p.811), and Estey, J. remarks

(p.814) 'Actual value must be, except where there is a market in which the exchange value may be ascertained, a matter of judgment exercised after determining every item that affects the value of the particular immovable under consideration...'

Lord Parmoor's remark in *Great Western v. Kensington, supra*, must be read in relation to the assessment system then (and largely now) in force in England. In that case the assessment statute was the Valuation (Metropolis) Act of 1869 which, by s.4 provided

> The term 'gross value' means the annual rent which a tenant might reasonably be expected, taking one year with another, to pay for an hereditament, if the tenant undertook to pay all usual tenant's rates and taxes and tithe commutation rentcharge, if any, and if the landlord undertook to bear the cost of the repairs and insurance, and the other expenses, if any, necessary to maintain the hereditament in a state to command that rent.

The actual case concerned railway running lines through the parishes of Kensington and Hammersmith, and railway lines are notoriously difficult to assess. In fact, in England, (as distinct from Ireland and Scotland) the House of Lords had sanctioned a formula for doing so. This is to be found in *Great Central Railway Company v. Banbury Union Assessment Committee*, [1909] A.C. 78, at p.85. There the legislation was the Parochial Assessment Act, 1836. The statutory test was 'the rent at which the same might reasonably be expected to let from year to year' after certain prescribed deductions. Annual rental on a year-to-year basis (which the cases indicate was the general English system) can obviously be both more restrictive and more fluid a test than the willing-buyer—willing-seller test. It is obviously a more restrictive test, because it eliminates certain possibilities of exploitation such as long-term leases that could in certain circumstances prove more profitable, and it is more fluid because the annual rental on a year-to-year basis is obviously more easily influenced by annual changes in

circumstances than would be the selling price of the premises.

The conclusion is that the Canadian and Nova Scotia cases, above cited, rule out purely speculative elements in assessing market value, but that any circumstance or potentiality that a prudent purchaser would be likely to give some weight to is proper to be taken into account in fixing the market value of the property. It also seems evident that English assessment cases may not prove too helpful in this country, because of the basic difference in the statutory basis of assessment: see 32 Halsbury (3d) § 85, p.60.

In *Sun Life* the main point in issue was what value to place upon certain features of the building added to make it ornate and impressive as the head office of the company, but otherwise having little value from an investment point of view. The Privy Council and all judges in the Supreme Court of Canada agreed that the assessors had not made a lawful assessment because they followed a rule laid down without authority by the Municipality. Most of the judges agreed that the added features represented an added value to the building over and above its value as a commercial building, and the potential market forces involved are most graphically described by Rand, J., at pp.808-810. A feature of this kind of bidding accepted by the Privy Council and explicitly mentioned both by Rand, J. and Taschereau, J. is that the owner must be considered as a possible purchaser in order to estimate the possible bids that a purchaser would offer in order to take over the building as owner. This calls for a distinction between objective value to the owner and the subjective value that he places on the property, because of its peculiar value to him. This theoretically difficult distinction may not, in fact, be quite that difficult in practice. The owner as a possible purchaser is, in fact, mentioned frequently in assessment cases.

The difference between potential value and speculative value is of some importance in the present case, because the

experts on both sides have gone into the possibilities of the development in considerable detail, and in the case of Mr. Charles Hardy, have projected some of the figures 'to infinity'. This, however, is merely a calculating device to fix a capital value, and I am satisfied that the potential investors in this kind of property are not speculators in the forbidden sense but probably prudent and very shrewd investors who would welcome the kind of information that has been presented at the trial.

Methods of Valuation

In *Great Western v. Kensington, supra*, the House of Lords held that the rule in *Banbury, supra* should be followed, but they shied at laying that down as a rule of law. Indeed, Lord Parmoor quoted Lord Halsbury from *North and South Western Railway Company v. Brentford Union*, 13 App.Cas. 592, as saying 'It is not the function of the Courts to give directions as to the preferable course to follow in valuation, when it is admitted that neither course is in itself contrary to law.' Nevertheless, it is pretty clear from *Sun Life* that there is a preferred sequence of approaches to use in estimating property values. This may not be a rule of law in the strict sense, but for all practical purposes it seems to have the force of law.

In *Sun Life* Lord Porter cited the judgment of MacKinnon, J. in the Québec Superior Court for 'five ways by which the true figure can be reached'. This was apparently with approval, because he went on to discuss and apply two of the ways, the first three being inapplicable. The five ways are as follows:

1. <u>The sales-comparison approaches:</u>

'(a) A recent free sale of the property itself where neither the conditions of the property nor the market have since changed;

'(b) Recent free sales of identical properties in the same neighbourhood and market;

'(c) Recent free sales of comparable properties;'

2. Income approaches:

'(d) The price which the revenue producing possibilities of the property will command;'

3. Cost approaches:

'(e) The depreciated replacement cost.'

(I have imposed headings and numbers on the original five lettered clauses for greater clarity and convenience of reference.)

The sales-comparison approaches are obviously based on market data and thus may be called market-data approaches, but the income approaches, as Mr. Hardy pointed out in his evidence and reports, also require some reference to market data in order to transform income figures into capital. In this respect, the sales-comparison approaches might be called direct market-data approaches, and the income approaches characterized as indirect market-data approaches. (No doubt the cost approach is also based on market data of costs rather than sales: this emphasizes that it is market data with respect to sales that are intended in the market-data approaches.)

Neither party contended that a sales-comparison approach was directly applicable for the property as a whole, although some comparisons were made with individual components. Mr. Hardy caused quite a lot of field work to be done to obtain comparable sales figures, but mainly for the purpose of deriving a capitalization rate: capitalization rates are part of the income approach. Mr. North, on the other hand, was able to cite some sales, but for the most part he distinquished between them and the subject property to indicate that the sales were not comparable. In effect, the sales figures were used mainly to find a capitalization rate and as a check on the overall results. There was also some

reference to a depreciated-replacement-cost approach as a check on the overall result, but the main employment of this approach was to estimate the value of tenant improvements in certain cases.

Thus, both sides relied on an income approach since the property is clearly an investment property and the sole economic interest of the owner in the property would be in its revenue-producing capacity. Mr. North outlined four income approaches, three of which were employed for evaluations in this case, as follows,

(a) Gross-rent multiplier;
(b) Capitalizing net operating income;
(c) Cash-flow method;
(d) The discounted cash-flow approach:

(trans. pp.44-50). As Mr. North noted (tr. 45), these approaches are distinquishable 'by the type of earnings that you are going to process into value'.

Thus Mr. North summed up the gross-rental multiplier in the following way: 'Gross rents or gross earnings are earnings, and for certain types of properties and certain cities of this continent folks buy them and sell them on a multiple of those gross earnings'.

Mr. McCluskey testified that she used a gross-income multiplier of six for the two apartment buildings. This was based on a study of forty or fifty sales of apartments in the city which showed a range of between four and eight times gross earnings. For 1981, however, she used a capitalized-net-income approach for the apartment buildings, but as a check employed the gross-rent multiplier also and 'the two came very, very close'. I take Mrs. McCluskey's evidence (tr. 282-5) to mean that she initially used a gross multiplier, because at that point she did not have sufficient data to develop an overall capitalization rate based on net income. I will pass over the net-operating-income approach for

the moment in order to deal with the cash-flow method.

Mr. North defined this as based on what is called 'cash flow', which is the net operating income, less what is called 'debt service':'It is the residual earnings from the operation of the property after paying all the operating expenses and after paying the costs of borrowed capital'. Mr. North did not use that method because it 'presumes the presence of financing in a specific amount', and it was his understanding that financing was not to be taken into consideration in this case. Mr. North did not say whether the cash-flow method would exhibit greater variety than the method based on the capitalization of net operating income, but that was my (entirely theoretical) reaction. I do not recall Mr. Hardy discussing this approach and, in any event, it did not figure in any concrete way in the evidence.

Under the canon of the discounted cash-flow approach Mr. North and Mr. Hardy described techniques that were, to all appearances, quite disparate and Mr. Hardy was clear that Mr. North's idea of the approach was not the one he used. An analysis of each indicates, however, that both are methods of putting a present value on future income, taking into account the changes in that income that can be projected on present data. Because of the nature of future projections, each is an idealized method. Here is Mr. Hardy's statement of the method he adopted, as set out in ex.15, at pp.22-3:

> A more reliable method of analysing a sale is by accounting for existing contractual net incomes together with lease renewals at the termination dates of the leases at existing and known economic rental values for the occupied space at the date of the sale. Such an approach takes into account the contractual income flow from each tenant to the termination date or renewal date of the lease at which time the income will revert to present full market value. So as not to get into the realms of speculation, future rents are not projected but the

> renewal rates are taken to be those prevailing at the date of the sale. Such an analysis is quite simplistic [?] in nature, although quite time consuming to carry out, and provides a realistic analysis of the sale. It is totally unrealistic to suppose that a sophisticated purchaser of an income producing property will not make his own analysis of future incomes particularly at known rates presently being obtained in the market.
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> Note: There are numerous methods of Discounted Cash Flow Analysis, but the method utilized in this report is as described above.

(I surmise that Mr. Hardy probably meant 'simple' rather than 'simplistic', where I have inserted a question mark.)

Mr. Hardy discusses the method more fully in his evidence beginning at p.358. One of the characteristics he describes is, I believe, of some importance. He said (p.359):

> A. My method accepts the fact that any one building cannot be always ... it's very rare that you'll ever find one building that is at full rental value. There's almost a rental cycle whereby tenancies are being renewed normally on a five year basis. And my method takes into account the renewal cycles.

Mr. Hardy used the discounted cash-flow method to evaluate all the buildings other than the two apartment buildings and the Parkade, the reason being that he considered the latter buildings to be at full rental value. (Tr. 356-7)

In his report (ex.1, pp.41-2) Mr. North describes the net operating-income approach as used in actual practice by setting out the method of arriving at an overall capitalization rate:

One of the yardsticks of price measurement utilized in the evaluation of revenue producing properties is a current-earnings ratio commonly referred to as an overall capitalization rate. This (capitalization) rate basically represents the relationship between the net operating income of which [that] a property is capable of producing at the date of valuation (or date of sale) and the most probable selling price (or the actual selling price) as of the same moment in time.

Overall capitalization rates, from the perspective of their composition, represent a singular expression of all an investor's devises and desires as they pertain to the realty in question. Expectations for growth in earnings, anticipations of capital appreciation, reflections of comparative risk, considerations of security of capital——virtually all characteristics associated with the investment——are reflected in this singular rate which the investment community will ascribe to a revenue producing property when evaluating the same for sale, for purchase or for whatever reason a value must be established.

In general, the magnitude of an overall capitalization rate will be determined in the market place by the investment community in their ranking of competitive investment opportunities. When changes occur in the yield structure of stocks, bonds, mortgages and other alternative investments, one would expect rates of return on investment real estate to react in a similar fashion. To an extent this is true, to the point that the desired yields on realty will change accordingly. On the other hand, however, the illiquidity, permanancy and other long-term investment features of real estate tend to hold capitalization rates to a fairly even keel during periods of radical changes in the costs of borrowed capital and erratic fluctuations in the money market. So much to say that overall capitalization rates for prime investment properties have not changed that much over the years. For this reason, capitalization rates extracted from comparable sales of major realty ventures do not become as "dated" as the passage of time would lead one to believe.

Considering the magnitude of capitalization rates in a more direct perspective, investment properties will generally transact in the market place at prices

> which will produce overall rates ranging from 8 to 12 percent, the primary conditions which tend to establish the specific capitalization rate being the prospects for growth in earnings and capital appreciation which the realty investment has to offer. More specifically, my interpretation of investor attitudes leads me to the conclusion that prime revenue properties will trade at price levels which will produce overall capitalization rates between 8 and 9 percent if the characteristics of the income stream will provide the investor with nearly fully insulation of the net earnings from inflationary erosion. In other words, rentals must be net-absolute or of such a nature that all increases in operating costs are five years or less, save and except for certain major tenants whose presence in a project will offer an offsetting element of security of earnings. The property must be well insulated from extraordinary competition. The property must be young, in terms of its physical and functional attributes and, of course, well located within the marketing area it serves. Finally, the macro-market which encompasses the property must be economically vibrant.
>
> At the other extreme, investors will ascribe overall capitalization rates in the order of 11 to 12 percent to properties whose characteristics run contrary to the above-mentioned features. Such properties would have very limited prospects for growth in earnings or capital appreciation. They would be poorly located, comparatively speaking. They would have an effective age in excess of 15 to 20 years. They would suffer the ravages of newer and more competitive ventures.

(I have corrected a few typing errors in the text.)

The respondent did not really differ with the appellant about the net-operating-income approach except concerning a few details, which will be discussed later on.

The depreciated replacement cost was used in the case only to value tenants' improvements, and this also will be discussed later. The method is particularly applicable to industrial buildings where physical depreciation and functional obsolescence can be appraised with reasonable accuracy, and it is hard to match market data either direct or indirect.

Should the Properties be Valued Separately or as a Unit?

Whether the properties should be valued separately or as a unit is a question distinct from whether they should be assessed separately or as a unit. If, however, the Act requires separate assessment that may or may not have some weight in implying a need for separate valuation. The properties were, in fact, assessed separately, but Mr. North made his valuation on a unitary* basis and gave cogent reasons for doing so. One small difficulty is that, as previously noted, the entire property is not before me on this appeal.

While 'property' is given a very broad and general meaning in the Act, s.23 requires the director to make up the assessment roll on the basis of individual pieces (or lots), and it is the entry on the roll that constitutes the assessment for all purposes including that of appeal. One reason for this degree of particularity is that the property of any one owner may contain pieces that differ in their assessment classification. Indeed, the Act by s.25(2) requires the director to distinquish parts of a property that belong to different assessment classifications and to enter the value of each such part on the roll. This provision does not seem to contemplate a formal subdivision as a pre-condition of such valuation, although it is not, of course, necessary to decide that question here.

Several other sections of the Assessment Act deal with property in terms that arguably have a bearing on the question of unitary or piecemeal assessment, e.g., ss.15,17, 19, 162. None of them, however, detracts from the specific wording of s.23, which is as follows:

> 23. The director with the assistance of the assessors having ascertained as nearly as he can the particulars of the property to be

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* Mrs. McCluskey's evidence is unclear but she stated that the properties constitute one lot but were assessed separately for 1979 and were valued separately for 1980 to suit the needs of the owners.

> assessed shall prepare the assessment roll in which shall be set down
>
> (a) the location and a concise description of each separate piece of assessable property, with the name and address of the owner thereof;
>
> (b) the assessed value and classification of each lot or piece of assessable property in such detail as the assessor may determine;
>
> (c) the amount of any exemption for each property;
>
> (d) Repealed. 1973, c.21,s.1.
>
> (e) such other particulars as the assessor deems necessary or as the Minister directs.

Does the requirement for a separate assessment of each piece of land mean that the assessor cannot take into account any increase in the market value due to common ownership of the different pieces of property in a complex such as Scotia Square? It seems to me that to pose the question is to answer it. If there is an increased market value—a question of fact—because of the existence of the complex then that must be reflected in the assessment. It is not a question of advantages accruing to this particular owner that would not necessarily accrue to another owner: in such a case other considerations might apply. Here, any owner of the whole complex would be able to take advantage of the economies of scale and unitary management, as well as what was called the 'synergistic effect'. It is a fully transferable characteristic of the complex and, hence, marketable.

There appears to be a dearth of authority on the point but that is not remarkable, as Manning, *Assessment and Rating* (Canada Law Book, Toronto, 1962, 4th ed.) points out with respect to an analogous problem, at p.166: 'The principle in any event is simply to find the actual value, that, being a question of fact, needs no special authority to justify its adoption.'

The practical difference between the two parties is that Mr. North or the Director of Assessment used a single capitalization rate to capitalize the net income of the property, while Mr. Hardy, for Halifax Developments, valued each of the properties on a capitalized net income basis, using a capitalization rate that he deemed appropriate to each of the components.

In what follows I am assuming that the assessor has determined that each of the assessments made relates to a 'piece' (or 'lot') of assessable property within the meaning of Assessment Act s.23(a) and (b). I have not noticed any direct evidence on the question, nor does there appear to be any admission of fact, and in the absence of evidence to the contrary I am probably bound to assume that the assessments conform to the requirements of Assessment Act s.23(a) and (b).

Counsel for Halifax Developments argues that separate valuations are appropriate, because (a) the assessments were separate and, in any case, (b) the whole of the property is not before the court. These considerations do not pose any great difficulty, however. Both of them, in fact, tend to confuse the distinction between valuation and assessment. Any increment in value due to the unitary ownership of the complex can be apportioned among the components by suitable means, either mathematical or practical. . The second argument would, in fact, make the outcome depend to some extent not on the value of the properties but on how many of the assessments were taken on appeal. There is no danger of a clash with the value of the components not on appeal, however, because they are presumably correct, having now been accepted by both parties. It is the aim of this court to arrive, with the help of counsel, at values that are also correct. Accordingly, the results should be a harmony of values of all the components whether now on appeal or not.

Counsel advanced two further arguments that require deeper consideration.

The first (c) is that any enhancement in value because of the unified ownership and control of the project is reflected in the data used by Mr. Hardy to arrive at his capitalization, because the data in question consist of the actual income and expenses (except for certain 'economic' rents used in the alternatives).

The second argument (d) is as follows (I've inverted the order of the sentences):

> The physical characteristics and mix of the Scotia Square project are almost unique in Canada and the evidence will indicate that no comparable sales of an appropriate mixed use project could be developed to analyze an appropriate capitalization rate. Consideration of the buildings individually is the only practical way of analyzing market data in order to form an opinion of an appropriate capitalization rate.

Argument (c) is sound to the extent that the increment in the value of the property due to its unitary state is based upon net income, but as all the witnesses agreed, explicitly or implicitly, the overall capitalization rate depends upon much more than that, including age, physical and functional attributes, location, competition, long-term prospects, risk and general character. In particular, it struck me that Scotia Square's commanding presence in its area, its very broad mix of different kinds of rental components and the fact that to a large extent it contains the core of its own market, would confer on it advantages of value in comparison with those of individual components. These factors are quite distinct from the economies of scale and management that would normally be reflected in the income and expense figures. Indeed, the very expression of argument (d) tacitly concedes this point.

With respect to argument (d) Mr. North was able to cite some evidence to the contrary. Even if that evidence were discounted, it would be necessary to adjust the capitalization rate of the individual properties when formulating an overall capitalization rate for the whole, because of the considerations just previously mentioned.

What both arguments serve to bring the fore is the question: 'How accurate can an overall capitalization rate be made?' Mr. North has convinced me that the determination of an overall capitalization rate, while it undoubtedly involves a certain amount of comparison of data, accounting and mathematical computation in dealing with the comparable data upon which it is based, also requires a large experience of the market (including the knowledge of the scope of the market geographically) and probably a certain amount of intuition. In this respect I am satisfied that Mr. North has the edge on Mr. Hardy by a considerable margin, although Mr. Hardy is, of course, a very knowledgeable and able man in his field, and I would discount his evidence only in the respect mentioned. In fact, I found the evidence of Mr. Hardy and his associates quite helpful. It is still necessary to return to the question: 'How accurate can an overall capitalization rate be made?'

Accuracy of the Capitalization Rate

In those cases where the selling price and the annual net income of a property are both known, the capitalization rate can be derived directly, and purely mathematically, using the formulas to be found in the texts containing annuity and instalment tables that are readily available in most financial and law offices. The formulas can also be worked out from first principles, using simple algebra. The formulas involved here are:

$$P = a/r \qquad (1)$$

$$r = a/P \qquad (1.1)$$

$$P = a(R^n-1)/R^n r \qquad (2)$$

$$D = P/R^d \qquad (3)$$

$$P = \frac{a_1(R^d-1) + a_2}{R^d r} \qquad (4)$$

where

- a = annuity, consolidated payment, instalment;
- D = present value of a deferred annuity;
- d = the number of payments by which the annuity is deferred;
- n = number of instalments;
- P = present value, principal;
- r = decimal rate of interest per instalment;
- R = 1 + r.

The formulas given are those respectively for: (1) a perpetual annuity showing the derivation of the principal or present value from the instalment and the rate of interest; (1.1) the same, showing the derivation of the rate of interest from the instalment and the present value; (2) the present value of a term annuity, given the amount and the number of the instalments and the rate of interest; (3) the present value of a deferred annuity; and (4) the present value of an annuity for a term followed by a perpetual annuity (which may be in the same or a different amount) where the rate of interest is the same for the two. In applying these formulas to the capitalization problem the rate of interest corresponds to the net income involved. Where the capitalization rate is derived directly from a known sale price and a known net income (1,1) it may, seemingly, be worked out to any desired degree of accuracy.

Mr. Hardy gives an example of this degree of accuracy, working from a hypothetical sale price and hypothetical present net income, to be followed in two years by a new net income based on present economic rents. The example is to be found in

exx. 12, 13 and 15— there is a page missing in ex.12, but the text is the same in all three. Mr. Hardy derives a capitalization rate of 11.232%—that is five significant figures—to yield a capital value of one hundred and twenty-five thousand and ten dollars ($125,010.00) which is pretty close. But, .11233 yields in figures $124,998.92 which is more accurate by a decimal order of accuracy. To make the dollars coincide, however, it is necessary to go to a rate composed of nine significant figures: e.g., 11.2329085% or 11.2329084%. *To what purpose?* Even Mr. Hardy's five-figure rate must be considered more accurate than is actually possible, although on the basis a 'known' sale price and a 'known' net income. With respect to each of these the evidence amply demonstrates that in any factual situation there are likely to be financial factors in the sale that do not appear on the surface (such as favourable mortgages, package deals, tax-avoiding exchanges, etc.) as well as a certain number of judgmental or even arbitrary decisions in the income accounting that makes the result only a best approximation.

This is to view the derivation of a capitalization rate in the case most favourable to accuracy, i.e., where the sale price and net income are known. Where the capitalization rate for a property is being derived not from data pertinent to the property itself, including a sale or sales, but from data relating to other properties, it is clear from the evidence of both Mr. North and Mr. Hardy and, indeed, from the evidence of all who spoke about this situation that a large element of experience and business judgment enters in the picutre, and that, even so, the result must be applied with great caution.

Mr. North's opinions on the range of capitalization rates depending upon the nature of the risk have already been cited. He discussed rates varying between eight per cent and twelve per cent. Mr. Hardy in the three exhibits prepared by him, previously mentioned, remarks:

> The overall capitalization rate, whether based on existing net incomes or on full market or economic rents is considered a rough guide only, and should be treated with extreme caution. (ex.12, pp.21-2; ex.13, pp.22-3; ex.15, pp.23-4)

(He goes on to emphasize the need to base any capitalization rate upon consistent data.)

A capital value derived from multiplying a net income figure by a capitalization rate can only be as accurate as the least accurate of these factors. This is easily demonstrable but it is probably intuitively apparent in any case. There is, of course, no harm in using a five-figure capitalization rate and income figures down to the last dollar or even to the last cent. It is useful to employ the best approximations available, but the product should not be expected to have the kind of accuracy suggested by data in that degree of detail. Appraisers and assessors generally recognize this by rounding off a valuation to (say) the nearest five hundred dollars. When dealing with a valuation of the order of ten million dollars, however, that practice pretends to an accuracy of six significant figures and that is not at all likely, if knowledgeable appraisers can differ with each other as to whether the appropriate capitalization rate is ten-and-one-half per cent or eleven per cent. In the case of those two rates the capital difference is close to five hundred thousand dollars rather than five hundred dollars: in relation to ten million dollars it means there are three significant figures only (at the most) and that is because the capitalization rates used have only three significant figures.

Is it possible to go beyond that in a capitalization rate? On the basis of the evidence in this case it does not appear to be so, although what may come about when the art of estimating these rates is more advanced may well bypass the limitations I find here. Despite those limitations it will be

necessary to find specific figures in this case, some of which will necessarily appear to be more accurate than is theoretically allowed. This is not an inconsistent result because in civil law we are not bound to achieve certainty or exactitude but the most probable conclusion. Nevertheless, the weaknesses inherent in the capitalization-rate approach must be kept in mind.

What Income-data-base Year?

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 proceding 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.

When the assessment is based primarily on a net-income approach and the financial year of the property in question is the calendar year, most of the data for the calendar year in which the assessment is prepared will not be available in December of that year, so that the financial data for the previous year must

perforce be used. This conclusion is reinforced by ss.17(2) and 18, which require the assessor to request the data 'before the 1st day of December in any year' and require the person queried to respond within fifteen days of receipt of the request. (Subsection 17(2) was amended by S.N.S. 1981 c.15, s.6 to delete the date limitation, but that does not affect the impact of the section before amendment.)

There are some twenty-five thousand assessable properties in Halifax City, and it seems to be agreed by all concerned that it is not feasible to reassess them all each year. The practical solution has been to make a complete reassessment periodically and then maintain the assessment figure so established for a number of years. The Halifax City Charter, S.N.S. 1963 c.52, s.266 provided that the assessor was to make a general reassessment of all real property in every fifth year, commencing with 1965 (amended to 1966 by 1964 c.72, s.20). Section 266 was, however, repealed by 1975 c.57, s.203(1), which came into force on January 1, 1976. At the same session the Legislature, by 1975 c.69, s.6, amended Charter s.266(1) to require a general reassessment for the fiscal year 1977. This legislative history may account for certain peculiarities in what ensued. Thus, a general reassessment of the City was completed to take effect for 1978 rather than 1977, but the base date to which all valuations were made to conform was January 1, 1976. This can be illustrated by reference to Figure 1 annexed to these reasons.

There, the value level as of January 1, 1976 is expressed by the lowest horizontal line OC which extends as a broken line from O to the beginning of 1978, from which it continues as a solid line to the end of 1980, designated '1978 Reassessment Level'. This signifies that the 1976 values were retained for three years, beginning with January, 1978. All the horizontal lines in the figure represent values that were maintained for computational purposes beyond the epoch to which they really applied. In Figure 1, O is placed in mid-1975 rather than at January 1, 1976,

for reasons that will appear later. Mid-1975 values are, in fact, those most probably involved. One hint of corroboration is that the line from 0 to mid-1977 would otherwise be steeper.

Some of Mr.Hardy's evidence and much of Mr. Speed's was a criticism of the validity of the concept. Some of this criticism is sound as far as it goes, but it is almost entirely theoretical and is therefore limited in the effect that can be given to it in a practical inquiry such as this. To the extent that the theoretical criticism is valid, it supports the use of 1978 data rather than 1979 data in calculating net income. This is in the interest of maintaining uniformity of assessment which, as previously noted, is a dominant principle under the Assessment Act. That is the real principle involved in the choice between 1978 and 1979 data. The 1979 data being more recent would normally yield a solution nearer to the actual present value of the property, but the 1978 data being nearer to the valuation bases then in effect would conform more closely to the values embodied in the reassessment.

It is necessary to look at the facts more close to determine what actually is done in order to weigh more exactly the value of the devices employed, especially the concept of 'the general level of assessment'. Before doing so, I should remark that the general level of assessment has been approved by the Appeal Division on several occasions as a means of achieving uniformity, although everyone realizes that it is intrinsically a very rough instrument.

According to Mrs. McCluskey a general reassessment takes place over the course of a year, during which every property is visited and evaluated. The values are adjusted to conform to an epoch referred to as the base date. I do not recall any testimony as to why January 1, 1976 was chosen as the base date for the 1978 reassessment, but the legislative history I have cited may

have influenced that result or it may be that the 1978 reassessment actually required more than one year to complete: it was a time of major change in the assessment system in the Province.

In the case of the assessments under appeal, the assessor used 1978 data to arrive at an assessment for the fiscal year 1980, i.e., the taxation year, but the base date at which the value was stabilized was January 1, 1979. This was then multiplied by a factor to reduce the value to the general level of assessment.

The general level of assessment, as that concept is reduced in practice to figures, is subject to the same kind of constraints and limitations as the assessment process itself. In practice, it is determined by comparing sales of properties during the course of a year with the assessed values of those properties. To secure a weighted average, the aggregate of the assessed values is taken as well as the aggregate of the sales prices, and the former is divided by the latter to give a decimal fraction, which is then usually converted into a percentage. Mrs. McCluskey testified that this is done at the beginning of every year, using the previous year's sales and the result is used as the general level of assessment for the year in which the calculation is made, especially in dealing with any new properties that have to be assessed or with any reassessments or appeals.

It is obvious that the figure representing the general level of assessment, taking in as it does an entire year's sales, will not represent the average value of those properties at the end of that year, December 31, or at the beginning of the next year January 1, especially in a time of rapidly rising or changing values, such as we have experienced in the last decade. A more probable epoch would be at mid-year, although this could be affected by seasonal changes in sales or even by one very large sale of a single property to one side or other of mid-year.

This can also be illustrated by reference to Figure 1. There, the general level of assessment, i.e., the average actual cash value of properties in the City is represented by the line OA, which is drawn as a broken line to meet the horizontal line marked 1.238 in mid-1977. Sales in 1977 yielded a general level of assessment of .808, indicating that *on the average* real property in the City had increased in value by 23.8% since the re-assessment (indicated by 0). The line OA then continues to mid-1978, and on a slightly different course to mid-1979 as a solid black line and is continued further as a broken line (indicating a hypothetical rate of increase not based on the evidence) beyond mid-1980. On the basis that it is more probable that the sales figures relate more accurately to mid-year values than to year-end values, the solid parts of line OA signify that by mid-1978 the average value of property in the City of Halifax was 29.7% above the value at the assessment base date January 1, 1976 and that at mid-1979 that average value had climbed further to 39.6% above the base-date value. Where the value at origin is put at 100% = 1 these figures become 1.238, 1.297 and 1.397, and their reciprocals are .808, .771 and .716, which are the general levels of assessment given in the evidence for 1978, 1979 and 1980, at the commencement of each of those years.

Given the conditions of rising values disclosed by the evidence, it is clear that the average actual cash value of properties in Halifax as of (say) January 1, 1980 was considerably more than 39.6% above value at origin, January 1, 1976.* This is unfortunate because it constitutes a distortion, but it can be compensated for in various ways, and in the meantime it is the only real approach to uniformity available.

(Strictly speaking, the line OA does not trace the general level of assessment but its *reciprocal*, but the latter is a more useful quantity because it is the actual cash values that change to produce a change in the general level of assessment. Line OA

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* Actually mid-1975: see above.

thus represents the average change in actual cash value *per* dollar over the period in question. It has nothing to say about aggregates.)

What in fact happens to property values after an assessment? It is notorious that real-estate values in Canada climbed rather rapidly over the period in question, and that is was also a period of considerable inflation. To the extent that inflation, i.e., the change in the relative value of money, influenced market values, it was a common influence that would equally affect all values.

It is a point emphasized by Mr. Speed and Mr. Hardy that all properties do not change value equally or in equal proportion: there will be relative increases and decreases. If the changes in the actual cash value of each property were to be traced on a graph by a separate line, the lines originating at one point at the reassessment base date would be found to diverge over a very broad spectrum and might on occasion cross over other lines. This can be easily conceded*, but the trouble with it is that in the instant case there is no quantitative evidence to give it substance as there was, e.g., in *Morgan v. City of Halifax* (1976), 20 N.S.R. (2d) 356, a decision of my own. Mr. North testified that because of the stable nature of the investment in major investment-type properties, the overall capitalization rate tends to remain stable also, with the result that the values of such properties expressed in money would be mainly affected by the rate of inflation, because this presumably is reflected in the annual net income that the landlord investor seeks to maintain. It is therefore possible that the general level of value of major investment properties as a class is below the general level of value for all real properties, as reflected in the general level of assessment.

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*Conceded, that is, for the sake of argument. A more systematic factual research might show different results because of the kind of differences to be expected between estimated and actual values.

What is to be done in the case of a property or a class of properties that diverges from the average, as may be the case with the class of major investment properties? Such a property or class of properties is represented by the line OB, on Figure 1, which is the assumed course of a rise in value that lags behind the general average rise in value illustrated by OA. If the actual cash value is determined as of (say) January, 1980, and is then multiplied by the general-level-of-assessment figure applicable at that date, the product will be a true measure of its relative value with respect to the then general level of assessment, unless the general level of assessment is determined as of mid-1979 rather than as of the start of 1980. That possibility is certainly a defect in the system that ought to be corrected, but in the absence of a quantitative basis in the evidence for dealing with it, it is necessary to use the means at hand.

In this context there are two matters raised by Mr. Speed and, to some extent, echoed by Mr. Hardy that should be dealt with. The first is that the purpose of using the general-level-of-assessment factor is to ascertain the actual cash value of the property as of the base date of the last reassessment. This, with respect, I consider incorrect. The purpose of using the general-level-of-assessment factor is to assign to the present actual cash value of the property figures that will reflect its value compared to the other properties in the assessment area at the base date for the current assessment. It is assumed that these other properties have retained their relative values since the reassessment base date although the figures representing those values are no longer accurate with respect to present money values. The assumption is a workable one because most properties will be within a reasonable range of the average, and because any assessment that strays far from the average can be corrected by appeal. In other words, this computational structure works reasonably well to measure comparative values on a uniform basis while permitting any marked deviations to be dealt with.

The other point is Mr. Speed's suggestion that new assessments and reassessments change the tax base to which the general level of assessment factor is applied. I have considered this argument with great care but, with respect, I think it is not sound. A new assessment or reassessment may be done well or poorly, but it can affect the application of the general-level-of-assessment factor to another property only if it enters into the sample of sales used to determine the general level of assessment. Exx.5 and 6 indicate that there were 1459 sales in the 1978 sample and 1541 in the 1979 sample, so that any excess or defect in a new assessment or reassessment of a single property would have only a minimal effect. We have no data in the evidence on what percentage of sales are constituted by properties that have been reassessed or assessed for the first time since the general reassessment, but it is likely enough that there are some of them in the samples. In fact, there should be in order to maintain the representative character of the samples. In any event, in the absence of concrete evidence that something went amiss in reducing the individual properties that were reassessed or newly assessed to the general level of assessment, a court has to go on the basis that the normal result was achieved.

To put it in another way, the increase in the tax base, that is, the change in the aggregate valuation of all properties in the city due to reassessment and assessments for the first time, does not affect the general level of assessment directly. This is because the aggregate valuation does not enter as such into the computation of the general-level-of-assessment figures. A change in the tax base may show up in the sampling process: indeed it would be expected to do so. There, however, it can affect the general level of assessment factor only if the individual properties concerned have been so dealt with as to warp the result. This would occur in individual cases, if the assessment of such a property were not properly reduced to the general level of assessment, but there is no evidence of that other than the

evidence of theoretical defects in the derivation of the general-level-of-assessment figure that have already been discussed.

The matter can be made clearer, perhaps, by further recourse to Figure 1. This line OB is a time line tracing the relative change in values of a property or class of properties since the base date, January 1, 1976, when, presumably, the value was relatively uniform with the general average value of all property traced by OA. If the value traced by OB remained at the same nominal figure at January 1, 1980, that would be cause for an appeal, because its actual cash value has fallen below the general level. The same can be said, of course, of any other property that falls below the general level in its relative valuation but maintains the original valuation figures assigned to it.

This does not apply, however, in the case of a property that is assessed for the first time or reassessed on a new basis at (say) January 1, 1980, because at that point the previous value as traced by line OB has no further significance, and the accuracy of the uniformity process will depend solely on the accuracy of the uniformity factor. If, for example, a property has an actual cash value at January 1, 1976, of $10,000.00 and is assessed at that amount, but then increases to only $11,500 at the beginning of 1978 (rather than the $12,380 projected by the average rise in value at the latter date) what will be the result of a new assessment at the $11,500 figure? The $11,500 must be multiplied by the applicable general-level-of-assessment factor—— .808——to yield an actual assessment of $9292.00. This reflects the relative loss of value from the original $10,000 and vindicates the process, at least for assessment purposes.

Since the income or expenses for any one year may contain abnormalities sufficient to give a false picture, it cannot be laid down as a legal rule that the data for any one year are to be preferred as the basis for valuation. In the instant case some of the indicators mentioned point to 1979 as the preferable data base and I propose to employ that year in coming to a conclusion. There is, however, no reason why the data from adjoining years or even more remote ones should not be used to find out whether 1979 is a sound data basis or whether some of the figures require to be 'normalized', a process employed, for example, by Mr. Hardy in some of his figures.

In particular, if the data for 1979 and the adjoining years indicate a trend that differs appreciably from the general increase in the level of value, that should be taken into account because, as previously noted, the object of the assessment is to find the relative value of the property assessed as of the base date for the 1980 taxation year (expressed however in 1976 numbers) rather than the value as of January 1, 1976.

Economic Rentals or Discounted Cash Flow?

Since in most cases the purchaser of an investment property must take the property subject to existing leases, he will be looking to actual rents as the basis of his valuation together with whatever estimate he may make of the potential. Ordinarily the purchaser can be expected to be more optimistic about the future than the seller (whatever the latter may *say*). That argues that he will use a more optimistic overall capitalization rate than would be applicable to the more sophisticated analysis put forward by Mr. Hardy and his colleagues in capitalizing actual rents plus the potential to be expected at the end of each term. This is where Formula (4) is employed. The parties do not seem to be at odds on most aspects of this.

The employment of economic rents as the basis of valuation by the assessors and Mr. North derives from the need to comply with Assessment Act s.39, which requires assessments to be made 'as if the person assessed were the owner of the title in fee simple' and also provides 'no reduction in value shall be made merely because the property is subject to any lien, mortgage, lease, claim, license or any other encumbrance on the title'. Even without that provision I have held* that the assessor is to evaluate all estates or interests in the property including leaseholds and assess them to the owner, i.e., in this case the landlord-reversioner. In general, this is carried out on the assumption that the tenant's interest has no assessable value where he is paying the economic rent: his interest and the cost of that interest exactly balance each other. There is a certain difficulty in defining 'economic rent' however, and this is very apparent in the evidence. It might be defined as what the space could be expected to fetch on the open market if it were available for immediate lease at the data-base of the assessment, but that gives an unreal meaning to 'economic'. The economic fact is that large buildings of this type, each with many tenants, can be expected to undergo a continual turnover of the leases from year to year, with the terms running from two to five years, according to the evidence. Tenants will be at the most demanding point of their leases with respect to money at the beginning and will have some advantage as rentals around them go up, either by reason of inflation or for other causes. This is surely an element foreseen in the bargaining process, so that ordinarily the rent agreed on is the rent produced by the market *for the period in question*. Moreover, the fact that rentals in the same building are out of phase with each other is also part of the market process and something relied on by the landlord to smooth out income flow.

There are exceptions, and there are no doubt many reasons for these, but the evidence emphasized two: (1) the expectations of the parties in entering into the lease are changed by radical

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* *Bennett v. Dartmouth* (1978), 2 N.S.R. 1965-69 669, affirmed 2 N.S.R. 1965-69 655, C.A.

changes in conditions, so that the tenant acquires a substantial benefit from the lease over and above the cost to him; and (2) the landlord in order to entice a desirable tenant offers the space at a rental substantially below what others would be willing to pay for it.

In the first case the interest acquired by the tenant, by change of circumstances, is usually quite apparent and fairly easily estimated, although there can be complications. The usual case is a long-term lease to an anchor tenant or other principal tenant. Here, the principal instance is that of the Woolco Department Store, which I will have to consider later in these reasons.

With respect to the cases that fall under (2) the question is a bit more complex. The chief examples occur in the Mall, or so it is alleged, and the nature of this marketing process is such that the landlord expects to get an indirect return on its concessions by encouraging a growth of business in the Mall for which the favoured tenant will act as an attraction. Under the leases in the Mall the landlord has usually reserved a percentage rent on profits, and business in the Mall depends upon an attractive mix of tenants. So that from the landlord's point of view the bargain is a favourable one.

In other instances the landlord may be willing to concede a lower rent in exchange for greater security, relying on the stability and assured income of the tenant.

While the landlord may thus appear to be economically satisfied by the bargaining process, it seems clear that where a tenant by reason of its nature or circumstances is able to command a lower rent than might otherwise be expected for the space the tenant does obtain a valuable interest, which is assessable. Nevertheless, there will usually be other elements in the deal

(e.g., a longer term) that change the picture sufficiently to make it difficult to fix the value of the interest involved, and in many cases it may, in fact, have no specifiable value because of the number of elements that enter into the bargain.

In other words, apart perhaps from the case where a sub-lease is granted at an increased rental, it will very often be difficult to conclude that an actual rent differs from the economic rent for the space involved. In general, there should be a marked difference between the actual rent and what is estimated to be the economic rent before it is reasonable to assess a tenant's interest. This is because of the complex nature of the bargaining process, which is the foundation both of actual rents and of what should be economic rent.

The evidence is that purchasers use actual rents, reduced by actual expenses, with an overall capitalization rate to arrive at an estimate of value. Mr. Hardy suggests that his method of the discounted cash flow will produce a more reliable result and one that is more informative to a would-be purchaser. Mr. North conceded that a discounted-cash-flow method of valuation was in use on this continent or possibly several such methods, but the one he described does not correspond to that demonstrated by Mr. Hardy. Mr. Speed suggests that Mr. Hardy's method requires a somewhat different overall capitalization rate, and this appears to be so. Both methods are intended to yield the same actual cash value but if the same capitalization rate (r) is used, Mr. Hardy's method will always yield a greater capital value than Mr. North's where the deferred annual net income (a_2') is greater than the present net income (a_1). By subtracting Formula (1) in the form, $P = a_1/r$, from Formula (4), we derive the net difference in capitalized values as

$$(a_2 - a_1)/R^d r \qquad (5)$$

with the letters having the values given previously. This, in effect, is the value of a deferred perpetual annuity of the difference between the two net incomes.

Economic Rents and Actual Recoveries

In their pre-trial memorandum counsel for the respondents stated at p.14:

> At the time relevant to the assessment, office space in the office buildings under appeal was rented on a "semi-gross" basis. In other words, a square foot rental was struck which included operating expenses to be paid by the landlord for a base year, usually the year preceding the lease. Increases in operating expenses would be charged back to the tenant by way of recoveries, However, the tenant, of course, would be liable only for the amount by which the operating expenses increased over the operating expenses included within its base rental.
>
> Accordingly, it is submitted that if one is imputing so-called "economic rents" to such spaces great care must be taken to ensure that the recovery income (if any) added to the base rent is calculated in relation to the appropriate base year for the base rental. If recovery income is calculated on the basis of some year earlier than the appropriate base year, then there will be a double accounting and the total indicated rental will be too high. This double accounting will exist because a portion of the earlier costs will be included in the base rental and will be accounted for again in the recovery income provided for.
>
> It is understood that in preparing her assessment the Assessor used what she considered to be "economic rents" (and which Halifax Developments Limited asserts essentially were 1979 rental levels) and then added thereto the actual recoveries which Halifax Developments Limited had received from those spaces. It is submitted that the Assessor was in error in this respect. When she updated to alleged economic rents the base rentals received from various spaces it was also necessary for her to reduce the recoveries to the level (if any) which could have been achieved on that base rental.
>
> This was not done and accordingly it is submitted that the original assessment provided for double accounting in this respect, an excessively high indicated net income and an excessive assessment.

This is plausible and is certainly correct with respect to the contention that the economic rent chosen should be for the same year as the other data applied to arrive at the ultimate capitalization. That is, it is not correct to use a 1979 economic rent in conjunction with 1978 expenses, taxes and recoveries, because the result will be warped by many considerations including the rate of inflation.

The assumption, however, that the employment of an economic rent requires the construction of new hypothetical framework for recoveries, etc. does not appear to be warranted on the evidence. A great many of the recoveries in fact are on a user-pay basis and are thus pass-through figures, even if some of those figures are apportioned among the tenants on a rather generally expressed rate per square foot. As to taxes, I have been unable to discover whether they are apportioned among the tenants on other than a rate per square foot, and there is no positive proof that an individual tenant's tax apportionnment increases with an increase in rent. That, however, is the only basis upon which an adjustment for recoveries might be made, in favour of the tenant. The figures given in exx. 12 and 13 with respect to the two office towers show a great variety of square foot rates, but the evidence indicates that the rental is fixed at various times so as to include figures for taxes and services at that epoch with the tenant becoming responsible for the excess. The rates shown exhibit a great variety of numbers and some curious features. One of these is that many of them end in '82', which suggests that they really represent more rounded figures that have been reduced by the subtraction of a four decimal place rate or rates—the figures given in these exhibits do not include the tax rate or tax distribution, because Mr. Hardy extracted it so as to incorporate it in the capitalization rate.

Whether that is so or not, I cannot find on a balance of probabilities that the suggestion with respect to adjustment of

recoveries as put forward by counsel for Scotia Square is supported by the evidence. In an appropriate case an argument could be made for it: e.g., where recoveries increase or decrease with a decrease or increase of rent but always *with respect to the same year*. That is, it is not material that recoveries would likely be on a different basis upon the renegotiation of the lease, because what is being measured is not the difference between net rentals for two different years but between the actual net rental received by the landlord and what the property would yield if leased at an economic rent, i.e., the tenant's actual advantage from the existing arrangement. None of the factors entering into the calculation of recoveries can affect the result there other than an increase or decrease in recoveries based solely on a greater or lesser rent than the actual one. There is no sufficient evidence of such a factor.

In fact, it is probable that the question only arises if one does an analysis in the detail advocated by Mr. Hardy. The rental paid by any individual tenant does not directly affect the tax rate, and on Mr. North's approach expenses and taxes are dealt with *en bloc*, so that the possibility is remote that any change from an actual to an economic rent would affect recoveries.

The Value of Tenants' Improvements

The respondents contend that leasehold improvements paid for and owned by tenants have no value as that term is understood in the Assessment Act. Counsel contend (a) in the Scotia Square complex leasehold improvements are installed to fit the particular functional and aesthetic requirements of each tenant, and are thus highly personal to that tenant; (b) there is no market for the sale of leasehold improvements in place or removed; (c) it is common leasing practice to require tenants to remove their improvements on the expiry of the lease; (d) if leasehold improvements fall into the ownership of the landlord he is not in a position to charge extra rent, even if the new tenant will accept the existing improvements; (e) even if the landlord installs leasehold improvements for the tenant, the additional rent he is able to

charge only balances the expenditure required, and does not increase the net income stream from the property; and (f) in Halifax, leasehold improvements have been assessed on such a sporadic basis that there is no uniformity in the result.

There is some factual basis in the evidence for each of these propositions, but that does not conclude the matter. A leasehold improvement can be a very small part of the value of the total realty or it may be the major part. It is very common today for one party to erect a building on land that belongs to another. Indeed there are some very intricate lease and counterlease arrangements commonly used in the business world. A fixture consisting of a building, especially a large building, could hardly be denied to have value in the tenant's hands even though the landlord received only a ground rent. The difference between such a fixture and fixtures of the kind in issue here is for legal and assessment purposes mainly a matter of degree rather than kind. In most instances in Scotia Square, apart from the apartment buildings, the tenant rents space consisting of floor, ceiling and the enclosing walls, which are in some but not all instances finished. It is customary for the tenant to erect his own partitions and install carpets, decorations, lighting fixtures, etc... As long as these qualify as fixtures in the ordinary sense, that is, improvements added for the better enjoyment or exploitation of the realty, there can be no doubt that they are assessable and are assimilated to the 'land', because of the provisions of the Assessment Act. They are therefore, assessable to the landlord although the landlord has no interest in them.

The argument that they have no value in exchange encounters at once the principles in the *Sun Life* case, where the ornamentation of the building, which had little or no value in exchange, was yet determined to have assessable value. The owner must always be considered a possible purchaser. The fact that the improvements are constructed to meet the owner's needs and tastes is a consideration in value, but it certainly does not wipe it out. What

we are considering here are commercial improvements or similar business improvements designed to assist the owner in dealing with the public on the premises in all the ways that improved premises can do so.

The assessor dealt with improvements by assessing them at their initial cost and allowing them to be depreciated over the term of the lease. This seems to be an eminently reasonable approach that takes into account both the fact of value and the fact that the improvements will have usually very little value when they have served their owner's purpose. There will be exceptional cases, e.g., where the installation has been botched or the purpose of the installation has been frustrated, where other evaluations may be in order.

No problem of valuation arises where the improvements are 'fixtures' in the common-law sense: see *Re Marley and Sandwich* (1932), 41 O.W.N. 178; *Re Hiram Walker & Sons Ltd. and Walkerville* (1931), 41 O.W.N. 6, affd. with a variation [1933] S.C.R. 247, [1933] 3 D.L.R. 433; *Richmond v. Ashton*, [1962] O.R. 49, 31 D.L.R. (2d) 12; *J. D. Irving Ltd. v. Minister of Municipal Affairs (N.B.)* (1978), 22 N.B.R. (2d) 234, 39 A.P.R. 234, Q.B. The legislature has enlarged the scope of the definition of 'assessable property' in Assessment Act, s.1(a), to include not only land and its natural contents and the traditional fixtures but also a good many things that have not traditionally been included within the idea of fixtures or improvements, because they were not added to the land for the better enjoyment or exploitation of the land but to enable the additions to be exploited for their own purposes. That, however, is a problem that does not present itself in the present case, and is merely mentioned to indicate that the general approach suggested here is not necessarily applicable to all problems arising out of tenants' improvements.

The most serious objection to the procedure adopted by Mrs. McCluskey is that she did not carry it through with respect

to all the eligible properties, with the result that some people are taxed and some are not taxed in this respect. That, however, is an argument not for ignoring this element in the assessment but for extending the approach to the other properties that have so far escaped it. A failure to achieve uniformity of assessment is an argument not for avoiding the assessments that have been made but for making better efforts to attain that result: see the remarks of Ilsley, C.J. on an analogous problem in *Morash v. Municipality of Chester* (1961), 28 D.L.R. (2d) 428, and the similar remarks of MacKeigan, C.J.N.S. in *Hebb v. Town of Lunenburg* (1979), 32 N.S.R. (2d) 427, at p.433.

The Appropriate Capitalization Rate

I have already indicated above that Mr. North's use of a single capitalization-rate for the whole complex is the most appropriate for a development of this kind. There does not seem to be any contest between the parties that capitalization rates will differ according to the method of evaluation employed. Thus, even if Mr. North and Mr. Hardy had arrived at identical valuations, one would expect them to employ different capitalization rates because of the differences in their approaches. Mr. Hardy's various capitalization rates for the different buildings can be melded to yield a consolidated rate of an approximate kind of 16.16% with the depreciated tax rate included and 12% with the tax rate excluded. (There is no single tax rate involved but a variety because of the different classification of the apartment buildings and the other components for tax purposes.) These deduced rates are quite high, but they cannot be directly compared with the 11% used by Mr. North, because even when reduced to a single rate they are designed to be applicable to net-income figures that will always, *ceteribus paribus*, be greater than the net income figures relied on by Mr. North. This was discussed previously.

Despite the differences in approach both gentlemen are very nearly in agreement on the value of four of the components of the property. With respect to the apartment towers, Mr. North's appraisal is 2.22% greater than Mr. Hardy's with respect to

MacKeen Towers, and 1.5% lower than Mr. Hardy's with respect to Scotia Towers. Mr. North's appraisal of Duke Tower is 2.21% greater than Mr. Hardy's, and with respect to Barrington Tower 5.21% greater than Mr. Hardy's. The significant differences between them show up in relation to the Trade Mart, where North's appraisal is 18.35% greater, and Scotia Mall and the Parkade where he is 38.87% greater.

One of the chief reasons for the large discrepancies in the last two items, the Trade Mart and the Mall and Parkade, is the choice of capitalization rates involved. Where Mr. North uses a uniform 11%, the capitalization rates used by Mr. Hardy (when reduced by subtraction of the adjusted tax rate) are as follows:

Apartment Towers	10.75%
Office Towers	11.5 %
Trade Mart	15 %
Mall and Parkade	12.5 %

The divergences in results within the very close approximations offered by the experts on values of the apartment towers and office towers are explicable by the use of different data. This is also the case, to some extent, with the Trade Mart and Mall and Parkade, but much more important in these latter cases appears to be markedly different views about the elements of risk involved as well as Mr. North's employment of economic rents to account for leasehold interests.

The use of economic rents for this purpose is a perfectly valid approach: The difference between the economic rent and the actual rent is a first-hand quantity with which to measure the tenant's interest. Mr. MacFarlane argued that there should be set off against this difference any increase in recoveries that would be due to the landlord from the tenant because of the use of the economic rent rather than the actual rent. This is

an echo of a rather striking expression used by Mr. Miller in another context: 'You can't go half-way in make-believe!. But in this respect the employment of economic rents is not make-believe: it is a way of estimating the actual benefit being received by the tenant, but not what he might receive under a different leasing arrangement. I would disagree with Mr. North's approach in this case only with respect to his understanding of economic rents. A rent that is agreed on by arms-length bargaining between free parties ought generally to be accepted as the economic rent or as close to it as we can expect to arrive, unless there has been some substantial change in the circumstances (such as unexpected inflation) since the bargain was entered into. This is a restatement of my previous conclusion on the matter, but it is opportune to bring it up at this point because it is now time to go on to a consideration of the individual components of the complex.

THE APARTMENT TOWERS

Messrs North and Hardy differ least in their assessment of the apartment towers and use substantially the same method of evaluation. This is evident from the closeness of their respective appraisals. They do differ however concerning certain details: the proper vacancy rate to be attributed to the towers; what value should be deducted because of the contribution to income of the furnishings of furnished apartments; how to deal with the contribution of refrigerators and stoves to capital or income; whether to exclude or include laundry income in that of the building; how to deal with municipal taxes as an expense.

Both appraisers made evaluations based on the 1979 figures for income and expenses. Each then proceeded to modify some of the figures in order to adjust or 'normalize' them. This is a perfectly legitimate process, because a potential buyer would do the same if he could. That is, he would try to make allowances for any abnormalities either by way of excess or deficiency in the figures for

that year. In doing so he would undoubtedly compare the latest figures, which are usually the most significant, with the figures for the preceding years, if available. That is what both sides have done here.

The Appropriate Vacancy Rate

In reconstructing the actual 1979 figures Mr. North started, not with the actual rental income but with the potential gross income indicated by the leases, and he then deducted from that figure the income attributable to the furnishings of the furnished units. I shall call the result 'the potential gross income (unfurnished)'. (In arriving at a net income Mr. North, of course, had to make an allowance for the expenses associated with the furnishings.) He said he followed this procedure because furnishings, being chattels, were not assessable.

Since the vacancy allowance is on this basis a direct function of the potential gross income (unfurnished), it follows that the actual vacancy rate should be a function of the actual gross income (unfurnished) and the potential gross income (unfurnished). This can be expressed more succinctly in the following formula:

$$\text{Vacancy rate} = 100 \left[1 - \frac{\text{Actual gross rental income (unfurnished)}}{\text{Potential gross rental income (unfurnished)}}\right] \quad (6)$$

There was some protest from the other side concerning this procedure on the basis that it involved mixing different types of figures, but that is not my understanding of what Mr. North did, at least as far as concerns mixing potential and actual figures. Otherwise, it was no different in substance from the kind of normalizing that Mr. Hardy performed with certain other items in the account and, as a normalizing process, it seems the natural and straightforward way to do it, in the case of income.

The real question is whether 5% is the appropriate rate. The actual vacancy rate for apartments of this type in Halifax, at the time, was close to 2%. Mr. Hardy gave the following figures for

the apartment towers: MacKeen Towers in 1978—10% and in 1979—13%; Scotia Towers in 1978—6.5% and in 1979—7%. Mr. North gave the same figures for 1979. I have been unable to reconcile the 13% for MacKeen Towers in 1979 with any result *derivable by Formula (6)*. There is also a discrepancy with respect to Scotia Towers but it is much less. Thus, in the case of Scotia Towers the substitution of figures derived from exx. 1 and 16 yields the following equation:

$$100\left[1 - \frac{671768 + 7931 - 19541}{715367}\right] = 7.7\%$$

The $671,768.00 is given as the actual rental income for 1971 in ex.1, p.39. It is obviously intended to include furnishings rental, because there is an item under expenses for furnished units of $13,957.00. The income from furnished units is given in the appendix to ex.16 as $19,541.00. The amount of $7,931.00 is the cost of staff quarters given in ex. 1, p.39, and should be added to the actual rental income so that it will have the same ingredients as the potential gross income—there can hardly be any difference between potential and actual figures in this respect. Even if this last item is omitted the vacancy rate will be only 8.8%. In the addendum to ex.16, the expense figure corresponding to $19,541.00 is $13,957.00, which is the same as the furnished-units expense in ex.1, p.39. Thus, for Scotia Towers 7.7% is close enough to 7% to validate the statement that the latter is the actual vacancy rate.

When the same process is applied to the figures for MacKeen Towers in exx.1 and 18, however, as follows:

$$100\left[1 - \frac{440438 + 3784 - 23328}{464426}\right] = 9.4\%$$

the result is not 13% but 9.4%, or if the figure for staff quarters is omitted 10.2%. Similarly, employing Mr. Hardy's rental income figure of $441,010.00, the Formula gives 9.25% or, omitting the staff-quarters figure, 10%. In both cases, in fact, the discrepancies are such that I suspect that the actual vacancy rate was derived by some method other than that provided by Formula (6).

I cannot fault Mr. North's approach, which seems to be a fundamentally consistent and significant one, but that does not settle the point.

In this instance the expert with the local experience probably has the edge. As mentioned at the outset, the Scotia Square project was built on a cleared slum area. All Haligoians over a certain not too great age are aware of those antecedents and what they imply about the character of the area as a residential neighbourhood. This character was notorious, not only in the sense that the word has in dealing with judicial notice but also in the perjorative sense. This character figured briefly in the evidence of David B. Hyndman, the Executive Vice-president of Halifax Developments Limited, who is in general charge of the whole project. When questioned about the acceptance of apartment living on Brunswick Street by Halifax citizens, he remarked that there was 'reticence' on the part of those who know Halifax. Against this, several factors made the apartments desirable: They are right in the central business district, and the cost of transportation has been rising. Moreover, the company refurbished the whole structure in 1979, and there has been a 'very severe tightness of housing in Halifax'.

Undoubtedly there are many newcomers to the City who are not to be intimidated by the history of the area—at least until they become aware of it—but the 'melody lingers on'. The history is so well known that it is not necessary to invoke any authorities on the subject, but one such authority gives an epitome of what it was like in the following terms:

> In almost every sense, the worst part of the Central area lies between the City Hall and Jacob Street. With the exception of the blocks between Barrington and Argyle Streets, it is in a generally deplorable condition. Here are some of the worst tenements, and dirty cinder sidewalks merge with patches of cleared land littered with rubbish. It is suggested that the clearing of this area should have high priority. (See *Re Development Study of Halifax, Nova Scotia*, Gordon Stephenson, M.T.P.I.C.

(Halifax, City of Halifax, 1957), pp.25-6.

This excerpt from *The Stephenson Report* does not detail the effects on the neighbourhood of the crime, prostitution and bootlegging that went with a very depressed slum area, which also suffered the evil results of partial segregation on racial lines.

Mr. Hyndman was hoping for an occupation percentage in the high nineties, which would make Mr. North's 5% allowance not unrealistic. This had not yet been achieved at the time of the hearing, and since assessment valuation has to rely heavily, although not exclusively, on present conditions because of the prudent-investor factor, it seems sensible to employ the actual rental figures which are in fact over the 90% mark, but sufficiently removed from 5% to warrant not taking the high nineties for granted. Mr. North's reasoning on the matter is, of course, entitled to great weight, but in this instance there is a countervailing element in the evidence and in local general knowledge of the area. Absent that element, of course, Mr. North's estimate would have to be given much more weight.

Furnished-Apartments Income

Mr. Hardy introduced an extra page of calculations for each of the apartment towers, under the heading 'Amended Calculations (Appendix 2) for 1979 Assessable Value'. The main point of this was to eliminate the value to be attributed to the furnishings of the furnished apartments. This was done by estimating the additional income from furnishing certain units and deducting from the income figure the expenses attributable to those furnishings. The difference was then deducted from the net income for each tower and the result capitalized. In effect, this is the same process as Mr. North employed, except that Mr. Hardy used actual (but normalized) figures for 1979 throughout. In opting to use actual figures rather than potential in this case, I have as a consequence opted to use Mr. Hardy's method although not necessarily his figures.

Refrigerators and Stoves

Each apartment, whether furnished or not, is supplied with a refrigerator and a stove. All parties treated them as chattels and on that basis they are not assessable property. The remaining value of the refrigerators and stoves should therefore be deducted from the capital value of the apartment building, but only if they affect the net income from which that capitalized value is derived. That is, they must be taken into account *only if they produce part of the net income.*

Mrs. McCluskey apparently took it for granted that they did and allowed $10.00 a month for each apartment, i.e., a net income value of $5.00 an appliance per month. Mr. Hyndman testified that the original cost of these appliances was included 100% in the capital cost of the buildings, and the annual depreciation on them was part of a single figure depreciation for the whole complex. When new refrigerators and stoves are acquired the cost is shown as an expense in the year of acquisition under building maintenance. Mr. North and Mr. Hardy said that this was also their understanding of the accounting. Mr. Hardy pointed out that there was no separate item for depreciation as an annual expense in the various statements, and that it is not taken into account in valuation. What the statements of income and expenses show is 'income flow'. (The statements do in fact appear to be very much on a current basis without allowances for depreciation, capital recovery, reserves or the like.

Mr. North did not attribute any net income to refrigerators and stoves because he understood they had been 'fully expensed'. Mr. Hardy said he didn't quite understand what Mr. North 'was saying in that', but disagreed that the appliances could be ignored. He did not try to ascertain a net income attributable to them but capitalized them on an overall depreciated value of 50%, which figure, however, was apparently increased from year to year to keep up with inflation. In general, such an increase is not

justified where depreciation represents capital recovery or capital cost allowance, but in this instance it is meant to represent the present value of assets and that value undoubtedly is affected by inflation.

Both approaches pose difficulties. Mr. Hardy's 50% depreciation appears to be arbitrary in the absence of some basis for choosing that particular figure. (See trans., pp. 464f.,547-54.) Mr. North conceded from his point of view that the income and expenses from the refrigerators and stoves would be unlikely to balance out in any year, but insisted that on principle surpluses and losses would tend to balance each other out so that effectively no net income should be attributed under this head. (See transcript, pp.112-3, 169-71, 208.) On the last cited page there is the following passage on cross-examination:

> Q. Thank you. Now Mr. North just going back to the apartment buildings for one moment. The appraisal that you did and arrived at an actual cash value, if that were to be the sale price of the property on the basis of your method, would it include the stoves and refrigerators?
>
> A. Would it include the stoves and refrigerators.
>
> Q. Yes, bearing in mind the method or technique that you followed?
>
> A. It would physically include them but it would include them at no actual cash value.
>
> Q. That's because you say the expenses balance out the revenue attributable to them?
>
> A. Right.

The difficulty with this approach is to determine what reality is to be accorded to what is above all a convenient bookkeeping approach. The fact that the owner chooses to write them off in this way does not change their character as marketable property for whatever remaining value they retain. The accounting system might justify Mr. North in assuming that that remaining value was little or nothing, but the likelihood that they do have

some remaining value despite the accounting system is apparent. Most people would consider an apartment furnished with a refrigerator and stove more rentable and at a better rent than one without, and most landlords would consider it necessary to earn some annual profit on their initial outlay.

Mr. Hyndman, on cross-examination, confessed that he did not know in detail how much was spent for replacement and repairs to stoves and refrigerators in 1978 and 1979, but thought it might be $2,000 or $3,000 a year per building, at the outside. There may also be expenses relating to these appliances not discussed in the evidence. Mrs. McCluskey's figure of $5.00 an appliance a month (which Mr. North suggested was a 'text-book figure') is some basis for surmising that there may be a profit on them. All things considered, they suggest that there is some basis for Mr. Hardy's approach, and I propose to accept both his method and his figures in this case.

Laundry Income

Mr. North in his statement of operations for each apartment tower (ex.1, pp.37,39) includes in each case an item 'Laundry & Sundry Income', which is lacking in exx.16 and 18 put in by Mr. Hardy. In the case of each building Mr. Hardy lists a slightly higher amount than Mr. North under the item 'Rental Income', but these differences are not at all comparable to the laundry income items (although it is possible that there is an overlap). In the back of my mind there is a suggestion that Mr. Hardy eliminated the laundry income on the same basis that he eliminated the furnishings of the furnished apartments and the refrigerators and stoves, i.e., because they were not assessable, being chattels. Despite an intensive search, however, I have been unable to find any reference to this either in the evidence of Mr. North or of Mr. Hardy in the transcript or in my notes.

If that, however, is the basis for the difference of approach between Mr. Hardy and Mr. North, Mr. North is more nearly

correct than Mr. Hardy, because the figures exhibited indicate that no account has been taken with respect to the expenses referable to the operation and maintenance of the laundries. Nor is the income, either gross or net, divided in any way between what is appropriate to the machines and what is appropriate to the space in the building where they are used. It is quite clear that they do occupy space, which is set apart for this purpose and which is quite distinct from the apartments proper. I am quite prepared to take judicial notice of the general nature of coin-operated apartment-building laundry rooms, as they are just as much an established fact of contemporary living as the use of baby strollers and shopping wagons in department stores and supermarkets: see *Rafuse v. T.Eaton Co. (Maritimes) Ltd.* (1957), 40 M.P.R. 149, at p.151, N.S.S.C., MacDonald, J.

This is quite apart from the question whether the washers and dryers, with which apartment-building laundry rooms are customarily equipped, constitute chattels, so as not to fall under the definition of 'assessable property' in the Assessment Act s.1(a). In general, any building or other thing affixed to the land becomes part of the land, and this extends to chattels such as equipment and appliances that have been fixed to the land for the better exploitation or enjoyment of the land and its fixtures. Thus, formerly, stoves were considered fixtures because, in general, they had to be attached to the fabric in some way so as to function. This is not necessarily true of the modern electric stove, although there is a case to be made for considering such a stove a fixture and part of the realty where 220-volt current is supplied by a permanent electrical connection, i.e., one that is not severable by unplugging the connection from the socket. See, e.g., Williams *On Personal Property* (any of the older editions) under 'fixtures'. See also *Argles v. McMath* (1894), 26 O.R.224, affd. 23 O.A.R.44; *Re Canadian Northern Rwy. and Omemee School District* (1906), 4 W.L.R. 547, 6 Terr.L.R. 281, Wetmore, J.; *Reamsbottom v. Haileybury* (1919), 45 O.L.R. 345, C.A. A recognized exception has been the

case of 'trade fixtures', which when placed on the land or attached to the fixtures by a tenant for the purpose of employment in a trade or in business are commonly understood to be severable at or before the term of the lease, or (possibly) within thirty days thereafter. This is a case of a custom that has become law, although it is frequently embodied in leases: see *Carscallen v. Moodie* (1858), 15 U.C.Q.B. 304, C.A. Where such elements are added to the fabric by the landlord, however, they are considered, ordinarily, to become part of the fabric and part of the land. The exception made in the case of trade fixtures indicates that the answer to the question 'Fixture or no fixture?' may frequently depend upon the legal context in which it arises. See, for example, the series of distinctions made by McLellan, J.C.C. in *Robert Simpson (Eastern) Ltd. v. Colchester-East Hants Amalgamated School Board et al.* (C.C.4, Colchester, 1971, April 18—unreported, unfortunately), a Mechanics' Lien case.

A case under the Ontario Assessment Act, R.S.O. 1960 c.23, s.1(i)(iv), suggests that the washers and other equipment installed in a coin laundry by a tenant become fixtures and part of the land for the term of the lease: *Richmond v. Ashton*, [1962] O.R. 49, 31 D.L.R. (2d) 12, H.C., Gale, J. The case itself turns upon the interpretation of the statutory provisions just cited, but in interpreting those provisions Gale, J. (as he then was) relied on certain of the general principles applicable to the distinction between fixtures and other chattels. Moreover, there are certain similarities between the legislation involved and our own Assessment Act that might require a more detailed comparison if the material were available to decide the question. It is clear from the cases, for example, that trade fixtures, although they would ordinarily be classified as fixtures and part of the land rather than chattels, are excluded from that class by way of exception, as a result of custom and in favour of freedom of trade. As the property of the proprietor of a building rather than a tenant, they are ordinarily included in the category of fixtures because the reasons for

excepting them do not apply.

In this case, however, the material for determining the question with any degree of probability is simply not present. It is one thing to take notice of the general nature of coin-operated laundries: it is quite another thing to determine the exact physical conditions that prevail with respect to the installation. The Director of Assessment is the primary appellant on this question—although there is no suggestion that it was disputed in the Court of Assessment Appeals—and I cannot be satisfied without more that the washers and dryers are not chattels, although there could even be a *prima facie* inference that they are not, if there were any evidence at all on the subject.

This being the case, some allowance should be made for the net income of the washers and dryers as chattels, but in the absence of any evidence on the point, one can only apply the probable ratios arising from the statements, such as the general ratio between the net income and the gross, and the possible ratio between the cost of the space and the cost of the appliances. Again, there are no figures available with respect to the latter consideration, and the only recourse possible is to cost relationships suggested by experience.

Here, the first ratio is available based either on the figures given by Mr. North in ex.1, pp.37 and 39, or from Mr. Hardy in exx. 16 and 18. For 1979 the actual ratio of net to gross income in the case of Scotia Towers is .489, and in the case of MacKeen Towers .479, and the reconstructed net and gross income ratio is .502 in the case of Scotia Towers and .462 in the case of MacKeen Towers. These can be rounded to .5, probably with some error in favour of the taxpayer. The other years given indicate similar but mostly lower figures, the highest being .516 for 1978 in the case of Scotia Towers. With respect to the other ratio 10% for equipment as against 100% for space plus equipment would

appear to be a safe and even generous figure here. Multiplying the two ratios and applying the product at .05 to the laundry income, should indicate a fair estimate of the net laundry income attributable to the equipment in the circumstances. Ordinarily the route chosen by Mr. Hardy with respect to the refrigerators and stoves would probably be preferable. The data for that are just not available here.

The Effective Tax Rate

Mr. Hardy increased his captialization rate by a decimal fraction corresponding to the tax rate, multiplied by the overall level of assessment, in order to eliminate the actual taxation figures from the calculation of net income. Mr. North did this only with respect to the apartment towers, because he considered that it was only in that case that the taxes could not be passed on to the tenants by the landlord. Thus, in ex.1, at p.45, he comments:

> ...First, in the application of a capitalization rate to net earnings, in the process of calculating value, it is only necessary to replace the realty taxes in the expense statement with the effective tax rate when the influence of a change in realty taxes will effect the net operating income produced by a property.
>
> For example, in the case of an apartment building, any change in realty taxes will have a corresponding change in the net operating income as such change cannot be passed on to or credited to the tenants. In other words, a change in taxes does not pass through to the tenants. The landlord absorbs the full effect of the change. It is for this reason that realty taxes must be converted to a percentage of value and said percentage added to the capitalization rate in lieu of a dollar amount of realty taxes.
>
> When estimating the actual cash value of a property in which all taxes or all increases in taxes are passed through to the tenants, there will be no change in the net operating income, which is the figure to be capitalized. Consequently, it is not necessary to replace the existing realty taxes with the effective tax rate.

Mr. Hardy explained to some extent why this was done in his evidence and in several of the exhibits. In ex.16, at p.20, for example, he has:

> As the taxes for any one year are a function of the assessment, and the assessed value is the purpose of the appraisal, the property tax portion of the expenses from the income and expense schedules has been omitted from the expense schedule, and the capitalization rate used has been adjusted accordingly. The adjustment to the capitalization rate is calculated by the addition of a factor representing the tax rate for the 1978 year (the relevant year for the income and expense statements being used) multiplied by the level of the assessment roll for that year. The additional rate represents the amount of taxes that would have been payable had the assessment been correct in that year, and not necessarily the actual real estate taxes paid.

I have trouble with this mathematical device not because it is complex—it is straightforward enough—but because it relates the tax rate and the taxes to the value of the property as assessed by that very process, rather than to the already assessed value upon which the taxes have actually been paid. The quotation from ex.16 seem to take it for granted that the assessment of which the taxes are a function is the same as the assessed value that is the purpose of the appraisal, but these two values are distinct and may or may not be the same in figures or in absolute values. If, for example, 1979 data are employed to arrive at the value as of January 1, 1980, Mr. Hardy's capitalization rate will be applied to yield that value, but the taxes paid in 1979, which form part of the data, will be based on a value arrived at in 1978 for January 1, 1979.

The assumption is that the actual taxes paid may not be correct because they may be based on an incorrect assessment. There is a temptation to say that they are correct presumably, either initially or as corrected on appeal, but an investor facing

a reassessment, especially in the case where the reassessment will be carried out on a different principle (as is the case here in some of the buildings) will want to 'normalize' the taxation figure so that the normalized net income will give a just appreciation of the potential.

The tax rate and the level of assessment are both retrospective, that is, they exist with respect to an already measured actual cash value, but they are employed, in this instance, to produce a new actual cash value. How can this be handled mathematically to produce a satisfactory result?

Neither Mr. Hardy nor Mr. North deals with this quirk in their oral evidence or written submissions, that I can recall. I had a look at Mr. North's text book, *Real Estate Investment Analysis and Valuation*, ed.2, 1976, Appraisal Institute of Canada, Winnipeg, to see whether he provided any mathematical explanation of the problem but, while he uses the effective-tax-rate device in some examples, I could not find anything dealing with the principle. (The index may be inadequate.)

In order to reduce the matter to its basic terms I have tried to express the relationship involved by the formulas and equations that follow. The basic assumption is that the actual cash value to which the appropriate tax rate and level of assessment should be applied may be fundamentally mistaken, so that it is necessary to express that actual cash value as a function of the following year's actual cash value, which is of course the one that is sought to be established from the data used.

Let

P_n = Actual cash value for Year n before reduction by the level-of-assessment factor;

T_n = Taxes for the Year n;

t_n = tax rate for the Year n;

f_n = level of assessment for Year n.

Using these definitions but substituting '1' and '2' for 'n' as the two years involved, the value for the first year (the value upon which the tax is levied) can be expressed in terms of the second-year value by means of the following formula:

$$P_1 = P_2\frac{f_2}{f_1} \quad (7); \quad \text{or} \quad P_1 f_1 = P_2 f_2 \quad (7.1)$$

The assumption here is inherent in the general-level-of-assessment concept. It is that P_1 and P_2 differ in the amount but that they represent values that are approximately the same in absolute amount, so that the monetary difference between them can be determined by finding the ratios of their respective levels of assessment, i.e., the figure represented by f_2/f_1. Each side of Formula (7.1) represents the assessed value for the year in question. If the assessment in fact remains static, as in the case with all those properties that remain assessed at the figures assigned to them in the base year and which have not changed in relative values since, the equation is true. Even where the property in question has changed in relative value from year to year the equation is probably nearer to the truth than it would be if the two successive valuations were based on different methods, such as one finds, for example, in a changeover from a replacement-cost-less-depreciation approach to a capitalized-net-income approach. That justifies the assumption in the instant case.

If the substitution of the 'effective tax rate' ($f_n t_n$) for the actual taxes is analyzed algebraically however, with attention paid to the distinction between the two actual-cash-value years involved, the result appears at odds with the practice of the appraisers: what is to be added to the capitalization rate is not the effective tax rate, but generally, something less.

Thus, starting with taxes, which are the product of the actual cash value for that year by the effective tax rate, we derive

$$T_1 = P_1 f_1 t_1 \qquad (8)$$

$$P_2 = (I_1 - T_1)/r \qquad (9)$$

where

I_1 = Net income for Year 1 before deduction of municipal taxes;

and

r = The capitalization rate (as in Formula (1)).

Substituting in (9) the value given in (8) for T ,

$$P_2 = (I_1 - P_1 f_1 t_1)/r \qquad (9.1)$$

and substituting in (9.1) the value given in (7.1) for $P_1 f_1$,

$$P_2 = (I_1 - P_2 f_2 t_1)/r \qquad (9.2)$$

Ordinary algebraic processes then yield

$$P_2 (r + f_2 t_1) = I_1 \qquad (10)$$

or

$$P_2 = I_1/(r + f_2 t_1) \qquad (11)$$

The meaning of Formula (11) is quite clear: the actual cash value sought is not a function of the net income for the past year, divided by the augmented capitalization rate (the capitalization rate plus the effective tax rate) for the that year, but as shown. Mr. Speed, for example, (ex.27, p.15) has demonstrated that the effective tax rate is not necessarily the same from year to year, nor are its factors comparable. In recent years the level of assessment has been declining from year to year, sometimes quite markedly, with the result that the factor $f_2 t_1$ is probably less than either $f_1 t_1$ or $f_2 t_2$. (Where $f_1 > f_2$ and $t_1 < t_2$, then $f_1 t_1 > f_2 t_1$ and $f_2 t_1 < f_2 t_2$.)

One of the great difficulties is that the level-of-assessment factor f_n is (as previously shown) out of date by the time that it is established, and is applied to a taxation year when, in fact, it represents an average of values for the previous year. This makes an analysis of the employment of this factor confusing. It tends to blur the time distinctions that should be observed in deriving a new capital value from net income. Thus, a case can probably be made algebraically for employing a modified tax rate symbolized by $f_1 t_0$. I have not bothered to elaborate this, as the sole purpose of the exercise is to show that the employment of the effective tax rate as an addition to the capitalization rate is suspect.

Probably the best way to deal with the suspicion is to use the augmented capitalization rate only in those cases where, as Mr. North has pointed out, the municipal taxes cannot be passed through by the landlord to the tenant. In the cases where they cannot it will sometimes be possible to employ $f_2 t_1$ instead of the effective tax rate where all the data have become available. The augmented capitalization rate has the advantage of avoiding the need for successive approximations, where the taxes represent a real cost that cannot be passed on. Where, however, there is an escalation clause providing for increased tax recoveries where taxes are increased, an allowance for this augmentation must obviously be made in any employment of the capitalization rate augmented by the effective tax rate, especially where the valuation to which the tax is applied was on a fundamentally difference basis. This is not the case with the apartment towers but it is the case with the other components of the Scotia Square complex.

To the extent that the augmented capitalization rate is employed by people in the market to determine market value, it ought to be taken into account by appraisers and courts in determining that market value. I have merely pointed out what seems to me to be a mathematical weakness in the concept to explain why I have chosen to use it as used by Mr. North rather than by

Mr. Hardy. The theoretical objection is there in either case.

THE OFFICE TOWERS

There appeared to be two main problems that require comment in the evaluation of the office towers: (a) Should actual, i.e., (contractual) rents or economic rents be the basis of the valuation? (b) What is the appropriate vacancy rate applicable?

Actual or Economic Rents

As concluded above, ordinarily in short-term leases the actual rent is the economic or market rent. What is a 'short-term' lease may, however, depend upon the rate of inflation, if that rate has not been taken into account by both sides in fixing the rent. In the case of the office towers the closeness of the results reached by Mr. North and Mr. Hardy, as well as the closeness of the results reached by Mr. Hardy with respect to economic rents as contrasted with actual rents, indicates that the difference between actual and economic rents is not a substantial matter, and that actual rents are a good indication not only of the value of the landlord's reversion but of the lack of value on a gross scale, at any rate, of tenants interests. For the reasons previously given I propose to deal with these buildings on the basis of the actual (contractual) rents.

The Appropriate Vacancy Rate

Mr. Hardy is alleged to have by-passed this problem by incorporating an allowance for this in the overall capitalization rate he derived from the data his brother gathered in the Montreal region. This immediately raises the question whether that kind of data provides an appropriate vacancy rate for the Halifax region. It is doubtful that it does. The capitalization rate is derived from the selling price and the net income, and the selling price and net income are both functions of either the actual or the deemed vacancy rate of the comparable property researched by the Messrs Hardy. This

means that those vacancy rates are latent components of the capitalization rate so derived and not merely elements that have been excluded or by-passed. The vacancy rate for any building must obviously be a function of the characteristics of that particular building in comparison with other similar buildings in the area, and dependable estimates of it must themselves be dependent upon the knowledge of the area by the estimater, as well as on his or her training, experience and good judgment. Comparable data are useful but in any particular instance the characteristics of the building being assessed may be so distinctive as to outweigh all other elements.

In any event the question only arises with respect to calculations based on economic rents rather than actual ones. As I propose to base the valuations on actual rents rather than economic rents, I propose also to by-pass this problem. Even if there were some of those exceptional cases where the disparity between actual and economic rent indicates a substantial, measurable tenant's interest, the problem would obviously not arise.

In any event Mr. North was able to justify his choice of 5% as the vacancy rate on adequate grounds in view of the history of the properties and their dominant position in the central business area.

Of the four values given by Mr. Hardy with respect to each of the office towers, the two using 1979 contractual figures and expenses seem, on the basis of the foregoing discussion, to be the most suitable. It is preferable, however, to use a capitalization rate in this situation that has not been augmented by the effective tax rate (for the reasons already mentioned), and for that reason Mr. North's estimates appear to me to be more useful. In addition, of course, there is the computing effort that would be required to make the adjustments to Mr. Hardy's figures that I consider required.

On the basis of the 1979 figures (actual in Mr. Hardy's case, economic in Mr. North's) Mr. North gives a capitalized value for Duke Tower of $8,545,000.00, while Mr. Hardy gives $8,696,804.00. Mr. North's total actual cash value of $8,735,000.00 includes $190,000.00 for leasehold improvements that does not appear in Mr. Hardy's valuation. Mr. North's figures are thus slightly over $150,000.00 more in favour of the taxpayer in what the two appraisers are actually comparing. The $190,000.00 is a figure given Mr. North by Mrs. McCluskey on the basis of her calculations, which were not really challenged as such—the contention of the respondent is that the improvements have no value at all.

With respect to Barrington Tower on the other hand, Mr. North's capitalized value of $7,635,000.00 is $515,638.00 greater than Mr. Hardy's $7,119,362.00, and to Mr. North's figure is to be added $50,000.00 for leasehold improvements. In basing his valuation on 1979 economic rents, Mr. Hardy came up with a figure of $7,532,569.00, which is $413,207.00 more than the figure he arrived at on the basis of contractual rents. This suggests that in this instance the difference of $400,000.00 can be attributed to the distinction between actual rents and the theoretical economic rents that might be chargeable if all the space were equally available for rent. That being an unreal market condition in dealing with office towers, there seems to be a case for deducting something of the order of this amount from Mr. North's estimate which is based on the same hypothesis. The situation does not arise with respect to Duke Tower, because in that case Mr. Hardy's value based on economic rents is actually $56,284.00 less than the value he estimated on the basis of contractual rents.

Is it possible to be any more precise with respect to Barrington Tower? The picture is complicated by the employment of different augmented capitalization rates for the two approaches, each of which is increased by the effective tax rate and each of

which is basically different from the rate used by Mr. North. Mr. Hardy's two figures purport to show the difference between a valuation based on economic rents and valuation based on contractual rents. Assuming that this is so, and assuming also that Mr. Hardy's basic capitalization rate corresponding to Mr. North's capitalization rate of 11% is either 11.5% or 12% (see ex.13,pp.42-43), if either is used to reduce the $400,00.00 to a net income figure, which is then divided by Mr. North's figure, the result suggests that the $400,000.00 might be increased by anything between 4.5% and 9%. Obviously this is a very crude way to approach the matter, and it is a discrepancy that is not really significant in view of the limited accuracy of the overall capitalization rate in any case, as well as the fact that the methods involved call for different capitalization rates.

Does the difference indicate that there may be substantial leasehold interests here? The difference $413,207.00 is only 5.8% of $7,119,362.00, and this suggests that there is, in fact, no substantial tenant's interest but that the percentage represents the difference between a value yielded by theoretical rents as opposed to those based on actual market conditions.

This being so, although Mr. North's estimate of what the spaces would rent for, if available, is no doubt sound, the theory upon which the estimate is based must yield to what is economically possible. Accordingly, I propose to reduce Mr. North's actual cash value for Barrington Tower by $400,000.00, being the probable excess due to hypothetical but probably non-existent leasehold interest. Deducting $400,000.00 from the total actual cash value $7,685,000.00 yields $7,285,000.00, which multiplied by .716 gives an assessed value of $5,216,00.00. On the basis of the considerations already mentioned I accept Mr. North's assessed value for Duke Tower of $6,254,000.00. Mr. North's valuation based on economic rents, which was dictated to him by the need to value all interests, is vitiated to some extent by neglecting to take into account that

renting is for a *term*. This is expressed in the usual lease by setting out the entire rent for the term and then stipulating how it is payable, e.g., by monthly installments, etc. Despite changes in leasing law that have assimilated it more to contract than to property law (e.g., an obligation to mitigate damages), the legal nature of the lease still has practical consequences. One of these is that the tenant in inflationary times can often looked forward to his rent becoming less onerous over the term because of an increase in income in terms of money, however unreal the increase may actually be in purchasing power. From this it will follow that the tenant will often be willing to pay more now in the expectation that over the course of the term things will even out. This means that the 'economic rent' (which Mr. Speed characterized as 'an opinion as to what the market rent should be') is not just the rent for here and now but is conditioned by and subject to the length of the term. Spread over the term evenly by installments payable in amounts representing the real value of that portion of the rent it would, in these times, commence at a sum considerably less than the final installment. Economic rents in this sense are not truly market rents with respect to a property that is already under lease. No doubt any such existing lease would be renewable today at a higher money value if only because of the effects of inflation. Against that one must take into account the eventual application of the level of assessment ratio, which goes far to reduce valuations to the same money value. (Indeed, the Consumer Price Index for housing, which is the nearest index available, closely parallels the increase in the inverse level-of-assessment ratio in Halifax for the years in question: see *Canada Year Book, 1980-81*, Table 23.15, p.869, as illustrated in Figure 2.)

THE TRADE MART

The Trade Mart is described as a totally different building from the others. The first three levels are a multi-tenanted warehouse structure. The top level is offices. It is located to the north

of the main complex and is joined only by a pedway. Indeed, Cogswell Street for most of its length cuts it off completely from the other parts, so that the only easy access at foot level is the pedway or the ground level at the junction of Cogswell and Brunswick Streets. It could, in fact, be fairly easily dealt with as a separate property, although it no doubt contributes to some extent to the traffic of the whole of Scotia Square.

The building was originally built as a trade-mart, the idea being to combine warehousing with dealing in materials on the premises and with the office space being used in relation to the warehousing and merchandising effort. According to Mr. Hardy—and in this he is supported by Mr. Hyndman—'The property never really took off as it was intended. The warehousing has been particularly unsuccessful, especially after the opening of the Burnside Industrial Park where more modern warehousing and industrial facilities are available.' Mr. Hardy lists several handicaps in comparison with the industrial-park warehousing that is available in the metropolitan area: the tenants do not have their own loading facilities but must share common loading decks; the material when loaded has to be carried by forklift along corridors to the individual warehouse space; the downtown location makes access difficult at certain times of the day; parking is restricted. Mr. Hardy contended that net income has been declining and this is confirmed by the fact that asking rents are declining also.

Mr. Hyndman supported this picture to a great extent. Mr. North, on the other hand, was much more upbeat, contending that the declining cycle of the building had bottomed out and that future prospects were good.

A major element in the difference between Messrs North and Hardy is the vacancy rate to be assigned to this building, although that is not the whole of the difference between them

by any means, because Mr. North uses a uniform basic capitalization rate of 11% for the whole complex, while Mr. Hardy uses 15% as his basic rate (before augmentation by the effective-tax-rate). Mrs. McCluskey used a 10% vacancy rate in her estimate. Mr. North put it at 15%, although in 1979 'the actual vacancy was just shy of 23%', but he added that it was on the decline.

Mr. Hardy divided his vacancy allowance into two: one for office space and the other for warehouse space. This was because the two kinds of space rent at distinctly different rates. He testified that the actual vacancies in office space were 9.9% in 1978 and 5.7% in 1979, so he took the average 7.8% for both years in doing his further calculations. In the case of warehouse space the actual vacancy rate in 1978 was 16.5% and in 1979 26.9%. Mr. Hardy used 21.5% rather than 21.7% as the average in this case.

I find that Mr. Hardy's appreciation of the situation of the Trade Mart is more realistic than Mr. North's, but that does not mean that his valuation is acceptable without more. To use Mr. Hardy's capitalization rate, for example, would require an adjustment to the capitalization rate used in the rest of the complex, because I have accepted Mr. North's view that the complex should be valued as a whole on the basis of a single capitalization rate. The result in value is then apportioned on the basis of the capitalized net income and the leasehold improvements.

Mr. Hardy's figures result from the use of a program based on Formula (4), above, or an analogous formula. In Formula (4), the capitalization rate denoted by 'r' is a constant divisor, but it also enters into the formula as part of 'R', which in turn is affected by the figure 'd', a variable that may be different for each lease. Accordingly, it is not feasible to substitute

11% for 15% in the calculations (or 15.412% for 19.412%) without retracing the calculations in all their detail.

I accept Mr. North's figures as fundamentally sound, subject to the two questions concerning the potential net rental income and the vacancy allowance. In this respect, the discrepancy between the final evaluation proposed by Mr. North ($3,89,540.00) and that proposed by Mr. Hardy on the basis of the 1979 contractual income ($2,258,500.00) can be accounted for almost wholly by the difference between their respective capitalization rates. This can be seen by multiplying Mr. Hardy's figure by the ratio of the two rates (.15/.11 = 1.$\dot{3}\dot{6}$). Even if the augmented capitalization rates are used much of the discrepancy is accounted for: in this case the multiplication would be by their ratio (.19412/.15412 = 1.259538). This does not eliminate the two problems but it indicates that they probably can be managed by approximations.

In ex.20, at p.32, Mr. Hardy sets out a schedule of the rental income, recoveries and parking income of the Trade Mart for the years 1976 to 1979. The 1979 income for rental income is $571,334.00, which is $49,112.00 less than the potential net rental income assigned to the Trade Mart for 1979 by Mr. North on p.31 of his report, ex.1. This is 8.6% of $571,334.00 and is the same kind of figure within the same kind of range as were the estimates of potential over actual rental income in the other cases. A comparison of other figures, which it is not useful to set out here, indicates that the $49,000.00 figure is as close an estimate as the evidence affords of the difference between the potential net rental income and the actual net rental income for 1979.

An examination of Schedule 2 in ex.20 (Mr. Hardy's report on the Trade Mart) indicates that the rental income figures for 1979 of $571,334.00 is exclusive of vacant space. Taking it as an actual figure rather than an estimate one, there can be no

basis for a vacancy allowance unless the figures are normalized. The figures given in ex.20, p.33, for expenses are the same as those given in ex.1, p.31, by Mr. North, except that Mr. North includes the municipal taxes of $190,968.00 as an expense, while there is a small discrepancy of $616.00 with respect to grounds and a rather larger one of $21,354.00 with respect to miscellaneous. The $616.00 and $3,410.00 were also apparently included in a supplementary page to Schedule 1 as expenses for snow removal and parking. This to me indicates a possible bookkeeping lapse on Mr. Hardy's part—not necessarily his but located in his corner somewhere—so I propose to base the evaluation on Mr. North's figures mainly but with the reconstruction I have suggested concerning net rental income and vacancy allowance.

At this point one should remember that Mr. North's use of a capitalization rate of 11% was based on the use of economic rents: as I understand his evidence the rate would have been lower so as to produce a higher capitalization had contractual rents been used. I propose to stick with the 11%, because I have no means of knowing how much lower the capitalization rate would have been; because, also, it is the rate used throughout; and because the contractual rents are, in my opinion, the economic rents for the most part. The only justification for using the present economic re-rental rate estimates was to capture any tenant's interests that might exist, i.e., the market value of all interests in the property and not just of the reversion.

If the logic of the procedure outlined is followed out rental income of $571,334.00 will be substituted for $620,446.00 in the statement for the Trade Mart, on p.31 of ex.1, and the vacancy allowance of $178,543.00 (which is a deduction) will be eliminated. This procedure cancels out the problem with respect to the difference between economic rents and contractual rents, as well as the difficulty concerning a proper vacancy allowance, but it increases the net operating income given of $471,694.00 by $129,431.00 to $601,125.00. Capitalized at 11% this yields

$5,464,773.00, which is $1,189,773.00 more than Mr. North's figure of $4,275,000.00. (I have not rounded any figures, because the top figures are the significant ones at this point.) The difference between the two evaluations based on Mr. North's figures is actually $68,773.00 greater than the difference between Mr. North's appraisal and Mr. Hardy's 1979 contractual income appraisal, which was, in effect, $3,154,000.00. (The figures are given before the application of the general-level-of-assessment factor of .716.)

What this indicates to me is that here experience is more important than logic, and I conclude that Mr. North's professional intuition led him to select figures and, in particular, the vacancy allowance that brought him much closer to the real market value of the property than mere logic could do. In fact, if the actual contractual rents prevalent in 1979 (as given in ex.20) are used to fix a potential rental income they suggest a potential $752,000.00, which is approximately $130,000.00 more than that appraised by Mr. North; it seems highly probable, therefore, that he has taken into account in fixing his so-called economic rents, the fall in rental potential of the building and that, accordingly, economic rents express no more than the true market rents. This being the case, I am prepared to accept Mr. North's evaluation of $4,275,000.00, to which should be added $40,000.00, representing the value of leasehold improvements, and the sum of these when factored by .716 yields $3,089,540.00 as the assessed value—I fix that as the appropriate value.

THE MALL & PARKADE

The Mall and Parkade together compose the largest money-producing element in the complex and present the part of the complex that is theoretically most difficult to deal with because of the diversity inherent in the concept of a shopping mall. The diversity is reflected in the different rates per square foot chargeable to the tenants. In addition, many of the leases contain a percentage

clause providing that the tenant pay the landlord a percentage of sales. Mr. Hardy notes, in ex.15, at p.27, 'The effect of the clauses is to keep rents as high as possible as tenants business increases and also to keep abreast of inflation.', and he goes on to remark 'It is quite often the case that existing tenants paying rent on a base plus overage together with recoveries, pay rent well in excess of what could reasonably be charged as an economic base rent'.

The latter statement is obviously debatable, but it does emphasize how difficult it would be to assign an economic rent in the abstract to any space in the Mall. The basic reason for this is the requirement of an optimal 'tenant mix'. Mr. Hardy gives an interesting and helpful description of this in ex.15, at pp.27-29:

> Tenant Mix
>
> Unlike an office tower, a shopping centre or mall must have a good tenant mix for the operation to function as economically as possible.
>
> In order for a shopping centre to draw any customers, the initial necessity is for a major anchor store. In the subject case, the anchor tenant is Woolco. It is often a prerequisite to the financing of a development, that a contract be in place with a suitable anchor tenant.
>
> Because of the amount of space occupied by the anchor and also the major anchor tenants knowledge that their presence in any shopping centre is essential, negotiations on retail agreements are somewhat one-sided. It is an accepted fact that rentals paid by anchor tenants are very low, although it is their presence that, in essence, create the shopping centre, and is the draw to customers and indeed other tenants. It is the draw of customers which make the individual smaller tenants successful, and it is in turn the smaller tenants success which pays the return to the investor by way of base rents, overage and percentage rents, which in effect subsidize the lack of return from the anchor tenant.

With regard to the individual mall tenants, the tenant mix is of great importance in order to obtain the optimum overall return from the investment. The mix of tenants should draw the maximum number of people to the mall. There should not be an over preponderance of any one type of tenant so as to provide an over supply of any specific type of commodity with the consequential effect of lessening overall returns. Some tenants that act as a draw to customers may well be occupying space at lower rents then could be obtained from other tenants purely to obtain the optimum draw to the public and to achieve the greatest overall economic return. A good example of this type of tenant in the subject property is the Nova Scotia Liquor Commission who occupy space at a total rent of $6.28 per square foot when the adjoining tenants pay substantially more.

It would be totally unrealistic to assume that all space should be let at the same rate and that all low paying tenants should be removed for higher paying tenants, as this would almost definitely upset the required mix and reduce the overall return.

The highest paying tenants in the mall are generally tenants occupying small areas with a high turnover such as Laura Secord Candy Shop, paying approximately $38.00 per square foot, and The Key House at $51.00 per square foot and Kentucky Fried Chicken at $57.00 per square foot. A shopping centre full of tenants paying $57.00 per square foot would obviously be an asset, although it is doubtful that if the shopping centre were filled with Kentucky Fried Chicken outlets that such a return could be achieved.

There are of course, in any shopping centre, the marginal tenants that could be replaced without having a detrimental effect on the overall operation.

The relationship of landlord and tenant in a typical shopping mall has thus taken on some of the characteristics of a joint venture, although it cannot of course be legally described as such. Arrangements of this kind have substituted a certain amount of fluidity and risk in the field of revenue-producing investment properties. What it means with respect to valuation, however, is that economic rents are even more difficult to determine other than in the way that the market has already determined them in the existing leases.

That is the trouble I have with Mr. North's figures here. He has produced a meticulous and detailed estimate of what each property might produce at 1979 rental rates, but, as I have already remarked, I think this approach is based upon a misconception, i.e., the idea that the current attainable rent, if the property were free to be leased, is the economic rent. This ignores the fact that renting is for a *term* and not just a matter of the moment—this has already been fully discussed.

Consequently, I propose to base the value of the Mall and Parkade (including the Shell Station) on Mr. Hardy's normalized income figures for 1979 with certain exceptions. In this respect I am satisfied that Mr. North was mistaken about the net income attributable to the Shell Station.

In this instance I propose also to use the augmented capitalization rate, because the taxes of $651,000.00 may be quite unrelated to the actual figure payable under the new assessment, and thus the actual taxes could have a distorting effect because of the factors already described.

The two exceptions are Woolco and the Nova Scotia Liquor Commission Store, which in my opinion are clearly established by the evidence as measurable and identifiable leasehold interests.

It is thus quite clear that Woolco was costing the landlord $3.63 a square foot at the time of Mr. North's investigation, rather than producing any net revenue. This is partly due to inflation and partly due to the fact that Woolco is the anchor store and was offered favourable terms to become involved in the complex. That the market forces the landlord to offer favourable terms is part of the paradox of free-market bargaining. In a way it is an example of an ancient shrewd observation mentioned in the Gospels (see Mt 13:12, 25:29; Mk 4:25; Lk 8:18, 19:26) and pithily expressed in *David Harum*, 'Them that has gits'.

A lease does not have to be onerous on the landlord to this degree in order to confer a valuable benefit on the tenant. In this case the presence of the tenant is of value to the landlord and to the rest of the tenants, so that the original process of bargaining was part of the market, although a peculiar part limited to bargaining between parties with special advantages to offer to each other. Even at the initial stage, however, the granting of an advantage of this nature to a tenant obviously gives that tenant something valuable and measurable over and above the value of the reversion. Consequently, it falls within the language and intendment of Assessment Act s.39(1). Indeed, while the result in this case is probably unintentional it is easy to conceive of a case where the landlord and tenant are companies in common ownership and where a lease between them might be made onerous on the landlord for the direct purpose of reducing the value of the assessment in the absence of a provision such as s.39(1).

As to the value of the tenant's interest it is at least $3.63 multiplied by the Woolco square footage. I have given some thought as to whether it should be increased but the figures that might be applicable are not that clear and decisive. (This is incidentally a case where a strictly market approach is misleading: Mr. North took such an approach with the result that I think he has overlooked the real tenant's interest here in favour of what a revised deal might produce.)

The Nova Scotia Liquor Commission also enjoys a palpable advantage. It is, of course, a government monopoly, and while not an anchor store it is evidently in the estimation of the landlord a desirable tenant because of the increased traffic it brings. It is clear from the figures that the landlord gave it very favourable terms of forty-seven cents a square foot (including storage). Mr. North thought that the store space was worth $6.00 a square foot*—he seems to have ignored the storage space—

* Possibly more in comparison with Mr. Hardy's figures: they do not use the same 'net-net' basis.

and with this I agree: it is in accord with the general level in that location and in the Mall. This is a measure of the benefit that the Nova Scotia Liquor Commission is enjoying by reason of the landlord's concession and is thus a measure of its tenant's interest in the property. That is the case whether the Liquor Commission would be willing to pay that rental on renewal or not. Because of its monopoly position, it has a very large bargaining advantage, which has to be taken into account in estimating the value of its leases.

I would accordingly reconstruct the assessment of the Mall and the Parkade according to the following tabulation, keeping in mind that the Parkade taxes have to be dealt with separately because they include business occupancy taxes:

TABLE II

The Mall			
1979 Normalized net income (Hardy)			1,639,426
Woolco tenant interest	110,840 x	$3.63	402,349
N.S.L.C. tenant interest	4,636 x	$5.53	25,637
			2,067,301
	Capitalized at	.15412	13,414,301
The Parkade			
Net income (Hardy)			837,729
	Capitalized at	.176183*	4,754,877
Totals			
The Mall			13,414,301
The Parkade			4,754,877
Leasehold improvements			545,000
			18,714,178
	Reduced to level	.716	13,399,351
	Rounded to		13,399,000.

CONCLUSION

On the basis of the foregoing discussion I have arrived at the following valuations for assessment purposes.

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* .176183 represents .15412 + .022063 business occupancy tax.

TABLE III

Element	Capitalized Value	Leasehold Improvements	Total Actual Cash Value	Assessed Value at .716
MacKeen Towers	2,166,062		2,166,062	1,530,000
Scotia Towers	3,419,969		3,419,969	2,407,000
Duke Tower	8,545,000	190,000	8,735,000	6,254,000
Barrington Tower	7,235,000	50,000	7,285,000	5,216,000
Trade Mart	4,275,000	40,000	4,315,000	3,089,500
Scotia Square & Parkade	18,169,187	545,000	18,714,178	13,399,000
				31,895,500

This lengthy and possibly pretentious response to the questions posed by the parties in this appeal may itself raise questions about the proper role of the judge in dealing with expert testimony. The weight of the testimony is, of course, for the judge (or jury), but to what extent is a judge entitled to weigh and even criticize the testimony on technical grounds, including (as I have done here) some elementary arithmetical or algebraic analysis? In dealing with, e.g., medical or engineering evidence no judge would be tempted to get too deeply involved in either field, and the valuation of real estate has, of recent decades, taken on some of the characteristics of these professions in that it now involves a great many technical approaches and procedures in addition to the basic experience, that is, at bottom its true foundation.

Nevertheless, property valuation is something that everyone is involved in to some extent. The special methods employed by appraisers, while not within the scope of the knowledge and education of ordinary people, are based on common experience and involve only elementary mathematical training. To that extent they are capable of appreciation and criticism by any reasonably informed person.

This is fortunate, because the case law requires a judge of the county court sitting on an assessment appeal to rehear the case and to come to his or her own conclusion as to the value. More recently, some of the higher courts pointed out that the decisions of a specialized tribunal such as the Court of Assessment Appeals are entitled to respect because of the special qualifications and experience of the members of the tribunal. In the instant case that consideration was by-passed to some extent by the agreement of the parties at the outset of the case, in this court, that it was 'a whole new ballgame'. Both parties were aware that the reports prepared by their experts would depart in some significant ways from the conclusions of the Court of Assessment Appeals, and neither party was seeking to uphold any specific finding of that tribunal.

This is the first assessment appeal that I have tried in which I felt that the experts were taking a fully professional and scientific approach, which is why the results are so close in some cases, while the differences between them are in most cases based at least to some extent upon a different view of the principle involved. Incidentally, the fact that I have relied mostly on the contributions of Messrs North and Hardy does not cast any reflection on the competence of Mrs. McCluskey: that lady simply did not have the material available that they were able to rely on.

Each expert used a mass of data and a complex procedures to achieve an intricate balance in his conclusion. It was not possible for me to do the same in revising the figures submitted, so that the final conclusions, while based, I believe, on sound principle, can be, at best, approximations only. With the approaches taken by the experts in this case it is simply not satisfactory to try for some sort of average, as has undoubtedly been the approach of some courts in the past.

One question is of interest and importance. Are the methods employed by Mr. Hardy in this case, however promising they may be

for more meaningful real estate evaluation, really suitable to be employed in the assessment field? This really depends upon the availability of computers and people able to use them intelligently. It should not, in fact, be very long before this is quite feasible and becomes the accepted way of processing assessments. Indeed, if the business world starts to use this method as the method of choice for assessing values, the assessment authorities will have to do likewise by the very nature of the search for 'market value'.

This suggests also that those concerned with the legislation might give some thought as to whether the present time limits laid down by the Assessment Act are really the best adapted for present conditions. Three or four points emerge from the course of the proceedings here:

It is obvious that the base date for evaluation is too far in the past. The rapid inflation of recent years has created conditions that brought this to everyone's notice. On the other hand, the mechanics of evaluation, especially in the case of income-producing properties, makes it difficult to be strictly up to date. What the evidence would suggest is that the best epoch for fixing the value of a property in money terms would be mid-year (say July 1) of the year preceding the assessment year. This is the point indicated, for example, by the fixing of the yearly level of assessment on the basis of the comparison of sales with the assessed values of the property sold.

It would only be feasible to adopt such an epoch if the filing of the roll were postponed past the date now fixed by Assessment Act s.64(1), so as to permit it to be deposited (say) before January 31st of the assessment year. By that time most of the data needed could be made available so as to be processed by computers. In the case of the larger businesses it might not be audited data, but that should be sufficient for assessment purposes, at least in the first instance.

In the past the deadlines were fixed to suit the needs of municipal councils to ascertain the total assessable property available and, hence, to fix the tax rate at their annual meetings. Very few contemporary municipal bodies operate that simply any more, and the evidence makes it clear that the bulk of assessments are carried on from year to year and are upgraded only in the course of reassessments, so that, in fact, the approximate assessment totals are known notwithstanding that the roll has not been finalized through the appeal process. The instant case is very much in point: it is now just over three years since the assessments under appeal were disposited and this may not be the end of the process here.

The case law and the evidence suggest two things: (1) the assessors are fundamentally mistaken in fixing a level of assessment and sticking with it year after year; (2) it is no longer economical or otherwise practical to make a complete revision of the assessments periodically.

A review of the cases, previously cited, concerning the need for uniformity as a dominant factor does not show any expression by our Court of Appeal condoning the fixing of an assessment at the same level over a period of years, unless that represents the actual cash value or market value in contemporary terms. Instead of fixing a level for a period, what is clearly called for is the raising of values from year to year if that, in fact, is what is happening to money and to real-estate values. The level-of-assessment concept has received sufficient recognition by the courts to justify this simply by the application of the level of assessment formula. That is, every assessment could be multiplied by the same factor to bring it up to the presumptive level for that year.

This would, of course, not mean that individual assessments would be discontinued. Quite apart from those that have to be

undertaken because of changes in the property or in its use, there would be a need to revise the assessment of every property from time to time, but it is clear from the evidence that this need not be done and, indeed, cannot be done within the limited time presumed by the former legislation that required periodic revisions. What the Act now requires is both uniformity and an assessment at the market value, and this can be sufficiently achieved by the employment of (a) the level-of-assessment formula; (b) periodic re-examination of each property on a rotating basis; and (c) the appeal process.

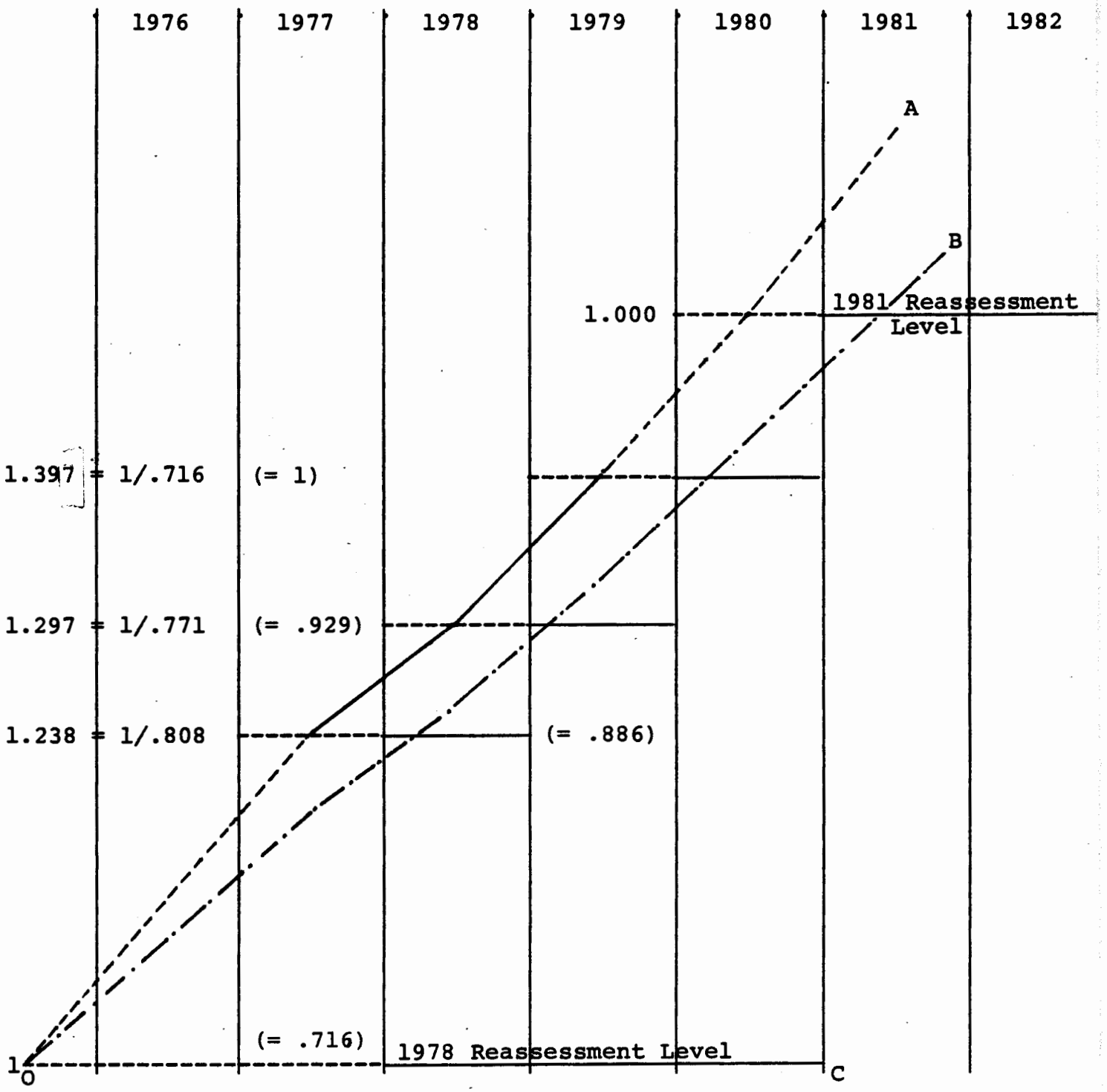
I have ventured these suggestions not only because they arise quite naturally and, indeed, forcefully from the evidence and arguments in the instant case, but also because this is one of the last appeals to be heard in the county courts, in Nova Scotia, under the Assessment Act, and I feel a certain obligation to offer these comments for the better administration of the Act before ceasing my function under it as appeal judge.

I will hear the parties as to costs.

P.M.T. Thomson

A Judge of the County Court
of District Number One

F I G U R E 1

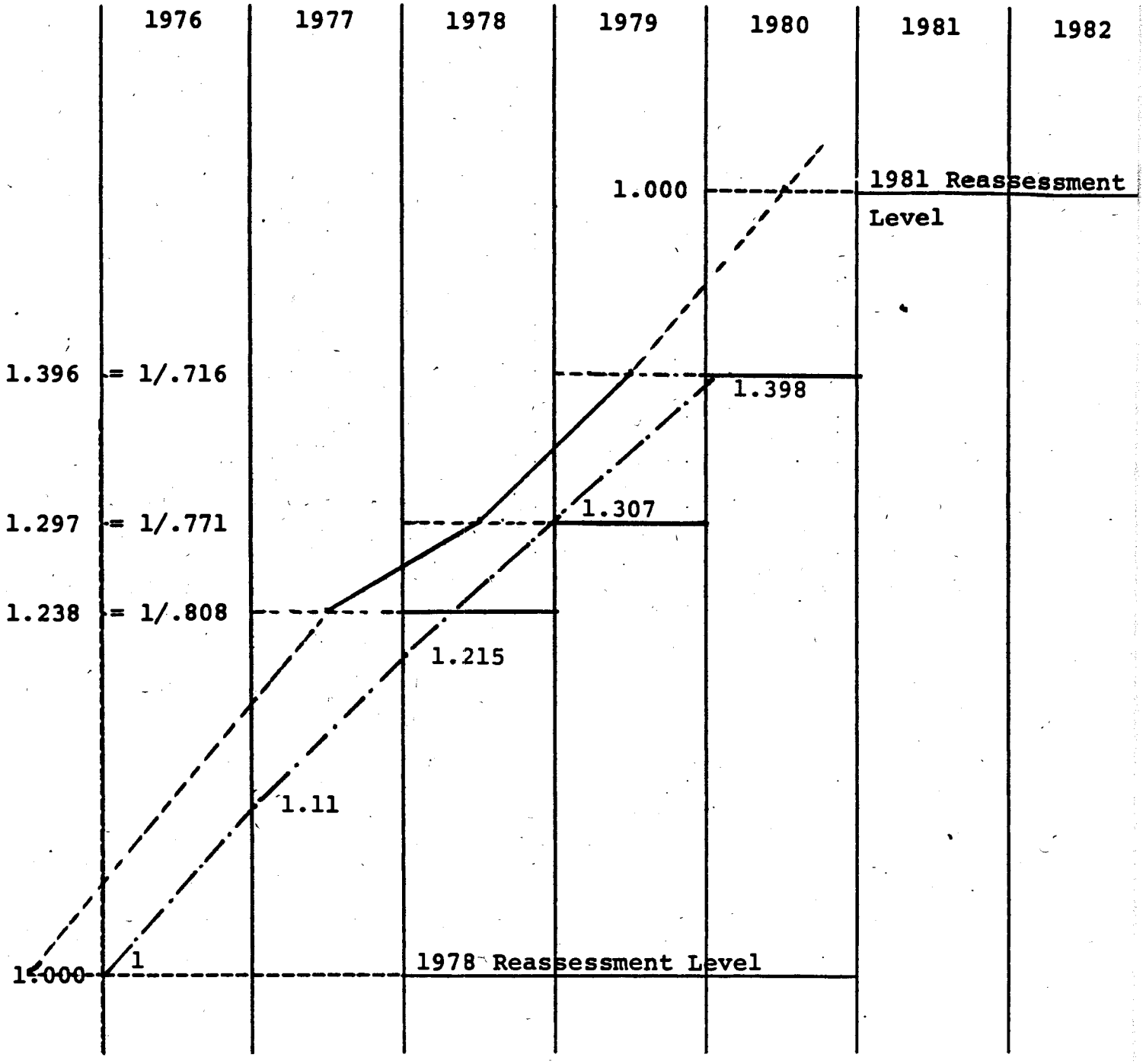


---------- Average value of real property.

·—·—·—·—·—· Hypothetical market value of major investment property

The figures in parentheses give the relative values where the 1979 value is taken as 1.

FIGURE 2



---------- Average value of real property

—·—·—·—·— Consumer price index rise for housing, after Table 23.15, *Canada Year Book, 1980-81*, p. 869.

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