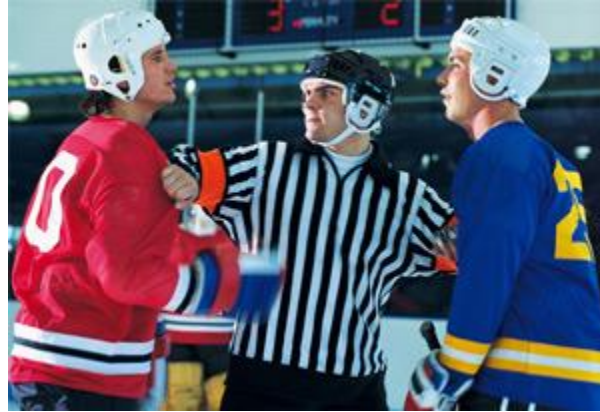


## OH LORD! BENCHED AGAIN! (Newsletter Summer 2004)



comstock

On July 19th 2004 the New Brunswick Court of Queens Bench heard an appeal by Service New Brunswick, the provincial assessment authority, from a decision by the Assessment and Planning Appeal Board which had lambasted SNB's methodology of including the 15% H.S.T. (a "pass through" tax similar to the G.S.T.) in its calculation of assessed value as "*an affront to common sense*". The Judge agreed with the Board and in dismissing Service New Brunswick's appeal reiterated that "*It would be an affront to common sense that the cost of an item could be increased by the amount of a local tax which is rebated to the payer, with an offset of one with the other*". Service New Brunswick's Director of Assessment, Mr. William Morrison, was in court to hear the decision, which also awarded costs to the Respondent. This case was an appeal of the latest, in a series of scathing decisions by the normally reticent Board, which has called into question the judgement, competence and experience of SNB's assessment staff (Newsletter Vol. 2 No. 76).

In June 2001 a Board decision (*Baxter Foods Limited versus Director of Assessment*) dismissed SNB's argument that the functional inadequacies of an old dairy plant should be ignored because their assessor "was only doing a bricks and mortar appraisal". The Board, whilst noting that the assessor had "prepared an excellent and thorough Building Valuation Report" also decreed that "functional and economic" depreciation had to be reflected in the assessed value.

In a November 2001 decision, (*NB Publishing Co. versus Director of Assessment*) the Board plainly thought it ludicrous that facts, known before the assessment date, were ignored by the Assessor in arriving at the assessed value. In tones of mounting incredulity the Board observed that "*it was the assessor's position, and obviously that of the Respondent (Service New Brunswick) that no matter what you found out what was to happen after January 1st of any particular taxation year, you must ignore it! He believes the Assessment Act requires him to focus on conditions on January 1st, 1998 no matter what happens, no matter how catastrophic an event takes place on January 2nd, 1998 and, even if you knew this event would happen in November of 1997*".

The assessment appeal involved a multi-storey printing plant, still being utilised for this purpose, but with the widely published decision having already been made to move the process to Moncton.

A December 2001 Board decision (*Small Fry Snack Foods Inc. versus Director of Assessment*) was even more forthright noting that Service New Brunswick's "Exhibit D-13, which was presented as some sort of valuation report, is woefully deficient in virtually every respect. Because it lacks a signature, the Board does not even know who is the author" and "It must be stated this document (it is difficult to call it a report) was full of misinformation, partial information and error". Whilst the only witness called by Service New Brunswick was a senior level assessor with 25 years experience, "her experience with industrial properties like that of the Appellant was limited".

The December 2003 Board decision referred to earlier (*Food City Limited versus Director of Assessment*) involved the use, by Service New Brunswick, of the Boeckh costing system to calculate the assessed value. This is a well established technique for ascertaining the value of "specialised property"; real estate that is often built by the occupier to fulfill a specific function such as a saw mill, oil refinery ... and in this case a large food distribution warehouse and supermarket. Even though SNB had utilised the Boeckh costing system since time immemorial they had not realised that the costs were inclusive of the H.S.T., a "pass through" tax similar to the G.S.T., but levied at 15% instead of 7%. The Board decision observed that "This rather startling revelation came to light when two local agents of the Respondent (Service New Brunswick) advised the Board they were unaware of this". Once they discovered that their costing figures **included** H.S.T., SNB did a flip flop and decided that this was the way to go. Since property owners engaged exclusively in commercial activities are entitled to full Input Tax Credits for the H.S.T. they incur, the tax is a "wash". The Board was plainly outraged by SNB's tactics and said so ... the Court of Queens Bench concurred.

### Quo Vadis?

Service New Brunswick re-assessed all heavy industrial property in 2003. The Board decision in the Food City case noted that Service New Brunswick's Manager of Valuation, gave evidence and was unaware that his Boeckh costings included H.S.T. He was also in charge of the heavy industrial property re-assessment. The latter was completed using a Heavy Industrial Manual which excluded H.S.T. and the Boeckh Manual which *included* the 15% tax. In addition many other types of owner occupied property such as supermarkets, warehouses, fabrication shops, dairies, fish plants, meat packing plants, gasoline service stations, theatres, restaurants, wharves, etc. were assessed using the Boeckh costing manual. No doubt the merry men (and women) of the heavy industrial assessment team are scurrying around lowering those assessments as we speak. We must expect nothing less. SNB's mission statement, (still) clearly enunciated on its web site, is "customer service, customer consultation and customer satisfaction". Hopefully they are doing it on their own time too: the cost of the appraisal work in New Brunswick is charged back to the taxpayer as part of their property tax bill ...

Service New Brunswick has now appealed the Court of Queen's Bench decision to the NB Court of Appeal.

### Standing On Guard For Thee

Winning an assessment appeal can too often be a pyrrhic victory. The New Brunswick Assessment and Planning Appeal Board rarely awards costs, and those granted by the Court of Queens Bench are unlikely to cover all of your actual expenses. So how can you prevent such an occurrence, faced with Service New Brunswick, an obdurate opponent apparently unabashed by this steady stream of court criticism? Try holding the assessor to account: most are members of the New Brunswick Association of Real Estate Appraisers, a private club that, in 1995, was granted a monopoly on appraising in the province on condition that it would "govern its members ... in order to serve and protect the public interest". (New Brunswick, and shortly thereafter Nova Scotia, are the only provinces to vest this type of power in a private group). You can confirm that the assessor is a member by visiting NBAREA's web

site [www.nbarea.org/getmembers.asp](http://www.nbarea.org/getmembers.asp). NBAREA's by-laws do not allow its members to appraise property unless they have a specified minimum level of education, experience and competence. Presumably NBAREA, "in order to serve and protect the public interest", will act promptly to prevent an assessor from conducting an assignment unless he/she is qualified to do so ... particularly if there is a prior court decision that questions his/her judgement, competence or experience on a similar assignment.