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**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR  
TRIAL DIVISION**

**Citation:** *Gander International Airport Authority v. Town of Gander, 2008NLTD120*

**Date:** 20080702

**Docket:** 200605T0190

**BETWEEN:**

**GANDER INTERNATIONAL  
AIRPORT AUTHORITY**

**APPELLANT**

**AND:**

**TOWN OF GANDER**

**RESPONDENT**

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**Before:** The Honourable Justice Michael F. Harrington

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**Place of hearing:**

Gander, Newfoundland and Labrador

**Heard:**

March 31, April 1, April 2, April 3, and  
April 29, 2008

**MUNICIPAL TAXATION – ASSESSMENT OF SPECIAL OR LIMITED  
USE PROPERTIES** – International Airport operated by not-for-profit entity as  
tenant of Crown – Restrictions on sale and alternate use of property – Airport  
operations not economically viable – Assessment in error based on cost approach –  
Nominal fair market value.

**Appearances:**

Michael J. Crosbie  
Jamie M. Smith, Q.C.

Counsel for the Appellant  
Counsel for the Respondent

**CASES CONSIDERED:** *Murphy (Re)*, (1994) 117 Nfld. & P.E.I.R. 243 (NLTD); *Newterm Ltd. v. St. John's (City)*, (1988) 74 Nfld. & P.E.I.R. 328 (NLCA); *3163083 Canada Ltd. v. St. John's (City)*, (2005) 245 Nfld. & P.E.I.R. 1 (NLTD); *Southam Inc. v. Surrey White Rock Assessor, Area No. 14*, (2004) 28 B.C.L.R. (4<sup>th</sup>) 317 (BCCA) – leave to appeal denied to SCC (2004) 238 D.L.R. (4<sup>th</sup>) 640; *Pacific Newspaper Group Inc. v. Surrey/White Rock Assessor, Area No. 14* [2006], B.C.J. No. 1417 (BCSC); *Canso Seafoods Ltd. v. Canso (Town)* (1980) 43 N.S.R. 651 (NSCA).

**STATUTES CONSIDERED:** *Canada Business Corporations Act*, R.S.C. 1985, c. C-44; *Municipalities Act*, S.N.L. 1999, c. M-24; *Assessment Act, 2006*, R.S.N.L. 1990, c. A-18.1; Schedule (Terms of Union of Newfoundland with Canada), *Newfoundland Act*, 12 and 13 Geo. VI c. 22; *Payment in Lieu of Taxes Act*, R.S.C. 1985, c. M-13; *St. John's Assessment Act*, R.S.N.L. 1990, c. S-1.

## REASONS FOR JUDGMENT

**Harrington, J.:**

### INTRODUCTION

[1] The Appellant, Gander International Airport Authority (“G.I.A.A.”), is a not-for-profit corporation incorporated under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44. The Respondent, Town of Gander (“Town”), is a statutory corporation existing under the *Municipalities Act*, S.N.L. 1999, c. M-24.

[2] Effective March, 2001 G.I.A.A. became the authority responsible for the management, operation and maintenance of the Gander International Airport (the “Airport”). In the broad scheme of things, this transaction was a small part of a National Airports Policy of the Federal Government which was grounded in a strategy to transfer management and operation to local interest groups.

[3] As of January 1, 2002 (the "Base Date"), the provincial Municipal Assessment Agency (the "Agency") assessed the land and structures of the Airport under the provisions of the *Assessment Act, 2006*, R.S.N.L. 1990, c. A-18.1 (the "Act") for the purpose of real property taxation by the Town of Gander (the "Town"). The Agency's assessor determined an assessed value of 24.8 million dollars, which would, in his opinion, represent the fair market value of the Airport, which is the basis for assessment mandated under subsection 17(1) of the Act. The assessed value of the Airport lead to a series of individual notices of assessment in 2004 and 2005 regarding various segments of the Airport, which resulted in an aggregate amount of real property taxes being imposed for each of these two years of approximately \$254,000. At the hearing of this appeal by G.I.A.A. the assessor submitted a revised assessment in the aggregate amount of 14.754 million dollars.

[4] G.I.A.A. appealed the notices of assessment to an Assessment Review Commissioner arguing that the assessor had erroneously determined the fair market value of the Airport using the cost approach. G.I.A.A. argued that there is no market for the Airport and that, therefore, a nominal value of one dollar is the only assessable value of the Airport that can be applied under the Act. The Assessment Review Commissioner upheld the assessor's use of the cost approach for the determination of the fair market value of the Airport and G.I.A.A. has now appealed to this Court.

## **BACKGROUND**

[5] The Airport was built in the late 1930's and has operated as both a domestic and international airport ever since. The Airport had a significant role during the Second World War. After the War, it continued to be an important facility for growing commercial aviation because of its location in the international air travel routes between North America and Europe. The Airport is operated today from a terminal building constructed in 1959 with a large extension built in 1982. The building contains approximately 150,000 square feet of space. There are also ancillary facilities such as a maintenance depot, a fire station and hangars.

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[6] Term 33 of the Terms of Union between Newfoundland and Canada ("Terms of Union") provided that the Airport, including buildings and equipment, together with any other property used for its operation, became property of Her Majesty in right of Canada subject to certain trusts. The Orders in Council authorizing this transfer provided that in the event the Airport ceased to be operated as an airport, the lands, buildings and equipment are to be transferred back to Her Majesty in right of Newfoundland and Labrador.

[7] The Federal Ministry of Transport managed, maintained and operated the Airport until March 2001 when divestiture took place to G.I.A.A. This divestiture took the form of a sixty-year Ground Lease to G.I.A.A. with provisions, placing extensive restrictions upon the manner in which the Airport could be managed and operated in the future. G.I.A.A. is not only a not-for-profit corporation but also is comprised of stakeholders who represent the community of Gander. Its governance is in the hands of a board of directors that is representative of the Town, the Chamber of Commerce and other community stakeholders who have an interest in the continuing existence and operation of the Airport for the benefit of the Town and surrounding areas of central Newfoundland.

[8] Unfortunately, the Airport has over time lost some of its strategic position with regard the technical stops by international aircraft. It has a significant amount of state-owned military air traffic but until recently it has been barred from collecting any landing fees or revenue in lieu of fees. The number of passengers annually passing through the Airport has declined for many years to the point where the average total passenger volume is approximately 100,000 persons per year, yet the infrastructure of the Airport is comparable to that of Vancouver Airport where approximately 1.5 million passengers transit through annually. The Airport is looked upon as the "life boat of the Atlantic", because of its strategic position for air traffic control and for landing by international air travel in the case of emergencies. From an air traffic control perspective, the Airport has maintained an important status as a key point of contact with a significant amount of international air traffic proceeding to and from North America.

[9] Deloitte Consulting in March, 1999 submitted a financial viability review report for Transport Canada with regard to the proposed transfer of the Airport to G.I.A.A., in which it concluded:

The results of our analysis indicate that over the first ten years of operations under the current operating assumptions, the Gander International Airport Authority's cash flow would not be adequate for it to be considered financially viable.

[10] The Deloitte report also took the view that there would be serious operating challenges since the inherent operating cost structure and capital program to maintain and operate a 24-hour / seven day a week international airport operation would continue to be significant.

[11] The report assessed the alternate possibility of utilizing the Airport as a regional airport without any international traffic. The report concluded that this could only be viable if a downsizing of the Airport infrastructure occurred since the large terminal building, ancillary buildings and three large runways made the financial viability of a regional/local airport "questionable" at best.

[12] Finally, the report also indicated that, if the Federal Government transferred the Airport to G.I.A.A. within the then prevailing operating perimeters, it should expect that it will likely have to make payments during the first ten years of operations by G.I.A.A. in the range of 34 million dollars.

[13] It should be noted that in providing its recommendations, the consulting firm also commented at page 4 that the Minister had four alternatives, the first being that he:

... recognize that the Airport is not financially viable and either continue to operate as a Transport Canada facility or close the airport.

The consultant also concluded that:

... the operating deficits would continue if Transport Canada continues operations as an international airport. These actions would be inconsistent with the general direction of the National Airports Policy but, if there are no community groups willing to operate the airport, then such action is open to the Minister.

[14] It is noteworthy that the Business Plan prepared for G.I.A.A. in 1998 by the accounting firm of PricewaterhouseCoopers and a consulting firm YVR Airport Services Limited concluded in the Executive Summary:

Y.Q.X. [the Airport] is an essential part of the Town of Gander and surrounding communities and one of the economic drivers of the central Newfoundland region. The Airport, however, is currently not a viable or self-sufficient enterprise. In the preceding five years the Airport has sustained operating deficits of 4.7M, \$5.1M, 4.9M, 3.2M and \$2.1M and its most important revenue source, technical stops international aircraft, is declining. Even after cost-cutting measures and rate increases, Transport Canada still forecasts Y.Q.X. to sustain on-going deficits of over \$2M per year. It is important to note that these forecasts do not include the additional overhead costs that an airport authority operating Y.Q.X. will incur.

[15] The evidence presented on this appeal confirms that the predictions by the consultants were correct in that the operations of the Airport have generated deficits in each of the operating years prior to and following the 2001 transfer by the Federal Government to G.I.A.A. However, the entire history of deficits is not relevant since I am satisfied that the jurisprudence relevant to this appeal has found that the assessment must be focused on the existing circumstances including the use of the Airport as of the Base Date. In practice, the assessed value is then to be applied annually for three years of notices of assessment before a new assessment is carried out by the Agency.

[16] The assessor in his report discussed the "Highest and Best Use" of the property as a key aspect of the assessment process. He acknowledged that it is

important for the assessment to determine which uses are legally permissible and physically possible in the following context:

When the other uses have been eliminated, it must be determined which remaining uses will produce a return that is equal to or greater than any financial obligations. These uses would be financially feasible. Of the financially feasible uses, the use that produces the highest residual land value consistent with the rate of return warranted by the market for that use is the highest and best use.

[17] The assessor also acknowledged that in determining the highest and best use, one had to be mindful of the fact that the Airport must conform to an existing land use plan prepared by the Federal Government. The land use plan contemplated the continuing use of the Airport as a "major international airport", which was reconfirmed in the provisions of the Ground Lease between Her Majesty in right of Canada and G.I.A.A.. The assessor also cautioned that:

The cost of a conversion change to an alternate use may not result in a higher property value. It is therefore concluded that the present use as an airport is anticipated for the foreseeable future.

[18] The assessor noted that there are three traditional approaches to valuation - the income, market comparison and cost approaches. The cost approach is described as the current cost of reproducing or replacing the improvements minus the loss of value from depreciation and the site value. Income approach is the value of the property's earning power based on the capitalization of its income. Market comparison approach is the value indicated by recent sales, listings or offerings to purchase comparable properties in the market.

[19] The assessor concluded that for his assessment of the Airport the cost approach to valuation was the correct approach to use. He justified this position on the basis that this was the valuation approach that had been used in the past for the

purpose of determining payments in lieu of taxes by the Federal Government to the Town under federal legislation entitled the *Payment in Lieu of Taxes Act*, R.S.C. 1985, c. M-13. He testified that representatives from the assessments audit division of the Federal Government had never questioned the valuation approach used by the Agency. Implicitly, he also determined that the income and market comparison approaches should not apply.

[20] In arriving at an assessed value based on the cost approach, the assessor's report outlined the steps which he had followed. He estimated the replacement costs of the Airport as of the Base Date. He further estimated the amount of accrued depreciation, which is divided into three major categories: physical deterioration, functional depreciation and external depreciation. In the process, functional obsolescence was taken into account based on 38% for the first floor of the terminal facilities still required to operate the Airport and 100% adjustment on the second floor and for the second storey finger corridor, based on the fact that these areas are virtually redundant. The rate of external depreciation of 25% was applied, notwithstanding the age of the Airport infrastructure and the significant change in utility of a major portion of the physical plan which the assessor acknowledged when he wrote:

The Gander air terminal is a structure which was built and designed for use which has changed over time. The environment for airports is much more competitive and changes in government policy for foreign carriers has lessened the demand from an international standpoint for a terminal building like Gander. Under the domestic side, changes in the last 20 years have seen the larger airlines like Air Canada, who previously serviced Gander with large jets, form affiliations with regional carriers using smaller aircraft. The net result is that **the terminal building in Gander was built and designed for a use which is no longer needed.** (emphasis added)

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## ASSESSMENT REVIEW COMMISSIONER

[21] Before the Assessment Review Commissioner, G.I.A.A. argued that the fair market value of the Airport is a nominal sum of one dollar based on the following reasons:

- i. The Airport is leased from the Federal Government and can only be used as an airport and cannot be sold by G.I.A.A.;
- ii. If the Airport is no longer to be used for that purpose, the Federal Government are required to transfer administration and control back to Her Majesty in right of Newfoundland and Labrador;
- iii. The Airport has been operating with a deficit in each year with the exception of 2005 and would likely lose money in the future; and
- iv. There is no market for the Airport which is underutilized given its size and there would be no potential buyer for the property with its restricted use.

The Review Commissioner refused to accept the position of G.I.A.A. that the assessed value ought to be the sum of one dollar on the basis that there is no market. The Commissioner ruled:

With respect, I cannot agree with the Appellants that a large airport property consisting of a large international terminal building and other buildings and improvements in a municipality such as Gander should be valued at one dollar due to there being in the Appellant's view no market for such a facility.

We cannot anticipate the future with any certainty and any number of events may occur which would make the Gander Airport look much better from an economic point of view... simply the payment of fees by the military planes using the Airport would significantly affect the balance sheet of the Airport Authority. Mr. Tretheway [Appellant's expert] agrees that an airport which shows a profit may, in fact, be marketable and he conceded that the some airports may be sold as airport facilities.

[22] The Commissioner concluded:

So I must accept Mr. Russell's [the Assessor] approach which seems to be the only approach that makes sense in the circumstances when attempting to value this special type of property.

I believe the building values had been adjusted substantially for depreciation and obsolescence so I believe these values are appropriate. I also accept Mr. Russell's valuation of the lands as outlined in his report.

## ISSUE

[23] The single issue on this appeal is whether the assessor erred in determining fair market value of the Airport by utilization of the cost approach to valuation.

## LAW AND ANALYSIS

### **Nature of the Hearing and the Burden of Proof**

[24] The Town raised a concern about the proper scope of this appeal hearing and in particular the nature of the burden that rests upon G.I.A.A. in establishing a basis to overturn the "opinion of the assessor" under subsection 17(1) of the Act.

[25] Counsel for the Town submits that G.I.A.A. carries the burden throughout to establish not only that its view of the appropriate valuation method should apply, but also that the assessor was wrong both in fact and in law in applying the cost approach in establishing fair market value. The way counsel for the Town framed the issue in its brief was to state that G.I.A.A. must demonstrate on the balance of probabilities that the method of valuation employed by the Town through the Agency is wrong.

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[26] Counsel for the Town relies on the decision of this Court in **Murphy (Re)**, (1994) 117 Nfld. & P.E.I.R. 243 (NLTD) at paragraph 40 where Green, J., as he then was, stated:

The issue facing the Court is whether the Appellant has demonstrated on a balance of probabilities that the method of valuation by the City is wrong.

[27] In **Newterm Ltd. v. St. John's (City)** (1988) 74 Nfld. & P.E.I.R. 328 (NLCA), our Court of Appeal confirmed that this type of review from a municipal assessment is in the nature of a new hearing and that the onus remains with the Appellant. The Court wrote at paragraphs 22 and 23:

As to the onus of proof and of leading evidence when the hearing is conducted by way of hearing de novo, that rests upon the appellant, as it did before the Review Court and does on any appeal. At that stage, the record with regard to the assessment itself and of the proceedings before the Review Court will presumably be before the appeal judge. No onus lies on the City at the outset. The assessment is presumed to be correct unless and until it is demonstrated to be wrong. However, having heard an appellant's evidence, the City may itself wish to adduce its own evidence in support of its position.

In the present case it is Newterm which disputes before the Trial Division the assessment as determined by the Review Court. The onus lies upon Newterm to establish that the valuation should be reduced.

[28] As an aside, the **Murphy** and **Newterm** cases, supra, while dealing with assessments under the *St. John's Assessment Act*, R.S.N.L. 1990, c. S-1 have found that the assessment criteria is similar to that which applies under the Act so that the principles outlined with regard to onus of proof and the nature of the hearing are the same for proceedings under the Act as well as the *St. John's Assessment Act*.

[29] G.I.A.A. must satisfy the Court that the application of the cost approach to determine fair market value of the Airport as of January 2002 was an error of law and fact under section 17 of the Act. The Court must also determine whether or not

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the approach to fair market value, in the particular circumstances of this case does not permit the cost approach to be applied. If G.I.A.A. is correct in its assertion that there is no market for the Airport, under subsection 17(1) of the Act, and no other valuation methods can properly apply, I must then decide whether the assessed value of the Airport ought to be set at the nominal value of one dollar.

### Determination of Fair Market Value


[30] The statutory provisions which outline the criteria for assessing of real property for taxation are found in subsections 17(1) and (1.1) of the Act:

17. (1) An assessor shall assess property at its fair market value, that value being the amount which, in the opinion of the assessor it would realize if sold on the open market by willing seller to willing buyer.

(1.1) A determination of fair market value under subsection (1) shall be made by determining the fair market value of the property as of the base date.

[31] Orsborn J., at paragraph 31 in **3163083 Canada Ltd. (Labatt Brewery) v. St. John's (City)**, (2005) 245 Nfld. & P.E.I.R. 1 (NLTD), summarized the applicable principles for arriving at fair market value under the *St. John's Assessment Act*, supra:

- (i) The objective of the assessment is to determine the fair market value of the property, that is, the amount the property would realize if sole [sic] on the open market by a willing seller to a willing buyer.
- (ii) An opinion on fair market value may be informed by:
  - (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;

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- (c) Recent free sale of comparable properties (market data or direct comparison approach);
  - (d) The price which the revenue producing possibilities of the property will command (income capitalization approach); and
  - (e) The depreciated replacement cost (cost approach). Professional appraisers customarily resort to one or more of the last three methods.
- (iii) As a general proposition, all approaches to valuation may be resorted to, either to provide a fair market value, to provide a "reality check" of the results of one approach against the results of another, or to enable the formulation of a value using a composite of the results.
  - (iv) In assessing the fair market value of the property, the property is to be assessed in its current condition and as it is currently being used.
  - (v) The objective is not to determine the value to the owner as a going concern or otherwise; while the owner may indeed be considered as a possible purchaser in the notional and hypothetical market, that fact does not serve to inflate the value beyond what other potential purchasers would pay.
  - (vi) The direction in subsec. 49(2) of the Act to ensure uniform taxation does not contemplate an assessment that may exceed fair market value. Fair market value is the objective and represents the upper limit of assessed value, but that value may be reduced if assessments of like properties have been set at a lower amount.

[32] Both parties agree that the traditional approaches to the determination of fair market value are the market comparison approach, the income capitalization approach and the cost approach. It also appears there is no disagreement that the fair market valuation of the property is to be determined from the circumstances as they existed as of the Base Date and not with regard to prospects for the property in the future. Ironically, it is clear that the Assessment Review Commissioner placed considerable emphasis on the information which he had with regard to the future prospects for the Airport beyond the Base Date relating to possible revenue generation and financial viability.

[33] The area of contention is the extent to which the cost approach can be used to determine fair market value particularly with respect to special or limited purpose properties. Both parties acknowledge that the Airport is a special or limited use property. Its highest and best use is as an airport and there does not appear to be any alternate use because of the restrictions placed on the tenancy of G.I.A.A. from Her Majesty in right of Canada under the Ground Lease, in that it must be used solely for a major international airport operation.

[34] A key mandate for the assessor in the determination of fair market value is the search for a market for the property, since fair market value is to be determined by what a willing seller would agree to accept and a willing buyer would agree to pay for the property. The willing buyer, particularly with respect to special or limited properties, can hypothetically be the current owner for assessment purposes. However, the jurisprudence indicates that this approach is problematic and potentially unfair to the extent that the use of traditional approaches to valuation, such as a cost approach, may lead to an assessment of the value of use to the owner of the property, as opposed to a value in exchange for the property which is the true basis for determining the fair market value.

[35] This perspective is at the heart of this case since G.I.A.A. is contending that it is a not-for-profit company which is community based. It is operating a money-losing airport under a long-term lease for which there is free rent for the first fifteen (15) years of the term, which is in turn reflective of the difficult financial circumstances of operating this unique international airport, with its limited international use and weak domestic air travel business.

[36] As of the Base Date, the Airport was suffering a major slump in business due to new security protocols that resulted from the September 11, 2001 terrorism attacks in the United States. More stringent *visa* requirements decreased the volume of charter flights from eastern European countries passing through Gander. New security restrictions for aircraft travel to the United States, including corporate jet travel, also resulted in less technical refueling stops at the Airport.

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[37] G.I.A.A. was clearly saddled with a money-losing airport at the time of the transfer in March 2001 and this situation was deteriorating between September 11, 2001, and the Base Date. G.I.A.A.'s obvious mandate as a community based organization is to ensure the Airport did not close. The evidence of Gary Vey, Chief Executive Officer of G.I.A.A. indicates that the operation not only had an annual operating deficit, but it has not been able to accumulate any reserves for capital.

[38] G.I.A.A.'s appeal is based on the following points:

- i. The Airport is a special and limited purpose property;
- ii. The provisions of the Ground Lease restrict G.I.A.A. to the operation of an airport and no other use;
- iii. If G.I.A.A. or the Minister of Canada Transport cease to operate the Airport, administration and control reverts from Her Majesty in right of Canada to Her Majesty in right of Newfoundland and Labrador;
- iv. The market comparison approach cannot be utilized because the property cannot be sold even on a hypothetical basis because of the restrictions;
- v. An income approach cannot determine fair market value because the Airport is a perennial money-losing operation whether it is being operated by the Federal Government or by a not-for-profit corporation acting as a tenant;

vi. In the absence of an alternate use, a valuation based on a cost approach would only be an assessment of the value to the owner, as opposed to the value in exchange, the latter being an underlying prerequisite for the proper determination of fair market value; and

vii. A cost approach valuation that determines value to the owner, as opposed to value in exchange, is wrong in law and cannot be sustained.

[39] Counsel for the Town argues that the assessor has acted correctly because:

- i. The cost approach has been accepted at law as a proper method of determining fair market value of special or limited purpose properties;
- ii. Reasonable allowances for depreciation and functional obsolescence have been made by the assessor to ensure that the fair market value determined by the cost approach does not exceed a valuation that reflects the reality of limited current use;
- iii. Since the legislation says fair market value is that which is determined by the assessor, the burden is on G.I.A.A. to establish that the assessment is outside his statutory mandate; and
- iv. Newfoundland and Labrador and other provinces have enacted new legislation specifically providing for the valuation of special or limited purpose properties for municipal taxation purposes on the basis by the application of the cost approach.

[40] Counsel for the Town argues that there are many reported decisions involving special or limited use properties that have confirmed the cost approach to be an acceptable valuation method for the determination of fair market or actual value of property for the purpose of the municipal taxation assessments. However, for the reasons that I will outline, it appears that these cases deal with properties which are fundamentally viable from a financial and economic point of view and, for the most part, deal with private property owners of positive income generating properties. Few of these cases deal directly with the assessment of the value of public amenities or public purpose properties.

[41] Two important cases which counsel for G.I.A.A. relies upon are the **Southam Inc. v. Surrey White Rock Assessor, Area No. 14**, (2004) 28 B.C.L.R. (4<sup>th</sup>) 317 (BCCA) – leave to appeal refused (SCC) and the decision of Orsborn J. of this Court in the **Labatt Brewery** case, supra, which was affirmed in relevant part on appeal (2005 NLCA 76).

[42] In **Southam**, supra, the property in issue was a state-of-the-art newspaper printing facility. The evidence indicated that it had cost the owner of the printing facility more than 40 million dollars to build the printing facility and further indicated that, if the property was offered for sale on the open market, it would sell for 25 million dollars (an amount agreed by the parties). The municipality involved assessed the property at a value of 40 million dollars. The British Columbia Supreme Court Trial Division and Court of Appeal ruled that the assessment should be 25 million dollars. In reaching this conclusion, the British Columbia courts held that the legislation required a determination of the market value of the real property (the land and printing plant facility).

[43] The British Columbia Court of Appeal affirmed the following comments of Justice Gray of the B.C. Supreme Court at para. 50:

The plant should not be assessed for more than anyone other than the owner would pay for the property.

[44] The task for the assessment board was to determine the market value of the plant property. The board was found to have erred by following the process of accepting a highest and best use for which there was no market, and then valuing that use of the property using the cost approach. In doing so, the board was said to have given a higher priority to the concept of highest and best use than to the concept of market value, and it had applied a narrow concept of use. The statute required the board to address the ultimate question of market value. (See **Southam**, supra, paras. 51 and 53 – Gray, J.)

[45] The British Columbia Court of Appeal concluded that even though a company spent 40 million dollars to build or create a property (i.e., a printing plant facility), this did not demonstrate that the property could be assessed for that cost. The issue was not the cost of creating the property but rather what was the market value or value in exchange of the property. The parties had agreed that in the marketplace the property would only sell for 25 million dollars. The Court of Appeal said that while **Southam**, supra, may be a successful and profitable enterprise, its real estate would only sell for 25 million dollars. Since municipal taxation was a tax on real estate wealth, not business enterprise value, the Court of Appeal agreed that the lower assessment value should apply.

[46] In the **Labatt Brewery** case, supra, the property being assessed was a brewery complex located in a building that was 72 years old. The City of St. John's used a cost approach to assess the land, building and brewing tanks at a value of \$3,575,000. The owner of the property argued that there was no party who would buy the land and building to use it for a brewery and argued that the land and building would sell only in the marketplace for an alternate use as industrial land and at a price of \$552,000 based upon the market evidence. The *St. John's Assessment Act*, supra, subsection 49(1) also mandated a search for the market value.

[47] Our Court of Appeal affirmed the following comments of Orsborn, J. of this Court:

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The overriding objective is to determine market value. The *Act* set the objective of the assessment and further defines market value, the objective of that assessment:

S. 49(1) ... the amount which in the opinion of the assessor would be paid if the property were sold to a willing buyer by a willing seller both of whom are knowledgeable in the market.

[T]he intent is to find out what the price of exchange would be between a knowledgeable willing buyer and a knowledgeable willing seller. I note in particular the reference to a willing seller. The seller is not defined in terms of the present owner, but in terms of a hypothetical seller of the real property. The position or view of the owner is not relevant. The market value is derived using a hypothetical buyer in a hypothetical market. The market being what it is, one would expect the seller to achieve as high a price as possible, with the reverse being true for the buyer.

The task of the appraiser is then to determine that highest and best use for which there is a market, and to select that use which will attract the highest price.

Generally, the more specialized the features of the property, the fewer hypothetical buyers there will be. In a number of the cases reviewed, there was no market for the special purpose property. But it does not follow that because there is no market for a special purpose property that, without more, the replacement cost should immediately be utilized to determine market value. A market must be found, the use for which there is a market must be found, and the valuation proceed accordingly. Once the market (and highest and best use) are determined, then, and only then, does the question arise of which valuation method should be employed. If there are sales of comparable properties with a similar use, then the direct comparison approach may be appropriate; lacking such comparable sales, then replacement cost may be considered as a guide to market value. But the analysis remains, fundamentally, a search for the market. Once the (hypothetical) market is determined and defined, an appropriate method of pricing for that market may be selected.

[48] Not only is *Labatt Brewery*, supra, important for its analysis of the market value concept in assessment law but, in particular, its emphasis on the distinction

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between business enterprise value and real property value. At paragraphs 23 and 111, Orsborn, J. commented:

If the property is not used as a brewery by Labatt, it has a limited alternate or secondary use as an industrial warehouse. A sale by the owner would, obviously, not carry with it the Labatt brand and market share.

The authorities refer to market value as a value in exchange, a concept that differs from value in use. The difference between value in use and value in exchange confirms that, when seeking market value, any subjective value to the owner and any value not flowing from the real property itself e.g., brand identity – are not to be included in the valuation.

[49] I agree with the submission by counsel for G.I.A.A. that municipal tax assessment is an assessment of the value in exchange of real property; such an assessment is not an assessment of the market value of the business enterprise because the market value of the business enterprise includes more than just the land and building, i.e., the value of the business. (See also **Pacific Newspaper Group Inc. v. Surrey/White Rock Assessor, Area No. 14** [2006], B.C.J. No. 1417 at paragraph 17.)

[50] It is also clear that a fair market value assessment must be an objective process and not one filled with subjective elements which are speculative and which are focused on the special value of the property to the particular owner or purchaser. It appears that the Review Commissioner fell victim to this temptation.

[51] In the **Murphy** decision, supra, Green, J. found that the question of the approaches to be used to determine fair market value are not cast in stone when he wrote in paragraph 31:

In my view, as a general proposition all approaches to valuation are, in principle, appropriate to be resorted to, both as a means of conducting a "reality check" of the results of one approach by comparison with the results of other approaches,

and also as a means, in appropriate cases, of providing a composite or correlated value using all applicable data. There will, of course, be special situations, as was argued in this case, where certain of the approaches to valuation will not be appropriate.

[52] He also noted that often the methodology of using comparative sales or income approach to valuation are the most straightforward methods of determining fair market value. At paragraph 39 he commented further about the challenges of using the cost approach to valuation:

It is also said that it is difficult to reflect the real replacement cost of older or unique buildings using the cost approach ... As buildings get older the possibility of error in estimating depreciation becomes greater and the difficulty of accounting for functional and economic obsolescence as factors in limiting the likelihood that an owner would want to replace the building at cost, also introduces greater uncertainty into the process. The cost approach is thus frequently regarded as indicating merely the upper range or higher level of value.

[53] In my view, these comments are operative in this case. Here we have not only a special or limited purpose property but also a massive out-of-date infrastructure significantly overbuilt for the demands of the aviation business that existed at Gander on the Base Date. Consideration has been given to a regional airport and a smaller terminal facility. However, a new terminal facility would cost approximately twenty million dollars, which is not a viable proposition given the low volume of domestic and international aviation traffic passing through Gander.

[54] I also have concerns about the arbitrariness or unreliability of the application of depreciation and functional obsolescence. G.I.A.A. witnesses such as Jerome Kirkland, who is a certified appraiser gave evidence that the Airport buildings, given their age and obsolescence in the absence of any significant capital revitalization, as of the Base Date would lead to the conclusion that they ought to be treated as having been fully depreciated, which would have a significant impact on what the final cost approach valuation. Even then, it is questionable whether

this approach bears a realistic relationship to fair market value in the particular circumstances of this case.

[55] In **Labatt Brewery**, supra, Orsborn, J. reaffirmed the need to avoid the value to owner assessment process by the use of a cost method and concluded that, because there was an alternate use based on the industrial use of the property, a market comparison approach was the proper basis for valuation. He found that the brewery property had been improperly assessed on a value to owner basis as an operating brewery enterprise rather than recognizing that the building was antiquated and had no alternate purpose except as a storage facility on industrial land. The continuing existence of the business operation was only to retain the Labatt brand in this Province since the Labatt product could not be imported into the Province for sale and could only be sold if it was produced here. Orsborn, J. properly concluded that there really was no market for the brewery in its current use but, given the existence of an alternate use, i.e., industrial land, a market comparison valuation could and should be applied.

[56] Applying that logic, we have a circumstance here where not only is there no market for the Airport but there is no other higher or best use, which is a fact recognized even by the assessor. If the Airport is no longer to be used for that purpose, then G.I.A.A. as a tenant would have any realty interest to convey. The Airport would revert to the administration and control of Her Majesty in right of Newfoundland and Labrador. In that respect, there is no need to look at the money-losing aspect of the operation, which is a fact which only further detracts from the Airport having any market value.

[57] These restrictions mean that unlike **Labatt Brewery**, supra, an alternate use as industrial land is not an option simply because neither G.I.A.A. nor Her Majesty in right Canada would have the option to sell the property. It is significant that there was a prior transaction involving Her Majesty in right of Canada and Her Majesty in right of Newfoundland and Labrador, where a piece of the Airport land was transferred back to the Province for the purpose of the development of an industrial park under the auspices of a provincial crown corporation. This

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transaction referred to the reversion of administration and control to the Province under the Terms of Union.

[58] Counsel for G.I.A.A. also relies on **Canso Seafoods Limited v. Town of Canso**, (1980) 43 N.S.R. (2d) 651, where the Nova Scotia Court of Appeal considered a challenge to a municipal assessment of a fish processing facility based on a cost approach. The facility was scheduled for demolition though some portion of the plant was being used for storage. The Court of Appeal concluded at paragraph 667 that:

To apply it [the cost approach] to a building for which there is no sale or rental market, which is unwanted by the owner and unsuited to his needs is, in my opinion, to give an erroneous, inflated and unrealistic value. In short, to talk in terms of replacement value of a building that the owner intends to demolish and that has the drawback and limitations of the subject one is, in my opinion, fallacious.

[59] In this case, the assessor used the cost approach, while recognizing the importance of depreciation and the allowance for functional obsolescence of this unprofitable Airport under its highest and best use and arrived at an assessed value of 24.8 million dollars. I cannot accept the proposition that this was the result of a proper search for the market for this rather unique, special purpose property.

[60] Given that the mandate to the assessor under section 17 of the legislation is to find the market, it seems perverse that with clear evidence that there is no market and also no alternate use, we would be left with a hypothetical construct of market value based on a determination of replacement cost, less depreciation and functional obsolescence.

[61] Counsel for the Town has urged upon me that decisions in British Columbia by assessment review boards involving assessed values of airports have upheld the use of the cost approach which should be influential in terms of the approach to

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assessment taken here by the assessor. Counsel also relies on a decision of an assessment review commissioner for St. John's airport with respect to a building owned and occupied by Nav Canada which is involved with air traffic control services. That decision upheld the cost approach method to the valuation of a building, which was found to have uses both as a control tower and as an office building complex.

[62] I believe that these cases are distinguishable in that the airports in question are economically viable and do not have the same operating restrictions at the time the assessments were carried out. In the case of the Nav Canada assessment, the evidence before the Review Commissioner indicated that part of the building in question had alternate use as space for other tenants at the Airport. The space was surplus to the needs of Nav Canada in carrying out their air traffic control functions at the facility. An assessment was produced based on allowances for depreciation that were subsequently increased by the Review Commissioner.

[63] In this case, I find that the evidence given by Jerome Kirkland, a certified appraiser, as well as that of Dr. Michael Trethewy, an aviation economist, is persuasive. They both pointed to the uniqueness of the predicament of the Airport, which they contend was not economically or financially viable and had no market on the Base Date.

[64] I have concluded that the circumstances of this case are unique. I am aware that new legislation exists for future assessment of special purpose properties based on the cost approach. Counsel for the Town says it is a codification of existing law. I suggest that it may be a statutory solution to a vexing and contentious valuation issue.

[65] G.I.A.A. is justified in arguing that the Airport has a nominal fair market value for municipal taxation purposes. The assessor ought not to have relied on the affirmation of the Federal Government assessors in the use of a special formula for cost approach valuation of public facilities or amenities to determine Federal grants

to municipalities in lieu of taxes. Their mandate is dictated by Federal legislation and does not focus on the fair market value which is the mandate of an assessor under the Act.

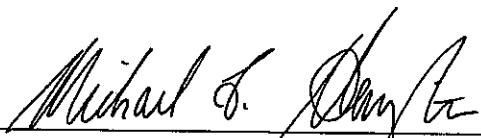
[66] G.I.A.A. has no real property interest to buy or sell in reality or hypothetically. It has no real property wealth to be the basis for municipal taxation.

### **SUMMARY AND DISPOSITION**

[67] For the reasons outlined, I allow the G.I.A.A. appeal and set aside the assessor's notices of assessments for the taxation years 2004 and 2005. I also set aside the decision of the Assessment Review Commissioner.

[68] I direct that the assessments for 2004 and 2005 should be amended to reflect a nominal assessed value of \$1.00 for the Airport.

[69] I also order that the Appellant is entitled to its costs on a party and party basis on this Appeal.

  
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**MICHAEL F. HARRINGTON**  
Justice