Gottardo Properties (Dome) Inc. v. Toronto (City)

Gottardo Properties (Dome) Inc. et al. v. Corporation of the City of Toronto et al.
McDonald's Restaurants of Canada Ltd. v. Corporation of the City of Toronto et al.

162 D.L.R. (4th) 574
1998 CLB 624, [1998] O.J. No. 3048, 18 TLWD 1816-009, 81 A.C.W.S. (3d) 409, 111 O.A.C. 272, 46 M.P.L.R. (2d) 310

Ontario Court of Appeal
McMurtry C.J.O., Doherty and Laskin JJ.A.
Heard: March 3, 1998 and March 4, 1998
Judgment rendered: July 29, 1998
Court File No. C22625

Appeal -- Grounds -- Standard of review -- Motions judge making finding of fact or mixed fact and law on documentary record -- Finding entitled to deference on appeal -- Not to be reversed if finding reasonable.

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Assessment -- Business assessment -- Liability -- Use of premises -- Licensees of stadium boxes occupying suites limited portion of time -- Licences subject to restrictions on use by owner -- Using premises to further business interests -- Use for purpose of or in connection with business -- Stadium's use paramount -- Licensees not liable for business assessment -- Assessment Act, R.S.O. 1980, c. 31, s. 7(1).

The applicants were licensees of stadium boxes in a stadium. The licences were subject to a number of restrictions. These included: the number of persons allowed to use a box was limited; all persons using a box for an event had to purchase a ticket; box holders had to purchase food and beverages from the stadium caterers; box holders could not directly promote their commercial products in the boxes; box holders could not install corporate logos that interfered with the stadium's business; and box holders could use not use their boxes at times other than during scheduled events without the stadium's permission. The licensees used the boxes to promote their business interests by entertaining clients, customers and employees in order to increase profitability. The regional assessment commissioner assessed the licensees for business assessment under s. 7(1) of the *Assessment Act* , R.S.O. 1980, c. 31 (now R.S.O. 1990, c. A.31). It provides for business assessment of a person "occupying or using" land "for the

purpose of or in connection with, any business". The applicants brought applications for orders declaring that they were not subject to the assessment. The judge of first instance granted the application, holding that the stadium's use of the boxes was paramount. That decision was affirmed on appeal. The regional assessment commissioner and the municipality appealed further.

Held , the appeal should be dismissed.

The predominant purpose of the licences was to improve the profitability of the licensees' businesses. Hence, the licensees carried on their businesses in the boxes within the meaning of s. 7(1). The licensees' occupation or use of the boxes was also sufficiently permanent to satisfy the requirements of s. 7(1). However, both the licensees and the stadium occupied the boxes simultaneously. In those circumstances, assessability cannot be determined on the basis of exclusive use, but must be ascertained by the application of the paramount occupancy principle. The stadium's use was paramount because of the controls it imposed on the box holders' use of the boxes. Those controls showed that the box holders' business use of the boxes was subordinate to the business use of the boxes by the stadium. In addition, the business activity carried on in the boxes by the box holders was an incidental part of their business, while the business activity carried on in the boxes by the stadium was an integral part of its business. Moreover, the decision of the judge of first instance, whether characterized as a finding of fact or a finding of mixed fact and law, had little precedential value, while the record before him was entirely documentary. His finding should be accorded deference on appeal. It was reasonable and should, therefore, not be reversed.

Cases referred to
Assessment Committee of the Holywell Union v. Halkyn District Mines Drainage Co. , [1895] A.C. 117 -- **refd to**

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Canada (Director of Investigation and Research) v. Southam Inc. (1997), 144 D.L.R. (4th) 1 , 71 C.P.R. (3d) 417, [1997] 1 S.C.R. 748, 50 Admin. L.R. (2d) 199, 209 N.R. 20, 69 A.C.W.S. (3d) 586 -- **refd to**
Casco Terminals Ltd. v. Vancouver (City) (1978), 93 D.L.R. (3d) 261 , 9 M.P.L.R. 11, 8 B.C.L.R. 177 -- **refd to**
Cory v. Bristow (1877), 2 App. Cas. 262 -- **refd to**
Equity Waste Management of Canada Corp. v. Halton Hills (Town) (1997), 40 M.P.L.R. (2d) 107, 35 O.R. (3d) 321, 103 O.A.C. 324, 74 A.C.W.S. (3d) 297 -- **refd to**
Hodgkinson v. Simms (1994), 117 D.L.R. (4th) 161 , 57 C.P.R. (3d) 1, [1994] 3 S.C.R. 377, 16 B.L.R. (2d) 1, 22 C.C.L.T. (2d) 1, 95 D.T.C. 5135, 5 E.T.R. (2d) 1, [1994] 9 W.W.R. 609, 80 W.A.C. 1, 97 B.C.L.R. (2d) 1, 171 N.R. 245, 50 A.C.W.S. (3d) 469 -- **refd to**
Ontario (Regional Assessment Commissioner) v. Caisse Populiare de Hearst Ltee (1983), 143 D.L.R. (3d) 590 , [1983] 1 S.C.R. 57, 21 M.P.L.R. 9, 46 N.R. 285, 18 A.C.W.S. (2d) 134 -- **refd to**

Qu'Appelle Developments Ltd. v. Regina (City) (1989), 46 M.P.L.R. 32, [1989] 5 W.W.R. 353, 77 Sask. R. 19, 16 A.C.W.S. (3d) 160 -- **refd to**
R. v. Nova Scotia Pharmaceutical Society (1992), 93 D.L.R. (4th) 36 , 74 C.C.C. (3d) 289, 43 C.P.R. (3d) 1, [1992] 2 S.C.R. 606, 15 C.R. (4th) 1, 10 C.R.R. (2d) 34, 114 N.S.R. (2d) 91, 139 N.R. 241, 34 A.C.W.S. (3d) 1092, 16 W.C.B. (2d) 460 -- **refd to**
Ritz Foods Ltd. v. Winnipeg (City) (1982), 133 D.L.R. (3d) 6 , 18 M.P.L.R. 51, 15 Man. R. (2d) 202 -- **refd to**
Saga Canadian Management Services Ltd. v. Ottawa (City) (1977), 77 D.L.R. (3d) 341 , 16 O.R. (2d) 65 -- **distd**
Schwartz v. Canada (1996), 133 D.L.R. (4th) 289 , [1996] 1 S.C.R. 254, 17 C.C.E.L. (2d) 141, 10 C.C.P.B. 213, [1996] 1 C.T.C. 303, 96 D.T.C. 6103, 193 N.R. 241 *sub nom. M.N.R. v. Schwartz* , 60 A.C.W.S. (3d) 1257 -- **refd to**
Tisdale (Township) v. Hollinger Consolidated Goldmines Ltd. , [1933] 3 D.L.R. 15 , [1933] S.C.R. 321 -- **refd to**
Toronto (City) v. University of Toronto (Governors) , [1946] 2 D.L.R. 532 , [1946] O.R. 215 -- **refd to**
Westminster City Council v. Southern Railway Co. , [1936] 2 All E.R. 322 -- **distd**

Statutes referred to
Assessment Act , R.S.O. 1980, c. 31 -- now *Assessment Act* , R.S.O. 1990, c. A.31 s. 7(1) [am. 1986, c. 69, s. 3(1); 1989, c. 42, s. 1]

Authorities referred to
Kerans, R.P., *Standards of Review Employed by Appellate Courts* (Edmonton: Juriliber, 1994)
Ryde on Rating , 13th ed., Widdicombe *et al.* (London: Butterworths,1976)
Wright, Charles, "The Doubtful Omniscience of Appellate Courts" (1957), 41 Minn. L. Rev. 751

APPEAL, with leave, 57 A.C.W.S. (3d) 403, from a judgment of the Ontario Divisional Court, 116 D.L.R. (4th) 533 , 20 M.P.L.R. (2d) 230, 75 O.A.C. 46, 48 A.C.W.S. (3d) 899, dismissing an appeal from a judgment of Farley J., 96 D.L.R. (4th) 1 , 13 M.P.L.R. (2d) 198, 36

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A.C.W.S. (3d) 160, holding that the licensees of stadium boxes were not subject to business assessment.

Bernard Chernos , for appellant, Regional Assessment Commissioner, Region No. 9.
Diana W. Dimmer , for appellant, City of Toronto.
Robert Russell and *Adam Fanaki* , for respondents, Gottardo Properties (Dome) Inc. *et al* .
Phillip Sanford , for respondent, McDonald's Restaurants of Canada Ltd.

The judgment of the court was delivered by

[1] LASKIN J.A.:--The respondents were licensees of SkyBoxes at the SkyDome in Toronto under licence agreements with the owner of SkyDome, the Stadium Corporation of Ontario ("Stadco"). The issue on this appeal is whether the respondents were liable for business assessment under s. 7 of the *Assessment Act* , R.S.O. 1980, c. 31, because of their occupancy or use of the SkyBoxes.

[2] The appellant, the Assessment Commissioner, assessed the boxholders for business assessment for the years 1989 to 1991. The respondents brought applications on an agreed statement of facts challenging the assessments. The motion judge, Farley J., granted their applications, concluding that "they are not occupying or using their box within the meaning of s. 7 of the Act". His decision was affirmed on appeal by the Divisional Court (Southey, Carruthers and Rosenberg JJ). The Assessment Commissioner and the City of Toronto appeal, with leave, to this court.

A Overview

[3] The respondents were assessed under s. 7(1) of the *Assessment Act* , R.S.O. 1980, c. 31 (now R. S.O. 1990, c. A.31), which provides:

> 7(1) Irrespective of any assessment of land under this Act, every person occupying or using land for the purpose of, or in connection with, any business mentioned or described in this section, shall be assessed for a sum to be called "business assessment" to be computed by reference to the assessed value of the land so occupied or used by that person as follows . . .

[4] Subsections (*a*) to (*j*) of s. 7(1) stipulate the assessments for specified businesses and subsection (*k*) provides that any business not specifically mentioned shall be assessed "for a sum equal to 30 per cent of the assessed value of the land so occupied or used".

[5] To be liable for assessment under s. 7 a person must occupy or use the land in question for the purpose of or in connection with its

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business. In other words, s. 7 assesses business occupancy or business use. In this case the boxholders admitted that they used the SkyBoxes to promote their business interests by inviting clients, customers and others to the boxes to enjoy the entertainment, catering and other services provided at the SkyDome. Stadco, however, also uses the SkyBoxes for its business, the supply of entertainment, food and beverages. Where two competing occupants use the same land at the same time, the person liable to assessment is the person whose occupancy or use is paramount. The person whose occupancy is subordinate is not occupying or using the land under s. 7 and is not liable for business assessment.

[6] Therefore, the principal question on this appeal is whose occupancy of the SkyBoxes was paramount, Stadco's or the boxholders'. Farley J. implicitly found that Stadco's occupancy was paramount. He held that the boxholders did not have an assessable occupation or use because of the restrictions and controls imposed

by Stadco on their enjoyment of the SkyBoxes. In the Divisional Court, Southey J., and in concurring reasons Rosenberg J., both expressly applied the paramount occupancy principle and both concluded that Stadco's occupancy or use of the SkyBoxes was paramount. The finding of paramount occupancy is entitled to deference on appeal. Deference aside however, in my opinion the conclusions of Farley J. and the Divisional Court are correct and should be upheld by this court.

B Background Facts

[7] The factual background and the relevant documents are extensively reviewed in the reasons of Farley J., (1992), 96 D.L.R. (4th) 1 , and in the reasons of Southey J. in the Divisional Court, (1994), 116 D.L.R. (4th) 533 . I will summarize those facts pertinent to my analysis.

(a) The SkyDome

[8] The SkyDome is a multi-purpose sports and entertainment facility owned and operated by Stadco. The Toronto Blue Jays baseball team and the Toronto Argonauts football team both play their home games at the SkyDome. Also musical productions and various other events are staged at the SkyDome. Not all SkyBoxes may be used for these additional events because sight lines may be obstructed. In 1990 the SkyDome was used for 81 Toronto Blue

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Jay baseball games, 11 Toronto Argonaut football games and 20 additional entertainment events.

[9] Three types of seats are available to ticket holders to watch entertainment and sports events at the SkyDome: field level seats, club seats and SkyBox seats. To view the entertainment from a SkyBox, a person must have a ticket for the event priced at the highest category of ticket. The Assessment Commissioner acknowledges that Stadco is properly assessable for business assessment for its occupation or use of field level seats and club seats. The Commissioner claims, however, that the boxholders are assessable for seats in the SkyBoxes. Stadco did not participate in these proceedings.

(b) The SkyBoxes and the SkyBox Suite Licence Agreement

[10] The SkyDome has approximately 150 SkyBoxes. Each boxholder signed a SkyBox Suite Licence Agreement with Stadco. Therefore the legal relationship between Stadco and the boxholders is that of licensor and licensee. The typical licence agreement runs for ten years with an option to renew. The typical licence fee was $1.5 million.

[11] Sixty-six boxholders or licensees brought the main application before Farley J. These boxholders were divided into three categories: category A, consisting of 48 licensees who did not share, syndicate or sublicense their SkyBoxes; category B, consisting of 14 licensees who did share, syndicate or sublicense their SkyBoxes, but to share costs, not to earn income; and category C, consisting of 4

licensees who sublicensed their SkyBoxes to earn income. The boxholders in categories A and B admitted that they used the SkyBoxes to promote their business interests by entertaining clients, customers, investors and other business associates.

[12] McDonald's Restaurants of Canada Limited, which brought a separate application heard together with the main application, is also a boxholder. McDonald's is in the fast food restaurant business and has several outlets at the SkyDome at which it sells food and beverages to the public. McDonald's used its SkyBox principally for its employees and their families and friends, and admitted that it did so to boost employee morale and therefore improve the profitability of its business.

[13] The dimension of each SkyBox is approximately 20' by 50'. Each boxholder or licensee decorated and furnished its SkyBox suite

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at its own cost but it had to choose one of nine basic design options supplied by Stadco's architect. Suppliers and contractors approved by Stadco delivered the materials and completed the work. On average, each boxholder spent $144,000 to complete its SkyBox.

[14] Under the terms of the licence agreement, Stadco "grants the Licensee the exclusive right to the use" of its SkyBox. In the agreed statement the boxholders acknowledged "that no one other than the applicants or their guests in fact make any use of the SkyBox suites". Stadco, however, attaches several conditions to a licensee's exclusive use of a SkyBox. For example, the licence fee by itself does not give the SkyBox licensee or its guests the right to attend entertainment events at the SkyDome. To view the entertainment from a SkyBox, a person must have a ticket for the event. The licence agreement provides that each licensee must purchase a minimum of 16 tickets to every regular season home game of the Toronto Blue Jays. Ordinarily, SkyBoxes are open for use only when an event is taking place at the SkyDome, although a licensee can make special arrangements with Stadco to use the SkyBoxes at non-event times. Understandably, such non-event use is rare.

[15] Stadco also imposes numerous restrictions on a licensee's use of its SkyBox. The following are the most important restrictions. Licensees cannot add to or alter the furniture, fixtures and equipment in their SkyBoxes without Stadco's written consent. And any such additions or alterations must be done by Stadco's interior design architect or by other contractors specified by Stadco. Licensees may put pictures, plants and corporate logos in their suite only if they are "reasonable in size and in good taste, as determined solely by [Stadco]". Stadco maintains that SkyBoxes are for "personal use", for the licensees and their guests to come to the SkyDome to watch baseball or football games or musical productions. Therefore Stadco prohibits licensees from using the SkyBoxes for the "direct promotion of commercial products".

[16] Except for McDonald's, the licensees cannot bring their own food or beverages into the SkyBoxes. Instead all food and beverages consumed in the boxes must be purchased from Stadco and its designated caterer, Bitove Corporation. Bitove charges prices comparable to those for room service in major Toronto hotels and adds a 15% service charge. Stadco also provides telephone service in the SkyBoxes for which it charges a monthly rate plus a surcharge of 30% on all Bell Canada service charges.

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[17] Under the licence agreement, Stadco may make rules and regulations governing the use and occupation of and access to and from the SkyBoxes. These rules and regulations include: no more than four friends seated elsewhere in the SkyDome may visit a SkyBox during an event; licensees and their guests may enter a SkyBox no more than two hours before the scheduled time of an event; and they may remain no more than one hour after the event is over. Stadco also retains a right of access to any SkyBox and therefore has a duplicate key for each suite. Finally, Stadco retains the right to exclude licensees from their SkyBoxes for events such as the Olympics or the World Series, because of the requirements of promoters, sponsors or other governing bodies. This last restriction is more theoretical than real because even during the 1992 and 1993 World Series no licensee was evicted from its SkyBox.

C The Proceedings Before the Motion Judge and the Divisional Court

[18] Farley J. heard the application brought by the group of 66 licensees and the application brought by McDonald's together. The record before him consisted of an agreed statement of facts, relevant documents, the affidavit of an officer of McDonald's and the transcript of his cross-examination. No oral evidence was led. Important provisions of the SkyBox suite licence agreement and Stadco's rules and regulations for the SkyBoxes are in appendices to Farley J.'s reasons.

[19] Farley J. considered that the applications raised two issues: first, were the licensees "occupying or using" their SkyBoxes within s. 7 of the *Assessment Act* ; second, if they were, was their occupation or use "for the purpose of or in connection with" any business mentioned in s. 7. On the first issue, after a detailed review of the case law and the facts, Farley J. concluded that the licensees did not have an assessable use or occupation of their SkyBoxes because of the restrictions and controls imposed by Stadco. He held at p. 24:

> I therefore find on the indicated circumstances of this case (namely: the restrictions on decor and especially additional furniture, equipment and insignia; the embargo concerning self-provisioning; the inability to determine the number of attendees in a SkyBox; and the prohibition against using the unit for the direct promotion of commercial products) that Stadco has not agreed to provide or in fact provided the applicants such enjoyment of their respective units as would be necessary under the law relating to business assessment to give the applicants assessable use or occupation of such units. No explanation was given as to the "necessity" of such assaults on the castle being required for

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> the ordinary enjoyment of a SkyBox -- either in isolation or with respect to the rest of the SkyDome. On their own I would not have thought the cleaning of the unit and being pre-empted for the World Series, etc., (*i.e.* , to the expected limited extent of such pre-emption as presently contemplated) persuasive; however, they seem to superadd to the weight against the respondents.

[20] This conclusion was sufficient to dispose of the applications, but Farley J. addressed the second issue and concluded that the licensees' "use" of the SkyBoxes was "for the purpose of or in connection with" their businesses. He held at pp. 31-32:

> In the subject case in my view what is carried on in the SkyBox is an integral part of the applicants' businesses generally. That is, in the aspect of category A, it is business promotion in the sense already discussed of seeking new business or maintaining established business. To disengage this aspect of the business from the general business would be the equivalent of in effect setting up an artificial corporation for tax purposes as was unsuccessfully done in *Re Seagrams Distillers (Ontario) Ltd., and Regional Assessment Com'r, Region Nos. 9 and 10* (1986), 26 D.L.R. (4th) 457 , 54 O.R. (2d) 289, 12 O.A.C. 313 (Div. Ct.).
>
> . . . . .
>
> I do not see that a cost-sharing arrangement in category B changes this aspect in any material way from category A. As for a category C applicant, it is in the business of "letting out" its SkyBox for a profit. McDonalds uses its SkyBox for the most part to build employee morale (although some 15% to 20% is customer and supplier schmoozing); it is clear that McDonalds does not allow its employees to use its SkyBox for reasons of altruism but rather to promote an efficient and effective atmosphere in the workplace with an ultimate goal of (all other things being equal) increasing profits.

[21] In the Divisional Court, Southey J. (Carruthers J., concurring) held that the case should be decided by determining who had paramount occupancy of the SkyBoxes and that paramount occupancy "depends on the extent to which the owner of the whole has retained general control over the use made of the SkyBoxes by the licensees". He found that Farley J. applied these principles. For the reasons given by Farley J. and because only ticket holders could enter the SkyBoxes to watch games or events, Southey J. agreed that the licensees did not have an assessable occupation or use for business assessment. He held at pp. 545-6:

> The essential nature of that which was acquired by the holders of the SkyBoxes was not exclusive occupancy of a comfortable apartment, but the right and obligation to purchase some very fancy seats for Blue Jay games and other events at the SkyDome. The agreement respecting those rights and obligations, in my view, went far beyond merely directing the manner in which they used and occupied the boxes. It determined the essence of "the nature and degree of

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> the use and occupation", to use the words of the Court of Appeal in *Re Mowat and Lorne Murphy Foods Ltd.*
>
> . . . . .
>
> [T]he aspect of the various businesses being carried on in the SkyBoxes is the entertainment of customers and others. That is the very business being carried on in the boxes and elsewhere throughout the SkyDome by Stadco and its lessees and concessionaires. The boxholders participate in that business as consumers. It is their function as consumers that the assessor seeks to assess in the case at bar.

[22] He also agreed with Farley J. that the licensees' occupation or use of the SkyBoxes was "for the purpose of or in connection with" their businesses. He held at p. 548:

> As to whether the occupation or use of the SkyBoxes by the applicants was "for the purpose of or in connection with" any business mentioned in s. 7 of the *Assessment Act* , I agree with the submission of Mr. Chernos that that question must be decided in favour of the assessor. In the case of the applicants in categories A and B, para. 14 of the agreed statement of facts is conclusive:
>
> > "The applicants in categories 'A' and 'B' use their SkyBox suites solely for the purpose of promoting their business interests by entertaining clients, customers, investors and other business associates."
>
> The result is the same for applicants in category "C", who sublicense their SkyBoxes for the purpose of gaining or producing income and profit, and McDonald's who used the SkyBox as an employee benefit for the purpose of improving morale and ultimately of increasing profits.

[23] Rosenberg J. wrote separate reasons reaching the same result. He agreed with the appellants "that the occupancy need only be sufficient for the purpose for which the occupant has contracted the premises". In his view that "test is met by the fact that the tenant or licensee would not have entered into the deal if the occupancy was not sufficient for its purpose". Like Southey J., however, Rosenberg J. concluded that assessable occupation or use turned on whose business use was paramount. He held at p. 549:

> It is not really open to question which occupation in the present case is paramount and which is subordinate. The SkyBoxes as any other seats in the SkyDome are used to watch the event being put on in the SkyDome. That is their paramount business use. The fact that some or all of the SkyBox tenants use the SkyBox some or all of the time for their own business purposes and charge the expense for income tax purposes does not change the paramount use. It is possible for a wealthy person to lease the SkyBox just for use of himself and his family and friends as purely recreational. That using the test of "the degree of restriction on occupancy" is unsatisfactory can be demonstrated by comparing it with the kiosks in the SkyDome. They may have more stringent rules with regard to the occupation; they may be forced to be open at certain

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> times and closed at other times; they may not even be able to close off their premises; but they are used for the business of the kiosk operator and that is a

> business with no possible recreational connotation. They are liable for business tax because they are carrying on a business in that area. The occupancy is sufficient to the extent that is compatible with their business or they would not have entered into the agreement.

D Discussion

(a) Did the Boxholders attend the SkyBoxes for the purpose of or in connection with their businesses?

[24] Section 7 assesses business occupancy or use. To be liable for business assessment, the licensees must not only have occupied or used their SkyBoxes, they must have done so in connection with their businesses. As Krever J. wrote in *Re Saga Canadian Management Services Ltd. and City of Ottawa* (1977), 16 O.R. (2d) 65 at 72, 77 D.L.R. (3d) 341 (H.C.J.), "[t]he simple point is that to be assessable for business tax under the provisions of s. 7(1) of the *Assessment Act* , whatever else may be involved, one must be carrying on a business".

[25] The licensees submit that Farley J. and Southey J. erred in holding that they attended the SkyBoxes in connection with their businesses. They argue that they attended the SkyBoxes with their guests to enjoy entertainment, not to make a profit. Whatever business activity took place at the SkyBoxes was incidental to their businesses, which were carried on elsewhere.

[26] This argument views the "business" requirement of s. 7 too narrowly. To determine whether occupancy or use of land is for the purpose of or in connection with a business under s. 7 of the Act, Ontario jurisprudence has adopted the preponderant purpose test. McIntyre J. explained this test in *Ontario (Regional Assessment Commissioner) v. Caisse Populaire de Hearst Ltee* , [1983] 1 S.C.R. 57 at 71, 143 D.L.R. (3d) 590 :

> The preponderant purpose test has had wide -- in fact almost complete -- acceptance in Ontario and certain other provinces since the decision in the *Rideau Club* case. Essentially it has been based upon a consideration of whether the activity concerned is carried on for the purpose of earning a profit or for some other preponderant purpose. If the preponderant purpose was other than to make a profit, then even if there were other characteristics of the organization, including an intent in some cases to make a profit (see *Maple Leaf* case), it would not be classed as a business.

[27] The licensees admitted that they used their SkyBoxes to promote their business interests by entertaining clients, customers and

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others. Even McDonald's acknowledged that it used its SkyBox to improve employee morale and therefore increase the company's profitability. These admissions suffice to satisfy the preponderant purpose test. These admissions show that the preponderant reason the boxholders attended the SkyBoxes was to improve the profitability of their businesses, though no doubt they also enjoyed the entertainment. As I will discuss, however, the incidental nature of the business activity carried on at the SkyBoxes does have a bearing on assessable occupation

or use. But I agree with Farley J. and Southey J. that the appellants have established that the licensees carried on their businesses in the SkyBoxes within s. 7(1) of the *Assessment Act* .

(b) Were the boxholders occupying or using the SkyBoxes?

[28] Carrying on business on the land is not enough to make a person liable for business assessment under s. 7. The person must also be "occupying or using" the land. The statute does not define "occupancy" or "use", leaving the courts to interpret these words. The judicial interpretation of occupancy or use in assessment legislation has had a long history, much of it drawn from English jurisprudence and much of it based on differently worded rating statutes. Nonetheless, the applicable principles are well established. "Occupancy" or "use" -- and the two words have been used interchangeably in the case law -- in the context of s.7 has never been applied literally. Krever J. noted in *Saga* at p. 76:

> The language of the statute itself does not qualify the occupation or use. Judicial interpretation, however, based, it must be admitted, on the traditional application of English cases decided on different statutory provisions, has brought about such a qualification.

[29] One qualification turns on whether the use is transient or permanent. Mere transient use is not assessable. The Manitoba Court of Appeal made this point in *Re Ritz Foods Ltd. and City of Winnipeg* (1982), 133 D.L.R. (3d) 6 at p. 8:

> Literally interpreted, the Act would make all businesses liable for the annual rental value of each and every building used by the business. This would mean that a painter who contracts his work for the painting of business premises would be liable for the rental value of every building he painted. This would be absurd.

[30] In *Casco Terminals Ltd. v. City of Vancouver* (1978), 9 M.P.L.R. 11, 93 D.L.R. (3d) 261 , the British Columbia Court of Appeal voiced the same sentiment at p. 19:

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> The task of the Court here, it seems to me, is to decide whether in all the circumstances these respondents have occupied and used the piers in such a way as to render them liable to assessment within the intention of the Legislature. . . . I cannot believe the Legislature intended the words "occupying or using" to be applied literally. Consider for example persons who enter office buildings at night time with mops and brooms to get on with the business of cleaning. I think the Legislature must have intended that the Courts should reach practical and sensible decisions based upon the circumstances of individual cases.

[31] The licensees suggested that their occupancy of the SkyBoxes was too transient to be assessable. I would not give effect to this argument. Whether occupancy is transient or permanent depends on the context. Realistically the SkyBoxes are used only during sports and other entertainment events at the SkyDome. In that context the licensees' occupancy of the boxes is sufficiently permanent to be assessable.

[32] A second and important qualification on assessable occupancy or use turns on the concept of exclusivity. Although the requirement of exclusivity permeates the caselaw there have been few judicial explanations of the concept. In my view, the explanations that have been offered are not entirely satisfactory because they do not determine assessability when there is simultaneous occupancy. One explanation suggests that the exclusivity required is not absolute exclusivity but is related to the purpose of the occupancy or use. The occupancy or use must be sufficiently exclusive to permit the occupant to carry out the purpose for which it acquired an interest in the land. As Krever J. observed in *Saga* , *supra* , at p. 78:

> It is not difficult to discern in the case law the need for the exclusiveness of the occupation or use to be related to the purpose for which the land is occupied or used.

[33] Similarly, Widdicombe *et al.* , *Ryde on Rating* , 13th ed. (1976), a leading English text on assessment, states at p. 27: "that one of the ingredients of rateable occupation is that the occupation must be exclusive for the particular purposes of the possessor. . . . Occupation is exclusive if the occupier can exclude all other persons from using the land in the same way as he does".

[34] Drawing on this notion of exclusivity, the appellants submit that the proper test for assessability is "whether the boxholders' use and occupation is sufficiently exclusive to enable them to fulfil the boxholders' purpose in occupying and using their SkyBoxes". The appellants' test may be a threshold requirement for assessability but

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it cannot always be determinative. As Rosenberg J. commented in his concurring reasons, this test would invariably be met because the lessee or licensee would never have acquired an interest in the land if the occupancy was insufficient for its purpose. If the licensees did not have sufficiently exclusive use of the SkyBoxes to enable them to promote their business interests presumably they would not have entered into the licence agreements.

[35] Moreover, the appellants' test does not recognize that another person may also be using the land in another way for its purposes. In the present case, though the boxholders have sufficiently exclusive use of the SkyBoxes for their business purposes and they can exclude all others from using the boxes in the same way, Stadco is also using the boxes in a different way for the purpose of its business. Although only the licensees could attend the SkyBoxes for the purpose of promoting their business interests and watching entertainment, Stadco, simultaneously, was using the SkyBoxes for the purpose of its business, the supply of entertainment, food and beverages.

[36] Stadco, admittedly, does not physically attend the SkyBoxes in the way that the boxholders do. But assessable occupancy or use under s. 7 does not require being physically present on the land, although physical presence may be a relevant consideration: *Qu'Appelle Developments Ltd. v. Regina (City)* (1989), 46

M.P.L.R. 32 at 34 (Sask. C.A.). Occupation or use under s. 7 is broader than physical occupation or physical use. Thus, the "exclusive use" of the SkyBoxes accorded to the boxholders under the licence agreement cannot necessarily be equated with assessable use under the statute. Both Stadco and the licensees are using the boxes simultaneously. Each has sufficiently exclusive use for its purposes to be assessable under the appellants' test. Each, therefore is a possible occupant or user of the SkyBoxes within s. 7 of the Act. As I will discuss, when two persons use the land at the same time but in different ways and for different purposes, assessable use goes beyond the notion of exclusivity and depends on whose use is paramount.

[37] Another frequently cited explanation of exclusive occupation comes from the reasons of Lord Hatherley in *Cory v. Bristow* (1877), 2 App. Cas. 262 (H.L.) at 276:

> . . . the courts have not meant by the term "exclusively" that the interest may not be determined on certain terms and conditions, but merely that the person

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> so occupying should have the right unattended by a simultaneous right of any other person in respect of the same subject matter.

[38] The appellants rely on this passage. They submit that there was no "simultaneous right of any other person" to occupy the SkyBoxes at the relevant times. The appellants are correct, however, only in the limited sense that no other person had a simultaneous right to use the boxes in the same way as the boxholders. But as I have stated, Stadco had a simultaneous right to use or occupy the boxes for its own purposes. Like the previous explanation of exclusivity, the passage from *Cory v. Bristow* does not resolve assessability where two persons are simultaneously using the land, each in a different way for its own purposes. Indeed the passage suggests that neither Stadco nor the boxholders had the needed exclusivity to be assessable. Yet one or the other must be assessable when both used the boxes to meet their business purposes. Thus the notion of exclusivity is not determinative.

[39] Although the context is unusual, the present case is an example of a large group of cases in which the owner of land leases or licenses parts of the land to different persons. Stadco, the owner of the SkyDome, has licensed the SkyBoxes to the appellants. In these cases either the owner or the licensee is potentially assessable because each is a potential occupant under the statute. The principle that governs assessability in cases where there are competing occupants is the principle of paramount occupancy.

(c) The principle of paramount occupancy

[40] The principle of paramount occupancy holds that when two persons occupy or use the same land at the same time assessability depends on who has the paramount occupancy or use of the land for its business. Thus the primary issue in

this case is who had the paramount business occupancy or use of the SkyBoxes, the licensees or Stadco?

[41] The main authority establishing the principle that paramount use governs assessability when two rival or competing occupants claim to use the same land at the same time is the decision of the House of Lords in *Westminster City Council v. Southern Railway Co.* , [1936] 2 All E.R. 322 (H.L.), in which Lord Russell stated at 326-7:

> Where there is no rival claimant to the occupancy, no difficulty can arise; but in certain cases there may be a rival occupancy in some person who, to some extent, may have occupancy rights over the premises. The question in every

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> such case must be one of fact, viz., whose position in relation to occupation is paramount, and whose position in relation to occupation is subordinate; but, in my opinion, the question must be considered and answered in regard to the position and rights of the parties in the premises in question, and in regard to the purpose of the occupation of those premises. In other words, in the present case, the question must be not who is in paramount occupation of the station, within whose confines the premises in question are situate; but who is in paramount occupation of the particular premises in question.

[42] The statute in question in the *Westminster* case expressly required the court to choose between rival occupants. But Lord Russell's analysis was derived from general rating law and has been applied to assessment legislation comparable to s. 7 of the Ontario Act. *Ryde on Rating* , relying on the *Westminster* case, endorses the principle of paramount occupancy at p. 63:

> It often happens that there are two persons concerned with the use of land, and the question arises which of the two is the rateable occupier. For instance, where parts of a larger hereditament are appropriated or let out to others, it may have to be decided whether the "landlord" or the "tenant" is rateable; and this is particularly important in the case of dwelling houses. It is often said that the occupation which is rateable is that which is the "paramount" occupation of the two competing occupations.

[43] Underlying this principle of paramount occupancy is the proposition that only one occupant of the land can be assessed for business assessment at any one time. This proposition is not immediately evident in the language of s. 7(1). But whether driven by the established case law on paramount use or by concerns about double taxation because business assessment is based on the assessed value of the land occupied, all parties to this appeal agreed that the court had to choose between the licensees and Stadco. One or the other could be liable for business assessment under s. 7(1) of the Act, but not both. I therefore turn to consider who had the paramount business occupancy.

(d) Who had the paramount business occupancy of the SkyBoxes?

[44] The motion judge held that the licensees did not have an assessable use of the SkyBoxes. In so holding he applied the correct legal principles. He also weighed the relevant considerations bearing on paramount use and he found that Stadco's business use was paramount. A threshold issue on appeal is whether his finding is entitled to deference in this court. This issue has two branches, one concerning the characterization of the finding, the other concerning the nature of the record before the motion judge.

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[45] On the first branch, in my view, the motion judge's finding is either a finding of fact or a finding of mixed fact and law with little precedential value. Looked at either way his finding is entitled to deference on appeal and should not be overturned unless it is unreasonable. At the margins, the distinction between questions of law, questions of mixed fact and law and questions of fact can be difficult. See *Canada (Director of Investigation and Research) v. Southam Inc.* (1997), 144 D.L.R. (4th) 1 at 12-15 (S.C.C.). Historically, paramount use or assessable use has always been treated as a question of fact. In the *Assessment Committee of the Holywell Union v. Halkyn District Mines Drainage Co.* , [1895] A.C. 117 (H.L.), Lord Herschell observed at 125: "[t]he question whether a person is an occupier or not within the rating law is a question of fact". Similarly, in *Westminster* Lord Russell said at p. 326: "[t]he question in every such case must be one of fact, viz., whose position in relation to occupation is paramount, and whose position in relation to occupation is subordinate". See also *City of Toronto v. Governors of the University of Toronto* , [1946] O.R. 215, [1946] 2 D.L.R. 532 (C.A.). Treating assessable use or paramount use as a question of fact accorded with the principle that the construction of a statutory provision is a question of law but whether a particular matter falls within the statutory provision is a question of fact. See *Tisdale Township v. Hollinger Consolidated Goldmines Ltd.* , [1933] S.C.R. 321, [1933] 3 D.L.R. 15 ; *R. v. Nova Scotia Pharmaceutical Society* , [1992] 2 S.C.R. 606, 93 D.L.R. (4th) 36 .

[46] A different approach might view the question of assessable or paramount use as a question of mixed fact and law because it is a question about whether the facts meet the legal test of occupancy or use under s. 7. Even so, the facts of this case are sufficiently unusual that the finding of paramount occupancy is of little precedential value and therefore should be accorded deference from an appellate court. Iacobucci J. explained this approach in *Canada v. Southam Inc.* , *supra* , at pp. 13-15:

> [37] By contrast, the matrices of facts at issue in some cases are so particular, indeed so unique, that decisions about whether they satisfy legal tests do not have any great precedential value. If a court were to decide that driving at a certain speed on a certain road under certain conditions was negligent, its decision would not have any great value as a precedent. In short, as the level of generality of the challenged proposition approaches utter particularity, the

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> matter approaches pure application, and hence draws nigh to being an unqualified question of mixed law and fact.
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> . . . . .
>
> [45] In short, the Tribunal forged no new legal principle, and so its error, if there was an error, can only have been of mixed law and fact. It should be noted that no one has suggested that the Tribunal erred in its findings of fact. All of this tends to suggest that some measure of deference is owed to the decision of the Tribunal because, to paraphrase what Gonthier J. stated in *Nova Scotia Pharmaceutical Society* , *supra* , appellate courts should be reluctant to venture into a re-examination of the conclusions of the Tribunal on questions of mixed law and fact.

[47] See also *Hodgkinson v. Simms* (1994), 117 D.L.R. (4th) 161 (S.C.C.); Kerans, *Standards of Review Employed by Appellate Courts* (Edmonton: Juriliber, 1994).

[48] On the second branch of the deference issue, the record before the motion judge was entirely documentary. No oral evidence was adduced. The absence of oral evidence does not however negate the desirability of a deferential standard of review. Deference is desirable for several reasons: to limit the number and length of appeals, to promote the autonomy and integrity of the trial or motion court proceedings on which substantial resources have been expended, to preserve the confidence of litigants in those proceedings, to recognize the competence of the trial judge or motion judge and to reduce needless duplication of judicial effort with no corresponding improvement in the quality of justice. See *Schwartz v. Canada* , [1996] 1 S.C.R. 254, 133 D.L.R. (4th) 289 ; Kerans, *Standards of Review Employed by Appellate Courts* , *supra* ; *Equity Waste Management of Canada Corp. v. Halton Hills (Town)* (1997), 35 O.R. (3d) 321 (C.A.); and Charles Wright, " *The Doubtful Omniscience of Appellate Courts* " (1957), 41 Minn. L. Rev. 751. These reasons for deference apply even if no issue of credibility arises. Issues of credibility raise an added concern about the ability of appellate review to improve the quality of justice, because an appeal court does not have the trial judge's advantage of seeing and hearing the witnesses. Therefore, a deferential standard of review may be applied more strictly to findings of credibility or other findings that depend on the trial judge's or motion judge's advantage in seeing and hearing the witnesses. But deference is still called for on an appeal from an entirely written record.

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[49] Applying a deferential standard of review, the appellants have not persuaded me that Farley J.'s finding is unreasonable. On that ground alone I would dismiss the appeal. Even, however, if no deference is afforded to Farley J.'s finding, I would uphold his decision and the decision of the Divisional Court. In my opinion, on the facts of this case, both courts correctly concluded that Stadco's business occupancy of the SkyBoxes was paramount.

[50] Lord Russell emphasized in *Westminster* at p. 326 that paramount occupancy depends on "the position and rights of the parties in the premises in question" and

on "the purpose of the occupation". The court must determine which of the two competing occupants had the greater business interest in using the land. Three main considerations bear on this determination: first, an occupant's physical presence on the land, second, any controls imposed by one occupant on the other occupant's use of the land and the purpose and effect of those controls and third, the relative significance of the activities carried out on the land to the primary business of each of the competing occupants.

[51] In this case, the boxholders' physical presence in the SkyBoxes is far more pronounced. They and their guests attend the boxes while entertainment is taking place. Although Stadco retains a key to the SkyBoxes its physical presence is limited to cleaning and other incidental activity. The appellants emphasize those provisions of the licence agreement giving the boxholders exclusive use and possession of the suites. In their submission, those provisions support the conclusion that the boxholders' occupancy is paramount. I agree that physical possession is a relevant consideration in determining assessable occupation but it is far from a decisive consideration. An owner who has leased out or licensed parts of its land may still be assessable because it is using the land for the purpose of its business and deriving benefit from such use. In short, in my view, physical presence by itself does not determine paramount occupancy.

[52] A far more important consideration is the control imposed by the owner, Stadco, on the boxholders' use of the SkyBoxes and the purpose and effect of that control. Farley J. relied on this consideration in his reasons and Krever J. observed in *Saga* at p. 80 that there is in the case law "extensive discussion of the need for control over the premises as a condition of imposing liability for assessment".

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[53] In the *Westminster* case, Lord Russell discussed the significance of the control over the land exercised by the owner at p. 327:

> The general principle applicable to the cases where persons occupy parts of a larger hereditament seems to be that if the owner of the hereditament (being also in occupation by himself or his servants) retains to himself general control over the occupied parts, the owner will be treated as being in rateable occupation; if he retains to himself no control, the occupiers of the various parts will be treated as in rateable occupation of those parts.

[54] The control exercised by the owner may make the licensees' occupation subordinate and thus not assessable. *Ryde* , *supra* , makes this point at p. 48:

> An important group of cases concerns the question which of two persons is the occupier when parts of a larger area are let out or appropriated. In such cases the issue is which of the competing occupations is paramount and which is subordinate. The degree of control reserved by the landlord must be examined with a view to seeing whether "its exercise would interfere with the enjoyment by the occupant of the premises in his possession for the purposes for which he

> occupies them, or would be inconsistent with his enjoyment of them to the substantial exclusion of all other persons".

[55] On the other hand, a licensee may be assessable under the statute though the owner imposes some controls or restrictions on the licensee's use of the premises. Some measure of control is to be expected. Thus an owner may maintain a right of access to the premises or impose restrictions ordinarily found in a licence (or lease) without negating assessable occupancy. What must be examined is the degree of control, the purpose of the restrictions imposed and the effect of those restrictions on the owner's and licensees' use of the land.

[56] In my opinion Stadco exercises extensive control over the licensees' use of the SkyBoxes. It has imposed restrictions or controls that go well beyond those ordinarily found in a licence or a lease. Stadco has limited the number of persons who may attend a SkyBox suite for an event; it has required that any person attending a SkyBox purchase a ticket for the event; it has also required boxholders to purchase their food and beverages from Stadco's caterers; and it has prohibited the boxholders from directly promoting their commercial products in the SkyBoxes. Stadco imposes these and the other controls referred to by Farley J. to promote its own business, the supply of entertainment, food and beverages. The effect of these controls is to restrict the boxholders' use of the SkyBoxes for their

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business interests. As Southey J. observed, the boxholders and their guests are consumers of Stadco's business.

[57] Indeed a boxholder cannot use its SkyBox for its business without furthering the business interest of Stadco. Each licensee has to purchase tickets for the events at the SkyDome; no boxholder can install corporate logos that interfere with Stadco's business; and without Stadco permission no boxholder can use its SkyBox when Stadco is not engaged in its own business of supplying entertainment, food and beverages. These considerations show that the boxholders' business use of the SkyBoxes is subordinate to that of Stadco. The boxholders may use the boxes for their business purposes only by participating in Stadco's business purpose and only to the extent that their use does not interfere with Stadco's use.

[58] The final consideration focusses on the significance of the business activity carried on in the SkyBoxes. The business carried on by Stadco in the SkyBox seats is an integral part of its business of the supply of entertainment and catering at the SkyDome. In contrast, the business activity carried on by the boxholders in the SkyBoxes is an incidental part of their businesses, which mainly are carried on elsewhere. The position of the boxholders differs from the position of the tenants in the *Saga* and *Westminster* cases, both of whom were held to be assessable. In *Westminster* , a railway had leased land to kiosk owners to sell their wares and the court held that the kiosk owners, not the railway, were in rateable occupation. The business of selling wares, however, was central to the business of the kiosk owners. The railway's use of this space was incidental to its business of operating

a railway. Similarly, in *Saga* , the business conducted on the land was catering, which was the business of the tenant who was assessed. Its use of the land was central to its business interests. The university's use of the land was incidental to its business of providing education.

[59] Taken together these considerations demonstrate that the motion judge and the Divisional Court were correct in concluding that Stadco's business use of the SkyBoxes was paramount and that the boxholders' use was subordinate. Therefore, in my opinion, the boxholders are not liable for business assessment under s. 7 of the Act.

[60] I would dismiss the appeals with costs.

Appeal dismissed.