Docket No.: CA 161771
Date:20010117

NOVA SCOTIA COURT OF APPEAL

[Cite as: Point East Investments v. Barry, 2001 NSCA 7]

Glube, C.J.N.S.; Chipman and Freeman, JJ.A.

BETWEEN:

POINT EAST INVESTMENTS LIMITED (IN TRUST)
and STEVE HANIAS (IN TRUST)

Appellants

- and -

ANGELA BARRY AND SANDRA BARRY

Respondents

REASONS FOR JUDGMENT

Counsel:	Craig M. Garson, Q.C., for the appellants A. Douglas Tupper, Q.C., and Douglas Skinner, for the respondents
Appeal Heard:	December 4th, 2000
Judgment Delivered:	January 17th, 2001
THE COURT:	Appeal dismissed with costs as per reasons of Freeman, J.A.; Glube, C.J.N.S. and Chipman, J.A. concurring.

FREEMAN, J.A.:

[1] At issue in this appeal is ownership of a condominium apartment at 1021 Cole Harbour Road in the former Halifax County claimed by the respondents as **bona fide** purchasers for value without notice and by the appellants under a tax deed from the Regional Municipality of Halifax. The tax sale procedure was begun in the former county municipality and was completed by tax deed issued by the Regional Municipality which was created by amalgamation in the meantime.

[2] Justice Oland of the Supreme Court of Nova Scotia, as she then was, decided for the respondents after a hearing on an agreed statement of facts, which was narrowly focused on the interpretation of s. 162 of the **Assessment Act**, R.S.N.S. 1989 c. 23. This provides:

> 162. Notwithstanding Section 161, if a tax deed is not registered in the office of the registrar of deeds within fifteen months after the sale, the grantee and other persons claiming under it shall lose their priority as against a *bona fide* purchaser for value without notice who has registered his deed prior to the registration of the tax deed.

[3] The respondents had no actual notice of the Certificate of Sale for

Taxes registered in favour of the appellants when they bought the condominium and registered their deed. The appellants registered their tax deed more than 15 months after the tax sale. The question for the trial judge, and on this appeal, was whether the respondents had notice within the meaning of s. 162.

[4] Owners of properties sold by municipalities for arrears of taxes are able to redeem them during the year after the tax sale by paying the arrears and expenses (except when the arrears have accumulated over more than six years, when the right of redemption is lost). Purchasers at tax sales must wait out the redemption period before they are entitled to their tax deeds. During that period, pursuant to s. 156, they enjoy only limited rights to protect the property and collect rent. The effect of s. 162 is to limit purchasers to a three-month window for registering their tax deeds before losing priority to **bona fide** purchasers. (The sale and redemption provisions differ from the practice in Ontario, where notice of the intention to sell for taxes is advertised for a year in advance of the sale and the tax deed is issued immediately after sale: see **Municipal Tax Sales Act**, R.S.O.1990, c. M.60 s. 9.)

[5] Section 162 was introduced to the **Assessment Act** in 1966. It was repealed together with a number of other provisions with the creation of a new scheme for notification and redemption in the **Municipal Government Act,** S.N.S. 1998, c.18, s. 547. Section 162 was in effect at all times relevant to the present appeal.

[6] The respondents purchased the property from the Toronto-Dominion Bank in August, 1996, by a quit claim deed purporting to convey the fee simple, which they registered September 3, 1996. It was not explained why the Bank chose the quit claim form of deed rather than the customary warranty form, but nothing appears to turn on this question. The Barrys had no actual notice that the municipality had sold the property to the appellants at a tax sale February 19, 1996, or that the municipal treasurer had registered the Certificate of Sale for Taxes on February 26, 1996. The appellants' tax deed was dated May 28, 1997 and registered September 18, 1997.

[7] The appellants submitted before this court, as they had before Justice Oland, that s.162 did not assist the respondents, firstly because

they were fixed with constructive knowledge of the tax sale, and secondly, that the section, read in context, applies only to persons who purchase property 15 months after the tax sale.

[8] The agreed statement of facts states in its entirety:

> 1. The property which is the subject of this consolidated proceeding is a condominium at 1021 Cole Harbour Road, Cole Harbour, Dartmouth ("Property"). The Property is described in Declaration #69947, registered in Condominium Record 8, p. 813, as Unit 3, Level 1, Bldg. 1, Halifax Condominium Corporation #116.
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> 2. In 1992, Central Guaranty Trust ("Central Guaranty") purchased the Property at a foreclosure sale. In October 1992, Central Guaranty deeded the Property by warranty deed to 2180182 Nova Scotia Limited ("the numbered company"). The numbered company mortgaged the Property to Central Guaranty in 1992. All these documents were registered.
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> 3. On November 3, 1995, the numbered company executed a warranty deed ("Warranty Deed") to the Toronto-Dominion Bank ("the Bank") as the Bank had purchased the assets of Central Guaranty. The Warranty Deed was not delivered to the Toronto-Dominion Bank until shortly before it was registered on April 25, 1996.
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> 4. In the meantime, the numbered company was in arrears with the City of Halifax with respect to taxes for the Property. The Bank was sent by registered mail dated November 16, 1995 a Notice of Intention to Sell for Arrears of Taxes in the amount of $2,031.15 for Unit 208, Condo Corp 116, 1021 Cole Harbour Road, Cole Harbour. An Acknowledgment of Receipt was executed by Ms. Carolyn Simpson of the Bank on November 17, 1995.
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> 5. Subsequently, and in accordance with the provisions of the **Assessment Act**, the Property was advertised in a "tax sale". There is no record of the Bank having received notice of the tax sale.

6. On February 19, 1996, the Plaintiffs purchased the Property at a tax sale for $6,100. The taxes and interest were $1,860.88. The expenses of selling were $351.29.

7. Other than the November 16, 1995 Notice of Intention to Sell for Arrears, there is no evidence the Bank had notice of the tax sale, and the actual sale of the Property at the tax sale.

8. As required under the **Assessment Act,** R.S.N.S., c. 23, the Treasurer of the City of Halifax registered a Certificate of the Tax Sale at the Registry of Deeds Office in Halifax on February 26, 1996.

9. From late April, 1996 to the date the Bank deeded the Property to the Barrys, the Bank collected the rents. The net rents collected by the Bank during this period of time was approximately $120.00.

10. On June 26, 1996 the Bank entered into a Listing Agreement with Royal LePage as listing broker to sell the Property. Clause 12 of the Listing Agreement signed by the Bank stated: “I hereby warrant that I own the property, or that I have legal power to execute this authority on behalf of the owner(s) hereof . . . “.

11. In late July, 1996 the Bank entered into an Agreement of Purchase and Sale with the Defendant Angela Barry to sell her the Property for $43,000.00 by way of a Deed without covenants. The Property was also sold “as is - where is”. The Bank was represented on the sale by solicitor Cyril Randall while the purchaser was represented by solicitor Kent Rodgers.

12. On August 7, 1996, the Bank conveyed the property by Quit Claim Deed to the Defendants, Angela and Sandra Barry. The Barrys paid the Bank $43,000 for the Property. The Deed was registered September 3, 1996, The Barrys mortgaged the Property to the Defendant, Canada Trustco, by Mortgage dated August 30, 1996 and registered September 3, 1996.

13. The title searcher for the Barrys’ solicitor did not discover the Certificate of Tax Sale recorded at the Registry in Book No. 5839 at Pages 503-504 on February 26, 1996. The Barrys and their solicitor, Kent Rodgers, did not have actual notice of the tax sale.

14. The tax sale to the Plaintiffs was eventually confirmed by Tax Deed from the Halifax Regional Municipality. The deed was dated May 28, 1997 and was recorded at the Registry of Deeds Office in Halifax on September 18, 1997.

> 15. From February 1996 to September 1997, (i) no representatives from the Plaintiffs visited the Property, (ii) the Plaintiffs did not pay the taxes or condominium fees, for the Property, (iii) the Plaintiffs did not pay for any utilities for the Property, and (iv) the Plaintiffs did not inspect or maintain the Property.
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> 16. After the Barrys "purchased" the Property they paid the taxes, the condominium fees and the expenses for maintaining the Property. In September 1997, the Plaintiffs, for the first time, advised the Barrys and the Bank of their position and claimed ownership of the Property.
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> 17. Since September, 1997, by agreement between counsel (but not counsel for the Toronto-Dominion Bank), all rent collected has been paid in trust.
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> Dated at Halifax, Nova Scotia this 24th day of November, 1999.

[9] The agreement was signed by Craig M. Garson, Q.C., solicitor for the plaintiffs; A. Douglas Tupper, Q.C., solicitor for the defendant, Canada Trustco Mortgage Company, Angela Barry and Sandra Barry; and Dufferin Harper, solicitor for the defendant The Toronto-Dominion Bank. Proceedings against the other defendants were dismissed and the only parties to this appeal are the appellants, Point East Investments Limited (In Trust) and Steve Hanias (in Trust), and the respondents Angela Barry and Sandra Barry.

[10] Justice Oland stated the issues before her as follows:

> First, whether all the Barrys acquired by the Quit Claim Deed was the right to redeem, in Section 157(1), so that they, having failed to do so, the Tax Deed to the Plaintiffs is valid, and second, if not, whether by Section 162, the Plaintiffs lost their priority to claim title to the property by failing to register their Tax Deed within 15 months after the tax sale.

[11] On the first point she concluded, that in addition to the right to redeem given by s. 157 of the **Assessment Act**, the Barrys had all ownership interest and rights, excepting those specifically given to purchasers at tax sales by s. 156(1). That section provides:

> 156 (1) The purchaser shall, on receipt of the certificate of sale, become the owner of the land so far as to have all necessary rights of action and powers for protecting the same from spoilation or waste, until the expiration of the term during which the land may be redeemed, and may from time to time collect rents due or to grow due, or use the land without diminishing its value, but he shall not cut down any trees thereon, or injure the premises or knowingly suffer any other person to do so.

[12] Justice Oland therefore concluded that the fact the property was not redeemed was not of itself determinative of the issue of ownership. She found the Barrys were purchasers for value who, as set out in the agreed statement of facts, had no actual notice of the tax sale.

> The Plaintiffs registered their Tax Deed more than 15 months following the tax sale, and the Barrys registered their Quit Claim Deed prior to the Plaintiffs' Tax Deed. Whether the Plaintiffs lost their priority to claim title depends on whether notice, in Section 162, means actual notice, as submitted by the Barrys, or constructive notice, as submitted by the Plaintiffs.

[13] She considered **Shubenacadie Band v. Francis**, [1995] N.S.J. No. 347 in which Justice Hallett, of this court, reviewed so-called "registration statutes", legislation such as the **Assignment of Book Debts Act**, the **Corporation Securities Registration Act**, the **Conditional Sales Act** and the **Bills of Sale Act** which set up schemes of registration by which constructive notice could be given that persons remaining in possession of assets pledged as security for debts no longer enjoyed the incidents of ownership that possession ordinarily implied. Justice Oland concluded that the **Assessment Act** was not such a registration statute and that its language and provisions did not support an inference that registration of a Certificate of Sale for Taxes was intended to give constructive notice of a tax sale.

[14] It is not the purchaser at a tax sale, but, as Justice Oland noted, it is the treasurer of the municipality who is required to register the tax sale

certificate (s. 154(6)). The **Assessment Act** is the principal means of raising tax revenues by municipalities. The method of enforcement is by the rather drastic measure of selling real property owned by taxpayers who have defaulted on paying their taxes. The **Ac**t reflects legislative efforts to balance the requirements of a workable system of tax collection with fairness and openness for the protection of property owners. The scheme is carefully controlled by the statute to avoid abuse by ensuring that all parties likely to be affected not only have advance notice of various kinds but a fair opportunity to remedy the loss of property by redemption after the event.

[15] The enforcement scheme of the **Assessment Act** is founded upon s. 134 which creates a statutory lien for rates and taxes imposed upon real property. It need not be registered (s. 134(5)).

[16] From time to time the municipal treasurer prepares a schedule showing properties in the municipality on which taxes are unpaid. After scrutiny by the assessors and diligent inquiry as to ownership by the treasurer (s. 138(2)), the schedule becomes a report of the Director of

Assessment from which the treasurer prepares notices for each lot stating the amounts of taxes owing and warning that the land is liable to be sold for the arrears. Under s. 141 the treasurer must serve the notice on the "owner and encumbrancers so far as he has been able to ascertain them."

[17] Service of the notice "is good and sufficient for the purpose of this **Act** if it is mailed, postage prepaid, by registered letter, to the last known address of such person or, if the address of such person is not known, then by leaving the same with the tenant or occupant of the lands, or by posting a copy of the notice in some conspicuous place on the premises." (s. 141(3)). If the taxes remain unpaid by the owner or encumbrancers the warden or mayor grants a warrant directed to the treasurer for sale of the property.

[18] The treasurer then advertises the impending sale for 30 days by four weekly insertions in a newspaper circulating in the municipality. This is a means of attracting purchasers to the sale, but it also serves as further notice to the owner. The property is then sold by public auction at the advertised time and place. If the sale is set aside for any "error, irregularity

or any other cause" the property may be sold again (s. 147).

[19] Upon payment of any balance of the purchase price within three days of the sale the treasurer prepares a certificate of sale setting out the particulars and stating that a deed will be executed at any time after a year from the date of the tax sale certificate if the land has not previously been redeemed. One copy of the certificate is provided to the purchaser, one is kept at the treasurer's office for inspection by any person, and a copy is lodged within ten days for registration at the registry of deeds (s. 154). While registration provides additional notice to owners and encumbrancers, it does not appear necessary to the exercise by the purchaser of rights under s. 156, which arise on receipt of the certificate. Presumably the right to collect rent and prevent waste can be proven by the purchaser's own copy of the certificate, and the treasurer's failure to register the tax sale certificate would fall within the curative provisions of s. 161.

[20] Registration of the tax sale certificate is therefore only one of several means of giving notice and informing concerned persons of the enforcement proceedings under way by the municipality. While the

notification scheme, which must be considered cumulatively, falls short of a standard of certainty, it is fair and reasonable, particularly when viewed against the background of the statutory lien for municipal taxes of which every land owner must be aware. It reflects a legislative concern to strike a balance between the requirements for an effective means of tax collection and rights of property owners.

[21] In the usual course of events contemplated by the **Assessment Act**, an owner whose property is sold for tax arrears begins with the knowledge that he has not paid his taxes. If he subsequently neglects to keep himself informed of the municipality's collection efforts, and all statutory requirements are fulfilled, he cannot complain of lack of notice and is left without recourse when the property is finally sold. It is not merely registration of the tax sale certificate, but the cumulative effects of the various statutory means of notifying him, that fix him with constructive notice of the unfolding tax sale process. The overall purpose of the whole scheme is to clothe the municipality with authority to sell property to collect taxes. The procedure culminates with the issuance of a valid tax deed. The purchaser's chain of title begins with the registration of the tax deed,

which is his responsibility. In the chain of title the tax sale certificate is the link between the old title and the new.

[22] Before the addition of s. 162 by amendment in 1966, what the purchaser did with his tax deed was his own business. The last of the tax sale and redemption provisions in the **Assessment Act** was s. 161, which was widely regarded as providing a new root of title virtually equivalent to a Crown grant. Section 161 provides:

> 161 Such deed shall be conclusive evidence that all the provisions of this Act with reference to the sale of the land therein described have been fully complied with and every act and thing necessary for the legal perfection of such sale has been duly performed, and shall have the effect of vesting the said land in the grantee, his heirs or assigns, in fee simple, free and discharged from all encumbrances whatsoever.

[23] If the assessed owner remains unchanged from the first failure to pay taxes through to the issuance of the tax deed, the legislative intent is clear that he should be constructively fixed with all notice necessary to the validity of the tax deed. Likewise, any purchaser from that owner during the tax sale process must be deemed to acquire the property at the existing stage of the municipality's proceedings, with the same constructive notice

and the same rights as the vendor. A purchaser who does not ascertain the status of the municipal tax lien risks buying a property on which substantial taxes may be owed, or that is in the process of being sold. The municipality's progress toward the tax sale cannot be impeded by a change in ownership. In the present appeal the change of ownership from the numbered company to the Bank, and from the Bank to the Barrys, occurred independently of, but nevertheless subject to the exercise of the municipality's statutory rights under the **Assessment Act**. The Bank and the Barrys both acquired their title during the redemption period; each could have redeemed the property until February, 1997. Neither could have objected to the issuance of the tax deed at the end of the redemption period. Neither did, because they were unaware of what was happening.

[24] As a result, they lost the right to redeem the property. They had no recourse against the issuance of the tax deed, which the municipality was bound by statute to deliver to the tax sale purchasers on demand following the end of the redemption period (s. 160). That degree of constructive notice - but no more - was necessary to give effect to the objective of the **Assessment Act;** the valid sale of property to enforce the payment of

taxes. The purposes of the **Assessment Act** with respect to all relevant previous assessments were fulfilled.

[25] Constructive notice which extends further, creating legal relationships between the assessed owner and the tax sale purchaser, is outside the purposes of the **Assessment Act**, unnecessary, and in my view not provided for. The former owner has been divested of ownership by the municipality, not the purchaser. The purchaser takes title from the municipality, not the former owner. Upon the issuance of the tax deed the processes provided for by the **Assessment Act** have run their course. While registration of the tax sale certificate in the registry of deeds was one of the devices by which notice is given, the **Assessment Act** and not the **Registry Act** was the controlling statute. It does not follow that because the treasurer has performed the statutory duty of registering the tax sale certificate, fixing the property owner with notice that if the property is not redeemed a tax deed may be issued, a **bona fide** purchaser who is a stranger to the proceedings must be deemed to have the same notice they would have under the **Registry Act** if the purchaser had registered his deed.

[26] In **Robertson v. McCarron** (1985), 71 N.S.R. (2d) 34 (N.S.S.C.T.D.) Hallett, J., as he then was, considered the meaning of "actual notice." He stated in § 72 (p. 55):

> The cases have consistently held that if a party claiming under a subsequent deed that is registered before a prior deed to the same lands can prove that he did not have actual notice of the prior conveyance, even though he had constructive notice, he is entitled to the protection of the **Registry Act** (**Ross v. Hunter** (1882), 7 S.C.R. 289 at p. 325).

[27] At § 75 he wrote:

> The next question that comes to mind is actual notice of what? Is it actual knowledge of the deed to the other party or merely that another party has a claim? The law appears to be unsettled. In **Marriott v. Feener**, Ilsley, J., in an *obiter dicta* statement, raised the question but did not have to decide it in that case. However, he concluded by stating that it seems that the Courts of this province have consistently assumed that actual notice of the deed itself was necessary . . . . It would seem to me . . . it is necessary that the actual notice consist of knowledge of the legal claim and not merely facts that upon investigation could lead to such knowledge and that such knowledge would have the quality that an attempt to take in defeasance of that person's right would amount to a fraud. (emphasis in original.)

[28] Hallett, J., was considering the degree of notice that would permit an unregistered claim to defeat a registered instrument under the **Registry**

Act. Here the appellants are seeking to promote a certificate of tax sale into such a registered instrument enjoying the protection of the **Registry Act**. However the certificate is not defined as an instrument; it is registered not under the general authority of the **Registry Act** but because s. 154(6) of the **Assessment Act** requires the registrar to accept it for registration as part of the scheme of that **Act**.

[29] It gives notice not of the existence of a tax deed but merely that steps have been taken in the tax sale process which can lead to the issuance of a tax deed, provided (1) the purchasers demand it and pay the necessary fees (s. 160); (2) the property is not redeemed (s. 157); or (3) the tax sale is not set aside for error, irregularity or other cause (s. 147).

[30] Here, in the absence of actual notice of the tax sale on the part of the Barrys, they had “no actual notice (which) consist(s) of knowledge of the legal claim and not merely facts that upon investigation could lead to such knowledge and that such knowledge would have the quality that an attempt to take in defeasance of that person’s right would amount to a fraud.” (**Roberts v. McCarron**, supra, p. 75.)

[31] Ownership of the property was in the numbered company when the relevant tax sale procedure began, passed through the Bank which was given actual notice presumably as an encumbrancer, and passed to the Barrys who knew nothing about it, although they were represented by a solicitor who relied on a title searcher. It is possible the title searcher missed the tax sale certificate because it referred to the property as Unit No. 208, Halifax County Condominium Corporation No. 116 instead of its correct designation, registered by the declaration on behalf of Halifax County Condominium Corporation No. 116 as Building No. 1, Unit No. 3, Level 1 in that condominium corporation. Having found that the respondents were **bona fide** purchasers for value without notice, Justice Oland did not consider it necessary to engage in a further inquiry as to whether the tax sale and tax deed identified the property, and it is not necessary to do so in determining this appeal.

[32] Until the 1966 amendment which added s. 162, tax sale purchasers were not required to register their deeds. It is that provision which gives relevance to the Barrys' lack of knowledge. In the absence of s. 162 the appellants' tax deed would have been conclusive against the Barrys

despite the appellants' tardiness in registering it, because s. 161 of the **Assessment Act** vests the title in fee simple in the purchaser at the tax sale free from encumbrances.

[33] We have received little guidance as to what circumstances prompted the enactment of s. 162 in 1966. Charles W. MacIntosh, Q.C., author of *Nova Scotia Real Property Practice Manual*, offers a glimpse of the circumstances prevailing at that time in a paper entitled **Tax Deeds Revisited**. He states:

> From about 1960 until 1978 there was general agreement among property practitioners that the statutory provisions as to conclusiveness of a tax sale deed meant what they said, and that a tax deed cured all past title defects and commenced a new root of title.

[34] The view that a tax deed was conclusive changed with **Devereaux and Robinson v. Saunders** (1978), 26 N.S.R. (2d) 283 which held that when a municipality erroneously assesses lands owned by one person in the name of another and proceeds to sell the lands at a tax sale, the resulting deed did not deprive the true owner of title. Thereafter prudent solicitors found it necessary to inquire as to the interest the person

assessed had in the property sold for taxes.

[35] It is reasonable to consider that s. 162 was intended to do what it appears to be intended to do; to impose a requirement for registration on the grantee of a tax deed. The recorded tax sale certificate leaves title to the property in a state of considerable uncertainty which could continue indefinitely, until the treasurer recorded a certificate of discharge after redemption (s. 157(4)), or until the grantee chose to demand and register the tax deed. If the grantee died or the deed were lost only to resurface years later after competing interests had developed, it is not difficult to imagine unfortunate consequences. The three-month window for registration by the tax sale purchaser provided by s. 162 appears as a reasonable means of remedying such mischief.

[36] As Justice Oland suggested, that remedy would be frustrated if the mere registration of the tax sale certificate by the treasurer as a step in the tax sale procedure had the same effect as actual registration of the tax deed under the **Registry Act**. Tax sale purchasers could neglect registration of their deeds with impunity. Section 5 of the **Interpretation**

Act requires that s. 162 must be interpreted to ensure the attainment of its objects.

[37] In determining that the notice referred to in s. 162 is actual notice and not constructive notice, Justice Oland stated:

> If that registration constituted constructive notice, Section 162 would be meaningless. There could never be a *bona fide* purchaser for value without notice, nor a situation where that section could apply. This result is contrary to the rule of statutory interpretation.

[38] Justice Oland considered the appellants' argument that s. 162 is to apply only to assist persons who purchase more than 15 months after the tax sale, so that they may safely do so with regard to that sale. She conceded the argument "has certain attraction."

> As it is indeed unlikely that a person would purchase property from the owner during that period in the hope that the purchaser, at a tax sale, [would] fail to register in time, and he would acquire title. Nevertheless, a particular fact of the case at hand come[s] within the wording of Section 162, and that provision does not stipulate that its benefit is reserved for persons purchasing after the expiration of the 15 month period. In summary, then, I find that the Barrys were *bona fide* purchasers of value without notice, under Section 162 of the **Assessment Act**.

[39] The appellants advance no authority for the proposition that s. 162 benefits only **bona fide** purchasers who acquire title 15 months after the tax sale, arguing only that it is supported by the context of the **Act**. The respondents answer that this interpretation is contrary to the ordinary meaning of the language of the provision. If the legislature had intended s. 162 to apply only to **bona fide** purchasers who acquired title 15 months after the tax sale, it would have been a simple matter to say so.

[40] Prior to the enactment of s. 162, s. 161 was the culminating provision of the tax sale portion of the **Assessment Act**. The legislature may therefore be presumed to have taken into account all aspects of all relevant provisions, the full context of the **Act,** in setting forth the sweeping declarations as to the validity and effect of tax deeds contained in s. 161. The appellants' context argument loses much of its force because s. 162, a later amendment, is to be construed "notwithstanding s. 161", thus overriding its effect.

[41] I would agree with Justice Oland when she states:

> In summary, then, I find that the Barrys were *bona fide* purchasers [for] value without notice, under Section 162 of the **Assessment Act**. The Plaintiffs, having failed to protect themselves by registering the Tax Deed, within 15 months after the tax sale, they have lost their priority to claim title to the property, as against the Barrys. The Plaintiffs' Tax Deed to the property is void, as against the Barrys.

[42] I would dismiss the appeal.

[43] Increased costs were awarded against the appellants as plaintiffs at trial because they had refused settlement offers. The appellants abandoned a ground of appeal with respect to costs at trial, but it is necessary to determine costs on the appeal. Additional defendants, respecting whom Justice Oland dismissed the appellants' claims, apportioning some of the costs, were not parties to the appeal. In a separate hearing as to costs Justice Oland determined the amount involved to be $43,000., the amount the Barrys paid the Bank when they purchased the property. Under Scale 3 of Tariff A the Barrys' costs at trial would have been $4,125. on $40,000. if they had been the only defendants. I would fix costs on the appeal at 40 per cent of that amount rounded to $1,600.

Freeman, J.A.

Concurred in:

Glube, C.J.N.S.

Chipman, J.A.