IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Romad Developments Ltd. v. Nova Scotia (Assessment), 2008 NSSC 260

Date: 20080908
Docket: 295014
Registry: Kentville

Between:

Romad Developments Limited

Applicant

v.

Nova Scotia (Director of Assessment) and
Town of Wolfville

Respondent

Judge:	The Honourable Justice Gregory M. Warner
Heard:	June 17 and July 17, 2008 in Kentville, Nova Scotia
Counsel:	Sharon Cochrane, Counsel for the Applicant Valerie Paul, Counsel for the Respondent

By the Court:

[1] The Applicant ("Romad") applies for (a) an order in the nature of *certiorari* to quash a decision of the Regional Assessment Appeal Court dismissing its assessment appeal and for an order for *mandamus* directing the Court to hear the appeal, or (b) determination of the question relating to assessment pursuant to Section 94(1) of the *Assessment Act*.

[2] Essentially the issue is the meaning of Subsection 21(2) of the *Assessment Act* - which requires a property owner to answer and complete a request by an assessor for relevant information required by him to make a proper assessment of a property, sign it and "***return it to the assessor*** so answered and completed" within thirty days. In this case, Romad mailed the answer by ordinary mail to the assessor at the proper address, but the assessor has no record of receipt. The question is whether this constitutes compliance with 21(2). By section 23, a person who "neglects, refuses or fails to. . . answer, complete and return the [information]" is guilty of an offence under the *Act*, and loses his or her entitlement to appeal from the assessment.

A. Background

[3] The evidence in this application consists of affidavits of Wendy Kinsman, Nicole DeEll (assistant at Kimball Brogan) and Derrick J. Kimball (principal of Romad) for the Applicant, and Phillip Schofield (acting commercial manager for the Respondent). None of the affiants were cross-examined.

[4] On May 20, 2005, Assessment Services sent by registered mail to Romad c/o Kimball & Associates 121 Front Street Wolfville, a request for information with an attached Statement of Income and Expense form for the property owner to complete and return to the Director. The request related to an 8-unit apartment building in Wolfville, Nova Scotia. The request was for information for the year ending December 31, 2004, which information was for use in respect of the 2007 assessment roll. Mr. Schofields states those requests for information was sent to Romad in 2002, 2003, 2004, 2005, 2006, and 2007; there is no record that the requests for information were returned in 2002, 2003, 2004, and 2005 (the latter being the reply in question); but replies were received in 2006 and 2007.

[5] Romad received the request on May 24, 2005. Wendy Kinsman, bookkeeper for Romad, completed the Property Income and Expense questionnaire form, signed it and caused it to be mailed by regular mail on May 26, 2005. Specifically she swears that she placed it in the office's outgoing mail box, for the administrative assistant to personally deliver it, as part of her daily duties of picking up and dropping off mail, to Canada Post at Wolfville, and made a note of the fact of delivery on her copy of the letter from the assessor. Ms. DeEll swears that she was at work on May 26 and May 27, and would have delivered and posted at Canada Post the reply on May 26 (if it was placed in the outgoing mail box by 11:50 a.m.) or May 27 (if Ms. Kinsman placed it in the outgoing mail box after 11:50 a.m.). The information form was not returned to the sender by Canada Post.

[6] Based on the uncontradicted affidavits, I find that the reply was mailed by regular mail to the assessor on May 26 or May 27, 2005, and was not returned to Romad or received by the assessor.

[7] On February 13, 2007, Romad appealed its assessment. The Director objected to the appeal on the basis that Romad, having failed to provide the information in response to their request, was not entitled to appeal (Section 23(b)). The Regional Assessment Appeal Court ("RAAC") accepted the property owner's affidavit that it had mailed the requested information but found that putting the information in the mail did not establish compliance with Section 21(2).

B. Jurisdiction

[8] Subsection 94(1) reads that ". . . any person assessed may apply on originating notice to the Supreme Court . . . for the determination of any question relating to the assessment, except a question as to persons alleged to be wrongfully placed upon or omitted from the roll or assessed at too high or too low a sum or whose property is wrongly classified." The Applicant and Respondent agree that the question before this Court for determination relates to an assessment, and is not an "excepted" question.

[9] *Certiorari* and *mandamus* are prerogative writs usually reserved for circumstances where no statutory remedy exists.

[10] Based on the agreement of the parties that this Court has jurisdiction to determine the question pursuant to Section 94, the application for *certiorari* and *mandamus* is not dealt within this decision.

C. Meaning of "return" in s. 21(2)

[11] Section 21 of the *Act* reads as follows:

> "**Request for information**
>
> 21 (1) Every person to whom a request referred to in Section 20 is delivered shall provide the information requested.
>
> (2) If a form has been delivered to him, he shall answer and complete it with a true statement of the particulars thereby required, and shall sign the same **and shall**, within thirty days after receipt thereof, **return it to the assessor** so answered and completed." (Emphasis added)

C.1. Applicant's Position

[12] In its first brief, the Applicant took issue with the decision of James L. White, the Regional Assessment Appeal Court Adjudicator, who determined that proof that the required information was mailed by the tax payer did not satisfy the burden in Section 21(2):

> "The onus is on the taxpayer to show the required information was given, furnished or provided to the department. The taxpayer has shown, by way of affidavit, that the requested material was mailed to the assessment department. The question becomes whether this has met the burden of proof.
>
> The purpose of the legislation is the orderly, fair, rational and systematic valuation of property values for the purposes of taxation. If taxpayers could avoid the harsh consequences of S. 23 by simply arguing, in effect, that "the form is in the mail," the requirements of that section would be largely neutralized. Therefore it seems clear proof the forms were mailed is simply not enough to meet the common sense burden of Section 20. [sic, 21]"

[13] Romad submits that the *Act* does not require personal service. While the Director must deliver the request for information by registered mail addressed to the person at his/her/its last known address (s. 20(3)), there is no such requirement in Subsection 21(2).

[14] *Civil Procedure Rule 10.12*, which applies to proceedings in the Court of Appeal and Supreme Court, permits service by ordinary mail, except where the Rules specifically require personal service.

[15] In its second pre-hearing memorandum, Romad submits that the silence in Section 21 as to the method of delivery, in contrast to the requirements of Section 20, means that regular mail is sufficient.

[16] It notes that Section 53 of the *Act* respecting the service of Notices of Assessment by the Director on the property owner permit service to be either in person or by leaving it at the assessed owner's residence or work, or posting it on the assessed property, or mailing it postage pre-paid (that is, by regular mail) to the assessed owner's last known address.

[17] In ***Yasmine David* v. *Director of Assessment*** 1999 NSUARB 95, the taxpayer acknowledged receipt of two of three Notices of Assessment served by ordinary mail. A late appeal by the taxpayer of the assessment not received by her was dismissed on the basis that the appeal period commences on the date of mailing "even if the person never receives the notice".

[18] Romad argues that Section 62 and 63 are silent as to the matter of service of a notice of appeal from an assessment, suggesting service may be by regular mail.

[19] Romad repeats that *Civil Procedure Rule 10*, while not applicable to Assessment Appeals, is persuasive on the issue of a justification for not requiring any more than ordinary mail to effect service.

[20] The Applicant submits that the use of the more formal words “serving” “served” and “serve” in Section 53 of the *Act* in relation to notices of assessment, which notices are on their face more formal and serious than requests for information, contrasts with the use of the ordinary terms “delivered” and “returned” in Sections 20 and 21 of the *Act* respecting requests of information. The latter terms do not connote a greater obligation than the term “serve” and may connote a lesser obligation.

[21] The Applicant argues that in the absence of an explicit statutory requirement setting out the method for service of a proper return, the obligation of the taxpayer should not be more onerous than the requirement on the Department respecting service of notices of assessment, nor more onerous than the requirements of the *Civil Procedure Rule* for service in legal actions. Requiring personal service would be inconsistent with the term “service” in the *Act* generally.

[22] The Applicant argues that the taxpayer suffers a prejudice by a procedure that imposes on the taxpayer a higher standard of service in replying to requests for information than is required of the Director in serving a notice of assessment on the taxpayer.

C.2 Respondent’s Submissions

[23] Every enactment shall be deemed remedial and interpreted to ensure attainment of its object. See *Interpretation Act*, Section 9(5).

[24] The relevant sections of the *Act* should be read in “plain language terms” and mean exactly what they say.

[25] Subsection 20(3) requires the Director to deliver the request for information by registered mail. The fact that subsection 21(2) does not require a return by registered mail means that other forms of delivery may be considered but the use of the words “shall” in Section 21, taken in combination with the consequences for failure to return the information, suggests that the object of the legislation is clearly to mandate the actual receipt of a reply.

[26] “A mere intent to file” or “hopeful mailing of documents” will not achieve the objects of the *Act*. Only actual receipt would serve “the efficacy and promotion of [the legislation’s] purpose”.

[27] The Respondent submits that the mode by which the information is conveyed is of little consequence. Delivery by mail, registered mail, courier, hand-delivery, facsimile or e-mail should all suffice if actually received by the Assessor.

[28] The Respondent cites ***Quebec* v. *Notre-Dame de Bonsecours*** [1994] 3 S.C.R. 3 and ***Nova Scotia* v. *Emscote Limited***, 2001 NSCA 92.

[29] In the former decision, at ¶ 38 of the Carswell edition (1994 CarswellQue 86), the Court summarized the rules for interpretation of taxation statutes as follows:

> "38 The rules formulated in the preceding pages, some of which were relied on recently in *Symes* v. *Canada*, [1993] 4 S.C.R. 695, [1994] 1 C.T.C. 40, 94 D.T.C. 6001, may be summarized as follows:
>
> -- The interpretation of tax legislation should follow the ordinary rules of interpretation;
>
> -- A legislation provision should be given a strict or liberal interpretation depending on the purpose underlying it, and that purpose must be identified in light of the context of the statute, its objective and the legislative intent: that is the teleological approach;
>
> -- The teleological approach will favour the taxpayer or the tax department depending solely on the legislative provision in question, and not on the existence of predetermined presumptions;
>
> -- Substance should be given precedence over form to the extent that this is consistent with the wording and objective of the statute;
>
> -- Only a reasonable doubt, not resolved by the ordinary rules of interpretation, will be settled by recourse to the residual presumption in favour of the taxpayer."

[30] In the latter decision, the issue before the Court of Appeal was the interpretation of a section of the *Act* that required the property owner to "serve notice" on the Regional Assessment Appeal Court and the Director of Assessment within seven days after service of a Notice of Dissatisfaction. The Respondent had appealed its Assessment. The Director responded by serving a Notice of Reassessment at a higher value than the original assessment appealed from, pursuant to Section 68(4). That subsection required service of the Amended Notice of Assessment by the Director by personal service or registered mail. The Reassessment Notice was received by the taxpayer on December 24. The same day the owner mailed a Notice of Dissatisfaction by ordinary mail. The Notice was received on January 4, more than seven days after receipt of the Reassessment Notice. Similar to this case, while Section 68(4) required service on the owner by personal service or registered mail, Section 68(5) was silent as to the method of service of the Notice of Dissatisfaction by the owner.

[31] In ***Emscote***, there was no issue that the RAAC received the Notice. In that context, at ¶ 23, the Court accepted that the term "serve" in Section 68(5) connotes receipt by the RAAC: "It would be unwieldly, for example, for the Regional Assessment Office to have to deal with appeals that were "in the mail" but not received by the Regional Assessment Office."

[32] In ***Emscote***, the Director acknowledged the Notice was mailed and received (just late); in the case at bar, the Director does not deny that it was mailed but denies that it was received.

C.3 Analysis

[33] Any ambiguity as to whether taxation statutes are to be interpreted as all other statutes - that is, remedially or purposively, was resolved by ***Quebec* v. *Notre-Dame de Bonsecours***.

[34] After reviewing Supreme Court decisions that reflected the change in the Court's interpretative policy for taxation statutes from that of strict construction against the government, except where it "relates only to the clarity of the wording of tax legislation" (¶ 28), to a purposive approach, the Court effectively adopted Elmer A. Driedger's formulation of the modern approach to statute interpretation.

[35] In a more recent decision, ***Bell ExpressVu Limited Partnership* v. *Rex*** 2002 SCC 42, the Court held that:

a) this approach recognizes the important role that context must play in construing the words of a statute (¶ 27);
b) other principles, such as strict construction of penal statutes and "Charter value" approaches, only enter the picture where an ambiguity exists (¶¶ 28 and 53-67);
c) by necessity, an ambiguity only arises if, after consideration of the entire context of a provision, it is reasonably capable of multiple interpretations. An ambiguity must be real and the words reasonably capable of more than one meaning (¶ 29); and,
d) the interpretative factors laid out by Driedger need not be canvassed separately in every case, and are closely related and interdependent (¶ 31).

[36] For the Court, Iacobucci, J., grouped his analysis of the interpretative factors in that case into two headings: first, interpretation of the grammatical and ordinary sense of the words of the provision; and, second, interpretation within the context of the broad legislative scheme, the rest of the statute, and related legislation.

Words in their grammatical and ordinary sense

[37] Application of the ordinary dictionary definition of the word "return" as a transitive verb is not helpful. For example, in Merriam-Webster On-Line Dictionary, "return" means: "to bring, send, or put back to a former or proper place" or "to send back". In MSN Encarta On-Line Dictionary it means: "put something back: to put, bring, send or take something back to where it came from" or "to give a response".

[38] The ordinary or grammatical use of the word does not necessarily connote receipt.

[39] Reference to the conceptual reasoning for assigning the risk (by analogy, the mischief) created by the physical and temporal separation of the sender and recipient in contract law - the "mailbox" or "postal acceptance" rule, provides no greater clarity. See *Canadian Contract Law*, First Edition (Butterworths, 2006) by John Swan, pages 202-205; *The Law of Contracts*, Fifth Edition (Canada Law Book, 2005) by S.M. Waddams, ¶¶ 98-104, especially ¶ 104; and *The Law of Contract*, Fifth Edition (Carswell, 2006) by G.H.L. Fridman, pages 65-70.

Words in the context of the *Assessment Act*

[40] The fact that no method for return of the requested information is contained in Subsection 21(2) does not, as the Respondent acknowledged, connote delivery by registered mail, the express minimum threshold for proof of delivery to the Applicant of the request for information under Subsection 20(3).

[41] Other sections of the *Assessment Act* that make reference to delivery or service of documents does not, in all instances, call for personal service or registered mail or some other method of delivery that provides the sender with immediate knowledge of the fact of receipt by the addressee. For example, Section 53 of the *Act* provides for delivery of Notices of Assessment by ordinary mail to the last known address of the tax payer. Other sections are silent on the manner of delivery or service.

[42] A search for the meaning of "return", in the context of the other provisions of the *Assessment Act*, does not lead to the inevitable conclusion that fulfilment of the condition of delivery requires proof of receipt, or, more important, a guarantee of receipt.

The scheme of the *Assessment Act*

[43] The Respondent argues that the scheme of the *Act* is frustrated if all the tax payer had to do was say they put the reply in the mail.

[44] The Applicant argues that the purposes of the legislation would be equally frustrated if tax payers lost their right of appeal by reason of the failure of the Director to ensure delivery of Notices of Assessment to the tax payer, but only being required to say that the notice was put in the mail. Section 53 simply requires delivery by ordinary mail to the last known address.

[45] The purpose of the legislation is not served in either instance. The *Act* contains no express statement of its purpose, and Counsel did not brief the point. This decision is based on the premise that the object of the *Act* is to provide a scheme for the classification, valuation, and exemption of property for municipal taxation that is fair and falls uniformly upon all such property.

[46] Of particular significance in this analysis, where the Court (and the RAAC) accept that the reply was put in the mail but was not received, is that Section 23 of the *Assessment Act* makes it an offence, punishable by a fine or imprisonment, to neglect, refuse or fail to return the form requested in Section 20, in addition to the denial of the right to appeal the assessment. The standard of clarity for a provision of a statute that creates an offence is higher than when no offence is created.

[47] There appears to be no adverse consequence to the Director in the event that a notice of assessment sent by ordinary mail is not received by the taxpayer. Furthermore, failure of the notice to reach the taxpayer may frustrate the object of a fair and uniform distribution of the property tax burden.

[48] Romad has established, at least on a balance of probabilities, that it mailed the reply on May 26, 2005. This is not a case of a taxpayer simply saying "it was in the mail". It has responded to the evidentiary burden on it to establish that the reply was posted to the assessor by ordinary mail, postage prepaid, and not returned to the sender.

[49] If the clear language of Section 53 of the *Assessment Act* does not impose upon the assessor the obligation of establishing receipt by the taxpayer of an important document such as a notice of assessment, with the adverse concomitant consequences to the tax payer, it is hardly just or equitable to infer such as strict obligation on the taxpayer, in the absence of greater clarity in the wording of Section 21(2).

[50] This Court had no evidence before it with respect to the number of notices of assessment issued and delivered annually, nor the number of requests for information issued annually, nor the number of replies filed annually, upon which to assess the consequences on the respective parties by imposing an obligation on the taxpayer under s. 21(2) that was greater than that imposed upon the assessor in respect of those circumstances where ordinary mail is expressly stated, in legislation, to be sufficient to fulfill the purposes of the *Act*.

[51] Gonthier, J., at ¶ 28 in ***Quebec* v. *Notre-Dame de Bonsecours***, recognized that the rule of strict construction continues to exist, but "relates only to the clarity of the wording of the tax legislation".

[52] In ***Bell ExpressVu***, at ¶¶ 28 and 29, Iacobucci, J., wrote that external interpretive aids, such as the strict construction principle, receive application only where there is a real ambiguity; that is, where the words are reasonably capable of two or more plausible readings, each equally in accordance with the intentions of the statute.

[53] The issue before this Court could, and can, be easily resolved by express legislative language. The method of delivery is not expressed in the subsection. Recognizing on the one hand the mischief that can be created to the assessment process by dishonest taxpayers, and on the other hand the serious quasi-penal and financial consequences that flow from a taxpayer trusting the mail (that is, the ordinary mail), I doubt whether the legislative intent of the

Assessment Act was to create an offence punishable under the *Act*, or to deny a property owner the right to have its property assessed fairly and uniformly, when the ordinary and plain language of the section of the legislation does not prevent a reply by ordinary mail and where, having established that the reply was posted at Canada Post by ordinary mail and was not returned, it cannot establish at what place the reply might have ended up.

[54] In summary, to the extent that (a) some provisions of the *Assessment Act* expressly provide for the method of delivery, some of which ensure receipt by the addressee and others of which do not, (b) some provisions are silent as to the method of delivery, and (c) all methods of delivery have a consequence upon the legislative purpose of making fair and uniform assessments of property for taxation purposes, the absence of any express method of delivery in Section 21(2) creates a real ambiguity in the entire context of the legislation. It leads to the conclusion that return by ordinary mail conforms to both the intent of the legislation and the ordinary and plain meaning of Subsection 21(2).

D. Remedy

[55] By Subsection 94(6) of the *Act*, this judgment is binding up and shall be given effect by the Regional Assessment Appeal Court.

[56] I find that the RAAC's determination that Romad was not entitled to appeal from the assessment of its property for the year 2007 was made in error, and that Romad is entitled to have the Regional Assessment Appeal Court hear its appeal.

[57] If the parties cannot agree on costs, the Court will receive written submission.

J.