IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Admiral Recycling Ltd. v. Inverness (County), 2006 NSSC 93

Date: 20060327
Docket: SPH 261456
Registry: Port Hawkesbury

Between:

Admiral Recycling Limited

Applicant

v.

Municipality of the County of Inverness

Respondent

Revised decision:	The docket number and registry have been corrected according to the erratum released on April 7, 2006.
Judge:	The Honourable Justice John M. Davison
Heard:	March 3, 2006, in Port Hawkesbury, Nova Scotia
Written Decision:	March 27, 2006
Counsel:	M. Louise Campbell, for the Applicant Harold A. MacIsaac, for the Respondent

By the Court:

[1] This was an application in chambers requesting a determination of a question of law involving interpretation of a statute with respect to taxation on real property and seeking an order which reflected the applicant's view of the answer to the question.

[2] The question which is set out in the application reads as follows:

> Was the Municipality correct in its interpretation of Section 131 of the *Municipal Government Act* that it had to apply the tax payment submitted by Admiral Recycling Limited to the business occupancy taxes owed by Admiral Tavern Company Limited rather than to the real property taxes as directed by Admiral Recycling Limited, in light of Section 133(8) and Section 162 of the *Municipal Government Act.*

[3] The form of the order the applicant seeks from the court is set out in the application and contains the following terms:

i. Restraining the Municipality of the County of Inverness from selling the property assessed to Admiral Recycling Limited bearing Assessment Account No. 0026646 until determination of this question.

ii. Directing that the Municipality of the County of Inverness apply funds in the amount of $8,045.15 to real property taxes owing on property assessed under Assessment Account No. 0026646.

iii. Directing that any interest which has accumulated on outstanding property taxes of Admiral Recycling Limited as it relates to the above noted payment be written off.

iv. In the alternative an Order directing the Municipality of the County of Inverness refund to Admiral Recycling Limited funds in the amount of $8,045.15.

v. Costs of this action.

[4] Effectively the application seeks a decision on a point of law. It involves interpretation by the court of statutes and is properly brought under Civil

Procedure Rule 25. This requires an agreed statement of fact. In *Curry v. Dargie* (1984), 62 N.S.R. (2d) 416 (N.S.C.A.), MacDonald J. A. stated at p. 430:

> To my mind the only proper method of having the issue of Crown immunity determined in this case before trial was on a proper application under Rule 25. This rule, however, appears to be applicable only where the parties agree to submit a question of law to the court based upon an agreed statement of fact - *McCallum v. Pepsi Cola Canada Ltd. et al.* (1974), 15 N.S.R. (2d) 27; 14 A.P.R. 27.

[5] The parties have agreed on facts and the statement of agreed facts is set out completely as follows:

1. On July 20, 2005, the Municipality of the County of Inverness pursuant to Section 138 of the *Municipal Government Act* gave a preliminary notice of tax sale to Admiral Tavern Company Limited of its property at Port Hood, Nova Scotia, PID No. 50031608. Admiral Tavern Company Limited was the owner and operator of a tavern business on the property.

2. On November 1, 2005 Admiral Tavern Company Limited, a body corporate, conveyed property bearing PID No. 50031608 and Assessment Account No. 0026646 by Warranty Deed recorded on November 4, 2005 to Admiral Recycling Limited, a body corporate.

3. On November 1, 2005 the taxes owing by Admiral Tavern Company Limited on property bearing PID No. 50031608 and Assessment Account No. 0026646 were real property taxes of $13,602.07, being principal of $11,405.72 and interest of $2,196.36. Admiral Tavern Company Limited also owed business occupancy taxes of $42,504.06, being principal of $22,331.50 and interest of $20,172.56.

4. The sole director, officer and recognized agent of Admiral Recycling Limited is also a director, officer and recognized agent of Admiral Tavern Company Limited.

5. The Municipality of the County of Inverness had accepted payment from Admiral Tavern Company Limited in previous years which payments were applied to property taxes of Admiral Tavern

Company Limited when there was business occupancy tax owed by Admiral Tavern Company Limited.

6. On November 7, 2005 Admiral Recycling Limited forwarded a cheque in the amount of $8,045.15 to the Municipality of the County of Inverness directing as follows:

"I would ask that this amount be applied against outstanding property taxes re lands recently transferred to Admiral Recycling Limited bearing Assessment Account No. 0026646."

7. The Municipality responded that is was obliged, pursuant to Section 131 of the *Municipal Government Act* to reapply the funds first against the business occupancy taxes owed by Admiral Tavern Company Limited before paying the real property taxes.

8. After some exchange of correspondence, the Municipality, after giving notice that it was going to do so, but without permission of Admiral Recycling Limited applied the funds toward the business occupancy taxes owed by Admiral Tavern Company Limited.

9. On November 29, 2005 the Municipality gave a 60 day Notice of Intent to sell property bearing PID No. 50031608 and Assessment Account No. 0026646 for taxes to Admiral Tavern Company Limited and Admiral Recycling Limited pursuant to Section 140 of the *Municipal Government Act ,* the proposed date of the tax sale being February 28, 2006.

10. The parties have agreed to refer the following question to the Court for an answer:

> "Was the Municipality correct in its interpretation of Section 131 of the *Municipal Government Act* that it had to apply the tax payment submitted by Admiral Recycling Limited to the business occupancy taxes owed by Admiral Tavern Company Limited rather than to the real property taxes as directed by Admiral Recycling Limited, in light of Section 133(8) and Section 162 of the *Municipal Government Act."*

[6] It is to be noted from the statement of facts that on November 7, 2005 when Admiral Recycling Limited (referred to as Recycling) forwarded the cheque in the amount of $8045.15 to the respondent it was the owner of the real property at Port Hood, Nova Scotia PID No. 50031608 which had been purchased from Admiral Tavern Company Limited (referred to as Tavern) on November 1, 2005 at which time taxes as described in paragraph 3 of the statement of facts had not been paid.

[7] Since 1998 the legislation which relates to the taxation of real property is contained in the *Municipal Government Act* 1998 c. 18. Prior to that time it was dealt with pursuant to the *Assessment Act R.S.N.S.* 1989 c. 23. The relevant sections which dealt with the collection of rates and taxes and tax sale procedures in the *Assessment Act* were s. 107 to s. 162.

[8] It is the position of Ms. Campbell, counsel for the applicant, that at the time Recycling forwarded the cheque to the respondent it was the owner of the property and the taxes which had accrued as outstanding were the responsibility of Tavern including the business occupancy taxes which pursuant to s. 133(8) of the *Municipal Government Act* does not constitute a lien on the property. S. 133(8) reads.

> Taxes in respect of business occupancy assessments are not a lien upon property.

[9] Notwithstanding no affirmative statement in the *Assessment Act* that business occupancy taxes were not a lien on property, Ms. Campbell submits s. 150 of the Act which refers to "unsecured taxes" supports her assertion. s.150 reads:

> If the owner of land sold for taxes is indebted to the municipality for taxes, water rates, electric power rates or any other rates under this or any other Act not secured by a lien on the land so sold, the Supreme Court or a judge or a local judge thereof may on the summary application of the treasurer order and direct that those taxes, water rates, electric power rates and other rates be paid and discharged out of so much of the purchase money not disposed of under Section 149 as is sufficient to pay and discharge the same or, where insufficient, that the amount not so disposed of be applied in part payment and discharge of the taxes, water rates, electric power rates and other rates, provided that any mortgage, judgment or other encumbrances affecting the property so sold shall have priority over any claim made by a municipality by virtue of this Section. R.S., c.14, s. 167; 1972, c.2, s.23; 1980, c.54, s.3.

[10] In her pre-hearing brief counsel for the applicant states:

> Section 149 referred to in the above noted section provided that the Treasurer shall out of the purchase money paid for a lot deduct the amount of rates and taxes, interest and expenses for which the same is liable and if any balance of the purchase price then remains deposit it forthwith in a chartered bank in the name of the Municipality or an account containing tax sale surpluses only.
>
> Although the legislation in effect prior to the present *Municipal Government Act* does not clearly state that business occupancy taxes were not a lien on the property, the effect of the interpretation of Section 134 which directed that rates and taxes rated or levied in respect of real property constitute a lien on real property meant that business occupancy taxes were not a lien.

[11] Mr. MacIsaac, counsel for the respondent acknowledges s.133(8) of the *Municipal Government Act* indicates taxes on business occupancy are not a lien and he states, in his brief, that the business occupancy assessments are not liens as many businesses do not own the property they use but lease it or rent the property. He states it would "not be fair or reasonable for their business occupancy taxes to constitute a lien upon the property of the land owner".

[12] I agree with the last sentence which Mr. MacIsaac quite properly presents. But I also suggest, with respect, the legislature would not consider it fair or reasonable to require A to pay B's occupancy tax particularly when they state the assessment shall not be a lien.

[13] The respondent's argument is because there was not a lien to assist in collecting business tax, sections were put in the Act "to facilitate the collection of business occupancy taxes against the landowner" and the "main" step was s. 131 of the *Municipal Government Act*. I must point out there was no evidence in the agreement of facts as what intention the legislator had in enacting s. 131. That section reads:

> Partial payment of taxes
>
> 131 (1) Where a person, including a person paying on behalf of another person, pays only a portion of the taxes due, the treasurer shall apply and credit the amount

> (a) firstly, to the payment of any other taxes rated upon the person in respect of business occupancy assessment;
>
> (b) secondly, to the payment of any other taxes that are not a lien on any property; and
>
> (c) thirdly, to the payment of accumulated interest and then the taxes longest in arrears with respect to any real property designated by the person.
>
> (2) Where no real property is designated, the treasurer shall, subject to the priorities listed in subsection (1), apply the amount received to the payment of the taxes longest in arrears.
>
> (3) The acceptance of part payment does not prevent the collection of any interest imposed in respect of non-payment of taxes or an installment of taxes.
>
> (4) Where taxes are paid on behalf of a purchaser of real property, the taxes shall be applied to taxes due with respect to the property designated by the person paying the taxes, including any business occupancy tax owed by the owner with respect to the owner's occupancy of that property.

[14] The respondent's brief refers to other sections in the *Municipal Government Act* but as stated by counsel for the respondent, s. 131 was the main section on which the respondent relies. In my view, the parties are apart because of the differences advanced in their respective interpretations of s. 131(4).

[15] The respondent makes the point that with the reference to "purchaser" the word "owner in the above clause has to be the equivalent of vendor in order for the section to make sense".

[16] The applicant says the word in the section is "owner" and not "previous owner" and the owner was Recycling. The previous owner, Tavern, according to paragraph 3 of the agreed statement of facts owed the business occupancy tax.

[17] Thus there is an ambiguity. As stated by Justice Freeman in *Forbes Chevrolet Oldsmobile Ltd. et al. v. Dartmouth (City) et al* (1996), 148 N.S.R. (2d) 138 at p. 141:

> ...Two reasonable but contradictory interpretations of a statutory provision suggest ambiguity. Ambiguity in the interpretation of a statute must be decided in favour of the taxpayer.

[18] Mr. MacIsaac argues that finding an interpretation favorable to the taxpayer is only significant when attempting to consider clauses which impose a tax. I am afraid I cannot agree. As stated by Cooper, J. A. In *Harvard Realty Ltd. v. Director of Assessment and City of Halifax* (1979), 35 N.S.R. (2d) 60 at p. 71:

> I add that if there is ambiguity in s. 84(2) that ambiguity should be resolved in favour of the respondent. We are here dealing with a statute which although not imposing a tax by its own terms nevertheless provides the basis for taxation. We were referred to a number of authorities holding that, as put by Brodeur, J., in *Foss Lumber Co. v. The King* (1912), 8 D.L.R. 437, Supreme Court of Canada, at p. 447:
>
> > ...a statute imposing a tax should always be strictly construed and that, in case of doubt, the tax should not be levied...
>
> Among the other cases cited to us I need only mention further *Shaw v. Minister of National Revenue*, [1939] 4 D.L.R. 81, Supreme Court of Canada, and *Ottawa v. Kemp*, [1931] 4 D.L.R. 412, Ontario Court of Appeal, at p. 415, where Masten, J.A., approved a passage from *Craies' Statute Law*, 3rd ed., p. 105:
>
> > 'Express and unambiguous language appears to be absolutely indispensable in statutes passed for the following purposes:- (1) Imposing a tax or charge, ...'
>
> It seems to me that these authorities should be applied in construing the Act here; it results in tax being imposed upon owners of property as an indispensable step in the taxing process.

[19] The act referred to was the *Assessment Act*. The head note of the case made references to the paragraph which contained Justice Cooper's comments, the author of the head note set out "the Nova Scotia Court of Appeal stated that any ambiguity in the *Nova Scotia Assessment Act* should be resolved in favour of the taxpayer." This, of course, is not authority on which I rely but independently I believe it is the conclusion reached by the Nova Scotia Court of Appeal in the *Harvard Realty* case.

[20] The subject of interpretation of statutes involving taxation of members of the public was considered in Chapter 17 of the text Sullivan and Driedges on the Construction of Statutes 4th ed. The authors referred to *Royal Bank of Canada v. Saskatchewan Power Corp.* (1990), 73 D.L.R. (4th) 257 and the words of Vancise, J.A., at p. 264:

> Historically, the courts took a literal approach to revenue statutes to determine legislative intent. The written expression almost exclusively prevailed over legislative content and purpose. The literal interpretation, coupled with the restrictive interpretation, placed the onus on Parliament to express itself clearly, and if it did not, the benefit of the doubt went to the taxpayer.

[21] The authors state at p. 443:

> Under the doctrine of strict construction, statutes that impose a tax on the person or property of a subject are strictly construed in favour of the subject and against the Crown. Strict construction of tax legislation amounts to a presumption in favour of the taxpayer for its effect is to resolve doubts concerning the subject's liability in favour of the subject.
>
> A recent statement of the strict construction principle is found in the judgment of the Supreme Court of Canada in *Morguard Properties Ltd. v. City of Winnipeg*. Speaking for the Court, Estey J. began with a passage from the judgment of Ritchie J. in *Nicholls v. Cumming.*
>
> > When a statute derogates from a common law right and divests a party of his property, or imposes a burthen on him, every provision of the statute beneficial to the party must be observed. Therefore it has been often held, that acts which impose a charge or a duty upon the subject must be construed strictly, and ... it is equally clear that no provisions for the benefit or protection of the subject can be ignored or rejected.

[22] Justice Estey speaks on the duty on the legislature to expressly set out language which "adversely affects a citizen's right, whether as a taxpayer or otherwise" and he states at p. 444:

> ... The Legislature has complete control of the process of legislation, and when it has not for any reason clearly expressed itself, it has all the resources available to correct that inadequacy of expression. This is more true today then ever before in our history of parliamentary rule.

[23] The authors point out that there has evolved a new approach in interpreting fiscal legislation and refers to *Stubart Investments Ltd. v. R*. (1984), 84 D.T.C. 6305. They indicate this legislation is to be interpreted in the same manner as other legislation to give effect to the intention of the legislature. The authors refer to *Antosko v. Canada,* [1994] 2 S.C.R. 312 and the words of Justice Iacobucci J. at p. 326:

> While it is true that the courts must view discrete sections of the *Income Tax Act* in light of the other provisions of the Act and of the purpose of the legislation, and that they must analyze a given transaction in the context of economic and commercial reality, such techniques cannot alter the result where the words of the statute are clear and plain and where the legal and practical effect of the transaction is undisputed ...
>
> (emphasis added)

[24] Under the heading "Presumption in favour of the taxpayer" the authors of the text stated at p. 450:

> In both *Stubart* and *Golden*, Estey J. referred to the demise of strict construction. However, it continues to be available to the courts as a presumption of last resort. In *Johns-Manville Canada Inc. v. The Queen*, Estey J. ruled that a "residual presumption" in favour of the taxpayer is consistent with the "basic concept in tax law that where the taxing statutue (sic) is not explicit, reasonable uncertainty or factual ambiguity resulting from lack of explicitness in the statute should be resolved in favour of the tax payer.

[25] It is clear there exists an ambiguity in s. 131(4). Counsel for the respondent seems to recognize that when he suggests the word "vendor" as a substitute for "owner" in order to "make sense" of the situation. Counsel for the appellant relies on the word "owner" for its plain meaning which is not "previous owner".

[26] It is also clear that notwithstanding the movement away from strict interpretation of fiscal statutes the comment of Justice Freeman in the *Forbes*

Chevrolet case that where there is an ambiguity one must favour the taxpayer is still a true statement of the law.

[27] For the forgoing reasons I would find in answer to the question put to the court the municipality was not correct in its interpretation of s. 131 of *Municipal Government Act*. The interpretation advanced by the municipality on that section effectively establishes a lien on the property when there are outstanding business occupancy taxes which is in conflict with s. 133(8).

[28] I would also direct in the form of an order:

(1) The Municipality of the County of Inverness shall not sell the property assessed to Admiral Recycling Limited bearing Assessment Account No. 0026646 until final determination of the question.

(2) The Municipality of the County of Inverness shall apply funds in the amount of $8,045.15 to real property taxes owing on property assessed under Assessment Account No. 0026646.

(3) Any interest which has accumulated on outstanding property taxes of Admiral Recycling Limited as it relates to the payment of $8,04515 be "written off".

(4) The applicant shall recover cost of this application from the respondent in the amount of 1,500.00.

Davison, J.