S.C.A. No. 02719

NOVA SCOTIA COURT OF APPEAL

Cite as: Nova Scotia (Attorney General) v. Sobeys Inc., 1993 NSCA 18

Jones, Hallett and Freeman, JJ.A.

BETWEEN:

THE ATTORNEY GENERAL OF NOVA SCOTIA, representing Her Majesty the Queen for the Appellant - and - SOBEYS INC., a body corporate (formerly known as Sobeys Stores Limited) for the Respondents	)	John D. Wood for the appellants T.A. Berry and David Miller for the Respondents Appeal Heard: February 1, 1993 Judgment Delivered: February 15, 1993)

THE COURT: Appeal allowed, the decision and order of the trial judge set aside and the action dismissed with costs to the Crown in the amount of one thousand dollars per reasons for judgment of Jones, J.A.; Hallett and Freeman, JJ.A. concurring.

JONES, J.A.:

This is an appeal from the decision of the Honourable Mr. Justice Nathanson of May 5, 1992, in which he found that purchases of equipment and services for the respondents's meat markets made between 1983 and 1987 were exempt from provincial sales tax because they were used in manufacturing or processing.

The facts are set out in the learned trial judge's decision as follows:

> "Sobeys claims restitution of provincial sales tax which it paid between 1983 and 1987 in regard to certain equipment and services purchased for use in meat, fish, and bakery departments of its supermarkets. Consequently, it seeks a refund in the amount of $103,405.02 tax together with interest thereon.
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> Sobeys owns and operates supermarkets in Nova Scotia. Between 1983 and 1987, it purchased equipment and repair services from Hobart Canada Inc. for use in its meat, fish and bakery departments, some of which were combined and some of which were separate. It paid provincial sales tax of 10% with respect to all such equipment and services believing that it was required to do so by the provisions of the **Health Services Tax Act**, R.S.N.S. 1967, Ch. 126, as amended. In or about 1986, it became aware of the decision in **Hobart v. Minister of National Revenue** (1985), 61 N.R. 233 (F.C.A.) which held that certain Hobart equipment purchased by Loblaws, a retailer, in carrying out butchery operations in the meat rooms of its supermarkets, was exempt from federal sales tax under the **Excise Tax Act**, R.S.C. 1970, Ch. E-13. Sobeys considered that the Hobart equipment which it purchased for use in its meat departments should be exempt from provincial sales tax because the equipment was used for the production of goods for sale which were exempt from tax under the **Health Services Tax Act**.
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> Sobeys initiated two courses of action. It stopped paying sales tax on current purchases from Hobart; its struggle with the Provincial Tax Commission over those taxes is the subject of a parallel court action. In addition, it came to believe that the sales tax which it had paid with respect to previous purchases of Hobart equipment had been paid in

error; it communicated with the Provincial Tax Commission by letter and, eventually, initiated the present court action.

> The meat departments in Sobeys' supermarkets carry out butchering operations. Large blocks of beef, lamb and pork are received, stored, cut and prepared to produce saleable retail cuts of meat which are transferred to retail areas of the store for sale to customers. Such butchering operations utilize Hobart equipment, including meat choppers, mixers/grinders, saws, automatic bone dust removers, electronic stretch wrappers, index label appliers, and scale systems.
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> Fish departments carry out fish processing operations. Fish is purchased whole and is then cut, filleted and deboned. Some of the Hobart equipment is used in this process to produce saleable retail portions of fish."

This action was commenced on April 5, 1988 under the **Proceedings Against the Crown Act**, c. 239 R.S.N.S 1967 for a declaration that the respondent was not liable for the tax and for an order for the payment of $114.041.92 together with interest and costs.

In his judgment the trial judge stated that counsel agreed that there were two issues for determination by the Court:

> 1. Whether the Hobart purchase, including machinery and apparatus and services, were exempt under the **Health Services Tax Act** during the material time and accordingly whether the tax was paid in error.
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> 2. Whether Sobeys is entitled to recovery of the taxes paid, together with interest, if the provincial sales tax paid on the Hobart purchases was paid in error to the province.

There was no dispute that the equipment was tangible personal property under the **Health Services Tax Act** and as such was taxable under s. 3(1), unless exempt under s. 10(1)(h)(i) of the **Act** which provided as follows:

> "10(1) The following classes of tangible personal property are specifically exempted from the provisions of this Act:
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> > (h) machinery and apparatus and parts thereof which are to be used or which are used in the manufacture or production of goods for sale;
> >
> > (i) materials consumed or expended in the manufacture or production of goods for sale;"

Section 1(ca) of the **Act** provided:

> "1 In this Act,
>
> > (ca) 'Manufacture or production' means the transformation or conversion of raw or prepared material into a different state or form from that in which it originally existed as raw or prepared material but does not include production or processing;"

On the first issue the learned trial judge concluded:

> "I accept **Hobart** and **York Marble** as persuasive authorities. I am bound by the decisions of the Appeal Division in **Silver Spoon** and **Stora Forest Industries**. The act of manufacturing or producing includes the transformation of raw materials into a different state or form, which act takes place between transportation in of the raw materials and transportation out of the goods having a different state or form, and which act includes all steps shown to be reasonably necessary to the finished product.
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> I hold that the equipment used by Sobeys in its meat and fish departments constitute machinery, apparatus and parts in use in the manufacture or production of goods for sale, within the meaning of s. 10(1)(h) and (i) of the **Health Services Tax Act**.
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> Therefore, the machinery, apparatus and parts in question

> were exempt from tax under the **Act** during the material time and, accordingly, Sobeys paid the tax thereon in error."

On the second issue he found that the tax was paid through a mistake of law and accordingly recoverable under the decision of the Supreme Court of Canada in **Air Canada et al v. British Columbia**, [1989] 1 S. C.R. 1161. He concluded that there was no statutory provision requiring the Crown to pay interest on the claim and accordingly made no award for interest.

The Crown has appealed the decision ordering the repayment of the taxes. The following issues are raised in the appellant's factum:

> "1. Did the learned Trial Judge err in law in his interpretation of s. 10(1)(h) and s. 10(1)(i) in finding that the butchering of meat and the processing of fish by Sobeys in its supermarkets constitute the manufacture of goods for sale as defined in s. 1(ca) of the **Act**?
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> 2. Did the learned Trial Judge err in law in finding that a purchaser could claim an exemption from tax retroactively after the date of purchase?
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> 3. Did the learned Trial Judge err in law in his interpretation of s. 4 of the **Health Services Tax Act** in failing to find that this section imposed a duty on the purchaser to claim an exemption from tax at the time of purchase?
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> 4. Did the learned Trial Judge err in law by failing to find that the burden of tax was not born by Sobeys when the evidence before him disclosed that Sobeys, in setting its prices, included the cost of production which would of necessity have included equipment purchases together with the tax paid on those purchases?
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> 5. Did the learned trial Judge err in law in finding that the Province was enriched by the receipt of taxes paid by

> Sobeys when the evidence disclosed that the goods sold by Sobeys were exempt from tax and the Province thereby collected sales tax only once on the sale of tangible personal property to Sobeys?"

The respondent has cross-appealed the finding that no interest was payable. The claim for interest was $89,753.83 which counsel for the respondent stated was compounded.

In its first submission the appellant contends that the exemption under s. 10(1)(h) only applies to machinery used in the production of goods for sale. Section 10(1) also exempts "food and food products for human consumption off the premises". By definition under the regulations food includes meat and fish. Counsel argued that as meat and fish are exempted from "the provisions of this Act" under s. 10(1) then they were not being processed for sale under s. 10(1)(h) and therefore that exemption could not apply. With respect all tangible personal property referred to in s. 10 is exempted under the provisions of the **Act**. There is no reason to give greater weight to one exemption as opposed to another. It was not the intention of the legislature that because meat and fish are not taxable therefore machinery used in the processing of those products is taxable. The issue here is whether certain machinery is exempt and not fish and meat. That depends on the wording of s. 10(1)(h). All of the words in the clause apply. Sale is defined in s. 1(a) of the **Act** as follows:

> "'sale' includes a conditional sale, hire purchase and any transfer of title or possession, conditional or otherwise, including a sale on credit or where the price is payable by instalments, an exchange, barter, lease or rental, or any other contract whereby at a price or other consideration a person delivers to another tangible personal property and also includes the provision by way of promotional distribution of any tangible personal property. (emphasis added).

There is no limitation or exclusion in that definition and accordingly it applies to s. 10(1)(h). These goods did not cease to be for sale simply because they were not taxable. I see no merit in this contention.

The main issue on this appeal is whether the machinery and apparatus were used in the manufacture or production of goods for sale. In **Attorney General of Nova Scotia v. Silver Spoon Desserts Enterprises Limited** (1989), 89 N.S.R. (2d) 363, this court had to decide whether a restaurant could be considered to be engaged in the manufacture or production of goods for sale within the exemption provided by s. 10(1)(h) of the **Act**. This court extensively reviewed the provisions of the **Health Services Tax Act** and the history of the **Excise Tax Act** where similar language was used. It was noted that there was no definition of "produced" or "manufactured" in the **Excise Tax Act** and that the words as used in that **Act** were not synonymous. In the **Silver Spoon** case in delivering the judgment of the court I stated at p. 371:

> "By c. 27, S.N.S. 1982, the **Health Services Tax Act** was amended by inserting the present definition section of 'manufacture or production' and by changing clauses (h), (i) and (j). It is important to note that the language in the definition section is substantially similar to the language of Archambault, J., as referred to by Spence, J., in the **York Marble** case. The words 'manufacture or production' now have a single meaning and are no longer distinct as defined by Spence, J. The emphasis is on the word 'manufacture' as defined by the cases. It should also be noted that the words 'directly and exclusively' were deleted from s. 10(1)(h). As to the effect on that change see **Stora Kopparbergs v. Nova Scotia (Minister of Finance)** (1987), 78 N.S.R. (2d) 354; 193 A.P.R. 354."

And at p. 373:

> "Having regard to the history of these provisions and the restricted definition in our **Act**, I agree with the appellant's

> contention that the preparation of meals in the respondent's restaurant did not fall within the exemptions in clauses (h), (i) or (j) of s. 10(1) of the **Health Services Tax Act**. Clauses (i) and (j) have to be interpreted in the same light as clause (h). I agree with the authorities that the preparation of meals does not constitute manufacturing as that word is used in common usage or as defined under the **Act**. I am not aware of any Canadian cases which have held otherwise. It follows with respect that the distinction made by the auditor between goods produced in the bakery and the preparation of meals in the restaurant was not arbitrary but based on the proper interpretation of the **Act**."

Silver Spoon was decided after **Hobart v. Minister of National Revenue** and is definitive with respect to our **Health Services Tax Act**. With respect it applies in this case. In my view cutting and packaging of meat and fish in a retail outlet is not "the production of articles for use from raw or prepared material by giving to these materials new forms, qualities or combinations whether by hand or machinery". The preparation of meat and fish was a service incidental to the respondent's retail operation. It is analogous to the preparation of food in a restaurant. In that context it cannot be viewed as manufacturing or production within the meaning of those words as interpreted in the authorities. In 1989 the Regulations were amended to make it clear that machinery and apparatus used in meat cutting or processing by retail vendors were not exempt under s. 10(1)(h) of the **Act**. The trial judge placed no significance on this change insofar as the interpretation of the **Act** is concerned and I agree with that conclusion. See s. 25(2) of the **Interpretation Act**, R.S., c. 235.

With reference to **Hobart v. Minister of National Revenue, supra**, in **The King v. Vandeweghe Ltd.,** [1934] 3 D.L.R. 57 at 60 Duff, C.J.C. stated:

> "The words 'produced' and 'manufactured' are not words of any precise meaning and, consequently, we must look to

> the content for the purpose of ascertaining their meaning and application in the provisions we have to construe".

I have already noted some of the differences in the **Excise Act** particularly the absence of a definition of those words. In **Hobart**, Mahoney J. relied on the fact that the words were not synonymous.

With respect the learned trial judge erred in not applying the **Silver Spoon** decision in this case. The respondents' equipment and apparatus was not subject to the exemption and therefore was taxable under the **Health Services Tax Act**.

In my view it is unnecessary to consider the remaining issues raised by the appellant or the respondents' cross-appeal. However, I would note in **Johnson v. Nova Scotia (Attorney General)** (1990), 96 N.S.R. (2d) 140 this court had to consider whether taxes paid at the wholesale level were recoverable in an action by **Johnson**. After reviewing the decision of the Supreme Court of Canada in **Air Canada and Pacific Western Airlines Ltd.** v. **British Columbia**, [1989] 1 S.C.R. 1161 in delivering the judgment for the majority I stated at p. 151:

> "I have not found the statute to be **ultra vires** and accordingly restitution is not barred on constitutional grounds. The general rule of recovery stated by La Forest, J., through a misapplication of the law applies. This is made clear from the judgment of Beetz. J., at p. 1172 of the report where he stated:
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> > 'Assuming without deciding that my brother La Forest, J., is correct in holding that "the rule should be against recovery of **ultra vires** taxes, at least in the case of unconstitutional statutes", I agree with him that this rule should not extend to a case of misapplication of the law such as the misapplication of the **Social Service Tax Act** of British Columbia to aircraft, aircraft

> parts and alcoholic beverages in the related appeals.'"

I would allow the appeal, set aside the decision and order of the trial judge and dismiss the action with costs to the Crown in the amount of one thousand dollars ($1,000.00).

J.A.

Concurred in:

Hallett, J.A.

Freeman, J.A.