IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Selkowitz v. Inverness (County), 2007 NSSC 383

Date: 20071204
Docket: SH 283177
Registry: Halifax

Between:

Anton Selkowitz

Applicant

v.

Municipality of the County of Inverness

Respondent

D E C I S I O N

Judge:	The Honourable Justice Suzanne M. Hood
Heard:	October 3, 2007, in Halifax, Nova Scotia
Final Written Submissions:	November 7, 2007
Written Decision:	January 18, 2008 *(Oral decision Dec. 4, 2007)*
Counsel:	David J. Demirkan, for the applicant Daniel M. Campbell, Q.C. for the respondent

By the Court:

INTRODUCTION

[1] The applicant bought property on which both real property and business occupancy taxes were owed. When his lawyer forwarded the tax payment to the municipality, the municipality applied it first to outstanding business occupancy taxes of the vendor.

ISSUES

1) The effect of retroactive legislation; and

2) The interpretation of s. 131(4) of the *Municipal Government Act*, S.N.S. 1998, c. 18.

FACTS

[2] Anton Selkowitz purchased the commercial and residential properties of Robin Jones & Whitman Inc. in Inverness. Robin Jones & Whitman Inc. had gone out of business leaving real property taxes owing on all its properties and business

occupancy taxes owing on its commercial property. At closing, the lawyer for Mr. Selkowitz forwarded funds to the municipality for the County of Inverness requesting that they be applied only to the real property tax accounts. The municipality applied the payment firstly to business occupancy taxes and the balance to real property taxes, relying on s. 131(1) of the *Municipal Government Act*. Mr. Selkowitz's lawyer objected.

ANALYSIS

[3] In *Admiral Recycling Ltd. v. Inverness County (Municipality)*, [2006] N.S.J. No. 113, 242 N.S.R. (2d) 314 (N.S.S.C.), Admiral Tavern Co. Ltd. had been given a notice of tax sale for its property at Port Hood because of outstanding real property taxes. It also owed business occupancy taxes. It conveyed its lands to Admiral Recycling Ltd., a related company. The latter forwarded a cheque to the Municipality of the County of Inverness only in the amount of the outstanding property taxes and asked that the payment be applied only to those taxes. The municipality applied the payment first to business occupancy taxes of Admiral Tavern, the vendor and previous owner of the property, relying on s. 131 of the

Municipal Government Act. As here, the municipality said it was obliged to apply the payment in this fashion because of the wording of s. 131.

[4] The issue in that case, as here, is whether the municipality was correct in its interpretation of s. 131 in that it had to apply the payment first to business occupancy taxes.

[5] In March 2006 when *Admiral* was decided, the *Municipal Government Act* provided in s. 131(1) and s. 131(4) as follows:

> 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 the 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.

> (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.

[6] Section 133(8) of the Act provides:

> (8) Taxes in respect of business occupancy assessments are not a lien upon property.

[7] In *Admiral*, Justice Davison concluded in paras. 17 and 25 that there was an ambiguity in the wording of s. 131(4). In para. 19, he cited *Harvard Realty Ltd. v. Director of Assessment and City of Halifax* (1979), 35 N.S.R. (2d) 60, at p. 71, as authority for the proposition that ambiguities in the *Assessment Act* should be resolved in favour of the taxpayer. The assessment and taxation provisions of the *Municipal Government Act* are the successors to the *Assessment Act*, R.S.N.S. 1989, c. 23 provisions referred to in *Harvard*.

[8] Counsel for the municipality in *Admiral Recycling* agreed that business occupancy taxes do not form a lien on real property. His argument as Justice Davison put it in para. 13 was that:

> **13** ... 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*.

Justice Davison said in para. 13 that there was no evidence of the intention of the legislature:

> **13** I must point out there was no evidence in the agreement of facts as *(sic)* what intention the legislator had in enacting s. 131.

[9] Justice Davison referred to cases on the interpretation of taxing statutes and said in para. 26:

> **26** ... where there is an ambiguity one must favour the taxpayer is still a true statement of the law.

[10] He concluded in para. 27 that the municipality was incorrect in its interpretation of s. 131. He said:

> **27** For the forgoing *(sic)* 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).

[11] As part of his reasoning, Justice Davison referred to the statement of counsel for the municipality in para. 11 where he said:

> **11** ... 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] Justice Davison then continued in para. 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] Justice Davison referred in paras. 15 and 16 to the points made by the two parties before concluding in para. 17 that there was an ambiguity. He said:

> **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 that 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 ... .

[14] That decision was released on March 27, 2006. As a result of the decision in *Admiral Recycling*, s. 131 of the *Municipal Government Act* was amended by s. 5 of Bill No. 95 which was introduced in the 1st session of the 60th General Assembly, 55 Elizabeth II, 2006. The amendment echoes what counsel for the municipality said as quoted above, that is, that the word "owner" has to be treated as "vendor" for the section to make sense. The amendment substitutes the word "vendor" for the word "owner." The explanatory notes to s. 5 of Bill 55 (Exhibit 1 to the affidavit of Sarah Pottle) say:

> Clause 5 substitutes 'vendor' for 'owner' to clarify that when a purchaser pays taxes on a property the purchaser has bought, the taxes include the vendor's business occupancy tax. This Clause is retroactive to April 1, 2006.

[15] Section 17 of that Bill provided that s. 5 was to take effect "on and after April 1, 2006, upon the Governor in Council so ordering and declaring by proclamation." It is not disputed that on January 9, 2007, s. 5 was proclaimed and took effect retroactively.

[16] The issues with respect to the amendment of s. 131 are its retroactive effect and its interpretation.

Retroactive Legislation

[17] It is not disputed that governments can pass retroactive legislation. The issue in this case is what effect it has.

[18] When the payment was made on December 12, 2006, the amendment to s. 131 had not yet been proclaimed although it had been passed. According to the affidavit of Sarah Pottle, it received Royal Assent on November 23, 2006. Kate Beaton, the Chief Administrative Officer of the Municipality, wrote to the lawyer for Mr. Selkowitz on December 27, 2006 (Exhibit B to the affidavit of Lawrence K. Evans, Q.C.). In that letter, she stated that the payment had been made "in accordance with Section 131(1) of the Municipal Government Act." Saying that was problematic because it was the same sort of situation that had occurred in *Admiral Recycling*.

[19] It is correct that at the time the tax payment was made the amendment to s. 131(4) had not been proclaimed and was therefore not in effect. I disagree, however, with the submission of counsel for Mr. Selkowitz that, because it was not

in force then, it could not affect the payment. That would be so only if the amendment did not have retroactive effect.

[20] In *Air Canada v. British Columbia*, [1989] S.C.J. No. 44, the Supreme Court of Canada dealt with retroactive legislation. Justice Le Dain said in para. 51:

> 51 None of the judges in the courts below casts any doubt on the legislative power of the province to impose a retroactive tax in the manner provided in ss. 25(1) to (4). What they really disagreed about was the effect of s. 25(5) on those provisions. In common with these judges, I am unable to see any constitutional impediment to the province's enacting ss. 25(1) to (4). On the reasoning regarding the 1976 Act, these provisions seem to be a proper exercise of its power to impose direct taxation in the province, the sole difference being that the 1981 provisions are given retroactive effect, a result that is not constitutionally barred. ...

Justice Wilson who dissented in the result said in para. 86:

> 86 I take a different view, however, from my colleague of what was done by the province in 1981. I do not doubt for a moment that the province was free in 1981 to impose a retroactive tax covering the period 1974 to 1976.

[21] In Driedger on the Construction of Statutes (3rd Edition by Ruth Sullivan), the authors dealt with retroactive application of legislation at p. 522:

> The presumption against the retroactive application of legislation can be rebutted by express words or by necessary implication. All that is required is some

> sufficient indication that the legislation is meant to apply not only to on-going and future facts but also to facts that are past. Ordinarily, reliance on the tense of verbs used in a provision is insufficient to rebut the presumption.
>
> Retroactive legislation often states that it is deemed to come into force or to take effect on a date prior to the date of enactment. or it may state that it applies to designated facts occurring from or before a particular date or time. ... Because the presumption against the retroactive application of legislation is strong, express provisions of this sort often are included in legislation. ...

[22] In Statutory Interpretation (Second edition, Irwin Law 2007), authored by Ruth Sullivan, the author says at pp. 259-60:

> It is strongly presumed that legislation is not meant to be applied to facts that were already passed when the legislation came into force. This presumption is grounded in rule of law principles. In order to comply with the law or rely on it in a useful way, a person must know what the law is prior to acting. As noted above, the retroactive application of legislation makes it impossible for the law to be known in advance of acting: the content of the law becomes known only when it is too late to do anything about it. In effect, the law is deemed to be different from what it actually was. This sort of tampering with reality is inherently arbitrary, and it undermines social security and stability. It is also unfair insofar as it inflicts loss or hardship on particular persons in ways that could not have been anticipated or prevented.
>
> Of course, in certain circumstances, the benefits of retroactive legislation are significant and may outweigh the disadvantages outlined above. There are a number of situations in which the legislature commonly resorts to retroactivity and this is considered acceptable. For example, amendments to fiscal legislation are often made retroactive to prevent taxpayers who have notice of the impending change to arrange their affairs so as to avoid the impact of the amendment. ...
>
> Generally speaking, however, retroactive legislation is considered offensive and the presumption against the retroactive application is heavily weighted and difficult to rebut. Ideally, there will be a provision in the legislation

> that deems it to have come into force prior to enactment or one that makes it expressly applicable to past facts.

[23] There is a presumption against retroactive application of legislation but, as is noted in the quotes to which I have just referred, it can be rebutted by express words and that was done here. Section 5 of Bill 95 clearly provided that the amendment to s. 131(4) would have retroactive application. As was the case in *Air Canada*, *supra*, the amendment was purportedly made to correct an error in or invalidity of legislation.

[24] In his decision in *Admiral Recycling*, *supra*, Justice Davison concluded that the municipality was incorrect in its interpretation of s. 131(4) to that date. In introducing amendments to the *Municipal Government Act*, the Minister said (Exhibit 2 to affidavit of Sarah Pottle):

> For example, under one of the amendments, we're changing the word owner to vendor in the tax collection provision of the legislation. This is in response to a court case that stated the existing provisions in the legislation were too vague.

[25] In Driedger, *supra*, the effect of retroactive legislation was explained at p. 513:

> Some years ago, in an effort at refinement, a distinction was drawn between 'retroactive legislation', defined as legislation that changes the *past* consequences of completed transactions and 'retrospective legislation' defined as legislation that changes *future* consequences of completed transactions by imposing new liabilities or obligations. ...

[26] The intent of the retroactive amendment to s. 131(4) was to cure the problem identified by Justice Davison in *Admiral Recycling*, *supra*. The intent was to change the past legal consequences of the municipality incorrectly applying the tax payments first to business occupancy tax. This affected the transaction completed in December 2006. In other words, I must consider the effect of the municipality's actions as if the legislation had been in effect in December 2006. The question is whether the amendment succeeded in addressing the problem identified by Justice Davison in *Admiral*.

Interpretation of s. 131(4)

[27] In *Admiral*, there was no issue about business occupancy taxes are a lien on property. It is clear they are not. In *Stott Timber Corp. (Receiver of) v. Cape Breton (County)*, [1988] N.S.J. No. 125, 84 N.S.R. (2d) 68, Justice Nathanson said (p. 16 QL Version):

> The business occupancy tax was never intended to constitute a lien upon real property. The reason is that it is not a tax on property. In Minas Basin Pulp and Power Company Limited v. Director of Assessment, (supra), Chief Justice MacKeigan stated at p. 502:
>
> > The business occupancy tax here is a tax on the occupancy or use of property and not a tax on property. A business tax is a personal tax on a busin+ness *(sic)* and not a tax payable by an owner of property qua owner. The business occupancy assessment here is an assessment of the presumed dollar value of the right to occupy or use business premises.

[28] The issue in *Admiral Recycling* was s. 131 of the *Municipal Government Act* and, in particular, s. 131(4). In paras. 15 and 16, the two interpretations of that section were set out followed by Justice Davison's conclusion that there was an ambiguity. He repeated that in para. 25 and concluded that the Municipality's interpretation established a lien. He said that was in conflict with s. 133(8) which says business occupancy tax is not a lien.

[29] The Legislature, as I have noted, then amended s. 131(4) to address the wording concerns which Justice Davison says created an ambiguity. The question for me is whether that amendment resolved the broader issue raised by Justice Davison, that is, whether s. 131(4) creates a lien.

[30] That necessitates a close look at what a lien is and the effects of a lien. Section (1), (3), (7) and (8) are relevant in this regard and they are as follows:

> 133(1) Taxes levied in respect of real property are a first lien upon the real property.
>
> (3) The lien has priority over the claims, liens or encumbrances of any person and need not be registered.
>
> (7) Taxes cease to be a lien on the property when six years have elapsed after the end of the fiscal year in which they were levied, but may be collected after they have ceased to be a lien.
>
> (8) Taxes in respect of business occupancy assessments are not a lien upon property.

[31] Other sections of the *Municipal Government Act* deal with tax sale proceedings which may be undertaken by a municipality to enforce its lien for real property taxes. That is an important characteristic of a lien. It can be enforced through sale of property against which the lien exists. The most important feature of a tax lien is that it takes priority over all other "claims, liens or encumbrances" without being registered against the property. It ranks ahead of mortgages, for example. The legislature in creating what is in effect a "super lien" has recognized the importance to municipalities of collecting its taxes. Section 133(8) does not

give the benefits of that super lien to business occupancy taxes and there is a good reason for that. Many who are rated for business occupancy taxes do not own real property but are tenants, some in larger commercial complexes such as MicMac Mall.

[32] Chief Justice MacKeigan was quoted in *Minas Basin Pulp and Power* as saying (quoted above in *Stott*):

> ... The business occupancy assessment here is an assessment of the presumed dollar value of the right to occupy or use business premises.

[33] Counsel for the municipality in *Admiral Recycling, supra*, said it:

> ... would not be fair or reasonable for their business occupancy taxes to constitute a lien upon the property of the land owner.

Justice Davison said he agreed and then added:

> I also suggest with respect the legislation would not consider it fair or reasonable to require A to pay B's occupancy tax, particularly when they state the assessment is not a lien.

[34] However, that in my view is what the legislature has attempted to do in enacting s. 131(4). They are requiring A to pay B's business occupancy taxes in certain circumstances. This flows from the priorities set out in s. 131(1) which provide for business occupancy taxes to be paid first but only where a partial payment is made. Section 131(4) extends those priorities to situations where the tax payment is made after the sale of the property on which the taxes are owed.

[35] I conclude that the wording in s. 131(4) does not create a lien.

[36] A lien under the *Municipal Government Act* (and the former *Assessment Act* and, before that, assessment provisions in other municipal statutes) is a creature with far greater implications than what is achieved by s. 131(4). In my view, s. 131(4), as now worded, gives a limited priority to payment of business occupancy taxes in specific and limited circumstances. Those are circumstances where the person paying the taxes is paying them after the purchase of a property where the vendor operated a business. That does not make business occupancy taxes a lien. Property with outstanding business occupancy taxes cannot be sold at tax sale to collect the outstanding business occupancy taxes. Furthermore business occupancy taxes do not rank ahead of such things as mortgages like real property taxes do.

There are limited situations where there is special treatment given to the collection of business occupancy taxes. The first is the general situation where a property owner or someone on his behalf makes a partial payment. In that case, the business occupancy taxes are paid first. A subset of that is where both real property and business occupancy taxes are owed by a person who not only owns real property but is also operating a business on it and where that property is sold. There is no doubt that, in those circumstances, the business occupancy taxes have priority in payment but priority of payment can exist independently of a lien.

[37] Governments have the power to create priorities of payment and have done so in other statutes where there is no lien created. One example is the *Bankruptcy Act* which sets out priorities for payment. However, the extraordinary power to sell lands of as a means of collection of taxes is reserved for the collection of real property taxes.

[38] The payment of the business occupancy taxes is made along with any outstanding real property taxes and would be adjusted for at closing. The unfairness which may result from the retroactive operation of that amendment is something which must have been contemplated by the legislature when it made that amendment retroactively. One assumes that the legislature did consider what

is fair and reasonable. One cannot assume that the legislature was not aware that it was changing the past legal consequences of adjustments made on closings of property transactions such as this and possibly others concluded between April 1, 2006 and January 9, 2007.

[39] Section 131 is a provision to assist municipalities to collect business occupancy taxes in limited situations. In those limited circumstances, an adjustment can be made at closing. The nature of retroactive legislation is such that, in this case, it may be seen to operate unfairly to the purchaser/applicant, Mr. Selkowitz. However, that is the nature of retroactive legislation with its potentially adverse effects. That is why there is a presumption against retroactive legislation unless specifically set out clearly, as was the case here.

[40] The application is therefore dismissed. Costs are awarded in the amount of $1,000.00 and payable forthwith.

Hood, J.