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Docket: 12/27

Citation: *Sundance Saloon Limited v. Newfoundland and Labrador
(Finance)*, 2014 NLCA 15

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL**

BETWEEN:

SUNDANCE SALOON LIMITED

FIRST APPELLANT

AND:

BIG BEN'S LIMITED

SECOND APPELLANT

AND:

HER MAJESTY IN RIGHT OF
NEWFOUNDLAND AND LABRADOR, as
Represented by the Minister of Finance

FIRST RESPONDENT

AND:

NEWFOUNDLAND AND LABRADOR
LIQUOR CORPORATION

SECOND RESPONDENT

Coram: Green C.J.N.L., Welsh and Rowe JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
Trial Division (G) 200701T0748

Appeal Heard: December 11 and December 14, 2012

Judgment Rendered: March 31, 2014

Reasons for Judgment by Welsh J.A.

Concurred in by Green C.J.N.L.

Concurring Reasons by Rowe J.A.

Counsel for the Appellants: David P. Goodland and Brodie Grant
Counsel for the First Respondent: Rolf Pritchard Q.C. and Lori Williams
Counsel for the Second Respondent: Daniel W. Simmons and Rebecca Marshall

Welsh J.A.:

[1] Sundance Saloon Limited is a representative plaintiff in a class action in which members of the class of licensed lounge owners claim that they were obliged to pay an invalid tax on alcoholic beverages, and that they are entitled to restitution for the amounts paid between February 17, 2001 and March 31, 2006. The trial judge concluded, among other things, that the levy imposed on alcoholic beverages amounted to an invalid tax, but that a subsequent amendment to the *Liquor Control Act* resulted in the imposition of a valid retroactive tax and that the legislation precluded an award of restitution. Sundance appeals that decision on behalf of the class.

BACKGROUND

[2] The certification order defines the class for which Sundance Saloon is the representative:

Those corporations or persons who held valid licenses issued by the Newfoundland and Labrador Liquor Corporation authorizing them to engage in the retail sale of alcoholic beverages in Newfoundland and Labrador, who purchased alcoholic beverages from the Newfoundland and Labrador Liquor Corporation within the class period of February 17, 2001 and February 16, 2007 and who, in respect of those purchases, paid amounts identified as a “liquor licensee levy” to the Newfoundland and Labrador Liquor Corporation.

[3] While the certification order is potentially broad in its definition of the class, specifying those holding licenses “authorizing them to engage in the retail sale of alcoholic beverages”, the statement of claim on which the order is based identifies only two plaintiffs, both being licensed lounges. In addition, I note that the legislation is limited in application to the use or consumption of alcoholic beverages and beer purchased “in the licensed premises of a licensee or permittee” (section 56.1(2) of the *Liquor Control Act*, RSNL 1990, c. L-18).

[4] The trial proceeded on the basis of an agreed statement of facts which was adopted by the trial judge. The foundation of the action is a levy on alcoholic beverages that was initially imposed in April 1969 through the Newfoundland Liquor Commission, predecessor to the Newfoundland and Labrador Liquor Corporation. Licensees were required to pay a 10% levy on spirits and wines that were purchased from the Commission for subsequent sale to the licensee's customers. The levy was continued throughout subsequent years, with some modifications, until it was eliminated as of April 1, 2006.

[5] Sundance takes the position that the levy amounted to an indirect tax which was beyond the constitutional authority of the Province to impose. In addition, Sundance submits that section 56.1 of the *Liquor Control Act*, which imposes a retroactive tax and precludes restitution of the money paid pursuant to the levy, is invalid.

[6] The trial judge, in an oral decision, expressed conclusions on two of the common issues in the class action:

Issue 6a of the Certification Order is answered in the affirmative; the liquor license levy was not a tax. That disposes of all common issues.

Issue 6e of the common issues is answered in the negative, the Act to amend being section 56.1 is valid and enforceable. That also disposes of all common issues.

[7] For the following reasons, I conclude that section 56.1 of the *Liquor Control Act* imposes a valid retroactive tax and that section 56.1(7), authorizing the Crown to retain monies collected under the previously imposed levy, is valid. Having accepted that the levy amounted to a tax, I make no comment on the question of the validity of the levy characterized as a levy. (For convenience, in this decision, reference to "alcoholic beverages" includes all relevant alcoholic beverages with the exception of beer which was treated separately under both the levy and section 56.1.)

ANALYSIS

The Question of Taxation

[8] Pursuant to sections 91(3) and 92(2) of the *Constitution Act, 1867*, the Province is competent to impose only direct taxation; indirect taxation is reserved to the federal Parliament. Section 92(2) provides:

In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

...

2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.

...

[9] The distinction between a direct and an indirect tax is explained in Hogg, *Constitutional Law of Canada*, 5th edition, supplemented (Toronto, ON: Thomson Reuters Canada Limited, 2007), at pages 31-6 to 31-7:

The distinction between a direct and indirect tax has been held to lie in “the general tendencies of the tax and the common understandings of men as to those tendencies”. If the general tendency is for the tax to be paid by the very person taxed, then the tax is direct; if the general tendency is for the tax to be paid by someone else, then the tax is indirect. The courts have said that they are not concerned with whether the tax is in fact recouped by the taxpayer in a particular case.

And further, at page 31-8:

If a tax is related to a unit of a good, the tax will still be direct if it is impossible for the payer of the tax to pass it on to anyone else. ... But if the tax is imposed on the consumer (the last purchaser) of the good, who is not going to resell the good, then the payer of the tax has no way of shifting the burden to anyone else, and the tax is direct. ...

[10] In this case, the levy imposed from the beginning of the class period on February 17, 2001 until the elimination of the levy on April 1, 2006 is properly characterized as a tax. This is consistent with the decision in *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3, at paragraph 4, concerning a similar scheme that had been imposed in New Brunswick. The tax was clearly indirect in nature and beyond the legislative authority of the Province due to the tendency of the licensee to pass on the tax to customers who were the consumers of the alcoholic beverages and beer (*Kingstreet Investments Ltd. v. New Brunswick (Finance)*, *supra*). (The liquor licensee levy is referenced below as “the levy” or as “the invalid tax”.)

[11] The question, then, is whether the Province had authority to impose a retroactive tax and to retain the amounts paid under the levy, and whether the legislation achieved that purpose in a manner consistent with the Constitution.

The Legislation

[12] Section 56.1 of the *Liquor Control Act* provides, in relevant parts:

(1) For the purpose of this section,

(a) “licensee” means a licensee as defined by this Act at any time after January 31, 2001 and before March 31, 2006;

(b) “permittee” means a person issued a permit under this Act at any time after January 31, 2001 and before March 31, 2006; and

(c) “purchaser” means a person who, in the province, at any time after January 31, 2001 and before March 31, 2006

(i) purchased liquor for his or her own use or consumption or for the use or consumption by other persons at his or her expense, or

(ii) purchased liquor on behalf of or as an agent for a principal who was acquiring that liquor for use or consumption by the principal or by other persons at the expense of the principal.

(2) A purchaser shall pay to the Crown for the purpose of raising revenue for Crown purposes a tax respecting the use or consumption of all liquor purchased by him or her in the licensed premises of a licensee or permittee at any time after January 31, 2001 and before March 31, 2006, computed at the rate of

(a) 12% of the purchase price of liquor and wine and \$0.60 per dozen beer for the period of January 31, 2001 to March 31, 2005; and

(b) 9% of the purchase price of liquor and wine and \$0.45 per dozen beer for the period of April 1, 2005 to March 31, 2006 inclusive.

(3) The tax shall be in addition to every other tax paid by the purchaser in respect of the purchase of the liquor.

(4) A purchaser shall be considered to have paid the tax at the time he or she purchased the liquor.

(5) At any time after January 31, 2001 and before March 31, 2006, a licensee or permittee shall be considered to have been an agent of the Crown for the purpose

of collecting the tax and shall be considered to have collected the tax from the purchaser at the time the purchaser purchased the liquor and to have remitted the tax to the Crown.

(6) An allowance or commission is not payable to the licensees or permittees for their services in collecting and remitting the tax.

(7) Where, at any time after January 31, 2001 and before March 31, 2006, money was collected or purported to have been collected as a licensee levy, the money shall by this section be conclusively considered to have been collected and retained by the Crown, without compensation, as payment for the tax.

...

General Principles

Presumption of Constitutionality

[13] The purpose of section 56.1 is to retroactively replace the liquor licensee levy, which amounted to an invalid tax, with a tax that is valid, and to retain amounts collected under the invalid tax as payment for the retroactive tax. Sundance contends that such legislation undermines the foundations of the Constitution, amounting to an invitation for the Legislature to ignore the bounds of its constitutional competence. For the following reasons, this contention is not persuasive. Indeed, the Supreme Court of Canada has recognized the validity of such retroactive legislation.

[14] I begin with the presumption of constitutionality. In *Siemens v. Manitoba (Attorney General)*, 2003 SCC 3, [2003] 1 S.C.R. 6, at paragraph 33, Major J., for the Court, relied on this principle, quoting as follows from two earlier decisions. First, the principle is succinctly stated in *Reference re The Farm Products Marketing Act*, [1957] S.C.R. 198, at page 255:

... There is a *presumptio juris* as to the existence of the *bona fide* intention of a legislative body to confine itself to its own sphere and a presumption of similar nature that general words in a statute are not intended to extend its operation beyond the territorial authority of the Legislature. ...

Similarly, in *Nova Scotia Board of Censors v. McNeil*, [1978] 2 S.C.R. 662, at pages 687 to 688, Ritchie J. wrote:

In all such cases the Court cannot ignore the rule implicit in the proposition stated as early as 1878 by Mr. Justice Strong in *Severn v. The Queen*

[(1878), 2 S.C.R. 70], at p. 103, that any question as to the validity of provincial legislation is to be approached on the assumption that it was validly enacted. ...

[15] This presumption is consistent with the rule of law that requires legislative bodies to act within the scope of their constitutional authority. The presumption is that they will do so.

[16] However, on occasion, the courts have concluded that the legislature overstepped the bounds of its authority. The result may be a declaration of invalidity which may be accompanied by a suspension of the declaration to permit the legislature to make an appropriate amendment. In other situations, the courts have recognized the validity of retroactive legislation. In some circumstances, the legislature may be found to have overstepped the bounds of its authority such that there is no possible option to correct the invalidity. The decision in *Canadian Pacific Air Lines Ltd. v. British Columbia*, [1989] 1 S.C.R. 1133, provides an example. Considering a tax imposed by the province on alcohol consumed during an aircraft flight and, therefore, outside the province, La Forest J., for the majority, concluded, at page 1155:

... In either case, both the person taxed and the transaction in respect of which he is taxed take place on the aircraft when it is in the airspace. Under these circumstances, there is no presence in the province sufficient to provide a basis for the imposition of the tax.

Retroactive legislation imposing a tax

[17] Legislation may be applied retroactively to impose a valid tax, and it may preclude restitution of monies previously collected under an invalid tax, provided, of course, the amending or new legislation is valid. In *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, *supra*, Bastarache J., for the Court, commented on the possibility of retroactive legislation:

[12] This appeal concerns whether restitution is available for the recovery of monies collected under legislation that is subsequently declared to be *ultra vires*. For the reasons given below, I find that restitution is generally available. I agree with Robertson J. A. that there is no general immunity affecting recovery of an illegal tax. I would, however, decide the case on the basis of constitutional principles rather than unjust enrichment. An unjust enrichment analysis is ill-suited to deal with the issues raised by *ultra vires* taxes. The Court's central concern must be to ensure the constitutionality of fiscal legislation. Moreover, the availability of suspended declarations of invalidity as ordered in *Eurig Estate*

(Re), [1998] 2 S.C.R. 565, and the possibility of retroactive ameliorating legislation are sufficient to guard against the possibility of fiscal chaos. ...

(Emphasis added.)

[18] The authority of the legislature to impose a retroactive tax with legislation that has the effect of precluding restitution where an invalid tax was imposed is discussed in *Kingstreet*, with reference to earlier decisions of the Court. After setting out the relevant principles and considerations from *Amax Potash Ltd. v. Government of Saskatchewan*, [1977] 2 S.C.R. 576, and *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161, Bastarache J. explained:

[27] ...

The impugned provision in *Amax Potash* sought to immunize the Province from any claim relating to any action or omission authorized by legislation subsequently declared *ultra vires*. In this sense, the legislation attempted to attach legal consequences to acts undertaken pursuant to invalid laws. By contrast, in *Air Canada*, the Province of British Columbia enacted a new and valid tax which it imposed retroactively. It then retained the monies paid pursuant to the invalid legislation as the payment for the new and valid retroactive tax. The critical distinction between these two cases is that the valid retroactive tax at issue in *Air Canada* constituted a legal basis for the taking and retaining of the monies, independently of the prior unconstitutional tax. For this reason, I find La Forest J.'s concern about the impact of *Amax Potash* on the Province's ability to enact retroactive legislation so as to limit recovery of unconstitutional taxes to be, with respect, unwarranted.

(Emphasis added.)

[19] The authority to enact retroactive taxation legislation is also referenced in *Kingstreet*, at paragraph 25:

... Moreover, this Court's decision in *Air Canada* demonstrates that it will be open to Parliament and to the legislatures to enact valid taxes and apply them retroactively, so as to limit or deny recovery of *ultra vires* taxes. Obviously, such legislation must also be constitutionally sound.

[20] The distinction between the decisions in the *Amax Potash* and *Air Canada* cases is also discussed in *Constitutional Law of Canada, supra*, at page 58-16:

... By an amendment in 1981 [in the *Air Canada* case], the new valid tax was made retroactive, so that it covered the 1974 to 1976 period; the 1981 amendment also provided that the taxes collected between 1974 and 1976 were “confiscated”. Was this 1981 amendment effective to bar the recovery by the taxpayer of the unconstitutional taxes? The Supreme Court of Canada by a majority said yes. The majority held that this was a different case from *Amax Potash*. In *Amax Potash*, the Saskatchewan Legislature had simply tried to immunize itself from suit to avoid repaying an unconstitutional tax. In this case, the British Columbia Legislature had imposed a new valid tax, had made the new tax retroactive, and had collected the new tax by retaining (confiscating) the moneys collected under the old invalid tax.

The *Air Canada* case shows that the imposition of a new, valid, retroactive tax is a way around the restriction of *Amax Potash*. That was a sufficient reason for the majority to deny recovery of the unconstitutional tax. ...

Application of the Law

[21] In assessing the validity and effect of section 56.1 of the *Liquor Control Act*, I begin with the principle that the legislature is competent to enact retroactive taxation legislation, provided such legislation is, itself, valid.

[22] The first hurdle to be cleared is to establish that the tax is direct in nature. Section 56.1 states that the tax is imposed on the purchaser, being the consumer, or the person paying on behalf of the consumer (subsections (1) to (4)). The definition of “purchaser” precludes the tax being passed on to anyone else. It follows that the tax is direct in nature and, therefore, within the authority of the Province to impose. The tax applies only to a purchase made “within the province” (section 56.1(1)(c)) and is imposed for a public purpose, being the “raising of revenue for Crown purposes” (section 56.1(2)).

[23] As discussed above, provided the tax is constitutionally valid, it may be imposed retroactively. Section 56.1 defines the amount of the tax and the products to which it applies. In addition, in a manner similar to the provincial retail sales tax, section 56.1 requires the licensee or permittee to act as an agent for the Crown in the collection of the tax. No allowance or commission is paid to the licensee or permittee for complying with that duty. This is a policy decision within the authority of the legislature.

[24] The next question arises from section 56.1(7) which provides that the money collected pursuant to the levy is retained by the Crown “as payment

for the tax”. One factor relied upon by Sundance to challenge this provision is that the tax under section 56.1 is not imposed on the same person as was the levy.

[25] Sundance alleges that this is significant, first, as applied to alcoholic beverages, because the levy was imposed on the purchase price paid by the licensee, whereas the retroactive tax is imposed on the purchase price paid by the consumer. This difference could be expected to have an effect on the amount of money collected where both the levy and the tax were calculated as a percentage of the purchase price. That is, due to the commercial imperative of a mark-up, the purchase price paid by the consumer of the beverage would presumably be more than the purchase price paid by the licensee for the product. The retroactive tax would, therefore, have yielded more revenue than the levy.

[26] The same applies in the case of beer, though to a lesser extent. Both the levy and the tax were calculated on the basis of sixty cents on a dozen beer from January 31, 2001 to March 31, 2005 and forty-five cents on a dozen beer from April 1, 2005 to March 31, 2006. The licensee, having no need to calculate the levy on the basis of one bottle, would have paid sixty or forty-five cents per dozen for the relevant period of time. Where the retroactive tax is paid by the consumer in licensed premises, the tax would be calculated proportionately. This follows from section 27 of the *Liquor Control Act* which applies to licensees selling alcoholic beverages and beer in licensed establishments such as lounges. Subsections (2) and (3) provide:

(2) A person to whom a licence is granted under subsection (1) to sell beer may sell the beer only by the glass or by the open bottle.

(3) Alcoholic liquors sold or served under a licence granted under this section may be consumed only on the licensed premises relating to that licence.

[27] In the case of beer, the amount payable when the levy was sixty cents per dozen would be an even five cents per bottle, resulting in the same charge under the levy and the retroactive tax. However, when the tax was forty-five cents per dozen, taxing the consumer in a proportionate amount would result in a total of forty-eight cents per dozen (3.75 cents, rounded up to four cents per bottle). For completion, I note that, the levy and the retroactive tax on volumes other than the standard size of a bottle of beer (341 millilitres) would be calculated proportionately by volume. Section 36.1(1)(a) of the *Liquor Licensing Regulations*, CNLR 1162/96, defines a

“standard serving” of beer to be 341 millilitres. In the result, the retroactive tax on beer served in licensed premises would have yielded slightly more revenue than under the levy.

[28] The Legislature dealt with any discrepancy between the amounts collected under the levy and those due under the retroactive tax by accepting the money paid under the levy as full payment for the amount due under the retroactive tax, thereby forgiving a portion of tax that would otherwise have been due. This follows from the phrase “as payment for the tax”. For convenience, I repeat section 56.1(7):

Where, at any time after January 31, 2001 and before March 31, 2006, money was collected or purported to have been collected as a licensee levy, the money shall by this section be conclusively considered to have been collected and retained by the Crown, without compensation, as payment for the tax.

[29] However, Sundance submits that section 56.1 does not satisfy the requirements necessary to establish the constitutional validity of the tax and the retention of monies paid under the levy when compared with the decision in *Air Canada v. British Columbia*, *supra*. As described in the *Air Canada* decision, in 1974, the *Gasoline Tax Act* required a purchaser to pay a tax on gasoline of ten cents per gallon. “Purchaser” was defined as “any person who within the Province purchases gasoline when sold for the first time after its manufacture or importation into the Province”. This resulted in an invalid indirect tax when applied to retail vendors of gasoline. To address this issue, and impose a valid direct tax, the definition was amended in 1976, as follows (*Air Canada v. British Columbia*, at page 1174):

“purchaser” means any person who, within the Province, purchases or receives delivery of gasoline for his own use or consumption or for the use or consumption by other persons at his expense, or on behalf of, or as an agent for, a principal who is acquiring the gasoline for use or consumption by the principal or by other persons at his expense.

[30] In 1981, there was a further legislative amendment applying the tax retroactively to 1974 to cover the period when an invalid indirect tax had been collected. Section 25(5) of the amending legislation provided for the Crown to retain monies collected between 1974 and 1976:

Where, after August 1, 1974 and before July 8, 1976, money was collected or purported to have been collected as taxes, penalties or interest under this Act, the money shall by this section be conclusively deemed to have been confiscated by the government without compensation.

[31] In concluding that this subsection was constitutionally sound, La Forest J. referred first to the principle that legislative interpretation is to “be informed by the presumption that the Legislature intended to stay within its constitutional powers” (at page 1193). He then characterized the retention of the monies collected under the invalid tax as “nothing more nor less than machinery for collecting the taxes properly imposed in the first four subsections of s. 25” (at page 1193).

[32] La Forest J. went on to say, at page 1193:

Administratively, the taxes levied under the invalid scheme were collected in the same manner and in the same amounts and from the same taxpayers as would have occurred if the scheme had originally been framed along the lines of s. 25(1) to (4).

[33] Sundance relies on this statement in submitting that section 56.1(7) does not pass constitutional muster because the amounts collected under the retroactive tax were not collected from the same persons in the same amounts as under the levy. This proposition is not persuasive. While there may be circumstances where a retroactive tax dovetails with an invalid tax in the way expressed in *Air Canada*, this will not be the norm. As noted by La Forest J., retention of the amounts collected under the invalid tax is merely the machinery for collection of the retroactive tax. The proposition is summarized, at page 1194:

... The Legislature did directly what it was empowered to do – impose a direct tax under s. 25(1) to (4). I see no reason why it could not then take that tax out of moneys it had improperly collected from the taxpayers under the *ultra vires* statute, just as it could have set it off against any other obligation of the government to the taxpayers. The good fortune of the Legislature, in the unusual facts of this case, in having collected amounts that matched precisely those owing by each taxpayer under s. 25(1) to (4) affords no reason to brand as unconstitutional a tax that it can validly impose and collect.

[34] As described in *Air Canada*, the essence of the legislation is the imposition of the retroactive tax. Where that tax is constitutionally valid, the retention of monies collected under a previous but invalid tax is, in appropriate circumstances, simply a method of obtaining payment for the valid tax. In this case, under both the levy and section 56.1, the tax is applied to the same commodity, alcoholic beverages and beer, and in the same circumstances, sales in licensed premises. Whether the tax was payable by the licensee or the licensee acted as an agent for the collection of

the tax, in both cases, the money was funneled to the Crown through the licensee. Further, the direct tax was required to be paid by the consumer of the beverages and the indirect tax, having a tendency to be passed on by the licensee, would, in that sense, also have been paid by the consumer.

Applying the conclusion stated by La Forest J. in *Air Canada*, retention of the monies collected under the levy is “nothing more nor less than machinery for collecting the taxes properly imposed in the first [six] subsections of [section 56.1]” (at paragraph 31, above). This conclusion is consistent with the principles discussed above affirming that the legislature is competent to enact ameliorating legislation where it has been found to have overstepped the bounds of its authority.

[35] In addition, Sundance submits that section 56.1 is a colourable attempt to confiscate money paid by licensees under the levy. The doctrine of colourability is discussed in *Constitutional Law of Canada, supra*, at pages 15-19 to 15-21:

The courts are, of course, concerned with the substance of the legislation to be characterized and not merely its form. The “colourability” doctrine is invoked when a statute bears the formal trappings of a matter within jurisdiction, but in reality is addressed to a matter outside jurisdiction. In the *Alberta Bank Taxation Reference* [[1939] A.C. 117], for example, the Privy Council held that the legislation, although ostensibly designed as a taxation measure, was in reality directed at banking. ...

...

The colourability doctrine applies the maxim that a legislative body cannot do indirectly what it cannot do directly. However, as is suggested by the paucity of citations in this section of the chapter, arguments of colourability are rarely successful. Often, a legislative body will find a way to do indirectly what it cannot do directly. ... A provincial Legislature [for example] cannot levy a sales tax on the vendor of a good, because such a tax would be indirect, but the legislature can impose on the vendor an obligation to collect a tax that is formally levied on the consumer of the good.

[36] Clearly, section 56.1, as discussed above, does not engage the doctrine of colourability.

SUMMARY AND DISPOSITION

[37] The levy imposed on licensees amounted to an indirect tax which is beyond the constitutional authority of the Province. However, section 56.1

of the *Liquor Control Act* imposes a valid retroactive tax on purchasers of alcoholic beverages and beer in licensed premises. Section 56.1(7) is valid legislation authorizing the Crown to retain monies collected under the levy as payment for the retroactive tax.

[38] Accordingly, I would dismiss the appeal. There will be no order as to costs (*Class Actions Act*, SNL 2001, c. C-18.1, section 37).

B. G. Welsh J.A.

I concur with the reasons of Welsh J.A.:

J. D. Green C.J.N.L.

Concurring Reasons by Rowe J.A.

[39] I agree with my sister Welsh in her reasons and the result. My comments that follow are, thus, *obiter*.

[40] In this decision and the cases upon which it relies the legislature is ascribing different legal consequences to actual events. While there were some differences in the modalities of how the tax was collected, these are not significant; otherwise my position would be different. (See *Air Canada v. British Columbia*, *supra*, as quoted at para. 32-33 above.)

[41] Ascribing different legal consequences to actual events is fundamentally different from saying that something that did not occur did so or saying that something that did occur did not do so. Retroactive legislation

should not be given effect where it is based on a (deemed) reality that never existed.

M. H. Rowe J.A.