



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

Citation: *St. John's (City) v. St. John's Dockyard Limited*, 2017 NLCA 14

Date: February 21, 2017

Docket: 201601H0079

BETWEEN:

CITY OF ST. JOHN'S

APPELLANT

AND:

ST. JOHN'S DOCKYARD LIMITED

RESPONDENT

Coram: Welsh, White and Harrington JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
Trial Division (G) 201601G2347
(2016 NLTD(G) 133)

Appeal Heard: February 10, 2017

Judgment Rendered: February 21, 2017

Reasons for Judgment by Welsh J.A.

Concurred in by White and Harrington JJ.A.

Counsel for the Appellant: Irene S. Muzychka Q.C.

Counsel for the Respondent: Michael J. Crosbie Q.C.

Welsh J.A.:

[1] St. John's Dockyard Limited sought to appeal the assessment for taxation purposes that it received from the City of St. John's. The City refused to accept the notice of appeal because the Dockyard had not provided information requested by the City's assessor. The Dockyard then applied to a judge of the Supreme Court, Trial Division for declarations that certain property that had been included in the City's assessment was not assessable as real property, and that the assessment should be reduced by a specified amount.

[2] Jurisdiction of the judge to hear the application and issue the requested declarations was not contested by the City. Without addressing the jurisdictional issues, the judge determined that the property in question was not real property and was, therefore, not assessable. He issued a declaration to that effect.

[3] As a preliminary matter, this appeal requires an analysis of the scope of jurisdiction of the courts and of an assessment review commissioner under the *Assessment Act, 2006*, SNL 2006, c. A-18.1, including the effect of failure to provide information requested by an assessor.

ANALYSIS

Jurisdiction to Determine Whether Property is Real Property Under the Act

[4] The *Assessment Act, 2006* provides for a municipality, including the City of St. John's, to assess real property for purposes of taxation. The *Act* requires the City to appoint an assessment review commissioner (section 32). Part II of the *Act* deals with "Assessment Appeals". Section 30(1) provides for an assessed party to file a notice of appeal against an assessment:

A party objecting to or complaining of an omission from or an error in a roll may personally or by agent, serve notice of appeal to the city clerk or the director within 30 days from the date of the notice of assessment.

[5] An appeal begun by means of a notice of appeal is heard and determined by an assessment review commissioner. Section 33 provides:

At the time fixed for appeals the commissioner shall hear the appeals made in accordance with this Act.

(Emphasis added.)

[6] The powers of a commissioner are set out in section 37:

(1) A commissioner, after hearing the evidence, shall confirm or amend the assessment appealed against by increasing or decreasing it but the commissioner shall not amend an assessment only on the ground that it is above or below the actual value if the assessment bears a just and fair relation to the value at which other properties are assessed in the city or a municipality.

...

(3) A commissioner shall not amend an assessment unless an appeal has been made in accordance with this Act ...

(4) A commissioner, after hearing from the parties and any witnesses produced, shall decide the matter and shall provide reasons in writing to the parties to the appeal.

(Emphasis added.)

[7] Section 39 provides for an appeal from a decision of a commissioner on a question of law or jurisdiction to the Trial Division:

(1) A party aggrieved by a decision of a commissioner may appeal from that decision to a judge of the Trial Division in the judicial centre in which the real property is located upon giving written notice to all parties and to the Trial Division within 30 days after the mailing of delivery to that person of the decision of the commissioner.

(2) The practice and procedure relating to appeals under the *Judicature Act*, and the *Rules of the Supreme Court, 1986* apply to proceedings under this section.

(3) An appeal of a decision of a commissioner under subsection (1) may be made on a question of law or jurisdiction.

...

(5) The court shall either confirm or vacate the decision of the commissioner and where vacated the court shall refer the matter back to the commissioner with the

opinion of the court as to the error in law or jurisdiction and the commissioner shall deal with the matter in accordance with that opinion.

(Emphasis added.)

[8] The effect of section 39 is summarized in *Loblaw Properties Limited v. City of Mount Pearl*, 2017 NLCA 6:

[12] It follows from the legislation read as a whole that the determination of issues of fact falls within the realm of a commissioner, with appeals restricted to questions of law or jurisdiction.

[9] It is clear from a reading of the *Act* as a whole and Part II in particular that the legislative intention is that an appeal as to whether property is assessable falls within the mandate of a commissioner. Limitation of an appeal to the Trial Division on a question of law or jurisdiction circumscribes the extent of the court's jurisdiction. Even where there has been a successful appeal to the Trial Division, section 39(5) requires the judge to refer the matter back to the commissioner who must determine the assessment issue by applying the law as set out in the judge's decision. To authorize a judge of the Trial Division to make a declaration at first instance on the assessment issue would be inconsistent with the legislative scheme and intention.

[10] In this case, without the issue having been considered by a commissioner, the Trial Division judge proceeded to determine that the property in question was not real property assessable under the *Act*. He then issued a declaration "that the assessment of the items in question for the taxation year 2016 is *ultra vires* the City of St. John's" (2016 NLTD(G) 133, at paragraph 32). In so doing, the judge acted outside his authority by usurping the statutorily mandated power of a commissioner to determine at first instance whether property is assessable and whether the assessment should be confirmed or amended.

[11] In the result, the Trial Division judge's analysis and conclusion as to the characterization of the property in question must be set aside with the matter remitted to a commissioner for determination, assuming the *Act* does not otherwise preclude an appeal to a commissioner. A discussion of that issue follows. I would emphasize that the judge's analysis and conclusion, having been set aside, may not be relied upon.

Effect of the Assessed Party's Failure to Provide Information

[12] Under section 8(1) of the *Act*, a party is required to provide information to an assessor:

A person shall give to the assessor all information requested by the assessor for the purpose of enabling the assessor to properly assess the real property of that person.

[13] Section 47(4) of the *Act* provides a penalty for refusing or failing to provide information required by an assessor or a commissioner. The assessed party may be charged with an offence and, in any event, is precluded from appealing the assessment:

Notwithstanding that a person has not been charged with an offence [under subsection (2)], a person who refuses to permit an assessor or a commissioner to enter real property or to provide information under this *Act* shall not be entitled to appeal an assessment of real property under this *Act* ...

(Emphasis added.)

[14] The underlying rationale for these provisions is to streamline the process of assessing property for taxation purposes and to facilitate the City obtaining information relevant to completing assessments. (See 3163083 *Canada Limited v. City of St. John's*, 2004 NLCA 42, at paragraph 63, addressing comparable provisions under the former *St. John's Assessment Act*, RSNL 1990, c. S-1.)

[15] However, section 8 of the *Act* does not address the situation where an assessed party objects to providing information requested by an assessor. Under the legislation, the information must be submitted unless the party is “unable” to provide it. However, principles of fairness and equity require an avenue for an assessed party to challenge the validity of an assessor's request. For example, a party may wish to challenge the City's right to specific information on the basis that it is not necessary for the purpose of completing the assessment because it is irrelevant.

[16] Since there must be an avenue for challenging an assessor's request for information, the next question is whether a commissioner has jurisdiction for that purpose.

[17] As discussed above, the authority of a commissioner is limited to confirming or amending an assessment. This, of course, will require the

commissioner to conduct a hearing, consider evidence, and determine issues such as whether the assessed property is real property under the *Act*. However, a commissioner has no jurisdiction to make any determinations in the absence of an appeal (sections 33 and 37(3) of the *Act*). Pursuant to section 47(4), an appeal is precluded where the assessed party has failed to provide information requested by an assessor. In effect, section 47(4) closes the door to the involvement of a commissioner. The conclusion follows that a challenge to an assessor's request for information must be determined by a court.

[18] I note in passing that this result seems somewhat incongruous since, in exercising his or her authority under the *Act*, a commissioner is required to deal with evidence related to an assessment, including the extent to which the evidence is relevant to the assessment. Absent the bar under section 47(4) which prevents a commissioner from considering a refusal or failure to provide information requested by an assessor, I would have concluded that the matter fell within the scope of authority of a commissioner.

[19] In this case, despite having authority to determine whether the Dockyard had a valid reason for refusing or failing to provide the information requested by the assessor, the judge neither conducted an analysis nor made a determination. This amounted to error.

[20] If a court concludes that the requested information should be provided, the Dockyard would have the option of complying with the request, thereby avoiding the operation of section 47(4) of the *Act*. In that situation, upon receipt of the information, it would be necessary for the City to review the assessment, providing the Dockyard with the opportunity to accept the assessment or proceed with an appeal to a commissioner.

SUMMARY AND DISPOSITION

[21] The Trial Division judge erred by issuing a declaration that certain property was not assessable as real property under the *Act*. The legislative scheme vests authority over that issue at first instance in a commissioner appointed under the *Act*. A commissioner's decision may be appealed to the Trial Division only on a question of law or jurisdiction. In the result, the judge's analysis and conclusions regarding whether the property constituted real property for assessment purposes must be set aside and cannot be relied upon for purposes of precedent.

[22] In addition, the judge erred in failing to address the operation of section 47(4) of the *Act*. On a proper analysis, the courts, not a commissioner, have jurisdiction over that issue. The question of whether the information requested by the assessor must be provided must be determined by a Trial Division judge.

[23] In the result, I would allow the appeal. If the Dockyard decides to provide the information without seeking a determination as to the application of section 47, the appeal of the assessment to a commissioner may proceed and, I reiterate, no reliance may be placed on the judge's analysis and decision regarding characterization of the property in issue for purposes of the assessment. In the circumstances, the parties shall bear their own costs in this Court and in the Court appealed from.

B. G. Welsh J.A.

I Concur: _____

C. W. White J.A.

I Concur: _____

M. F. Harrington J.A.