

CANADA / JUDGMENT

Voroney v. British Columbia

2020 BCSC 853

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Supreme Court of British Columbia

DECIDED

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2020 BCSC 853 Voroney v. British Columbia

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Voroney v. British Columbia,

2020 BCSC 853

Date: 20200608

Docket: S1811801

Registry: Vancouver

Between:

David Voroney and Milene Voroney (nee Faivre)

Petitioners

And

Her Majesty the Queen in Right of the Province of British Columbia

Respondent

Before: The Honourable Madam Justice Tucker

Reasons for Judgment

The Petitioners, appearing in person:

D. Voroney

M. Voroney

Counsel for the Respondent:

J.A. Dickieson

Place and Date of Hearing:

Vancouver, B.C.

March 2, 2020

Place and Date of Judgment:

Vancouver, B.C.

June 8, 2020

[1] David and Milene Voroney (the "Petitioners") bring an appeal under s. 21 of the Property Transfer Tax Act, R.S.B.C. 1996, c. 378 [Act]. The appeal involves the Minister of Finance (the "Minister")'s refusal of their application for an exemption under the Act.

I. background

- [2] The accuracy of the facts relied on by the Minister is not in dispute. Both parties filed affidavits providing additional detail, but no new material facts were established. Thus, the material facts before me remain as before the Minister.
- [3] The Act imposes a tax in relation to the registration of transfers of real property in British Columbia at land title offices. The Act provides exemptions for certain types of transfers and transferees in certain situations. One exemption provided under the Act is the first time home buyers' exemption (the "FTHB Exemption").
- [4] A transferee can apply for the FTHB Exemption at the time of property registration by tendering both an application for registration and an application for the exemption. A transferee who does so, and is granted the exemption, avoids paying the tax. A transferee who qualifies for the FTHB Exemption but pays the tax at the time of registration, can apply to the Administrator for a refund of the tax paid (the "FTHB Refund").
- [5] The Petitioners purchased a real property in Pemberton (the "Property"). The Property includes a residential improvement.
- [6] On October 14, 2016, the Petitioners registered the Property. They filed a property transfer tax return for tax payable in the amount of \$6,920. The Petitioners did not apply for the FTHB Exemption at the time of registration. Thus, on or about October 14, 2016, the Petitioners paid \$6,920 in tax.
- [7] On or about January 15, 2018, the Petitioners applied for the FTHB Refund. On January 24, 2018, the Administrator refused their application.

- [8] On February 27, 2018, the Petitioners filed a notice of objection regarding the Administrator's refusal. A notice of objection is determined by the Minister under s. 19 of the Act, which requires the Minister to decide "the amount of penalty or tax owing or the refund payable, as the case may be."
- [9] On August 3, 2018, the Minister affirmed the Administrator's refusal (the "Decision"). The application was refused on the basis that the Petitioners failed to meet the requirement in s. 8(2)(a)(i), which requires the transferee to inhabit a residential improvement on the registered property as a principal residence "beginning on a date that is not more than 92 days after the registration date."
- [10] At the time the Petitioners purchased the Property, it was leased to a tenant under a fixed term lease through June 2017. The lease was assigned to the Petitioners on purchase and the tenant continued to live at the Property.
- [11] After registering the Property, the Petitioners continued to live in their rental home in Whistler. They then went on a vacation to France, returned to their Whistler home briefly, and then moved to France for about 10 months. On deciding to move to France, they granted an extension of the Property lease to the tenant.
- [12] While in France, the Petitioners operated out of Mrs. Voroney's parents' home. They traveled about, but used Mrs. Voroney's parents' home as their base.
- [13] The Petitioners first moved into the residential improvement on the Property on or about June 30, 2018.

II. Standard of review

- [14] Section 21 of the Act provides, in part:

Appeal to court

21 (1) A decision of the minister under section 19 may be appealed to the Supreme Court by way of a petition proceeding.

- (2) The Supreme Court Civil Rules relating to petition proceedings apply to appeals under this section, but Rule 18-3 of those rules does not apply.

...

(4.1) An appeal under this section is a new hearing that is not limited to the evidence and issues that were before the minister.

- (5) The court may dismiss the appeal, allow the appeal, vary the decision from which the appeal is made or refer the decision back to the administrator for reconsideration.

- [15] The parties agree the standard of review on this appeal is correctness.

- [16] I agree as well. Notwithstanding that the Act provides for a petition to be filed, the Act is clear that the proceeding itself is in the nature of an appeal. In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, the majority of the Court held:
- [36] We have reaffirmed that, to the extent possible, the standard of review analysis requires courts to give effect to the legislature's institutional design choices to delegate authority through statute. In our view, this principled position also requires courts to give effect to the legislature's intent, signalled by the presence of a statutory appeal mechanism from an administrative decision to a court, that the court is to perform an appellate function with respect to that decision. Just as a legislature may, within constitutional limits, insulate administrative decisions from judicial interference, it may also choose to establish a regime "which does not exclude the courts but rather makes them part of the enforcement machinery": *Seneca College of Applied Arts and Technology v. Bhadauria*, [1981] 2 S.C.R. 181, at p. 195. Where a legislature has provided that parties may appeal from an administrative decision to a court, either as of right or with leave, it has subjected the administrative regime to appellate oversight and indicated that it expects the court to scrutinize such administrative decisions on an appellate basis. This expressed intention necessarily rebuts the blanket presumption of reasonableness review, which is premised on giving effect to a legislature's decision to leave certain issues with a body other than a court. This intention should be given effect. As noted by the intervener Attorney General of Quebec in its factum, [translation] "[t]he requirement of deference must not sterilize such an appeal mechanism to the point that it changes the nature of the decision-making process the legislature intended to put in place": para. 2.
- [37] It should therefore be recognized that, where the legislature has provided for an appeal from an administrative decision to a court, a court hearing such an appeal is to apply appellate standards of review to the decision. This means that the applicable standard is to be determined with reference to the nature of the question and to this Court's jurisprudence on appellate standards of review. Where, for example, a court is hearing an appeal from an administrative decision, it would, in considering questions of law, including questions of statutory interpretation and those concerning the scope of a decision maker's authority, apply the standard of correctness in accordance with *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 8. Where the scope of the statutory appeal includes questions of fact, the appellate standard of review for those questions is palpable and overriding error (as it is for questions of mixed fact and law where the legal principle is not readily extricable): see *Housen*, at paras. 10, 19 and 26-37. Of course, should a legislature intend that a different standard of review apply in a statutory appeal, it is always free to make that intention known by prescribing the applicable standard through statute.

[Emphasis added.]

[17] Thus, the applicable standards here are the appellate standards of review. The issues raised by the Petitioners involve statutory interpretation. Thus, the standard of review of correctness.

III. the relevant legislation

[18] In addition to the general statutory definitions found in s. 1, the relevant provisions of the Act are ss. 4 through 12 (collectively, the "FTHB Provisions").

[19] The following FTHB Provisions are particularly relevant here:

Definitions in relation to first time home buyers' program

4 (1) In this section and in sections 4.1 to 12:

"eligible transaction" means, for the purposes of determining the eligibility of a first time home buyer for an exemption or refund under sections 5 to 12, a taxable transaction not referred to in paragraph (f) or (g) of the definition of "taxable transaction", for which an application for registration is made at a land title office after March 23, 1994;

"first time home buyer" means an individual who,

- (a) on the registration date, is
 - (i) a Canadian citizen, or
 - (ii) a permanent resident of Canada,
- (b) either
 - (i) continuously maintained the individual's principal residence in British Columbia throughout a period of not less than one year immediately before the registration date, or
 - (ii) was subject to tax under section 2 (1) (a) of the Income Tax Act (British Columbia) and has filed a return under section 29 (1) of that Act in at least 2 of the 6 taxation years immediately preceding the registration date,
- (c) has not previously held a registered interest in land, whether in British Columbia or elsewhere, that constituted the individual's principal residence, and
- (d) has not previously obtained a first time home buyers' exemption or refund;

"principal residence" means the usual place where an individual makes his or her home;

"property" means a parcel of land and the improvements, if any, in respect of which an application is made for

- (a) an exemption under section 5 or 6, or
- (b) a refund under section 7;

"qualifying property" means a property the fair market value of which does not, on the registration date, exceed the sum of the qualifying value of that property and \$25 000;

"qualifying value", in relation to a property, means \$500 000;

"registration date" means, in respect of an eligible transaction, the date on which the application for registration of the eligible transaction is made at a land title office;

"residential improvement", in respect of a property, means

- (a) an improvement that is permanently affixed to the property and is intended to be a dwelling, or
- (b) if only part of an improvement that is permanently affixed to the property is intended to be a dwelling, that part of the improvement that is intended to be a dwelling.

First time home buyers' exemption

5 (1) Subject to subsection (1.1) and sections 6 to 11, a transferee who applies for registration, at a land title office, of an eligible transaction in respect of a qualifying property is exempt from the obligation to pay tax under section 2(1)(a) on that transaction if

- (a) the transferee is a first time home buyer, and
 - (b) the transferee applies for an exemption under this section or section 6 by tendering with the application for registration an application for exemption.
 - (c) [Repealed 2008-10-90.]
- (2) An application for exemption under subsection (1) must be in the form required by the minister and must
- (a) include a declaration, in the form required by the minister, by which the transferee declares that the transferee is a first time home buyer,
 - (b) disclose that the property to which the eligible transaction relates is a qualifying property, and
 - (c) include a consent, in the form required by the minister, by which the transferee consents to the administrator conducting inquiries respecting the transferee that the administrator considers necessary to confirm the qualifications of the transferee for the exemption.

First time home buyers' refund

7 (1) A transferee who is entitled to an exemption under section 5 or 6 in respect of an eligible transaction who fails to apply for that exemption on the registration date may, within 18 months after that date, apply to the administrator for a refund of the tax paid on the registration of the transaction by the transferee.

- (2) On receiving an application under subsection (1), the administrator must,
 - (a) on being satisfied that the transferee would have qualified for an exemption under section 5 or 6 on the registration date, pay out of the consolidated revenue fund a refund of that portion of the amount of tax paid by the transferee that is equivalent to the amount of the exemption to which the transferee would have been entitled had the application for the exemption been made on the registration date, or
 - (b) if not satisfied that the transferee would have qualified for an exemption under section 5 or 6 on the registration date, refuse the application and provide written notice to the transferee of that refusal under subsection (3).
- (3) If an application for a refund under subsection (1) or (1.1) is refused, the administrator must send a letter to the applicant stating the reason for the refusal, and the letter is deemed to be a notice of assessment for the purposes of allowing the applicant to file a notice of objection under section 19.

First time home buyers' program -- obligations of transferee

8 (1) A transferee who has applied for an exemption under section 5 or 6 or a refund under section 7 must establish a qualifying residence on the property within the meaning of subsection (2) of this section.

- (2) For the purposes of subsection (1), a transferee establishes a qualifying residence on a property if, on the registration date,
 - (a) the property contains a residential improvement that the transferee inhabits as the transferee's principal residence
 - (i) beginning on a date that is not more than 92 days after the registration date, and
 - (ii) continuing to a date that is not earlier than the first anniversary of the registration date, or
 - (b) the property does not contain a residential improvement but .

First time home buyers' program -- unqualified transferee

9 (1) Subject to section 10, a transferee who has obtained an exemption under section 5 or 6 or a refund under section 7 is liable under subsection (2) of this section if and from the time that the transferee

- (a) fails or ceases to qualify for an exemption under section 5(1)(a),
- (b) fails or refuses to comply with section 5(1)(b) or (2), or
- (c) subject to subsection (1.1), fails, refuses or ceases to comply with the obligations under section 8.

(1.1) If a transferee does not meet the obligations under section 8 only because the transferee, before the first anniversary of the registration date, fails to establish a qualifying residence as required under section 8(2)(a)(ii) or (2)(b)(i)(B) as applicable, the transferee is liable under subsection (2.1) of this section from the date of the failure to establish a qualifying residence.

(2) A transferee referred to in subsection (1) must pay to the administrator tax in the same amount that the transferee would have been obliged to pay under section 2(1)(a) had the transferee not received the exemption or refund.

First time home buyers' exemption or refund retained

10 Section 9(1) to (2.1) does not apply to a transferee who has obtained an exemption under section 5 or 6 or a refund under section 7 if the transferee does not comply with section 8(2)(a) or (b) only because

- (a) the transferee dies before the first anniversary date of the registration date, or
- (b) the property is transferred by the transferee pursuant to a written separation agreement or a court order under the Family Law Act.

[Emphasis added.]

IV. parties' positions

[20] The Petitioners rely on the established approach to statutory interpretation. That approach was recently affirmed by Chief Justice McLachlin (for the Court) in *B.C. Freedom of Information and Privacy Association v. British Columbia (Attorney General)*, 2017 SCC 6, [2017] 1 S.C.R. 9:

[21] I conclude that, properly interpreted, s. 239 does not catch the categories of expression upon which the appellant relies. This follows from the application of our long-accepted approach to statutory interpretation, namely that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26, quoting both E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87, and *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21. ...

[21] The Petitioners emphasize the purposive aspect of interpretation, in the sense of the intention of the Legislature and social policy goal of the FTHB Provisions.

[22] The Petitioners' starting point is the (undisputed) assertion that they come within the statutory definition of "first time home buyer". The Petitioners also assert the Property was their "principal residence" from the time they registered it, as they did not have a "principal residence" elsewhere after registration. Essentially, they submit that it is their principal residence by default. They also note that they did not enter into the lease that entitled the tenant to live there during the 92 day period, but rather purchased the Property subject to

the existing lease. They could not have bought and registered the Property and then actually moved in during the 92 period; the lease prevented that. Adding these points together, they say that they fall squarely within the group of people the FTHB Exemption was meant to benefit.

- [23] The Petitioners assert the FTHB Provisions are benefit-conferring, social policy provisions that should be liberally interpreted. They submit the Minister could have interpreted the Act so that they - people the FTHB Exemption was intended to benefit - would qualify. Instead, the Minister took the position that s. 8(2)(a)(i) barred their application from succeeding. They submit the FTHB Provisions should be interpreted through the lens of the Act's policy objective and that a proper interpretation would result in their application being granted.
- [24] In argument, Mr. Voroney posited that it could not be the case that the FTHB Exemption cannot be granted where, for example, the transferee is somehow prevented from moving into the residential improvement until 93 days following the date of registration. He asserted the Minister could grant an application in the circumstances of his example and thus is wrong in treating s. 8(2)(a)(i) as a bar in their case.
- [25] In response, the Province submits that the Petitioners have failed to identify any legal basis for the relief sought. The Province says the Petitioners' position is that they are entitled to the FTHB Exemption based on the purpose of the Act, as opposed to advancing an argument that their application complies with the FTHB Provisions.
- [26] The Province does not dispute the general interpretative approach outlined by the Petitioners, but argues there are additional interpretative principles that pertain to taxation statutes in particular. The Province cites *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20 [Placer Dome], where the Court (per Justice Lebel) stated as follows:

B. Interpretation of Tax Statutes

(1) General Principles

21 In *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, this Court rejected the strict approach to the construction of taxation statutes and held that the modern approach applies to taxation statutes no less than it does to other statutes. That is, "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (p. 578): see 65302 *British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. However, because of the degree of precision and detail characteristic of many tax provisions, a greater emphasis has often been placed on textual interpretation where taxation statutes are concerned: *Canada Trustco Mortgage Co. v. Canada*, [2005] 2 S.C.R. 601, 2005 SCC 54, at para. 11. Taxpayers are entitled to rely on the clear meaning of taxation provisions in structuring their affairs. Where the words of a statute are precise and unequivocal, those words will play a dominant role in the interpretive process.

22 On the other hand, where the words of a statute give rise to more than one reasonable interpretation, the ordinary meaning of words will play a lesser role, and greater recourse to the context and purpose of the Act may be necessary: *Canada Trustco*, at para. 10. Moreover, as McLachlin C.J. noted at para. 47, "[e]ven where the meaning of particular provisions may not appear to be ambiguous at first glance, statutory context and purpose may reveal or resolve latent ambiguities." The Chief Justice went on to explain that in order to resolve explicit and latent ambiguities in taxation legislation, "the courts must undertake a unified textual, contextual and purposive approach to statutory interpretation".

23 The interpretive approach is thus informed by the level of precision and clarity with which a taxing provision is drafted. Where such a provision admits of no ambiguity in its meaning or in its application to the facts, it must simply be applied. Reference to the purpose of the provision "cannot be used to create an unexpressed exception to clear language": see P. W. Hogg, J. E. Magee and J. Li, *Principles of Canadian Income Tax Law* (5th ed. 2005), at p. 569; *Shell Canada Ltd. v. Canada*, [1999] 3 S.C.R. 622. Where, as in this case, the provision admits of more than one reasonable interpretation, greater emphasis must be placed on the context, scheme and purpose of the Act. Thus, legislative purpose may not be used to supplant clear statutory language, but to arrive at the most plausible interpretation of an ambiguous statutory provision.

24 Although there is a residual presumption in favour of the taxpayer, it is residual only and applies in the exceptional case where application of the ordinary principles of interpretation does not resolve the issue: *Notre-Dame de Bon-Secours*, at p. 19. Any doubt about the meaning of a taxation statute must be reasonable, and no recourse to the presumption lies unless the usual rules of interpretation have been applied, to no avail, in an attempt to discern the meaning of the provision at issue. In my view, the residual presumption does not assist PDC in the present case because the ambiguity in the Mining Tax Act can be resolved through the application of the ordinary principles of statutory interpretation. I will say more on this below.

[Emphasis added.]

[27] The Province asserts the FTHB Provisions are unambiguous in relation to the points raised by the Petitioners, and that the Petitioners are seeking to override clear statutory language by reference to social purpose.

V. analysis & decision

[28] I agree with the Province's position.

[29] Section 5(1) of the Act is expressly subject to, among other provisions, s. 8. Thus, the FTHB Exemption is only available to those who can establish "a qualifying residence" within the meaning of s. 8(2) of the Act.

- [30] Where there is a residential improvement on a property, s. 8(2)(a)(i) obliges a transferee to establish they inhabited the residential improvement as a principal residence within 92 days of registration. The wording is clear on its face, and no amount of reliance on the broad social purpose of the FTHB Exemption is sufficient to disclose any latent ambiguity in the relevant terms or in their application on the facts of this case.
- [31] The Petitioners assert the Property was their "principal residence" from the date of purchase. There are two answers to this argument.
- [32] First, on the evidence the Petitioners did have a principal residence after registration: first, at their Whistler rental home and, later, at Mrs. Voroney's parents' home in France. Those homes were, respectively, where the Petitioners could usually be found.
- [33] Second, the statutory definition of "principal residence" is somewhere an individual "makes" his or her home. The word "makes" is a verb and implies active use, not possessory status. The Act contains many terms regarding various forms and means of possession: e.g., "transferee", "right to occupy", "owner", "holder". The term "makes" is used purposefully, not generically. I also note that neither Petitioner changed their Provincial driver's licence or Medical Service Plan addresses to the address of the Property until 2018.
- [34] In any event, s. 8(2)(a) further requires the transferee to "inhabit" the residential improvement as a principal residence. The Merriam-Webster online dictionary defines "inhabit" as follows:
- 1 : to occupy as a place of settled residence or habitat : live in
// inhabit a small house
- 2 : to be present in or occupy in any manner or form
// the human beings who inhabit this tale
- [35] The plain and ordinary meaning of "inhabit" requires occupation with at least some degree of physical presence. Again, the larger context of the use of "inhabit" in s. 8(2)(a) is an Act that draws precise lines about the exercise of rights in relation to real property. The plain and ordinary meaning of "inhabit" is apt in s. 8(2)(a).
- [36] The Petitioners did not inhabit the residential improvement on the Property as their principal residence within the 92 day period, and thus did not meet the s. 8(2)(a)(i) condition. Nor, for that matter, did they meet the s. 8(2)(a)(ii) condition. The Province's submission that the FTHB Provisions are unambiguous in their application in this case is correct. The Petitioners moved in some 18 months later. They do not qualify for the FTHB Exemption.
- [37] Even assuming the Petitioners' framing of the legislative objective of the FTHB Provisions is correct, that objective cannot, as held by the Supreme Court of Canada in *Placer Dome*, be used "to create an unexpressed exception to clear language".

- [38] As noted, in argument Mr. Voroney asserted that it could not be that the FTHB Exemption requires absolute, literal compliance with s. 8(2)(a), providing his 93 days after registration example. In my opinion, that and similar examples raise the issue of what the Administrator can take into consideration when determining whether he is "satisfied" for purposes of s. 7. Nothing on the facts this case warrants close consideration of that argument.
- [39] The Petitioners never had any intention of moving in within 92 days of registration. They bought the Property with full knowledge that it was leased out until June 2017. The Petitioners ultimately moved in some 18 months after registration - a point of time on the far side of s. 8(2)(a)(ii). Assuming for purposes of argument that the Administrator has the authority to consider the issue of intended or substantial compliance when determining satisfaction, this case does not engage that issue.
- [40] At several points in their argument, the Petitioners stressed the fact that the lease was in place when they purchased the Property. They are correct that where there is a fixed-term lease with more than 92 days left on term when a property is bought, the buyer's ability to obtain the FTHB Exemption is hindered. These kinds of situations are an example of why taxation statutes are drafted so very precisely: i.e., to enable individuals to ascertain tax consequences beforehand and account for them in their dealings. Where a residential improvement is encumbered so as to deprive a purchaser otherwise eligible to claim the FTHB Exemption, the matter can be raised in negotiations regarding purchase price or might result in an offer to buy the tenant out early. One of the reasons taxation statutes are detailed and precise is because the forewarned citizen can be a forearmed citizen.
- [41] Finally, I note that there was no evidence before me regarding legislative purpose. The Petitioners' conception of the social policy served by the FTHB Provisions is both extremely expansive and extremely general. If the legislative objective was simply ensure that every buyer that fit within the statutory definition of "first time home buyer" received the FTHB Exemption, the Act would not be drafted as it is. It would simply set the statutory definition as the sole condition of eligibility. The specific terms and conditions of the FTHB Exemption reflect more refined social policy judgments about who is entitled to that exemption and who is not, whatever broad social concern may have informed the Legislature's embrace of the FTHB Exemption as a general concept.
- [42] The appeal is dismissed.
- [43] The Province is entitled to its costs.

"Tucker J."

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