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How Perfect Is A Tax Deed Title??

The question of the effectiveness of a tax deed was the subject of a presentation at the Practical Property Conference sponsored by the Continuing Legal Education Society of Nova Scotia, March 26 & 27. The paper, presented by Douglas C. Campbell, alerted the legal profession to a number of the problems associated with tax deeds, which some lawyers have unequivocally accepted as curing all previous defects and creating a new root of title. The purpose of this article is to point out some further pitfalls.

In addition to hallowed tradition, the magic properties of a tax deed derive from section 178 of the *Assessment Act* and the similar provisions in various municipal statutes which state that the deed shall be conclusive evidence that all provisions with reference to the sale of the land have been fully complied with, the sale duly performed and that the deed shall have the effect of vesting the land in the grantee in fee simple, free and discharged from all encumbrances.

There are unfortunately, a number of exceptions to this provision which have come to light from time to time as the courts have considered various tax sales.

1. Tax Deed Not Registered Within 15 Months After Sale

Section 179 of the *Assessment Act* provides that if a tax deed is not registered within 15 months of the sale, the grantee and others claiming under it lose their priority as against a bona fide purchaser for value without notice who has registered his deed prior to the registration of the tax deed.

This section would appear to open the door with respect to all past transactions with the property and with respect to conveyances by persons other than the assessed owner. A careful check should therefore be made to ascertain that a tax deed has been registered within the required time period.

2. Tax Deed Including Property Assessed to Another

In *Aulenback v. Aulenback*, [1949] 2 D.L.R. 365, property owner who had not recorded his deed had the description to his lot included in a tax deed of a larger lot out of which his particular lot had originated. This was a case of double assessment. The tax sale was set aside since the lot in question was not subject to arrears of taxes and a tax deed can only deal with land against which there are arrears. A similar circumstance arose with the same result in *Crestpark Realty Limited v. Riggins* (1977), 21 N.S.R. (2d) 298.

Another case of double assessment was *MacDonald v. MacLennan* (1981), 48 N.S.R. (2d) 14. Here, two individuals were assessed for the same property and when one did not pay, it was sold for taxes. The Appeal Division confirmed the decision of Glube, J. that the sale be set aside. The following passage was quoted from the *Crestpark* case:

"In my opinion there is a heavy duty on a city when it sells the land of an individual citizen. The municipality must use the greatest of care in such a sale and observe every particular and ensure that a valid lien exists against the land that is being sold."

3. Lands of Another Included In Sale

The decision of Chief Justice Cowan in *Devereaux and Robinson v. Saunders* (1977), 26 N.S.R. (2d) 30, appears to suggest that inclusion in an assessment of lands owned by another renders a tax sale invalid:

"If, for example, the municipality erroneously assesses lands owned by one person in the name of another person, and then proceeds to sell the lands under the tax sale provisions, the result is

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deed does not, in my opinion, deprive the true owner of title."

This decision was affirmed upon appeal.

This question was also considered in 1918 in the case *Ennis v. Bell* (1918), 52 N.S.R. 31, where property was vested in a daughter subject to her mother's right to dower and the City assessed the whole property to the widow and she alone received the notice of assessment and notices of tax arrears. The court considered the Supreme Court of Canada case of *O'Brien v. Cogswell*, 17 S.C.R. 321, and concluded that no procedural irregularities had occurred and that the sale was valid. An appeal from this decision was dismissed ((1918), 40 D.L.R. 3).

4. Ungranted Property

The Crown is not bound by a sale pursuant to municipal taxes and therefore a tax sale of property which has not been granted may do no more than convey whatever title the former occupant had obtained by adverse possession. In the absence of such possession nothing may have been acquired through such a sale. This situation was the subject of considerable discussion in the cases of *Scott v. Smith* (1979), 36 N.S.R. (2d) 541 and *Stewarts of Dartmouth Ltd. v. City of Dartmouth* (1981) 128 D.L.R. (3d) 547.

5. Description in Tax Deed Differing From Property Advertised

In the case of *Hebb v. Hebb*, [1944] 2 D.L.R. 255, the purchaser at a tax sale requested that an additional lot, which went along with the lot described in the advertisement, be included in the tax deed. The deed with respect to this added description was declared to be ineffective since all the formalities necessary for a valid tax sale had not been complied with.

6. Owner Having No Notice of Sale

In *Gordon v. Attorney General*, (1979) S.H. No. 26465, the property was sold for taxes in 1925 to the Town of Dartmouth. The property had been assessed against the heirs of Jane Taylor. Mr. Justice Burchell examined the abstract of title and, although there was a chain of title showing ownership of the property in the Taylor family since 1843, the judge found that "one George Gibson had obtained a deed to the property in 1825 and accordingly the tax sale and resulting certificate had no effect on the outstanding interest of Mr. Gibson or his heirs there being no assessment or notices given in the names of the real owners of the parcel". Mr. Justice Burchell cited the cases of *Devereau and Robinson v. Saunders* and *Crestpark Realty Limited v. Riggins* and concluded that the 1925 tax certificate did not vest in the City of Dartmouth the title to the parcel "which was then vested in George Gibson".

7. Property Sold Subject to an Easement

If a tax sale is held for the express purpose of clearing the property of an easement, it is ineffective for this purpose (*Assessment Act*, s. 39(3)). Similarly a tax

deed carries with it a right of way used by the property even though not specifically described.

8. Property By Its Character or Ownership Exempt from Taxation

Section 3 of the *Assessment Act* sets forth a number of categories of properties which are exempt from taxation and therefore would not be capable of being the subject of a tax deed. The list is a lengthy one and includes such things as churches, colleges, crown property, wharves, municipal property, property of an agricultural society, bomb shelters, railways, property of the Royal Canadian Legion, Boy Scouts and Girl Guides. There is an exception, however, with respect to property held by the Director under the Veterans' Land Act to permit such property to be sold for taxes.

9. Property of a Dissolved Corporation

Objection was made to a tax sale by the City on the ground that the assessment was against a limited company which had been dissolved by striking off the register in *Stewarts of Dartmouth Ltd. v. City of Dartmouth* (1981) 128 D.L.R. (3d) 547. The objection proceeded on the argument that, the corporation being dissolved, its property escheated to Her Majesty in right of the Province of Nova Scotia and the municipality has no power to sell Crown lands for taxes and the tax sale was therefore ineffective.

The purchaser at the tax sale referred to an order for reinstatement of the former corporate assessed owner issued by the Supreme Court three years after the sale. Burchell, J. accepted this procedure as cancelling the escheat retroactively as if it had never taken place and ruled that this objection to the tax sale had been cured.

10. Conveyance to a Purchaser for Value

Many of the foregoing cases involved circumstances where the purchaser at a tax sale still held title to the property and therefore it would be possible for the land to be reconveyed to the former owner. The circumstances where, subsequent to the tax sale, a portion of the property was conveyed to a third party was considered in the case of *Hyland v. Halifax*, [1932] 3 D.L.R. 760. In that case the Appeal Division of the Nova Scotia Supreme Court did not disturb the title of the bona fide purchaser for value from the buyer at the tax sale, but required the City to compensate the owner for loss of that portion of the property. There was the additional consideration that the purchaser for value was not made a party to the action. This case seems to suggest that a bona fide purchaser for value from the holder under an otherwise invalid tax deed may have a better title than his predecessor and that a conveyancer may be able to rely upon an old tax sale as being effective.

The conveyancer must, however, be cautious with respect to tax deeds in general and they should be carefully scrutinized to determine whether they have any of the characteristics which have induced courts to set tax sales aside.

— Charles W. MacIntosh