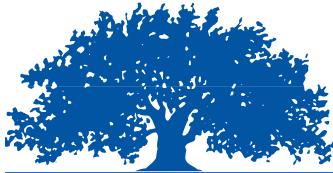


STILLMAN LLP'S



LEGAL EYE

PRO POSSE SUO

VOL 20, No2.

WINTER, 2016



Presenting Legal News, Views and Updates from
Stillman LLP
Barristers & Solicitors



EDITOR'S NOTE

Should you have any questions, concerns or suggestions for future articles please contact Erik Bruveris by phone at 930-3639, or by email at ebruveris@stillmanllp.com.

HEADS UP

Heads Up is a column which appears in each issue of the Stillman LLP Legal Eye, highlighting new or upcoming legislation and legal issues in the Province of Alberta.

Administrative Law and Standard of Review Update: Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd., 2016 SCC 47

By Shannon Kinsella

In our Summer 2015 edition of Legal Eye, Alexander Manolii provided you with an article on Administrative Law and the Standard of Review as it was changed by our Court of Appeal in *Edmonton East (Capilano) Shopping Centres Limited v. Edmonton (City)*, 2015 ABCA 85 ("Edmonton East"). In that case, the Court of Appeal broadened the categories where the correctness standard would be applied on appeals from administrative tribunals. This changed the presumption of the *reasonableness standard* that was previously applied. Very recently, the Supreme Court of Canada overturned our Court of Appeal and again changed the landscape for the Standard of Review in administrative law.

Standard of Review refers to the level of deference that a reviewing body will give to the administrative tribunal that made the original decision. The amount of deference shown to a tribunal can have a considerable effect on the likelihood of success on appeal.

To recap, the 2008 Supreme Court of Canada decision *Dunsmuir v. New Brunswick*, 2008 SCC 9, narrowed the choices for standard of review to two:

1. *Reasonableness Standard*: the reviewing court is more likely to defer to the adjudicator's decision. In fact, the decision would be upheld as long as it (a) is intelligible, transparent, and justified and (b) falls within the possible outcomes based on the applicable facts and law. Since enforcing this standard is necessarily subjective, it affords adjudicators a relative measure of deference.
2. *Correctness Standard*: the reviewing court considers and answers the issue in question directly. To this end, no deference is given to the decision that is being appealed.

In *Edmonton East*, the City of Edmonton assessed the complainant shopping center at \$31,000,000.00 for the 2011 tax year. The complainant sought a reduction in the assessed value before the Edmonton Assessment Review Board. At the hearing, the review board increased the assessment value to \$41,000,000.00, based on an error found by the City in their characterization of the property. This decision was appealed by the complainant.

INSIDE:

HEADS UP:

-a review of some recent and upcoming legislation and legal issues

FIRM NOTES:

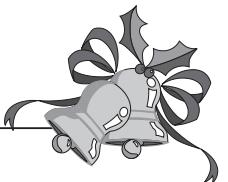
-update on the happenings at Stillman LLP

CAUSES CÉLÈBRES:

-some recent case law to be aware of

AS WE SEE IT:

-semi-annual commentary on a current legal issue



Previously, there was a presumption of deference and of the reasonableness standard when appealing an administrative tribunal's decision. This presumption is displaced and the *correctness standard* is applied in the following cases:

- a. Constitutional questions;
- b. Questions of law of central importance, outside the tribunal's expertise;
- c. Questions involving competing specialized tribunals; and
- d. Questions of jurisdiction or *vires*.

At the Court of Queen's Bench level, the chambers judge quashed the tribunal's decision and remitted the matter back to the tribunal for a new hearing on the basis that the tribunal did not have the authority to increase the assessed value. The Court of Appeal upheld the decision of the chambers judge. In doing so, Justice Slatter applied the *correctness standard* in reviewing the tribunal's decision. Relying on section 470 of the *Municipal Government Act* (the "Act"), which outlines the right to appeal the tribunal's decision, the Court of Appeal held that this section displaced the presumption of the *reasonableness standard*. In their view, the review board was interpreting provisions of the Act, which would then be a question of law outside of the tribunal's expertise and fall into the *correctness standard*.

The City of Edmonton appealed the Court of Appeal's decision to the Supreme Court of Canada ("SCC"). By a slim majority of 5-4, the SCC overturned the Court of Appeal and reinstated the decision of the Assessment Review Board. Karakatsanis J., writing for the majority, held that a *reasonableness standard* should have been applied and if it had been applied, the tribunal's decision would not have been quashed. It was also found that it was reasonable, and within their authority, for the tribunal to increase the assessment value.

The SCC reinforced the presumption of reasonableness when an administrative tribunal is interpreting its own statute or one closely connected to its function. This presumption respects the legislative choice to delegate certain matters to a specialized tribunal rather than to the courts. The SCC concluded at paragraph 34 that the case law clearly shows that the *reasonableness standard* applies and that "[i]nevitably, the result would have been the same as in those cases. The presumption of reasonableness is not rebutted".

In addition to the standard of review, the SCC clarified the merits of the decision as well. This was the issue of whether or not the Assessment Review Board has the ability to increase an assessment at a hearing. This was again a 5-4 decision with the same Justices forming the majority. The majority held that it was within the authority of the board to increase an assessment if appropriate evidence is presented by the City. The reasoning given to this decision is that the goal of the board should be to ensure that the correct, fair and equitable value is given for the assessment so that the taxpayer bears their fair share of the overall tax burden.

The fact that the SCC confirmed that an Assessment Review Board has the ability to increase an assessment when a taxpayer brings a complaint means that there is increased risk to a taxpayer wanting to complain about their assessment. In addition, the hotly contested issue of standard of review has now been clarified and the SCC has given greater discretion to administrative tribunals in general and it will be more difficult to appeal a decision. This has the potential of having a major impact as the legislature has been trending towards giving more and more powers to administrative tribunals. In the end, with the decision of the SCC it is now even more important to seek legal advice early in the administrative process.

FIRM NOTES

Our office is pleased to welcome Shannon Kinsella who joins our office as a junior associate after having articled and spent her first year as an associate with a large Edmonton firm.

We have also welcomed a new assistant, Jody Gallagher, who will be working primarily with Shannon Kinsella and Katie Kenny. Jody brings a wealth of experience with her in the area several different areas, and we are pleased to have her aboard.

Unfortunately (for us) Melissa Mackay is no longer with our office. Ms. Mackay has returned to Halifax to pursue opportunities with the government of Nova Scotia. While we are happy for Ms. Mackay and the opportunities she is now pursuing, she will be missed by all and we wish her nothing but the best.

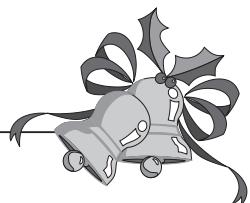
CAUSE CÉLÈBRES

The Importance of Following Court Orders and Avoiding Civil Contempt in Alberta: 336239 Alberta Ltd. (Dave's Diesel Repair) v. Mella, 2016 ABCA 226

By Alexander Manolii

When dealing with litigation matters, individuals must often determine what steps they wish to take in order to reach their desired results as quickly and as efficiently as possible. This is especially true when the opposing parties are uncooperative and difficult to deal with. A particular challenge arises, for example, when the opposing side refuses to follow court orders. How can a person respond to such a situation? Recent Alberta cases show that an application for civil contempt can significantly empower the complying party and force the opposing side to act in accord with the granted order.

Civil contempt refers to any intentional act or omission that demonstrates beyond a reasonable doubt and without a reasonable excuse disrespect towards the authority or dignity of the court. Under the *Alberta Rules of Court*, the court has the authority to both declare



someone as being in civil contempt and to punish such a person. The penalties or sanctions that a court can order against someone found in civil contempt range from a fine, dismissal of a claim or action, and can even include imprisonment.

The court's willingness and ability to sanction civil contempt was recently set out by Justice Schutz in the case of *336239 Alberta Ltd. (Dave's Diesel Repair) v. Mella*, 2016 ABCA 226 ("Dave's Diesel").

Dave's Diesel involves the case of a corporation (Plaintiff) and its former bookkeeper (Defendant) who allegedly misappropriated over \$2.2 million fraudulently. The Plaintiff successfully obtained an Attachment Order that limited the amounts the Defendant could spend each month. The Defendant breached the Attachment Order and was found to be in contempt.

The Defendant's actions in *Dave's Diesel* led to two civil contempt orders. The first civil contempt order required the Defendant to become compliant with the original Attachment Order and carried a schedule for accumulating fines for each day he remained in contempt. The court found that the Defendant failed to purge his contempt and acted in clear opposition of both the original Attachment Order and the civil contempt order. In fact, the Defendant accumulated approximately \$56,000 in fines for his failure to comply with the first civil contempt order. Subsequently, the Defendant was required to show cause for why he should not be imprisoned.

Having failed to show an acceptable reason for his conduct, the Defendant was sentenced to 3 months of imprisonment – even though this was a civil action. This sentence survived the Defendant's appeal – which outlined the reasons for why the imprisonment was justified. After a further showing of contempt of court, the Defendant was recently sentenced to a further 12 months of imprisonment in August 2016.

In addition to affirming the court's ability to enforce compliance with "the process of the court itself" by means of fines and imprisonment, the case outlined the seriousness of acting against court orders. Based on the Defendant's disregard and defiance of the court's orders, the monetary sanctions of approximately \$56,000 as well as the 3 month prison sentence were affirmed as proportionate to the Defendant's conduct and necessary.

When dealing with civil actions, parties do not always see the urgency to follow court orders. For those involved in civil litigation, *Dave's Diesel* shows the value of an application for civil contempt as a remedy for non-compliance. While contentious cases and uncooperative opposing parties will always exist, the threat of significant fines and potential imprisonment can motivate a person to follow the court's instructions. Overall, there are significant benefits from an application for civil

contempt for a complying party. It is advisable that a person considering an application for civil contempt discuss this matter with a lawyer. Doing so could help expedite the action and force the opposing side to comply with the direction of the court.

AS WE SEE IT

Protecting an Expectancy in an Estate: *Kostrub v Stuparyk*

By Katie Kenny, Associate lawyer at Stillman LLP

In the recent decision of *Kostrub v Stuparyk* ("Kostrub"), the Alberta Court of Queen's Bench was asked to consider a legal question that has long been considered decided – whether an individual has any right to property he or she expects to receive in an estate, prior to the death of the person giving the gift.

The individual in question in the case, Anastazia Kostrub, had three daughters, Karen, Shirley and Marcy, and two nephews, Sheldon and Tyler. She was the sole owner of two quarters of farmland. In her will, Anastazia bequeathed the farmland to Sheldon and Tyler, provided that they paid a specific sum of money to her daughters.

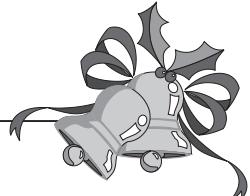
Shortly before her death, Anastazia transferred the farmland from her name as sole owner, into her name along with her three daughters. Anastazia, Karen, Shirley and Marcy then held the land as "joint tenants".

When property is held in joint tenancy and one co-owner passes away, ownership of the land remains in the hands of the surviving co-owners. The result was that after the transfer, the land would no longer form part of Anastazia's estate. When she died, the land would be owned by Karen, Shirley and Marcy by virtue of the right of survivorship.

Sheldon and Tyler were disappointed to learn that their aunt had transferred the land. They brought an application asking the court to prevent the transfer. Karen, Shirley and Marcy asked the court to strike out their claim, on the basis that the nephews, as "mere beneficiaries under the will", have no right to challenge the transfer.

The court was asked to decide whether the nephews had the right to protect their interest in the farmland, before Anastazia had passed away. Master Schlosser began his reasons by commenting that the law in this area is "clear and has been settled for about half a millennium", and described the legal principle as follows:

"A will is a document which is of no effect until the testator's death and until then, is a mere declaration of his intention and is at all time, until such death, subject to revocation or variation... [A] person named as a beneficiary in a will takes no interest whatever under it until the death of the testator[.]"



Generally speaking, a beneficiary may not sue over property they expect to receive from an estate before the person who would have given them the gift (the “testator”) has passed away. Master Schlosser, however, went on to say that there are exceptions to this rule.

If the testator has lost capacity, for example due to affliction by Alzheimer’s disease, and there is no chance he or she will regain capacity, the court may allow the beneficiaries of the will to sue to protect their interest in the property they expect to receive upon the testator’s death. In this instance, the testator is unable to make another will, and therefore the beneficiaries may be considered to have a “vested interest” in the property. However, this exception likely applies only to a narrow set of circumstances.

The nephews failed to prove to the court that this exception applied. Master Schlosser decided that the nephews did not have standing to bring their application, and their application was dismissed. Upon Anastazia’s death, ownership of the farmland remained with her three daughters.

This case illustrates the importance of having carefully considered estate planning documents that reflect your true intentions. The purpose of a will is to communicate your intentions regarding the disposition of your assets. An individual’s intentions may change over time as relationships and circumstances change. The testamentary gifts you want to give may change as the assets you own change towards the end of your life.

We can only guess as to what Anastazia’s true intentions were. In any case, if Anastazia had signed a new will after the land was transferred, her intentions would have been clearer. This may have prevented the legal battle that ensued around the time of her death.

Individuals must continually consider whether the latest version of their will accomplishes their estate planning goals over time. Upon the sale or transfer of a major asset, we recommend that you review your will to ensure that your estate will be distributed in the manner that you intend. Should you have any questions or concerns regarding the interpretation of your will or if you would like to update your will, please contact our office to speak to a lawyer in our estate planning department.

STILLMAN LLP



Barristers and Solicitors

#300, 10335 - 172 Street
Edmonton, Alberta, Canada T5S 1K9
Tel: (780) 484-4445
Fax: (780) 484-4184
Canada Toll Free: 1-888-258-2529
E-Mail: lawyers@stillmanllp.com
Website: www.stillmanllp.com



Stillman LLP is a general law firm formed in 1993 with emphasis on Civil Litigation, Corporate and Commercial matters, Real Estate, and Wills and Estates and Family Law. The firm represents clients throughout Alberta, and has also represented clients from British Columbia, Saskatchewan, Manitoba, Yukon, Northwest Territories, Ontario, Quebec and various jurisdictions in France, Ireland and the United States.

The firm has a well established network of agents in Canada, including Vancouver, Vancouver Island, Calgary, Regina, Saskatoon, Winnipeg, Toronto and Montreal. Stillman LLP also has established affiliations with various law firms throughout the United States and Great Britain.



“COMMON SENSE SOLUTIONS” ®

This newsletter contains general information only. It may not apply to your specific situation depending on the facts. The information herein is to be used as a guide only, and not as a specific legal interpretation.