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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 email at ebruveris@stillmanllp.com.

HEADS UP

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

New Legislation and Rules Regarding the Administration of Estates

By Ara McKee

The new *Estate Administration Act* as well as the revised surrogate rules came into force June 1, 2015. The new legislation and revised rules will apply to all estates that are currently being administered as of June 1, 2015. This article provides a summary of the important changes that all personal representatives and beneficiaries should be aware.

Firstly, the new legislation sets out the duties and tasks of personal representative in administering estates. The duties of personal representatives are that the role must be performed:

1. honestly and in good faith;
2. in accordance with the deceased's intentions and the Will (if there is one); and
3. with the care, diligence and skill that a reasonable and prudent person would exercise in comparable circumstances.

Additionally, a personal representative is now required to distribute the estate as soon as practicable. This provision does away with the common notion of the "executor's year" which suggested that a reasonable time frame for distribution of an estate was one year. The new provision requires personal representatives to take proactive steps throughout the administration of an estate to ensure the estate is managed in a timely manner, without reference to a specific time frame.

The new legislation also sets out four core tasks of personal representatives as follows:

1. identify the estate assets and liabilities;
2. administer and manage the estate;
3. satisfy the debts and obligations of the estate; and
4. distribute and account for the administration of the estate.

The schedule to the new legislation provides a detailed list of activities involved in the core tasks as listed above. Two important new requirements of personal representatives included in the list are the requirement to create and maintain records pertaining to the administration of the estate and the requirement to communicate with beneficiaries regarding the administration and management of the estate on an on-going basis. It is advisable that a personal representative review the schedule of tasks in preparation of administering an estate.

Secondly, the new legislation sets out new requirements for providing notice to beneficiaries and potential claimants of the estate. It is very important that a personal representative be aware of who is required to receive notice. Notice must be provided in four specific instances. Firstly, notice must be provided to beneficiaries of the deceased person. Secondly, notice must be provided to family members including: the spouse and/or common law partner of the deceased, if they are not the sole beneficiary, any adult children of the deceased who are unable to earn a livelihood due to a physical or mental disability and any child of

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the deceased who is under 22 years old and unable to withdraw from his or her parent's charge by reason of being a full-time student. Thirdly, notice relating to matrimonial property rights must be provided to a spouse of the deceased if the spouse is not the sole beneficiary of the estate. Fourthly, notice must be provided to the public trustee and the guardian if a beneficiary is a minor and to the attorney or trustee of a beneficiary if applicable.

It is important to note that the notices as stated above must be provided even in circumstances where a grant of probate is not applied for. The surrogate rules provide suggested forms of notices to be used to satisfy the notice requirements.

Under the new legislation, if a personal representative refuses or fails to perform any of the duties or tasks, or fails to provide the required notices, an application can be made to the court. The court may then order the personal representative to perform the duty or task, impose conditions on the personal representative, remove the personal representative, revoke a grant, or any other order the court considers appropriate.

It is advisable that personal representatives seek the assistance of a lawyer in order to seek advice and direction in the proper administration of an estate, even in the circumstance where an estate does not require probate. A lawyer can assist with ensuring the proper notices are provided as well as preparing and submitting applications for grants and attending to the estate distribution. Any of the estate lawyers in our office may be contacted in this regard.

This article outlines some highlights of the new legislation but does not purport to be an extensive review of all changes in the area of estate administration.

FIRM NOTES

The first half of 2015 has been bustling and we would like to thank all of our clients for their continued trust in our legal services. Long time and trusted employee Marilyn Essex recently retired and Marilynn Waddell who had retired in the past and had come back to work at our firm on a part-time basis has also announced her final retirement.

We are pleased to welcome back Delaine Stefanyk from maternity leave. We are also pleased to welcome Katherine Levitt as a student paralegal finishing her practicum at our firm. We are also pleased to welcome back Sara Boulet and Alex Manolii, both summer students working at our firm.

Stillman LLP is continuing to maintain its involvement in the community and has recently sponsored a West Edmonton Business Association golf tournament as well as the Canadian Home Builders Association, Edmonton Region awards ceremony, as well as other various activities such as golf tournaments and the coveted Stillman LLP Stealers softball team.

If you have any questions about how to get involved in some of our sponsored activities please contact Greg Bentz or Ara McKee.

CAUSE CÉLÈBRES

Administrative Law and Standard of Review Developments in Alberta: *Edmonton East (Capilano) Shopping Centres Limited v Edmonton (City)*

By Alexander Manolii

Following an unfavourable ruling by an administrative tribunal, individuals must often determine whether appealing a decision is ultimately worthwhile. The appeal process involves the review of the decision by the Court with the specific appeal procedure dependant on the tribunal involved and governing legislation. Since the appeal process is both costly and time consuming, the decision to appeal requires much thought and consideration. One of the key factors that merits consideration is the *"standard of review"* that the higher-level court would apply when assessing a decision.

In evaluating the decisions on appeal, reviewing courts must first determine the extent to which they should defer to the findings of the previous decision maker. This step is especially important when dealing with administrative tribunals where the adjudicators have expert knowledge in an area (e.g. *Alberta Utilities Commission*). In law, the term "*standard of review*" refers to the degree of deference that a reviewing body applies to a tribunal's decision. In other words, the selected standard affects how stringently a review court would consider the decision upon appeal – thus affecting the likelihood of the ruling being either held or overturned.

Since the 2008 Supreme Court of Canada decision *Dunsmuir v New Brunswick* (2008 SCC 9) the choices of standard of review are either *reasonableness or correctness*. These two standards are best characterized as follows:

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.

Understandably, an appellant looking to see a decision reversed would usually prefer that the *correctness* standard be applied on appeal, as this minimizes the amount of deference to the previous adjudicator's decision.

Although not an exhaustive list, *Dunsmuir* outlines the following categories of issues to which the *correctness* standard is applied:

(a) constitutional questions
(b) questions of law of central importance, outside the tribunal's expertise
(c) questions involving competing specialized tribunals
(d) questions of jurisdiction or *vires*

The ultimate effect of the analytical framework provided in *Dunsmuir* is that, outside of the exceptions listed above, there is a presumption of deference.

In *Edmonton East (Capilano) Shopping Centres Limited v Edmonton (City)* (2015 ABCA 85) *("Edmonton East")* an addition or variation to the above list is presented.

Edmonton East involved the appeal of a decision of the Edmonton Assessment Review Board – a tribunal that adjudicates property assessment complaints in the City of Edmonton. In appearing before this tribunal, the complainant was seeking a reduction in its 2011 assessment value. Instead, the review board not only dismissed the reduction request, but also increased the assessment value. Subsequently, the complainant appealed the tribunal's decision.

At the Court of Appeal level, Justice Slatter applied the *correctness standard* in evaluating the review board's decision. In applying this standard, Justice Slatter relied on section 470 of the *Municipal Government Act* (the "Act"). Section 470 outlines the right to appeal the tribunal's decisions to the ordinary courts, starting with the Court of Queen's Bench. The Court of Appeal interpreted this section as justifying judicial scrutiny and displacing any presumption of deference and of the *reasonableness standard*.

Ultimately, the *Edmonton East* decision – at paragraph 31 – concludes that "the appropriate standard of review of decisions of assessment review boards in interpreting provisions of the *Municipal Government Act* is correctness." This could significantly displace the presumption of deference that is currently in place. Since administrative legislation in Alberta commonly includes the right to appeal tribunal decisions, the decision in *Edmonton East* could shift the standard of review used from that of *reasonableness* to *correctness* for a significant number of administrative bodies. Going forward, it will be interesting to see how often *Edmonton East* is relied on and whether the change towards the *correctness* standard of review is a permanent one in the Province.

In the case of possible tribunal appellants, a potential shift in the standard of review increases the likelihood that a tribunal's decision could be reversed. Of course, more than the standard of review must be considered when contemplating the appeal process. Prior to commencing the appeal process, a lawyer should be contacted to discuss the benefits and drawback of such a decision. Any of the lawyers at Stillman LLP could provide helpful legal advice in this regard.

AS WE SEE IT

Squatter's Rights in Alberta
by John Hagg

The legal concept of adverse possession of land, often referred to as "Squatter's Rights", is a method of acquiring title to real property by possession for a statutory period of time. This concept has been around since the times of the Roman Empire and still exists in a variety of forms in different legal systems across the world.

The test for adverse possession in Alberta under the common law, the *Land Titles Act* (RSA 2000 c. L-4) and the Limitations Act (RSA 2000 c. L-12) were recently set out by Justice Marceau in the case of *1215565 Alberta Ltd. the Canadian Wellhead Isolation Corp* (2012 ABQB 145) ("*Wellhead*").

In *Wellhead* the Plaintiff and the Defendant owned plots of lands next to one another, Lots 8 and 9 respectively. Their dispute was over the placement of a chain-link fence and possession of a 5.03 m strip of Lot 9 (the "Disputed Lands") which appeared to be part of Lot 8 because of misplacement of the fence. The Defendant was attempting to regain possession of the Disputed Lands, and the Plaintiff was attempting to gain exclusive possession and title for the Dispute Lands under the *Land Titles Act* and *Limitations Act*.

The Defendant acquired title to Lot 9 in September 1998 from which time access to Lot 8 as well as the Disputed Lands was only through a fence and gate. From 1998 to 2008, access to those lands was controlled by the Plaintiff (Owner of Lot 8) or Lot 8's previous owner.

In July 2008, the Defendant learned the chain-link fence did not mark the true boundary line between Lots 8 and 9 and that the Plaintiff and his predecessor on title had been in possession of part of the Defendant's property since he had purchased his property in September of 1998.

Pursuant to the *Limitation Act* and the *Land Titles Act*, the Defendant had a ten year limitation period within which he must have taken steps to take back possession of the Disputed Lands, or sell them.

Justice Marceau explained that the Plaintiff could apply under Section 74 of the *Land Titles Act* to obtain a Judgment which then can be registered at the Land Titles Office giving them exclusive possession of the Disputed Lands. Further, that Section 3 of the *Limitations Act* provides that in order for a Section 74 application to be successful, ten years must have elapsed from the time the Defendant was dispossessed of the real property. That is, the 10 year limitation clock started when the Defendant purchased the property in September of 1998, and the Defendant had until September 2008 to retake possession of the Disputed Lands to defend against the Plaintiff's Application to take away his title. To be clear, the limitation clock only starts when the Defendant purchased the land in this instance because the fence was in place on that date. If the fence had been built 5 years later, then the clock would also start 5 years later.

The type of possession that must exist for that 10 year period in order to make a successful Section 74 Application is also set out by Justice Marceau at Paragraph 35:

1. The true owner be out of possession of the claimed lands;
2. The claimant must be in use and occupation of the claimed lands;
3. The claimant's use and occupation must be exclusive, continuous, open or visible and notorious for the requisite 10-year period; and
4. The fact of use and occupation by the claimant is the only determinant while the belief, ignorance, mistake or intention of the claimant is immaterial.

In *Wellhead*, the Plaintiff satisfied this test. He had possession of the Disputed Lands by virtue of the fence through which he controlled access, he was in use of the Disputed Lands by using to it store his belongings, and that possession was exclusive, continuous and open. Further, the fact that no one knew the location of the correct property line was irrelevant.

So, between July and September of 2008, the Defendant had to retake possession of the Dispute Lands in order to defend against the 10 year limitation period running out. Justice Marceau set out the only four ways that the Defendant could take back possession of the Disputed Lands at Paragraph 20:

1. The Defendant could have commenced an action before the ten year limitation period expired.

2. The Plaintiff could have abandoned possession of the Disputed Lands.

3. The Defendant could have obtained an acknowledgment in writing, or Encroachment Agreement, from the Plaintiff which would be an acknowledgment from the Plaintiff that the Defendant still owned the Disputed Lands, but was permitting the Plaintiff to use them.

4. The Defendant could re-enter the disputed lands and take back possession from the Plaintiff within the ten year limitation period with an overt act or acts which objectively show the intension to recover the land then and there.

Justice Marceau held that although the Defendant did take steps between July and September 2008 to recover possession of the land, including offering the Disputed Lands for sale to the Plaintiff, that they did not satisfy any of the four options available to them. Therefore the Plaintiff's Section 74 Application was successful and he took the title to the Dispute Lands away from the Defendant.

There are some exceptions to the law on adverse possession operating exactly as described herein, including if for instance a previous owner of Lot 9 had donated the Disputed Lands to a previous owner of Lot 8 [*Limitations Act* s. 3(8)] which would prevent the limitation clock from restarting when title transfers, or if there had been mistaken improvements to the Disputed Lands by the Plaintiff pursuant to Section 69 of the *Law of Property Act* which would warrant the award of various remedies by the Court in favor of either the Plaintiff or the Defendant, but neither of those scenarios are applicable here and are not dealt with in this short article.

The way the law on adverse possession currently sits in Alberta is very interesting. Particularly because of the fact that the 10 year limitation clock restarts every time someone new purchases or gains title to the dispossessed property as a bona fide purchaser. This means that within the context of the *Wellhead* case, if the Defendant had become aware of the misplaced fence prior to the Plaintiff commencing his Section 74 Application, all the Defendant would need to do is transfer title for money to a relative or friend to restart the 10 year limitation clock and give them more time to retake possession of the Dispute Lands. That type of situation does not appear to have been discussed by the Courts, but will no doubt lead to an interesting discussion and potentially a change in principal if and when it does in the near future.

In the end, if you are an owner of real property, it is important to know exactly where your property lines are in order to protect against losing part of your property to an adverse possession claim.

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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 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.

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