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The Standard of Review on Appeals of Masters' Decisions to the Court of Queen's Bench

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Cases Considered:

Canada (Attorney General) v. Chak, 2008 ABQB 103

Canada (Attorney General) v. Chak appears to be the first written decision by our former colleague, Keith Yamauchi, who was appointed to the Court of Queen's Bench of Alberta on December 14, 2007. That fact alone might make it worthy of a comment here. However, within his decision concerning a rather mundane student loan collection matter, the Honourable Mr. Justice K.D. Yamauchi also raises one interesting point.

First, the case itself. This was an appeal from the September 17, 2007 decision of Master R.P. Wacowich who allowed the federal government to amend the style of cause in its action, granted summary judgment to the federal government in the amount of $7,525 plus interest, and directed a trial of an issue on other amounts allegedly owing by the appellant. The government guaranteed loans that were disbursed seventeen years ago, in 1991. The appellant had not been a student since 1997. The federal government, after reimbursing the original lender, finally sued in 2001. They spelled the appellant's first name incorrectly on the front page of their Statement of Claim, referring to him as Nagham Mujahid Chak, rather than Naghman Mujahid Chak. The federal government made this application to correct the name and for summary judgment almost four years ago, in March 2004. The appellant's best argument was that an amendment correcting his name on the front of the Statement of Claim would prejudice him because the time had run out for the Crown to "add" a claim to their action. Mr. Justice Yamauchi found no prejudice to the appellant in allowing the amendment and dismissed the appeal.

What was the interesting point? This was an appeal from a Master of the Court of Queen's Bench. Therefore the first issue that Mr. Justice Yamauchi addressed was the nature of such an appeal. He noted that various decisions of the Court of Queen's Bench have held that an appeal from a Master is a de novo hearing. He cites, at paragraph 12, *Comcorp Life Insurance Co. v. Harvard Developments Ltd.* (1996), 47 Alta. L.R. 97 (Q.B.) and *Discount Auto Sales v. Cash Store Inc.*, 2005 ABQB 212 for this proposition. Mr. Justice Yamauchi then notes, however, in connection with a standard of review, that the judge in *Matwychuk v. Western Union Insurance Co.* (1992), 134 A.R. 230 (Q.B.) at 232; reversed on other grounds (1994), 162 A.R. 182 (C.A.), said:

> Pursuant to Rule 500 of the Alberta Rules of Court, this appeal comes before me as a hearing de novo. However, I am of the view that, while the matter is to be heard de novo, the decision of the learned Master in this (or any case) should not be disturbed on appeal unless there is some clear error in the interpretation of the

> law (or the application thereof), some palpable and overriding error of fact, or some other appropriate reason why the decision should be varied…

Mr. Justice Yamauchi noted that Matwychuk had been followed in *Barrett v. McClellan* (2004), 350 A.R. 385 at 388 (Q.B.), but he also acknowledged that Discount Auto chose to give no deference to the Master's decision. Mr. Justice Yamauchi concluded with the interesting point:

> However, whether one adopts a Discount Auto, supra, approach or a Matwychuk approach, the result is the same in this case.

Are there really are two different approaches within the Court of Queen's Bench on how to handle an appeal from a Master? Judges of the Court of Queen's Bench hear many of these appeals every year and have been doing so for decades. It would be surprising if the nature of the appeal and the standard of review, if any, are still open issues on which there is no controlling Alberta Court of Appeal authority. As it turns out, these matters have been resolved.

The nature of appeal from a Master and the standard of review certainly have been controversial in the recent past. Part of the reason for the uncertainty in the past is that there is little guidance in the legislation. Appeals from a Master's decision are brought pursuant to Rule 500 of the Alberta Rules of Court, Alta. Reg. 390/1968, and section 12 of the Court of Queen's Bench Act, R.S.A. 2000, c. C-3l. Neither says much that is helpful, except for the fact that there is a statutory appeal. In the former, Rule 500(1) states: "An appeal from a Master in chambers … shall be by motion on notice setting out the grounds of appeal." The latter, in section 12, merely states: "An appeal lies to a judge in chambers from a decision of a Master in chambers."

Just over one year ago, in December 2006, the Alberta Court of Appeal considered the nature of an appeal from a Master to the Court of Queen's Bench in a decision that should have resolved any uncertainty. In *Dickey v. Pep Homes Ltd.*, 2006 ABCA 402, the appellant, Pep Homes Ltd., applied to set aside an order approving the sale of mortgaged lands in a foreclosure action. Pep Homes appealed the Master's order to the Court of Queen's Bench, where the appeal was dismissed. The chambers judge concluded that the Master had not erred and that he would not have exercised his discretion in any other way at that time the Master approved the sale. Pep Homes argued that the chambers judge erred in not treating the appeal as a de novo hearing. Had he treated it as a de novo hearing, Pep Homes argued, he would have considered evidence of events that happened after the master made his order.

The Alberta Court of Appeal quoted a passage from Roger P. Kerans and Kim M. Willey, Standards of Review Employed by Appellate Courts, 2nd ed. (Edmonton: Juriliber, 2006) at 43-44:

> In a true de novo hearing, the reviewing tribunal makes its own decision on the issues with no regard to the proceeding before the first tribunal. This is the complete absence of deference. Like absolute deference, it is, strictly speaking, not a standard of review because there is no review.
>
> When it views a matter afresh, a reviewing court asks, "What is the right decision?"

The Court of Appeal went on to note that Kerans and Willey addressed the standard of review governing appeals from Masters at 240-42 of their text and indicated that while the chambers

judge has unfettered discretion and deference is not owed to the Master, if the Master's decision is right, it will stand, i.e., the governing standard is correctness.

In *Dickey v. Pep Homes Ltd.*, the Court of Appeal also quoted with approval the characterization of the nature of an appeal from a Master made by Madam Justice Trussler in *Taylor v. Alberta (Worker's Compensation Board)*, [2005] A.J. No. 968 (Q.B.) at para. 5. In her oral decision, Madam Justice Trussler stated:

> The appeal process with respect to a decision of the Master in Chambers is provided for by Section 12 of the Court of Queen's Bench Act. The standard of review for appeals of this nature has recently been confirmed by the Court of Appeal in the TransAlta Corporation decision. The Court confirmed that appeals from a Master's decision to a Justice are appeals de novo, meaning that the applicable standard of review on appeal from a Master is that of correctness, and this standard has again been more recently confirmed by this Court in the *GMAC Leaseco Corporation* decision [[2005] A.J. No. 224]. As appeals from a Master's decision are heard de novo, the presiding Justice is entitled to reconsider all the evidence, including the fresh evidence. . . . The Justice owes no special deference to the Master.

The decision of the Alberta Court of Appeal in *Dickey v. Pep Homes Ltd.* appears to be as clear a statement of the nature of an appeal from a Master's decision as has ever been issued by the Court of Appeal. It also appears to be binding.

Mr. Justice R.A. Graesser certainly accepted *Dickey v. Pep Homes Ltd.* as binding upon him in *Lydian Properties Inc. v. Chambers*, 2007 ABQB 541 at paragraph 22 and in *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 2007 ABQB 616 at paragraphs 30-31. He relied on *Dickey v. Pep Homes Ltd.* and on *United Utility Workers Association of Canada v. TransAlta Corp.* [2004], 354 A.R. 58 (C.A.), leave to appeal to S.C.C. refused, [2004] S.C.C.A. 386, 371 A.R. 401, to hold that the applicable standard of review is correctness, noting that he was essentially entitled to treat the matter as an application de novo and that he was not bound by any exercise of discretion by the Master. He correctly noted that because the appeal from a Master is a hearing de novo, the parties are entitled without leave to put new or additional factors before the court and the judge on appeal is entitled to consider matters that were not before the Master.

Aside from Mr. Justice Graesser, however, the Alberta Court of Appeal decision in Dickey v. Pep Homes Ltd. has only been noticed by one other Court of Queen's Bench judge. In *Brown v. Malik*, 2007 ABQB 270, Mr. Justice S.J. LoVecchio — currently the Judge in Residence at the Faculty of Law at the University of Calgary — acknowledged that counsel for the plaintiff had referred him to *Dickey v. Pep Homes Ltd.* Mr. Justice LoVecchio stated, at paragraph 16: "In that decision, our Court of Appeal states that the standard of review on a matter of law on an appeal of a Master's decision is correctness." (emphasis added) He does not indicate why he was confining the Court of Appeal's decision to appeals from Masters on questions of law. There is nothing in *Dickey v. Pep Homes Ltd.* to suggest such a limit.

It is unfortunate that the decision of the Alberta Court of Appeal in *Dickey v. Pep Homes Ltd.* might be open to misinterpretation because it involved a chambers judge's refusal to consider new evidence on the appeal. It is important to note that the new evidence was evidence about facts that did not even exist until after the Master granted his order. The issue was not one of

whether or not new evidence was admissible in an appeal de novo. It is admissible, and that point has been settled for quite some time. The issue was whether an order for the sale of mortgaged land should be set aside because of a change in circumstances after the order was made. As a question of law, the chambers judge had decided that the change in circumstances came about too late to undo the sale. The Court of Appeal agreed, noting that finality and certainty in the judicial sales process was necessary.

It is also unfortunate that the Court of Appeal in Dickey v. Pep Homes Ltd. chose to deal with the issue of the nature of an appeal from a Master through the extensive use of quotations, from both Standards of Review Employed by Appellate Courts and Madam Justice Trussler's oral judgment in *Taylor v. Alberta (Worker's Compensation Board)*. The issues could have been addressed with more clarity and conciseness in the Court of Appeal's own words. Some disavowal of *Matwychuk v. Western Union Insurance Co.* and its indication that the standard of review is more deferential to the Master's decision than a correctness standard would have also been helpful.

Nevertheless, the Alberta Court of Appeal decision in *Dickey v. Pep Homes Ltd.* states that an appeal from a Master to the Court of Queen's Bench is an appeal de novo. That means that new evidence may be adduced on the appeal and that appeals may be on the basis of fact, mixed fact and law, or law. *Dickey v. Pep Homes Ltd.* is clear, however, that it is not a true de novo hearing because in a true de novo hearing the Master's decision would be ignored and thereby granted no deference at all. Instead, a Master's decision and the reasons for it are to be considered on the appeal. The standard of review for this consideration is one of correctness. If the Master was correct, the Master's decision will be affirmed.

It would seem that newly appointed judges to the Court of Queen's Bench are either given no instructions on commonly encountered procedural points or that those instructions are out of date. It is hoped that the Court will take note of the resolution in *Dickey v. Pep Homes Ltd.* of the issues relating to the standard of review of Masters' decisions.