

Court of Queen's Bench of Alberta

Citation: Pincher Creek (Town of) v. Municipal Government Board, 2006 ABQB 513

Date: 20060710
Docket: 0603 01290
Registry: Edmonton

Between:

Town of Pincher Creek

Applicant

- and -

**The Municipal Government Board,
The Good Samaritan Society
(A Luthern Social Service Organization)**

Respondents

**Memorandum of Decision
of the
Honourable Mr. Justice Sterling Sanderman**

[1] The Applicant, the Town of Pincher Creek, asks the Court to quash Order MGB 069/05 of the Municipal Government Board (the "Board") dated July 26th, 2005, and to remit the matter back to the Board for a proper consideration.

[2] On May 22nd, 2003, the Town of Pincher Creek issued a combined Property Assessment and Taxation Notice to the Good Samaritan Society (the "Society") in relation to Vista Village, an assisted-living, seniors care facility owned and operated by the Society. The Society appealed the assessment to the Town's Assessment Review Board ("ARB"), on the grounds that it was exempt from taxation pursuant to a number of sections of the *Municipal Government Act*, RSA 2000, c.M-26. Specifically, the Society sought exemption under sections 362(1)(g.1), 362(1)(h), 362(1)(m), 362(1)(n)(iii) and 362(1)(n)(iv). They state:

362(1) The following are exempt from taxation under this Division:

- ...
- (g.1) property used in connection with health region purposes and held by a health region under the *Regional Health Authorities Act* that receives financial assistance from the Crown under any Act;
- (h) property used in connection with nursing home purposes and held by a nursing home administered under the *Nursing Homes Act*;
- ...
- (k) property held by a religious body and used chiefly for divine service, public worship or religious education and any parcel of land that is held by the religious body and used only as a parking area in connection with those purposes;
- ...
- (m) property held by
 - (i) a foundation constituted under the *Senior Citizens Housing Act*, RSA 1980 cS-13, before July 1, 1994, or
 - (ii) a management body established under the *Alberta Housing Act*, and used to provide senior citizens with lodge accommodation as defined in the *Alberta Housing Act*,
- (n) property that is
 - ...
 - (iii) used for a charitable or benevolent purpose that is for the benefit of the general public, and owned by
 - (A) the Crown in right of Alberta or Canada, a municipality or any other body that is exempt from taxation under this Division and held by a non-profit organization, or
 - (B) by a non-profit organization,
 - (iv) held by a non-profit organization and used to provide senior citizens with lodge accommodation as defined in the *Alberta Housing Act*, or

[3] The ARB denied the appeal, finding that Vista Village did not qualify for an exemption under any of the claimed sections. In particular, the ARB found that Vista Village was not “held

by” the health region, noting that the Society was the registered owner of the property. The ARB did not grant relief under section 362(1)(g.1). The Society further appealed the ARB’s decision to the Municipal Government Board. A lengthy hearing was held. A review of the record reveals that the focus of the hearing was not directed solely to section 362(1)(g.1), but on sections 362(1)(n)(iii) and 362(1)(k).

[4] At the hearing held by the Municipal Government Board, the Society took the position that it qualified for an exemption pursuant to section 362(1)(g.1) by virtue of a contract that it had entered into with the Chinook Regional Health Authority (the “Health Authority”). The Continuing Care Agreement (the “Contract”) between the parties provided that:

- The Society would construct a facility from which to provide programs and services, and the Health Authority would provide ongoing funding for such programs and partial funding for construction of the facility (a maximum of \$1.9 million of an estimated approximately \$5 million cost)(Preamble, s. 4.1).
- The Contract expressly stated that nothing contained within it would constitute the parties as joint venturers, fiduciaries, partners, employers-employees of each other, or create an agency relationship between the parties (s. 1.5).
- The Society was responsible for purchasing the property, subdividing the parcel, constructing the facility, and operating the facility (ss. 1.4, 3.1 to 3.4).
- The Health Authority would oversee operation of the facility and provide financial assistance for construction of the facility, together with funding towards operations (s. 1.4).
- The Health Authority would provide advances of financial assistance upon certain conditions precedent (s. 4.3).
- The Health Authority would pay the Society operational costs in the form of costs per resident day, and the Society would reimburse the Health Authority for the financial assistance provided in the form of a reduction in those costs (s. 4.5).
- The Society was responsible for obtaining and repaying financing to construct and operate the facility. The Society did not require the Health Authority’s approval to obtain a first priority mortgage, and the Health Authority could not unreasonably withhold approval of any other financing that would encumber the property (ss. 1.7, 4.6, 4.7).
- The Society was obligated to operate the facility and provide services in compliance with the agreement, the applicable legislation, and the policies of

the Health Authority, developed after discussion and participation of the Society (ss. 5.4 - 5.5).

- The Health Authority had the authority to admit, transfer and discharge residents of the facility in accordance with the Alberta Health Resident Classification System or other system, and expressly invited any concerns the Society may have about proposed admissions (ss. 5.6).
- The Society was responsible for obtaining insurance policies respecting the property (s. 7.11) and agreed to indemnify the Health Authority (s. 7.12).
- The term of the Contract was for 20 years, with the Society having the option to renew. If the Society chose not to renew, the Health Authority would obtain the right to purchase the property at fair market value (s. 2.1).
- The Health Authority could terminate the Contract on 12 months notice to the Society (s. 2.2). If the Health Authority chose to terminate the Contract prior to expiration of the term, it was obligated to purchase the property for a price in accordance with a formula set out in the Contract (s. 2.3).

[5] Evidence was called showing that the Society was the registered owner of the property. All staff on site were employed by the Society. Individuals wanting to reside in Vista Village had to be recommended by the Health Authority and meet certain criteria. However, the Society had the final say as to which individuals meeting these requirements would be allowed to move into Vista Village.

[6] The Board concluded that Vista Village was held by the Health Authority and exempt from taxation on the basis that the Health Authority had elements of control over Vista Village analogous to the central features of ownership and leasehold interests. This finding was reached despite the fact that the Society physically controls Vista Village and the Health Authority has no ownership or leasehold interest in the residence. The Town quarrels with the interpretation placed upon the term “held by” by the Board and seeks judicial review.

[7] Since Justice Slatter decided *White v. Alberta (Workers’ Compensation Board, Appeals Commission)* 2006 ABQB 359, on May 16th, 2006, deciding applications for judicial review has become easier because of the approach he adopted in determining the appropriate standard of review. I embrace that approach.

[8] In *White*, at paras. 26, 27, 28, 29 and 30, Slatter J. outlines the requirement to follow the rule of *stare decisis* and the corresponding obligation to avoid unnecessary legal analysis. He stated:

- [26] ...
It is perhaps no longer a matter of debate in Alberta whether the Supreme Court of Canada in *Dr. Q.* intended its comment about “every case” to be read as literally, and applied as universally as the Court of Appeal has held in *Davick*. I am satisfied however that neither court intended by these general words to repeal the doctrine of *stare decisis* that lies at the heart of our hierarchical common law system. ... Trial courts are still bound by decisions of the Supreme Court of Canada and the Court of Appeal. Since the Court of Appeal has held that the standard of review of decisions on the entitlement to compensation based on a particular set of facts is patent unreasonableness, that is the standard judges in Alberta must apply. No fresh functional and pragmatic analysis is needed, other than to confirm that the present case involves such a question.
- [27] Besides violating the rule of *stare decisis*, performing a fresh functional and pragmatic analysis in every case is counterproductive. The standard of review analysis is designed, partly at least, to ensure that the superior courts do not intrude excessively on the work of administrative tribunals. The standard of review tries to allow tribunals to get on with their work, without the constant distraction of judicial review applications. If the standard of review analysis is to be done afresh in “every case”, neither the litigants nor the tribunals will ever know where they stand. Parties will be tempted to roll the standard of review dice in the hope that a different standard of review might emerge. Appeals will also become more tempting. This will only promote litigation, and instability and uncertainty in administrative law.
- [28] It is one thing to say that sweeping statements should not be made about the standard of review for “all questions of law”, or “all decisions”, and quite another to say that the analysis must be done on a case-by-case basis. There is a middle ground, where the standard of review for a particular type of decision from a particular tribunal can be set. As the Court noted in *Davick* at para. 42: “Unfortunately there is no formula to apply in selecting the applicable standard”. Often the courts will survey the four parts of the functional and pragmatic analysis, note that some favour review and some deference, and then seemingly select a standard of review out of the air. In this environment there is a place for the appellate courts to set, once and for all, the standard of review for certain types of cases. The “nature of the question” can be set in generic terms, and a standard of review specified. ...
- [29] ...
If the decision in *Davick* is to be taken literally we will always be plagued with that uncertainty, and indeed the uncertainty will become

institutionalized. Even though the functional and pragmatic approach is intended to be a principled one, all we will ever achieve is a system of principled *ad hoc*ery.

[30] In adopting a rule that one must perform the standard of review analysis in every case, the courts must also have regard to the expense involved. The standard of review analysis is complex, requiring lengthy briefs and oral arguments, as happened in this application. This is expensive for litigants and tribunals alike. The rule of *stare decisis* exists precisely to avoid the endless re-analysis of the same issues, and to avoid inconsistent results in similar cases. Likewise, regard must be had for the use of judicial resources. In *Schumaker*, the Court expended considerable resources to set the standard of review. Less than two months later the Court gave even more extensive reasons in *Davick*, fortunately (and not surprisingly) reaching the same result. While the two panels may have not realized that the other was working on the same problem, if *Davick* is taken at face value this would not have mattered, as the analysis must be done in “every” case. (The Court of Appeal Practice Note on reconsidering previous decisions presumably would not apply, because the issue is always open.) The system cannot afford this luxury, never mind the uncertainty it entrenches.

[9] On January 11th, 2006, the decision of *Alliance Pipeline Ltd. v. Alberta (Minister of Municipal Affairs)*, 2006 ABCA 9 was released. In this unanimous decision, the Court of Appeal decided what standard of review would be applicable when a court was called upon to review a decision made by the Municipal Government Board that dealt with the proper interpretation of a phrase contained within the governing statute. The Court of Appeal determined that the standard of review for the interpretation of the phrase “capable of being used for the transmission of gas” found in section 291(2)(a) of the *Municipal Government Act* was correctness. In this case, the Town calls into question the Board’s interpretation of another phrase in the same act. The recent decision of our Court of Appeal is binding upon me. The doctrine of *stare decisis* dictates that the standard of review in this case is correctness.

[10] Has the Board correctly interpreted the meaning of the phrase “held by”. On Page 10 and 11 of the Board’s decision, the following statements are made:

In summary, these cases establish the following:

1. the term “held by” may mean something other than ownership;
2. the term “held by” should be interpreted broadly to facilitate the overall purpose of the section in which it is used; and
3. one can hold property by owning it, by leasing it, or by physically controlling it.

Here, there is no question that the GSS owns Vista Village and that CRHA does not own or lease Vista Village. Thus, it must be determined whether CRHA has a sufficient degree of control over Vista Village to be the effective holder.

[11] It is clear that the Board accepted that the Health Authority did not own or lease Vista Village. Therefore, by the scheme of analysis the Board adopted, it was incumbent upon the Board to find that a broad interpretation of the term “held by” gave the Authority physical control over Vista Village. Failing that, it could not be found that Vista Village was “held by” the Authority.

[12] Although the Board stated that one could hold property by physically controlling it, it failed to set out what it meant by physically controlling. No legal test was adopted by the Board to show that the requisite physical control the Board alluded to was present. The Board concluded that the Authority was given a sufficient degree of control over Vista Village by the agreement it entered with the Society to come within the meaning of section 362(1)(g.1). This falls far short of satisfying the legal test of what “held by” truly means. *Cypress (County) v. Alberta (Municipal Government Board)* 2000 ABQB 807 and *Irrigation Canal Power Co-operative Ltd. v. Warner (County) No. 5* (1998), 217 AR 84 (Alta QB) are instructive on this point.

[13] In *Cypress (County) v. Alberta*, Rowbotham J. was called upon to interpret the meaning of the word “held” as it was used in section 298 of the *Municipal Government Act*. She did within the context of Cypress County’s application for Judicial Review of an order of the Municipal Government Board. She found that the interpretation of the governing statute attracted a standard of review of correctness.

[14] She found at paragraph 31, the following:

There are two possible interpretations of the term "held" in s. 298(1)(k). The legislature may have intended that the term "held" be broadly interpreted to include any of:

- (a) property both owned and physically controlled and possessed by the Crown;
- (b) property owned but not physically controlled and possessed by the Crown;
- and
- (c) property not owned by the Crown but physically controlled and possessed by the Crown (for example, where the Crown has leased the property from another party).

[15] In *Irrigation Canal Power Co-operative Ltd. v. Warner (County) No. 5*, McBain J. concluded at paragraph 36 that:

“I am satisfied the word “held” would certainly include ownership and would include physical control over the operations of the plants and possession of the plants physically.”

[16] The Board’s conclusion that the Authority was given a sufficient degree of control over Vista Village clearly fails to meet either of these legal definitions of what the term “held by” means. The failure of the Board to define what it envisioned by “sufficient degree of control” is an error. On the reasons given by the Board in its written decision, it is impossible to conclude that the legal test for an exemption had been met by the Society. It appears as if the Board eliminated a crucial part of the prevailing legal test, that of physical control, from its consideration of determining whether an exemption should be granted.

[17] The Board extended the test well beyond physical control. It found that some form of control was found to a sufficient degree because contractual rights existed between the Society and the Health Authority. No basis was given for this broad interpretation. This resulted in an incorrect decision being made by the Board.

[18] Consequently, the Municipal Government Board Order 069/05 cannot remain in force. It is quashed. This matter is remitted back to the Board for a rehearing on a s.362(1)(g.1) claimed exemption and for a determination whether any of the other claimed exemptions are applicable. It is unfortunate that the Board did not deal with them. The Board chose to rely upon the exemption claimed pursuant to section 362(1)(g.1). The evidence presented to the Board would appear to establish arguable claims for an exemption pursuant to other subsections.

Heard on the 29th day of June, 2006.

Dated at the City of Edmonton, Alberta this 7th day of July, 2006.

Sterling Sanderman
J.C.Q.B.A.

Appearances:

Carol M. Zukiwski, Brownlee LLP
for the Applicant

Mark Talaga, Alberta Justice
for the Respondent, The Municipal Government Board

Elvis Iginla, Iginla & Company
for the Respondent, The Good Samaritan Society