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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.

Revision of the "Drop-Dead" Rule

By Ara L. McKee

The Alberta Rules of Court have long contained a provision for dismissal of an action due to long delay. Commonly known as the "drop-dead" rule, it requires that a step be taken that significantly advances an action within a certain period of time or an application can be made to dismiss the action. The purpose of the rule is to prevent unnecessary delay in civil litigation matters.

Recently, there has been much debate about revisions to the Rule under the new Rules of Court. Rule 244.1 of the former Rules of Court provided that an action could be dismissed if nothing had been done to materially advance the action within five years of the last step taken. Under the new Rules of Court, which came into effect on November 1, 2010, the "drop-dead" rule was revised to require a step which materially advances the action to be taken within two years of the last step taken.

The significant time reduction in the drop-dead triggering period from five years to two years caused much debate about the Rule, including whether the Rule was altogether necessary or appropriate. While the intention of the revision had been to move matters forward in a timely fashion, opposition built regarding the drastic nature of the change under the new Rules.

Although two years with no significant advance in an action may seem to be a lengthy time to litigants, there are many practical time constraints that counsel face which make the time period of two years difficult to meet. For example, there can be considerable time delay as a result of obtaining independent medical examinations and review of independent medical reports. Additionally, and on a more practical level, a litigant may find it financially unfeasible to materially move a matter forward due to cost constraints. Another reason for the difficulty in complying with the two year drop-dead provision was the mandatory requirement for participation in Alternative Dispute Resolution (ADR) prior to trial.

Rule 8.4(3)(a) of the new Rules of Court states that the parties must have participated in at least one of the dispute resolution processes prior to setting the matter for trial. Due to the significant increase in demand for Judicial Dispute Resolution (JDR) as a result of the requirement, there became extensive time delay due to limited resources available to deal with the increased demand. As a result, the mandatory requirement for ADR has been suspended until additional resources become available to effectively handle the demand and parties may now proceed directly to trial. Suspension of the ADR requirement will alleviate some of the concern surrounding compliance with a shorter "drop dead" triggering period.

After review by the Rules of Court Committee, it was determined that the triggering period should be increased to three years rather than two years. This most recent revision attempts to strike a balance between the purpose and intent of the Rules

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

in resolving matters in a timely manner while having regard to the practical difficulties that both counsel and litigants face in moving a matter forward.

In the end, and as an aside, it should be noted that the "drop-dead" provision can be modified in certain situations, particularly, by agreement. For example, the Rule 4.33(1)(a) provide for a 'standstill' agreement wherein the parties agree to delay taking another step in an action beyond the three year period. In the event such an agreement is contemplated, it should be clearly established between the parties and be in writing.

The "drop-dead" rule is an important provision for encouraging matters to move forward as expediently as possible. This is especially important for litigants as the litigation process can be a very stressful experience which is exacerbated by lengthy delay. There will no doubt be continued debate and revisions to the "drop-dead" provision as well as related issues such as mandatory ADR. Any of the lawyers at Stillman LLP may be contacted should there be any questions related to the revised rules as outlined in this article.

FIRM NOTES

We are very pleased to welcome John Hagg, who has accepted a position as an articling student and who will be commencing his articles in the summer of 2013.

We are also happy to welcome a number of other new members of the Stillman team. Rita Garland and Amy Simms have joined our office as legal assistants in our Litigation Department. Melanie Simpson is our new receptionist while Sara Boulet will be working with Stillman LLP during the summer of 2013 as administrative support.

We are pleased to announce Stillman LLP's sposorship in the West Edmonton Business Association (WEBA) golf tournament fund raiser. We provided hotdogs and beverages on hole number 5. It was a tremendous success: all were fed and watered. For further information on WEBA, or its fundraisers, please contact Greg Bentz at gbentz@stillmanllp.com.

CAUSE CÉLÈBRES

Boyd v. Cook, 2013 ABCA 27
by Christopher Younker

The *Limitations Act* sets out a time limit within which a plaintiff must commence legal proceedings or risk having their claim struck as time-barred. These time limits were legislated to bring certainty to businesses and individuals, so that one was not left with the indefinite threat of a lawsuit. Under section 3 of the *Limitations Act*, this two year limitation period contains a three-prong test that has created some uncertainty as to when the time limit starts to run. Specifically, the third component of the test, "that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding," has been open to various interpretations by the courts. The Court of Appeal's recent decision in *Boyd v. Cook* goes some way towards resolving this uncertainty.

Mr. Boyd was a "sophisticated businessman" who was experienced in land developments. Mr. Boyd and Mr. Cook had previously done business together. Initially, Mr. Cook approached Mr. Boyd to enter into a land development project on Salt Spring Island. Mr. Boyd reviewed Mr. Cook's proposed deal and rejected it on the basis that he thought it had almost no chance of success. Two years later Mr. Cook then approached Mr. Boyd with a new business proposal, one that Mr. Boyd sold as a conservative real estate investment with a guaranteed annual payout of 9 percent. This time Mr. Boyd opted to invest, however, unbeknownst to him, what he thought was a diversified portfolio of property development was essentially a dressed up version of the prior Salt Spring investment scheme he had rejected. Mr. Boyd only discovered Mr. Cook's misrepresentation of the deal in March, 2009 – the same time he learned that the project was in financial trouble. At that time Mr. Boyd grew concerned about the security of his investment of $1.3 million. However, Mr. Boyd relied upon assurances of Mr. Cook that the project was financially sound. As a result of Mr. Cook's assurances, Mr. Boyd did not file his Statement of Claim until June 16, 2011.

This case was first brought before a Master in Chambers who dismissed the Defendant's application for summary dismissal. In coming to her decision the Master applied and analyzed the *Limitations Act*, which reads as follows:

> Section 3(1)
> If a claimant does not seek a remedial order within:
>
> a. 2 years after the date on which the claimant first knew, or in the circumstance ought to have known,
> (i)that the injury for which the claimant seeks a remedial order had occurred,
> (ii) that the injury was attributable to the conduct of the defendant, and
> (iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding.

The defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

The Master noted that the three requirements set out above are conjunctive, that is to say the limitation period only starts to run when the last requirement has been satisfied.

An issue between the parties is the relevant time when the requirement found in sub-clauses (i) and (iii) were met. In other words, did Mr. Boyd know or ought he to have known of the injury and that it warranted bringing a proceeding prior to June 16, 2009?

The Master found that the relevant time was not simply when Mr. Boyd knew that Mr. Cook had misdirected the funds but when Mr. Boyd knew or ought to have known that he had suffered the injury of economic loss. The Master also held that the second relevant determination that needed to be answered was whether prior to

June 16, 2009 Mr. Boyd knew that the injury warranted bringing an action. In short, the Master applied Justice Clackson's reasons in a prior decision where he stated that a cost-benefit analysis must be undertaken by the judge making this determination. The Master held that although Mr. Boyd had significant doubts about his investment as early as March 2009 and increasingly by June 5, 2009, he was not in a position to ascertain his expected loss or undertake a cost-benefit analysis at that time because of a lack of information provided by the Defendant. As such, the Master dismissed the application for summary judgment and ordered that the matter proceed to trial so that a judge could undertake the subjective/objective assessment required to determine if the injury, economic loss, warranted bringing a proceeding. The Master's decision was upheld by a judge in Chambers and appealed to the Court of Appeal of Alberta, which overturned the Master's decision.

The Court of Appeal re-examined the lower court's analysis for the three criteria of the two-year limitations defence. They found that two of them were clearly not an issue: That the Plaintiff had suffered the injury and that the injury was attributable to the defendant's conduct.

The only issue requiring determination was whether or not "the injury, assuming liability on the part of the defendant, warranted bringing a proceeding".

Referring to the Supreme Court's introduction of a subjective element to the previously objective test of "ought to have known", the Court of Appeal held that an experienced and sophisticated businessman with extensive knowledge in real estate ought to have known that the injury warranted bringing a proceeding. As a result, the suit was dismissed.

In its decision the Court of Appeal emphasized the public policy reasons for upholding strict limitations and that the *Limitations Act* exists to give people some certainty in their lives, so that individuals and businesses are not left with an indefinite threat of a lawsuit that could cause mental and emotional stress. It is important that potential plaintiffs and the general public understand the strictness to which the court interprets limitation defences. Even situations where plaintiffs have misunderstood the law or where defendants have made repeated assurances to the plaintiff that they will be repaid have not been found to extend the limitations time. In short, when in doubt it is often best to sue first and try to mitigate your damages second.

AS WE SEE IT

Parental Mobility, an Alberta Caselaw Update
by Erik Bruveris

Parental mobility applications concern the request of one parent to remove the child or children from one location to another. An example here might be one parent wishing to move with a child from the Edmonton area, to any other location, hypothetically and for example to India, New York, or Saskatchewan. As is the case with many couples working through the process of divorce, mobility can be the cause of much disagreement and litigation. Over the past year, there have been a number of decisions handed down from the Alberta Court of Appeal dealing with the issue of parental mobility. In this edition of "As We See It" we simply wish to review the key aspects to parental mobility applications and take some lessons from the recent cases.

The starting point in any parental mobility application is the case of *Gordon v. Goertz*, 1996 CanLII 191 (SCC) and the set of factors established by the Supreme Court of Canada. The Supreme Court, in *Gordon v. Goertz* directed that when evaluating whether or not it is appropriate to remove a child from a given location the best interests of the child is the key concern, while having regard to a number of factors, including:

(a) The existing custody arrangement and relationship between the child and the custodial parent;
(b) The existing access arrangement and the relationship between the child and the access parent;
(c) The desirability of maximizing contact between the child and both parents;
(d) The views of the child (where applicable);
(e) The custodial parents reason for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child;
(f) Disruption to the child of the change in custody; and
(g) Disruption to the child consequent on removal from family, schools, and the community he or she has come to know.

In *Pasha v. Pasha*, 2012 ABCA183, the Alberta Court of Appeal issued a very short decision on the issue of mobility. If nothing else, the case serves as a brief cautionary tale as to the approach that is not to be taken when making a request to the court. In *Pasha v. Pasha*, the mother had applied to permanently relocate to either Michigan or "wherever in the world she wished[d]" (at para. 5). Her request was denied and she appealed. Not surprisingly, her appeal was unsuccessful.

The Court of Appeal did note that the trial judge failed to consider whether it was in the child's best interests to stay in Canada with the father and without the mother or vice versa as would normally be part of the analysis outlined in *Gordon v. Goertz*. In specifically addressing this issue the Court of Appeal went on to state that the reason for not addressing it was clear from the record in that ,"the Appellant did not demonstrate any realistic plan at this time to relocate" (at para. 5). Further, there was clearly a lack of "serious planning" and the trial judge questioned her motive (at para. 5). If nothing else, the case of *Pasha v. Pasha* demonstrates the need for careful planning when proceeding with a mobility application. It may also serve as a warning for those considering representing themselves. Ms. Pasha was self-represented and the manner in which she proceeded with her application was far from helpful.

The case of *O. (M.) v. O. (C.)*, 2012 ABCA297, is another recent case out of the Alberta Court of Appeal. In *O. (M.) v. O. (C.)*, the mother appealed an order denying her request to permit her six year old daughter to move with her to Spokane, Washington, where she intended to relocate. The mother was a US citizen, was raised in Spokane, and moved to Calgary twenty-six years ago to marry her first husband. Her daughter from that marriage was enrolled in post-secondary education and also intended on moving to Spokane. The mother had married the father in 2006, and the child was born that same year. The mother had stayed at home to look after the child. The parties separated in 2010, and for the most part, had dealt with the majority of the issues between them amicably. Both provided the court with evidence to show that they were capable, caring and concerned parents (at para. 4). Both parents had a close relationship with the child. The mother's wish to move back to Spokane primarily so that she could retrain as a nurse and be near to her parents and extended family, with whom she maintained close ties. The mother's request, at chambers level, was denied and she appealed to the Alberta Court of Appeal.

At chambers level, the judge considered the factors set out in *Gordon v. Goertz*, however, the manner in which this occurred was less than ideal. The "deciding factor" for the chambers judge was the disruption to the child that would be occasioned by the child's removal from Calgary (at para. 7). At the same time the chambers judge recognized that the child's links with her older sister and family in Spokane were strong and that the child's existing links with school and her community were minimal and that it was, at present, a good as a time as any, to move with the child.

In dismissing the mother's appeal, the Court of Appeal noted that the chambers judge's comments regarding the disruption caused by the proposed move were "unfortunate" (at para. 9). Ultimately, the court held that while "another judge may have balanced the factors differently, that is not a basis on which we can interfere with the decision. Absent an error in principle or an unreasonable exercise of judicial discretion, a chambers judge is entitled to a high degree of deference[.]" (at para. 10).

On the whole, the mother appeared to have had a fairly strong case. The Court of Appeal seemed to acknowledge this in its carefully worded comments and appeared to hint that another judge may have applied or balanced the factors differently and decided the case differently. That her request was denied at the chambers level and her appeal dismissed should serve to illustrate the level of discretion that is afforded to judges deciding an initial application regarding mobility. This article is not meant to discourage those who are considering a mobility application. A litany of other decisions from the Alberta courts serve to show that courts can and do approve moves in different circumstances. But not all proposals will be accepted by the court. The court is in an unenviable position and is assigned a difficult task of balancing the wants and needs of both the parents and children involved. All individuals who wish to move should extensively prepare a detailed plan regarding a proposed move, including their plans for employment, childcare, family life and an access schedule for the other parent.

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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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