STILLMAN LLP'S

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

EDITOR'S NOTE

Our office will be closed during the Holiday Season from the afternoon of December 24th, to December 29, 2013 inclusive and we will be closed January 1, 2014. Our office is open during regular business hours on December 30 and 31, 2013, and January 2, 2014.

We wish you all the best this Holiday Season and a safe and happy New Year!

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.

Interpretation of Contracts: Bhasin v. Hrynew, 2013 ABCA 98

By Melissa MacKay

The recent decision out of Alberta's Court of Appeal in *Bhasin v. Hrynew* (2013 ABCA 98) canvasses the interpretation of contracts by the Courts and specifically discusses the admissibility of parol evidence, and the finding of implied terms to contracts including the imposition of a duty of good faith. Parol evidence is evidence (written or oral) not contained in the actual contract, which purports to amend or add to the actual written contract in dispute. This evidence is not admissible evidence in a contract dispute, unless the party attempting to rely on it argues that the contract was ambiguous or unclear. The Supreme Court of Canada has granted leave to appeal this decision, which will be heard on February 12, 2014, putting it on our radar.

Mr. Bhasin entered into a written contract with Canadian American Financial (Corp) Canada Limited ("Canadian American") with respect to the registration of education savings plans carried out by Mr. Bhasin. The contract between the parties contained two pertinent clauses: The first allowed Canadian American to effectively terminate the renewal rights of Mr. Bhasin provided they give him notice 6 months prior to the end of the term of the contract. The second provided that there were no other terms, representations or warranties outside of the written provisions of the contract.

Canadian American terminated the contract, with the required notice. The Trial judge awarded damages to Mr. Bhasin on the basis of parol evidence heard at the trial which led the Trial Judge to find an implied term of the contract which required any termination or decision not to renew the contract to be carried out in good faith. The decision was appealed to the Court of Appeal, where it was subsequently overturned.

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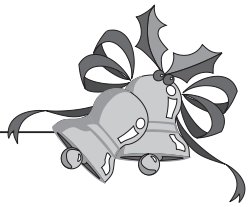

Throughout the trial of the matter, the Court heard an abundance of parol evidence regarding the negotiation and formation of the express terms of the contract. Typically, parol evidence is not heard by the Court in a matter regarding the interpretation of a contract, unless the party attempting to rely on it argues that the contract was ambiguous or unclear, which would require the submission of parol evidence in order for the Court to make a determination. The party attempting to rely on the parol evidence may also be allowed to present it if they show that the contract was unconscionable. At the Trial level, Mr. Bhasin did not argue that the contract was unclear or ambiguous, but rather that it did not properly represent the matters between the parties. The Court of Appeal did not find that this submission fell into the stated exceptions of when a Court can hear parol evidence, and thus determined that the Trial judge should not have allowed the evidence.

The Court of Appeal held that the circumstances in which the Court will find a duty of good faith in contracts have been very limited in judicial history. The Courts have applied this strict limitation to a finding of implied terms in contracts as well. The Courts have historically strived to protect the interests of the parties by strictly interpreting the terms of a contract, to a point. Not only have the Courts employed strict tests, in which they will find an implied term of a contract, they have also failed to find a stand-alone duty of good faith. The Courts have found a duty of good faith to exist in certain types of contracts, one of which being in an employment situation, due to the unequal bargaining powers between employer and employee.

The Courts face a struggle when determining if a duty of good faith exists between parties to a contract. They must be careful not to allow any imposition or finding of such a duty to alter the terms of the contract. Rather, they may find such a duty exists in order to preserve the very nature of the contract, preventing the parties from acting in a manner which would alter the objectives of the contract.

Despite the fact that the Court of Appeal overturned the decision of the Trial Judge in this case and ultimately determined that there was no implied duty of good faith, leave to appeal to the Supreme Court has been granted. It will be interesting to keep an eye on this matter, to see if the Supreme Court decision extends the ability of Courts to read implied terms or duties into contracts. If the historical test or analyses are altered, this may have far reaching consequences for how contracts are drafted in the future.

FIRM NOTES

Our firm continues to grow and in so doing, has some new additions. We are pleased to announce a number of new members to Stillman LLP. Included among our new assistant additions are Skye Van Giessen, and Tryna Anderson who have joined our litigation department, and Natalka Manning who has joined our real estate department.

We are saddened to see the departure of Sue Yacoub, who will be leaving our office in December, 2013, after nearly twenty four years at Stillman LLP. While we wish her the best in her future endeavours, her loss will be felt by all in both a professional and personal capacity.

Stillman LLP continues to support the West Edmonton Business Association (or WeBA). Greg Bentz was recently elected to the position of the Secretary to the Board of Directors. If you have questions about how to get involved in WeBA, please contact Greg at 780 930-3630, or email at gbentz@stillmanllp.com.

CAUSE CÉLÈBRES

Clements v. Clement, [2012] 2 SCR 181
By John Hagg

The Supreme Court of Canada (the "SCC") recently came down with the decision of Clements clarifying the 'but for test' in negligence cases.

In *Hanke* the SCC discussed an exception to the 'but for' test, which is a crucial component of causation. The 'but for' test essentially states that the defendant caused the injury if the injury would not have happened 'but for' the defendant's negligent action. As discussed in *Hanke*, the 'material contribution exception' stated that if it is impossible to prove the defendant's negligence using the 'but for' test, and if the defendant breached a duty of care to the plaintiff, then if the plaintiff can demonstrate that the defendant 'materially contributed' to the risk of injury, it will be enough to establish causation. The issue in Hanke was whether the proximity of gas and water tanks in the design of an ice resurfacer, which admittedly increased the risk that an explosion might occur, was the actual cause of the explosion. The SCC determined that the material contribution to risk of harm was not sufficient to cause the injury sustained by the ice attendant when an explosion occurred.

Unfortunately, lower level courts misinterpreted the *Hanke*

decision by misapplying 'material contribution.' Chief Justice McLachlin took advantage of the opportunity in the *Clements* decision to get the lower courts back on track by clarifying the proper application of the 'but for' test and the 'material contribution' exception.

In *Clements*, the plaintiff passenger was severely injured while riding on a motorcycle driven by her husband, the defendant. As the husband pulled out to pass another vehicle and accelerated to 120 km/h, a nail which had previously punctured the rear tire of the bike came out, causing the tire to rapidly deflate. The husband lost control of the motorcycle and it flipped over. The wife received a severe brain injury during the crash, and sued her husband for negligent operation of the motorcycle. The question became one of caustion: could the 'but for' the husbands conduct would the accident have occurred?

The BC Supreme Court held that due to limitations of scientific reconstructive evidence Mrs. Clements was unable to prove that 'but for' her husband's negligence she would not have been injured. The Court then applied the 'material contribution' test in error and found Mr. Clements liable on the basis that he materially contributed to the tire deflating by driving too fast with too heavy a load. The case was appealed all the way to the SCC.

Chief Justice McLachlin ultimately sent the case for a retrial because of improper application of 'material contribution.' She stated that the test should not be viewed as a less stringent form of causation, and identified two errors in the reasoning of the BC Supreme Court: First, scientific precision is not required in assessing 'but for' causation; and second, the 'material contribution' test should never be applied in a "simple single-defendant case." The Chief Justice emphasized that material contribution should rarely be used, but set out the test for the exception as follows:

1. First, the plaintiff as a general rule cannot succeed unless they show that, in fact, they would not have suffered their injury 'but for' the negligent act or omission of the defendant.
2. Second, a plaintiff may succeed in getting around the 'but for' test by showing the defendant 'materially contributed' to their injury if:
    a. they can show that two or more people each are possibly responsible for the injury caused on the balance of probabilities using the 'but for' test; or
    b. each of a number of people are able to point to another as possibly causing the injury to the plaintiff using the 'but for' test.

For these reasons the Chief Justice cautiously noted that departure from the 'but for' test should almost never happen except in the rare circumstances set out above, as it should be used with a common sense approach. It will be interesting to keep a watchful eye on jurisprudence in the years to come to see what role the 'material contribution' exception to causation has to play, but hopefully after McLachlin's clarification in *Clements* it will be applied by the courts much less frequently and more consistently.

AS WE SEE IT

ESTATE PLANNING CONSIDERATIONS

By Ara L. McKee

As part of effective estate planning it is important to consider beneficiary designations and joint ownership of assets in addition to ensuring an updated Will is in place. This article provides information regarding common misconceptions related to beneficiary designations and joint ownership of assets.

Beneficiary designations are often required for investment accounts, tax free savings accounts and insurance products. Usually, either a specific person can be named as beneficiary or the estate can be named as beneficiary. If a specific person is named as beneficiary, the asset falls outside of the estate and is not subject to probate. If the estate is named as beneficiary, the asset falls within the estate and is subject to probate. A Will can also designate a beneficiary to investment accounts and/or insurance products.

A common misconception is that a beneficiary designation in the Will always overrides any beneficiary designation made outside the Will. This is not necessarily true. In accordance with s. 662(2) of the *Insurance Act* and s. 71(7) of the *Wills and Succession Act*, the Will does not negate the designation if the designation is made after the Will. For example, if a Will is made on Monday designating a certain person as beneficiary of an investment account, and on Friday a beneficiary designation on that investment account is made naming a different person, the beneficiary designation made on Friday is the effective designation and the Will does not override it.

Beneficiary designations have important consequences as they determine the disposition of your assets on death. It is therefore important to review your beneficiary designations

regularly in conjunction with your Will to ensure your assets will be distributed in accordance with your wishes.

A second common misconception in estate planning is that transferring assets such as land or bank accounts into joint names with someone else will result in the asset falling outside of the estate and automatically transferred to the joint owner upon death. Again, this is not necessarily true and depends on the relationship between the joint owners. There are certain presumptions at law that will apply depending on the relationship. For example, joint ownership of land and bank accounts between spouses is recommended as effective estate planning strategy. In this case the presumption of advancement applies whereby it is presumed that the asset is intended to be transferred to the joint owner. This presumption also applies to joint ownership between a parent and minor child. This concept was discussed in previous Legal Eye articles and set out in the Supreme Court of Canada's *Pecore v. Pecore* and *Madsen Estate v. Saylor*.

These 2 Supreme Court of Canada cases further set out that it is quite different in the case of joint ownership between a parent and an adult child. In this case, there is no presumption of advancement regardless of dependency of the adult child on the parent. The presumption in this case is that the adult child is holding the asset in trust for the parent rather than a gift from parent to child. The onus was then on the adult child to prove that the transfer was intended to gift the asset to the adult child rather than be held in trust for the estate.

An effective way of proving intention is to have the intent stated directly in the Will. The Will should state that any joint ownership designation is intended to be gifted to that person, or alternatively, that a joint ownership designation is intended for the sole reason to facilitate the management of the person's affairs.

Your Will should be reviewed on a regular basis to ensure the disposition of your assets is in accordance with your intentions. Should you have any questions on estate planning, including beneficiary designations and joint ownership of assets, contact our office to speak with a lawyer.

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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 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.

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