McGREGOR STILLMAN'S

LegalEye

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VOL 10, No1. SUMMER, 2006

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

EDITOR'S NOTE

Should you have any questions, concerns or suggestions for future articles please contact Greg Bentz at 484-4445 ext. 307, or contact Greg at gbentz@mcgregorstillman.com.

HEADS UP

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

KNOW YOUR LIMITS

By Aaron M. Vanin

One of the easiest ways to lose a lawsuit is to not start it in time. The recent decisions regarding the *Limitations Act,* RSA 2000, c. L-12 only go to show just how important it is to be aware of all of the issues surrounding this key first step.

The *Limitations Act* prescribes the length of time in which actions can be commenced in the Province of Alberta. With exceptions existing for minors or people without mental capacity, the general limitations to bring an action are two years within the loss occurring or the claimant becoming aware of its existence or when it would have been reasonable to have done so. While the *Limitations Act* sets fairly clear deadlines, limitation periods themselves are not always that clear.

Castillo v. Castillo [2005] 3 S.C.R. 870 involved a motor vehicle accident that occurred in Canada. The injured party sued within the two year limitation period of Alberta. The problem arose since the limitation period in the State of California was only one year (this has since changed). The decision of which law applies when different jurisdictions collide is governed by an area of law called conflict of laws. Generally, Torts are sued in the jurisdiction in which they occur. Therefore the shorter limitation period of California prevailed. The Supreme Court of Canada found that the *Limitation Act* of Alberta could not impose the Alberta Law of its limitation period over another jurisdiction.

Brar v. Roy [2005] A.J. 990 involved an injured party negotiating with his insurance company. The insurance company made an open-ended offer of settlement. The injured parties lawyer accepted the offer two days after the two year limitation date expired. The insurance company refused to pay on the grounds that a claim could not succeed because of a limitations defence. The Alberta Court of Appeal found that the open ended offer had the effect of extending the limitation period by "promissory estoppel", namely the action of making the open ended offer stopped the insurer from relying on a limitations

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defence as long as their offer was still open to acceptance.

So not only does it matter where a loss occurs, the parties' conduct during the time frame also matters. The first step is to identify what type of action you have. The second step is to then determine in which jurisdiction should you bring your action. The third step is ensuring that all offers, communications and requests are made with conditions or timeframes. Lastly, you should always err on the side of caution and consult legal advise regarding commencing the action within the shortest limitation period that could apply.

FIRM NOTES

We are pleased to introduce Christopher G. Hoose as a partner in McGregor Stillman LLP. Chris was a welcomed addition to the partnership when he joined January 1, 2006.

There are two new additions to our legal team. Lisa Caines, a law graduate from the University of Alberta, will be articling with our firm commencing July 1st of this year. Samantha Basarab, who is going into her third year of law school at the University of Alberta, is interning with us this summer and has accepted an articling position with the firm starting in May, 2007.

We are sorry to lose our administrative assistant, Maureen Larbalestier. Maureen has planned a 3 month trip throughout Europe and will then be returning to school. We wish Maureen the best in her further endeavours. On this note, we welcome Cathy McElroy as the new administrative assistant.

Our corporate commercial and wills and estates legal assistant, Terrie Stadnyk has left us for greener (or is it browner?) pastures, accepting a position with a law firm in Calgary. We are sorry to lose Terrie after several years with our firm, and we wish her the best. Taking over in our corporate commercial department is Marilyn Essex, who has been with us for many years and has a great deal of experience in the corporate commercial field. Elana Yaremkevich of our office will be assuming the duties of legal assistant in both the areas of wills and estates and civil litigation.

Mark Stillman has been re-appointed for another year to the Law Society of Alberta Audit Committee. He will also once again be acting as an examiner in the interviewing and counselling portion of the Canadian Centre for Professional Legal Education (CPLED) program in September.

CAUSES CELEBRES

By: Christopher G. Hoose

***Cause Celebre: Wi-Lan Inc. v. St. Paul Guarantee Insurance Co.* [2005] ABCA 352 (Alta. C.A.)**

The law in relation to the duties of Officers and Directors of corporations can often seem confusing. On the one hand, a corporation is a vehicle created specifically to provide limited liability to its principals. Yet, there seems to be an ever growing trend in civil litigation practice to name officers and directors of corporations as defendants in civil lawsuits.

Generally, officers and directors have duties to the corporation they serve, duties to persons other than the corporation, duties with respect to the securities market and other statutory duties. Probably the most important statutory duty is found in the Alberta *Business Corporations Act,* R.S.A. 2000, c. B-9 which imposes on officers and directors the duty to exercise the care, skill and diligence that a reasonably prudent person would exercise in similar circumstances.

It is important to recognize that the principle of limited liability for the principals of a corporation means just that – Limited. Directors' and officers' personal assets may be at risk from suits that contain allegations such as fraud, unfair trade practices, defamation or breach of contract. In the normal course, directors and officers will usually have indemnity provided to them by the corporation they serve for amounts that they may be held liable for. However, indemnification is not always available due to many reasons such as financial insolvency of the corporation or it may be prohibited by certain provisions of the corporate by-laws.

Therefore, it is becoming more and more prevalent that corporations obtain Directors and Officers (D&O) Insurance. D&O insurance will generally cover any error, misstatement, misleading statement, act, omission, neglect or breach of duty committed by the insured in their capacity as an executive of the corporation; subject of course to the many listed exclusions.

In the case of *Wi-Lan Inc. v. St. Paul Guarantee Insurance Co*, a director of Wi-Lan Inc., Zaghloul, was covered under a D&O insurance policy issued by the St. Paul Guarantee Insurance Co ("St. Paul"). Under the policy, Zaghloul would be covered, but only when acting solely as a director

or officer of Wi-Lan Inc. Consequently, litigation arose in which Wi-Lan Inc. and Zaghloul (in his personal capacity) were named as defendants. The action arose out of a claim for a breach of contract against Wi-Lan Inc. and Zaghloul and the plaintiffs claimed that the immediate cause of loss or damage to them was the misplacement of some property title documents. St. Paul refused to defend Wi-Lan Inc. or Zaghloul.

The ultimate issue in this case was, simply put, whether St. Paul had to defend Wi-Lan Inc. and Zaghloul. A Court of Queen's Bench Justice initially held that St. Paul did not have to defend Wi-Lan Inc. and Zaghloul, however the Alberta Court of Appeal overturned this decision and held that the insurer did have to defend the insured.

The Alberta Court of Appeal held that the basic test to see if an insurer has a duty to defend an insured is whether the factual allegations against the insured in the Statement of Claim could possibly support a judgment against the insured which the policy would pay. The Alberta Court of Appeal cited the principle as set out by the Supreme Court of Canada that for liability insurance purposes, pleadings are to be read generously and in favor of the widest latitude for the claim, and therefore in favor of requiring the insurer to defend.

Often in civil litigation, the allegations found in a Statement of Claim set out the plaintiff's best case. As noted by the Court of Appeal, in determining whether an insurer has a duty to defend a claim, the truth or falsity of the allegations in the statement of claim are irrelevant. The test is whether any of the allegations in the statement of claim could possibly support a judgment against the insured which would be covered by the policy.

As with all insurance policies, the relationship between insurer and insured is one of *"uberrima fides"* – utmost good faith. When placing D&O insurance for your corporation, make sure to completely read and review the entire policy and clearly understand what is covered and what is excluded pursuant to the policy.

AS WE SEE IT

By Samantha Basarab

The Importance of Preserving Electronic Records for Litigation

As technology advances, businesses have come to produce and rely on electronic records as a primary source of communication and administration. Electronic records may include e-mails, web pages, data files and source data, as well as usage and access records. Many of these records are found on computers, data servers, hand-held devices, as well as back-up and monitoring programs or systems. It is important to be aware that if litigation is on the horizon that there is a requirement of producing electronic records as evidence and there are consequences of failing to properly preserve such evidence.

Why is This Important?

Electronic records are producible in the same way as paper documents and the Alberta *Rules of Court* impose a duty to preserve evidence once a party has been served with notice of an action. Rule 187 requires a party to disclose all relevant and material records in its possession and the time and manner by which its possession ended. Failure to do so may result in a finding of "spoliation", which carries unfavourable consequences to the party that fails to preserve or destroys evidence.

Spoliation has been defined as the destruction or material alteration of evidence, or the failure to preserve property for another's use as evidence in litigation that is pending or reasonably foreseeable. In addition, a finding of spoliation creates a presumption that the evidence would have been unfavourable to the party that destroyed it.

Electronic Records

Electronic records present a unique facet to spoliation. In terms of evidence preservation for litigation, electronic records may have to be produced in their electronic form. These records are to be produced in this manner even if they have been printed out. This is due to the fact that there is additional information present in the document in electronic form that is not visible on the paper printout. This information or "meta data" may include the name of the author, the origin date and any modification dates of the document, tracked changes, and even hidden text or comments.

The issue that arises is that electronic records can be, and usually are, at some point deleted. Deletion can occur both intentionally and unintentionally. For example, businesses may have destruction procedures that are carried out automatically at certain time intervals by computer programs as a method of office administration and organization (i.e. the computer may automatically destroy e-mails after one month).

It is unclear whether the court will apply spoliation to cases where the evidence was lost unintentionally or if it will restrict it to cases where spoliation was performed to intentionally suppress evidence. However, the courts have made it clear that the failure to preserve electronic evidence in breach of an order of the court is a very serious form of contempt (*Dreco Energy Services Ltd.* v. *Wenzel* 2005 ABCA 185). To protect against unintentional or accidental deletion of vital electronic evidence, it is important to suspend any automatic destruction procedures that might destroy relevant electronic records once the potential for litigation is suspected.

The British Columbia Law Institute has addressed this issue and highlights the importance of businesses implementing document retention and destruction policies to avoid the negative presumption associated with spoliation. They suggest that where positive steps are taken to set up retention and destruction policies and the documents are still lost, such steps may result in the negative presumption only applying to a situation of intentional destruction.

As dependence on electronic communication becomes more prevalent, the more importance electronic records will play as evidence in litigation. It is essential to understand the specific rules and consequences associated with electronic records in such processes. Being informed and taking the proper precautions, such as suspending automatic destruction procedures and implementing document retention and destruction policies, will likely ensure that your business is protected from any sanctions or negative treatment by the court.

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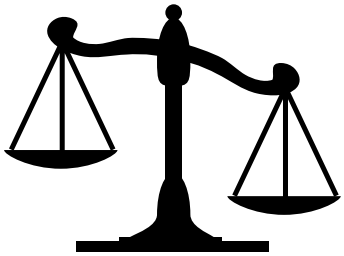

McGregor Stillman LLP is a general law firm formed in 1993 with emphasis on Civil Litigation, Corporate and Commercial matters, Real Estate, and Wills and Estates and Family Law. The firm represents clients throughout Alberta, and has also represented clients from British Columbia, Saskatchewan, Manitoba, Yukon, Northwest Territories, Ontario, Quebec and various parts of the United States.

The firm has a well established network of agents in Canada, includingVancouver, Vancouver Island, Calgary, Regina, Saskatoon, Winnipeg, Toronto and Montreal. McGregor Stillman LLP also has established affiliations with various law firms throughout the United States and Great Britain.

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