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

EDITOR'S NOTE

Our office will be closed during the holiday season from December 23 to December 27 inclusive. Our office is open during regular business hours December 28th, and 29th. We will be closed January 1, 2007.

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 Greg Bentz at 484-4445 ext. 307, or email 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.

Income Trusts: What they are and how the Government of Canada is reacting

By Lisa Caines

The Canadian Income Trust market has seen significant growth since its beginning in the mid 1980s with currently over 200 Income Trusts and a market capitalization of over $200 Billion. In 2006 alone, corporations representing approximately $70 Billion in market capitalization have either converted themselves into Income Trusts, or have announced plans to do so. With higher available cash distributions in a low interest rate environment, it is no surprise that these structures have attained such growth.

A simple business Income Trust is simply a trust fund that sells units to the public and invests the proceeds in an entity that carries on the business operations. The unitholders are the beneficiaries of the trust. The Trustee is appointed when the Income Trust is created and is responsible for making decisions relating to the company on behalf of the unitholders. However, in actuality, the Trustee likely delegates many of these responsibilities to the management of the operating company. This differs from the classic corporate structure that involves shareholders investing equity into the corporation which in turn issues dividends.

Income Trusts provide corporations with the ability to substantially reduce or even eliminate corporate tax. Under the Income Tax Act, trusts are taxed on retained

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income, not on trust capital. Therefore, Income Trusts operate as "flow-through" vehicles allowing income to flow through it and be taxed at the investor level. These corporations pass along their income directly to the unitholders. The distributions paid to the unit holders are typically much higher than dividend-paying stocks paid to shareholders under classic corporate structure. This is the main attracting feature of income trusts - the ability to obtain high yields amid a low-interest rate environment.

The process of setting up a Canadian Income Trust resembles that of becoming a public company. In a typical ITO, or Income Trust Offering, the Income Trust is created to distribute units to the public. The proceeds of the trust are used to acquire debt and equity in the operating company, or interests in the operating company's income producing properties. Instead of offering securities directly to the public like corporations, the vendors sell their interests in the operating entity to the Income Trust. The proceeds raised through the offering of units to the public allow the Income Trust to purchase the interests.

Although Income Trusts provide corporations and unitholders with attractive financial incentives, the Government of Canada is less than enthused with the potential impact the trusts have on the economy. Not surprisingly, the Government announced a new "tax fairness plan" on October 31, 2006 in a response to the growing number of Canadian businesses converting to the income trust structure. Calling trust conversions "a growing trend to corporate tax avoidance", Finance Minister Jim Flaherty introduced a proposed tax regime which will essentially treat Income Trusts like corporations and tax their investors like shareholders. Citing the negative effect the trusts have on the economy, Flaherty specified that the new rules will not apply until 2011 for existing trusts. Income Trusts that begin to be publicly traded after October 2006 will be subject to the regime in the New Year. Although no legislation has yet been released, the Government indicated that it will consider anti-avoidance rules to ensure that its policy objectives are met.

FIRM NOTES

The second annual McGregor Stillman LLP Super Bowl was held on October 20, 2006 at the Callingwood Lanes and was a resounding success again this year. Roughly $11,500.00 was raised for Capital Health and the Northeast Community Health Centre ("NECHC"). The funds will be used to assist patients and families who face financial hardship due to the illness or injury that brings them to the Community Health Centre. The funds will also be used to assist Capital Health and the Northeast Community Health Centre purchase vital medical equipment for use in the Health Centre. To all of the participants, sponsors and volunteers, we once again send our thanks for all your help and support in putting on this great event and supporting an excellent charity.

Terry McGregor retired from the practice of law effective September 30, 2006. We send out our thanks to Terry for his years of friendship and mentorship and wish him all the best in his future endeavors.

Mark Stillman volunteered again this year as an assessor for the interviewing and counseling competency evaluation section of the 2006-2007 Canadian Centre for Professional Legal Education Program.

We welcome Roxanne Coursaux, Brandi Morin and Audrey Hardwick to the firm. Roxanne joined in September of this year as a family law assistant; Brandi joined us in October of this year and is a junior real estate legal assistant; and Audrey joined us in November and is a junior litigation assistant.

CAUSES CELEBRES

Don't Check Your Responsibility at the Door: Social Host Liability in Alberta
By: Aaron M. Vanin

The issue of social host liability, that is the liability of the host of a private function to third parties harmed by their guest, has been addressed by the Supreme Court of Canada recently in *Childs v. Desormeaux*, [2006] S.C.J. No. 18.

Unlike our cousins to the south, Canadian jurisprudence has been seemingly hesitant to attach liability to the host of a private function. The idea that a private party's host should foresee harm to a third person from a guest's consumption of alcohol has been found to be just beyond the liability that Canadian courts have been willing to allow.

This being said, hosts of private parties, that is, functions that are not open to the public, or for commercial gain or attractions that carry an inherent risk, still have some duties to their guests and have some responsibility regarding their role as host.

Social host liability in Alberta was addressed in the *Wince v. Ball* case. In that instance a father allowed his teenage daughter to have a party in their residence. The father removed all liquor from the home, did not provide alcohol to any of the guests but did allow the teenagers to drink alcohol that they themselves had brought. One of the guest drove home striking a pedestrian. Justice Bielby dismissed the claim against the host finding that there was no error or omission by the father beyond the actual authorization of the party itself. Justice Bielby noted the expansion of social host liability in the United States but found no precedence for it under Alberta or Canadian law.

Calliou Estate v. Calliou Estate was a case where the estate of a deceased individual attempted to sue the host of a hockey tournament. The organizers held a hockey tournament, giving the team on which the deceased person played a case of beer and coupons for pitchers of beer at a local bar. After the first game the team went to the bar, became intoxicated and nine hours later became involved in a fatal collision. Madame Justice Moen held that the host must do or omit to do something that contributes to the drunken driving to attach liability. Her Ladyship went on to cite previous cases that only when the level of intoxication was known to the host and they continued to supply alcohol or did not supply the means for alternative transportation would liability apply. After the team left the locker room and left for the bar Justice Moen accepted that they were not visibly or apparently intoxicated making the tournament organizers not liable for the subsequent accident.

In *Childs v. Desormeaux* the host had a bring your own beer party. One of the guest drank 12 beer, got into his car and caused a serious accident. The guest was known by the hosts to be a heavy drinker and the host walked the guest to his car asking if he was okay. The Supreme Court was unanimous in finding that social hosts do not owe a duty of care to public users of highways. Further, that harm to public users of highways was not foreseeable by private hosts. Madame Chief Justice McLachlin stated that when a guest came to a private party they "did not park his autonomy at the door". The court went on to find that a private party in and of itself was not dangerous conduct and that more would be required to establish a risk that would attach liability. That more was positive action. The court did find that where a host continued to serve a visibly inebriated person, knowing that they would drive home in such a state, this would constitute the positive action required to establish liability.

The Supreme Court has said that people are responsible for their own actions. Walking through a front door, does not create liability on the part of the host. For a private social host to be found liable for injuries to a third person that host must have taken active steps to create a hazard. A host must not only act irresponsibly but they must actively create a risk.

AS WE SEE IT

Avoiding Delays at the Land Titles Office
By Mark Stillman and Greg Bentz

Due to our super heated economy, the Northern Alberta Land Titles Office (LTO) is currently taking 23 business days to register land title documents. This means that if all goes well, registration of security on a given title of land will take approximately one month. This is a matter of concern for anyone buying a home, obtaining a mortgage, or refinancing their home. This is so because traditionally, banks (or financers) only advance money once their security (mortgage) is in place.

Essentially, if a home owner wants a mortgage today, they must wait one month before funds are releasable; this delay can be costly or even a deal killer.

There are three ways to address this issue:

1. Tenancy at Will- Though not a tool for refinancing, tenancies-at-will can be used on house purchases to deal with the delay at the LTO. Essentially the vendor allows the purchaser to take possession of the house as a renter, and not as owner, until the funds can be paid. It simply allows the purchaser possession to the new home as a renter, usually paying rent at the rate of interest that they

would otherwise pay on the loan proceeds.

2. Title Insurance (gap insurance)-The reason funds are only released upon registration is to guarantee the lender (the bank) that the security (the mortgage) is in place: only once the registration of the mortgage is evidenced by the Certificate of Title, can the lender's security be enforced.

Certain forms of title insurance (but one must ensure that the wording in the policy is satisfactory) include gap insurance which covers the gap in time between the point that mortgage documents are submitted to the LTO and the point that the mortgage is registered. With gap insurance, the lender is covered from any loss, if for some unforeseen reason the mortgage is incapable of being registered.

Although this resolves the delay at the LTO, not all lenders, or lawyers acting for lenders will accept gap insurance. Further, there is a cost associated with title insurance although in many cases this will be less than the the potential interest charges.

3. Western Protocol- Similar to gap insurance, the Law Societies of the western provinces, in certain circumstances, will essentially guarantee the registration of the transfer of land and/or mortgage. When Western Protocol is used, there is no cost to the buyer/borrower but all parties and their respective lawyers must agree that the transaction is suitable for this type of closing. Not all lenders will allow the use of Western Protocol. Lawyers acting for lenders or borrowers in accordance with the Western Protocol must undertake to use their best efforts to ensure registration.

These three solutions to the present delays at the LTO all have their associated risks that must be weighed and explored with the acting lawyer. But if the situation warrants, and meets the requirements, and if the risks are acceptable, then they are a useful means available to avoid delays.

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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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