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

EDITOR'S NOTE

Should you have any questions, concerns or suggestions for future articles please contact Greg Bentz by phone at (780) 930-3630, or email at gbentz@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.

ALBERTA – BRITISH COLUMBIA AGREEMENT STREAMLINES EXTRA-PROVINCIAL REGISTRATION PROCEDURES FOR CORPORATIONS AND PARTNERSHIPS

By I. Mark Stillman

In April of this year, an agreement known as the Trade, Investment and Labour Mobility Agreement ("TILMA"), between Alberta and British Columbia was fully implemented. The result of this Agreement has been the streamlining, and in certain cases, the elimination of additional registration and reporting requirements for businesses which are incorporated or registered in one province and extra-provincially registered in the other. Certain previously duplicated registration and reporting requirements have been eliminated as a result of the Agreement, thus making it more cost effective to expand an Alberta corporation, limited partnership or limited liability partnership into British Columbia and vice versa. A corporation will no longer have to file an annual report in both jurisdictions, now only being required to file one in the province where it was originally incorporated. All filing fees for extra-provincial registrations have been eliminated.

TILMA has the effect of committing Alberta and British Columbia to reconciling business reporting and registration requirements. Hence, if a business meets its home province's requirements, registration in the other province can be initiated in the business's home jurisdiction. A new joint registry system has been developed by Alberta and British Columbia to streamline and integrate corporate registration for businesses in the two provinces.

When initially incorporating a new company, part of the registration procedure will be the need to answer whether the corporation wishes to be registered in the other province. If the answer is yes, then the home jurisdiction registry will facilitate the extra provincial registration, as well as forward periodic updates onto the registry in the other province.

British Columbia or Alberta corporations that are already registered in the other province will not be required to take any additional action as a result of TILMA. As well, there will no longer be the requirement to file annual returns or notices of other changes in the corporation with the other province's registry. Each corporation which is extra-provincially registered, however, will still need to maintain an attorney for service in the other province. The Attorney for Service

INSIDE:

Notification, however, can be registered in the corporation's home province, even though the attorney is situated in the other province.
If an Alberta corporation wishes to extra-provincially register in British Columbia the following is still required:

1. A name examination fee;
2. An attorney for service in British Columbia; and
3. A head office address.

If a British Columbia corporation wishes to extra-provincially register in Alberta, the following is required:

1. An Alberta-based NUANS report ;
2. An attorney for service in Alberta; and
3. A head office address.

It should be noted that TILMA does not affect local governments' power to control business operating conditions such as municipal licensing and taxation, land use regulations and health and safety requirements.

For further information or advice associated with TILMA, please contact us.

FIRM NOTES

Mark Stillman has been re-appointed to the Law Society of Alberta's Real Estate Practice Advisory Committee.

Richard Smith has completed "The Mediation of Family and Divorce Conflicts" Seminar and will now be providing his services as a mediator to individuals experiencing family law disputes who wish to attempt to resolve the disputes in a more collaborative process than traditional litigation.

Eric Bruveris has accepted a position with our firm as an associate lawyer commencing in July, 2009. Jim Chronopolous has accepted a position with our firm as a student-at-law whose articles commence with the firm in July, 2009. We look forward to Eric and Jim joining the Stillman team.

Crystal Holloway has joined the firm as a legal assistant and will be working with the firm lawyers on family law matters. Danielle Borgia has accepted a full-time legal assistant position with our firm.

The fifth annual Stillman LLP Super bowl Bowling Extravaganza has been booked for Friday, October 16, 2009. Monies raised at this year's Super bowl will be donated to the SKILLS program, a local charity assisting special needs individuals in increasing their employability and giving them the requisite skills to enter the work force. Anyone wanting to participate in the Stillman LLP Super bowl, or to donate items for our silent auction held at the Super bowl, can contact Greg Bentz of our office to find out more information. All friends and clients of Stillman LLP are invited to assist in this worthwhile cause.

CAUSE CÉLÈBRES

Minor Injury Regulations in the Court of Appeal
By Greg Bentz

As we have written about in past issues, in 2004, Alberta passed legislation entitled Minor Injury Regulation, ("MIR") which, among other things, imposed a $4,000.00 cap on non-pecuniary damages (pain and suffering) for minor injuries (such as whiplash or strain or sprain injuries) as defined under these Regulations.

In 2008, the constitutionality of the MIR was challenged in the case of Moreau v. Zang, alleging that the legislation infringed on people's rights and liberties under the Charter.

As we indicated in our previous articles, the Plaintiffs were ultimately successful and the legislation was struck down.

The Defendants appealed to the Alberta Court of Appeal, and on June 12, 2009, the Court of Appeal rendered its unanimous decision.

Writing for the Court of Appeal, Madam Justice Rowbotham allowed the Defendants' appeal and dismissed the Plaintiff's cross-appeal stating:

> "The MIR when considered with the entire scheme of insurance reforms, does not infringe section 7 or 15 of the Charter. While the legislation does make a distinction on the basis of disability, it is not discriminatory. The legislation, as a whole, responds to the needs and circumstances of those suffering minor soft issue injuries."

The Court of Appeal found that the trial judge held that to succeed under section 7 of the Charter the injured litigant must prove that there has been a deprivation of one's right to "life, liberty, or security of the person". Secondly, the injured person must demonstrate that the deprivation was contrary to the principles of fundamental justice.
The Court of Appeal further found that the trial judge concluded that the distinction created by the cap demeans the dignity of

those in the claimant group by reducing recognition of their pain and suffering and the benefits provided under these insurance reforms would not, "in the eyes of a reasonable person, overcome the distinction created by the cap."

Notwithstanding trial judge's conclusions, the Court of Appeal found that this was not the correct approach in determining whether a distinction is discriminatory. The correct method is to assess the challenged provision (in this case the MIR) as part of the scheme in which it is enacted. It was incorrect to first determine whether the challenged provision is discriminatory and only then have regard to the legislative context. The Court of Appeal stated that:

> "In other words, the question to be asked is, "what is the impact of the whole scheme on human dignity?"…. the impugned legislation was part of a larger scheme in which the legislature attempted to provide a particular benefit to a claimant to respond to the distinction in the treatment."

Accordingly, the Court of Appeal held that the trial judge erred when he constitutionally assessed only the MIR and that the distinction made by the MIR was the focus of his analysis, when the correct approach was to assess the entire package of insurance reforms as a whole.

The Court of Appeal stated the trial judge failed to consider the benefits that were provided in the Minor Injury Regulations such as early treatment protocol.

The Court of Appeal held that:

> "Given that full costs of care [i.e. Alberta Health Care] are awarded, damages for pain and suffering can be moderated by policy considerations."

Further, the Court of Appeal stated:

> "the nature of the interest affected is important to a reasonable minor injury claimant in the economic sense and in recognition of her pain and suffering, it is not fundamental in the broader sense required here. In my view, it is not an interest which is fundamental either societal or constitutionally.

Based on the Court of Appeal's Decision of June 12, 2009, the legislation is deemed to be reinstated retroactively to the time it was enacted in October 2004.

Likely what this will mean to many personal injury claimants (arising out of motor vehicle accidents) is a reduction in the amount of compensation for one's pain and suffering. This will not affect compensation for injuries from non-motor vehicle accident injuries or injuries that are not considered minor.

For further information, please contact our office.

AS WE SEE IT

E-DISCOVERY OF FACEBOOK – FAIR PLAY OR FOUL PLAY?

By Christopher Hoose

With the advent and exponential growth and popularity of social networking sites such as Facebook, it was only a matter of time before these sites would be targeted as potential sources of information in the context of civil litigation.

Although there seems to be some division in the courts across Canada on how to deal with requests from counsel seeking production of the opposing parties' Facebook pages, it seems the trend from the majority of our courts is to lean towards production of the Facebook material.

In the recent British Columbia Supreme Court decision of Bishop (Litigation guardian of) v. Minichiello, [2009] B.C.J. No 692 (decision delivered April 7, 2009), the defendant maintained that the Plaintiff's Facebook login/logout records were relevant as they could have significant probative value in relation to the Plaintiff's claim that ongoing fatigue as a result of a motor vehicle accident prevented him from maintaining employment. The court stated that as relevance should be granted a broad scope, and the defendant sought only the Plaintiff's login/logout records, the information sought by the defence was directed to be produced.

The Ontario Superior Court of Justice in Leduc v. Roman, [2009] O.J. No. 681, also had a recent opportunity to rule on a broader motion than that in Bishop. The defendant in Roman applied for the production of all information in the plaintiff's Facebook profile. The court found that it was reasonable to infer that the plaintiff's Facebook site potentially contained content relevant to the issue of the plaintiff's post accident lifestyle given the inherent social networking nature of Facebook.

The court did not go so far as to state that the mere existence of a Facebook profile entitled the defendant to access all of the material on the site, but there was a requirement that if

some evidence that relevant content existed on the Facebook profile, then trial fairness dictated that the defendant should be permitted to test whether the plaintiff's Facebook profile was relevant to any matter in issue.

One contrary decision has been given by a Master of the Ontario Superior Court of Justice. In Kent v. Laverdiere, [2009] O.J. No. 1522, Master Haberman refused a defendant's request for a supplementary affidavit of documents listing the Facebook pages of the plaintiff, just prior to trial. The learned Master found that much of the information sought by the defendant was equally available by traditional means of surveillance commonly practiced by defendants in personal injury actions.

One may wonder, despite the possible invasion of privacy one might incur from having their Facebook profile looked at by others, what is the harm? The position could be advanced that if one commences litigation in a personal injury or family law situation, then your social habits, activities and friends may be relevant to the outcome of that proceeding.

However, it is our opinion that such a superficial analysis is not sufficient. The true question is whether the content of one's Facebook profile and pages meet the legal tests of necessity and reliability. As noted in Laverdiere, much of the information sought by those seeking production of one's Facebook profile can be ascertained through traditional investigative means.

Further, how reliable is the information posted on an individual's Facebook profile. Items can be posted onto an individuals "wall" by friends, relatives or if an individual in not overly discreet as to who is allowed to be added as a "friend", perhaps almost complete strangers.

It is an observation that perhaps applications by counsel for access to an individual's Facebook profile is nothing more than a short cut and end around other conventional methods for ascertaining the same information. As well, there is the potential for access to other third parties information that may not be fully comprehended by the courts.

In summary, the court's tendency appears to be towards allowing Facebook profiles and the information contained therein to be produced in the context of civil litigation. However, the court's should look to ensure that proper evidential foundations for the production of these materials is set, and that the reliability of the information posted on Facebook profile's can be verified.

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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 parts of 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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