



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



EDITOR'S NOTE

Our office will be closed during the holiday season from December 24, 2009 to December 28, 2009 inclusive and we will be closed January 1, 2010. Our office is open during regular business hours on December 29, 30 and 31, 2009, and January 2, 2010.

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 Geoff Coombs by phone at 930-3634, or email at gcoombs@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's new Adult Guardianship and Trusteeship Act **By Eric Bruveris**

On October 30, 2009, the *Adult Guardianship and Trusteeship Act* ("AGTA") took effect. This new legislation replaces the *Dependent Adults Act* and represents an overhaul of the law regarding the court appointments of guardians and trustees for disabled adults.

A central feature of the AGTA is a recognition that an individual's capacity at a given time is not "all or nothing". While some individuals gradually experience a decline in their capacity, others may experience a non-linear decline, and still others may be only temporarily incapacitated.

The AGTA has developed a spectrum of decision making which recognizes life's realities, as it relates to personal matters. This spectrum ranges from Supported Decision Making at one end, to Guardianship at the other. In between is Co-Decision Making.

Pursuant to the AGTA, personal matters are defined as matters which may include a person's health, where and with whom a person may live and associate, what social activities the person may engage in, a person's employment, etc. However personal matters do not include financial matters.

An adult person is presumed to have the capacity to make personal decisions until it can be shown otherwise. The AGTA defines "capacity" as the ability to 1) understand information that is relevant to the decision; 2) appreciate the "reasonably foreseeable" consequences of both making; and 3) not making the decision.

Supported Decision Making

There are instances in which adults who have capacity to make decisions benefit from the assistance of other individuals to help make that decision. Supported Decision Making is to be used when an adult has capacity to make a decision if assisted by a trusted and trustworthy relative or non-relative. The AGTA formalizes the Supported Decision Making relationship by allowing the formal authorization of another adult to act as a "supporter" by preparing an authorization. The authorization enables the supporting adult to access personal information about the supported adult, to speak on his or her behalf and to assist in the communication of the decision of the supported adult.

INSIDE:

HEADS UP:

-a review of some recent and upcoming legislation and legal issues

FIRM NOTES:

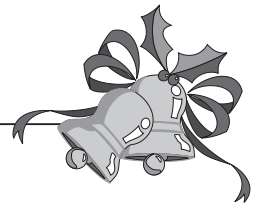
-update on the happenings at Stillman LLP

CAUSES CÉLÈBRES:

-some recent case law to be aware of

AS WE SEE IT:

-semi-annual commentary on a current legal issue



Co-Decision Making

Some Adults require greater assistance than supported adults. Under the AGTA, the court will order Co-Decision Making where it finds that although the adult’s capacity is “significantly impaired”, the adult would have capacity to make decisions about personal matters if the adult was provided with guidance and support. In addition to the best interests of the adult, the court is obliged to consider whether or not less intrusive measures, such as Supported Decision Making, have been considered and would be as effective to meet the adult’s needs.

The court cannot order Co-Decision Making unless both the assisted adult and proposed co-decision maker agree. Furthermore, the court order only allows the co-decision maker to engage with the assisted adult to arrive at an appropriately considered decision.

Guardianship

Guardianship orders must be court ordered and only when all three aspects of an adult’s capacity are lacking. The court must also be satisfied that the order is in the best interests of the adult. Section 26 of the AGTA sets out what the court must consider in determining the best interests of an adult. The order must also identify the specific personal matters over which the guardian has authority to make decisions; eg. with whom the adult may associate, the adult’s employment, or the adult’s participation in social activities, etc.

The court can also appoint the Public Guardian to act as guardian or as one of a number of guardians, however, in the latter case the court shall authorize the Public Guardian to act exclusively on specific personal matters.

Trusteeship

The court’s jurisdiction to make a trusteeship order under the AGTA is similar to that which existed under the *Dependent Adults Act*. Certain criteria must be met prior to the court appointment of a trustee, specifically:

- 1) the adult must be found to lack capacity;
- 2) less intrusive measures would not adequately protect the adult; and
- 3) it is in the adult’s best interests for a trustee to be appointed.

In determining the adult’s best interests, the court considers the capacity assessment report, the report of the review officer, the trusteeship plan, as well as the other factors set out in section 46 of the AGTA.

A trusteeship order applies to real property in Alberta and all of the adult’s personal property, wherever it may be located. Subject to any court imposed limits, the trustee is authorized to do anything in relation to financial matters that the adult could do if the adults was capable of making decisions.

Under the AGTA, Certificates of Incapacity are no longer issued and the provisions dealing with existing certificates are now found in the *Public Trustee Act*. Other changes include allowing individuals who live outside Alberta to be trustees and providing for trustee compensation pursuant to a fee schedule. Private trustees must also now abide by the “prudent investor rule” of the *Trustee Act* and trustees also have limited authority to make gifts without seeking specific court authority.

In sum, the AGTA represents a major overhaul of the previous legislation which should serve better respond to dependent adult’s needs specifically with respect to issues relating to guardianship and trusteeship. If you have any questions regarding this new legislation and how it may affect you or a dependent adult that you know, please contact any of the firm’s lawyers and we would be happy to assist you.

FIRM NOTES

Stillman LLP’s fifth annual Super Bowl Bowling Extravaganza took place on Friday, October 16, 2009. The event was once again a great success, raising roughly \$23,000.00 for the Skills Society, a local charitable organization involved in supporting special needs individuals in their daily living and assisting those individuals to develop the requisite skills to enter the work force. Randy and Margo Cable of Edmonton generously agreed to match our fund raising efforts and therefore the amount raised translates to approximately \$46,000.00 with this matched funding. To all of the participants, sponsors, donors and volunteers, we once again wish to express our appreciation for all your help and support in putting on this great event and supporting such a worthwhile cause.

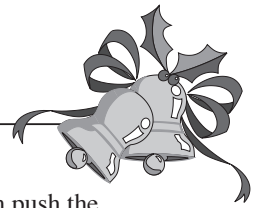
We are pleased to advise that the following legal assistants have joined our team:

Brittany Kowalchuk in our family law department;
Heather Morrow in our family law department; and
Monika Pachan in our real estate department.

Mark Stillman has been re-appointed to the Law Society of Alberta’s Real Estate Practice Advisory Committee for 2010.

Greg Bentz was a guest instructor for the Legal Education Society of Alberta for its instructional seminar on Small Claims & Collections.

Cathy McElroy of our real estate department graduated and received her diploma from the Legal Assistant Program at Grant MacEwan University. Cathy completed this program while working full time for Stillman LLP.



CAUSE CÉLÈBRES

THE TICKING CLOCK

by **Jim Chronopoulos**

INTRODUCTION

Unbeknownst to most people in the general public, there is a ticking clock counting down the time a person is permitted to start a civil legal action against another. In Alberta, in most cases a person has two years to commence a civil claim after the date when the person knew an injury had occurred or, in the circumstances, ought to have known an injury had occurred. At first glance, this may seem unjust to some. After all, if someone has a legitimate claim against another, why should there be any time limit at all? As discussed below there are sensible and compelling reasons why this clock must continue to tick, and as a recent decision from the Court of Appeal of Alberta shows, the two year time limit ends definitively at the toll of midnight on the two year anniversary.

REASONS FOR A LIMITATION LAW

The principle of imposing a limitation period on legal claims is well founded. Broadly speaking, the imposition of deadlines on lawsuits encourages the timely resolution of legal controversies and strikes the proper balance among the interests of potential claimants, potential defendants and society at large. There appears to be at least three compelling reasons for why our legal system operates with these time limitations.

One reason for legal claim timelines is due to evidentiary considerations. As time passes witnesses can disappear, memories can fade, and records can become lost or destroyed, and with the loss of evidence so too goes the legitimacy and credibility of a person’s potential claim. Accordingly, in the interests of making decisions with the best and most truthful facts, our legal system has set a limitation period that encourages parties to start their proceedings before evidence fades away and recollections disappear.

A second argument to encourage timely lawsuits is for peace and repose. At some point it is just and fair that potential defendants continue on with their life without having the threat of a possible lawsuit hanging over their head. The notion of wiping the slate clean, either by paying a penalty or by forgiving or forgetting, is a long standing principle in our legal system. In its essence, our legal system encourages people to address their disputes and move along or, simply, just move along.

The third compelling reason to keep claim periods fixed is based on economic reasons. The threat of a lawsuit adversely affects an individual’s ability to enter into business transactions. Likewise, it becomes expensive to maintain records and to get insurance for indefinite time periods. Someone who threatens but hesitates to sue might also choose to stall so that they would extort favorable treatment or stall for what would otherwise be unjust reasons. The economic principle, under a cost benefit analysis, demands that legal actions be commenced within a definite period.

Despite these compelling reasons, litigants often push the boundaries of this two year period. Paradoxically, two years goes by very quickly and if a limitation deadline is missed in commencing civil claim, a defendant can claim and will have an absolute defense to that action. This absolute defense will carry the day despite the fact that a defendant would otherwise be found liable for their actions. A recent case from our Court of Appeal addressed and clarified the when time would run out for a litigant to start a claim.

ZOETEMAN v. FEIST (2009 ABCA 311)

The facts of the case were as follows: Zoeteman filed a statement of claim on January 4, 2007 against Feist for injuries that Zoeteman suffered in a motor vehicle accident on January 3, 2005. An initial ruling from a Queen’s Bench Master ruled the action was time barred. This decision was overturned by a Queen’s Bench Justice who, relying on a previous Alberta Court of Appeal ruling that said a limitation period “expires on the day following the second anniversary of the happening of the event upon which the action arose”, determined that the time period had not expired.

On appeal, the Honourable Mr. Justice Picard spoke for the majority of the Court of Appeal and clarified the law on the two year period. He agreed with the principle that “the limitation period continues until midnight of the second anniversary.” As such, the period has expired “on the day following the second anniversary of the triggering event.”

Thus, by filing her claim one day late (mere hours perhaps) from the date of her accident, Zoeteman was not allowed to file a claim against Feist.

CONCLUSION

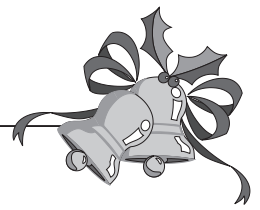
The ticking clock on civil claims appears to be very well founded in our legal system. Moreover, the above noted case highlights the strict degree to which the timelines will be applied. A two year limitation period is just that -- two years and not a day more. Perhaps, in the end, the best advice comes from our legal system’s English parentage. In the ultimate Shakespearean tradition, “Better three hours too soon, than one minute too late.”

AS WE SEE IT

By **Christopher Hoose**

BILL 53 – THE PROFESSIONAL CORPORATIONS AMENDMENT ACT 2009

Currently working its way through the Alberta Legislature, and expected to pass third reading in December 2009, is the Professional Corporations Amendment Act, 2009 (the “PCAA”). The thrust of this new legislation is to remove the restrictions of share ownership placed on professional corporations by allowing family members to become non-voting shareholders in the professional corporation – a practice not previously allowed.



The PCAA will affect those professionals engaged in the provision of services in law, chiropractic, optometry, accounting (chartered accountants, certified general accountants and certified management accountants), medicine (including physicians, surgeons and osteopaths) and dentistry as the PCAA makes amendments to the various statutes governing these professions.

As noted above, the primary focus of the PCAA is to allow non professional shareholders to become non-voting shareholders in the professional corporation. The non-voting shareholders which are currently being proposed as permitted are:

- ➔ The spouse of the professional
- ➔ The common-law partner of the professional
- ➔ Children of the professional
- ➔ A trust of which the only beneficiaries are minor children of the professional.

We would point out that the PCAA and Bill 53 has not yet been proclaimed into law, and the contents of the proposed legislation may still change. However, there are four interesting points to note in the legislation:

1. Non-voting shareholders may not be subject to professional practice liabilities;
2. Upon divorce or the dissolution of a marriage or common-law partnership, the professional corporation will have 90 days to remove the former spouse as a non-voting shareholder, otherwise the permit issued by the professional governing body will be terminated;
3. Upon the death of any non-voting shareholder, the professional corporation will have 90 days to remove the deceased's non-voting shareholdings or the governing bodies issued permit will be terminated; and
4. Where a trust exists which holds the non-voting shareholdings, and the only beneficiaries are minor children of the professional, the trust must distribute the beneficiaries allotment of non-voting shares to the child within 90 days after the child attains 18 years of age.

For those authorized by their regulating bodies to carry on as a professional corporation under an authorized permit, substantial tax benefits may be attained through the PCAA and the changes being instituted. Some of these benefits could include increased income splitting opportunities through the allocation of dividends to the non-voting shareholders, capital gains exemptions and other potential tax deferrals.

In summary, we would strongly recommend all those in the above enumerated groups, utilizing a professional corporation, to contact their accounting professionals to seek the appropriate advice on how the PCAA may benefit them and their tax planning and estate planning.

STILLMAN LLP



Barristers and Solicitors

#300, 10335 - 172 Street
 Edmonton, Alberta, Canada T5S 1K9
 Tel: (780) 484-4445
 Fax: (780) 484-4184
 Canada Toll Free: 1-888-258-2529
 E-Mail: lawyers@stillmanllp.com
 Website: www.stillmanllp.com



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.

“COMMON SENSE SOLUTIONS”[®]

This newsletter contains general information only. It may not apply to your specific situation depending on the facts. The information herein is to be used as a guide only, and not as a specific legal interpretation.