



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 21, 2012 to December 26, 2012 inclusive and we will be closed January 1, 2013. Our office is open during regular business hours on December 27, 28, and 31, 2012.

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 by phone at 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's New Home Buyer Protection Act

By Chris Younker

With the introduction of Bill 5, the *New Home Buyer Protection Act*, Alberta is set to become the fourth Canadian province to enact legislation to require home builders to provide home warranty coverage for all new homes built in the province starting in the fall of 2013.

The proposed legislation is based, in part, on British Columbia's *Homeowner Protection Act*, which was introduced back in 1998 in response to a wave of leaky condos that left uninsured owners high and dry. However, unlike British Columbia's legislation, the Act will not require home builders to be licensed. Instead, the Alberta government opted to require home builders to provide private home warranty insurance that will be enforced through penalties ranging between \$100,000 and \$500,000 for non-compliance.

Highlights of the Act include:

- One-year warranty on labour and materials
- Two-year warranty for defects in materials and labour related to delivery and distribution systems
- Five-year warranty on the building envelope with a requirement to offer additional years of coverage to the home buyer to purchase
- Ten-year warranty on major structural components

New home warranty will be mandatory for all detached homes, condominiums, modular homes, mobile homes, and dwellings on recreational properties built in the province starting in the fall of 2013 (exact date to be announced pending enactment). One important exemption to the mandatory home warranty coverage will be owners who build their own house. However, any owner/builder who decides to sell their house within the ten-year mandatory warranty period will be required to provide a warranty to the subsequent buyer.

INSIDE:

HEADS UP:

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

FIRM NOTES:

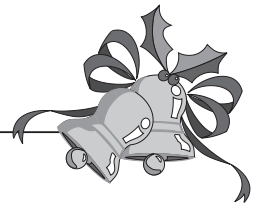
-update on the happenings at Stillman LLP

CAUSES CÉLÈBRES:

-some recent case law to be aware of

AS WE SEE IT:

-semi-annual commentary on a current legal issue



One interesting feature of the *New Home Buyer Protection Act* is the proposed online warranty tracking system that will allow home buyers, realtors, municipalities, and lending institutions to track warranties on homes built under the new legislation. Purportedly, this will help home buyers make informed decisions and may aid in the government's stated goal of increasing the quality of home construction in the province.

All told, the government estimates the new mandatory home warranty will add approximately \$1,700.00 – \$2,000.00 to the cost of an average detached home in the province; however, it is a small price to pay relative to the potential for expensive litigation.

As of press time, the *New Home Buyer Protection Act* has passed third reading in the legislature and is awaiting royal assent.

FIRM NOTES

STILLMAN LLP's 8th Annual Superbowl Extravaganza was held on Friday, October 18, 2012. The event was held at Ed's at West Edmonton Mall, and changed from 5 pin to 10 pin bowling. Notwithstanding the additional aches and pains associated with the change from 5 pin to 10 pin, the event was an enormous success, raising over \$20,000.00 for the SKILLS Society, a local charitable organization. The SKILLS Society provides community support to children and adults with developmental disabilities, and adults with acquired brain injuries.

To all 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.

2012 has seen some changes to our firm and we would like to extend a hearty welcome to Michelle Giles, a legal assistant in our Real Estate Department; Denine Christianson, a part-time receptionist and office assistant; and Delaine Stefanyk, a legal assistant in our Litigation Department. We would also like to welcome back Marilyn Essex who returned to our firm in the Corporate, Wills and Estates Department.

We are also pleased to announce that Christopher Younker has accepted a position at our firm as a lawyer, and will be practicing primarily in civil litigation.

Mark Stillman has been re-appointed a mentor under the Western Law Society's Protocol for Real Estate Practice.

CAUSE CÉLÈBRES

Sparrowhawk v. Zapoltinsky, 2012 ABQB 34

By J. Melissa MacKay

The *Minor Injury Regulation* and the *Diagnostic and Treatment Protocols Regulation* have, since their enactment, placed a cap on the damages one could recover as a result of suffering a minor injury in a car accident.

The decision in *Sparrowhawk* elaborates on the definition of a minor injury and identifies instances in which an injury may have effects which, if present, allow recovery of damages which exceed the statutory cap.

Background

In March of 2005 Mr. Sparrowhawk and his three children were driving in their car when they were rear ended by Mr. Zapoltinsky. The Sparrowhawk vehicle was stationary when the accident occurred and the collision threw the vehicle approximately 30 feet.

Prior to the accident, Mr. Sparrowhawk was in good general health. Immediately following the accident he began to experience jaw pain. His injuries resulted in diagnosis by a dentist of Temporomandibular Joint Disorder, more commonly known as "TMD" or "TMJ". At the time of trial, Mr. Sparrowhawk was experiencing jaw pain daily, had been prescribed a lower jaw splint, could no longer eat any chewy foods, his speech was less distinct and he could no longer participate in sporting events which he previously enjoyed.

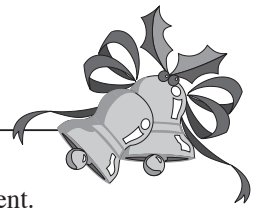
The question before the Court was whether or not the jaw injury experienced by Mr. Sparrowhawk as a result of the accident was classified as a "minor injury" pursuant to the *Minor Injury Regulation*, Alta. Reg. 123/2004 ("MIR") and the *Diagnostic and Treatment Protocols Regulation*, Alta. Reg. 122/2004 ("DTPR"), which impose a monetary cap on recovery in damages for minor injuries.

Decision

The Court notes that the *MIR* and *DTPR* define minor injury in the same manner, stating that "minor injury" in respect of an accident means:

- (i) a sprain;
- (ii) a strain; or
- (iii) a WAD (whiplash associated disorder) injury

The Court goes on to state that the test to determine whether or not an injury is minor is a two-step process as outlined in the *MIR*.



First, a medical professional must determine whether or not the injury is a sprain, strain or WAD injury. If it is determined to be one of the defined minor injuries, the medical professional must then determine if the minor injury has caused serious impairment. If it has not, the claimant will be restricted in their recovery of damages.

Whether or not a minor injury has caused a serious impairment was evaluated by canvassing the following:

- (i) whether or not the injury caused a physical or cognitive impairment resulting in a substantial inability to perform the following:
 - a. essential tasks of employment, despite accommodation;
 - b. essential tasks of training or education, despite accommodation; and
 - c. normal activities of daily living.
- (ii) whether or not the injury was the primary contributing factor to the impairment;
- (iii) whether or not the impairment has been ongoing since the accident; and
- (iv) whether the injury is expected to improve substantially

The Court concluded that Mr. Sparrowhawk’s injury was not a minor injury on the basis of the following:

- (1) The injury was not classified as a sprain, strain or WAD. It was concluded that Mr. Sparrowhawk’s injury was most likely the result of damage to the TMJ cartilage. The experts agreed that cartilage is not a muscle, tendon or ligament and therefore the injury was not a sprain or strain. The point was conceded by all parties that the injury was not associated with a WAD injury. The injuries sustained to Mr. Sparrowhawk’s teeth were also not considered to be minor injuries on the same analysis.
- (2) The injuries were a primary contributing factor to the impairment. The Court indicated that the primary factor could mean the largest contributing factor and may be analogous to the “but for” test found in tort law.
- (3) The injuries caused serious impairment. The Court concluded that jaw dysfunction and the pain related thereto, is a physical impairment. The Court determined that substantial inability is found somewhere between a trivial interference and a complete disability and will exist when the injury prevents a person from engaging normal daily activities which is non-trivial to the individual and it does not impede the person from engaging in normal daily activities, but the activity causes pain and discomfort to the extent that it diminishes the person’s enjoyment of life.

- (4) The injuries were ongoing since the accident. The Court finds that in order for an injury to be ongoing requires it must persist over time. It is not necessary that it is continual or at the same level every day.
- (5) The injury is not expected to improve substantially. The Court found that this point must be evaluated on a subjective basis. A substantial improvement was found to be one that if occurred, would negate the substantial inability referred to above.

Finally, the Court concludes that the definition of minor injury does not include dental injuries. Dental injuries are not injuries to tendons, muscles or ligaments and are not WAD injuries. Furthermore, the Court concludes that because the injuries are treated primarily by dentists, whom are not listed as qualified certified examiners pursuant to the *MIR* and *DTRP*, dental injuries are never minor injuries.

Conclusion

The decision in *Sparrowhawk* elaborates on the current regulations which impose a cap for the recovery of damages for a minor injury. The decision provides that the legal analysis required to determine whether or not an injury falls outside of the cap is partially a subjective one, and must be done on a Plaintiff by Plaintiff basis. It also provides guidelines for the analysis required to be undertaken in making the determination as to whether or not an injury sustained allows for recovery outside of the legislated cap on damages.

AS WE SEE IT

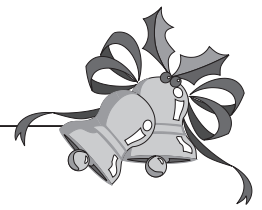
PRESERVING PROPERTY RIGHTS DURING DIVORCE

By Erik Bruveris

When two spouses are divorcing it is typical that each will want to untangle their emotional and financial affairs from the other as quickly (and painlessly) as possible. Unfortunately, and in reality, the divorce process can take time. In addition, the actions that one spouse may take in an effort to deplete matrimonial assets during the divorce may result in the entire process being frustrated.

Notwithstanding the foregoing, there are certain steps that may be taken by either party in an effort to protect their interests upon separation.

As is typically the case in most divorces, the most significant asset that a couple owns is the matrimonial home. One of the



most important and frequently employed mechanisms a spouse may take to safeguard the matrimonial home is by virtue of filing a certificate of *Lis Pendens* (also referred to as a CLP) against title. A CLP operates so as to provide notice to any individuals who may be interested in purchasing the home when there is an outstanding legal issue with respect to the entitlement to the home. Typically a CLP can remain on title until the parties have resolved the issues between them either through agreement or Court Order.

In more extreme cases, the parties may desire a preservation, or freezing Order. Both the Alberta Rules of Court, as well as the *Matrimonial Property Act* give the Court authority to prevent the disposition of property or to make any such further Orders that it deems necessary. Indeed, the Court also can find additional jurisdiction to grant a preservation, or freezing Order under the *Judicature Act* which provides for interlocutory injunctions where it is appropriate and just to do so.

In the end, with matrimonial property matters, as is the case generally in civil matters, the party seeking a preservation, or freezing Order must meet a three part test, set out as follows:

- (a) Based on a preliminary tentative assessment of the merits of the case, the Plaintiff must establish that there is a serious question to be tried that frivolous or vexatious;
- (b) The Plaintiff must demonstrate that irreparable harm will be caused which could not be compensated if successful at trial;
- (c) On the “balance of convenience”, will the Plaintiff suffer greater harm in the absence of an injunction than the Defendant would suffer if an injunction were imposed.

In the end, the test that is required to be met to obtain a preservation, or freezing Order in the context of matrimonial property cases is an onerous one. Indeed, they are typically employed as a remedy of last resort, while the CLP are far more common and can be employed to protect important assets owned by the parties. Whatever the case or particular circumstances may be, there are mechanisms through which either party can seek to protect their interest in matrimonial property.



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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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