



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

### EDITOR'S NOTE



On behalf of McGregor Stillman, I would like to wish everyone a Happy Holiday Season and all the best in the coming year.

Please contact Mark Stillman at 484-4445 with any suggestions for future articles, or with any comments you may have.

### HEADS UP

*Heads Up is a column which appears in each issue of the McGregor Stillman Thomas's Legaleye, highlighting new or proposed legislation in the Province of Alberta.*

#### Trusting Your Trustee - Amendments to the Trustee Act

*By Greg Bentz*

Amendments made to the Trustee Act, February, 2002 allow trustees and other people in similar relationships (such as Executors, Administrators, or guardians of estates) much more discretion in the manner of their investments. No longer must trustees invest in statutorily specified property or court sanctioned investments enumerated in the old *Trustee Act*.

The changes let trustees use their discretion regarding where and how the trust funds will be invested even if the trust was created prior to February. Section 3(1) states, "A trustee may invest trust funds in any kind of property if the investment is made in accordance with this section."

Trustees are free to invest as they choose so long as they invest as a reasonably prudent person. The section goes on to codify the common law understanding of a "Prudent Person".



A trustee meets the "Prudent Person" test by:

- Investing the trust funds with "a view to obtaining a reasonable return while avoiding undue risk, having regard to the circumstances of the trust."
- Reviewing the investments at reasonable intervals in order to determine if investments are still "appropriate to the circumstances of the trust."
- Exercising any right or power as a person who was vested with both legal and beneficial title to the trust property.
- Using certain factors that a "Prudent Person" would use, such as taking into account:
  - The purpose, duration, total value of the trust and its assets, along with the circumstances of the beneficiaries;

### **INSIDE:**

#### **HEADS UP:**

-a review of some recent and upcoming legislation

#### **CAUSES CÉLÈBRES:**

-some recent case law to be aware of

#### **FIRM NOTES:**

-update on the happenings at McGregor Stillman LLP

#### **AS WE SEE IT:**

-semi-annual commentary on a current legal issue



- The trustee's duties - such as acting impartially toward different classes of beneficiaries;
- Any special values of the assets regarding the purpose of the trust;
- The need to maintain the capital of the trust funds;
- Balancing the risks, the potential quantity of the gains, the liquidity of assets, and the regularity of income generated from assets;
- Importance of diversifying;
- Costs of commissions and fees etc.;
- Tax consequences.

If the trustee can demonstrate that the investment followed these factors then this alone satisfies their duty of care. Further, when assessing damages, the court may look at the overall performance of the investments.

### **What this means to Trust Settlers (people who create trusts) and Testators' Wills:**

No longer are trustees, executors, administrators, or guardians of estates confined to rigid enumerated rules for investing as they may invest in "*any property*". It is unlikely that trustees will be justified in going to Las Vegas and investing all the trust assets on a hand of black jack, but the door is open for less conservative approaches to investments with the trust assets. Any assumptions that the substance of the trust would be invested conservatively with a slow but sure gain, are no longer accurate.

Further, the Amendments apply retroactively. Any trustee or executor who's powers originated prior to February, 2002 will also be held to the less intrusive standard of the "Prudent Person". So it would be unfounded to infer that trusts created prior to February still impose the conservative gain approach of the old *Trustee Act*.

Testators or trust settlers who wish to create trust instruments should note that the only way for the settlor to impose the conservative investment scheme as outlined in the old *Trustee Act*, is to expressly state that these provisions are to govern the trust. Otherwise the only duty of the trustee is that of the "Prudent Person".

### **CAUSES CÉLÈBRES**

*By Richard D. Smith*

Ingrid M. Eggertson v. Alberta Teachers' Association [Nov 5, 2002, Alberta Court of Appeal]

The Appellant Eggertson had been a teacher with the Calgary

Board of Education and a member of the Alberta Teachers' Association since 1977. In the fall of 1997, the Appellant had two children who were in grades 2 & 3 respectively at a Calgary Elementary School. In late September the appellant and her husband attended "Meet the Teacher" night at their children's school. The purpose of the occasion was to afford parents and teachers an early opportunity to meet and exchange information about the students. During a discussion with their children's new teacher, the Appellant made a comment to the effect that the children did not learn a thing from their teachers the previous year. Approximately two weeks later, at a meeting convened by the school principal to deal with the concerns expressed by the Appellant and her husband about the academic progress of their children, the Appellant made a comment to the effect that her son had learned nothing the previous year. Present at the meeting were the Appellant and her husband, the children's current teacher and two other members of the teaching staff. Neither of the previous teachers was in attendance.

The Appellant was charged with violating the ATA'S code of professional conduct. A hearing committee found the Appellants' comments amounted to criticisms of the professional competence and reputation of the former teachers, in violation of the Code of Professional Conduct. The committee held that "comments made by a teacher in his or her joint capacity as a parent do not absolve the teacher of his or her adherence of Code of Professional Conduct."

The Appellant appealed the hearing committee's decision to the Professional Conduct Appeals' Committee, which upheld the decision of the hearing committee.

The Appellant then applied for judicial review to a judge of the Court of Queen's Bench. The application for judicial review was dismissed.

The Appellant appealed the decision of the Queen's Bench judge to the Alberta Court of Appeal. The Court of Appeal held that the Appellant's comments at each of the two meetings constituted criticism of the professional competence and professional reputation of the former teachers. On a literal interpretation of the Code of Professional Conduct, the Appellants' comments were in contravention of the Code.

However, the Court of Appeal held that it was unreasonable for the hearing committee and the Professional Conduct Appeal Committee to adopt a literal interpretation in the circumstances. A literal interpretation "effectively deprived the Appellant of her parental right under the School Act" ... "to



participate fully in the education of her children is a handicap not shared by parents who are also not teachers. In short, an interpretation of the application of (the relevant section of the Professional Code of Conduct) which deprives parents of their right to participate fully in their children's education, simply because they are also teachers and members of the ATA is unreasonable and cannot be sustained".

The Court of Appeal went on to state that it is a question of context when determining whether the relevant section of the Code of Professional Conduct applies to teachers who happen to also be parents and who may feel they have reason to speak critically of their children's teachers. In the present case, the comments were made on occasions which were exclusively devoted to issues of the educational well being of the Appellant's children; the comments were directed to the subject matter of the meetings (the children's academic progress); the comments were not intemperate; and the individuals in whose presence the comments were made shared the Appellant's concern for the children's progress and were not disinterested members of the public. The Court of Appeal held that parents who are also teachers would be at a disadvantage in communicating with their children's teachers and would be discouraged from the free and candid exchange of information and ideas between parents and teachers which is recognized by the School Act and the Calgary Board of Education's regulations as a vital part of the educational process. Accordingly, the Appellant's status as a parent required a balancing of her parental rights with her professional obligation as a teacher and member of the ATA, rather than the strict and literal approach taken by the Hearing Committee and the Professional Conduct Appeals Committee. The Appellant's appeal was allowed and the finding of the misconduct on the part of the Appellant was set aside.

#### **FIRM NOTES**

Karen Wood left our firm in July to pursue her career in other areas.

We welcome Eileen McGregor to our office. Eileen is a junior legal secretary, performing general duties for the legal support staff.

We also welcome Greg Bentz to our firm. Greg is in his third year of law school and will be joining us as an articling student in the spring of 2003 along with our other student, Chris Hoose.

Mark Stillman once again volunteered his time as a Bar Admission Course Examiner.

Richard Smith has been asked by the Court of Queen's Bench to volunteer as a Child Support Resolutions Officer, to assist unrepresented litigants resolve disputes over child support without having to appear in court. Richard continues to instruct the Parenting After Separation course.

We are pleased to announce that we now have a website: [www.mcgregorstillman.ca](http://www.mcgregorstillman.ca).

#### **AS WE SEE IT**

*By Christopher G. Hoose*

#### **Small Claims: Not So Small Anymore**

On October 22, 2002, Dave Hancock the Alberta Attorney General and Minister of Justice announced that the small claims limit was being raised in Alberta to \$25,000 from \$7,500 effective November 1, 2002.

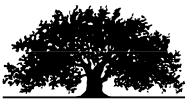
The way was paved for this change when the Alberta Legislature passed the *Justice Statutes Amendment Act* in early 2001. One provision of this Act raised the potential civil claims limit for the Provincial Court Civil Division from \$10,000 to \$50,000.

The Alberta Small Claims Limit of \$25,000 is now the highest in Canada. Other provinces such as Nova Scotia, British Columbia and Ontario have small claims limits of \$10,000.

Pursuant to s.9.6(1) of the *Provincial Court Act*, the Provincial Court has jurisdiction over the following types of actions, not including certain family matters, to a maximum of \$25,000:

- For debt;
- For damages, including breach of contract;
- Return of personal property; and
- Specific performance or rescission of a contract.

The Provincial Court does not have jurisdiction over



the following matters, which must be brought in the Court of Queen's Bench:

- Where title to land is brought into question;
- The validity of a devise, bequest or limitation; or
- For malicious prosecution, false imprisonment, defamation or criminal conversation.

What Does This Mean to You

What this change means for Albertans and the court system is quite significant. The Provincial Court utilizes a less formal process than the Court of Queen's Bench. One significant time-saving aspect of the Provincial Court is that it relies on verbal (*viva voce*) evidence given by the parties rather than the formal discovery process seen in the Court of Queen's Bench.

In the Court of Queen's Bench, before trial, a Certificate of Readiness must be filed along with a \$600 fee. In the Provincial Court no such Certificate or fee is required. As well, the Provincial Court has a mediation program available pursuant to s.65 of the *Provincial Court Act*. Mediation can be mandatory in certain cases to help parties resolve their dispute outside of court in a more time and cost efficient manner.

With the small claims limit being raised to \$25,000 there are some changes in Provincial Civil Court procedure. Perhaps the most notable is that the \$100 initial filing fee in Provincial Civil Court is maintained for claims under \$7,500, but for those claims over \$7,500 the initial filing fee will be \$200.

The purpose of the change in Provincial Civil Court is to improve Alberta's access to the Provincial Civil Court and to free up the Court of Queen's Bench. Information released by the Department of Justice in Alberta states that the average waiting time for a short trial in the Court of Queen's Bench is 23 weeks in Edmonton. The average wait time for a short trial in the Provincial Civil Court in Edmonton is 11 weeks.

The \$25,000 limit in Provincial Civil Court should encourage parties who before felt it unfeasible to pursue their claim in Court of Queen's Bench, due to the costs, to now seek justice through the Provincial Civil Court.

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*The law firm of McGregor Stillman LLP is a four lawyer general law firm, with emphasis on Civil Litigation, Corporate and Commercial matters, Real Estate, Wills and Estates, and Family Law. The firm has represented clients throughout Alberta, and has also represented clients from British Columbia, Saskatchewan, Manitoba, Yukon, Northwest Territories and Ontario. The firm has a well established network of agent connections in Canada, including Vancouver, Calgary, Regina, Saskatoon, Winnipeg, and Toronto and environs. The firm has an affiliation with Goodman, Lister & Peters of Detroit, Michigan. McGregor Stillman LLP also has established contacts with various other law firms throughout the United States and Great Britain.*

*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.*