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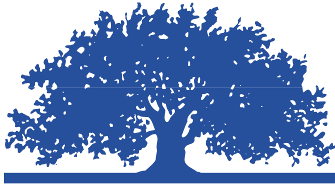

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Presenting Legal News, Views and Updates from
McGregor Stillman LLP
Barristers & Solicitors

EDITOR'S NOTE

Please contact Mark Stillman at 484-4445 ext. 303, 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 Legaleye, highlighting new or upcoming legislation and legal issues in the Province of Alberta.

CORPORATE FRAUD - AN EPIDEMIC

By Terry McGregor

Each of us has experienced a rash of unsolicited credit-card applications, and solicitations for credit from various credit granting institutions, including Banks, Credit Unions, Retailers and others. The competition for the sale of credit in association with the provision of goods and services is multiplying at an exponential rate, and is causing problems in the control of fraud, particularly within personal and small business areas. The problem arises from a combination of factors:

- Cut-throat competition by credit granters to gain more market share. In order to accomplish this, credit is granted with virtually no checking whatsoever. Credit is granted usually on the same day, and sometimes within the same hour. Credit is usually limited to under $10,000.00, and the person requesting the credit is allowed to purchase immediately. Because of the lack of time involved in the process, no credit checks are done.

- Fraud artists take advantage of this process, and know that the credit granter will not be searching or investigating credit history for weeks, if not months. Consequently the fraud artist picks a name of a business, (usually a small business or a well-established individual) and applies for credit under that name. As soon as the first credit is granted (usually a credit card with a small limit) the fraud artist then uses that card as a reference for applications for more credit. The fraud artist then goes on a blitz of applying for credit under that name and, in some cases, could be granted twenty or thirty different credit facilities within a space of one or two months. The credit is then used to purchase goods in most instances, and consumable items in others. The goods are quite commonly taken to pawn shops and flea markets, and pawned, or sold for approximately 25% of their retail value, thus realizing a profit for the fraud artist.

- The business (or individual) knows nothing of the fact that its name is being used for applications for credit. It is only after months of purchasing and no payments on the credit cards or loans that the company or individual finds out from that credit granting institution that they expect payment because credit has been granted in their name.

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- ❑ At this point, the corporation or individual realizes that something has been going on, but it usually takes two to three months to figure out the extent of the problem. It then costs that person considerable time and expense (including legal fees) to straighten out the mess which has been created.

- ❑ Police services, both local and national, consider this problem to be an epidemic, and because of continuing budget cut backs, they are virtually powerless to mount a sustained campaign against such fraudulent practices, despite the fact that in many instances they know or strongly suspect who has been committing the crimes.

The effects of such scams on the victims can be seen both in the present, and in the future. Victims cannot afford to let the matter rest, because it will affect their credit rating unless they take positive steps to ensure that it does not.

In the event that you start receiving letters regarding debts to organizations with whom you have not done business, take immediate action to determine what has been going on with your credit history and standing. We would also suggest that you contact us so that we can plan a strategy to resolve these problems as quickly as possible.

One method by which you can check to see whether somebody has been using your name in such a scam is to check your credit via your bank regularly once a month. Ask the bank to do a credit check on you and find out whether or not there have been any inquiries from other institutions in that month. Then determine whether or not you have been dealing with the institutions which have been making inquiries. These inquiries would be credit checks, and would be a good indicator as to whether or not somebody is using your name. If you find that there have been credit inquiries from organizations with whom you have not been dealing, then you should immediately contact those institutions and ask them why they were making the inquiries.

More and more, people must be very protective of their credit and cautious in their transactions. For more information or specific details about this problem and its possible resolutions, please contact any of the lawyers at our firm.

FIRM NOTES

Eileen McGregor has replaced Teddi Lothian as our Family Law paralegal.

Amanda Meyers has joined us in the position of Corporate, Commercial, Wills and Estates Paralegal.

Jaci Smith joined us for law office administration experience. She will commence the accounting program at GMCC full time in September.

Our law students, Chris Hoose and Greg Bentz, now have their LL.B. degrees from the University of Alberta. They commence their year of articles on June 1.

Client Appreciation Night, April 7th at Scruffy Murphy's was a roaring success. Thanks to all who came!

CAUSES CÉLÈBRES

Courts Leery to Interfere With Separation Agreements
by Greg Bentz

On April 17, 2003, the Supreme Court of Canada decided in *Miglin* v. *Miglin*, [2003] S.C.J. No. 21, that it would severely limit the situations where the Courts will interfere with existing spousal support agreements.

The Miglins, during their marriage, had acquired a great deal of wealth, including a hotel that provided them each an $80,000 yearly salary. Eventually the marriage broke down and the Miglins entered into a separation agreement that provided for the payment of child support, divided the parties matrimonial assets, and established future ability to remain financially independent.

The agreement included full and final release from any future spousal support which included: The wife getting the matrimonial house, child support in the range of $60,000 per year, and a $15,000 per year consulting job from the hotel that would be renewable after a 5 year period. The husband received the hotel that at the time was approximately equivalent in worth to the matrimonial home. Four years later as relations deteriorated the wife applied to the Courts for sole child custody, as well as child and spousal support. The Supreme Court decided that the Courts have discretion to alter the agreement, but not an unfettered discretion to substitute their own views for that of the mutually agreed provisions as between the spouses.

After *Miglin* v. *Miglin*, in order for a Court to vary the

spousal separation agreement, the party applying for the variation must demonstrate one of the following:

1. At the time of the agreement one spouse was taken advantage of. It is clear that there will be no presumption of a power imbalance between spouses, rather, the question becomes whether one spouse was vulnerable. This does not mean that the applicant needs to show that the one spouse was "unconscionable". However, parties are not vulnerable if they are represented by legal counsel, or

2. If at the time of the application for the court order the agreement does not meet the objectives of the *Divorce Act* or no longer reflects the original intention of the spouses. The *Divorce Act*'s objectives are to achieve an equitable distribution of economic consequences of marriage breakdown. If circumstances not reasonably anticipated arise that alter the original intentions of the spouses, then the Courts may use their discretion to alter the agreement.

The key to the first point is vulnerability of one spouse, while the key to the second point is "reasonably anticipated circumstances". This means that the Courts will only alter a spousal separation agreement if the applicant can demonstrate that either at the time of the separation agreement one party is vulnerable, or there is a circumstance which has arisen such that the objectives of the *Divorce Act* are no longer met. If the applicant can not demonstrate either one then the Courts will not interfere.

The key to "reasonably anticipated circumstances" is that the spouse is deemed to anticipate changes that occur in the ordinary course of a person's life, such as: health problems, changes in the job market, business ups and downs, re-marriage, and increased parenting responsibilities. Simply put, in order for an unanticipated circumstance to occur, it must be quite drastic.

Because of the decision in *Miglin* v. *Miglin*, it will be very difficult for a party to vary the spousal support that they have agreed to in a written agreement. It will be important to consider this when negotiating with the other spouse, as the Supreme Court has said that barring exceptional or drastic circumstances, "a deal is a deal".

AS WE SEE IT

Alberta's Proposed Unified Family Court: A Needed Step Forward
By Christopher G. Hoose

Perhaps no greater potential for confusion exists in the minds of individuals and lawyers trying to access Alberta's legal structures, than those in the realm of Family Law. Currently in Alberta both the Court of Queen's Bench and the Provincial Court have jurisdiction in family matters. The Court of Queen's Bench has exclusive jurisdiction over divorce and matrimonial property while the Provincial Court has sole jurisdiction over young offenders and child welfare matters. To complicate matters further, there are some areas of family law in which the Court of Queen's Bench and the Provincial Court share concurrent jurisdiction. This is illustrated by the ability of both courts to deal with spousal support, child support, child custody and access.

However, there is a light on the horizon for beleaguered and confused litigants and lawyers alike. The Unified Family Court Task Force released its report, known as the Graham Report, in April of 2003. Some of the more notable of the 17 recommendations of the Graham Report are as follows:

Recommendation No. 2 – A unified family court should be established in Alberta to exercise all family law jurisdictions and powers.

Recommendation No. 3 – The unified family court should be a division of the Court of Queen's Bench of Alberta.

Recommendation No. *5* – Unified family court judges should be specifically appointed to the Family Division of the Queen's Bench.

Recommendation No. 10 – The unified family court should be headed by an Associate Chief Justice of the Family Division.

The Graham Report came to the general conclusion that the current legal structure and setting in Alberta is unworkable. The unified family court would allow one court to deal with all family matters with simplified court procedures and specialized judges. Recommendation No.8 states that areas which should not be included in the jurisdiction of the Unified Family Court are family violence, dependent adults, wills, estates and family relief (where a deceased fails to make adequate provision in his/her will for a dependent of the deceased).

The remainder of the recommendations made by the Task

Force stress the importance of accessibility, simplicity and informality in the Unified Family Court. The Task Force recommends that individuals coming before the Family Court have access to services such as the education of parents on issues of custody and access (like the current Parenting After Separation course), services that facilitate access to children and alternative dispute resolution.

Recommendation No. 13 also calls for expanded access to legal services for individuals coming before the Family Court unrepresented or unable to afford legal services. This would include easier access to Legal Aid and Duty Counsel and judicial officers other than judges who would be able to deal with matters not requiring a justice.

In reply to the recommendations made by the Unified Family Court Task Force in the Graham Report, the Alberta Government, through the Minister of Justice and Attorney General issued a response. The Alberta Government accepted all 17 of the recommendations in principle put forth by the Task Force, while acknowledging that further research and study is still needed to implement the recommendations.

In a News Release dated April 23, 2003, the Alberta Government anticipates that the unified family court could be established in 2005 or 2006. Also, the Alberta government has established an implementation committee to put the wheels into motion in setting up the unified family court, its structure and procedures. This is to be done in conjunction with the current Alberta Rules of Court re-write project currently underway through the Alberta Law Reform Institute.

An important incidental effect of the unified family court is that it will ease some of the pressure that will accompany the recent changes to the Provincial Court Act. In November of 2002 the Provincial Government raised the monetary limit of the Provincial Court from $7,500 to $25,000. Due to the relative cost effectiveness of proceeding through Provincial Court rather than Queen's Bench, the Provincial Court has undoubtedly seen a great increase in its workload. The unified family court would shift a great deal of work in Child Welfare matters, custody and access away from the Provincial Court.

The unified family court is going to be a very important and long needed step forward for family law in Alberta. It will greatly simplify all aspects of the court process such as accessibility, specialization and alternate dispute resolution services available to litigants. It will alleviate much of the confusion and stress for individuals attempting to access the Family Courts. All in all, the unified family court is a tremendous development for the province of Alberta.

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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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