McGREGOR STILLMAN'S

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

EDITOR'S NOTE

Should you have any questions, concerns or suggestions for future articles please contact Greg Bentz at 484-4445 ext. 307, or email at gbentz@mcgregorstillman.com.

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.

The Business Corporations Amendment Act – Alberta is "Open for Business"

By Chris Hoose

The Alberta Government on May 17, 2005 demonstrated once again that it is amongst the foremost proactive provinces in the country in ensuring a business friendly atmosphere through its legislation and vision for businesses and corporations.

The ***Business Corporations Amendment Act***, proclaimed on May 17, 2005, includes the following changes to the Business Corporations Act (BCA), which will have positive impacts on how corporations conduct business in our province.

1. The amended BCA will now allow shareholders, by unanimous resolution, to waive their right to receive annual financial statements. This will provide relief to small corporations which are usually privately held where often the sole director/shareholder is involved in the day to day operations of the corporation.

2. There is also good news for directors of Alberta corporations by virtue of two other amendments:

   a) Only one quarter of the Directors of an Alberta corporation need to be residents of Canada, rather than one-half; and

   b) Alberta corporations may now hold a director's meeting anywhere in the world, or even entirely by electronic means.

3. Individuals who make representations either orally or in writing to an auditor in response to an auditor's demand will now receive protection under the amended BCA from civil liability as long as the representations are made in good faith – "whistle blower legislation".

4. The amended BCA will now, in certain circumstances, also require the corporation's financial statements to contain auditor's statements. For example, if the corporation intends to replace an auditor either by removal or at the end of the auditor's term, a corporation must now state the reasons for the change and that the proposed auditor has the ability to comment on the reasons given by the corporation for the change.

INSIDE:

HEADS UP:
-a review of some recent and upcoming legislation and legal issues
FIRM NOTES:
-update on the happenings at McGregor Stillman LLP
CAUSES CÉLÈBRES:
-some recent case law to be aware of
AS WE SEE IT:
-semi-annual commentary on a current legal issue

The above changes will all have positive impacts on existing corporations and individuals in Alberta by loosening restrictions and reporting requirements that are often unnecessary burdens on small privately held corporations.

Possibly the greatest change to future corporate law in Alberta contained in the Business Corporations Amendment Act is the introduction of the Alberta Unlimited Liability Corporation ("ULC"). Currently, the only other province in Canada which has provisions allowing for ULC's is Nova Scotia.

The key differences between an ULC and a regular corporation is that an ULC does not afford shareholders protection from liabilities of the corporation. In an ULC, the individual shareholders will be held personably responsible, jointly and severally for any liability, act or default of the ULC.

There are several reasons why an ULC may be a preferential corporate vehicle, despite the obvious liability concerns. Recently, amendments were made to U.S. tax law which would allow a "ULC" to be eligible for "hybrid" tax treatment - as an ignored entity for tax purposes in the U.S., even though it is a corporation for tax purposes in Canada.

These tax changes in the U.S. make certain that the activities of the ULC are consolidated with the U.S. parent company for U.S. income tax purposes. Achieving this consolidation means deductions of the ULC can be treated as having been incurred by the U.S. parent company.

Finally, the Business Corporations Amendment Act also contains provisions favourable to the tax planning community such as allowing subsidiary corporations to hold shares in itself or its parent corporation for a maximum of 30 days and new rules for stock dividends.

The above is by no means a detailed list of all the changes to the Alberta ***Business Corporations Act,*** nor is it meant to be. Above all, it is clear that the new changes have something for everyone. They will make the Province of Alberta even more attractive to out of province and foreign investors and will assist the small business with some relief from previous stringent reporting requirements. Alberta truly is "Open for Business".

FIRM NOTES

We are thrilled to welcome back to the fold, Elana Yaremkevich. Elana has re-joined us and will be assisting in all areas of the Firm's practice.

We are also pleased to welcome Aaron Vanin, a lawyer who will be practicing primarily in the area of litigation and research, but will also have involvement with our real estate and corporate and commercial department.

Mark Stillman has been appointed to the Audit Committee of the Law Society of Alberta.

CAUSES CÉLÈBRES

Retroactive Child Support

In January of 2005, the Court of Appeal of Alberta released a trio of decisions which materially affect how the courts are going to approach the issues governing an award of retroactive child support. From these three cases *(S. (D.B.) v. G. (S.R.); Henry v. Henry;* and *L.J. W. v. T.A.R)*, the Court of Appeal identified six principles which remain relevant in any application for retroactive support. These principles are:

1. The legal basis of child support is the parent's mutual obligation to support their children. This obligation arises from both the legislation and from the parent-child relationship;
2. Child support is the right of the child and cannot be bartered away by a parent;
3. The court is always free to intervene and determine the appropriate level of support;
4. Because support is the child's right, the fact that the custodial parent may benefit incidentally cannot decrease the amount awarded;
5. There is no "one year rule" in relation to child support; and
6. The obligation for support does not depend on an action being commenced.

The Court of Appeal also held that the following factors are no longer relevant to an award of retroactive child support:

1. The needs of the child and the ability to pay of the parent are no longer relevant, the focus switching from the need of the child to "entitlement";

2. A person seeking retroactive child support no longer has to prove some blameworthiness on the part of the person who should be paying child support. Further, honest ignorance on the part of the payor would also not provide an excuse for denying retroactive child support;

3. The parent seeking retroactive child support does not have to demonstrate that he or she had to encroach on their capital or incur debts to support the child, for an award of retroactive support to be made. The argument that a large retroactive child support award would be an unfair burden on the part of the payor was also rejected by the Court of Appeal which held that while a large retroactive award may create some financial difficulties for the payor, the courts will need to look at creative ways to ensure that retroactive payment can be made, including spreading payments over time;

4. The parent seeking retroactive child support does not have to make the application while the child is still a "child of the marriage" but can pursue the retroactive support claim even after the payor's obligation to pay ongoing child support has ended.

5. Neither the failure of the payor to disclose his or her financial information, nor the failure of the parent receiving child support to request disclosure, eliminates the existence of the obligation to pay support, and a retroactive child support order will be triggered as of the date that the payor's changing income occurred.

The Court of Appeal recognized that an award of retroactive child support is discretionary, and one factor which may impact on whether a retroactive support award is made is whether the parent seeking child support has unreasonably delayed in bringing the application. However, unreasonably delay can be justified where it can be shown that the parent seeking child support had a lack of knowledge about the payor's address or employment, lack of financial means to retain counsel, fear of reprisal, fear of counter applications or applications for custody, and conflict avoidance behaviour.

In conclusion, the trio of cases from the Court of Appeal now make it much easier for a parent entitled to child support to claim retroactive child support, and the payor's arguments against an award of retroactive child support have been significantly reduced

AS WE SEE IT

THE STREAMLINED PROCEDURE: QUICKER LITIGATION

By Terry McGregor

In 1998, the Alberta Rules of Court were amended to provide for a quicker procedure for actions where money is claimed for an amount of $75,000.00 or less, not including interest or costs. This subset of Rules also allow the Court to use its own discretion to allow the streamline procedure to be utilized in other circumstances where it considers it appropriate. Certain types of lawsuits cannot be prosecuted under these Rules: they include divorce, foreclosures, and matters where the government is suing.

The main features of the streamlined procedure are that:

1) Rather than having 90 days to provide the opposing party an Affidavit of Records, each party must provide the Affidavit of Records in 30 days;

2) The Affidavit of Records need not include <u>all</u> documents which <u>may</u> be <u>relevant;</u> rather only records that are directly relevant and material to the issues in the suit.

3) A corporate party also names its representative in the Affidavit of Records, doing away with the need for filing a Notice to Select Officer thereby saving more time.

4) The Examination for Discovery is only <u>6 hours</u> rather than an unlimited amount of time which is sometimes used to drag out proceedings interminably. This is where the most amount of time is saved.

5) Further, there is a procedure by which each party can elect to examine the other party by way of written interrogatories (questions) rather than actual discovery (thereby avoiding the payment of prohibitive conduct money, for example) provided the interrogatories do not exceed 1,000 words.

The Streamlined Procedure offers a less time consuming, less expensive manner to resolve legal issues. For more information on Streamlined Procedures, please contact our office either by email <u>lawyers@mcgregorstillman.com</u> or by phone.

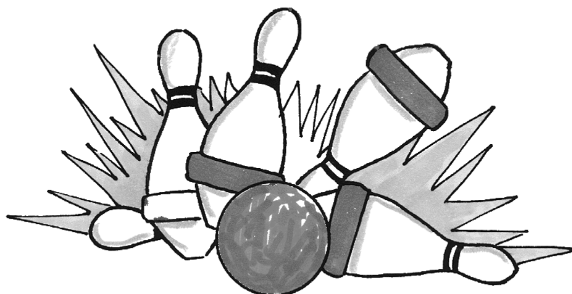
FIRST EVER McGREGOR STILLMAN LLP SUPER BOWL

On October 21, 2005, McGregor Stillman LLP will be sponsoring a five-pin bowling tournament at the Callingwood Lanes to raise funds for programs of the Northeast Community Health Centre ("NECHC"), a facility operated in the Capital Health System. The number one priority is to raise funds to match an anonymous donation of $50,000.00 for providing assistance to patients and families who face financial hardship due to the illness or injury which brings them to the Community Health Centre. This donation must be matched by November 2005.

The NECHC is located at 14007 – 50 Street in Edmonton. It is a unique model which combines an Emergency Department with a Primary Care centre and provides a range of health services based on the needs of the residents of northeast Edmonton. Many workers of the NECHC are volunteers including doctors, nurses and other healthcare workers. The NECHC is targeted to meet the needs of the most vulnerable people in the northeast Edmonton community: individuals and families who have low health status, who are not mobile, and who are economically and socially disadvantaged.

The entry fee for the tournament is $500.00 per team. There are 5 members on a team. The winners of the 4 sections of the tournament will play for the tournament championship after a buffet dinner and special demonstrations and challenges by some of Canada's champion five-pin bowlers, who have graciously donated their time. There will be a cash bar. Prizes will definitely be worth the effort!

Space is limited and is filling up fast, so we urge you to contact Terry McGregor at McGregor Stillman LLP at 484-4445 to enter your team as soon as possible! We will also be encouraging teams to collect pledges, either on a "straight cash" basis or on a "per pin basis". More details will follow.



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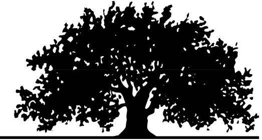

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McGregor Stillman LLP is a general law firm formed in 1993 with emphasis on Civil Litigation, Corporate and Commercial matters, Real Estate, and Wills and Estates and Family Law. The firm represents clients throughout Alberta, and has also represented 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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