STILLMAN LLP'S

LegalEye

PRO POSSE SUO

VOL 12, No1. SUMMER, 2008

Presenting Legal News, Views and Updates from

Stillman LLP

Barristers & Solicitors

EDITOR'S NOTE

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.

Minor Injury Regulations Un-charter-like

By Greg Bentz

On February 8th, 2008 after a lengthy trial and submissions by the Plaintiff, the Defendants and several interveners, including the Insurance Bureau of Canada and the Government of Alberta, Associate Chief Justice Neil Wittman ordered that the complete Minor Injury Regulation be struck down and be of no force or effect.

Associate Chief Justice Wittman held that although the Minor Injury Regulations (MIR) did not violate Section 7 of the *Charter* (the right to life, liberty and security of the person), it did violate section 15 (discrimination) and that the discrimination was not justifiable, as he states:

> "The cap represents more than a simple disappointment to the claimant group, as suggested by the Interveners. It is demeaning to them because it suggests that their pain is worth less than that of other injury sufferers, in particular members of the comparator group [all other injury sufferers from a motor vehicle accident]. It also confirms prejudice that soft tissue injuries are generally faked or exaggerated. The impact of the discrimination cannot be viewed as trivial when the impugned legislation reinforces prejudicial stereotypes.
>
> The reasonable person in the position of the claimant would know that some automobile injury victims suffer less pain than some Minor Injury victims, and that they are nonetheless able to access more non-pecuniary damages [pain and suffering]."

Associate Chief Justice Wittman also held that although the rapidly rising premiums for mandatory automobile insurance was prior to the imposition of the cap under the MIR, that this group would feel less worthy as a result of having been the group selected to forego individually assessed pain and suffering damages to subsidize those premiums for Alberta drivers generally.

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Ultimately the MIR was struck down as un-charter-like and is to be of no force or effect. The Government of Alberta together with Interveners have appealed the decision, which is currently set to be heard in **September 2008**, and immediately applied for a Stay Application.

A Stay Application would allow the legislation to remain in effect pending the appeal however, this application was denied on the basis that the Government of Alberta failed to demonstrate that there would be an irreparable harm to the public interest should a stay not be granted. In paragraph 50 of the decision Associate Chief Justice Wittman states:

> "In the event that a stay is not granted and the Judgment is overturned the consequences of not granting the stay to the insurers relates to expense and administrative inconvenience. These consequences are undoubtedly alleviated by the fact that the insurance industry is currently in a soft market that began in 2003/2004, before the imposition of the MIR. Additionally, the evidence at trial disclosed that the industry has made historic profits in 2004, 2005 and perhaps 2006."

Effectively however, a stay is in effect given that people with WAD 1 or WAD 2 injuries, as defined by the MIR; either must take their matter to trial before September 2008, or settle on the basis that the Court of Appeal might overturn the trial judge.

Ultimately there are always risks when settling or going to court, and in each situation they should be individually and carefully assessed with a lawyer.

FIRM NOTES

Sarah Moore has joined the firm as our new articling student effective June 16, 2008.

Mark Stillman has been appointed to the Law Society of Alberta's Real Estate Practice Advisory Committee.

Stillman LLP will be holding its Fourth Annual Super Bowl Bowling Extravaganza on October 24, 2008. Once again, proceeds raised will go to International Child Care to further improve the health and wellbeing of children and families in Haiti and the Dominican Republic.

In Memoriam: on April 1, 2008, Terry McGregor, our former partner and friend, passed away. Terry was one of the founding members of the Firm. Terry was instrumental in introducing the Plaintiff's Bar in Alberta to the best education available for the presentation of medical evidence in personal injury cases. He was one of the founding members of the Alberta Civil Trial Lawyers Association and was 1 of 4 to earn an "honourary lifetime membership". Throughout his distinguished career, Terry took special pride and enjoyment in mentoring young lawyers. He was a past President of the Alberta Civil Trial Lawyers Association, a past Governor of the American Trial Lawyers Association and was actively involved with the Pro Bono Committee of the Law Society of Alberta, as well as being actively involved on the Advisory Committee for the Edmonton Centre for Equal Justice (Poverty Law Clinic). Terry was always actively involved in the community and he will be sadly missed by us, his colleagues and his numerous friends in the community. The Firm extends its deepest condolences to Terry's wife, Cheryl, and his daughters, Shelagh and Eileen.

CAUSE CÉLÈBRES

Who will inherit your property? *Devon Archer v. Laureen Ella St. John, et al*, 2008 ABQB 9

The Winter 2007 Edition of the LegalEye contained an analysis of the recent Supreme Court of Canada (S.C.C.) decision of *Pecore v. Pecore* [2007], S.C.J. No. 17. In *Pecore*, the S.C.C. reviewed the law surrounding the transfer of joint bank accounts and joint ownership with adult children.

As explained in the previous edition, two presumptions have historically been applied by different courts when dealing with transfers into joint ownership with adult children:

(a) Presumption of Advancement: the assumption that a gift was intended by the parent to the adult child; and,

(b) Presumption of Resulting Trust: the assumption that when a parent gratuitously transfers property to an adult child the parent retains beneficial ownership to the property and gifts only the legal title to the child.

The S.C.C. in *Pecore* held that in circumstances involving transfers to joint ownership with adult and independent children, it is presumed that the adult child is holding the property in trust for the parent. However, the Court acknowledged that there are situations in which a parent intends to gift the joint asset to an adult child upon death. Accordingly, in such circumstances, the child must rebut the presumption of resulting trust and prove that the transfer was a gift.

In *Pecore*, the S.C.C. considered joint ownership in the context of personal property: joint bank accounts. However, the Court of Queen's Bench of Alberta in *Devon Archer v. Laureen Ella St. John, et al*, 2008 ABQB 9 recently extended the application of *Pecore* and the presumption of resulting trust to transfers of real estate into joint tenancy with adult children.

In *Devon Archer*, an elderly father transferred a quarter section of farm land into joint tenancy with his adult daughter, which the daughter asserted was intended as a gift upon the father's passing. Following the father's death, an adult son, who expected to inherit the quarter section as part of his share of the family farm pursuant to his father's Will and Codicils, applied to the Court to set aside the transfer and allow the provisions of his father's probated Will and Codicils to prevail.

In their analysis, the Court held that, as the daughter was an adult, the presumption of resulting trust applied to the transfer. The Court reiterated that the presumption of resulting trust will arise in circumstances in which a challenged transfer of property, purportedly a gift to the recipient, has been made for no consideration. Accordingly, in such circumstances, the onus is on the recipient to show that a gift was intended; otherwise, it is presumed that it was not a gift but that the recipient is merely the holder of the property on behalf of the transferor or, as in *Devon Archer*, the transferor's estate.

The presumption of resulting trust applied to the transfer unless the daughter could rebut the presumption of resulting trust by satisfying the Court that her father transferred the property to her in joint tenancy intending it to be a gift.

In making their decision, the Court not only considered evidence at the time the property was transferred into joint tenancy, but evidence from events leading up to and subsequent to the transfer. The failure of the daughter to disclose information about the transfer to her siblings as well as her organizing and registering the transfer without the knowledge of her siblings lead the Court to find that there were issues with her credibility in asserting that the transfer had been a gift. The daughter was unable to satisfy the Court that the father intended to transfer the quarter section into joint tenancy as a gift to the daughter. As a result, the Court set aside the transfer and the quarter section was conveyed in accordance with the father's Will and Codicils.

While transfers of real property into joint tenancy are used by many Canadians for a variety of reasons, including estate planning, it is imperative to clearly state your intentions. Failure to make your intentions known can carry significant consequences; including lengthy estate litigation and a subsequent distribution that may not live up to your true wishes. Protect yourself and seek legal advice when considering your estate planning options.

AS WE SEE IT

Assuming Mortgages and the "Due on Sale" Clause

By Geoffrey W. Coombs

In a residential real estate transaction, it is very common that Purchasers will obtain the bulk of the money necessary for the close of the purchase by borrowing the money from a bank or other lender. In return for the loan of money, the Purchaser (the "Mortgagor") is required to give the lender (the "Mortgagee") a mortgage on the property being purchased.

From a Mortgagor's perspective the mortgage document appears intimidating and full of legal jargon. In recent years, mortgage documents are becoming increasingly reader-friendly however they are still quite long and contain an enormous amount of important information. In many cases, despite the urgings of the Mortgagor's solicitor, the details of the mortgage and the rights that are granted to the Mortgagee are often glossed over, if not ignored, by most Mortgagors.

One of the clauses in the mortgage document that doesn't generally get much attention is the "Due on Sale" clause. This is a clause found in most mortgages, in one form or another, and its purpose and intent is to give the Mortgagee the option of demanding repayment of the balance of the underlying loan upon the sale of the subject property. Typically, this clause doesn't become an issue because the New Purchaser usually requires, as a condition of the close of the transaction, the Vendor payout and discharge the mortgage registered against the subject property.

However, occasionally a situation will arise where a New Purchaser would like to assume the existing mortgage that is on the property being purchased. An example of such a situation occurs when the New Purchaser cannot qualify for financing at an interest rate as low as the rate that is on the existing mortgage. In such circumstances, the New Purchaser could realize significant savings in interest costs if they could assume the existing mortgage.

With a "Due on Sale" clause, the decision of whether or not the New Purchaser is allowed to assume the existing mortgage is made by the Mortgagee/Lender. It is the Mortgagee/Lender who holds the mortgage and it is the Mortgagee/Lender who has the discretion to determine that it would not be suitable to allow a New Purchaser to assume the debt underlying the mortgage. If the Mortgagee/Lender determines that the New Purchaser is not a good credit risk, the "Due on Sale" clause gives the Mortgagee/Lender the power to protect itself and disallow the assumption.

In recent years as Lenders in the United States and Canada experienced increasing numbers of defaulting borrowers, Lenders in Alberta have become more rigid in their application of the "Due on Sale" clause. For a time in Alberta, Lenders were not inclined to vigorously enforce their rights under the "Due on Sale" clauses and commence the time-consuming and expensive process of foreclosing on the property, particularly when the New Purchaser was meeting the obligations under the mortgage (Section 17(1) of the *Judicature Act* and Section 38(1) of the *Law of Property Act*, provide the Court the power to stop foreclosure proceedings.)

Lately however, as mentioned above, recent problems have caused Lenders to become more aggressive in enforcing their discretion over the assumption of a mortgage by a New Purchaser. Major Banks in Alberta are now requiring the New Purchaser, who wishes to assume the existing mortgage of the Vendor, to qualify for the mortgage in much the same fashion as the New Purchaser would have had to follow had he/she been applying for a new mortgage loan.

Both the New Purchaser and the Vendor who agree to an assumption without the approval and authorization of the Mortgagee/Lender run the risk of having to defend themselves against legal measures commenced by the Mortgagee/Lender, up to and including foreclosure and/or breach of contract actions.

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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, includingVancouver, 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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