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EDITOR'S NOTE

Should you have any questions, concerns or suggestions for future articles please contact Greg Bentz by phone at (780) 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.

Substance Over Form: The Alberta Court of Appeal in Mahe on Cost Consequences of "Without Prejudice Offers"

by Erik Bruveris

Unlike the American legal system, in Canada, successful or substantially successful litigants are normally entitled to costs. While cost awards typically do not reimburse a successful party for their legal fees actually incurred, they do serve to mitigate the costs of litigation for the successful party. Generally costs are awarded according to Schedule C under the *Alberta Rules of Court* which takes into account both the amount of the Claim and the particular procedural steps in litigation.

In certain circumstances, parties may also be able to obtain double costs on the basis that an offer which was submitted is more favourable than the result. Offers which attract additional cost consequences are significant because they can act as a powerful tool to cause the party to ponder whether they would actually like to proceed with litigation in the face of increased risk.

When making offers to attract additional cost consequences, the standard approach, until recently, was to submit a Formal Offer in accordance with the *Alberta Rules of Court*, or to submit a *Calderbank* offer which specifically references the offeror's intention to refer to the content of the offer when speaking to costs of the matter. On March 4, 2010, the Alberta Court of Appeal rendered its decision in the case of *Mahe v. Boulianne*, 2010 ABCA 74 which appears to have changed the approach that the court is to adopt when determining whether or not to award double costs.

In *Mahe*, the Appellants appealed the Trial Judge's damages award and were successful in having the award reduced from $700,000.00 to $365,000.00. Pending the appeal, the Appellants offered the Plaintiff $500,000.00. The offer did not include a reference to the offer being a *Calderbank* offer, nor was it a Formal Offer pursuant to the *Rules*. As such, in speaking to costs, the Respondents argued that the offer of settlement did not have any feature necessary to attract double costs. The Court disagreed, and held at paragraph ten:

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> The Rules of Court do not specify that any particular form of offer is required to trigger its costs consequences, and an offer need not make reference to costs. The parties are presumed to know the law, including the provisions of the Rules of Court…. While informal offers do not restrict the court's discretion over costs, they are nevertheless a relevant consideration. The appellant made a generous offer that exceeded his eventual liability, and he is entitled to double costs of the appeal after the offer was made.

The only distinction noted by the Court was that informal offers do not restrict the Court's discretion over costs as do Formal Offers. At the same time, the door has now been opened for informal, "Without Prejudice" offers to be employed when speaking to costs.

This approach has been confirmed in two recent cases out of the Court of Queen's Bench, namely *Dhala v. Dhala,* 2010 ABQB 176, and *Gauthier v. Butkevich* 2010 ABQB 357. In *Gauthier*, the Justice K.G. Nielsen summarized the recent decisions of *Mahe* and *Dhala* in stating, "an informal offer can be considered in a costs application in the action in respect of which the offer is made and it is not necessary for such reservation to be specifically made in the informal offer." In the end, *Mahe* is already being already being adopted and endorsed, and therefore, informal offers should now serve to cause opposing parties in litigation to pause and reflect on whether they actually wish to proceed to litigate a matter.

FIRM NOTES

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

Mark Stillman has agreed to act as an assessor for the interviewing and counselling competency evaluation section of the 2010 Canadian Centre for Professional Legal Education Program.

Jim Chronopoulos, our articling student, has accepted a position with our firm as an associate lawyer. Jim's expected bar call date is September 8, 2010. We are also pleased to welcome Ara Mckee, who has accepted a position with or firm as a Student-At-Law commencing June 28, 2010.

We welcome to the Stillman LLP team the following Legal Assistants:

Heather Morrow in our Family Law Department
Brittany Kowalchuk in our Family Law Department
Ying Fraser in our Real Estate Department

The Sixth Annual Stillman LLP Super Bowl Extravaganza has been booked for Friday, October 22, 2010. Monies raised at this year's Super Bowl will again be donated to the Skills Program, a local charity assisting special needs individuals in increasing their employability and giving them the requisite skills to enter the work force.

Anyone wishing to participate in the Stillman LLP Super Bowl, or to donate items as prizes, or for our silent auction held at the Super Bowl, please contact Greg Bentz of our office to find out more. All friends and clients of Stillman LLP are invited to assist in this worthwhile cause.

CAUSE CÉLÈBRES

ELGERT V. HOME HARDWARE STORES LIMITED, **2010 ABQB 62 AND 71 – "Be Wary of What you Ask For"**
by Christopher G. Hoose

The *Elgert* Case was an action for wrongful dismissal and defamation arising out of the Plaintiff Elgert's termination from his employment with Home Hardware. The Plaintiff had been employed with the Defendant for 16 years in a management position. The Plaintiff claimed for wrongful dismissal, defamation, aggravated and punitive damages.

The action was set to be heard by a civil jury trial commencing January 13, 2010 for a period of 12 days. It is rare in civil litigation for a matter to be heard by jury, and even more rare for an employment matter to be heard by civil jury trial.

Prior to the commencement of trial, the defendant Home Hardware, made a pretrial application that the Learned Trial Judge can and should, in the charge to the jury, provide the Jury with a range of appropriate damages for defamation and wrongful dismissal (2010 ABQB 62). The Plaintiff contested this application on the grounds that the law in Alberta was clear that no Range of Damages should be given to the Jury with respect to these damages. The Learned Trial

Judge agreed that this was the current state of the law, but noted that the law in Alberta was evolving to become more consistent with the position taken in many other jurisdictions that a Range of Damages should be provided to the Jury.

In the end, the Learned Trial Judge sided with the Defendants and found that a Range of Damages should be provided to the Jury.

Towards the conclusion of the trial, an application was made to determine what Range of Damages should be put to the Jury. In discussing the notice period the Plaintiff may be entitled to, the Court noted the Plaintiff was a long term employee in a senior position and was over the age of 50. This meant that the Plaintiff would receive the upper end of a notice period, if wrongful dismissal were made out. Ultimately, the Court directed that the Jury should be given a Notice Period Range of between 12 to 24 months.

With respect to aggravated and punitive damages, the Learned Trial Judge concluded that the amount of Aggravated Damages Range for the Jury would fall between $0 and $200,000 and for punitive damages the Punitive Damages Range for the Jury would fall between $0 and $400,000. Finally, with respect to defamation damages, the Learned Trial Judge concluded that a range of between $5,000 and $60,000 would be submitted to the Jury.

In the end, the Jury came to its verdict on January 28, 2010. The result was not in the defendants favour. The Jury awarded the Plaintiff the maximum notice period of 24 months, the maximum defamation damages of a total of $60,000.00 and the maximum aggravated damages amount of $200,000.00. Finally, the Jury awarded the Plaintiff punitive damages of $300,000.00. Except for the punitive damages, each amount awarded was the limit of the Jury's range. This case, as we understand it, is now currently under appeal.

It is arguable whether the defendant's position in its pre-trial application to have a Range of Damages submitted to the Jury backfired or whether it prevented an even larger award. This we will likely never know. However, it does go to demonstrate that you should always be wary what you ask for.

AS WE SEE IT

Alternatives to Signing on the Dotted line, and the *Electronic Transactions Act*

by Jim Chronopoulos

INTRODUCTION

Electronic communications are so pervasive and have been so widely adopted by individuals and businesses in Alberta and around the world that to state its importance would seem, in this day and age, too obvious to be worth mentioning. And yet, when we compare this paradigm shift with the law's traditional reliance on paper records, written signatures, printed forms and printed contracts, a gap emerges with how we communicate today and with how the law requires us to document and execute our legal relationships. The Alberta's *Electronic Transactions Act* (the "*ETA*") serves to bridge this emerging gap between our modern methods of communication and our traditional requirements in law.

APPLICATIONS OF THE ACT

The *ETA* attempts to effectively ensure that electronic records and electronic signatures have the same legal status as paper-based written records. As with most matters of this nature, the devil is in the details.

"Electronic" includes faxes, e-mails, and arguably any internet based communications. For an electronic record to be given the same force and weight as a paper based original, it must: 1) be organized in the same or substantially the same manner as the non-electronic form, 2) be accessible for future reference, 3) be capable of being retained and 4) be reliable assurance to its integrity (eg. read-only documents).

"Electronic signature" means electronic information that a person creates or adopts in order to sign a record that is in, attached, or associated with the record. Interestingly in the 2008 Alberta Queen's Bench case of *Leopky v. Messon*, the court decided that an identifiable personal signature includes a typewritten name of the signatory which may be included at the end of an agreement or communication. This is especially relevant for e-mail accounts that customarily include an individual's name at the bottom of outgoing e-mails.

Another interesting feature of the *ETA* is that it can not force an electronic transaction on a resistant individual. In other words, parties must first consent to use the electronic medium. Consent can be implicit or explicit: On the one hand, explicit consent can take place orally, in writing or electronically and does not require any assumption of the person seeking consent. Implicit consent, on the other hand, is obtained when a person provides information in a way that infers an electronic transaction can or should take place. This means that a transaction facilitated by a business's website, or an e-mail address written on a business card will implicitly consent to electronic communications being accepted between the parties.

TRADITIONAL WRITTEN REQUIREMENTS NOT EFFECTED BY THE ACT

As much as the Act progressively adjusts to the modern methods of electronic communication, the legislature was cognizant to the fact that the requirement for paper based written forms are, in some areas of law, sacrosanct. Thus the *ETA* does not apply to: law that expressly requires written records or prohibits electronic record; Wills and codicils; Trusts; an enduring power of attorney; personal directives, and negotiable instruments and records that create or transfer an interest in land if they have to be registered to be effective against third parties (such as Land Titles Office) – records that do not require registration may be completed electronically.

CONCLUSION

Alberta's *Electronic Transactions Act* ensures that most electronic records and electronic signatures in most circumstances have the same legal status as paper-based and written records. Although certain areas of the law remain unchanged in their express requirement for paper based documentation, individuals and businesses would do well to carefully scrutinize their electronic postings and policies especially e-mails and facsimile practices, as it may have significant legal implications. If you have any questions regarding these implications please contact us.

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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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