STILLMAN LLP'S

LegalEye

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

EDITOR'S NOTE

Our office will be closed during the holiday season on December 24, 2010 up to and including December 28, 2010 and we will be closed January 3, 2011 for New Years. Our office is open during regular business hours on December 29, 30 and 31, 2010, and January 4, 2011.

We wish you all the best this holiday season and a safe and happy New Year!

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.

CHANGING THE RULES

by Jim Chronopoulos

Alberta's Rules of Court, the procedural framework upon which lawyer and litigants advance their civil cases before the Court, recently underwent a ten year comprehensive review and rewriting that took effect on November 1, 2010. This change marked the first significant revision since the previous set of rules was implemented back in 1968. The jury is still out on what the effect of these new rules will mean for lawyers and litigants. Some practitioners see the changes as relatively minor – after all, one cannot simply ignore hundreds of years of well thought-out and established procedural jurisprudence. Others, on the other hand, see the new rules as a significant change to the old way of practicing law that will have a marked impact on how parties are able to advance their cases. Time will only tell which camp is more correct (although surely there is some truth in both positions). In the meantime, we wish to highlight an important change that will impact how parties will advance their cases on a go-forward basis – namely, the requirement for parties to enter a mandatory alternative dispute resolution (ADR) process.

ADR is most commonly understood as a process outside of our court's traditional adversarial system. It can include such things as negotiation, mediation and arbitration and it almost always includes a process whereby the parties sit down and try to talk out their differences with the help of an objective third party facilitator. Under the New Rules of Court, parties must now enter mandatory ADR before they are able to set their matter for trial. Before the parties commit to resolving their differences under the court system's adversarial process, they must first try to meaningfully settle the matter. This process will not be viewed as a mere bump on the road to trial. Parties are not going to be able to simply go through the motions of ADR to satisfy the requirement. The ADR, according to the Rules, must be a "good faith participation". And while the rules have a process for parties to waive the requirement on court application, it is likely that this will be a high and difficult hurdle for parties to meet. We may look at other jurisdiction with similar ADR requirements

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for guidance. For example, an Ontario plaintiff deposed she feared to be in the same room as the defendant and, if forced to undergo ADR, that she would suffer psychological harm. Despite her concern, the Ontario court ruled that this was not enough to waive the ADR requirement given that the plaintiff's fears could be accommodated by an appropriate mediator and the possibility existed that mediation could unfold in separate rooms. If cases like these are any indication, courts will view the ADR requirement quite seriously. That being said, the Courts acknowledge is there are certain situations where ADR is not possible or required, these include when:

1. The parties have already engaged in some form of dispute resolution process before their matter was brought before the Court and the parties believe that an additional dispute resolution process would not be beneficial. This likely would also mean that the party's previous attempts would have to have been of such a nature as to equal or better the standard within the mandatory requirements in the Rules.

2. The nature of the Claim is not one, in all the circumstances, that will or is likely to result in an agreement between the parties. Presumably this will include cases that have a punitive component to them that would otherwise not be possible to be carried out within an ADR setting.

3. There is a compelling reason why dispute resolution process should not be attempted by the parties.

4. The Court is satisfied that engaging in an ADR process would be futile; or

5. The Claim is of such a nature that the decision by the Court is necessary or desirable. This is likely to include such cases that require the dispute, for the betterment of the law and due to public policy, to be heard before the Court in open session.

Time will only tell whether the New Rules of Court will be a change for the better. In the meantime, lawyers and litigants would do well to consider how an ADR process would likely benefit their case. If chances are that ADR would be helpful, it might be a process worth exploring before litigation even commences and the parties proceed to have their day in Court.

FIRM NOTES

Stillman LLP's 6th annual Super Bowl Bowling Extravaganza was held on Friday, October 22, 2010. The event was an unprecedented success, raising a record $40,000.00 (net after expenses) for the Skills Society, a local charitable organization. The Society provides community support to children and adults with developmental disabilities and adults with acquired brain injuries. Randy and Margo Cable of Edmonton once again generously agreed to match our fund raising efforts and therefore the amount raised translates to approximately $80,000.00 with this matched funding. To all of the participants, sponsors, donors and volunteers, we once again wish to express our appreciation for all your help and support in putting on this great event and supporting such a worthwhile cause.

We are pleased to announce the following additions to our staff:

Dawn Herrington as our new receptionist;
Jayme Kasimova in our real estate department; and
Samantha Skrepnyk in our real estate department.

Marilynn Waddell, our receptionist of 16 years, retired at the end of October, 2010 to spend more time with her family, and in particular, her new grandchild. We wish Marilynn all the best in her retirement.

CAUSE CÉLÈBRES

Federal Bank Act versus Provincial Personal Property Security Act: Who Has Priority?

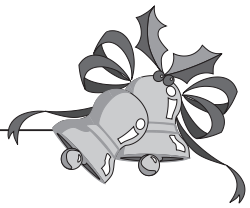
By Ara McKee

In the recent case of *Bank of Montreal v. Innovation Credit Union*, 2010 SCC 47, the Supreme Court of Canada was left to resolve a dispute between an unregistered security interest under the Saskatchewan *PPSA* and a subsequent registered security interest under the *Bank Act*.

In this case, a Saskatchewan farmer entered into a security agreement with the Credit Union for the purpose of financing farm equipment. The agreement was not registered. The farmer, without disclosing the loans or security agreement with the Credit Union, secured additional financing through the Bank of Montreal. The security interest with the Bank of Montreal, under the *Bank Act*, was registered. The farmer ultimately defaulted on his loans and the Bank of Montreal seized property under its security. The Credit Union brought an application seeking a declaration that it had priority over the proceeds of the seized property.

In the Saskatchewan Court of Queen's Bench, it was held that the Bank of Montreal had priority over the Credit Union based on s.428 of the *Bank Act* which states that a *Bank Act* security interest has priority over subsequently acquired rights in the property. The Court found that the Credit Union's interest under the *PPSA* was not perfected through registration until after the Bank of Montreal registered its interest under the *Bank Act* therefore the Bank of Montreal had priority.

Both the Court of Appeal and the Supreme Court of Canada rejected the Lower Courts, s.428 priority rule, finding instead that the proper approach is found in sections 427(2) and 435(2)



of the *Bank Act*. The combined effect of these sections operates in the same way as the common law principle of *nemo dat*. That is, the Bank of Montreal cannot acquire a greater interest in the property than the debtor himself and priority is given to the first party taking a legal interest in the property. At the time the Bank of Montreal took its security, the debtor had already given the Credit Union a security interest in the same collateral. Following the *nemo dat* principle, the Bank of Montreal took its security subject to the Credit Union security.

The Bank of Montreal argued that application of the *nemo dat* principle would lead to commercially unreasonable results. Banks would have no way of knowing about the existence of undisclosed and unregistered *PPSA* interests. By giving these unregistered interests priority over subsequent *Bank Act* interests, the banks are exposed to unreasonable commercial risk. The Bank suggested the way to overcome this problem is for a "first to register" priority system for security interests.
In addressing the policy concerns of the Bank, the Court acknowledged the need for legislative reform. Currently, there is nothing in the *Bank Act* that gives priority to *Bank Act* security over prior unperfected *PPSA* security interests. *Bank Act* security interests continue to be subject to pre-existing interests of third parties, whether perfected or unperfected.

Although acknowledging the need for reform, the court strongly opposed a "first to register" priority system, as suggested by the Bank, for several reasons. Firstly, under the provisions of the *PPSA*, there is no requirement for registration. If a security interest is registered, this does not necessarily constitute notice of an existing security interest but rather only provides notice that a security interest may exist, currently or in the future. Secondly, the *PPSA* revolves around the concept of perfection rather than registration. A security interest may be perfected without registration. A priority rule aimed at all unperfected security interests would not encompass all that it is intended. Thirdly, a priority rule established under the provincial *PPSA* cannot operate to give precedence to a prior provincial interest over a federal interest. Lastly, the Saskatchewan *PPSA* has expressly excluded *Bank Act* security interests from being registered under the provincial scheme. This was intentionally done to prevent banks from getting the benefit of the provincial statute but not being bound by it.

There is little doubt that banks will find this decision disconcerting as they continue to be left in the dark as to whether their *Bank Act* security interest will be subject to unregistered provincial *PPSA* security interests. The Supreme Court of Canada is sending a strong message for legislative reform to address this area of concern. It remains to be seen whether legislative reform will occur in the future.

AS WE SEE IT

HOW THE NEW RULES OF COURT WILL AFFECT FAMILY LAW CLIENTS

By Erik Bruveris

As set out above in our article "Heads Up," Alberta has overhauled the *Alberta Rules of Court*. The scope of this article is simply to highlight some of the key features of the new *Rules* as they relate to the family law context.

Family law actions are governed by the general *Rules of Court* which apply to all actions or lawsuits, except as are otherwise modified by the more particularized subsection of Rules pertaining to the family law context which are contained in Part 12 of the *Rules*. There are certain unique requirements when commencing an action under the Family Law Rules, for example, one is required to file a mandatory notice of seminar where children are involved, and one obtains basic financial information that is needed by serving the opposing party with a document requiring the opposing party to disclose.

The new *Rules* now clarify which actions fall within the Family Law Rules by setting out the statutes and equitable actions which are applicable. This change, while not earth shattering in nature, serves to guide litigants through the process from the very beginning.

There is a new feature: the enhancement of the ability for individuals without counsel to represent themselves via the rules relating to self-represented litigants (SRLs). The enhanced role of SRLs and the support upon which they may rely should serve not only to make the legal system more accessible, but also potentially more chaotic as individuals attempt to do away with lawyers. While access to the legal system may theoretically increase as a result of the provisions relating to SRLs, legal counsel do serve a purpose and proceeding with the absence of counsel or with the help of lay assistants may ultimately serve to do more harm to individuals that attempt to navigate through our complex legal system.

There have also been significant changes regarding the duties and obligations of a lawyer of record. The changes are designed to facilitate the hiring of legal counsel on a limited retainer. If one would now like a lawyer to undertake to act for a particular portion of a larger action, for example, to attempt to force the sale of a matrimonial home within a larger divorce and property action, then he or she has the ability to do so within the context and guidelines as set out in the *Rules*. Of course, there are requirements that the *Rules* set out when acting in such circumstances, the most significant of which being that that a solicitor on a limited retainer must advise the court of its scope.

The new *Rules* also modify the way in which the litigation process itself is managed. As a starting point the new *Rules* place the onus on the parties to manage the litigation. Cases are now either standard or complex, based upon a set of factors. The management rules also include a number of procedural Rules to aid in moving litigation forward, such as appointing a case management judge, obtaining procedural orders, or holding court conferences. The *Rules* also provide detailed procedures surrounding dispute resolution and specific requirements relating to the same as above in our "Heads Up" article. Requiring litigants to engage in a dispute resolution process should serve to be helpful, particularly in the family law context where litigants are prone to less rational decisions.

There are also new rules that relate to dealing with matters without resorting to a full trail, which obviously can be quite costly. It is now permissible, and there are specific procedures available, for the trial of a particular issue. For example, it may occur that the parties to a divorce action are largely in agreement on all matters that may concern their action, such as child custody and access, child support, and property, however, they are not in agreement on whether one spouse is or may be entitled to spousal support. Summary trials should be helpful in such situations and act to cut down on costs and efficiently deal with the matter on a timely basis.

There are several other changes to the *Rules* which are important which have not been looked at here. A good starting point for anyone considering litigation, whether that be family law litigation or otherwise, is to meet with a lawyer and discuss the merits of your case as well as the procedural steps and costs which may be involved.

The new *Rules* were drafted with important goals in mind and numerous changes have been made. Several of these changes have been touched on, and these should act to change the way in which family law litigation is approached in this province. Whether all or most of the changes will be seen to be effect change in the long run in light of the goals set out by the Alberta Law Reform Institute is yet to be determined, however, the changes will serve to provide both individuals and their counsel additional tools to deal with the intricacies of litigation, family or otherwise.

STILLMAN LLP

Barristers and Solicitors

#300, 10335 - 172 Street
Edmonton, Alberta, Canada T5S 1K9
Tel: (780) 484-4445
Fax: (780) 484-4184
Canada Toll Free: 1-888-258-2529
E-Mail: lawyers@stillmanllp.com
Website: www.stillmanllp.com

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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