McGREGOR STILLMAN'S

LegalEye

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Presenting Legal News, Views and Updates from
McGregor Stillman - Avocats
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HEADS UP

Heads Up is a column which appears in each issue of the McGregor Stillman Legaleye, highlighting new or proposed legislation in the Province of Alberta.

THE NEW *LIMITATIONS ACT*

The new *Limitations Act* will soon replace the *Limitation of Actions Act*, which sets the time frame within which different types of law suits must be commenced. The new legislation has not as yet been proclaimed in force in Alberta, although it is anticipated that it will be proclaimed in the near future.

The current *Limitation of Actions Act* categorizes a claim according to the type of law involved (e.g. contract, negligence, etc.). Depending on the type of law involved, the old Act determined which time period applied, which could be one year, two years, six years or ten years from the date when the cause of action arose. There could also be instances where the time period could be extended as a result of, for example, a person being under a disability and as a result unable to commence an action within the time frame provided by the legislation.

Under the new *Limitations Act*, a claimant must commence an action within two years of discovering the claim. The Act sets forth the criteria for when the claimant has sufficient knowledge to have discovered the claim.

The new Act also provides that after a period of ten years from the date when the claim arose, the claimant can no longer commence an action, regardless of the state of knowledge of the claimant. This is subject to some exceptions including disability, agreement of the parties, fraudulent concealment, acknowledgment and part payment.

It is intended through the new legislation that there be one limitation scheme for all types of claims. It will no longer be necessary to categorize the claim or the type of breach in order to determine what the limitation period is. All claims will be subject to the same principles - two years from the date that the claimant gained knowledge of the claim or, in some instances, ten years from the date that the claim arose, whichever is earlier. There are transitional provisions in the new legislation. For example, a claim previously governed by a six year

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limitation which has three years left to run at the time of proclamation, must be commenced within two years of proclamation. Essentially, a known claim must be commenced within the existing limitation period, or within two years from the date of proclamation, whichever is the earlier.

In the next issue of McGregor Stillman Legaleye, look to Heads Up for a summary of recent changes in the area of family law including in particular the area of child support.

CAUSES CÉLÈBRE

Each quarter McGregor Stillman selects a few *recent* decisions which we feel may affect you or your business, and provides a quick summary of each. If you want more information on any one case, please contact our offices.

DAMAGES FOR EMOTIONAL DISTRESS

Shillingford v. Dalbridge Group Inc. (December 2, 1996). J.D. Edmonton
8703 05333 (Alta Q.B.) Perras J.

FACTS: The Plaintiff contracted with the defendant corporation to build her house after several meetings with its principals, and a down payment was made. No house was built though several draws were made against the mortgage. The evidence was that the corporate defendant had no employees and $1,000.00 capital. The bank foreclosed and Plaintiff lost her deposit and down payment.

ISSUE: 1) Could the Plaintiff obtain judgement against the principals of the contracting company?

2) Could the Plaintiff obtain damages for mental distress?

DECISION: The individual Defendants were liable as they never intended the Corporation to be anything but a shield to deflect personal liability. The individual Defendant could not invoke the Corporation to shield them from fraudulent misrepresentations. As it was reasonably foreseeable that a breach would cause the Plaintiff mental distress, $6,000.00 was awarded on that item.

AGENCY - CREDIT CARDS

Sundial Travel Club Inc. v. Lucky (Nov. 27, 1996) (Alta. Prov. Ct.)

FACTS: The Plaintiff travel agency provided travel services to the Defendant father & son. Most of the trips were booked by the son on the father's credit card. The father never specifically authorized the Plaintiff to accept his son's use of his card, but he paid without complaint. After an argument with his son, the father notified his credit card company that his son's most recent booking with the Plaintiff was unauthorized.

ISSUE: Did the father apparently authorize his son to use his card with the Plaintiff?

DECISION: Father is liable to the Plaintiff for the price of the booking. By paying previous bookings without complaint he had given his son ostensible authority to use the card with the Plaintiff.

FAMILY LAW - CHILD MAINTENANCE - ADOPTED CHILD

Alberta (Dir. of Child Welfare) v. Roy (Nov. 29, 1996), 60526498 W10101 (Alta Prov. Ct.), Norheim P. C.J.

FACTS: The Respondents adopted two children in 1987, aged three and four. Both suffered from fetal alcohol syndrome. Both children exhibited inappropriate behaviour from the time they were adopted which steadily grew worse despite the Respondents best efforts. Finally, the Respondents decided they could no longer care for the children and the children were made permanent wards. The father had surgery for a brain tumour in 1995, causing some financial difficulties for the Respondents.

ISSUE: Should the adoptive parents be required to pay maintenance for the children?

DECISION: The law considers the relationship between adopted children and parents to be the same as if the adoptive parent was the natural parent. They, not the natural parents, are liable for maintenance.

FIRM NOTES

We remind our clients that Christine Pratt, the firm's civil litigation and personal injury associate, will be returning from maternity leave on July 1, 1997.

Both of the firm's partners, Terry McGregor and Mark Stillman acted as instructors for the Client Counselling Section of the Bar Admission course in May, 1997.

Teri Lynn Bougie attended a Child Support Guidelines Seminar through the Legal Education Society of Alberta in June, 1997.

John Poirier recently spoke for the Speakers Bureau for Public Legal Education sponsored by the University of Alberta's Faculty of Extension. John talked about rights on being arrested and charged with a criminal offence, and the effect of a criminal record on young offenders.

As mentioned in the first issue of the Legaleye McGregor Stillman was planning a seminar for its clients on Environmental Legal Issues in the Summer of 1997. This seminar has now been rescheduled for October, 1997.

AS WE SEE IT

BUILDERS' LIENS - MYTH AND MYSTERY

The *Builders' Lien Act* allows a material supplier or labourer, who has not been paid for his services or material to file a document with the Land Titles office as security for funds owed. The legislation sets a limitation for filing such a lien at 45 days from the date the last nail was driven or the certificate of substantial performance was posted in order for a claimant to rely on his rights. Failure to file the lien within the time period will result in the lien being unenforcible. It is the responsibility of the material suppliers/labourers to ensure their liens are filed in a timely fashion or the lien claimant may be subject to additional financial penalties imposed by the Courts and the proper amounts.

The Act also requires an owner to retain 15% of the value of the work or materials furnished. **Failure of an owner to retain this amount can result in the owner being required to pay out this figure twice in the event a lien is filed.**

THE LIEN FUND

The lien fund is a mystery to some contractors/owners involved with the *Builders' Lien Act*. The Act creates a scheme whereby once a lien is filed the lien fund "crystallizes". The effect of this is that once a lien is filed on title to property a lien fund is actually created and calculated on the following basis: 15% of the value of the work/labour in place plus any amounts due and owing under the contract as yet unpaid.

There are two contradictory Court decisions currently being held as law with regards to the calculation of the builders' lien fund. The preferred calculation is one that basically states that once 15% of the value of the work is calculated and amounts unpaid are added together, should the amount unpaid exceed the 15%, then the amount remaining unpaid on the contract in effect becomes the lien fund. It is, of course, acceptable for an owner to reduce the amount of the lien fund to the extent that he is able to establish that the remaining work unpaid for is deficient in quality and as such effectively reduce the lien fund. However, the lien fund **cannot** be reduced below the minimum 15% of the value of the work in place. There are also provisions under the legislation (s.20) that permit an owner, mortgagee, contractor, or sub-contractor, upon giving written notice to a person liable on the contract or his agent, of his intention to make payment to a person who has a lien for work done or materials furnished. In the event the contractor receiving notice of this payment going directly to his sub-trade/material man, the contractor must, within 5 days, voice his objection otherwise this payment can be made and in effect reduce the ultimate amount owing by the owner for payment of the lien fund. **In all other cases any payments made in the face of a lien filed on the property will not reduce the lien fund, and the owner may be required to pay this amount out again in order to "build up" a proper lien fund.** Hence, it is advisable prior to making any payment on a construction contract to conduct a search of the title to ensure that no liens have been filed. In this way payment can be made out, thereby reducing the amounts owed to the contractor.

RENTAL PROPERTY

Rental properties pose an unusual problem for builders' lien claimants and owners. If the owner of such property did not authorize the leasehold claimant to make the subject improvements the owner may not be held liable as he is not an owner who requested the work. Accordingly he would not fit within the confines of the

legislation and as such, his interest may not be subject to a lien.

Section 12 of the *Builders' Lien Act* deals with the provision of notice to an owner in a lease situation. Any contractors doing leasehold improvements should be aware of this section.

WHAT LANDS ARE LIENABLE?

It should be noted that certain projects are not lienable under the Statute. Examples are, some properties situated on an Indian Reserve and public enterprises conducted by the government. There are specific pieces of legislation which deal with giving notice to appropriate Ministers where a government project is involved. It should also be noted that once a lien has been filed at the Land Titles office there are a number of limitations that have been imposed by the Act. There is a requirement that a Statement of Claim and a document known a Lis Pendens be filed at the Courthouse and Land Titles office respectively to preserve the lien. There are also various provisions that allow an owner and/or contractor to serve notice on lien claimants to take certain proceedings, by certain times, failing which the lien may be discharged.

The effect of a lien being filed on a project is that any funds that are paid subsequent to the lien being filed will not be allowed to reduce the lien fund. As such, mortgage holders as a general rule will not make advances on the unpaid portion of a mortgage until such time as all liens have been discharged.

DISCHARGE OF LIEN

A lien can be discharged either by operation of the statute, or by proper payment out of the funds. There are procedures that permit an owner, mortgagee or contractor to make payment into Court (or to a lawyer's trust account) the face amount of a lien in order to have it discharged. The effect of this is such that in the event funds are paid into Court or a lawyer's trust account, the funds then stand in place of the property as security for the lien. This is not to be confused with a lien fund that is created when a lien is filed, as such a fund is for satisfaction of all lien claimants on a pro rata basis; is not intended to act as security for a specific lien.

In situations where the funds are paid into Court or a lawyer's trust account it is not uncommon to have an additional 10% of the face value of the lien paid in as security for costs that may be awarded by the Court.

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The law firm of McGregor Stillman is a five lawyer general law firm, with emphasis on Civil Litigation, Corporate and Commercial matters, Real Estate, and Wills and Estates. The firm has represented clients throughout Alberta, and has also represented clients from British Columbia, Saskatchewan, Manitoba, Yukon, Northwest Territories and Ontario. The firm has a well established network of agent connections in Canada, including Vancouver, Calgary, Regina, Saskatoon, Winnipeg, and Toronto and environs. The firm has an affiliation with Goodman, Lister & Peters of Detroit, Michigan. McGregor Stillman also has established contacts with various other law firms throughout the United States and Great Britain.

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