

McGREGOR STILLMAN'S



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

EDITOR'S NOTE

LEGAL SPEAK SEMINAR

We are pleased to announce that **McGregor Stillman's** first **Legal Speak Seminar** is scheduled for Thursday, October 30, 1997, at the Mayfield Inn.

The Seminar will cover the following topics:

- Environmental Liability - It's a '90's thing;
- Heading off Litigation by Preparation;
- Directors' Liability - Then & Now;
- Construction Litigation.

The Seminar will run from 1:30 p.m. to 4:15 p.m. followed by a wine & cheese reception.

The cost of the seminar is \$ 25.00 plus GST.

Some or all of these issues concern everyone involved in business. We are confident that this practical seminar will be useful to our clients. We hope to see you there.

Please confirm your attendance at this seminar prior to October 24, 1997 by calling Marilyn Waddell at 484-4445, or by fax at 484-4184.

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 FEDERAL CHILD SUPPORT GUIDELINES

The new Federal Child Support Guidelines were proclaimed in force on May 1, 1997. There were two



INSIDE:

HEADS UP:

-a review of some recent and upcoming legislation

CAUSES CÉLÈBRES:

-some recent case law to be aware of

FIRM NOTES:

-update on the happenings at McGregor Stillman

AS WE SEE IT:

-quarterly commentary on a current legal issue

major changes under the Guidelines. The first involves the tax effect of child support payments. Under the new rules, those payments are no longer taxable in the hands of the payee, nor are they any longer a deduction for the payor. However, child support orders dated before May 1, 1997 remain unaffected by this.

The second change is the introduction of a table for basic child support amounts in each province. The tables include a column for income of the payor and the number of children. Income is determined by the Total Income under the payor's T-1 income tax form for the last year. Where there has been a fluctuation in income over the last several years, the income can be determined by averaging the last three year's T-1 figures. The Court

can also attribute income to the payor where it is shown that they are deliberately lowering their employment income. There are special provisions dealing with income where the payor is a shareholder or has significant investment income.

The new guidelines make the application of the table amounts mandatory by the Courts. This means that the Court must start out with the table amount, and can only deviate from it in two circumstances.

The first is where a claim is made out for undue hardship. In order to prove undue hardship, the relative standard of living of the payor's and the payee's households are compared. If the applicant can establish a lower standard of living, then the Court will consider several factors, including high family debts, unusually high child access costs and other legal obligations when asked for a variation in the basic table amounts. The Guidelines require the Court to record reasons for any variation to the Guidelines they make.

The second exception to the strict application of the guideline amounts is extraordinary expenses required for the children, or "add-ons". The list of extraordinary expenses under s.7 is exhaustive, and includes expenses for post secondary education, extracurricular activities, primary or secondary school education, other necessary educational programs, certain health and health insurance related expenses and child care expenses incurred as a result of the custodial parent's employment, illness, disability or education or training for employment.

Where an extraordinary expense is demonstrated, the cost will be divided between the parents according to their relative incomes. To determine whether an expense will be included, the test to be applied is "Is the activity necessary in the best interests of the child and is it a reasonable expense, given the parties' economic means?"

Applications for child support where the parents are not married are still made under provincial jurisdiction, and are not governed by the new federal reforms. However, it is expected that the Province will enact similar legislation in the near future.

CAUSES CELEBRES

CREDITOR AND DEBTOR - FRAUDULENT CONVEYANCE

Pigeon Lake Park Maintenance Ltd. v. Foley
(May 21, 1997), J.D. Edmonton 9503 26278 (Alta QB)
Funduk (Master)

FACTS:

In November, 1995, Defendant got judgment against the Plaintiff. Prior to judgment, the Plaintiff corporation had transferred ownership of two trucks to its major shareholder's wife and son. The Defendant could not collect as the Plaintiff had no assets after judgment.

ISSUE:

Could the transfers of the trucks be reversed pursuant to the *Fraudulent Conveyances Act*?

DECISION:

Transfers will be reversed under the Act if the debtor made the transfers with the intent to defraud creditors. Such an intent is inferred if by reason a voluntary transfer of assets, sufficient assets are not left for payment of the transferor's debts. This is so even if the debt does not crystallize until after the transfer, but was anticipated at that time. The transfer was reversed.

EMPLOYMENT LAW - REMUNERATION STANDARDS

Flint Canada Inc. v. Bonokosi

(February 7, 1997) J.D. Calgary BCAL 127 1 (Alta Prov. Div.) O'Neil

FACTS:

Bonokosi, a resident of Saskatchewan, entered into an employment contract with Flint, whose head office was in Alberta. All work under the contract was to be performed in Russia.

ISSUE:

Was Flint liable to pay vacation and general holiday pay as prescribed by the *Alberta Employment Standards Code*?

DECISION:

Flint does not have to comply with the Code. The ESC cannot confer rights in an extraprovincial employment situation.

INJUNCTIONS - BREACH OF RESTRICTIVE COVENANT - EMPLOYMENT CONTRACTS

FACTS:

The Applicant, prior president of the Respondent, had been restrained from competing with the Respondent as a result of a non-competition clause in his employment agreement. He applied to set aside the injunction. The applicant

stated that the Respondent had not shown irreparable harm if the injunction was not granted, a requirement for the granting of injunctions.

ISSUE: Did the Respondent need to show irreparable harm.

DECISION: While non-competition clauses in employment contracts are generally presumed to be unenforceable, the clause may be enforceable in these circumstances due to the Applicant's high position in the company. Since it may be enforceable, a clear breach of the clause is sufficient to get an injunction, and irreparable harm to the Respondent need not be shown.

FIRM NOTES

McGregor Stillman will be holding its first annual client seminar on Thursday, October 30, 1997. The topics will focus on Environmental Legal Issues and we welcome all those who are affected by environmental factors. For more information on the seminar topics and registration, please contact our offices.

On October 7, 1997, Christine Pratt attended an Alberta Civil Trial Lawyers Association seminar on the mechanics and causation of injuries caused in low impact collisions. Ms. Pratt is on the ACTLA executive as the judicial representative for Edmonton.

On September 30 to October 3, 1997, Terry McGregor attended a three day seminar in Calgary through the Environmental Services Association of Alberta. Topics discussed included Environmental Management Systems and an update on environmental law.

AS WE SEE IT

SMALL CLAIMS - GETTING BIGGER

As many of our clients who have consulted the McGregor Stillman legal team regarding fee for service lawsuits may know, we often do not recommend hiring a lawyer to prosecute a Queen's Bench claim that is valued at less than \$10,000.00. The reason is that the cost of legal services and disbursements may well meet or exceed that

amount by the time a lawsuit gets to trial. An alternative to a Queen's Bench suit is to bring your claim in Small Claims Court. Unfortunately, the claim limit of \$4,000.00 has deterred many people from going this route, as they would be required to abandon their claim over this limit.

However, a recent Order in Council which was effective October 1, 1997, increased the limit on Small Claims from \$4,000.00 to \$7,500.00. This change opens up small claims procedure to claims which doubled the old limit, allowing many more Plaintiffs to use this less expensive and quicker route.

Of course hiring a lawyer to represent you in Small Claims Court can still cost \$1500.00 to \$3000.00, and in order to make the most of your claim, it is best if you can represent yourself.

YOU BE THE LAWYER

A civil claim should be brought only after you have made honest attempts at the settlement of your claim and it has become clear that litigation is necessary.

In order to commence a civil claim in Small Claims or "Provincial Court - Civil Division", you must go to the Courthouse and obtain two forms - a Civil Claim and a Dispute Note. If your claim exceeds the \$7,500.00 limit, you must also obtain a Notice of Abandonment. The particulars of your claim are filled out by you on the Civil Claim form which is given to the Provincial Court Civil Clerk along with a \$25.00 filing fee. Three copies of the claim are returned to you.

In order to properly serve the Defendant with your claim, you must include with the green copy of your claim a Dispute Note form and any Notice of Abandonment. If the Defendant is an individual it should be handed to him personally. However, service on a corporation can be done by sending the documents by single registered mail to its registered office on record at Corporate Registry.

The Defendant then has 20 days to file a Statement of Defence. If a defence is filed, you will be notified of a hearing date. If a defence is not filed you may request a default judgment or a noting in default. Your request is on a form available from the Clerk and should be accompanied by an Affidavit of Service, which is on the back of the blue copy of your Civil Claim. The Affidavit must be sworn in front of a commissioner for oaths.

A Default Judgment is requested when the amount owing is exactly known without anyone's opinion (eg. an estimate) coming into play. In all other circumstances, a

noting in default is entered and a hearing as to the amount owing is set by the clerk.

Once a trial hearing has been set, you may wish to take advantage of a pre-trial conference by requesting one in writing to the clerk. This will give you and the Defendant the opportunity to exchange documents, so you can determine what evidence they plan to use at trial.

EVIDENCE AT TRIAL

Your evidence may be put in to court in two forms.

(a) DOCUMENTS

All documents must be identified under oath either by the person who made it or the person who received it from the Defendant before it can go in as an Exhibit. If you wish to enter an Exhibit, have an extra copy for the court.

(b) WITNESSES

Witnesses other than yourself put in information as answers to questions asked of them by you. You must be careful not to ask questions of your own witness that suggest the answer (leading questions), as it makes the evidence less persuasive. Further, be aware that any witness can only testify as to knowledge he has first hand. He cannot testify as to what someone else said, as that is hearsay. Hearsay rules will also exclude written statements, written estimates or expert opinions from being admitted as evidence, without the originator of the document being present and available for cross-examination by the Defendant.

IN THE END

Once both you and the defendant have put all your evidence in, the Court will either decide immediately or reserve and decide later, the Court's decision being mailed to you. A formal judgment will be received in the mail, which will then allow you to attempt to collect it.

Even going to Small Claims Court is not cost free. You cannot claim for time you miss from work to attend or prepare. Costs can be awarded against you if you lose in any amount from \$25.00 and up. Your best bet is to avoid trial by making sure all your agreements are complete, clear, in writing and witnessed, if possible.

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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.

*The firm's partners are
TERRY M. McGREGOR
and I. MARK STILLMAN
The firm's associates are
JOHN P. POIRIER,
CHRISTINE J. PRATT
and TERI LYNN BOUGIE*

This newsletter contains general information only. It may not apply to your specific situation depending on the facts. The information herein is to be used as a guide only, and not as a specific legal interpretation.