

McGREGOR STILLMAN'S



LEGALEYE

PRO POSSE SUO

207, 10335 - 172 Street
Edmonton, Alberta, Canada
T5S 1K9
Tel: (403) 484-4445

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

EDITOR'S NOTE

Once again we are pleased to present our holiday issue of the Legaleye to our clients. We wish to take this opportunity to convey our Season's Greetings to you and your families, and wish you a safe and happy holiday.

If anyone has an idea for an article or topic which they would like to see addressed in the Legaleye, please contact the Editor, Christine Pratt, at 484-4445.



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.

BUILDING OR RENOVATING? YOU SHOULD BE AWARE OF CHANGES TO THE BUILDERS' LIEN ACT

The *Builders' Lien Act* of Alberta has been amended such that the 15% builders' lien holdback has been reduced to 10%.



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

Previously the *Builders' Lien Act* provided that an owner of real estate, who entered into a contract to build on or improve the property through either the provision of labour or the furnishing of materials, when making payment on the contract, was to retain or hold back an amount equal to 15% of the value of the work actually done and materials actually furnished for a period of 45 days from:

- (a) the date of issuance of a Certificate of Substantial Performance of the contract;
- or

- (b) the date of completion of the contract, in a case where a Certificate of Substantial Performance is not issued.

REAL ESTATE COMMISSION - FORECLOSURE

Royal LePage v. 545626 Alberta Ltd. (August 1, 1997). J.D. Calgary 94901 01499 (Alta Q.B.).

Under the revisions to the *Builders' Lien Act*, the amount of the holdback has been reduced to 10% as it relates to any contract or sub-contract entered into on or after September 1, 1997 including any contract solely for the furnishing of materials, the performance of services or the provision of work by a labourer.

A 15% holdback must still be maintained, however, in the case of any sub-contract entered into on or after September 1, 1997 including any sub-contract solely for the furnishing of materials, the performance of services or the provision of work by a labourer, that is made in respect of a prime contract entered into before September 1, 1997.

When involved in the construction of a house, or with a home renovation, one should be aware of the provisions of the *Builders' Lien Act* and the amendments that have been recently made. The legislation itself is fairly complex and the best advice is to seek legal assistance prior to entering into a construction or renovation contract in order to ensure that the provisions of the *Builders' Lien Act* are adhered to and that your interests are protected.



CAUSES CÉLÈBRES

FATAL ACCIDENT - DAMAGES

Duncan v. Baddeley (Nov. 6, 1997), [1997] SCCA No. 315 (SCC)

The Supreme Court of Canada refused to allow the Defendant to appeal a decision of the Alberta Court of Appeal allowing the estate of a person killed in an accident to sue for the money the deceased person would have made and saved if not for the accident. This decision is therefore the law in Alberta unless and until the legislature decides to amend the Survival of Actions Act in this regard.

FACTS:

During foreclosure proceedings by the bank, the Defendant owner of the land listed the property with the Plaintiff. The listing agreement contained a clause that commission was payable to the agent if the property was sold by anyone during the agreement, or within 60 days after its termination to a buyer who inspected the property during the currency of the agreement.

The Plaintiff realtor found a prospective buyer who made an offer to purchase subject to inspection. During the inspection the buyer learned of the Judicial listing and therefore withdrew his offer and re-offered for lesser amount. through the Judicial listing realtor, which offer was accepted by the Court.

ISSUE:

Was the Plaintiff entitled to commission on the sale?

DECISION:

The Plaintiff is not entitled to commission from the Defendant owner.

REASONS:

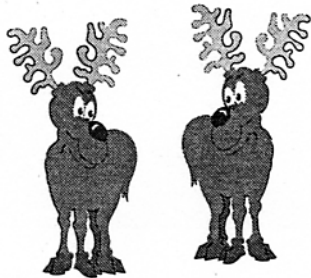
Since the property was sold by the Court, a process over which the Defendant had no control, no commission was payable by the Defendant. However, the agent may have a claim for part commission against the Judicial listing agent if his efforts were the effective cause of the sale.



FIRM NOTES

Our client seminar held in October, 1997 at the Mayfield Inn was well received. Due to client interest, our next seminar will deal largely with construction litigation. We welcome any comments on the seminar as well as suggestions for future topics.

AS WE SEE IT



'Tis the Season - A Christmas Story

Twas the night before Christmas and all through the house,
there was something stirring but it wasn't a mouse,
it was Donner and Blitzen near the kitchen sink,
fixing themselves a Christmas drink.

Said Donner to Blitzen, "I'll have another beer."
This was his fourth, not unusual for that time of year.
Said Blitzen to Donner, "It's a little after three
and I think another drink would be better for me."

So they continued till a little after five,
totally unconcerned about the sleighs they would drive.

Donner, the male, at 180 lbs, the bigger of the two
consumed three and a half Labatts Blue.

Blitzen, the female, at 130 lbs.
had four tasty drinks before completing her rounds.

They both had determined at a quarter after five,
better get started, they had a long drive.
They both then attended to each of their sleds,
not a care in the world for what lay ahead.

Both Donner and Blitzen were seated in their sled,
keys in the ignition, not a thought in their heads.

The engines were started, when from out of the dark,

A policeman shouted, "Leave those sleds in park."

The reindeer protested, they were not yet on the trail,

The policeman replied "You're still off to jail".



The above story is used to illustrate that a 180 lbs. male who consumed three and a half bottles of 5% alcohol over a two hour period, from three until five, using a standard elimination rate of 10 mg percentile per hour, would in fact be at 90 mg at 5:00 p.m.. This is over the legal limit provided under Canadian law to operate an automobile. Blitzen, the female at 130 lbs., consuming the equivalent of two 2.5 oz drinks of hard liquor using the same elimination rate would be at 100 mg at 5:00 p.m., and also in excess of the legal limit.

The charges that both would be facing are set out under the Criminal Code; specifically, sections 253(a) & 253(b) of the Criminal Code of Canada which provide that where a person operates an automobile while his ability to do so is impaired by drug or alcohol, he is guilty of the offence of impaired driving. Subsection (b) provides that where a person has consumed alcohol to the extent that there is in excess of 80 mg of alcohol per 100 mL of blood this is in contravention of the Criminal Code as well. The minimum penalties imposed for a first conviction under this section are:

- 1) A minimum driving prohibition under the Criminal Code of three months, and in Alberta a provincial suspension for an additional 9 months resulting in a driving suspension for a period of one year;
- 2) In addition to that, Donner and Blitzen will be facing fines in the range of \$500.00 - \$1,000.00 as first offenders, and a criminal record.

You will note from the factual situation that neither Donner nor Blitzen had actually operated the automobile, but were seated in the driver's seat and had started the

engine. These particular acts are governed by Section 253(1) of the Criminal Code which provide that where a person occupies the seat and position ordinarily occupied by the operator, he may be found guilty of care and control of the vehicle, unless he can rebut the presumption that he entered the vehicle with the intention of setting it in motion. Further, the Supreme Court of Canada has determined that if the vehicle is running, then the inherent danger is present that an impaired person may accidentally set it in motion. Regardless of whether the vehicle is stuck or not, a person may be convicted of the offence of having care and control, which carries the same penalties as for actually operating an automobile.

In order for the police to make a demand under the Criminal Code to provide a sample of breath they must have reasonable and probable grounds. In the event they are only suspicious they are entitled under the provisions of the Criminal Code to make a request for a roadside sample, which upon a failure being registered provides the officers with grounds to proceed to the next step, which is to request the accused to accompany them to provide a sample of breath suitable of analysis in the Intoxilyzer 5000. This device will give readings in milligrams per 100 mL of blood of the alcohol content and a certificate is issued which may be used in Court. Should the readings exceed 80 mg per 100 mL of blood this may be established through the use of a certificate. It should be noted that failure to provide a sample into the roadside tester is itself an offence and you may be subject to a suspension of up to one year and a fine as well as a criminal record. As well, at the roadside testing stage an accused is not automatically entitled to consult with counsel. However, upon a demand being made within a reasonable time from the time the vehicle is stopped, an accused person or person under investigation is entitled to consult with counsel before providing a sample into the Intoxilyzer 5000. Failure on the part of the police to permit access to counsel may result in the Courts refusing to allow the certificates outlining the blood alcohol content into evidence.

A criminal conviction may limit your ability to travel in other jurisdictions and more particularly in the United States as immigration authorities are authorized to prevent foreigners with criminal records from travelling in the jurisdiction of the United States.



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Barristers and Solicitors



#207, 10335 - 172 Street
Edmonton, Alberta, Canada
T5S 1K9

Telephone: (403) 484-4445
Facsimile: (403) 484-4184

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.