# McGREGOR STILLMAN'S

# LegalEye

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

## EDITOR'S NOTE

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.*

## DISTINGUISHING DNA - DNA DATABANK PROPOSED

The Solicitor General introduced legislation in the Fall of 1997 to allow for the establishment of a National Data Bank of DNA information. The Bank would contain the DNA records of people already convicted of designated offenses, and from unsolved crime scenes.

This proposed legislation is the second stage of changes to the Criminal Code as proposed by the Federal Government to create a structure allowing for the use of DNA evidence. The first stage was implemented in 1995, when amendments to the Criminal Code were made allowing Police to make an application for a warrant to take DNA from suspects. In this second stage, the Criminal Code will be amended again, this time to mandate that persons convicted of certain named serious offenses must provide a sample of their DNA for forensic analysis and storage in the DNA database. The database will then be used to assist in investigations involving repeat offenders and unsolved crimes.

The latest proposed amendments also include several listed offenses where provision of DNA on conviction will not be mandatory, but where the Court may order that one convicted of those offenses provide a sample of DNA for storage in the database. The Court will determine whether it is in the best interests of justice that the offender be required to provide a DNA sample.

The new proposals raise concerns for average people who are not serious or repeat offenders. The Federal Government's proposal includes safeguards to protect the privacy of DNA information by creating a number of offenses having to do with the misuse or unauthorized use of the DNA profiles. However, the DNA database will be operated and controlled by the RCMP rather than an independent organization.

**INSIDE:**

Another concern is the fact that the second schedule of offenses is very broad. These are the offenses where the Crown may ask the Court to issue an Order requiring that a DNA sample be provided, where it is in the interests of justice to do so. Some of the designated offenses are: endangering the safety of an aircraft, using explosives and failure to stop at the scene of an accident. These are not traditionally considered violent offenses.

On the positive side, the Federal Government has indicated that this proposal will assist the police in the investigation of violent and repeat criminals. Young offenders are included under the amendments. In addition to assisting in the conviction of violent offenders, DNA profiles have been used in Canada to assist in clearing the names of innocent people accused and convicted of violent crimes.

## CAUSES CÉLÈBRES

LEGAL PROFESSION - TAXATION - OBLIGATION ON LAWYER TO INTERIM BILL.

Anglin v. Zonda (August 21, 1997), J.D. Calgary 9301-15446 (Alta QB)

FACTS: The client had retained the solicitor to defend a claim worth approximately $11,000.00. The claim eventually settled, and the account rendered at that time totalled almost $42,000.00. The client took the solicitors bill to taxation.

ISSUE: Should the solicitors bill be reduced?

DECISION: The solicitors bill was reduced by approximately one-half.

REASONS: Where a client's legal bill is mounting higher than he had originally been led to expect, the solicitor should indicate so to his client. The solicitor should issue interim bills to keep the client up to date on the amount of fees.

AGENCY - LEGAL PROFESSION - AGENT FRAUDULENTLY CLAIMING TO BE A LAWYER

Wood v. Beaton (August 20, 1997), J.D. Calgary 9601 05777 (Alta QB)

FACTS: The Plaintiff hired someone she thought was a lawyer to settle her accident claim. The person was not a lawyer, but he told the insurance agent for the wrongdoer that he had authority to settle the Plaintiff's claim. He did settle the claim but did not give the money to the Plaintiff.

ISSUE: Did the insurance agent have a duty to confirm that the person had the Plaintiff's authority to accept a settlement?

DECISION: No.

REASONS: If an adjuster has been previously advised that someone has authority to settle a claim on behalf of a claimant, he does not have to check again to make sure that person has authority to accept a settlement. It does not matter that the representative was not actually a lawyer.

BANKRUPTCY - ACTION FOR WRONGFUL DISMISSAL - JUDGEMENT FOR WAGES

Wallace v. United Grain Growers (October 30, 1997). 24986 (SCC [from Man.])

FACTS: The Plaintiff commenced a wrongful dismissal action in his own name when he was summarily terminated shortly after making a voluntary assignment into bankruptcy.

ISSUE: Could the action be brought in the Plaintiff's own name, or must it be brought in the name of his estate?

DECISION: The action could be brought in Plaintiff's own name.

REASONS: While pursuant to s.67 of the *Bankruptcy and Insolvency Act* all present and future property vests in the trustee, an exception exists in s.68 to allow the Plaintiff to retain wages and remuneration subject to the trustee's right to apply for some or all of the same. This exception extends to a judgement representing lost wages.

## FIRM NOTES

The partners and staff at McGregor Stillman have declared Fridays to be "Loonie-toon" days. On these days, any staff member contributing a loony or toonie to the staff charity fund is entitled to dress in casual wear. Quarterly, McGregor Stillman will choose a charity to receive the proceeds of the fund. The chosen recipient during the first quarter of 1998 is the Edmonton SPCA.

Teri Lynn Bougie has left our firm effective April 1, 1998. Teri Lynn has not yet decided where she will be going, but we will remain up to date on where she is practicing. We wish you luck, Teri Lynn.

## AS WE SEE IT

# Mediation - The Art of Compromise

Mediation is by no means a new concept. It historically had been used by the Chinese whose Confucian philosophy was that moral persuasion and agreement were the best means to resolve a dispute. This philosophy is in direct opposition to the process of submitting a dispute to a third party for a decision, which is then imposed on parties, and is the major distinction between other forms of dispute resolution. Mediation is often confused with arbitration. The single most important distinction between the two is that in the use of arbitration, a decision is imposed on the parties, whereas in mediation, the parties are encouraged (through the use of a neutral third party whose sole purpose is to facilitate negotiation) to resolve the conflict. The result is that a mediated solution must, due to the nature of the mediation process, be one that is satisfactory to both parties.

## The Mediation Process

The mediation process itself, in a simplified form, consists of five steps. These are as follows:

1) Introduction

At this stage a neutral setting is established and normally some minimum ground rules are set. The actual mediation process is described. One of the paramount steps at this point is to ensure that both parties have a commitment to mediate and are there voluntarily.

2) Story-telling

This step is known as the story-telling step. The purpose is for each of the parties in conflict to define those issues which they view form the dispute, and as well to set the agenda for the balance of the mediation. A key factor in this step is to distinguish between assumptions and facts, and positions as opposed to interests. The positions are the different views held by each party, whereas the interests could be described as the hidden agendas of the parties involved or their bottom line.

3) The Understanding Process

This particular step can be summarized as the point in the mediation where facts versus assumptions have been generally clarified. At this point the mediator is satisfied that each party has had an opportunity to vocalize their perspective on the issues. It is hoped that at this stage the parties involved will focus on each other as opposed to the mediator. Hopefully, through this process facts can either be agreed or disagreed on depending upon the mood of the parties. It is important to understand that it is not at this stage that there is an effort to resolve a dispute. It is simply a clarification process to determine the parties' positions and clarify the reasons for their respective positions.

4) Problem Solving

This step is commonly known as the problem solving step. In general terms its purpose is to brainstorm and hopefully generate options to satisfy the various parties' interests and needs. Generally, there is usually a discussion about what each party would consider a "fair" resolution to their dispute.

5) Reaching an Agreement

It is at this point that, hopefully, the issues have been resolved through the review of options available to the parties. If consensus is arrived at a written memorandum may be prepared using clear and concise language as to the solutions arrived at by each party. Both parties would be invited to review the memorandum prepared and confirm its accuracy. In some cases the parties are requested to sign the memorandum. A copy of the memorandum would be provided to each party. Depending upon the process enforcement provisions may be contained if this is agreeable to the parties.

The mediation process itself is often confused with negotiation. The difference between these two concepts is mediation's use of a neutral third party, as mediator. The benefits to mediation over alternative dispute resolutions such as arbitration, litigation or negotiation include:

1) The speed within which a matter can be resolved. The time frame can usually be shortened substantially over litigation or arbitration. Anyone who has been involved in litigation understands and appreciates that due to the increasing workload of the civil courts it is not uncommon for a matter to take months and/or years before trial dates can be provided due to the backlog of cases. The length of time involved in mediating a conflict is basically dependent only on the complexity of the issues and not outside agencies;

2) Mediation avoids additional costs of legal fees and court costs associated with the litigation process;

3) Its ability to ensure privacy. The use of the civil court process by its very nature makes the parties to the dispute and the issues being dealt with by the parties a matter of public record, as documents are filed at the Courthouse to which the public has access;

4) Voluntary procedure resulting in a solution rather than a winner and loser result.

One of the potential downsides of the use of mediation is that there is simply no mechanism to enforce mediated settlement as is the case with arbitration awards or Court Orders. However, in many instances it is possible to reach a mediated settlement, and as part of your settlement have an agreement that may be enforced by Court Order.

Mediation is not always the best way to proceed when legal difficulties arise, but it is an alternative for all parties to consider both before and after conflicts arise.

*McGregor Stillman lawyer, Mr. John Poirier is a qualified mediator, and has been a member of the Arbitration and Mediation Society since 1989.*

*This article 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.*


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*The law firm of McGregor Stillman is a four 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 and*
*CHRISTINE J. PRATT*

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