McGREGOR STILLMAN THOMAS'S

LegalEye

PRO POSSE SUO

VOL 4, No.2 WINTER, 2000

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

EDITOR'S NOTE

Our office will be closed during the holiday season from December 23, 2000 until December 27, 2000. Our office is open December 28 and 29, 2000. We will also be closed January 1, 2001. We wish you all the best this holiday season, and a safe and happy New Year!

HEADS UP

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

CHANGES TO THE CONDOMINIUM PROPERTY ACT WHICH CONDOMINIUM OWNERS SHOULD BE AWARE OF

By Mark Stillman

Numerous changes to the *Condominium Property Act and Regulations* took effect in Alberta on September 1, 2000. With the removal of almost all references to "Residential Condominium Units", the provisions of the Act and Regulations now apply to all forms of condominium - residential, commercial, industrial, recreational, etc.

Condominium Corporations have new powers to set and collect condominium contributions. Condominium fees, as they are commonly known, are the major source of income for the Condominium Corporation. The *Condominium Property Act* now allows the owners, by special resolution to change the by-laws of the corporation, to set a formula for allocating condominium fees that is different than unit factors. The Act now allows a mortgage company to pay any outstanding contribution amount owing on behalf of the owner and add that amount to the mortgage. If an owner rents the unit and the owner is not paying the condominium fees on time, the Board of the Corporation can demand the tenant to pay the rent to the Corporation to cover outstanding condominium fees. The Act protects the tenant because it deems that payment to the Condominium Corporation is rent paid to the owner. In the event the Corporation files a caveat against the title of a defaulting owner, the caveat remains until paid – even in the event of foreclosure. The Act also allows the Corporation to collect all its reasonable costs of recovering condominium fees, including legal expenses.

The amended *Condominium Property Act* contains new disclosure provisions for the corporation including information on post tensioned cables, amount of the reserve fund, amount of monthly contributions for the unit, unit factors for the unit and how they are set, information about any structural deficiencies known to the Board, and any lease agreements or exclusive use agreements, including a parking stall or storage unit.

A new provision in the legislation allows persons to use mediation, conciliation or arbitration to resolve condominium disputes of all types. Corporations may consider adopting by-

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laws which set out which types of disputes will go first to mediation, which will use arbitration, which may proceed directly to court, and those which may use all three. The by-laws may provide for who pays what costs or that the parties can agree, on a case by case basis, or ask the arbitrator to decide.

Reserve funds are now mandatory. Every condominium must now conduct a reserve fund study to determine how to fund the reserve fund. The study must be conducted by a "qualified person" who is defined as being a person who, based on reasonable and objective criteria, is knowledgeable about depreciating property, the operation and maintenance of that property, and the costs of replacements or repairs to that property. Condominium Boards should tender for a reserve fund study, the same as it would tender for any other contract. Every five years, condominium corporations must retain a qualified person to conduct a reserve fund study, receive a reserve fund report, prepare and adopt a reserve fund plan, and present the reserve fund plan to the owners for their information. New condominium corporations created after September 1, 2000 have two years from registration of the condominium plan to retain a qualified person to conduct a reserve fund study and to establish a reserve fund. All owners must receive a copy of the Board's approved reserve fund plan before money is collected for the fund. At every annual general meeting after the study is complete, the Board must give an annual report on the reserve fund that includes the opening balance, payments made in and out of the reserve fund, and a list of the property components repaired or replaced during the year. At any time, an owner or a lender can ask for a copy of the reserve fund plan or annual report and can ask to see the reserve fund study report.

The amended legislation differentiates doors and windows on the interior walls of the unit from those on the exterior walls of the unit. Under the previous legislation, it did not matter on which wall the door or window was located. Now, owners and Corporations must first determine whether a door or window is on an interior or exterior wall. The amended legislation shifts responsibility for doors and windows on exterior walls of the unit from the unit owner to the Corporation, unless the condominium plan states the unit owner is responsible for them. The regulations under the *Condominium Property Act* create a short time period (until September 1, 2002) for condominium Corporations and owners to alter the impact of this change by adopting a special resolution to amend the condominium plan.

The new legislation gives owners of condominiums a new way to challenge the actions of the condominium Corporation or its Board. A new section in the *Condominium Property Act* allows anyone with an interest in the property, including an owner, to seek a court remedy for "improper conduct" by a developer, the condominium Corporation, an employee of the corporation, a director, or another owner. Improper conduct is considered to be non-compliance with the legislation, oppressive or unfairly prejudicial actions by the Board or in the operation of the corporation, or by the developer or the developer's Board. The legislation empowers the Court to remedy improper conduct, including appointing an investigator, giving directions to stop or change the conduct, compensating the applicant and awarding costs.

The foregoing is only a brief outline of some of the amendments to the legislation in Alberta governing condominiums resulting in significant changes to the rights and obligations of developers, owners, mortgage companies, condominium corporations and their Boards.

CAUSES CÉLÈBRES

Bankruptcy Cases: "Fool Me Once..."

This past summer, Alberta Court of Queen's Bench Master Michael Funduk, sitting as the Registrar in Bankruptcy, released a series of decisions dealing with individuals who had gone bankrupt for a second time. The decisions are Re O'Dell, Re Schrag, Re Schwartz, Re Lavigne, Re Cardinal, Re Anderson, Re Van Bavel, Re Lloyd, Re Noble, Re Humeniuk, Re Clarke, Re Fauser, and Re Hojjati.

The facts in the above cases are quite similar and the facts from three of the decisions are illustrative of the whole line of cases. In Re Noble, the bankrupt was 30 years old, and had first assigned himself into bankruptcy in February of 1997. He listed unsecured creditors at that time totaling $45,850.00. These creditors received nothing from the first bankruptcy. 21 months after he was discharged from his first bankruptcy, the bankrupt assigned himself into bankruptcy again, this time listing unsecured creditors of $38, 870.00. In the year prior to the second bankruptcy, the bankrupt spent $9,000.00 on a one-week trip to Disney World.

In Re Humeniuk, The bankrupt was 30 years old and he had assigned himself into bankruptcy in August of 1996, listing creditors totaling $14,120.00. He assigned himself into bankruptcy again in September of 1999, listing unsecured creditors totaling $89,487.00.

In Re Lloyd, the bankrupt was 40 years old, with no dependents. He had first assigned himself into bankruptcy in August of 1993, listing unsecured creditors in the amount of $69,638.00. He assigned himself into bankruptcy a second time in September of 1999, with proven unsecured creditors in the amount of $93,904.00, including Revenue Canada in the amount of $51,000.00.

Registrar Funduk had the following to say in these cases:

"This is a gross abuse of the Bankruptcy and Insolvency Act. For a $1,100.00 "solvent" fee, the bankrupt expects to get rid of $89,487.00 in debts." (Re Humeniuk)

"The alleged cause of the bankruptcy is the cookie-cutter "over extension of credit". The Bankruptcy and Insolvency Act is not to be periodically used as a debt-clearing house." (Re Schwartz)

"The Trustee says that the causes of bankruptcy are "marital problems and over-extension of credit. The second euphemistic ground is a meaningless cookie cutter reason blandly mouthed in virtually every bankruptcy". (Re Lavigne)

"The Trustee recommends a six month suspended order "because of the second time bankruptcy". This recommendation is grossly inadequate. Bankruptcies are not supposed to be a cash cow for trustees." (Re Cardinal)

This is another example of the spiralling use of the Bankruptcy Insolvency Act by financially irresponsibly bankrupts who have not learned anything from their first bankruptcy, except possibly that a formal bankruptcy is a golden mecca for borrowing and buying and not having to pay." (Re Lloyd)

"This is an abuse of the Bankruptcy and Insolvency Act. Parliament prefers to dump the problem onto the Courts rather than facing and dealing with recidivist bankrupts by legislation. After all, it is easier for legislators to dump problems onto the Courts and let the Courts be criticized by the public at large. Repeat bankruptcies are now almost as common as injury lawyers." (Re Van Bavel)

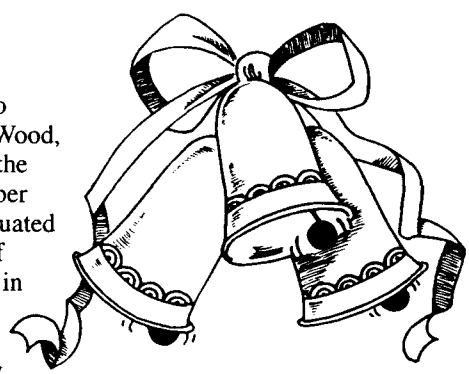
"Bankruptcy is fast becoming an economic planning tool by many debtors. The purpose of the Bankruptcy and Insolvency Act is to let honest but unfortunate debtors make a fresh economic start and reintegrate themselves into the economic society. The Bankruptcy and Insolvency Act is not to be used as a periodic whitewash." (Re Schrag)

In Re Noble and Re Humeniuk and Re Schwartz, Registrar Funduk ordered that the bankrupt will pay the Trustee's fees and all proven unsecured creditors 100 cents on the dollar, that the bankrupt's discharge from bankruptcy would be suspended for 15 years, and the Trustee will advise the bankrupt in writing of section 199 of the Bankruptcy and Insolvency Act.

In the other cases, the bankrupt's discharge from bankruptcy was suspended from between 15 and 25 years, and in all cases, the Trustee was advised to tell the bankrupt in writing of section 199 of the Bankruptcy and Insolvency Act.

S. 199 of the *Bankruptcy And Insolvency Act* provides that a undischarged bankrupt who either (a) engages in any trade or business without disclosing to all persons with whom the undischarged bankrupt enters into any business transaction that the undischarged bankrupt is an undischarged bankrupt, or (b) obtains credit to a total of $500.00 or more from any person or persons without informing such persons that the undischarged bankrupt is an undischarged bankrupt, is guilty of an offence punishable on summary conviction and is liable to a fine not exceeding $5,000.00 or to imprisonment for a term not exceeding 1 year, or to both.

FIRM NOTES



We are very pleased to announce that Karen Wood, B.A., LL.B. will join the firm effective November 27, 2000. Karen graduated from the University of Alberta with a degree in Political Science and History, and then went to the University of British Columbia for her law degree. She returned to article with a small Edmonton firm and was admitted to the Bar in 1999. Karen's main areas of concentration will be civil litigation and legal research, but will be handling other files as well.

In June 2000, we were pleased to welcome Teddi Lothian as a Legal Assistant primarily in the area of family law, as well as taking on the job as the Firm's systems coordinator. Teddi has a wealth of experience in the private business sector which will aid her, and us, immensely.

Mark Stillman was an examiner for the September 2000 session of the Law Society Bar Admission Course in the Client Interviewing and Counselling course.

Terry McGregor was appointed to the Law Society Pro Bono Committee which is working towards establishing free legal clinics for disadvantaged people in Edmonton and possibly other major centres in Alberta

AS WE SEE IT

OFF TO COURT WE GO - STREAMLINED PROCEDURE
BY TERRY J. THOMAS

Streamlined Procedure has been refined with the latest amendment to the Alberta Rules of Court, occurring in May 2000, which can be found in the Alberta Rules of Court at Part 48, Rules 659 through 673. The Streamlined Procedure applies where the amount being claimed is $75,000.00 or less, not including interest and costs. In short, the Streamlined Procedure facilitates a quicker resolution to a dispute and a matter may be resolved within 12 to 15 months, as opposed to two to four years.

To facilitate a speedy resolution, each party must file and serve an Affidavit of Records within 30 days after the closing of the pleadings (being the Statement of Claim and the Statement of Defence). Any party which fails to comply with the deadline, disobeys any of the Rules, or by Order, shall be ordered to pay costs in any event and forthwith.

The Streamlined Procedure does not apply to any action commenced before September 1, 1998 unless an agreement that it should apply is filed with the Clerk, and the Court orders that it should apply.

Please note the Streamlined Procedure does not apply to divorce, foreclosure, specific performance actions, judicial practice and civil matters or judicial review and civil matters.

If the specific rules with respect to an issue or matter are not found in the Streamlined Procedure rules, then the other rules set out in the Alberta Rules of Court continue to apply. A party must supply to the requesting party a copy of the producible documents listed in the Affidavit of Records if a request is made, and copy charges paid. The party requesting a copy of the producible records from the Affidavit of Records need not proceed to Examinations for Discovery until such are supplied.

The Affidavit of Records must include records on which the party filing the Affidavit of Records relies or may rely; records which assist or may assist the case of any adverse party and any records directly relevant and material to the issues in the action.

Examinations for Discovery of a party are limited to no more than six hours of actual examination, not including recesses or answering undertakings, but including examining on answers to undertakings. The parties may further restrict, or may extend the time limits for Examinations for Discovery by filing a written consent with the Clerk of the Court. The party being examined for discovery must make all reasonable efforts before attending at the Examinations for Discovery to be fully informed of the matters and issues in the action. However, a party may elect to discover by written interrogatories, which are not to exceed 1,000 words.

Evidence may be given by Affidavit at trial and is to include cross-examination on the Affidavit. If evidence is to be given by Affidavit, the Affidavit is not to be filed if cross-examination is still outstanding. If there is cross-examination on an Affidavit, it is to be filed together with the Affidavit. The Affidavit is to be served upon each opposing party in interest at least 90 days before trial. If an opposing party objects, the opposing party must file and serve a written Notice of Objection within 15 days of having been served with the Affidavit. If a Notice of Objection is filed and served, then the Affidavit cannot be received in evidence without leave of the trial Judge or written consent of counsel.

A party may apply for a pre-trial conference after Examinations for Discovery have been completed, even if undertakings remain outstanding. If a pre-trial conference is ordered, the Court can also order that the Plaintiff file and serve a Statement of Facts and Issues at least 21 days before the pre-trial conference; that the Defendant file and serve an Answer within seven days following receipt of the Plaintiff's Statement of Facts and Issues; and that the Plaintiff may serve an Answer to the Defendant's Statement of Facts and Issues within seven days of receipt of the Statement of Facts and Issues. The facts in a party's Statement of Facts and Issues which are not disputed by the opposing party will be deemed to be admitted if such was ordered at the time the exchange of the Statement of Facts and Issues was ordered.

Each party is to file and serve upon the other parties a written statement of the factual and legal theory of its case at least seven days before the commencement of the trial. This statement is not to be more than five pages in length, and is to include a list, in point form, of the major facts of law upon which the party will rely.

Case management is available under the Streamlined Procedure.

No interlocutory applications can be made more then six months after the close of pleadings.

In short, the Streamlined Procedure as set out in the Alberta Rules of Court may be an effective means to facilitate a speedy resolution to a dispute that otherwise may take two to three times as long to resolve.

Should you have any questions concerning the Streamlined Procedure and how it may assist you in your dispute, please feel free to contact McGregor Stillman Thomas.

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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
I. MARK STILLMAN
and TERRY J. THOMAS
The firm's associates are
RICHARD D. SMITH
KAREN G. WOOD