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

EDITOR'S NOTE

Please contact Richard Smith at 484-4445 ext. 303, with any suggestions for future articles, or with any comments you may have.

HEADS UP

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

Keeping Personal Information Private

-By Greg Bentz

As of January 1, 2004, the Governments of Canada and Alberta, as well as a couple other provinces, enacted new privacy legislation. This legislation, Federally called *Personal Information Protection and Electronic Documents Act*, and Provincially called *Personal Information Protection Act*, forces all those involved in commercial activities to keep personal information it has secret.

This has a tremendous impact on individuals and businesses alike. In this article, Part 1 in a 2 Part series, we will discuss what this legislation means to individuals.

Essentially, the legislation governs who has access to and for what purposes businesses collect, use, and disclose personal information. Personal information is broadly defined, subject to certain exceptions, as information that can lead to the identity of an individual.

The legislation empowers individuals to know why and control who has collected and used their personal information. It requires businesses, subject to certain exceptions, to show a purpose and seek consent from individuals, before the business can collect or use the personal information. At any time, an individual may revoke their consent or simply ask to see what personal information the business has collected.

Should an individual wish to see their personal information, or wish to correct information that is incorrect, subject to the rights of other individuals, a simple request to the business and the individuals information will be provided free of cost. If there is a cost associated with the retrieval of the information, the business must notify the individual prior to charging. Should the business not comply, the legislation allows for the individual to contact the Privacy Commissioner to lodge complaints.

Finally, unless there are good reasons, as laid out in the legislation, the business must not disclose an

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individual's personal information, without first explaining why, and obtaining consent. This includes disclosing information to a third party who has made a request for information through the new legislation.

The legislation gives individuals control over who and how their personal information is collected, used, and disclosed. As such it creates very important rights for individuals with respect to their privacy.

As a law firm, McGregor Stillman LLP, is required to comply with the legislation and is obligated by similar rules of confidentiality imposed by the Law Society of Alberta. For further and a more detailed view of our privacy statement, please visit our website at <www.mcgregorstillman.com>.

Next issue, what does this legislation mean to businesses.

FIRM NOTES

Roy Verma, University of Alberta graduate, has joined the firm as an articling student. He commenced his year of articles on June 30, 2004.

We would like to congratulate our former articling students, Chris Hoose and Greg Bentz, who have been admitted to the bar this July and are staying with the firm as associate lawyers.

Our firm has recently acquired Michel St. Pierre's practice as Michel is retiring. Michel will remain with the firm for the next 6 months, as a liaison and advisor.

In August Mark Stillman will be an evaluator and examiner for the interviewing and counselling component of this year's bar admission course.

In April of this year, Richard Smith was presented with an award from the Honourable Dave Hancock, Q.C., Minister of Justice and Attorney General of Alberta, for his service to the Child Support Resolution Officer Pilot Project.

CAUSES CELEBRES

By Richard Smith

Gerber v. Telus Corporation et al. (2003 ABQB 453)

The Plaintiff was an employee of Telus from 1989 until 1999. In 1998, she was diagnosed as suffering from Chronic Fatigue Syndrome ("CFS"), and she applied for and was approved for disability benefits under the Telus Corporations Disability Income Plan ("the Plan"). Her disability benefits were terminated by the Defendants on December 31, 2000 and the Plaintiff did not return to work. The Plaintiff sued the Defendants for reinstatement of her disability benefits, and, among other things, aggravated damages.

Madam Justice Rowbotham of the Court of Queen's Bench held that a Plaintiff must provide medical evidence of a continuing disability to the Defendants and that once the Plaintiff has established a continuing disability, the onus then shifts to the Defendants to satisfy the Court that the medical evidence was not satisfactory to support a finding a continuing disability. After reviewing the various medical opinions of the doctors who gave evidence at the trial, Madam Justice Rowbotham held that the Plaintiff had established that she continued to be disabled, and that the Defendant had not discharged their obligation to prove that the medical evidence was not satisfactory to support a finding of continued disability. Accordingly, on this portion of the lawsuit, Madam Justice Rowbotham held that the Plaintiff was entitled to reinstatement of her disability benefits from the date of termination of benefits to the date of the Judgment.

This case becomes more interesting when looking at the decision as it relates to the Plaintiff's claim that she was entitled to aggravated damages from the Defendants. Aggravated Damages are awarded to compensate the Plaintiff and are equated with the mental distress suffered by the Plaintiff as a result of the Defendant's actions. A party can claim aggravated damages without having to prove that they have suffered a separate, actionable wrong. Therefore, the conduct of the Defendants leading up to the termination of the Plaintiff's benefits including the manner in which she was advised of the termination of benefits formed the basis for the Plaintiff's aggravated damages claim.

Madam Justice Rowbotham found that the manner in which the Defendant had informed the Plaintiff that her disability benefits were terminated was harsh. When the Plaintiff's benefits were terminated, the Defendants left the Plaintiff with the impression that the only option available to her was to return to work full time commencing January 2, 2001. When the Plaintiff advised the Defendant that she could not return to work full time on January 2, 2001, she was told that she only had three options available being a reassessment of her claim, a termination package, or termination without a package. The Defendants did not acknowledge that it may be difficult for the Plaintiff to return to work, or suggest any assistance in helping the Plaintiff return to work, or provide a gradual work plan.

All of the foregoing was very distressing to the Plaintiff as at that point the disability benefits were her sole source of income. The Plaintiff's health deteriorated as a result. In addition, the Plaintiff's credibility was continually challenged despite the evidence of all the medical practitioners who had spent significant periods of time with her, including two medical professionals who were selected by the Defendants to perform independent medical examinations on the Plaintiff. In reviewing the totality of the actions of the Defendants, Madam Justice Rowbotham found that the Plaintiff was entitled to an award of aggravated damages, and that an award of $20,000.00 was justified.

The Defendant's appeal of the decision to the Alberta Court of Appeal was dismissed.

AS WE SEE IT
By Chris Hoose

AUTOMOBILE INSURANCE REFORM – WHO REALLY BENEFITS?

Automobile insurance reform has been a hot topic for Albertans and the government for some time now. The debate has been played out in the legislative assembly, the media, in legal circles and in thousands of homes across Alberta by people affected by soaring premiums.

One of the main reasons put forth in the year 2003 by the insurance industry to the Alberta Government on the need for auto reform, specifically caps on automobile injury awards, was the tremendous amounts of money auto insurance companies were losing due to increases in personal injury awards.

The theory behind automobile insurance reform was that the automobile insurance companies would lower insurance premiums in exchange for the introduction by the Alberta Government of a no fault system of auto insurance whereby awards for personal injury damages would be greatly reduced.

The Alberta Government responded by introducing Bill 53, an act that was designed to amend the Alberta *Insurance Act* by lowering amounts paid to individuals injured in auto accidents. In anticipation of the introduction of Bill 53, the Alberta Government passed a regulation in the fall of 2003 that froze any increases in insurance premiums.

Bill 53 was generally designed to lower personal injury awards in 2 main ways.

First, Bill 53 changes how certain heads of damages are calculated. Prior to January 26, 2004, when calculating damages for personal injury awards, tax issues were generally not considered. On January 26, 2004, the Alberta Government proclaimed sections 4, 6, 14, and 23-25 of Bill 53. A result of this has been that now all heads of damages must be reduced by all payments a claimant received due to the accident from sources as income replacement plans or other disability benefits. A simplified example would be: if an individual were injured and to receive a settlement including $10,000.00 for loss of income, but that individual had already received $5,000.00 from an income replacement plan for which he paid the premiums, the net award for loss of income, subject to other complicated tax issues, would be reduced to $5,000.00 minus applicable deductions.

The second way the Bill 53 reduces personal injury payouts is by capping general damages awarded for pain and suffering at $4,000.00 for "minor injuries." This is where the Government has received the most pressure from insurance companies.

If the insurance companies propaganda was to be taken at face value, a case may indeed exist for insurance reforms including capping general damages.

However, there are three major concerns that have been glossed over in Government releases and the media:

1. In the year 2003 the insurance companies of Canada posted collectively one of their largest profits ever, topping the $2 Billion dollar mark;

2. The "theory" behind auto reform called for a reduction in auto premiums. It was just announced on May 18, 2004, that there will be a 5% government forced reduction in that portion of auto premiums covering third party liability and property damage but not for collision damage. However, these changes, if they do come into force, will not take effect until "later this year". No fault insurance were instituted seldom provides the promised reduction in auto insurance premiums;

3. Also, it is well acknowledged in legal circles that 90 – 95% of all civil claims are settled prior to trial. This means that the insurance companies are willingly settling almost all motor vehicle claims under the present legislation.

Despite the insurance industries record profits, the Alberta Government seems undeterred on their drive to automobile insurance reform with the insurance companies behind the steering wheel. It appears as if the inflated premiums that individuals have been paying over the past two years were an attempt to create an artificial crisis among the public in order to put pressure on our elected representatives.

The bottom line of auto insurance reform is simple – regular drivers and injured individuals will receive less and pay the same for premiums, or marginally less, while the insurance companies will continue to enjoy growing profits.

Call your MLA and ask him or her to explain the system to you. See if you benefit in either the long, or the short, term. We'd appreciate knowing what their answers are. Thanks in advance.

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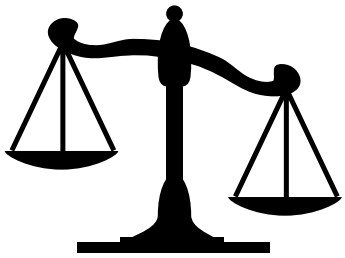

McGregor Stillman LLP is a general law firm formed in 1993 with emphasis on Civil Litigation, Corporate and Commercial matters, Real Estate, and Wills and Estates and Family Law. The firm represents clients throughout Alberta, and has also represented clients from British Columbia, Saskatchewan, Manitoba, Yukon, Northwest Territories, Ontario, Quebec and various parts of the United States.

The firm has a well established network of agents in Canada, includingVancouver, Vancouver Island, Calgary, Regina, Saskatoon, Winnipeg, Toronto and Montreal. McGregor Stillman LLP also has established affiliations with various law firms throughout the United States and Great Britain.

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