McGREGOR STILLMAN'S

LegalEye

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

EDITOR'S NOTE

Our office will be closed during the holiday season from December 24 until December 29. Our office is open during regular business hours December 29, 30 and 31st. We will be closed January 3, 2005.

We wish you all the best this holiday season and a safe and happy NewYear!

Please contact Christopher Hoose at 484-4445 ext. 316, 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.

Business and Privacy Legislation

By: Greg Bentz

In our last issue, Summer 2004, we discussed the impact, on individuals, of the newly enacted privacy legislation: the Federally created *Personal Information Protection and Electronic Documents Act* (*PIPEDA*); and the Provincially created *Personal Information Protection Act* (*PIPA*). These statutes give individuals who deal with organizations privacy rights. Likewise, they impose on organizations the obligation to keep an individual's information private.

Any business or organization that carries on commercial dealings is considered an "organization" pursuant to the new privacy legislation. This includes corporations, unincorporated association, unions, partnerships, and individuals acting in a commercial capacity. These organizations have a duty to see that the personal information that they collect, use, and disclose is done with the consent of the individual person and within the parameters of the privacy legislation.

Consent is obtained in different ways and may be granted expressly or by implication. Depending on the circumstances, an organization may be required to obtain consent through a written authorization, whereas sometimes consent may be implied by the conduct of the parties. For example: an organization that wishes to disclose an individual's personal information (i.e. medical/financial) that was collected in strict confidence, to a third party for profit, would likely require written consent before disclosing this information to the third party. However, an individual's consent would likely be implied if the organization collected the personal information strictly to enable the organization to contact the individual in the case of emergency. The nature and confidentiality of the information and the use for which it collected and disclosed will determine the level of consent required.

The organization must not only seek consent from the individual but it must disclose to the individual the express purpose for which the personal information will be collected, used, or disclosed. This may be done by an express written document or

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by implication depending on the situation and the importance of the purpose for which the information is to be collected, used, or disclosed.

An organization may have disclosed to the individual the purpose for which they collected that individual's personal information, and the individual may have agreed to allow collection. However, when an organization collects information for an express purpose, with the consent of the individual, express or implied, the organization in no way may use, or disclose that personal information for any other purpose.

The bottom line for organizations is that they are accountable for the protection of personal information under their control. Not only must they seek consent and disclose the purpose of the collection, use, and disclosure of personal information, but also they must ensure that the proper safeguards are in place to prevent the escape of personal information. An organization will be held liable for information that is disclosed (where there has been no consent) if there has been no reasonable attempt on the part of the organization to keep the information secure, regardless if that information was stolen, lost, or mishandled.

Personal information must also be kept up to date and individuals have the right to know the personal information the organization has on them. The organization may prohibit the individual from accessing their personal information held by the organization if, by disclosing the information to the individual, it would disclose the personal information of another individual.

Organizations must have a privacy policy and provide access to their privacy policy. The organization is also responsible for providing a mechanism whereby an individual may challenge an organization's compliance with the applicable privacy legislation. For example, an organization must have a contact person to whom an individual can contact with respect to their privacy issues as well as provide contact information for the appropriate government agency.

The new privacy legislation has put a positive obligation on the part of businesses or organizations to keep personal information private. These obligations make it easier for individuals to know the purpose for which their personal information has been obtained, and makes the storage of their personal information safer, more secure, and accurate.

FIRM NOTES

We would like to welcome Christine Alvarez who has joined us and will be providing assistance in our Real Estate Department.

We would also like to welcome Jennifer Sabourin who has joined us as an accounting assistant.

Also, Lori Paquette has joined our firm beginning December 1 and will be providing assistance as our Family Law Paralegal.

Rod Duncan has left our offices effective October 1, 2004 to pursue his career in other areas – Good Luck Rod and best wishes.

Elana Yaremkevich has also left our offices to pursue her career in other areas – Good Luck Elana and best wishes.

We are pleased to announce our new and improved website at www.mcgregorstillman.com.

CAUSES CELEBRES

Retroactive Child Support: *Leithoff v. Leithoff, 2004 ABQB 698*

By: Richard Smith

The parties separated at the end of 1999. Between that time and the end of 2003 the parties were on amicable terms and Mrs. Leithoff had unrestricted access to a substantial joint bank account to which Mr. Leithoff contributed. Mrs. Leithoff applied to the Court in 2004, seeking $93,108.00 in retroactive child support for the 4 year period from January 2000 to December 2003.

The Honourable Madam Justice Veit of the Court of Queen's Bench of Alberta set out the factors to be considered on an application for retroactive child support. The factors in favour of ordering retroactive child support are:

1. The need on the part of the child and a corresponding ability to pay on the part of the non-custodial parent;

2. Some blameworthy conduct on the part of the non-custodial parent such as incomplete or misleading financial disclosure at the time of the original order;

3. The necessity on the part of the custodial parent to encroach on his or her capital or incur debt to meet child rearing expenses;

4. An excuse for delay in bringing the application where the delay is significant; and

5. Notice to the non-custodial parent of an intention to pursue maintenance followed by negotiations to that end.

The factors which are against the ordering of retroactive maintenance include:

1. The order would cause an unreasonable or unfair burden to the non-custodial parent;

2. The only purpose of the award would be to redistribute capital or award spousal support in the guise of child support; and

3. A significant, unexplained delay in bringing the application.

In applying the general principles set out above to this particular case, Madam Justice Veit noted that there was no suggestion that the parties' children had any needs that were not met during the period in question. Also, there was no blameworthy conduct on Mr. Leithoff's part in attempting to hide any assets from his wife.

There was no explanation as to how much money Mrs. Leithoff had borrowed from friends and family particularly when she had access to a substantial bank account during the whole period in question and Mrs. Leithoff had never even hinted at a claim for child support. A four year delay in claiming child support was a significant delay and Mrs. Leithoff has not explained the delay.

Finally, Madam Justice Veit found the only purpose of a retroactive award at this stage would be to redistribute capital between the parties (and in fact Mrs. Leithoff went so far as to acknowledge that there was a component of spousal support in her retroactive child support claim.)

In the end result, Madam Justice Veit, while acknowledging the court has the capacity to award retroactive child support, concluded that this was not a situation in which such an award should be made and accordingly Mrs. Leithoff's claim for $93,108.00 in retroactive child support was dismissed.

97320 Alberta Ltd. v. Lindstrand Auction Ltd., 2004 ABPC 102.

By: Greg Bentz

This action arose when the corporate Plaintiff did not receive payment for goods that it had sold to the Defendant Lindstrand Auction Ltd. (Lindstrand). Lindstrand had an arrangement with Remote Auto Source Inc. (Remote) in that Remote would purchase goods from the Plaintiff. For its efforts, Remote would receive a finder's fee paid by Lindstrand.

The evidence adduced at trial indicated that there were two separate transactions. First, invoices were sent from the Plaintiff to Remote for the goods and the purchase price. Then, secondly, invoices were sent from Remote to Lindstrand for the goods, the purchase price, and the finder's fee. When the Plaintiff failed to receive payment from Remote, and the Plaintiff commenced action against both Remote and Lindstrand, Lindstrand argued that it had never entered into any agreement with the Plaintiff and as such was not the proper party to be sued.

The Honourable Judge Hope, of the Alberta Provincial Court, found that despite there being two transactions (or two sets of invoices), Lindstrand had engaged in a contractual relationship with the Plaintiff by way of agency. Lindstrand had used Remote as its agent, for a finder's fee, to procure the goods for itself. Hope J. found that Remote was the agent of Lindstrand and had entered into an agreement with the Plaintiff on behalf of Lindstrand. Accordingly, Lindstrand was deemed to have entered into a contractual relationship with the Plaintiff. The Plaintiff carried out its end of the bargain by sending the goods to Lindstrand through its agent, Remote.

Accordingly, the Honourable Hope J. found that Lindstrand had failed to pay the purchase price, therefore had breached the contract, and was liable to the Plaintiff.

This case demonstrates that when doing business one must keep in mind that agency and agents are legal concepts. An agency may be found to exist despite what the parties have called the relationship. Even where a party may have acted outside the traditional role of an agent, depending on the circumstances an agency relationship may be found to exist. The law will not be governed by what parties call one another, but rather what the parties reasonably intended to occur.

AS WE SEE IT

By: Roy Verma

Bill 29, the Alberta *Law of Property Amendment Act* ("LOPAA"), came into force on August 1, 2004, along with the *Law of Property Regulation* (LOPR).

Prior to the passing of LOPA, only the Canada Mortgage and Housing Corporation (a federal Crown agency) could pursue a mortgage holder for the balance owing after foreclosure on a property (known as a "deficiency"). Previously, the general rule under the Alberta Law of Property Act was that if the sale of a property did not cover the total amount owing on a mortgage, private-sector insurers were not able to sue for the deficit.

LOPAA was enacted with the purpose of evening the playing field for private mortgage default insurance providers, and ensures that *all* providers of mortgage default insurance in Alberta have the ability to sue borrowers for any balance owing when there is a default on a high-ratio mortgage.

A "High-ratio mortgage" is defined by the LOPR as "a mortgage of land given to secure a loan under which the specific principal sum of the mortgage, together with the specific principal sum of any existing encumbrance on or mortgage of the same land, exceeds 75% of the market value of the land at the time the mortgage is given." Typically, high-ratio mortgages are those where borrowers have placed a small down payment on a property.

What do the changes in the LOPAA and LOPR mean for you?

First, on new mortgages made on or after August 1, 2004, if the loan is insured and the loan-to-value ratio at the time of placement is 75% or less, providers of mortgage default insurance cannot sue the borrower for any deficiency. However, if the loan-to-value ratio is 76% or higher, the borrower is liable to being sued for any deficiency.

Second, the new laws do not apply to loans existing prior to August 1, 2004 as these loans and their renewals are exempted. Direct CMHC loans, both old and new, are unaffected by the changes and pre-Bill 29 rules will continue to apply to these loans.

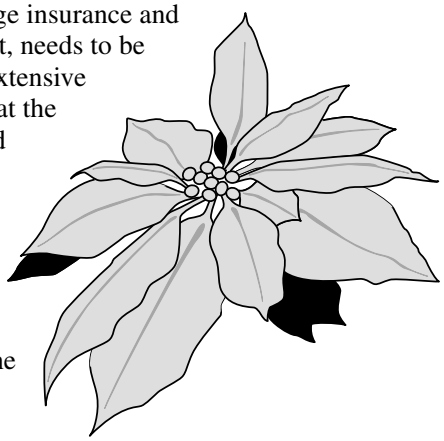
Finally, a further change will occur on August 1, 2006. Mortgages placed after this date that secure high-ratio insured loans must contain a prominently published statement of their nature. The form is prescribed by the LOPR and is as follows:

> "This mortgage is a high ratio mortgage to which sections 43(4.1) and (4.2) and 44(44.1) of the *Law of Property Act* apply. You and anyone who, expressly or implied, assumes this mortgage from you, could be sued for any obligations under this mortgage if there is a default by you or a person who assumes this mortgage".

As E. Mirth, Q.C. states, the two year deferral is designed to allow lenders and lawyers an opportunity to revise their forms.

According to legislators, these changes were made in keeping with Albertans' belief that public institutions and Crown corporations such as CMHC should not have a competitive advantage over their private sector counterparts. As Marlene Graham, Q.C., MLA, states: "This is simply a matter of fairness…high-ratio mortgages present a unique risk because of the small down payment on a large asset such a house. High risk investors should not be able to walk away from their investment, letting someone else absorb the loss."

Notwithstanding the changes, some lawyers argue that this area of the law, mortgage insurance and the Law of Property Act, needs to be cleaned up on a more extensive basis. It is suggested that the rules in the LOPAA and LOPR and their exceptions, and the exceptions to the exceptions, have become so complex that they are nearly incomprehensible for the average individual.



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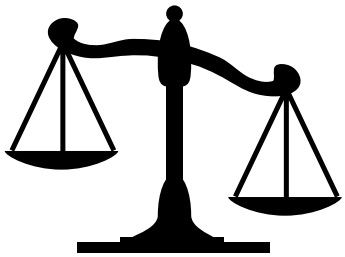

McGregor Stillman LLP is a general law firm formed in 1993 with emphasis on Civil Litigation, Corporate and Commercial matters, Real Estate, and Wills and Estates and Family Law. The firm represents clients throughout Alberta, and has also represented clients from British Columbia, Saskatchewan, Manitoba, 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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