McGREGOR STILLMAN'S

LegalEye

PRO POSSE SUO

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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 to December 28 inclusive. Our office is open during regular business hours December 29 and 30th. We will be closed January 2, 2005.

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

Should you have any questions, concerns or suggestions for future articles please contact Greg Bentz at 484-4445 ext. 307, or contact Greg at gbentz@mcgregorstillman.com.

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.

THE ALBERTA GOVERNMENT CLEANS UP THEIR ACTS

By Aaron Vanin

On October 1, 2005, the *Family Law Act* came into effect in Alberta. This new piece of legislation replaced older acts and updated the practice of Family Law, as it relates to parentage, custody, child support, and guardianship applications for unmarried, common law and adult interdependent partners. These changes are not only in form and structure, but jurisdictional as well.

The new act replaces the *Domestic Relations Act*, the family law provisions of the *Provincial Court Act*, *Parentage and Maintenance Act*, *Maintenance Order Act,* and the private guardianship provisions in the *Child Welfare Act*. Federal legislation such as the *Divorce Act* and *Maintenance Enforcement Act* are not affected by the *Family Law Act* nor is the *Matrimonial Property Act,* a Provincial act.

The most noticeable change under the *Family Law Act*, is the shift to a form based system. All applications made under the *Family Law Act* are made with standardized forms located on the Alberta Courts webpage, or alternatively from the courthouse. These forms, designed to assist parties in the organization of their materials, take the place of the notice of motion and accompanying affidavit. Supplemental affidavits may still be filed, though this practice is being actively discouraged by the Court.

In addition to these functional changes, there have been language changes as well. The applicant now files a Claim accompanied by the Statement with a Reply and Response being filed by the Respondent. New words for old terms

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emerge as well, with Guardianship applying to decision making powers, Parenting Time applying to access to the child, Contact Orders are for non-parents, while Access Enforcement Orders refer to enforcing Parenting Time.

These form and name changes are also accompanied by changes in jurisdiction. Applications under the *Family Law Act* may be filed in either Provincial or Queen's Bench Courts. There is no longer a fee for any application under the *Family Law Act*. The Provincial Court is only limited in making determinations of status, that is making declarations of parenthood or nullity of relationships. After filed in a specific level of court, that file remains at that level for all subsequent applications. The courts will now be adopting a "one family-one file" practice.

Other changes include: a requirement by lawyers to address the avenues of mediation available to their clients; a service time of five clear business days for applications; more clearly defined definitions of what is in the best interest of the child; defined assumptions in parentage; new rules regarding the transfer of guardianship through wills; and notably an ability to contract out of Canada Pension Plan entitlement.

The *Family Law Act* doesn't fundamentally change the practice of Family Law. It doesn't introduce any new concepts, nor does it create any new forms of action. It does make things a little easier for the parties. It organizes applications and it specifies the issues that need to be addressed. Parties can spend more time telling their lawyers what they want, rather than having every aspect of their application explained to them. This compartmentalized approach should make arguments more condensed and focused, making it easier to get down to the heart of the matter at hand and avoiding some of the overt negativity that has become common in these types of applications.

The new *Family Law Act* allows for applications for child support, custody, parentage, and guardianship to be done under one piece of legislation. While it doesn't change the way family law is practiced, it certainly affects the manner in which it is carried out. Hopefully, the new legislation will allow for improved access to the courts, through both a clearer format and more efficient bureaucracy.

FIRM NOTES

The first ever McGregor Stillman LLP Super Bowl was held on October 21, 2005 at the Callingwood Lanes and was a resounding success. Roughly $13,000.00 was raised for the Northeast Community Health Centre ("NECHC") enabling the NECHC to reach its $50,000.00 goal by November 2005 to match an anonymous donation of $50,000.00. The funds will be used to assist patients and families who face financial hardship due to the illness or injury that brings them to the Community Health Centre. For McGregor Stillman LLP photos please see our website. (Click on Photos).

Mark Stillman volunteered as an assessor for the interviewing and counselling competency evaluation section of the 2005 – 2006 Canadian Centre for Professional Legal Education Program.

Jennifer Sabourin left our office in September 2005 to further her education. We wish Jennifer the best of luck.

We welcome Maureen Larbalestier to the firm. Maureen joined us in September of this year and is assisting with accounting and reception duties.

Richard Smith is participating as a mentor in the Alberta Law Society Mentor Program, a program that matches senior practitioners with law students to provide guidance and practical knowledge to the student.

CAUSES CÉLÈBRES

By Richard Smith

Robertson v. British Fine Cars Ltd.

This case illustrates the additional protections that are given to consumers as a result of the *Fair Trading Act*, c. F-2 RSA 2000.

The Plaintiff, Mr. Robertson, leased a 2002 Land Rover from the Defendants in May of 2002. The vehicle was described by the Defendants as a "demo" model.

Starting on the very first day that the Plaintiff took the vehicle from the Defendant's lot, the Plaintiff experienced a litany of

problems with the vehicle over the next 18 months. In January of 2004, the Plaintiff discovered that the vehicle had been owned by a prior individual. The Defendant confirmed at trial that the vehicle had previously been owned by an individual who had returned it with approximately 1000 kilometers on the vehicle because the vehicle was basically inoperable as it required the replacement of its internal engine computer that governed the operation of the motor vehicle. After the Defendant dealership took the car back from the previous owner, it then registered the vehicle as "demo" and sold it to the Plaintiff on that basis.

Prior to the coming into force of the *Fair Trading Act*, the Plaintiff, Mr. Robertson, would have had to prove to the Court that the Defendant's advertising of the vehicle as a "demo" was either a fraudulent or negligent misrepresentation on the part of the Defendant; if, on the other hand, the Defendant's misrepresentation of the vehicle was "innocent" or "unintentional", the Plaintiff's claim would have failed.

His Honour Judge Skitsko reviewed the relevant sections of the *Fair Trading Act*, as well as two Court of Queen's Bench decisions in concluding that the *Fair Trading Act* creates a statutory ability to sue broad enough to cover even unintentional misrepresentations. His Honour concluded that in reviewing the transaction between Mr. Robertson and the Defendant car dealership, that the representation made to the Plaintiff that the vehicle was a "demo model" rather than a "used" vehicle would mislead the Plaintiff into leasing; not purchasing the vehicle. The statement therefore was false and deceiving and contravened the provisions of the *Fair Trading Act*.

In assessing damages, the Court concluded that had the vehicle been held out to be "used" instead of a "demo", its value would have been 10% less. The Plaintiff was entitled to recover from the Defendants $3,782.45, being 10% of the purchase price plus GST. In addition, the Plaintiff claimed damages for inconvenience and expenses associated with the numerous visits to the Defendant's place of business for the necessary repairs to the vehicle. His Honour Judge Skitsko reviewed the relevant case law relating to this aspect of the claim for damages and concluded general damages in the amount of $2,000.00, plus special damages of $407.00 for car rental expenses.

Finally, while the standard practice of the Provincial Court of Alberta is to award the successful party costs equal to 10% of the amount that the party recovered (or in present case, $620 or 10% of $6,189.45), His Honour Judge Skitsko decided that the Defendant's conduct should be penalized beyond the ordinary order of costs. Judge Skitsko concluded that the facts of this case clearly revealed just how vulnerable the consumer is when relying on the honesty of a supplier. Therefore when making representations as to the state of a consumer item being purchased, the supplier bears the responsibility of the accuracy of the information being provided to the consumer, and failure to supply accurate information must bear strong and certain consequences. As a result, His Honour Judge Skitsko awarded the Plaintiff court costs in the amount of $2,500.00 plus filing fees, as opposed to the usual 10%.

This case illustrates that the *Fair Trading Act* will be applied by the Courts to hold suppliers to a higher standard than was the case prior to the implementation of the *Fair Trading Act*, and will punish those suppliers who do not deal with consumers with honesty.

AS WE SEE IT

EMPLOYEE DRUG AND ALCOHOL TESTING

By Greg Bentz

Lately, there has been much ado about drug testing in the world of professional sport. But what about the every day employee who is suspected of substance abuse? Do employers have the right to impose substance testing, random, regular or otherwise on employees or would that be a violation of one's human rights pursuant to the *Human Rights, Citizenship, and Multiculturalism Act* of Alberta (the "Act"). When do employers have the right to test for inappropriate substances and what are inappropriate substances?

On the one hand, employers have a duty to ensure their workplace and employees, clients, and customers are safe from harms way, but on the other, employees have the right not to be discriminated against. Drug and alcohol dependencies have been found to be disabilities pursuant to the Act and the Act prohibits discrimination based on disability without a "reasonable and justifiable" excuse. Therefore, testing for a disability such as drug or alcohol use is generally only acceptable where the drug or alcohol use prevents or disables the employee from performing the essential elements of their employment (including the safety of themselves or others).

Employers must understand that it is their obligation to show that the testing is "reasonable and justifiable in the circumstances". The Human Rights and Citizenship Commission will require that the employer show that the testing is appropriate in the circumstances.

It is important to note that drug testing differs from alcohol testing. Although drug testing may determine the use by the employee, it does not indicate the level of impairment. Accordingly, drug testing is more appropriately done after an incident.

Alcohol testing, however, does correlate directly with impairment. Accordingly, the two types of testing are distinguished by the Human Rights Commission and testing for alcohol may be appropriate when testing for drugs would not; especially for random testing.

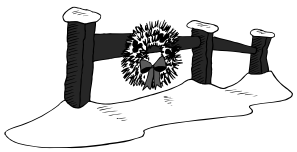
There are some rare and specific exceptions, but as general rule, random, blanket testing for drug use is a violation of an employee's human rights as it does not show whether the employee's ability is presently hampered or will be hampered in the future.

Testing for both drugs and alcohol, whether randomly or post-incident must be shown by the employer to be part of a larger plan to assess an employee's use and abuse of a substance and promote safety within the workplace.

The testing for a substance, post-incident, will only be permitted when an employer can show that the incident occurred because of the actions of the employee. If an incident was caused by something other than the actions of an employee, the employer is not at liberty to test for substance use.

Lastly, when the employer has tested for and found an inappropriate substance, they must still accommodate the employee so as not to cause "undue hardship". This requires the employer to try to find alternative suitable (usually non-dangerous) employment.

Substance testing is a relatively new area that employers are engaging in and as such the law is still being defined. Employers and employees should be mindful of each others rights and if questions arise to seek legal counsel.



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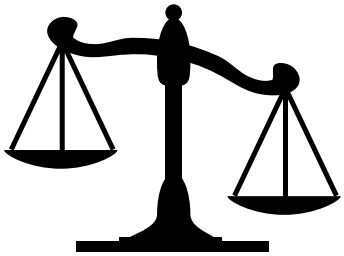

McGregor Stillman LLP is a general law firm formed in 1993 with emphasis on Civil Litigation, Corporate and Commercial matters, Real Estate, and Wills and Estates and Family Law. The firm represents clients throughout Alberta, and has also represented clients from British Columbia, Saskatchewan, Manitoba,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

The firm has a well established network of agents in Canada, including Vancouver, 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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