



# FILLMORE RILEY REPORT

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## *Social Host and Employer Liability*

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**FILLMORE  
RILEY**

BARRISTERS, SOLICITORS AND TRADE-MARK AGENTS  
ASSOCIATED WITH ADE & COMPANY, PATENT AGENTS

1700 Commodity Exchange Tower

360 Main Street, Winnipeg,

Manitoba, Canada R3C 3Z3

Telephone: (204) 956-2970

Facsimile: (204) 957-0516

E-mail: [frinfo@fillmoreriley.com](mailto:frinfo@fillmoreriley.com)

Web site: [www.fillmoreriley.com](http://www.fillmoreriley.com)



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When can you be found liable as a “host”? Can you be found liable when alcohol is served to guests or employees on your premises if they suffer injury or death in an alcohol-related accident or cause injury to another person? Some recent highly publicized decisions have considered the potential for liability in these circumstances.

Generally, liability as a host does not arise under a statutory obligation. Usually, a host’s liability, if any, is based on the common law (case law as opposed to statute law) under the well developed tort of negligence. In order to establish a host’s liability for negligence, the person alleging it must prove three requisite elements:

1. A duty of care – a relationship between the injured person and the injuring person must be established, which makes it reasonable to conclude that the injuring person owed a duty not to expose the injured person to an unreasonable risk of foreseeable harm;
2. Failure to meet the standard of care – the injuring person did not meet the standard of care required by this duty of care;
3. Resulting damage – damage resulted from the actions or omissions of the injuring party.

In the past, Canadian courts have found that, in applying the negligence test, commercial hosts, such as bar owners as well as employers who offer employees alcohol in a business/office party context, can be found liable for failing to take reasonable steps to either prevent intoxication or stop the person from driving home while impaired. Liability has not ordinarily been

imposed in a social host situation, that is to say, a social gathering at one’s home.

Two court decisions in 2001 – *Hunt v. Sutton Group Incentive Realty Inc.* (Ontario Superior Court of Justice) and *Prevost et al. v. Vetter et al.* (British Columbia Supreme Court) – imposed high standards respecting the duty of care on both an employer and a social host in circumstances where alcohol was consumed.

Both decisions have since been overturned, but could well illustrate the mood of the judiciary. Having said that, the very recent decision of *Childs v. Desormeaux* (Ontario Superior Court of Justice) has expressly rejected imposition of liability on a social host on the basis of policy considerations.

In the *Hunt* decision, an office party was held by the employer on company premises and during working hours. One employee became intoxicated during the party and then left the office with some other employees to go to a restaurant where she consumed one or two more drinks. On the way home from the restaurant, the employee was seriously injured in a motor vehicle accident.

Based on the case law prior to the *Hunt* decision, the employer owed a duty of care to its employees to safeguard them from harm based on the employer/employee relationship. However, this duty was usually limited to providing a safe work environment; that is, it was thought that the duty extended only to the workplace. In the *Hunt* case, the accident occurred when the employee was on her way home from a restaurant, already having left the company premises, and after having consumed at least one to two more drinks at a restaurant. The court found that while the

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employer had to ensure the safety of the employee while on the premises, it should also ensure that she would not become so intoxicated while on the premises so as to interfere with her ability to safely drive home afterwards, even though she stopped at a restaurant in between.

In considering the standard of care, the lower court found that the actions (or lack thereof) of the employer did not discharge the duty of care it owed to the employee, even though an offer of a cab was made to the employees generally, and possibly a specific invitation to drive the employee home. The court found that it was open to the employer to send the employee home by taxi, and, if necessary, to take her car keys away and assume custody of her car. In the alternative, the employer could have insisted that the employee stay in a local hotel or find someone else to drive her home. The damage resulted, at least in part, from the employer's failure to discharge this duty and the employer was therefore liable. However, the employee was found to be 75% contributorily negligent and damages were reduced accordingly. This decision suggested a very high standard respecting the duty of care of an employer to its employees in the context of an office party where alcohol is consumed.

Very recently, the Ontario Court of Appeal reversed the trial judge's decision in *Hunt* (August 14, 2002) on a number of technical grounds. A new trial was ordered on both liability and damages.

The *Prevost* decision, decided by way of a summary trial, imposed a duty of care on "host" parents in a social host situation. The plaintiff was an uninvited teenage guest who attended a house party. Although the "host" parents were in bed sleeping, the mother was aware that her teenage children were holding a party. The plaintiff was injured in an accident when he left the party as a

passenger in a car driven by an intoxicated guest.

The judge found that the parents created a dangerous situation by permitting minors to drink at their home and then drive. The parents recognized the danger and, in the past, had established a "paternalistic relationship" with minors who drank at their home. The mother had previously taken steps to prevent intoxicated minors from driving. The judge found that the mother failed to do so on this occasion and, therefore, the parents failed in their duty.

In past decisions, in order to impose liability in a social host situation, it had to be established that, aside from hosting the gathering, the host did or failed to do something which contributed to the negligent act/impaired driving. The judge's decision in *Prevost*, however, clearly imposed a duty of care on the host of a party, notwithstanding their indirect level of involvement.

Recently, the Court of Appeal of British Columbia reversed the motion judge's decision in *Prevost* (March 22, 2002) on the basis that the case raised issues which should not have been determined on a summary basis. A new trial was ordered.

In the *Childs* decision, the 18 year old plaintiff was injured while a passenger in a car that collided with a vehicle driven by the defendant Desormeaux, who had been drinking at a party. The hosts of the party were friends of Desormeaux and familiar with his background and problems related to alcohol. The court had no problem finding that the hosts of the party "had a duty not to turn Desmond Desormeaux loose on the highway where he could cause injury or death to others."

However, the court determined that there was a good policy reason not to impose liability on the social hosts. In particular, it would place "an inordinate

burden on all social hosts," including inquiry of each guest's consumption of alcohol before arrival, measuring and monitoring the effects of each guest's consumption, and inquiry of each guest's ability to operate a motor vehicle. As well, the court noted that every time an accident would occur and the driver was drinking at a private party, the host would be joined as a defendant. Further, it would be necessary for social hosts to obtain insurance. The court determined that the expansion of tort law to include social host liability was best left to the legislature. The plaintiff intends to appeal the decision.

Although the decisions in *Hunt* and *Prevost* have arguably broken new ground respecting liability of employers and social hosts in circumstances where alcohol is served, their impact has been greatly moderated by the appellate courts and by the subsequent *Childs* decision. Nevertheless, it is clear that Canadian courts are considering liability of employers and social hosts, where consumption of alcohol occurs on their premises, and the imposition of such liability has not yet been settled. As the Court of Appeal in *Prevost* notes, "whether social hosts ought to be held liable for the negligent actions off their property of persons who became intoxicated while on their property is a controversial and unsettled question that might well engage the attention of the Supreme Court of Canada in this case." What is clear is that it is an issue that should be considered by each person who hosts either an office party or any type of social gathering.

*Marcia L. Dzik may be reached by telephone at (204) 957-8360, by direct facsimile at (204) 954-0360, or by email at mldzik@fillmoreriley.com*

## Commercial Leasing: The Application of Goods and Services Tax on "Additional Rent"

◆ Daniel C. St-Jean

Is a landlord of commercial property required to collect and remit Goods and Services Tax ("GST") with respect to the share of property taxes, insurance costs, utilities and common element expenses the landlord recovers from its tenants? The Canada Customs and Revenue Agency ("CCRA") says yes.

The leasing of commercial property is, subject to certain exceptions, a taxable "supply" under the *Excise Tax Act* (Canada) and thus attracts the incidence of GST. Under the provisions of the Act, every person who makes a taxable supply is required to collect GST and, conversely, every recipient of a taxable supply is required to pay GST, equal to 7% of the consideration for the supply.

In the context of a commercial property lease, the tenant is often required to pay, in addition to base and/or percentage rent, a certain share of the property taxes, utilities, insurance costs and other common element costs with respect to the leased property. The latter are often grouped together and called "additional rent" under the terms of the lease. The payment/reimbursement by the tenant of these amounts forms part of the consideration paid by the tenant for the lease of the property. In simple terms, the landlord agrees to lease the property to the tenant in exchange for the tenant paying base rent plus the assumption by the tenant of certain obligations of the landlord, such as the landlord's obligation to pay realty taxes or insurance premiums on the building.

Although landlords are most often aware that GST generally must be charged on the base rent and percentage rent payable by the tenant, many may be unaware that CCRA requires that GST be charged on such additional rent as well.

CCRA is of the view that, where the ultimate obligation for a cost payable by the tenant under the terms of the lease rests with the landlord (i.e., it is the property owner to whom the municipality will look to for realty taxes or the insurance company for premiums on the building insurance), GST will be due on the amount paid by the tenant towards or in satisfaction of such costs, even if they are otherwise GST-exempt expenses. In this regard, it does not matter whether the payment is made by way of reimbursement to the landlord or directly to the third party to whom the amount is ultimately owed.

For example, assume a lease provides that the tenant is to pay base rent of \$500 per month and is responsible for the payment of a portion of common element expenses (assume \$100 monthly), realty taxes, and the water account for its premises, being 80% of the water account for the building (assume the tenant's share is \$50 monthly). Each month, the tenant pays a total of \$650 to the landlord and pays \$40 on account of property taxes directly to the municipality.

The total consideration for the monthly supply would, in this case, be \$690 and accordingly, the landlord would be required to collect \$48.30 of GST per month from the tenant. In CCRA's view, it does not make a difference whether the tenant pays the property taxes directly to the municipality or to the landlord by way of reimbursement, whether the property taxes and other obligations are itemized and paid separately, or recovered by the landlord collectively as additional rent. Only where the tenant is directly liable to the third party for the payment of the amount will the GST not apply. For example, where utilities are separately metered for the tenant's premises and the tenant, as opposed to the landlord, is ultimately responsible for the payment of same to the third party, the landlord would not be required to collect GST on the amounts so paid. Such is the case with business taxes, which are usually the responsibility of the tenant.

It follows, therefore, that the landlord is required to collect GST on all amounts paid by the tenant, under the terms of the lease, to or for the benefit of the landlord. Where the tenant is a GST registrant and the leased premises are used in commercial activities, the tenant may be eligible to claim input tax credits for the GST paid on the net rent.

*Daniel C. St-Jean may be reached by telephone at (204) 957-8344, by direct facsimile at (204) 954-0344, or by email at dcst-jean@fillmoreriley.com*



# Overlapping Coverages and “Other Insurance” Clauses

◆ Dean G. Giles

*Insurance coverage disputes most often arise when, for whatever reason, the insurance company refuses to pay.*

In most cases, this involves an argument that the alleged loss falls outside the scope of the insuring agreement or that coverage is excluded under one or more exclusion clauses in the policy. Less frequently, a situation will arise where coverage is available under multiple policies issued by different insurers. The question then becomes which of the insurers is required to pay and what amount.

At the heart of such a dispute is the meaning of the so-called “other insurance” clauses which often are included in insurance policies. The particular wording of these provisions can lead to disputes among insurers as to whether the coverage afforded by their respective policies is “primary” or “excess.”

This issue was recently addressed by the Supreme Court of Canada in *Lombard Insurance v. Family Insurance*. The plaintiff, who had been injured in a fall from a horse, sued both the owner of the stable and the owner of the horse. The stable owner was insured by Family Insurance under a homeowners/residential policy with a maximum benefit of \$1 million. She also was insured under a comprehensive

general liability policy issued by Lombard Insurance up to a limit of \$5 million.

Both policies contained “other insurance” clauses that described the coverage afforded as “excess insurance” to any other coverage. The insurers each acknowledged that the claim advanced by the plaintiff fell within the scope of coverage afforded under their respective policies but denied primary liability on the basis of the “other insurance” clauses.

The Court noted that, while the situation before it was not a novel one, the dispute between Family and Lombard provided an opportunity to clarify the law with respect to overlapping insurance coverages and the effect of these clauses.

Writing for the majority of the Court, Mr. Justice Iacobucci took, as the starting point of his analysis, the well-established principle that an insured who holds more than one policy of insurance covering the same risk is entitled to select the policy under which to claim indemnity. The insurer so called upon is then entitled to contribution from other insurers who have covered the same risk. This principle of

“equitable contribution” is founded on the notion that parties under a coordinate liability are obliged to share in the burden of making good the loss on a pro rata basis.

The Court also stated that, because an insurer can seek to contractually limit its liability, the wording of the policy itself is paramount when determining the extent of that liability. In circumstances where the contest is between the insurers, the intentions of the parties are to be determined from the words they have chosen to include in their policies and not by referring to surrounding circumstances.

With the above principles in mind, the Court concluded that the intentions of both Family and Lombard were unequivocal. Both intended to provide primary coverage to the insured except in circumstances where other valid insurance was available, in which case the intention was to provide excess coverage only. This left the Court with the problem of resolving the dispute in a way that respected the intention of the insurers and also preserved the insured’s right to make full recovery.

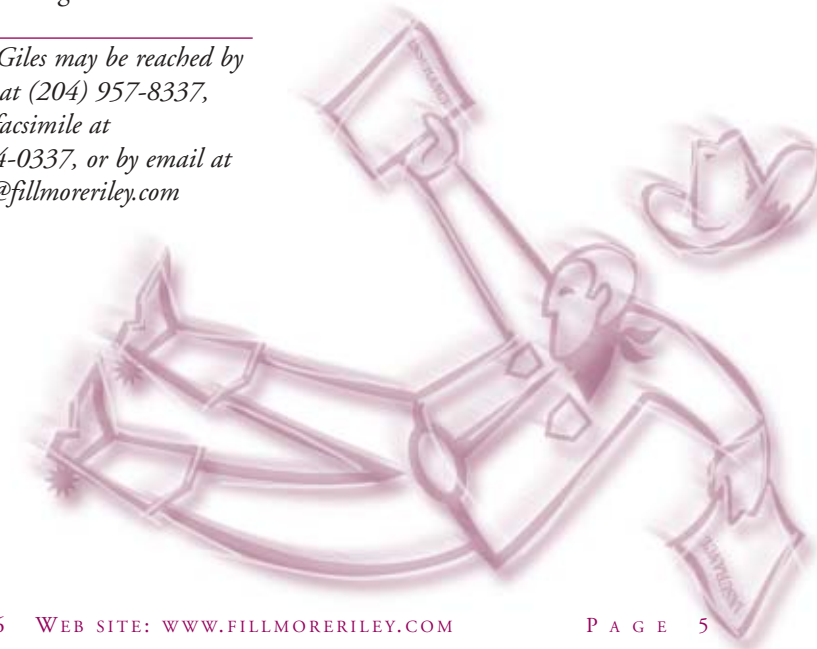
The Court concluded that, were it to give effect to the intention of each insurer, both policies would provide the insured with excess coverage only. The insured, on the other hand, would be left without primary coverage entirely. Citing the absurdity of such a result, the Court concluded

that “where competing policies cannot be read in harmony, the most sensible course, and that which accords with the interest and expectation of both the insured and the insurers, is to treat the conflicting clauses as mutually repugnant and inoperative.”

With the “other insurance” clauses having been rendered inoperative, the insured was entitled to primary coverage under both of the policies. As stated by the Court, each insurer was held to be independently liable for the loss, as if the other policy did not exist. The insurers were then left to share equally the cost of making good the loss, up to the limit provided for in the Family policy. If there was any additional exposure (above \$2 million) the Lombard policy would respond up to its \$5 million limit.

The outcome in this case serves as a cautionary tale to insurers who may seek to rely on an “other insurance” clause to avoid or limit liability. Such a clause may not be given effect if the result of doing so would be to leave the insured without primary coverage.

*Dean G. Giles may be reached by telephone at (204) 957-8337, by direct facsimile at (204) 954-0337, or by email at [deangiles@fillmoreriley.com](mailto:deangiles@fillmoreriley.com)*



# What's NEW in Federal Legislation



## *Bill C-23: An Act To Amend The Competition Act and the Competition Tribunal Act*

In an attempt to clamp down on marketing scams, the Canadian Parliament recently amended the *Competition Act* to provide law enforcement officials with more power to investigate such schemes and prosecute the offenders. Specifically, these amendments create a “deceptive prize notices” offence. Other amendments provide new judicial powers to the Competition Tribunal respecting air carriers who abuse their dominant position and facilitate co-operation with foreign nations for the enforcement of competition and fair trade practices laws.

The new offence – Deceptive Notice of Winning a Prize – is similar to the existing offence of telemarketing fraud; however, the new offence is a criminal matter. Telemarketing fraud has become a booming business, and Canada has been identified as a haven for such fraud.

An individual or corporation commits a deceptive prize notice by sending a notice which gives the general impression the recipient has won, or will win; the recipient then is asked to, or is given the option of, paying money or doing anything to incur a cost.

However, a person or a corporation will not be guilty of this offence if:

1. The recipient actually wins the prize; or
2. The sender makes adequate and fair disclosure of:

- the number and approximate value of the prizes or benefits;
  - the areas to which the prizes have been allocated; and
  - any facts within the sender’s knowledge that would significantly affect the chances of winning;
3. The prize or benefit is distributed without unreasonable delay; and
  4. Participants are selected or the prizes are distributed randomly or on the basis of participants’ skill in any area to which the prizes have been allocated.

Directors and officers of a corporation committing this offence may also be liable if they were in a position of influence concerning the conduct of the corporation relating to the offence. The punishment if convicted of this offence can be severe, including jail terms of up to five years and fines at the discretion of the court.

The second amendment grants the Competition Tribunal the authority to levy a monetary penalty of up to \$15 million against a domestic air carrier where the Competition Tribunal finds the air carrier has abused its dominant position in the market. An airline may be found to be guilty of this offence if:

- It operates a route or routes at a cost that does not cover its operating expenses;
- It increases the number of discounted fares so it does not cover its operating expenses;

- It uses a low-cost second brand carrier that does not cover its operating expenses;
- It monopolizes airport facilities or services, take-off and landing slots, to prevent a competing carrier from operating from that location; or
- It uses incentives or other inducements to sell or purchase flights to eliminate or prevent a competitor from entering into or expanding the market.

The third amendment to the Act creates new technical rules for requests for assistance by foreign nations when gathering evidence required for prosecution. It also arranges for reciprocal rights for the Competition Bureau in other nations. A mutual legal assistance agreement must be entered into by the Minister of Justice with another nation prior to these rules coming into effect for such requests. As a minimum requirement, the competition laws of the foreign nation must be substantially similar to those of Canada. Ultimately, this will allow the Competition Bureau to gather evidence in Canada at the request of a foreign nation even if the alleged offence did not occur in Canada.

In conclusion, these amendments illustrate Parliament’s response to the increasing problems of deceptive prize awards and its willingness to cooperate with others to prosecute these crimes. It also recognizes the cross-border nature of business dealings and permits cross-border investigations.

# What's NEW in Provincial Legislation

## *Limitation of Actions Act*

During this last legislative session, the Manitoba government made significant changes to the *Limitation of Actions Act*. Most importantly, the amendment eliminates a time limitation during which one can begin an action as a victim of sexual assault. It allows the victim to launch a civil action for assault at any time, regardless of when the assault took place. However the following criteria must be met for the action to succeed:

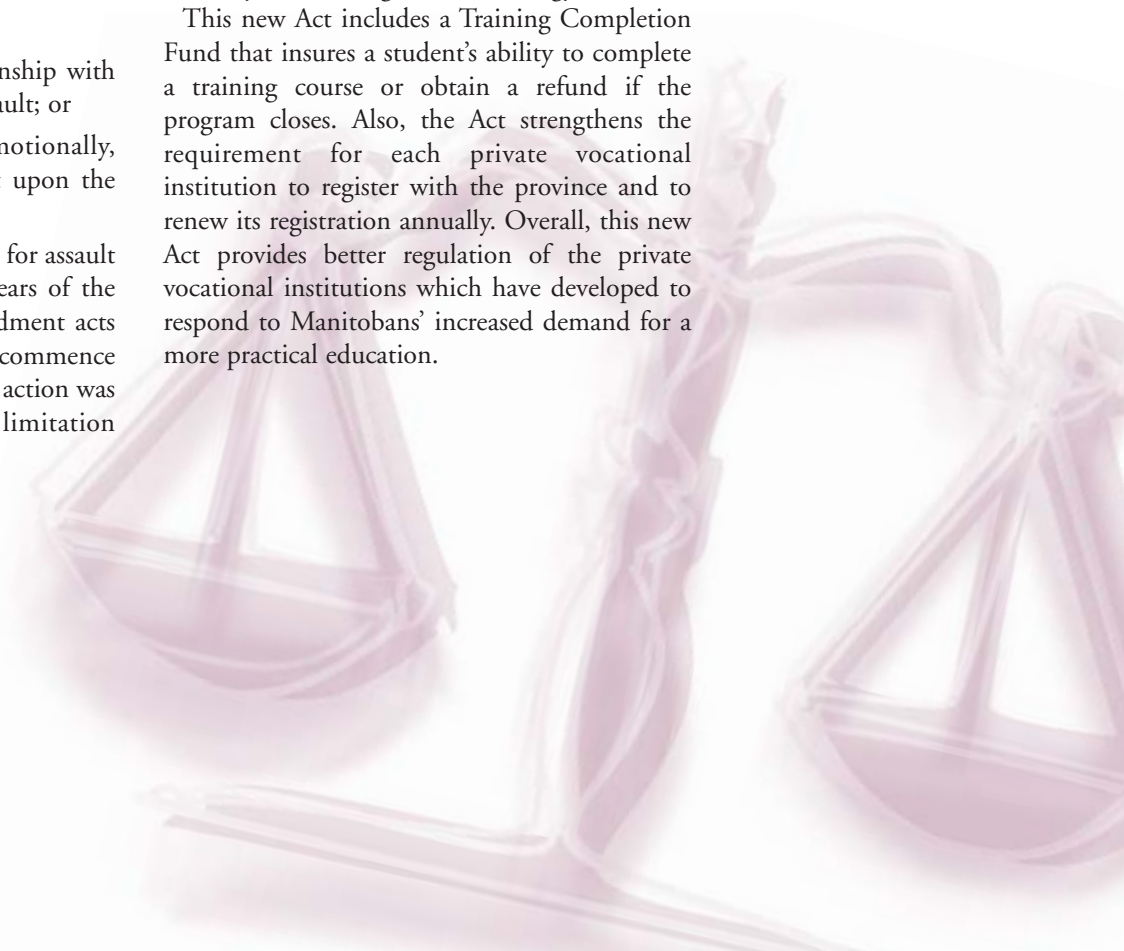
1. the assault was sexual in nature; or
2. the victim had an intimate relationship with the person who committed the assault; or
3. the victim was financially, emotionally, physically or otherwise dependent upon the person who committed the assault.

Prior to this amendment, any action for assault had to be commenced within two years of the occurrence of the assault. This amendment acts retroactively and allows a person to commence an action for sexual assault even if the action was previously dismissed because the limitation period under the Act had expired.

## *Private Vocational Institutions Act*

The Manitoba legislature also passed a new act which abolishes the old *Private Vocational Schools Act* and replaces it with the *Private Vocational Institutions Act*. The changing face of education in the province and across the country necessitated a re-writing of the older act. For example, computer technology, computer graphics and web site design courses are much in demand as employees and employers adjust to new ways of working with technology.

This new Act includes a Training Completion Fund that insures a student’s ability to complete a training course or obtain a refund if the program closes. Also, the Act strengthens the requirement for each private vocational institution to register with the province and to renew its registration annually. Overall, this new Act provides better regulation of the private vocational institutions which have developed to respond to Manitobans’ increased demand for a more practical education.



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## NEWS

**Stuart Blake** participated in a regional meeting/conference of a major insurance company held in Kenosee, Saskatchewan. Stuart presented papers on the topics of trigger theories as they relate to an occurrence policy and the vicarious liability of employers for acts of sexual abuse by employees.

**Don Bowes** completed the final component of the Canadian Institute of Chartered Accountants' In-Depth Tax Course. The course, which is held over a two year period, is designed for advanced learning by tax practitioners and consists of group study along with "in residency" conferences.

**Bill Ryall** and **Jean-Marc Ruest** published an article in *The Transportation Lawyer*, a joint publication of the Transportation Lawyers Association and the Canadian Transport Lawyers' Association. The article is titled "Employee or Independent Contractor: The Fears Exposed."

**Beth Eva** participated as a panelist at the Motions Practice seminar as part of the Law Society of Manitoba's Bar Admission Course.

**Vivian Hilder** participated as a coach at the training session on Collaborative Law held by the Law Society of Manitoba.

**David Kroft** is serving as the course leader for the Civil Procedure and Administrative Law Advocacy segments of the Law Society of Manitoba's Bar Admission Course.

**Anita Southall** has been appointed to the Professional Liability Claims Fund Committee of the Law Society of Manitoba. She is also a seminar leader on Practice Management and Ethics for the current Bar Admission Course of the Law Society of Manitoba.

**Wayne Leslie**, a member of the Board of Directors of the Canadian Association of Insolvency and Restructuring Professionals, attended the Association's board meeting and annual meeting in Canmore, Alberta. On this occasion, a review was conducted of proposed amendments to the *Bankruptcy and Insolvency Act* in the areas of corporate and personal bankruptcy, and proposed changes to protection for non-insured RRSPs.

Our librarian, **Heidi Rees**, taught a session on legal research resources on the internet. This session was organized by the Law Society of Manitoba's Continuing Legal Education program and was part of the Law at Lunch series.

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ASSOCIATED WITH ADE & COMPANY, PATENT AGENTS

1700 Commodity Exchange Tower

360 Main Street, Winnipeg,

Manitoba, Canada R3C 3Z3

Telephone: (204) 956-2970

Facsimile: (204) 957-0516

E-mail: [frinfo@fillmoreriley.com](mailto:frinfo@fillmoreriley.com)

Web site: [www.fillmoreriley.com](http://www.fillmoreriley.com)

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