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Supreme Court Clarifies "Likelihood of Confusion" Test in *Trade-marks Act*

The Supreme Court reversed both lower courts in [Masterpiece Inc. v. Alavida Lifestyles Inc.](#), 2011 SCC 27, ordering the Registrar of Trade-marks to expunge Alavida's registered trade-mark, which was confusingly similar to the unregistered trade-mark Masterpiece had been using for several years in another part of Canada. Noting the national scope of the trade-marks regime (giving a trade-mark owner exclusive use of the mark throughout Canada), the Court found that the test for likelihood of confusion is based on hypothetical, not actual, use in the same geographic area. The court also commented on the use of (often unhelpful) expert evidence and consumer surveys in the confusion analysis, suggesting at para.100 that "it would be salutary to have a case management judge assess the admissibility and usefulness of proposed expert and survey evidence at an early stage so as to avoid large expenditures of resources on evidence of little utility." These articles discuss the decision:

- [A Masterpiece for Brand Owners - The Supreme Court of Canada Makes it Easier to Enforce your Trade-mark!](#), McCarthy Tétrault;
- [the Supreme Court of Canada clarifies the test for trade-mark confusion in Masterpiece Inc v Alavida Lifestyles](#), McMillan;
- [Supreme Court Decision Clarifies Relationship Between Common Law and Registered Trade-mark Rights](#), Canadian Intellectual Property Blog;

- [Supreme Court of Canada Overturns Lower Court Decisions in Masterpiece v. Alavida Lifestyles](#), Torys.

Fraud makes an agreement voidable, not void: SCC

In [i Trade Finance Inc. v. Bank of Montreal](#), 2011 SCC 26 the Supreme Court confirmed the well-settled principle that fraud makes an agreement voidable (at the election of the party defrauded), not void (para.45). The court found i Trade had no claim to funds it advanced to a fraudster, which were later traced to a PPSA secured investment held by BMO, a *bona fide* purchaser for value without notice.

Disclosure Obligations, Negligent Misrepresentation and Fiduciary Duties: SCC

The Supreme Court of Canada found a B.C. developer not liable for either statutory or negligent misrepresentation or for breach of fiduciary duty in [Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.](#), 2011 SCC 23, a class action proceeding concerning what information issuers must disclose to potential real estate investors. The court's findings on statutory materiality and disclosure standards (summarised at para. 61) provide a framework for assessing disclosure obligations in other contexts, and its comments on fiduciary duties ([para.131ff](#)) and the common law elements of negligent misrepresentation ([para. 120ff](#)) are also instructive.

Proving a Preference - the Shifting Evidentiary Onus Under s.95 of the **BIA**: MBCA

"An improvident and unreasonable" plan by an insolvent person to reorganize his or her financial affairs was not objectively reasonable and therefore did not rebut the presumption of preference in [s.95](#) of the *Bankruptcy and Insolvency Act*, according to the Court of Appeal in [Forbes \(Bankrupt\), Re](#), 2011 MBCA 41. The court disagreed with two lower court findings: (1) that the evidence was insufficient to establish that the bankrupt was insolvent when he paid the full amount of the debt owing to CIBC from the proceeds of a new mortgage one month before declaring bankruptcy; and (2) that the evidence did not establish that the bankrupt preferred CIBC over other creditors. The Court of Appeal found that, although more direct evidence as to the existence of the other debts would have been preferable, the only reasonable inference to be drawn from the unchallenged declarations of the bankrupt as to his assets and liabilities was that the indebtedness that existed at bankruptcy "was far more likely than not in existence one month earlier." (para.46) On the second question the court found that the payment to CIBC was a "preference in fact." In such cases the intention to prefer is presumed unless the creditor shows, on an objective analysis of the evidence, that the bankrupt did not have that intent. (para.58)

Legislative Changes Introduced

The provincial government has recently introduced several new business related bills:

- [Bill 35](#), *The Consumer Protection Amendment Act (Cell Phone Contracts)*, amends *The Consumer Protection Act* to provide protection for consumers who enter into cell phone contracts. Among other things, the legislation would prohibit unilateral amendments to material provisions in cell phone contracts (such as service or cost), unless the change clearly benefits the consumer. Other protections include a prohibition against unreasonable cancellation fees and a requirement that companies fully disclose all charges and terms. See the [explanatory note](#) and [news release](#) for further details.
- [Bill 40](#), *The Condominium Act and Amendments Respecting Condominium Conversions (Various Acts Amended)*, would replace the existing *Condominium Act* and amend various other Acts in relation to condominium conversions. Some of the proposed changes include an extended cooling-off period, enhanced cancellation rights, better disclosure through mandatory reserve fund studies, and stronger enforcement of by-law compliance. See the [explanatory note](#) and [news release](#) for more information.
- [Bill 43](#), *The Real Property Amendment Act*, proposes significant changes to *The Real Property Act* designed to protect against fraud in land transactions.

Among other things the amendments would streamline the process involved in correcting land titles, tighten signature requirements for transfers and mortgages, and simplify the compensation system for fraud victims. The [explanatory note](#) and [news release](#) provide more details about the proposed changes.

Legislation and Regulations Coming Into Force

Part 1 of [The Mortgage Dealers Amendment and Securities Amendment Act](#) (assented to July 11, 2009) came into force May 1, 2011, changing the title of *The Mortgage Dealers Act* to *the Mortgage Brokers Act* and expanding the regulation of previously unregulated and unlicensed independent mortgage brokers.

Sections of [The Residential Tenancies Amendment Act](#) (assented to June 11, 2009) will come [into force](#) November 1, 2011 as announced in May 28, 2011 Manitoba Gazette.

Manitoba Regulation [42/2011](#), registered April 26, 2011, amends Form 1 of Schedule A (the current residential form of offer to purchase) by adding a section on property disclosure statements. It also amends Regulation [56/88](#) to add s.3.2, requiring the commission to conduct periodic reviews of the forms prescribed under *The Real Estate Brokers Act*. It will come into force August 1, 2011.

Budget 2011

The federal government will table its 2011 budget on June 6, 2011. The Next Phase of Canada's Economic Action Plan: A Low-Tax Plan for Jobs and Growth is expected to restate the [budget](#) tabled on March 22 but not passed before the election was called (see [Budget in Brief](#) for a summary of its terms). The new budget documents will be posted [here](#) on June 6th.

The May 2011 edition of the CBA's [Charity Talk](#) contains the article [2011 Federal budget: Provisions regarding charities and other qualified donees](#). It describes some of the anti-avoidance measures introduced in the first budget which will likely be reintroduced on June 6th.

Business Publications

Ned Brown has posted two more articles on business topics on [Pitblawg](#):

- [Just When You Thought You Had an Interest in Land, You Discover That You Don't](#) - which discusses certain rights in realty which are not enforceable against successors in title because they do not constitute "interests in land"; and
- [Danger for a Lender Who Gets Too Close to its Borrower's Third Party Contractors](#) - this paper discusses the *Wales/Goodland* case and the situations in which a lender may be held responsible to third party contractors of the borrower.

New Manitoba Business Development Program

The Manitoba government has [announced](#) a new \$30 million [Commercialization Support for Business Program](#) which will "promote and support entrepreneurship, commercialization and business development" in Manitoba. Details of the program can be found in these [guidelines](#), in the list of [frequently asked questions](#), and in the online [application form](#).

Continuing Professional Development: LSM

The June 10, 2011 program on [Financial Statements](#) is sold out, but you can put your name on a waiting list by completing and faxing this [form](#) to the Law Society. Shawn Wilson, who presented the popular One Day MBA for Lawyers last January, is back for this comprehensive all-day review of the principles involved in constructing and decoding financial statements for family, business and personal injury lawyers.

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