eLaw - Litigation Update
October / November 2011 - No. 52
ISSN 1916-3932

In This Issue



## Parol Evidence Primer: MBCA

The court examines the "often confusing" issue of the parol evidence rule and contractual interpretation in *King v. Operating Engineers Training*, 2011 MBCA 80, a dispute over whether the remuneration referred to in an employment contract was to be "net" of income taxes and other deductions or "gross." The employer took issue with the fact that the trial judge had admitted extrinsic evidence of the circumstances surrounding the formation of the contract even though the written terms were clear. The appeal court found that even though no collateral contract had been alleged, the trial judge was entitled to consider the factual matrix in the case to aid him in understanding and interpreting the language and meaning of the written contract. In addition, the court concluded that the "parol evidence rule does not apply where there is an allegation that the contract is partially in writing and partially oral, or that a collateral contract exists," and that "(i)n such cases, certain extrinsic evidence is admissible to substantiate those allegations." (para.83)

On the issue of the standard of review in contract cases the court had this to say:

> ....determining the legal principles related to the parol evidence rule raises a question of law reviewable on a standard of correctness. Determinations of the factual matrix, the essential terms of the contract in this case, and findings as to credibility, are findings of fact reviewable on a standard of palpable and overriding error. Application of the parol evidence rule to the disputed facts as determined by the trial judge is a question of mixed fact and law to be reviewed on a standard of palpable and overriding error. (Para 29)

## Medical Opinion, Not Google Research, Required to Asses Standard of Care: MBQB

"Lawyers are not doctors, nor should they be acting like they are" according to the court in *Hunt v. Lee*, 2011 MBQB 252, a medical malpractice case where the defendants opposed the plaintiff's application under Part II of *The Limitations of Actions Act* to amend her statement of claim to include new allegations of negligence. The court rejected the defendant's argument that the plaintiff's lawyer should have been able to identify the material facts without a medical opinion by reading the medical records and consulting sources such as Google. The court also disagreed with the defendant's interpretation of s.14, that applications under Part II can only be made where the material facts become known after the limitation period expires (i.e. that s.14 cannot be relied on where the material facts were known or discoverable within the limitation period). In the court's view, "where a person acts with reasonable diligence in determining the material facts, the only limitation imposed by Part II is that that person must act on that information within a reasonable period of time (the reasonable period of time being the one year set out in the Act) regardless of when that information is acquired." (para. 56)

## Financial Advisors Liable for Failed Retirement Plan: MBQB

Financial advisors whose retirement plan failed to generate the income to allow the plaintiffs to retire as represented were negligent according to the court in *Giesbrecht v. Canada Life Assurance Company*, 2011 MBQB 244. The advisors did not meet the standard of care required of persons undertaking the preparation of a retirement plan in that they failed to properly inform themselves of their clients' assets and needs, did not provide alternative scenarios based on differing rates of return, did not ensure the plan's implementation, and failed to ensure that their clients understood the plan. The plaintiffs' damage award of $403,829.05 was reduced by 40%, however, reflecting the degree of contributory negligence assessed against them for failing to act prudently in their own assessment and implementation of the plan.

## Insurer Responsible for Policy Ambiguities: MBQB

An insurer who refused coverage on a disability claim on the basis that the plaintiff had misrepresented her health when she failed to disclose that she had seen a marriage counsellor was ordered to pay the claim plus $30,000 damages for mental distress in *Badenhorst v. The Great-West Life Assurance Company*, 2011 MBQB 217. The issue, said the court, was "not whether marriage counselling is a health issue. It is whether the plaintiff and a reasonable applicant for insurance would recognize that the questions sought to find out whether the applicant had received marriage counselling." Given the ambiguity in the policy application and the reasonableness of the plaintiff's interpretation, the court found the insurer had failed to establish misrepresentation.

## Court of Queen's Bench Rule Amendments

The Queen's Bench Statutory Rules Committee has announced amendments to the Court of Queen's Bench Rules effective December 1, 2011. Rule 59.07, Subrule 16.02(1)(g), Form 66A and Form 72K will all change.

## Recommended Reading

Litigators may be interested in the following publications:

Osgoode Hall Dean Lorne Sossin's paper *Revisiting Class Actions Against the Crown: Balancing Public and Private Legal Accountability for Government Action* may be downloaded free from SSRN, the e-Library of the Social Science Research Network.

The *National* article *Seeking leave to appeal* offers advice from experienced advocates on what you need to know before seeking leave to appeal from the Supreme Court of Canada.

*Getting insurers to the table* is a *Canadian Lawyer* article concerning insurance companies' duty to defend in lawsuits over property damage.

*Canadian Lawyer's* Arguably the Best series has published three morearticles on improving litigation skills:

- *Lessons from Lewis Carrol on excellence in written appellate advocacy* and *More lessons on excellence in written appellate advocacy*, both by Ontario Court of Appeal judge Eleanore A. Cronk,dissect what it takes to write a compelling factum; and
- *The advocate as storyteller*, by Colin Feasby, discusses why storytelling should permeate all aspects of advocacy starting with pleadings.

*Status update: service by Facebook*, from the September 30, 2011 issue of *Lawyers Weekly*, discusses where courts in Canada and elsewhere are at with respect to service via social media.

## MBA Program

Researching That Dreaded Question: What Is the Appropriate Standard of Review? - Mr. Justice Richard Chartier (Manitoba Court of Appeal) and Dénis Guenette (Civil Legal Services) will present at this joint meeting of the Administrative Law and Legal Research sections of the Manitoba Bar Association. The program takes place November 21, 2011, from 12:00 noon to 1:30 p.m. at the offices of Pitblado Law.

## Back From the Brink - Insolvency in the New Era: 2011 Isaac Pitblado Lectures

It's not too late to register for the 2011 Isaac Pitblado Lectures, which will explore the latest developments in bankruptcy and insolvency law. This year's lectures are chaired by Senior Master Rick Lee and David Jackson. Keynote speakers include Professor Janis Sarra, Bob Klotz, Jeff Lee and Frank Bennett. The lectures will be held November 25 and 26 at the Fort Garry Hotel. For further details or to register see the website.