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Neufeld Report on Disclosure in Real Estate Transactions

The province released the [Neufeld Report on Disclosure in Real Estate Transactions in Manitoba](#) on November 12, 2009. The report, initiated after concerns were raised about the resale of a flood damaged home, reviews current Manitoba law and practice regarding disclosure of the condition of homes during real estate transactions. Among other things the report examines proposals to reform the doctrine of *caveat emptor*, to encourage (or make compulsory) property condition statements, to educate buyers, and to encourage use of home inspectors. The Manitoba Securities Commission, which is conducting a review and consultation on the report, has issued a [notice](#) seeking comment from interested parties by January 20, 2010.

Why Better Disclosure is Needed

A recent example of a case where clearer disclosure obligations might have prevented a nightmare scenario for buyer and seller is [Rebillard v. Janzen](#), 2009 MBQB 287, a classic water in the basement case which turned on whether the seller made a deliberate misstatement concerning the extent of the water problem. Finding that the buyer relied on the seller's fraudulent misrepresentation such that the doctrine of *caveat emptor* no longer applied, the court awarded judgment against the vendor in the amount of \$28,675.80.

Alberta Law Reform Institute Report on Wills

The Alberta Law Reform Institute released Report #96, [The Creation of Wills](#), in September,

2009. The 167 page report is a comprehensive overview of wills legislation in Alberta and elsewhere. It makes 34 recommendations for reform of the Alberta *Wills Act*, including Recommendation No. 1 that the court should be given a "dispensing power" to validate wills which do not comply with the formalities. The report surveys the history of wills legislation and case law and looks at what reforms have been proposed or made in Alberta and other jurisdictions.

Mortgage Fraud "Test Case": BCCA

A recent *Lawyers Weekly* article, [The fight against mortgage fraud](#) by Sybil Johnson-Abbott, makes the point that although mortgage fraud has existed in many forms for a long time, courts continue to grapple with the legal principles surrounding it. Two recent B.C. cases, [Gill v. Bucholtz](#), 2009 BCCA 137 and [Re Oehlerking Estate](#), 2009 BCCA 138 illustrate the problem. In both cases an innocent property owner was the victim of a fraudulent transfer of land which was then mortgaged by the fraudster. In both cases the Court of Appeal overturned the lower court decision which had found that the fraudster, as the registered owner, had an indefeasible right to deal with the property hence, while title was restored to the innocent property owner, the title remained encumbered by the mortgages. The Court of Appeal disagreed, ordering that the mortgages be cancelled and that the cost of frauds perpetrated against mortgagees and other chargeholders should be borne not by the public (as the funders of the Assurance Fund) but by lenders. Referring to the decision in *Gill* as a 'test case,' the court notes that the pre-2005 legislation

..gave "mixed if not conflicting signals" as to whether the system was one of 'deferred' or 'immediate' indefeasibility" (and) Amendments made to the Act in 2005 have added to the jigsaw puzzle of provisions and case authority without stating a unifying principle. Certainly the conception of British Columbia's land registration system as one on which anyone dealing with any interest in land may safely rely, is not clearly reflected in the present legislation, at least where interests less than fee simple are concerned. (para.1)

Loser Pays Applies to Estate Litigation

Clients contemplating frivolous estate litigation should be warned of the growing trend away from awarding costs out of the estate regardless of success. The point is succinctly made in a recent Ontario decision, [Fiacco v. Lombardi](#), 2009 CanLII 46170 (ON S.C.), in which the judge, quoting from an earlier judgment, expresses his frustration with the "preposterous" cost claims of the warring siblings as follows:

Parties cannot treat the assets of an estate as a kind of ATM bank machine from which withdrawals automatically flow to fund their litigation. The "loser pays" principle brings needed discipline to civil litigation by requiring parties to assess their personal exposure to costs before launching down the road of a lawsuit or a motion. There is no reason why such discipline should be absent from estate litigation. Quite the contrary. Given the charged emotional dynamics of most pieces of estates litigation, an even greater need exists to impose the discipline of the general costs principle of "loser pays" in order to inject some modicum of reasonableness into decisions about whether to litigate estate-related disputes.(para. 6, [Salter v. Salter Estate](#), 2009 CanLII 28403 (ON S.C.)

The *Law Times* article [The ATM is closed, courts say](#), by John Harvey, canvasses the reaction of Ontario lawyers to the judge's warning.

Upcoming CPD: LSM

The Law Society is presenting the following continuing professional development programs on property and estates topics:

[Death Bed Wills: Estate Planning Where Capacity is at Issue](#) - Presenter John Poyser will

review the case law on capacity and suggest best practices in this difficult area at a lunch program presented on December 8, 2009.

[Annual Hot Topics in Real Estate Practice](#) - a half-day program on January 14, 2010 examining the latest issues facing real estate practitioners. Topics to be discussed include: revenue property issues, internet lenders, new condominium legislation, new sewage ejector regulation and Land Titles Office concerns.

And, mark your calendars now for ['Til Death Do Us Part and Beyond](#), a program exploring the intersection of family law and death, scheduled March 5, 2010.

For more information or to register contact the Education and Competence Department.

Education Webcasts

The Ontario Bar Association is now presenting live webcasts of some of its education programs. Property and estates practitioners may be interested in the following programs: [Covenants Concerning the Use of Land](#) (December 8, 2009) and [Primer on Succession Planning](#) and [Estate Litigation: A Primer](#) (both on December 9, 2009).

The Law Society of Manitoba provides this service solely for the benefit of and to support the competence of its members. Members should exercise their professional judgment in using or adapting any content.