



eLaw - Property & Succession Update

June 2011 - No. 53

ISSN 1916-3894

***eLaw Property & Succession will not be published in July and August.
Watch for the next issue in your Inbox in September 2011.***

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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.

Specific Power of Attorney Stands: MBCA

In [*Kushnier v. Kushnier*](#), 2011 MBCA 46, the Court of Appeal upheld the application judge's [decision](#) invalidating a revocation of authority of an enduring specific power of attorney by the holder of a subsequent enduring general power of attorney. The appeal court adopted the lower court's reasons, which were premised on the fact that there was ambiguity in the interpretation of the general power of attorney and "where there are two interpretations that can be drawn from the document, the most narrow interpretation should be adopted... to discourage attorneys from claiming more power than they really possess." The applications judge also noted that "providing one son with a right to take responsibility away from the other son would be a recipe for friction between siblings, something that a father would normally seek to avoid, not encourage."

Voluntary Property Disclosure Statements and Real Estate Agent Duties: ONCA

Both the vendor and the real estate agent involved in the sale of property which had serious latent defects that were not disclosed on the seller property information sheet were found jointly and severally liable to the purchaser by the Ontario Court of Appeal in [*Krawchuk v. Scherbak*](#), 2011 ONCA 352. The case has attracted attention for two reasons: first, because the court appears to have imposed a duty on real estate agents to verify information provided by vendors; and second, because it highlights the "dangers" of voluntary disclosure statements. As noted below in the Coming Into Force section, such disclosure statements will form part of the Manitoba residential form of offer to purchase as of August 1, 2011. These articles discuss the *Krawchuk* decision:

- [*Ont. CA decision could widen real estate agents' duties - Agent and vendor liable for misstatement on information sheet*](#), *Lawyers Weekly*, May 20, 2011;
- [*The Dirt: Krawchuk a big strike against disclosure statements*](#), *Law Times*, June 13, 2011.

Clear Evidence Needed to Sever Joint Tenancy: MBQB

A transfer of land signed by a since deceased respondent in an ongoing divorce action and purporting to transfer an undivided one-half interest in the family home to his three children did not meet the requirements of *The Homesteads Act* and was declared invalid by the court in [*Gorski v. Gorski*](#), 2011 MBQB 125. The court also enjoined the executrix of the respondent's estate from registering any documentation relating to a notice to sever the joint tenancy, finding that since there was no clear evidence of severance at death the petitioner became the sole owner of the property by right of survivorship.

Mortgage Statute Barred Under ***The Limitation of Actions Act***: MBQB

The court granted an order extinguishing a mortgage it found to be statute barred under s. 21(1) of *The Limitation of Actions Act* in [*Radway v. GFK Capital Base Corporation*](#), 2011 MBQB 120. The court did not accept the assertion of the mortgagee that its own discharge statement (provided in 2007 after the property sold and indicating that no payments had been made since 2000) was erroneous in that it did not reflect two payments made by the now deceased mortgagor or her agent in 2001 and 2006. Neither of the alleged payments was credited to either the discharge statement or the mortgagee's receipt ledger and there was no credible evidence that the mortgagor had made the payments. In addition, there was evidence that the mortgagee was attorning rents on the property and the court speculated that one of the alleged payments might just as well have been a rental payment, which would not constitute a payment on the mortgage.

New Bills

The province has recently introduced several real property related bills:

[*Bill 17*](#), *The Cooperatives Amendment Act*, authorizes the establishment of multi-stakeholder cooperatives, amends the appeal process for termination of cooperative membership, and changes the provisions governing access to membership and shareholder lists.

[*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.

Coming Into Force: Legislation and Regulations

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. [Mortgage Brokers Regulation 41/2011](#), which sets out the regulatory scheme, fees and forms, also came into force May 1, 2011.

Several sections of [*The Residential Tenancies Amendment Act*](#) (assented to June 11, 2009) will come [into force](#) November 1, 2011 as announced in the May 28, 2011 Manitoba Gazette. Regulatory changes ([55/2011](#), Residential Tenancies Regulation, amendment and [56/2011](#), Residential Rent Regulation, amendment) will also come into force November 1, 2011. The Director of Residential Tenancies now has the authority to deal with tenancy agreements that include supplemental services such as meals and housekeeping and new administrative penalties will apply to landlords who fail to comply with orders made under the Act

Manitoba Regulation [42/2011](#), Real Estate Brokers Regulation, amendment, 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.

Recommended Reading

Ned Brown has posted several articles on [Pitblawg](#) in the last few months dealing with real property topics:

- [Just When You Thought You Had an Interest in Land, You Discover That You Don't](#) discusses certain rights in realty which are not enforceable against successors in title because they do not constitute "interests in land";
- [Danger for a Lender Who Gets Too Close to Its Borrower's Third Party Contractors](#) discusses the *Wales/Goodland* case and the situations in which a lender may be held responsible to third party contractors of the borrower;
- [Mortgage/Security interests in "Fixtures"](#) discusses why, under the current law relating to the perfection of security interests in fixtures, the common law rule that registration of a real property mortgage automatically attaches to goods that are, or in the future may become, fixtures can no longer be relied upon.

[ABLawg](#), the University of Calgary Faculty of Law blog, often publishes posts on notable property law cases. Two recent posts include:

- [Specific Performance of Contracts for the Sale and Purchase of Land: Is Deeming Land to be Unique Enough to Return to Pre-Semelhago Days?](#), which discusses the Saskatchewan Court of Appeal's interpretation (in [Raymond v Anderson](#), 2011 SKCA 58) of the [Semelhago](#) test regarding the equitable remedy of specific performance in contracts to purchase land; and
- [Perennial Problem of Section 8 of the Interest Act](#), which discusses a decision of an Alberta master ([Equitable Trust Co. v. Loughheed Block Inc.](#), 2011 ABQB 193) which adopts a limiting commercial purpose approach to s.8 of the *Interest Act*, contrary to prior B.C. Court of Appeal rulings.

Estates practitioners may be interested in the following publications:

- The May 2011 edition of the CBA's [Charity Talk](#), which includes the article [2011 Federal budget: Provisions regarding charities and other qualified donees](#); and
- [Planning for Taxation at Death](#), a [Practice Points](#) article which looks at the principal income tax considerations in respect of estate freezes which are implemented in advance of death, and related matters.

Upcoming CPD: LSM

The Law Society will repeat the sold out [Will Drafting Process and Pitfalls](#) program in Brandon on September 19, 2011. Presenters Cynthia Hiebert-Simkin & Jennifer Pfuetzner discuss best practices in will drafting and estate planning and highlight common drafting errors in this informative afternoon session to be held at the Victoria Inn Hotel, Brandon.

[Register](#) soon to ensure your spot.

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