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Discharge Declined for Bankrupt Estate: MBQB

The court declined to issue an order discharging a bankrupt estate in [Bankruptcy of Lyle Coleman](#), 2011 MBQB 300, finding that it was important to preserve the future authority of the administrator, and that the law applies only to and against individuals and corporations and the estate is not a legal entity. The court distinguished [Re Simoes](#), 2011 BCSC 63 (a composite case in which the B.C. court found no "legal impediment to granting a bankrupt a discharge after death") on the basis that all the *Simoes* bankrupts had made their own assignments into bankruptcy, whereas in this case the administrator of the estate had done so. Citing finality as the main reason why the granting of a discharge would be inappropriate the court said:

If a discharge is granted these unanticipated future matters will be caught in legal limbo. Any further monetary benefits could not be distributed to the creditors nor would the trustee have authority. An annulment of the discharge would have to be taken at considerable expense for a probable modest return. While everyone likes to close files and consider outstanding matters at an end, this procedure unfortunately is not practical nor wise under the circumstances.

This court regards the noted provisions of the BIA i.e. the estate references within s. 49.(1), as being primarily remedial and facilitative in legislative purpose. To achieve those goals, the future authority and ability of the administrator should be preserved. This does not mean that after a reasonable period of time that the trustee could not be discharged. It does mean, however, that the subject bankrupt estate would remain as legislatively intended unbarred by discharge and thus capable of undertaking future legal and bankruptcy obligations. (paras. 10 and 11)

Property Lessees Exempted From School Tax: MBQB

Overruling an order of the Board of Revision, the court exempted WASO, a training organization for adults with intellectual abilities, from taxation for school purposes under s. 23(1)(e) of the *Municipal Assessment Act* in [WASO v. Assessor for the City of Winnipeg](#), 2011 MBQB 297. The primary issue was whether WASO fell within the definition of "owner" in the section, given the fact that the property in question was leased rather than owned as was the case with their other (exempted) properties. The court rejected the city's argument that the legislature's intent in amending the act was to tie the meaning of "owner" to a fee simple interest in land and to distinguish between situations in which real property is "owned by" a party and those where a party only holds the property "under leasehold title." The court assumed, instead, that the legislative drafters had good reason for clarifying the definition of "ownership" in some but not in all sections of the act and that they deliberately chose not to provide a universal definition. As such, the pre-amendment *Cultural Centre* finding that a leaseholder fell within the definition of "owner" under a different section of the act applied.

Agreement to Arbitrate Doesn't Apply "Forever and a Day": MBQB

The court invoked ss. 6(c) and s.7(2)(b) of *The Arbitration Act* to prevent the unfair or unequal treatment of a party to an invalid arbitration agreement in [Hopkins v. Ventura Custom Homes Ltd.](#), 2011 MBQB 271, a case involving a dispute between a builder and a home purchaser over whether the finished product was fit for its purpose as a family dwelling. The builder argued that the parties' Custom Home Agreement obliged them to settle disputes by arbitration, even though the problem giving rise to the dispute arose four years after the homeowners took possession. The court disagreed, finding that obligatory arbitration is restricted to those disputes arising in the course of construction. Applying the principle of *contra proferentem* (para.42), the court noted that typical standard form construction agreements do not always ensure even or fair bargaining positions:

such agreements are imposed unilaterally, without negotiation, by one party upon the other. In that context, discerning the intention of the parties - which is sometimes more evident when there has been an easier to identify, informed "give and take" negotiation - requires the court to assume that a party would not knowingly endorse an agreement which puts itself in an obviously disadvantaged or prejudiced position respecting, amongst other things, future dispute resolution and basic precepts of natural justice. (para.31)

Resulting and Constructive Trusts: MBQB

The court considers the law of resulting trusts in [India Association of Manitoba Inc. et al. v. India School of Dance, Music & Theatre Inc.](#), 2011 MBQB 292, a case involving a dispute over beneficial ownership of a property purchased in part with money contributed by several cultural organizations. The court found a trust had been established with respect to the contributed funds, but not with respect to grant money received from the government. On the distinction between the remedies afforded by resulting and constructive trusts the court said:

the reasoning that applies to a constructive trust does not apply to a resulting trust. A constructive trust is an available remedy for unjust enrichment. A resulting trust is not an alternative remedy. A resulting trust arises by operation of law and is based on the parties' intentions as to the interest in property of the party or parties who advanced the purchase money. No authority was cited to say that monetary compensation can be an adequate remedy and in fact, this is contrary to the very concept of a resulting trust which is to give a purchaser an interest in the property. (para.68)

Land Titles Search Feature Improvements

The Property Registry has [announced](#) improvements to the Manitoba Land Titles system search features allowing better access to Land Titles information. As of December 15, 2011, instrument registration numbers and title numbers will be followed by a forward slash and a number corresponding to the office number in the Manitoba land titles system. Both the registration and office number will be required to order land titles documents. Changes (detailed in the announcement) have also been made to several screens or print outs.

Complying with RPA Witness Requirements

[Bill 43](#) came into force December 5, 2011, introducing significant changes to real estate practice in Manitoba, including the requirement under [s.72.5](#) and [s.72.7](#) of *The Real Property Act* that transfers of land and mortgages be witnessed "by a barrister or solicitor entitled to practise in the province or territory where the transfer/mortgage is executed." The Land Titles Office interprets this to mean a lawyer holding a practising certificate issued by the Law Society of Manitoba (i.e. not a non-practising or inactive member) in accordance with the definition of lawyer and practising lawyer under [The Legal Profession Act](#). The above sections also specify what witness information is required to prove execution (ss. 72.5(4) and 72.7(3)). Lawyers who are considering purchasing a stamp to use for this purpose should use the following LTO accepted format:

Susan Smith
Manitoba Practising Lawyer
6th floor - 10 Main St.
Winnipeg, MB R3K 3M5

Adding the words "and Notary Public" (to make it a multi-purpose stamp) is also acceptable.

Recent Articles on Property and Estates Topics

These publications may be of interest to solicitors:

- The latest edition of [Charity Talk](#), the CBA National Charities and Not-for-Profit Law section newsletter, contains articles on [the Canada Not-for-Profit Corporations Act](#), [Recent cases on charity law issues](#), and [Recent CRA views on condo corporations as non-profit organizations](#).
- [The perilous presumption of undue influence](#) - this *Lawyers Weekly* article considers whether the rules should be liberalized to make it easier to challenge a will on the basis of undue influence.
- [Caveat realtor?](#) - a *National* magazine article on the stretching of the doctrine of latent defect and whether vendors and agents have a duty to alert buyers to "stigmatized real estate." The Ontario case referred to in the article (in which the latent defect was a child pornographer living across the street from the sale property) is also discussed in this recent [Pitblawg post](#) and [article](#) by Ned Brown.
- [Beware U.S. property tax implications](#) - a *Lawyers Weekly* article on using a residence trust to address the tax implications of owning U.S. property.
- [The Dirt: Oklahoma frauds return as scam of choice](#) - this *Law Times* article urges mortgage lending lawyers to protect themselves from the return of the Oklahoma fraud scheme, which has recently implicated five lawyers in a lawsuit brought by the liquidators of the Croation (Toronto) Credit Union.

Winter CPD: LSM

- **Not-for-Profit Corporations Act (Webinar)** - The [Canada Not-for-profit Corporations Act](#), S.C. 2009, c. 23 came into force October 17, 2011, updating not-for-profit corporate governance procedures and requiring existing federal not-for-profits (governed under Part II of the *Canada Corporations Act*) to transition to the new regime within three years. Presenter Bruce King will walk you through the new act and regulations at this webinar-only program scheduled from 12:00 noon to 1:00 p.m. February 8, 2012. For further details see the [course description](#) and [registration form](#).
- Enrolment is limited for the Law Society's upcoming program on [Practical Ethics: Real Problems, Real Solutions](#), which takes place February 28, 2012 from 9:00 a.m. to 12:00 noon at the Law Society classroom. Featuring Canadian lawyer and leading legal ethics instructor Paul Paton and a local panel, this session will teach you what you need to know about ethical practice. [Register](#) soon to take advantage of early bird pricing.

2012 MBA Mid-Winter Meeting

The Manitoba Bar Association's [Mid-Winter Meeting](#) will be held January 19-20, 2012 at the Fort Garry Hotel. The Real Property Law section is sponsoring the program **The Manitoba Real Property Act Enters the 21st Century**, with Irv Simmonds and Barry Effler of the Property Registry and Russell Davidson of the Winnipeg Land Titles Office. The Wills and Estates Law section is presenting the program **Cross-Border Planning for Canadians with US Interests**, with Leilani Kagan and James McDonald.

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