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Sidestepping Statutory Variance Appeal Not Abuse of Process: MBCA

The court rejected the City's argument that only *City of Winnipeg Charter* tribunals can deal with zoning variances or non-conforming uses of property and that there is no corollary right to seek a court declaration for prior non-conforming use in [*Donald B. Holdings Ltd. et al. v. The City of Winnipeg*](#), 2012 MBCA 70. The respondents only started the variation process because they were assured that if the variance was denied matters would revert to the status quo, said the court. It was not an abuse of process for them to forgo the statutory appeal process and to seek a declaration and damages in court.

Leaseholder Exempt From Payment of School Taxes: MBCA

In [*W.A.S.O. Inc. v. Winnipeg*](#), 2012 MBCA 66 the Court of Appeal refused to overturn the lower court finding that a leasehold interest in property satisfied the criterion of "ownership" under [*s. 23\(1\)\(e\)*](#) of *The Municipal Assessment Act*, thus exempting WASO from paying school tax. The court rejected the assessor's argument that amendments made to other sections of the MAA made it clear that the legislature did not intend the words "owned...or...used by" in the section to include leasehold interests. The court disagreed, finding that "(i) f the Legislature intended to remove the exemption provided to a leaseholder under s. 23(1)(e) of the MAA it should do so in a clear and unambiguous manner." (para. 9)

Property Assessment Appeal Allowed: MBCA

The court granted leave to appeal a "puzzling" property assessment decision of The Municipal Board in [*Canadian Property Holdings Inc. et al. v. The Assessor for the City of Winnipeg et al.*](#), 2012 MBCA 55. Although the Board's methodology in determining assessed value would not normally be an appealable question of law, in this case the discrepancy between the comparables and the actual rental rates was sufficiently disparate that the Board arguably failed in its duty to establish value. The court concluded:

Because of this disparity, what would normally be a question of mixed fact and law or methodology might well morph into an issue of law alone.

The distinction between a question of law and one of mixed fact and law is, in this case, sufficiently narrow that the applicants should be allowed the opportunity to attempt to make their case before a panel of this court (paras.17 and 18).

Mortgagor Denied Pending Litigation Order: MBQB

The court dismissed a mortgagor's application for a pending litigation order and vacated an interim interlocutory injunction prohibiting the mortgagee from continuing with mortgage sale of the property in [*Vitran Express Canada Inc. v. Samborski Garden Supplies Ltd.*](#), 2012 MBQB 218. The court found that the mortgagor sought the pending litigation order in an attempt to prevent the mortgagee from exercising its rights and, in these situations, "case law in Manitoba clearly establishes that...a pending litigation order is not available to a mortgagor." The court also found that the mortgagor had failed to meet the test for an interlocutory injunction since it clearly had the funds to pay the balance of the mortgage and prevent the mortgage sale.

Court Voids Powers of Attorney: MBQB

The court ordered punitive damages against a defendant who fraudulently misled the plaintiffs into signing powers of attorney that he later used to transfer the plaintiffs' real estate in India to a second defendant in [*Grewal et al. v. Brar et al.*](#), 2012 MBQB 214. In a case that turned on the credibility of the witnesses, the court found all of the defendant's testimony to be incredible and his lawyer's evidence as to the execution of the documents to be "unreliable." The court declared the powers of attorney void *ab initio* and invalid.

Trust Claim Fails: MBQB

The court rejected a plaintiff son's claim that he was the beneficial owner of land held in trust for him by his now deceased mother in [*McLean v. McLean*](#), 2012 MBQB 206, a dispute between brothers over ownership of the family farm. In the absence of any documentation evidencing a trust relationship, and considering credibility gaps in the plaintiff's testimony, the court found that "the evidence fell far short of establishing" a resulting trust or otherwise. In an aside, the court noted that counsel for the estate had not relied on the conclusion in *Ehrmantraut* that, "by virtue of s. 59(1), a certificate of title is conclusive evidence of ownership both at law and in equity and thereby ousts the equitable jurisdiction of the court to recognize a resulting trust."

Executors' Conduct Condemned: MBQB

An executor who repeatedly placed himself in a position of adversity with a sibling beneficiary and acted in defiance of the advice of the estate's lawyer with no regard for possible detriment to the estate was ordered to pay all of the beneficiary's legal costs personally and on a solicitor client basis in [*The Estate of Mary Margaret Bos*](#), 2012 MBQB 173. Another sibling (described as a "puppet" co-executor) was also found responsible for the protracted and unnecessary litigation and ordered to share the costs. The court commented at para.77 that, while

(i)t may not be the court's role to comment on perceived moral failings of a party demonstrating reprehensible behaviour towards a close relation who has rendered services of incalculable value to the family...(c)ase law makes clear that it **is** the court's function to consider the actions of a party who undertook a position of trust to that same relative, and to determine whether those actions met the required standards.

Legislative Update

[Bill 28](#), *The Residential Tenancies Amendment Act*, received royal assent on June 14, 2012. Parts of the act came into force on royal assent, and other sections (7, 12, 15, 16(2) and (3), 18, 19, and 29(3)) await proclamation. The amendments clarify the rights and obligations of tenants and landlords concerning termination, rent increases, and rehabilitation. The [explanatory note](#) to the bill and this government [news release](#) discuss the changes.

2013 Rent Guideline Set

The 2013 provincial rent guideline has been set at 1 per cent and will take effect January 1, 2013. Further details can be found in this government [news release](#) or on the [Residential Tenancies Branch website](#).

New Land Titles Fees

Several new land titles fees came into effect August 26, 2012, pursuant to Land Titles Fee Regulation, amendment, 55/2012, registered May 14, 2012. The new regulation amends [M.R. 171/89](#). The new fees are described in this Property Registry [notice](#), dated May 25, 2012.

Articles on Property and Estates Topics

The following articles may be of interest to solicitors:

- [Problems With Credit Card Account Interest Obligations](#) - Ned Brown discusses possible solutions to the problem of collecting post-default interest where the credit card debt is real estate secured (usually by an all obligations mortgage on the cardholder's home). Securing cardholder debt by real estate engages s.8 of the *Interest Act*.
- The July 2012 edition of [The Last Word](#), the National Wills, Estates and Trusts newsletter, contains four articles on estates topics, including two written by lawyers from Manitoba's Inkster Christie Hughes LLP. The [first](#) concerns [Re: Quandt](#) 2011 SKQB 345, a Saskatchewan decision that "introduces a potential new twist to the issue of undue influence"; and the [second](#) discusses the Manitoba Court of Queen's Bench decision in [Young v. Paillé](#), 2012 MBQB 3.
- [How not to draft a will](#) - this *Lawyers Weekly* article discusses [Rondel v. Robinson Estate](#), 2011 ONCA 493, in which the court refused to rectify an improperly drafted will by allowing direct extrinsic evidence of the testator's intention and deleting the revocation clause. The author contends that the lawyer's failure to ask basic questions was the root cause of the testator's misunderstanding.
- [Genetic Material As Property: Rethinking The Common Law View](#) - this WeirFoulds article points out that several recent cases have reconsidered the common law view that body parts are not property. The authors suggest that testators who have stored genetic material should consider its disposition in their wills.
- [What Your Will Should Say About Your Digital Assets](#) - this post by Sensei Enterprise partners Sharon Nelson and John Simek contains sample digital asset clauses for powers of attorney and wills.

Fall CPD: LSM

Be sure to register soon for these upcoming continuing professional development programs offered by the Law Society:

- [Confidentiality & Privilege: An Estate Litigation Perspective](#) - this program will give you the information you need to respond appropriately to third party requests for confidential information concerning powers of attorney or wills you drafted. It takes place October 25, 2012, from noon to 1:30 p.m. at the Law Society classroom. [Register](#) soon to attend in person or by teleconference.

Learn more about the operations of the Law Society in these upcoming webinars:

- [Dealing with Complaints to the Law Society - What Every Lawyer Needs to Know](#) - this repeat webinar on the complaints process, facilitated by Law Society staff, takes place September 18, 2012 from noon to 1:00 p.m.
- [Everything You've Ever Wanted to Know About the Professional Liability Insurance Claim Process, But Were Afraid to Ask](#) - Law Society insurance department staff will review insurance coverage and reporting obligations in this lunch hour webinar on October 17, 2012. Groups of two or more people will receive a fee discount.

MBA/CBA Programs

The MBA is offering the following programs:

- [Ethics in Estate Planning](#) - The Wills & Estates section is presenting a lunch program on estate planning ethics on September 14, 2012 at the Law Society classroom. Presenter John Poyser will address quality control, liability control and profitability.
- [The use \(and abuse\) of trust conditions in conveyancing transactions](#) - Herb Peters will discuss trust conditions at this September 20, 2012 meeting of the Real Property section. The meeting takes place from 5:00 to 6:30 p.m. at the Pitblado LLP offices, 360 Main Street.

The CBA is presenting two online webinars this month:

- [Wills and Estates Planning: A Primer](#) takes place on September 27, 2012 in a live webcast from Toronto.
- [Trusts & Estates Law: Disclaiming, Renouncing, Retiring And Removing: How to Get Rid of A Trustee](#) will review the practical strategies and procedures for the voluntary and contested removal and replacement of trustees. It takes place September 25, 2012 in a live webcast format.

Upcoming STEP Programs

The [Winnipeg branch](#) of the [Society of Trust and Estate Practitioners](#) (STEP) is offering a full slate of [educational sessions](#) this year, open to members and non-members. Sessions for the upcoming year include: charitable giving, domestic and international uses of trusts, business succession planning, the principal residence exemption, Canada-US estate planning, planning for the capital gains exemption, and a CRA Roundtable.

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