



eLaw - Property & Succession Update

**October/November 2012 - No.
61**

ISSN 1916-3894

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Real Estate Developers Must Mitigate: SCC

In [*Southcott Estates Inc. v. Toronto Catholic District School Board*](#), 2012 SCC 51 the court considered whether the plaintiff/appellant (a corporation incorporated for the sole purpose of making a profit on a specific land purchase), was excused from mitigating its losses when the vendor breached the agreement of purchase and sale, on the basis that it had made a prompt claim for specific performance. While acknowledging that there may be situations in which a refusal to mitigate may be reasonable, the court found that "(a) plaintiff deprived of an investment property does not have a "fair, real, and substantial justification" or a "substantial and legitimate" interest in specific performance unless he can show that money is not a complete remedy because the land has "a peculiar and special value" (para. 41). The decision has been criticized for its failure to accord with commercial reality:

- [*A Doctrine Of Mitigation In The Supreme Court Of Canada: A Triumph Of Theory Over Commercial Reality*](#), McCarthy Tetrault.
- [*Duty to Mitigate When Seeking Specific Performance: The Supreme Court's Catch-22*](#), Trial Warrior blog.

Oil and Gas Lease Wars: MBQB

Challenges to oil and gas leases and royalty assignments are becoming more common with the increased value of mines and minerals. [*Campion et al v Radomski*](#), 2012 MBQB 267, a dispute between the holders of an assignment part of royalty (petroleum) agreement and the participants in a subsequently executed petroleum and natural gas lease and mineral trust agreement, illustrates the complexities inherent in these arrangements. The court dismissed the motion for summary judgment asking that the assignment of royalties be declared invalid on the basis that the rights assigned in the assignment were rights *in persona* and therefore incapable of being assigned. Among other things, the court found that it would be hard to refute the contention that the property interest transferred by the assignment constituted an interest in land.

Property Directive Not Law: MBQB

In [*Chartier v. Chartier Estate \(Trustee of\)*](#), 2012 MBQB 243 the court dismisses the trustee's motion for a stay of an [earlier order](#) (now on appeal) dealing with the novel point of law as to whether a person's right to veto the sale of homestead property vests in her trustee in bankruptcy. In the decision last June the court held that it did not, "which effectively removed the obstacle to the plaintiff selling the home that he now shares with his bankrupt wife." The court found no basis for the argument that the trustee would suffer irreparable harm if a stay was not granted. On the contrary, it was the husband who would suffer harm by the continued inability to access the equity in his house.

The court granted the responding motion by the plaintiff/husband to compel the Registrar-General to comply with the original order. The Registrar-General's refusal to lift the homestead notice or to accept a waiver of homestead rights from the bankrupt wife was based on an October 2004 directive that the Property Registry will not act on an order without either a certificate that no appeals are pending, or the consent of all parties or a specific order of the court

dispensing with those requirements. On this issue the court found at para.30:

The rule-making authority given to the Registrar-General by *The Real Property Act* does not empower him to create law, nor does it give him authority to enact rules which conflict with the laws of this province. And the law of this province, as I understand it, is that an order of this court is enforceable unless it is stayed by an order of this court or the Court of Appeal (*Court of Queen's Bench Rules*, s. 63.01(1)).

Resigning Executor Entitled to Reasonable Compensation: MBQB

An executor who resigned and later asked for \$71,500 compensation on a \$188,000 estate was awarded \$10,000 as reasonable compensation for his time and trouble in [*The Estate of William Thomas Snowden*](#), 2012 MBQB 237. In determining what constituted reasonable compensation the court balanced the fact that the executor was a family friend who had never indicated that he expected to be compensated with the reality that he had provided professional accounting services that were of value in completing the administration of the estate.

Input Sought on Proposed Changes to Law on Nuisance Actions

[The Manitoba Law Reform Commission](#) is seeking input on its Report for Consultation: [The Nuisance Act and The Farm Practices Protection Act](#) which, among other things, recommends repealing *The Nuisance Act* and introducing substantive and procedural changes to *The Farm Practices Protection Act*. Comments should be made in writing to mail@manitobalawreform.ca by November 30, 2012.

Property Registry Annual Report

The 15th [Annual Report of the Property Registry](#) is now available online. It contains historical information about the operations of the Manitoba Land Titles Office and Property Registry and describes modernization efforts undertaken by the Agency such as the implementation of an electronic title system and the Client Service Improvement Initiative.

Historic Property Notices

In compliance with [s.157.1](#) of *The City of Winnipeg Charter* the City has filed caveats registering a Historic Property Notice against all properties currently on the Conservation List pursuant to the Historical Buildings By-law No. 1474/77. The Historic Property Notice does not prevent buying or selling of the property, but does alert prospective purchasers that there are restrictions with respect to the property and that a defined process needs to be followed in order to alter certain aspects of the property. Further information can be found on the [City of Winnipeg website](#) or by calling the City's Heritage Planner at (204) 986-4722.

Recommended Reading

The following articles may be of interest to solicitors:

- [*What It Means to Be a Trustee: A Guide for Clients Acting as Fiduciaries*](#) - this Practice Points publication provides an overview of the duties all prospective and existing trustees should be aware of in exercising the office of trustee, in a format for practitioners to use as a guide when advising clients.
- [*Selling Your Home? You and Your Agent Better Be Careful of What You Say... or Don't Say*](#) - this Slaw post discusses [*Costa v. Wimalasekera*](#), 2012 ONSC 6056, a recent Ontario decision upholding a \$25,000 damage award against a vendor who failed to disclose a known backyard water accumulation problem on a Seller Property Information Statement (he answered "No" to the question "Is the property subject to flooding?").
- [*Lawyers advised to brush up on digital assets*](#) - this *Law Times* article discusses why estates lawyers should encourage testators to think about who should have access to their digital accounts and passwords and how this should be dealt with in their wills.

Legal Boundaries in a Global World: 2012 Isaac Pitblado Lectures

The [2012 Isaac Pitblado Lectures](#) will explore how increasing globalization is affecting the practice of law in Manitoba. Keynote speakers include Chief Justice Warren Winkler, Prof. Trevor Farrow, Dr. Michael Geist, Edward Northwood, and Dr. Bryan Schwartz. The lectures take place November 30 and December 1 at the Fort Garry Hotel.

Upcoming CPD: LSM

There's still time to register for these upcoming professional development programs offered by the Law Society:

- [*Electronic Legal Research Booster \(An Intermediate Level Legal Research Program\)*](#) - Enhance your online legal research skills at this hand-on program where you will learn how to find the best free legal commentary on recent case law and legislative developments in your practice area. The program takes place on November 14, 2012, from 1:00 to 4:00 p.m. at the Law Society classroom.
- [*Practical Ethics: Real Problems, Real Solutions*](#) - [register](#) soon to attend either the morning or afternoon session of this live repeat of last winter's popular program on practising ethically. The sessions take place on December 10, 2012 and feature leading legal ethics instructor Paul Paton and local panellists Vivian Rachlis, Bill Gange and Anita Southall.
- [*Short-Writing: A 21st Century Paradigm for Persuasive Writing*](#) - Stuart Teicher, a professional legal educator who focuses on ethics law and writing instruction, will teach you how to write persuasive documents of any kind (letters, memos, etc.) in this one hour webinar starting at noon on December 3, 2012. Discounts are offered for multiple participants.

MBA/CBA Programs

- The CBA's National Real Property Law section is presenting the online program [The New MLS Rules: What Lawyers Should Know](#) on November 15, 2012. Presenters from Calgary and Toronto will discuss how changes to the MLS rules have created new opportunities for lawyers to get involved in the real estate market.
- Mark your calendars for the Manitoba Bar Association's 2013 Mid-winter Conference which will be held January 24 and 25, 2013 at the Fort Garry Hotel. There will be professional development programs on both days, including sessions on Condominium Law, Builders' Liens, All Purpose Mortgages and Trustee Powers in Wills.

Society of Trust and Estate Practitioners (STEP) Programs

- The Winnipeg branch of [STEP](#) is presenting the program [Various Domestic and International Uses of Trusts](#) on November 20, 2012. Presenters will highlight various trust structures for both domestic and international trusts using case studies. Cases will include the use of trusts for immigration, asset protection, real estate holdings, charitable purposes, generational planning, insurance and first nations. The program takes place from 9:30 - 11:30 a.m. at the Delta Winnipeg.
- The December program, Succession Planning in Practical Terms, will be held December 11, 2012.

Honouring Chief Justice Richard Scott on His Retirement

Manitoba's legal community is invited to participate in two events honouring Chief Justice Richard Scott on his retirement. An educational forum [Courting Change: The Changing Role of Courts](#) will be held February 8, 2013 and a [gala dinner](#) is planned for February 9, 2013. See www.scottretirement.org for more information.

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