



## eLaw - Property & Succession Update

April/May 2013 - No. 64

ISSN 1916-3894

### In This Issue

#### **"Talk is Cheap": MBQB**

**Clear and Convincing Evidence Required for Reliance on Aboriginal  
Custom Adoption: MBQB**

**Agreement too Uncertain to be Enforced: MBQB**

**Registration Against Title Critical to Determining Priority of Interests:  
MBQB**

**Lien Bond Satisfies Trust Obligation: MBQB**

**Update on New and Proposed Legislation**

**New Land Titles Forms**

**Reports on Nuisance, Farm Practices Protection Act, and Commercial  
Tenancies: MLRC**

**Recommended Reading**

**Upcoming CPD Programs: LSM**

**MBA Programs**

**STEP Programs**

#### **"Talk is Cheap": MBQB**

Talking about changing one's will is not tantamount to expressing testamentary intention, said the court in [\*Re Moore Estate\*](#), 2013 MBQB 82, a case "fraught with ambiguity" in which the deceased's caregiver and his lawyer gave contradictory evidence concerning the deceased's wishes. The court rejected the caregiver's application to invalidate the final codicil made by the deceased in which he reduced his bequest to her by \$300,000 and removed her as a residual beneficiary. It was clear, said the court, that the deceased "understood well the solemnity and "ritual" involved in making a will" and, over the course of many revisions, " was always careful and precise in his instructions."

## **Clear and Convincing Evidence Required for Reliance on Aboriginal Custom Adoption: MBQB**

The court refused to grant legal effect to an aboriginal custom adoption in the [\*Estate of Samuel Corrigan\*](#), 2013 MBQB 77, finding that "(i)f customary adoptions involving non-aboriginal parents are to be recognized, the onus to prove that the Caucasian parent is entitled to rely on the aboriginal custom must be onerous. Any evidence of acceptance of aboriginal custom and culture as the adoptive parent's own must be clear and convincing." (para. 36) In this case, the court found no clear evidence that the deceased (a Caucasian professor who adopted the applicant by way of an aboriginal custom adoption and subsequently raised him) lived in accordance with or followed aboriginal custom. As such the applicant was not an adopted son for the purposes of *The Intestate Succession Act* and the residue of the estate would be transferred to the Crown.

## **Agreement too Uncertain to be Enforced: MBQB**

The court found an agreement to divide farmland unenforceable in [\*Shumilak v. Shumilak\*](#), 2013 MBQB 54, because the parties (brothers who were each the registered owners of a one-half interest in land previously owned by their parents) failed to agree on several material terms, including those specifying how the land was to be divided, when subdivision would occur, and who would bear the cost. To do equity between the parties the court ordered an accounting of all rental and farm income and expenses from the date of the mother's death and urged the parties to resolve their issues without further court proceedings.

## **Registration Against Title Critical to Determining Priority of Interests: MBQB**

The City of Winnipeg acted correctly in refusing to assign the tax sale certificate for a property to the assignee of a judgment which had failed to register its interest against the title by way of certificate of judgment, according to the court in [\*Daylight Capital Corporation v. The City of Winnipeg et al.\*](#), 2013 MBQB 51. The court rejected Daylight's argument that the city had received *de facto* notice of its interest when it initially provided the City with a copy of the assignment of judgment (which was not in registrable form). Daylight was at fault in failing to register its interest before a third party was assigned the tax sale certificate said the court, which dismissed the damages claim against the City.

## **Lien Bond Satisfies Trust Obligation: MBQB**

A lien bond filed by the general contractor of the new football stadium in order to obtain removal of a builder's lien filed by the roofing subcontractor (Structal) satisfied its trust obligation under s. 4(3)(a) of *The Builders' Liens Act* and the general contractor was not obliged to hold back disbursement of progress payments according to the court in [\*Stuart Olson Dominion Construction Ltd. v. Structal Heavy Steel\*](#), 2013 MBQB 48. The court declined to determine, at this preliminary stage in the litigation, whether the general contractor had a right of set-off to diminish the amount of the trust fund and whether Structal was entitled to payment of funds from the progress payment.

## Update on New and Proposed Legislation

The [\*Protection of Residential Mortgage or Hypothecary Insurance Act\*](#), S.C. 2011, c. 15, s. 20 (part of the [\*Supporting Vulnerable Seniors and Strengthening Canada's Economy Act\*](#)) came into force January 1, 2013. The new act and [regulations](#) formalize existing mortgage insurance arrangements with private mortgage insurers and CMHC, strengthening government oversight of the mortgage insurance industry, according to this [regulatory impact analysis statement](#).

Bills currently before the Manitoba Legislature dealing with property issues include:

- [Bill 5](#), *The New Home Warranty Act*, under which all new homes built for sale are covered by a warranty against defects in materials, labour and design and structural defects. New home builders will be required to register and all homes built by a registered builder must be covered by a home warranty provided by a warranty provider. The act sets out the minimum required coverage. See the [explanatory note](#) for further details.
- [Bill 7](#), *The Planning Amendment And City of Winnipeg Charter Amendment Act (Affordable Housing)* amends *The Planning Act* and *The City of Winnipeg Charter* to enable planning districts and municipalities to use zoning by-laws and development agreements to require that affordable housing be provided in new residential developments.
- [Bill 22](#), *The Planning Amendment Act (Subdivision Approval)*, introduced April 19, 2013, condenses the approval process for minor subdivisions in rural municipalities and makes municipal decisions involving minor subdivisions final decisions of the approving authority.
- [Bill 29](#), *The Land Surveyors and Related Amendments Act*, introduced April 24, 2013, provides updated legislation for the governance of the land surveying profession. It contains a consequential amendment to *The Condominium Act*, and related amendments to *The Real Property Act* and *The Registry Act*.

## New Land Titles Forms

The Land Titles Office recently released updated versions of their [land titles forms](#) which are now available online or at the Land Titles Office. Older forms will be accepted until September 30, 2013, as explained in this [Notice on Transition](#). The implementation of the new forms is the first phase of a two phase approach toward the development of electronic Land Titles forms, or eForms, according to the notice.

## Reports on Nuisance, *Farm Practices Protection Act*, and Commercial Tenancies: MLRC

The Manitoba Law Reform Commission released its final report on [\*The Nuisance Act and The Farm Practices Protection Act\*](#) on March 28, 2013. The report reviews the common law of nuisance and its historical role in regulating environmental and land-use conflicts and examines how the two acts restrict the common law. It concludes by recommending that *The Nuisance Act* be repealed and that there be a broad, inter-disciplinary and public review of *The Farm Practices Protection Act*.

Also released on March 28, 2013 was Report #127: [Commercial Tenancies: Section 17 of \*The Landlord and Tenant Act\* and Section 93 of \*The Real Property Act\*](#). It reviews the discrepancies between the above noted sections governing a landlord's right to re-enter leased commercial premises where a tenant has committed a serious breach of a tenancy agreement. The Commission recommends the enactment of a single statutory implied term allowing a landlord to re-enter leased commercial premises if rent is unpaid for a period of 15 days or if a covenant is breached continuously for a period of 15 days. As noted in the [executive summary](#), the Commission also recommends incidental changes to the legislation, with a view to improving its clarity and accessibility.

---

### Recommended Reading

The British Columbia Law Institute released its comprehensive [\*Consultation Paper on Common-Law Tests of Capacity\*](#) on February 22, 2013. According to the [press release](#), the paper "examines legislative reforms to judge-made rules governing when a person is determined to have the mental capacity to carry out a transaction or enter into a relationship...(It) contains 31 proposals for reform on how tests of mental capacity operate when someone wants to make a will, to designate a beneficiary under an insurance policy or retirement plan, to make a gift, to nominate a committee, to enter into a contract, to retain legal counsel, to marry or enter into a spousal relationship, or to separate from a spouse."

Executors are increasingly facing the issue of how to handle online profile and social media assets, particularly where the deceased has left no instructions in the will. The *Lawyers Weekly* article [\*Virtual life after death\*](#) explores some of the complications, including how to gain access in the face of third party control and how to delete or maintain a profile. For a more detailed exploration of the issue see [\*What Happens to Our Facebook Accounts When We Die?: Probate versus Policy and the Fate of Social-Media Assets Postmortem\*](#), a scholarly (albeit American) article which can be downloaded from SSRN.

[\*Home Purchaser Forfeits \\$100,000 Deposit Because Her Lawyer Doesn't Check Fax Machine\*](#) - this Slaw post discusses the decision in [\*Thomas v. Carreno\*](#), 2013 ONSC 1495, in which a purchaser lost her \$100,000 deposit because her lawyer missed a fax from the vendor's lawyer advising that an open building permit had closed and the purchaser was obligated to proceed.

[Sage Advice](#), the CBA National Elder Law section newsletter, contains articles on [Planning for the protection of older adults](#), [Snapshot of housing options for seniors](#), and [Proposed changes to the Indian Act](#).

[Judge seeks end to "longest running legal drama"](#) - this *Law Times* article discusses an Ontario estate dispute that has been ongoing for more than forty years and involves more than thirty lawsuits. In the latest action the court declared the plaintiff son a vexatious litigant.

Cynthia Hiebert-Simkin's article [Don't call it a pre-nup - call it an estate-planning agreement](#), originally published in *The Lawyers Weekly*, is in the March 2013 edition of [The Last Word](#), the CBA's Wills, Estates and Trusts section newsletter. Also in the newsletter are articles on [Taxation of Executor Compensation](#) and [Certainty in Probate Practice](#).

[Competing with DIY Making the case for a lawyer-prepared will can be a challenge](#) - this *Lawyers Weekly* article offers tips for persuading clients of the value of lawyer-prepared wills.

[Buyer beware a toxic surprise](#) - real estate lawyers should warn clients of the risk of environmental contamination according to the authors of this *Lawyers Weekly* article.

[Condominiums, Caregivers and Human Rights](#) - this ABLawg post discusses the legal avenues to challenge condominium by-laws purporting to restrict the use of live-in caregivers and makes the argument that human rights legislation should apply in this context.

[British Columbia Court of Appeal Reaffirms Seller's Right to Retain Defaulting Buyer's Deposit Without Proof of Damages](#), McCarthy Tetrault and [Real Estate Deposits Held to be Forfeit Without Proof of Damages](#), Blakes - these two articles discuss [Tang v. Zhang](#), 2013 BCCA 52, a recent BCCA decision on forfeiture of deposits under BC purchase and sale agreements.

[Court sends message about hiding from dependants](#) - this *Law Times* article discusses the controversial decision in [Stevens v. Fisher](#), 2013 ONSC 2282, in which the judge essentially rewrote the will of an Ontario testator who left nothing to his common law wife by reallocating his insurance funds.

---

## Upcoming CPD Programs: LSM

[Time Mastery for Lawyers](#) and [Time Mastery for Support Staff](#) - Effective time management is a skill both lawyers and support staff strive to master. The Law Society is once again bringing in Frank Sanitate for two full-day workshops on this topic on June 11 and 12, 2013. [Register](#) on or before May 10, 2013 to take advantage of the early bird rate.

## MBA Programs

The Wills and Estates Law section of the Manitoba Bar Association is presenting a lunch program on [Estate Planning Agreements](#) on May 10, 2013 at the Law Society classroom. Cynthia Hiebert-Simkin will address estate planning issues when dealing with second (or third or fourth!) marriages, a complex web of rights and obligations that is becoming increasingly common (see her article on this topic above).

The Elder law section is hosting a program with the [Geriatric Mental Health Assessment Team and the Geriatric Psychiatric Assessment Team](#) on May 24, 2013, from noon to 1:30 p.m. at the Law Society classroom. Dr. Stewart-Archer, a nurse specialist in rehabilitation and geriatrics, will speak on the in-home assessment process and results.

## STEP Programs

The Society of Trust and Estate Practitioners is presenting a lunch program on [Estate Fees and Costs](#) on May 21, 2013 at the Fairmont Hotel. Mr. Justice Rempel and Robert Fabbri will discuss recent updates to the Queen's Bench Rules concerning the fees that lawyers may charge when administering an estate.

*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.*