July 29, 2016

Oral Promises of Land and Controversial Issues in the Doctrine of Part Performance

By: Jonnette Watson Hamilton

Case Commented On: *Jordan v Skwarek*, 2016 ABQB 380 (CanLII)

As Master John T. Prowse noted, the facts of this case are not unusual: "A family member, often a son, works on a family farm on the understanding that he will inherit it when the owner, typically his father or grandfather, dies. If he does not inherit the farm the son brings a claim for the farm, or in the alternative a claim for compensation based on the doctrine of unjust enrichment" (at para 2). As in similar cases, the understanding in this case appeared to be unenforceable because it was an unwritten one and therefore did not meet the requirements of section 4 of the *Statute of Frauds*. The decision is interesting because it points to disagreements among the Canadian courts of appeal about the correct test for part performance, what that test demands, and what evidence may be relied upon to prove acts of part performance to get around the requirements of section 4 of the *Statute of Frauds*.

Facts

The family farm at issue in this case was near Nanton, Alberta. It was initially owned by the mother's father, and then by the mother's mother, and now by the mother, the defendant Esther Skwarek. Her son, the plaintiff Glenn Jordan, worked on the family farm for more than 30 years. Mr. Jordon alleged that he had the following unwritten understanding, first with his grandfather, then with his grandmother, and finally with his mother:

> 1) He would rent the farm on a crop share basis, 2/3 to him and 1/3 to them. While the crop input expenses were borne in the same 2/3 to 1/3 ratio while his grandfather was alive, after his grandmother inherited the farm and moved into town to live with his mother, he agreed to pay all the crop input expenses in return for living in the farm house for free.
>
> 2) He would ultimately be given ownership of the farm.

Mr. Jordan also acquired his own nearby 480-acre farm in 1987. He had begun work on a residence for himself on that farm in 2009.

When Mr. Jordan's mother asked him to sign a lease for the family farm in 2013, contrary to the unwritten understanding, he left the family farm and sued his mother for enforcement of the unwritten understanding or, in the alternative, for unjust enrichment. His mother applied for summary dismissal of both of her son's claims. Mr. Jordan relied upon the doctrine of part performance to exclude the operation of the *Statute of Frauds* and allow him to enforce the unwritten understanding.

This post will focus on the doctrine of part performance and ignore the unjust enrichment claim. I will first discuss the case and its application of the doctrine of part performance. Then I will comment on three aspects of that doctrine that appear to be unsettled in Canada among different courts of appeal.

The Statute of Frauds

The first basis on which the mother asked the court to summarily dismiss her son's claim was the *Statute of Frauds: An Act for the prevention of frauds and perjuries*, 29 Charles II, c 3 (1677, UK). In *Jordan v Skwarek*, section 4 was the relevant provision of that statute, and its relevant portions read as follows:

> No action shall be brought whereby to charge ... upon any contract or sale of lands...unless the Agreement upon which Action shall be brought or some Memorandum or Note thereof shall be in writing and signed by the party to be charged therewith... (emphasis added).

Section 4 of the *Statute of Frauds* basically requires that a contract involving land be in writing and be signed by the party to be sued. Unless both requirements are fulfilled, the contract is not enforceable.

The purpose of the 339-year-old *Statute of Frauds* was to eliminate the fraud and perjury in proving claims to land that was widespread in England in the 17th century. Most Canadian provinces have re-enacted the *Statute of Frauds*. A number of provinces have relatively recently affirmed the continued relevance of the statute and recommended retention of the requirements for writing for contracts for the sale of interests in land. See, for example, Manitoba's Report on the Statute of Frauds at 26, Alberta's *The Statute of Frauds and Related Legislation* at 2, and Saskatchewan's *The Statute of Frauds: Report to the Minister* at 4. In Alberta, it is the original English statute of 1677 that is in force.

Mr. Jordan agreed that section 4 of the *Statute of Frauds* applied to the unwritten understanding to give him ownership of the farm. However, he said his claim to the farm was enforceable because of the doctrine of part performance.

The Doctrine of Part Performance

The doctrine of part performance is an exception to section 4 the *Statute of Frauds*. Shortly after the statute was enacted in the 17th century, the courts of equity decided that they would not permit the statute to be used to commit injustice. In other words, "[i]f one party to an agreement stands by and lets the other party incur expense or prejudice his position on the faith of the agreement being valid he will not then be allowed to turn around and assert that the agreement is unenforceable": *Steadman v Steadman*, [1976] AC 536 at 540 (HL).

Section 4 of the *Statute of Frauds* is not easy to get around, however. The doctrine of part performance requires two things. The first is detrimental reliance by the party wishing to enforce the contract. The second is acts of part performance which, to use the oft-quoted formulation of Lord Selborne in the House of Lords decision in *Maddison v Alderson* (1883) 8 AC 467 at 479 (HL), "must be unequivocally, and in their own nature, referable to some such agreement as alleged".

Proof of detrimental reliance is usually not too difficult to establish. In this case, Master Prowse found that detrimental reliance was too complicated and fact-specific to be determined except by a trial. This was the only point on which Master Prowse held that the mother's application failed (at para 15).

The second part, the "unequivocally referable" test, can be demanding. I write "can be" because there is quite a lot of disagreement in Canada today about what *Maddison v Alderson* requires to meet the test that the acts "must be unequivocally, and in their own nature, referable to some such agreement as alleged." I will return to the controversies about the meaning of that test later in this post. Suffice to say that in this case, Master Prowse adopted (at para 11) the interpretation of Lord Selborne's words that was summarized in one paragraph by the Alberta Court of Appeal in *B & R Development Corp v. Trail South Developments Inc*, 2012 ABCA 351 (CanLII) at para 35:

> To invoke the doctrine of part performance, the party claiming to have performed a valid contract must demonstrate: (1) detrimental reliance and (2) that the acts of part performance sufficiently indicate the existence of the alleged contract such that the party alleging the agreement is permitted to adduce evidence of the oral agreement: *Erie Sand & Gravel Ltd. v. Seres' Farms Ltd*., 2009 ONCA 709 (CanLII), 312 D.L.R. (4th) 111 at para 79. Acts of part performance must be "unequivocally" referable to the alleged oral agreement: *Erie* at para 32; *Deglman v. Guaranty Trust Co. of Canada*, 1954 CanLII 2 (SCC), [1954] S.C.R. 725 at 733, [1954] 3 D.L.R. 785 (S.C.C.).

Unfortunately, in *B & R Development Corp* the Alberta Court of Appeal did not address its mind to the controversies surrounding the test for part performance and Lord Selborne's requirement that the acts "must be unequivocally, and in their own nature, referable to some such agreement as alleged." Part performance was only one of several issues in *B & R Development Corp* (discussed in only 6 of 80 paragraphs) and the test for applying the doctrine did not seem to be questioned. The better precedent, given its grappling with conflicting authorities, would have been the Alberta Court of Appeal decision in *Haan v Haan*, 2015 ABCA 395 (CanLII) — a decision released five months before *Jordan v Skwarek* was heard.

In any event, by relying on *B & R Development Corp*, Master Prowse adopted the strictest and most demanding interpretation of Lord Selborne's "unequivocally referable" test. Master Prowse required that the acts of part performance relied upon by Mr. Jordan to prove the existence of the unwritten understanding he alleged be "unequivocally referable to the promise that he would ultimately receive the farm" (at para 16). Mr. Jordan's acts had to be "part performance of an agreement to acquire the farm" (at para 18). In other words, it was not enough if Mr. Jordan's deeds proved the existence of an agreement dealing with the land. Under this interpretation of the test, Mr. Jordan's actions had to prove the exact contract that he alleged: the transfer of the ownership of the farm to him.

That version of the test has been called "overly stringent" (*Mountain v Mountain Estate*, 2012 ONCA 806 (CanLII), [2012] OJ No 5452, at para 88). After all, as is noted in *Snell's Principles of Equity*, 27th edition (1973) at 587, "few acts of performance point exclusively to a particular contract, least of all a multi-term contract." Not surprisingly, Mr. Jordan failed to show that the doctrine of part performance applied to his actions to allow him to exclude the operation of section 4 of the *Statute of Frauds*.

Only Mr. Jordan's acts were scrutinized. His farming expenditures were held to be "just as consistent with the acts of a long time tenant" (at para 21), his capital and maintenance expenditures for the home were held to be "equally consistent" — i.e., not "unequivocal" — with a long term tenancy as with a prospective home owner (at para 23). Because the unwritten understanding that Mr. Jordan was trying to prove was what *Snell's* called a "multi-term contract" **—** in this case including a lease of the farm, as well as a promise to transfer ownership **—** it is not surprising that his deeds looked like those of a long-term tenant as much as they looked like those of a prospective owner. He was both under the terms of the alleged agreement.

But matters were much worse than equivocal in Master Prowse's estimation. He found it "extremely significant" that when Mr. Jordan left his mother's farm in 2012 "the outbuildings were no longer usable and the farm house was tired and worn" (at para 25). His farming, capital and maintenance expenditures — which, over his 30 years on the land, included things like drilling two new water wells, adding new plumbing and sewer lines and weeping tile, and replacing the hot water tank and roof and fireplace — were judged to have "resulted in no residual benefit to the land." After initially characterizing the farm house as "tired and worn" while acknowledging that it could have been brought back into service with relatively minor expenditures (at para 25), Master Prowse concluded that by the time Mr. Jordan left the farm in 2013 "the outbuildings were unusable, and the farm house was uninhabitable" (at para 29). Just what these points had to do with whether the acts were referable to an agreement to convey the farm to him was not said. Neither was the age of the outbuildings or the farm house noted or whether it was reasonable for a future owner (and especially one with a new house on a nearby farm) to have maintained them considered. The context and circumstances of Mr. Jordan's deeds were not discussed.

Result

In the end, the mother's application for summary dismissal of both of her son's claims — for part performance and for unjust enrichment — succeeded. Her success was abetted by the fact the test for summary judgment was changed by the Supreme Court of Canada in *Hryniak v. Mauldin,* 2014 SCC 7 (CanLII), [2014] 1 SCR 87 in order to allow for quicker dispositions of cases. Instead of the old test of "discloses no triable issue," courts now decide whether there is a meritorious issue that genuinely requires a trial or whether the claim or defence is so compelling that the likelihood it will succeed is very high: *Whitecourt Power Limited Partnership v. Elliott Turbomachinery Canada Inc.*, 2015 ABCA 252 (CanLII) at para 9. Because there was no real dispute about the facts in this case, aside from whether or not the unwritten understanding existed, Master Prowse decided that a trial was not required to decide that Mr. Jordan's claims had no merit and his mother's defences were highly likely to succeed.

Comments on the Test for Part Performance

There appears to be at least three contentious aspects of the test for part performance within Canada. The first is whether to abandon the traditional test set out in *Maddison v Alderson* in favour of the more liberal test later adopted by the House of Lords in *Steadman v Steadman.* The second concerns the interpretation to be given to the *Maddison v Alderson* test and, specifically, to the requirement that the acts of part performance "must be unequivocally, and in their own nature, referable to some such agreement as alleged." The third is whether the acts of part performance must be the acts of the plaintiff, or whether the acts of the defendant can be relied upon as well.

1) Maddison v Alderson or Steadman v Steadman?

The House of Lords reconsidered its formulation of the test for part performance in *Maddison v Alderson* in the 1974 case of *Steadman v Steadman*, [1976] AC 536 (HL). The test from *Maddison v Alderson* requires that the acts of part performance "be unequivocally, and in their own nature, referable to some such agreement as alleged" (at 479 per Lord Selborne; at 491 per Lord Fitzgerald). Even more explicitly, an act "must have relation to the one agreement relied upon, and no other" (at 485 per Lord O'Hagen).

In *Steadman v Steadman* (at 546 per Lord Reid; at 553 per Viscount Dilhorne; at 559-62 per Lord Simon of Glaisdale; at 569 per Lord Salmon), the House of Lords relied upon the judgment of Upton LJ in *Kingswood Estate Co v Anderson*, [1963] 2 QB 169 and his adoption of the following rule from *Fry on Specific Performance*, 6th ed, at page 278:

> The true principle, however, of the operation of acts of part performance seems only to require that the acts in question be such as must be referred to some contract, and may be referred to the alleged one; that they prove the existence of some contract, and are consistent with the contract alleged.

The *Steadman v Steadman* test is much less demanding and easier to satisfy than the test in *Maddison v Alderson*.

Whether the correct test in Canada is from *Maddison v Alderson* or *Steadman v Steadman* is an open question because the Supreme Court of Canada has not directly confronted it. The Supreme Court has disapproved of the formulation in an earlier edition of *Fry on Specific Performance* on which the test in *Steadman v Steadman* is based. They have also adopted aspects of *Steadman v Steadman* that are related to the purpose of the doctrine, its historical development, and the relevance of payment as an act of part performance. However, the highest court has not directed its focus on the test for part performance since *Steadman v Steadman* was decided in 1974.

There are three important Supreme Court of Canada cases dealing with part performance or oral contracts dealing with land: *McNeil v Corbett* (1907), 1907 CanLII 45 (SCC), 39 SCR 608; *Deglman v Brunet Estate*, 1954 CanLII 2 (SCC), [1954] SCR 725; and *Hill v. Nova Scotia (Attorney General)*, 1997 CanLII 401, [1997] 1 SCR 69. Of these three, the leading case, which included a thorough review of *Maddison v Alderson*, is *Deglman*. The adoption of the stricter *Maddison v Alderson* test in both *McNeil v Corbett* and *Deglman* is unambiguous. Indeed, in *Deglman*, the test articulated in *Fry on Specific Performance* and quoted above was urged upon the Supreme Court and specifically rejected by the majority: *Deglman* at 733 (per Cartwright J). Instead, the majority relied upon the articulation of the test in *McNeil v. Corbett* at 611-12, which demanded "acts unequivocally referable in their own nature to some dealing with the land which is alleged to have been the subject of the agreement sued upon", explaining that meant there has to be something in the nature of the acts which bears the necessary relation to the interest in land said to have been the subject of the agreement.

In *Hill* the Supreme Court relied upon *Steadman v Steadman* for a number of principles. They relied upon it for a statement of the purpose of the *Statute of Frauds* (at 558). They also quoted from *Steadman* v *Steadman* (at 558) for a history of the evolution of the doctrine of part performance. However, the Court did not comment on *Steadman v Steadman's* consideration of the test from *Maddison v Alderson* or its adoption of a more liberal test. No test was articulated in *Hill*.

Because the Supreme Court of Canada has yet to expressly consider and choose between the different tests in *Maddison v Alderson* and *Steadman v Steadman*, cases from different provinces disagree on which of those two House of Lords cases represents the law in Canada. As Professor Joseph T Robertson noted, in his *Discussion Paper on the Statute of Frauds, 1677* (St. John's, Nfld: Newfoundland Law Reform Commission, 1991) at page 22, "ambiguity provides the basis on which trial and appellate courts in each province can reformulate the proper test without disregarding the principle of *stare decisis*." Twenty-five years later, his assessment appears to continue to be accurate.

At least three provincial courts of appeal have looked favourably on the more lenient test. The *Steadman v Steadman* test was acknowledged as "the leading authority" by the British Columbia Court of Appeal in *Currie v Thomas*, 1985 CanLII 769 (BCCA) at para 28, but without reference to the prior Supreme Court of Canada decisions. However, British Columbia's *Law and Equity Act*, RSBC 1996, c 253, s 59(3) has subsequently replaced the doctrine of part performance with a new statute-based test. The Saskatchewan Court of Appeal has also favoured the *Steadman v Steadman* test, but only in the most general of terms, without actually articulating or applying a test. They indicated in *Bell, Sokalski and Ross v Guaranty Trust Company of Canada, Prudential Trust Company Limited, Ashland Oil Canada Limited and Ashland Oil and Gas Limited*, 1984 CanLII 2422 (SK CA) at para 3 that "*Deglman* must be read in the light of the comprehensive judgment of the House of Lords in *Steadman v. Steadman* . . .", and in *Tiringer v. Tiringer*, 1998 CanLII 12304 (SK CA) at para 2, that, had the *Statute of Frauds* applied, "the principles articulated in *Steadman v. Steadman*, [1974] 2 All E.R. 977 (H.L.) are apposite to this case." Finally, the Court of Appeal in Newfoundland and Labrador more recently canvassed the competing tests in *King v. Cleary*, 2014 NLCA 33 (CanLII) and approved the trial court's adoption of the test in *Steadman v Steadman*.

In contrast, most Canadian courts of appeal have seen themselves bound by the Supreme Court of Canada decision in *Deglman*. The courts of appeal in Nova Scotia and Alberta have recently reiterated that the test in *Maddison v Alderson* is still the leading authority, based on *Deglman*. For example, the Nova Scotia Court of Appeal in *Brekka v. 101252 P.E.I. Inc.*, 2015 NSCA 73 (CanLII) at para 32, upheld the trial judge's application of the stricter *Maddison v Alderson* test as reflecting the current law in that province.

Over the past 15 years the Alberta Court of Appeal has twice opined at length on the test for the doctrine of part performance. The first time was in 2002 in *Booth v. Knibb Developments Ltd.*, 2002 ABCA 180 (CanLII) at paras 19 and 25, where the Court of Appeal affirmed that "[t]he leading decision on the doctrine of part performance is *Maddison v. Alderson* …" and that "[n]o lesser standard will suffice." They held that the acts had to be "unequivocally referable to the oral contract alleged by the Booths" (at para 28) and noted that the acts relied upon "cannot be said to be referable to a contract for purchase and sale and nothing else" (at para 29).

In 2015, the Alberta Court of Appeal reaffirmed its commitment to the test in *Maddison v Alderson* in *Haan v Haan*, 2015 ABCA 395 (CanLII). They stated that "part performance must be 'unequivocally' related to the alleged contract" (at para 11; see also para 15). They quoted with approval from both *McNeil v Corbett* and *Deglman* and their adoption of the test in *Maddison v Alderman* (at paras 12-13). *McNeil v Corbett* was relied upon for requiring "acts unequivocally referable in their own nature to some dealing with the land which is alleged to have been the subject of the agreement" (at para 12, quoting *McNeil v Corbett* at 611-12). They also quoted a passage from *Deglman*, which quoted with approval from In *re Meston, Meston v*

Gray, 1925 CanLII 179 (SK CA), [1925] 4 DLR 887 at 888, explaining "…[t]he acts performed must speak for themselves, and must point unmistakably to a contract affecting the ownership or tenure of the land, and to nothing else." (at para 13) Therefore, in Alberta there is no question that the "unequivocally referable" test from *Madison v Alderson* is the authoritative test, given its adoption after detailed discussion of the law in both *Booth* and *Haan*.

The Ontario Court of Appeal stands apart. In *Erie Sand & Gravel Ltd. v. Seres' Farms Ltd.*, 2009 ONCA 709 (CanLII), it adopted what it called the "*Deglman* test" **—** referring to the majority judgment of Cartwright J in *Deglman* **—** and rejected what it calls the "Rand test" from *Deglman*. It stated that the Rand test is the stringent one, requiring the acts to be referable only to the alleged contract and no other (at paras 86 and 92, citing *Deglman* at 728). The Ontario Court of Appeal read the *Deglman* test as requiring only that the acts be referable to "some dealing with the land" (at paras 87 and 92, citing *Deglman* at 733 and its reliance on quotes from *McNeil v Corbett*). The Ontario Court of Appeal therefore appears to follow the *Maddison v Alderson* test by referring to the majority judgment in *Deglman*, but by only requiring that the acts of part performance be referable to "some dealing with the land", they seem to be adopting a test that is even more lenient than that in *Steadman v Steadman* (lacking the requirement that the acts be consistent with the alleged contract).

In the more recent *Mountain v Mountain Estate*, 2012 ONCA 806 (CanLII), [2012] OJ No 5452, the trial judge had required acts "that are only consistent with part performance of the alleged contract" (at para 53). The Ontario Court of Appeal stated (at para 82) that *Erie Sand & Gravel* had been clear that the acts need not be referable only to the contract alleged. They only had to be "unequivocally referable in their own nature to some dealing with the land". (at para 82)

The Ontario Court of Appeal therefore appears to follow the *Maddison v Alderson* test by adopting Cartwright J's majority judgment in *Deglman*, but their understanding of that test is very different from that of the Alberta Court of Appeal. Indeed, the test in Ontario appears to be even more lenient than the test in *Steadman v Steadman*, as I will discuss in the next section.

2) Interpreting Maddison v Alderson's "unequivocally referable to … some such contract as alleged"

It appears from the Canadian case law that there are three ways to interpret the *Maddison v Alderson* requirement that the acts of part performance must be "referable to *some such agreement as alleged*." One requires the acts of part performance to be unequivocally referable to the exact contract alleged. The second requires them to be referable to the type of contract alleged. The third merely requires them to be referable to a contract related to the land at issue. The first — the most demanding and the one used by Master Prowse in *Jordan v Skwarek* — requires that the acts be referable to the *exact contract* that the plaintiff alleges. As we saw when it was applied in *Jordan v Skwarek*, it is almost impossible to fulfill, especially given the alleged multi-term contract in that case. The first interpretation **—** referable to the *exact contract* alleged **—** is the traditional understanding of *Maddison v Alderson*. It appears to be the one adopted by the Alberta Court of Appeal in *B & R Development Corp* at para 35, requiring the acts to "sufficiently indicate the existence *of the alleged contract*" and to be "'unequivocally' referable *to the alleged oral agreement*" (emphasis added).

The second possibility is that the acts must be referable to the *type of contract* the plaintiff alleges (e.g., a sale, a lease, an easement, etc). That seems to be the test adopted by the Alberta Court of Appeal in both *Booth* and *Haan*. *Booth* at para 27 relied upon Cartwright's judgment in

Deglman at 734 which they characterized as "clearly" setting out the test and interpreting "some such agreement as that alleged" as follows:

> In order to exclude the operation of the Statute of Frauds, the part performance relied upon must be unequivocally referable to the contract asserted. The acts performed must speak for themselves, *and must point unmistakably to a contract affecting the ownership or the tenure of the land, and to nothing else.* (emphasis added by Alberta Court of Appeal)

The Alberta Court of Appeal went into more detail on this aspect of the test very recently in *Haan* at paras 14-15, confirming their interpretation in *Booth*. There the Court specified that "the claimant has to prove that the part performance was "unequivocally" related *to the very type of contract alleged*. Part performance that is "consistent with" several different types of contractual arrangement is insufficient" (*Haan,* at para 15). How specific does that "type" have to be? *Haan* answers this question with an example: "Thus, for example, the test is not met if the part performance is equally consistent with a transfer of ownership, a lease for a term of years, or a loan with the land given as security." Those three examples are all examples of "some dealing with the land" but they make it clear that is not enough: the type of contract has to be unequivocally referenced by the acts. Although this understanding of the *Maddison v Alderson* test is less strict than the first, it is quite likely that, had Master Prowse adopted this interpretation in *Jordan v Skwarek*, Mr. Jordan's claim would still have failed due to the multi-term nature of the contract that he alleged.

A third possible interpretation is that the acts must be referable to *a contract* dealing with the relevant piece of land, based on the Ontario Court of Appeal case in *Erie Sand & Gravel*. This interpretation is arguably even more liberal than the test in *Steadman v Steadman*, which not only demanded that the acts indicate some contract between the parties, but also required they be consistent with the oral contract alleged. It is certainly no more demanding.

In *Erie Sand and Gravel Ltd*, the Ontario Court of Appeal considered the test set out by Cartwright J in *Deglman* at some length. They held (at para 94) that the majority in *Deglman* at 732-33 required only that the acts be referable to "some dealing with the land." This interpretation was re-affirmed in *Mountain v Mountain Estate* at para 82, where the Ontario Court of Appeal held that the "the acts of part performance need not be 'referable only to the contract alleged' [but rather] the test as established by the majority judgment of Cartwright J. in *Deglman* … is that it is sufficient if the acts are 'unequivocally referable in their own nature to some dealing with the land'. The Ontario Court of Appeal emphasized "*some dealing with the land.*" There is nothing to tie "some dealing with the land" to the type of contract, although it must be tied to the land in issue. The Court then broke the test down into two steps: "the first step is to determine whether the acts of part performance are connected to the land" (at para 89), and the second step is to determine if the conduct, in and of itself, indicates that there had been "some dealing with the land". (at para 90)

It therefore appears that the test for part performance is more demanding in the province of Alberta than in Ontario. Ontario merely requires that the acts point to a contract concerning the land in dispute. Alberta requires that they refer to the type of contract alleged. But neither is as demanding as the test applied in *Jordan v Skwarek*, which required the acts of part performance refer to the exact contract alleged.

3) Whose acts? The plaintiff's only or acts of both the plaintiff and the defendant?

Prior to 1997 it was agreed that the acts relied on must be the acts of the plaintiff. Indeed, the requirement that the acts be those of the party who relied on the existence of the contract to his or her detriment is usually tied to the purpose of the doctrine of part performance; see, for example, *Steadman v Steadman* at 558 (per Lord Simon of Glaisdale). However, the Supreme Court decision in *Hill v. Nova Scotia* considered the acts of the defendant. They did so without noting that what they were doing appeared to change the law. Indeed, in *Hill* (at 558), the Supreme Court's only statement of the law — a quote from *Steadman v Steadman* — required the acts be those of the plaintiff. The concluding words of that quote are: "the 'part' performance being that of the party who had, to the knowledge of the other party, acted to his detriment in carrying out irremediably his own obligations (or some significant part of them) under the otherwise unenforceable contract". The Court therefore stated one principle and applied a different one. One has to wonder whether this was done *per incuriam*.

Nonetheless, the Ontario Court of Appeal has taken the Supreme Court's actual reliance on the acts of the defendant to be a change in the law. In *Erie Sand & Gravel*, they concluded (at para 75) that "given the decision of the Supreme Court in *Hill*, it is now settled law in Canada that the acts of both parties to an alleged oral agreement may be considered when a court is called on to determine if sufficient acts of part performance take an alleged agreement outside the operation of the Statute of Frauds." The Court offered additional reasons, beyond the precedent in *Hill*, for taking this position (at paras 76-79), but it did assert that the law was settled on this point by *Hill*.

The Ontario Court of Appeal's position that the acts of part performance can be those of both the plaintiff and the defendant was re-asserted more recently. In *Mountain v Mountain Estate*, the trial judge had required that the acts be those of the plaintiff and the Ontario Court of Appeal held that that he erred in doing so (at paras 79 and 81).

The position is different in Alberta, however. In *Booth*, the trial judge had considered only the acts of the plaintiff when determining if the test has been met and the Court of Appeal did not find this to be an error (*Booth*, at paras 31, 39). Indeed, in *Wasylyshyn v. Wasylyshyn*, 2008 ABQB 39 (CanLII) at para 40, Justice E.A. Marshall explicitly interpreted *Booth* to require that the acts relied upon be carried out by the plaintiff.

Therefore, despite the Ontario Court of Appeal's insistence that the new principle of law was settled by the Supreme Court in *Hill*, the Alberta Court of Appeal appears to differ.

Conclusion

In conclusion, it should be noted that there is no uncertainty in the Alberta Court of Appeal's understanding and application of the doctrine of part performance, based on the authority of *Booth* and *Haan*. The same could be said about the Ontario Court of Appeal, based on *Erie Sand & Gravel* and *Mountain v Mountain Estate*. They both seem quite certain in their statements of the law. But those two courts of appeal — and others more briefly mentioned — are not in agreement with each other, and the principles for application of this equitable doctrine vary depending on which province hears the case for enforcement of an oral promise with respect to land. It will take another Supreme Court of Canada decision – hopefully one conscious of the controversies this time — to harmonize the law.