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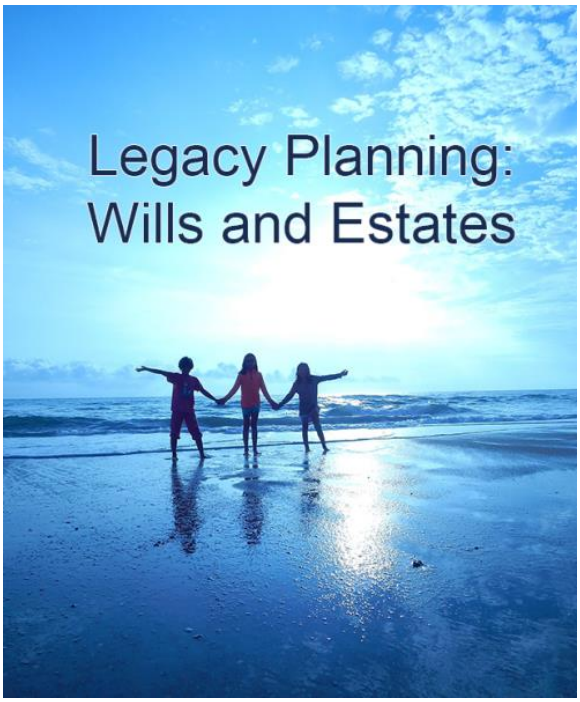

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“Have You Heard the One About The Canadian Who Died Without a Will?”

By Kathy Hawkesworth

It is hard to overstate the advantages of having a good will. So, why don’t more of us embrace “will power,” even when we know story after story of families, business partners, and advisors having to clean up the mess when a person dies “intestate” (without a will)?

In a lighthearted twist on a serious topic, here are five excuses, together with my rebuttal, for you to share with colleagues and clients or consider in your own situation.

1. *‘All I have is debts”*

With monthly bills, car loans, and mortgage payments, it is sometimes hard to appreciate that you do have an “estate” (your home, your vehicles, etc.) to distribute.

You may have also overlooked the important “minor” reasons for having a will:

- naming guardians for your children; and
- setting up trust funds to manage the impact of money on young lives, so that they are not damaged by receiving money that is either too much or too soon, or too difficult to access by the parent or guardian who will care for them.

2. *“I would have to visit a lawyer”*

Who should I call? What will it cost? Why can’t I just use a will kit or write it myself? Each province has its own wills and succession laws. Do you know what law the kit was drafted for or how the courts have interpreted will wording in your province? Do you know the rules about how the will must be signed and witnessed? It is best to work with a lawyer who knows about wills and estates, and has practical experience with both the questions you have and the ones you haven’t yet thought about

To put the cost in perspective, look at what you pay in home and car insurance every year and then compare that to the cost of a will that protects so much more than your home and car; it protects your business, all your other property and, most importantly, your family.

3. *"I haven't decided what to do yet"*

Actually, by not having a will, you're letting the government decide for you. Every province has its own rules about what happens when a person dies without a will—rules which may be quite different than you think. This is the largest financial transaction you will ever have, distributing all your hard-earned property to others. Your assumption of what is going to happen may be wrong. It will be so much better for you to choose what you want to happen. That is the beauty and power of a will. You are able to state your unique wishes and also name who you trust to make sure your wishes are followed. This person is sometimes called a personal representative or an executor or trustee. Your advisors will be able to give you guidance about the sort of person to fulfill this important role.

Having a will is also the only way you have to distribute property to friends, distant family, or to support organizations or diverse causes important to you, such as preserving the environment; helping arts and creativity flourish; supporting education; and encouraging health, activity and recreation. Some people create endowment funds to make the gift last forever. If a lasting legacy appeals to you, you will need a will to accomplish it.

There are other powerful documents that you may want to prepare at the same time. One is an enduring power of attorney, which allows the person you trust to handle your financial matters when you don't have the ability to do so. Another is a personal directive, which identifies health and living choices and a person to make these decisions on your behalf when you are unable. These two documents are tremendous gifts to your family members who need to care for you and deal with your affairs as you lose the capacity to handle them yourself, whether temporarily or permanently.

4. *"My family can sort it out"*

Really? Your family must comply with what the laws dictate. There is not a lot of flexibility. Not having a will means your family must, in a time of grief and loss, make decisions that are often more difficult and expensive than would be the case where a will exists. Confusion and uncertainty may lead to unintended results. Someone will need to be appointed to deal with it all, and that might not be the person you believe is most capable to do so. All of this can create friction among loved ones that could easily be avoided if you exercise will power." Make no mistake, some families never recover from this.

5. *"I don't have time right now"*

How much time do you have, period? None of us know the answer to that. This is better done now, while you have the opportunity to do so. It is harder to think this through on your own, so make an appointment with someone who will guide you through the process, using questions, and perhaps a questionnaire, that will help you navigate the decisions to be made. S/he can then write out your wishes in a legally enforceable way, taking the mystery and worry away.

I have a theory that fear keeps us from getting our wills in order. If signing a will feels like signing your death warrant, these two ideas may be helpful:

- 100% of people, *with or without a will,* die.
- British statistics indicate that people with wills have a longer average life expectancy than people who don't. (Perhaps peace of mind is why people with wills statistically live longer).

Harness "will power." Focus instead on the power of a will to change lives for the better.

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People Always Told Me, Be Careful What You Do: Wills and Dependency Legislation

By Fred Fenwick and Andrea MacLean

It is the kind of tragic story that makes for best-selling novels and Hollywood blockbusters. A young woman, raised in a loving home by two hard-working parents, battles a severe and debilitating disease. Left penniless and alone when her parents pass, she struggles to make ends meet as her body slowly breaks down. Then, an incredible and shocking discovery; she is, in reality, the biological daughter of a wealthy, recently-deceased man whose estate is valued in the tens of millions of dollars.

It was not a fiction for one Alberta woman – it was the very thing that brought her into my office. While it would make for a more nuanced and intriguing story to relay all of the fascinating and heartbreaking details of this case, lawyers are bound
by a positive ethical duty, protected at law to keep solicitor/client matters completely confidential.

I can, however, speak of the struggles and balancing of interests inherent in Alberta's wills and dependency legislation that I dealt with as I worked closely with this disabled adult child to eventually obtain a substantial payment from the estate of her deceased biological father.

The woman grew up having no idea that her biological father was a man other than the father that loved and raised her. She was never acknowledged or supported by her biological father and, unsurprisingly, she had not been provided for in his will.

This may have been the sort of thing that, in an earlier age, would have been considered a deep dark secret (love child?) carried to the grave of the biological parents. Today, a more expansive definition of family, a less judgmental attitude towards innocent children and easy and cheap DNA tests make this sort of thing neither deep, dark, nor secret anymore.

How you think about the result may depend on which "side" you are on. On the side of the family members actually mentioned in the will, their share was greatly reduced by the eventual award and the considerable costs of determining a correct and just result. This was a complication that they were not

expecting and were innocent of creating. On the side of the dependent child, a genuinely disabled person was lifted out of poverty. On the side of taxpayers, a disabled person was taken off public support freeing up tax dollars to be spent elsewhere. On the side of the deceased person who made the will, this was a pretty stark interference by the state on his freedom to do what he wished with his property, in life and in death. In life, the deceased parent had no enforceable legal obligation to support a disabled adult child (let alone an unknown one); how did that become an obligation of the estate upon his death?

The answer is that it is complicated. Every society, going back as far we know, has had rules and compromises between the freedom to dispose of your estate as you wish and the expectations of family and society. In feudal times, the lord's estate had to be kept intact, so it went to the eldest son, even if younger children had to be shipped to Canada. Ancient Scottish rules of "forced share" (one third to the widow, one third to the children, one third, only, to be distributed freely) recognized the expectations of family for support. Our Dower legislation protects a widow or widower's right to live on the homestead after the death of his or her spouse.

Going beyond the hurt feelings that arise when one sibling realizes that mom really did love the other sibling more, society-at-large has a legitimate social interest in the disposition of an estate in some circumstances. Support of disinherited dependents (as opposed to legitimately disappointed but otherwise independently supported family members) may fall to the state (read that: you and I) if inadequate provision for their maintenance and support has not been made.

The modern reflection of this is that most provinces in Canada have adopted the compromises first set out in New Zealand legislation from 1900; this legislation tempered a testator's freedom to dispose freely of her estate with her legal and moral obligations to support certain family members and society's legitimate interest in having families, instead of the public purse, supporting dependents. Alberta has had *The Married Women's Relief Act* (1910), *The Testator's Family Maintenance Act* (1947), *The Family Relief Act* (1969), *The Dependent's Relief Act* (1980), and those maintenance provisions are now included in *The Wills and Succession Act* (2010). Throughout that time, the classes of dependents protected by the legislation has evolved. Today in Alberta, if a person dies with a will that does not make "… adequate provision in the person's will for the proper maintenance and support of a family member…" then the court can make an order for "… any provision the Court considers adequate … for the proper maintenance and support of the family member" (see s. 88 of the Wills and Succession Act). The term "family member" is defined in the *Wills and Succession Act* and includes some of the expected classes of dependents:

- a spouse;
- an adult interdependent partner;
- a child under 18; and
- a child over 18 at the time of the deceased's death and unable to earn a livelihood by reason of mental or physical disability (This is the section we accessed in the case of the disabled adult

child), and child between 18-22 unable to withdraw from parental support because of full-time attendance at school (This is a new addition to the legislation and meant to echo the dependency provisions for child support in the *Divorce Act* and Federal Child Support Guidelines).

The compromises and words used to describe the sorts of dependency and support are not perfect and force us to pay particular attention to the words of the legislation, like it or not. For example, in the case of our DNA-proven dependent, it would be difficult to say that this is exactly the sort of dependent that the legislature had in mind. But the definition fit our case even though the new "family member" was a surprise to the rest of the family and maybe was not in the contemplation of the parent writing the will. Also, the wording in the various dependent relief acts from province to province is different and can make a difference.

For example, the British Columbia legislation speaks to support that is "adequate just and equitable" which the courts have interpreted to allow a more equitable sharing of the estate than the Alberta legislation which speaks to "…adequate provision for proper maintenance and support…" which has been interpreted to limit the judge to a needs-based calculation of the support obligations. In our disabled adult child dependency case, we had to take the Alberta wording into account, requiring us to calculate and dispute over how much it would cost to support the dependent. In addition, what was "adequate" had to be considered in light of the fact that there was no history of support as opposed to a long history of acknowledgement, support and actual dependency on the support.

There are compromises and definitions that remain unclear. For example, the dependency sections of the Alberta *Wills and Succession Act* are couched in terms of needs-based maintenance and support. The *Matrimonial Property Act*, however, gives a divorcing spouse a presumptive ½ share. Could it be fair that the spouse that stayed until "the end" only gets "adequate" support when the spouse that divorced before the other dies gets a full ½ share? The Alberta *Wills and Succession Act* tried, at one time, to deal with this by giving spouses the ability to choose a matrimonial property ½ share but this would have upset so many formal and informal estate plans that the section was withdrawn in 2012.

What this all means for planning wills is that regular and confidential consultations with lawyers who specialize in drafting wills is necessary to not only deal with the changing realities of a modern long life with complicated families and dependencies, but also with the regular evolution of the law that tries to deal with the compromise of freedom of testation and society's interest in seeing legitimate dependents taken care of.

A final word about confidentiality in estate and lawyer-client matters. In any lawsuit, most information gathered (including that compelled from the other side) is considered privileged and not usable outside of the actual lawsuit. In our case, the matter was settled, not at trial (which is largely public and sometimes reported in the official reported decisions and law reports) but in the Alternative Dispute Resolution (ADR) arena. In ADR, parties meet outside of the courts, sometimes together with their lawyers, sometimes with trained neutral arbitrators or mediators, sometimes with judges through the

court system to create a resolution, outside of a trial. These proceedings offer both (relative) speed and flexibility but also the opportunity to resolve highly personal and contentious matters, still professionally and in good faith, but privately, confidentially and out of the glare and stress of the public.

Creating a document like a will that is expected to work and produce a desired effect years and years after it was drafted is complicated and impossible unless it is drafted with complete and, sometimes, uncomfortable disclosure between the lawyer and the client. The law has recognized this requirement for centuries and for the special relationship between lawyers and clients, the instructions, advice and the important back and forth between lawyers and clients while decisions are being made, are legally protected and confidential.

The young woman in our case ultimately recovered from her father's estate, despite not being named in the will. We will never know what her father actually knew about her. There was certainly no overt acknowledgement. It is likely that everyone "knew" or at least suspected the truth and a confidential and candid discussion with the lawyer drafting the will could have averted a lot of legal confusion in administering the will following his passing.

Round Two: Blended Families and Estate Planning

By Mandy England

One of the main goals that people have when they are estate planning is making sure their family members are taken care of when they are gone. This can be more complicated when you have a blended family, where there can be all kinds of additional considerations. How do you balance supporting a second spouse with leaving gifts to children of your first marriage? Do your stepchildren have any claim against your estate? How would a prenuptial agreement fit into the equation?

There is no "right" way to approach a blended family situation, as every family (and their relationship) is different. However, this article touches on some issues that commonly arise that you may want to consider as you plan for your own family.

Prenup or Cohabitation Agreement

When entering into a new long-term relationship, particularly after a divorce, many people will consider a prenuptial agreement. For couples entering into a common law relationship, in which their partner is called an adult interdependent partner or "AIP", the equivalent is called a cohabitation agreement. These agreements are designed to govern how assets will be divided on the breakdown of a relationship, but they can also address the treatment of assets after death. One important fact is that such an agreement may not be determinative after death.

There is a legal obligation to provide financial support for your spouse or AIP after your death. If your spouse or AIP does not believe that they were adequately provided for by what they received from your estate, then they can bring an application to request that a larger share of the estate be provided to them for support. The court has the power to make an order for additional support to your spouse, notwithstanding any prenuptial or cohabitation agreement that may have been in place.

There are methods, such as the use of a trust, which may protect assets from a support claim after your death. While it can be effective, it can also be complicated to do properly. You should seek professional

advice, to discuss your particular situation including potential tax implications, in order to determine whether it might work for you.

Even so, a prenup or cohabitation agreement can be persuasive in determining what amount of support might be appropriate, and can be an effective way on death to ensure that certain assets are not used to fund any support payable to your spouse against your wishes. If you have one, you should always discuss such an agreement with your lawyer when you are writing a will.

Providing for Your Children and Your New Spouse

Given that you have certain support obligations toward your new spouse, a common concern is how to provide for your new spouse or AIP, while also ensuring that your children from a prior relationship will receive a benefit from your estate.

One potential solution is to create a spousal trust. Some or all of the estate assets would be transferred into a trust, and your spouse (or AIP) would be entitled to all of the income generated in that trust during his or her lifetime. You may also permit the trustee to make payments to your spouse from the capital. No one else can receive benefits from a spousal trust while your spouse is alive; however, you can name your children as the beneficiaries of the remaining assets in the trust after your spouse's death.

If such a trust is properly set up, it can qualify to receive tax benefits for your estate by deferring the tax payable on certain assets until your spouse's death (meaning there would be more money available during your spouse's lifetime).

There may be concern that the spouse would use all of the assets in the trust during his or her lifetime, and there would be nothing left after the spouse dies for the children from the first marriage, such as if the second spouse is relatively young or the assets in the estate are fairly modest. To ensure that your children get something, one solution might be to purchase an insurance policy that names them as beneficiaries of the policy. They would receive those insurance proceeds directly, and quickly, after your death.

One word of caution is to make sure that your beneficiary designations are in line with the rest of your plan. There are a number of assets that can have a designated beneficiary, such as insurance policies, pensions, TFSAs and RRSPs/RRIFs. If you name a beneficiary, that person will receive that asset directly. It's not uncommon for people to make a designation when they first open the account, or first start a job and receive an insurance policy, and then lose track of them. There are even cases where a former spouse is still named–and receives the money–because the designation was never updated. If you make a plan, such as having a spousal trust, but then don't ensure you have the proper designation for the assets that you were counting on to fund it, all of your good planning could be undone.

If insurance isn't an option for you, another possible solution could be achieved by using your house. For most people, their house is their largest asset, and most often, it is held with their spouse as joint tenants. When two people own a house as "joint tenants" and one of them dies, the other person will automatically own house entirely in their own name. Another way that two people can share ownership of a house is as "tenants in common". When two people own a house as tenants in common, each owns a 50% interest in the property. If one dies, they can leave that 50% interest in their will to someone else.

If you own property as tenants in common with your spouse, one way of balancing caring for your spouse and providing a gift to your children is to include a clause in your will permitting your spouse to live in the house as long as they want, or to sell it and buy a more suitable house. If you include a clause like this, when your spouse dies or sells the house without buying a new one, your children would be entitled to receive your share of the proceeds (and they would also be entitled to your share of any surplus proceeds if the house is sold and your spouse purchases a new home for less). The purpose of such a clause would be to ensure that your spouse is provided with a house for his or her lifetime, but your children would benefit when it is no longer needed.

Stepchildren and New Children

Each blended family is different, and planning for stepchildren doesn't lead to one right path for everyone. It may be that your second marriage has happened late in life, after your children and your spouse's children are all adults, and you may not want to include your stepchildren in sharing your estate. Or you might have a very close relationship with your stepchildren, perhaps even having raised them as if they are your own, and would want them included in sharing your estate.

Many people in a blended family are familiar with the idea of "child support" in the context of a marital breakdown. The *Wills and Succession Act* has its own system that allows children under 18 (or in post-secondary education) to make a claim against an estate for support. However, if you have not legally adopted your stepchildren, then they would not qualify as your "child" and cannot make a claim.

Similarly, unless they are legally adopted, your stepchildren would not be entitled to a share of your estate if you die without a will. The Act has a scheme for dividing your estate between your spouse and your descendants if you do not have a will, and your stepchildren wouldn't fall within the definition of "descendants". This situation could be particularly problematic if you spouse dies before you and leaves their estate to you, and then you die without a will, as your step-children could end up receiving nothing from either estate. If you want to ensure that your stepchildren are included, you should have a will.

If you and your new spouse have a child together, then there are even more considerations to provide for that child along with your children from a prior relationship. Again, trusts for spouses and children can often solve that problem, but they should be planned with a professional to ensure that the terms are drafted correctly and tax implications have been considered.

Talk to a Professional

No one wants to be second best, especially a new spouse or child. This can make estate planning in a blended family particularly difficult, as it can take more work to ensure that everyone feels like they are being treated fairly. Compromises are necessary, but if you speak to a lawyer, he or she can give you ideas and come up with a solution that can make everyone happy. And since no one wants their family to end up fighting in court after they are gone, planning ahead is the best way that this most important wish is met.

Inheritance Issues in Bankruptcy

By J. Doug Hoyes

When someone files for bankruptcy, they surrender all non-exempt assets to the licensed insolvency trustee for the benefit of their creditors. This includes not only assets they have at the time they file for bankruptcy, but also comprises of any assets that "devolve" on the bankrupt prior to discharge such as an inheritance "received" during bankruptcy.

In determining when an inheritance is received or devolved, the trustee will look at the date of death of the benefactor, not the date the will is read or the date money or assets are distributed.
We can consider three possible scenarios that could occur:

1. Mark's father passed away before Mark filed for bankruptcy. Mark is entitled to an inheritance but the will is under probate and he doesn't expect money to be distributed for several months. Mark also has a wage garnishment so he has decided to file for bankruptcy to deal with his debts now. The bankruptcy estate will be entitled to the proceeds of Mark's father's estate, because Mark received the assets to the date of bankruptcy. Therefore, the assets from the estate are now the property of the trustee for the benefit of Mark's creditors.

2. Mark files for bankruptcy and unexpectedly he receives an inheritance from a distant Aunt while bankrupt. The proceeds of that inheritance must be paid into the estate to be distributed amongst Mark's creditors.

3. Mark filed for bankruptcy but has received his discharge. Two days after his discharge Mark's uncle passed away and left him a substantial inheritance. Because Mark is a discharged bankrupt, his bankruptcy is complete and he can keep his inheritance.

If an individual receives an asset rather than money in an inheritance, the trustee will realize on that asset. It is possible for the bankrupt to purchase that asset at fair market value from the trustee although, depending on the value, this may be difficult as they will not likely be able to obtain a loan while bankrupt.

It is important to know that failure of a bankrupt individual to disclose an inheritance would be an offence under the *Bankruptcy & Insolvency Act* and could result in their discharge being refused or suspended. It could also result in a conditional discharge order requiring additional terms of the bankrupt.
What should someone do if they have debts and require relief now, but has an elderly parent who may be leaving them an inheritance in the next few years?

One option would be to consider a consumer proposal. In a consumer proposal, the debtor obtains protection from creditor actions (wage garnishments and collection calls stop) and keeps all assets, including potential inheritances. In offering terms to the creditors, the potential size, likelihood and timing of any inheritance would be considered. If someone receives an inheritance after the proposal commences, the debtor could use the proceeds to repay the proposal early. The terms of the proposal, once accepted, will not change, regardless of the size of the actual inheritance.

It is also possible to file a proposal while bankrupt if someone receives a large inheritance. I was the trustee for an individual (we will call him John) who owed $50,000 to his creditors and filed for bankruptcy. A month later his father died, and he expected to receive a $100,000 inheritance very quickly (his father's assets were all in bank accounts and easily liquidated and there were no other heirs, so there were no complications to delay the distribution of funds).

Had we allowed the bankruptcy to continue, I would have seized the $100,000, and then, at the conclusion of the, the creditors would have received payment in full of their debts, plus interest at the prescribed rate, and the balance of the $100,000 would be returned to John.

In John's case, the bankruptcy would have concluded 21 months later, since he had surplus income. To avoid that delay, John, while bankrupt, filed a consumer proposal offering to pay the creditors enough to pay their claims in full and to cover all administration costs as a lump sum. Obviously, the creditors accepted, and within three months the creditors were paid in full, the bankruptcy was replaced with the consumer proposal, the consumer proposal was completed and John received the balance of the funds from the estate.

This is not an entirely uncommon example, and illustrates the point that where debts and inheritances are involved, there are numerous alternatives for dealing with debt, so professional advice is encouraged.

Death and Taxes – When the Certainties Collide

By Hugh Neilson and Christie Hoem-McNall

As the cliché goes, the only certainties in life are death and taxes. When the former occurs, the Personal Representative(s) (formerly known as the Executor(s)) of the Estate must address the latter. Taxes become more complex in the year of death, and the period of Estate administration. This article provides a brief overview of some common issues.

Returns to be Filed

The Personal Representative must file the deceased's terminal (final) return. This return includes the deceased's regular income from all sources from January 1st to the date of death, like a typical tax return. It is due on the later of the usual filing deadline (April 30 for most individuals) or six months after the date of death (e.g. June 15, 2018 for an individual passing away on December 15, 2017).

The final return must include most income accrued to the date of death. For example, income on term deposits and similar investments are normally taxable when received. However, the income must be accrued to the date of death. For example, assume Charlie invested $10,000 in a one year Term Deposit bearing 1% interest on October 1, 2016, maturing September 30, 2017. He died on June 30, 2017. His final return should include interest of $75 ($10,000 x 1% x 273/365 days to June 30).

For an individual with many investments, determining the amounts to report can require considerable analysis.

Deemed Disposition – Most Assets

The general rule is that a deceased person is deemed to have disposed of all of their property at fair market value (FMV) on the date they die. The income tax consequences in regards to this rule depends on the type of property that is held by the deceased. Even though there was not an actual sale, there will be a capital gain (or loss) or full income inclusion, depending on the nature of each asset, resulting from this deemed disposition. The FMV becomes the cost to the Estate, or the beneficiary.

It would not be tax without exceptions to the general rule:

1. Assets transferred to a surviving spouse avoid the disposition at fair market value by transferring instead at original cost. No additional income is included in the deceased's final return. When the surviving spouse sells the property (or passes away themselves), they will compute any gains based on the deceased's cost. This transfer at cost occurs automatically, however the Personal Representative can elect a transfer at FMV, realizing any gains (or losses). This election is made on each property individually, so the Personal Representative could choose to allow some assets to roll over at cost, and others to be deemed disposed of at FMV.

Generally, assets must be transferred to the spouse or to a trust with very specific terms to benefit from the rollover, which is beyond the scope of this article.

2. Certain property used principally in a farming or fishing business can roll over to a child, grandchild or parent of the deceased. These complex rules are beyond the scope of this article.

Careful consideration is required when designating specific beneficiaries to receive specific assets – any tax is paid from the remainder of the Estate, not the recipient of the specific bequest.

Retirement Plans

Many Canadians have accumulated tax-deferred savings in Registered Retirement Income Funds (RRIF) and Registered Retirement Savings Plans (RRSP). Generally, the value of these accounts on the date of death is considered income to the deceased on their final return.

This can be problematic if the deceased has named a designated beneficiary (DB). The full value of the account goes directly to the DB, while the taxes must be paid from the Estate's other assets. There have been cases where the taxes eliminated the Estate or even exceeded the other Estate assets. The Canada Revenue Agency (CRA) can collect any excess from the DB, but the Estate has no similar right to recover these taxes.

For example, assume Jane has two assets, a $150,000 RRSP and a $100,000 term deposit. She designates her son, Tom, the beneficiary of his RRSP, and leaves the term deposit to her daughter, Sue. Tom receives the full $150,000 from the RRSP, leaving Sue to pay the taxes (as much as $72,000 in Alberta) from her $100,000 inheritance.

Once again, exceptions to the general rule exist:

1. Funds paid to a surviving spouse are not included in the deceased's final return, but instead are reported by the surviving spouse when received from the plan. The surviving spouse is generally able to transfer the funds to their own RRSP or RRIF, such that the funds will be taxed only when withdrawn by that individual.
2. Similarly, funds paid to a child or grandchild who was financially dependent on the deceased are reported by the recipient, rather than the deceased. A disabled beneficiary can transfer these

funds to their own RRSP or to a Registered Disability Savings Plan, to defer this tax. An individual under age eighteen can use the funds to acquire an annuity to spread the income over the years until they turn eighteen. Other beneficiaries must pay the tax when the funds are received from the plan.

Again, this is a simplified description of many complex provisions.

While the value of the plan is, outside these special circumstances, taxed on the final return, any further growth is taxed to the Estate or its beneficiaries when the funds are received. Where the value declines from the date of death to the date the account is cashed out, a deduction for the shortfall can normally be claimed to reduce the income on the final return to the funds actually recovered.

Further complexities can arise when these plans are not cashed out by December 31 of the year following the year of death (for example, by December 31, 2018 for an individual who passes away any time in 2017).

The value of a tax-free savings account (TFSA) at the date of death is received free of tax, but any growth in value from the date of death is taxable. A decline in value generates no tax relief.

A true pension plan is treated differently with lump sum payouts being income of the Estate.

One Return is Required – More May be Possible

Additional tax returns can sometimes be filed in the year of death. Certain types of income which have been earned, but not received, at the date of death (referred to as "Rights & Things") are reported on the final return by default, but can instead be reported on a second tax return if the Personal Representative so elects. Common Rights & Things include:

- salary, commissions and vacation pay owed before the death and paid after the death;
- retroactive salary adjustments paid after death;
- Old Age Security (OAS) or Canadian Pension Plan (CPP) paid after the date of death for the month of death;
- CPP and Employment Insurance (EI) arrears; and
- dividends declared before the date of death, but received after.

Including these items on a separate income tax return subjects income to a second set of marginal tax rates and personal credits, rather than adding it to the final return. This normally reduces the taxes payable on these amounts. It is also possible to transfer Rights & Things to beneficiaries so that they will pay the tax when the funds are received.

Additional returns can sometimes be filed for individuals carrying on a business with a non-calendar year end or who are beneficiaries of an Estate with a non-calendar year end, however this is rare.

What Next? Estate Tax Returns

Income earned subsequent to death is taxable to the Estate, which is considered a Trust for tax purposes. Its tax year begins on the date after death, and can end on any date no later than one year after the date of death. The Estate is taxable at the same marginal income tax rates as an individual for up to three years. After that, any income is taxed at the highest personal tax rate (48% in Alberta), and a calendar year-end must be adopted.

The Estate is taxable on its income. However, where that income is paid or legally payable to beneficiaries, the income is instead taxed to the beneficiaries. The Estate is required to file T3 slips reporting each beneficiary's share of the Estate income. The Estate return, including these slips, is due 90 days after its year end.

A common source of Estate income is the CPP death benefit. Depending on the assets of the deceased, an estate could have many other sources of income. Pension and investment income are common.

Depending on the assets of the deceased and the estate, elections and complex planning strategies may be available to reduce tax costs. As one example, it is possible to elect that some losses realized in the Estate's first tax year be claimed on the deceased's final tax return.

Get Advice

Taxes can be complex for anyone – taxes for deceased persons and Estates can be even more complex. Personal Representatives can be personally liable for unpaid taxes. This article provides only a brief overview of the more basic tax issues – obtaining professional advice is generally wise.

Setting Up Wills and Trusts

By Doug Surtees and Amanda Doucette

Not all families are the same. That is why not all wills should be the same. The law provides us with tremendous flexibility in deciding how to leave our estates to our loved ones. In order to understand some of the choices you should consider, it is essential to understand the difference between a will and a trust.

What is a trust?

The trust is an ancient common law concept, which manages to appear simple and complex at the same time. At a simple level, everyone who has sold tickets to raise money for a charity probably has thought about trust concepts. We almost intuitively understand that the money we raise by selling tickets 'really' belongs to the charity. We are responsible for it, but we consider it to ultimately be the charity's money.

We call a person who sets up a trust a settlor. The trust can be used to transfer money to one person, such as your sister, to be used for the benefit of another person, such as your daughter. We call the person who has legal title to the money the trustee, and the person for whom the money is used the beneficiary.

When a trust is created, we separate legal title (sometimes loosely called 'ownership') from equitable or beneficial title ('ownership'). This transfer of title occurs immediately upon the creation of the trust. In the ticket example, we have legal title (and only legal title) to the ticket money, as soon as we receive it. We have the right to keep the money in our teapot, or in a bank account, as appropriate, until it is time to turn the money over to the charity. Even if we need money for groceries or to repay a debt, we must not use the ticket money. We hold legal title to this money, but the charity has the equitable or beneficial title to the money. Therefore, we may only use the money as allowed by the trust, which in this case would be to pay the money to the charity when appropriate.

What is a Will?

A will is the document we use to transfer property to others upon our death. We call the person whose property is being distributed the testator. A will does not transfer any property rights until the testator's death.

Every will creates a trust. We call this type of trust a testamentary trust because it does not exist until the testator's death. Upon death, legal title to the testator's property is transferred to the executor (who is also a trustee and is sometimes called a personal representative). The executor holds legal title to the property and so must take care of it, and then transfer it to the beneficiaries named in the will.

Wills distribute property upon death. Many times people are content to leave a person money, and simply express their wish as to what they would like the person to do. For example, a person may be content to leave a friend their dog and $500, and express the wish that their friend look after the dog. However, it may be very difficult to determine how much money is needed to provide care for pets that may live a long time, such as turtles or parrots. Similarly, it is difficult to budget for the care of animals, such as horses, that are expensive to care for. As the costs and length of time commitment the testator is asking for increase, testators who have sufficient funds may want to establish a trust to provide for their pets or animals. Trustees can be held to their obligations and a replacement trustee can be appointed if the animals outlive the original trustee.

While a will is not effective until the testator's death, a trust may be effective immediately. It is possible to set up a trust, with an immediate transfer of property, during your lifetime. It is also possible to set up your will so that it contains a series of trusts in addition to the one which transfers property to the executor.

What are the advantages of a trust?

Trusts provide a useful solution for testators who want to provide for a person, such as their child, who would benefit by not having a large amount of money in their name. For example, an individual who receives a disability pension or other assistance may lose that payment if they also receive a large gift under a will. Some trusts can be set up so that only the money actually paid to the beneficiary counts when considering if the person qualifies for a disability pension or assistance program.

Establishing a trust can also provide more protection than an outright gift, if the testator is concerned that others may have a claim against the beneficiary of the gift. These claims may occur if the beneficiary is at high risk of a business failure, marriage failure or other lawsuit. In these cases, the trust may protect (and reallocate) money, which has not yet been paid to the beneficiary. In some cases, a trust may offer some protection from the American IRS to individuals with ties to the United States.

Trusts can also be created while a person is alive. Until recently, there were certain tax advantages available to trusts created during lifetime. For example, one of these advantages was that the income of the trust could be "split" or "allocated" between various beneficiaries and paid out to beneficiaries who

were low-income earners (but at least 18 years of age) and therefore taxed at a lower rate. The Federal Government recently released a proposal to change the rules respecting the taxation of income from a trust – as a result of this proposal, many of the tax advantages that were previously available to trusts will be eliminated.

A trust (whether created through a will, or during lifetime) has a limited life-span for tax purposes. Every 21 years, a trust has a "birthday" and is deemed to sell everything it owns. It is possible to do some tax planning in advance of the 21st birthday – failure to do so could result in unintended tax consequences.

Drafting a Trust – Consult a professional

Although many of the tax advantages to the creation of a trust have been eliminated, there are still many non-tax reasons to create a trust, either during lifetime, or within your will. However, it is important to consult a professional advisor prior to creating a trust. It is very important that the 'terms' of the trust are worded correctly to ensure that the trust will suit the purpose that it is intended to accomplish. For example, if you are trying to set up a trust to ensure that only the money actually paid to a beneficiary counts for the purposes of determining qualification for disability pensions or assistance programs, specific terms need to be added into the trust document to satisfy that requirement.

In addition, there are some costs associated with managing a trust. A trust has to file a separate tax return each year. Records need to be kept as to what money is going in and out of the trust each year. There should also be written confirmation by the trustees confirming what monies are paid out of the trust and which beneficiaries received the money.

Mental Capacity Has Different Meanings in Different Contexts

By Donna L. Gee

President Donald Trump consistently makes the news, though more often it seems for comments an elected leader with sounder judgment would not be making. Furthermore, among the many outrageous statements that have left people scratching their heads, there have also been moments caught on camera throughout the Trump presidency that have led many to speculate about the state of the President's mind.

Various video clips of the President appearing dazed and temporarily lost have been viewed by many around the world. Among the more noteworthy, the President wanders away from a photo-op with Israeli Prime Minister Netanyahu, leaving Netanyahu looking awkward before an aide directs the President back to shake his hand and pose for a photo. In another clip, the President descends from Air Force One and wanders down the tarmac away from the waiting presidential limo before an aide gently directs him back toward his waiting ride.

Of course, nobody from the most powerful among us to those of us from a more modest station in life is immune from the effects of aging. As we age, not only do our bodies slow down and deteriorate but so do our minds; even those of us lucky enough to escape the effects of senility, dementia, stroke, or depression. In this article, I will discuss the issue of mental capacity in two contexts: 1) the capacity to make a will or to give instructions to a lawyer for drafting a will; and 2) the capacity to make daily decisions about personal care and health, and to manage one's financial affairs. Essentially, capacity refers to a person's ability to understand the consequences of one's choices and actions. However, as will be explained, what constitutes capacity in a will-making context is not the same as the capacity to make decisions concerning personal care, health and managing one's financial affairs. This article will address these areas in general terms only as a thorough discussion of the complexities arising in these areas is beyond the scope of a brief article.

For purpose of simplicity, the term testator (the person who makes a will) is used to refer to either gender. In Alberta, the requirements pertaining to making a will are set out in the *Wills and Succession*

Act, SA 2010, c. W-12.2 (referred to after as "the Act"). One of the requirements for making a valid will is that the testator must have the mental capacity to do so. However, the Act does not define mental capacity so lawyers and judges have had to look to case law. In English-speaking legal circles, the classic, leading case about mental capacity to make a will (the term testamentary capacity is the more precise legal term) is *Banks v Goodfellow* (1870), LR 5, QB 549. This 19th century United Kingdom decision stands for the proposition that a testator's freedom to say how her/his property should be given away after death is so fundamentally important that unless evidence can be produced by somebody challenging the Will afterwards that the deceased lacked capacity when s/he made the will, a court will uphold the will's validity. (This assumes there was no undue influence on the testator, a discussion of which is beyond the scope of this article.)

The question of whether a testator has testamentary capacity is a legal one. In other words, although a physician's opinion regarding whether a patient has the capacity to understand the nature of her/his assets and how they should be doled out after death would be given weight by a court, it is just one bit of evidence and certainly not the determining one. On the other hand, the opinion of the lawyer who drafted the will is of far greater significance such that all notes the lawyer made regarding the nature of the testator's property and the lawyer's observations regarding the testator's state of mind during meeting(s) with her/him will be closely scrutinized. The legal test for testamentary capacity, though far from being an exact science, does include certain basic characteristics though, i.e. the testator must understand what s/he is doing at the signing of the will; must have at least a general idea of the nature of her/his assets and their value; and know who her/his beneficiaries are and the nature of their relationships with the testator.

In contrast to the **legal** question regarding testamentary capacity, the question as to whether an elderly client has the mental capacity to make reasonable decisions regarding daily maintenance of a household, individual care, decisions as to health care and management of financial affairs is a **medical** one.

We all move a little slower the older we get. We also may tire more easily at certain parts of the day so that we may have momentary bouts of confusion that impair our ability to make decisions at those fixed points in time that are not, however, ongoing; these momentary periods of impaired decision-making are known as *sun-downing*. However, if it becomes increasingly, painfully evident to people within an elderly person's circle of care (a spouse, friends, adult children, relatives, attending physicians, even a lawyer of long-standing association) that the person is unable to maintain their household properly, failing to take prescribed medications regularly, spending money recklessly, or showing erratic behaviour that presents a danger to her/himself and/or others, then it may be time for somebody to assume responsibility for decisions regarding the care and financial affairs of that elderly person.

In Alberta, the *Adult Guardianship and Trusteeship Act*, SA 2008, c. A-4.2 (referred to after as "the AGTA") sets out the process by which a guardian may be appointed to look after an elderly person's daily needs (including making decisions regarding health care) and/or a trustee appointed to look after an elderly person's financial affairs (paying household bills, maintaining the house, doing the banking,

etc.). Usually it is a spouse, family member or close friend who steps forward and provided there is consent from anyone who should be given notice of the process, applies to Queen's Bench Surrogate Court for an order of appointment to be guardian and/or trustee, depending on the state of mental capacity of the elderly person. Where there is no such person in the elderly person's life or such person declines to act, the provincial *Office of the Public Guardian and Trustee* may step forward to act.

In either scenario, the AGTA requires that such an appointment can only be made following an independent assessment of the elderly person's mental capacity. This capacity assessment is done by a capacity assessor who has received specialized training; the list of provincially approved and regulated capacity assessors includes physicians, psychiatrists, psychologists and social workers. Two things must be stressed here: 1) none of the professionals identified in the preceding sentence are designated capacity assessors because they are designated, licensed professionals *per se* – they must have received special training; and 2) the appointment of a guardian and/or trustee under the Act is not simply for elderly persons who have been found to lack capacity to look after themselves and/or their finances. Examples of other persons who may need guardians and/or trustees include people suffering serious psychiatric disorders such as schizophrenia or mentally handicapped people. However, a comprehensive discussion of who may need guardians and/or trustees is beyond the scope of this article.

In conclusion, the testamentary capacity to make a will is a legal assessment whereas the mental capacity to look after one's daily affairs, health care and finances is a medical assessment. Both engage different sets of considerations and criteria for analysis. In any event, lawyers and other professionals involved with the affairs of elderly people must exercise diligent care in the pursuit of their responsibilities and not base their decisions on fleeting, superficial observations. Although elderly clients may have the capacity generally to make decisions about their personal affairs or to make a will, such capacity may vary not just from day to day but even throughout the day such that moments of confusion may occur, for example, when the person is tired.

Lawyers working with elderly clients, who must make important decisions regarding their health or how to dispose of their property after they are gone, face a particularly difficult challenge. They must be extra observant, extra diligent and take extra care to thoroughly document all their interactions with their elderly clients. The challenge for lawyers practicing Elder Law can be stated in these terms: to what extent should a lawyer balance the need to respect the dignity and right of elderly people to make independent, informed decisions about their affairs against the need to ensure that the interests of clients are protected if they seem unable to make rational decisions because of a debilitating condition or disease?

Donna L. Gee is the Managing Partner of Guardian Law Group, LLP a Calgary-based law firm. Her preferred areas of practice include Elder Law; Wills, Estates and Estate Law; and Guardianship and Trusteeship matters. She is also past president of the Canadian Bar Association National Elder Law section.

A Renewed Senate That Works for Canadians

By Senator Peter Harder

Had you been standing in the foyer of Canada's Senate on June 22nd 2017, you'd have been forgiven for thinking that a constitutional crisis was about to engulf our nation's Parliament.

While the national media waited outside the chamber with cameras, microphones and hot television lights in tow, senators on the inside were voting on whether to send a message to the House of Commons insisting that it adopt a Senate amendment with respect to the ongoing taxation of alcohol.

Had the Senate taken this almost-unprecedented step, the Commons would have had to respond, almost certainly by reaffirming its own view that the budget be passed without amendment. This would have constituted a game of legislative ping pong between the two houses, with legislators looking for a way to break the deadlock.

It didn't turn out that way, of course.

Senators ultimately agreed that the budget be passed without amendment, deferring to the elected accountability of the Commons. Cool heads and sober secondthinking helped avert the parliamentary standoff that some feared.

As the Government's Representative in the Senate, there have been more than a few occasions over the past year that have left me with a touch of heartburn. But, as the spring sitting ended, this discomfort seems a small price to pay as we work to create a more modern Senate designed to be less partisan, more independent, accountable and transparent, and truly complementary to the elected House of Commons. When you sweep away the chaff left over from the sometimes messy business of modernizing the upper chamber, Canada's Senate scrutinized, debated and eventually passed 26 bills since June of 2016, often with amendments accepted by the House of Commons. It was a place where members of the public increasingly made their voices heard on policies that were important to them and where debate often had the effect of triggering change even before bills arrived in the Red Chamber.

There are, to be sure, many challenges ahead as we build a legislative record demonstrating that the Senate's modernization project is good for Canada. But I'd argue that we're further ahead than many political observers thought we'd be one year ago.

To understand where we're going, a bit of history is required.

To begin with, the 150th birthday that we're busy celebrating this year might not be happening had the Fathers of Confederation not agreed on the need for an upper chamber.

It's well to remember that Canada's founders spent six of 14 days discussing the Senate when they got together in Quebec City in 1864 to strike the Confederation deal. The Senate was crafted to provide a moderating voice on behalf of the smaller regions and minority groups whose voices can sometimes be muffled by the elected majority in the Commons. It wouldn't be an exaggeration to say that the Maritime Provinces may not have agreed to the bargain without a Senate to protect regional interests.

In the view of Sir John A. Macdonald, the Senate was also intended to be a chamber of 'sober second thought' with a mandate to regulate, review and amend legislation initiated by the elected House of Commons. And while it was to be invested with most of the powers of the House (save for initiating money bills), the fact that the Senate was not elected checked any inclination members might have to overreach when reviewing legislation from the Commons. Senators decided last June, for example, that they would not insist on changes to the budget in part, I believe, because doing so would have exceeded the complementary function conceived for them at Confederation. So, in a real sense, the Senate that we are busy remodelling increasingly resembles the one that Canada's founders envisioned.

Alas, in practice, the upper chamber did not always live up to the goals of the founders or the expectations of Canadians.

The difficulties of the last decade or so are well-known, and need not be reviewed in detail here. Suffice to say that Canadians' trust in the institution was deeply undermined by expense scandals and hyper-partisanship. Canadians began to believe that the Senate was little more than a House of Commons echo-chamber, where bills were merely rubber-stamped by senators who owed their allegiance to the prime minister that appointed them. Some Canadians understandably asked what the point was of having a bi-cameral system?

Meanwhile, efforts to change the Senate, including calls to turn it into an elected chamber, became moot in the wake of the Supreme Court of Canada ruling of 2014, which confirmed that significant change required a reopening of the Constitution. Outright abolition, for example, needed the unanimous agreement of provinces and the federal Parliament, while electing senators required the agreement of at least seven provinces representing a combined population of more than 50 per cent of Canadians.

Given these restrictions, Prime Minister Justin Trudeau moved to change the system in the ways that were effectively open to him. In 2014, as leader of the Liberal Party, he took action by removing all Liberal senators from his caucus. After his party was elected, the Prime Minister began selecting new senators through a new arms-length process under which interested candidates are asked to apply to an independent advisory board, which then makes recommendations to the PM.

These new appointees – of which there are now 27, with 11 more vacancies coming open by the fall – sit as Independents in the Senate. Given that they do not join with a caucus in the House, they vote according to their judgment. Unlike in the past, the three-person Government representative team in the Senate cannot direct senators on how to vote because we have no favours to confer or punitive actions to impose. Freed from their votes being 'whipped,' these senators exhibit the kind of sober second thought that Sir John A. MacDonald and other founders had visualized.

So far, the results are encouraging.

For example, our evolving Senate made significant amendments earlier this year to Bill C-6, which repealed 2014 legislation that erected additional barriers to citizenship. Specifically, the Senate added an appeal process for those who face losing their Canadian citizenship because of allegations of fraud or misrepresentation. In another example, late last year, a group of senators led by Independent Senator André Pratte, objected to provisions in a bill establishing new federal consumer-protection measures under the Bank Act. Senator Pratte argued at that time that the law infringed on provincial jurisdiction. The federal Finance Minister listened and has agreed to bring in a new bill. The House of Commons has also accepted Senate amendments on life-saving legislation aimed at tackling Canada's growing opioid crisis, as well as amendments further empowering the RCMP to engage in collective bargaining, among other examples.

That's not to say that there haven't been bumps in the road and challenges that we must still meet.

To wit, the description of what constitutes sober second thought is still, to some extent, being developed. While it is well-established that the unelected positions senators hold circumscribe some of their political authority, we continue to debate what complementarity means. This debate, I believe, will evolve over time, informed by the fact that senators are appointed, and not elected.

Second, the new more-independent system is also only half-built, and there are those who would prefer to go back to the old ways. Conservative senators, for example, still meet with their House of Commons caucus colleagues and have taken the traditional position that they exist to oppose government legislation.

This leads to a Senate that is somewhat bifurcated.

On one hand, we have senators who act unencumbered by party direction or electioneering, voting and amending legislation according to their judgment. On the other, we have a group of senators whose

stated goal is to oppose with an eye to the next election. Canadians will have to decide which model best serves their interests in Parliament.

For those working to build a more independent institution, another task that we must tackle is getting the word out to Canadians about how this remodelled Senate will work better than what went before. To that end, I and my colleagues have written op-eds, given speeches and generally made ourselves available to discuss the project. Most recently, I was in Calgary and Edmonton doing just this, and I will continue to make the case for Senate renewal to Canadians every chance I get. The Senate has also built for itself a new website, complete with modern social media and digital communications tools.

But we can't be the only ones doing the talking. An important part of the project is hearing from you – both in terms of advice on how to make the Senate a better place, and on how you feel about various bills and issues of the day.

These are not hollow sentiments. The renewed Senate will be judged on whether it makes better laws for Canadians and whether it includes them in its deliberation.

As the upper chamber becomes more independent and less-tied to the political parties in the House of Commons, Canadians can be more confident that their views will be listened to.

My closing advice to you is to get to know the senators in your region. They work for you.

The *Senate Reference*: Supreme Court of Canada Outlines Constitutional Road to Reform

By Katherine Creelman

Controversies in the Senate have caused many to question whether we need a Senate at all. Realistically, however, what changes could Parliament make to the Senate? Constitutionally, what changes is Parliament allowed to make to the Senate? In 2014, Parliament found out exactly how it could change – or even abolish– the Senate by asking the Supreme Court of Canada (SCC) in the *Senate Reference*, 2014 SCC 32.

What is the Senate? What does it do?

The Senate is the second house in Canada's two-house parliamentary system. It is comprised of 105 Senators who are appointed by the Governor General on advice of the federal government. Senators can work until they reach the mandatory retirement age of 75.

The powers and duties of the Senate are described in sections 21-36 of the *Constitution Act, 1867*. The Senate is often referred to as the 'house of sober second thought' because its major role is reviewing the bills that the House of Commons passes, and ultimately, approving or rejecting them. The Senate can reject bills entirely or suggest improvements. In either case, the bills are sent back to the House of Commons for final ratification.

Why was Senate reform an issue for Parliament?

The concept of Senate reform is almost as old as the Senate itself. Parliament first considered reform measures in 1874 – just seven years after the creation of the Senate. In 1874, the House of Commons was asked to consider amending the Constitution to allow each province to choose their own Senators.

Over the years, the major reform measures that have proposed are consultative elections (meaning the Senators are still appointed, but the provinces are asked who are their preferred candidates), limits on the terms for Senators, or the abolition of the Senate entirely.

With the introduction of the National Energy Program (NEP) in the 1970s, the Senate reform conversation heated up. In particular, Albertans thought if they had been represented properly in the Senate, they would not be subject to "majority rule" motions they disagreed with, like the NEP. This is when Alberta rallied behind the idea of a "Triple-E" Senate: an equal, elected, and effective Senate. The Triple-E Senate envisions equal representation of Senate seats for each province and elected Senators to increase accountability to the public. Although a Triple-E Senate never materialized, Alberta implemented its own consultative election process. Starting in 1989, Albertans were given the opportunity to vote on who they would want as a Senator in non-binding polls.

The concept of Senate reform became hot (again) in the late 2000s when Senate controversies came to light, including the suspension of Senators for expense scandals and the criminal trial of Senator Mike Duffy. To address problems with the Senate, in 2011, the Conservative government proposed the *Reform Act* which sought to add provincial consultative elections to the appointment process and nine-year terms for Senators. The *Reform Act* was never passed because it was outside of Parliament's authority to make the changes without a constitutional amendment.

What was the *Senate Reference*?

A reference is an opportunity for the government to ask the SCC questions about the constitutionality of potential government actions or legislation. The government seeks a reference to obtain the SCC's legal opinion on prospective legal challenges. The SCC can choose to respond (or not) to the questions asked. The response the SCC offers is an expert or advisory opinion, but is not binding.

In 2014, the federal government asked the SCC whether it could put Senate reform into action, asking how far it could go on its own, without consulting the provinces. The government was uncertain about Parliament's authority to change specific aspects of the Senate such as term limits or eligibility requirements.

What did the government ask?

The government asked the SCC these questions:

1. Can Parliament introduce term limits for Senators?
2. Can Parliament ask the population of each province and territory about possible preferences for Senate candidates from their region? Or can Parliament set up a framework for provinces or territories to consult the public about their preferences for Senate candidates (referred to as "consultative elections")?

3. Can Parliament change the Constitution's qualifications for Senators? The Constitution requires a prospective Senator to own $4,000 worth of property and wealth to be eligible for appointment.
4. Can Parliament abolish the Senate? If so, how?

How did the SCC respond?

Because the Senate is created by the *Constitution Act, 1867*, any changes to its structure require a constitutional amendment. The government was concerned about how those amendments might be made as the *Constitution* requires different amending procedures depending on the nature of the change sought.

In the *Senate Reference*, the SCC outlined which amending procedure would need to be used for each potential change to the Senate. Some changes, for example, require unanimous agreement by the provinces. Others require the agreement of seven provinces (that must make up at least 50% of the population of Canada) to approve the change. This latter formula, called the general amending formula, is the most commonly relied-upon procedure.

1. The federal government cannot unilaterally impose consultative elections for Senate appointments.

The SCC explained that consulting the provinces to find out who they would prefer as Senators would weaken the Senate's fundamental nature and role as a body for legislative review. Consultative elections would consist of asking provinces who they would want as Senators, with the Prime Minister only having to consider the results.

Although the text of the *Constitution* would not significant changes to allow for consultative elections, the practice would significantly alter the current appointment process, resulting in more than just a change to the text. This greater effect would alter the Constitution's "internal architecture"– an idea that the entirety of the Constitution must be interpreted as a whole. In other words, if one brick is removed, the whole thing could fall apart.

Having Senators appointed was "[the framers'] original answer to the clash that would inevitably occur between two elected chambers." The Senate was intended to be a complement to the House of Commons, not a rival. Changing to consultative elections would also likely place election pressures on potential Senators because they would have to adopt a popular mandate to be elected by the masses. Such pressures could result in Senators losing their objectivity as they would feel the need to support legislation that they campaigned on. Interestingly, the SCC did not comment on Alberta's ongoing consultative election scheme.

The *Constitution* outlines that the general amending formula should apply to changes to the method of selecting Senators, and implementing consultative elections would fall under this category. The general

amending procedure "protects" the process of selecting Senators by needing agreement from the provinces, and not allowing Parliament to make changes without substantial provincial agreement.

2. *The government cannot unilaterally impose fixed terms for Senators.*

Security of tenure (the fact that Senators cannot lose their jobs until retirement at 75) allows Senators to act independently of the House of Commons because they are not in fear of losing their jobs or of losing elections based on the decisions they make. A switch to fixed-length terms would allow Senators to stay in the role for a set amount of time.

The government argued that, since it is exclusively allowed to make laws governing the Senate, it should be able to impose fixed term limits unilaterally. However, the SCC explained that a change to fixed terms for Senators would not only affect the Senate's fundamental nature and role (because of the practical effects that would occur), but also that the change which would involve all "stakeholders in our constitutional design", i.e. all the provinces. Because of this effect on provincial interests, the general amending formula would have to be used to make sure there is substantial provincial support for the change.

3. *The requirements for Senators' net worth and property can be amended unilaterally by the federal government, with one condition.*

The *Constitution* has two property requirements for appointment to the Senate: 1) potential Senators must own land worth at least $4,000 in the province they are from, and 2) they must have a personal net worth of at least $4,000. The SCC explained that the change or removal of either qualification would not alter the fundamental nature and role of the Senate, so the federal government can unilaterally change this requirement.

Senators from Quebec, however, have a special arrangement for their property requirements. The land they own (worth at least $4,000) must be in a specific electoral district. Because of this special arrangement, the federal government would need the approval of Quebec's general assembly to change this requirement for the province.

4. *Unanimous consent is needed to abolish the Senate.*

Abolishing the Senate altogether would fundamentally change Canada's constitutional structure by removing its two-house, or bicameral, system. For this reason, the change would mean that *all* provinces must approve the change (the amending formula's "unanimity clause"). The SCC explained that, although the general amending procedure can be used for Senate "reform", abolishment is vastly different from reform. It would significantly change the nature of our democratic system.

What did this reference teach us about constitutional change?

For the first time, the SCC clearly outlined how the amending procedures in the *Constitution* work. It also described how specific changes to the Senate can be made. The SCC made clear that Parliament

cannot act alone on any significant changes to the Senate–it needs substantial provincial consent for all changes proposed, except for the property and net worth requirements.

The *Senate Reference* also described the concept of "constitutional architecture", which means that "[t]he individual elements of the *Constitution* are linked to the others, and must be interpreted in reference to the structure of the *Constitution* as a whole." In terms of Senate reform, this means that constitutional change involves much more than just altering the text of the *Constitution* as a document. The original intentions behind the document and how the constitutional provisions interact with each other must guide the interpretation, understanding, and application of the text, as well as any changes that might be made to it.

Will there ever be changes to the Senate?

In light of the criticisms of the Senate, scandals, and the *Senate Reference,* the Senate appears to have woken up.

Recently, changes have been made in the Senate *without* formal or constitutional amendment-driven reform – the Senate has come alive! Proposed bills are being initiated from the Senate, such as the shield law to protect journalists' sources. Caucus rules have changed, resulting in many Senators no longer feeling a need to vote within party lines and having the ability to create new caucuses based on region, ideology, or issues, such as a military caucus or women's caucus.

Stringent review of bills coming from the House of Commons has resulted in proposed changes suggested by the Senate. For example, with the 2017 federal budget and infrastructure bank omnibus bill: the Senate was concerned about the new infrastructure bank, and wanted to split the bill into two, so that the budget could be passed without the infrastructure bank. This caused an uproar when the House vehemently disagreed, and the Senate almost did not pass the bill before Parliament broke for the summer. It was narrowly passed by a vote of 38-38 in the Senate, with the House Leader breaking the tie in favour of the bill.

Interestingly, not everyone is happy about change in the Senate. Critics allege the Senate is overstepping its role – it should only be making sure that bills are good enough to become law. What is this new, Senate "activism"? In contrast, some allege that recent events demonstrate that the Senate is, for the first time in a long time, being true to its mandate of conducting the "sober second thought" needed for review of bills from Parliament.

As for significant structural changes to the Senate, the ball is in Parliament's court. Thanks to the *Senate Reference*, it knows exactly how these changes can be made. The *Reference* clarified that the Senate structure is entrenched in the Constitution, so constitutional amendment is required to make significant reforms. The next step to major Senate reform? Reopening the *Constitution,* and putting the Senate up for debate.

An Insider's Look at Senate Committees

By Marjun Parcasio

When I first stepped into the Senate atrium and peered into the chamber, I recall experiencing a sensory overload of colour. Carpeted in a sea of red with gold leaf adorning the ceiling, the Senate is decorated in a style befitting a monarch, the colours hinting at the Upper House's regal connection. This connection is perhaps more explicitly made in the two thrones situated at the north end of the Chamber and the golden mace, symbolic of the authority of the Crown, sitting perpendicular to the crimson-upholstered seats of the Senators on both sides of the aisle.

With all the grandeur of the Senate chamber, it was sometimes easy to forget that the Senate also had a different face: one that was more modest, functional and certainly much less red. Elsewhere in the Parliament Buildings, in the East Block on Parliament Hill and even across the street in the Victoria Building, were simpler rooms with less pomp and circumstance but just as much a part of the Senate as the chamber itself. These rooms are the homes of the Senate committees.

Committees, in the words of the Senate's first female Speaker Senator Fergusson, are the "heart and soul of the Senate." While the Senate has been a much maligned institution in the eyes of many Canadians due to the unelected status of its members and in recent years as a result of scandals, the work of its committees is often underappreciated and overlooked. Similar to corresponding committees in the House of Commons, Senate committees hear from witnesses and review and scrutinize legislation. However, they also have the opportunity to study issues of public policy in depth and over a prolonged period of time, which is generally a luxury for the House whose members face much greater political and constituency pressures. Senate committees regularly produce detailed and comprehensive reports on both legislation and on other issues of public concern which have been lauded even by some of the institution's harshest critics. In this sense they play an important role in the legislative process, a nod to the idea that the Senate should function, in the words of Sir John A. Macdonald, as a chamber of "sober second thought".

Most Senators sit on two or three committees, often in areas in which they hold related professional expertise, or of particular importance to the provinces they represent. For instance, the Standing Committee on Legal and Constitutional Affairs currently counts among its members a number of constitutional experts and lawyers, as well as previous members of the police forces and a former judge. The Standing Committee on Fisheries and Oceans, meanwhile, has Senators hailing from across the country with a significant number representing Maritime provinces.

These standing committees are regular fixtures of the parliamentary framework that are responsible for main areas of policy, such as agriculture or transport. Following second reading in the Senate, a bill will typically be subject to detailed consideration in the appropriate standing committee. In addition, standing committees often conduct special studies following which they submit recommendations to the government for consideration. The removal of the penny from circulation, for example, was studied extensively and recommended by the Standing Committee on National Finance in 2010 and subsequently implemented by the government in its 2012 budget. Another prominent study was that undertaken by the Kirby Committee (so named for the then chairman of the Standing Committee on Social Affairs, Science and Technology), which cast light on the state of mental health support and addiction in Canada and which ultimately led to the creation of the Mental Health Commission of Canada.

In addition, the Senate has historically convened special committees to consider specific areas of interest. In the 1960s, the Croll Committee embarked on an ambitious study of poverty in Canada, visiting all ten provinces and the Yukon and hearing over 800 witnesses. In 1995, the Special Committee on Euthanasia and Assisted Suicide waded into an ethical minefield, tackling contentious issues of voluntary euthanasia and palliative care, among others, in its final report.

In the world of politics, there is often a predominant focus on the rhetoric, political drama and partisanship that far too often characterizes our parliamentary system. A committee hearing generally pales to the excitement of politicians trading barbs during Question Period or to the ceremonial significance of an event like the Speech from the Throne. That said, having sat through hundreds of hours of testimony and debate in Senate committees, some of the most meaningful work I ever saw on Parliament Hill was in committee, with Senators asking poignant questions to witnesses or with experts expounding on the impact of legislation. Senate committees provide a platform for the public to consider the particulars of public policy and allow for engagement in topics often neglected by governments or considered to be too politically risky to be examined. While the Senate, with all its flaws, may have its critics seeing red, the value of Senate committees in improving the quality of our democracy should not be underestimated.

The author represented the province of Alberta as a Senate Page from 2010-2012.

BenchPress – Vol 42-1

By Aaida Peerani

1. Bribery Law in Canada is No Joking Matter

The Ontario Court of Appeal (ONCA) has shown that the bribery laws in Canada are nothing to scoff at. The ONCA upheld the trial decision convicting Nazir Karigar for agreeing to bribe a foreign official contrary to the Corruption of Foreign Public Officials Act. Karigar was sentenced to three years in prison. In making this decision, the Court noted that a person can be convicted of direct or indirect agreement to bribery even if there was no bribe paid and the foreign official was never approached with the bribe or aware of it.

R v Karigar, 2017 ONCA 576 (CanLII)2

2. Duty to Consult is Not a Veto

The Supreme Court of Canada (SCC) released a decision reviewing the National Energy Board (NEB)'s approval of a pipeline project proposed by Enbridge Pipelines Inc. The proposed project would modify a pipeline to reverse its flow, increase its capacity, and allow it to carry heavy crude.

The NEB approved the project even after having consulted the Chippewas of the Thames First Nation (Chippewas). The Chippewas were concerned that the project would increase pipeline ruptures and spills and could adversely impact their use of the land. However, the NEB found that the impacts to Indigenous groups would be minimal and appropriately mitigated. The Chippewas' appeal to the Federal Court of Appeal was dismissed.The Chippewas then appealed to the SCC, where their claim was dismissed again. The SCC found that the NEB, acting on behalf of the Crown, had fulfilled its duty to consult to the Chippewas. The SCC highlighted that the duty to consult "is not the vehicle to address historical grievances" and "does not provide Indigenous groups with a 'veto' over final Crown decisions."

Chippewas of the Thames First Nation v Enbridge Pipelines Inc., 2017 SCC 41 (CanLII)

3. Google Search

The SCC upheld a novel injunction order against Google, who found itself to be an unwilling third party in an intellectual property dispute. An injunction is an order that restrains a party from beginning or continuing specific acts.

The defendant "D", previously a distributor for the plaintiff "E", re-labelled and sold E's inventory as its own and used E's intellectual property and trade secrets to its advantage. The British Columbia Supreme Court ordered D to halt its activities to avoid any potential further harm to E. In contravention of this order, D continued the sale of product and use of intellectual property through the internet. D and its suppliers could not be located. As a result, Google was approached by the E to block the websites from showing up in Google's search results (also known as de-indexing) D's websites to prevent harm, but

Google refused. Subsequently, after discussions, Google appeared in Court with E and agreed to remove specific pages pursuant to a court order prohibiting D from carrying on business on the internet. However, E found out that Google de-indexed only some of D's websites, not all of them, which allowed D to circumvent the court orders by selling product through the websites that were not de-indexed. As such, E sought, and was a granted, an interim injunction to prevent Google from displaying any part of D's websites on any of its search results worldwide. In upholding the injunction, the SCC noted that without this global order, E could continue to be irreparably harmed.

The novelty in this landmark decision is that the Order applied worldwide. Notably, Canadian courts do not often issue orders that apply outside of Canada to avoid impinging on the authority of foreign nations or their courts. In making this unique decision, the SCC noted that: "[t]he Internet has no borders – its natural habitat is global."

Google Inc. v Equustek Solutions Inc., 2017 SCC 34 (CanLII)

4. Edmonton Police Association Loses Defamation Lawsuit

Tom Engel won a $50,000 defamation lawsuit against the Edmonton Police Association. Tom Engel is a criminal lawyer in Edmonton who has taken a special interest in policing issues. At the heart of the case was an article written by a member of the Edmonton Police Service, which was published on the Edmonton Police Association website. The article claimed that Engel was incompetent and dishonest. It also implied that Engel had ulterior motives in pursuing cases against the police. The Court found that the article was defamatory in fact, opinion, and tone. The Court also noted that reputation is "the cornerstone of a lawyer's professional life."

Engel v Edmonton Police Association, 2017 ABQB 495 (CanLII)

Viewpoint 42-1: Scoring NAFTA: The United States Trounces Canada in Investor-State Disputes

By Peter Bowal and Ahmed Zaid

"NAFTA is the worst trade deal maybe ever signed anywhere, but certainly ever signed in this country" (September 26, 2016)

"Because NAFTA . . . is perhaps the greatest disaster trade deal in the history of the world. Not in this country. It stripped us of manufacturing jobs. We lost our jobs. We lost our money. We lost our plants. It is a disaster." (October 9, 2016)

"NAFTA's been very, very bad for our country. It's been very, very bad for our companies and for our workers, and we're going to make some very big changes. . . Cannot continue like this, believe me." (April 18, 2017)

-Donald Trump (candidate and US President)

Introduction

In light of the current renegotiation of the North American Free Trade Agreement (NAFTA), we focus on a 'chapter' of decisions in investor-state disputes.

Chapter 11 of NAFTA, arguably the most controversial part of NAFTA, prohibits each of the three countries from punishing or nationalizing businesses and investments from the other countries. If there is to be free trade in investments across the three countries, each country must accord the NAFTA investor no less favourable treatment than it grants to its own investors and minimum standards of fairness in any event. Expropriating vulnerable foreign investments and assets are the worst sin under this Chapter. If these investor-state disputes are not settled, there is an arbitrated decision.

It is well known that the US President continues to sharply criticize NAFTA on the basis of unfairness. It is described as a leading cause of harm to American economic interests. What is less well known is how dominant and successful the US has been under Chapter 11 since it came into effect in 1994. (This should not be confused with another dispute resolution mechanism in Chapter 19 where Canada has enjoyed better outcomes.)

Background

The Chapter permits investors to bring direct proceedings against non-compliant governments before impartial international tribunals. While observers originally expected Mexico to face the most claims under Chapter 11, Canada has (by far) been the target of most investor-state arbitration claims. Up to now, Canada is the most sued country under Chapter 11, but has answered claims only from American investors. We have not found any of these claims by Mexican investors against Canada and vice versa.

Summary of Claim Outcomes

Accurate statistics are difficult to obtain because all claims are not publicly reported. About *half* of the total number of 84 claims against all three nations have been against Canada.

Half of the reported final cases brought by American investors against Canada have been successful (six out of twelve). As a result, Canada has paid a total of C$215 million in compensation, mostly due to provincial breaches. An example is the *AbitibiBowater* claim, the settlement of which cost the Government of Canada $130 million.

On the other hand, Canadian investors have lost all eleven reported claims they have filed against the United States. The most recent case filed against the United States by TransCanada Corporation, for more than $15 billion in connection with the cancellation of the Keystone XL Pipeline, was withdrawn.

The two tables below describe the completed Chapter 11 claims raised by Canadian companies against the United States and American companies against Canada, respectively. Withdrawn and ongoing cases are not included.

Table 1: Canadian NAFTA Chapter 11 Claims against the US

Case	Claim Summary	NAFTA Articles	Award
ADF Group Inc. v. USA	ADF, a Canadian construction company impacted by "Buy America" statutes which require federally-funded state highway project to use domestically produced steel only. ADF was forced to use US girders, rather than the company's girders in Canada. ADF claimed $90 million in lost profits.	1102 1105(1) 1106	2003 – Dismissed. Tribunal ruled that Article 1108 exempts government procurement from Chapter 11.
Apotex Holdings Inc. and Apotex	Apotex is a Canadian pharmaceutical company with a US-based subsidiary. Apotex claimed $520 million in	1102 1105 1110	2013 – Award I & II both dismissed.Tribunal found Apotex did not qualify as an investor. Money

Inc. v. USA there were two arbitrations	damages due to the US FDA Import Alert against two of its Canadian facilities. Apotex claimed the FDA did so without due process and in breach of NAFTA's fair treatment provisions.	1139	spent to obtain FDA approvals in the USA and to develop the drugs in Canada were not "investments".
	Apotex filed another claim based on its FDA applications which had been approved by the FDA (versus the first arbitration which was based on tentative FDA applications).		Award III Tribunal applied *res judicata*, finding claim was "precluded by a prior decision" which barred Apotex from further claims based on Awards I & II.
Canfor Corporation v. USA	Canfor claimed $250 million in damages resulting from the US's antidumping and countervailing rules which imposed additional duties on Canadian-imported softwood lumber. Tembec filed a similar claim for $200 million and the claim was later consolidated.	1102 1103 1105 1110	2005 – Dismissed, for lack of jurisdiction.*Tembec withdrew from the consolidated case
Cases Regarding the Border Closure due to BSE Concerns	Several Canadian cattle companies filed claims ranging from $40 – $95 million, caused by the US decision to close its borders and bar Canadian cattle imports due to concerns around the so-called Mad Cow outbreak in Canada.	1102	2003 – Dismissed. Tribunal did not have jurisdiction as the Canadian complainants did not make the investment in the US, rather in their home country.
Glamis Gold Ltd. v. USA	Glamis is a Canadian precious-metals mining company with rights to develop an open-pit mine in California. The project was near a sacred Native land. The federal and state government imposed reclamation duties on Glamis to backfill and grade the open-pit mine as a measure to conserve the Native lands. Glamis claimed $50 million in damages.	1105 1110	2009 – Dismissed.Tribunal decided the government acts did not rise to the level of expropriation. Glamis was ordered to pay two thirds of the arbitration costs.
Grand River Enterprises Six Nations,	Grand River, an aboriginal tobacco manufacturer, claimed $300 – $500 million due to US anti-smoking rules	1102 1103 1104	2011 – Dismissed. Tribunal did not have jurisdiction as the claimant did not make the

Ltd. et al. v. USA	and a settlement between the US tobacco companies and the US government.	1105 1110	investment in the United States.
Methanex Corp. v. USA	Methanex is a Canadian company that produces methanol, an ingredient in MTBE, which was banned by a California legislation for health reasons. Methanex filed for $950 million due to loss of market share in California.	1102 1105 1110	2005 – Dismissed. Tribunal found legislature was supported by scientific evidence. It was transparent and non-discriminatory. Methanex ordered to pay US government legal costs.
Mondev International Ltd. v. USA	Mondev is a Canadian real estate company with development projects in Boston dating to the 1980's. Mondev, other companies, and Boston entered a series of complex transactions where Boston might have violated its commitments. These issues were litigated in the local legal system. Mondev claimed the Supreme Judicial Court violated NAFTA.	1102 1105 1110	2002 – Dismissed. Tribunal determined that US court judiciary decisions did not breach NAFTA.
The Loewen Group, Inc. and Raymond L. Loewen v. USA	Loewen, a Canadian funeral services company, was the second largest chain in North America. It was a party in a civil trial in Mississippi against a US funeral operator over a contract dispute. The Mississippi judge, clearly favoring the local company over the foreign investor, awarded the US party punitive and compensatory damages amounting to $1 billion which bankrupted Loewen. Loewen claimed the state court system discriminated against his company.	1105 1110	2003 – Dismissed. Tribunal agreed that Loewen was wronged, but he did not exhaust all local remedies. It also did not have jurisdiction due to the fact that Loewen filed for bankruptcy as a US company, so it is not protected by NAFTA.

Table 2: American NAFTA Chapter 11 Claims against Canada

Case	Claim Summary	NAFTA Articles	Award
Windstream Energy LLC v. Canada	Windstream entered into a 20-year agreement with Ontario's Power Authority to develop a wind energy project in Lake Ontario. The Ontario government deferred the offshore wind development until a scientific study was completed. Windstream sought $475 million in damages for discrimination and delays imposed by Ontario.	1102 1105 1110	2009 – Tribunal agreed the study delays left Windstream in uncertainty and awarded it $21 million.
Mobil Investments Inc. and Murphy Oil Corporation v. Canada	Mobil and Murphy, US oil companies operating in offshore fields in Canada, Hibernia and Terra Nova. Canada-NL Offshore Petroleum Board passed rules requiring oil companies operating in the region to spend a percentage of revenues on research, development and training. Both companies claimed damages of $66 million.	1105 1106	2007 – Tribunal said Canada breached by asking both companies to buy services locally. * Contradicts with ADF Group Inc. v USA
V. G. Gallo v. Canada	Gallo, a US citizen, owned an Ontario-based corporation that owned an abandoned open-pit mine, Adam Mine. Gallo marketed Adam Mine as a landfill location. The Ontario legislature enacted legislation prohibiting use of Adam Mine as a landfill due to environmental concerns re: drinking water. Gallo filed a NAFTA claim.	1105 1110	2007 – The Tribunal dismissed the case, finding insufficient evidence of Gallo's ownership before the legislation.
AbitibiBowater Inc. v. Canada	AbitibiBowater is a US-incorporated company with Canadian headquarters in Montreal. The company owned a paper mill and	1102 1103 1110	2010 – Canada settled the case, paying AbitibiBowater $130 million.

	hydroelectric generating facilities in Newfoundland and Labrador, with water and forestry access rights. The company closed its mill and laid off thousands of workers. The province expropriated the company's water and forestry rights. The company claimed $500 million.		
Chemtura Corporation v. Canada	US-based Chemtura, produced "Lindane-based" treatment for canola seeds. The Pest Management Regulatory Agency conducted a review and determined the product bears public health risks. Chemtura filed a $78 million claim that the PMRA review was discriminatory and done in bad faith.	1103 1105 1110	2009 – The Tribunal found the review was supported by science. No bad faith was proven. The PMRA decision applied to all producers and did not discriminate against the claimant, who must pay costs.
Dow AgroSciences LLC v. Canada	Dow, a US-based pest control chemical producer, was impacted by the Government of Quebec's ban on pest control products containing a certain chemical. It filed a claim 2 million alleging that Quebec's decisions was not based on scientific evidence.	1105 1110	2009 – Claimant withdrew its claim in return of Quebec's admitting that the chemical poses no public risk. No financial compensation in the settlement.
Ethyl Corporation v. Canada	Ethyl is a US exporter and distributor of a fuel additive MMT that's meant to increase the octane level of gasoline. The Parliament in Canada passed legislation prohibiting MMT due to its effects to on-board emission monitoring systems and health risks. Ethyl filed a $201 million claim.	1102 1106 1110	1998 – Federal government settled with claimant after three provinces challenged the federal act on basis that it violated the Agreement on Internal Trade.
Merrill & Ring Forestry LP v. Canada	M&R owned timber land and marketed logs. It filed a $50 million claim that Canada's control measures on exports of logs from	1102 1105 1106 1110	2010 – Tribunal dismissed allegation of discriminatory practices. The rules applied to all players. The control measures did not qualify under the

	British Columbia violated Chapter 11.		performance requirements in 1106. Measures constituted more inconvenience than expropriation.
Pope & Talbot Inc. v. Canada	P&T, a US-based company owning paper and softwood lumber mills in Canada, claimed $500 million on basis that Canadian export rules imposed on foreign company exports violated NAFTA chapter 11. Those controls put an additional levy and a requirement for permits from foreign companies.	1102 1105 1106 1110	2002 – Tribunal awarded the claimant only $400,000 under 1105 only as it found those measures discriminatory. All other claims were dismissed.
S.D. Myers Inc. v. Canada	Myers was a US company involved in processing and disposal of polychlorinated biphenyl (PCB) waste. PCB is a heavily controlled toxic chemical. Canada issued a temporary ban on US company exports of the substance in response to a US decision to ban the substance. Myers filed a claim for $53 million in damages.	1102 1105 1106 1110	2002 – Tribunal awarded $6 million plus interest and legal costs to claimant only under 1105 since it found Canada's treatment of US companies different than Canadian companies. All other claims were dismissed.
United Parcel Service of America, Inc. v. Canada	UPS, a US based courier, competed against Canada Post and Purolator, both government-owned entities. UPS claimed Canada's treatment of packages is not equal. It said Canada Post and Purolator received subsidy in imports costs. UPS claimed monopolistic practices of both entities breached Chapter 11.	1102 1105 1502 1503	2007 – Tribunal found the claims did not come under Chapter 11.
Detroit International Bridge Company v. Canada	DIBC is a US company that owns a toll bridge (Ambassador Bridge) between Canada and the US. It filed a $3.5 billion claim against Canada alleging its agreement with the US government to build a new	1102 1103 1105	2012 – Tribunal found it did not have jurisdiction and ordered DIBC to pay Canada's legal costs.

	bridge diverts travelers from the Ambassador Bridge, which will reduce its revenue. It accused Canada of delaying its decision to DIBC's application to build a bridge in favour of this new bridge.		

Observations and Analysis

In reviewing the reported decisions under Chapter 11, several observable patterns arise:

- The number of US-investor disputes against Canada is about the same as the number of disputes Canadian investors have filed against the United States. However, Canada's perfect loss rate on its own claims is highly anomalous. Many of the tribunal decisions simply cannot be reconciled.
- One of the challenges for Canadian companies in their disputes against the US is the technical definition of "investment." For example, tribunals concluded that the money spent on obtaining regulatory approvals did not qualify as Chapter 11 "investment."
- Physical corporate presence was another important consideration. Conceived as a matter of jurisdiction, the more one is operating in the other country, the greater the chance that one's claim will be successful.
- There were no claims of direct expropriation against the United States, although a few claims relied on practices tantamount to expropriation. The *Loewen* case demonstrated clearly unfair and predatory treatment toward a Canadian investor, but it was dismissed on technical grounds.
- Government procurement is always challenging. The US government's "Buy America" rules imposed on Canadian companies operating in the US (ADF was required to use US-produced steel) were considered exempt. However, when Canada imposed similar rules on Mobil and Murphy Oil to spend locally, the Tribunal awarded damages to both companies.
- Although the NAFTA tribunals cannot order punitive damages, legal costs awarded may have a punitive effect. Canadian companies claiming against the US might wish to reconsider, given the low success rate and risk associated with legal costs.
- Geographically, most cases originated in Central and Eastern Canada. The small size of a provincial (or state) economy may be a factor why protectionist policies of industries and governments take root in these regions.
- Apart from cases involving emerging big pharma industry, none of the decisions involved the new digital economy. Countries are struggling to determine how they can regulate and tax Netflix, Amazon, Uber, Google, AirB&B and similar providers. Regulating these businesses in Canada will be even more challenging under NAFTA.

Conclusion

One of the Canadian government's priorities in the current renegotiation of NAFTA is to reform the investor-state dispute settlement mechanism found in Chapter 11. Governments should be able to

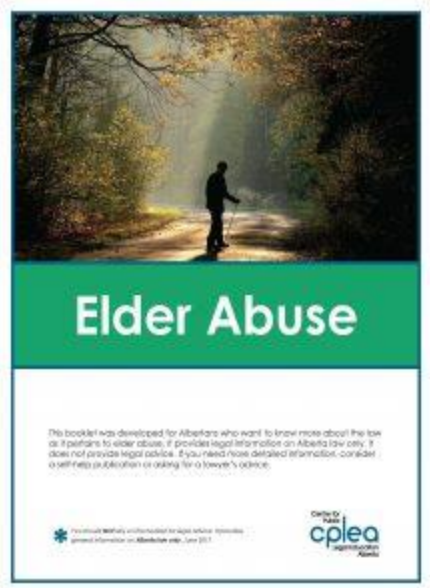
adopt regulations that are in the best interests of the public in health or safety and security matters without the fear of facing private suits by foreign investors. Moreover, as Canada works to recalibrate NAFTA's Chapter 11, it must balance the freedoms it seeks to regulate its own marketplace with the expectations of Canadian businesses investing in the United States.

Not surprisingly, the United States seems much more content than Canada with the existing version of Chapter 11. Even then, the US is under the impression that investors from its NAFTA partners enjoy greater rights to its market than American investors. This scorecard showing disposition of claims over the 23 years of NAFTA experience shows that is not true.

New Resources at CPLEA – Vol. 42:1

By Aaida Peerani

LawNow has created a Department called New Resources at CPLEA, which is now a permanent addition to each issue. Each post will highlight new materials at CPLEA. All resources are free and available for download. We hope that this will raise awareness of the many resources that CPLEA produces to further our commitment to public legal education in Alberta. For a listing of all CPLEA resources go to: www.cplea.ca/publications



CPLEA has produced a new, extensive booklet on Elder Abuse. This resource covers the different forms that elder abuse can take and looks at the legal tools available to help older adults and those who care about them caught in this difficult and dangerous situation.

Reminder: Beyond A Reasonable Doubt is a Pillar of our Justice System

By Melody Izadi

In the post-Ghomeshi trial hoopla, many seem to question the integrity of Canada's criminal justice system. Hashtags, slogans, movements and even possibly legislation have been the ripple effects of an ever increasing angry public after Jian Ghomeshi was acquitted of his charges. Much to some of the public's dismay, yet another acquittal has been handed down from Canadian courts. This time, three officers— Joshua Cabero, Leslie Nyznik and Sameer Kara— were acquitted on August 9, 2017 after a lengthy trial in which these officers were accused of sexually assaulting a female parking enforcement officer in a hotel room.

Perhaps not so coincidentally, a female judge— Her Honour, Justice Anne Molloy— was scheduled to preside over this trial. In her written decision released on August 9, 2017, Justice Molloy gave the public a much needed reminder that the Crown's burden of proof is a pillar of our justice system that cannot be lowered, despite how unfortunate or upsetting the allegations may be.

It simply means that the Crown failed to meet their burden of proof. The slogan and hashtag "believe the victim" has become an increasingly popular statement of protest against the justice system because there is an ever increasing popular belief that the justice system gives no justice to complainants in sexual assault trials. However, Justice Molloy aptly addressed this phenomenon head on in her written reasons:

> *"To approach a trial with the assumption that the complainant is telling the truth is the equivalent of imposing a presumption of guilt on the person accused of sexual assault and then placing a burden on him to prove his innocence. That is antithetical to the fundamental principles of justice enshrined in our Constitution and the values underlying our free and democratic society."*

Put simply, the complainant was inconsistent in her testimony in important ways. Most notably, she was inconsistent with regards to how intoxicated she remembered to be during the incident. She testified that she experienced blackouts, was unable to move and was inebriated. However, a toxicologist testified that her blood alcohol content at the time, consistent with what she testified to having consumed, would make it almost impossible for her to experience such symptoms. In addition, the

toxicologist testified that if she were subject to any common “date rape drug”, the symptoms would have been apparent within 15 minutes to 30 minutes of ingestion, and disappeared within 30 minutes after the symptoms became apparent. These inconsistences brought out through cross-examination and defence evidence were key in assessing the credibility of the complainant’s testimony.

However, the public should take note that Justice Molloy also considered some of the complainant’s testimony and defence evidence argued to be relevant by the defence as *irrelevant*, and reminded everyone that “rape myths” and stereotypes about sexual assault victims have no place in the courtroom. Her Honour powerfully stated: “[w]hat a woman wears is no indication of her willingness to have sexual intercourse, nor can it be seen as even the remotest justification for assuming she is consenting to sex.”

Her Honour also addressed the stereotypes that were presented by the defence about the complainant’s behaviour after the alleged incident: “[a] woman who has been the victim of a sexual assault will not necessarily exhibit immediate symptoms of trauma. She might, or might not, be weepy. She might, or might not, be depressed and withdrawn. She might, or might not, be hysterical. Or she might cover up any of those kinds of emotions with an exterior of jocularity.” “There is simply no ‘normal’ or typical,’” Her Honour goes on to say, “I have not taken any of this conduct into account in reaching my decision.”

In addition, her Honour expressly stated in her reasons that she didn’t believe large parts of Mr. Nyznik’s evidence, who was the only accused to take the stand. She was not even sure if she could believe his evidence on the most important point of litigation in this trial: whether or not the complainant consented.

However, it is the Crown’s burdens of proof to prove that the crimes are alleged have occurred beyond a reasonable doubt. Despite a team of three prosecutors and months of preparation, the Crown was not able to do so in this case. Her Honour then, despite her criticism of Mr. Nyznik’s testimony, must, in accordance with our laws, find the three accused not guilty. To not do so would be a miscarriage of justice. The accused does not need to prove his or her innocence, nor does a verdict of not-guilty mean that an accused is innocent. It simply means that the Crown failed to meet their burden of proof. Without that burden, our justice system would be unrecognizable, and would fail to serve any justice at all.

Bad Behaviour 2.0, Part 1: Employees Getting Away With . . .

By Peter Bowal and Lindsay Thorburn

We scoured the judicial and arbitral decisions and found ten more random instances of egregious employee behaviour that Canadian courts and arbitrators excused. Since the judge or arbitrator found that the employers had no legal basis to find these employees, employers were hit with damages for wrongful dismissal and court costs. The employer was successful, only in the first case below, in overturning the original decision on appeal.

In reading these cases, one asks, "what was that judge (or arbitrator) thinking?" One might also consider whether such forbearance of co-worker harassment will continue.

1. *Bannister v General Motors of Canada Ltd.*

Twenty six witnesses, mostly women aged 18 to 23, testified over fourteen days to their own sexual harassment experiences with Bannister, the senior security officer on site. Although this conduct violated corporate policy, the trial judge found this was typical behaviour in the General Motors industrial plant. Concluding that Bannister was wrongfully terminated, the trial judge awarded him $119,510.41 plus prejudgment interest and costs. This decision was mercifully reversed by the Ontario Court of Appeal four years later in 1998.

2. *Stone v Sybron Canada Ltd.*

Stone was employed with Sybron Canada for 16 years before his termination. Four women accused him of sexual harassment alleging he would grab their legs, poke their mid-sections, and run his fingers up their legs. All the women told him to stop. He did stop for a few shifts and then continued. He was also accused of drinking on the job. If he did not come to work drunk, he would be drunk by the end of the shift. He would put alcohol in his soft drink can and was too drunk by the end of his shift to perform his duties. In 2006, the judge found insufficient legal cause for the employer firing Stone and awarded him a notice period of 13 months, which was $43,353.31.

3. *Soplet v Bank of Nova Scotia*

In 2005, an analyst with the Bank of Nova Scotia purchased marijuana during work hours at a colleague's workstation. For this, he was fired from his job. He admitted to purchasing the marijuana (an illegal act)

and despite having annually signed the bank's Guidelines for Business Conduct, he deliberately breached said Guidelines. Still, he was awarded six months of wages in the amount of $36,300, plus 10% for lost benefits, and 4% interest.

4. *Chandran v National Bank*

Virtually every subordinate employee complained about Chandran's "inappropriate management style." He was a very experienced, often-promoted senior manager at the National Bank. The complaints involved his condescending remarks and bullying. The bank found his behavior had a serious impact on employees and the morale of this office. The bank concluded Chandran had made condescending remarks, criticized and embarrassed employees in front of others, raised his voice and shouted, was volatile and demonstrated bullying behaviour. He had been previously cautioned about this "arrogant and harsh behaviour," which description of his management style he agreed with. He refused to take responsibility for his actions. After he refused to take one of two other jobs offered to him at the bank, Chandran was fired. Aged 41, with 18 years of service with the employer, he had been earning about $100,000 at the time. In 2011, the Ontario court awarded Chandran 14 months of wages ($115,295) and benefits, plus costs in the amount of $65,833.35 for his wrongful dismissal. The case was cited with approval by the Supreme Court of Canada in 2016.

5. *Warren Ens v Gfs Prairies Inc.*

In 2010, Ens was a transit and delivery driver for 10 years in Saskatchewan who had earned generally good performance assessments. He protested a scheduled driving assignment. In doing so, he used profanities, accused his supervisor of lying and covering up, and described his managers as "gullible". For this, he received a written warning. A few months later when he was scheduled for overtime driving, which he had done in the past and which was occasionally a job requirement, he left work without notice or finishing his assigned deliveries for the day. When asked to return, he refused. Given the insubordination a few months earlier and this abandonment of duties, the employer fired him. The employer also noted another incident the year before where Ens had made derogatory comments about a co-worker. Still, Ens was awarded wrongful dismissal damages of 18 weeks which, after deducting mitigated earnings, amounted to $14,122.00, plus costs.

Look for Cases 6-10 in Issue 42-2 of LawNow Magazine.

A River Runs Across It: Solving Trans-border Disputes Over Water

By Jeff Surtees

People get very passionate about both water and borders. So how do we avoid or resolve disputes involving rivers and lakes that cross the border between Canada and the United States?

At almost nine thousand kilometers, our border with our closest neighbour is the longest unprotected political border between two sovereign nations on Earth. The southern section of the border roughly follows the forty-ninth parallel while the northern section, between Alaska and the Yukon, mostly follows the one hundred forty-first meridian west. In places, like the St. Lawrence River and the Great Lakes, water forms the border. In hundreds of other places water flows across the border, sometimes from Canada to the United States, sometimes the reverse. Occasionally, as is the case for the Milk and St. Mary's rivers in southern Alberta, streams cross the border in one direction then turn and cross again in the other direction.

With such a long border and with water being so important to human health, to wildlife and to the economies of both countries, disputes are inevitable. Harm could be potentially be caused by direct pollution, inadequate water treatment, poor industrial practices, poor forestry practices, side effects of building infrastructure, such as increased sedimentation from building roads for forestry, mining and oil exploration, stream diversion for irrigation, raising or lowering the natural water levels of streams or damage to upstream fish habitat, especially in spawning areas.

How do we avoid or settle disputes? The answer, as always in environmental law, is complicated. Several international agreements play a role and there is a movement toward more local methods.

The first international document is the draft "UN Convention on the Law of the Non-Navigable Uses of International Watercourses" (here) which calls for 'equitable and reasonable utilization' of transboundary waters. This Convention could play a role in defining the obligations of Canada or the United States if it were held to have become part of customary international law, even though neither country has signed on to it. International environmental law works differently than domestic law. It is a world of norms, customs and "moral suasion". So if most of the world is following something they accept as a rule, there will be pressure put on other countries to follow the same rule, whether or not they have formally signed an agreement.

The second international agreement which might be used to solve cross-border disputes is the North American Free Trade Agreement ("NAFTA"), a tri-lateral trade agreement between Canada, the United States and Mexico which came into force in 1994 (here). The Preamble to the NAFTA states that the three signatory governments will carry out the agreement "in a manner consistent with environmental protection and conservation" and to "promote sustainable development". The NAFTA contains extensive and elaborate dispute settlement provisions, providing for panels of experts to rule on certain trade disputes. A panel may ask for input from a scientific review board in in environmental cases. However, since the NAFTA is a trade agreement, environmental issues would only be considered in the context of a trade dispute. It is not an agreement that could be used on its own to protect the environment or to deal with transboundary environmental issues if there were no connection to trade.

The third possible international mechanism to deal with transboundary water disputes comes through the adversarial processes made possible under a side-treaty to the NAFTA called the North American Agreement on Environmental Cooperation ("NAAEC"). The Commission for Environmental Cooperation is established by the NAAEC. (see the Commission's website at www.cec.org). One of the most powerful features of the NAAEC is its mechanism which allows citizens to make submissions against their home government for failing to effectively enforce its own environmental laws. The proceedings which have been brought against Canada are listed on the Commission's website above under "Submissions on Enforcement Matters". The NAAEC could be a powerful tool to force compliance with either country's environmental laws. Many of the proceedings deal with enforcement of legislation that could apply to interjurisdictional waters, including the *Fisheries Act,* the *Canadian Environmental Protection Act,* the *Canadian Environmental Assessment Act* and the regulation ratifying the Convention on Biological Diversity signed at the Rio Earth Summit on June 11, 1992. Two of the matters out of approximately thirty listed on the Commission's website alleged improper enforcement of the anti-pollution provisions of the Boundary Waters Treaty and the *International Boundary Waters Treaty Act*, discussed below. Neither proceeding went to completion. Unfortunately, groups wanting to run a proceeding before the Commission are faced with the same costs and complications as they would in a court.

The fourth possible mechanism for avoiding or resolving disputes comes through the work of the International Joint Commission established under the Boundary Waters Treaty (here), which was signed into force by the United States and Canada in 1909. The enabling legislation for the Boundary Waters Treaty in Canada is the *International Boundary Treaties Act*. (here). There are few, if any, examples of international organizations created by treaty with the longevity of the International Joint Commission or treaties with the successful lifespan of the Boundary Waters Treaty. Direct applications to the Commission are always made by one of the federal governments but can be prompted by a request from a project proponent and preceded by negotiations. In many cases the Commission establishes an expert group which examines the science around the matter in question and agrees upon common facts. The Commission solicits the views of the public on the findings of the expert group and then provides non-binding recommendations in reports submitted to the two governments and to the public. These reports are included among the almost seven-hundred publications listed on the Commission's website. The Commission has broad powers to establish boards, workgroups and taskforces responsible for a wide variety of practical, on the ground matters such as measurement of water flows, developing

adaptive management plans, monitoring and management of matters under various agreements, and supervision of dams.

The mechanisms mentioned above all operate at the national level. The Boundary Waters Treaty was entered in an era where the norm was that negotiations and planning were done nation to nation and only at the federal level. In the modern world, there is a movement toward more citizen consultation and participation and to many decisions being made at a more local or watershed level. Some of this shift comes about as a result of the higher levels of government downloading responsibilities to more local levels. The approach is one where water resource management is integrated with management of the landscape as a whole, including management of source water, drinking water, flood control, wildlife management and recreational area management. In addition to political boundaries, it operates across social, cultural, linguistic and hydrologic boundaries. (The observations in this paragraph are not mine, they come from "Rise of the Local? Delegation and Devolution in Transboundary Water Governance" by Emma Norman and Karen Bakker, in *Water Without Borders*? : *Canada, The United States, and Shared Waters* edited by Emma Norman, Alice Cohen and Karen Bakker, available here).

Drs. Norman and Bakker ask us to think about what conditions are necessary to make local level decision making work. If those conditions are not present, local decision making may not automatically be more effective decision making. Local participant groups may face very real practical and political barriers to achieving full participation in decision making processes – barriers such as a lack of funding, difficulty travelling to hearings and different processes on either side of the border.

We don't need the same process in every case. Resolving cross border issues concerning the Great Lakes is fundamentally different than resolving an issue involving a small mountain stream in southern British Columbia. Our goal should be to have the negotiation done at the level that results in the best decision after a fair, transparent, inclusive process with the decision maker or negotiators being provided with the accurate information they need, when they need it. Local interests and knowledge should almost always be considered in all cases, regardless of the level of decision making. When aboriginal rights and title of Canada's native people are involved, this is a constitutional requirement.

Things are going to get harder. Climate change will bring water shortages, perhaps catastrophic water shortages, to large areas of the United States. It will bring reduced glacial runoff in the mountains of Canada into the rivers that cross the border. It will bring changed weather patterns that could alter river flows in both directions. It will bring increased appetite for Canadian water in the United States, just as there may be less of it to go around. Change and uncertainty will bring increased opportunity for conflict. Nobody said the future was going to be easy.

Conflict Between Parents, Part 2: Strategies to Reduce Conflict

By John-Paul Boyd

In Part 1 of this article, I wrote about the effects conflict between parents can have on their children. In this part of the article, I'm going to talk about some steps parents can take to protect children from their conflict.

First, the bad news. Children are commonly negatively affected when their parents separate. Separation undermines their sense of stability and the security they feel in their relationship with their parents. Separation is associated with adverse outcomes like depression, anxiety, falling behind in school, delinquency, substance use and abuse and, for younger children, the temporary loss of important developmental milestones.

The likelihood that a child will experience one or more of these outcomes is influenced by their own resilience, their parents' behaviour and the resources available to the child outside the home, including the presence of supportive adults at school and the availability of counselling. Conflict between parents is one of the more important of these factors and poorly managed conflict can increase both the chance that a child will experience an adverse outcome as well as the severity of any adverse outcomes that are experienced.

Now, the good news. There are a number of things that parents can do to protect children from conflict. Every step that protects children from conflict helps, no matter how small, even if it's just one parent making the effort. Here are some easy things to do and not do, before we get into more challenging steps.

Do not:

- Encourage, or fail to discourage, the child's negative remarks about the other parent.
- Ask the child questions that will test the child's loyalty or put the child in a loyalty conflict – "would you rather come with me to the fair this weekend or go to your dad's office while he works?"
- Create a need for the child to conceal information or feelings.
- Grill the child about activities, including meals and bedtimes, in the other parent's house.

- Badmouth the other parent to the child, or within the child's hearing.
- Talk about who is to blame for the separation.
- Share details about the separation or what's going on in court with the child.
- Undermine the other parent's authority.

Do:

- Continue to be actively engaged in parenting the child and in the child's life.
- Listen and pay attention to the child's thoughts and feelings about the separation, the child's relationship with the other parent and your relationship with the other parent.
- Encourage the child's relationship with the other parent, including by keeping photographs of the other parent in the child's bedroom and encouraging contact by telephone, text or Skype.
- Help the child look forward to time with the other parent.
- Maintain consistent rules between homes, especially if the child has special needs.
- Use the same alternative caregivers and supports, especially if the child has special needs.
- Be extra patient with the child.

The next step to try and take is about disengaging from the other parent. You may not be in a relationship with that parent any more, but love and anger are both very strong emotions and signify a continuing attachment to the other parent. Your goal should be to reach a more business-like relationship with the other parent. If you can get there – and it's really worth trying – you'll take arguments less personally, you'll react to problems less explosively and you'll be able to have calmer discussions about difficult topics. Tips to help you disengage and reach that more neutral relationship include:

- Setting and following clear personal boundaries – "I won't talk with you when you're yelling" or "please don't call after 10pm."
- Setting and following clear ground rules about the children – "we won't use the children as messengers" or "we won't criticize each other to the children."
- Working out and following parenting plans that are clear and unambiguous.
- Accepting that there are things about the other parent that you cannot change and are just part of who that parent is.
- Stop dwelling on the past, especially on old arguments and old complaints. You can't change the past; all you can change is the present.
- Remembering that you are predisposed to interpret the other parent's words and actions in a negative light.

It's probably obvious, but avoiding an ongoing sexual relationship with the other parent is also a good idea.

Improving your coping strategies can also help reduce the intensity of the emotional climate between you and your ex. Strategies that don't work include:

- Going to war on every problem, no matter how small. Pick your battles!
- Withdrawing and refusing to talk to the other parent. That doesn't help anything.
- Trash-talking the other parent to anyone who will listen, including mutual friends, coworkers and Facebook.
- Making false or inflated complaints to the police, child protection, employers and regulators.

Some strategies that might improve things include:

- Focusing on the problem at hand, not the other parent.
- Being aware of your triggers, and when the other parent is triggering you.
- Ignoring small and unimportant problems.
- Not replying to insults and attacks. You're bigger than that.
- Modeling the sort of behaviour you want your ex to adopt.
- Improving how you communicate with your ex.

Remember that your goal is to defuse, or at least decrease, conflict. Good coping strategies also help dampen your emotional reaction to conflict and to the other parent, and that's good for your wellbeing too.

Improving how you communicate, however, is much easier said than done. You may have to unlearn some bad habits and work on developing some good habits that may at first may feel awkward and unnatural. Before getting into some positive communication strategies, here are a few general guidelines:

- Be informative and as brief as possible, without being impolite.
- Use the communication tool – in person, over the telephone or by email or text – that's best for you and best for the problem. Sometimes different conversations just work better in different media.
- Do your best to be, and appear to be, emotionally disengaged.
- Be positive, and avoid criticism and nit-picking

One easy communication strategy requires you to be alert to your use of pronouns. *You* often sounds nagging, blaming and accusatory, for example: "you didn't work on her homework again," "you didn't book the doctor's appointment" or "you make me furious!" It's usually possible to express the same concern using *I*, which at least talks about your feelings and your reactions rather than the other parent's misbehaviour: "I felt really embarrassed when the teacher called about the homework," "I was upset that he missed the field trip because he didn't get his checkup" or "I felt really angry when you said that."

Even better than *I* is *we*. *We* includes you and your ex. *We* suggests that a problem is a shared problem, encourages a team approach and is really useful when you need to get something done. For example: "how can we make sure her homework is completed in the future," "why don't we call the doctor and see if we can get an early appointment" or "I don't want to feel angry, how can we talk about this differently?"

More complicated communication strategies involve active listening and looping, which I'll talk about in the next and final part of this article. Active listening is a way of having a conversation in which you really listen to what the other parent is saying and go out of your way to confirm that you've understood the other parent. Active listening reduces conflict and is useful for any difficult conversation. Looping is a way of having a conversation in which you work with the other parent to more fully understand what he or she is saying. Looping can slow the conversation down, and usually calms high emotions in doing so.

Interveners in Human Rights Cases

By Linda McKay-Panos

Canadian courts, even though they are not litigants, third parties may have an interest in intervening in court proceedings because the court's judgment may affect them or others whom they represent. They often have information that they believe may be relevant to the courts in making their decisions. In Canada, interveners usually appear in appellate proceedings, but they can also appear in trial proceedings. Interveners commonly intervene on either side of a human rights or *Charter* dispute because these cases often deal with broad public policy issues. Interveners may include human rights statutory bodies (e.g., the Alberta Human Rights Commission), governments, unions, employer groups and interest groups (e.g., the Council of Canadians with Disabilities). While governments (e.g., Attorneys General) have the right to intervene in *Charter* cases and must be given notice in advance of a *Charter* claim, private interveners must seek leave (permission) from the court to intervene. It is quite usual for several interveners to seek leave to intervene in major human rights and *Charter* cases.

Interveners may be given leave to intervene when they are seeking to provide a different perspective on issue(s) that are before the court, but not when they are seeking to change or otherwise expand upon those issues. When an individual, group or body is given leave to intervene in a case, they usually submit a written argument (called a factum) and are also given permission to make a brief oral submission to members of the court. There are strict rules about the maximum length of the factum and the amount of time interveners are allotted to make their arguments. In the interest of time management, sometimes groups of interveners combine their efforts and make joint submissions.

Recently the Supreme Court of Canada made the news when, on July 27, 2017, Supreme Court Justice Richard Wagner rejected four Lesbian, Gay, Bisexual, Transgender, Queer or Questioning (LGBTQ) groups that had applied to intervene in a case about a law school at Trinity Western University (TWU). TWU requires students to sign a code of conduct limiting their sexual intimacy to heterosexual marriage. The case involves equality and freedom of religion—both important human rights issues.

Justice Wagner told the *Globe and Mail* on August 2, 2017, that he did not purposely exclude the LGBTQ groups. Because there was only one day allotted for the case hearing (and there were two cases to be heard together), he had granted leave to intervene to 9 out of 26 applicants for intervention, believing that this would adequately represent the interests of the LGBTQ community. (See: here)

After learning there were concerns expressed on social media, Justice Wagner reached out to Chief Justice McLachlin. In a rare move, Chief Justice McLachlin on August 2, 2017 revised Justice Wagner's decision (see: News Release August 2, 2017 ("News Release")). While the SCC and other levels of court do not usually give reasons for rejecting interveners or undoing the decision to reject interveners, the News Release provided some insight into the procedural challenges faced by the SCC when planning hearings involving multiple applications from potential interveners.

The News Release explains that at the time the decision was made, there was one day set for the SCC hearing. Since March 2017, the SCC has given interveners five minutes of oral argument time. Each of the litigants (legal parties) is given one hour for argument, which can be made longer when there are two appeals heard together. The goal is to hear a variety of views, while at the same time, efficiently managing the court's time. The News Release also explains that it is the responsibility of the litigating parties to ensure the issues are fully canvassed. Since the Chief Justice schedules hearings, she added a second day, which allowed all 26 interveners to be heard. This resolved the matter. Legal scholars are debating the constitutionality of the process followed in this case and whether there should be more transparency in SCC decisions involving intervention (See: here)

It is clear that interveners are seeking to intervene in most major human rights and *Charter* cases heard by the SCC (and often cases heard by Courts of Appeal). For example, in the *Reference re Same-Sex Marriage*, [2014] 3 SCR 698, 2004 SCC 79, the SCC granted 23 institutions and individuals leave to intervene. It is also clear that interveners or potential interveners believe that they have an important role to play. See, for example: Anna Pellatt, *"*Equality Rights Litigation and Social Transformation*:* A Consideration of the Women's Legal Education Fund's Intervention in *Vriend* v*. R"* (2000) 12(1) Canadian Journal of Women and the Law at 117-146. This article discusses the role of the intervention of the Women's Legal Education and Action Fund (LEAF) in the case of *Vriend v Alberta*, [1998] 1 SCR 493, a case which resulted in the SCC ordering the ground of "sexual orientation" to be read into Alberta's human rights legislation (then the *Individual's Rights Protection Act*). There are a number of similar cases where it could be argued that the submissions made by interveners were quite influential and assisted the SCC in arriving at its decision.

Likewise, it has been argued on occasion that the refusal to allow interveners in some cases has been detrimental. For example in *Ishaq v Canada (Citizenship and Immigration)*, 2015 FC 156, (a case about whether a woman could wear her niqab during a citizenship ceremony), six public interest groups — including the Ontario Human Rights Commission, the Canadian Civil Liberties Association and the National Council of Canadian Muslims—were refused permission to intervene, as the court determined that they could not advance their proposed arguments without social science evidence to back them up; nor could the court take judicial notice (facts and materials are accepted on a common sense basis without being formally admitted in evidence) of any of the facts necessary to support the arguments. Another example may be found in the recent case of *Brent Bish on behalf of Ian Stewart v Elk Valley Coal Corporation, Cardinal River Operations,* SCC Case No 36636, leave to appeal granted from the judgment in *Stewart v Elk Valley Coal Corporation*, 2015 ABCA 225 (CanLII), where Jennifer Koshan points to the missing voices of five human rights commissions (who had applied to intervene jointly), which, had they

been allowed to intervene, could have contributed meaningfully by assisting the court in a case where the test for discrimination was a live issue. (See: "The Fall's Supreme Court Hearings—A Missing Voice for Human Rights" here)

It may be difficult to be certain that interveners contribute to our courts' understanding of human rights and *Charter* issues. One way of determining this is to analyze interventions and draw conclusions on their effects. Benjamin R.D. Alarie and Andrew J. Green examined empirically the role of interveners in all of the cases heard by the SCC between January 2000 and July 2009. They concluded that all judges are susceptible to being influenced by interveners in a statistically significant way. They note that hearing from interveners provides objectively useful information to the Court and thus promotes the "accuracy" of the SCC's decision making. The authors conclude that the SCC appears to be using interventions to better understand the impacts of its decisions and is particularly willing to hear from interveners if the SCC might gain some information that is valuable. Alarie and Green also conclude that their empirical analysis indicates that the increase in the number of interveners at the SCC is a positive development in the practice of the SCC. (See: "Interventions at the Supreme Court of Canada: Accuracy, Affiliation and Acceptance" (2010) 48(3/4) Osgoode Hall Law Journal at 381-410 here)

Hopefully, the SCC will also benefit in the Trinity Western University case by increasing the number of interveners it will hear from 9 to 26.

Leonardo Padura, *The Man Who Loved Dogs*

By Rob Normey

Leonardo Padura is a Cuban novelist, known first and foremost as one of the most exciting crime novelists of our time. In *The Man Who Loved Dogs*, Padura presents us with an epic, Tolstoyan novel that mostly succeeds in the ambitious goals he has set for the work. This year marks the 100th anniversary of the Russian Revolution, arguably the preeminent political event of the twentieth century. Yes, the rise of Hitler and the Nazi Party in Germany is perhaps equally important, but we need to recall that his rise was in part made possible by the perceived need to allow such an unscrupulous, hate-filled demagogue a free hand so that the Communist menace, inspired by events in Russia, might be successfully destroyed. This novel is one of the few I have encountered that provides an adequate account of the myriad ways that the Revolution fought for by various idealists and scoundrels detonated around the world, with far-reaching effects in Third World countries like Cuba.

Our contemporary world is so different from the time a century ago when so many writers and ordinary citizens were convinced that only a political revolution and dynamic forces of change could bring the needed progress and justice to the tottering and seemingly decadent world that had emerged at the end of the First World War. Now, it is difficult for us to attain an adequate understanding of the hopes that emerged in the early years of the Russian Revolution. One of the exciting things about Padura's novel is the expert way he is able to integrate a narrative of the heady days, with all their promise, of the "Ten Days That Shook the World", to use the brilliant phrase of the American journalist John Reed, and the major reforms instituted by Vladimir Lenin and his key lieutenants, including Leon Trotsky, into the fictional tale told by his Cuban narrator, Ivan Cardenas. This narrative describes the dramatic arc which took Trotsky and his family and friends from the top of the political ladder to a shocking situation wherein he had been demonized and expelled from the country.

In gripping fashion, Padura is able to bring Trotsky alive, his fierce determination to see a world-wide revolution succeed and his growing fears for the fate of the revolution, all its gains jeopardized by the ruthless seizure of power by Josef Stalin, who undeniably betrayed the better prospects that the Revolution had once held. The novel builds in intensity in the period of 1939 and 1940, when Trotsky has accepted an invitation of asylum from President Cardenas of Mexico, who comes off in this work as a remarkably courageous and fair-minded political leader, one who could be said to have upheld the finest principles of international law and political decency.

Any attempt to describe the vast scope of the three interrelated plots in this hefty novel would take up far more space than I have here. I would like to focus on a rather amazing legal aspect of the whole sorry anti-Trotsky saga and its ramifications for world history. This is the ongoing efforts of the Soviet state under dictation from Stalin the new, murderous Czar, to link "criminal plot" to subvert the Soviet state after "criminal plot" to the machinations of Trotsky, supposedly orchestrated from abroad. The Moscow show trials are now well understood to have involved the wholesale fabrication of evidence, the torture and unrelenting coercion of all of the major accused persons as well as witnesses, forced confessions and denial of the most basic legal presumptions and protections. However, at the time, a reasonable proportion of the general public across the globe accepted the various guilty verdicts as being the result of proper trials or alternatively, were simply uncertain as to what had transpired and unwilling to question the legal conclusions or the mass executions or lengthy sentences that were meted out. Gullible reporters from mainstream newspapers like the New York Times recounted the trials and generally accepted the results at face value. Only some years later did widespread criticism and revulsion set in, long after it was too late to have done much good. The novelist rather carefully controls point of view to compel the reader to appreciate both the ridiculousness of the charges and the findings of guilt, given the many improbabilities associated with plots involving virtually all of the "Old Guard" of revolutionaries to destroy the very cause they gave their heart and soul to, and the stakes involved for the political left in various countries. Further, the changing political situation would make it more and more frightening for Trotsky and his loved ones, who we see are all to be sacrificial victims to the new cult of Stalin as Maximum Leader. What should be the majesty of the law, its ability to carefully, dispassionately sift through various allegations to come to a fair and just result, is crudely corrupted by this pathetic display of "revolutionary justice."

Reading The Man Who Loved Dogs, I got a vivid sense of the machinations that placed leading up to the trials of so many leading Soviet figures in the dock at the nauseating show trials of 1936-38 (not understood generally to have been show trials at the time). I can still summon up the image of the fervent denunciations and wild gesticulations of the prosecutor Viyshinsky, acting as the people's representative and conscience, presenting a supposed ironclad case and then asking for the death sentence to be imposed on the "rabid dogs" that had betrayed the people's trust. The trials took place in the Great Hall of the Columns of the House of Trade Unions, a massive and forbidding fortress indeed. We can visualize the statements by the lawyers and the confessions of guilt by chastened accused, trembling with emotion, who are at pains to place their actions within the context of the ongoing revolutionary struggle.

Padura shifts between this harsh, violent land of "dog eat dog" to the seemingly tranquil beach scenes where Ivan, the narrator, a failed writer who has mourned the recent death of his wife and later describes the tragedy of his family, when it is learned that his brother William is homosexual and will face discrimination and persecution, eventually dying in mysterious circumstances. Ivan's story of his family and its travails serves as an important counterpoint to the story of the larger-than-life Trotsky and the plot to assassinate him. With the plot of the narrator and the Cubans in his life, we are given an essential element of what makes the novel such a powerful and irreplaceable art form – as Flaubert states, the history of the common man can be told and can be placed on the same plane of significance

as that of the history of great men and nations. Indeed, as I myself have just returned from a trip to Cuba and had the opportunity to converse with any number of remarkable Cubans, this novel has opened up for me in a brilliant way the manner in which the greater forces of history can impact even a small, remote island its rarely noticed people (Cold War victims of both a repressive dictator who denied free speech and a pitiless and pointless American economic blockade). Just as Ivan's interest in ferreting out the details of the assassination and its aftermath are initially triggered by the simple human connection between himself and the mysterious Spanish stranger on the beach, accompanied by two purebred Russian wolfhounds, based on a shared love of dogs, so too I found on my trip that a shared love of boating, Cuban music, and baseball led to any number of fascinating discussions with my Cuban hosts.

Given the limited access Cubans have to history books and to the modern communications we now possess in the digital age, the need for Ivan as writer to search for clues and dig deep to locate the full meaning of the events he is finally able to narrate for us gives the novel an urgency it might otherwise lack. Similarly, the tone created by the narrator as ordinary, troubled citizens, with many failures to contemplate gives the epic tale a freshness that a historical account cannot match. I would like to conclude with words of praise for Padura's unobtrusive introduction of vital participants in the story who serve as counterparts to the evil machinations of Stalin and his Communist henchmen. During on one of the scenes in the midst of the Spanish Civil War and in the context for the recruitment of Ramon Mercarder, an assassin, we meet a very tall, very thin man with a horse like face in a Barcelona hotel, who turns out to be none other than George Orwell, brave volunteer in the fight for the democratic Republic. Later, reference will be made to the fantastic novel he wrote, 1984, a work which the narrator ruefully notes would turn out to be all too close to being a realistic account of the political situation Ivan must confront.

The other character of note is John Dewey, the aging liberal philosopher who is selected to chair a Commission of Inquiry into the allegations made against Trotsky. He travels to Mexico City and there displays the necessary qualities of an impartial and fair minded judge. He sifts through the allegations, allows Trotsky to mount a defence, including evidence that clearly refutes a number of the charges that the totalitarian justice system had made against him. Dewey then works patiently but persistently to finish the Report that will permanently exist as a vital counterpoint to the fraudulent proceedings that had earlier occurred in Moscow. In the novel, we are given a clear example of all that was lacking in the system of "revolutionary justice " that was supposed to have brought into being a new and better world, but ended up as a suffocating hell.

What's Fair?

By Peter Broder

One of the far corners of charity law is the fair market value of donations. For economists, the classic definition of fair market value is how much, in an open market, a knowledgeable, willing, and unpressured buyer would pay a knowledgeable, willing, and unpressured seller for a property. In the context of charitable donations and the *Income Tax Act* (*ITA*), it is a bit more complicated than that.

Since the advent of preferential *ITA* treatment for donations to charities, there have been numerous court cases both about what constitutes a donation and, when a gift isn't of cash, how it should be valued. At common law, a gift has to be a voluntary transfer of property without consideration (i.e., without receiving anything of value in return). For purposes of charitable donations, it has long been established that getting a tax credit or deduction for a donation does not constitute consideration. That said, a credit or deduction for a donation may be disallowed where a transaction is a sham to enrich taxpayers, rather than a *bona fide* gift.

There is some ambiguity in the case law with respect to valuation of donation property obtained in bulk and assessed as individual items for purposes of determining how much should be receipted when it is gifted. As well, in 2013, the law was changed (with some retroactive application), so that in certain cases where consideration was received by a donor, he or she could still claim a reduced credit or deduction. Such practice is commonly known as split-receipting. The credit or deduction will equal the value of the gift less the value of the consideration received. This allows for situations such as where a property with a mortgage on it is given to a charity to still be eligible for preferential tax treatment. Under the old rule, because the assumption of the mortgage by the charity was consideration the transaction did not qualify as a gift.

But recent legislative measures have not all been favourable to donors. Owing to the proliferation of dubious donation schemes in the early 2000s where a donor often claimed fair market value far exceeding the original cost paid for property, section 248(35) was added to the *ITA*. The subject matter of these arrangements included everything from time-shares to pharmaceuticals to comic books. The schemes had to register as tax shelters but were not in-and-of-themselves illegal. Section 248(35) deems a generally more modest value (essentially the cost of acquisition) for donations made as part of a tax shelter gifting arrangement or in certain situations where the timing or other factors indicated that the property was acquired with a view to donating it.

The opportunity to assert that the fair market value of property exceeds the price that had been paid for it can stem from any of a number of causes: inflation; significant appreciation of a property owing to change in the market, such as for a work of art after the death of the artist; and, more problematic, bulk purchase of items that were valued individually for purposes of assessing the worth as a donation.

The third approach has sometimes been used in widely-marketed schemes to justify a credit on charitable gifts that is considerably more than the cost paid by an individual acquiring the property for use in the scheme. There is some ambiguity in the case law with respect to valuation of donation property obtained in bulk and assessed as individual items for purposes of determining how much should be receipted when it is gifted. In a limited number of cases, often involving works of art and sometimes entailing valuation by the Cultural Property Export Review Board (Review Board), the courts have allowed claims for somewhat more than the cost of acquisition.

Section 248(35) was generally successful in putting an end to such schemes for properties other than art.

Which brings us to 2017 and efforts to donate a collection of Annie Leibowitz photographs to the Art Gallery of Nova Scotia. Leibovitz is perhaps best known for her many celebrity portraits, which often appear in magazines such as *Rolling Stone* and *Vanity Fair*. According to reports in *The Globe and Mail,* more than 2000 of Leibovitz's photographs were obtained by a Torontonian at a cost of about U.S. $4.75 million. As part of an initiative to have the works donated to the Art Gallery of Nova Scotia, several attempts were then made to have the collection certified as cultural property through the Review Board and to have them valued at around $20 million for purposes of gifting them to the gallery.

In July 2017, the Review Board announced that major portions of the collection did not meet the criteria for works of outstanding significance or national importance. Thus the works are not cultural property. Because of that, valuation of the collection as a gift to a charity or other qualified done falls under usual *ITA* rules, and section 248(35) will likely apply to reduce the value for receipting purposes to the original cost.

Four years ago, when prospective donation of the collection was first raised, the *ITA* measures targeting gifting arrangements and the provisions of the *Cultural Property Export and Import Act* (which mandates existence of the Review Board) hadn't been fully reconciled so there was uncertainty as to which valuation would prevail. The CRA had historically relied on the Review Board fair market value assessment. In its 2014 Budget, however, the government changed that and moved to deem the value of a gift of certified cultural property to be no greater than the donor's cost of the property, if it was acquired under a gifting arrangement that is a tax shelter. The CRA's guidance *Gifts and the Income Tax 2016* has been updated to reflect that change. Now even if something qualifies as cultural property (which, in the end, the Review Board found this photography collection didn't qualify), where it is part of a gifting arrangement, it is valued for donation purposes at the cost of acquisition, not what would generally be considered the fair market value.

So, with having the Leibovitz collection declared cultural property no longer a possibility, a regulatory loophole that has led to so much abuse appears to be fully and finally closed.