

# LAW MATTERS

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CANADIAN BAR ASSOCIATION ALBERTA

# President's REPORT

Michele Hollins



I am both honoured and pleased to be able to represent the CBA as President of the Alberta Branch for the 2007-2008 term and look forward to serving with other members of the Executive Committee; Diane Young, Gillian Marriott, Analea Wayne and Scott Watson.

I have had a very exciting start to the year, beginning with the hosting of the August Canadian Legal Conference in Calgary. I had the privilege of speaking at the Opening of the Courts ceremony in September in our amazing new Calgary Courts Centre. I also attended a welcome reception at the University of Calgary, with an exceptional turnout. All of these things are representative of our diverse membership of the Canadian Bar Association and the important interrelationships we have within this community.

One of my goals this year is to increase the level of participation of our Alberta members and volunteers at the national level of the CBA. While our Branch activities are the main priority of our Executive Committee and Council, we are very lucky to be a viable part of a national organization of over 36,000 members, which is involved in many initiatives to assist all lawyers across Canada.

For example, the CBA has launched an expert Conflicts of Interest Task Force to develop practical guidelines, advice and solutions to help lawyers and law firms serve their clients better. This is an area that should be of interest to each of you whether you are in a small or large firm or you practice in a large or small centre. Early in October the National CBA sent you an e-mail outlining the activity and proposed mandate of this committee and, asking you for your input to the fifteen questions on the consultation paper. Please take the time to go to the CBA website at [www.cba.org](http://www.cba.org) and provide your

thoughts. This Task Force is chaired by R. Scott Jolliffe from Gowling Lafleur Henderson LLP in Toronto. Jim Lebo, QC, from McLennan Ross LLP, is an active member of the committee and will be facilitating the two consultation meetings to be held in Alberta. The first will be in the CBA Calgary office, November 13th at 4:00 pm and the second in the CBA Edmonton office on November 14th at 4:00 pm. Lawyers outside of these two centres are invited to participate by conference call and webcast in the Calgary consultation. We will be sending you an invitation and truly hope you will take the time to participate. Following the consultation meetings that will take place throughout Canada the Task Force will prepare a paper for presentation at the February CBA National Mid-Winter Meeting in Yellowknife.

To members outside of Calgary and Edmonton, I would also like to promote the opportunity to be an active member of Alberta sections. The Branch is now webcasting ten meetings per month. These are real time meetings available to lawyers practising throughout Alberta. All you need to participate is a computer with an internet connection. Visit the website to register! Go to [www.cba-alberta.org](http://www.cba-alberta.org).

Lastly I would like to thank Judge Sean Dunnigan for the introductory article he wrote about me in the last newsletter. As always, I appreciated his being complimentary over accurate.

Please feel free to contact me as I would be pleased to receive any input or comments you may have during my tenure as President.

## NOTICE OF THE 2008 ANNUAL MEETING

THE CANADIAN BAR ASSOCIATION ALBERTA  
ANNUAL MEETING  
will be held in the CBA Calgary Office,  
Wednesday, January 16, 2008, following the  
CBA Alberta Branch Council Meeting.



Analea Wayne,  
Secretary,  
CBA-AB Branch Executive

*Mark Your Calendars NOW!*

## The 2008 Alberta Law Conference

will be held March 13 and 14, 2008  
at the Westin Hotel in Calgary.

Watch for your program brochure  
outlining all of the CLE and special  
events coming with the January issue of  
this newsletter!

# NOTES

## Editor's

Dragana  
Sanchez Glowicki



This is my first column as Editor of *Law Matters*. I am very excited about my new role. I have been on the *Law Matters* Editorial Committee since November of 2002. My plan for the next two years is to provide our readers with interesting, informative, and, sometimes entertaining articles, that will be useful to you in your day-to-day practice.

There have already been some changes to the publication this year that I should tell you about. The first change is, rather than publish five times a year, there will be four publications. The publications will come out in the winter (January), spring (April), summer (August), and fall (October). Another interesting change that will soon be evident is that we will be going back to what some may refer to as the "good old way". This means that *Law Matters* will have a theme for each publication. We thought that the theme concept used in the past was a good idea and we decided to return to that format. Our plan is to create concepts, or themes, for each publication. For example, we may focus on a particular area of law, a particular event, or something interesting that is happening and current in the legal profession. Suffice it to say that the Editorial Committee will be working very hard to give you the best possible magazine each and every time.

As a reader, you may wish to contribute to *Law Matters*, and in this regard, we encourage letters to the Editor. If anyone has a thought, comment or opinion on anything that has been published in *Law Matters*, I encourage you to send us a note. Our readers are going to be interested in what you have to say, so please communicate with us. I would also like to encourage readers to write "articles of interest" and send them to us. Depending on the theme, we will be contacting you to discuss your article and determine when the best time to publish it would be. As much as possible, we would like to fashion *Law Matters* as an interactive publication, and we encourage all of our readers to participate.

Before I close, I should tell you about an important and interesting initiative currently taking place called the Habitat for Humanity Initiative. This is an exceptionally worthy cause that benefits the community by enabling both the Edmonton community, in general, and the Edmonton legal community to join forces. The upcoming Habitat for Humanity Legal Build 2008 Initiative will be dedicated to the memory of the Honourable Mr. Justice Cawsey. As most of you know, Justice Cawsey was a staunch supporter of Habitat for Humanity, a sitting judge for more than 30 years, a great friend of the Aboriginal people, and was known throughout the Province of Alberta for his extensive public service, including his chairmanship of the task force on Aboriginal issues. What some of you may not know is that he loved the estate practice, which, as some of you may know, is my area of practice. As a young lawyer, I was fortunate enough to occasionally go before Justice Cawsey and reap the benefits of his wisdom and mentorship.

In closing, since I have mentioned the Editorial Committee a number of times in this column, it is appropriate to introduce the Editorial Committee members. There are seven members. As the "Editor" I am formally the Chair of the Committee. The other members on the Committee are the Honourable Madam Justice J. A. Picard (Edmonton); Jason Schlotter (Calgary), past Chair of the Committee; Terrence A. Cooper, Q.C. (Fort McMurray); Tony Young (Calgary); Devin Mylrea (Calgary); and, Robert Harvie (Lethbridge). The honorary members of the Committee are Gillian Marriott, the 2007-2008 *Law Matters* Executive Liaison (Gillian is also the Treasurer of the Alberta Branch); Terry Evenson, the Executive Director of the Branch; and, Lindell Larson, Publications Co-ordinator and really the person who does most of the work to get this fantastic publication out.



Legal Education  
Society of Alberta

## EXECUTIVE DIRECTOR

Applications are invited for the position of Executive Director of the Legal Education Society of Alberta.

The Legal Education Society of Alberta (LESA) was founded in 1975 to meet the developmental needs of the legal profession and the public that it serves. It was structured in such a way as to assume the existing educational responsibilities and to respond to future needs as they evolve.

The Executive Director is the Chief Executive Officer of the Society. Reporting to the Board of Directors, the Executive Director is responsible for the overall planning, organization, directing and management of the Legal Education Society of Alberta. In addition, the Executive Director serves as the Director of CPLED Alberta (Centre of Professional Legal Education), oversees all aspects of CLE/CPD (Continuing Legal Education/ Continuing Professional Development), represents and advocates on behalf of LESA with appropriate bodies, oversees the operation of LESA from a management perspective, works with the Board of Directors to develop and establish goals, objectives, policies, standards and actions, and ensures ongoing positive relations with members of the legal profession and the larger community, locally and beyond.

Qualified candidates will be respected within their profession, will hold a Law degree and be qualified to practice law in Alberta. In addition, significant private practice experience and a demonstrated ability to effectively deal with volunteers would be an asset. A total commitment to the legal profession and a strong belief in the value of continuing education to all members of the profession is essential.

Please forward your cover letter, resume and a minimum of three referees and contact information to Mr. A. Gerry Davies or Ms. Jennifer Klarenbach, Davies Park Executive Search Consultants, 1505 Scotia 2 - 10060 Jasper Avenue, Edmonton, Alberta, Canada T5J 3R8. It is preferred that applications be sent electronically to: [careers@daviespark.com](mailto:careers@daviespark.com); however, faxes may be forwarded to 780-426-2936. Visit our website at [www.daviespark.com](http://www.daviespark.com) for a copy of the Opportunity Profile.



# Notices to the Profession

Neil C. Wittmann, Associate Chief Justice  
Court of Queen's Bench of Alberta

COURT OF QUEEN'S BENCH OF ALBERTA



CELEBRATING 100 YEARS IN 2007

## Calgary Case Management

According to the practice of the Court, case management requests in Calgary are made to me. Case management has been widely embraced by both the Bar and the Bench as a useful and valuable method of moving cases along at a reasonable pace in an increasingly complex and busy society. Our individual judicial assistants play a vital role in arranging and coordinating case management appearances and meetings between judges and counsel. Lately, the Calgary economy has taken its toll on our judicial assistants. As of today, we have a 50% vacancy rate in our staff of judicial assistants and the remaining persons are over-burdened and simply cannot cope with the demands of case management scheduling.

I am advised that Alberta Justice is seeking a full time case management officer for our Court in Calgary. In the meantime, I am regrettably notifying the profession that there will be a freeze on all current case management extant in the Calgary Court, due to staff shortages. This means that all case management activities will cease effective immediately, except in those cases where an appearance, meeting or application is already scheduled as of this date. In addition, no new case management requests will be granted until further notice.

Resumption of case management will depend on our ability to recruit and retain sufficient judicial assistants or new personnel to handle the situation. In the meantime, matters that would normally be subject to case management should proceed in regular or special chambers, if necessary. Any emergencies or requests for expedited dates should be directed to me.

## Calgary Courts Centre

Effective September 4th, 2007, the following Queen's Bench matters will be held in the Calgary Courts Centre, located at 601 - 5<sup>th</sup> Street SW:

- Family and regular chambers; bail; breaches of restraining orders; civil and criminal pre-trial conferences; and, JDRs.
- Case management conferences will also be held at the Calgary Courts Centre unless there are self-represented persons appearing, in which case counsel must advise the clerks' office. Additional matters will be assigned to the Calgary Courts Centre as more courtrooms become available. Also please note that the barristers' lounge and lockers on the 4th floor of the CCC are ready for use.

Unless otherwise advised by the trial coordinators, all other matters will continue to be held at the former Queen's Bench Courthouse, 611- 4<sup>th</sup> Street SW until further notice.

Counsel are reminded that to avoid being required to pass through perimeter security, you will need to show your Law Society card and a piece of picture ID.

## 2008 Distinguished Service Awards Nominations

If you know an Alberta lawyer who has made an outstanding contribution to his or her community, to the profession, to legal scholarship and in pro bono legal service, consider nominating him or her for a 2008 Distinguished Service Award. Presented jointly by the Law Society of Alberta and Canadian Bar Association Alberta, these annual awards celebrate excellence in the legal profession. Award categories are:

- The Distinguished Service Award for Service to the Community
- The Distinguished Service Award for Service to the Profession
- The Distinguished Service Award for Legal Scholarship
- The Distinguished Service Award for Pro Bono Legal Service

Nominations should include:

- Nominee information, i.e. name, award category, firm/company name, business phone and fax, business and e-mail addresses
- Nominator information including name, business phone and fax, business and email addresses.
- A statement detailing why the candidate is worthy of the award
- A curriculum vitae outlining the nominee's background, career and any present activities that qualify them for nomination in one of the four categories.
- A maximum of two letters of support for the nomination.

The nominees will be contacted to confirm their participation and willingness to accept the award if chosen. All nominations will be considered for two

years. Benchers and staff members of the Law Society of Alberta, staff and executive members of the Canadian Bar Association Alberta and members of the judiciary are eligible for nomination one year after their term in office/employment ends. Deadline for nominations:

4:30 p.m. on Tuesday, January 15, 2008

The 2008 Distinguished Service Awards will be presented at the Alberta Law Conference on Friday, March 14, 2008 at the Westin Hotel in Calgary. Send nominations to:

2008 Distinguished Service Awards  
c/o Sheila Serup, Communications Manager,  
Law Society of Alberta, 500, 919 - 11 Ave. SW  
Calgary AB T2R 1P3





# QB COMMENTARY

## QB Court Celebrates a Special Opening

QB INFO: Michelle Somers, Media Relations Officer, Court of Queen's Bench, 403-297-5003

The following is a portion of the address delivered by The Honourable Allan H. Wachowich, Chief Justice of the Court of Queen's Bench of Alberta, at the ceremony of the Opening of the Court for 2007-2008. The event was the first public celebration in the new Calgary Courts Centre and was held on September 10, 2007. For the complete text of the speech, go to <http://www.albertacourts.ab.ca>.

*"It is my privilege as Chief Justice to welcome all of you to the beginning of a new Court year. This is a very special occasion and I am happy to tell you we have a great deal to celebrate in this centennial year of the Court of Queen's Bench and of the Bar.*

### THE OLDEST TRADITION

The first one is not modern. The practice of circuiting from central common law courts to county courts became standardized in the 15th century. Justices in Westminster set out every fall to the far reaches of England to try cases in the county courts.

At that time, the justices' powers did not emanate from their office but from commissions issued to them by the sovereign. And much earlier than the 15th century - in the year 1166 to be exact - commissions were created to try persons sitting in the county jails. These commissions continued until they were abolished by the *Courts Act* in 1971 - that is a remarkable 800 years! The Court of Queen's Bench continues as the circuit court to this day - and if there is a practice that has withstood a longer test of time - I haven't heard of it!

### THE SECOND ACHIEVEMENT

The second major achievement we are celebrating this year relates to the past 100 years of the Alberta justice system. Actually, Alberta's superior court system is 120 years old. The Supreme Court of the North-West Territories - of which Alberta was a part - was created in 1887 when the *North West Territories Amendment Act* came into force. It is surprising to me how little has changed, and yet how much. That is one of the important things we are celebrating today - a tradition that has ensured that the Rule of Law is exercised in a manner that is consistent, predictable and impartial.

### THE THIRD ACCOMPLISHMENT

The third thing we celebrate today has to do with the opening of the wonderful new Calgary Courts Centre. No judiciary today can function independently without a government that understands the essential ingredients of a just society - and an impartial judiciary. This year, those principles were put into action. I would like to express my deep gratitude to the Government of Alberta for the Calgary Courts Centre.

### COURT CHALLENGES

Three pressing issues facing the Court now are the integration of new technology into court operations, educating the public about the justice system and the courts, and meeting the needs of a growing population.

The population in Alberta grew last year by 10.6%. Fort McMurray expanded by an astounding 86% since 1999, and Grande Prairie increased by almost 11% in two years. A report

by Alberta Human Resources and Employment predicts that Alberta will grow by 284,000 people in the next five years, the equivalent of the entire population of the City of Saskatoon.

Children are expected to make up the largest population group in this period. Those under 15 will constitute about 18% of the total population. This has implications for the administration of justice because males under the age of 25 are the largest users of the criminal justice system, and couples under the age of 40 are the largest users of the family law system. These together form more than 50% of the demand for judicial services.

I cite these numbers so that we keep them in mind as we continue to improve Court operations. Much more will need to be done. Working together, we can achieve marvels in these areas.

### AN OPEN COURT

This year, I was able to spearhead a partnership with the Edmonton Journal and Calgary Herald to issue an educational supplement. The magazine, which appeared as an insert in August in all the daily newspapers in Alberta, will be posted on legal educational websites and provided to schools and libraries for future reference.

The Court has changed its policy on audio recording in the courtroom by the media. Media representatives will be able to record court proceedings with their tape recorders in the courtrooms across the province. The new policy will take effect before the end of the year, and the Bar will be notified.

### TECHNOLOGY AT THE COURT

Together with Provincial Court and government IT staff, we were proactive in promoting video-conferencing linkage throughout the province. Video-conference access was added to link Edmonton with Grande Prairie, Fort McMurray, Peace River and St. Paul so that applications could be made via video link in emergent situations.

There is now very little preventing us from adding e-filing to bring us into the 21st century. Concerns about its shortcomings - which mitigated against adoption only a few years ago - have been ironed out. I have made a formal request to accelerate the adoption of available technology at our courthouses across Alberta.

### CONCLUSION

We are indebted to the Canadian Bar Association, the Calgary Bar Association, and Alberta Justice for underwriting the reception for this special occasion.

In an era of blogging and Blackberries, I believe it is important for us to get together as often as possible and share some "face time" - in both good times and bad. That's what strong communities do, and you are the justice family."

# SPOUSAL TRUSTS

## *Discretion to Retain Income\**

*Lawyers who draft wills may be asked to write the terms of a spousal trust that allows a discretion to retain and recapitalize income. This has to be approached cautiously. This article updates the case law and current CRA policy in the area.*

While a discretion in the hands of the trustees allowing them to withhold income is generally fatal, a discretion written into the terms of trust to be exercised by the spouse will not preclude the trust as qualifying as a spouse trust.<sup>1</sup> The discretion must be solely in the hands of the spouse beneficiary. If a trust is to be drafted allowing this ongoing discretion then particular care has to be taken to be clear on that point if the spouse is to be both trustee and beneficiary under the trust, expressly indicating that they exercise the discretion only because they are the spouse of the settlor and not in their capacity as a trustee.

Where the trust does not contain an express discretion on the part of the spouse, it may remain possible to recapitalize income in the trust if the spouse signs a written disclaimer giving up all rights to the receipt of the income.<sup>2</sup> A qualifying spousal trust is said by CRA to remain a qualifying spousal trust even where the spouse renounces or disclaims the income interest in its entirety, notwithstanding the fact that the spouse is no longer an income beneficiary of the trust.<sup>3</sup>

If the spouse trust is to be a testamentary trust then care has to be taken to ensure that the discretion does not inadvertently create the possibility that spouse may in exercising the discretion be seen as making a contribution to the trust, thereby disqualifying it as testamentary.<sup>4</sup> A simple disclaimer of the income after it was payable to the spouse would generally be expected to have the effect of causing a testamentary spousal trust to lose its status as testamentary and become *inter vivos* for tax purposes but, at the same time, retain its character as a spousal trust. CRA has indicated that a trust can qualify as both spousal and testamentary if the terms of the trust, properly interpreted, provide for the exercise of the discretion to recapitalize income before it becomes payable.<sup>5</sup> CRA has also made comments suggesting that this may be difficult to draft.<sup>6</sup>

If the trust is *inter vivos*, care should still be taken on the same point if attribution under 75(2) to the spouse who has made the disclaimer is to be avoided. The trust in this scenario may successfully avoid attribution of income back to the original settlor, but some portion of the income may be attributed later to the spouse beneficiary of the trust if they have control of the capital and have become a "contributor" to the trust.<sup>7</sup>

<sup>1</sup> M.N.R., Technical Interpretation 2003-0046171E5, "Contribution to Testamentary Trust" (December 1, 2004); M.N.R., Technical Interpretation 2003-0014515, "Spouse's Discretion to Accumulate Income in Trust" (June 2, 2003); M.N.R., Technical Interpretation 9926255, "Spousal Trust Entitled to Receive All Income" (January 6, 2000); M.N.R., Technical Interpretation 9505015, "Meaning of 'Entitled to Receive'" (May 25, 1995) (regardless of whether spouse might be sole trustee).

<sup>2</sup> M.N.R., Technical Interpretation 9926255, "Spousal Trust Entitled to Receive All Income" (January 6, 2000) (If the spouse beneficiary can legally enforce payment of all income of the trust but indicates in writing to the trustee(s) of the trust a desire not to receive some or all of such income, the fact that some income is retained by the trust and added to the capital of the trust will not, by itself, disqualify the trust as a spousal trust). As discussed later, however, such a disclaimer will generally cause a testamentary trust to lose the status as testamentary and become *inter vivos* [that discussion appears at page 127 of the textbook from which this article is drawn as an excerpt].

<sup>3</sup> M.N.R., Technical Interpretation 2002-0154435, "Payment of Trust Expenses by Beneficiary" (April 17, 2003); M.N.R., Round Table 8M17920, "Strategy Institute Round Table" (June 26, 1998) ("Question 12 - Buy Out of Spouse's Interest in Spousal Trust", Part 1).

<sup>4</sup> M.N.R., Technical Interpretation 2003-0046171E5, "Contribution to Testamentary Trust" (December 1, 2004) (the terms of the trust have to expressly allow for the disclaimer, and it has to be clear that the income is not "payable" to the spouse or common-law partner before the disclaimer is given, otherwise the trust may be disqualified as testamentary); contrast to M.N.R., APFF 2005 conference, "Round Table on Federal Taxation" (October 7, 2005) (Question 27) (suggesting that the trust will retain its character as testamentary only if the disclaimer or waiver refers to possible earnings not as of yet earned by the trust, on the grounds that where the spouse is entitled to income, that income is necessarily "payable" upon being earned). The authors are of the view that the Technical Interpretation sets out the better view and suggest the following wording as qualifying a trust as both spousal and testamentary: "My spouse shall be entitled to all of the income from my spouse's trust, but the income from the trust shall not be payable to my spouse until the end of the fiscal period of the trust. At any time prior to that date my spouse may, at my spouse's sole discretion, elect not to receive the income, in whole or part, and shall signify that election by providing a written statement to that effect to the trustees of my spouse's trust. If any income in my spouse's trust is not subject to such an election prior to that date, then the income must be paid to my spouse at the end of the fiscal period."

<sup>5</sup> M.N.R., Technical Interpretation 2003-0046171E5, "Contribution to Testamentary Trust" (December 1, 2004).

<sup>6</sup> See, for example, M.N.R., Technical Interpretation 2002-0129655, "Spousal Trust" (February 4, 2003) (discussing the relationship between "payable" and "entitled").

<sup>7</sup> A person contributing capital to a trust may have income from the trust attributed back to them under subsection 75(2) of the Act generated on the contribution if they have any control over the capital. This would have the effect of having income attributed back to the beneficiary even if they would have preferred to see that income taxed in the hands of the trust, as might be the case if the trust were an Alberta taxpayer and the spouse was tax resident in a jurisdiction subject to higher tax rates.

## *Income Splitting\**

*Our clients are being urged by financial advisors and newspaper articles to use testamentary spousal trusts as income splitting strategies. How do you balance between the interests of the spouse and the interests of the remainder beneficiaries when you draft a spouse trust to avoid income taxes for a surviving spouse or partner? The following sets out some of the law and published guidance available from CRA on point.*

A spousal testamentary trust is commonly used as an income splitting mechanism, leaving the surviving spouse with the broader tax base afforded by a second set of graduated tax rates on the second tax return. Depending on the jurisdiction and the income of the surviving spouse from other sources, the tax savings inherent in such a structure will range as high as ten or twelve thousand dollars a year.

## INCOME SPLITTING - Continued from page 6

This strategy is often employed for purely income tax purposes and appears to have the sanction of the courts.<sup>1</sup> The trust is not intended under those circumstances as a conduit to ensure capital passes to the next generation of beneficiaries or to otherwise control the ultimate destination of the capital in the trust. No other planning purpose is served, only tax savings. Where the trust is tax driven, the terms of the trust will typically contain a provision allowing encroachments on capital in favour of the spouse beneficiary. The spouse may also be the sole trustee of the trust, being in charge over the power to encroach and thereby affording the surviving spouse the fullest measure of control possible.

The next generation of beneficiaries, typically but not necessarily the children of the settlor, may misinterpret the intent behind the structure and come into conflict with the surviving spouse if they believe that the power to encroach on capital is being exercised too liberally. Thus, where the intent of the settlor is tax-driven, the power to encroach should be drafted in the broadest and most permissive language possible.<sup>2</sup> There are several variations of wording commonly used, alone or in combination, to achieve that result. First, the discretion to encroach can be described as “unfettered” or “uncontrolled,” or phrasing can be added to the effect that the exercise of the discretion is not subject to review. Where those forms of language are used, the courts will not interfere with the exercise of the discretion unless it is exercised in bad faith or relying on “extraneous” circumstances.<sup>3</sup> Second, the language can expressly contemplate the release of all of the capital of the trust to the surviving spouse, completely disgorging the capital and winding up the trust during the spouse’s lifetime. This wording would be useful if tax laws were to change to strip the structure of any ongoing tax advantages. It also makes it clear that capital need not be preserved for later beneficiaries. Third, the terms of trust can expressly make the interests of the spouse paramount over the interests of the remainder beneficiaries to capital, both in making capital distributions and in selecting investments. This is often done alongside wording that specifically ousts the operation and effect of the even hand rule. Fourth, wording can be employed to the effect that encroachments on capital can be made without regard to the financial situation of the surviving spouse, notwithstanding that the spouse might be well-heeled and enjoy substantial resources of his or her own.<sup>4</sup>

Some practitioners recommend the use of a letter or memo alongside the will in such circumstances to reinforce the settlor’s intent. The side document may not be admissible in court as evidence of that intent, and is not suggested as an alternative to express wording in the terms of trust, as discussed above, but can provide a persuasive statement of moral force to dissuade the children from approaching the courts in any effort to limit the surviving spouse’s access to capital. The will is a public document. The memo is not. The memo can be expressed in fairly blunt terms as a result.

<sup>1</sup> Lussier v. R. (1999), [2000]2 C.T.C. 2147, 99 D.T.C. 1029(Fr.), 2000 D.T.C. 1677(Eng.), 32 E.T.R. (2d) 95, 1999 CarswellNat 1427, 1999 CarswellNat 2730 (T.C.C. [General Procedure]), at paragraphs 47 to 49 (CRA argued that the spousal trust in that case was being used as a transparent device to minimize the taxes payable after the husband’s death, and the court took the position that the surviving spouse was, under the Act, entitled to those tax savings even if the trust was put in place purely as a tax avoidance measure and served no other planning purpose whatsoever).

<sup>2</sup> This is a practical consideration that can also be seen as extending to alter ego and joint partner trusts.

<sup>3</sup> *Gisborne v. Gisborne* (1877), 2 A.C. 300 (H.L.); *Fox v. Fox Estate* (1994), 5 E.T.R. (2d) 174 (Ont. Ct. (Gen. Div.)) 1994 CarswellOnt 4516, reversed on other

grounds at 28 O.R. (3d) 496, 10 E.T.R. (2d) 229 (C.A.), leave to appeal to S.C.C. refused 207 N.R. 80n.

<sup>4</sup> See Ian M. Hull, “Discretion to Encroach: Do The Beneficiary’s Personal Resources Matter?” (2004) 24 E.T.P.J. 30 (reviewing the case law on point at pages 37 to 40). The article also contains an authoritative and detailed discussion relating to capital encroachments.

## Growing Spouse Trusts\*

*A testamentary spouse trust can be used as a tax planning device to split income and reduce the overall tax burden for the surviving spouse under the Income Tax Act (Canada). That strategy is only effective if the trust is able to generate income in significant amounts. In general terms, the larger the body of capital, the greater the ability to generate income. Thus, the ability to grow the trust after it has been settled can be important. There are a variety of permitted ways to do so. This article updates the case law and current CRA policy in the area.*

There may be occasions in planning or administering a spousal trust where the settlor or the trustees wish to ensure that the trust can grow after it has been settled.

That may be the case, for example, where a larger trust is desired over time to generate a larger stream of income to be taxed within the trust at graduated rates. Until the income reaches a level where the trust is paying taxes in the top tax bracket, more income will amount to more tax savings. That will be the case where the surviving spouse already has significant income from other sources.

It may also be desirable to grow the trust where the spouse is a low rate taxpayer, with little income from other sources. Growing the trust further can be an effective strategy with a view to creating enough income to fill both of the two income tax returns. If the trust has \$200,000 in income each year, and that income is payable to the spouse, the designated income provisions in subsections 104(13.1) and (13.2) of the Act can be used to ensure that the income is divided between the tax return of the spouse and the tax return of the trust in a way to ensure the minimum overall tax liability in the circumstances.

It may also be desirable to grow the spousal trust if it is being used as a stepping-stone to fund successive trusts for a next generation of beneficiaries.<sup>1</sup>

There are several ways to grow a spousal trust while ensuring, at the same time that it will qualify as a spouse trust under the Act. Most were discussed earlier.<sup>2</sup>

- Retaining Capital Gains Income -- Capital gains income is income for tax purposes under the Act but is not considered to be income under trust law. It is considered to be a capital accretion under trust law and the requirement that the spouse be entitled to all income focuses on “income” from a trust law perspective. Thus, capital gains income can be re-capitalized in the trust without tainting it and a provision can be inserted in the terms of the trust that either make it mandatory to recapitalize capital gains income or provide a trustee discretion to do so.
- Retaining Certain Forms of Dividend Income -- Certain types of dividend income are excluded from the definition of income when considering entitlement to income under spousal trusts, alter ego trusts, joint partner trusts and the like. Thus, certain types of dividend income can be recapitalized in the trust without tainting it and a provision can be inserted in the terms of the trust that either make it mandatory to re-capitalize those forms of income or provide a discretion to do so.

**GROWING SPOUSE TRUSTS - Continued from page 7**

- Investments That Favour Capital Growth -- The value of a trust can be grown by carefully adopting an investment policy that focuses on building unrealized capital growth in the form of stocks in companies that do not pay significant dividends but might be expected to appreciate significantly over time in value. A portfolio that successfully takes advantage of that strategy succeeds in growing without triggering income during the growth phase. The pent up capital gains will not be subject to deemed realization at twenty-one years so long as the trust is a qualifying spouse trust under the Act.
- Recapitalizing Income Through Spousal Discretion -- Wording might be developed and inserted into the trust to allow the spouse, not the trustees, the discretion to leave income in the trust to recapitalize. With appropriate wording, income can be recapitalized within the trust without tainting it. In the case of a testamentary spouse trust, that wording should also make it clear that the discretion to recapitalize income is exercised before the income is payable to the spouse or the exercise of the discretion will cause the trust to be disqualified as testamentary for tax purposes.
- Spousal Disclaimer -- If the spouse disclaims the income from an inter vivos spousal trust, and allows it to be recapitalized, it will grow the trust without tainting it. That strategy will generally be ill advised in dealing with a testamentary trust as it will generally have the effect of disqualifying the trust from tax treatment as testamentary. The trust will continue to be spousal, ousting the twenty-one year deemed realization, but will cease to be testamentary and all income in the trust will thereafter be taxed at top rates.

<sup>1</sup> [Cross-reference omitted.]

<sup>2</sup> [Cross-reference omitted. The topic is dealt with elsewhere in the text from which this article is drawn, with extensive footnoting and citations relevant in the area.]

\* Reprinted by permission of Thomson Carswell, a division of Thomson Canada Limited from A Practitioner's Guide to Trusts, Estates, and Trust Returns 2006-2007 (Toronto: Thomson Carswell, 2006), by Larry H. Frostiak and John E. S. Poyser, Chapter 2, pp.73-75; pp.94-96; and, pp.125-127. Footnotes containing cross-references to other section of the text have been omitted.

Larry H. Frostiak, FCA, CFP, TEP, is a founding partner of Frostiak & Leslie, Chartered Accountants Inc., Winnipeg. He serves on the executive of the STEP World Wide Council as Treasurer, and is a member of the taxation committee of the Manitoba Institute of Chartered Accountants. John E. S. Poyser, BA, LL.B, TEP, is a lawyer with the Wealth and Succession Practice Group, Inkster Christie Hughes LLP, Winnipeg. He serves as Chairperson of the National Wills, Estates and Trusts Section of the Canadian Bar Association, as Chairperson of the Manitoba Chapter of the Society of Trust and Estate Practitioners, and as an Associate Editor of the Estates and Trusts Reports. Douglas Gorman and Phil Renaud, both of the Alberta Bar, serve on the editorial panel of the text from which this article was taken.



Ecojustice Canada, formerly Sierra Legal Defence Fund, is seeking a senior lawyer, preferably 10+ years experience, for a new Ecojustice office to be opened in Alberta in early 2008. Applicants must be committed to public interest environmental law, have extensive litigation experience, excellent research and writing skills and knowledge of relevant law and policy.

Ecojustice is dedicated to defending Canadians fundamental right to a healthy natural environment. Since its inception in 1990, Ecojustice has become an integral part of the environmental community, providing legal expertise to help conservation groups be more effective in their efforts. Ecojustice currently has offices in Vancouver, Toronto and Ottawa.

Please send your resume in confidence by November 30, 2007 to: [cmcdonald@ecojustice.ca](mailto:cmcdonald@ecojustice.ca) or fax 604-685-7813.



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# View from the BENCH

Judge A. A. Fradsham



Conventional wisdom has it that we would all benefit from being able to see ourselves as others see us. Apparently, suggesting that a good mirror should solve the problem results in one being labeled “shallow” (as I think about it, getting labeled would also seem to address the problem, but I digress).

We in the legal profession are often made light of when we “deem” something to have happened. Our “legal fictions” have never made the best sellers lists.

A recent experience at the Calgary airport gave me some insight into how our games of “let’s pretend” might appear to the general public.

I was at the airport to catch a flight (making the airport a more logical place to be than, say, the bus depot) for a quick trip out of the province but within the country. I had carefully researched the issue of carry-on luggage, and was content that the item I gripped firmly in my right hand met all the published size requirements. Anyone who says that “size does not matter” has not recently been on a commercial airline.

The other issue facing today’s air traveller is that of the dreaded gels and liquids. You may be aware that one must not carry onto a plane any liquid or gel in a quantity exceeding 100 millilitres. Apparently, the average airline passenger is infinitely better at chemistry than I am, and is able to bring down an aircraft by a cunning combination of hair spray and toothpaste as long as he or she has more than 100 millilitres of each. The security people who wrote these new rules must have watched the old television series “MacGyver” and thought the show was a series of scientific instructions. (Note to Reader: If you are not familiar with this TV series, check with the nearest QC who will be elderly enough to remember it).

However, I try to be a law abiding type of person, and not only because it seems to be more conducive to keeping my job. So, I dutifully put into a clear “zip-lock” bag the various and sundry liquids and sprays which I call upon in an effort to keep this ageing body groomed and presentable, and I made sure that each container had less than 100 millilitres of liquid in it. I was confident that I had met all the conditions precedent to breezing through security, apart from the inevitable scrutiny of my shoes for heavy armaments or telephones (akin to the old TV series “Get Smart” – again, check with a QC).

When I reached the examination stage of the security procedure, I confidently explained that, yes, I did have liquids and gels in my carry-on luggage, and that, yes, they were in a plastic bag, and easily accessible. I proceeded to the next stage of terrorism prevention.

“Do you know the rules about liquids?”, asked a guard who, if he had snow on his head, could have been mistaken for a mountain.

“Oh,” I thought, “a pop quiz. I haven’t had one of those since high school.” Well, that may not be completely accurate. From a judge’s point of view, a trial is full of quizzes in evidence which pop up each time an objection is made. However, as a judge (as opposed to a student), I have the option, if it is a particularly prickly point, of adjourning, and converting the pop quiz into a take home exam. I am digressing again.

“Yes,” I said, “liquids can be no more than 100 millilitres.” I had this quiz aced.

Mountain man held up an allegedly offending bottle with the same air of disdain with which one holds up a full pooper-scooper bag. “This bottle says 200 millilitres.”

“Yes,” I conceded, “it does bear that notation as to its ultimate capacity. However, as you will observe, it is only one-third full, and therefore contains less than 100 millilitres.” I considered throwing in an “ipso facto”, but thought better of it. I also thought, “This is like a math quiz. I have to show my work and how I arrived at my answer.”

“We don’t go by that. We go by what is written on the bottle. If it says more than 100 millilitres, then it is banned.”

So, while I was purchasing a much smaller container of replacement toiletry product in the tuck shop in the waiting area just beyond security, I had ample opportunity to reflect upon what I had learned. I concluded that the lesson was this: The threat to air travel safety is not posed by the substances which we take onto the plane, and it is not posed by the quantities of the substances which we take onto the plane. Rather, the real threat to national security is embedded in the very numbers printed on the bottles containing the substances which we take onto the plane. If the numbers printed on a container read 100 millilitres or less, then we may sleep safely in our beds confident that we are well protected. However, if the container bears an inscription stating a capacity of more than 100 millilitres, regardless of how much is really present in the container, the safety of the world as we know it is in peril. There must be some sort of secret message which threatens aircraft stability contained in all numbers higher than 100. It is not a “MacGyver” type of problem after all. Sounds more like a “Da Vinci Code” thing to me (Note to QCs: check with a young associate in your firm).

Happily, there are two benefits arising from this adventure:

- (1) I no longer feel so defensive about our profession’s penchant for legal fictions; and,
- (2) I think I have discovered a great business opportunity in the manufacture and sale of very, very large bottles bearing the words “99 millilitres”.

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ARBITRATORS  
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# MEDIATION MINUTE



One of the keys to a successful mediation is preparation. So how does a lawyer prepare for a mediation and, perhaps even more importantly, how does the lawyer prepare the client? While every case is unique and the approach to each mediation should be carefully considered there are some general principles that can be applied in every case. This article will address two aspects of preparation: interest identification and creative problem solving.

As legal counsel you should review the pleadings, documents and the history of negotiations, if any, well in advance of the mediation. The identification of the key legal issues is critical. However, of equal importance in a mediation is the identification of the interests of the parties. What is the client's view of the dispute? What are the client's objectives? Be attuned to the fact that the client may have different concerns over and above the pure legal issues. Be sensitive to the emotional impact of the dispute on the client. Listen not only to what the client says but how they say it. Be aware of non-verbal clues and body language. Often, these non-verbal clues can be very powerful indicators of hot button issues and emotional barriers to an effective settlement. What is important to the client in the dispute may be quite different from the bare legal issues.

In addition, broadly consider what you or your client really know about the other party. What would you like to know? Do you really know what motivates them in the dispute? Develop some open-ended questions to ask of the other side to explore some of these areas. If you and your client are genuinely interested in learning more about the opposing side's view of the dispute, the likelihood of reaching a settlement is

greatly improved. This is not an examination for discovery or cross-examination at trial. A mediation is a confidential and without prejudice process. Ask questions which allow the other side to explain their position, their feelings, their motivations.

To resolve the dispute the parties should be encouraged to engage in creative problem solving. This process may involve the disclosure of certain facts or information not previously disclosed but which may open up opportunities for a successful resolution of the dispute. The lawyer should engage the client in a mediation role play to review certain contentious issues and how the client might respond to those issues. Consider a variety of settlement positions and be open to alternatives that do not necessarily or solely involve the payment of money. What does your client have that the other side wants? What does the other side have that your client wants? Are there non-monetary benefits that your client would like to receive or would be prepared to offer to resolve the dispute? Don't be afraid to be creative and brainstorm with your client. This will likely be good practise for both of you and will be invaluable once you attend the actual mediation. The better that you are able to prepare yourself and your client for the mediation, the better the ultimate result.


*Jim Bancroft is a partner in the Calgary Office of Fraser Milner Casgrain LLP. He has more than 25 years experience in dispute resolution and is a member of the firm's ADR Practice Group.*

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# RISK: Lawyers, their Practice and their Clients



The Law Society of Alberta (LSA) in its Mission Statement makes a commitment to serve the public interest by promoting a high a standard of legal services and professional conduct through the governance and regulation of an independent legal profession.

In my capacity as the Risk Assessment Officer (RAO) for the LSA one of my tasks is to ensure that I remain current in respect to fraudulent schemes that could negatively impact on you, your practice, and ultimately the service provided by you to the public. The next obstacle I face is how to effectively and efficiently circulate this information to you, the lawyer, in a timely and non-intrusive manner.

Future communiqués could focus on mortgage fraud and identity theft. During my short term with the LSA these two fraudulent schemes are at the forefront, however, there are a myriad of other fraudulent schemes that will be brought to the attention of practicing lawyers by their unsuspecting targeted clients.

Additional fraudulent schemes that may come to your attention are prime bank Instruments with their dazzling financial terminology, promise of 100% plus returns, off shore attractiveness and off course the legal avoidance of income tax. The list includes Nigerian letters, lottery scams, both domestic and foreign, fraudulent billings and numerous scams involving land development. In my humble opinion if the proposal sounds too good to be true, it usually is.

It is also important to remember that you too are a potential victim. The “high end” fraudsters like to target professionals such as dentists, doctors, accountants and

lawyers. Practitioners in these professions are typically so busy balancing family and professional life that they are more than vulnerable to fraudulent schemes and, they have access to large amounts of “cash”.

High end fraudsters are generally of above average intelligence, sophisticated and immaculately groomed. They engage you in conversation that makes you think you are the most important person they have ever met.

When the conversation comes to an end, you must ask yourself two key questions:

- what have I learned about this person versus what has he/she learned about me;
- when is the last time I was engaged in conversation where the person was more interested in my family's achievements than their own family's.

Future articles will be more topic specific; however, in the interim I need feedback from you, the practitioner. What risks concern you? How would you like to receive information and strategies to deal with these risks - E-Mails, the Advisory, CBA publications, other? I look forward to receiving your feedback.

M.P. (Mike) Martin

Risk Assessment Officer, Law Society of Alberta  
500, 919-11<sup>th</sup> Avenue S.W., Calgary, AB T2R 1P3

E-mail: Mike.Martin@lawsocietyalberta.com.

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# FRONT &



The Fall 2007 Council Meeting held in Edmonton; clockwise from top left photo: the Branch Executive, I-r, Michele Hollins, Diane Young, Gillian Marriott, Scott Watson, Analea Wayne and Terry Evenson; President Michele Hollins presents Scott Watson with an appreciation gift as outgoing President; Terry Matchett, Q.C., Deputy Minister of Justice addressed Council, bringing greetings and updates on government initiatives; hard-working Council members finish the meeting with an informal reception.



Above Left: A recent Seniors Section South meeting featured David Vallance as the guest speaker (second from right). Accompanying him were several of the Vallance family members.

Left: Members and guests at the "Vallance" evening gather for a group photo.



Fall North Sections Workshop with Section Coordinators, (left) John Williams and (right) Kate Welsh, and (center) Analea Wayne (CBA Branch Secretary).



September Municipal Law - North Section Meeting with the Mayor of Edmonton. L-R: Roberto Noce, Mayor Stephen Mandel, Charlotte St. Dennis and Don Manderscheid, Q.C.

# & CENTER



The CANADIAN LEGAL CONFERENCE was hosted by Calgary this summer and proved an enormous success thanks to all of the great CBA volunteers. The CLE program offered outstanding panels; the guest speaker program was top calibre and the opportunities to network were many with an evening at Heritage Park, a pancake breakfast, several law firm receptions, at-home dinners and a final gala event. The Children's Program was also a great draw.

L-R Top Row: Bernard Amyot, (now) the 2007-2008 National President; Kevin Carroll, Q.C., National Second Vice-President; Parker MacCarthy, Q.C., (now) National Immediate Past President, wearing the beautifully handcrafted ceremonial chain of the Office of the President; and Sheilagh Murphy, now Past President of the Newfoundland/Labrador Branch; Michele Hollins, now Alberta Branch President; Jim Lebo, Q.C., Chair of the CLC 2008; John Hoyles, Chief Executive Officer of the CBA National; and, Jim Bancroft, Q.C., CLC Committee member. Thanks especially to Jim Lebo for his extraordinary work in making the Conference happen.

L-R Second Row: Daphne Dumont, Q.C., National Past President; Greg Harding, Q.C, Alberta Branch Past President and Robert Patzelt, Q.C., Past President of the CCA; Judge Sean Dunnigan, Alberta Past President and Alan Shewchuk, Q. C., looking like dudes in the Maverick film; Terry Evenson, Alberta Branch Executive Director; Annette Horst, Young Lawyers Conference Chair; Sarah Klinger, Young Lawyers Late Night Party organizer; and, Michele Hollins.

L-R Third Row: Inez Cardinal, Q.C., Past President of the Saskatchewan Branch; Angela Ovens, Calgary Law Day Advertising Chair; and, Bailey the Buffalo, a delightful participant in the events; Annette Horst and Sarah Klinger sky-riding; and, a busload of guests bound for the closing night events.

L-R Fourth Row: Judge Dunnigan making sausages for Council breakfast; Leila Gosselin, Alberta Branch Council member; Gillian Marriott, Alberta Branch Treasurer and newsletter Executive Liaison; Sandra Hildebrand, South Section Co-Coordinator; Don Higa, Q.C., Alberta Branch Past President; Wayne Barkauskas, Calgary Law Day Co-Chair; and, The Calgary Fiddlers welcoming everyone at the Heritage Park opening event.

LESA has a wide variety of seminars in a range of formats and levels planned for the fall. Stay current with developments in law and practice. Register online at [www.lesa.org](http://www.lesa.org) or by phone at 780-420-1987.

Missed a seminar? More convenient to learn at your office? Seminar sold out?  
Check out our Webcasts at [www.lesa.org](http://www.lesa.org).

**Property in Family Law**, *Chaired by Wendy E. Best, Q.C.*  
Webcast October 30 & November 6, 2007

1:00 – 4:00 pm each day

Explore Section 8 factors. Is it property? How to value or divide it? Married v. Unmarried, what are the differences? Get other practical pointers to assist you in this increasingly complex field. Register online only at [www.lesa.org](http://www.lesa.org).

**Estate Administration for Legal Support Staff**, *Chaired by Shelly K. Chamaschuk*

Webcast November 5 & 7, 2007

1:00 – 4:00 each day

Stay on top of the newest, practical ways to manage your estate files. Learn about why your forms get rejected and what you can do to expedite applications for probate. Get updated on changes in the law and how they impact your job as legal support staff. Register online only at [www.lesa.org](http://www.lesa.org).

**Family Law Boot Camp**, *Chaired by Lonny L. Balbi, Q.C.*  
November 2, 9, 23 & 30, 2007 in Calgary

Will be held in Edmonton at a later date.

9:00 am – 12:00 pm each day

A practical foundation for junior lawyers and an excellent review for more experienced practitioners. Tackle family law files working hands – on with expert practitioners who will guide you step-by-step through handling custody disputes, spousal support, common law property division, exemptions and matrimonial property disputes.

**Advanced Insolvency**, *Chaired by Darren R. Bieganeck*

November 6, 13, 20 & 27, 2007 in Edmonton

Will be held in Calgary at a later date.

For experienced practitioners. Join us for this interactive, small group seminar addressing challenging issues typically encountered in complex, sophisticated insolvency files. Enrollment is limited.

**Evidence for Civil Litigators**, *Chaired by Peter Michalyszyn, Q.C.*

November 13, 2007 in Edmonton

November 19, 2007 in Calgary

9:00 am – 4:30 pm

Presented in partnership with The Advocates' Society. Recognize and respond to evidence issues on the spot. Judges and top advocates lead a practical refresher on the most important rules every litigator must know. Attend the optional skills training workshop to maximize the benefits. This program is designed for litigators at all levels who want to sharpen their evidence skills and minimize their stress. Limited enrollment in afternoon skills training session.

**Wills and Estates Boot Camp**, *Chaired by Douglas G. Gorman*

November 19, 26 & December 3 in Edmonton

9:00 am – 12:00 pm each day

A practical foundation for junior lawyers and an excellent review for more experienced practitioners. Tackle estate files working hands – on with expert practitioners who will guide you step-by-step through estate planning and administration topics.

**Mediation of Civil Disputes II**, *Featuring Karen M. Trace and Camilla L. Witt, Q.C.*

November 22 (evening), 23 & 24, 2007 in Edmonton

Take the next step in becoming a Mediator, deepen your understanding, strengthen current skills, develop new skills and practice your technique. Work with experienced coaches, building on the theory of interest based negotiation/mediation. Limited enrollment.

**Shareholders' Agreements**, *Chaired by Robert C. Dunseith, Q.C.*

December 4, 2007 in Edmonton

December 11, 2007 in Calgary

1:00 pm – 4:30 pm

Properly customize and document the issues arising in your clients' unique businesses. Our expert panel will address the latest strategies and law around drafting Shareholders' Agreements, share transfer provisions (exit strategies), majority shareholder protection mechanisms, minority shareholder protection, litigating and resolving shareholder disputes and remedies and tax issues in shareholders' agreements.



## CBA Alberta Members Benefit



A renewed agreement between LESA - Legal Education Society of Alberta and the CBA allows any new CBA member to receive a \$100 coupon toward a LESA publication or session during the 2007-2008 season

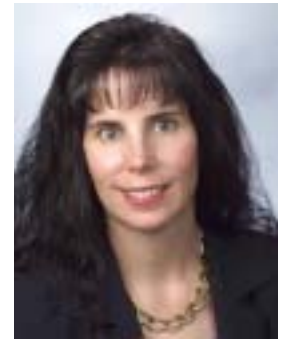
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# What's HAPPENING

Patty Johnston, Q. C.



## NOVEMBER 2007:

8: The Canadian Corporate Counsel Association and Miller Thomson LLP present **Employment Law for the Small and Mid-size Law Department**. In Toronto at The National Club and Vancouver at The Terminal City Club. Contact: Kendra Keaney. Phone: 416-869-0522 ext. 221; Fax: 416-869-0946; E-mail: kendrakf@ccca-cba.org.

14: CCH and the Canadian Corporate Counsel Association presents the **2nd Annual Ultimate Corporate Counsel Conference**. St. Andrews Club & Conference Centre, Toronto. Contact: Phone: 1-800-268-4522; E-mail: cservice@cch.ca.

15-17: The Alberta Civil Liberties Research Centre and the University of Calgary Department of Genetics present "**One Origin, One Race, One Earth: Genetics, Human Rights and the Next Phase of Human Evolution**". University of Calgary, Calgary. Contact: Brian Seaman. Phone: 403-220-2505; E-mail: bseaman@ucalgary.ca; Website: www.aclrc.com/OneOrigin.

16&17: **CBA National Administrative Law and Labour and Employment Law Conference**. Hilton Lack Leamy Hotel, Gatineau. Contact: Kim MacDonald. Phone: 613-237-2925 or 1-800-267-8860, ext. 161; E-mail: kimm@cbc.org.

## FEBRUARY 2008:

21-24: The Canadian Bar Association Mid-Winter Meeting of Council, Executive and Standing Committees. Yellowknife, NWT. Contact: CBA Meetings. Phone: 1-800-267-8860; E-mail: mtgs@cba.org.

*Please send your notices to Patricia (Patty) Johnston, Q.C.,  
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# UPDATE

The last year has been a busy one for Assist "business" and we thought it time to update everyone on your Assist Program:

## Professional Service Provider Name Change:

One visible change at Assist is the recent name change of the professional service provider we contract with. Our provider has changed its name from Kelly, Luttmmer & Associates to Sykes Assistance Services. All else remains the same – help is accessed by calling the same 1-800 number (1-800-461-8908).

## Strategic Plan:

Recent planning efforts established or confirmed a number of our guiding principles, including our mission and goals:

### ▣ Assist Mission:

Providing confidential help to lawyers, articling students and their immediate families with personal issues.

### ▣ Assist 2007/2008 Goals:

1. To provide immediate, confidential and valuable professional help to lawyers, articling students and immediate family members in distress.
2. To enhance the long-term financial security of Assist.
3. To make lawyers and articling students aware of Assist and the services we provide.
4. To make lawyers and articling students aware of the signs of personal distress and encourage them to deal with that distress before the point of crisis.
5. To identify and develop ideas to help lawyers, articling students and immediate families in personal distress.

## Charitable Status / Fundraising:

Thanks to the efforts of many, Assist was recently granted charitable status by Canada Revenue Agency. This new status will help facilitate our efforts to raise private funding. Please watch for our upcoming funding campaign and give generously. We would, of course, be happy to accept

Craig Kinsman  
Executive Director  
Alberta Lawyer Assist Program



donations ahead of our more formal efforts, so if you are eager to donate right away, please send your donations to the Alberta Lawyers' Assistance Society c/o #404, 602-11th Avenue SW, Calgary, Alberta T3E 2E3.

## Current Board Members:

Tim Carter (Edmonton), Andy Crooks (Board Chair) (Calgary), Kerry Day, Q.C. (Edmonton), Rick Gilborn, Q.C. (Calgary), John Gulak (Calgary), Carter Nagel (Cochrane), Brad Nemetz, Q.C. (LSA Nominee) (Calgary), Jack Perraton, C.M., Q.C. (Calgary), Judge Robert Philp (Edmonton), Dana Schindelka (Calgary).

## Thank You

Our thanks to the Law Society of Alberta for their generous funding and support and to the Canadian Bar Association for their funding and generous in-kind support.

Many thanks also to Brett Anderson, Brian Felesky, Q.C., Siobhan Goguen and Craig Jones, Q.C. of Felesky Flynn LLP for their outstanding pro-bono work on our charitable status application and many thanks also to Burnet, Duckworth & Palmer LLP for their generous ongoing in-kind support.

Thanks also to the many other individuals, law firms and corporations who support Assist.

Assist offers immediate, professional, confidential help to lawyers and their immediate families. Call toll-free anywhere in Alberta: 1-800-461-8908. Assist is an independent, Charitable Society.



To learn more about Assist, see our website at [www.albertalawyersassist.ca](http://www.albertalawyersassist.ca) or call me at 403-537-5508 (direct) / 877-737-5508 (toll free) or e-mail me at [alap@nucleus.com](mailto:alap@nucleus.com).



## Artful Bench and Bar

The "Artful Bench and Bar" is your opportunity to bid on original pieces of art created and donated by local lawyers, judges and friends of the legal community. Proceeds from the event will support CLERC and the Kids Help Phone.

**Date:** Tuesday October 30, 2007  
**Time:** 6:00 pm – 8:00 pm  
**Location:** Hotel Arts, 119-12th Ave. S.W., Calgary  
**Cost:** \$45.00 includes appetizers and a chance to win fabulous door prizes  
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# Practice POINTERS

Molly Naber-Sykes and Jo'Anne Strekaf

## *Cross-examination of Member Permitted in Professional Disciplinary Proceedings*

*With our thanks to Simon Johnson, Bennett Jones LLP*



In Alberta, members of professions who are required to attend before disciplinary tribunals can generally be compelled to testify as part of the case for the prosecution. But are prosecutors entitled to cross-examine them, or are they limited to direct examination? In *Real Estate Council of Alberta v. Henderson*, 2007 ABCA 303, the Court of Appeal upheld the Queen's Bench decision (2006 ABQB 520) that the prosecutor can call and then cross-examine a respondent member in a professional disciplinary proceeding. This is a departure from the well-developed principles governing the circumstances under which counsel can cross-examine their own witness.

Prior to *Henderson*, the Alberta Court of Appeal had consistently and repeatedly held that a party calling a witness is limited to direct examination and is not entitled to cross-examine, no matter who the witness may be: see *Ferguson v. Cairns* (1959), 30 W.W.R. 276 (C.A.) at p. 279; *Wawanesa Mutual Ins. Co. v. Schneider*, [1995] A.J. No. 881 (C.A.) at paras. 9 - 10; *Richardson v. Honeywell Ltd.*, [1996] A.J. No. 254 (C.A.) at para. 4; *Dechant v. Law Society of Alberta*, 2000 ABCA 265 at para. 15. While these cases dealt specifically with Rule 266, they were based on the general principle that a party is not entitled to cross-examine a witness the party has chosen to call, even if that witness is the opposite party or is adverse in interest.

This principle is subject to two well-recognized exceptions:

- (i) Counsel may cross-examine their own witness on a prior inconsistent statement in accordance with ss. 22 and 23 of the *Alberta Evidence Act*; and
- (ii) Counsel may apply to the court or tribunal to have the witness declared hostile at common law, which entitles counsel to cross-examine at large: see *McWilliams Canadian Criminal Evidence* (looseleaf) at 18.50.40.

These exceptions consider the conduct and demeanour of the *witness*, including but not limited to prior inconsistent statements. In other words, they focus on the conduct of the person while testifying as a witness, not their role, interests, or alignment in the proceeding. The entitlement to cross-examine one's own witness generally depends upon what the witness does, not who the witness is.

The traditional rules governing cross-examination of one's own witness reflect a balance between efficiency and fairness. If a witness is being so difficult or dishonest that their evidence cannot be extracted by the reasonable efforts of a competent prosecutor using the techniques of direct examination, the prosecution can apply for a declaration of hostility and the tribunal can consider whether to exercise its discretion to permit cross-examination.

Are there good reasons to depart from the traditional rules in professional disciplinary proceedings? The Court in *Henderson* based its decision on the ground that the right to compel testimony must be meaningful, and this requires the ability to cross-examine. In considering this issue in the context of a disciplinary proceeding under the *Real Estate Act*, the Queen's Bench Justice noted:

In my view because [the section which provides that the member whose conduct is at issue is a compellable witness] is in the Act without any amplification of the powers of the Executive Director when he or she calls the industry member I must decide what makes sense and is fair to both sides within the adversarial context. The Executive Director and the industry member will be adversaries when they appear before a hearing panel.

Since the legislation gives the Executive Director the right to compel the industry member to testify, it must be a meaningful right. The only way to challenge an adversary is to permit cross-examination. Accordingly in my view the Executive Director may cross-examine an industry member that it has compelled to take the stand.

The Court of Appeal agreed on the grounds that the right to obtain the member's evidence in this context "cannot be illusory".

While previous decisions of the Court did not accept that the ability to cross-examine was a necessary accompaniment to the right to call an opposing party as a witness in a civil proceeding pursuant to Rule 266, *Henderson* provides clear direction on this issue in the context of professional disciplinary proceedings.



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# Cross-Section SOUTH

Sandra Hildebrand and James Swanson



## From the desk of James Swanson

Here it is, fall already, and Calgary is definitely back to business, and the CBA is no exception. This is my first cross-section column as one of the section coordinators and, of course, there will be more such columns to follow (deadlines, deadlines).

If you have not received your new Section Handbook for this year, please contact the CBA office to receive one. If you have not already registered in the sections of your choice, please do not wait any longer to do so. We have an exciting year getting underway and this is a summary of just some of what is going on.

As you may know from last year, Oktoberfest has been discontinued. In its place, your Section Handbook contains a coupon permitting a non-CBA member to attend one complimentary section meeting during the year. This offers a more flexible alternative for non-members to experience the value of a section membership and is a good way to promote the benefits of CBA and section membership. We would ask that you let your non-CBA colleagues know of this program and encourage them to participate. For information on section topics and meeting dates, please contact Linda Chapman in Calgary at 218-4313.

Volunteers are needed for Law Day, to be held in the new Court Centre building on April 19, 2008. It is definitely not too late to get involved, by volunteering with the 2008 Calgary Law Day Committee now, by volunteering to participate on Law Day next April, or even by just giving us some good suggestions. If interested or you have suggestions, please call either Cynthia Scheible at 403-750-2592 or Wayne Barkauskas at 403-750-2584 and I am sure they would be happy to hear from you.

Last year we started a new section, the Articling Student Section, which provides students with an opportunity to meet outside their offices, network amongst themselves and experience programs tailored to the needs of students. Please support this section by encouraging students to take part and freeing them up from their busy schedules to do so. An example of a topic that really focuses on the realities of being a student-at-law is the "Masters Chambers Practice - Do's and Don't's Winning Advocacy - What you should and shouldn't do, protocol and rules to be observed in Master Chambers" meeting which was held in October.

As examples of what various sections are up to, I thought it might be of some interest to set out a short summary of selected topics that have recently been the subject of section meetings. I have not listed them all as space does not permit that, so my apologies to those who may have been left out.

Construction Law held a discussion of Encana's Bow 1.9 million square foot office building project currently underway (as any of you who navigate that area of downtown are doubtless aware), while Elder Law had a session entitled "I wish I were home", a story about an elderly man, beaten regularly by his sons for his pension cheques while his wife watches. (I was

personally saddened by this topic and sincerely hope it is an uncommon type of case for practitioners in this area – however I would think it is something that every practitioner dealing with the elderly should be aware of). Tax Specialists considered foreign affiliates while Corporate Counsel looked at current issues in valuations.

Environmental Law had a session on "Provincial Environmental Enforcement and Creative Sentencing in Alberta" while the Commercial Real Property section held a meet and greet at Divino's with two free cocktails and appetizers (I unfortunately became aware of that session after the fact).

Sections also regularly cooperate on topics and meetings – for example, the Personal Injury Law Section recently invited the ADR Law Section to participate in a session entitled "Managing Complex Personal Injury Mediations". The Labour and Employment section provided a look at the state-of-the-art technology in the new courthouse in their session "In With the New ... An Introduction to the Courthouse Technology and Other Technological Issues for Your Practice" to which they invited Civil Litigation.

Many sections now simultaneously record and webcast their meetings for members who live outside Calgary. The webcasts are archived on the CBA Alberta website for subsequent viewing by section members. Not all sections are able to do this as we have limits on available equipment, but being able to see as well as hear a session means that members outside of Calgary don't have to travel and do not have to miss out because their schedule did not permit them to attend a session.

Sandra Hildebrand, the other section coordinator, and I will be alternating our columns in this space. I would encourage any of you with questions, concerns, comments or ideas to contact us. Sandra and I would be pleased to hear from you.

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# Cross-Section NORTH

John B. Williams and Kate Welsh

## From the Desk of Kate Welsh

Greetings, all! As the new Section Coordinator (or is that Co-Coordinator?), I'm looking forward to working with my fellow Coordinator, John Williams, and the rest of the fine folks at the CBA-AB Branch. I've been a CBA member for quite some time, and I've been involved with several sections. Currently, I'm the chair of the Privacy Law Section. But I'm new at this job, and in advance, I'll just thank everyone now for their patience – so, thanks, John, the CBA staff and executive, and members generally!

These crisp fall days always make me feel that autumn is the real "new year". The sections have sprung into activity once more. Of the many great meetings coming up, here are a few I happen to know of:

- Look for confirmation of a date for the "Inns of Court" dinner to be held later this fall in Edmonton. The Junior Lawyers Section co-sponsors this event with the Edmonton Bar Association. This event is open to a limited number of Junior Lawyers so be sure to register early. This is a wonderful program, particularly for those who are fairly new to practice and are interested in the barrister's side.
- The Family Law section's November 1st meeting topic will be "Bringing *Family Law Act* Applications in Provincial Court", with a speaker who is certain to be knowledgeable – a judge of that Court.
- Health Law plans a meeting soon on the Electronic Health Record. Watch for the notice – this subject will be of interest to practitioners in areas as diverse as administrative law, civil litigation, insurance, and privacy.
- Privacy Law's November 22 meeting will be on biometrics, smart cards... and, of course, privacy.
- The Research Lawyers' November 13th topic is "Substantive Research in Bankruptcy Cases"; on January 8th, "The Role of the Research Lawyer in Large-File Litigation". The speakers for both meetings are judges of the Court of Queen's Bench.

Both Privacy Law and Research Lawyers include non-lawyer members. Privacy Law welcomes privacy and FOIP officers, while Research Lawyers welcomes law librarians. For registration forms, contact the section chair or the CBA office.

If you know a lawyer who is not a CBA member, you can show that poor lost soul what he or she has been missing. Invite your friend to try out a section by using the coupon from page 21 of your Section Handbook. Any meeting held in a CBA office will be free; there may be a surcharge for meetings held in other locations. You or your guest must confirm with the CBA just so there's sure to be enough food for everyone.

Many sections still have a blank or two in their schedule of meetings for the year. Section members, don't be shy about letting your section executive know your ideas for topics or speakers. (Maybe you have a topic and you're willing to



speak on it yourself? – even better!) Use your Section Handbook for contact information.

Here are some other ideas for sections in search of a speaker:

- Both the Provincial Court and the Court of Queen's Bench have judicial liaisons who are happy to help you connect with members of the bench who can speak authoritatively (of course!) on a topic for your section. The Edmonton liaisons this year are, for Provincial Court, Judge Creagh, and for Queen's Bench, Justice Topolniski and Justice Macklin.
- Watch for upcoming events at other places, such as the U. of A. law school or associations such as LESA or ACTLA. You may be able to host a high-profile speaker who's in Edmonton for another event, and can spare a little time to speak to your section on a related topic. (And without blowing your budget on travel costs!)
- The law school is also a gold mine of expert speakers who are very generous with their time – all those professors and Institute staff. That includes the Alberta Law Reform Institute, whose counsel can speak on lots of topics – not just the Rules Project!
- Share a speaker with another section by holding a joint meeting. Often there's a topic that would be of great interest for members of both sections – for example, last year Civil Litigation and Privacy Law held a joint meeting on the interaction between litigation and privacy legislation.
- Feel free to call and brainstorm topics and speakers with either John or me. Our contact info is on P. 3 of the Handbook.

For chairs, once you've found that "perfect storm" of speaker and topic, please remember to do two things:

- First, tell John about it. He's writing the next Cross-Section North column – he may be able to mention your meeting, so you'll want him to know about it before deadline.
- Second, chat with Heather Walsh about inviting members of other sections. It's a great way to get some fresh energy going, increase your section's coffers, and maybe even find some new members.

It's shaping up to be another fantastic year with the CBA. If you haven't joined a section or two yet, what are you waiting for? Get going, and send in the registration form in the Section Handbook! If, heaven forbid, you've already lost your Handbook, the form is also on the CBA website.

Something to think about for the cold weather ahead ... At 275° below zero (absolute zero on the Kelvin scale), all atomic motion stops, Albertans say "Cold 'nuf for ya?", and it's still warm at the CBA meeting!



# Volunteer Lawyers Service

Each year many lawyers across Alberta donate their time to helping their community. If you are among these lawyers seeking an opportunity to contribute your skills to help those in need, the Volunteer Lawyer Referral Service may appeal to you.

The Volunteer Lawyers Service is a *pro bono* program sponsored by the Association of General Counsel of Alberta, the United Way of Calgary, the Canadian Bar Association Alberta, and the Law Society of Alberta. Our mandate is to assist eligible non-partisan charitable organizations in obtaining legal services that would otherwise be unavailable to them due to a lack of financial resources. This enables charitable organizations to avoid legal roadblocks while enhancing access to the justice system and the legal profession's profile.

The Volunteer Lawyers Service was originally established because many lawyers who did not practice in public law or a *pro bono* capacity were looking for opportunities to use their legal skills in a capacity outside their daily work and clientele. One of the appealing factors of this volunteer opportunity is the flexibility. As a volunteer lawyer you can donate as much – or little time as you are able, to accommodate your busy schedule. Any time you can donate to the program is much appreciated as it will aid these organizations in achieving their community development goals. Other benefits include networking opportunities, promoting the positive image of the legal profession, advertising your legal skills and broadening your personal areas of interest.

This year we expect to expand our services to communities outside of Calgary and Edmonton, run additional workshops, and increase community awareness of the program. As well, keep an eye out for our new website which we hope will be an interactive and helpful resource for both lawyers and community agencies.

If you are interested in this opportunity, please fill out the application form enclosed in this package. The application form will ask for your contact information, specific areas of interest, preferences, and availability. Preference choices include working with charitable organizations in a one-on-one capacity, leading an information workshop, and working collaboratively with a junior lawyer, articling student or with Pro Bono Students Canada based out of the University of Calgary.

Your name will then be added to the Volunteer Roster. When an agency requests legal help, we work hard to match them up with a member of our roster who can address their needs. It should also be noted that insurance coverage is available through the Canadian Lawyer Insurance Association for lawyers who take on one of our files. In addition, disbursements and out of pocket expenses are the responsibility of the charity.

As an added bonus, if you renew your application, join for the first time, or convince a new member to join our roster, your name will be entered into a draw to win a brand new iPod.

To find out more about the Volunteer Lawyer Service, or to join our Volunteer Roster, please contact Laura Liscio, VLS Project Coordinator at 403- 218-4317, or by e-mail at vls@cba-alberta.org.

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Please join us as we recognize and celebrate Hugh's accomplishments throughout his career. Receptions will be held in both Calgary and Edmonton.

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For further information please contact:

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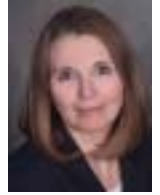
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