

MARCH 2003

NATIONAL ELDER LAW SECTION

ACTIVITY REPORT

MEMBERSHIP AND PROVINCIAL SECTIONS

The National Elder Law Section was officially inaugurated on September 1, 2002. As at the date of this report we have 353 members, including amongst that number new CBA members drawn to the association by their interest in this new field.

We have established provincial sections in New Brunswick, Quebec and Nova Scotia and have Sections close to formal establishment in British Columbia, Manitoba, Saskatchewan and Alberta. Ann Soden travelled to Calgary and Saskatoon in February to give talks on Elder Law to CBA lawyers about expanding their practices and becoming involved in the new Elder Law Section.

CONTINUING LEGAL EDUCATION CONFERENCES

This year conferences addressing Elder Law issues were held in British Columbia, organized by Hugh McLellan, by Tim Matthews, National Chair of the Wills and Estates Section in Nova Scotia and in Quebec, Danielle Chalifoux and her executive organized a formal two-year continuing education programme on Elder Law which was launched in March 2003.

We have planned an interesting two-hour CLE, the first national CLE on Elder Law, for our annual meeting in Montreal in August. *Elder Law: A New Practice Area Coming of Age* will be held on August 18, 2003 from 9:30 to 11:30 a.m., followed by a short business meeting and light lunch from 11:45 a.m. to 12:45 p.m. to which all are invited. The conference will feature a welcome by former CBA President and senior member of the Quebec Bar, l'Honorable Paule Gauthier. Marilyn Piccini-Roy of Borden Ladner Gervais LLP, will speak on Planning for Aging: A Multidisciplinary and Case Management Approach; Robert Gordon, Director of the School of Criminology, Simon Fraser University and author of the Carswell legal text on Adult Guardianship will address the dilemmas and utility of adult protection: guardianship and enduring powers of attorney; and senior legal counsel to the ABA's Commission on Law and Aging, Stephanie Edelstein, will cover ethical and practice management issues.

WEBSITE

To keep our members informed about Section activities and practice issues, we have contributed to our new website articles explaining the role and issues involved in Elder Law, an article on practice tips and another on a marketing approach to Elder Law: Planning for Aging. Eric Lister has reported on our yearly agenda in November 2003 and each provincial section has undertaken to report periodically on its current membership, conferences and other activities to encourage a national exchange of ideas and information. In addition our report on the Ministry of Justice Meeting will be posted.

INFORMATION and REFERRALS

We have been able to provide information to lawyers and other professionals proposing adult protection legislation in the Yukon and Northwest Territories and referrals to academic specialists in Elder Abuse: Rob Gordon, Directors of the School of Criminology Simon Fraser University and Donald Poirier of the Faculty of Law, University of Moncton.

We were also able to connect a Nova Scotia Law Professor to Charmaine Spencer, a lawyer with the Institute of Social Gerontology, Simon Fraser University, to advise on topics for a unit on older women's issues for a course on *Women and The Law*.

DEPARTMENT OF JUSTICE MEETING

Our meeting originally scheduled for November, 2002, was rescheduled and held on March 14, 2003. Co-Hosted by Carole Théberge, criminal prosecutor with the Department of Justice and Ann Soden, representatives from National Advisory Council on Aging, and from Health Canada's, Information Coordination and Dissemination Section, and the Family Violence Prevention Unit, Division of Aging and Seniors were in attendance. Current issues of law and aging were surveyed and a proposal approved for collaboration on an ongoing basis with government, law enforcement and related professions of health and social service in studying needed law reform and for setting national policies and directions in the area of Elder Abuse, Powers of Attorney and Residential and Assisted Living Facility Contracts. Issues were discussed under the following headings:

1. Adult Protection/ Elder Abuse
2. Employment
3. End of Life Care
4. Guardianship/Trusteeship/Powers of Attorney
5. Health
6. Housing
7. Human Rights

8. Immigration
9. Income Security
10. Income Tax
11. Institutional Care (Nursing Homes)
12. Access to Justice
13. Motor Vehicles (Driving, Older Drivers)

Further detail under these titles is provided in Annex I to this Report.

AMENDMENT TO THE CODE OF PROFESSIONAL CONDUCT

We have been asked by the revision Committee of the CBA to respond to the following question in the context of a general review and amendment to the CBA *Code of Professional Conduct*:

"Are there any circumstances when you may breach solicitor/client privilege and disclose confidential information to prevent exploitation or abuse of an incapacitated or vulnerable older person (client or not). Should you have a duty to disclose?"

A national written symposium published in the *Estates, Trusts and Pensions Journal* in 2000 on this issue including responses from Ann Soden, Tim Matthews and Robert Gordon has been submitted to Lois Hoegg. We are awaiting a paper from The Advocacy Center for the Elderly in Toronto and recommendations from provincial sections based on their laws and policy. British Columbia submitted its report to Hugh McLellan on the current status of the law in that province.

PROPOSED STUDY OF ENDURING POWERS OF ATTORNEY BY NATIONAL JOINT COMMITTEE OF THE CBA, THE CANADIAN BANKING ASSOCIATION, MAJOR CHARTERED BANKS AND REPRESENTATIVES OF PROVINCIAL OFFICES OF THE PUBLIC GUARDIAN AND TRUSTEE/PUBLIC CURATOR.

Increasingly, a variety of forms of enduring powers of attorney are appearing across the country, which are intended to preserve and enhance autonomy and independence of an older person at every stage of diminishing capacity.

When not recognized by banks because they are not on a bank's standard form, the older clients' family and caregivers have to take long, costly and often traumatic guardianship proceedings. Financial transactions and oftentimes, quality of life are compromised, in the interim, both for the client and his/her family.

The National Elder Law Section proposed to (the legal department of) the Royal Bank of Canada the need to address the following issues by a joint national committee, comprised of the above-mentioned parties:

- Criteria for verification, validation and revocation of power of attorney, as well as current bank instruments, with respect, amongst other matters, to the powers and identity of the attorney and competency of the client;
- Education of employees and management of banks and other financial institutions about the legal effects of guardianships and continuing powers of attorney for property;
- Cross-jurisdictional recognition of provincial guardianships through protocols. Although guardianships are provincial matters, we find that the mobility of our clients and their property raise increased need to have smoother recognition across provincial borders; and
- Establishment of policies, guidelines and client agreements to assist bank personnel who suspect financial exploitation or the potential thereof and how to address the incompetence or negligence of an attorney (under an enduring power of attorney or other representation agreement); and
- Public need for recognition of a variety of representation/substitute decision-making agreements.

Heather Lawson of the legal department at the Royal Bank of Canada reports that issues arising from the use and recognition of powers of attorney are growing every day and are now considered the single largest legal issue facing her bank in the coming five years. Thus this National Elder Law Section initiative was warmly welcomed.

The National Will and Estates Section is enthusiastic to participate with us in this endeavor.

INTERNATIONAL RELATIONS

We have become charter members of the International Network of Law and Aging in Washington D.C., an initiative of AARP, who will be publishing an annual legal journal and organizing an annual conference to which Ann Soden has been invited to speak in November, 2003 on behalf of the CBA. In addition Ann has been invited to speak at an Ann Arbor Michigan, Elder Law Conference, *Running Against the Wind* in September 2003 on comparative law approaches in Canada to Elder Abuse, Guardianship, Powers of Attorney and in October at the National Law and Aging Conference of the ABA. An expected increase in our budget in 2003 will also allow us to become members of the National Academy of Elder Law Attorneys (NAELA) in the U.S. who educate and certify Elder Law Attorneys nationwide.

CONCLUDING REMARKS

We can proudly say that we are addressing each of the special stated purposes of the Section set forth in our By-Laws:

“to improve the law affecting seniors; to educate the public, the Bars of the Provinces and Territories of Canada, association members and the Judiciary on important Elder Law issues; and foster professionalism in the practice of Elder Law through communication among Elder Law practitioners in various disciplines by various undertakings including, without limitation. . .

- To regularly submit recommendations for effective action that might be undertaken with regard to legal issues and legislation;
- To enhance communication and cooperation with, inter alia, the National Office, other Sections and Branch Sections, to stimulate and strengthen Section activity;
- To interact with governments and other organizations as appropriate; . . .

Our initiatives in establishing provincial sections, in sharing information with professionals in other disciplines, in offering continuing education conferences and courses and our first national conference planned for August are addressing our communication and cooperation mission and stimulating and strengthening our ever-growing membership.

We have fostered professionalism in the practice through our website newsletters and articles addressing certain ethical and practice issues relevant to an Elder Law practice. We are addressing with ethics committees of our provincial law societies, proposed amendments and guidelines to our CBA *Code of Professional Conduct* on matters of solicitor/client privilege.

We are fostering informed dialogue and a forum for study of legislation and policies, education of the public and improved access by older persons to legal information and the justice system through the Department of Justice meeting and continuing collaboration with government bodies, including Health Canada, the National Advisory Council on Aging and law enforcement.

We will be addressing practice and substantive law issues relating to Powers of Attorney with financial institutions, and with public guardians in an effort to streamline and improve the law, to protect the vulnerable, to inform the public and banking personnel serving the public about the nature and extent of these instruments and to permit the profession to render improved legal service to the public, generally, and in particular, to older people.