

NATIONAL ELDER LAW SECTION
REPORT TO COUNCIL 2004
SUBMITTED BY ANN SODEN, CHAIR

I. MEMBERSHIP AND PROVINCIAL SECTIONS

The National Elder Law Section has 655 members. There are sections in 8 of 10 provinces and the Northwest Territories and Yukon as well as representatives in Ontario, and Nunavut.

Former Supreme Court Justice, **Claire L'Heureux-Dubé** and former Canadian Bar Association President, **Paule Gauthier**, have graciously agreed to act as **legal counsel to the National Elder Law Section.**

We have completed our Executive Officers for 2004-2005. Members-at-Large positions will be appointed and confirmed at the business meeting in Winnipeg, August 16.

II. CONTINUING LEGAL EDUCATION CONFERENCES AND COURSES

Our first national CLE, "**Elder Law: A New Practice Area Coming of Age**" was held in Montreal on August 18, 2003. The conference gave an overview of Elder Law issues, an auspicious beginning to a host of conferences to come.

Eric Lister, Chair of the Manitoba Elder Law Section co-chaired "**Elder Law: Issues for an Aging Population**" at the celebrated **Pitblado Lectures** in November of 2003. Ann Soden, Chair, of the National Elder Law Section gave an Introduction to Elder Law. A wide variety of topics, perspectives and expertise were tapped in this two-day conference.

Our second national CLE is planned for August 16, 2004 at the annual meeting in Winnipeg "**Cross-Border Issues for Snowbirds and Roving Retirees**" -

A Canadian lawyer and an American attorney join forces to provide a wealth of legal information and practice tips to lawyers who advise Canadians living part-time in the United States and/or who change residences across provincial lines. Issues include multiple wills, probate planning, powers of attorney and healthcare directives, health insurance, pension benefits, U.S.-Canada tax considerations and planning opportunities.

Moderator: Eric G. Lister, Partner, Taylor McCaffrey (Winnipeg)

*Speakers: Marilyn Piccini-Roy, Partner, Borden Ladner Gervais, LLP
Ed Northwood, Hodgson Russ LLP (Toronto, and Buffalo, New York)*

Provincial conferences and continuing education courses are being held by provincial sections in British Columbia, Alberta, Saskatchewan, Quebec, and Nova Scotia. Please refer to our website for a schedule of topics and dates and other general information on provincial and territorial activities, where reported.

A successful conference/workshop was held on February 23, 2004 in Whitehorse, Yukon following this year's mid-winter meeting, entitled '**Elder Law Comes of Age, Part 1**'. Organized by the National Elder Law Section and co-sponsored by CBA Yukon Branch, Law Society of Yukon, and Department of Health & Social Services, featured speaker Hugh McLellan, covered a vast array of subjects in his two-hour session:

- Planning for Aging: A Multidisciplinary & Case Management Approach
- Powers of Attorney
- Advance Care Directives/Health Care Proxies
- Capacity Issues
- Response to Abuse and Exploitation of Seniors/Elders
- Ethical Considerations

This conference/workshop brought together lawyers and professionals from social work and health care fields for the first time. The multidisciplinary and collaborative approach of Elder Law so inspired the attendees that they have agreed to meet from now on a regular basis and to use this approach in addressing issues and problems facing older persons in their territory.

The Section has been approved for a stand-alone, full-day conference in April/May 2005 **Planning for Later Life: Legal, Financial and Social Challenges**, hopefully, in collaboration Canadian Institute of Chartered Accountants. (Details to be confirmed)

The National Elder Law Section has also submitted a proposal for the 2005 CBA Canadian Legal Conference in August (Vancouver) on *Elder Abuse and Exploitation*.

III. WEBSITE

The Elder Law Section listserv allows members to exchange information, "best practices" and to seek advice and practice tips from the colleagues across the country.

The national and provincial executives of the sections, from time to time, have been invited to access the American Bar Association's Commission on Law and Aging Elder Bar Listserv.

Articles on the Website include Marilyn Piccini-Roy's paper on "Planning for Aging: Multidisciplinary and Case Management Approach" and from Stephanie Edelstein of the ABA Commission on Law and Aging, ethical considerations of an Elder Law practice.

IV. NATIONAL EXECUTIVE BUSINESS MEETING, APRIL 24, 2004.

The first face-to-face meeting of the Executive Committee including provincial chairs was held in Montreal. The meeting allowed us to learn more about each other, our jurisdictional issues and practices and to plan our future directions for 2004-2005 and beyond.

Saturday afternoon was reserved for information sessions by experts from Universities of Ottawa and Sherbrooke, Quebec Human Rights Commission and the Canadian Bankers

Association on topics of Abuse and Exploitation, Nursing Home Regulation, Care Facility Best Practices and a Report on the Powers of Attorney National Study Group's findings and research.

V. DEPARTMENT OF JUSTICE MEETING

The National Elder Law Section met for the third time within the past twelve (12) months on October 24, 2003 in Ottawa, with colleagues in the Department of Justice and with professionals from other government and par-governmental bodies to discuss priority legal issues facing older Canadians and those currently being addressed by these departments and associations. Planning for the October 22, 2004 meeting in Ottawa will involve working with these colleagues on legislative issues and collaborative projects.

These exchanges of information on our respective goals, plans and undertakings during the year are important. They are our opportunity to bring together stakeholders addressing aging issues under the aegis of the National Elder Law Section and the DOJ. Together we ensure that our respective efforts are not duplicated and that every attempt to coordinate and collaborate our initiatives is made. Our meetings reflect an ongoing commitment by private sector lawyers through the CBA to contribute to advocacy and law reform. We recognize, particularly in the emerging field of Elder Law, that we need to use the law not just to defend but to shape policy and the political agenda and to promote the development of law. We recommended, and there was consensus on developing an ongoing consultative network on a number of emerging Elder Law issues with government and those organizations advising government on policy and law reform:

- Putting together an educational program and creating awareness by law enforcement, prosecutors and the public as to creative legal recourses to address elder abuse, neglect and exploitation;
- Development of an Advance Care Planning Project, including education of professionals and the public as to the importance of planning, of developing best practice guidelines where instruments do not exist and of securing legal recognition of such instruments; and
- Establishing a task force to study accreditation and regulation of assisted-living facilities and hospices.

We reviewed the *Older Adults Justice Act*, a federal private member's bill calling for the establishment of a federal agency to address abuse, neglect and exploitation of persons over 65. The appropriateness, relevance, cost and constitutionality of such a bill, introduced by Sudbury M.P., Dianne Marleau, was addressed by National Advisory Council on Aging at its first reading. The Bill received its:

- first hour of debate in second reading of the House on February 5, 2004;
- A second hour of debate is scheduled for the March 22-23, 2004.

If this Bill is ultimately referred to the Committee for Justice and Human Rights for study and consultation with stakeholders following its second reading the National Elder Law Section will be called upon to give its view on the form and content of the proposed law.

Luis Rodriguez from Canada Mortgage and Housing Corporation reviewed housing options and financing (e.g. life leases and reverse mortgages) as well as research carried out on contractual terms of care agreements, best practices and law reform in the context of assisted-living facilities.

Attendees included legal counsel of the Criminal Law Policy Section and Family Children and Youth Policy of the Department of Justice, the Chair of the National Advisory Council on Aging, a representative from Canada Mortgage and Housing Corporation, and Research, Policy and Project Officers of Health Canada.

VI. NATIONAL STUDY GROUP ON POWERS OF ATTORNEY

At the initiative of the National Elder Law Section, a National Study Group on Powers of Attorney was formed in the spring of 2003 comprising private practitioners specializing in the areas of Estate, Trust and Elder Law and counsel from the Canadian Bankers Association and Canada's major chartered banks and financial institutions.

The impetus for the creation of the study group was borne of demographics and the resulting increase in the number and kinds of powers of attorney being used across provincial and international borders. As legal counsel for the RBC Financial Group stated at the outset of the group, "We at the Bank consider issues relating to powers of attorney the single most important legal challenge facing the Bank in the next five years".

The study group's purpose is to start the process of sharing knowledge and experience, to examine existing laws across the country, and to identify gaps and practical problems. The ultimate goals for the study group include establishing "best practices" for lawyers and bankers in the drafting and education of parties to such instruments their rights and responsibilities, raising public awareness about the usefulness of such instruments when carefully counselled in planning for ageing generally and for the potential for disability, aiding in policy discussions and legislative reforms regarding, *inter alia*, portability of such instruments and the addressing specific legal issues arising in the context of banking transactions and estate planning by attorneys acting pursuant to such instruments.

Powers of attorney are important tools of self-determination for persons at any age. However, powers of attorney and enduring powers of attorney are deceptively simple documents and there is much confusion, fear and the potential for abuse in relation to these instruments both on the consumer and professional side. Furthermore, there are areas of the law that appear to be unclear. In particular there seems to be uncertainty around the ability of an attorney to undertake estate planning and as to the limits on the ability of an attorney to benefit from his or her office.

A thorough examination of provincial legislation and a comprehensive review of the case law would be beneficial to the legal community in drafting powers of attorney and in advising clients. Guidance is critical to financial institutions who need to determine daily whether instructions provided, and transactions proposed, by an attorney are valid, thereby ensuring prompt and effective use of a power of attorney for the benefit of a donor-client. A review of legislation and the common law framework would serve to clarify the state of the present law and determine whether legislative reform is necessary in order to minimize disputes, liability and aggravation in the use of these important instruments. Given the ageing population of our country, resolution of these issues is a timely and pressing matter.

The following issues will be researched as part of this project and an article submitted for publication by the commissioned researchers, bearing the working title: "Powers of Attorney: Fiduciary Duty and the Power of the Attorney":

1. What is the nature of the fiduciary duty under a power of attorney and what are the powers of the attorney named thereunder? In particular, does the fiduciary acquire the status and powers of the donor and if so, is he not bound by or subject to the same liabilities as the donor to revenue authorities, for example?
2. Can an attorney instruct a financial institution to make the attorney a joint account holder on a bank account of the donor? Does this represent a testamentary disposition falling outside an attorney's powers? Does the attorney, a fiduciary, ever stand on an equal footing with the donor? Would the foregoing instruction be a breach of the attorney's fiduciary duty or is it within the attorney's powers and merely representative of good estate planning? Does there need to be specific language in the power of attorney which allows for the attorney to benefit?
3. Can an attorney place a donor's assets into a trust for estate planning purposes and to avoid probate fees which would otherwise be payable by the donor's estate? What components, if any, must be present in the structure to validate these vehicles (i.e. revocable, donor beneficiary etc.)?
4. Can an attorney assign a beneficiary on a registered plan where a plan is moved to another financial institution or where the plan is rolled over? Review the *Desharnais v. Toronto Dominion Bank* decision.
5. What is the ability of, or the limitations on, an attorney's ability to borrow.

VII. ADVANCED CARE PLANNING – PUBLIC INFORMATION AND AWARENESS WORKING GROUP

An initiative of the Health Canada's Secretariat on Palliative and End-of-Life Care, the National Elder Law Section was invited to participate in a Public Information and Awareness Working Group on the importance of and issues in advanced care planning. Other members of the working group include the Canadian Hospice Palliative Care Association, and The Canadian Medical Association.

The group is currently surveying the work undertaken to date regarding legislation and use and recognition of planning instruments by the public and health professionals across the country. It seeks ultimately to foster advanced care planning, including legal, health and social planning, as an integral part of the health care system so that doctors encourage planning at earlier stages of aging or of illness, that an openness to death and quality of dying is fostered amongst health professionals and that values regarding death and dying communicated throughout life by individuals.

Ann Soden was able to provide the Study group reflections and proposals resulting from the Quebec Elder Law Section's roundtable consultation of June 12, 2003, as well as materials from Alberta's experience's with its *Personal Directives Act*.

Ann Soden attended a working group on Ethical and Legal Issues Involved in Informal Caregiving in May, 2003 in Ottawa, hosted by Health Canada and addressed legal issues facing informal caregivers including such matters as standards of care, substitute decision-making, and tax credits available to caregivers and to those under one's care.

VIII. INTERNATIONAL RELATIONS

As charter members of the International Network of Law and Aging, an initiative of AARP, Washington D.C., and Stetson University of St. Petersburg, Florida, Ann Soden has been asked to prepare an article for the first Journal of International Law and Aging set forth publication this summer. The article will address international initiatives by Canadians in selected areas of Elder Law and the challenges and achievements of establishing Elder Law in Canada.

Ann Soden spoke 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 November in Orlando, Florida, at the first international forum on Law and Aging entitled: *The Future of Aging*, with representatives from Australia, the U.K., Israel and the U.S.A. Her talk was entitled: "Cultural Diversity in an Aging Population".