

INTRODUCTION

A. WHY ELDER LAW?

The dramatic increase in the population of older persons in Canada, the ever-increasing scope of their social, economic and health problems, and the resulting expansion of legal problems and issues affecting this population had called for the creation of the field of Law and Aging, better known as Elder Law, in order to provide a comprehensive framework and legal program to address these issues and meet the needs of older Canadians and those legal and non-legal practitioners serving them.

What seemed so self-evident was not without its challenges in the early days. When I was researching Elder Law issues several years ago, I attended a conference in Montreal on discrimination and ageism. The day long event was put on by social workers and health care professionals. There were no lawyers invited as speakers, and as far as I could tell, none in the audience. I was introduced by my colleague at the Institute of Social Gerontology as a lawyer who was developing the new field of Elder Law across Canada. "Elder Law?" the organizer said quite matter-of-factly. "Isn't that discriminatory? Why segregate seniors from the mainstream any more than they are?" I welcomed the question because it made me realize very early on that there would be challenges to the need to create a distinct area of law on issues of aging. "Yes," I said, "the senior population faces the same legal issues as the rest of the population, but they also have a growing number of special issues due, in part, to living longer and facing disability." There were many other examples: I pointed to her field of age discrimination and to discriminatory practices in housing, health, transport, and employment related to age. I gave additional illustrations of unique issues and problems particular to aging, saying that we, lawyers, had a special contribution we could make. We could defend and educate about legal rights, and would work with social workers, health professionals and others, bringing our particular skills to bear in areas of advocacy and law reform. Save for the one notable exception, Ontario's Advocacy Centre for the Elderly, we Canadian lawyers had been conspicuously absent from participation in advocacy and in the debate of the important social and legal issues of our day.

Another question put to me was whether Elder Law was, in fact, a new field of law or merely a field of practice, as there appeared to be no new laws to enact. What laws existed, were general in nature embracing all sectors of the population, at all ages. Their application, in practice, needed to be tailored to an older clientele.

While there are unique practice issues involved in Elder Law, we have only to look at current and proposed legislation in the areas of adult protection and assisted housing regulation, for example, brought about because of the problems faced by the vulnerable older person, to see the special role that law plays, and will play, in responding to the needs of some within the older population.

Are there problems and/or benefits associated with using age as a category in law or age groups in law? More recently, the Law Commission of Canada has focused the debate about age in a discussion paper entitled, “*Does Age Matter?*”:¹

Age (specifically old age) has been extensively used as a criterion for legal eligibility and differentiation in statutes during the 19th and 20th century. The use of categorizing people by age has invaded education, industry and family life. This development has not been without its detractors. It has been cautiously suggested that having a separate area of law and legal practice may inadvertently promote “the pernicious belief that older persons are less capable, less deserving of respect, and less needful of independence and autonomy.”² In other words, it is feared that law is (or can become) ageist.³

Despite the foregoing admonition, Spencer and Beaulieu support the advent of Elder Law. They would emphasize, however, the need to recognize that the law and policy are not neutral and are not being applied in a neutral manner with respect to older adults.

There is danger, Spencer warns, in focusing the practice of Elder Law on preparing for death and disability alone. In developing Elder Law in Canada we must be careful to avoid an ageist approach, while still responding to needs and realities of this population.

We need to guard against paternalisms in law, policy and practice, particularly where the latter treat older adults as children, or assume incapability, or deny them equitable access to resources. This is especially evident in health care.

Ironically, one of the many forms of ageism that occurs is treating older persons exactly the same as other adults. There is a false belief that

¹ <<http://www.lcc.gc.ca>>, February 2004.

² L. Frolik, “Introduction, Social Attitudes Towards the Elderly” in L. Frolik, ed., *Aging and the Law* (Philadelphia: Temple University Press, 1999) at 18.

³ Marie Beaulieu and Charmaine Spencer, *Older Adults’ Personal Relationships and the Law in Canada: Legal, Psycho-social and Ethical Aspects* (Ottawa: Law Commission of Canada, September 1999) at 35.

if you treat older adults as you would other adults, then the law is fair. That attitude fails to recognize where there are relevant differences among individuals. At a policy level, “treat everyone the same” can become an ideological rationale for reducing or eliminating benefits to older adults.

While the ideas in Elder Law are not new, we will be examining how and whether they should be implemented and institutionalized. We have only begun to see legislation on issues affecting this population. Lawyers will have an important role to play in advocating, developing, and in tempering aging law and policy.

On the practice side, of course, we will continue to employ existing laws, implementing innovative practice approaches to address new needs of this clientele, such as multidisciplinary planning for aging and intergenerational mediation. Clearly, we have to be educated on a broad range of both legal and practice issues cutting across many disciplines if we are to be in a position to offer quality service, in a holistic manner, to older clients. As well we need to be in a position, as a profession, to competently and effectively respond to and advocate with other professionals serving this population on policy and legislative reform, where appropriate.

B. WHAT IS ELDER LAW?

Elder Law, therefore, refers both to a broad range of legal issues relating to aging which transects many areas of law and to a unique multidisciplinary approach that recognizes the connections among the legal, social, economic and health needs of older persons and their families. The term “Elder Law” is borrowed from our American colleagues who established this field of law and practice in the late 1970s. The term is well accepted, but is, in part, a misnomer. Elder Law refers to a broad continuum of law and aging issues, spanning several decades of life. It embraces aging considerations of the hale and hearty older person as well as those with serious deficiencies. The term “older” has been used variously to refer to standard retirement ages of 60 and 65, to early retirees in the over-50 age group, or, indeed, to younger persons in certain discrimination cases. Much depends upon the social, economic, or political context.

While Elder Law addresses those issues that arise because one is aging or because the issues themselves are connected to later life as defined by the society in question, it does not seek to address or study issues that an older person may face merely as a member of the general public. A landlord and tenant matter would not be an Elder Law issue, unless there

was, for example, evidence of discrimination or of an unfair housing practice arising because of age.

To provide an example, an older client was referred to me in my capacity as an Elder Law lawyer because the woman had lost a large part of her mutual fund portfolio. At first blush, the case presented no Elder Law issues. The client was in her mid-70s and mentally competent, although a naïve investor. There was no proof of undue influence, and she had formally authorized every transaction carried out by her agent. However, an evaluation of industry standards revealed that the mutual funds agent, and hence the brokerage firm for whom he worked, had failed to take into account investment strategies which would conserve capital and lower exposure to risk appropriate to this person's age, investment knowledge and financial circumstances. The deviation from industry standards and rules of practice was sufficiently great that we were able to mediate a settlement and the partial reimbursement of the client's loss, without judicial intervention.

C. ELDER LAW CUTS ACROSS MANY AREAS OF LAW

Practitioners in diverse areas of law as well as general practitioners have become aware of this increase in the population of older Canadians. Specialists in estate planning, employment law, tax law, real estate law, health law, family law, and criminal law recognize the growing impact of older clients on their practices and the legal questions that they and those who influence their lives are asking.

Given demographic changes, Elder Law will be a necessary feature of every legal practice in the future. Arthur I. Fish, a partner at Borden Ladner Gervais LLP, Toronto, and conference speaker on Elder Law health issues, notes that:

Canadian lawyers will increasingly find themselves serving older clients or family members seeking to protect or assist older relatives. It is likely that lawyers who practise in estates and trusts or family law will be the first to experience these new client demands. Over time, however, the banking, financial and insurance industries will increasingly call for legal advice on issues that arise in dealing with older Canadians.⁴

Many lawyers are just beginning to look at the practice of Elder Law. Almost uniformly, they are recognizing that their clients are inquiring about Elder Law matters: for example, a will or transfer of assets may be impacted by the possibility of long-term care needs; or, there may be a

⁴ National, Canadian Bar Association, May 1999, at 33.

need to name appropriate persons to carry out decisions should they become incapable.

D. ELDER LAW IS DISTINCTIVE

Issues seldom occur in isolation in an older person's life. Traditionally, the boundaries of legal specialties forced older persons to seek lawyers whose practice was limited to one or two of the areas Elder Law now addresses.

In Elder Law, a client's needs go beyond the conventional tools of the legal system. While drafting, counselling, negotiation, and litigation are important, they are not sufficient. Most clients need a lawyer who is able to assist them, in a comprehensive, competent, and caring manner, in assessing, planning for, and responding to a variety of interconnected financial, legal, economic, and health needs.

In order to meet the legal and other needs of this growing population, it was incumbent upon the Canadian legal profession to begin to address the issues of the day in a multidisciplinary and holistic manner, as well as to develop caring and competent legal counsel to provide these services.

The approach of Elder Law is holistic because it seeks to address and solve *all* legal needs and problems specific to persons in later life. For example, under this all-encompassing approach, the Elder Law practitioner, using a case management approach, would address 1) general estate planning issues as well as 2) planning for aging and incapacity with substitute decision-making documents. Coordinating the services of a number of multidisciplinary professionals, as and when appropriate, such as accountants, financial planners, social workers, health professionals, and care managers, the lawyer might also assist the client in reviewing housing options and planning for possible long-term care needs, including nursing home care. Locating the appropriate type of care, planning, counselling, and coordinating the cost of care and working to ensure the client's right to quality care, are all part of the Elder Law practice. Life planning or later-life planning, as it is variously referred to, stands as a complement to, or extension of, estate planning.

1. Sample Case

My client, Pearl (not her real name), is 80 years old. When she was a youth, she had poliomyelitis. Today, she walks in constant pain with a limp, but walks determinedly everywhere. She worked for a university and has an excellent pension, some savings, and life insurance for a total

value in excess of \$350,000 (\$200,000 in liquid assets). She is divorced and has no children.

Pearl came to me originally with one question.

The bank was trying to interest her in having it named as her executor for a fixed fee of 4 percent of the value of her estate at death. To sweeten the offer, they would pay for a new will or amendment to her existing will, as the case might be. She wanted to know whether this was a reasonable offer.

“The potential of paying in excess of \$12,000 for the settlement of simple estate was, in the circumstances, more than you need pay,” I replied. I explained the elements of the settlement of her estate. Her sister was named as Executor/Liquidator and her nieces were alternates. The settlement of her estate was straightforward, and could be easily carried out by her present Executor/Liquidator or alternates, as the case might be. A new or amended notarial will would cost \$300 the bank stated. At this fixed fee, a notary could not give her much additional time if she had other issues to discuss.

In fact, Pearl wanted to change her will substantially due to changed circumstances. Since it had been first executed, 20 years before, her values about funeral arrangements had changed: new family, and friends had entered the picture to whom she wanted to leave legacies. There were possessions she wanted left to individuals in her will. She intended to give away, at present, many of her possessions to friends and family, as well as to make gifts of money to each of her six siblings, as “most of them could use the money,” she said.

This led to talks about her future health care needs, housing options, and the costs of these in a critical care and long-term context. After discussing and informing Pearl of all the costs and options (and visiting a number of private and public residences to understand the market), Pearl insisted that she was prepared to go into a public nursing home or long-term care institution, if need be. Her needs were not great and she wanted, above all, to make this loving gesture of gratitude to her siblings for a lifetime of love and assistance to her.

I recommended that she check out the financial and tax implications of such a move as well as review with her own accountant and tax specialist (or with an accountant I could recommend), who were experts in the area, the complete financial, health, housing and care planning we had elaborated.

The consultations with me lasted approximately four hours, were not costly and confirmed to her the value of her short and long-term plans as well as the risks of giving away a good portion of her assets. Pearl now understood the implications of what she was doing and still wanted to go ahead. Hers was a full and enlightened decision, and one which had been

weighed against all her present and future plans and potential needs. At her age, the plan might have to be reviewed every couple of years, but would probably remain unaltered unless her financial circumstances changed significantly.

At her request, I composed a letter to her siblings, in her name, thanking them for a lifetime of assistance and enclosed the cheques.

2. Postscript

Pearl thanked me for putting her life (and after-life) in order. She said she was no longer afraid of the future — of aging or of dying. Her house was in order. She had made many gifts of possessions and made many friends and her family happy. She had entrusted people to represent her, when needed. Her wishes were known. We had spoken to her executors under her will and attorneys under her enduring power of attorney to explain their powers and responsibilities and her values generally. We had redone her estate planning and put in place her planning for potential disability and end-of-life. We had addressed the “whole” picture: health care, housing questions and options, and general tax and financial issues.

And the siblings? Every one returned her cheques saying she had done the same and more for them in her lifetime and that she could use the money. “Don’t worry, we’ll be fine,” they replied in unison.

And so, Pearl amended her will to ensure that the returned sums were left to her selfless siblings as particular bequests upon her death.

E. ELDER LAW LAWYERS ARE DISTINCTIVE

Elder Law lawyers are unlike other members of the legal profession whose practices focus more on the adversarial aspects of the legal system. The Elder Law lawyer involves himself or herself, not exclusively, but in more of a role of counselling, in addressing social, psychological, financial, as well as legal needs of his or her clients in a global and inter-disciplinary manner. He or she requires compassion, empathy, and understanding.

Elder Law lawyers are expected to bring to their practice more than just legal expertise. In addition to understanding how to counsel older persons, they need to be aware of the special ethical issues that may arise in the course of the representation, be familiar with the aging process and the network of aging services and community resources that might meet their client’s needs.

The practice of Elder Law is distinctive in several other ways. One is the degree to which the lawyer works for his or her client within the

context of the family. Here there are potentially differing opinions and goals, and the possibility of conflicts of interest. Hence, the need to identify just who is the client.

Can one practice Elder Law alone? Can one do well financially by doing good? Many aspects of Elder Law will provide a very fine paying practice. Elder Law practitioners will play an important role in advising their a) older clients, but also b) families who are caregivers and/or legal representatives, c) employers who are assisting their employees who have caregiving responsibilities, and d) professionals serving an older clientele, including lawyers in other fields, accountants, financial planners, banks, insurance and trust companies, home care managers, health and social work professionals, nursing homes, and care organizations.

Recently, a Nova Scotia lawyer left a larger tax and estate firm to set up a full-service Elder Law practice. Other lawyers address Elder Law issues as an adjunct or extension to their existing family law or estate or health law practices. In Quebec, a former nurse, turned lawyer, has added Elder Law to her health law practice, and a British Columbia lawyer now practices Elder Law as an extension to an estates and guardianship practice.

F. ISSUES IN ELDER LAW

Elder Law practices encompass a broad range of issues including:

- General Planning for Aging: A Case-Management and Multidisciplinary Approach
- Age Discrimination
- Abuse and Exploitation
- Undue Influence and Unconscionability
- Care Agreements (Transfer of Property in Exchange for Care)
- Housing Options and Care Facility Regulation
- Assisting-Living Contracts and Fair-Housing Practices
- Mental Capacity and Consent
- Guardianship (Protective Regime in Quebec)
- Health Care Decision-Making and Advance Directives
- Powers of Attorney and Mandates
- Elder Marriage, Divorce and Separation
- Intergenerational Issues of Filial Responsibility and Grandparents' Rights
- Ethical Issues

G. ADVOCACY AND LAW REFORM

The influence of Elder Law and of Elder Law lawyers will extend to developing national best practices for lawyers in areas such as the drafting and execution of powers of attorney and establishing national best practices for other professionals; for example, setting uniform standards of quality care in end-of-life situations and regulation of aspects of assisted-living services. Lawyers will advocate for the poor and vulnerable and for needed law reform or to prevent or modify proposed reforms, where appropriate. Access to justice for older persons will be fostered through public education and the creation of legal advocacy centres for older persons across the country within the legal-aid system. Elder Law will be taught to judges, lawyers and law students, and research will abound on aging law and policy issues. The ever-growing number of Elder Law issues are diverse and will extend to every aspect of life, including, without limitation, the legal and ethical issues of caregiving; the ethics of health care, end-of-life care and right-to-die issues; immigration; cultural diversity and aging; elder incarceration; income security; income tax benefits; pensions; and motor vehicle testing.

Robert Kennedy Jr., renowned lawyer and environmentalist, spoke to lawyers assembled at the annual Canadian Bar Association (CBA) conference in the summer of 2003. He recalled his father saying that his generation, indeed any generation, would be judged by how it treated and protected the most vulnerable in society. In this regard, lawyers as the bulwarks of society and protectors of rights, had a very great public duty to perform. And so, while Elder Law deals with all kinds of older people, most of whom are healthy, involved, financially and socially secure there is a very great, and largely unpaid, task that lawyers will be called upon to play for the frail, the poor, and the vulnerable.

H. NATIONAL ELDER LAW SECTION, CANADIAN BAR ASSOCIATION

The CBA took an important leadership and pioneering role in September 2002 by formally recognizing Elder Law as a new area of practice and of law in Canada. Since then, Elder Law practitioners have emerged, and Elder Law practice sections have been established in nine provinces and three territories. For the first time, interested lawyers from many disciplines are 1) addressing issues of law and aging on a comprehensive and national scale; 2) engaging in the social debates of the day and in legislative reforms to benefit this clientele on both a national and

provincial basis; and 3) fostering continuing education and exchanges among lawyers across the country entering this new area of law.

The National Elder Law Section's stated purposes are: advancement of laws affecting older persons, education of the public, the Bars, and the judiciary on Elder Law issues and the fostering of professionalism among practitioners with a view to providing a higher quality of legal services, advocacy and representation to older clients.

The National Elder Law Section is promoting professionalism in the practice through an online national listserv to exchange information, questions, and best practices; through conferences and courses at the provincial and national levels; and through online newsletters and articles addressing ethical and practice issues relevant to an Elder Law practice.

The Section is developing a forum for the study of legal issues, legislation and policies, promoting public education and improving access to legal information and the justice system for older adults. It is working with the federal Department of Justice, Health Canada and other government and paragovernmental organizations, the National Advisory Council on Aging and law enforcement bodies at the federal and provincial levels, on such priority social issues as abuse and exploitation of older adults, quality housing and care facilities and legal and ethical issues of caregiving.

Great strides have already been made. A national study group was initiated by the CBA in May 2003 to address national best practices and substantive law issues relating to powers of attorney in association with Canada's major chartered banks, the Canadian Bankers Association, and public guardians in an effort to improve the delivery of legal services to the public generally, to streamline and improve laws and policies related to these instruments, to raise public awareness and to educate both legal practitioners and banking personnel serving the public about potential misuses and the nature of appropriate counselling before entering into these instruments. We are also working with Health Canada and the Canadian Medical Association on a national study of advance directives and end-of-life decision-making.

Supreme Court Chief Justice Beverley McLachlin reminded lawyers at the annual CBA legal conference in Montreal in 2003 that we have a duty to create and protect. If the public is to have confidence in the legal profession, lawyers have to breathe life into the law and make it relevant for our times. They have to foster access to social justice. As well, they must promote the law as a framework for living together and less as a vehicle for dispute resolution. Elder Law is actively addressing all of these objectives.

The development of Canadian Elder Law or the field of law and aging and of informed, sensitive lawyers to practise in this area will be a great contribution to the legal profession and the public. It is only in developing a comprehensive framework for the study of the complex array of issues that affect this population that lawyers will be in a position, along with others, to advocate the reform or abolition, as the case may be, of ageist laws that do exist, to develop carefully reflected legislation to address issues which are appropriately age-oriented, to inspire professionalism and holism in the delivery of legal services and to ensure access to justice for this clientele and those who serve them.