

THE IMPACT OF DEATH ON FAMILY LAW ISSUES

Introduction

Under provincial legislation and the common law, individuals' legal obligations to financially support their dependants can extend beyond their death. This paper therefore surveys the legal consequences of a spouse's death in the family law context, as it is incumbent on lawyers to consider the impact that death can have on various property and support issues.

The Family Law Act (FLA) and the Succession Law Reform Act (SLRA) provide several processes through which a surviving spouse can seek additional financial support from the deceased's estate, including by way of property equalization and dependants' support relief. The SLRA provides additional protection for surviving spouses in cases of intestacy, in ensuring that they receive a preferential share of the deceased spouse's estate. Importantly, however, there remains a distinction between married and unmarried spouses in this area of law, insofar as certain statutory remedies are restricted to married spouses. As a result, unmarried spouses must turn to the common law in seeking an equitable distribution of the deceased's assets – most commonly, through claims of unjust enrichment and constructive trust. In preparing domestic contracts, drafting lawyers must also remember that death can impact support arrangements between separated spouses, requiring counsel to ensure that their clients' support rights and obligations will not be affected by the potential claims of other dependants.

Operation of the *Family Law Act*

The FLA places certain limits on testamentary freedom, and offers some protection to spouses following the death of a partner. The sections of the *FLA* that address family property and the matrimonial home define spouse as follows:

“Spouse” means either of two persons who,

- (a) Are married to each other, or
- (b) Have together entered into a marriage that is voidable or void, in good faith on the part of a person relying on this clause to assert any right.¹

As such, common law partners are not spouses within the meaning of the sections of the *FLA* dealing with property. Only a surviving married spouse, or their personal representative such as an attorney for property, may access the statutory relief related to personal property and the matrimonial home.²

i) Married Couples under the *Family Law Act* – Statutory Entitlements

Elections for Equalization of Net Family Property

When a married spouse dies, the statute entitles the surviving spouse to claim an equalization of net family property.³ If a valid Will exists, the surviving spouse may elect to receive an equalization of net family property instead of their entitlement under the Will.⁴ In the case of an intestacy, the statute provides that the surviving spouse may elect to receive equalization or their entitlement under the *SLRA*.⁵ Electing to receive an equalization payment is entirely within the discretion of the bereaved spouse.

An election must be made no later than six months after the first spouse's death.⁶ The election must be made in the form prescribed by the regulations.⁷ If the

1. *Family Law Act*, R.S.O. 1990, c. F.3, s.1(1). [FLA]

2. *Substitute Decisions Act*, 1992, S.O. 1992, c. 30, s.31(1). See *Anderson v. Anderson Estate*, [1990] O.J. No. 1123, para 12. (Ont. H.C.). [Tab1]

3. *FLA*, s.5(2).

4. *FLA*, s.6(1).

5. *FLA*, s.6(2).

6. *FLA* s.6(10).

7. Form 1, R.R.O. 1990, Reg 368.

surviving spouse elects for an equalization, then they must also bring an application for the equalization of net family property no later than six months after the first spouse's death.⁸ Importantly, however, the Court retains the discretion to extend filing timelines on motion if:

- (a) there are apparent grounds for relief;
- (b) relief is unavailable because of delay that has been incurred in good faith; and
- (c) no person will suffer substantial prejudice by reason of the delay.⁹

If the surviving spouse does not file an election within six months, they will be deemed to have elected to take under the Will or, in the case of an intestacy, to receive their entitlement under the *SLRA*.¹⁰ An election filed outside of this time frame will have no effect, absent a reasonable explanation for the delay.¹¹

A surviving spouse is not meant to receive a windfall or double recovery through election, and the statutory scheme guards against this outcome in several ways. When a surviving spouse opts for equalization, the Act provides that gifts made under the Will are revoked and the Will is to be interpreted as if the surviving spouse had predeceased the testator.¹² It should be noted that the testator may use express language to preserve entitlements under the Will, despite an election for equalization.¹³

Special considerations for the calculation of net family property also apply in the context of death. A net family property calculation is meant to distribute assets equitably as between the spouses, not as between a surviving spouse and the estate of the deceased spouse. Accordingly, the surviving spouse will have the following amounts credited to his or her net family property:

- any sum payable under the deceased's life insurance policy;
- any lump sum payable under a pension or similar plan; and
- the value of any property to which the surviving spouse is entitled by right of survivorship or otherwise.¹⁴

Special considerations for the net family property of the deceased spouse also apply, insofar as the following items are excluded from the calculation:

- estate assets that arise only as a result of death, such as insurance proceeds and pension plan death benefits;¹⁵ and
- liabilities that arise as a result of death, such as funeral and estate administration expenses.¹⁶

However, it is appropriate to deduct foreseeable liabilities that arise on date of death, such as the tax payable on capital gains resulting from the deemed disposition of RRSPs.¹⁷

As a final matter, if a surviving spouse makes an election and subsequently dies, their estate or estate trustee may commence or continue their application for an equalization of net family property.¹⁸

Matrimonial Home – Additional Statutory Protection

The legislative scheme provides further protection to the surviving married spouse by addressing the use and ownership of the matrimonial home. Part II of the *Act* defines the matrimonial home this way:

Every property in which a person has an interest and that is or, if the spouses have separated, was at the time of separation ordinarily occupied by the person and his or her spouse as their family residence is their matrimonial home.¹⁹

The *Act* provides that both spouses have an equal right to possess the matrimonial home, but that this right ends when they cease to be spouses, unless a separation agreement provides otherwise.²⁰ Despite this section, the *Act* provides further protection for a non-titled married spouse in the case of their partner's death.

First, if a spouse dies owning an interest in the matrimonial home jointly with a third person and not with the other spouse, the joint tenancy is deemed to have been severed immediately before the time of death.²¹ This provision prevents third parties from inheriting title to a major asset and taking their value out of the estate through the right of survivorship.

8. *FLA* s.7(3).

9. *FLA* s.2(8). See for e.g. *Mischuk v. Mischuk*, 2013 ONSC 4128, paras 20-32. (ONSC) [Tab2]

10. *FLA* s.6(11).

11. *Van Den Oetelaar v. Van Den Oetelaar Estate*, [2004] O.J. No. 1424, para 26. (ONSC). [Tab3]

12. *FLA*, s.6(8).

13. *FLA* s.6(5).

14. *FLA* s.6(7).

15. *Laframboise v. Laframboise*, 2012 ONSC 4508, para 23. (ONSC) [Tab4]

16. *Weatherdon-Oliver v. Oliver Estate*, 2010 ONSC 5031, para 32. (ONSC) [Tab5]

17. *Bobyk v. Bobyk Estate*, 13 O.R. (3d) 559, para 79. (On Gen. Div.) [Tab6]

18. *FLA* s.7(1)-(2).

19. *FLA*, s. 18(1).

20. *FLA* s.19.

21. *FLA* s.26(1).

Second, despite section 19 of the *Act*, an untitled spouse occupying the matrimonial home at the time of the other spouse's death is entitled to retain possession, rent free, for 60 days following death.²²

Presumption of Resulting Trust – Overridden by Statute

Married couples receive further statutory protection in the event of death, with respect to the gratuitous transfer of property. At common law, a rebuttable presumption of resulting trust applies to gratuitous transfers. Where a transfer is made for no consideration (for instance, a titled spouse placing a property in joint tenancy with their partner), the transferee bears the onus of demonstrating that a gift was intended. This is so because equity presumes bargains, not gifts.²³ This presumption places a considerable evidentiary burden on the surviving spouse and, in the example above involving a gratuitous transfer of title, the surviving spouse would need to adduce evidence to show that they were meant to hold joint property by right of survivorship. The *FLA* reverses this presumption in the context of married spouses. Section 14 provides:

The rule of law applying a presumption of a resulting trust shall be applied in questions of the ownership of property between spouses, as if they were not married, except that,

- (a) the fact that property is held in the name of spouses as joint tenants is proof, in the absence of evidence to the contrary, that the spouses are intended to own the property as joint tenants; and
- (b) money on deposit in the name of both spouses shall be deemed to be in the name of the spouses as joint tenants for the purposes of clause (a).²⁴

The statutory scheme reverses the presumption of resulting trust as it relates to married spouses with respect to other jointly held assets as well. As a result, if there are jointly owned assets and one spouse dies, the surviving spouse is assumed at law to have a beneficial right of survivorship. The surviving spouse will presumptively obtain ownership to jointly held property and bank accounts.

ii) Unmarried Couples under the *Family Law Act* – the Use of Constructive Trust Doctrine

As previously mentioned, the definition of “spouse” under the *FLA* excludes common law couples and common law spouses are therefore denied the proprietary statutory remedies that arise on death. Yet, common law couples may pursue relief in respect of property through the equitable use of remedial constructive trust doctrines.

The remedial constructive trust is available as a response to unjust enrichment and it can arise where the title-holding spouse would be unjustly enriched if he or she were not required to share the property with the other spouse, who contributed to its acquisition, preservation, or maintenance.

To establish unjust enrichment, the claimant must show:

- the opposing party has been enriched;
- the claimant has suffered a corresponding deprivation; and
- an absence of a juristic reason for the enrichment and corresponding deprivation.²⁵

A valid juristic reason may be a contract, a statute, a disposition of law, or a donative intent on the part of the giving party.²⁶ Domestic services rendered may support a claim for unjust enrichment.²⁷

In the family law context, unjust enrichment may be most realistically characterized as one party retaining a disproportionate share of assets resulting from a joint family venture. If the Court determines that there is unjust enrichment and a monetary award is appropriate, it should be calculated on the basis of the share of those assets proportionate to the claimant's contributions. The Court may determine that there was a joint family venture by looking at:

- the mutual effort of the parties, whether they worked collaboratively towards common goals;
- the degree of economic integration that characterized the parties' relationship;
- the actual intent of the parties; and
- whether the parties gave priority to the family in their decision making.²⁸

22. *FLA* s.26(2).

23. *Pecore v. Pecore*, 2007 SCC 17, para 24. (SCC) [Tab7]

24. *FLA*, s.14.

25. *Kerr v. Baranow*, 2011 SCC 10, paras 38-40. (SCC) [Kerr] [Tab8]

26. *Kerr*, para 41.

27. *Kerr*, para 42.

28. *Kerr*, paras 87-100.

In certain cases, a monetary award will be insufficient or inappropriate. In these cases, a proprietary award will be granted if the plaintiff can show a substantial and direct link between their contributions and the acquisition, improvement, or maintenance of the property.²⁹ Here, the claimant will be *deemed* to be a part-owner of the property, to allow the claimant to share in the value of the property (including any increase in the value of the property) as joint title-holder.

iii) Domestic Agreements – May Override the Statute

Both married spouses and common law parties should be aware that their rights and entitlements may be affected by the existence of a valid, enforceable domestic contract. The *FLA* preserves the rights of private parties to contract out of statutory provisions by providing that:

Two persons who are married to each other or intend to marry may enter into an agreement in which they agree on their respective rights and obligations under the marriage or on separation, on the annulment or dissolution of the marriage *or on death*, including,

- (a) ownership in or division of property;
- (b) support obligations;
- (c) the right to direct the education and moral training of their children, but not the right to custody of or access to their children; and
- (d) any other matter in the settlement of their affairs.³⁰ (Emphasis added)

There is a parallel provision permitting unmarried cohabitants to make similar agreements.³¹ Domestic contracts may be set aside on application, if a party failed to disclose significant assets or debts, if the party did not understand the nature or consequences of the agreement, or otherwise in accordance with the law of contract.³² However, the Supreme Court of Canada commented that courts should be extremely reluctant to interfere in the private arrangements of parties, particularly where they first obtained independent legal advice.³³

29. *Kerr*, paras 50-53.

30. *FLA*, s. 52(1).

31. *FLA* s.53(1).

32. *FLA* s.56(4).

33. *Hartshorne v. Hartshorne*, 2004 SCC 22, para 9, 67. (SCC) [Tab9]

34. *Succession Law Reform Act*, R.S.O. 1990, c. S.26, s.1(1). [SLRA]

Operation of the *Succession Law Reform Act*

The *SLRA* also circumscribes testamentary freedom in some respects, and provides further statutory protection for spouses following the death of a partner. The *Act* defines the term “spouse” in the same manner as the *FLA*, and as a result some of the relief available is restricted to legally married spouses.³⁴

i) Married Couples under the *Succession Law Reform Act* – Statutory Entitlements

Generally, an individual has the power to dispose of all his or her property under a will at the time of death.³⁵ However, if a married spouse dies intestate, the statutory scheme provides a number of protective mechanisms for the surviving spouse. If a spouse dies intestate and without issue, the surviving spouse is absolutely entitled to the entirety of the deceased’s estate.³⁶ If a spouse dies intestate leaving the surviving spouse as well as some children, then the surviving spouse is entitled to a preferential share of the estate and a fixed portion of the residue based on the number of children once the preferential share is paid out.³⁷ The preferential share is currently fixed by regulations at \$200,000.³⁸ Finally, if the deceased was not legally married and did not have children, the statute provides for distribution of intestate estates to parents, siblings, nephews, next of kin, and ultimately the Crown.³⁹ The statutory scheme provides certain minimum entitlements for a married spouse in the case of an intestacy, but a common law spouse does not receive anything under a statutory distribution.

ii) Unmarried Couples under the *Succession Law Reform Act* – Dependant Support Claims

Part V of the *SLRA* provides an avenue for relief if the deceased did not make adequate provision for the support of his or her dependants. A dependant is the spouse, parent, child, or sibling of the deceased to whom the deceased was providing support or was under a legal obligation to support immediately prior to his or her death.⁴⁰ This part of the statute specifically defines spouse in the following way:

35. *SLRA*, s.2.

36. *SLRA*, s.44.

37. *SLRA*, s.45-46.

38. O. Reg. 54/95.

39. *SLRA*, s.47.

40. *SLRA*, s.57.

“Spouse” means a spouse as defined in subsection 1 (1) and in addition includes either of two persons who,

- (a) Were married to each other by a marriage that was terminated or declared a nullity, or
- (b) Are not married to each other and have cohabited,
 - (i) Continuously for a period of not less than three years, or
 - (ii) In a relationship of some permanence, if they are the natural or adoptive parents of a child.⁴¹

Accordingly, both married and common law spouses can make claims for dependant support. Section 58(1) reads as follows:

Where a deceased, whether testate or intestate, has not made adequate provision for the proper support of his dependants or any of them, the court, on application, may order that such provision as it considers adequate be made out of the estate of the deceased for the proper support of the dependants or any of them.⁴²

A claim for dependant support must be made within six months of the issuance of the certificate of appointment of estate trustee.⁴³ If an application is brought outside of this timeframe, the court has the discretion to hear the application with respect to any portion of the estate remaining undistributed at the date of application.⁴⁴

Recent jurisprudence from the Ontario Superior Court of Justice suggests that in certain circumstances, it may be appropriate to grant leave for a support application under s. 58 of the *SLRA* despite the fact that the assets of the estate have already been distributed at the time of application. The decision to grant leave is a question of what is equitable between the parties based on all circumstances.⁴⁵

The statute provides a list of factors that the court must consider in determining the amount and duration of a dependant support award.⁴⁶ In particular, if the dependant is a spouse, the court must consider:

- (i) a course of conduct by the spouse during the deceased’s lifetime that is

so unconscionable as to constitute an obvious and gross repudiation of the relationship;

- (ii) the length of time the spouses cohabited;
- (iii) the effect on the spouse’s earning capacity of the responsibilities assumed during cohabitation;
- (iv) whether the spouse has undertaken the care of a child who is of the age of eighteen years or over and unable by reason of illness, disability or other cause to withdraw from the charge of his or her parents;
- (v) whether the spouse has undertaken to assist in the continuation of a program of education for a child eighteen years of age or over who is unable for that reason to withdraw from the charge of his or her parents;
- (vi) any housekeeping, child care or other domestic service performed by the spouse for the family, as if the spouse had devoted the time spent in performing that service in remunerative employment and had contributed the earnings to the family’s support;
- (vii) the effect on the spouse’s earnings and career development of the responsibility of caring for a child; and
- (viii) the desirability of the spouse remaining at home to care for a child.⁴⁷

Adequate support is not restricted to the necessities of life alone but also includes physical and moral support, and may extend to non-essential items, and even luxuries.⁴⁸

The determination of adequate support will require consideration of the subjective perspective and lifestyle of the parties such that the support is appropriate in the circumstances.⁴⁹ The Ontario Court of Appeal confirmed that this provision requires the court to consider not only the legal obligations of the deceased but also the moral obligations that arise between the deceased and their dependants as a result of society’s expectations of what a judicious person would do in the circumstances for their support and care.⁵⁰

41. *SLRA*, s.57.

42. *SLRA*, s.58(1).

43. *SLRA*, s.61(1).

44. *SLRA*, s.61(2).

45. *Weigand v. Weigand Estate*, 2016 ONSC 6201, paras 32-34. (ONSC) [Tab10]

46. *SLRA*, s.62(1).

47. *SLRA*, s.62(1)(f).

48. *Davies, Re*, 105 D.L.R. (3d) 537, para 15. (Ont. Sur. Ct.) [Tab11]

49. *Caluori v. Caluori Estate*, [1992] O.J. No. 1538, para 6. (Ont. Gen. Div.) [Tab12]

50. *Cummings v. Cummings*, [2004] O.J. No. 90, para 50. (ONCA). [Tab13]

As a final note, any agreement between the deceased and the dependent may also be relevant when determining an entitlement under the *SLRA*.⁵¹ An order for dependant support may be made despite any agreement or waiver to the contrary.⁵² However, as in the context of the *FLA*, courts may be reluctant to frustrate the clear contractual intentions of privately bargaining parties who obtained the benefit of independent legal advice.

Appointment of Estate Trustee under an Intestacy

Where an individual dies intestate or the executor named in the Will refuses to act, section 29(1) of the *Estates Act* provides that the Court may, in its discretion, grant the right to administer the estate to:

- (a) the person to whom the deceased was married immediately before the death of the deceased or person with whom the deceased was living in a conjugal relationship outside marriage immediately before the death;
- (b) the next of kin of the deceased; or
- (c) the person mentioned in clause (a) and the next of kin.⁵³

The Court may also appoint an administrator at the request of the parties with a beneficial interest in the estate.⁵⁴ However, the Court is not bound to accept applications to administer the estate or to defer to the wishes of the beneficiaries. The Court retains the ultimate discretion to appoint an administrator.⁵⁵

The statute does not establish a formal priority scheme in the case of multiple applications to administer the estate. A rigid priority scheme would unduly fetter the discretion of the Court to appoint a different administrator in special circumstances.⁵⁶ However, it is the general practice of the Courts to give priority to the spouse or common law partner of the deceased over other relatives.⁵⁷

Despite the wording of the statute, a spouse or common law partner may be disqualified from administering the estate in the event of an intestacy due to a

conflict of interest. For example, a spouse could not simultaneously administer the estate and bring a dependent support relief claim. Their action against the estate would disqualify them from administering it.⁵⁸ Even a trustee named as executor in a valid Will may be disqualified from acting as administrator of the estate if their rights under the testamentary instrument are in conflict with those of other claimants against the estate.⁵⁹ The court may need to appoint an estate trustee during litigation in such circumstances.

Consequences of Death on Support Payments

Without a specific statutory provision to the contrary or clear language in a court Order, a support obligation is a personal right and terminates upon the death of the payor.⁶⁰ The statutory scheme in Ontario reverses this presumption. Pursuant to s. 34(4) of the *FLA*, “an order for support binds the estate of the person having the support obligation unless the order provides otherwise.”⁶¹

The Court of Appeal in *Katz v Katz* recently affirmed that the *FLA* is sufficiently broad to permit courts to secure support payments in the event of the payor’s death by requiring them to obtain life insurance for a specified beneficiary while the order is in force.⁶²

While the *Divorce Act* contains no provision analogous to s. 34(4) of the *FLA*, the prevailing view in Ontario is that a court still has the power to issue support orders binding on the payor’s estate, so long as the order contains explicit language to that effect.⁶³ As such, a court is equally entitled under the *Divorce Act* to require a spouse to obtain life insurance to secure support payments.⁶⁴

In light of this statutory scheme, common practice in Ontario is to secure payment of a support order through an irrevocable designation of the payee spouse as beneficiary under the payor spouse’s policy. A recent decision of the Ontario Superior Court of Justice, affirmed on appeal to the Divisional Court, may undermine the effectiveness of this practice.

51. *SLRA*, s.62(1)(m).

52. *SLRA*, s.63(4).

53. *Estates Act*, R.S.O. 1990, c. E.21, s.29(1). [*Estates Act*]

54. *Estates Act*, s.29 (2).

55. *Estates Act*, s.29 (3).

56. *Mohammed v. Heera*, [2008] O.J. No. 4176, para 29. [*Mohammed*]

57. Brian Schnurr, *Estate Litigation 2nd ed.* (Toronto: Carswell, 2016), at 23-4.

58. *Mohammed*, para 31.

59. *Woode v. Woode*, [1998] O.J. No. 3911, para 4.

60. *British Columbia (Public Trustee) v. Price*, [1990] B.C.J. No. 580, para 18. (BCCA)

61. *FLA*, s. 34(4).

62. *FLA*, s. 34(1)(k). *Katz v. Katz*, 2014 ONCA 606, para 70. [*Katz*]

63. *Linton v. Linton*, [1990] O.J. No. 2267, para 109. (ONCA)

64. *Katz*, para 73.

In *Dagg v. Cameron Estate*, the issue was whether the proceeds of a policy of life insurance were available to all dependant relief claimants pursuant to the claw-back provision of the *SLRA*. The relevant section provides for the recapture of “any amount payable under a policy of insurance effected on the life of the deceased and owned by him or her” as part of the estate.⁶⁵

Two consent orders provided that the deceased would maintain his former spouse as an irrevocable beneficiary of his life insurance policy. The deceased subsequently cohabited with another common law spouse, with whom he had a child. The deceased executed a new Will, which amended the beneficiary designation to include his new partner. His former spouse successfully brought a motion to vary the change in beneficiary designation. Shortly afterward, the testator died. The Will failed to provide adequate support for all beneficiaries. The issue for the trial judge was whether the proceeds of the life insurance policy were available for the support of dependants, or whether they were excluded as not being owned by the deceased at the date of death.⁶⁶

Douglas J. ruled that despite the irrevocable beneficiary designation that the insurance proceeds were available for all dependants under the *SLRA*.⁶⁷ He concluded that the deceased owned the policy at the date of death. He also held that the former spouse of the deceased was not a creditor within the meaning of s.72 (7) of the *SLRA*, and could not avoid the effect of the claw-back provision through the application of this section. She had no security interest in the life insurance policy. As such, the policy was not excluded from the other dependants.⁶⁸

The Divisional Court subsequently affirmed this decision, finding no intention on behalf of the parties to change the actual ownership of the policy.⁶⁹ The Divisional Court declined to find that the irrevocable designation created a bare trust, with the former spouse entitled to a beneficial interest in the proceeds.⁷⁰ The Divisional Court also confirmed the trial judge’s finding that the former spouse was not a

creditor and could not claim the protection of s.72 (7). The Court emphasized that the applicant was not a secured creditor, and therefore that she obtained no creditor rights under the statutory scheme.⁷¹

As a result of this decision, counsel drafting support agreements for the protection of a payee spouse may wish to consider transferring the ownership of a life insurance policy to the payee spouse as well as designating them irrevocably as beneficiary. Counsel could also seek an order placing a first charge over the estate in favour of the payee spouse, making them a secured creditor within the meaning of s.72 (7) of the *SLRA*.

Conclusion

The death of a spouse or former spouse can have a significant financial impact on their dependants. The law in Ontario consequently provides various mechanisms through which surviving spouses can seek additional support from the deceased’s estate. With respect to property, a surviving spouse may elect to take by way of property equalization under the FLA rather than under the deceased’s Will, provided the spouses were married, while unmarried spouses must rely on claims of unjust enrichment and constructive trust to pursue an equitable distribution of the deceased’s assets. The FLA further protects the interests of surviving (married) spouses by addressing the use and ownership of the matrimonial home. In terms of support, both married and unmarried spouses may bring a claim for dependants’ support relief under the *SLRA* and will be required to show that their relationship with the deceased spouse prior to his or her death warrants payment of support from the estate. In advising their clients, not only must counsel consider the distinct statutory and common law remedies available to surviving spouses, but they must also appreciate how these remedies interact with each other as well as a surviving spouse’s ability to act as estate trustee and any existing support obligations under a domestic contract at the time of a spouse’s death.

65. *SLRA*, s.72(1)(f)

66. *Dagg v. Cameron Estate*, 2015 ONSC 6134, para 5.

67. *Dagg*, para 49.

68. *Dagg*, paras 39-43.

69. *Dagg v. Cameron Estate*, 2016 ONSC 1892, para 19. [Dagg Appeal]

70. *Dagg Appeal*, para 21.

71. *Dagg Appeal*, paras 27, 32.

Author

Katherine Cooligan

613.787.3565

kcooligan@blg.com

FAMILY LAW GROUP

National Leader

Katherine Cooligan Ottawa 613.787.3565 kcooligan@blg.com



Borden Ladner Gervais

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BORDEN LADNER GERVAIS LLP LAWYERS | PATENT & TRADEMARK AGENTS

Calgary

Centennial Place, East Tower

1900, 520 – 3rd Ave S W, Calgary, AB, Canada T2P 0R3

T 403.232.9500 | F 403.266.1395

Montréal

1000 De La Gauchetière St W, Suite 900, Montréal, QC H3B 5H4

T 514.879.1212 | F 514.954.1905

Ottawa

World Exchange Plaza, 100 Queen St, Suite 1300

Ottawa, ON, Canada K1P 1J9

T 613.237.5160 | F 613.230.8842 (Legal)

F 613.787.3558 (IP) | ipinfo@blg.com (IP)

Toronto

Bay Adelaide Centre, East Tower

22 Adelaide St W, Suite 3400, Toronto, ON, Canada M5H 4E3

T 416.367.6000 | F 416.367.6749

Vancouver

1200 Waterfront Centre, 200 Burrard St, P.O. Box 48600

Vancouver, BC, Canada V7X 1T2

T 604.687.5744 | F 604.687.1415

blg.com